Hudson Institute

EFFECTIVE STRATEGIES FOR THE PROSECUTION OF PUBLIC CORRUPTION

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FINAL REPORT

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ACKNOWLEDGMENTS

This work is the culmination of a two-year effort involving the work of a number of people whose efforts should not go unrecognized.

Our project advisory panel included Indiana University Law Professor Craig M. Bradley; Notre Dame Law Professor G. Robert Blakey; Indiana University Public and Environmental Affairs Professor Roger A. Parks; former Acting U.S. Attorney Bradley L. Williams; and the Chief of the Criminal Division of the Office of the U.S. Attorney for the Southern District of Indiana, Larry A. Mackey. These individuals provided their considerable expertise both individually and collectively, with Dr. Parks being especially helpful in keeping project staff from making too many blunders on the survey protocol and data analysis, and Mr. Mackey offering a great deal of assistance in helping shape the on-site interview component.

At the Hudson Institute, Bruce A. Chapman made significant contributions that may be found on virtually every page in terms of his influence on the author's thought processes, if not in the provision of actual language. Steven F. Pockrass spent countless hours extracting and analyzing data from the survey and providing lucid memos that suggested links between items and theories that would have otherwise gone unnoticed by the author. His co-authorship of two papers stemming from this project is indicative of the effort he put forth on the project in a short period of time. Dr. David Weinschrott contributed his time and expertise to the project when requested, ensuring our ability to keep data entry and analysis programs running on computer systems that appeared to have an inbred dislike for public corruption data. Finally, Barbara Husk coordinated the administration of both waves of the survey, overseeing both the mailing and receipt and filing of the surveys and accompanying materials. In addition, she served as the sole data entry resource, entering the data effectivly and consistently. Her role on the project as a troubleshooter should not go unmentioned or understimated.

Our thoughts were put into perspective in mid-stream by many people, but we would be remiss if we failed to thank Professor Michael Benson of the University of Tennessee, professors John Dombrink and Henry Pontel of the University of California - Irvine, and Dr. Ko-lin Chin of the New York City Criminal Justice Agency for their constructive criticism of our project methodology during a National Institute of Justice Research Cluster Conference in November, 1990. Their perceptive insights saved us from falling into several traps in the data aggregation and analysis phase.

An immeasurable degree of assistance was also provided by all of those local and federal prosecutors who gave their time and insight so willingly in the completion of the survey instrument, and again in the on-site visits. We were pleasantly surprised by the access we received, and the candor with which prosecutors and other related officials spoke during our on-site visits and follow-up telephone calls. This project, designed to help local prosecutors, may properly also be viewed as a tribute to their contributions. Unfortunately, our promises of anonymity prevent us from thanking specific individuals; we only hope that they understand the depth of our appreciation for their cooperation.

Finally, Lois F. Mock, the Program Manager for White Collar and Organized Crime of the National Institute of Justice, also provided considerable guidance on project matters and critiqued our methodology at various points of the project's life. She deserves full credit for persuading us to retain the survey component of the project after staff and advisors felt that it would not serve to make an effective contribution to the knowledge. We were wrong; she was right, and the project clearly benefited from this decision.

To each of these individuals, sincere thanks. Their efforts should serve to make this report a major contribution to the effective prosecution of public corruption.

Edward D. Feigenbaum, J.D.
August, 1991

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BACKGROUND AND PURPOSE OF THIS PROJECT

This project was conceived to examine the nature of extent of public corruption across the United States today. While a great deal has been said and written about the federal role in investigating and prosecuting allegedly corrupt public officials (those elected to serve or represent the electorate) and public employees (those appointed and otherwise selected for government positions, ranging from department heads to custodians), little attention has been devoted to examining the situation at the state and local levels of government.

Project staff were concerned about learning how prevalent corrupt activities were at the state and local levels of government--those closest to the people, and what was being done about it by state and local law enforcement authorities--those arguably with the best perspective on the allegedly illicit activities. We were interested in learning about what types of crime were most frequently being committed, and determining what strategies were proving most effective in deterring and prosecuting them. Finally, we felt that an exploration of the role of the federal government--principally that of the United States Attorney--in investigating and prosecuting state and local government corruption was warranted, given the large hue and cry about excessive federal intervention into an area largely reserved to the states, and related implications about local self-governance.

While an in-depth review--and retrospective critique--of the methodology employed in this project is contained in the appendix, the following serves to illustrate how the project was organized and data collection carried out.

Review of the Literature and Case Law

To fully flesh out the questions required a multi-disciplinary approach. Project staff reviewed legal, scholarly, and popular literature to gain a basic understanding of the matters to be reviewed, and to help prepare a comprehensive research plan. This included major works on the topic, and political science and public administration texts and articles. Project staff also reviewed U.S. Department of Justice publications and policies, and office-internal guidelines. Relevant case law pertaining to significant prosecutions and the laws being employed to combat public corruption was studied. We have attempted to direct the reader to source material that will result in a greater understanding of given contentions or circumstances.

Survey of Prosecutors

With the cooperation of the National District Attorneys Association and the Executive Office of United States Attorneys, a survey was sent out to all local prosecutors and U.S. Attorneys in the latter part of 1990, with a follow-up survey remailed to initial non-respondents in early 1991. This survey sought both objective information about demographics, resources, types and amounts of cases handled and their disposition; and subjective information about matters such as case generation, sentencing effectiveness, methods of resource deployment, and case turnover.

On-Site Visits

The survey was complemented by a series of on-site visits with current and former local prosecutors (and their deputies), U.S. Attorneys (and their criminal chiefs), Attorney General staffers, and state-level ethics commission directors. We also conducted numerous follow-up conversations with investigators, news reporters, and public officials and public employees who had experience in investigations of public corruption--or in being investigated themselves.

The on-site visit jurisdictions were selected so as to afford project staff insight into different systems and types of investigations. Some jurisdictions visited were chosen because of their high degree of investigative and prosecutive activity; others were chosen because they appeared to represent the opposite end of the spectrum. No claims are made as to their general representativeness.

Project Advisory Board

Finally, our work was assisted by a project advisory board comprised of current and former prosecutors with experience in handling public corruption cases, and academics with a particular background in criminal justice survey methodology and data analysis; and the laws relating to public corruption.

Methodological Note

Many of the unattributed statements contained in this report that are not apparent on their face are derived from our on-site visits. Most of the statements, however, are derived from a combination of the knowledge acquired through the on-site interviews, responses to the survey of federal and local prosecutors, and the literature and case law review. This information, added to the body of knowledge of the legal system and political process brought to the effort by members of the project team, serves to round out the substance of this report. Where a citation or reference to an interview, case, or piece of literature appeared to be helpful or relevant, we attempted to guide the reader accordingly.

Objectives of this Project

There is an "almost . . . irresistible" temptation to quantify public corruption, according to one federal judge who has published a massive cross-cultural review of bribery through the ages [Noonan, 1987: p. xii]. And while "Quantification is conceivable[, i]t has never been systematically attempted [Ibid.]. Judge Noonan further cautions us that "A common mistake is to use the number of laws enacted or convictions obtained as an index of corruption" [Ibid.: p. xiii]. We believe that we have established some baselines for future researchers, and have tried to avoid characterizing our federal, state, or local governments as "clean" or "corrupt." Such labels serve no true purpose absent a means of comparison, either to another society, or to our own society in adiffernt period. The means to make such comparisons simply do not exist.

Rather, through our research, findings, and recommendations, we hope to impress upon readers that the investigation and prosecution of public corruption is a complex, multi-faceted process fraught with peril for both the prosecutor and the potential or actual defendant at virtually every stage of the system. We have attempted to learn more about what strategies and tactics are effective, and what modes of operation should be avoided so an individual seeking to enter into a public corruption investigation can avoid re-inventing the proverbial wheel. One caveat: while certain universal verities may be gleaned from our work, we present our findings in more of a cautionary nature than as a "cookbook"-type set of formulas that must always be followed.

We hope that investigators, prosecutors, judges, and others involved in the process will read this report carefully, and sensitize themselves to the problems that can arise in even seemingly minor contexts in the prosecution of public corruption. We hope that legislators, executive branch officials and administrators, and others with appropriate authority will read this report carefully, and consider appropriate changes to laws and procedures that will afford investigators and prosecutors the tools and resources that they need to ferret out serious wrongdoing in government. We hope that scholars read this report carefully, and undertake research into areas which we have opened by our investigations, particularly those areas which we outline briefly at the end of this report. Finally, we hope that other public officials and public employees will read this report carefully, and reaffirm their commitment to public service free of actual and perceived improprieties.

THE STATE OF PUBLIC CORRUPTION TODAY

Overview

Given the headlines that dominate our newspapers today, one could certainly conclude that there is a new wave of corruption sweeping across governments at all levels today. From coast to coast we have seen new names and offices sullied by involvement in both traditional and more novel schemes. While we may not be surprised to hear about more corruption charges brought against wardheelers in Chicago, it does come as a bit of a shock for most to learn about charges of misconduct against Supreme Court justices in Vermont. The inner sanctum of the White House, the cloakrooms of the United States Congress, governors' offices, legislative chambers, and even law enforcement offices across the country have not been immune from the phenomenon in recent history.

U.S. Department of Justice statistics indicate that the federal corruption indictments of 695 federal officials in 1989 (the last year for which figures are available) was more than 75 times the number of federal officials indicted on public corruption charges in 1970--a mere nine individuals (a change in the focus of U.S. Attorney reporting of public corruption by lower-level federal employees in 1983 may have largely resulted in an increase of some 300 cases from 1982 to 1983; however, federal official indictments still rose from 460 in 1983 to 695 in 1989, while such convictions increased from 424 to 610) [Public Integrity Section, 1990: pp. 25-26]. Conviction rates for these officials also rose more than 70 times the 1970 numbers [Ibid.]. Indictments of state officials by federal authorities rose from 10 in 1970 to 71 in 1989, with one year in between soaring over 100 [Ibid.]. The growth in prosecutions of local officials rose from 26 in 1970 to 269 in 1989 [Ibid.].

SUCCESSFUL PROSECUTIONS REPORTED FOR STUDY PERIOD

Successful Prosecutions of Public Officials by All Prosecutors

Number	Frequency	Percent
0	684	87.8
1	49	6.3
2	15	1.9
3	3	0.4
4	5	0.6
5	5	0.6
6	3	0.4
7	1	0.1
8	2	0.3
9	2	0.3
17	1	0.1
25	1	0.1
60	1	0.1
NA	8	1.0

N = 780

Successful Prosecutions of Public Employees by All Prosecutors

Number	Frequency	Percent
0	535	68.6
1	102	13.1
2	49	6.3
3	30	3.8
4	12	1.5
5	8	1.0
6	4	0.5
7	2	0.3
8	4	0.5
9	2	0.3
10	3	0.4
11	1	0.1
12	1	0.1
13	1	0.1
14	3	0.4
15	4	0.5
16	1	0.1
20	1	0.1
25	2	0.3
26	2	0.3
30	1	0.1
34	1	0.1
95	1	0.1
109	1	0.1
130	1	0.1
142	1	0.1
163	1	0.1
164	1	0.1
NA	5	0.6

N = 780

These statistics only encompass cases that are prosecuted, and thus may serve as only the tip of the proverbial iceberg. In spite of the increase in prosecutions, according to at least one former U.S. Attorney, "There's an awful lot of public corruption, and very little being done about it" [O'Sullivan, 1989].

Further, these figures do not include prosecutions by state and local prosecutors of state and local public officials and public employees on public corruption charges. Before this project, there has been no systematic attempt made to quantify such local prosecutions, which may account for a significant addition to the universe of public corruption prosecutions. Indeed, anectdotal evidence would suggest that local prosecutions of public corruption are increasing at a pace similar to those undertaken by the federal government.

The rise in prosecutions (at least insofar as it relates to public employees as opposed to public officials, and to prosecutions undertaken by the federal government) is not due to a

corresponding increase in the number of state and local employees. The increase that is being seen is an increase in indictments per million public employees rather than an increase that mirrors the rise in the numbers of the population.

Federal Public Corruption Indictments and State and Local Public Employment

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
State Employees*	2,755	2,832	2,957	3,013	3,155	3,271	3,343	3,491	3,539	3,699
State Indicted	10	21	17	19	36	36	59	50	55	58
Indicted/Million	3.63	7.42	5.47	6.31	11.41	11.01	17.65	14.32	15.54	15.68
Local Employees*	7,392	7,612	8,007	8,339	8,559	8,813	8,826	9,120	9,204	9,403
Local Indicted	26	46	106	85	130	139	194	157	171	212
Indicted/Million	3.52	6.04	13.24	10.19	15.19	15.72	21.98	17.21	18.58	22.55
State/Local Employees*	10,147	10,444	10,964	11,353	11,754	12,084	12,169	12,611	12,743	13,102
State/Local Indicted	36	67	123	104	166	175	253	207	226	270
Indicted/Million	3.55	6.42	11.22	9.16	14.12	14.48	20.79	16.41	17.74	20.61

	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
State Employees*	3,753	3,726	3,642	3,674	3,773	3,863	3,929	3,987	4,084	4,207
State Indicted	72	87	49	81	58	79	88	102	66	71
Indicted/Million	19.19	23.35	13.45	22.05	15.37	20.45	22.40	25.58	16.16	16.88
Local Employees*	9,562	9,377	9,444	9,417	9,568	9,772	10,082	10,265	10,444	10,716
Local Indicted	247	244	257	270	203	248	232	246	276	269
Indicted/Million	25.83	26.02	27.21	28.67	21.22	25.38	23.01	23.97	26.43	25.10
State/Local Employees*	13,315	13,103	13,086	13,091	13,341	13,635	14,011	14,252	14,258	14,923
State/Local Indicted	319	331	306	351	261	327	320	348	342	340
Indicted/Million	23.96	25.26	23.38	26.81	19.56	23.98	22.84	24.42	23.40	22.78

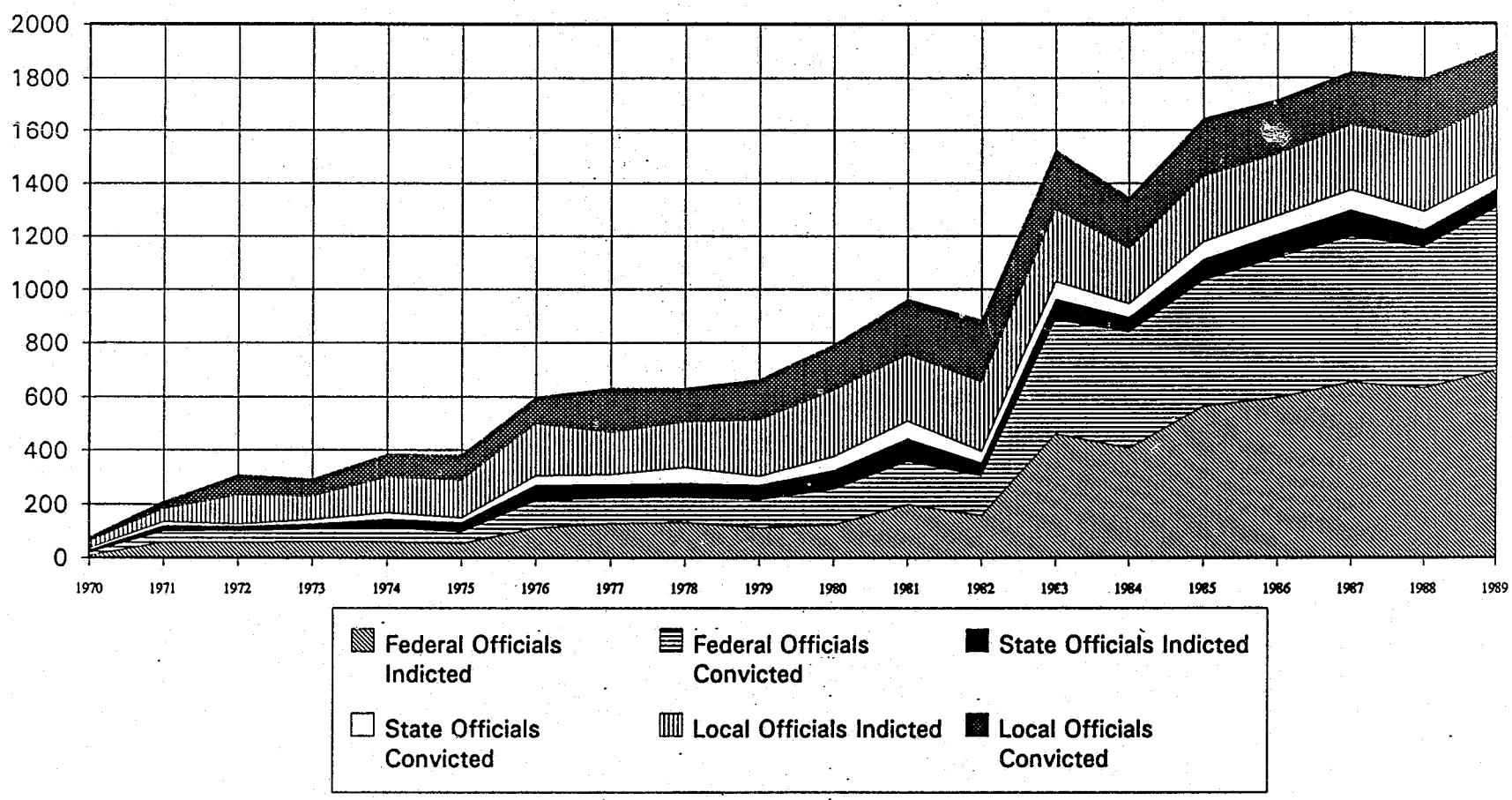
* numbers in thousands

Figures taken from Department of Justice Public Integrity Section annual reports to Congress; U.S. Department of Labor Monthly Labor Review; Census of Public Employment

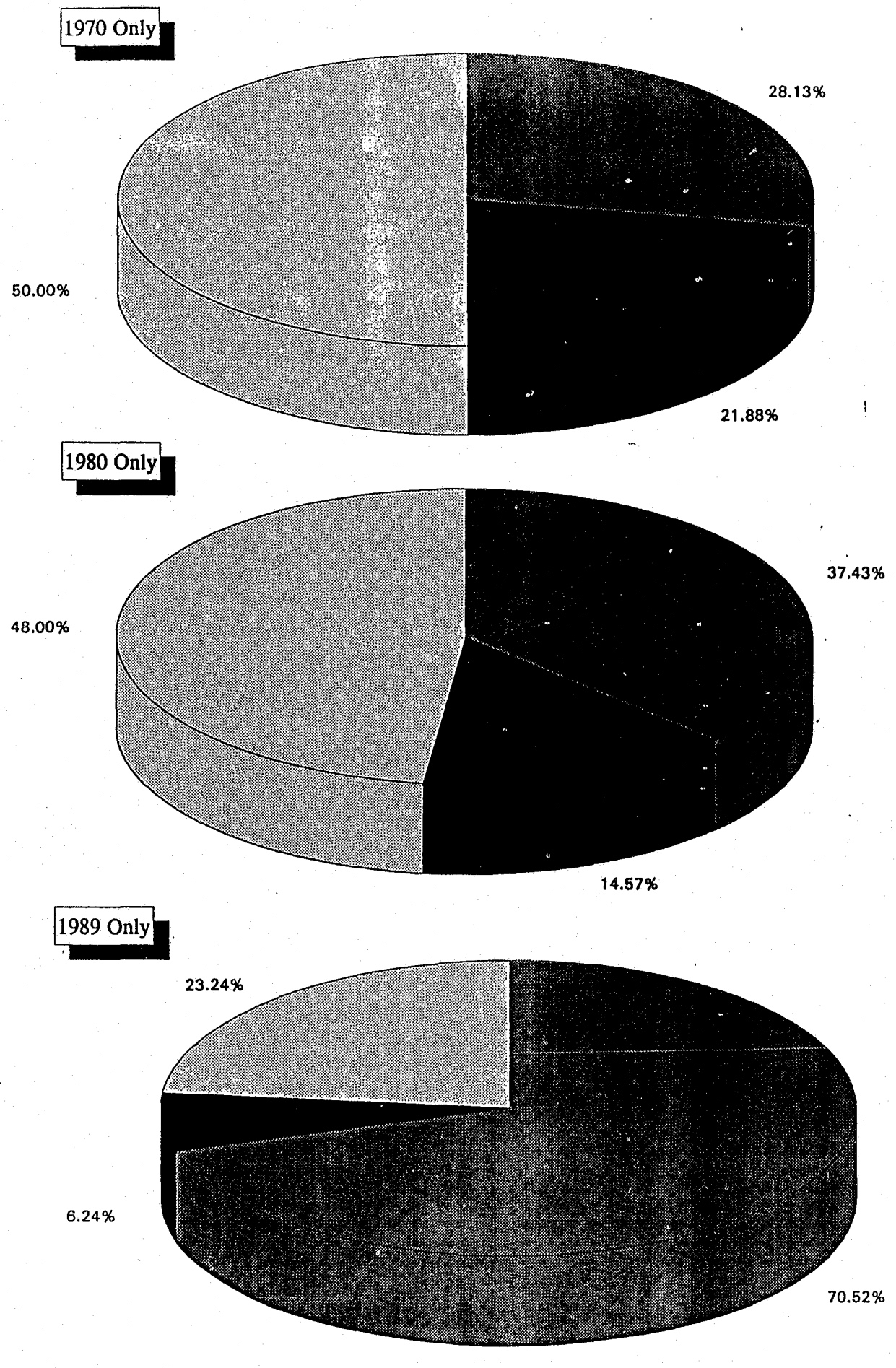
Why are we seeing what appears to be a significant increase in prosecutions? Several factors apparently contribute to this situation. The effects of:

(1) post-Watergate laws proscribing certain practices that were previously permitted [*see*, Lewis and Gilman, 1991: p. 3; Witt, 1989: p. 33];

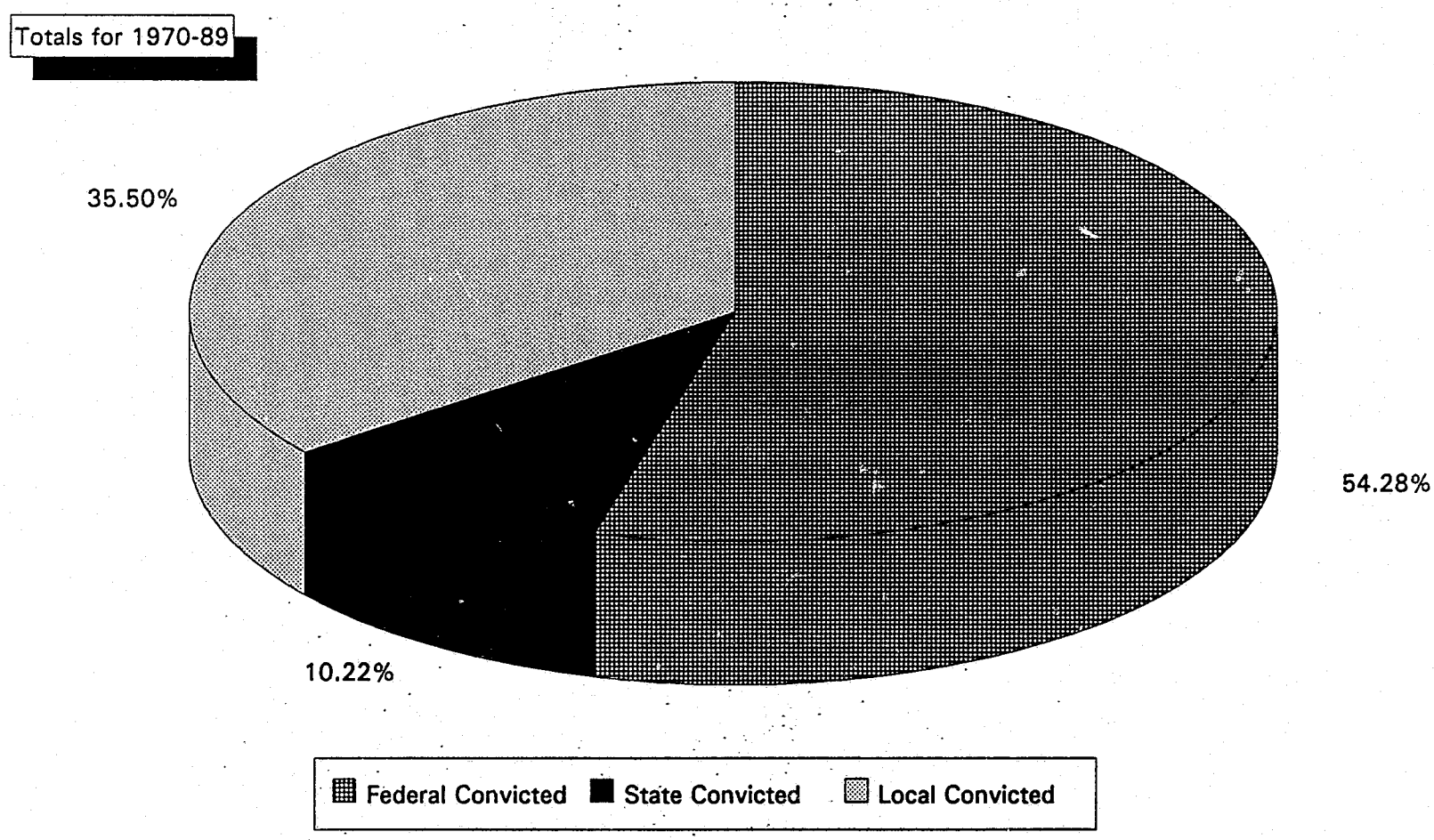
FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS

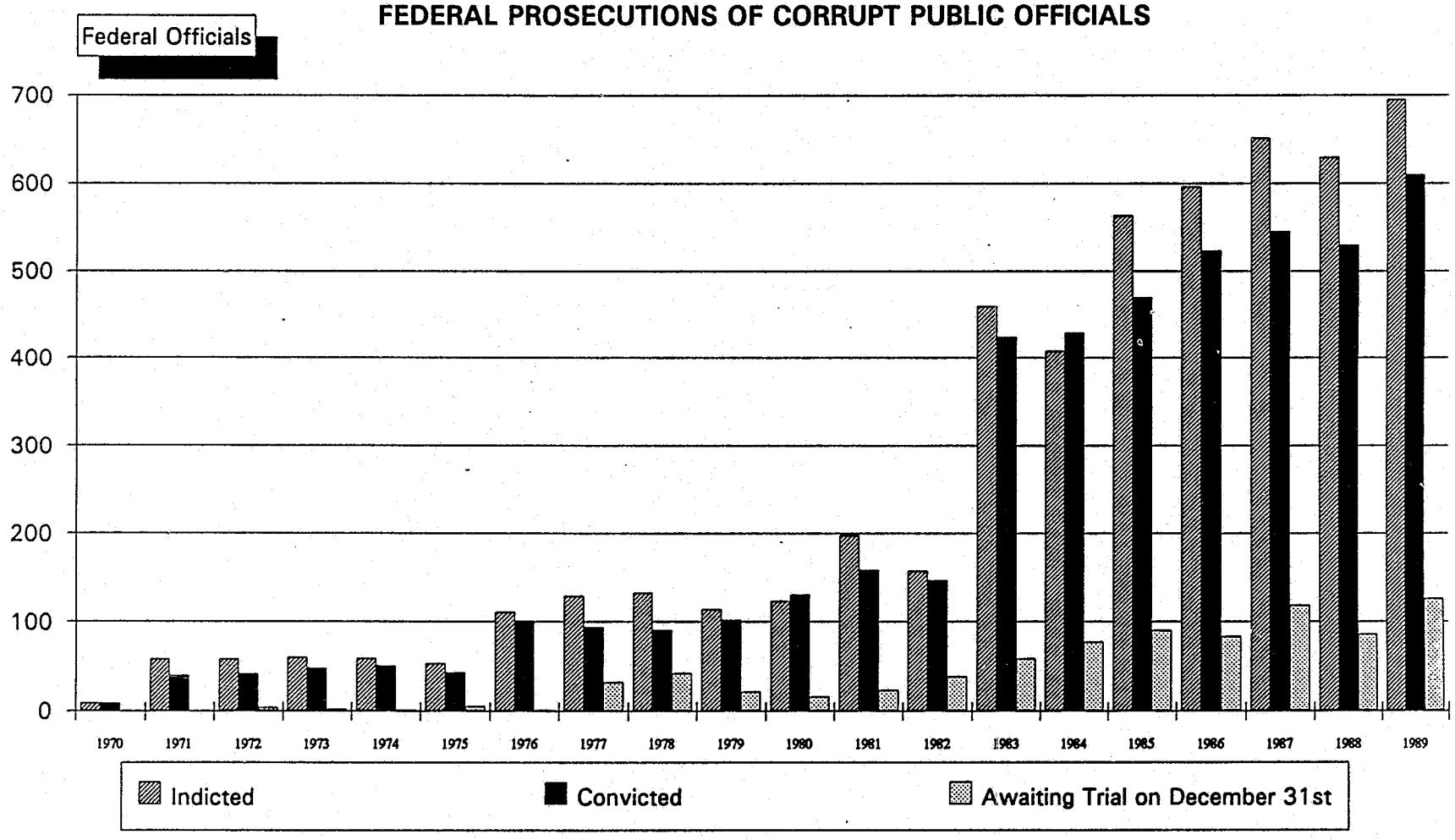


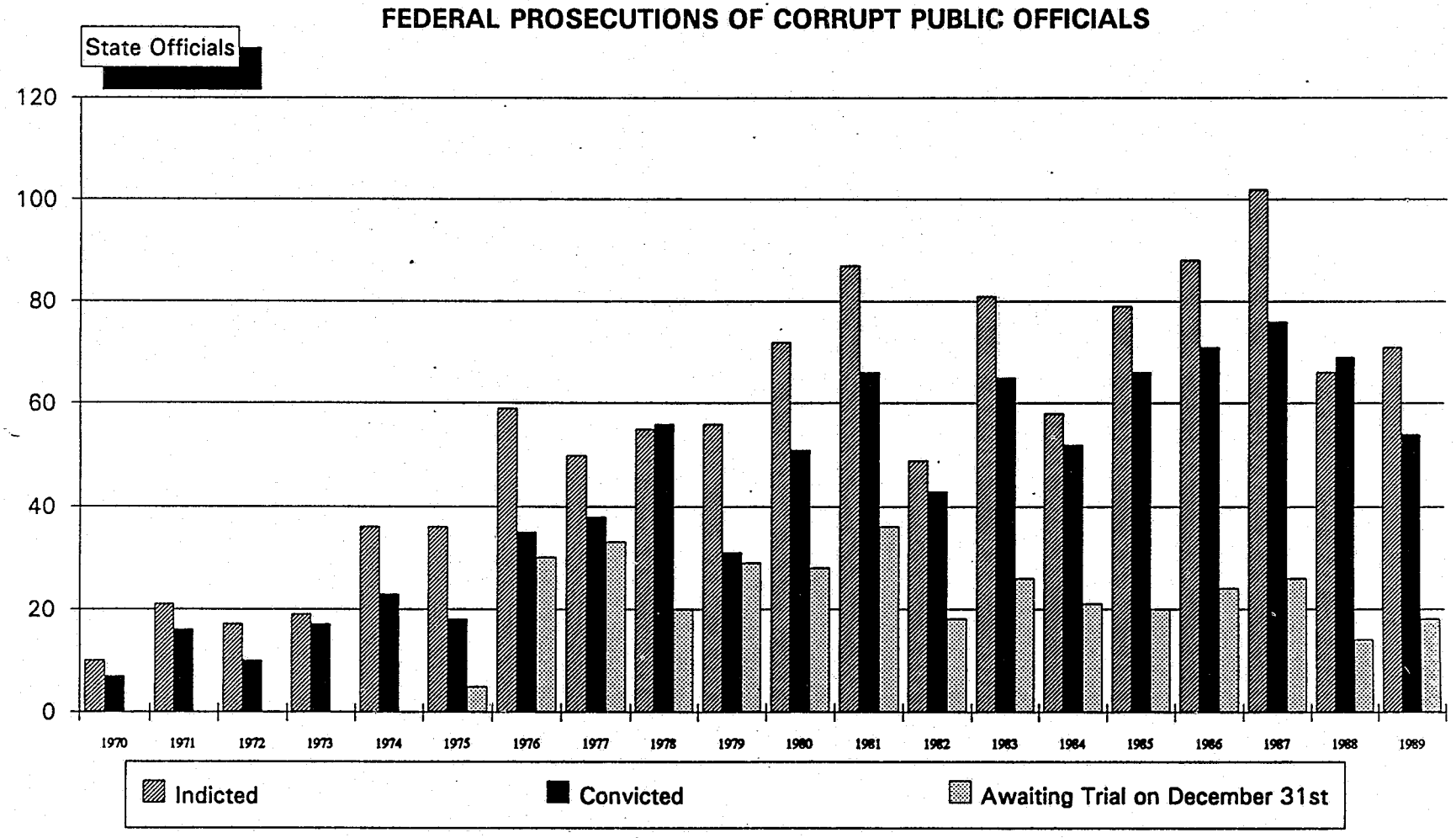
FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS

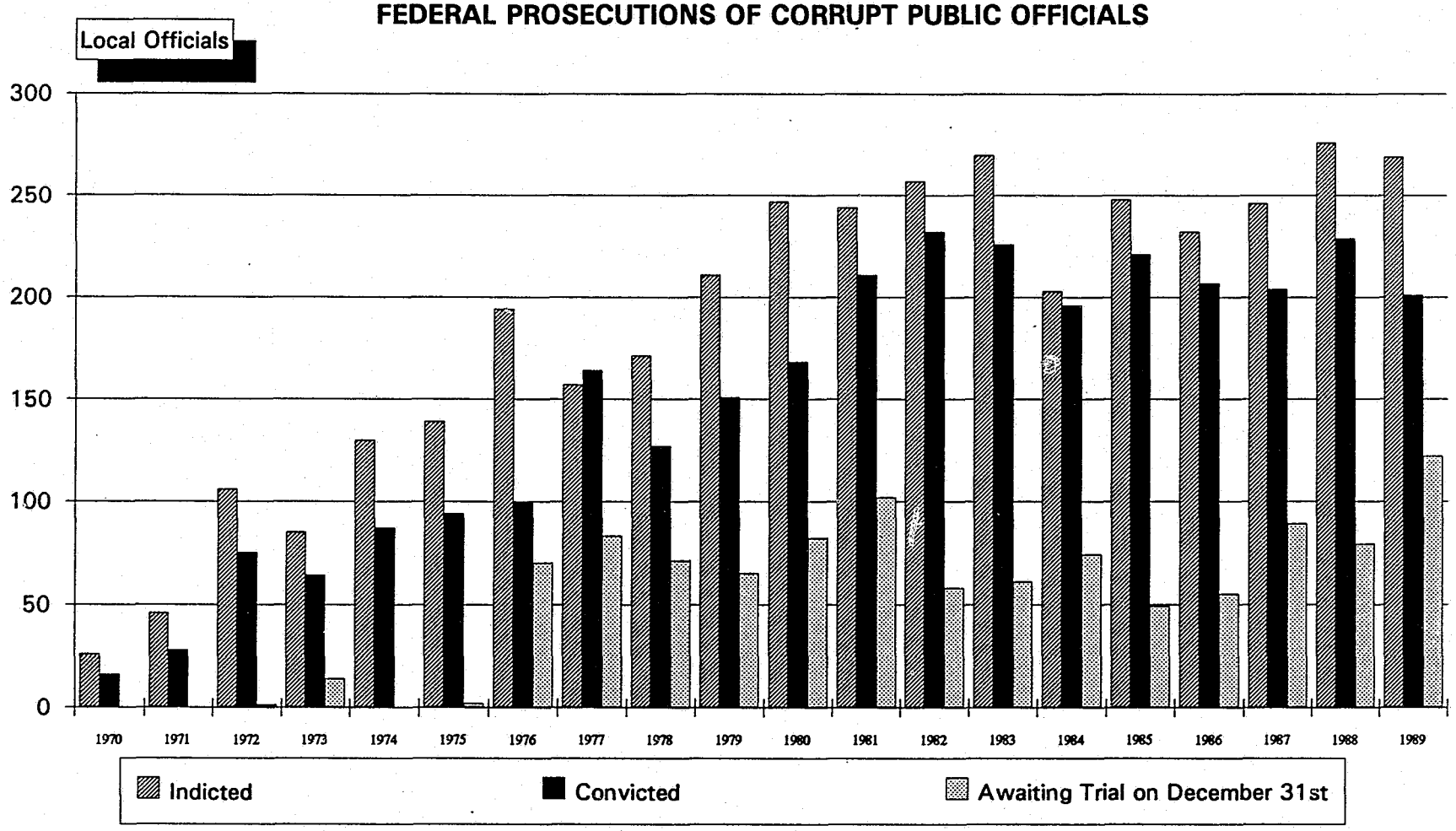


FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS




FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS
Federal Officials
700
600
500
400
300
200
100
0
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
Indicted
Convicted
Awaiting Trial on December 31st


FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS
State Officials
120
100
80
60
40
20
0
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
Indicted
Convicted
Awaiting Trial on December 31st


FEDERAL PROSECUTIONS OF CORRUPT PUBLIC OFFICIALS
Local Officials
300
250
200
150
100
50
0
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
Indicted
Convicted
Awaiting Trial on December 31st

(2) more aggressive investigation and prosecution by prosecutors--and by boards, commissions, and other agencies that weren't even established until the mid-70s [*see*, Witt 1989: p. 34];

(3) additional investigative resources and publicity brought to bear by a suddenly inquisitive news media;

(4) a change in public attitudes toward government as a public trust and what is or is not permissible behavior [*see, e.g.*, comments by Professor Frank Sorauf in Jackson, 1990: p. A-20; comments by municipal and law enforcement officials in Keller and Knotts, 1991: p. A-1], or simply changing social mores, such as an "old-boy network . . . caught in a new-boy vise" [comments by Professor Charles W. Dunn in Applebome, 1991: p. A-16; *see*, Schmich, 1991: pp. A-1, 8].

(5) the general public's greater willingness to come forward with evidence of wrongdoing (some of which may be attributable to special governmental protections afforded so-called whistleblowers [*see, e.g.*, Perry, 1991]).

At least one former mayor, Bob Cox of Fort Lauderdale, Florida, suggests that lower quality individuals are running for office today because their personal and financial dealings undergo such strict public scrutiny [Keller and Knotts, 1991: p. A-1], although the evidence suggests that such is not the case, at least at the federal level [Walter, 1981].

The stakes are certainly higher now; the opportunities of yesterday pale in significance to the chance to strike it rich from a single multi-million dollar bond transaction--or, as in one recent Illinois case, even "borrowing" a few million dollars of government cash for a day or so to receive the interest through the mixed-blessings miracle of electronic funds transfer [Council on Governmental Ethics Laws, 1987: p. 21].

The existence of fraud and corruption in government is anathema to most of us [*see*, Noonan, 1983]. Clearly, a government free of self-dealing is more likely to be responsive and responsible than one in which the officials ask, "What's in it for me?"; as one Arizona state legislator was caught on tape egging on a government undercover agent. Beyond the obvious effects of corruption on public confidence, there may be deleterious effects on the economy. The Governor of South Carolina, one state embroiled in systemic corruption in 1990, claimed that his state lost a major economic development prospect from overseas because of the myriad of scandals uncovered in his state [Surratt, 1990: p. B-1].

What can be done to ensure a "clean" government? A concerned and vigilant citizenry can make officials wary of stepping outside the bounds of appropriate conduct. So can a well-tuned media. But officials will never be completely perfect. 'Good' laws and regulations are no guarantees of ethical officials, just as 'bad' laws and regulations do not necessarily result in corrupt officials. We are ultimately dependent upon those whom we elect and appoint to serve us to properly exercise their discretion. Further, we must be concerned that while the laws, regulations, and

interpretations on ethics should guide the conduct of our public officials and public employees, they should not needlessly interfere with the everyday conduct of government affairs. At least one observer, however, writes that "The argument that the possibility of prosecution for misconduct will 'overdeter' officials and agencies depends largely on empirical assumptions that have not been supported with any substantial evidence" [Thompson, 1987: p. 81].

We do, however, have certain potentially effective weapons in the arsenal of good government. We can enact laws banning certain types of conduct. These laws can cover things that are *malum prohibitum*, conduct that we merely determine is inappropriate, such as using airline frequent flyer or hotel frequent guest bonus points earned while on state travel for personal benefit. These laws can also cover matters that are *malum per se*, conduct that society as a whole agrees is inherently wrong. While we have no functional equivalent of murder in the world of government ethics, an example of ethical conduct that is clearly antithetical to us all--*malum per se*--might be the exchange of a legislative vote for cash. Blackstone's Commentaries considered bribery to be an offense against public justice.

Conduct is not always easy to categorize as right or wrong. The law is not always as clear as we might wish it to be for a given circumstance, leaving an opening for an obviously unscrupulous official to slip through the bonds of justice. An official might do the "right" thing for the "wrong" reason, or vice versa. We prosecute a public official for accepting a bribe even if the official was predisposed toward voting for the matter--or even if the official voted against the dictates of the benefactor, a matter of considerable chagrin to those who attempt to employ this questionable philosophy in their legal defense (*see, e.g.*, comments at his bribery trial by Rep. Luther Taylor of South Carolina, in which he asserted, "I didn't sell my vote. My vote was already there for pari-mutuel . . . There was nothing more that Mr. [FBI informant] could have done to get me any more excited about pari-mutuel betting." [O'Shea and Miller, 1990: p. A-1]). Indeed, even after viewing their bribe-taking behavior on videotape in the less-than-friendly confines of the U.S. Attorney's Office, some South Carolina legislators "still didn't believe they had done anything wrong," according to U.S. Attorney Bart Daniel (Surratt 1991 (A): p. B-2).

And even if there is a law that is applicable to a given situation, there must be a mechanism by which an official can be investigated and effectively prosecuted. Proscriptions have minimal impact if they exist without the threat of sanctions. Penalties that are commensurate with the offense must also exist (and be consistently and uniformly applied) to serve as both punishment and as a deterrent.

Federal Anti-Corruption Laws

Federal prosecutors have a variety of tools available to them that may apply to or be stretched to combat official misconduct--but no single law covers public corruption, something that prosecutors often bemoan. "You have to stretch a little bit to find an offense," according to Andy Coats, the former Oklahoma County district attorney, who is familiar with the prosecution of local systemic public corruption [Zizzo, 1991: p. A-14].

□ Hobbs Act

Most federal prosecutions have been undertaken under the authority of the Hobbs Act [18 U.S.C. § 1951]. The Hobbs Act was enacted in 1946 as a means of handling labor racketeering. The Hobbs Act covers interference with interstate commerce through robbery, extortion, or threats of physical violence. A person paying a bribe is treated as a victim under the Hobbs Act.

The legislative history of the Hobbs Act does not contain "any indication of legislative intent to reach corrupt demands for payoffs by local officials, nor is there any discussion of the issue" [Maass, 1987: p. 208]. Only through "innovative legal craftsmanship by federal prosecutors" [Henderson, 1977: p. 385] has the law been held to apply to cover official corruption, and then only in limited circumstances [Note, 1986: pp. 391 *et seq.*]

But the Hobbs Act has now assumed the preeminent role in federal prosecution of public corruption. Official corruption can even be found without the need to show a quid pro quo. A public official or public employee who exploits his or her official position to the extent that a potential vendor or someone similarly situated feels compelled to perform a certain act or acts (e.g., offer gifts) because the individual has a justifiable fear that failure to do so would result in the loss of the contract or other benefit. This may include situations in which there is no solicitation of a bribe if the official is in a position where payments are made out of fear of retribution, rather than with the expectation of a benefit, if the public official or public employee is acting under color of the law [*see*, *United States v. O'Grady*, *United States v. Holzer*]. However, a 1991 case held that when a campaign contribution is called into question as a potential violation of the Hobbs Act, prosecutors must prove that the donor made the contribution because of an "explicit promise" of help by the public official that rises to the level of a quid pro quo, or the payment must be "induced by the use of force, violence or fear" [*McCormick v. United States*. Perhaps instructive is that news accounts spent an almost equal amount of space discussing the dissenting opinion in the 6-3 decision; the dissenters suggested that the existence of a "mutual understanding" about a harm to be avoided or a benefit to be obtained should suffice as the quid pro quo. *See*, Marcus, 1991: p. A-1; Greenhouse, 1991: p. A-19]. However, federal prosecutors are understandably reluctant to rely on the theory espoused in the dissent, and at least one major case--an investigation into highway contract payoffs in South Carolina--was dropped shortly after the decision, and turned over to state authorities for possible prosecution under state laws because of the *McCormick* decision, according to the U.S. Attorney whose office investigated the alleged misconduct (O'Shea and Surratt, 1991: p. A-12).

An indictment can also charge extortion through economic coercion under the Hobbs Act, but there may be a requirement of an additional showing that the victim has been threatened with the prospect of an obvious economic detriment, rather than just precluded from receiving some undue special benefit [*see*, *United States v. Capo*].

Prosecutions under the Hobbs Act may be pursued even though there is merely an indirect effect on interstate commerce, such as through the depletion of a victim's assets that would have

otherwise ordinarily have been applied toward the purchase of goods in interstate commerce [*United States v. Freeman*].

There is some debate today, however, as to whether the use of an out-of-state front established by federal investigators as part of an undercover operation is sufficient to trigger the interstate commerce element required under the Hobbs Act absent any other direct effect on interstate commerce. We were unable to locate any cases in which the U.S. Supreme Court has recognized the interstate commerce element where it was limited to federal authorities using the crossing of state lines to justify an interstate commerce element. In fact, a defense brief in one South Carolina Operation Lost Trust case suggested that "If the process for passage of a bill . . . is held to have the requisite nexus with interstate commerce, then every time a state legislative body acts, it arguably affects interstate commerce sufficiently to invoke federal jurisdiction" [O'Shea 1990 (C): p. A-12]. Thus, the brief concluded, "according to the government's theory in this case, there would be no powers reserved to the states because every time it acted, it would affect interstate commerce" [Ibid.]. Jury instructions by the judge in the first South Carolina Operation Lost Trust case to go to trial told jurors that they could find the defendant guilty if they determined that the defendant intended his actions to impact interstate commerce at some future time.

The Hobbs Act can only be used against the recipient of the bribe; the payor of the illegal gratuity is not subject to prosecution under this statute [*see*, Lindgren, 1988].

- Conspiracy Provisions

Many federal prosecutions are also brought under conspiracy provisions which relate to a variety of criminal offenses [18 U.S.C. § 371]. "Almost without exception, an indictment charging a 'white collar' or economic regulatory offense will contain a conspiracy count" [Pomerantz and Obermaier, 1990: p. 4-3]. Simply put, a criminal conspiracy is an agreement between two or more persons to achieve an unlawful object, or to achieve a lawful object by unlawful means [*Pereira v. United States*]. Conspiracy charges allow the introduction of proof that might not otherwise be admissible with other charges--including use of hearsay evidence. Joinder of defendants may also aid the prosecutor in presenting a case that almost invariably will compel a jury to find certain defendants guilty if the jury is convinced of the guilt of certain others. A conspiracy count may also be useful in overcoming venue or statute of limitations problems.

- Mail Fraud

Until 1987, mail fraud laws (18 U.S.C. §1341) were the weapon of choice by federal prosecutors. "When in doubt, charge mail fraud," was said to be a well-known maxim of federal prosecutors [Coffee and Whitehead, 1990: p. 9-2]. Federal prosecutions of corrupt public officials and public employees relied quite heavily on mail fraud provisions until late in the last decade. The 1872 mail fraud law seeks to prevent the use of the mails in any "scheme or artifice to defraud." Mail and wire fraud laws have been used to convict officials for participation in

activities that might have more than an appearance of impropriety, but may not be explicitly prohibited under other laws.

