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# The Investigation and Prosecution of Police Corruption

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# CRIMINAL LAW

## THE INVESTIGATION AND PROSECUTION OF POLICE CORRUPTION

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### INTRODUCTION

Within the last few years there has been a marked proliferation of federal investigations and prosecutions of state and local officials for official misconduct and corruption. So active has the federal government become in investigating the local political arena that state and city politicians and police officers are being investigated, indicted and often convicted for a wide variety of violations of federal criminal statutes. Because this intense interest in the affairs of local officials by federal investigators is a relatively recent development, little attention has been given to the changes in the application of federal law, federal jurisdiction and constitutional protections which have accompanied these investigations. Questions concerning political motivations behind such federal incursions into local affairs have also beclouded any real attempt to delineate objectively the legal and practical effects of investigations of local corruption.[1]

The purpose of this article is to focus on one recent and controversial development—the investigation and prosecution of police corruption. This analysis will identify the specific methods employed by federal prosecutors to subject local police officials to federal prosecution,[2] thereby offering insight into the intricacies of the investigation of one governmental body by another. In addition, the federal investigation of state and local corruption has raised new questions about the proper role of federal law enforcement. By analyzing the problems which arise in one particular type of investigation, it will also be possible to point out new ways in which to improve the relations between state and federal agencies.

### TYPES OF POLICE CORRUPTION

Essentially, police corruption falls into two major categories—external corruption, which concerns police contacts with the public, and internal corruption, which involves the relationships among policemen within the workings of the police department. The external corruption generally consists of one or more of the following activities:

> (1) Payoffs to police by essentially non-criminal elements who fail to comply with stringent statutes or city ordinances; or, payoffs by those in particular need of police protection, who are willing to pass money to individual officers or groups of officers (for example, businessmen dispensing liquor, businessmen located in high crime areas, individuals operating any type of business requiring a license, automobile towing operations, attorneys who represent those guilty of minor violations of the law where police testimony constitutes most

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Much of the factual material found in this article is based on the author's tenure from September, 1970 to November, 1972 with the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice. The views expressed in this article are his own and do not necessarily coincide with the views of officials of the Justice Department. In addition, much of his time was spent with the Chicago Strike Force, one of eighteen field offices of the Racketeering Section and nothing in this article is intended to reflect on any government lawyers or personnel of agencies with whom he worked.

[1] During my assignment with the Chicago Strike Force, I found little political influence in the investigations which I conducted, the enormity of the federal bureaucracy effectively blunting any overt political bias that might affect a decision on whether or not to investigate local corruption. More particularly, the experience of supervising an investigation of police corruption led me to the conclusion that such investigations were at least as much the product of "an idea whose time has come" as they were the consequence of any political bias.

[2] Since the authority or jurisdiction of any single police department is confined to a single jurisdiction within a state, it traditionally has been assumed that the investigation and elimination of police corruption should be left to the state. That such enforcement rarely happens may be explained by any one of the following: (1) One cannot effectively investigate himself; (2) Local government officials are themselves paying the police for favors; and (3) The citizenry largely acquieses in and enjoys the favors and leniency granted by the police who can be bought.

of the state's case, and individuals who repeatedly violate the traffic laws).

(2) Payoffs to police by individuals who continually violate the law as a method of making money (for example, prostitutes, narcotics addicts and pushers, and professional burglars).

(3) "Clean Graft" where money is paid to police for services, or where courtesy discounts are given as a matter of course to the police.

These manifestations of external corruption often follow the established hierarchial structure of the police department. For example, a tavern owner who wishes to avoid arrest by members of a vice squad investigating violations of the liquor laws must be assured that his payments to a single officer will guarantee that the recipient either has the power to direct other officers not to bother the tavern owner or shares the money with those who have command responsibilities. For this reason, the payment of money to the police by businessmen, who are particularly vulnerable to arrest for minor statutory violations, generally assumes a highly organized structure of distribution. Where the method of distributing the proceeds of collection becomes too burdensome, a more sophisticated method may develop. A commander of a district, who knows that collections can easily be extracted from tavern owners, may simply charge an officer who wants to be assigned to the vice squad a fixed fee per month regardless of the amount actually collected. Similarly, those in charge of appointing commanders of districts may extract a monthly charge in exchange for awarding that position.

Sophisticated methods of corruption also exist where the police receive money from organized crime. Because large scale bookmaking, narcotics peddling and other forms of organized criminal activity are highly structured, payments to the police tend to be highly organized. Thus, protection for a syndicate's numerous wire rooms in a district might require payments to the commander who will direct his subordinates not to harass certain establishments. The commander will either have to pay his officers or allow them to keep a portion of the proceeds which they collect.

In all cases of external police corruption, protection is the service bestowed, either in overlooking violations of the law or in providing some additional police aid or assistance. Because the police have broad discretion in enforcing the law, the establishment of an organized system of corruption does not require extensive covert activity. As long as those who pay are satisfied with the service, exposure is unlikely.

Internal corruption exists as a result of a desire of individual officers to improve their working conditions or to achieve higher status in the police department. It may include:

(1) Payment of money to join the police force.

(2) Payment of money to higher ranking officers for better shifts or assignments.

(3) Payment for choice vacation time.

(4) Strict adherence to a code of silence concerning external police corruption.

(5) Payment for promotions.

(6) Payment for an assignment which will yield lucrative kick-backs.

Most types of internal corruption seldom are publicized and usually are not the subject of federal prosecution. However, because they are often interdependent, the elimination of external corruption may have the effect of eliminating many forms of internal police corruption. Thus, widespread investigations and prosecutions of external police corruption may have a potentially significant impact on all aspects of police corruption.

## Federal Authority for the Investigation and Prosecution of Police Corruption

### A. *The Hobbs Act*

Although Congress has recently passed legislation which authorizes federal investigative and prosecutorial efforts against police corruption in the area of organized gambling,[3] the most signifi-

[3] 18 U.S.C. § 1955 (1970), enacted as part of the Organized Crime and Control Act of 1970. This statute expanded federal jurisdiction over gambling activities by proscribing the conduct of an illegal gambling business under state law by five or more persons and which grossed $2000 in any single day, or remained in substantially continuous operation for a period in excess of thirty days, whether or not the business involved any interstate activity. At the same time, and as part of the same Organized Crime Act of 1970, Congress enacted another statute which incorporates within the illegal gambling business ambit of section 1955 state officials who either through official acquiescence or active participation facilitate the gambling business, although only the enforcement of state laws may thus be obstructed. *See* 18 U.S.C. § 1511 (1970).