For many years, the use of mail fraud as a criminal prosecution device had been limited largely to prosecuting frauds carried out literally through the mails, frauds which resulted in people being bilked of cash. What changed the ground rules was a 1970 Chicago case involving the prosecution of an industrial purchasing agent who had accepted kickbacks from a supplier. The prosecution was based upon the novel theory that the company was deprived not of tangible property, but rather of an intangible right, the right to honest work by its employee [*United States v. George*].

The decision, upheld by the 7th Circuit Court of Appeals in 1973, quickly paved the way for subsequent prosecutions of many notable Illinois political figures and launched the political careers of several federal prosecutors, including two who went on to serve as governor and attorney general of Illinois. Soon authorities across the country were bringing officials to justice for their involvement in mail fraud and deprivation of the intangible right of the citizenry to good government.

Several hundred successful prosecutions were initiated under this novel theory, and prosecutors were satisfied with this weapon until June 24, 1987, when the U.S. Supreme Court, in a 7-2 decision in the case of *McNally v. United States*, ruled that the mail fraud statute could not be so broadly interpreted. The statute, according to the majority, required an affirmative showing of actual economic injury, not merely intangible harm.

The Public Integrity Section of the Justice Department conservatively estimated at the time that the ruling could affect as many as 185 convictions and more than 100 pending cases [Marcus 1987: p. A-15]. Such high-profile convictions as that of former Maryland Governor Marvin Mandel, have been overturned--even though the judge who threw out the conviction termed Mandel's disputed dealings "sleazy and perhaps dishonest" [McConnell, 1987: Op-Ed Page].

The impact of the *McNally* case has been somewhat mitigated by (1) the 1988 congressional passage of an amendment to the mail fraud laws which defines the term "scheme to defraud" to include depriving someone of "the intangible right of honest services" [18 U.S.C. § 1346]; (2) the adoption by lower courts of a dissenting opinion of Justice Stevens in McNally in which he finds the property loss in the employee's retention of the bribe or kickback, which would otherwise revert (in some form) to the employer [*see, United States v. Matt, United States v. Fagan*, and *United States v. Runnels*]; and the Supreme Court's subsequent decision in Carpenter v. United States which upheld a mail fraud conviction where the victim was defrauded of intangible property rights (improper disclosure of confidential business information) in an insider trading case [*Carpenter v. United States* at 27]. Yet the meaning and impact of the changes have been the subject of debate in the legal community [Coffee & Whitehead 1990: pp. 9-77, 78], and it appears that federal prosecutors have merely turned to other, time-tested, weapons in their vast arsenals rather than risk an adverse decision in a mail fraud case. There continues to be

controversy over whether prosecutors are putting these laws to the use for which they were intended.

- RICO Charges

Prosecutions under the Racketeering Influenced and Corrupt Organizations Act [18 U.S.C. §§ 1961-68] are viewed as one of the most severe legal charges that can be levied against an individual. As with the Hobbs Act, RICO was originally intended to be an instrument that prosecutors could use against organized crime. Just like the evolution of the Hobbs Act, RICO actions have evolved into an effective tool for federal prosecutors to use in combatting public corruption. Their applications also have raised controversial issues of constitutionality that still are being tested in the courts.

RICO charges require the presence of one of the following:

(1) Investing income from a pattern of racketeering in an enterprise [18 U.S.C. § 1962(a)];

(2) Acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity [18 U.S.C. § 1962(b)];

(3) Conducting the affairs of an enterprise through a pattern of racketeering activity [18 U.S.C. § 1962(c)]; or

(4) Conspiring to violate any of the first three prohibitions [18 U.S.C. § 1962(d)].

The two key definitions are those covering "racketeering" and "pattern of racketeering activity." Racketeering is spelled out as any chargeable or indictable act under an extensive list of state and federal offenses [18 U.S.C. § 1961], and a pattern of racketeering activity includes two or more acts of racketeering activity during a ten-year period [18 U.S.C. § 1961(5)]. Thus, two or more predicate offenses--including state charges beyond the federal statute of limitations--can combine to create a new offense: a RICO violation.

RICO charges permit the joinder of several acts of criminal conduct in a single indictment that might otherwise have been subject to a motion for severance [Panneton, 1990: p. 17]. Each monetary demand, for example, serves to corroborate and reinforce testimony by others as to similar conduct, and while a single demand or bribe solicitation might be explained away, a jury faced with numerous incidents possessing common characteristics occurring over a protracted period would be able to fully comprehend the impact and magnitude of the defendant's behavior [Ibid.].

An enterprise has been found to include a court system [*United States v. Murphy*], a judgeship [*United States v. Hunt*], a governor's office [*United States v. Thompson*], and a legislator's office

[*United States v. Long*], among others. This comes in spite of "no indication that RICO was designed . . . to forbid infiltration of government agencies" [Bradley, 1980: p. 845].

The interstate commerce element of RICO is often more easily satisfied than the commerce requirements under the Hobbs Act, because only the enterprise has to affect commerce [*United States v. Murphy* at 1531]. Even if the racketeering activity itself is the matter affecting commerce, there is sufficient nexus to satisfy the requirement [*United States v. Conn*].

Asset forfeiture provisions under RICO have been used both as effective threats and as tools for enforcement.

- Ethics in Government Act of 1978 and its Progeny

The Ethics in Government Act of 1978, P.L. 95-521, established public financial disclosure requirements for executive, legislative, and judicial branch officials and employees. The Act also amended the criminal conflict of interest statute, 18 U.S.C. § 207, restricting certain post-employment activities of former executive branch officials and employees, and established an Office of Government Ethics to provide overall policy direction, and authorized the use of special prosecutors to investigate and prosecute certain executive branch officials for alleged violations of criminal laws. Much of what Congress did, especially in the area of post-government employment, was done "to avoid *even the appearance* of public office being used for personal or private gain" [S. Rep. No. 170, 1978: p. 32 (emphasis in original); *see*, *United States v. Coleman*].

A violation of virtually any provision in the federal ethics laws found at 18 U.S.C §§ 203-209 constitutes a felony punishable by imprisonment of up to two years and a felony-level fine, which, under 18 U.S.C. § 3571 may be of any amount not to exceed $250,000. Violations of provisions relating to prohibition of supplementation of salary as compensation for services as an officer or employee of the executive branch, 18 U.S.C. § 209, or the prohibition on representation by partners of a federal government employee on matters in which the employee has participated personally and substantially are considered to be misdemeanors, punishable by imprisonment of up to one year and a fine of not more than $100,000.

To find a violation of the federal ethics laws, the prosecutor must prove that the defendant acted "knowingly"; there is, however, no requirement that the defendant act "willfully," as is also required under many criminal statutes.

In spite of the fact that the new administrative enforcement authority provision was included in the Act "to provide a more realistic possibility that violators would be punished, since criminal prosecutions had been pursued so infrequently," under the first years of experience under the Ethics in Government Act of 1978, few criminal prosecutions were undertaken (total referrals for post-employment conflict of interest matters referred to U.S. Attorneys ranged from four to 12 during fiscal years 1975 to 1981), and the General Accounting Office found that "Agencies seldom use the administrative sanction authority available under the Ethics Act" [U.S. General

Accounting Office, 1983: p. 19]. Indeed, the President's Commission on Federal Ethics Law Reform in 1989 recommended stiffer ethics provisions and "additional enforcement mechanisms" [President's Commission on Federal Ethics Law Reform, 1989: p. 6].

The President's Commission specifically recommended that civil penalties be added to the enforcement mechanism, with an attendant standard of proof of the preponderance of the evidence; that civil penalties be permitted in addition to criminal penalties; "willful" violations of most of the provisions should be punishable as felonies, while a mere "knowing" violation should constitute a misdemeanor [Ibid.: p. 104].

The President's Commission was able to see much of its advice taken by Congress in the form of the Ethics Reform Act of 1989, P.L. 101-194. The Reform Act permitted criminal conflict of interest provisions at 18 U.S.C. §§ 203-209 to be prosecuted either as a felony (for willfully engaging in the conduct) or as a misdemeanor (for engaging in the conduct). Civil actions can also be brought by the Attorney General with a fine not to exceed the greater of $50,000 per violation, or the amount of compensation offered or received as a result of the illegal action. Post-employment restrictions were extended to include more officials and Members of Congress and legislative branch officials. Additional amendments also severely restricted behind-the-scenes assistance by former government employees. Other key provisions include the enactments of statutes restricting the acceptance of non-criminal gifts by individuals and the acceptance of certain official travel expenses from outside sources by agencies; a tax deferral mechanism for executive branch employees required to divest themselves of assets to avoid a conflict of interest; and a total ban on restriction of honoraria [Ley, 1990: p. 4].

- Other Federal Statutes

The Travel Act [18 U.S.C. § 1952], and perjury [18 U.S.C. § 1621], bribery [18 U.S.C. § 201], and obstruction of justice [18 U.S.C. § 1501] provisions account for most of the remainder of federal charges in public corruption cases.

The Travel Act was enacted as a keystone of then-Attorney General Robert F. Kennedy's organized crime prevention program. Again, there is no legislative history indicating that the law was intended to apply to official corruption, and, as with the mail fraud law and RICO, this law's application was stretched to fit the need.

The bribery provisions allow federal prosecution of local officials even when federal monies are not involved in the actual bribe transaction. All that is needed to be proven for jurisdictional purposes is that the local government unit that is involved receives at least $10,000 annually in federal funds [*see, Westmoreland v. United States*]. Bribery statutes also permit the prosecution of those who pay the bribes.

The perjury and obstruction of justice provisions of the law similarly fail to directly address matters of government corruption, but have been used to prosecute public officials and public employees for their conduct arising out of direct public corruption activity.

Dilemmas Presented by the System

There is considerable debate within the legal community as to the propriety of federal prosecutions of what are essentially perceived as "local" cases [Baxter, 1983: pp. 321 *et seq.*; Loomis, 1978: p. 63; Ruff, 1977: p. 117; Stern, 1971]. One prominent academic commentator terms such prosecutions "basically unauthorized, in important respects out of control, and overall questionable in terms of the federal nature of our constitutional system" [Maass, 1987: p. 195]. Some turf battles have recently broken out between local and federal prosecutors over jurisdiction. Conversely, the persistent failure of state and local governments to clean their own houses has seemed to necessitate such creative federal intervention.

As a result, we are presented with a system that poses a number of dilemmas for participants--prosecutors and defendants alike--and for the general public. According to two prominent scholars in the field, among the tensions with which we must cope are:

> (1) the tension between legality and morality, between what is unethical and what is criminal;
>
> (2) the tension between judicial lawmaking and the doctrine, founded both on due process and the separation of powers, that there are no common law crimes;
>
> (3) the tension between federal law and the right of states to have primary jurisdiction over the determination of what behavior is criminal

[Coffee and Whitehead, 1990: p. 9-10].

Adding to these tensions are other problems inherent in public corruption investigations and prosecutions. Consensual transactions with mutual benefits typically are not easy to pierce. The theories of prosecution for certain public corruption offenses are often difficult to prove, and can result in labor-intensive efforts, particularly in cases involving complicated or sophisticated financial transactions with out-of-state or international implications. Finally, there is often the unspoken realization that the prosecutor is taking on what amounts to the titled establishment; investigating and prosecuting public corruption may entail untangling longstanding power relationships between those running the government and those leading the business community.

There is also a sense in some quarters that public corruption is becoming more obvious in part because of the political appeal of combatting it; that vague laws and overzealous media and prosecutors are stigmatizing public life unduly, and diminishing its appeal for people of stature and worth--just the opposite of the desired effect. Laws that are "stretched" may contribute to a fear of public service.

Conscious of these tensions, we have attempted to assess the nature of public corruption across the United States, and identify and discuss these methods that seem most effective in combatting such corruption.

PUBLIC CORRUPTION: WHAT IT IS AND WHY IT MATTERS

Definition of Public Corruption

For purposes of this report, we define public corruption as duty-related conduct by a public official or public employee that runs afoul of the law. The Federal Bureau of Investigation defines a public corruption case as "a criminal investigation wherein it is alleged that a public official has abused the position of trust in violation of Federal criminal law" [Clarke, 1988: p. 279]. For our purposes, public corruption does not include an offense that would not meet the definition of "public corruption" if a public official or public employee was not the perpetrator. For example, if a city comptroller were to break into City Hall and the city vault through the use of force, that would not constitute public corruption. However, if the city comptroller were to use his or her key to City Hall for entry, and then use the combination to the vault, obtained through the ordinary course of serving the public, to gain access to the riches inside, that would constitute public corruption for our purposes. Thus, an offense such as drug possession would almost never constitute a public corruption charge under our definitions, except if the drugs were obtained by virtue of the public official's or public employee's official governmental status. Of course, other laws are sufficient to cover such illegal acts as breaking and entering or drug possession by any individual.

Impact of Public Corruption

Virtually everyone is affected by public corruption. Far from being a consensual "victimless crime," as some would seek to portray it, public corruption has a major impact both on our society and on our individual lives.

When an elected official is blessed with the trust of the public, he or she "can afford to exercise the necessary leadership to advocate unpopular but needed policy initiatives" [Simmons, 1991: p. 197]. However, "leadership is difficult and the narrow goals of special interests thrive when public apathy and cynicism weaken the political system" [Ibid.; however, at least one study has shown that allegations of corruption have little effect on the net turnout. Peters and Welch, 1980]. Beyond the implications for reduced public confidence in government and its leaders--and the danger that such an atmosphere creates, including the perpetuation of corruption in government [Bowman and Kearney, 1986: p. 40]--public corruption can result in more tangible problems such as unsafe buildings whose inspections have been compromised; criminals who have been wrongly returned to the streets to harm others due to law enforcement officials who have been improperly influenced; increased taxes to pay for waste from bribes and kickbacks; threats to public health and the environment; and sabotage of our national security [*see*, Weld, 1988: pp. i-iii]. Public corruption can have the effect of lowering the availability of certain government services due to increased costs of corruption passed along to the taxpayer. Public corruption may also serve to drive away major new economic development prospects from a particular jurisdiction [Surratt, 1990: p. B-1].

From 1985 through 1989, more than 5,000 federal, state, and local public officials or public employees were convicted on federal public corruption charges--with the totals rising each year.

The Nature of Corruption

In the popular media, assumptions were made that this increase in corruption convictions was caused by the higher stakes that public officials were tempted by [*see*, U.S. News & World Report, 1987: p. 10; Moore, 1987: p. 1963]. Others suggested that many public officials and public employees were falling victim to new laws that proscribed conduct that would have been acceptable in the pre-Watergate era. An even more recent account holds that "[r]ecent political scandals generally suggest a pervasive pattern of biased representational behavior rather than outright corruption" [Simmons, 1991: p. 193]. Our survey responses and on-site interviews with federal and state prosecutors indicated that garden-variety financial fraud accounts for the bulk of these cases, with the newer types of offense linked to an individual's governmental position--"position-related offenses"--accounting for a small percentage of public corruption cases prosecuted by federal and state prosecutors (What we will call a "position-related offense" is one that arises out of the individual's holding of a position of public trust, whether the person is a public official or a public employee. Questions over proper channels of access and influence, for example, would be included in this definition [*see*, Ibid.]).

While it is unfair to suggest that prosecutors deem unimportant statutes that forbid not only the corrupt acquisition of money or property, but even the *appearance* of impropriety or conflict of interest, they clearly assume a much lower position on the scale of prosecutorial public corruption priorities. Tangible offenses clearly assume a higher priority among prosecutors than those with less tangible characteristics. The director of one independent state ethics entity told us in our on-site visit that he had difficulty in convincing the local prosecutor with jurisdiction to pursue such matters as failure to file statutorily required financial disclosure reports, or fraudulent filings. The reason? A matter of resources. "We're busy prosecuting rapes and murders, and we don't have the time to devote to this kind of stuff," the director said he was told by the prosecutor. Prosecutors may see position-related offenses as relatively trivial in comparison with such matters as embezzlement (the intentional and fraudulent conversion of money which the wrongdoer had access to by reason of office or employment or position of trust) or blatant conflict of interest (the clash between the public interest and the private pecuniary interest of the individual concerned). Prosecution of such "judgment calls" may also result in a "no-win" political situation for the local prosecutor. If he or she prosecutes someone from the other political party, the prosecutor may be accused of bringing the prosecution for political gain. If the prosecutor prosecutes someone from his or her own party, the prosecutor may be viewed as a pariah within the party.

Stealing or embezzling from the public till is the most prevalent of public corruption crimes, with another time-dishonored tradition: bribery (the offer, giving, receipt, or solicitation of anything of value in return for influencing action in an official capacity), extortion (the obtaining of property from another induced by the wrongful use of actual or threatened force, violence, or fear, or under color of official right), and kickbacks (the payment back of a portion of the

purchase price or salary to a public official by a seller or employee to induce purchase or employment, or future purchases or employment), weighing in next in frequency. Public employees are more than twice as likely to be investigated for stealing or embezzling government funds as are public officials, but the numbers for each other type of offense indicate relative parity between public officials and public employees who are investigated for other various forms of misconduct. The position-related crimes of conflict of interest and revolving door violations barely registered, with less than five percent of the public corruption cases prosecutors handle involving such offenses.

Perhaps this should not come as much of a surprise. Those prosecuted for embezzlement in U.S. District Court in 1987, the last year for which figures are available, outnumbered those who had charges brought against them on any charges other than drug, property, or fraud offenses [Bureau of Justice Statistics, 1990: p. 6].

These findings would seem to indicate that public officials and public employees seem to commit much the same types of offenses as their constituents (one is tempted to draw a further parallel to the paradigm that suggests that they are elected to represent a cross-section of their constituents!). Learning new theories of prosecution for "exotic" offenses isn't really a significant consideration for prosecutors.

Professionals have long understood that embezzlement is "one of the most foolish of white collar crimes" because "[t]he ordinary case of embezzlement is a crime by a single individual in a subordinate position against a strong corporation" [Sutherland, 1949: p. 75]. Yet this is the most prevalent of all public corruption crimes. Apart from the motivation of pure greed, we have not been able to answer the question of why this is so, given that the public official or public employee is probably up against even greater odds than he or she would face in a corporate context due to the high level of scrutiny of transactions in government. The only rational explanation--if it can be said to be a rational explanation in such circumstances--is that the stakes are so high that the risk is perceived as being worth taking.

When asked in our on-site interviews if there were trends in their jurisdiction toward certain types of public corruption offenses, prosecutors told us that they were seeing more crimes in recent years involving personal enrichment--principally bribery. Some prosecutors indicated that they are also seeing position-related offenses, such as the misuse of office for personal gain (using the title or prestige of office to gain favors that the individual would not otherwise be afforded or entitled to absent the office), not in the traditional "enrichment" sense, but rather in the context of a misuse of office for personal gain. However, these cases do not typically involve an enrichment of the traditional variety, but rather the improper use of a title or prestige of their office to obtain small considerations for personal gain or the gain of others. As one local prosecutor told our on-site interviewer, there isn't much that tangibly violates statutory language, but there is an intangible that he often sees in the form of "maintenance of a particular lifestyle" brought about by a sense of power and a warped sense of what constitutes appropriate conduct. Unfortunately, this prosecutor notes, it is frequently difficult to prove such cases, and "if you can find a crime to fit an evil, you're lucky."

What Individuals Commit the Transgressions

Our survey responses suggest that 64.8 percent (474) of local prosecutors did not investigate any allegations of misconduct involving public officials. Of this group, an identical 64.8 percent (307) of local prosecutors responded that they did not investigate any public employees for public corruption, a figure that drops to 41.9 percent when the total sample is considered. Thus, local prosecutors are clearly more likely to investigate a public employee than a public official for public corruption, a fairly intuitive finding considering the relative disparity in numbers between public officials and public employees. Prosecutors who did not report investigating any public officials also investigated few, if any, public employees, and those prosecutors who did not investigate any public employees are prone to investigate few, if any public officials.

To look at this phenomenon in greater detail, we removed all "zero" responses, and all no responses from the survey responses to the questions about investigations of public officials and public employees, and analyzed the investigations of public officials with respect to investigations of public employees in ratio form. A ratio of 0.0 means that the prosecutor investigated at least one public official, but did not investigate any public employees. A ratio greater than 1.0 indicates that the number of public employees investigated was greater than the number of public officials investigated, while a number less than 1.0 means the opposite. A ratio of 0.5 illustrates that one-half as many public employees as public officials were investigated, while a ratio of 2.0 represents that twice as many public employees as public officials were investigated.

INVESTIGATIONS OF PUBLIC EMPLOYEES VS. INVESTIGATIONS OF PUBLIC OFFICIALS

No. of Public Employees Investigated/No. Public Officials Investigated
(Local Prosecutors Who Investigated at Least One Public Official)

Value	Frequency	Valid Percent
.00	17	24.3
.05	1	1.4
.22	1	1.4
.25	1	1.4
.33	1	1.4
.42	1	1.4
.50	7	10.0
.60	1	1.4
.67	1	1.4
.80	1	1.4
1.00	12	17.1
1.20	2	2.9
1.30	1	1.4
1.67	2	2.9
1.71	1	1.4
2.00	4	5.7
2.50	2	2.9
3.00	4	5.7
3.10	1	1.4
4.00	4	5.7
4.67	1	1.4
5.00	2	2.9
6.67	1	1.4
31.72	1	1.4

N = 71

Out of 70 valid cases (one missing case was removed), 24.3 percent (17) had a ratio of 0.0. This statistic was somewhat surprising, since one might assume that a prosecutor who investigated at least one public official also would have investigated at least one public employee. So even though inaction in one investigatory category may indicate inaction in the other category, action in one category is not necessarily an indicator of action in the other. This may mean that when a local prosecutor opens a public corruption investigation involving a public official, the prosecutor does not necessarily assume that public employees also are involved. Such an assumption carries with it an interesting implication: local prosecutors may not be casting the "broad net" in investigations that they claim to employ so that they may better avoid charges of unfair targeting.

The sum of all cases with a ratio ranging from 0.0 through 0.5 is 41.4 percent, and the sum of all cases with a ratio below 1.0 (indicating that the prosecutor investigated more public officials than public employees) is 45.7 percent. Twelve cases (17.1 percent) weighed in with a ratio of 1.0, leaving 37.1 percent with a ratio greater than 1.0 (indicating that the prosecutor investigated more public employees than public officials).

Again, these findings are of interest. We have already shown through our survey that public employees more often engage in the types of offenses that leave some form of evidence, such as theft or embezzlement, than do public officials, yet prosecutors seem to investigate more public officials than public employees. However, when figures on successful prosecutions of public officials are compared with successful prosecutions of public employees, we found 40.8 percent (29) with a ratio of 0.0, and 8.5 percent (6) with a ratio greater than 0.0 but less than 1.0. Twelve cases (16.9 percent) had a ratio of 1.0, leaving 33.8 percent with a ratio greater than 1.0. Thus, successful prosecutions of public officials were more common than successful prosecutions of public employees among prosecutors who had successfully prosecuted a public official or a public employee for public corruption.

One explanation for this phenomenon might be that prosecutors are more successful in reaching plea agreements with public employees than they are doing so with public officials--but in fact the opposite is true. In 21 cases (38.9 percent), the plea agreement ratio was 0.0, and in 9.2 percent (5) of the cases the ratio was greater than 0.0, but less than 1.0. nine cases (16.7 percent) had a ratio of 1.0, with the remainder, 35.2 percent exceeding 1.0. Thus, public officials appear to be more likely to plead guilty to charges than public employees.

No. of Public Employees Indicted/No. Public Officials Indicted
(Local Prosecutors Who Indicted at Least One Public Official)

Value	Frequency	Valid Percent
.00	18	26.9
.18	1	1.5
.20	1	1.5
.50	3	4.5
.60	1	1.5
.75	1	1.5
.80	1	1.5
.83	1	1.5
1.00	17	25.4
1.38	1	1.5
1.67	1	1.5
2.00	5	7.5
2.50	2	3.0
4.00	6	9.0
5.00	2	3.0
5.25	1	1.5
8.00	1	1.5
13.00	1	1.5
13.60	1	1.5
NA	4	---

N = 71

No. of Public Employees Plea Bargained/No. of Public Officials Plea Bargained
(Local Prosecutors Who Plea Bargained with at Least One Public Official)

Value	Frequency	Valid Percent
.00	21	29.6
.20	1	1.9
.50	2	3.7
.67	2	3.7
1.00	9	16.7
2.00	5	9.3
2.33	1	1.9
3.00	4	7.4
3.33	1	1.9
4.00	2	3.7
4.33	1	1.9
5.00	1	1.9
6.50	1	1.9
7.00	1	1.9
8.00	2	3.7
NA	17	---

N = 71

No. of Public Employees Successfully Prosecuted/No. Public Officials Successfully Prosecuted
(Local Prosecutors Who Successfully Prosecuted at Least One Public Official)

Value	Frequency	Valid Percent
.00	29	40.8
.20	1	1.4
.50	2	2.8
.60	2	2.8
.75	1	1.4
1.00	12	16.9
1.50	1	1.4
2.00	7	9.9
2.50	1	1.4
3.00	3	4.2
3.33	1	1.4
4.00	5	7.0
4.67	1	1.4
5.00	1	1.4
7.00	1	1.4
8.00	1	1.4
11.00	1	1.4
16.25	1	1.4

N = 71

Areas for Special Attention

Our survey and on-site interview responses indicated that there are three areas where law enforcement prosecution for corruption may not be adequate. Each of these areas may require more attention in the years to come. The public has not, thus far, been alerted to these conditions. In the first instance, police corruption was frequently brought up--and always in the context of narcotics dealing. "Cops don't need to be negotiating their cases" on the street, letting offenders go in exchange for consideration, one prosecutor told us, but there appears to be a significant number of such instances across the country. In Kentucky on just one day in 1990, four county sheriffs and one city police chief were indicted on federal charges of taking payoffs and providing protection for drug trafficking [Wilson, 1990: p. A-1). All but one were convicted, bringing the count of sheriiffs and deputies convicted in Kentucky in the ten-year period since 1981 to at least 16 [Voskuhl, 1991: p. B-6]. The danger in the United States is underscored by patterns that have emerged in South America, where police have been suborned by drug traffickers; by simply looking the other way at critical times, such individuals can often make more money in one transaction than they could otherwise make in their entire law enforcement careers--and avoid the risks inherent in facing up to the traffickers as part of their sworn duties.

The second area that we have identified as an overlooked problem area is that of real estate development. Planning and zoning decisions have become far more important to developers today

with the value of real estate soaring, and the availability of prime property decreasing. "the real estate industry brings in money and puts pressure on the regulatory system," noted U.S. Attorney Dexter Lehtinen, whose office is particularly active in the prosecution of public corruption [Parker, 1991: p. A-4]. The environmental process in some areas may now be so complicated that frustrated and unscrupulous real estate developers may be tempted to short circuit the process through unethical or illegal actions [*see, e.g.*, California Commission on Campaign Financing, 1989: pp. 280-82]. This may be a particular concern to prosecutors in rapidly growing jurisdictions.

The final area that appears poised for activity is the field of government (especially municipal) finance. Billions of dollars of public debt are incurred annually, with underwriting contracts frequently awarded to out-of-state firms--often those who have made considerable campaign contributions to public officials involved in the bond issues [Pierog and Oxnevad, 1991: p. 19]--and awards are typically made without a competitive bid requirement. State and local governments must hire outside bond counsel and rely upon their independent judgment, and often this counsel is hired on the basis of political connections. Bonding is one of the least understood government functions, and when federal investigators are faced with looking into such transactions, they are often required to seek outside assistance.

Our survey and on-site interview responses indicated that there are three areas where law enforcement prosecution for corruption may not be adequate. Each of these areas may require more attention in the years to come. The public has not, thus far, been alerted to these conditions. In the first instance, police corruption was frequently brought up--and always in the context of narcotics dealing. "Cops don't need to be negotiating their cases" on the street, letting offenders go in exchange for consideration, one prosecutor told us, but there appears to be a significant number of such instances across the country. In Kentucky on just one day in 1990, four county sheriffs and one city police chief were indicted on federal charges of taking payoffs and providing protection for drug trafficking [Wilson, 1990: p. A-1). The danger in the United States is underscored by patterns that have emerged in South America, where police have been suborned by drug traffickers; by simply looking the other way at critical times, such individuals can often make more money in one transaction than they could otherwise make in their entire law enforcement careers--and avoid the risks inherent in facing up to the traffickers as part of their sworn duties.

The second area that we have identified as an overlooked problem area is that of real estate development. Planning and zoning decisions have become far more important to developers today with the value of real estate soaring, and the availability of prime property decreasing. "The real estate industry brings in money and puts pressure on the regulatory system," noted U.S. Attorney Dexter Lehtinen, whose office is particularly active in the prosecution of public corruption [Parker, 1991: p. A-4]. The environmental process in some areas may now be so complicated that frustrated and unscrupulous real estate developers may be tempted to short circuit the process through unethical or illegal actions [*see, e.g.*, California Commission on Campaign Financing, 1989: pp. 280-82]. This may be a particular concern to prosecutors in rapidly growing jurisdictions.

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We found no evidence so far of public corruption relating to the creation, storage, transportation, treatment, or disposal of hazardous waste.

Public Corruption Offenses vs. Other White Collar Crimes

Many prosecutors tend to view public corruption as falling under the umbrella of white collar crime, and do not distinguish between the two forms to any significant degree. But there are some very real differences, both in form and in substance. While most of these differences manifest themselves in the charging and trial stages, many of them are present from the outset.

The most significant difference in form appears to be in the notoriety and resultant amount of attention that is devoted to public corruption as opposed to that which is present in most white collar crimes. The glare of public and media attention (often inseparable elements) can be overwhelming in public corruption cases, and, according to the state and federal prosecutors whom we interviewed during on-site visits, virtually non-existent in most white collar crime cases. The result in public corruption cases, according to one local chief deputy prosecutor whom we interviewed, is "extra pressure that may subtly be on you that you have to ignore." This pressure is likely to be present from the outset, when political sensitivities, pre-clearance of investigations, and the potential impact of public knowledge of the facts and circumstances of a given incident are considered.

In terms of substantive differences, one local prosecutor told our interviewer that, while from his experience most white collar crime defendants enter into plea agreements, when public officials are accused of public corruption, "most will do battle with you" because of the higher stakes and longer sentences that they can expect. Unless they "win" their cases outright, public officials clearly have more to lose than the typical white collar defendant. Even an agreement to plead to lesser charges can cast serious doubt upon the fitness of the individual to hold office.

Public officials may also harbor a belief that they are so popular in their jurisdiction that a jury of their constituents would not convict them, a sense of faith which does not seem to be borne out in practice (except in isolated cases in which the public official makes his or her racial or ethnic identity the "issue"). A federal prosecutor also noted that public officials are likely to take the stand in their own defense, perhaps more so than a white collar defendant.

Prosecutors, especially those who have not had a great deal of experience in prosecuting public corruption, must be cognizant of the fact that a public corruption case is often considerably different than other white collar crimes, and prepare the prosecution strategy--which may include activities not exclusively trial-related--accordingly.

Difficulty in Prosecuting Public Corruption

During our on-site visits, we posed a seemingly simple open-ended question to local and federal prosecutors. We merely asked them what their biggest handicaps were in bringing public corruption cases. The answers ran the gamut, and though they are just illustrative, they should prove to be informative to those prosecutors embarking upon a public corruption prosecution.

- Inadequacy of State Laws

One fairly common refrain was dissatisfaction with the inadequate nature and extent of state laws. Vaguely worded statutes criminalizing certain conduct that was in the nature of something *malum prohibitum* frequently posed problems for prosecutors, as they would often find themselves being criticized for selective enforcement--reproached by some for pursuing certain cases while rebuked by others for failing to chase other leads. Prosecutors told our interviewers that they needed stronger, clearer laws that would make it easier for them to determine what types of conduct should legitimately be prosecuted, and that would reduce the burden on them to gather the types and amounts of evidence that would be necessary to bring to trial where the laws aren't as well-articulated as they would prefer them to be. Such an approach would also help public officials and public employees in their efforts to comply with the law. As one Department of Justice official has noted, lots of things that are proscribed aren't intuitively wrong [Gangloff, 1989]. Giving those who are required to comply with the law a better sense of what the law is intended to cover would prove to be in everyone's interest.

One local prosecutor who has authority over the activities of legislators suggested to our interviewer during an on-site visit not only that ethics laws be simplified and clarified, but also that states make campaign finance, ethics, and lobbyist registration and reporting consistent, because there are often elements of each that are present in any given investigation or prosecution.

- Invidious Pressures on Prosecutors and Investigators

Prosecutors also had a few cautionary words for their colleagues about the pressures of prosecuting public corruption cases. Some prosecutors feel very strongly about public corruption cases. One Assistant U.S. Attorney told a reporter that his sentiments on the subject are "probably why I've had more than several challenges to my closing arguments. I get overwrought about public officials abusing their trust" [Rejebian and Mitchell, 1988: p. I-2]. One local prosecutor told our interviewer during an on-site visit that some prosecutors want to win so badly that their effectiveness is reduced. There is an ethereal "fear of taking a swing and not landing it" that can also affect a prosecutor's judgment in deciding whether to pursue a possible

public corruption matter. "These are cases that will destroy you better than they'll make you," another local prosecutor who has experienced both success and failure in prosecuting public corruption cases told our interviewer. Such cases "can be your destruction," this prosecutor said, "If you're out for your own glory, forget about it. If you're not successful, you're out of a job."

Perversely enough, even those who are successful may find themselves in the same situation, victimized because of their success, which may have threatened those entrenched within a system they sought to protect. Arizona prosecutors found themselves facing legislation that would have threatened the viability of undercover operations after their investigation into systemic legislative corruption [*see*, Carlile, 1991: p. A-1], and the police chief of Phoenix, Arizona, resigned after "attacks and pressure resulting from the [AzScam] political-corruption probe became his downfall" [Collier and Kelly, 1991: p. A-1]. An FBI agent warned local authorities there about "the inevitability of a fallout, noting that the U.S. Department of Justice 'Abscam' undercover sting operation, directed against members of the U.S. Senate and House of Representatives, resulted in "subtle" budget reductions and calls for tighter scrutiny of the Justice Department's operations [Kwok, 1991: p. A-7].

One local prosecutor who found his campaign finances investigated, and charges of politically motivated prosecutions levied against his office after a particularly high-profile set of public corruption prosecutions had more than a few words of caution for his colleagues. He told us that "You know that they're going to question your motives. You need to think about that before you start. They're going to go after you however they can."

Finally, gathering information and evidence can often be particularly problematic. Investigations are frequently rendered difficult due to the sophistication of the defendants; "They're careful," one local prosecutor told our interviewer. Another local prosecutor told our interviewer that gathering evidence can be difficult because few people typically know the information being sought, and those who do are inclined to be loyal to the defendant because of their political connections, or job status. A U.S. Attorney recounted his frustration to our interviewer, explaining that it is difficult to maintain an effective intelligence network in public corruption matters. "Who do you work with in an agency?" this prosecutor asked rhetorically, noting that those involved in public corruption are far less susceptible to being discovered through a prosecutor's regular informant network than would be another type of less notorious offender.

AVAILABILITY AND SUITABILITY OF CRIMINAL PROSECUTION ALTERNATIVES

Alternatives to the criminal prosecution of public officials and public employees for certain ethical transgressions do exist. Some commentators have argued that the failure of a public official to strictly comply with certain laws that apply exclusively to individuals qua public officials should not necessarily subject the public official to criminal prosecution. Other appropriate sanctions may exist that better punish the improper action of the public official. Some suggest that removing many types of public corruption cases from the criminal domain would free up prosecutors to do the job they should be doing--pursuing those who commit more serious transgressions (much the same argument that we make to the police officer who has just ticketed our cars for parking meter violations).

In fact, a criminal conviction may not even have the desired effect in some circumstances. One close observer of the system writes that "Former officials seldom suffer as much as ordinary citizens from the subsequent effects of a criminal conviction" [Thompson, 1987: p. 92]. Some even wear their public corruption-related convictions as a 'badge of honor' of sorts, such as former CIA director Richard Helms and former national security staffer Lt. Colonel Oliver North. On the other hand, in the vast majority of cases--particularly those which we would associate with blatant self-enrichment--merely to charge a public figure with a criminal offense is a powerful action, so powerful that even if the individual is later found to be not guilty, his or her career, both within government and in the private sector, is often ruined, and almost certainly tarnished.

Electoral Sanctions

Almost always available in the case of an elective official is the ultimate sanction: removal by the electorate. Electoral sanctions may be most appropriate in certain situations, because it may be that the public considers the misdeeds to be of a nature that should not result in forfeiture of office or criminal penalty.

But electoral sanctions may not always be suitable. The public may not be fully informed [Bryce, 1959; Levin, 1960], or the media or a political opponent may misshape the debate. Voters may refuse to believe the veracity of the allegations [Gardiner, 1970]. Behavior that might be acceptable to voters in the offender's jurisdiction may not be considered proper by others outside the jurisdiction who are affected by the public official's broader sphere of influence (such as in the case of former House Speaker James Wright). Voters may not be reliably counted upon to cleanse the system, deciding to re-elect those who have clearly abused the public trust, such as U.S. Rep. Adam Clayton Powell of New York, or Mayor James Curley of Boston. Officials can trade material benefits, such as jobs or appropriations for projects within the constituency, or even trade on appeals to sympathy in order to gain re-election [Welch and Peters, 1980: p. 698; Rundquist, *et al.*, 1977: p. 955]. Indeed, after the 1991 death of a state senator implicated in South Carolina's Operation Lost Trust, voters in his district nominated to fill the vacancy a former state senator who had served time in federal prison on vote fraud charges, and whose five-year parole period had only just ended [*see*, Page, 1991: pp. A-1, 8].

Finally, the contention is often raised (typically by defense attorneys) that loss of office under such circumstances is "disgrace enough" for the guilty public official. However, some contend that such a fall from grace may not be considered to be sufficient compensation for the degree of undeserved prestige that the public official has accumulated and enjoyed through his or her tenure in office [Thompson, 1987: p. 92].

Resignation

Another alternative to traditional prosecution would be acceptance of a public official's resignation as penance. Resignation as a part of a plea agreement or sentencing will be explored in greater detail elsewhere in this report, but suffice it to say here that resignation carries with it significant ramifications for the integrity of the system.

Resignation is often the swiftest and surest "cleanser," but it is not a perfect circumstance. Resignation deprives the electorate of the opportunity to feel that they are part of the punishment, should the elective official be eligible for re-election in the near future. The cathartic effect of allowing the electorate to express disapproval should not be underestimated in its long-term potential impact on voter alienation.

However, the public may also lose when a public official or public employee who believes in his or her innocence decides to resign rather than face a lengthy and expensive trial, feeling that an attempt to continue service while maintaining a defense would hurt his or her family and ability to perform in office [*see*, Kass, 1991: p. A-5]. Here, the public is effectively deprived of its right to representation of its own choosing through the actions of a coordinate branch of government. Even to be threatened with a forced resignation or, in the alternative, prosecution, if the threat is only a tactical maneuver, can be characterized as an assault upon the public's right to representation. Any public official so threatened is certain to have his or her personal life undergo turmoil, and in that sense, his or her job performance diminished. This means that the public may lose the individual's services to a certain extent, causing a loss to constituents, as well as to the public official personally.

Also important is the effect of resignation on the system. Replacement of resigned officials is undertaken in different ways in different states, and how an official is replaced may change the balance of political power in a jurisdiction. In two recent situations involving widespread vacancies in legislative seats caused by prosecutorial sting operations, county supervisors in Arizona filled the vacancies, while voters made the choice of replacement legislators through special elections in South Carolina. Other states have other procedures. In Indiana, for instance, vacancies would be filled by the party of the departed legislator in a district caucus.

Legislative Sanctions

In the case of those public officials who happen to be members of collegial bodies--particularly legislators and members of city or county councils in larger jurisdictions--there may be organization-specific sanctions available. These sanctions may be either formal or informal.

Examples of informal sanctions that could be applied might include restrictions on a member's ability to promote his or her agenda or the mere shunning of the member (treating him or her as a non-entity) [Note, 1990: p. 435]. The member's favored items might receive short shrift at best, failing to receive committee hearings, or not being placed on a business calendar. Formal sanctions could consist of cuts in the member's staff, office budget, or travel; or stripping the member of his or her seniority or desirable committee assignments [Ibid.]. These informal sanctions may, however, have the effect of harming the member's constituents more than the member may be impaired on a personal level.

Beyond these types of sanctions are the more serious powers reserved to certain bodies, such as legislatures. Legislatures are typically imbued with the constitutional authority to exclude, censure, or expel members. Certain federal and state officials may also be subject to legislative impeachment and conviction proceedings. Such legislative actions may carry with them significant strategic advantages over traditional criminal prosecutions. However, many of these benefits may also carry concurrent burdens.

First, legislatures may often be able to carry out their activities in a more timely manner than the courts. Legislators take their responsibilities in such cases quite seriously (more so than their routine legislative activities), and often act quickly to remove the cloud over government [Jennings, 1991: p. A-12]. The desired result may also be effected more rapidly in an impeachment setting. Officials may choose to resign rather than face the humiliation of losing office on a vote of those that they might consider to be the functional equivalents of their peers. For example, the state agriculture commissioner in the Commonwealth of Kentucky (an elective official) chose to resign rather than subject himself to certain conviction by the senate following a 97-0 impeachment vote in early 1991 [Cross, 1991: p. A-10]. The commissioner was already serving time in jail following his conviction on charges of complicity to felony theft for state payroll fraud, and had been fined in a separate, unrelated conviction for false billings, but had not chosen to resign in the intervening months.

Yet impeachments and expulsions may also not be satisfactory means for alleviating problems. Legislative proceedings frequently deny an individual the same types and extent of due process rights that would be subject to protection in a judicial proceeding. This denial of rights may include the inability to have an adequate time to present a defense [Willey, 1991 (A): p. B-2]; different standards of evidence and admissibility [Jennings, 1991: p. A-12]; denial of the right to question the credibility of witnesses [Cross, 1991: p. A-10]; the inability to participate in debate [Jennings, 1991: p. A-12]; lack of any access by the respondent to proceedings [Associated Press, 1991: p. B-2]; and lack of the ability to present a particular preferred line of defense [Foster, 1991: p. A-1]. The potential absence of due process safeguards must be balanced against the ability to have proceedings which look at the issue from more of a moral or communal viewpoint in which such safeguards are not necessarily appropriate.

Legislators are also thrust into a different set of circumstances than those within which they ordinarily transact business. They may be called upon to judge the conduct of a colleague, an always uncomfortable proposition [Hansen, 1988: p. 14], and one for which they may not be

particularly well-suited, for the legislator is elected principally to legislate, not adjudicate [see, e.g., Hamilton, 1977]. Legislators in such instances may also find themselves acting in the potentially confusing--and constitutionally suspect--tri-partite role of investigator, prosecutor, and adjudicator. Even the Executive Director of the National Conference of State Legislatures concedes that "it is not easy for a legislative body, which is a relatively small group with strong internal procedures and relationships, to judge or punish its own members" [Pound, 1991: p. 34].

However, there is a different set of standards that are at stake in legislative proceedings than in court actions, and the applicability of certain forms of due process that are constitutionally mandated in a judicial context may not be obligatory in a different forum. In legislative expulsion actions, for example, a member is usually punished for conduct unbecoming the legislative body. As a result, the standards and burdens of proof may not be similar to those required by a court which is seeking to determine criminal culpability. Legislators may still have a problem in coming to terms with the differences. The Arizona Senate president faced a dilemma in deciding whether he should suspend those senators who had been videotaped apparently accepting bribes and payoffs. As he put it, "Having seen those tapes of my members and their participation makes the issue of defending due process very difficult. If I try to force them to resign, I am basically asking them to reach a conclusion that they are guilty" [Harris, 1991: p. 17].

This flexibility may also, however, translate into certain advantages for the respondent, as well. For example, certain exculpatory evidence that could not meet judicial standards may find its way into legislative proceedings, legislators may be "lobbied" for their support, while those accused of criminal misconduct must maintain their distance from the judge in the case, and the ability to schedule hearings before court proceedings could result in the accused being able to marshall public support if the legislative examination exonerates him or her.

Finally, a legislature that may, by rule or statute, "suspend" a member for a period of time (typically until the member has the opportunity to exonerate himself or herself in court) runs the risk of depriving voters of representation for an extended period of time. For example, if a judge is suspended, the judge's caseload may be assumed by another judge, an agency head who is suspended will have his or her duties picked up by an acting director or deputy, but a legislator cannot have someone vote in his or her stead. An internal legislative disciplinary rule may conflict with the right of the public to be represented.

The U.S. Department of Justice has indicated an interest in examining such situations as potential violations under the Voting Rights Act [Associated Press, 1991 (B): p. B-5]. This would have the effect of "extend[ing] the Voting Rights Act into an area where it has never been previously understood to govern," according to a brief filed by the South Carolina Attorney General, who defended his state's House of Representatives in such an action [Associated Press, 1991 (C): p. A-15]. The key issue appears to be whether the Voting Rights Act applies to a legislature's ability to discipline members of the body as an extension of the Act's application to a voter's right to cast a ballot. The U.S. Department of Justice contends that the Voting Rights Act is not "limited to changes directly affecting the casting of a ballot" [Ibid.].

Thus, the Justice Department in one 1991 case, *Gordon v. Sheehan*, actually found itself faced with the fascinating predicament of one of its branches challenging the expulsion of a member of the South Carolina House of Representatives which had automatically resulted under a House rule requiring expulsion upon conviction of certain serious crimes. The individual in question had been convicted of bribery in federal court, where the U.S. Attorney, representing the U.S. Department of Justice and the United States of America, had brought the charges. Justice Department review and subsequent reinstatement of the convicted individual as a voting member of a legislative body could wreak havoc upon the institution--especially if the seat had been declared vacant and a new representative was properly elected and seated, as was the situation in South Carolina [Ibid.]. Yet a three-judge federal district court has held that a rule providing for expulsion of a felon is a change in the standard, practice, or procedure that requires pre-clearance under the Voting Rights Act (in spite of the fact that the state Constitution here antedated the 1964 congressional action) [*Gordon v. Sheehan*, *see*, Earle, 1991: pp. 4-5].

Executive and Judicial Branch Sanctions

Virtually every state has some variety of independent ethics agency that oversees the conduct of executive [Lewis and Gilman, 1991; Council on Governmental Ethics Laws, 1990: pp. 10-17], and "each state and the District of Columbia has a body responsible for receiving and investigating complaints against judges" [Stover and Dove, 1989: p. 6]. These entities usually operate under the authority of statutes and regulations that specifically proscribe certain types of impermissible conduct and provide for penalties for certain transgressions following the provision of carefully prescribed hearings and appeals [Burke and Benson, 1989: pp. 195-98; Kansas Select Commission on Ethical Conduct, 1991: pp. 43-44]. Administrative sanctions can include fines or restitution; reprimands; suspensions, demotions, or dismissals; or disqualification from certain proceedings [*see, e.g.*, Council on Governmental Ethics Laws, 1990]. Evidence of criminal conduct may also be presented by the entity to the appropriate prosecutorial office.

Few states, however, have particularly strong laws and agency jurisdiction, and "diversity best describes the overall pattern of state ethics laws and practices . . . . [with c]ompetence, jurisdiction, organizations and specific prohibitions vary[ing] from state to state [Lewis and Gilman, 1991]. State ethics agencies tend to be more oriented toward providing guidance and counsel to public officials and public employees than to disciplining them for transgressions. While the vast majority of state ethics agencies are authorized to issue advisory opinions, declaratory rulings, or interpretive statements [Ibid.], they appear to be much more reluctant to exercise their enforcement powers--if any [Feigenbaum and Stover, 1986: p. 9].

Unfortunately, some jurisdictions have "no clearly defined way of dealing with the berobed miscreant" [*see, e.g.*, The State, 1991: p. A-18]. For example, a judge convicted of bribery in the South Carolina Operation Lost Trust investigation refused to step down from the bench, and later on in 1991, the first federal judge to be found guilty of taking a bribe (and also convicted on charges of conspiracy and obstruction of justice) also was determined not to leave the bench, except by impeachment [Sayre, 1991: p. A-9].

The judiciary is now beginning to take steps oriented toward the promotion of more ethical conduct in the judicial branch, "fueled by the increase in judges facing removal, the growth in federal judges to more than 1,100, and the mounting drug cases where loose cash increases the risk of corruption" (Sniffen, 1991: p. A-9).

The American Bar Association has adopted a new Model Code of Judicial Conduct--one that is more mandatory than aspirational, the American Judicature Society has conducted the first survey of judicial conduct organizations throughout the country in more than a decade, and states have begun to promulgate codes of conduct for nonjudicial court employees [Stover, 1990: pp. 3-4]. Changes include the expansion of "the range of sanctions available to disciplinary bodies" [Ibid.: p. 13].

Enforcement of judicial ethics may pose some concern, however. "Comparatively, the more internal--some would say secretive--enforcement provisions of the judicial ethics codes are more apt to result in charges that the procedure protects those judges whose conduct does not conform to the standards of the code, and results in the imposition of less stringent penalties than would be levied if misconduct and enforcement actions were made public and were investigated and prosecuted by disinterested parties" [Stover and Dove, 1989: p. 6].

Of concern also is the often considerable length of time that judicial discipline cases take. While only four federal judges were impeached and convicted during the nation's first 160 years, three federal judges have been impeached and convicted in the past five years with two additional impeachment cases on the horizon if the criminal appeals of the two judges fail, and they choose not to resign (Sniffen, 1991: p. A-9). The 1989 impeachment and conviction of U.S. District Court Judge Alcee Hastings came six years after his criminal acquittal; observers labeled as "fast" the impeachment and conviction of U.S. District Court Judge Harry E. Claiborne because just two years elapsed between his criminal conviction and congressional ouster (Ibid.).

Problems Associated with Concurrent Jurisdiction

Beyond the dilemmas related to alternative forms of punishment noted above are questions posed by the availability and activity of a non-judicial forum within which to pursue a dispute at the same time that a court is poised to act in the same or a similar matter involving the same or related parties or circumstances. Even though different standards may apply in non-judicial settings, the actions may have a considerable impact upon what happens in court.

Proceedings in a non-judicial setting may compel testimony from an accused individual that falls short of being protected by the individual's Fifth Amendment right to avoid self-incrimination. Details may be revealed in such proceedings that could yield important leads for investigators working toward building a solid criminal case. There may also be unique state protections that apply in such proceedings that would result in problems for prosecutors. For example, in Arizona, persons charged with bribery are considered immune from criminal prosecution if they testify "when legally called upon to do so," and do not voluntarily and knowingly sign a waiver of immunity prior to testifying. The result is that a type of transactional immunity could be

inadvertently (or even intentionally) granted. In the Arizona sting operation, the prospect was very real; the respective House and Senate ethics committees were scheduled to hear evidence on legislators implicated in a public corruption investigation prior to the legislators in question being brought to trial, a situation that would create a heavy burden to overcome in proving that the immunized testimony did not affect or contaminate subsequent testimony in the related criminal case [Foster and Yozwiak, 1991: p. C-1]. A similar situation arose in the conviction of Lt. Colonel Oliver North in the Iran-Contra case, where three felony convictions were overturned because the court found that North's indictment and trial were tainted by the testimony of those witnesses whose memories had been 'refreshed' by North's immunized testimony before Congress.

Implications

The implications of the findings on the nature of corruption by a public official or a public employee are evident. Prosecutors must have the resources to target everyday financial fraud in government. Critical to the effectiveness of the prosecutor is an investigative staff well-skilled in financial transactions and management auditing. Since a public official or public employee is not likely to be a hardened criminal, the deterrent effect of bringing one or two cases may send a strong message to other potential transgressors. Merely communicating the consequences of apprehension and prosecution may be sufficient to deter others who might be harboring thoughts of sticky fingers.

Prosecutors must also look behind the actual transaction to determine the reason behind it. Bribery in today's society may indicate the existence of a major drug trafficking network, and may be an appropriate launching pad for an undercover operation against such a conspiracy. Close attention should also be given to apparent aberrations in planning and zoning permit, license, and change decisions.

Prosecutors should not overlook the necessity of enforcing the law with respect to position-related offenses as well. Failure to file required disclosure statements, or filing false information can be indicative of substantive underlying criminal activity, and, as such, may be worthy of additional investigation. Also important is the need to pursue such prosecutions in cases of egregious behavior to (1) demonstrate to the public that the law is being actively enforced against all transgressors; and (2) to enforce in the minds of public officials and public employees that they have a responsibility to follow the law as written.

The availability of other, less aggressive and provocative forms for dispute resolution should not be given short shrift. Deferral of prosecution or referral of certain cases by the prosecutor to an appropriate enforcement entity may sometimes result in more appropriate and swifter punishment. Decisions about which vehicle is more appropriate should include such questions as:

(1) Are the potential penalties adequate?

(2) Are there other public interests that will be better served by an alternative form of relief, rather than prosecution?

(3) Could an alternative form of relief solve the problem more swiftly and surely than prosecution?

(4) Which forum has better resources available?

(5) Does the situation involve mere negligence (e.g., carelessness), or specific intent (e.g, deceit)?

(6) Was self-enrichment a factor?

(7) Is burden of proof a special concern?

(8) Would there be a suitable degree of finality to the non-judicial proceeding?

(9) Which of the alternatives sends the most desired message to other current and potential offenders?

(10) Would concurrent jurisdiction or a subsequent court action pose a problem?

One local prosecutor whom we interviewed in our on-site visits counsels his counterparts to avoid using non-judicial remedies in circumstances where a private citizen would not ordinarily be afforded the same type of treatment for a similar offense. To do otherwise, this prosecutor believes, would have the effect of significantly eroding public confidence in the system. On the other hand, ordinary citizens are not subject to the special and detailed standards that arise in matters related to position-related offenses.

Considerable attention should be devoted to the problems and opportunities posed by these alternatives to traditional prosecution at a point before the courts have fully resolved the controversy. Ongoing communication and close cooperation between the prosecutor and those responsible for other forms of dispute resolution should prove beneficial in resolving any conflict over jurisdictional prerogative that might arise under a given set of facts.

However, legislators themselves should consider the provision of alternative forms of conflict resolution in order to clarify the occasions in which administrative relief is preferable to prosecution in the public corruption context.

FEDERAL VS. LOCAL PROSECUTION OF PUBLIC CORRUPTION

Overview

Ten times as many public officials at the local level were convicted on federal corruption charges in 1989 as had been convicted in 1970 (the actual numbers rose from 26 to 269 [Public Integrity Section, 1990: pp. 25-26]). At the same time that the nation was experiencing the full effects of a "New Federalism" policy launched in the early seventies, the federal government was assuming a pre-eminent role in the prosecution of those public officials closest to the people. Today, in the words of one U.S. Attorney (now a federal judge), "federal courts, federal prosecutors, and federal investigative agencies now occupy a central place in the prosecution of state and local officers" [Levi, 1990].

However, to all of this must be added a caveat: the percentage of state and local public corruption cases being successfully prosecuted by the federal government has declined precipitously compared to the percentage of federal public officials and public employees that U.S. Attorneys are able to convict. State and local public corruption cases constituted almost 73 percent of the public corruption convictions by U.S. Attorneys in 1970, dropped to under 63 percent by 1980, and, in 1989 state and local public corruption convictions accounted for less than 30 percent of federal public corruption convictions [Public Integrity Section, 1990: pp. 25-26].

To be sure, there has been a rationale for federal judicial intervention into local governmental affairs. Congress specifically recognized three limited areas where concurrent (but not automatic nor necessarily pre-eminent) federal jurisdiction over instances of local public corruption was justified. Such federal jurisdiction was viewed as appropriate when the corruption:

- involves public officials in federal jurisdictions;
- obstructs or uses a facility in interstate commerce; or
- is so systemic or pervasive that local enforcement cannot control the problem.

However, experience demonstrates that the federal involvement has grown far beyond this limited congressional mandate. The higher federal profile is not easily attributable to any one particular factor, but rather developed through synergy. Federal criminal laws were broadened in both definition and jurisdiction during the sixties and early seventies, arming federal prosecutors with new tools for pursuing those whose activities had previously eluded their grasp. New theories of prosecution evolved from existing law, and Justice Department strike forces, and the creation of the Public Integrity Section within the U.S. Department of Justice all contributed to the growth of federal influence. Federal prosecutors (James Thompson, William Weld, Richard Thornburgh, Robert Merkle, and Rudolph Giuliani to name a few) saw that their careers could be advanced by successful high-profile prosecutions of public officials [Ehrenhalt, 1989: pp. 38-44].

Then there was Watergate. The federal scandal left Americans with a new sense of affront. The "Post-Watergate Mentality" not only refused to tolerate systemic corruption that had pervaded the bastions of America's cities and counties, but it went further, leading to public demands for cleaning house.

Ronald Reagan's presidency brought us a free enterprise approach to most markets. Coupled with this was a sense among many that public officials and public employees were perhaps over-regulated, their activities too closely monitored. Laws were making public service a status offense of itself, many contended. We needed to loosen the restrictions on public servants, many urged, decriminalizing certain offenses, and allowing creativity and collegiality to re-enter the system. The President continued to further devolve responsibilities to the states. Yet one glaring exception was in the area of public corruption prosecutions. In spite of the continuing trend toward deregulation, decentralization, and an administration with a more relaxed view of what should be the law, the federal government maintained a high priority on prosecuting corrupt local officials.

Part of this federal justification for intervention was based--however tenuously--on the Guarantee Clause of the Constitution, under which every state is guaranteed a republican form of government (*see, e.g.*, Justice Sandra Day O'Connor's highly-regarded dissent in *Federal Energy Regulatory Commission v. Mississippi*, where she observes that "federalism enhances the opportunity of all citizens to participate in representative government," while she goes on to praise state sovereignty). What could be more critical to the preservation of a republican form of government, some would reason, than the elimination of pervasive and systemic corruption? Others, however, point to the Supremacy Clause of the Constitution and suggest that the federal role in squelching local corruption was totally inappropriate and posed a much greater threat to preservation of the rights of the state than local corruption did.

The Supreme Court observed in a 1981 case involving federal intervention into state affairs that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" [*Pennhurst School & Hospital v. Haldermann*]. But were the states and localities eager to seize upon the Supreme Court's judgment and run with it, protecting their collective territorial prerogative? Generally not.

One former U.S. Attorney active in the public corruption field--now a federal judge--suggested that the active federal role was not a product of federal force, but rather the result of local choice. "It is difficult to view the federal role as an affront to federalism when it is the product of choice by state and local officials," he said [Levi, 1990]. "It's hard to get a state prosecutor to touch it," according to another former U.S. Attorney, Gary Richardson of Oklahoma, who briefly served as a local prosecutor [Zizzo, 1991: p. A-14]. Indeed, such intervention may actually be welcomed by local law enforcement officials. "It's great when the federal government can come and not do something to us, but do something for us," the then-attorney general of Mississippi said in the midst of the highly successful federal probe into corrupt county commissioners in that state [Mitchell, 1988 (A): p. B-1].

The U.S. Department of Justice also specifically acknowledges the state primacy role in fighting public corruption, noting in its public corruption prosecution manual that while "Corruption in state and local government contracts is, generally speaking, the responsibility of local prosecutors," it becomes of federal concern "when it either corrupts local law enforcement or becomes so pervasive that local prosecution can no longer handle it on an individual-case basis" [Hailman, 1988: p. 17].

Our survey of local prosecutors and on-site discussions with them generally confirmed this belief. We found very little evidence of any "resentment" against federal prosecutors for their work in the public corruption field. Federal prosecution of local corruption appears to be largely welcome by local prosecutors. Federal prosecutors often have better resources, clearer laws, stiffer sentences, and more isolation from local political pressures. Where local prosecutors choose to prosecute local public officials and public employees on charges that could have resulted in federal prosecution of those same individuals, we have found no convincing evidence of federal domineering. To the contrary; federal prosecutors appear to be quick to step aside when requested to do so by local prosecutors in public corruption cases.

Of course, it is not always so cut-and-dried. While there are many instances which we can point to where the applicable prosecutor conducted his or her public corruption investigation in a vacuum, more often it appears that the prosecutor who receives the public corruption complaint or allegation confers with his or her counterpart and determines whether the case is more appropriately prosecuted as a federal or state case. Public corruption prosecution tends to be more a referral or deferral matter than a decision based upon conscious usurpation of or disregard for authority.

Advantages to Federal Prosecution

Why would--or should--the federal government become involved in the prosecution of local officials? Several reasons exist.

- Greater Resources

Public corruption cases are extremely labor-intensive matters, far more labor-intensive than any other criminal cases and matters in a federal criminal workload weighting model [Griffiths, 1991: pp. 26-28]. Estimates of investigative personnel assigned to public corruption investigations across the country in recent years show this in graphic detail. Operation Brispec, the federal investigation into legislative corruption in California, involved more than 90 federal agents; Operation Rocky Top, the federal probe into public corruption related to Tennnessee's Bingo industry was said to involve as many as 40 federal agents; a 1991 federal/state investigation in Kentucky into laundering of campaign contributions and favoritism in public contract awards required as many as 60 federal agents; and some 25 federal agents were employed on the West Virginia casino gaming bribery investigation (McCarville/Hill Report, 1991 (B): pp. 2, 5]. A federal investigation into illegal campaign contributions in the 1990 Oklahoma gubernatorial race may have used more than 100 federal employees, including 33 FBI agents (McCarville/Hill

Report, 1991 (A): pp. 1, 3]. Similarly, the federal investigation into judicial corruption in Dade County, Florida used at least 100 federal agents [Parker, 1991: p. A-4].

Federal figures suggest that U.S. Attorneys assign virtually the same number of full-time employee equivalents to public corruption matters and violent crimes, yet the number of violent crimes cases is almost exactly twice that of public corruption cases, and the number of defendants charged with public corruption is significantly lower than those charged with violent crimes--Almost two-thirds of the more than 11,000 charged in 1989 with a violent crime or a public corruption offense were violent offenders [Griffiths, 1991: p. 28].

Few local prosecutors have the ability to match the budget, staff, and equipment available to the U.S. Attorney. Most federal prosecutors have more lawyers, paralegals, support staff, and investigators on their staffs than their local counterparts. The U.S. Attorney can also readily call upon the investigative resources of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, the U.S. Customs Service, and other agencies, such as those that regulate financial institutions and markets. Federal prosecutors readily draw upon the expertise of those in other districts, exchanging briefs, sharing investigative strategies, and the like. Only those prosecutors from major metropolitan areas--or those who, under state law, may call upon the Attorney General or a state prosecutor/solicitor--are similarly blessed with suitable investigatory or prosecutorial resources.

- Stronger Laws

Few state laws come near matching the expansive scope of federal public corruption statutes. Some federal statutes, such as RICO, even use chargeable state infractions as federal predicate offenses. Most states have no investigatory grand jury with the power to compel production; many states do not permit wiretapping or offer use immunity (a form of immunity in which the court can compel a witness to give self-incriminating testimony, but provides that such testimony cannot be used as evidence in a subsequent prosecution of the witness); and some states do not even authorize surreptitious recording by undercover agents.

- Broader Jurisdiction

Federal prosecutors have wider geographic areas of jurisdiction than most local prosecutors. Most local prosecutors are hamstrung by an inability to operate outside of their city, county, or judicial district, while U.S. Attorneys are less fettered by jurisdictional problems due to their territory and federal inter-district cooperation. A broader jurisdiction also means that the U.S. Attorney can draw from a wider jury venire than can the local prosecutor, something that some prosecutors suggest is advantageous in public corruption cases.

- Political Sensitivity and Conflict

"A local D.A. who prosecutes public corruption is a one-term D.A.," in the words of one former U.S. Department of Justice attorney. Local prosecutors are typically elective officials, and, as

such, are usually closely tied to their political party. One of the most difficult decisions that a prosecutor may be faced with is the prospect of opening an investigation of a public official of the same party as the prosecutor. Equally sensitive is having to probe the conduct of a member of the opposite political party. In the former case, every action will be closely scrutinized to ensure that the prosecutor is not being "soft" on his or her colleague; in the latter example, all eyes will be on the prosecutor, expecting to find evidence that the prosecutor is "out to get" the other party, and is "playing politics" with the charges [*see, e.g.*, Leonard, 1991 (B): p. A-2].

"Conflict" and "sensitivity" were identified by almost two-thirds of local prosecutors responding to our survey as factors that would weigh on their decision to turn a case over to their federal counterpart. Interestingly, however, elected prosecutors and their appointed counterparts do not vary in their perceptions of political sensitivity. In response to a survey question about whether political sensitivity was a factor in a decision to turn a case over to another prosecutor, 25.4 percent of elected prosecutors said that it was a factor, and 26.3 percent of appointed prosecutors agreed. More than one-half--51.9 percent--of elected prosecutors responded that political sensitivity was not a factor in a turnover decision, and 52.6 percent of their appointed colleagues concurred.

The closeness of local prosecutors to those whom they might have to prosecute on public corruption charges also makes it difficult to maintain the integrity and confidentiality of investigations. As one police detective who headed a local law enforcement association observed, "Politicians come up through the ranks, they keep contacts with their parties, owe people favors and have good friends who are politicians. They might reveal something, even inadvertently" [Nichols, 1991 (A): p. A-5].

The U.S. Attorney, although a political appointee, is widely viewed--correctly or not--to be less of a political animal and better insulated from the day-to-day political scene, and is thus more likely to be accepted as politically detached by the public and the media. None of the U.S. Attorneys who responded to the survey cited "conflict" or "sensitivity" as playing a part in a referral or deferral decision. There are no formal checks and balances on the local prosecutor before a prosecution commences. The U.S. Attorney must obtain pre-clearance from the U.S. Department of Justice before embarking upon investigations of certain officials, prior to employing certain investigatory techniques, and in advance of levying certain charges.

- Priority

Our survey showed that less than one-half of local prosecutors placed public corruption among their respective offices' top five priorities, while more than nine out of ten U.S. Attorneys ranked public corruption among their top five priorities--but it did not tend to be the top priority. One intriguing finding from our survey is that 23 of 713 elected prosecutors (3.2 percent) ranked public corruption as their single highest priority, while none of the 19 appointed prosecutors who responded ranked public corruption so highly. Also, 116 (16.3 percent) of the elected prosecutors replied that public corruption was among their top three priorities, while only one (5.3 percent) of the appointed prosecutors ranked the prosecution of public corruption that high.

The disparity in priority placed upon public corruption prosecutions between elected and appointed prosecutors could mean either (or both) of two things: (1) the elected prosecutor could be more of a political creature, perceiving public corruption prosecutions as his or her ticket to the top politically; or (2) the appointed prosecutor may be more reluctant to investigate or prosecute the people who appointed him or her.

PROSECUTORS' PRIORITY RANKING OF PUBLIC CORRUPTION

LOCAL PROSECUTORS

Jurisdiction Size	Not in Top 5	Top 1	Top 3	Top 5	NA/ NK
0-20,000	174	7	38	35	57
20,001-50,000	93	8	26	37	20
50,001-100,000	37	5	15	21	10
100,001-500,000	46	2	28	43	7
500,001-1,000,000	4	0	10	5	2
1,000,001 or more	3	1	1	8	1
TOTAL	357	23	118	149	97
PERCENT	48.0	3.1	15.9	20.0	13.0

N = 744

FEDERAL PROSECUTORS

Jurisdiction Size	Not in Top 5	Top 1	Top 3	Top 5	NA/ NK
0-20,000	0	0	3	2	1
20,001-50,000	0	0	0	0	0
50,001-100,000	0	0	0	0	0
100,001-500,000	0	0	3	2	0
500,001-1,000,000	0	0	2	3	0
1,000,001 or more	1	3	8	6	0
TOTAL	1	3	16	13	1
PERCENT	2.9	8.8	47.1	38.2	2.9

N = 34

In general, our survey found that public corruption becomes a higher priority as the size of the jurisdiction increases. The lack of local priority--and connection with special stand-alone units) is further confirmed by the dearth of local prosecutors who have established special stand-alone public corruption prosecution units in their offices (and we found no local prosecutors from non-major metropolitan areas who had established a separate public corruption unit). When something is not a priority, it typically does not receive much attention, particularly on a proactive basis. The priority placed upon public corruption by federal prosecutors is matched by the concern of the retinue of supporting federal investigative entities.

- Experience

There is simply no substitute for experience, and federal prosecutors have more institutional experience in public corruption investigations and prosecutions. Our survey of local prosecutors indicated that only one in every three had successfully prosecuted a public corruption case in recent years. Public corruption is an extremely expensive, and time-consuming occurrence to investigate and prosecute, and local prosecutors are more concerned about keeping up with the daily flow of cases than they are about devoting time, resources, and attention to a type of offense that they may never see again in their tenure.

U.S. Attorneys also have the luxury of being in a better position than local prosecutors to have their assistants develop specific areas of expertise. U.S. Attorneys have a greater body of federal law to refer to, know what types of investigative techniques are more likely to succeed than others, and have a better idea of success or failure of certain theories of prosecution. Finally, Assistant U.S. Attorneys tend to have a lower turnover rate than do local deputy prosecutors.

- Stronger Penalties

Federal law may offer more significant and effective penalties for public corruption offenses than may be available under state law. To illustrate this point, one former U.S. Attorney in Oklahoma points to how his office was able to use interstate commerce elements in a particular fraud case (not a public corruption offense) to obtain a ten-year prison sentence--even though "they don't get 10 years up here for murder"--local charges, he noted [Zizzo, 1991: p. A-14].

Disadvantages to Federal Prosecution

Given what appear to be significant advantages for federal prosecution of local corruption, what are the detriments? As might be expected, they are also several.

- Imposition of Federal Standards

Certain federal laws--such as RICO, the Travel Act, and money laundering statutes--allow the federal government to effectively enforce matters that could have been prosecuted under state bribery laws. In fact, in the vast majority of cases involving public corruption and state and local public officials and public employees, there will be an applicable federal statute available. But federal prosecutions bring with them federal laws, federal criminal procedures, and federal standards. Federal standards appear to be more rigid than most local standards, leading to a bias toward prosecution rather than resolution of a situation through alternative means (resignation, local ethics or disciplinary tribunal, etc). Community standards as to what constitutes acceptable behavior might differ from federal legal interpretations.

- Erosion of Constitutional Balance Between the Federal Government and the States

The Founding Fathers clearly intended that state and local government, being closest to the people, would exercise robust powers in the legal realm, as well as in many other aspects of life, and would not be usurped by the powers of the federal government. Abdication of those powers contributes to a trend found in many other realms that undercuts state and local accountability, and furthers the centralization of federal authority.

- Lack of Consistency

There is still no complete consistency across federal judicial circuits as to how public corruption laws are to be interpreted (such as the interpretation of the Hobbs Act and the need to show "harm" to the individual providing the public official or public employee with an inducement). Thus, there may still be some uncertainty as to how certain items might be treated upon appeal to the U.S. Supreme Court, while, if the prosecution had been a state-level event, the parties might well be confident enough of the outcome of an appeal that such would not be necessary.

- Cost of Prosecution and Defense

Federal prosecutions of public corruption almost invariably will be more expensive to bring to fruition than similar local prosecutions. More resources will be used by the federal government than local governments would employ under the same circumstances. Defense costs will rise accordingly, making it difficult for a public corruption defendant to balance his or her desire for a complete airing of the facts against the prospect of a potential vow of lifetime poverty.

Relationships Between Federal and Local Prosecutors

Given this inherent tension between the local laws and local prosecutors and federal laws and federal prosecutors, and the lack of overall direction as to which should prevail in a given circumstance, how does the federal-state relationship work in practice?

Our contacts with federal and local prosecutors found that, in general, the relationship is on surprisingly solid ground. Where the relationship is not one of cooperation between federal and local prosecutors, there does not seem to be an atmosphere of strife. Rather, there appears to be, in certain areas, a "let George do it" attitude on the part of one of the prosecutors that permits the other prosecutor to have relatively unfettered discretion and jurisdiction in public corruption matters. As one local prosecutor told our interviewer during an on-site visit, "[We] rid ourselves of anything we could get rid of," turning cases over to the U.S. Attorney's Office.

However, our survey discovered that the majority of prosecutors--be they federal or local--don't turn over any public corruption cases. Fewer still turn over a high number of public corruption cases. Less than ten percent of those prosecutors responding to the survey indicated that they turned over one-half or more of their public corruption cases.

The reasons behind this deliberate deferral or retention of cases are manifold. They can be condensed into the following:

- Historical relationships. Prosecutors told us that certain things had "always been done that way," or that traditionally, they had retained authority over or deferred certain types of cases. One local prosecutor suggested that his office has just done its "own thing," and, as a result, the U.S. Attorney has remained aloof. Another aggressive local prosecutor told us that he just doesn't give the U.S. Attorney the opportunity to say "No."

- Personal relationships. One factor that was repeated to us in our on-site interviews as being an extremely important determinant was the informal relationship between the prosecutors and their staffs. A local prosecutor who refers matters on a case-by-case basis to the U.S. Attorney in his state mentioned that ten of his former prosecutors were on the staff of the U.S. Attorney, making it easy for him to cut through the chaff and to have his side represented. In many instances, a former local prosecutor will be selected for the U.S. Attorney position, positioning him or her well for working with not only his or her former office, but with those of other local prosecutors in the federal judicial district, who are apt to know their former colleague, or at least know that the new U.S. Attorney will likely have some empathy for them. If there was a problem on the horizon, one U.S. Attorney (formerly a well-known attorney in private practice in the largest city in his district) told us, he would feel comfortable just picking up the phone and calling his local counterpart about it.

These findings effectively mirror a federal study which found that federal agency inspectors general who did not choose to refer a case to the Department of Justice's Public Integrity Section for prosecution tended to turn them over to an individual U.S. Attorney because they had "developed a personal relationship with 1 of the 94 U.S. Attorney's Offices and feel more comfortable referring cases there" [U.S. General Accounting Office, 1987: p. 9].

- Advantages of certain forums. Another point that was readily apparent from our surveys and on-site visits was the premium that local prosecutors place on the advantages that might accrue from a certain type of prosecution. Almost invariably we learned that a local prosecutor will turn a case over to the U.S. Attorney if the local authority believed that there was some advantage to be gained through sentencing prospects, statutes of limitations, and similar items.

- Structure. As sovereign elected officials, some local prosecutors chafe at the idea of having to clear matters with anyone--much less a representative of the federal government in the person of the U.S. Attorney. One local prosecutor expressed his dismay over the "bureaucratic nightmare" in working with the U.S. Attorney. He told our interviewer that he changed his public corruption prosecution philosophy, and began to run his own investigations and prosecuted his own cases after encountering federal "rigidity" that led to inordinate delays in obtaining clearance.

- Confidentiality. Perhaps the overriding key to effective prosecutions is the ability to maintain the integrity of the investigation. Once an investigation has been commenced, it is difficult to preserve secrecy. The more players that are brought into the investigatory web, the harder it becomes to conceal the existence and extent of the investigation. Prosecutors conveyed to us their reluctance to release an investigation from their office--or to involve another office in the investigation--once it had commenced and was making progress. While some of this attitude can be attributed to the desire to nurture the case as one's own, there was considerable concern expressed on this point. If a prosecutor believed that his or her office could handle the investigation and prosecution, there typically was a decision made to keep it in-house.

The system appears to be functioning smoothly, in spite of the inherent potential for friction that exists between the two levels of government. Those who are states' rights advocates will undoubtedly be satisfied with nothing short of a mandate, such as that from the Federal Courts Study Committee, which suggests that "federal authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge Federal-state partnerships to coordinate prosecution efforts" [Federal Courts Study Committee: 1990]. But even such a mandate carries with it some extremely important caveats.

The most important factor, one local prosecutor told our interviewer during an on-site visit, is "knowing when to get rid of the case," and turn it over to the U.S. Attorney. Several factors should enter into the decisionmaking process. The first question that should be asked when an allegation of public criminal misconduct is received by a prosecutor or investigator is, "Based upon the uncorroborated facts and the possible criminal violations involved, does it appear that the [receiving] office has jurisdiction?" If not, the immediate action taken should be to refer the allegations to the appropriate investigative entity or prosecutor. If reservation of jurisdiction to the receiving office is manifest on its face, the receiving office should proceed with the investigation. If concurrent jurisdiction is a possibility, the matter should immediately be discussed with the other appropriate investigative entity or prosecutor's office.

While it is easy for someone independent of the process to suggest that there be an informal relationship established between local and federal prosecutors, this is usually easier in the abstract than in practice. But there should be some open avenue of informal communication between the prosecutors themselves, or between the criminal chiefs in each office. The discourse over who could best or who should handle a given public corruption case should not arise in a de novo context.

Concerns that should be reviewed in such a dialogue include both legal and practical questions. Legal questions that should be raised include the availability of different charges under each jurisdiction; how the courts have shaped case law in the area; whether certain investigative techniques are permitted under state or federal law; and the types and lengths of sentences that could be handed down.

Practical items that must be reviewed include the availability of experienced attorneys, investigators, and support staff; the ability of the respective offices to shoulder the cost burden of the investigation and prosecution; the convictions of judges that could hear the case; the success record in each jurisdiction on the charges that would presumably be filed; the venue, potential pre-trial publicity, and likely juror attitudes; and the other intangibles that require consideration, such as political sensitivities which would make prosecution by one or the other office more credible.

One thing is clear: no prosecutor should feel uncomfortable stepping into a void created by either the action or inaction of others. If a prosecutor simply refuses to acknowledge a problem, makes an affirmative decision to refer or defer a matter under review, or remains unresponsive to overtures, the prosecutor on the other end of the matter should have no hesitation in pursuing a legitimate criminal investigation or prosecution under appropriate laws, regardless of assumptions as to whose responsibility the prosecution really should be. As one state-level observer has noted, "constitutional accountability aside, the matter of how conducted the investigation will not ameliorate public scorn over an abrogation of public trust" [Biemesderfer, 1991: p. 18]. The objective should be to bring those who have committed transgressions to justice, and not to rigorously adhering to rhetorical platitudes about supremacy or guarantees where those who have the opportunity to administer or waive such considerations have abrogated their respective responsibilities.

Public Corruption Units

Several prosecutors have chosen to establish dedicated units to investigate and prosecute public corruption in their respective jurisdictions. Fewer than two percent (14) of the local prosecutors who responded to our survey indicated that they had established a special public corruption prosecution office. Of those, the smallest such jurisdiction we located had a population of 267,000. The largest local jurisdiction with such a unit reported to us was 1.8 million. Of the 14 with special public corruption units, 28.6 percent have populations above one million, and another 28.6 percent have populations between 750,000 and one million. Jurisdictions with 700,000 to 749,999 population account for 14.3 percent of the units. By contrast, at the federal

level, the smallest jurisdiction with a full-time public corruption unit as reported to us was 400,000.

Such special public corruption prosecution units are usually created for a number of reasons:

(1) Perception of a systemic problem. If a prosecutor believes that there is a serious systemic problem in his or her jurisdiction, a special public corruption unit may be established to combat the problem. Special units are not likely to be created to confront isolated incidents of public corruption. For example, The U.S. Attorney for the Southern District of Florida decided in 1991 to unveil a special public corruption unit after his caseload increased from eight public officials indicted in 1988 to 56 in 1990 [Davidson, 1991: p. A-11]; with at least 15 more public officials under investigation [Keller and Knotts, 1991: p. A-1], and a "massive" undercover sting operation into state judges being made public [Leen and Lyons, 1991: p. A-1].

(2) Making a statement. By publicly announcing the creation of a public corruption unit, the prosecutor effectively sends a message to the community that public corruption will not be tolerated, and puts miscreants on notice that they had best clean up their respective acts or face prosecution. Establishment of such a unit can have a preventive effect as people realize that such prosecutions are not a fad, and the message should be taken seriously.

(3) Receipt of Information. Publicizing the fight against public corruption should result in members of the general public coming forward to provide information about alleged wrongdoing to the prosecutor. The fact that the prosecutor is placing a priority on public corruption should provide the necessary impetus for public input.

(4) Inadequacy of other resources. One local prosecutor told our interviewer during an on-site visit that he set up a special public corruption prosecution unit within his office because "I had to." This prosecutor lamented the inadequacy of the local police ("not sophisticated enough") and state law enforcement (couldn't get enough help, and too many hurdles to jump over to get it), and established his own unit stocked with former FBI agents and top attorneys from his office.

(5) Maximization of resources. A public corruption unit can serve to focus and coordinate law enforcement efforts, and to maximize the resources that the prosecutor has available. Attorneys who prefer to handle public corruption cases can have their talents best utilized. Expertise can be developed and nurtured, and institutional memory can be fostered.

Interestingly, none of the local prosecutors who reported having a special public corruption unit within their offices cited public corruption as their top prosecutorial priority. Of the 14, 42.9

percent cited public corruption as one of their top three priorities, while another 42.9 percent cited public corruption as one of their top five priorities. The others--14.3 percent--chose not to respond. On the other hand, all but one of the U.S. Attorneys with such an office who responded to our survey ranked public corruption as one of their top priorities, although none singled it out as the single highest priority.

Prosecutors who have a dedicated public corruption unit are more likely than those without such units to investigate public officials--and particularly public employees--and are much less disposed to turn over their cases to a federal prosecutor. Of the 14, 42.9 percent responded that they do not turn over any cases to a prosecutor at another level of government, while 42.8 percent report turning over up to ten percent of public corruption cases. In spite of having a dedicated unit, one prosecutor reported turning over some 50 percent of all public corruption cases.

ACTIVITY/SUCCESS OF FULL-TIME SPECIAL PUBLIC CORRUPTION UNITS (Based on Indictments)

INDICTMENTS OF PUBLIC OFFICIALS

Jurisdiction	Number of Indictments							
Size	0	1	2	3	4	5	31	NA/ NK
0-20,000	0	0	0	0	0	0	0	0
20,001-50,000	0	0	0	0	0	0	0	0
50,001-100,000	0	0	0	0	0	0	0	0
100,001-500,000	1	0	0	0	0	0	0	2
500,001-1,000,000	5	2	0	1	0	1	0	0
1,000,001 or more	1	0	1	0	1	0	1	3
TOTAL	7	2	1	1	1	1	1	5
PERCENT	36.8	10.5	5.3	5.3	5.3	5.3	5.3	26.3

N = 19

INDICTMENTS OF PUBLIC EMPLOYEES

Jurisdiction	Number of Indictments								
Size	0	1/5	6/10	11/15	20/25	50/75	75/100	100+	NA/ NK
0-20,000	0	0	0	0	0	0	0	0	0
20,001-50,000	0	0	0	0	0	0	0	0	0
50,001-100,000	0	0	0	0	0	0	0	0	0
100,001-500,000	0	1	0	1	0	0	0	0	1
500,001-1,000,000	1	2	1	3	0	2	0	0	0
1,000,001 or more	0	1	0	1	2	0	1	1	2
TOTAL	1	4	1	5	2	2	1	1	3
PERCENT	5.3	20.5	5.3	26.5	10.5	10.5	5.3	5.3	15.8

N = 19

As expected, the numbers for indictments drop significantly from the number of investigations, as the "funnel" effect is felt. Of those local respondents with full-time public corruption units, six--42.9 percent--reported that they had not indicted any public officials, although only one reported not indicting any public employees. Five reported indicting between one and five public officials, with the remaining numbers unascertainable. With respect to indictments of public employees, two reported indicting two individuals, one indicted eight, one indicted 13, two indicted 15, one indicted 22, one indicted 88, and one indicted 173 public employees.

A typical dedicated public corruption unit is found in a larger jurisdiction, is directed by an attorney and will have from one to three other attorneys, a similar number of investigators, at least one paralegal or law clerk, and a corresponding level of clerical support. Some prosecutors do not use law clerks because of the turnover and concerns over maintaining confidentiality. Additional staff may be assigned to the unit when needed. Some investigations into public corruption have used more than ten investigators concurrently over a long period of time.

Some prosecutors who have chosen to establish special public corruption units have combined their functions with other, often related, responsibilities. This is especially true in smaller jurisdictions that perceive a problem requiring the establishment of such a unit, but don't have the resources necessary to devote to public corruption exclusively on a full-time basis. For example, one of the more active local public corruption units is found in Travis County (Austin), Texas. This special unit combines public corruption investigations with those involving motor fuel tax fraud. Other offices may have special units that investigate white collar crime, and include public corruption under this definition.

Special public corruption units are not in and of themselves a panacea. They may divert important resources away from other office priorities. Public corruption cases may take an inordinately long time to develop, and there may, in fact, not be as much corruption as the prosecutor first thought, making such a unit a questionable investment. Regardless of the existence of a special unit, certain things must still be shown to bring a case, and if these elements simply do not exist, a public corruption unit cannot create them (except through certain impermissible activities associated with specific types of undercover operations). Finally, there may be special pressure on a public corruption unit to justify its existence, possibly resulting in questionable investigative techniques and prosecutions based upon potentially tenuous grounds.

Offices that have established special units to handle public corruption cases generally experience a greater number of prosecutions than other prosecutors' offices, although we found little statistical confirmation that their success rate in prosecutions was greater than offices which did not have such units--our de facto assessment of quality. Nor did the offices without special dedicated public corruption units necessarily fair poorly in our quantity measurements. While some offices with such units appear to be prolific in the number of investigations, indictments, and successful prosecutions to their credit, prosecutors with such special public corruption units do not appear consistently at the top of the list ranking numbers of investigations commenced, indictments brought, and successful prosecutions. Those jurisdictions that do not have special

public corruption units are able to effectively compete with--and often surpass--those jurisdictions that do have them in these important categories.

The fact that there may not be a statistical relationship between having a dedicated public corruption unit and successful prosecutions should not automatically be presumed an indictment of such entities. Our survey did not account for the time of formation of these units. Such a unit formed within a year or two before the survey was administered will certainly not be able to have an impressive record of accomplishment in an area which sees major cases gestate over periods of one to two years. Several such units have also diligently pursued important cases of systemic corruption that might have otherwise fallen between the cracks in a prosecutor's office that placed a lower priority in the prosecution of public corruption. Considerable discussion might well be generated over whether it is more important to rid the system of, for example, one corrupt governor or 25 dishonest county payroll clerks. Further, it is impossible to prove the null hypothesis: what would have happened in a jurisdiction if a public corruption unit had not been in existence. For example, one of the professed benefits of a special public corruption prosecution unit, as duly noted above, is that it sends a clear message to current and future wrongdoers that certain patterns of conduct simply will not be tolerated. The deterrent effect of such units is incalculable, and perhaps they may be justified in their existence on this basis alone. Finally, one must understand that an investigation that does not conclude in criminal charges is not necessarily a failure. As one Department of Justice official elaborates, "An investigation that discloses proper conduct is not a failure--it is a legitimate exercise of [the prosecutor's] responsibility to guard the interests of the public in the [jurisdiction] and to be able to guarantee that the system is working properly. The very fact that [the prosecutor is] willing to investigate suspicious [conduct] may deter others from some scheme that would otherwise have been attempted" [Lawless, 1988: p. 275].

PRE-INVESTIGATION STAGE

The philosophy of a particular prosecutor with respect to public corruption cases is often best evinced through how the prosecutor approaches the potential investigation. Before an investigation into potential public corruption is commenced, several questions must be answered and myriad considerations must be factored into the decision. This section details the various components of the pre-investigation phase and examines the issues involved in each of them.

Emphasis on Past vs. Current Activities

Do prosecutors prefer to investigate allegations of public corruption that are believed to be ongoing or those which have happened in the past and appear to have been taken to fruition? Our on-site visits with federal and state prosecutors failed to uncover a great deal of difference in attitude or action, but it appears that current activities are more likely to be pursued.

At least one prosecutor suggested to us that allegations involving past misconduct were easier to pursue because the very fact that it had been brought to the attention of the prosecutor meant that there was a crack in the wall of silence involving transactions often consummated between two consenting parties who each stood to gain a benefit. Another prosecutor indicated that allegations of past misconduct may be easier to render a threshold decision on, as there is often some kind of evidence as to the nature (i.e., was it illegal?) and the extent (i.e., was it substantial?) of the conduct. Such a decision, however, would be more in the nature of "should the case be disposed of on its face?" rather than a decision made from the perspective of "should this case be investigated further?" However, prosecutors were quick to indicate that they would pursue any case, regardless of its current or past characterization, if the conduct complained of was sufficient to merit an investigation, and the statute of limitations would permit adequate investigation and subsequent charges.

Prosecutors seem to have a slight bias in favor of ongoing corruption cases, where corruption can be mitigated before others are harmed. One prosecutor explained that in current cases, the investigator was able to capture ongoing criminal conduct, and strengthen a potential case. Investigations could be shaped around the desired theory of prosecution, rather than be limited to a fixed set of circumstances, finite evidence, and witnesses whose recollection of the facts and events may have significantly diminished due to the passage of time.

Sometimes the prosecutor may be forced into a given perspective as a result of the source of his or her cases. Prosecutors who have jurisdiction over the affairs of state government, for example (such as the Franklin County Commonwealth's Attorney in Kentucky), tend to get more referrals from other prosecutors and information about current activities than their colleagues with a more limited purview. Similarly, prosecutors who are eligible to receive referrals from their colleagues because of a conflict that the colleague might have are more likely to handle current cases, as cases based upon past events would more likely result in less reluctance to handle the sensitive matter.

Based upon our observations, the chances for success in an investigation are better when the questionable activities are currently underway, thus giving prosecutors more opportunity and flexibility in investigating them. There is no quantitative evidence that confirms or disproves this prosecutorial partiality, but the ability to direct the investigation, and use it to possibly broaden the scope of and subjects involved in the probe should not be discounted.

How Investigations are Triggered

The manner in which allegations of misconduct are brought to the attention of the prosecutor can have a significant impact upon the direction of the investigation and subsequent prosecution. Information about possible violations of the law may come to the prosecutor from the office's own network of informants; other prosecutors from their level of jurisdiction, or prosecutors from different levels of government; law enforcement agencies; public officials; supervisors, employees, or relatives of those involved; those who have been wronged in a transaction, or who believe that someone has gained an unfair advantage in a particular transaction or set of transactions; from superiors; and from the news media. Tips may also develop from political rivals or bureaucratic antagonists. Some prosecutors may also generate their own cases through establishing undercover operations designed to benefit from a noticeable tendency in the jurisdiction.

There are some apparent discrepancies between our survey responses on this subject and the material generated through our on-site interviews. The surveys indicated that the principal sources of information for prosecutors about potential misconduct by public officials and public employees appear to be law enforcement agencies. The on-site interviews suggested that referrals from other prosecutors and leads offered by those with some form of 'inside' information ranked as high as law enforcement. The small universe of on-site visits makes us hesitant to discredit the survey responses, but we are similarly reluctant to discount the qualitative responses about tips and referrals from other prosecutors that we received from the prosecutors with whom we discussed the topic. One potential explanation for the discrepancy could be that prosecutors who were interviewed on our on-site visits answered the question after framing it in their own minds that it meant what types of referrals are their most effective, rather than most common source of information.

The U.S. Attorneys who responded to the survey appear to rely quite heavily on federal law enforcement agencies to generate information on public corruption. More than three-fourths of the federal respondents indicated that they rely upon federal law enforcement agencies (principally the FBI, as we learned in our on-site visits; their agents are evaluated on the quality of their sources) as sources in more than one-half of their cases. Approximately 40 percent of U.S. Attorneys reported using state and local law enforcement agencies as sources of information in up to one-fourth of their cases.

Local prosecutors use state and local law enforcement agencies as their single most dominant source of leads, with such sources accounting for all investigations conducted by some 20 percent of the state and local prosecutors who responded to the survey.

Particularly at the federal level, law enforcement agencies are held in high regard as sources of information and assistance. In one eastern district, the FBI special agent in charge describes his status in investigations of public corruption as "co-equal" to that of the U.S. Attorney. In this district, the FBI's acknowledged practice is to conduct a preliminary threshold investigation, and then present the findings to the U.S. Attorney, who is asked to determine whether the facts as alleged constitute a potential violation of the law, if jurisdiction rests with the U.S. Attorney, and whether the U.S. Attorney wishes the investigation to be pursued any further.

Ranking high among the sources are complaints that come in to a prosecutor's office from either what one prosecutor described as "whistleblowers," or through anonymous complaints. Tips might include a referral from an internal investigation conducted by an agency, but often consist of accusations levied by estranged spouses and alienated ex-lovers. More than one local prosecutor revealed to us in the on-site interviews that spurned paramours make superb sources both in the initiation of the investigation, and then later in the actual investigation of the misconduct and disposition of the proverbial ill-gotten gains.

Other prosecutors appear to be a significant source of leads. While all prosecutors, local or federal, expressed complete amenability toward pursuing such leads, we did detect slightly more enthusiasm on the part of the U.S. Attorneys to follow up such leads. Local prosecutors seemed to be somewhat condescending in our on-site interviews when discussing their treatment of colleagues who referred them leads, an attitude that appears to stem from two sources. First, one of the principal reasons for such referrals by one local prosecutor to another is that the referring jurisdiction fears that it does not have sufficient resources with which to pursue the allegations. The receiving prosecutor may simply be displaying a big jurisdiction versus small jurisdiction mindset. Second, another major reason for referral is because of a conflict or political sensitivity. Again, the larger office recipient is less apt to be sensitive to the environment within which colleagues from smaller jurisdictions must operate.

Cases generated through a prosecutor's network of informants are likely to be few and far between because of the nature of public corruption. Street-level informants, however, can be invaluable in alerting a prosecutor to a potential problem involving a public official or public employee who has become entangled in illegal drugs--something that prosecutors have recently become more attuned to. Drug involvement is often a strong signal to search for other serious criminal misconduct, such as receipt of protection money from drug dealers, fraud in hiding otherwise taxable income, or stealing or embezzling government funds to pay for the drugs.

Following up on leads generated by news stories and tips from reporters also appear to be low on the list of case generators. Perhaps this is explained by the desire of prosecutors to remain--or, more precisely, appear to be--a step ahead of public reports. Also, even before a news media investigation is communicated to the public in the papers or over the airwaves, chances are that the reporters involved will have done something overtly or inadvertently that would alert the subjects or targets of a prosecutorial inquiry and give them an opportunity to create a paper trail or construct a set of alibis. When the news account is published or broadcasted, the prosecutor can be placed at a significant disadvantage.

One federal prosecutor told us that there may be more self-generated cases actually initiated than prosecutors have reported. This prosecutor mentioned that certain historical patterns of conduct within the prosecutor's jurisdiction suggest areas appropriate for ongoing monitoring. Another U.S. Attorney confirmed this, telling our interviewer that "Where there is some noticeable tendency, we try to be proactive."

In circumstances such as this, where certain courses of conduct may be historically suspect, the prosecutor will ask two threshold questions: (1) Did the public official or public employee get money? (2) Did they get their money by virtue of their office? If the answers can reasonably be stated in the affirmative, an investigation may be launched. A local prosecutor told our interviewer that there is also investigative activity that may result from a 'spin-off' from another investigation into different, probably private sector, misconduct. One of our interview subjects no doubt spoke for all other prosecutors when he conceded that "We're much more reactive than we'd like to be."