Although couched in terms of obstruction of justice, section 1511 was a congressional response to the considerable amount of evidence that intrastate gambling flourishes in part because of protection payments made to police and other local officials. Despite the congressional initiative, the utility of these statutes in efforts against police corruption is still in doubt. Numerous factors contribute to the failure of these laws to be used effectively. First, there is difficulty in establishing the

cant enlargement of federal powers and jurisdiction has come through expanded use of a well entrenched federal statute known as the Hobbs Act. This statute provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.[4]

Two elements of the Hobbs Act are relevant to an investigation of police corruption: (1) the meaning of extortion; and (2) the commerce requirement. The following examples will illustrate their importance.

An officer observes a youth leaving a tavern with beer. He stops the boy and checks his identification which shows him to be under the legal age for purchasing alcoholic beverages. The officer then escorts the youth into the bar, confronts the owner or the bartender with the apparent violation, and receives an admission that he should not have sold the beer. The officer finds a private corner of the tavern to discuss the matter further with the bartender or owner and, being very careful not to be overheard, says,

> "What are you going to about this? You could lose your license."
>
> "How about if I give you $100."
>
> "That's not enough. I have others to take care of, you know."
>
> "I'll give you $300."
>
> "O.K."

The officer accepts the $300 and releases the minor without making any arrest. He does not file a report of the incident, although police regulations require a report whether or not an arrest is made.[5]

Or, a police officer may enter a tavern to check the patrons' identifications and the owner uses this occasion to complain that his customers' cars, which are parked outside in a no parking zone, are constantly being ticketed or towed away. "This hurts my business" explains the tavern owner. The owner also tells the officer that the constant checking of identification by him and other members of the vice squad drives customers away. The officer listens to the complaints and the following exchange takes place:

> "Why not cut out all this nonsense?"
>
> "How much will it cost me?"

"five person" requirement of section 1955, especially in light of the limiting construction given that statute by some courts. *See* United States v. Harris, 460 F.2d 1041 (5th Cir. 1972)(holding that low level employees are not "conducting"); United States v. Riehl, 460 F.2d 454 (3d Cir. 1972)(holding that customers do not fall within the purview of the statute but street level employees do). *But see* United States v. Mainello, 345 F. Supp. 863 (S.D.N.Y. 1972). Second, successful investigations under sections 1955 and 1511 often involve court authorized wiretapping which have met with serious difficulties in recent years due to non-compliance with the statutes' procedural requirements. *See* United States v. Giodano, 469 F.2d 522 (4th Cir. 1972), *cert. denied*, 405 U.S. 955 (1973); United States v. Becker, 461 F.2d 231 (2d Cir. 1972). *See also* United States v. Chavez, 478 F.2d 512 (9th Cir. 1973); United States v. Roberts, 477 F.2d 57 (7th Cir. 1973); United States v. King, 472 F.2d 1 (9th Cir. 1973); United States v. Robinson, 468 F.2d 189 (5th Cir. 1972). Third, federal judges probably have not always been enthusiastic about cases brought under these statutes which sometimes involve as many as thirty defendants in a single case and require extensive pretrial work. Fourth, there is undoubtedly the realization that evidence of payoffs to police is found not through wiretapping or testimony of conventional witnesses, but only through informants who are not willing to testify in court. Finally, there is also the traditional reluctance of the Federal Bureau of Investigation to employ undercover agents who would have the opportunity to obtain direct and usable evidence of police and official corruption.

[4] 18 U.S.C. § 1951 (1970).

[5] This incident is paraphrased from the court records and trial testimony in United States v. Gill, 490 F.2d 233 (7th Cir. 1973) and United States v. Pacente 490 F.2d 661 (7th Cir. 1973).

> $50 a month and you won't have any problems."
> "O.K.[6]

Whether these practices constitute extortion under the Hobbs Act and whether there is the requisite effect on commerce are the crucial problems facing the prosecutor who wishes to proceed against these officers. In analyzing the Hobbs Act, it must be emphasized that the fear, if any, which is felt by the tavern owner relates directly and solely to the enforcement or non-enforcement of the law by the police. In both examples the victims were concerned that the law would be enforced. Naturally, the tavern owner concludes that he would be better off paying the police and avoiding arrest or what he conceives to be unnecessary harassment. Hence, once the bar owner receives the slightest indication that the officer is willing to make a deal, he will often conclude that the payment of money is the only practical solution.

The expanding concept of what constitutes extortion by a public official under the Hobbs Act has largely been led by the Courts of Appeals for the Third and Fifth Circuits, whose opinions have encouraged prosecutors, with the support of trial courts throughout the country, to begin investigations of the activities of local officials. In *United States* v. *Hyde*[7] the attorney general of Alabama, his assistant, and a political supporter were indicted under the Hobbs Act. In substance they were charged with extorting money from life insurance companies and small loan companies in Alabama. In return for paying money to the defendants, the insurance companies were assured that the attorney general would refrain from enforcing the state securities laws while the loan companies were given assurances that they would not be sued for charging illegally high interest rates.[8] Because of the evident willingness of the insurance companies and loan companies to pay money to the defendants to avoid being subjected to sanctions for their unlawful conduct, the defendants vigorously argued that the payment of money by the companies was bribery and therefore outside the scope of the Hobbs Act.[9] The court, however, rejected the defendants' arguments. In affirming the defendants' convictions, the court assumed that the payors' satisfaction with the results obtained was irrelevant and concluded:

> Threatening to take official action—even where it is action that the official is duty bound to take—for the purpose of coercing the victim to pay the officials is extortion.[10]

Although the court did not discard the "threat" requirement, it required a threat no more explicit than the belief by the victim that unless he paid the money the official would enforce the law. The absence of reliance by the court on an explicit threat theory of extortion is repeatedly demonstrated by the court's willingness to overlook the lack of evidence of threats or coercion on some of the payments made by the companies:[11]

[6] This incident is adapted and modified from the records and trial testimony in United States v. DeMet, 486 F.2d 816 (7th Cir. 1973). Conversations like those quoted occur in an almost endless myriad of factual contexts ranging from an officer who approaches a businessman for monthly payments in exchange for adequate police service to an officer receiving money from individuals engaged in serious criminal activities (for example, narcotics or robbery offenses). The essence of external police corruption, however, is always the same and focuses on the willingness of the victim to pay money in exchange for either protection or favors.

[7] 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

[8] Some of the evidence produced at the trial indicated that, even where the attorney general was required by law to disapprove an improper sale of securities or to file suit against a loan company, he would refrain from taking any action if paid money by the company involved. *Id.* at 821.