U.S. Attorneys were unanimous in portraying their investigations as locally generated. One U.S. attorney pointed out that the impetus for investigations does not come from the U.S. Department of Justice in Washington, D.C., because the perspective there is to "let everybody take care of their own camp," as one federal prosecutor told our interviewer.

Survey responses seemed to indicate that a source was either a major contributor to the initiation of the office's investigations, or not a source at all. There appeared to be a pattern in the surveys that indicated that prosecutors most often used the sources that seemed to come through for them, or that they felt most comfortable with. This perception was confirmed by the on-site interviews, which concurred with the quantitative findings on the heavy reliance on certain sources.

Whistleblower complaints will likely increase in the future as more states enact laws that protect the status of those who complain of purported misconduct on the part of a supervisor, colleague, or subordinate. Perhaps a more active public relations effort to remind employees--and maybe even suppliers or contractors--that they are protected if they reveal evidence of misdeeds will result in a greater willingness on the part of these individuals to step forward. Similarly, publicizing fraud "hotlines," on which anonymous complaints may be recorded, may pay off with more leads, though their credibility would likely fall short of those which might be developed through other means; recent works have posited that many whistleblowing acts "may reveal that self-interest rather than altruism is the driving force behind a whistleblower's claim" [Perry, 1991: p. 4; *see*, Mansbridge, 1990].

Federal prosecutors seem to have a particular interest in identifying local practices that carry with them the potential for nefarious government-related conduct. They point to a record of success with this method of operation, and similar intelligence operations might be effectively launched by prosecutors at local levels. All that is needed initially is a modicum of perspective about past criminal activity in the jurisdiction, or activity that, while never found to be chargeable, might be continuing and could be prosecuted under changing laws or circumstances. A history of illegal liquor or tobacco sales might lead to the assumption that there may be a connection to local law

enforcement or revenue authorities. An active history of gambling activity in the community might suggest other links in government.

Greater sensitivity might also be called for on the part of local prosecutors who are referred allegations of misconduct by their colleagues from smaller jurisdictions.

Internal Review of Investigations

Public corruption cases are among the highest profile events that will cross a prosecutor's desk. Because of their importance--and their sensitivity--we sought to learn more about how prosecutors decided whether a case was worthy of further investigation after the receipt of an allegation. Our assumption was that, given the nature of the targets or subjects of such investigations, the prosecutor would become personally involved in the decision to open a full investigation or to close the investigative file at the complaint stage.

Our on-site interviews with prosecutors almost invariably showed that the prosecutor was isolated from the initial decision to open a full-fledged investigation. Most were extremely comfortable in delegating the decision to a division chief or even the attorney in the office who first comes into contact with the matter. Only in cases involving elective officials or cases involving significant impact or an extremely high profile were allegations of misconduct routinely brought to the prosecutor for his or her personal decision as to whether to proceed. As one local prosecutor put it, his office didn't run on the basis of hierarchy; rather it operated on mutual trust.

One local prosecutor outlined the procedure in his office for our interviewer, and that process appears to be similar to those employed elsewhere in the country. When a call alleging some manner of misconduct by a public official or public employee is received by the office, the individual to whom the call is directed by the receptionist (typically an attorney or investigator) will write up the pertinent parts of the conversation on an internal intake form. The form would be sent to the unit chief (most frequently the criminal chief or, in the case of a prosecutor's office that possesses a separate public corruption unit, the unit chief), and the unit chief would make a decision as to whether the complaint merits the opening of an investigation.

At that point the key decision must be made. One federal Justice Department official advises those under his jurisdiction to carefully consider three items when making the actual determination as to whether an investigation should be commenced: (1) is a crime alleged?; (2) is there a clear idea as to what needs to be investigated?; and (3) is there a statute that specifically applies to the misconduct, rather than just intuition suggesting that something is inappropriate [Gangloff, 1989]? The FBI has articulated a policy for its Special Agents in Charge to follow when approving a public corruption investigation. The criteria the FBI takes into consideration are:

(1) The source of the allegation.

(2) The credibility and motivation of the source.

(3) Whether the source was in a position to know the information furnished.

(4) Whether independent information exists to corroborate or lend credence to the allegation.

(5) Whether the allegation can be identified as a violation of federal criminal law.

(6) Whether the allegation received or developed is sufficient to support specific leads

[Clarke, 1988: p. 280; *see also*, FBI's Manual of Investigative Operations and Guidelines].

Once the decision to investigate has been reached, most prosecutors with whom we met described a process in which the unit chief would assign an attorney to the case, and the chief investigator or the unit chief would also designate an investigator to inquire into and analyze the facts and supposition. The team would meet at the threshold to discuss the elements of the allegations, and to determine an appropriate strategy for pursuing the situation. At the federal level, the only significant difference arising at this point would be that while a preliminary investigation could be commenced by an Assistant U.S. Attorney, commitments require the approval of the criminal chief or the U.S. Attorney.

The offices which appear to be most comfortable in their strategies for investigating allegations of public misconduct are those which handle their threshold decisions from the bottom up, rather from the prosecutor-down. Early involvement by the prosecutor in the direction of an investigation--with the possible exception of those matters concerning top officials--was pictured as potentially counterproductive by those prosecutors with whom we met in our on-site interviews. This approach tends to avoid the potential for accusations of political interference.

External Review of Investigations

The ability of someone outside of a prosecutor's office to dictate the nature and extent of an investigation--or even to disapprove the decision to investigate in the first place--is a serious matter. Prosecutors (particularly local prosecutors who are elected) fiercely guard their independence. The role of the prosecutor in the system--the individual charged with responsibility for ferreting out and correcting wrongdoing--suggests that an attempt to place any check or balance on the prosecutor other than the judge and jury would be viewed with suspicion and alarm by the prosecutor--and possibly by the community, when public perception is a factor.

In the course of our on-site visits, we found no local prosecutor who was required to obtain clearance from any other source prior to commencing a public corruption investigation or bringing a public corruption case. Even in states in which there was a statewide entity or official imbued with the authority to prosecute public corruption, we found no need for the local

prosecutor to obtain any type of preclearance from such an official or entity (typically the existence of such statewide statutory authority was in the form of concurrent, rather than exclusive jurisdiction). In practice, we also found little evidence of early "courtesy" clearance calls by the local prosecutor to the statewide entity.

While we found no formal preclearance requirements for local prosecutors, there appears to be a move on two fronts in at least one state to require investigators to provide certain information about investigatory activities in advance of bringing charges. Arizona legislation would require the reporting of use of forfeited assets and racketeering funds by local prosecutors to the state's Criminal Justice Commission, while proposed guidelines in the City of Phoenix would have required the following oversight of police activity as part of a larger package:

> • Criminal Investigations. City management (defined as the deputy city manager in charge of the police department, the assistant city manager, and the city manager) will be advised of any ongoing investigation involving major criminal activity, prominent individuals in the community, city employees, or politically sensitive issues as soon as it can be verified that a felony probably was committed. City management need not be provided all the names of the suspects or details of the case, but the general nature and reasons for the criminal investigation need to be explained.
>
> • 'Sting' Operations. City management will be advised in advance of all significant sting operations involving major criminal activity, prominent individuals in the community, city employees, or politically sensitive issues. City management need not be provided all the names of the suspects or details of the case, but the general nature and reasons for the sting operation need to be explained.

[Arizona Republic, 1991 (B): p. A-6]. "The judgment of what is 'significant' is left to the police department to determine" [Willey, 1991 (B): p. A-6]. After being presented with the guidelines, which also required notice prior to engaging in any such operations, the police chief of Phoenix--who had spearheaded the major investigation into legislative corruption in Arizona--resigned, but revoked his resignation after city officials agreed to remove the oversight provisions (later in the same week he did resign over related city council action) [Collier and Lobaco, 1991: pp. A-1, 6; Lobaco and Kwok, 1991: p. A-1]. Instead, an informal agreement was reached to provide for briefings of city officials "when there is a need to know" [Collier and Lobaco, 1991: p. A-1]. An alternative suggested during the Arizona debate over appropriate disclosure would call for "demanding strict year-end reports, along with stiff penalties for non-compliance" [Arizona Republic, 1991 (A): p. A-18].

A newspaper informally surveying high-ranking police officials from Arizona and California found no requirements for the law enforcement agencies to "inform their city managers before launching any undercover operations, including those that expose political corruption" [Sowers, 1991: p. A-6]. Some indicated, however, that they might brief appropriate city administrators

on a case-by-case basis as a courtesy if their investigations involved misconduct by certain public officials [Ibid.].

A totally different set of circumstances is in evidence, however, when U.S. Attorneys were queried about requirements imposed upon them for preclearance. The United States Attorney Manual makes it most clear that the staff of the U.S. Attorneys "consult" with the appropriate section of the Criminal Division of the U.S. Department of Justice in the preparation and prosecution of public corruption cases.

No clearance is required for the U.S. Attorney who wishes to conduct a preliminary investigation of a potential public corruption crime, even a possible Hobbs Act or RICO violation. However, once evidence suggests that a full field investigation is warranted, prior Department of Justice clearance is required.

Justice Department approval is needed before a U.S. Attorney or the Federal Bureau of Investigation may use certain investigative techniques. Approval is also necessary when the investigation seeks to encompass federal elective officials. In practice, we were informed in our on-site interviews, approval concerns at the federal level were more dependent upon the official involved than the technique used. Media reports of public corruption investigations involving city officials in Washington, D.C. confirmed this [Dedman, 1990: p. A-20].

While the Public Integrity Section may request that preliminary inquiries be made into matters that have been summarily declined by the United States Attorney [Donsanto, 1988: p. 42], there is little evidence to suggest that the U.S. Department of Justice exercises any significant degree of formal or informal control or direction over the activities of its prosecutors in cases involving public corruption. Our interviewers were told that the departmental preclearance was less in the nature of a "yes or no" decision on the matter at hand than it is a "get your ducks in order" type of evaluation of the totality of circumstances, and that prosecutors used the preclearance process as an opportunity to get early feedback on the viability of their proposed strategy and tactics. Preclearance and ongoing supervision also serves as a check and balance of sorts. One FBI agent told a reporter that with close supervision in certain public corruption cases, "you become more cautious. You don't want to make a mistake" [Dedman, 1990: p. A-20].

Clearance through or by an official or entity outside of the office is not a concern for local prosecutors. Federal prosecutors also report no significant problems with the process which requires them to seek prior approval from the U.S. Department of Justice for certain types of public corruption investigations and actions. U.S. Attorneys often welcome the clearance process as a means for helping ensure that they have the relevant materials compiled in the proper form, and that they have completely thought through the implications of their proposed actions.

Individual- vs. Event-based Investigations

Whether investigations are individual- versus event-based in nature depends more upon how the allegation triggering the investigation is generated than on other factors.

A prosecutor has the option of pursuing an investigation against a particular individual, a discrete group of specifically identified individuals, a certain class of individuals, or against a certain type of activity. Each option carries with it unique advantages and disadvantages.

- Investigating an Individual

An investigation involving a specific individual suspected of public corruption activity is the most conceptually clean--but certainly not perfect--investigatory concept. Such an investigation typically arises as a result of a specific allegation that the prosecutor's office has received and has found sufficient reason to believe that a criminal violation has occurred that it has decided to pursue the allegations further. Investigating a specific allegation against a specified individual is probably the best circumstance in which a prosecutor may be placed. These circumstances reduce the likelihood that the individual will be able to claim that he or she was merely caught in a wider web. This also helps eliminates claims that the individual did not have the requisite "articulated predication" that the prosecutor might have to prove the defendant possessed in certain types of undercover operations involving inducements (e.g., as in a sting operation). While the individual public official will almost invariably claim that he or she was "singled out" for investigation, such a defense, while it may play well to constituents, through the media, will find no sympathy in court, for there would be evidence of a specific allegation that was being properly pursued by the prosecutor.

- Investigating a Group of Specifically Identified Individuals

Investigating a group of specifically identified individuals for public corruption activities is also a comfortable situation for the prosecutor because it helps prevent accusations that the prosecutor has isolated someone for special consideration, or is on the proverbial fishing expedition. The fact that there is a named group of individuals whose activities are being monitored again suggests that specific information has been received and reviewed by the prosecutor's office, with a finding of sufficient preliminary evidence to merit opening a more formal investigation. With a larger group of individuals being specifically examined because of something that they specifically have been alleged to have done, the prosecutor is less likely to be placed in a situation in which a defendant can credibly claim that he or she was singled out without justification.

- Investigating a Certain Class of Individuals

Investigating a certain class of individuals for public corruption activities can be a difficult endeavor. Typically such an investigation will begin as a result of a perception within the prosecutor's office that there has been systemic corruption present in a given jurisdiction. The decision may be made to monitor the activities of, for example, all members of a planning commission, supervisors of a purchasing department, or officers in a certain division of the police department. Investigating a class of individuals will help the prosecutor deflect the inevitable criticism over targeting specific persons, but is likely to raise questions by the media and those who are subjects of the investigation about the propriety of engaging in so-called

"fishing expeditions." One local prosecutor who has had experience in managing large public corruption investigations told our interviewer that only under certain limited circumstances should a prosecutor pursue such a group out of fear of jeopardizing the case. Instead, the prosecutor recommended, the prosecutor should look to "create an opportunity" that would ensnare those who have the requisite criminal intent.

- Investigations Aimed at a Certain Type of Activity

Investigations aimed at a certain type of suspected criminal public corruption are similar in nature to those conducted with respect to a specified class of individuals. Again, systemic corruption perceptions are likely to drive such an investigation, although information may well have come to the prosecutor's office from outside sources. By pursuing a given type of activity such as illegal gambling, procurement fraud, or drug-related protection, a prosecutor may be able to change the way the investigation is perceived by the public from one which might have focused on a popular public official to one in which a widely acknowledged deleterious activity was investigated, and the popular official was coincidentally found to be entangled.

A special note here about why public perception is important. A high profile investigation may have an impact upon the prosecution of the case. If a public official is popular, the official may be viewed as a victim of an overly aggressive prosecutor. If the public official has been singled out, the public official can use this to his or her advantage. Subsequent publicity can have the effect of prejudicing the jury venire (the pool from which the jury is selected), making it difficult to maintain venue of the prosecutor's choice and select a fair jury.

Our on-site interviews found a fairly even split on the issue of preference for individual- versus event-based investigations. While one federal prosecutor told us that the genesis of an investigation is always the individual (because they are "the foot in the door to others"), another local prosecutor told our interviewer that an individual-based investigation is probably not appropriate unless reasonable certainty exists that the individual committed a criminal offense.

Systemic corruption cases are more likely to be event-based, because the prosecutor's office is proceeding on the basis of mere suspicion of criminal activity. As a result, cases generated by the prosecutor's office itself are less likely to focus on individuals than would be investigations emerging from complaints brought to the attention of the office. In systemic corruption investigations, one FBI Special Agent in Charge suggests that prosecutors and investigators will naturally gravitate toward those who possess a great deal of responsibility, and in whom the public places a high degree of trust [Bortz, 1990: p. 1].

One local prosecutor suggested that it may be more appropriate to focus on complaints involving individuals because the function of the prosecutor is to prosecute, and not to act as a type of regulatory agency, who might more suitably examine patterns of conduct.

There is no simple way to characterize investigations as more frequently arising out of the conduct of an individual, as opposed to being more prone to arise in the context of an

investigation of apparently impermissible ongoing activities. Investigations of systemic corruption more frequently focus on classes of individuals or patterns of conduct more than they target specific individuals, while complaints received by the office seem to result in investigations of specific individuals or discrete groups of specific individuals.

Each type of investigation carries with it certain advantages and burdens. Prosecutors who might worry about a public perception that an investigation is directed against an individual might feel more comfortable in broadening the net. One federal prosecutor suggested that this wide net be employed to snare the first prey in matters of systemic corruption, and then once the initial individual is trapped in the web, the prosecutor should use this individual as a bridge to others who potentially are involved. This prosecutor considered the most successful investigations to be those which were earmarked from the beginning; those investigations in which the investigative team compiled a long list of possible subjects at the beginning of the investigation, and followed up on each lead with this preliminary list in mind (obviously the content of the list would change as the investigation progressed).

One U.S. Attorney told our interviewer that investigations might be broadened to disguise the subjects of the investigation (both in terms of the individuals involved in, and the substance comprising, the investigation). This prosecutor observed that a prosecutor has a responsibility to "always try not to reveal who you're targeting until you're at the fine point of honing the investigation." Those prosecutors who have no reason to be worried about how their actions might be perceived often feel less constrained about singling out an individual or group of specific individuals for investigation.

Because prosecutions of public employees for corrupt activities are usually less inflammatory than those involving those higher profile public officials, prosecutors may feel freer to employ more controversial methods in their identification and investigation of such allegedly corrupt individuals.

Influence of Costs on Investigations

No public corruption case is handed to a prosecutor on the proverbial silver platter, with every conceivable angle fully explored and resolved in a manner that would hold up in court. Lengthy investigations are the rule, rather than the exception, in public corruption cases, and using the resources and personnel of those in several different agencies can be extremely expensive--especially if they have not been fully budgeted for previously. Defenders of embattled former District of Columbia mayor Marion Barry claimed that the federal government spent some $42 million in its pursuit of various allegations involving Barry's role in contract and expense fraud and drug use, while federal law enforcement officials pegged the total at an amount closer to $2.3 million--still an impressive sum [Thompson, 1990: p. B-1]. Law enforcement costs related to an extensive local investigation of public corruption, the so-called "AzScam" case involving corruption in the Arizona legislature, are estimated to be as high as $2.5 million [Nichols, 1991 (B): p. A-2], including more than $300,000 in bribe money [Leonard, 1991 (B): p. B-4]. This

figure does not include peripheral governmental costs, such as an anticipated $250,000 legal bill for special counsels hired for legislative disciplinary proceedings [Yozwiak, 1991 (A): p. B-1].

Against the backdrop of these very real budgetary considerations, prosecutors must determine whether they will open an investigation, what resources to devote to them, and how long to allow them to continue. Our on-site visits revealed, however, that cost has little restraining impact upon the prosecutor, at least when considering the threshold decision of whether to begin an investigation. The only exception appeared to be when an apparent violation of the law was of minimal importance to the prosecutor. As one local prosecutor told our interviewer during an on-site visit, "I wouldn't pay $30,000 to make a $5,000 case."

But while the prosecutors who shared their feelings about cost with us indicated that they attached little importance to how much a potential investigation would cost, they did suggest that related items played a part in their decisions about how the investigations would be conducted. The importance of time and resource allocation was stressed to us by one local prosecutor, who implied that the cost question became part of the decision process as he established his priorities. Cost considerations merely forced this prosecutor's office to become more efficient and selective; the prosecutor said that his office didn't have the luxury of being able to conduct extensive document searches, or launch investigations into matters in which the office's jurisdiction was tenuous at best.

None of the U.S. Attorneys with whom we met in our on-site visits felt that they were under any pressure from the Justice Department on costs. The U.S. Attorney is also able to call upon the investigative resources and expertise of the Federal Bureau of Investigation, the Internal Revenue Service, the Drug Enforcement Administration, the U.S. Customs Service, the Immigration and Naturalization Service, the General Accounting Office, and other such entities. As one federal prosecutor told our interviewers during an on-site visit, these agencies look to the U.S. Attorney to guide the investigations, and they don't have to be "sold" on the concept of investigating corruption because it is a high priority for these other agencies, too. Further evidence of this commitment is the fact that federal agencies each generally assume their own costs resulting from an investigation. Similar cost-sharing agreements at the local level would greatly benefit local prosecutors.

For one local prosecutor, the availability of state-level assistance (through a well-endowed state police investigatory detachment) eases the blow. For another, the cost of investigations is covered by the use of funds forfeited under a state RICO law. In the AzScam prosecution, a civil racketeering suit was filed against 18 suspects seeking a total of $2.5 million from the parties, an amount, perhaps not so coincidentally, that matches a news estimate of the expected cost of the investigation and prosecution.

The potential cost of an investigation can be staggering, but that does not seem to have a significant impact upon the decision to open an investigation. Cost is considered "when we spend too much," one federal prosecutor jokingly told our interviewers, but there is no penalty for doing so. We found no evidence that cost played a part in calling an early end to any major

investigation, although cost admittedly did force some local prosecutors to limit the extent of some investigations (though, we were assured, not to a meaningful extent). These limits were typically in the nature of narrowing the scope of a particular aspect of the investigation.

With respect to the assumption of costs, our on-site visits determined that, across-the-board, agencies were largely responsible for picking up the costs that they accrued during the course of the investigation. There were no differences among our federal, state, and local interviewees on this subject.

Prosecutors should consider how they might cooperate more closely with appropriate law enforcement and regulatory entities to reduce costs and improve efficiency. Open communications may result in law enforcement agencies increasing staff in particularly needed areas at the request of (and possibly with the fiscal support of) the prosecutor. Consideration should also be given by the prosecutor to bringing civil racketeering charges against public corruption defendants where such charges are justified, so as to assist in the payment of expenses for investigations and prosecutions. Clear agreements should be reached at the outset of the investigation, re-visited periodically, and signed off at the end of an investigation confirming the allocation of costs. Early agreements should also detail who may incur what costs with what level of authorization.

Additional consideration should be afforded to the use of federal prosecutors to assist local prosecutors in the prosecution of local cases in local courts. Because most U.S. Attorneys have greater resources and specialized expertise available to them, the deputizing of an Assistant U.S. Attorney to serve as a special prosecutor in a local public corruption case may have salutary effects. The case could be prosecuted under local laws with a local jury, in front of a local trial court, with the assistance of the local prosecutor. However, the local prosecutor would have the benefit of additional low- or no-cost expertise; the ability to train his or her staff in prosecuting such cases without throwing them to the proverbial lions the first time out; and open an avenue of cooperation and coordination that otherwise might have languished. This seems to be a shining example of a positive-sum transaction for both the U.S. Attorney and the local prosecutor.

Types of Cases Most Frequently Making it Past the Threshold

According to information from our site visits, the types of cases that most frequently made it past the pre-investigation threshold were those involving "financial gain," or a "significant diversion of money." This was certainly confirmed by survey findings about the investigation and prosecution of theft and embezzlement cases. The reason, we were informed, is that the paper trail in cases of embezzlement, misappropriation, and theft is easier to follow than in matters involving consensual transactions such as bribery. Other cases that tended to make it past the threshold were matters involving public officials and public employees and their involvement in sales or use of illegal drugs, simply because of the priority placed upon such prosecutions.

Matters involving personal financial gain are those most often brought to the attention of the prosecutor, and those which most often make it beyond the pre-investigation threshold. We are

unable to determine whether such cases have better success records (i.e., are more frequently fully investigated) than other types of public corruption cases simply because of their sheer volume, or because of the characteristics identified for us by prosecutors in terms of ease of detection.

INVESTIGATION STAGE

The investigation stage consists of the decision as to which entity should handle the investigation; who determines the type of investigation that should be conducted, and what elements affect the type of investigation to conduct; selection of targets in cases of rampant corruption; selection of appropriate means in undercover operations involving coordinate branches of government; the handling and resolution of institutional integrity questions; the determination as to when to bring an investigation into the open; the determination as to when to effectively end the investigation; assignment and payment of costs in multi-entity investigations; and the role in which the prosecutor places the grand jury.

Entity Handling and Directing the Investigation

The choice of the entity that will handle the investigation can have significant implications for the prosecution. The prosecutor's office may not have the appropriate investigative expertise for a major financial fraud investigation. A U.S. Attorney's office may not have sufficient contacts locally to be able to effectively penetrate a tight-knit local conspiracy. Each investigative entity brings to the table a set of distinct benefits and detriments that must be carefully weighed against each of the factors at stake in a particular public corruption investigation.

Typically, the entity that will handle the investigation will be chosen by the prosecutor acting in close coordination with the lead investigative agency. An investigative team will usually be assembled, led by an attorney, and staffed by the appropriate investigative agencies. Prosecutors will keep tight reins on the investigation, and few decisions will be made without consultation among the principals involved.

While prosecutors told our interviewers that they would avail themselves of all possible resources, they did make clear that their offices would "control" the investigation. Paramount in this decision was the understanding that it would be the prosecutor who is responsible for drafting the case and arguing the effort in court. As a result, the investigation had to be managed with an eye toward what is likely to arise in a judicial proceeding, as one local prosecutor explained. Flexibility was also stressed to us as being a critical component of the process.

While there remains a great deal of informality and collegiality on the surface, below the surface it is readily apparent that prosecutors' offices tended to control and direct investigations. Because of their accountability in court for both the results of the investigations and the methods used in the course of the investigation which ultimately led to the prosecution, this is neither a particularly surprising nor disturbing finding.

Another question that has arisen, and which has not yet been fully debated among academics and practitioners, is the propriety of the same office directing a sting operation and then being allowed to prosecute charges arising from the operation. Some defendants are starting to question the seemliness of such an arrangement, and it is only a matter of time before some defendant

decides that this might be an appropriate defense tactic that could result in a mistrial or a change in prosecutors.

Elements Affecting the Type of Investigation to Conduct

Once the initiation of an investigation has been approved, the question becomes one of what type of investigation to conduct. The two principal forces at work here are the cases themselves and the resources needed.

- Who is accused of what conduct

The initial consideration is the charges. Prosecutors and investigators must carefully scrutinize (1) those who are suspected of criminal activity; and (2) the type of public corruption activity that is suspected. Even if the underlying substantive allegations may be identical, an investigation of a state treasurer accused of embezzlement will proceed differently than an investigation of a clerk accused of the same type of misconduct.

The investigation is, above all, dictated by what information or conduct the prosecutor wants to expose. This will drive the inquiry. There are limited ways that corruption can occur, and these constraints will leave the investigator with a model or working hypothesis for investigation. The first item that should be considered is determining what traces are likely to be left behind. In cases involving financial gain through stealing or embezzlement, there will be some form of paper trail. The investigation will necessarily focus upon how money was paid, how money was generated, and how money was spent.

There are special considerations involved in investigations of public corruption. One local prosecutor spoke to our interviewer about the political sensitivity of such investigations. "You want to be absolutely right," we were told, because even the slightest false implication can ruin a public official's career. As a result, such investigations must be held as close to the vest as possible to avoid leaks, false information, rumors, and innuendos.

Investigations must also be conducted with an eye not only toward the court in the person of the judge and jury, but also toward the court of public opinion. Investigations of public corruption often involve undercover operations, and care must be taken to avoid raising--or providing fodder for--such questions as racism and targeting of certain public officials, as one local prosecutor mentioned during our on-site visits.

- What resources are needed

Resources, to the regret of prosecutors, are not infinite. One local prosecutor bemoaned the fact that his office could not rely upon local law enforcement officials for help in white collar crimes, so he turned for assistance to the U.S. Attorney who, he said, (1) had more time to investigate, and (2) possessed greater skill in prosecuting these types of cases. A U.S. Attorney told our

interviewer that, contrary to the belief of many, this particular U.S. Attorney's office didn't have "legions of prosecutors" that could be brought to bear on public corruption cases.

The four basic investigative techniques were summed up to us as the four Bs: be, buy, bug, and burrow. Being there consists of such things as reviewing records and transactions. Buying means finding an informant who can provide insight into the intrigue. Bugging refers to the use of electronic surveillance. Burrowing is the act of employing an undercover agent to penetrate the perfidy.

The key is matching the investigative resources to the task at hand. For example, if financial analysis is called for, perhaps state auditors or Internal Revenue Service agents might be best deployed. If role-playing is required in an undercover operation, a state law enforcement agency or the Federal Bureau of Investigation might be the investigators called into service.

We undeniably live in a television-dominated society. Television has become "A peremptory force in American culture, defining the news, reshaping politics . . . and remaking the cultural expectations of several generations of Americans" [Gilder, 1990: p. 8]. This phenomenon was quite clearly evidenced in the course of our research. The importance attached to videotapes by prosecutors, juries, defendants, and the public cannot be underestimated by investigators and prosecutors. According to one Justice Department official, people have come to expect videotapes in public corruption prosecutions, and it has become a prosecutorial imperative [McDowell, 1988: p. 107]. One local prosecutor suggested that the more sophisticated the investigation, the better the case is made, and "[m]ost videotaped 'stings' result in convictions" [Gellman, 1990: p. A-1]. Many defendants have agreed to plead guilty . . . but only with the proviso that the videotapes of their indiscretions not be rebroadcast outside of the courtroom. In the AzScam sting operation, investigators made the decision to use color videotapes as a further improvement on the use of advanced technology. While there may be overwhelming evidence of financial misconduct uncovered as the result of an exhaustive review of records, videotapes are clearly the preferred medium wherever possible. They help to refute defenses of entrapment, and they also serve as a further embarrassment to defendants.

A decision as to the type of investigation to undertake should rest not only on who is being investigated and on what charges, but also a consideration of the reality of limited resources for investigative purposes. Because our system of criminal justice is based upon a foundation which presumes a person to be innocent until proven guilty, extreme caution should be taken to protect the integrity of the investigation, and to safeguard the identity and potential involvement of those public officials who may be subjects or targets of an investigation.

Certain types of charges are certainly more amenable to certain types of investigations, but the widespread use and availability of dramatic videotapes showing corrupt public officials stuffing their pockets with bundles of cash (and cash is the commodity of choice--along with the occasional offer of drugs or sex--in public corruption stings) has led to a public that expects such overwhelming and irrefutable proof of wrongdoing, even in circumstances which might not ordinarily lend themselves to such a form of evidence-gathering. As a result, investigators and

prosecutors will continue to face some difficult decisions in how to prepare effective evidence in matters which the jurors are prone to either expect more proof than can be delivered, or look for it in a form in which it cannot practically be proffered.

Use of Outside Individuals to Assist in Undercover Investigations

A time-honored axiom of undercover investigations is that it takes a thief to catch a thief. Penetration of criminal enterprises by those unskilled in the ways of the conspirators can prove to be a disaster for investigative entities. Accordingly, many investigations rely heavily upon the unique "talents" of those who would not ordinarily be associated with the constructive side of law enforcement.

Such individuals often come to the investigative effort with considerable baggage. One principal method of obtaining an individual's cooperation is to find someone who has committed a crime and offer to plead down or drop the charges in exchange for participation as a principal in an investigation.

Law enforcement officials must be extremely wary of the consequences and plan for the worst. Use of someone who has something to gain by actively assisting the prosecutors--either through the ability to walk away from serious charges, or through payments for services rendered--can change the way in which the public perceives the prosecution.

Investigators and prosecutors must be extremely careful about entering into such relationships. At a minimum, law enforcement officials should obtain a complete admission to charges that would have been brought absent an agreement to participate in the investigation; this admission should be obtained as an insurance policy of sorts for the prosecutor. The agreement, which itself must be made confidential; should spell out the general boundaries of the proposed investigation; specify what is expected of the individual over the course of the investigation and prosecution; cover the agreement that the prosecutor is willing to enter into with the individual assuming the successful completion of undercover activity; clearly explain the risks likely to be attendant to the investigation; define the government's responsibility, if any, for the protection and safekeeping of the individual during and after the course of the investigation; detail the consequences of noncooperation or improper disclosure (which should warn that disclosure of any aspect of the agreement or investigation without prior consent of the government could constitute criminal obstruction of justice or a violation of grand jury secrecy laws); note the arrangement made with respect to pay and expenses; include a pledge to follow all laws and regulations to the extent possible during the duration of the agreement (with the exception of activity reasonably related to the alleged illegal activity being investigated); and contain any provisions that investigators or the prosecutor deem necessary with respect to such items as drug testing.

Because they are not likely to possess the same legal training, skills, and perceptions as law enforcement officers, individuals conducting undercover operations should be briefed by prosecutors before each transaction, to the extent possible, to ensure the production of the best

evidence possible. In the AzScam undercover operation, for example, the police undercover agent received telephone calls from investigators monitoring transactions during the course of those very transactions, offering advice on what should be said, or how to direct the conversation.

The prosecutor contemplating the use of a non-government undercover agent should heed the words of a local prosecutor who successfully employed such an individual in a major operation, but felt uncomfortable with the individual throughout the course of the investigation--and after indictments revealed to the public what had transpired. "You cannot control your 'agent'," this prosecutor lamented to us. Prosecutors clearly--and understandably--find that it is difficult for them to be in a situation where they have entrusted what may be a multi-million dollar, inter-agency undercover operation involving high-profile defendants to an admittedly crooked underworld figure who may be difficult to rein in.

One interesting issue that has recently arisen is the suitability of giving an individual serving in an undercover capacity a share of certain sting-related proceeds, such as assets recovered in civil suits attendant to criminal prosecutions. There is some disagreement within the legal and law enforcement community as to the propriety of such contingent fee arrangements.

The market rate for individuals serving as full-time undercover agents participating under contract in major public corruption investigations appears to be from $3,000 - $4,000 before expenses.

Selection of Targets in Cases of Rampant Corruption

In situations where corruption is believed to be widespread, prosecutors face special problems. Individuals cannot be singled out as targets of undercover operations involving inducements to improperly act in a particular manner absent some reasonable belief that they are predisposed toward such behavior [LaFave and Scott, 1972: p. 369]. Prosecutors must also tread gingerly when it comes to investigating certain classes of persons. Questions of improper discrimination may arise if prosecutors zero in on 'state officials' as a class without sufficient cause. One cannot easily argue that the circumstance of holding public office automatically predisposes the individual toward criminal behavior (although Mark Twain once suggested that "there is no distinctly American criminal class except Congress" [Twain, 1897: p. 1.8]). However, the public certainly seems to perceive that the old axiom about power corrupting still rings true, and many of those who plead guilty to, or are convicted of, public corruption offenses blame not themselves for their actions, but rather the system within which they were "forced" to operate. For example, one state representative who pleaded guilty in the AzScam undercover operation talked with reporters after her sentencing about the seduction of power. She said of the process:

> Sometimes it will be overt, sometimes covert, sometimes it's by osmosis. I lost my perspective. It's the system that's corrupt, not the people. I was stupid and I was naive. But people who were a lot more astute than me fell into the same trap. What the people have seen on [the sting videotapes] was the typical lobbying

process that happens on a daily basis down at the halls of power. If something isn't done, AzScam will continue for a long time

[Aleshire and James, 1991: p. A-6].

However, while it may be, as the reporters relating her story insinuate, that "her story says less about corrupt politicians than about the power of politics to corrupt" [Ibid.], the prosecutor must exercise caution to remember that individuals are responsible for their own actions, and they will be the ones prosecuted; it is not the system that will be put on trial.

Against this backdrop, prosecutors must make difficult decisions as to how to structure an undercover "sting" operation so as to limit its scope to those who already exhibit some characteristics suggesting that they are predisposed toward violating the particular provision of the law that prosecutors are investigating. Our on-site visits found a great deal of consistency in adherence to the principle that individuals should not be "targeted" without reasonable belief that they are engaged in criminal activity, but the interviews also uncovered a prosecutorial tendency to cast as wide a net as possible to learn who else might be susceptible to improper influence.

U.S. Attorneys were the most adamant in eschewing the targeting of individuals absent prior evidence. "The FBI does not make cold runs on anybody," according to one U.S. Attorney, who suggested that there must be some indication of predisposition before such an investigation would be commenced. Other FBI agents confirmed this belief, saying that they didn't target individuals, but rather only pursued allegations. As the U.S. Attorney involved in prosecuting the former mayor of the District of Columbia asserted, "we do not target individuals for criminal investigations. But when we receive allegations we follow up those allegations aggressively" [Washington Post, 1990: p. A-9].

One U.S. Attorney told our interviewer that his office policy was to focus on the evidence at hand and use it to guide the investigation with an eye toward looking higher up the ladder of power and corruption. Initial credible allegations would thus be used to investigate the initial individual accused of wrongdoing, but the opportunity for others to engage in similar misconduct, for example, accepting bribes in exchange for votes or contracts, might be created, especially if the corruption was believed to be widespread. Some local prosecutors with whom we met in our on-site visits were less reticent about focusing their resources. "When it comes to public integrity, everyone's a target," one prosecutor who had indirectly been involved in sting activity told our interviewer. This prosecutor saw no problem with targeting classes of persons for undercover operations. Another local prosecutor suggested that the philosophy of his office was that "You look at everyone and everything you can."

Defenses have been presented which allege selective prosecution and denial of due process rights. "[T]here is a long history in this nation of people responding to highly publicized trials on the basis of race, color, creed, or national origin" such as the Sacco and Vanzetti trial, the prosecution of Julius and Ethel Rosenberg, public corruption prosecutions involving Irish politicians in Boston in the 1940s, and even "many a southern politician . . . when faced with

problems with federal laws, claimed the feds were picking on the rebels again" [Wyman, 1990: p. 2]. African-Americans in particular have been outspoken in their criticism of recent investigations or leaks about possible investigations such as those of former District of Columbia mayor Marion Barry [Mann, 1990: p. B-3]; the South Carolina legislature [O'Shea, 1990 (A): p. A-1; Scoppe, 1990: p. B-1]; U.S. Rep. William H. Gray III (Pennsylvania) and Los Angeles mayor Tom Bradley [Duke, 1990]; U.S. Reps. Harold E. Ford (Tennessee), William Clay (Missouri), and Floyd H. Flake (New York) [Parsons, 1990; Glasser, 1991: p. 3]; U.S. District Court judges Robert F. Collins [Washington Post, 1991: p. A-6] and Alcee Hastings [Lacy, 1991: p. B-2]; and city officials in Birmingham, Alabama [Watkins, 1990: pp. S 2533 *et seq.*].

This litany suggests that prosecutors should exercise extreme caution in charging decisions. Selective prosecution defenses may be raised by showing that the prosecutor has not brought charges against most members of a particular class or status who commit similar acts to those the allegedly discriminated-against defendant is charged with committing. A "broad net"--as some prosecutors are wont to describe their operations--may be a most effective tool in avoiding such challenges, assuming charging decisions are made fairly and based upon evidence gathered in such a comprehensive probe. However, too broad a net may lead to allegations that the prosecutor is merely on a fishing expedition of sorts, and does not have sufficient evidence upon which to either open an investigation against an individual or target an individual--or even a class--for a sting operation; the requisite degree of predisposition may be far more difficult to prove as the investigation becomes wider.

Local sting operations in public corruption cases involving any significant degree of breadth are virtually non-existent. One local prosecutor who had established an active independent public corruption unit told our interviewer on an on-site visit that his office had not employed a sting operation in almost a decade because his office simply did not have the luxury of time and resources that he viewed as being conditions precedent to the use of such tactics. The 1991 Maricopa County/Phoenix experience may, however, generate more local interest in such activities. Indeed, the Arizona process is already being viewed as a potential model for local public corruption investigations [Biemesderfer, 1991: p. 18].

There are many reasons why sting operations involving local public corruption are so few and infrequent. Costs are high, stretching the resources of most local prosecutors and their investigative counterparts. The AzScam sting was estimated to cost somewhere close to $2.5 million, a figure that would dwarf the total annual budgets of most local prosecutors offices around the country (even federal prosecutors might have difficulty justifying the application of such a sum toward a somewhat speculative operation). Local prosecutors also have to carefully consider the effect of "potential political fallout" on the office, as one local prosecutor who has successfully undertaken a major public corruption sting operation told our interviewer, "You don't see local stings due to political problems." This prosecutor suggested that prosecutors must always remember that they will likely still be in office after a sting operation is concluded, and that they will still have to work both with and within the system. Lingering suspicions and resentment can lead to less than effective working relationships at the local level.

Also a factor with respect to cost is who will pay for the operation. One legislative corruption case that began at the local level was turned over to the U.S. Attorney because the financing and other resources for the prosecutor's investigation would have had to come from the state's law enforcement agency, which is controlled by the governor, and financed--and closely overseen--by the legislature. This local prosecutor told our interviewer that potential political problems with the financing and operation of what was expected to be an extensive investigation led him to turn the case over to federal authorities, who, he noted, "don't have to worry about that kind of stuff" (in this instance, local political influence).

Protection of Institutional Integrity in Undercover Investigations

No less important a principle is at stake in many undercover operations than the separation of powers between the three branches of government. Even under ordinary circumstances the functioning of the system often places the prosecutor in a predicament. The prosecutor must work within the context of the judiciary while functionally serving as a part of the executive branch, all the while operating under the umbrella of laws enacted by the legislative branch. When the prosecutor begins to investigate a member or employee of the judiciary, a member or employee of the legislature, or an official or employee of the executive branch, significant problems can arise.

In one recent case, the Arizona legislative undercover operation, a reporter later summed up the aftermath by noting that investigators "set in motion more than a simple public corruption investigation. They reset the course of history for an entire branch of government [Gurwitt, 1991: p. 27]. The result: "All of those legislatures [where sting operations were used: Arizona, California, South Carolina, Tennessee, and West Virginia] are now, to some degree, wounded institutions" [Ibid.]. Indeed, in South Carolina, the effect has been to reassess the entire structure of state government, including the powers and functions of all three branches of government [*see*, Thelen, 1991: p. D-1]. What the likely institutional effects are, and whether they even should be considered is something that few prosecutors take into consideration at the outset of an investigation. Further, while those who devise an investigative protocol may believe that events "necessarily follow a foreseeable course, evolving circumstances require[ ] constant reassessment [Panneton, 1990: p. 15].

- Legislative Integrity Issues

The legislature is a co-equal branch of government, with members elected by and directly accountable to, the people of the state or commonwealth. Legislatures are imbued with the sole authority to enact legislation. An attempt by a prosecutor to subvert the workings of the legislative branch for the purposes of conducting an undercover investigation can result in serious damage to the credibility of the process--perhaps even going beyond the damage alleged to have occurred as a result of the activity complained of. Prosecutors must tread softly in the halls of the state house.

Legislation introduced merely as a ruse to further an investigation (a so-called "vehicle bill") might have unintended effects. Few legislatures function under the luxury of no time constraints. The vehicle bill might receive a hearing in committee or be allocated time for debate on the floor that would otherwise have been allocated to consideration of a genuine item of public policy concern. Introduction and consideration of such a measure could mean the defeat by default of other "innocent" pieces of legislation.

The vehicle bill might also forever serve to cast aspersions on a type of legislation, or effectively taint an important public policy issue. If, for example, a "private" vehicle bill is used to advance a special interest in an undercover investigation, as was done in the investigation of California legislators and staff, all future private bills might receive extra scrutiny, or merely be viewed with suspicion or disdain, resulting in their demise regardless of the merits (not all states have a mechanism that would permit such legislation for private relief to be introduced). Similarly, certain pieces of substantive legislation selected for use in an undercover investigation, such as casinos in West Virginia, pari-mutuel racing in South Carolina, and bingo in West Virginia, may forever bear an almost insurmountable burden that could affect public policy for decades to come. The chair of the Arizona Senate Ethics Committee referred to the loss of the ability "to have a reasonable, thoughtful discussion on a topic" as a result of its involvement in a sting operation as "the police making public policy" [Gurwitt, 1991: p. 30].

Questions also arise when sting money is turned into campaign contributions by those receiving the bribes from undercover agents. Considerable concern was voiced in Arizona, for example, by legislators and civil libertarians, who suggested that the government may have subverted the election process to throw a few bad apples out of the legislature.

- Judicial Integrity Issues

Investigations involving the judicial branch carry with them special risks and attendant responsibilities. While it may not be illegal to invent phony legislation--or use an authentic bill on a real public policy matter as a front--exploiting the judicial system in a similar manner is often fraught with peril.

Judicial investigations tend to revolve around three forms of corruption: (1) case fixing by a judge in his or her court; (2) steering of defendants by judges to certain attorneys; and (3) fixing of cases by a judge in other court rooms. These practices are respectively known as fixing, hustling, and brokering [Valukas and Raphaelson, 1988: pp. 2-5].

Canons of ethical conduct impose constraints upon prosecutors seeking to perpetrate fraud upon the court, regardless of the motive. When cases involve real defendants, regardless of the ends, constitutional rights might be abrogated [Office of Legal Counsel Memo, 1981: pp. 9-10]. These restrictions severely limit the investigative strategies of the prosecutor. Electronic surveillance should not be used. Cases should not be invented. Real cases should not be subverted. Undercover agents should not be substituted as lawyers for real defendants. Using real private attorneys in an undercover investigation may raise questions of ineffective representation. But

these tactic have been successfully employed, and are only broad suggested guidelines. In Operation Greylord, the massive judicial undercover investigation in Cook County, Illinois, a U.S. Court of Appeals upheld the propriety of the use of phantom cases [*United States v. Murphy*], and an investigation into "various corrupt activities" in Florida courts "involved the placing of fictitious cases before a number of state judges, with notifications to the Chief Justice of the Florida Supreme Court," with federal and state undercover agents appearing in court as defendants, according to a joint statement by the U.S. Attorney and the Dade County State Attorney [Leen and Lyons, 1991: p. A-1]. But the threat of disbarment or discipline by state courts or the state bar looms large in the minds of many prosecutors.

Finally, there may be a practical concern at work. If the investigation involves a court in which the prosecutor and members of the prosecutor's office must regularly appear, there may be an additional element of personal discomfort and ethical doubt. Practicing in front of a judge whom one is investigating poses additional problems. Similarly, if the prosecutor knows that a judge is regularly fixing cases such as those in which the prosecutor's office regularly prosecutes, there may be additional elements present which could require a motion to disqualify the judge or change the venue of the proceeding (although in routine cases--those typically subject to fixing--such a motion could serve as a red light for the judge, alerting the wayward jurist to a potential problem).

- Administrative Integrity Issues

The executive branch of government does not begin and end with the governor. Of far greater importance to most people seeking favors from government are the various boards, commissions, and agencies that have been established under statute or executive order to implement or oversee certain functions. These administrative entities can have a major impact on the way people conduct business--and how expensive it might be to do something.

Examples of administrative corruption can include safety inspectors being paid off to overlook an unsafe condition in a private residence to a planning commission member being bribed to vote for a zoning change, and an agency director receiving unreported benefits in exchange for ensuring that changes in regulations promulgated by the agency would not unduly impact the director's benefactor. Finally, the act of a governor in vetoing, signing, or allowing a bill to become law without his or her signature may also be a target of an unscrupulous person. Such activities of governors may be considered to be outside the normal purview of executive actions, and instead be considered under the realm of legislative activities, changing the perception and prosecution of such issues [*Mandel v. O'Hara*].

Few problems are posed in terms of institutional integrity with respect to the lower-level individuals (the inspectors, for example). However, there are problems associated with the integrity of the system when an undercover investigation of county planning results in the rezoning of land that negatively affects the property value of adjacent or nearby landowners (consider that if the change would not be controversial or detrimental, the improper activity would not likely need to be initiated). There are also problems when rules are changed that

would benefit a particular group or interest following what many might have assumed was a proper hearing with public input. There almost invariably will be an individual "loser" who pays a heavy price for the improperly acquired success of each unjustified "winner" in such transactions. But there will also be a more generalized loser: the public interest, since taxpayers are the victims of such a crime, and because trust in government is eroded by such incidents.

In one federal sting operation involving the municipal bond business in Indiana, the FBI apparently established a front organization as a financial adviser to government, allowing investigators to "get a good view of the situation without being an underwriter, which erases a lot of sticky legal questions," according to an individual involved in the investigation [Pierog and Oxnevad, 1991: p. 19]. Other advantages of such an arrangement: investors, this individual explained, would be prone to panic if they discovered that they held bonds essentially underwritten by the FBI, and the FBI could also be spared a potential outlay of hundreds of thousands of dollars that would be necessary to its participation as an underwriter [Ibid.].

Preservation of Institutional Integrity

Prosecutors acknowledged to us in our on-site interviews that they recognized, and were sensitive to the potential for compromising institutional integrity. But they also expressed to us a strong desire that they not be forced to compromise the integrity of their own investigations. The bottom line among the prosecutors with whom we discussed the issue was that they were more likely to be troubled by institutional integrity issues affecting investigations of the judiciary than they were with respect to those looking into legislative or executive branch corruption. Because prosecutors have to appear on a consistent basis before judges and court officials who might be targeted in an undercover operation involving the judiciary, such an investigation becomes more problematic for them than one which involves a different branch of government.