[9] If the conduct were considered bribery, the defendants would not be subject to indictment under any federal statute, except perhaps income tax evasion if the money was received and not reported. Why the Hobbs Act included extortion but not bribery is an open question, but the answer is no doubt partially due to the fact that the Hobbs Act came into being in response to labor unrest and violence, rather than any need to reach all instances involving the payment of money to public officials. For a detailed survey of the history and background of the Hobbs Act, see Stern, *Prosecutions of Local Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1 (1971).

[10] 448 F.2d at 832. *See also* United States v. Sopher, 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966), which involved the kickbacks to a public official for construction contracts. The court did not discuss the distinction between bribery and extortion where a public official is concerned.

[11] In this context the court quoted with approval a definition of extortion proposed by the Drafters of the MODEL PENAL CODE which reads:

> The threatened harm need not be 'unlawful.' The actor may be privileged or even duty bound to inflict the harm which he threatens; yet if he employs the threat of harm to coerce a transfer of property for his own benefit he clearly belongs among those to whom theft sanctions should be applied. The case of the policeman who is under a duty to make an arrest illustrates this point. His threat to arrest unless the arrestee pays him money is clearly extortionate although the policeman would be derelict if he did not arrest.

448 F.2d at 833, n.27. The textual examples of police corruption demonstrate that an official commits extortion when he uses the power of his office and the victim's belief that he can and will enforce the law if not paid.

> The jury could infer that these people knew of the general pattern of extortion and sought out Hyde with the knowledge that they would have to deal with him eventually in order to get these issues approved. Even if these persons were not coerced, that is, they were really bribes, the jury could find that other payments were made by the victims coerced into paying extortion.[12]

Although the court failed to clarify what degree of coercion should be required to elevate bribery into extortion, it did attempt to draw a distinction based on who initiated the discussions which led to the payments. In effect, this limits extortion to instances where the public official seeks out the victim:

> The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim.[13]

The court did not explicitly define "voluntariness." Instead, it recognized that, because the victim's "fear" emerges from knowing that the law will be enforced unless money is paid, only the most ambiguous approach by the official is needed to give the victim the knowledge that a payment will be accepted and will have the desired effect. Indeed, one can argue that the official's mere acceptance of money constitutes extortion. To accept that position would, of course, eliminate any distinction between the concepts of bribery and extortion. *Hyde* did not reach this question, but simply concluded that once the official accepts the money the jury must decide whether the payment was made as a result of bribery or extortion. The inherent difficulty in distinguishing between bribery and distinction renders the charge to the jury based on *Hyde* extremely beneficial to the prosecution. The natural reluctance of a defendant to argue "Acquit me because it's bribery, not extortion" combined with the current appeal of public corruption cases makes the prosecution's task much easier. Once a case goes to the jury, any esoteric differences between extortion and bribery will probably have little effect on the final result. For this reason, *Hyde*, in not deciding as a matter of law whether the officials charged committed extortion or bribery, anticipates the death knell of any meaningful defense based on the theory that what was committed was bribery, not extortion. In two recent cases, the Court of Appeals for the Third Circuit has further hastened that development.

In *United States* v. *Addonizio*[14] fifteen individuals, including the mayor of Newark, New Jersey, were charged with extortion and conspiracy to commit extortion. The extortion charges involved kickbacks required to be paid to public officials by contractors in return for the awarding of contracts on public works buildings.[15] Neither the trial court nor the court of appeals was troubled by the lack of evidence of specific extortionate threats directed at the victims.[16] In affirming the convictions, the court of appeals held that the issue of extortion was a jury question, since there "could be extortion when contractors would succumb in advance to the pressure they knew would be forthcoming." [17] In effect, the court held that it was not error for a jury to find that extortion was committed when there is evidence that a businessman or a potential victim is aware that a public official's *modus operandi* is to refrain from doing certain acts only when he is paid money. Given this interpretation, it is difficult to conceive of a clear cut example of payment of money to a

[12] *Id.* at 834.

[13] *Id.* at 833.

[14] 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

[15] *Id.* at 55. According to one government witness, a defendant had said:

> Everybody in Newark pays 10% or they don't work in and they don't get paid in Newark.

*Id.* One contractor also tried to reduce a 10 per cent kickback to 5 per cent and was turned down. *Id.* There was also some testimony involving physical force—"You pay your ten per cent or I'll break your leg." *Id.* at 57. But the overall scheme did not depend on such threats but was a standardized method of doing business. Contractors in Newark knew that in order to obtain public business they would have to open up their pockets to city officials. The function of the threat was simply to keep the occasional straying contractor in line.

[16] The trial court had instructed the jury that "The mere voluntary payment of money, unaccompanied by any [fear] of economic loss, would not constitute extortion." *Id.* at 78. Missing from this definition of extortion is any reference to express threats. Instead, the term "voluntariness" is considered adequate to fulfill the function of satisfying the "threat" requirement of the Hobbs Act. But lack of voluntariness, as shown by *Hyde*, need not result from any express threat by the public official, but can arise simply because the victim knows that he is expected to pay. It now becomes possible to find extortionate activity even where the victim first contacts the public official for the purpose of paying him money *if* he does so in response to a belief (fear under the Act) that otherwise he will be treated differently than those who pay. Although no court of appeals has expressly held that a public official commits extortion even when the victim does the soliciting, this conclusion is the logical consequence of connecting the threat to the public office rather than to the person holding that office.

[17] *Id.* at 73.

public official which the *Addonizio* court would rule as a matter of law to be bribery.[18]

In *United States* v. *Kenney*[19] the court of appeals went even further and completely eliminated any requirement of evidence of force, fear or duress. *Kenney* involved the alleged extortion of money from contractors by public officials. Where the trial court in *Addonizio* had submitted the case to the jury on a use of fear theory, the trial court in *Kenney* added an instruction to the jury under the "color of official right" clause of the Hobbs Act.[20] The court of appeals concluded that the definitional elements of extortion in the Hobbs Act were phrased in the disjunctive,[21] and that "under color of official right" does not require proof of threats, fear or duress. The power of office, which is the color of official right, is, *ipso facto*, what constitutes coercion by a public official.[22]

While these courts have expounded a liberal interpretation of the Hobbs Act, these three cases do not necessarily lead to the conclusion that extortion under the Hobbs Act now encompasses every type of payoff arrangement. Nowhere in *Kenney* is there any discussion of the *Hyde* requirement of initiation by the public official, although the *Addonizio* court stated that payments made in response to the feeling of the inevitability of a demand constituted extortion. Inasmuch as *Addonizio* and *Kenney* involved the payments of money to public officials as part of a widespread kickback practice, the question whether the public official must initiate the practice was not actually resolved by the Third Circuit and still remains a possible defense under these interpretations of the Hobbs Act.[23]

[18] As the court of appeals noted, the Hobbs Act definition of extortion was lifted from a New York statute. *See* McKINNEY'S STAT. ANN. § 155.05 (1971). At least since 1942 the New York courts have distinguished bribery from extortion on the basis that bribery is the paying of money to obtain influence over a public official in the exercise of his duties, whereas extortion involves payment for what the payor was legally entitled to anyway. *See* Hornstein v. Paramount Pictures, 22 Misc. 2d 996, 37 N.Y.S. 2d 404 (1942). Although *Addonizio* cited *Hornstein* with approval, it does not appear that the court accepted the New York courts' distinction between bribery and extortion. Rather, it relied strictly on a broad concept of voluntariness. *See* Stern, *Prosecution of Local Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1 (1971).

[19] 462 F.2d 1205 (3d Cir.), *as amended*, 462 F.2d 1230 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972).

[20] The relevant portion of the Hobbs Act reads:

> The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right.* (emphasis added).

18 U.S.C. § 1951 (1970).

[21] According to the court:

> The 'under color of official right' language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official and which did not require proof of threat, fear or duress.

462 F.2d at 1229.

[22] As a practical matter, it is not difficult for the prosecution to mold testimony in any police corruption case so that it reflects some action by the officer which initiates discussion of the payment of money. Thus, once threats, fear, or duress are eliminated as requirements, any police officer who takes money can probably be prosecuted for extortion. And even where it is clear that the victim has initiated the discussion leading to the payment, *Addonizio* will still allow extortion to be found if the victim reasonably thought that he might as well raise the subject since he would eventually be asked. A good example of this is a tavern owner who seeks to join a "club" to pay officers not to come to his bar and check identifications, and to provide expedited service. *See* United States v. DeMet, 486 F.2d 816 (7th Cir. 1973); United States v. Braasch, No. 72 CR 979 (N.D. Ill. 1973). Other courts have dealt with extortion by public officials but have relied on the traditional requirements of threat and duress. *See* United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968); United States v. Sopher, 362 F.2d 523 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); United States v. Kubachi, 237 F. Supp. 638 (E.D. Pa. 1965). Kubachi held that, because a payment to public officials in return for the improper awarding to an equipment company of a city contract to buy parking meters did not involve the fear of economic loss by *coercion*, bribery not extortion was committed. The continued validity of this case in light of *Addonizio* and *Kenney* is doubtful.

[23] In United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), the court held that the fear of economic harm by a tavern owner, who made monthly payments to the police, constituted extortion even where the confrontations with the police were friendly and where there was evidence that the money was turned over voluntarily. The court framed the voluntariness issue as a jury question and concluded that the jury could properly find extortion. The court did not squarely confront the distinction, if any, between bribery and extortion, stating:

> Because we cannot accept defendant's view of the facts, it is not necessary for us to reach the question of whether bribery and extortion are mutually exclusive. Nevertheless, we note that at least one circuit has held that they are not. *See* United States v. Kahn, 472 F.2d 272, 278 (2d Cir. 1973), *cert. denied*, 41 U.S.L.W. 3606.

In *Kahn* the United States Court of Appeals for the Second Circuit was confronted with a claim by the defendants that under 18 U.S.C. § 1952 (1970), where bribery is charged, proof that the defendants paid money in response to extortionate acts by public officials is a complete defense. The court held that under Pennsylvania law there was no provision for extortion as a defense to bribery, but it concluded, along with the trial court, that evidence of extortion on the part of the public officials could be considered by the jury in determining whether the defendants had the requisite criminal intent under Section 1952. The court also concluded that "every bribery case involves at least

Once the issue of extortion has been resolved, the only remaining hurdle to negotiate is the statute's requirement that there be an effect on commerce. However, since courts generally have interpreted the commerce requirement expansively, there is, as a practical matter, little difficulty satisfying this requirement.[24] The only area of police corruption that may yet be beyond reach of the Hobbs Act is what has been described as purely internal corruption and isolated gratuities. However, as will be seen later, even those officers who cannot be prosecuted under the Hobbs Act may nevertheless find themselves under federal indictment.

### B. *Federal Perjury Statutes*

The federal perjury statute[25] and the federal false sworn declaration statute[26] have become

some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not non-existent, are at least exceedingly rare." United States v. Kahn, 472 F.2d 272, 278 (2d Cir. 1973). Thus, it may be said that the *Kahn* court, at least in theory, would accept the notion that under color of official right extortion ipso facto eliminates a defense of bribery, although the actions of the victim may be used by the defendant public official to demonstrate that the requisite criminal intent for extortion had not been proved. This approach, however, might run into difficulty if a court was inclined to rule that bribery is irrelevant under the Hobbs Act with regard to a public official. As stated in *Kahn*, evidence of bribery under Section 1952 would only be relevant on the issues of intent and willfulness. *Id.* at 278. In a Hobbs Act extortion case, however, where a public official is charged with extortion under the color of official right clause, it could be argued strongly that no willfulness or specific intent is required. Unlike Section 1952, which requires travel or the use of interstate facilities with the *intent* to commit a crime, the Hobbs Act does not appear to require any specific mental state. In the end, therefore, analysis of the decisions under Section 1952 bribery can be of little aid in determining whether or not bribery is a defense to a Hobbs Act extortion charge against a public official.

Although, as Judge Sweigert in *DeMet* made clear, the court was not deciding whether or not the distinction between bribery and extortion is irrelevant under the Hobbs Act, the Seventh Circuit may have the opportunity to decide that issue in United States v. Braasch, No. 72 CR 979 (N.D. Ill. 1973), now pending on appeal. In that case the defendant police officers were convicted solely on the basis that they received money under color of official right. In its charge to the jury, the trial court did not require the jury to find either threats, coercion, or initiation by the victims.