With respect to legislative matters, one local prosecutor who has conducted undercover investigations of legislators told our interviewer that the covert phase of the operation opened with the understanding that the investigators would "try not to have legislative process usurped very far." This prosecutor did not feel comfortable approaching legislative leaders with even an outline of the charges or investigation, fearing that even the most subtle of comments about the investigation--even to those in charge of the institution, who may not ever be viewed as under investigation--can hinder the effectiveness of the investigation. "I'm not sure that you can trust anyone" with 'sexy' information, this prosecutor worried. A decision to proceed with the investigation should be based upon the prosecutor's belief that the undercover investigation is necessary to further the matter and will result in admissible evidence that will lead to a conviction.

A federal prosecutor told our interviewers in the course of an on-site visit that his decision as to whether to inform the leaders of an institution turned on the relationship between the investigators and the leadership. If investigators are at all concerned about compromising the investigation, he counsels, then they should not feel compelled to inform institutional leaders. In the federal investigation of corruption in the California legislature, those directing the sting

maintained silence on the existence of the investigation for as long as they felt was possible. This turned out to be the point at which the contrived legislation was presented to the governor for signature (he vetoed the measure on the advice of the FBI) .

Selection of legislation or other matters which would be the "lure" for the illegal activity must also be a matter given careful consideration. One local prosecutor told our on-site interviewer that the item selected should be one that is amenable to creating opportunities and a "climate" that lends itself to corruption. We were told by prosecutors that this means that the item chosen as the centerpiece should (1) be a controversial issue, and (2) be one that those charged with decisionmaking would normally be somewhat reluctant to approve. Another prosecutor suggests two additional factors: (3) choose an issue in which there is a lot of money involved, and (4) find an issue on which the players--those who seek to effect the proposition--are not known to the officials who would be passing judgment. Finally, in federal cases involving the Hobbs Act, there must be present (5) an interstate commerce element to the act (preferably not one that becomes an interstate activity merely because federal investigators choose to locate an address for the principals out of state).

Certain caveats must also be set forth in deciding what issue to center a sting around. Some FBI investigators involved in legislative stings have chosen to avoid using legislative issues with sharply charged constituencies (such as abortion), and bills on issues that might draw excessive public support or antipathy. Refraining from use of issues with distinct battle lines allows the legislation to proceed in a context that is better defined by the participants themselves: the prosecutors and investigators, and the subjects and targets. Bills with excessive backing or opposition from the public could also serve to cloud the matter.

Where state proscriptions prevent private bills from being considered, prosecutors have looked toward so-called "sin bills" to give them the appropriate issue for consideration. Thus, stings in Tennessee have used bingo; in West Virginia and Arizona casino gambling was the issue; and pari-mutuel wagering was dangled as the bait in South Carolina.

The U.S. Department of Justice is extremely cautious about granting clearance for undercover investigations of coordinate branches of government. The head of the Justice Department's Public Integrity Section has warned U.S. Attorneys that "Care must be taken to make sure that in the course of our investigations, the Justice Department does not buy and pay for legislation that will affect the lives of the citizenry. It is simply not acceptable to cause a dry county to go wet, or a state to legalize gambling no matter how many crooked legislators are caught in the process" [McDowell, 1988: p. 113; *see also*, Panneton, 1991: p. 14].

One practical solution to this dilemma employed by the U.S. Attorney and FBI in South Carolina's Operation Lost Trust was to introduce a bill that authorized a referendum for the public to determine whether it preferred to legalize pari-mutuel racing, a "fail-safe" alternative to initiating a bill that would have actually served to change the underlying substantive law. Even if the referendum legislation had passed, it would not have directly altered state law; there still would have been an intermediate step required before the substantive provisions would have

taken effect. In California, care was exercised to introduce "fetcher" legislation that "had the practical effect of applying only to the FBI company" by exempting the FBI front company from certain capital requirements that were a condition precedent to eligibility for industrial bond financing [Panneton, 1991: p. 14].

Several precepts have been set forth by the U.S. Department of Justice to guide prosecutors and investigators in their decisionmaking processes in these matters. The Attorney General's Guidelines on FBI Undercover Operations suggest a balancing of the following risks against the potential evidentiary benefits expected to result from the undercover activity:

(a) the risk of harm to private individuals or undercover employees;

(b) the risk of financial loss to private individuals and businesses, and the risk of damage liability or other loss to the Government;

(c) the risk of harm to reputation;

(d) the risk of harm to privileged or confidential relationships;

(e) the risk of invasion of privacy;

(f) the risk that the proposed undercover conduct will result in entrapment; and

(g) the suitability of undercover employees or cooperating private individuals participating in activity of the sort contemplated during the undercover operation

[Attorney General's Guidelines, 1987: p. F.(3)]. One additional admonition comes from a federal prosecutor, who told our interviewers that the prosecutor and investigators should also do their utmost to limit the unwitting participation of third parties. For example, if an informant is used, care should be taken to use someone who does not have other clients who might be tainted by revelations that their contractor or consultant or lobbyist is the key figure in a cash-for-votes scheme.

In matters involving the judiciary, prosecutors in our on-site interviews indicated a general preference for being able to discuss matters with the chief judge of the court involved, or seeking out a chief administrative judge of a higher court for advice and guidance. However, if there was an overriding concern to protect the investigation, this concern would typically override the desire to cover one's various bases.

While providing notice to those in charge may not be necessary, it certainly can help in several areas. By seeking input, the prosecutor may be able to protect himself or herself against charges by those targeted of unwarranted or unjust usurpation or intrusion into the affairs of a coordinate branch of government. A discussion of the course of conduct leading to the investigation might also yield valuable leads that will further the course of the investigation or narrow the focus of

the probe. Leaders may also offer or be asked to provide "cover" for various aspects of the investigation, such as suggesting appropriate cases, vehicle bills, or individuals who might be predisposed toward engaging in certain illicit acts. Public criticism may also be deflected by enlisting the assistance of leadership in the investigation. Finally, while advance notice of investigations may not be absolutely necessary, it certainly helps the prosecutor in cases involving disputes over sovereignty [*Murphy v. United States*].

Prosecutors considering embarking upon investigations of judicial systems, in particular, should consider alternatives to undercover investigations as means for gathering information. If other methods for gathering evidence are open, those should be given consideration before employing something as extensive as a sting operation and its attendant implications. Options such as discreetly interviewing court personnel and attorneys who regularly appear before the courts in question, immunizing potential witnesses, analyzing court records for trends and aberrations among judges or divisions, and analyzing the financial records of suspected judges and lawyers could help to alleviate the necessity of undermining the foundations of the institution through use of spurious activities [Valukas and Samuelson, 1988: pp. 10-11].

One federal prosecutor told our interviewers that the key to an effective undercover investigation involving public corruption is to create an investigatory design that is of "simple profile," and maintain close reins on each significant action undertaken, "always thinking about how it will play out with a jury."

With this in mind, federal and local prosecutors have used flamboyant figures as their undercover agents, making it very difficult for legislators to avoid the feeling that something just wasn't quite right with the situation. In Arizona, the key figure was an individual whose presence, expensive clothes, gold chains, and diamond pinky ring made him look like something straight out of central casting for a Mafia movie, as more than one observer later commented [Biemesderfer, 1991: p. 13]. In South Carolina, the key figure was a lobbyist best known for his Jaguar, snappy attire, expensive cigars, poker-playing ability, heavy drinking and cocaine use, and a cloud over an incident involving the shooting of his ex-wife and his subsequent custodianship of her affairs. The federal investigation in Illinois into judicial and political corruption, Operation Gambat, featured as its undercover agent a crooked former police officer who became a crooked attorney, and who owed "hundreds of thousands of dollars in back taxes" and a six-figure gambling debt to "mob bosses" [Samborn, 1991: p. 8]. In Florida's federal-state Operation Court Broom investigation into Dade County judicial corruption, the government informer was a high-profile "flamboyant and controversial figure in South Florida legal circles" who had served as Panamanian General Manuel A. Noriega's former lawyer, had represented "big-time drug defendants for the better part of two decades," had been "sued repeatedly for failure to pay his bills" [Resnick, 1991: p. 43] and had "the IRS stalking him for almost $93,000 in delinquent federal taxes" [Parker, 1991: p. A-4]. One judge's attorney suggested that "Letting [this informant] run wild through the system is like letting the snake sell his own oil without the middleman" [Ibid.]. As one prosecutor with sting experience told us, the stings that will play best with the jury are those which make things look so obvious that the jury can't believe that

an official would be so naive as to fall for the ruse. Make your key figure look almost like a caricature, this prosecutor advises.

Market rates may also be difficult to measure. Legislators were bought in South Carolina during Operation Lost Trust for sums ranging from the low hundreds of dollars to just a few thousand dollars. In Arizona, by contrast, legislators involved in AzScam generally fared quite a bit better than their colleagues in South Carolina. While a few sold "too cheap," others sought--and may have been promised--six-figure deals, and several received five-figure bribes and campaign contributions.

Finally, care should be exercised, again, to ensure that prosecutors are not working to undermine the democratic process. The crime of money laundering may arise when a legislator accepts a bribe from an undercover agent and reports it as a campaign contribution. This is a very real question facing prosecutors: do they further subvert the law and process in certain circumstances which seem to often arise in undercover operations? Some considerations with respect to cash flowing into elections have been set forth above; additional concerns about the timing of operations will be specified in greater detail in the section of this report that covers matters of timing.

Investigating Public Records Without Breaking Cover

Maintaining confidentiality is vital to the integrity of the investigation. Breaking cover is a strategic decision that should be dictated by the progress of the investigation, and not by an unfortunate slip of the tongue or an indiscreet entry in the logs of a public agency. While many of the documents that investigators will wish to peruse are most frequently matters of public record, in practice it may be difficult for the prosecutor to avail himself or herself of the opportunity because of the risks attendant to disclosure of the investigator's interest in the records.

Public records most often likely to be of interest to investigators will include personal financial disclosure statements, conflict of interest declarations, campaign finance disclosure statements, lobbyist and lobbyist employer registrations, and disclosure reports submitted by lobbyists and those who employ lobbyists. While it may be easy to review these records, they are frequently maintained by political officers or employees (such as secretaries of state, clerks of the house or senate, or legislative ethics committees). Even if records are preserved by an ostensibly independent ethics board or commission, many of these entities are run by partisan boards and staffed by political appointees. Merely walking into an office and asking to see a given set of records may have the effect of (1) warning a particular individual that someone is reviewing that official's or employee's filings and giving them cause to consider amending a report or statement; or (2) alerting people to the fact that law enforcement agencies are poking around, which could compromise the investigation by "freezing" suspected conspirators for a period of time, hindering the ability of investigators to gather information and evidence.

These effects can occur even if the investigator is not required to provide his or her name to the entity before being granted access to the material. A friendly office worker can just mention to the person being investigated that "someone" was in to review the files. In smaller communities where investigators may be known, at least in political circles, it is not difficult for people to quickly add up the elements and realize that something is afoot. Even a move to enlist the cooperation of the top person in the records office may not prove to be appropriate; going outside of the normal procedures may also serve to raise a red flag in front of wrongdoers.

Many investigators prefer to use subterfuge to examine public records, or won't review them at all while they are on the public docket, choosing instead to wait until the investigation is ready for public disclosure, and then subpoena the documents (often the records pertaining to the entire class, such as all legislators) to permit review at leisure, laboratory analysis of forms for alterations, and a set of effectively static records that cannot be amended or altered after they have been seized by investigators. In the South Carolina legislative sting, the first real public inkling of an investigation came when the federal government issued subpoenas for the campaign finance reports of all 124 House members. In another sting operation, however, investigators successfully employed the ruse of a university study of election spending to quietly gain access to the campaign finance records of legislators and other state elective officials.

Decision to Make the Investigation Public

Determining the appropriate point at which to bring an investigation into the open is not an easy task. The simple answer, as given by one federal criminal chief we interviewed, is to do it as late as possible in the course of the investigation, and "do as much as you can discreetly as long as you can."

One local prosecutor told our interviewer during an on-site visit that the decision to make the investigation public would be the result of either of two circumstances: (1) either the prosecutor has reached the point at which he or she has just about successfully completed the prosecution; or (2) there is just no other road to go other than to "hit them dead on"--such as "when information you need can be obtained in no other way," as one U.S. Attorney told our interviewer. This U.S. Attorney added a third circumstance for going overt: (3) when the prosecutor wants to see how people react to a situation.

The last item is of extreme importance. One local prosecutor told our interviewer that the investigation really never concludes. This prosecutor asserts that investigators should always continue their investigations . . . "even after you're done," as he put it. This is where, prosecutors say, they are able to find evidence to support obstruction of justice charges. When the news of an investigation breaks, conspirators often contact each other to "get their stories straight," and if surveillance methods have been employed in the investigation, they should be continued in the phase immediately following disclosure of the investigation to bolster the charges that may be brought against those who are involved. When the Federal Bureau of Investigation subpoenaed the campaign finance records of certain South Carolina legislators, it

assigned 50 agents--two per member--to keep those members from warning others and giving them an opportunity to destroy or alter the documents.

A fourth reason for bringing an investigation into the open may be because the media has learned of investigative activity, and has published something that could compromise the integrity of the investigation. In such cases, the prosecutor may have little choice but to make the existence of an investigation--or components of an investigation--public. Prosecutors and investigators prefer to "compartmentalize" their cases as best as possible, so that if they are placed in a position where they must acknowledge the existence of an investigation involving one area of interest, the government is not forced to compromise an ongoing investigation that may be related to the one which has been disclosed. While knowledge of the existence of an investigation might be expected to have a deterrent effect upon participants, prosecutors are armed with a legion of stories which detail bribes continuing to be demanded later the same day after an investigation has been made public.

Ideally, the decision to go overt in an investigation should be one that is made jointly by the prosecutor and investigators.

When to End an Investigation

Related to the decision to bring the existence of an investigation into the open is the decision that must thereafter follow: when to effectively conclude the investigation and bring charges.

In cases involving ongoing conduct, there may not be a clean "break point" at which to appropriately conclude an investigation. When illegal conduct appears to be a continuing occurrence, there may be a temptation to maintain an investigation past its useful conclusion. Keeping an investigation open may result in unnecessary expense; a diversion of resources from more pressing matters; the possibility of compromising the activity or even undercover agents; and the risk of harm to innocent third parties.

Prosecutors look at the question from different perspectives. One local prosecutor suggested to our interviewer during an on-site visit that his decision to end an investigation came "the minute that I feel we have proof sufficient for a conviction." This prosecutor felt that it was best to "take the one you have the lock on" and turn that person for information as to others involved in the matter. On the other hand, another local prosecutor told us that he ended his investigations not on the basis of an affirmative event, but rather when his investigators were unable to find probable cause to indict a subject or target of the inquiry. Finally, another local prosecutor indicated to our interviewer that if the alleged crimes being investigated were ongoing, the investigation should also continue.

The decision on termination seems to boil down to the professional judgment of the individual prosecutor and investigators assigned to the case. Prosecutors are cautioned, however, not to give up the investigation too early, and to watch for evidence of systemic corruption that would justify

the continuation or expansion of the investigation, as one criminal chief suggested to our interviewers.

The prosecutor must take care to ensure that an investigation is not jeopardized by the decision of an individual subject or target to not cooperate in the probe. A prosecutor's decision to "turn" an individual to help in the investigation should fully consider the consequences of the individual's failure to participate on the side of law enforcement. An individual who has been tipped off by prosecutors that he or she stands to be indicted may choose to adopt a hard-line stance on cooperation and decide instead to warn others involved in the scheme (although doing so will likely lead to obstruction of justice charges). In the California Operation Brispec legislative bribery undercover investigation, federal officials failed to secure the assistance of a key legislative staffer--and immediately after the unfruitful interview with the individual, approximately 30 FBI agents executed search warrants at the State Capitol [Panneton, 1990: p. 16]. The search warrants had been obtained several days before, in anticipation of the individual's reaction, as part of a clear plan of action agreed to in advance of the individual's non-acquiescence [Ibid.]. The plan also called for teams to simultaneously interview numerous witnesses, and for the review of publicly available information [Ibid.].

Investigative Role of the Grand Jury

Grand juries in different states and at the federal level are held in varying degrees of repute. Some may be backwater tools of a wily prosecutor, while others may be effective, aggressive, independent investigative entities with a penchant for finding the truth, regardless of the direction to which a prosecutor may wish to lead them.

Depending upon the state, the grand jury was viewed by the prosecutors whom we interviewed as a "ratifying entity," a "rubber stamp for prosecutors," or even as "an investigative modality." The degree of reliance on the grand jury is related to state statutes. In some states, there may be other laws that would give the prosecutor the type of information that he or she seeks without the need for going before the grand jury. For example, Kansas affords prosecutors the ability to use an "inquisition statute," which allows the prosecutor to compel testimony and produce records related to certain heinous crimes, including bribery. The rough federal equivalent to the Kansas statute is the "forthwith subpoena", where an individual may be required to produce materials on the spot. U.S. Attorneys are cognizant of the rights at stake, and are not wont to use this power loosely, since it effectively is a search warrant that does not require establishing probable cause.

At the federal level, use of the grand jury in public corruption cases was described as "an absolute essential in terms of gathering records" under subpoena by one criminal chief--a fact confirmed by members of the white collar criminal defense bar with whom we spoke. Federal prosecutors may sit in the grand jury session and pose questions. Through use of the administrative summons power, people may be brought in to tell their stories, which might not have emerged otherwise. This prosecutor suggests that two questions should be reviewed before a decision is made to convene a grand jury: (1) whether substantial credible evidence exists to

believe that there is a potential case, and (2) whether the grand jury would be the best means for uncovering the sought-after evidence or learning about prospective witnesses.

Another possible investigative tool is the use of statewide grand jury powers to probe allegations of public corruption. The statewide grand jury can be limited to a specific type of investigation, and can be tapped into by a local prosecutor or a state-level official (such as an attorney general). The statewide nature of such a grand jury affords several advantages, including:

(1) The drawing of a broader venire. The ability to draw jurors from outside an area where corruption has flourished means that the case will be prosecuted with a lower likelihood of jury nullification, and the members of the jury will be less likely to factor their preconceived notions about the targets and subjects--either positive or negative--into their decisionmaking process. Jurors will also be subjected to less peer pressure "back home" when handling cases involving another jurisdiction. When dealing with an investigation of a state public official or public employee, the jury venire may consist of individuals from throughout the state, rather than being comprised exclusively of those who live in the county or judicial district in which the seat of state government just happens to be located. Federal courts often use a statewide jury pool to help minimize bias when public officials are charged in highly publicized federal cases.

(2) The ability to effectively investigate cases that cross political jurisdiction boundaries. Many state cases of public corruption involve an element of intrastate commerce: travel voucher or procurement fraud; embezzlement from government bank accounts in other counties; or acceptance of bribes for contracts to be performed elsewhere in the state. Our on-site interviews indicated that it is not an infrequent occurrence when local prosecutors quarrel over jurisdiction in such cases, playing a game of political "hot potato" in trying to pass controversial cases off to colleagues. A statewide grand jury may serve to reduce or eliminate these turf battles, as can investing a larger prosecutor's office--such as those often found in the capital of a state--with either the exclusive or supplemental authority to prosecute crimes arising anywhere in the state resulting from the misuse of state position or funds.

(3) Guaranteed prosecution of appropriate cases. Currently, if a local prosecutor declines to prosecute state public corruption charges (that do not rise to the level of federal criminal offenses), regardless of the reasons, there may be no alternative for those who feel that prosecution is appropriate. A statewide grand jury offers such an alternative, and a provision can be inserted that would re-institute jurisdiction with the local prosecutor should the statewide grand jury or statewide prosecutor decline to pursue the charges.

(4) Isolation of local prosecutors--and the process--from political pressures. One of the principal concerns of local prosecutors that results in their turning

> allegations of public corruption over to federal prosecutors is political pressure or conflict of interest. A statewide grand jury for investigating public corruption would remove the local prosecutor from the loop, and make it easier for the prosecutor to pass the charges along to another entity with jurisdiction. This can be as an alternative to federal prosecution, or it can be the last resort in an instance in which federal offenses have not been alleged. The same logic applies to isolating the process from the influence of those at the local level. One strong reason for South Carolina to work toward such powers was, according to the state's attorney general, because "It's difficult to get indictments and convictions at a local level for popularly elected officials" [Allard, 1990].

A statewide grand jury to combat public corruption was deemed such an important issue in South Carolina in 1990 that the Republican governor and Democratic attorney general banded together to spend $25,000 from their respective campaign funds to buy radio advertising urging voters to defeat constitutional limits on the existing state grand jury that would have kept it from investigating public corruption [Pope, 1990: p. A-1].

Those concerned about "runaway" state grand juries can see to it that the legislature imposes necessary statutory safeguards--including the ability to withdraw the authority. Placing the grand jury under the direction of an elective official--such as the attorney general, or even a state solicitor general--and under the jurisdiction of a state judge can provide further checks and balances.

Estimates for the cost of a statewide grand jury in South Carolina (which would look at matters other than just public corruption; its principal mission would be helping to alleviate the drug problem) are in the range of $675,000 per year for three attorneys and related expenses [Strong, 1991: p. B-2]. While it could be argued that the real cost is in the foregone opportunities to devote these resources to the investigation and prosecution of other crimes, these attorneys would not likely have been working for the state if there had not been a special appropriation.

DECISION TO CHARGE

Factors entering into the decision to charge include the need to look for guidance or approval from outside the office; correlations between certain types of charges and conviction rates; policies with respect to charging persons paying bribes as well as those accepting them; the potential for "sending a message" to, or "smoking out" others who might be involved in misconduct; the effect on public confidence in government; the potential for using tax evasion charges in cases involving financial misconduct; the availability of charges against a public official or public employee based upon the public official or public employee's personal vices rather than broader public corruption charges; the availability of conspiracy charges, and the structuring of a conspiracy charge; a determination as to whether a violation of the law is de minimis, and therefore should not be pursued. Subsequently, the prosecutor will have to decide whether a decision not to charge should be made public, and whether to convey relevant investigative material to other law enforcement entities following an inconclusive investigation involving a public official or public employee.

Perhaps the best elaboration of factors that would have a bearing on whether to charge an individual comes in the form of a statement made by a Justice Department official to a congressional committee. Stephen S. Trott, representing the Criminal Division of the Justice Department before a House Judiciary Committee subcommittee, phrased this in the negative; a determination of a lack of prosecutive merit in conflict of interest cases would include the following amalgam of items:

> (1) lack of evidence of venal conduct;
>
> (2) lack of evidence of tangible harm to the government;
>
> (3) lack of evidence of gain to the potential defendant or a party represented by the potential defendant;
>
> (4) the existence of strong legal defenses;
>
> (5) the existence of strong factual defenses;
>
> (6) authorized punishment disproportionate to the offense or the offender;
>
> (7) substantial likelihood of acquittal if prosecution were to be undertaken; and
>
> (8) the existence of administrative action as an adequate alternative to criminal prosecution [U.S. Congress, House, 1986: p. 66].

External Approval for Charging Decision

Virtually any type of public corruption charging decision (except mail fraud) at the federal level requires clearance from the U.S. Department of Justice. We were unable to find any local prosecutor who was required to seek approval from any other entity prior to filing public corruption-related charges against a public official or public employee.

The federal review, while not pro forma, is usually performed with an eye toward further honing a case, rather than attempting to persuade the U.S. Attorney against bringing the preferred set of charges.

Correlations Between Types of Charges and Conviction Rates

Our on-site visit interviews turned up no anecdotal evidence of correlations between certain types of charges and conviction rates. The survey of prosecutors indicated that convictions and plea agreements were accomplished in rough proportion to the number of charges brought. While theft and embezzlement were ranked highest in successful prosecutions, they were also the offenses most frequently prosecuted. There was no quantitative or qualitative evidence to suggest that prosecutors enjoy a higher success rate when prosecuting certain types of public corruption than they find with other charges.

Charging Bribe Payors vs. Recipients

Does the prosecutor treat both elements of a bribery transaction equally? Although prosecutors preface their answers to this question by suggesting that they will try to charge both parties in the prohibited transaction, in practice, this amounts more to rhetoric as the dictates of reality give way to the more abstract desire for consistency in charging decisions.

While prosecutors may "generally look at both equally," as one local prosecutor outlined it to our interviewer during an on-site visit, they tend only to charge both if they have sufficient supporting evidence to convict both without requiring more from someone directly involved in the transaction. Since bribery is typically a consensual transaction, such independent evidence is difficult to obtain, and one of the two parties will have to be "turned" by the prosecutor.

Forced into having to make a decision, prosecutors will invariably look to prosecute the "bigger fish" in a criminal case. In the typical situation, the individual paying the bribe is in an inferior position to the public official or public employee. This element of apparent coercion, coupled with the status of the public official or public employee and the attendant degree of trust and responsibility that public service carries with it, means that prosecutors will "trade up" to get information against those most culpable. As one local prosecutor explained it to our interviewer, the crime of bribery is basically on the books as an offense against the public trust, and "it's that attitude that we're getting after."

One option that the prosecutor has is to initially charge both parties with violating the law. This places the prosecutor in the strongest possible bargaining position. One local prosecutor told our interviewer that his office policy was to charge both, and then negotiate for testimony. This also

helps the prosecutor in the eye of public opinion. One refrain we continually heard raised was that "no one likes a snitch," and the more that the prosecutor can do to show that the person who may testify under a grant of immunity or promise of leniency is still being held accountable for his or her transgressions, the stronger the case becomes in the eyes of jurors. One factor that will enter into the decision to prosecute will be the extent of the bribe payor's illicit conduct; a bribe payor whose unlawful conduct was willful, wanton, and extensive would probably be held to a higher standard than one whose conduct doesn't go much beyond acquiescence.

Federal prosecutors point out that both sides of the transaction cannot be prosecuted under the Hobbs Act; only the recipient of the bribe may be charged under this law.

Use of Charges to Motivate Others

By bringing charges of public corruption against public officials, public employees, or those who may be identified as having special business arrangements with public officials or public employees, prosecutors may send a message to the community at large that unethical conduct is not being tolerated, and to the political community that people are free to conduct business without fear of retaliation or extortion, and that they should come forward to help cleanse the system of those who would seek to corrupt the system for their own ends.

Prosecutors will frequently bring charges as a warning shot of sorts, but caution that they would not do so unless there were substantive legitimate underlying charges that offered the opportunity. All of the prosecutors interviewed during the on-site visits indicated that they would do so, but not cavalierly. One local prosecutor acknowledged having engaged in the practice, and then promptly admitted that he should have been censured for it. Another local prosecutor suggested that for him, it was an effect, but never primarily the motivation. Another local prosecutor admitted performing such actions when needed to "cool down" people, citing instances of internal agency investigations which failed to deter the dubious conduct, but when the prosecutor brought charges, things changed in those agencies, and the practice complained of "will never happen again."

Not only can such charges send a message that certain activity no longer will be tolerated, but they can also serve to win the confidence of the public or political community, and open eyes and ears, as one federal criminal chief related to our interviewers. By suggesting through news conferences and news releases that there will be a new "fear-free" atmosphere, people are encouraged to come out into the open and turn over evidence of wrongdoing, providing the probable short-term benefit of bolstering the case which served as the example, and the potential long-term benefit of getting others to step forward with allegations or evidence that might help secure convictions of others involved in wrongdoing.

Extent to Which Public Opinion or Confidence is Considered in Decisionmaking

Prosecutors are extremely sensitive to public opinion and to the effect that their decisions to charge or not to charge will have on public confidence in government. Local prosecutors, most of whom happen to be elective officials, appear to be particularly aware of such considerations.

Prosecutors obviously resented any inference that they were slaves to public opinion, bringing cases when there was a public perception of general wrongdoing merely to placate the public. "We don't bring chickenshit cases," one local prosecutor told our interviewer during an on-site visit. And there was no evidence, qualitative or quantitative, that we found that suggested that prosecutors brought cases just for this reason, or in the absence of sufficient evidence or justification. As one U.S. Attorney told our interviewer during an on-site interview, if there is a perception in the community that public officials or public employees can get away with something that is illegal, that kind of an impression is harmful and should be changed.

Prosecutors did not, however, appear to ignore public outrage, even if they viewed it in somewhat convoluted terms. One local prosecutor told our interviewer that he didn't let the public run his higher ethical obligation, but then the prosecutor mentioned that he looked at the allegations from a tactical view, with the jury performing as the representative of community standards. Under this perspective, the prosecutor is functionally responding to community pressure by recognizing that he or she can get a conviction from the community based upon the evidence, and that the charge is not of such minimal consequence as to get the charge laughed out of court.

Prosecutors also act in the absence of defined public outrage. "Integrity is what you're shooting for," one local prosecutor contended during an on-site interview. If an allegation appears to be credible, and can lead to a conviction, prosecutors felt comfortable in bringing the charges. The prosecutor's responsibility is to investigate and prosecute wrongdoing, and this mandate is effectively unqualified.

Prosecutors may also act irrespective of public opinion. If an activity constitutes a crime, the prosecutor will likely proceed with charges, regardless of public opinion. Many popular political figures have been successfully prosecuted, only to find the electorate remaining content to have them remain in office, or even re-nominating or re-electing them while under indictment, or while awaiting sentencing. In the District of Columbia, where many felt that the mayor was being unfairly persecuted by federal prosecutors [Morin, 1990: p. A-17], the U.S. Attorney made it clear that he was interested in "the needs of this community in having the moral and political leadership that can deal with a drug and homicide crisis". [Melton and York, 1990: p. A-1]. Similarly, while there may be a considerable amount of public sentiment for ousting a public official from office, prosecutors are not disposed toward investigating or prosecuting such individuals absent a reasonable belief that they have engaged in criminal misconduct.

Prosecutors are sensitive to the needs of their community and to public confidence in government. The U.S. Attorney for the District of Columbia opted against retrying the District's mayor on drug and perjury charges with two thoughts in mind that were outside the strict legal context of the case. Prosecutors felt that they had already achieved a significant victory of sorts

by keeping the mayor from seeking re-election [Ayres, 1990], and the city was due to have a new chief executive who won a primary race the week before the retrial decision on a "clean house" pledge. Some suggested that "Prosecutors could fear the likely criticism that they were taking the city backward at a time when it had voted to move ahead" [Thompson and York, 1990].

Prosecutors must tread a fine line in being responsive to the community, while retaining the integrity of their offices. This is a particularly difficult task in a country (or even a state) where political cultures often differ. While some communities might tolerate a certain level of illegal activity--and society would recognize that the malum per se crimes such as bribery will not be condoned--this might have implications for increasing the stakes in determining what activities might be considered to be *de minimis*, and thus escape prosecution [*see*, Duncan, 1991: p. 714].

Prosecutors also need to think critically about bringing charges that may affect the way people perceive their offices. A high-profile prosecution of a public official on trivial charges may make the prosecutor look especially vindictive, overly political, or even incompetent. The backlash may be such that it would be difficult to credibly bring another such prosecution even on firm grounds in that jurisdiction. In a case that may generate less public attention, however, such as one involving a lower-level public employee, a prosecutor may be freer to take some risks and be less likely to come under public scrutiny, scorn, or ridicule.

The prosecutor who cries "Wolf!" and brings a marginal case that cannot be sustained must recognize that he or she risks damaging not only the individual charged, but confusing the public and indirectly undermining confidence in government.

Finally, priorities must be considered. Is a particular public corruption offense worth prosecuting if it means placing other, more important public corruption cases on the back burner? The priority assessment must also take into consideration other non-public corruption cases that would be delayed or not prosecuted as a result of pursuing such charges.

Use of Tax Evasion Charges

The extent to which prosecutors choose to charge public officials and public employees with tax evasion based upon substantive underlying predicate charges such as bribery is an interesting subject. In virtually every charge involving a degree of financial misconduct, tax evasion charges can usually be added. For example, none of the corrupt judges in Operation Greylord disclosed his bribe income--and few attorneys can afford to declare their actual income and pay taxes on the bribes that they pay [Valukas and Raphaelson, 1988: p. 8]. The Operation Greylord study examined whether prosecutors tended to use tax evasion charges as the actual substantive charge, as an element in a larger package, or as a bargaining chip to be used only if additional cooperation was sought further along in the course of the investigation or prosecution.

Most prosecutors apparently prefer to pursue the "active criminal conduct" as the primary charge, as one local prosecutor told our interviewer during an on-site visit. The prosecutor should

accomplish his or her intent under that primary charge, this prosecutor argues. Local prosecutors with whom we spoke suggested that they would concentrate on the primary charges, while letting the state revenue department or the Internal Revenue Service decide whether they want the prosecutor to pursue tax evasion charges. Such charges may also be the result of placating another agency, rather than a desire to see the charges brought and fully prosecuted. As one federal criminal chief explained to our interviewers in the course of an on-site visit, "If the IRS has supplied you with two agents for a year" to help conduct a broader investigation, it is difficult to tell them that it is "piling on" to add tax charges.

According to the prosecutors with whom we spoke, tax charges should be viewed as another weapon in the prosecutor's arsenal; these charges can be used as part of the package if a target or subject of an investigation expresses a reluctance to cooperate. The bottom line is that if the target evaded taxes, the target broke the law.

Finally, tax evasion charges may be added by a prosecutor to afford the jury the opportunity to find some grounds on which to convict a corrupt public official or public employee. To avoid a jury returning a verdict favorable to the defendant, some prosecutors add tax evasion charges--if justifiable on their own merits. Because a jury may feel better about convicting an individual on tax evasion than public corruption charges, prosecutors may add these charges in public corruption cases, particularly those involving officials who have enjoyed a longstanding reputation for probity. As one federal prosecutor pointed out to our interviewers, the judge will still be prone to sentence the individual on the basis of the underlying charge--such as bribery--and not just the tax evasion. The federal sentencing guidelines permit judges to consider evidence on other charges in the case, regardless of the verdict imposed on those other charges.

One caveat, however. Tax charges imposed by local prosecutors may not always lead to a "clean" plea bargain, because the local prosecutor is not able to offer immunity on federal tax evasion charges.

Charging Public Officials for Personal Predilections

Public corruption investigations are, by their nature, very difficult to launch, investigate, and successfully prosecute. Many times in the course of a larger investigation into corruption in government, investigators will uncover evidence of criminal activity that does not meet the definition of public corruption. A prime example of this was the investigation into municipal government practices in the District of Columbia, in which federal investigators learned that the mayor, who was apparently a subject (if not a target) of their larger investigation, was involved in illegal drugs. Investigators there justified the prosecution of the mayor as "a proper course of inquiry"; not only had the mayor allegedly committed a crime, but that crime was said to have affected the performance of governmental duties [Dedman, 1990: p. A-20]. "A person on drugs loses his reasoning power and therefore becomes incapable of governing," according to one FBI agent, so "In that regard, it is not only a drug but the mismanagement and malfeasance that accompany that drug" [Ibid.].

We examined how prosecutors reacted to this type of a circumstance, and whether they preferred to continue to pursue the larger investigation or were instead content to follow the personal predilection track, and be appeased by the knowledge that the public official or public employee was (1) out of office; (2) convicted of a crime; and (3) that the broader, more costly investigation could wind down.

As with tax evasion, prosecutors tended to view their ability to charge public officials and public employees for their impermissible predilections as another tool available to them. As one local prosecutor told our interviewer during an on-site visit, it is not an alternative to a pure public corruption charge, but if there is other impermissible conduct that is uncovered, "you go after it all." Another local prosecutor expressed the view that such a legal capability is necessary to get rid of the "bad apples" in government, and acknowledged that he had effectively employed petty charges as a means of chasing someone from public service. "Sometimes you have to be a bit underhanded to get the underhanded," he rationalized. No prosecutor, however, condoned using charges for such a purpose which would not be appropriate to bring in other circumstances.

While drug abuse or battery charges might be appropriate for a prosecutor to drop a public corruption investigation in favor of a quicker resolution to the short-term problem (evicting the offender from office), the prospect of lesser charges beg the question of whether this is an appropriate means to reach the ends sought by the prosecutor (deterrence of public corruption). For example, would--or should--charges of soliciting a prostitute be sufficient to meet the threshold? Charging public officials and public employees for their impermissible personal predilections uncovered in the course of a criminal public corruption investigation may not be a totally satisfying alternative, especially when their punishment might be a mere slap on the wrist instead of more severe punishment that could result from the application of true public corruption charges. In the case where widespread public corruption is suspected, the mere ouster of one individual may not be sufficient to cleanse the system, and may not even serve to send the appropriate message to others who might have been involved in the larger public corruption situation. For many prosecutors the operative rule is to pursue the lesser charges if they are justified on their own terms, and if they are justified also by indications of broader, more serious criminality; but seek to characterize the broader pattern of conduct so that the judge will be less prone toward lenience in sentencing.

Use of Conspiracy Charges

A criminal conspiracy is an agreement between two or more persons to achieve an unlawful object, or to achieve a lawful object by unlawful means [*United States v. Kissel*, *Pereira v. United States*]. Since few acts of public corruption can be attained through individual performance, conspiracy charges may be available to the prosecutor in a wide variety of cases--including virtually every bribery, extortion, or kickback incident, for example. But prosecutors--particularly those at the local level--have seemed somewhat reticent to file and prosecute on conspiracy charges.

A conspiracy charge is seen as stepping the prosecution up to a higher level of seriousness. Conspiracy charges usually carry stronger penalties than the underlying offenses (although in some states, such as Texas, the conspiracy charge is actually one degree lower than the object offense), and are viewed by the public as being a more serious transgression. The beauty of the charge for prosecutors is that they do not have to surrender the opportunity to use the substantive underlying charge; conspiracy is merely added as another count in an indictment or criminal information.

Prosecutors may also have to face the question of whether to structure the prosecution as a single conspiracy or as multiple incidents within discrete governmental units. We found during the course of our on-site interviews that the paramount consideration was the facts of the case. But even if the facts of the case permitted the prosecution to be structured as more than one conspiracy, there was some prosecutorial antipathy toward this. One local prosecutor told our on-site interviewer that approaching the prosecution from the perspective of multiple conspiracies within discrete governmental units was unethical, and that prosecutors "only do it to make names for themselves." Another local prosecutor told our interviewer that while he preferred to design his conspiracy cases as broadly as possible, he recognized that there could be a problem if the charges appear as though they may be unrelated, or if the prosecutor seems to be overreaching. One federal criminal chief suggested that when the discussion comes down to this stage, the better question to be asked is whether a RICO case can be brought on the basis of this evidence.

The single conspiracy/multiple conspiracies dichotomy can also be put to productive use by the prosecutor in much the same fashion as the bringing of normal conspiracy charges often result in a stronger bargaining position for the prosecutor. For example, in South Carolina's Operation Lost Trust sting, a legislator who had agreed to cooperate with the federal government as soon as he was presented with the facts of the case against him found that his indictment summarized in just one count the identical acts that resulted in six separate counts lodged against another legislator who ended up convicted at trial on the charges.

Federal prosecutors are urged by the U.S. Department of Justice to add conspiracy counts to public corruption indictments to the fullest extent possible. The conspiracy count enables the prosecution to describe the defendant's conduct in a comprehensive fashion; allows the introduction of statements made by co-conspirators during the furtherance of a conspiracy as evidence against all of the defendants; and may also serve to help solve venue and statute of limitations problems that might otherwise vex the prosecutor [Jarrett, 1988: p. 214].

Determination of *De Minimis* Violations

If every technical violation of the law were to be strictly enforced, virtually no public officials or public employees would be left in government. One local prosecution of a county judge in a midwestern state ended with acquittal after just a few minutes of jury deliberations. The judge had been accused of making approximately eight dollars worth of allegedly personal telephone calls at county expense over a long period. The U.S. Attorney had previously declined to prosecute.

Prosecutors have different ideas of what constitutes a *de minimis* violation of the law--one which is too minor a transgression to merit pursuing--and these definitions may change according to pending caseload, changes in the law, and community pressure, from which, realistically, an elective prosecutor may find it difficult to be shielded. Even strong cases of public corruption may fall by the wayside in favor of higher priorities. One state ethics commission director told our interviewer that when he recently turned over a file to the appropriate county prosecutor for possible prosecution, the prosecutor agreed with him about the merits, saying that "It's a winnable case, but I've got murders, rapes, and robberies, and I can't take the time for this." Then there are cases where something intuitively feels wrong, but no statute stands out on the page as being directly on point; rather it may be a matter of the act complained of not contravening the laws so much as they didn't really intersect with them. But there still is no chargeable offense.

Our interviewers found that lack of office resources sometimes causes prosecutors to regard as *de minimis* certain violations they otherwise might have investigated further. On the other hand, when resources are ample, most prosecutors seem careful to avoid the opposite temptation, which is to follow through on cases that otherwise would be considered *de minimis*. One local prosecutor related that his decisionmaking process was dictated by first finding whether a jury would consider the charges to be appropriate, and then evaluating his office's other commitments. Another local prosecutor conceded that "Limited resources are a natural curtailment" on prosecutions of more minor ethical transgressions. One local prosecutor active in public corruption investigations flatly asserted that in his office, "We don't do goofy things," and contended that his decision process was not unlike plea bargaining. "It's kind of a balancing process that you do," he told our interviewer during an on-site visit, a process in which the prosecutor weighs the time and resources needed to prosecute the case to conclusion against the equities on the other side. One federal prosecutor used an interesting bottom-line inquiry to arrive at a conclusion as to whether to prosecute. After considering the likelihood of conviction, this prosecutor simply asked, "was there evidence of enrichment?" If this element was present, there was a substantial likelihood that a prosecution would be launched.

One theme that our interviewers heard throughout the course of the on-site visits was that these apparently *de minimis* violations might be ideal opportunities for applying alternative sanctions. If the case does not involve something serious enough to merit the time, effort, and expense of actual prosecution, then perhaps administrative penalties, such as those applied by an agency head, or a state ethics commission might be more appropriate and effective. Similarly, restitution and or resignation might be sought by the prosecutor in a bluff of sorts, in which the prosecutor suggests that prosecution will commence if the individual does not comply with certain requests. Tied in with these concepts is the underlying question as to whether the individual is being pursued merely because of his or her status as a public official or public employee. One U.S. Attorney with whom we spoke expressed a particular reluctance to prosecute a public official for an infraction that someone else would not be prosecuted for. This prosecutor told our interviewer during an on-site visit that it is reprehensible to have different thresholds for people in and out of government. "If you would prosecute Mr. Joe Blow for something, then you should prosecute the governor for the same thing."

Announcement of Decision Not to Charge

The existence of many investigations manages to leak--or at least be speculated about--in spite of even herculean efforts to maintain the confidentiality of the investigation (we learned of prosecutors so intent to maintain the secrecy of their public corruption investigations that they even typed up their own grand jury subpoenas). If someone is believed to be involved in a particular investigation, especially if he or she is strongly rumored to be the target or a subject of an investigation, the person's innocence may, rightly or wrongly, be questioned by the public. The decision to announce whether someone has been cleared by an investigation--or at least not implicated--may go a long way toward restoring the individual's name in the perception of the public. If a decision is made to go forward with such a statement, it is important that the prosecutor be absolutely straightforward, eschewing "legalese" to the extent possible, so that the individual in question not be punished unfairly by misinterpretations of the import of what has happened.

In general, the prosecutors whom we interviewed on our on-site visits felt that they had a responsibility of sorts to do something affirmative following an inconclusive or exonerating investigation, particularly if the individual involved was a public official or high-ranking public employee, and there had been significant publicity about the individual's alleged role in the activity being investigated. But if there was little or no attention focused on the situation, the inclination of the prosecutors is to keep matters dormant. As one local prosecutor told our interviewer during an on-site visit, if the investigation has been made public, the office will generally make some type of announcement about its course or conclusion, but if it has been quiet, the office will try to keep it quiet. Another local prosecutor added another caveat, suggesting that this prosecutor's office would only announce the decision not to charge after word of an investigation had leaked "if it appeared that [the existence of such an investigation] could be damaging to the individual."

U.S. Attorneys are slightly more reluctant to take the matter public, but will willingly do so under the appropriate conditions. More frequently, they will choose to prepare a no-charge memo for their files and might then inform the target as permitted under Department of Justice guidelines.

Given the potential deleterious effect upon the career of a public official or employee, it seems reasonable and appropriate that a prosecutor should make public a no-charge decision in certain limited circumstances. These circumstances should include:

- cases in which the prosecutor is virtually certain that the alleged illegal activity has not taken place or is not reasonably likely to occur;

- cases in which it is clear that the case that the public official or public employee whose conduct was being investigated was not a participant in any illegal activity;

- cases in which the public official or public employee who will not be charged is not needed as a witness against others allegedly involved in related activities;

- cases in which the reputation of the public official or public employee will be subject to question if there is no announcement of a no-charge decision;

- cases in which the prosecutor might wish to fool other likely perpetrators by convincing them that the investigation into their activities has concluded; and

- cases in which the prosecutor has already received indictments, or notified potential subjects and targets about their potential involvement.

Consideration might also be given to release of convincing exculpatory evidence. For example, in the South Carolina Operation Lost Trust undercover operation, a list of legislators allegedly susceptible to being bribed was compiled by the federal undercover informant, and turned over to federal authorities. The list, which included 71 legislators, was released in court, and proved to be most embarrassing to those legislators who were never charged with misconduct. One legislator, who was offered a bribe by the undercover informant and turned it down, requested that the U.S. Attorney make available for public distribution a copy of the videotape which he said clearly showed him turning down the proffered illegal inducements [Scoppe, 1991: p. A-13].

Balancing individual rights against the integrity of the investigation can prove to be a difficult task for prosecutors.

Prosecutorial Referral of Non-Criminal Activities

Few things can be so frustrating for a prosecutor as pursuing a promising investigation for a long period of time and not being able to levy criminal charges for any number of different reasons. The statute of limitations might have passed for a criminal prosecution; evidence may be inadmissible; the prosecutor might not be confident of proving matters beyond a reasonable doubt; an internal or external review process may recommend against prosecution; resources might not permit an exhaustive trial; or the acts investigated may simply fall slightly short of criminal violations (e.g., someone may have done something wrong, but the conduct did not rise to the level of being illegal).

Prosecutors are only human--and often are political creatures. They are tempted to think of their personal ambitions and the time and other resources they may have invested in a case. But they need the perspective--and they need the public understanding--to put those considerations aside when a case cannot be brought. As officers of the court, they serve the larger cause of justice, including fair treatment for individuals, and concern for public confidence in government. Under our system, a person is considered innocent until proven guilty in a court of law, and especially, this must be so when he or she has not even been charged. In the field of public corruption, the legal system needs to be alert to the collateral damage that can be unleashed simply through the exercise of investigations that become public. Prosecutors must be able to let such cases go with

a certain amount of grace and humility. The public interest is not harmed by the occasional prosecutorial decision to conclude an investigation without prosecution.

On the other hand, genuine misdeeds may have been committed which do not warrant prosecution. Under such circumstances, there often are alternatives for the prosecutor to evaluate. The prosecutor may be able to turn over evidence to a statutory executive or legislative ethics commission or committee, or the prosecutor may make the information available in the context of a civil enforcement proceeding. There may, however, be legal, ethical, and practical constraints on such practices.

The prosecutor may volunteer or be asked to turn material from an investigation over to executive or legislative branch ethics entities with authority and jurisdiction over those whom the prosecutor investigated. While a particular act complained of might not have satisfied the rigorous requisites of criminal law, it might at the same time be a violation of an executive branch ethics code or a legislative standard of conduct, subject to action by those respective branches of government. Some might suggest that the prosecutor is under an affirmative duty to refer evidence of a probable violation to such entities where prosecution is inappropriate or impossible.