[24] *See, e.g.*, United States v. DeMet, 486 F.2d 816 (7th Cir. 1973) (where a tavern owner made small monthly payments of money to police and his liquor was manufactured out of state); United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972) (where meat purchased from New Jersey for New York drive-in restaurant, and payments depleted resources with which victim could purchase out of state goods); United States v. DeMasi, 445 F.2d 251 (2d Cir.), *cert. denied*, 404 U.S. 1167 (1971) (where meat and alcoholic beverages were purchased outside the state for use in a club and these deliveries would stop if the club were closed); Battaglia v. United States, 383 F.2d 303 (10th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968) (where the owner of a bowling alley was forced to place the defendant's pool table in his alley, although the pool table had not been obtained by the defendant until interstate movement had ended). *See also* Esperti v. United States, 406 F.2d 148 (5th Cir.), *cert. denied*, 395 U.S. 938 (1969); United States v. Amabile, 395 F.2d 47 (7th Cir.), *vacated in part*, 394 U.S. 310 (1968); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 (1968); United States v. Provenzanno, 334 F.2d 678 (3d Cir. 1964), *cert. denied*, 379 U.S. 947 (1969); Anderson v. United States, 262 F.2d 764 (8th Cir.), *cert. denied*, 360 U.S. 929 (1959); United States v. Strone, 168 F. Supp. 490 (E.D. Pa. 1957), *aff'd* 262 F.2d 571 (3d Cir. 1958), *reversed*, 361 U.S. 212 (1959).

All of these cases found the requisite nexus with commerce. *But see* United States v. Crichley, 353 F.2d 358 (3d Cir. 1965). In applying these cases to police corruption, there is a strong basis to conclude that when a police officer extorts money from any business whose products are either delivered from or manufactured in another state, the requisite effect on commerce is met. Similarly, it can even be argued that payments to police by prostitutes, burglars, and other criminals will affect commerce under the Hobbs Act if some minimal nexus with another state is proved.

[25] 18 U.S.C. § 1621 (1970) provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

[26] 18 U.S.C. § 1623 (1970) provides:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States.
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of

powerful weapons for the prosecutor in the investigation of public corruption. Both statutes deal with false testimony under oath, and in an investigation of public corruption are most pertinent at the grand jury stage.

When a prosecutor, with the aid of a grand jury, begins an investigation of police corruption, he initially has the benefit of only one or two witnesses who have paid money to a police officer.[27] The prosecutor often finds that calling the suspected officer to the grand jury to question him about the alleged extortionate payments will only result in the officer denying that payments were made or invoking the privilege against self incrimination. If, at the time of his appearance before the grand jury, the officer is still on the police force and a regulation of the police department authorizes the firing or suspending of an officer who refuses to testify, the officer will probably choose to answer all questions and save his job, hoping that his cooperation will convince the grand jury not to return an indictment.[28] While the officer has this option, he must know that there is only the slightest possibility that his testimony will save him from indictment.[29] If the officer testifies and denies receiving any payments, the prosecutor will add an additional count in the indictment for perjury or false sworn declarations.[30]

a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

This statute was enacted as part of the Organized Crime and Control Act of 1970 and, as can be seen from paragraph (e), eliminates any evidentiary requirements that had been by virtue of common law development, subsumed under the perjury statute. Thus, there is no evidentiary mandate that proof of a violation must be supported by two witnesses or by one witness and corroboration as is the case with Section 1621. Proof of a false sworn declaration simply requires evidence beyond a reasonable doubt.

The false declaration statute differs in other ways from the perjury statute. Proof of two inconsistent statements by the witness to a degree that one of them is necessarily false will support conviction (paragraph (c)). On the other hand, a witness can admit that a previous statement before the same grand jury was false and thereby avoid indictment (paragraph (d)). Naturally, the elimination of the two witness rule has been of great benefit to prosecutors, but neither that change nor the cure provision is specifically relevant to the interesting uses to which either statute may be put by a prosecutor in an investigation of police corruption or other local official corruption with which the textual discussion is concerned.

[27] This arises because, until the testimony and cooperation of a police officer or other "inside" witness is secured, it is practically impossible to fashion a case which will set forth a conspiracy allowing a single indictment to be returned against a number of police officers who share in the proceeds of collections which have, perhaps, been made by only one of these officers. Without the testimony of this type of witness, indictments must be returned against each officer separately for his own collections from individual victims because the victims will be unable, alone, to tie all the officers together in a single plan to extort money. Thus, A, B, C and D victims may each be paying $100 per month to E, F, G and H officers, respectively. With only the victims as witnesses, separate indictments must be returned against each officer. However, if E will testify that he shared his proceeds with F, G and H, who in turn shared their collections with him, then a single indictment may be returned against all the police officers.

[28] The constitutionality and legality of a rule which authorizes discharge of a public employee from office for asserting his fifth amendment rights is discussed in notes 40–52 *infra* and accompanying text.

[29] The prosecutor's statement to the grand jury that the uncorroborated testimony of a businessman that he paid money to a police officer constitutes probable cause is enough to convince the grand jury that an indictment can be returned although no definite conclusion is reached on the truthfulness of either witness. Because there is no requirement that the officer be called to testify at all, this argument to the grand jury has great persuasive force, especially where the prosecutor has been able to establish rapport with the jury members. This analysis has been corroborated by my experience in working with a grand jury investigating police corruption in Chicago where oftentimes the victims never testified before the grand jury at all and the jury instead heard an FBI agent report of the victim's statement to him. In no such case was a police officer's sworn denial to the grand jury so convincing that an indictment was not voted upon affirmatively. And in no case did the grand jury insist that the victim testify in person. Generally, hearsay testimony alone is sufficient to support the return of an indictment. United States v. Costello, 350 U.S. 359 (1956).

[30] Where there is only one witness and no corroboration, the false declaration statute must be used. Even where more than one witness is available prosecutors prefer to use the false declaration statute unless the cure provision presents problems. The validity of joining in one indictment against one defendant a count of perjury or false declarations with a substantive extortion charge is governed by the provisions of Rule 8(a) of the federal rules. That rule provides:

An indictment containing both charges of perjury or false sworn declarations and extortion gives the prosecutor several advantages, even when the factual basis for the different counts of the indictment is the same. First, there is the increased possibility in a close case for a compromise verdict—the opportunity for the jury to find the defendant guilty on only some counts. This is especially important where, without the perjury or false declaration charge, the indictment would have only one count. Second, there is the effect, however minimal, of the indictment indicating to the jury that at least one tribunal consisting of people like themselves believed that the defendant was not a truthful witness. Third, the officer will be forced to testify at trial. Since the grand jury testimony will be placed before the jury, the defendant cannot afford to remain silent at trial. Fourth, even with a charge to the jury which in effect states that the defendant can be found guilty of extortion only if the payment was not a bribe, the jury may still return a verdict on the perjury or false declaration count, if it believes that the defendant lied about receiving money from the victim. In other words, the defendant may find himself convicted although the evidence does not support a finding that he violated the Hobbs Act. Finally, if the defendant is charged with more than one count of extortion involving wholly unrelated payments to him by different individuals, the judge will charge the jury that it must consider the evidence on each count separately. However, the jury may consider all the evidence on the perjury or false declaration count because the crime alleged is the denial that any money was received. Thus, the perjury or false declaration charge allows the jury to consider the testimony of all witnesses together, although they may not do so in connection with the separate counts of extortion.

An equally important use of the federal false testimony statutes is the permissibility of indicting an officer for collecting money more than five years prior to the date of the indictment. These payments would be beyond indictment under the Hobbs Act because of the statute of limitations. A prosecutor with witnesses who have paid money to a police officer, for example in 1964, may call the officer before the grand jury and ask him if he ever asked for or received any money from any businessman in the course of his official duties. If the officer testifies that he did not, he can be prosecuted under the perjury or false declaration statute despite the fact that, had he answered in the affirmative, he could not have been indicted at all.[31]

### The Investigation And Indictment Stage

When commencing an investigation of police corruption or other official corruption that is believed to be widespread in a community, a planned procedure of obtaining information and usable evidence is necessary. One way of proceeding that is well suited to investigations of organized police

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(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Fed. R. Crim. P. 8(a).

The problem of joinder arises from the fact that the perjury or false declaration offense is committed subsequent to and separate from the extortion, although both charges depend on proof of the same elemental fact—whether or not the police officer took money. Joinder is further complicated where only one of many defendants is charged in an indictment with either perjury or false declaration. This latter joinder problem is somewhat alleviated by the presence of a conspiracy charge or at least a charge that all of the defendants acted together in the planning and execution of the substantive criminal act. Where only one defendant was involved and where he was charged with both extortion and false declaration, his conviction was affirmed. *See* United States v. Moore, 486 F.2d 1406 (7th Cir. 1973) (memorandum opinion affirming the conviction where the trial court had overruled defendant's objections to joinder). Courts have generally allowed joinder of false statement charges with their counterpart substantive charges. *See* United States v. Roselli, 452 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1970) (holding that the joinder of charges against defendants to cheat for profit in rigged gin rummy games with charges of false statements relating to the profits from those games on their income tax returns was permissible).

In a conspiracy case charging numerous substantive counts, the joinder of perjury counts was also held proper in United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (Special Panel of Judges from another circuit). However, the seventh circuit recently reversed a case for improper joinder of false declarations with extortion under Rule 14 of the Federal Rules of Criminal Procedure, holding that although joinder may be proper until Rule 8(a) prejudice arises because the defendant has the burden of overcoming an implicit presumption that he lied to the grand jury about the crime with which he is charged. United States v. Pacente, 490 F.2d 661 (7th Cir. 1973). The government has petitioned for a hearing *en banc* on the grounds that a different panel of the court had implicitly ruled the other way in United States v. Moore, 486 F.2d 1406 (7th Cir. 1973). The *Pacente* decision was also criticized in United States v. Isaacs, 493 F.2d 1124, 1160 (7th Cir. 1974).

[31] An indictment was obtained on this basis in United States v. Devitt, No. 73 CR 75 (N.D. Ill. 1973).

corruption is first to use informers to obtain the names of individuals involved (both payors and payees), then to solicit the cooperation of those who paid the police, and finally, to select a few key police officers upon whom concentrated efforts can be made to elicit testimony against other officers of the same rank and superiors in the higher levels of the police department.[32] If each step of this procedure meets with positive results, the end product will be a conspiracy indictment against participating officers in a payoff and shakedown scheme.

In considering the method of proceeding against widespread corruption, the prosecutor will probably select one specific area of corruption because it is more likely to yield dividends quickly. Since witnesses are obviously needed to make any case, it is best to focus on the kind of corruption which involves witnesses who will testify with little or no compulsion. For example, in the investigation of police corruption in Chicago, the Justice Department decided early that, although informant information was replete with references to payoffs to police by gamblers, narcotics peddlers, members of organized crime, and professional burglars and other criminals, the best hope for a meaningful investigation was to examine payments to police by persons and businesses licensed by the city to sell alcoholic beverages. Because the individuals paying money to police were vulnerable to police enforcement of the liquor license laws,[33] but did not engage in any type of general criminal activity, it was believed that they would be among the easiest to convince to testify against the officers whom they paid money.[34] Moreover, the police who took money from these individuals, especially if it was accomplished pursuant to an organized scheme, were often the same officers involved in corruption with various criminal elements in the community. Thus, if the investigation as designed was a success, the federal government would have, in effect, forced into the open the problems of all police corruption.

Because the payment of money to the police by tavern owners results in a service to the owner, any crime committed by the officer in taking money may be characterized as "victimless." In this type of crime, the investigator initially may encounter some difficulty in obtaining information. However, where an informant already has stated that a certain individual has paid the police, the attitude of "we know you paid" conveyed to the witness may be enough to obtain his cooperation. In any event, it is true that at first where the investigators are simply interviewing every tavern owner in a particular district, the majority will deny ever having paid the police or having knowledge of any one who did.[35] However, if a few, but significant number of tavern owners cooperate, a snowball effect may occur which will encourage others to come forward with information.[36]

At first it may also be difficult to obtain the cooperation of police officers, particularly those who have taken money. For this reason, the employment of some type of legal compulsion is usually necessary. Although the police officer who is destined to become an accomplice witness may

[32] These key officers will generally be the "bagmen," *i.e.* those who collect the money from the victims and distribute all or a portion of the proceeds to fellow officers, lawyers, politicians and higher ranking police officials.

[33] In Chicago, the police department has the responsibility of investigating applicants for liquor licenses and investigating for any violation of the city liquor license laws. Because it is possible for a liquor license to be suspended or completely revoked for a wide variety of minor offenses such as the sale of liquor to minors, the tavern owner finds himself almost completely at the mercy of the police. An arrest can lead to a suspension of the license even if no criminal conviction is obtained. And, as a result of police powers, tavern owners are often subjected to quasi-legal tactics such as the constant checking of licenses and identifications of patrons, all of which can effectively reduce the popularity of a tavern. Finally, because there is such a large host of trivial regulations with which the tavern owner must comply, the police can cause the owner trouble almost at will. Among such violations are selling liquor on credit, not providing an open view from the street into the entire tavern, not properly displaying a liquor license, staying open even a minute after the allowable closing time, and failing to immediately report to police any disturbance in the tavern. Because violation of any one of the above rules can cause trouble for the tavern owner with the liquor license commission, he is usually more than happy to pay money or grant special discounts to the police to avoid any possibility of trouble or harrassment.