But several problems might emerge here. First, the ethics entity might not have the same type of broad authority that the prosecutor has to compel appearances by witnesses, or to produce certain types of evidence that may implicate or exonerate the alleged wrongdoer. A defendant's rights might be violated by using a criminal investigatory entity to collect evidence to be used in an administrative-type process. Then there arises the question of how much material should--or can be--delivered by the prosecutor to the administrative entity. Actual investigative files or workproduct may not be released by prosecutors in certain jurisdictions, and grand jury secrecy requirements may prevent prosecutors from turning over as much material as they would prefer.

Prosecutors also have to worry about practical concerns. A witness may be willing to testify to certain types of conduct under a grant of criminal immunity, but may be reluctant to accept that grant of criminal immunity if he or she realizes that it can be used against them in an administrative proceeding growing out of the same charge. Similar questions arise about materials obtained under subpoena by an administrative ethics agency from a prosecutor who has decided not to pursue criminal charges in a public corruption investigation.

Questions also exist as to whether a prosecutor may be compelled--or is ethically obligated--to divulge potentially exculpatory evidence in or for a non-criminal proceeding.

A prosecutor who intends to work closely with administrative ethics agencies--to the extent that the prosecutor might be turning materials resulting from an inconclusive criminal investigation to such an entity--should closely examine laws in the jurisdiction that would apply to such actions. Early agreement should be reached as to what should be permitted and what types of requests or actions are beyond the ability of the prosecutor to comply with should be discussed

and agreed upon, saving both prosecutors and alleged wrongdoers the ignominy of having the dispute broadcasted far and wide, with its attendant implications for both parties.

PRE-CHARGING STAGE

The pre-charging stage of the process consists of the timing of decisions, prosecutorial actions before a grand jury meets, asset forfeiture in RICO cases, and pre-indictment plea negotiations and agreements.

Pre-Indictment Release of Evidence

The prosecutor almost always operates from a position of strength vis-a-vis the alleged wrongdoer. For example, a prosecutor has discretion to determine whether a public official or public employee suspected of public corruption should be investigated; what a public official or public employee should be investigated for; the charges that a defendant should have brought against him or her; and whether the charges should be bargained down for an immediate plea without going through the burden and expense of a full trial.

One tactical advantage that the prosecutor may choose to employ is that of a pre-indictment release of certain pieces of evidence. Strategic release of evidence to targets or subjects might have the effect of promoting swift plea agreements; obtaining early guilty pleas; used as leverage to turn potential defendants and obtain their cooperation as witnesses; employed to scare other potential defendants into coming forward; or used as bait to snare others in an obstruction of justice scheme.

Each of the prosecutors whom we interviewed during our on-site visits indicated that he or she would be willing to reveal evidence before grand jury proceedings under certain limited circumstances. As one local prosecutor noted to our interviewer, the target of a public corruption investigation will often know that he or she is a target, and targets often want to talk with prosecutors before the grand jury meets. Prosecutors are usually willing, at a minimum, to listen. Evidence shared with a target might run the gamut from a verbal summary of the case against them to a display of physical evidence, such as the U.S. Attorney in South Carolina screening copies of damaging videotapes of clear bribe-taking for targets and their attorneys.

One federal prosecutor told our interviewers that the policy in that U.S. Attorney's office was to bring in potential targets, "discreetly tell them about the problem, and seek cooperation." This prosecutor was particularly interested in gaining the testimony of a potential target, and said that the office did this "all the time." Another U.S. Attorney was somewhat more reluctant to engage in such activity, but acknowledged that the office would consider it if approached by a target under an undefined set of "appropriate circumstances."

We found no significant indication that prosecutors used the pre-grand jury selective release of evidence as anything other than a tool to secure testimony or plea agreements.

Pre-Indictment Plea Negotiations

Each of the prosecutors with whom our interviewers met during the on-site visits expressed enthusiasm--in varying degrees--for pursuing pre-indictment plea agreements.

One local prosecutor maintained that while a defendant has a right to be indicted, this right is not immutable, and a knowing waiver may be appropriate under some circumstances. In some jurisdictions, waiver of the right to a grand jury presentment may still entitle the target to plead guilty to a criminal information (the functional equivalent of such an indictment).

Prosecutors seem to differ on how they approach such situations. Some told our interviewers during the on-site interviews that they often sought pre-indictment plea agreements, and that it was a routine matter for them. Others told our interviewers that they did not engage in the practice very often, and they preferred to do it only when they were approached by a target, rather than assuming a more proactive stance.

Pre-indictment plea agreements send a powerful message to other targets and subjects of the investigation. The message is twofold: first, the government communicates the impression that its case is strong, and then it suggests to potential targets and subjects that they would be well-advised to step forward early, when the penalties for admitting complicity are likely to be much lighter than they would be if the government were forced to indict and proceed to trial to secure a conviction. Cooperation can further mitigate sentences.

One factor that seemed to weigh in favor of seeking a pre-indictment plea agreement was the effect on government and trauma within the community. One local chief deputy prosecutor told our interviewer that in that particular prosecutor's office, the pre-indictment plea agreement was viewed as a tool to try to get things over with quickly, avoiding disruptions to the operations of government that would be the natural result of a lengthy and lurid trial. A prosecutor should engage in pre-indictment plea agreements, according to this prosecutor, when it is needed "for the greater good of the community."

There is some debate in the legal community as to whether the federal sentencing guidelines offer a disincentive to enter into plea negotiations. For example, a legislator with no prior convictions would be eligible for a 30-month sentence under the guidelines for a Hobbs Act plea, just a 25 percent reduction from the 40-month sentence expected upon conviction. A prosecutor can move for a more substantial reduction in sentence and departure from the guidelines if the defendant provided "substantial assistance" to the government in developing another criminal case, and an "acceptance of responsibility"--a phrase fraught with the potential for widely disparate interpretations which has, indeed, posed problems for judges--in a plea agreement can result in a sentence reduction of 15 to 18 percent from the minimum applicable sentence. Experience thus far has not clearly suggested the impact of the federal sentencing guidelines in facilitating plea agreements in public corruption cases.

Resignation and Pre-Indictment Plea Negotiations

One particularly controversial element unique to public corruption cases has been the dilemma regarding the ouster of an allegedly--or admittedly--corrupt public official from office. Some prosecutors have used this as a major weapon in their arsenals, and have chosen to make resignation from office a principal condition in plea negotiations. Resignation by the targeted public official--coupled with an agreement to cooperate with the prosecution--has become a de jure quid pro quo for charge (and subsequent sentence) reduction.

Compelling the resignation of a public official by a prosecutor is a questionable tactic at best, given considerations of separation of powers and the lack of specific authority to do so. Yet the prosecutor can technically argue that a pre-indictment resignation in exchange for more favorable charging terms is an option freely entered into by the target public official, and that if the public official is not satisfied with the terms, then the individual does not have to accept the offer. The defense bar can also make a credible argument that the resignation option under such circumstances is the prosecution's functional equivalent of coercion; the target is being asked to make a decision that is tantamount to a Hobson's Choice. While no research has been conducted on this specific point, one could easily assume that those targets presented with such a choice devote considerably more attention to the stick (e.g., "you're gonna go to trial; we're gonna beat you; you're gonna go up the river for 50 years") than they do the carrot ("look at this nice offer we have for you, where you might be able to cop probation or cushy community service if you resign by the close of business today.").

But prosecutors will not always look toward resignation as part of an initial package offer. One local prosecutor told our interviewer during an on-site visit that a decision to make available the voluntary resignation option to a target would depend upon the seriousness of the alleged crime and the nature of the offense. This prosecutor informed our interviewer that voluntary resignation would more likely come into play as an alternative if the crime alleged to have been committed was essentially not much more than a status offense. Another local prosecutor suggested to our interviewer during an on-site visit that if the crime was particularly serious, voluntary resignation would not be offered as an option for the public official, but rather civil ouster procedures available under terms of state law would be combined with the substantive underlying charge as a package.

Resignation may also not be an appropriate option in a case aimed at a single powerful public official. Plea agreements are usually entered into in consideration for the cooperation of potential defendants, especially in situations in which they may be used to "trade up" to implicate those in higher positions of trust and authority. But when the investigation has reached its zenith, and the ultimate target has been selected and the evidence is presumably more than adequate for a conviction, questions may arise in the community as to why the individual was offered an easy way out of his or her troubles. The motives of the government may be open for debate when it appears as though the prosecutor is more concerned with the forfeiture of office than the underlying substantive charges. There is also no private sector parallel. If a bank vice president is convicted of embezzling funds from his or her bank, the bank would most likely--but not necessarily (especially if it was a family-owned institution)--fire the individual, but the prosecutor would likely have little ability to coerce such a resignation. The analogy becomes even more

complicated when the defendant is the chairman of the bank's board and owns a majority of the voting shares; the prosecutor would not likely be able to elicit a resignation.

In some jurisdictions, a public official's resignation automatically becomes part of a plea agreement by a public official by operation of state law. Some states have provisions which disqualify an individual from holding office if the individual is convicted of certain acts (usually felonies, crimes related to service in office, or other infamous crimes). Thus, upon pleading guilty to a certain charge or set of charges, the public official becomes divested of his or her public office. In other jurisdictions where the law does not so favor the prosecutor, the prosecutor is apt to offer a strict deadline for resignation after acceptance of the plea agreement (typically before the plea is officially entered in court). Such a deadline is not likely to exceed 24 to 48 hours.

Effect of Timing on Decisions

The sensitivity associated with public corruption cases means that particular care must be taken to ensure that the timing of disclosures does not have an undue impact upon such democratic functions as elections, legislative sessions, and other relevant aspects of public policymaking.

- Election Considerations

If an indictment is revealed shortly before an election, chances are good that an educated and enlightened electorate would be less willing and less likely to return to office a public official under such a cloud (this assumes, of course, the existence of a rational electorate, something that we have pointed out earlier in this report as being rather elusive in practice). Perhaps even more troubling is the investigation that is inadvertently revealed shortly before an election; here there is not even necessarily the same degree of prosecutorial certitude that a crime has been committed, but, in the eyes of the public, the public official/candidate is effectively tainted by the unintentional disclosure.

But there is more at stake here than just the timing of the actual elections. Some have suggested that prosecutors have deliberately timed certain public corruption operations so that they will be disclosed close to the time that a suspect public official is poised to announce re-election plans, disrupting those plans [*see*, Ayres: 1990]. If a candidate is indicted after a filing deadline, or after the deadline passes to fill a vacancy, the effect may be to give the office to another candidate--often a minor party candidate--by default, a prospect that must be recognized by the prosecutor.

Operations involving candidates extending through an election campaign can also be cause for prosecutorial concern. If campaign contributions are offered as incentives as part of an undercover operation involving public corruption, credible allegations can be levied that the prosecutor has actually subverted the process--and if the contributions offered as bait seem to have made the difference in a close race--such as enabling a candidate to make a last-minute television buy--then serious questions are raised, not the least of which is whether the undercover

cash served as the functional catalyst for the retention in office of the allegedly corrupt public official.

The U.S. Department of Justice recommends to prosecutors that they carefully analyze any undercover bribe payments that are scheduled to be made prior to an election to whether they would have the effect of skewing "the results of an election" [McDowell, 1988: p. 114] (arguably, virtually any sizeable contribution that comes into an election campaign will have some impact on the "results" of the election; perhaps a more appropriate consideration would be whether the contribution is likely to affect the outcome of the election, i.e., who wins and who loses). United States Attorneys are also cautioned that, "To the extent it can justifiably be prevented, undercover corruption investigations should not surface between September and early November" [Ibid.]. However, this is not a hard and fast principle. Federal prosecutors are also told that "The rule most prosecutors follow is that the decision to indict the public official should be made without considering its effect on an election. The indictment should be returned when the case is ready--not earlier or later. To do otherwise is to favor a party or candidate or to create the appearance of doing so" [Jarrett, 1988: p. 215].

One local prosecutor suggested to our interviewer in the course of an on-site visit that the process is often viewed by some candidates for public office as an opportunity to avail themselves of a free shot at impugning the credibility of an opponent. The resultant policy promulgated in this prosecutor's office is that if a complainant has made accusations about an opponent, the office will not take any action on the complaint until the election is over. This prosecutor believes that this policy is a fairly effective means for ridding the process of both frivolous and political complaints. Another local prosecutor with whom we discussed the issue on an on-site visit evinced no particular concern for elections and timing issues. "Once I had my case developed, I'd file it," this prosecutor told our interviewer, "I would only delay it for a strategical advantage for me."

While one federal criminal chief whom we interviewed in the course of an on-site visit reported that his office tried to wait until after elections had run their course to go public with charges against a public official seeking re-election or election to a different office, another federal prosecutor told our interviewer that he would not be averse to accelerate the pace of the investigation if the matter was important and the public needed to know the results. This U.S. Attorney felt that the decision should be made by balancing the public interest in being aware of the alleged wrongdoing against the need for fairness to the potential target.

Indeed, regardless of how it was actually stated, the balancing test appeared to be fairly consistently used among the prosecutors whom we interviewed. One local prosecutor may have best voiced the concerns of fellow prosecutors when this prosecutor said that he "did not want these people to serve." The philosophy held by this prosecutor (who had run an undercover operation during an election that was not revealed until well after the election) was that "You just do what you think is right, and politics will not interject into it." In balancing the interests, he suggested that the most important determinant was "trying to ensure the integrity of the organization out there."

□ Legislative Session Concerns

Other considerations must also be factored in. Timing an investigation of legislators to break while the legislature is in session can pose significant concerns (virtually all states have what is commonly considered to be a part-time legislature). For example, a prosecutor must weigh the importance of crippling a allegedly corrupt legislator through an indictment at the beginning of a legislative session against the right of the people to constructive representation. An indicted legislator may be subject to certain sanctions by rule or statute in certain states [Harris, 1991: p. 17], and may effectively be shunned or asked not to participate in deliberations and voting in other states [Yozwiak, 1991 (B)]. Then again, they may not be subject to sanctions in some states, and their votes can be the deciding factors on certain pieces of legislation that will forever bear some degree of suspicion. The prosecutor's decision to disclose the existence of an investigation or seek indictments just before the legislature is set to vote on certain matters--such as reductions in law enforcement budgets or jurisdiction, for example, may also cast a shadow on the credibility of the investigation. Finally, if word of an investigation leaks prematurely and indictments are not forthcoming for a lengthy period of time, legislators may be under a cloud in their actions [Surratt, 1991 (B): p. A-1], rendering them far more ineffective than they would have otherwise been--"marked men" as one news account of six legislators awaiting indictment or exoneration termed them [Miller, 1991: p. A-8].

However, one might reasonably contend that there is no truly "good" time to indict a legislator. Even though a legislator may be indicted following a legislative session, the criminal process often takes so long until consummation that the case may not have gone to trial by the time the legislature has returned to session. There may also be important interim study committee meetings held outside of the regular sessions.

The prosecutor should consider state laws and legislative rules and procedures in arriving at a decision with respect to when to announce or acknowledge the existence of an investigation, or determining the most appropriate time for issuing an indictment. The prosecutor must then determine whether the public interest is best served by proceeding more rapidly than otherwise planned; continue according to the planned schedule; or waiting until after the legislative session or a particular point in the session has passed.

□ Concerns Related to Tenure in Office

There also may exist practical and less tangible considerations that may have to be taken into account by a prosecutor in deciding when to issue an indictment or disclose the existence of an investigation and its subjects or targets. For example, a mayor may be nearing the end of his or her term in office, and may be restricted by law from seeking re-election. The prosecutor must decide whether it is more appropriate to indict the official while he or she remains in office, or to wait until the term of office expires. In the case of a long-time public employee who will soon be retiring from public service, the same considerations arise; a decision needs to be made as to whether it is more advantageous to prosecute the individual while he or she is still in the public

service, or to wait until the individual is again a private citizen. Further complications arise when the pending indictment is not sufficiently in order to move up deadlines.

There is an unmentioned, and potentially invidious, motive for delay in these circumstances. Once out of office, the individual may be more vulnerable. He or she may no longer have easy access to records, secretarial support, or even, in some cases, the same level of income. While the individual is being prosecuted for crimes allegedly committed while in the public service, he or she would likely find it easier to defend against such charges if still on the public payroll.

There is no all-encompassing satisfactory answer as to when to best proceed in such circumstances. Some prosecutors may feel that they should send a message to others by pursuing the case while the public official or public employee remains in service to the public. Others might feel that with the individual slated to leave public service, no further action should be taken, because the intent is to remove the individual from a position of public trust. The latter course of conduct is far more likely to occur than the former in cases involving smaller amounts of consideration; lack of an established pattern of conduct; the existence of a long record of otherwise distinguished public service; the individual's age, health, family, and financial circumstances; and, finally, the likelihood that the individual will seek public office or public employment again, or otherwise be thrust into a position of public trust.

Another factor that should be considered: the ability of an individual to receive public retirement benefits--and the propriety of being able to retain such benefits after having admittedly misused the trust placed in him or her by the people. A guilty verdict in some states on public corruption charges--such as in Illinois, for example--would automatically subject the convicted public official to the loss of the funds that the state contributed toward his or her pension. However, a decision not to prosecute in exchange for a quiet resignation, or a plea to lesser charges may serve to retain such public benefits for the offending public official or public employee. Prosecutors should remain cognizant of what may be an overlooked trump card of sorts that they may hold in the ability to bargain with an offender's public retirement plan. The loss of any portion of these funds, particularly for an older offender (a hidden fine of sorts), can be a persuasive threat due to its potentially devastating consequences.

- Other Timing Concerns

If a deadline is nearing for the filing of a report that would be important to the continued progress of the case, consideration might be given to delaying subpoenas or indictments past the deadlines, to ensure that targets or subjects have not filed amendments to those reports.

Indictments may also be spread out across time for strategic reasons beyond considerations imposed by the Speedy Trial Act. In at least one major federal public corruption investigation involving legislators and lobbyists, federal prosecutors employed the tactic of stringing indictments along, carefully choosing the timing of indicting certain targets, with the hope that they would be able to bring more people into the fold, encourage cooperation, and gain additional information for use against other potential subjects and topics for investigation.

□ Concerns About Others in Line

Ordinarily a prosecutor cannot or should not let the prospect of a resulting leadership vacuum enter into a decision to prosecute. But there may be certain unique circumstances that would suggest that such concern should be present. The office itself may be especially important, such as the presidency or vice presidency, or even a governorship. When former Vice President Spiro T. Agnew was investigated on public corruption charges, prosecutors were particularly concerned about his position, a literal heartbeat away from a presidency that, at the time, was tottering on the brink of failure. The discomfiting prospect clearly existed for a Vice President who was on trial for accepting bribes and kickbacks to be elevated to the nation's highest office at a time when public confidence in government was in need of being restored, not further derogated. Indeed, if he was elevated to the presidency, there was the potential that Agnew could conceivably have even pardoned himself [for more on this entire situation see, Cohen, 1990: p. A-23; Cohen and Witcover, 1974: pp. 235-67].

In general, however, prosecutors seem to be more preoccupied with their delegated responsibility to ferret out and prosecute wrongdoing than they are troubled by the broader political and social consequences of their action or inaction in such instances. Both federal and local prosecutors told our interviewers during on-site visits that the impact of a conviction on others in the chain of command should not interfere with a charge/no-charge decision. "That's not our business," one local prosecutor told our interviewer during an on-site visit. "You just use common sense," this prosecutor counseled. Another local prosecutor suggested that the importance of the offense allegedly committed was the key, and that while it should be considered in conjunction with the magnitude of office concerned, the prosecutor "can't worry about the consequences." Indeed, when a situation similar to the Agnew affair arose in Louisiana, federal prosecutors chose to indict and try the governor on a variety of criminal charges at the same time that the state's lieutenant governor--who would have become governor if the governor were convicted--"figured prominently in a federal grand jury's investigation of alleged bribery" [Bowman and Kearney, 1986: p. 39].

Forfeiture of Assets as an Element of Plea Negotiations

Federal charges under the Racketeering Influenced and Corrupt Organizations Act (RICO) have generally been acknowledged as among the most serious charges that the federal government can bring against an individual, and state RICO charges are similarly situated on the state spectrum of criminal offenses. A legislative office can be a continuing criminal enterprise for purposes of RICO [*United States v. Long*; *Commonwealth v. Cianfrani*], as can be a governor's office [*United States v. Thompson*], and courts [*United States v. Blackwood*] and several recent convictions in California have shown that prosecutors are more than willing to use this tool at the federal level. Federal racketeering penalties carry with them the same basic sentence and fine as for conviction on Hobbs Act violations, but the government may also pursue assets acquired through the racketeering activities--even before a trial begins.

At the state level, RICO charges are just now beginning to get an effective workout in the public corruption context. State and local law enforcement agencies, accustomed to large forfeitures of cash and often flashy and expensive assets by drug dealers and drug smugglers, are starting to recognize the potential of RICO for securing additional penalties and resources at the local level. Such forfeitures can include not only funds received as a direct result of allegedly engaging in the criminal activity specified, but also may include such items as the pay the public official received for the individual's public service; the government's contributions to the individual's pension fund; and any assets that may have been purchased in whole or in part with tainted funds. In one of our on-site visits, a local prosecutor told our interviewer about a county administrator who used his public position to further a small drug-dealing operation on the side. At least a portion of these drug profits were shown to have been applied toward the purchase of a domestic sport utility vehicle, which was surrendered to the county as part of a plea agreement that included the administrator's resignation from his public position.

In spite of what some might think, prosecutors (at least at the federal level) are cautioned against using RICO as a bargaining tool for plea negotiations. In fact, one U.S. Attorney involved in a recent RICO public corruption prosecution took umbrage at the suggestion that a racketeering charge might ever be dropped.

RICO cases require evidence of a pattern of racketeering activity, and federal guidelines for the use of RICO suggest that requests by U.S. Attorneys to prosecute a RICO case will not be approved by the U.S. Department of Justice if the "pattern" pursued by the prosecutor consists of installments of an agreed-upon bribe, but will be considered if the payments represent individual, separate transactions, such as where a public official who has received a bribe requests additional money from his or her benefactor [Organized Crime and Racketeering Section, 1988: p. 58].

Asset forfeitures are considered to be "an integral part of a RICO prosecution and should be used wherever possible," according to the U.S. Department of Justice [Ibid.], and local prosecutors are now following suit. In the AzScam operation in Arizona, prosecutors helped to finance the immense costs of the undercover operation from a fund consisting of assets that had been forfeited under other RICO actions.

In a civil RICO action, AzScam defendants were charged not only with the underlying substantive criminal offenses, but were also named as defendants, along with others, in a civil RICO action filed by the Maricopa County prosecutor's office seeking $2.5 million from 18 people. Defendants looking at their potential liability--or facing forfeiture of assets under criminal RICO charges--may be faced with few alternatives other than to plead down their charges.

Some of those named in the AzScam civil RICO suit were not charged with criminal offenses for various reasons, including lack of corroborating evidence, but the standards in a civil RICO action are lower than the levels of proof required for a criminal conviction. This difference also affords the prosecutor greater latitude in negotiating plea agreements. While a criminal RICO charge is difficult to plead away, a civil RICO lawsuit may easily be dropped against an

individual. One other important consideration for filing the civil RICO suit: to help recover damages and recoup the costs of the undercover operation. Our on-site interviews seemed to indicate that local prosecutors were much more intent on employing asset forfeiture techniques for the sake of acquiring assets than were their federal counterparts. While it was still a "desirous part" of a package, as one federal criminal chief noted to our interviewers during an on-site visit, money doesn't seem to drive the framework for federal prosecutors to the extent that it engages the attention of local prosecutors.

The potential exists for the expansion of civil RICO suits at the local level not only as an adjunct to criminal RICO actions, but also as an alternative to traditional prosecution. Some states are also now receiving asset forfeiture authority for the first time. Whether prosecutors will enjoy widespread success and support from courts remains an open question. Given some of the judicial concerns about overreaching through use of RICO, which we have described previously, there may be significant problems associated with the continued use of civil RICO in the public corruption context.

CHARGING STAGE

The charging stage encompasses factors such as input into the charging decision; how prosecutors handle speedy trial considerations and whether this is considered as part of the charging decision; and the statutes prosecutors most frequently choose to charge under within the public corruption context.

Input Into the Charging Decision

Two interesting tensions oppose each other in charging decisions. Individuals are presumed to be equal under the law. A rich jaywalker should be prosecuted in the same manner and to the same extent as a poor jaywalker. A public official who jaywalks should be treated the same as a poor person who jaywalks. But what happens when the situation turns to a crime of opportunity? Should a prosecutor treat a bank president who embezzles from his or her bank the same as a state treasurer who embezzles from the state general fund? Should a prosecutor treat a bank teller who embezzles from his or her bank the same as a cashier in the state treasurer's office who embezzles from the state general fund? Aside from the philosophical dilemma about how they should be treated, are these individuals in practice treated in the same way in charging decisions?

Because of the special position of trust that public officials and public employees occupy in our democratic system, most of the prosecutors whom we interviewed in our on-site visits suggested that they should be held to a higher standard and will be treated more harshly in charging decisions. "Other prosecutors are not shooting straight with you if they tell you otherwise," one local prosecutor reaffirmed to our interviewer during an on-site visit.

"I would expect more from a public official," one local chief deputy prosecutor told our interviewer, but he indicated that he would be reluctant to prosecute a public official for something that someone else wouldn't be prosecuted for. Another local prosecutor told our interviewer, "I play hardball with them," because violations of the public trust are "extremely important." Another local prosecutor who has made a name for himself by aggressively pursuing public corruption suggested to our interviewer that he didn't think that a public official should be treated differently in the charging decision, but believed that some charges could be enhanced because of their status. This particular prosecutor also mentioned that while he wouldn't differentiate between a public official and the proverbial person on the street, he would consider such discrimination further along in the proceedings.

Is there a special set of standards for charging decisions involving public officials? There appears to be a marked proclivity on the part of prosecutors to more aggressively pursue charges against such individuals. This tendency is more a subjective feeling than a propensity that may be clearly quantitatively proven. However, it appears from our interviews with prosecutors that the following items hold true in charging decisions involving public officials:

(1) When an investigation has proceeded to this stage, the prosecutor is likely not to have any special reticence about continuing the case into the prosecution stage.

(2) When a prosecutor has a choice between charging harshly or charging leniently, the decision will almost invariably come down in favor of the harsher charge (although there is other evidence to suggest that in certain crimes, such as conflict of interest offenses, there is a perceived difficulty in prosecuting such cases as felonies because officials "believe that juries will not return felony convictions on most conflict of interest cases" [U.S. General Accounting Office, 1987: p. 13]. In such instances, the decision not to prosecute a case as a felony violation, with no other level of offense available, might well result in an atmosphere in which public officials or public employees perceive that their illicit activities actually constitute an acceptable level of conduct).

(3) When a prosecutor would charge the average individual with a particular offense, the prosecutor will also seek to charge on similar terms the public official or public employee who has allegedly committed the same offense.

Speedy Trial Considerations

In cases involving a number of different defendants--some of whom may be tried on disparate charges--prosecutors may have to finesse the problem of resources available to meet the requirements of any jurisdictional speedy trial requirements that might exist.

Both local and federal prosecutors indicated to us in the course of our on-site interviews that jurisdictional speedy trial requirements tended not to be much of a concern. "We're ready," one local prosecutor who indicted a double-digit number of individuals in one fell swoop told our interviewer. This prosecutor indicated that defendants were usually more than willing to waive their rights to a speedy trial because of the vast amount of preparation that may be involved. Undercover operations may easily generate transcripts in the tens of thousands of pages; hours of often close to unintelligible audio or video tapes; thousands of records; and different items pertaining to other defendants that have to be scrutinized to ensure the adequacy of defense for co-defendants. Any substantial motion practice by the prosecutor also will be likely to force the defendant into a position in which the defendant would be best advised to waive his or her rights to a speedy trial.

Different state laws will also have an impact on charging decisions. For example, a state might have laws suspending speedy trial rights if a defendant is bonded out of prison. If a prosecutor runs into a situation in which the jurisdictional speedy trial requirement is a problem, the prosecutor may seek to bifurcate the proceedings.

Statutes Most Frequently Charged Under

The statutes that the prosecutor most frequently charges under can shed light on two things: (1) the statutes that the prosecutor appears to be most comfortable with, and (2) the types of offenses most frequently dealt with.

Our on-site interviews suggest that local prosecutors tend to levy financial misconduct charges most frequently, with conflict of interest also being mentioned. This correlates closely with the results from the survey of local prosecutors, which showed financial misconduct as the leading type of public corruption prosecuted, with conflict of interest offenses falling in the next largest category.

When we asked local prosecutors in the course of our on-site interviews whether there was a difference in the frequency of the offense and the frequency of the charge, we were generally informed that there was no real disparity.

Use of "Hands-Off" Agreements

Investigations involving informants may require some potentially unpalatable concessions so as to achieve the maximum possible impact. An informant, no matter how desperate his or her legal or financial situation, may be reluctant to provide information that could implicate a family member, a close friend, or a business associate, but could still provide enough important evidence that could not otherwise be obtained to make their participation critical, and render such a caveat acceptable.

The prosecutors with whom we spoke during our on-site interviews were unanimous in their distaste for entering into agreements that would protect some specific individual in exchange for the informant providing virtually any other information or evidence that the prosecutor sought related to any other individuals or organizations. However, virtually all of them indicated that they would, under very limited circumstances, enter into such agreements if absolutely essential to the central issues in their respective prosecutions.

"These type of agreements come back to bite you, and I don't want those kinds of distractions," one local prosecutor told our on-site interviewer. Indeed, in South Carolina's Operation Broken Trust, a hands-off agreement entered into by the U.S. Attorney was a central issue in one trial, with the defendant arguing that he wanted to be "fed out of the same spoon" as the one public official who was allegedly shielded by the hands-off agreement with the government's undercover agent. Serious questions can be raised about discrimination against certain defendants when others who appear equally culpable are not charged at the discretion of the prosecutor.

The only circumstances under which it might appear to be advantageous to use such a hands-off agreement--and in which it could be justified at all by the prosecutor--would be in the following circumstances:

(1) When the informant is literally the only avenue to the information needed to successfully investigate and prosecute a case of major importance.

(2) When the informant has such a close long-term relationship with a particular individual who might be a target of an investigation that the prosecutor credibly believes that the informant is not likely to provide information or assistance without a "hands-off" promise with respect to that individual. While this may be most readily apparent in the case of a loving family relationship, there are other types of relationships--even on a business level--that would seem to rise to the necessary level of believability.

(3) When the individual whom the informant seeks to protect would not be the highest-placed target of the investigation, but rather would be just another piece in a larger puzzle (even if it might be a fairly large piece).

(4) When the prosecutor is confident that the agreement will not backfire on him or her, such as through the disclosure of additional charges not contemplated by the initial inquiry.

(5) When the prosecutor may be able to independently develop a case against the individual who is the object of the intended protection.

(6) When the prosecutor may be able to bring sufficiently serious charges against the individual who is the object of the intended prosecution that are unrelated to the focus of the ongoing investigation which seeks to employ the informant to secure the necessary information.

POST-CHARGING STAGE

The post-charging stage covers the period from indictment to trial. This includes how the prosecutor chooses to handle rumors or misinformation; the prosecutor's strategy for managing informants, defendants, subjects, and targets; the effectiveness and propriety of gag orders; disclosure of grand jury defendants; and policies related to trying defendants together who are indicted together.

Tactics for News Management

The period between charging and the opening of a trial can be a difficult period for the prosecutor, given the publicity typically attendant to a significant public corruption case. Rumors may proliferate; misinformation may abound, but prosecutors are bound by the canons of professional responsibility to keep their public statements to a minimum. Prosecutors are also constrained by recent case law which suggests that persons in a privileged position should avoid abusing their status with respect to extrajudicial statements to the media [*see*, *Gentile v. State Bar of Nevada*]. Permitting blatant falsehoods to be printed or transmitted as the truth may, however, present major problems in drawing an unbiased jury venire. Media coverage may also have an impact on what witnesses might testify to.

Prosecutors told our interviewers during on-site visits that they were most aware of the media coverage. Our interviewers were told, in the words of the prosecutors, that the law enforcement officials followed the coverage "quite a bit," "closely," "extensively," or "like a hawk." Some local prosecutors mentioned to our interviewers that the media coverage could be a valuable source of information for them. Not only did it often give them what they believed to be a perception of community sentiment on the proceedings, but it sometimes uncovered items that hadn't been brought to the prosecutor's attention during the course of an investigation. Significant information about expected defense strategy may also sometimes be gleaned from media reports. Knowing what information others--such as prospective jurors and witnesses--will bring to the deliberations and stand, respectively, can also play a meaningful role in helping the prosecutor develop the most appropriate trial strategy.

However, the prosecutor should also be cautioned against relying upon the media as a comprehensive mirror of the community. Members of the media or media organizations may have their own hidden--or even blatant--agendas, and reference to how stories might be played up or down in prominence may prove misleading for a prosecutor. The media may be overly aggressive about a case (or supposed incident) where the public is not concerned. Similarly, a news outlet may play down a report about a favored individual while the community is in an uproar over the individual's alleged conduct.

The prosecutors whom we interviewed during our on-site visits were each troubled by what can transpire in this interregnum, and what they could do to mitigate the potential negative effects on their prosecutions. The phrase "no comment" percolated throughout the interviews, but

prosecutors acknowledged that there were some things that they felt that they could do to further their cause.

While prosecutors indicated that they "don't deal with media speculation," as one prosecutor told our interviewer, they do tend to follow media reports, and are often willing to do things to "set the record straight," in the words of one prosecutor. Off the record, the prosecutor may seek to guide the media away from problems. Even more common is the prosecutor correcting a statement by referral to public record.

At least one local prosecutor told our interviewer that he tried to cultivate the media so as to get the public on the prosecutor's side during a public corruption trial. In addition to working directly to affect media coverage, one local prosecutor suggested that it might be appropriate for the prosecutor to also consider writing or broadcasting a generalized commentary that might slightly more than peripherally touch on the subject that the prosecutor would like to speak out directly on, but is constrained by the dictates of the canons of ethical conduct.

A "no comment" response to a media query may not only have the effect of confirming a statement or question in the minds of the public, but also portrays the prosecutor as being less than forthcoming. When faced with responding to a discomfiting question, the prosecutor should consider answering the question with a statement that suggests that he or she would like to have the opportunity to answer the query, but that the prosecutor is unable to do so due to legal codes of ethics which exist to protect the rights of the defendant and the integrity of the justice system. The prosecutor should take care to not appear to be selectively answering questions, but rather refer questioners to the public record if an examination would, in fact, serve to respond to the query.

In some situations, having those charged with public corruption offenses talk to the media may be beneficial, and may actually be promoted by the prosecutor. Defendants who are about to plead guilty or who have been used as informants may be brought out to center stage in carefully controlled circumstances and with pre-cleared statements to get certain key messages out through the media that the prosecutor would not have been able to do directly under the code of professional responsibility.

Effectiveness and Propriety of "Gag" Orders

Because of the nature of the offenses charged and the notoriety of the defendant (or defendants), interest in the case and resultant pre-trial publicity is expected to be high. Certain publicity might serve to be prejudicial to the defendant--or even damage the government's ability to successfully prosecute.

Under certain limited conditions, a judge can impose an order sealing files, closing the courtroom during argument on preliminary motions or jury selection, and prohibiting any of the parties from commenting on any matters related to the case at bar. The orders may even apply to access to transcripts of open hearings in which the gag order was under consideration. Gag

orders in public corruption cases have even gone so far as to prohibit the disclosure of information by anyone as to when and where a trial will occur.

Files may be sealed where, for example, the prosecutor is forbidden from disclosing certain evidence outside of court, but files it as part of a response to a defense motion. A prosecutor may want to get a message across to other potential defendants who have not yet been named as co-conspirators, and choose to name them in such a public file, rather than provide the information to the defense in a more private manner, which is typically the way that such material is conveyed. The courtroom may be closed to enable prospective jurors to answer questions about their backgrounds and feelings about the defendants without fear of intimidation or retribution. Statements outside the boundaries of the courtroom may be prohibited to reduce the prospect of witness or jury contamination. Information on proceedings may be embargoed if the judge is concerned about intimidation, crowds, media coverage, and identification of jurors.

As one might expect, gag orders are rather extraordinary matters, and judges do not enter into them lightly. As one local prosecutor told our interviewer during an on-site visit, the ability to get a fair trial is paramount, but many judges would rather see cases go down the tubes than issue a gag order. Because these cases involve charges against members of public bodies and those charged with protecting the public's assets, the media and the public have a special interest in knowing what is happening behind the closed doors of the courtroom. Gag orders may be more difficult to justify after juries have been selected, a period in which the publicity would no longer pose a meaningful threat to the selection of an impartial panel.

Prosecutors also do not seek gag orders frivolously. One local prosecutor mentioned that if he were to seek a gag order--regardless of the reasons--he would "get beat up" in the media, which could have the unintended effect of swinging public opinion to the side of the defendant, and harming the prosecution. Only in extreme cases where something significantly endangered the government's right to a fair trial would the prosecutors whom we interviewed consider asking the court to impose a gag order, and even then, the prosecutors leaned toward imposing the orders specifically upon defense counsel who might be making particularly prejudicial and blatantly false statements, and suggested that they would shy away from any maneuver that would result in the sealing of files, closing of courtrooms, or preclude the disclosure of court dates and trial locations.

In the most recent appeal involving gag orders in public corruption cases, the Fourth Circuit Court of Appeals overturned portions of a series of gag orders imposed by a U.S. District Court in an Operation Broken Trust case. The Court of Appeals issued an order that set forth a set of standards for closing court records in such cases. The Court of Appeals held that "closure orders must be tailored as narrowly as possible," and that court records cannot be closed unless there is a "substantial probability" that:

> (1) Public access to the case files would serve to irreparably damage the right of the defendants to a fair trial;

(2) Alternatives, such as sealing only selected sensitive documents, would not adequately protect fair trial rights; and

(3) Closing the records would serve to protect those rights

[O'Shea, 1990 (B): p. A-8].

Providing Grand Jury Material to Defendants

Some prosecutors believe in turning over grand jury materials to defendants--or may, in fact, be required to do so under operation of law--prior to trial. Disclosure of such materials may have the effect of convincing defendants that it would be a futile exercise for them to pursue their rights to a trial, and may serve to expedite the plea negotiation process.

One U.S. Attorney told our interviewer during an on-site visit that if his case was overwhelming, he would consider turning such materials over to the defendant, but he would look for reciprocity from the defendant in the form of some quid pro quo. This particular prosecutor was not a big believer in being able to turn defendants on the strength of his case; he said that he had "tried it, and it never worked." Another federal criminal chief, however, suggested that he would turn materials over to a defendant if there was the likelihood of a trial and complete disclosure would help to avoid a trial. If the case was "a lock for trial," however, he might decide not to provide the material until required to do so by law. The names of unindicted co-conspirators are often provided to defendants in response to requests for more specific descriptions of allegations against them.

TRIAL STAGE

Our examination of the trial phase of proceedings consists of a look at the length of proceedings, the difficulty in finding unbiased jurors, selection of appropriate jurors, changes in venue, the degree of deference to be afforded the defendant at trial, and considerations as to the welfare of the defendant during proceedings.

Length of a Public Corruption Trial

Because the nature and severity of charges vary so widely, it is difficult to precisely pinpoint the average length of a "typical" public corruption trial. However, our on-site interviews indicated some general figures that should prove to be of interest.

Simple theft, larceny, and embezzlement cases appear to take the least amount of trial time, probably because the paper trail here is so easy to follow. These cases, our interviewers were told, tend not to take more than a few days. Conflict of interest cases seem to be next in terms of time required, taking from several days to as long as two weeks. Bribery cases are the most lengthy, according to prosecutors. The need to build a case that shows intent and the relationship between the parties results in proceedings that may run from ten days to as long as three months, depending upon the complexity and number of joined defendants. One federal criminal chief uses as his rule of thumb for most bribery and kickback cases a period of not less than one week nor more than one month.

Ability to Select Unbiased Jurors

Jury selection can be the most important stage of a public corruption defendant's trial--Perhaps moreso than in other cases. Many external factors can influence the jury [*see*, Thompson, 1990 (B): p. A-8].

Publicity--notorious in public corruption cases--can have an untoward effect on jurors. As one federal prosecutor told our interviewers during an on-site visit, jurors in public corruption cases don't come to the courtroom with as clean a slate as jurors in most other felony cases. This is due not only to the publicity attendant to the public corruption charges, but also to the fact that the jurors, especially in a smaller state or community, are more likely to know the public official or public employee who is the defendant. This knowledge can work either for or against the prosecutor. The federal prosecutors with whom we spoke during our on-site visits expressed concern about the ability to locate unbiased jurors, while the local prosecutors whom we interviewed were split on the subject, with one local prosecutor who felt that there was no problem in selecting an unbiased jury pointing toward the cosmopolitan mix of his county--"the fairest county around"--and the high level of education that residents possessed in support of his belief that there would be no problem. This prosecutor has tried major public corruption cases involving both local and state elective officials without experiencing any problems in drawing what he felt to be a fair jury venire (this particular prosecutor's record, which includes both

important convictions and significant acquittals in public corruption cases, indicates that his idea of a "fair" jury is not one that is inclined to favor the government).

One local prosecutor told our interviewer that he was concerned enough about the ability to select an appropriate jury in public corruption cases that he employed consultants to help in the *voir dire* process. No other prosecutors mentioned employing similar tactics to our interviewers, but we would not be surprised to learn that this practice occurs more frequently than we determined from our on-site interviews.

Another local prosecutor suggested to our interviewer that not only will there always be potential jurors who will know the defendant, but this prosecutor felt that the jurors were generally predisposed toward conviction, especially at the local level, where they knew the public officials or public employees in question more intimately, and apparently felt a greater sense of betrayal over the misuse of trust or tax dollars. A federal criminal chief with whom we discussed the matter felt that while juries came in with greater knowledge of defendants and their alleged misdeeds, they did not necessarily enter the process with any predisposition.

Selection of an Appropriate Jury

Selection of an appropriate jury by the prosecutor in public corruption cases can be difficult, with greater time perhaps being required to select jurors who are capable of rendering an unbiased decision based exclusively upon the law and facts to be presented to them in open court (although in one of the more publicized undercover operations, South Carolina's Operation Lost Trust, jury selection in some cases was not a problem. For example, in the case of one legislator-turned-judge, only nine individuals of the 58 screened for the jury had to be excused because of opinions they said that they could not set aside--and most of these had no relation to the publicity [O'Shea, 1991 (A): p. A-7].). In fact, it may be nigh impossible for a jury to be totally impartial in public corruption cases. In New Jersey, three consecutive secretaries of state were charged during the late 1960s and early 1970s with various serious crimes, with two convicted and the statute of limitations expiring on the third [Bowman and Kearney, 1986: p. 39]. The counsel for one of the secretaries requested a bench trial, suggesting to the judge that no jury in the state would find a politician not guilty of corruption charges in the prevailing atmosphere in New Jersey [Lockard, 1976: p. 97].

Prosecutors would be well-advised to pay considerable attention to the input that potential jurors have been subjected to in the period immediately preceding the jury selection process; consider the standing of the defendant in the eyes of the community prior to the disclosure of the illicit activity; review the composition of the community against the characteristics of the defendant; and consider the potential impact of any community standards or sense of outrage or apathy in the community resulting from the disclosures or indictment when deciding how best to approach the jury selection process.

One approach to jury selection in public corruption cases should be undertaken only with extreme caution. The use of a pre-trial poll by prosecutors to determine the effect of publicity about the

case, popularity of the defendant, or motives of the prosecutors is subject to varying interpretations, and at least one federal judge has expressed his displeasure with the use of such a poll in a public corruption case, condemning in particular questions about alleged racial motivations of prosecutors (asked by federal prosecutors in a telephone poll of 400 area residents) as "outrageous" [Donovan, 1991: p. 7].

When the setting turns to the trial, however, prosecutors should feel free to ask fairly personal questions about the political affiliations of prospective jurors. In the trial of the mayor of the District of Columbia, jurors were queried as to their political beliefs, whether they had voted in the past 12 years, their party registration, and how active they were in political affairs [Thompson, 1990 (C): p. A-10]. Care must be exercised with the information gleaned from such inquiries, however. For example, an entire class of jurors may not be excluded from service merely because of a shared political affiliation.

Prosecutors also question potential jurors about their knowledge of issues that the defendant stood for. One local prosecutor told our interviewer during an on-site visit that this aspect is extremely important. The prosecutor suggests that issues beyond those that would be at stake in the trial be explored in the *voir dire*, because the prosecutor should be concerned about the impact of a prospective juror's attitude toward certain emotional issues, and how those attitudes correspond with the defendant's expressed views, if any. For example, this prosecutor relates, a defendant who is a public official who has been an outspoken advocate of abortion rights is not likely to receive the same type of consideration from an abortion advocate as the defendant might be afforded by a potential juror who participates in anti-abortion protests.

Other questions may also include those related to the propriety of certain key investigatory techniques. In the prospective juror questionnaire administered in the trial of the mayor of the District of Columbia, prospective jurors were asked about their attitudes toward sting operations, including those "about the use of undercover . . . operations in which, for example, friends or associates of a subject cooperate in monitoring the subject's activities," and "the fairness of using concealed video and audio recording devices" as part of the investigation [Ibid.]. South Carolina jurors were quizzed about whether they held public officials to a higher standard than anyone else, and whether they believed that it would be harder for a public official to get a fair trial than an ordinary individual [O'Shea, 1991 (A): p. A-11].

One local prosecutor told our interviewer in an on-site visit that the characteristics of the best jurors to select in public corruption cases included business people (especially accountants, who could follow money trails); well-educated individuals; and those who possess the combination of logic and street-smarts to enable them to understand scams and the nature of proof (and practical limitations that might prevent the prosecution from presenting the best possible evidence.

Defense attorneys obviously look for opposite attributes in public corruption jurors. They will also seek as jurors individuals who might have a particular empathy with the defendant, trying to match the attributes of the defendant to those of the juror. If the defendant is a member of a

racial or ethnic minority, it would probably be in his or her interest to have a jury predominantly comprised of those with the same racial or ethnic origin.

Prosecutors told our interviewers that they didn't believe that there was much difference between selecting a jury for a white collar crime case and one involving public corruption. The only significant variation was expressed to our interviewer by one local prosecutor who maintained that his experience showed that there was more empathy shown on the part of jurors toward those on trial for public corruption offenses than for those facing trial for other white collar crimes.

One recent study surveyed 25 years of research work on public attitudes toward corruption, and offered a composite set of correlates of corruption attitudes [Malec, 1991: pp. 17-18]--not an easy task in light of studies which show that people aren't always aware of corrupt activities, and are often more concerned about issues other than their right to honest government [*see, e.g.* Rundquist *et al.*, 1977]. These correlates (adopted with some additions and deletions from Malec, 1991), though not always absolute and clear-cut, should serve to be instructive for prosecutors in determining what the best type of juror would be for a public corruption case.

Correlates of Public Corruption Attitudes

Respondent Characteristic	Stricter	More Lenient
Socio-Economic Status	Higher SES	Lower SES [Carlin, 1966; Gardiner, 1970; Johnston, 1986; Joseph, 1988; Gibbons, 1989]
Age	Younger/Older	Older/Younger [Gardiner, 1970/Gibbons, 1989]
Gender	Female	Male [Peters and Welch, 1978 (B)]
Residency	Long-Time	Short-Time [Gardiner, 1970]
Community	Rural	Urban [Atkinson and Mancuso, 1985]
Institutional Setting	High Courts	Lower Courts [Carlin, 1966]
Ethical Concerns	High Ethical	Low Ethical [Carlin, 1966; Howe and Kaufman, 1979]
Political Culture	Moralist	Individualist/Traditionalist [Elazar, 1984; Peters and Welch, 1978 (A), (B); Welch & Peters, 1980; Nice, 1983; Johnston, 1983]
Alienation	More Alienated	Less Alienated [Gibbons, 1989]
Ideology	Liberal	Conservative [Gibbons, 1989; Howe and Kaufman, 1979; Atkinson and Mancuso, 1985; Peters & Welch, 1978 (B)]
Political Experience	Previous	None [Peters and Welch, 1978 (B)]
Role Model	Technician	Political Actor [Howe and Kaufman, 1979]

Venue

Overwhelming publicity may have a deleterious effect upon the ability of a defendant to receive a fair trial, yet people in the jurisdiction have something approaching a right to be able to closely monitor the prosecution of a local public official or public employee--and both the public and the defendant should be able to expect the defendant to be judged according to prevailing community standards. Moving a trial outside the community in which it should ordinarily be tried may also result in higher costs and inconvenience to both the prosecution and the defendant, and also to witnesses.

Examples of venue changes in public corruption cases are few and far between. In some states, the prosecution is not entitled to even seek a change in venue. "Never give up home court," was the advice our interviewer received from a federal criminal chief during an on-site visit. Prosecutors generally suggested that they would only seek a venue change if the pre-trial publicity was outrageous and incorrect, or if the media was portraying the prosecution's case in a particularly bad light. Prosecutors will generally try to resist venue changes because of the practical problems associated with the changes.

Deference Afforded the Defendant

An indicted public official will often still be in office by the time trial begins. A prosecutor is faced with the decision as to how to address the defendant in court, choosing either to use the defendant's title or treating the defendant the same as other individuals appearing before the court.

There was an interesting divergence of opinion in the answers to this quandary. While local prosecutors whom we interviewed rejected out of hand the use of the defendant's title in court, the federal prosecutors to whom we posed the question were far less reluctant to use the title.

One local prosecutor best summed up the feelings of other local prosecutors in telling our interviewer, "I have no respect for the defendants, and I don't know why I should show any!" Federal prosecutors, however, felt that it may be a more effective jury tactic to use the title--especially if the defendant's demeanor and appearance made it more appropriate--and then later strip the title away in front of the jury during closing arguments, showing how the defendant abused the title and concomitant trust placed in him or her by the public.

Welfare of the Defendant

When a person takes as great a fall from grace as does a previously respected public official who faces trial on public corruption charges, concern must be raised about his or her physical and emotional welfare. Going from someone who hundreds of thousands or millions of voters have supported to one who is a pariah in his or her own community can be more than just a sobering experience; it can be overwhelming. Similarly, being asked to contribute the key evidence

ensuring the downfall of a popular public official--and concurrently losing standing in the community and being treated accordingly--may also wreak havoc on a potential witness.

Each prosecutor whom we interviewed in our on-site visits had personally experienced a public corruption defendant or witness taking or attempting to take his or her life, or had seriously considered the prospect in public corruption cases with which they were involved. While this was clearly an agonizing situation for each of them, the consensus was that a prosecutor should remain alert to the prospect, and sensitive to potential warning signals, but "don't really factor it in," one U.S. Attorney asserted to our interviewer. Decisions ought not to be based on the potential for a defendant to commit suicide, one local prosecutor agreed, but a federal prosecutor said that where possible, appropriate family members or counsel should be cautioned about the suspicions. One local prosecutor said that if the facts would bear out the foreboding feelings of the prosecutor, the prosecutor should seek a commitment hearing.

To guard against such a situation, one federal criminal chief indicated that when faced with the potential for such a situation, he talks with the defense team, and keeps close reins on how the Assistant U.S. Attorneys carry out their conduct. The best tool for preventing witnesses from irrational acts, he contends, is to keep them informed about the proceedings and what is likely to transpire.

POST-TRIAL STAGE

This examination of actions after the trial includes an examination of sentences actually handed down for various convictions; the requirement of resignation as an element of the sentence; the philosophy behind the sentencing; the appropriateness of sentence length; the pursuit of post-conviction information from the convicted defendant; release of information about an individual's guilt after a guilty plea; and the responsibility of the prosecutor to change the environment within which the corruption occurred.

The Sentence in Practice

Examining sentencing practices in public corruption cases is difficult because we have to account for the types of cases with which prosecutors are most familiar. Overall, at least at the local level, with which we are most concerned, there appear to be no "typical" sentences imposed for public corruption convictions. One U.S. Attorney has publicly stated that "A public official who uses his public office to violate the public's trust must spend time in jail," [Allard, 1991 (B): p. A-1]. While this will not always be the case--especially at the local level--certain conclusions can be drawn about when prosecutors seek enhanced sentences.

(1) Nature of the charges. Based upon responses to our survey from both federal and state prosecutors, theft/embezzlement and bribery are by far the two crimes most likely to result in the imposition of a prison sentence. The more heinous the crime charged, the greater the likelihood that the defendant will find the prosecutor urging a more severe sentence. Even when cases are pleaded down in severity, prosecutors will still seek a plea to a more serious charge than might have otherwise been the focus of a conviction if lesser charges had been brought. A crime that directly harms others may result in a different sentence from one where the personal enrichment tends not to encroach upon the prerogatives of others (or directly affects just a few).

(2) Extent of the charges. As with virtually any offense, a defendant who is charged with fewer counts, or just one type of offense versus multiple offenses, will find himself or herself treated more leniently than someone convicted of a number of counts or multiple offenses.

(3) Amounts of consideration at stake. Defendants in cases involving greater amounts of money or property will likely be treated more harshly than those who have become entangled in schemes involving small amounts of consideration.

(4) Degree of complicity. A willing participant--a public official or public employee who appears to be willing to bound into an obviously unethical situation--may be treated more strictly than one who seemed instead to be caught up in a tangled web, and wasn't as demanding or domineering in the unethical transactions.

(5) Acknowledgment of complicity and expression of remorse. All judges prefer to see individuals admit that they made an error, and accept responsibility for his or her actions, instead of pointing the finger at government undercover agents, co-conspirators, or the atmosphere or environment which may have been conducive toward the criminal activity. An individual who does so and truly expresses sorrow for his or her actions is prone to be treated with greater deference in sentencing than one who continues to deny any complicity or personal error.

(6) Attempts to cover up illicit activity. A defendant who acts to cover up or obscure his or her criminal activity after the fact, or after the existence of an investigation becomes apparent is less likely to be treated leniently than one who is forthright about the conduct and who takes no steps to warn co-conspirators, suborn perjury to bring about the best results for him or her, alter or destroy evidence, intimidate prosecutors or potential witnesses, or simply flee the jurisdiction.

On the other hand, reduced sentences may be aggressively sought by prosecutors--and granted by judges--if the defendant has been particularly helpful to the prosecution by providing information that would conserve the time of investigators by keeping them from being led astray; offering information that would keep investigators from having to independently corroborate other allegations; testifying against other individuals; or through actively working on behalf of investigators, such as by wearing concealed recording equipment and attempting to document past transactions with other implicated individuals.

The survey of prosecutors offered an interesting array of responses in the area of sentencing. The survey specifically sought information on "typical" sentences for certain offenses. The results suggest that judges are most apt to sentence a public official or public employee to prison time for the classic, time-tested public corruption offenses involving direct evidence of financial misconduct.

- Sentences for Theft and Embezzlement

More than one-half (56.5 percent) of the 161 local prosecutors responding to questions about average sentence length for public corruption offenses reported that a public official was likely to receive jail time for theft/embezzlement. For one-third of the respondents (33.5 percent), prison time was cited as the probable sole sentence; the others reported some combination of prison time and probation; prison and fine; prison and community service; or prison and some type of combination of the other options.

A public official convicted of the same offense in federal court was far more likely to receive prison time. More than three-fourths of all those public officials convicted in federal court of theft or embezzlement receive prison time as part of their sentence, with prison time constituting the exclusive sentence in one-half of the cases, according to those federal prosecutors responding to the question about sentencing.

Our survey results yielded higher numbers for prison sentences handed down for public employees convicted of theft or embezzlement. Almost two-thirds (60.1 percent) of the local prosecutors responding to the average sentence questions reported that prison time was typically part of a sentence for a public employee convicted of theft or embezzlement. Almost one-half (49.2 percent) of the local prosecutors answered that straight prison time was the basis of the typical sentence, with the remainder offering up some combination of prison and probation, fine, or community service.

At the federal level, More than three-fourths (77.3 percent) of the U.S. Attorneys responding to the sentencing question reported that theft or embezzlement by a public employee would result in some prison time, with 50.0 percent of the total respondents suggesting that prison time alone would constitute the "typical" sentence.

- Sentences for Bribery

A public official accepting a bribe is about as likely to receive a prison sentence in a state court as is a public official who commits an act of theft or embezzlement. Of those 84 local prosecutors responding to the questions, 56.0 percent reported that a bribery conviction would result in a prison sentence for a public official.

At the federal level, however, bribery is far more likely to result in jail time. A full 93.3 percent of federal prosecutors responding suggested that prison time would be a component of a sentence on bribery charges, with exactly two-thirds reporting that prison time alone would likely comprise such a sentence.

A public employee prosecuted at the local level for accepting a bribe is also about as likely to receive a prison sentence as is a public employee who commits an act of theft or embezzlement. Of those local prosecutors responding to the questions, 63.9 percent reported that a bribery conviction would result in a prison sentence for a public employee.

A public employee prosecuted at the federal level for accepting a bribe is as likely as a public official prosecuted at the federal level to receive prison time as a component of the sentence. Again, 93.3 percent of public employees convicted of federal bribery charges are likely to receive some prison time, with 70.5 percent likely to receive only prison time, and no probation, fine, or community service options or enhancements.

- Sentences for Other Offenses

Prison time, at least at the local level, is far less likely to be meted out for certain other public corruption offenses for which a public official is convicted. For favoritism, public officials are likely to be sentenced to prison in state courts in only 22.9 percent of cases; failure to disclose matters required to be reported (or improper disclosure) is apt to result in a prison term in only 16.4 percent of local cases; conflict of interest convictions resulted in 15.3 percent of offenders sentenced to prison; and engaging in prohibited employment practices (e.g., ghost employment,

payroll padding, nepotism) is only likely to send a public official to prison courtesy of state courts in 11.4 percent of cases. Convictions on other related charges (including a wide variety of items such as sexual harassment, drugs, misuse of government property or resources, or improper exercise of powers) are likely to result in a public official receiving prison time in one-third of the cases.

At the federal level, our responses to the questions pertaining to other offenses are far fewer in number, and thus difficult to generalize, although the percentages of those receiving prison time from federal courts for such offenses appears to be quite high. Public officials were sentenced to prison time for favoritism in three out of four cases (75.0 percent); improper disclosure by public officials resulted in prison terms in both of the two cases reported (100 percent); conflict of interest resulted in prison in one of the two cases (50.0 percent); and other cases reported resulted in prison sentences in all of the four cases reported (100.0 percent).

Public employees seem to be less liable to receive prison time as a component of their sentences as imposed by state courts. Prison is likely to be a part of sentences for public employees in 15.4 percent of favoritism cases; 11.4 percent of public employees convicted of conflict of interest charges are apt to receive prison time; and prohibited employment practices seems to justify prison in just 11.1 percent of local cases involving public employees. However, more than one-half (52.9 percent of those public employees convicted of other public corruption-related offenses reviewed above are likely to receive some prison time as part of their sentences.

Our numbers are again low for public employees convicted of other offenses, but, as with federal charges involving public officials, it may be that there is a higher prospect for prison time as a part of a sentence imposed upon a public employee convicted of federal public corruption charges. Those public employees convicted of federal favoritism charges received prison sentences in one of the two reported instances (50.0 percent); non-disclosure resulted in prison time in both of the two cases reported (100.0 percent); federal conflict of interest convictions generated convictions in one of the three cases (33.3 percent); and other offenses carried with them a 71.4 percent likelihood of prison time (five of seven cases).

South Carolina and Arizona: A Tale of Two Stings

A brief examination of the two principal sting operations of the early 1990s is interesting for purposes of reviewing sentencing practices. The South Carolina and Arizona undercover operations both focused upon legislative corruption, with the South Carolina probe spearheaded by the U.S. Attorney, and the Arizona inquiry led by the Maricopa County attorney.

The difference between the federal and state charges is enlightening. The Arizona state charges tended to include multiple bribery counts more often than did the South Carolina federal charges. Yet the federal charges still carried greater potential maximum sentences; the Hobbs Act and conspiracy charges carry formidable penalties.

SOUTH CAROLINA AND ARIZONA UNDERCOVER OPERATIONS

Key Indictments (as of August 31, 1991)

NAME	OFFICE	ST	BRIBE	CHARGES/COUNTS	SENT MAX	C/P	SENTENCE
Kenneth Bailey	Repr.	SC	$ 500	Conspiracy/Hobbs	40 yrs/$500K		AWAITING TRIAL
Larry Blanding	Repr.	SC	$ 1,300	Conspiracy/2 Hobbs	60 yrs/$750K	C	AWAITING SENTENCE
Ron Brown	Repr.	SC	$ 2,000	Hobbs	20 yrs/$250K	P	.5 yr halfway/200hr CS
Thomas Collins	Lobbyist	SC		Cocaine pos/2 distrib	41 yrs/$2.1M	P	AWAITING SENTENCE
Wade Crow	Agency	SC		Aiding/abetting bribe	20 yrs/$250K	P	AWAITING SENTENCE
Paul Derrick	Repr.	SC	$ 1,000	Conspiracy/2 Hobbs	40 yrs/$500K	C	AWAITING SENTENCE
James Faber	Repr.	SC	$ 1,000	Hobbs	20 yrs/$250K	P	AWAITING SENTENCE
Ennis Fant	Repr.	SC	$ 1,300	Conspiracy/Hobbs	60 yrs/$750K	P	1.75 yrs/3 yrs prob/ 200 hr CS
Tee Ferguson	Judge	SC	$ 3,000	Conspiracy/2 Hobbs/6 Coke	66 yrs/$1.3M	C/P*	AWAITING SENTENCE
B.J. Gordon	Repr.	SC	$ 1,000	Conspiracy/Hobbs	40 yrs/$500K	C	AWAITING SENTENCE
Dick Greer	Agency	SC		Cocaine possession	1 yr/$100K	P	2 mos halfway/3yrs prob/ 600 hrs CS/$7,701
David Hawkins	Agency	SC		Obstrux	10 yrs/$250K	P	AWAITING SENTENCE
James Hopkins	Univ.	SC		Cocaine possession	1 yr/$100K	P	AWAITING SENTENCE
Robert Kohn	Repr.	SC	$ 5,500	Conspiracy/Hobbs	20 yrs/$250K	P	AWAITING SENTENCE
Rick Lee	Senate	SC	$ 3,000	Hobbs	40 yrs/$250K	P	.5 yr halfway/ $3050/400 hr CS
Tom Limehouse	Repr.	SC	$ 2,000	Conspir/Obstrux/Hobbs	50 yrs/$750K	P	AWAITING SENTENCE
J.M. Long	Sen.	SC	$ 2,800	2 Hobbs	40 yrs/$500K		AWAITING TRIAL
Frank McBride	Repr.	SC	$ 1,000	Hobbs	20 yrs/$250K	P	AWAITING SENTENCE
Donna Moss	Repr.	SC		Cocaine possession	1 yr/$100K	P	3 yrs probation/$2,550
John Rogers	Repr.	SC	$23,000	RICO/7 Hobbs/2 Obstrux	180 yrs/$2.5M	P	AWAITING SENTENCE
Martin Rohling		SC		Cocaine possession	.25 yr/$2.5K	P	3 yr probation/$1K/ 100hr CS
Luther Taylor	Repr.	SC	$ 4,300	Conspiracy/ 6 Hobbs	120 yrs/$4.5M	C	6.5 yrs/$300/200hr CS
Timothy Wilkes	Repr.	SC	$ 1,500	Conspiracy/ 2 Hobbs	60 yrs/$750K		AWAITING TRIAL
Danny Winstead	Senate	SC	$ 1,000	Hobbs/Obstruction	30 yrs/$500K	P	2.5 yrs/$25K/3 yrs prob.
Jim Hartdegen	Repr.	AZ	$ 660	3 Conspir bribery/$ Launder	25 yrs/$450K	P	1.5 yrs prob/ 500 hr CS/$660 rest
Jesus Higuera	Sen.	AZ	$ 4,040	8 Conspir/bribery/$ Launder/ False CF stmnts.	45.61 yrs/$1.2M	P	2 mos/4 yrs prob/ $4040 rest/640 hr CS
Don Kenney	Repr.	AZ	$60,250	28 Conspir for bribery/ Conspir/Extort/Bribery/Leading Org. crime/$ Launder/Attempted bribery/False CF stmnts./Part. in a crime syndicate	141.48 yrs/$4.2M	P	AWAITING SENTENCE
Sue Laybe	Repr.	AZ	$24,960	17 Conspir/Bribery/$ Launder/ False CF stmnts.	5 yrs/$314,960	P	.5 yrs/4 yrs prob/ $14,960 rest/600 hrs CS
David Manley	Agency	AZ	$ 3,000	3 Conspir for bribery	25 yrs/$450K	P	3 yrs prob/$3K rest/ 240 hrs CS
Jim Meredith	Repr.	AZ	$ 9,300	4 Conspir for bribery/bribery/ False CF stmnts.	26.67 yrs/$600K	P	3 yrs prob/$15K rest/ 800 hrs CS
Bobby Raymond	Repr.	AZ	$12,105	14 Conspir for bribery/ Syndicate/Bribery/$ Launder/ False CF stmnts./Hindering a criminal investig/Conspir to Obstruct	85.87 yrs/$2.1M	P	2 yrs/7 yrs prob/$34.5K/ 300 hrs CS
Donald Stump	JoPeace	AZ	$ 4,700	9 Conspiracy for bribery/ bribery/$ Launder	70 yrs/$1.35M	P	.5 yrs/4 yrs prob/ $4700 rest/400 hr CS
Ron Tapp		AZ	None	27 Conspir for bribery/bribery/ Solicit for commiting 1st degree murder/Leading org. crime/ $ Launder/Exerting improper infl./ Attempted bribery/Solicit for committing bribery	162.92 yrs/$4.05M		AWAITING TRIAL
Carolyn Walker	Senate	AZ	$25,880	10 Conspiracy to bribe/ $ Launder/Bribery/False CF stmnts.	60.61 yrs/$1.5M		AWAITING TRIAL

ST=State, BRIBE= Bribe amount, SENT MAX=Maximum sentence, C=Convicted after trial, P=Guilty plea, CF=Campaign Finance, CS=Community service, Halfway=halfway house, Prob=Probation, Agency=Agency official, Obstrux=Obstruction of Justice, $ Launder=Money Laundering, Rest=restitution * convicted on Hobbs Act charges; pleaded guilty or no contest to drug charges

In terms of actual penalties, those who chose not to go to trial, and those who pledged cooperation to authorities (and carried through on their commitments) were treated far more leniently at both the federal and the state levels than those who professed their innocence and were convicted at trial. Also, some of those who offered to cooperate early in the South Carolina investigation were indicted on lesser charges than those of their colleagues who were indicted for similar offenses, something that does not manifest itself on the following chart.

Because proceedings are still ongoing in both jurisdictions, it is impossible to draw conclusions from the complete body of data, but based upon early sentences handed down, it appears that those who have pleaded guilty to the federal charges in South Carolina have not been treated much differently from those who pleaded guilty to similar state offenses in Arizona. Prison and probation terms do not seem to be particularly different. The differences appear in the peripheral areas: fines and community service sentences. The local sentences handed down in Arizona appear to place more emphasis upon restitution and fines than do the federal sentences in South Carolina. The Arizona courts also seem more inclined to hand out longer community service sentences than do the federal courts in South Carolina.

One factor that may have affected how different Arizona AzScam defendants were treated was the amount of money involved in the bribery or non-disclosure transaction that was the basis for the public corruption charge.. Those who accepted more money were clearly dealt with more harshly by prosecutors in Arizona, both in terms of the charges levied, and the opportunity for plea negotiation. Somewhat surprisingly, however, there does not appear to be any relationship between the sentences for the higher bribe amounts in Arizona (generally $3,000 to $25,000, with one over the $60,000 threshold) and sentences for the significantly lower amounts in South Carolina (generally $1,000 to $5,000). One would expect that while someone has either been bribed or not been bribed--you can't be "just a little bit bribed"--the sentences imposed would bear a closer relationship to the amounts of the bribes; this is one of the elements that federal judges are required to consider in their sentencing guidelines.

What appears to have happened here is that the sentences in Arizona became higher because of the types of times committed, while the sentences for the South Carolina defendants were harsher because of the federal Sentencing Guidelines that were required to be used.

Another catalyst that bears further exploration is the extent to which judges consider taking money from improper sources for personal gain to be more offensive than taking such money for political gain (i.e., taking the cash and using it for the individual's own campaign, or donating it surreptitiously to other candidates). Although no valid comparison can be drawn between the South Carolina and Arizona experiences (due to federal vs. state charges, and the fact that the South Carolina charges effectively amounted to use of funds for personal gain, while the Arizona charges were mixed), at least one judge affirmatively noted that he sentenced an Arizona defendant partially because of his misuse of the public trust for "political gain" (though other egregious circumstances apparently warranted severe sanctions). Public perception certainly plays a major role; the public views taking cash for personal gain as a true crime, while the

public may view using such ill-gotten gains for political purposes to be business as usual, an accepted practice in many political cultures.

In Arizona (the one situation noted above notwithstanding), sentences for those who did use their bribe money for personal benefit appeared to be longer than for those who used it as a redistributive tool, funds spread around among other candidates to help retain or win legislative leadership positions, or otherwise purchase influence within the legislative chambers. Indeed, "lesser" offenders were sometimes able to enter into plea agreements that enabled them to plead to campaign finance-related charges (including such charges as those perceived by the public as "technical" violations related to their status as a public official, such as the failure to file a proper campaign finance statement) rather than the more serious charges of accepting a bribe. There is also evidence suggesting that officials charged with bribery will try to reconstitute their transgressions in a more favorable light, e.g., claiming that rather than being a bribe, the alleged pay-off was actually a campaign contribution that was, regretfully, unreported [*see*, Allard, 1991 (A): p. B-1].

While one certainly has no trouble in condemning use of bribe money for personal advantage, there is less intensity of judgment when it comes to finding equally improper the conduct of accepting admittedly illegal funds and applying them to political objectives. Serious questions arise, however, when one considers whether the same types of judgments should be made by judges in determining the relative egregious nature of the crime. Should a public official be treated any less leniently for accepting bribes and applying them toward remaining in power--where the official receives the privileges attendant to power?

Resignation and Forfeiture of Professional Licenses as an Element of the Sentence

Loss of office or professional licenses may often be the natural consequence of a conviction. Some laws may mandate forfeiture of office or professional licenses upon conviction of certain offenses, or upon sentencing.

Local prosecutors will often seek ouster from office as an element of the sentence, although some acknowledge that they may be on shaky legal ground in doing so, or that the judge might not possess the requisite authority to order the forfeiture of office. If a prosecutor is negotiating with a convicted defendant over additional information, resignation may become part of the package that the prosecutor offers (e.g., in return for the defendant agreeing to testify against another individual in another trial and resigning from office, the prosecutor might offer to work toward a reduced sentence that might include probation rather than prison time).

The federal Sentencing Guidelines permit judges to:

> impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession . . . if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction;

(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and

(3) imposition of such a restriction is reasonably necessary to protect the public

[U.S. Sentencing Commission, 1987: § 5F5.5(a)].

As shattering to an individual as the loss of public office--regardless of the imposition of a prison sentence--may be the loss of the ability to practice a profession. "[T]he vast majority [of legislators] are business and professional people . . . . It is quite striking how few white- and blue-collar workers serve in the legislatures" [Patterson, 1990: p. 176]. Indeed, "[o]ne out of every five legislators in the nation is an attorney" [Rosenthal, 1981: p. 27], and many others also hold professional licenses: "insurance agents and realtors [sic] lose little by the prominence and publicity which waging a campaign and serving in office provide" [Ibid.: p. 28]. Many high-level public employees may also be professionally certified. One study found that 43 percent of state agency heads held some form of professional certification, of which only 11 percent was law-related [Hebert and Wright, 1982: p. 27]. South Carolina's Operation Lost Trust affected the professional licenses of several licenses to practice law, three licenses to sell real estate, one license to sell insurance, and one license to practice optometry.

Losing the ability to practice a trade or profession that has generated the bulk of an individual's income over his or her adult lifetime may be a crippling blow. Conversely, the ability of a prosecutor to recommend that a license be retained or reinstated may serve as an additional tool for securing cooperation.

Philosophical Basis for Sentencing

Three external elements enter into the process when the question is raised as to the appropriate philosophical basis for the sentencing. These include the perspective of the prosecutor, the public, and the judge--and how elements of the views and attitudes of each combine to influence the ultimate sentence handed down.

- The Prosecutor's Perspective

Prosecutors at both the federal and local levels were quick to impart their feelings that sentencing in public corruption cases should be pursued and viewed both as a punishment for the individual and as a potential deterrent for others similarly situated. The fact that prosecutors tend to view public corruption as a particularly heinous offense seems to influence them to strive for an exemplar-type sentence rather than a punishment that is more closely suited toward fitting the offense. There are issues involved in these types of matters that go well beyond simply the

punishment of a single individual, as one U.S. Attorney commented following a particularly notorious public corruption conviction. The community may also need to be placated by a sentence, particularly if a public official or highly placed public employee is believed to have committed significant transgressions, but is convicted only on lesser charges.

Most public officials who are convicted of public corruption charges are probably not prone to be multiple offenders, and the fact that they have risen to a high status in life and then been disgraced by a conviction will probably serve to keep them from recidivating--at least as far as public corruption offenses or cases linked to status as a public official or public employee are concerned. As a result, deterring subsequent similar conduct by the convicted individual is not apt to be much of a factor. The prosecutor must also factor into the decisionmaking process the understanding that "Not every public official deserves the maximum sentence, and not every corruption case is the worst thing since Watergate" [Holder, 1988: p. 247].

- The Public's Perspective

Anyone who believes that the views and attitudes of the public do not find their way into sentencing advocacy by prosecutors and subsequent sentencing decisions by judges is unduly optimistic (or pessimistic, as the case may be). But the public may differ from the views of the judge and the prosecutor.

In general, the public "judge[s] elected officials more severely than appointed officials; judges more than police officers; bribery and extortion more than conflict of interest, campaign contributions, and patronage; and harmful behavior more than petty behavior" [Malec, 1991: p. 5; *see*, Peters and Welch, 1978 (A), (B); Peters and Welch, 1980].

In the Washington, D.C. case involving Mayor Marion Barry, the judge and prosecutor took a much harsher stance with respect to the defendant's conduct than did the public there. However, in Arizona, almost one-half (48 percent) of those surveyed in a professional poll conducted by the *Arizona Republic* felt that two former legislators should have received a prison sentence rather than being placed on probation (an option supported by 43 percent of respondents), as the judge sentenced them [Leonard, 1991 (A): p. A-1]. In general, the poll indicated that more than one-half (54 percent) of the 808 state residents surveyed felt that all of the former legislators who were convicted of receiving bribes should be sent to prison, with 32 percent opting for probation, and nine percent answered that it depended upon the circumstances [Ibid.].

- The Judge's Perspective

Judges seem to be affected by many of the same considerations as are prosecutors in their sentencing decisions in public corruption cases. They may be disposed to consider general deterrence ["One of my duties is to discourage other young men from falling into the same trap," O'Shea, 1991 (C): p. B-5]; a concern for an individual defendant's duty to society and well-being; the threat of continual violations; the need for in-prison rehabilitation of a defendant; whether retribution is justified; the financial and emotional impact of the trial and other events on the defendant; and the seriousness of the offense [*see*, Renfrew, 1977].

However, when it comes to sentencing convicted fellow judges, sitting judges appear to be most harsh in their actions--or at least in their rhetoric [*see*, Noonan, 1987; Borkin, 1962; *United States v. Holzer*].

Federal judges are permitted to use the abuse of a position of trust as justification for sentence enhancement [U.S. Sentencing Commission, 1987: § 3B1.3], because "[s]uch persons generally are viewed as more culpable" [Ibid., in Commentary]. For enhancement to be employed under these circumstances, "The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons" [Ibid.].

A judge may also be cognizant of the so-called "public interest" in arriving at a sentencing decision. One West Virginia judge, called upon to sentence a former city employee for embezzlement, actually invited the public to submit written comments to the court or to the probation officer to aid in sentencing deliberations, saying that he wanted to get opinions from "the little man on the street" [Associated Press, 1990].

Some trial and appellate judges in the states are subject to election or retention votes, and they may also be cognizant of the impact of their sentencing decisions upon their likely electoral success (or even upon their party relationships, in those jurisdictions which have partisan elections for judges).

One point should be raised here which has been effectively used in sentencing proceedings in state courts. In public corruption cases involving proof of a lengthy pattern of criminal conduct (such as a revenue department employee's seven years of experience in altering state tax assessments [Baltimore Sun, 1990]), judges are less favorably disposed toward treating the defendant as a first-time offender, regardless of the absence of any criminal record for that individual. They tend to see through such defenses, perhaps viewing things from the perspective of whether the argument would be persuasive in any other kind of serious felony case context; the "first-time caught," not "first-time offender" scenario is apt to prevail [Holder, 1988: p. 248].

Appropriateness of Sentence Length

Do those convicted of public corruption offenses find themselves being treated more harshly or more leniently than those non-public officials who are convicted of similar offenses? The qualitative evidence from our on-site interviews suggests that at the local level there is no clear consensus, while at the federal level, there appears to be a move toward treating the convicted public official more harshly under the relatively new sentencing guidelines.

During our first on-site visit to a local prosecutor, our interviewer was told that courts are more lenient toward public officials, while on our final interview with a local prosecutor our interviewer was told that the perception is that judges are tougher on public officials because they have broken the public trust. Because the on-site visits between the first and the last also

uncovered disparate opinions, one cannot assume that the course of sentencing changed that drastically in course of that six-month period. Rather, the reality is probably that there is no consensus among local judges across the country as to how public officials should be treated in relationship to those who are guilty of similar transgressions. This should not be surprising, in that the universe of public corruption cases is small to begin with, and the likelihood of a judge handling enough of them for a prosecutor to develop an informed conclusion as to the judge's "toughness" is not as substantial as researchers might prefer. Regardless, we did gain some interesting impressions from the prosecutors with whom we spoke.

There is "complete compassion" for public officials in state courts, one local prosecutor told our interviewer during an on-site visit, noting that they often will receive public service sentences to force them to travel around the state talking about their sins. Another local prosecutor generally supported this perspective, insisting that in his jurisdiction, sentences were probably higher for other white collar criminals than they were for those convicted of public corruption offenses because the average white collar criminal was likely to have a longer criminal history. This tended to outweigh what the prosecutor said was a general unwritten policy in his jurisdiction: if the crimes are identical, the public corruption defendant should be punished more severely than the "typical" white collar criminal.

At the federal level, however, the situation is not quite the same, but it also appears to be almost as inconsistent as at the state level. One U.S. Attorney told our interviewer during an on-site visit that convictions occurring after the imposition of the federal Sentencing Guidelines seem to carry higher sentences for public corruption defendants, but another U.S. Attorney's office bemoaned the fact that there was not much difference--although it felt that there should be. While one U.S. Attorney's office uses public corruption as an aggravating factor in urging the judge to consider an augmented sentence, judges in that district disagree. However, the U.S. District Court judge who handed down a sentence for the mayor of the District of Columbia was quoted as saying that "His breach of public trust alone warrants an enhanced sentence," and the mayor's official position was "of greatest significance" in determining the appropriate sentence for him [Campbell, 1990: pp. A-1, 11]. In South Carolina's Operation Lost Trust, the Chief U.S. District Court Judge, in sentencing one high-profile former state agency director to a harsher than expected punishment, noted that, "Regardless of what you read or hear or see, all people are not created equal, and they do not get treated equally" (O'Shea, 1991 (B): p. A-16].

In examining recent non-systematic data on sentencing decisions that we compiled from both site visit jurisdictions and other states, we noticed that there is a marked proclivity for judges to avoid sentencing a corrupt public official to actual "hard" prison time if the individual was forthcoming in arriving at a plea agreement with the prosecutor. We saw federal judges make creative conscious trade-offs between prison time and halfway-house time; in one instance, the judge, displeased with a prosecutorial request for leniency, sentenced a high-profile defendant to six months in a halfway-house where the maximum sentence under the Guidelines would have permitted only four months of prison time [Ibid. After the government presented specific evidence *in camera* about the defendant's cooperation, the judge reduced the halfway-house sentence from six months to two months--but tripled the number of hours of community service

he was required to perform. O'Shea, 1991 (C): p. B-5]. There also appears to be an inclination by judges--both state and federal--to sentence a violator to prison if there is more than $2,000 involved in a bribery case, or more than $10,000 in a case involving misuse of campaign funds (*see, e.g.*, the chart comparing Arizona and South Carolina undercover operations).

Fairly lengthy probation--terms of three to five years--is most often imposed upon those who plead guilty, and virtually every sentence will be accompanied by a fine and/or restitution. While fines at the federal level are more carefully regulated by the federal Sentencing Guidelines, at the local level our site visits found a remarkable relationship between the amount of the fine and the amount of the transactions serving as the underlying basis for the criminal charges. Fines and restitution seemed to be fairly similar to the amount at stake until the amounts begin to hit the five-digit neighborhood. When such amounts are involved, chances are the punishment will already include prison time. Fines in such cases may be halved if they appear to exceed significantly an individual's ability to pay. This should not, however, be confused with the restitution requirements that are almost universally imposed; full return of ill-gotten gains will almost invariably be required. Our findings seem to track those of other research. For example, a survey undertaken for the National Institute of Justice showed that fines are most often imposed upon first-time offenders with known ability to pay (a profile of a typical public official or public employee), and one-third or more of judges reported imposing fines in more than one-half of the cases in which an adult first offender is sentenced for certain types of cases including such white collar offenses as fraud or embezzlement [Hillsmann, *et al.*, 1987: p. 2].

More federal and local public corruption sentences seem to be imposed today with community service requirements (an ironic twist of sorts, because public service was what the individual was supposed to have rendered, but somehow got caught up in more nefarious activities).

Our qualitative evidence does not clearly indicate whether the sentences of those convicted of public corruption offenses are treated more leniently or harshly than their white collar crime counterparts. Our interviews suggest that some states treat public corruption offenses more harshly, while the political culture in others does not serve to elevate public corruption to the status where sentences handed down for such transgressions are significantly different from those which apply to white collar criminals convicted of similar offenses. Federal judges appear to be treating public corruption more strictly than their state counterparts, but it is unclear yet as to whether the impact of the federal sentencing guidelines is resulting in augmented sentences for public corruption.

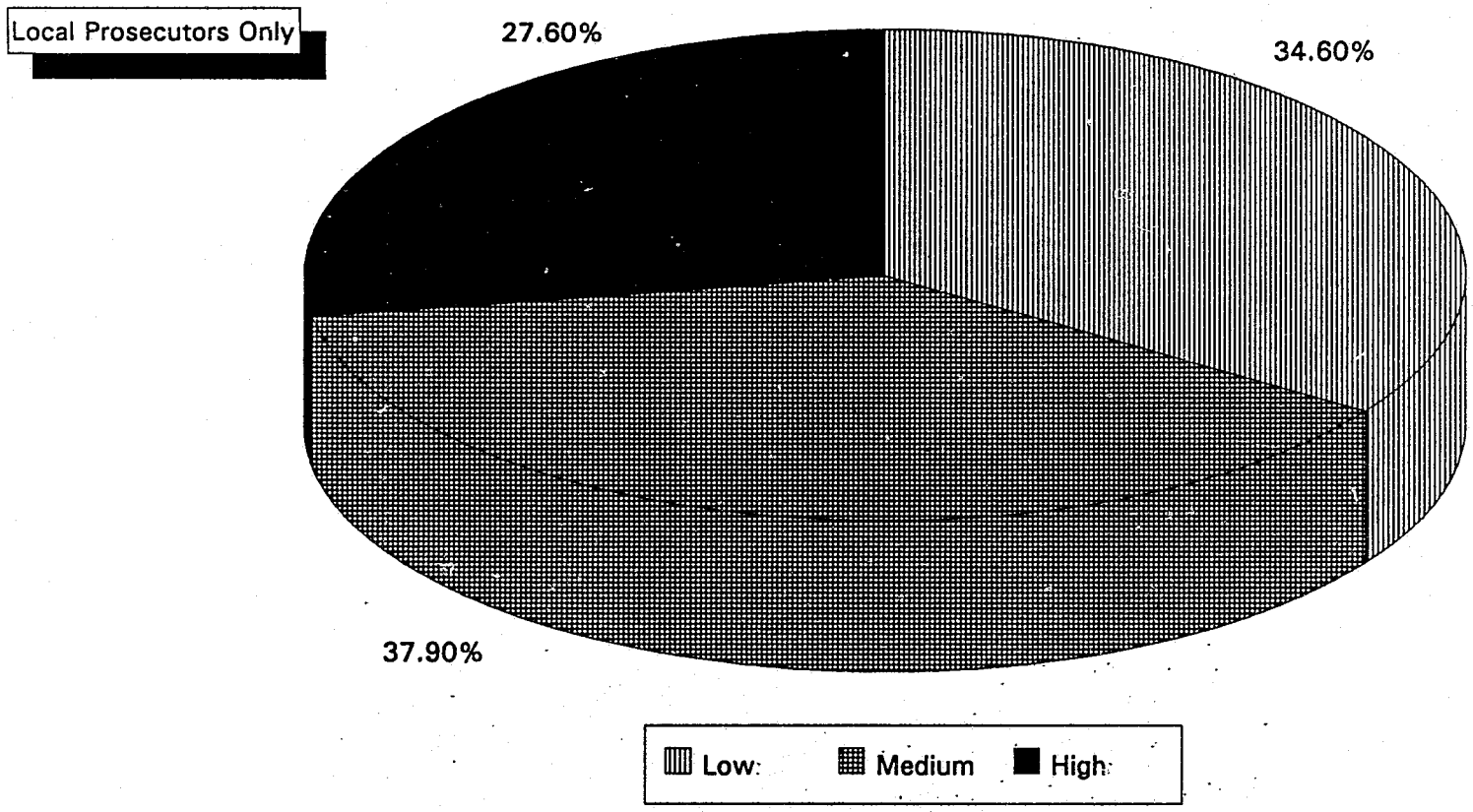
Sentencing Effectiveness

How effective are the sentences handed down in public corruption cases? In our survey of prosecutors, we asked this as an open-ended question. In compiling the results, we collapsed the responses into three categories: low, medium, and high. Removing non-respondents and non-applicable answers (68.8 percent), we find that prosecutorial ratings of sentencing effectiveness does not vary greatly from low to medium to high, although the low end is larger than the high end.

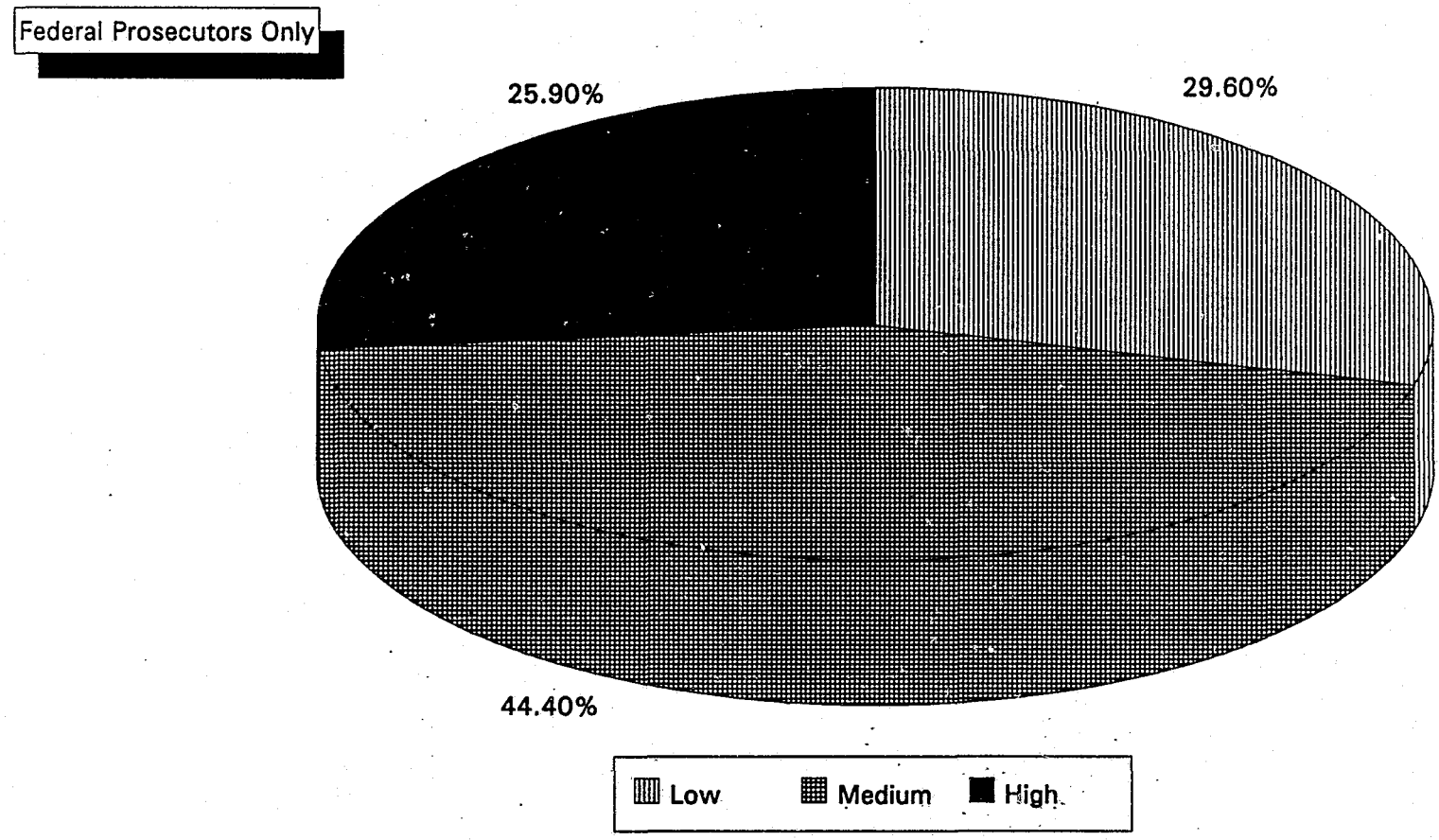
Of our total federal and state prosecutorial sample, 24.0 percent rated sentencing effectiveness as low, 38.6 percent felt that sentencing was of medium effectiveness, and 27.6 percent of the responding prosecutors felt that sentencing in public corruption cases was very effective. Local prosecutors (who dominate the overall sample) virtually mirrored the overall totals, with 34.6 percent of local prosecutors rating public corruption sentencing effectiveness as low, 37.9 percent suggesting that it was of medium effectiveness, and 27.6 percent felt that it was highly effective. Federal prosecutors were much less likely to be non-responsive to this question than their local counterparts, probably because they have more experience at evaluating public corruption sentences. Eliminating non-respondents and non-applicable answers among federal prosecutors yielded 29.6 percent who felt that federal public corruption sentencing effectiveness was low, 44.4 percent who believed it to be of medium effectiveness, and 25.9 percent who felt it to be high. Controlling for the population size of the jurisdiction did not afford any insight.

Thus, local prosecutors appear more likely to find local sentencing practices to be of low effectiveness than federal prosecutors find federal sentences, but only approximately one out of four local and federal prosecutors agree that public corruption sentencing practices in their respective domains are not effective. Federal prosecutors are more likely to have an opinion on the subject than local prosecutors, and are more likely to say that the sentencing is, in general, more effective.

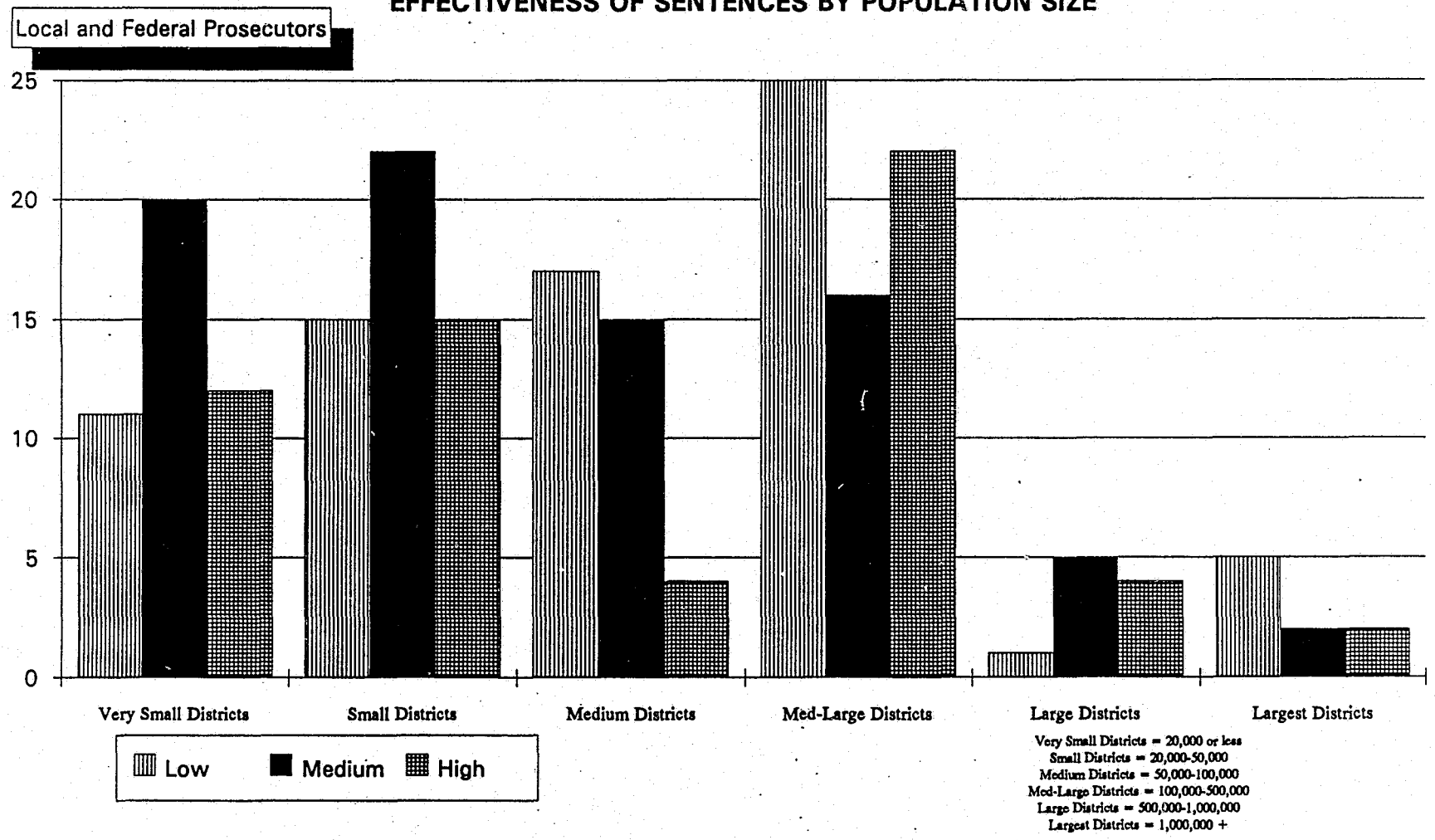
HOW EFFECTIVE ARE THE SENTENCES HANDED DOWN IN PUBLIC CORRUPTION CASES?