[34] This is not to say that tavern owners flock to testify about their payments to police, but it is true that, because they have relatively little to hide other than the payment of money itself, traditional methods of investigative pressure judicially applied by the agent will achieve the desired results. Although this article focuses on the payment of money to police by individuals who have liquor licenses, its precepts apply to anyone paying money to a public official who does not want the official to countenance or overlook serious and continuous criminal conduct but simply desires freedom from compliance with certain regulations.

[35] In many police districts in Chicago and other large cities, a tavern owner who maintains that he does not even know of anyone who has paid the police can be assumed to be lying or at best incredibly naive.

[36] For those who do not cooperate at the interview stage, the grand jury and all of its powers are available to the prosecutor.

never be taken before the grand jury or given immunity, the threat of employing these devices may by necessary to force the officer to cooperate.[37] Similarly, in attempting to obtain testimony from lawyers who may have played a significant role in a corruption scheme (for example, in passing money to the police in order to expedite the approval of liquor licenses), legal compulsion or threat of its use may also be required.

It is clear therefore that although much valuable spade work can be done through investigation alone, more formal means of building a case are necessary. Federal prosecutors have been particularly adept at using the grand jury subpoena, immunity and local administrative regulations to elicit testimony and cooperation in an investigation.

One method used by federal prosecutors is to subpoena a police officer before the grand jury even though sufficient evidence for an indictment already has been uncovered. When a potential defendant is subpoenaed in the usual federal criminal investigation, the witness may either testify or assert his fifth amendment privilege against self incrimination.[38] However, in a jurisdiction where a local police rule or state law authorizes dismissal of an officer for refusing to testify before any investigative body which is seeking information about his official duties, severe consequences attend the exercise of an option not to testify.[39] Naturally, the questions which face federal and local officials under these circumstances is whether such firings and suspensions are constitutionally permissible and what appropriate means are available for local authorities to learn if a police officer did in fact refuse to answer questions during the supposedly secret grand jury proceeding.

The United States Supreme Court has discussed the question of whether a public official may be discharged for refusing to testify in a criminal investigation, but has yet to resolve several critical issues. In *Garrity v. New Jersey*,[40] police officers in New Jersey were brought before an administrative tribunal supervised by the State Attorney General and asked questions about the fixing of traffic tickets. Each officer was warned that anything he might say could be used against him and that if he refused to testify he would be subject to removal from office under a New Jersey statute. The officers all testified and some of the answers were used against them in a subsequent criminal prosecution. In a five to four decision, the United States Supreme Court reversed their convictions and held that "protection of the individual under the Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." [41] In *Spevak v. Klein*,[42] the Supreme Court held that a lawyer could not be disbarred for asserting the privilege against self-incrimination. Neither of these cases decided whether a police officer may be discharged from employment because he refuses to testify. *Spevak* did not deal with a public official, and in a footnote Justice Douglas stated that "whether a policeman who invokes the privilege where his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach." [43] Thus, despite the apparently broad sweep of *Spevak* and *Garrity* and Justice Douglas' insistence that "we find no room in the privilege against self-in-

[37] More than any other professional group in society, the police have a code of secrecy. A breach of this code brings on the officer more approbation than the worst compromise of his integrity in the performance of his duties. Some police officers have suffered indictment, conviction, and stiff prison sentences for as little as taking a few dollars from one tavern owner (in one case simply asking for money and never receiving it), knowing that cooperation would have enabled them to avoid jail altogether and possibly even indictment. But the code of secrecy is often so strong that nothing will make an officer talk about his colleagues' illegal activities. Eventually, however, the code can be broken, but it is a long process and requires constant concentrated effort by the investigators and prosecutors.

[38] Although the law is far from clear, it has been the general practice in federal grand jury proceedings to inform a witness, who may be subsequently indicted, that he is a potential defendant and to inform him of his constitutional rights as a police officer would under Miranda v. Arizona 384 U.S. 436 (1966). Thus, the warnings given would consist of the following:

(1) You are a potential defendant in the investigation.
(2) You have a right to remain silent. Anything you say may be used against you in a later court proceeding.
(3) You may have an attorney to advise you. Although he may not come into the grand jury room, you may leave to consult with him prior to answering a question.
(4) If you cannot afford an attorney, one will be appointed for you prior to any questioning.

[39] For example, in Chicago, eight of the first nine police officers who were called before the grand jury were suspended by the police department for asserting their fifth amendment rights. Through the ensuing months it became rare for an officer to "take the fifth."

[40] 385 U.S. 493 (1967).

[41] *Id.* at 500.

[42] 385 U.S. 511 (1967).

[43] *Id.* at 516, n.3.

crimination for classification of people so as to deny it to some and extend it to others," [44] neither case reached the question of the discharge of public employees.

Subsequent Supreme Court decisions have done little to clarify the problem. In *Gardner v. Broderick*,[45] a New York City policeman was subpoenaed before a grand jury where he was advised of his constitutional rights and asked to sign a waiver of immunity. The constitution of New York and the Charter of New York City required a waiver of immunity if the public official wished to retain his position. The officer refused to sign the waiver of immunity and was discharged. Citing *Spevak* and *Garrity*, the Supreme Court held that the officer could not be discharged for refusing to waive his immunity. But the Court stopped short of holding that an officer could not be fired for refusing to answer questions about his official duties:

> He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege.[46]

In other words, the Court simply held that, inasmuch as *Garrity* would prevent the use of any compelled testimony against the officer, an attempt by the state to force the officer to sign a document waiving that protection was improper. The Court did not hold that the officer can escape discharge for asserting the privilege against self-incrimination.[47]

In *Lefkowitz v. Turley*,[48] the Supreme Court considered the constitutionality of a New York statute which provided that if a public contractor refused to waive immunity or to testify concerning his state contracts, his existing contracts could be cancelled and he would be disqualified from doing business with the state for five years. In *Lefkowitz* several such contractors were disqualified for refusing to waive immunity. In holding the statute unconstitutional, the Supreme Court carried forward its approach in *Gardner* and stated that "... given adequate immunity, the state may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." [49] The Court held the same standard applied to public contractors and that adequate immunity would consist of a prohibition of the use of the compelled testimony or its fruits.

Since there is no authoritative holding by the Supreme Court on exactly when and how public officials may be discharged for refusing to answer questions concerning their official duties, the lower courts have reacted in varying ways when confronted with the constitutionality of local police

[44] *Id.* at 516.

[45] 392 U.S. 273 (1968).

[46] *Id.* at 278.