HOW EFFECTIVE ARE THE SENTENCES HANDED DOWN IN PUBLIC CORRUPTION CASES?



EFFECTIVENESS OF SENTENCES BY POPULATION SIZE



Pursuit of Post-Conviction Information

Once an individual has been convicted, he or she immediately becomes vulnerable. The individual is faced with the real prospect of losing his or her freedom, and is wont to do whatever can be done to avoid the prospect of a lengthy prison term. Since first-time offenders and those who cooperate with the government appear more likely to receive reduced sentences, the combination of such circumstances could easily net a convicted public official a sentence that consists of probation or public service, rather than prison time, assuming that the prosecutor suggests during sentencing that a lighter sentence is justified. Not unimportant also is the fact that defendants forfeit their constitutional right against self-incrimination after conviction on those charges.

The lighter sentence may be earned by offering to cooperate with the prosecutor. Helping the convicted defendant improve his or her position can be thrown out "as a bone," as one local prosecutor told our interviewer during an on-site visit. Another local prosecutor took a different stance, however, telling our interviewer that his experience had been that if cooperation is not obtained before the trial, it will not be forthcoming after conviction--and any information that might still be forthcoming is probably not suitable "trade" bait for the anticipated reduction in sentence.

The federal prosecutors whom we interviewed during our on-site visits were not unduly deterred by the provisions of the federal sentencing guidelines which seem to restrict the ability of prosecutors to seek post-conviction sentence mitigation for cooperation by defendants. Although there was some grumbling about added paperwork, federal prosecutors with whom we discussed the situation felt that the federal sentencing guidelines did not hamper their ability to turn defendants after conviction.

Release of Information Following Conviction

In situations in which a public official has been convicted of a public corruption offense, or has pleaded guilty to such a transgression, but all relevant evidence has not been disclosed in open court, significant questions arise. Some prosecutors believe that disclosure should be the motivating force, and all relevant evidence should be disclosed so that the public can see that a public official who "accepted responsibility" for a lower offense was actually involved in more serious breaches of trust.

The bottom line appears to be that "anything can be negotiated," as one Assistant U.S. Attorney said, with the caveat that the additional incriminating material may include references to other parties or defendants that the prosecutor may not feel comfortable in releasing, or releasing at that particular point.

The prosecutors with whom we discussed this matter during our on-site visits didn't indicate any reluctance toward such disclosure; they split fairly evenly between indifference and favoring

disclosure. One local prosecutor told our on-site interviewer that the public should be made aware of all charges pleaded to, and other allegations that would have been made at trial.

Disputes over the release of information seem to arise in cases where the prosecutor has accumulated enough evidence to link an individual to more criminal activity than the charges to which he or she has pleaded, and the news media wants access. Few public officials who enter into guilty pleas on minor charges are favorably disposed toward the prosecutor or the court releasing miles of video or audio tape portraying them as stuffing their pockets with marked bills received from a Runyonesque character, or ingesting illegal drugs with an attractive member of the opposite sex. The stigma of a conviction may mean less to these individuals than the damage done to their future political or employment prospects by harm to their reputation when wider information is released. Obviously, prosecutors will want to take advantage of this concern of defendants. However, the prosecutor should balance this advantage against the value of further public disclosure. Removing information from public access can cast doubt over whether the prosecution really had a strong case against the defendant, and the extent of the defendant's guilt. A prosecutor certainly does not want a defendant who has admitted responsibility for an action to parade around the jurisdiction suggesting that he or she really wasn't guilty of anything important. A balance of sorts may be struck by which tapes and other similar evidence may be released or shown in court, with those present--including the news media--able to review the strengths of the government's evidence--but permitting the evidence to be sealed following such a one-time disclosure.

Responsibility of the Prosecutor to Change the Environment

The prosecutor does not operate in total isolation, and although charged with responsibility for enforcing the law, prosecutors are quick to acknowledge that they have a further duty to prevent crimes from occurring.

A prosecutor is in a unique position. The prosecutor has the opportunity to see a bigger picture than many other people toiling in government. This perspective may enable the prosecutor to discern trends and problems that others may not be able to perceive. For example, if a prosecutor prosecutes a case involving financial fraud by an agency financial clerk, there is a substantial likelihood that internal agency procedures were in some way deficient, allowing the practice to take place. The prosecutor may suggest a set of changes in financial management practices to the agency that would make it more difficult for similar fraud to be perpetrated in the future. If there appears to be a number of different agencies experiencing the same types of fraudulent practices, the prosecutor may wish to step in and recommend changes in law that would apply to all agencies or individuals handling certain responsibilities within the government.

Suggestions for policy changes were viewed as natural outgrowths of investigations and prosecutions by virtually all of the prosecutors who were interviewed during the course of our on-site visits. One local prosecutor, who mentioned that his office often "performed the role of a management consultant," also exhorted his counterparts to work toward the establishment of clear policies that could be enforced from a criminal standpoint in the future (loose state policies

regarding the official use of government telephones was one area that he is currently looking at as a reform target). This can even take the form of speaking out publicly for legislative action that would change "business as usual"--although prosecutors may feel more comfortable doing so with a disclaimer that indicates that they are speaking for themselves as private citizens, and not in their official capacity [Mitchell, 1988 (B): p. B-1].

WHAT WOULD HELP PROSECUTORS

What resources do prosecutors say are the most helpful to them in battling public corruption? What resources do they say would be the most helpful to them? Our survey results shed some light on this.

In answering an open-ended question, local prosecutors responded that their most valuable current resource was strong laws. Of those local respondents who cited a resource now available to them, 24.0 percent answered that strong laws were their top choice, and another 1.5 percent cited strong laws as their second most important resource. The first choice of 18.4 percent of the local respondents was personnel/staff, while an additional 6.4 percent ranked it as their second choice. State law enforcement garnered top votes from 9.4 percent of local respondents, and was the second pick by 1.1 percent. Examining the law enforcement universe as a whole--local, state, and federal--15.4 percent of local prosecutors responding suggested that this was their most important, with 4.1 percent ranking all law enforcement in second place (note that some of the second choice respondents could be repeats; for example, they may have marked state law enforcement as most important, and then chosen general law enforcement as the second most critical element.

CURRENT AVAILABLE RESOURCES VIEWED AS MOST HELPFUL

	1st Most Helpful	2nd Most Helpful	3rd Most Helpful
Local Prosecutors	Strong Laws	Personnel/ Staff	State Law Enforcement
Federal Prosecutors	Personnel/ Staff	Federal Law Enforcement (tie) Auditors/Accountants Strong Laws	

Surprisingly--given the emphasis on pursuing financial-related crimes such as stealing and embezzlement--local prosecutors were not quick to suggest that auditors, accountants and the like were top choices.

When we looked at the resources that would help local prosecutors (i.e., those that are not currently available to them), our numbers become more interesting. Controlling for our non-respondents and non-applicables, almost one-third of local prosecutors, 30.1 percent, cited personnel as their top need, with 13.7 percent ranking it second-most on their priority list, and 2.4 percent ranking it third. From these figures it is apparent that local prosecutors perceive additional personnel as a key element to the effective prosecution of public corruption cases. U.S. Attorneys who responded indicated a similar priority for personnel. Of the federal respondents, 18.5 percent cite personnel as their top resource, and 3.7 percent cite it as the next most important. Given the labor-intensive nature of public corruption cases, these findings are consistent with what should be expected.

RESOURCES NOT NOW AVAILABLE VIEWED AS MOST HELPFUL

	1st Most Helpful	2nd Most Helpful	3rd Most Helpful
Local Prosecutors	Personnel/ Staff	Funding	Strong Laws
Federal Prosecutors	Personnel/ Staff	Funding	Strong Laws

While funding is not frequently listed as a resource now available, it is a major choice among resources that would be helpful to local prosecutors. Almost one out of every four local prosecutors--23.3 percent--responding cited additional funding as their top need, with 6.0 percent terming it their number two need, and two percent rating it third on their wish list.

Strong laws were cited as the top need by 13.3 percent of the local respondents.

Of interest here is that some potential resources did not generate large numbers. For example, while local law enforcement was listed as a primary resource now available and relied upon, local prosecutors do not seem to perceive it in terms of a major additional need. The three law enforcement categories received a minimal number of first and second choice responses as resources that would be helpful.

Also mentioned as needs by some, but not many, local prosecutors were electronic surveillance equipment, accountants, training, and better working relationships with federal prosecutors.

What conclusions can be drawn from these figures? One potential conclusion is that it may be that prosecutors simply feel overworked and underpaid to the extent that they don't see how they can effectively devote their resources to public corruption cases. They may also simply be comfortable in pursuing a prosecution under a law that is either strong (i.e., harsh penalty provisions are attached), or clear (one that is carefully drafted to proscribe a certain type of activity), or both. In fact, the need for clearer laws was expressed to us in more intense terms during the course of our on-site interviews. *One of the strongest recommendations that we have is not for prosecutors at all, but rather for legislators, both state and federal: prosecutors need laws that directly apply to the conduct that is intended to be prosecuted. Prosecutors are more comfortable prosecuting public corruption activities under laws that directly proscribe certain conduct, rather than those which only peripherally seem to encompass it, through extensions of the law by judges, and not through legislative action. A single standard of judgment, clearly reflected in a single place in the statutes, would be of immense help not only to the prosecutor, but also to the public official or public employee who should be able to easily determine the propriety of an intended act.*

The lack of apparent interest in training and accountants or auditors is a somewhat confusing and potentially disturbing sign. If, as we have been told, crimes involving financial gain through theft or embezzlement are the most prevalent, then we should have seen auditors and accountants listed either as a very valuable resource currently available, or as one that needs to be secured by the prosecutor. Yet this was not the case. And if public corruption cases are truly a "different breed" of white collar crimes, as we were told in our on-site visits, it would seem that specialized training would be of more than passing fancy to local prosecutors.

FURTHER AREAS FOR RESEARCH

The results of our qualitative and quantitative explorations are fascinating, but they raise almost as many questions as they were intended to answer. Research into several areas beyond the scope of this study may be justified on the basis of our findings.

Our respondents may have been more likely than the national norm to have handled public corruption cases. The clear implication here is that while public corruption may be more widespread today than in the past, many local prosecutors still do not handle any public corruption cases at all. This is especially true when we look at crimes other than theft/ embezzlement and bribery.

At the same time, our figures should not be used to downgrade the importance of public corruption cases and/or research on this topic. As we have discussed, the potential impact of a public corruption case is great. Also, we have no means of knowing how many public corruption cases go unreported each year. We do not know how many prosecutors simply turn their heads or are blind to evidence of public corruption. With the advent of ethics agencies imbued with new jurisdiction, authority, and powers, many cases may simply be handled outside of traditional criminal justice channels.

In statistical analysis, raw figures are often less important indicators than the rate of change. However, in order to calculate change, one must analyze information across time. While some data pertinent to past cases may be available, this study is a first attempt to take a comprehensive look at the nature and extent of public corruption at a national level, and therefore may serve as a valuable benchmark for future studies.

Because our results do appear to be fairly representative, researchers may want to conduct general surveys in future years and compare their results to ours. Also, a future researcher may wish to use our survey results to construct a representative sample that could be analyzed regularly (on a an annual or biennial basis) over time to spot and track trends.

For example, a researcher could select 200 or 250 of the 744 local prosecutors who responded to our survey and track them over time, with our survey results serving as the baseline. Since these offices have responded once, they may be willing to participate in such a survey on an annual basis, and perhaps would make a conscious effort to maintain good statistics. This would help to reduce the margin of error.

By examining the prosecution of public corruption over time for a consistent sample of prosecutors, researchers should be able to determine whether the number of public corruption cases is increasing or decreasing. The impact of various laws and related actions, including changes in personnel and resources, on public corruption investigations, indictments, plea agreements, and other successful prosecutions should also be easier to determine through an on-going survey effort.

Better Statistics on Apparent Public Corruption Increases

We cited earlier the tenfold increase in federal indictments and convictions of public officials in the past two decades. We have compiled data on current levels of state and local activity covering public corruption prosecution. Analysts need comparable historical data for locally prosecuted public corruption cases, and sound analysis is also required to consider what is responsible for any increases.

In-Depth Analysis of Active Offices

While this project surveyed all prosecutors to determine their experiences with and attitudes toward the prosecution of public corruption, it may be of greater value in the future to identify those prosecutors who are actively engaged in the investigation and prosecution of public corruption and survey and interview them in greater detail--or compare their policies and procedures to a representative sample or control group of prosecutors who are not actively involved in the prosecution of public corruption). By doing this, we would be able to learn from the experts in the field. For example, instead of surveying all college basketball coaches on what it takes to win on the floor, why not concentrate on those who have winning records--or NCAA tournament wins--since they are the ones who really know what it takes to win?

Offender Characteristics

Is there a "typical" public corruption defendant? The ability to develop a profile on the average public official or public employee who is likely to engage in public corruption would be an invaluable tool for investigators. Do these individuals have prior records, as do many defendants in other white collar crimes? Are they more prone to engage in crimes of opportunity, or crimes that have been more carefully planned? Do they have characteristics that tend to differ noticeably from other public officials or public employees? Why do these individuals engage in public corruption activities?

Prosecutorial Priorities

Research should examine the relationship between the priority the prosecutor places on public corruption and other prosecutorial priorities. Why do many prosecutors appear not to have priorities? Why do prosecutors with priorities establish the priorities as they do? Is it a resource allocation decision, a perception as to community need, personal tenets, or a combination of these and other factors? Do established priorities actually relate to office output? What jurisdictional characteristics--other than population--seem to have an effect on establishment of priorities--and can such a relationship be borne out by looking at existing priorities?

Sentencing

Additional, more rigorous research should be undertaken into sentencing of public corruption defendants, especially as compared to other white collar crime defendants convicted of similar

offenses. In particular, research should focus on the relationship between charges brought to charges pleaded to (in cases involving plea agreements), and how the general pattern of such charging and plea agreement decisions by prosecutors relates to their parallel decisions in other white collar crime cases. Research should also be initiated which would examine judicial sentencing practices for both types of defendants in both plea agreement and trial situations.

Research should be undertaken into the differences in sentencing for individuals convicted of offenses involving personal gain and those convicted of crimes involving political gain or the gain of third parties.

Additional research should explore the relationship between charges brought and potential sentences versus the sentences eventually handed down, distinguished between plea agreements and actual convictions, and between pre-indictment and post-indictment plea agreements and ultimate sentences.

Factors Affecting Incidence of Public Corruption

Closer attention should be afforded to the conditions giving rise to public corruption. For example, does public corruption exist to a greater degree in a jurisdiction which has historically tolerated public corruption activities? Or, for example, is a more rapidly growing county more susceptible to public corruption than a moribund county? What factors might cause such a disparity? At least one model has been developed to examine political corruption in the states as a function of historical and cultural influences, the political environment, the structural/reform characteristics of government, and bureaucratic influences [Holbrook and Meier, 1991: p. 7]. However, this model is of limited utility because it only considers prosecutions of state public officials and public employees undertaken by U.S. Attorneys and does not break out the two categories (officials and employees) separately.

Research should also examine effects of changes in laws and the provision of ethics education upon the nature and extent of the corrupt activity.

Special Prosecution Units

Research should be undertaken to determine the effectiveness of special dedicated public corruption units as a deterrent to public corruption. Research would have to be undertaken into the level of corrupt activity in the jurisdiction before and after the establishment of such units, and consider the times along the continuum that the illegal activity was alleged to have occurred.

The Public Corruption Life Cycle

Qualitative impressions suggest that there is some form of life cycle associated with scandals. The cycle appears to begin with rumors about the investigation of an official or entity, which are met with skepticism. Then, following release of information about an investigation, denial appears to be the order of the day. The "it can't happen here" syndrome seems to take control--

for a day or so. Then comes the shock stage, when the realization finally sinks in among the public and public officials that there is a very real problem that must be dealt with. From there, we progress to the stage at which there is a tremendous clamor for reform, and then delay, as legislators or bureaucrats agonize over whether the far-reaching cures are appropriate to correct the problem. Inevitably, there will be more public input into the process, something will be passed, and the public will be quieted--at least until the next scandal appears. Whether such a scenario appropriately represents the situation in most jurisdictions bears closer observation as a potential means for learning how public corruption can best be mitigated.

METHODOLOGICAL OVERVIEW AND GUIDANCE FOR FUTURE RESEARCHERS

This project involved a review of available literature, collection of data through a survey of federal and local prosecutors, and on-site visits to select jurisdictions to learn more about the nature and extent of public corruption across the country, and to discover how practice meshed with policy. Prior to this project, no systematic research had been conducted regarding the numbers and types of public corruption cases handled by prosecutors other than at the federal level, and the considerations that affected the prosecution of public corruption by prosecutors at all levels of government.

Project Advisory Board

At the outset of the project, staff met with members of the project advisory board established to provide guidance to the project throughout its existence. Board members, each of whom had a particular degree of expertise in a project-related area, provided a great deal of insight into the procedures ultimately used to fulfill the project objectives, and to the substance of the effort. Board members were asked to critique the survey draft, and the draft of the final project report. Individual board members were consulted on a periodic basis when their expertise was needed to answer a particular question or contribute to a specific area of the report.

Literature Review

The literature review was accomplished through several means. On-line bibliographic searches were conducted to locate materials concerning public corruption and governmental ethics. Books were obtained for review through the Indiana University library system and inter-library loan. Project staff examined each potential entry for relevance to the project's needs.

Additional materials not generally catalogued or popularly available were also provided to project staff by the U.S. Department of Justice and prosecutors. These materials, often in the form of guidelines and policies, were sometimes provided to the project for background information only, and not for attribution or quotation. We have strived to respect the spirit in which they were given to us.

Law review articles related to public corruption and governmental ethics were also reviewed by project staff, as were articles that dealt with certain applicable state and federal statutes, legal theories, and prosecution strategies.

Judicial opinions identified through the review of literature were examined and analysis performed for use in the final project report on decisions that were relevant to the project theme. These included decisions from the U.S. Supreme Court, the U.S. Court of Appeals, and the U.S. District Court. State appellate court and court of last resort decisions that were on point were also reviewed.

Finally, project staff monitored major national newspapers; legal, political, and governmental trade journals; and other periodicals for material related to the project. After news broke about the major legislative undercover operations in South Carolina and Arizona, project staff reviewed The State (Columbia, South Carolina), and the Arizona Republic (Phoenix, Arizona) to remain current on the state of those investigations, indictments, plea negotiations, trials, governmental and public reaction, and other related maneuvering and action.

Survey Procedures

A lengthy survey instrument was developed to collect an extensive amount of information regarding the prosecution of public corruption. One of the principal goals of the project was to develop a database that would at least serve as a benchmark for research on the topic of public corruption.

Project staff used first-class mail to distribute a four-page, legal-sized survey of prosecutorial practices with respect to public corruption to all local prosecuting attorneys and U.S. Attorneys. The mailing list for local prosecutors was obtained from the National District Attorneys Association, and that for U.S. Attorneys was provided by the Executive Office of U.S. Attorneys. There were 2,645 local prosecutors who were mailed a survey over a three-day period from July 8-11, 1990, and 92 U.S. Attorneys who were sent surveys over the same period. Prosecutors were asked to return the survey by September 4, 1990.

The surveys were mailed with two cover letters, one from the National Institute of Justice explaining the project and urging cooperation, and the other from the Hudson Institute, instructing prosecutors on how to complete the survey protocol, and providing details on who to contact in case of questions. A mailing label for return of the survey was also included in the package. A copy of the survey protocol and cover letters are appended.

Formal approval was not obtained from the Executive Office of U.S. Attorneys for the administration of the survey to federal prosecutors, which resulted in some initial confusion. A copy of the draft survey package was sent to the Executive Office for review, but no formal approval or disapproval was forthcoming. Some U.S. Attorneys called or wrote project staff, explaining that they would not complete the survey without affirmative guidance from the Executive Office. Others called the National Institute of Justice Project Monitor seeking further information. U.S. Attorneys who called the Executive Office were told that they could complete and return the survey as long as no information was provided on pending prosecutions that was not otherwise in the public record.

There were 550 responses to the first wave of surveys. After conferring with the NIJ Project Monitor, and discussing the response rate with other NIJ grantees and the NIJ Research Roundtable, project staff undertook a second round of surveys, directed at those who had not responded to the first wave.

The second wave of surveys was mailed in early January, 1991, with a requested return date of February 15, 1991. By April 30, 1991, 236 responses had been received to the second wave of surveys.

Our total survey responses numbered 780, or 28.9 percent of our total sample. Local prosecutors returned 744 of the 2,645 surveys mailed, for a response rate of 28.1 percent; and U.S. Attorneys returned 34 of the 92 sent, for a response rate of 37 percent (two were classified as missing cases due to improper identification, but are likely from local respondents). Based upon Metropolitan Statistical Areas, 608 of our respondents serve non-metropolitan areas, 164 serve metropolitan areas, and two were classified as missing cases.

This response rate is lower than we would prefer, yet it appears to be a statistically sound sample. We believe that our response rate was kept down due to our desire to avoid anonymous responses (we wanted to be able to identify jurisdictions for on-site visits and to be able to examine certain state laws or prosecution practices that explained why certain responses were unusually high or low). Further hurting our response rate was the intervening election. We resurveyed non-respondents to the first wave of surveys in January, after a major election year. Virtually all local prosecutors are elective officials, and many prosecutors had turned over as a result of the intervening election, making it more difficult for prosecutors to return completed surveys, or forcing the survey to take a back seat to other office priorities in the first few weeks of their tenure.

Survey Sample

Data is meaningless if the sample from which conclusions are to be drawn is unrepresentative of the universe of potential respondents. To assess the validity of our sample of respondents, we compared the population characteristics of our local respondents against the population characteristics of all local prosecutors. We also examined the geographic distribution of our sample on a state-by-state basis. Population and geographic distribution are the only two areas which appear to be reasonable gauges of representativeness. While we also considered examining our sample for elective versus appointive prosecutors, only New Jersey appoints local prosecutors, making such a comparison not worthwhile.

For our general statistical analyses, we collapsed the populations of our respondents into six categories: (1) 0 - 20,000; (2) 20,001 - 50,000; (3) 50,001 - 100,000; (4) 100,001 - 500,000; (5) 500,001 - 1,000,000; and (6) 1,000,001 and greater. We believe that these breakdowns are best-suited for data analysis and cross-state comparisons.

While the population categories that we have used are best for analysis, for an assessment of statistical validity, we recoded our highest three population categories to conform to the population categories used by the National District Attorneys Association (NDAA) and the American Prosecutors Research Institute (APRI) to describe and classify their membership. NDAA/APRI uses different cut-off points for the three largest population categories than we used for our analysis. The top three categories (listed in reverse order) for NDAA/APRI are (6)

500,000 and greater; (5) 250,001 - 500,000; and (4) 100,001 - 250,000. Recoding of our sample by the NDAA/APRI population figures allowed us to compare "apples with apples."

Our percentages at the various population levels are extremely similar to the national profile. Interestingly, we had been worried that perhaps we had an overly large percentage of responses from prosecutors from very small jurisdictions (population of 20,000 or fewer). These prosecutors are the least likely to handle public corruption cases, so this obviously could have had an impact upon our results. However, the statistical comparison shows that our percentage of prosecutors serving this population category is actually slightly lower than the national average. At the higher population levels, we received a slightly higher percentage of responses than would be indicated by the national sample. Overall, however, the percentages were quite close to parity, and we are quite pleased with the apparent population-based validity of our sample.

There is a very strong similarity between our survey respondents and the national profile. For 14 of the 31 states with one percent or more of our survey respondents or the national prosecutor populace, our response was within one-half of one percentage point difference from the national numbers. In another six states, the difference was between one-half of one percentage point and one percentage point.

Only two states stand out in the survey as being particularly different from the national figures (which we consider to be three or more percentage points). One is the State of Texas. Of our respondents, 7.9 percent were from Texas. Texas is home to the highest percentage of prosecutors of any state; 11.34 percent of all local prosecutors are from Texas. However, of the 321 local prosecutors from Texas, 185 (57.6 percent) serve very small jurisdictions, and therefore would not be as likely to have handled public corruption cases as those who serve more populous areas. We did receive more responses from Texas than from any other state, and as the population percentages grow larger (as with Texas), the chance for a wider disparity between the survey sample and the national profile figures also increases.

The other anomaly was Mississippi. Only 2.3 percent of all survey respondents were from Mississippi, yet 8.0 percent of all prosecutors are from Mississippi. This is especially surprising, because Mississippi does not have an especially large population. A review of the NDAA/APRI figures shows that 153 (67.4 percent) of Mississippi's 227 local prosecutors serve jurisdictions with populations of 20,000 or less. Based on our other findings, this would indicate to us that many of Mississippi's local prosecutors have not had a great deal of experience with public corruption cases. Confirming this impression is the fact that Mississippi's U.S. Attorneys have been extremely active in the prosecution of local instances of systemic public corruption.

While our figures appear to be similar to the national profile, our responses do seem to show a slight bias toward the Midwest. This can probably be attributed to two primary factors. First, midwestern states generally seem to have a larger number of prosecutors, hence, there is a larger pool from which to draw. Second, the Hudson Institute is based in the Midwest, so midwestern prosecutors may have felt more of an obligation to respond.

Data Entry and Analysis

When surveys were returned to Hudson, a project staff member recorded the return, and assigned a population characteristic to the responder based upon the zip code, using Bureau of the Census information. Each returned survey was assigned a control number based upon the zip code of the respondent. In cases of multiple respondents from within the same zip code, a letter was added at the end of the zip code to create the control number. In addition to entering this information into the database, the original returned surveys have been retained on file in coded folders for future reference or additional verification.

Using Statistical Package for Social Sciences (SPSS) Data Entry II software, project staff designed a database for the survey results on an IBM-compatible AT computer. The SPSS Data Entry II program was judged to be an effective tool because it permitted staff to design a data entry format that was similar to the survey format, which, we believe, served to reduce the likelihood of errors during the data entry process.

The surveys were divided into two different groups based upon whether they were received as a result of the first solicitation or the second one, and were ultimately aggregated for analysis. They remain, however, readily segregable should there be a need to review the two sets separately. There were no statistically significant differences between the respondents to our two waves of surveys (aside from a greater number of U.S. Attorneys responding to the second survey at the behest of the U.S. Department of Justice).

One individual was responsible for the entire data entry process, ensuring consistency in the entry of data. Data was "cleaned" through the SPSS Data Entry II program, with both the individual responsible for data entry and another member of the project staff reviewing anomalous or otherwise suspicious data for necessary modifications.

Data analysis was conducted using SPSS/PC+ (Version 2.0). Because the data entry and analysis programs were designed by the same company for use together, they were fully compatible. Worthy of mention, however, is the fact that SPSS/PC+ is primarily a quantitative analysis program, and thus is not designed to manipulate string variables of any significant length. For the most part, this was not a problem. However, there is not an easy way to categorize, collate, or analyze lengthy comments made by respondents; much of this work was done manually.

Most variables were coded using a "9" or "99" to indicate a "No Response." If a respondent answered a question with "Not Known" or "Not Applicable," the codes "8" or "88" were used. These were separated from responses of "zero" or "none," which were coded as "O."

Comparison of Survey Responses to National Profile*

STATE	TOTAL	PERCENT	01	02	03	04	05	06
Alabama	40	1.4	4	10	16	8	1	1
	6	0.8	0	2	2	2	0	0
Alaska	10	0.4	8	2	0	0	0	0
	2	0.3	0	1	0	0	1	0
Arizona	15	0.5	2	4	7	0	0	2
	4	0.5	1	1	1	1	0	0
Arkansas	24	0.9	11	2	6	4	1	0
	3	0.4	0	0	2	1	0	0
California	58	2.1	8	10	7	12	8	13
	17	2.3	0	2	1	6	2	6
Colorado	22	0.8	3	8	2	5	3	1
	6	0.8	0	2	0	2	2	0
Connecticut	13	0.5	1	0	5	3	2	2
	2	0.3	0	0	0	1	1	0
Florida	20	0.7	0	0	2	4	7	7
	5	0.7	0	0	0	1	0	4
Georgia	45	1.6	0	1	21	17	4	2
	3	0.4	0	0	1	1	1	0
Hawaii	4	0.1	0	1	2	0	0	1
	3	0.4	0	0	2	0	0	1
Idaho	44	1.6	34	5	4	1	0	0
	14	1.9	10	3	1	0	0	0
Illinois	102	3.6	42	32	12	11	3	2
	38	5.1	18	11	4	2	2	1
Indiana	90	3.2	46	29	8	5	2	1
	36	4.8	12	16	4	3	0	1
Iowa	99	3.5	62	27	5	4	1	0
	41	5.5	29	7	3	2	0	0
Kansas	105	3.7	78	19	4	2	2	0
	29	3.9	19	5	2	1	2	0
Kentucky	176	6.2	100	52	18	4	0	2
	25	3.4	8	8	6	2	0	1
Louisiana	41	1.5	9	13	9	7	2	1
	7	0.9	4	2	0	1	0	0
Maine	8	0.3	0	1	2	5	0	0
	5	0.7	0	0	0	5	0	0
Maryland	24	0.9	3	6	6	4	1	4
	10	1.3	1	3	0	3	1	2
Massachusetts	11	0.4	0	0	0	3	3	5
	1	0.1	0	0	0	0	1	0
Michigan	83	2.9	26	24	15	11	3	4
	33	4.4	9	8	8	6	2	0
Minnesota	87	3.1	45	32	5	3	3	1
	39	5.2	17	14	3	2	2	1
Mississippi	227	8.0	153	46	16	11	1	0
	17	2.3	11	2	1	3	0	0
Missouri	115	4.1	74	27	7	4	1	2
	30	4.0	15	10	2	2	1	0
Montana	56	2.0	49	4	2	1	0	0
	20	2.7	16	2	2	0	0	0
Nebraska	93	3.3	80	10	1	1	1	0
	28	3.8	23	3	1	0	0	1
Nevada	17	0.6	13	2	0	0	1	1
	5	0.7	3	1	0	0	0	1
New Hampshire	10	0.4	0	4	2	4	0	0
	1	0.1	0	1	0	0	0	0
New Jersey	21	0.7	0	0	4	5	6	6
	4	0.5	0	0	1	1	1	1
New Mexico	14	0.5	4	4	1	4	1	0
	6	0.8	1	1	1	2	1	0

Comparison of Survey Responses to National Profile (cont.)

New York	62	2.2	2	14	25	9	3	9
	16	2.2	1	1	10	0	2	2
North Carolina	37	1.3	29	3	3	1	1	0
	7	0.9	0	0	0	5	1	1
North Dakota	53	1.9	45	4	4	0	0	0
	13	1.7	10	1	2	0	0	0
Ohio	88	3.1	6	35	24	12	6	5
	21	2.8	2	7	5	4	1	2
Oklahoma	27	1.0	10	8	6	2	0	1
	5	0.7	0	0	4	1	0	0
Oregon	36	1.3	14	9	7	4	1	1
	20	2.7	7	4	4	3	1	1
Pennsylvania	67	2.4	8	16	13	17	9	4
	20	2.7	1	4	3	6	5	1
South Carolina	16	0.6	0	0	0	13	3	0
	2	0.3	0	0	0	2	0	0
South Dakota	66	2.3	58	6	1	1	0	0
	21	2.8	18	1	1	1	0	0
Tennessee	31	1.1	14	6	5	6	1	0
	4	0.5	0	0	1	3	0	0
Texas	321	11.3	185	74	35	17	5	5
	59	7.9	26	21	1	6	1	4
Utah	29	1.0	20	3	2	3	0	1
	14	1.9	9	2	1	1	0	1
Vermont	14	0.5	2	10	1	1	0	0
	6	0.8	2	4	0	0	0	0
Virginia	122	4.3	54	38	17	10	2	1
	36	4.8	14	14	1	5	2	0
Washington	39	1.4	13	9	7	6	2	2
	9	1.2	3	2	2	1	0	1
West Virginia	55	1.9	24	19	10	2	0	0
	10	1.3	6	3	1	0	0	0
Wisconsin	71	2.5	24	23	13	8	2	1
	31	4.2	10	10	5	3	2	1
Wyoming	23	0.8	16	6	1	0	0	0
	9	1.2	5	4	0	0	0	0
Nat'l Profile	2,831	100.0	1,379	656	353	255	90	88
Survey Sample	744	99.7	311	184	88	90	36	35

* Top row for each state denotes national profile; bottom row is survey respondents

Population Categories

01 = 0 - 20,000
02 = 20,001 - 50,000
03 = 50,001 - 100,000
04 = 100,001 - 500,000
05 = 500,000 >

Percentages of Local Prosecutors in Various Population Categories

	01	02	03	04	05	06
Nat'l Profile	48.7	23.2	12.8	9.0	3.2	3.1
Survey Sample	41.8	24.7	11.8	12.1	4.8	4.7

Survey Sample Percentages Versus National Profile*

STATE	Survey Sample	National Profile	Survey Minus Profile
Alabama	0.8	1.4	(0.6)
California	2.3	2.1	0.2
Georgia	0.4	1.6	(1.2)
Idaho	1.9	1.6	0.3
Illinois	5.1	3.6	1.5
Indiana	4.8	3.2	1.6
Iowa	5.5	3.5	2.0
Kansas	3.9	3.7	0.2
Kentucky	3.4	6.2	(2.8)
Louisiana	0.9	1.5	(0.6)
Maryland	1.3	0.9	0.4
Michigan	4.4	2.9	1.5
Minnesota	5.2	3.1	2.1
Mississippi	2.3	8.0	(5.7)
Missouri	4.0	4.1	(0.1)
Montana	2.7	2.0	0.7
Nebraska	3.8	3.3	0.5
New York	2.2	2.2	0.0
No. Carolina	0.9	1.3	(0.4)
North Dakota	1.7	1.9	(0.2)
Ohio	2.8	3.1	(0.3)
Oregon	2.7	1.3	1.4
Pennsylvania	2.7	2.4	0.3
South Dakota	2.8	2.3	0.5
Texas	7.9	11.3	(3.4)
Utah	1.9	1.0	0.9
Virginia	4.8	4.3	0.5
Washington	1.2	1.4	(0.2)
W. Virginia	1.3	1.9	(0.6)
Wisconsin	4.2	2.5	1.7
Wyoming	1.2	0.8	0.4

* This chart only compares percentages for those states whose prosecutors comprise at least one percent of the survey respondents or one percent of the national profile of prosecutors; for the other 19 states, our percentages and the national profile percentages obviously were quite similar (they ranged from 0.14 percent to one percent).

During our analysis, we sometimes discarded the "No Response" and "Not Applicable" categories, or else merged them into the "0" category. This was done on a case-by-case basis based upon our review of how the data could best be analyzed and presented for easy understanding. We recognized the resulting inconsistency, but believed that it would be better to compensate for the broad variety of questions contained in, and quantity of responses to, our survey.

As a result of cleaning the data before conducting our analysis, we were able to eliminate most missing cases. However, a minimal number of missing cases still exists for certain variables. These missing cases were removed when we conducted our analysis.

The difficulty in drawing concrete conclusions from the survey results is compounded by the large number of local prosecutors who have never handled or successfully prosecuted a public corruption case. Although this is a variable beyond our control, it is important to mention.

Because the aggregated survey responses often raise more questions than they answer, the data should prove useful in terms of identifying issues for future study. We hope that the results are not taken as "gospel," but rather that they are viewed in a broader context. For example, it is more important to observe that fewer than one-half of the respondents noted that any portion of their budget is dedicated toward the prosecution of public corruption, rather than being concerned about the specific percentages.

Survey Responses

General Overview

The survey asked for information on 17 areas, some of which were divided into sub-areas. Overall, it is fair to say that the survey was somewhat imposing, and asked for a considerable amount of information. Thus, we are encouraged that approximately one-third of the respondents took the time to review, complete, and return the survey.

One caveat may be that those who have prosecuted the most public corruption cases, or handled the widest variety of public corruption cases, may have been the least likely to respond, since such a record would have meant more effort to complete the survey than that required for a prosecutor who had only handled one public corruption case in the period covered, and could answer the queries without reference to records. However, the opposite may also have occurred; those prosecutors without any experience in public corruption prosecution may have been less inclined to participate, reasoning that they had no experience to contribute. Even though an addendum to the Hudson Institute cover letter to the second survey implored prosecutors to respond regardless of not having any experience with public corruption cases, there was no discernible difference in the amount of public corruption experience between prosecutors who responded to the first survey wave and the second one. This leads us to believe that we have received a good cross-section of responses.

The survey was also quite broad. This was valuable because it allowed project staff to obtain a great deal of information. But, in some ways, it leads to more questions than answers. This is not necessarily bad, but we may find that our survey will prove more important as a starting point for other studies than as a final word or data set regarding public corruption.

A key point here is that although we had a strong survey and a good response rate, we asked a number of open-ended questions of prosecutors who did not necessarily have a great deal of first-hand experience handling the issue of public corruption, offenses that are quite different than those which comprise the bulk of the typical local prosecutorial caseload. Only through the conduct of this survey could we have established that there are some two-thirds of local prosecutors who do not have experience in prosecuting public corruption, and this is valuable information in light of statistics showing increases in public corruption, especially those generated by federal prosecutors.

Survey Questions

The first five questions were listed under the heading, "Demographics."

The first question asked for the official name of the office and whether the prosecutor is elected or appointed. Almost all indicated that they were elective officials. However, the survey did not ask whether a prosecutor fit into a third category: a prosecutor appointed to fill the remaining term of an elective official. While we would expect that most individuals in such a position would mark this as "elected" because it is an elective office, we had no means of controlling for those who may have chosen to respond to this differently.

The second question related to the total population served by the office, which was self-explanatory. The third question sought the office's 1990 budget and asked whether it was a fiscal or calendar year budget.

The fourth question asked what percentage of the office's budget is devoted to or used for the prosecution of public corruption. This question turned out to be of marginal value, since 355 (45.6 percent) of the prosecutors responded "none," 129 (16.6 percent) responded with "Not Known" or "Not Applicable," and 61 (7.8 percent) failed to respond to the question. Considering the pattern of responses, it may be more efficacious in the future to ask how money is dedicated toward the prosecution of other offenses. In this manner, we may be able to make some meaningful comparisons. This might also be valuable information for future researchers who want to analyze how prosecutors (especially local prosecutors) allocate limited resources--and how effectively they use those resources.

The final question in this category asked how many total cases, and how many public corruption cases prosecuted by the office went to trial in 1989, the baseline year. Considering that we had 149 (19.2 percent) "no responses," 78 (10 percent) "Not Applicable" or "Not Knowns," and 70.2 percent who had successfully prosecuted fewer than ten public corruption cases, it is clear that

we did not have an overwhelming number of respondents who were prosecuting many public corruption cases.

Questions 6-8 were listed under the heading, "Handling of Public Corruption Cases." These were straightforward questions that generally seemed to yield good results.

The sixth question asked if the office has a special policy or written guidelines for the prosecution of public corruption.

Question seven asked where the prosecution of public corruption ranks among the priorities of the office (number one, top three, top five, or not in the top five priorities). While we did not have a response category for "office has no priorities," we did find that 129 (16.6 percent) of our responses were "Not Applicables," or "Not Knowns." We also asked if the priority assessment combined public corruption with the more generalized white collar crime category, and 254 (32.6 percent) answered "Yes," while 414 (53.2 percent) answered "No."

The eighth question asked if there was a special full-time unit within the prosecutor's office devoted to the prosecution of public corruption. If so, the respondent was asked to delineate how many individuals were employed in this unit in several distinct categories (attorneys, paralegals, investigators, clerical, law clerks, and other personnel), and whether this unit was physically housed within the prosecutor's regular facilities.

Questions nine and ten dealt with "Characteristics of Public Corruption Prosecutions." Each of these questions subsumed a number of other sub-topics.

The first of these two questions asked how many elected officials and public employees the office had investigated, brought indictments against, reached plea agreements with, and successfully prosecuted since January 1, 1987. These are all straightforward questions, yet the numbers are not easily comparable. This is because public corruption cases take an inexorable amount of time to investigate and prosecute. Thus it is difficult to compare the number of elected officials prosecuted with the number of elected officials investigated during a block of time because the prosecutions could have resulted from investigations that commenced before the time period we sought information on (federal figures which annually break out amounts by indictments, convictions, and cases pending as of December 31 further illustrate the dilemma). Similarly, individuals may have been indicted in 1990 and not gone to trial by the time of the survey. We did not ask in our survey how long it usually takes for a case to move from the investigation to indictment or prosecution phases.

Another issue with respect to this data set revolves around the fact that we asked about numbers of individuals, not numbers of cases. For example, one prosecutor talked with project staff about casting a broad net when conducting an investigation. Therefore, if an elected official is suspected of engaging in public corruption, this prosecutor might very well investigate a large number of elected officials and/or public employees who work with this elected official. If those investigations do not result in indictments, that adversely affects the office's success rate.

Similarly, we may have one prosecutor who obtained ten indictments through one undercover operation, while another may have secured ten indictments as a result of five or even ten separate investigations. Here, we would end up with the same number of indictments, but the approaches and methodologies employed may have been radically different.

Our question regarding successful prosecutions makes it clear that cases that later were overturned on appeal may be included. We did not, however, ask how many of these prosecutors actually did have cases that were overturned on appeal.

We also did not ask how many public officials these prosecutors attempted to prosecute. Researchers seeking to survey prosecutors for similar information in the future would do well to consider asking questions that will lead to better direct comparisons. For example, a question on "how many public officials did you investigate?" should be followed by a question asking "how many of these investigations led to indictments?" Similarly, a question on "how many public officials did you successfully prosecute?" should be preceded by one asking "how many public officials did you attempt to prosecute?"

The tenth question asks how many elected officials and how many public employees fall into the following categories: bribery, stealing embezzling, nepotism/favoritism, failure to file required reports, conflict of interest, prohibited post-government employment, or other. The question appears to be straightforward, yet the wording proved to be of some concern because it did not precisely match the language used in the previous question. We were not as clear as we might have been in outlining exactly what was meant by the phrase "fall into."

The next three questions, 11-13, fell under the rubric, "Investigation and Coordination with Other Offices." These were also straightforward questions.

The first of the questions set forth a list of individuals and entities likely to bring public corruption cases to the attention of prosecutors, and asked the respondents to break them down into percentages. The second question here asked for the percentage of cases that the prosecutor turns over to another prosecutor at a different level of government. The third question in the trilogy sought information on the factors that would be important when deciding whether to turn over a case. We did not ask the respondents to rank these factors, but rather simply requested that they check those factors which were deemed applicable.

Questions 14 and 15 dealt with sentencing. Unfortunately, they did not provide as much information as desired because they were so open-ended in nature. For both elected officials and public employees, we asked what a "typical" sentence is in the jurisdiction. In retrospect, this left too many variables open for interpretation. For example, we did not distinguish here between levels of severity of the offense, and one might expect an individual to be treated more harshly for stealing $500,000 from the government agency which the individual serves than if the individual walked off with one dozen No. 2 lead pencils for personal use. As a result, comparisons between jurisdictions using these numbers are virtually impossible.

We did, however, attempt to make the best use of the responses. The responses to this question were recorded in a manner that illustrates the many variations--and combinations--of penalties. We employed a number system in which each response was individually reviewed and the type of penalty was assigned a single-digit number by our coder. The numbers were then combined as required. Thus, for example, if "jail" was coded as a "1," and fine was coded as a "3" (the actual values assigned to these particular categories of penalty), then a response indicating both jail time and a fine as elements of a typical sentence would be coded as "13." If the respondent indicates that jail time or a fine would be a typical sentence, the response would be coded as a "31" (multiple penalties were listed in ascending order, while either/or penalties were recorded in descending order).

Another issue that must be noted with regard to this question is that most prosecutors had handled few--if any--public corruption cases in general, and therefore were not in a good position to explain what a "typical" sentence was when the universe was broken down even further to include offenses such as nepotism and non-disclosure that were few in number. Our data thus becomes questionable, not because of any methodological flaw, but because there simply were too few people with the first-hand information needed to effectively respond.

The other question that was asked under "sentencing" was how effective the prosecutor believes the sentences are in deterring public corruption. Since this was another open-ended question, the survey coder collapsed the answers into a format that could be more easily analyzed. Based upon the response, effectiveness was translated into numeric variables representing the values "low," "medium," or "high" (again, one individual was responsible for this, ensuring consistency across surveys). However, the actual responses have been entered into the database as string variables for purposes of verification and future research.

The final pair of questions, 17 and 18, were listed under the heading, "Resources."

The first question asks what tools that are currently available to the prosecutor are helpful in pursuing public corruption cases, and the second asks what tools that are not now available would be most helpful in pursuing public corruption cases.

These questions were both asked in an open-ended fashion, although they were not difficult to collapse and code into 15 categories (number 15 was "Other"). In this instance, however, it might have been more productive to provide the prosecutors with an inventory of options, and asked them to rank the options for all those that applied. We chose not to do so because we wanted to receive unprompted responses to this question. Although the prosecutors were not asked to rank the resources in terms of effectiveness or need, we essentially did this based upon the order in which the variables were listed on each survey by creating five numeric variables and a string variable for each of these two questions. In this way, we not only can mention that a certain number of prosecutors cited a given variable as being an important tool, but we can also note whether the prosecutor listed that variable first, second, third, fourth, or fifth. In practice, most respondents limited their responses to one, two, or, at the extreme, three resources. We created the string variable to explain what "other" resources, if any, were listed.

At the end of the survey instrument, we ask for any additional information that the respondent might wish to supply. As a result, we included a comment area at the bottom of the data entry form to include such comments or other notes about the completed survey. For example, we might note that a copy of the prosecutor's public corruption policy statement, or the office's annual report highlighting key public corruption prosecutions, is attached to the survey.

On-site Visits

Project staff members conducted on-site visits to five jurisdictions, and conducted interviews with three federal prosecutors, five local prosecutors, and other state law enforcement and independent ethics officials.

On-site visits were determined by the desire to interview officials from jurisdictions with both high and low levels of federal activity, and high and low local prosecutorial activity. We sought to identify jurisdictions where federal prosecutors seemed to be active at the expense of local prosecutors, and situations where the roles were reversed. We looked at jurisdictions that had historically had problems with maintaining a high level of ethical conduct by public officials and public employees, and jurisdictions which were viewed as having a more positive tradition of public service.

We received the assistance of the Executive Office of U.S. Attorneys in securing cooperation from U.S. Attorneys offices. We were turned down only once--by a local prosecutor in the Midwest whose office was chosen on the basis of geographic location and a dearth of public corruption activity--who simply did not want to participate. We were able to select a jurisdiction of similar size and activity within that state and federal judicial district for an on-site visit, and cooperation was forthcoming.

Participating offices were assured of total confidentiality in the process as a means of gaining access to them. In the majority of cases, we met with the prosecutor himself or herself; where we were not able to have access to the principal, we were able to interview the criminal chief or office-equivalent. In one case, the interview involved both the prosecutor and the deputy who headed a special public corruption unit.

Several of those prosecutors whom we interviewed expressed a desire to review the final report, and a draft was mailed to those prosecutors in mid-June, 1991. Comments received were universally favorable, and suggestions conveyed to project staff as a result of this review were incorporated in this final volume.

While we do not pretend that the offices selected represent a statistical cross-section of the country, they do provide a good look at the various ranges of effort and ability across the country. We are confident that they have provided project staff with an excellent overview of why certain prosecutors do certain things in certain situations when handling public corruption investigations and prosecutions.

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