[47] Justice Harlan concurred in the result although he had vigorously dissented in *Garrity* and *Spevak*. But, because he read the Court's opinion in *Gardner* as leaving the way open for the discharge of an officer refusing to testify, he considered it necessary in view of the decisions in *Garrity* and *Spevak* to concur. Thus, he said:

> I do so [concur] with a good deal less reluctance than would otherwise have been the case because, despite the distinctions which are sought to be drawn between these two cases, on the one hand and Spevak and Garrity, on the other, I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. I add only that this is a welcome breakthrough in what Spevak and Garrity might otherwise have been thought to portent.

*Id.* at 285.

That the Supreme Court was not deciding the right to discharge a public employee for refusing to testify was clearly stated in *Gardner's* companion case, Uniformed Sanitation Men Association v. Commissioner, 392 U.S. 280 (1968). Justice Fortas, speaking for the Court, stated:

> [If] New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different.

*Id.* at 284.

After the decision in *Uniformed*, the Second Circuit again had occasion to deal with the issue after further disciplinary proceedings by the City of New York had occurred. Uniformed Sanitation Men Association, Inc. v. Commissioner, 426 F.2d 619 (2d Cir. 1970). The court held that "use immunity" suffices for the discharge of public employees for refusing to testify and noted that discharge may occur so long as the questions propounded relate to the performance of his duties and the official is advised of his options and the consequences of his choice.

[48] 414 U.S. 70 (1973).

[49] Id. at 84.

rules.[50] For example, in *Confederation of Police v. Conlisk*[51] the Seventh Circuit held that several officers who had appeared before a federal grand jury and subsequently refused to tell the investigative division of the police department whether they had answered the questions propounded to them by the federal prosecutor could not be discharged. The court denied the right to discharge on the narrow ground that the officers were not being questioned by their superiors about their official duties, although the city was attempting to find out if they had refused to testify about their duties before the grand jury. The effect of this decision was to reinstate the officers although under an extension of the language in the United States Supreme Court cases they could have been discharged had they been asked by the police investigators the same questions about their duties that the federal prosecutor had asked them and then again refused to answer. The court also concluded that it was improper to fire the officers for simply invoking the fifth amendment, ignoring the fact that it was the questions which were asked the officers in the federal grand jury that resulted in their discharge, not simply their invoking the fifth amendment. Because the police department could have discovered what had been asked at the federal grand jury proceeding in any case,[52] the questions concerning whether the officers had invoked the fifth amendment were unnecessary. In any event, the court of appeals apparently misread the implications of *Garrity* and subsequent cases by placing undue emphasis on the inquiry by the local officials after the officers had already refused to testify before the federal grand jury.[53]

[50] *See, e.g.*, Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973) and Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), where both courts held that the discharge of an official for refusing to answer questions was improper because he was not informed that he was subject to discharge if he asserted his fifth amendment rights or that, if he answered the questions, his testimony could not be used against him.

The logic of a requirement that a witness be told that his testimony cannot be used against him apparently grew out of the infirm waiver of immunity requirement condemned in *Gardner* and *Uniformed* (and again recently condemned in *Turley*). Still, the rationale behind the requirement is suspect. Whatever the witness is advised, his testimony *cannot* be used against him in a subsequent criminal proceeding, but there does not seem at present any prohibition against using that testimony to effect his discharge from public office. In any event, the requirement of telling a witness public employee that he has "use immunity" if he testifies has not spread to other courts. Such a requirement, if given full effect, would immeasurably complicate the proceedings and would add little in the way of protection for the witness because, whether or not he is told, the compelled testimony cannot be used against him under *Garrity*.

[51] 489 F.2d 891 (7th Cir. 1973).

[52] *See* note 58 *infra*.

[53] However, many other courts have held that a public official may be discharged for refusing to answer questions and take a lie detector test concerning the conduct of his official duties. Although courts recognized that the statements extracted from the officer during the lie detector test cannot be used against him in any subsequent criminal proceeding, courts have generally been able to find their way through the gaps left by *Spevak*, *Garrity*, *Gardner*, *Uniformed Sanitation* and *Turley* to the conclusion that no constitutional impediments arise which would prevent discharge of the police officer. *See, e. g.*, Fischera v. State Personnel Board, 217 Cal. App. 2d 613, 32 Cal. Rptr. 159 (1963); Coursey v. Board of Fire and Police Commissioners, 90 Ill. App. 2d 31, 254 N.E.2d 339 (1967); Dieck v. Department of Police, 266 So. 2d 500 (La. App. 1972); Clayton v. New Orleans Police Department, 236 So. 2d 548 (La.App. 1970); Roux v. New Orleans Police Department, 223 So. 2d 905 (La. Ct. App.), *aff'd*, 254 La. 815, 227 So. 2d 148, *cert. denied*, 397 U.S. 1008 (1969); Seattle Police Officers' Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972). *But see* Molino v. Board of Public Safety, 154 Conn. 368, 225 A.2d 805 (1966). Devito v. Civil Service Commission, 404 Pa. 354 172 A.2d 161 (1961).

In addition the majority view among state courts which have considered the question of discharge of a public official for refusal to testify in a grand jury or other proceeding is that discharge is constitutionally permissible. For example, in Seattle Police Officers' Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972), the police chief of Seattle had initiated an internal investigation which resulted in the ordering of various officers to respond to questions concerning their official conduct or suffer dismissal. This internal investigation was in response to evidence that several police officers had been involved in the taking of payoffs. No officer was compelled to waive immunity and all of the questions asked concerned only the officers' performance of their duties. The Police Officers' Guild sought to enjoin the investigation and the trial court granted the injunction. On appeal the Washington Supreme Court reversed, holding that no injunction could be granted which would prevent the police chief and the city of Seattle from dismissing or otherwise disciplining an officer for asserting his fifth amendment rights to questions directed at the performance of his official duties. *See also* Clifford v. Shoultz, 413 F.2d 868 (9th Cir. 1969); Bowes v. Commission, 330 F. Supp. 262 (S.D.N.Y. 1969); Kammerer v. Board of Fire and Police Commissioners of the Village of Lombard, 44 Ill. 2d 500, 256 N.E.2d 12 (1970); Silverio v. Municipal Court, 355 Mass. 623, 247 N.E.2d 379, *cert. denied*, 396 U.S. 878 (1969); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972). Finally, if an officer testifies falsely, he may be prosecuted for perjury, although the testimony may have been unconstitutionally compelled. *See* 18 U.S.C. § 2514 (1970); *see also* Glickstein v. United States, 222 U.S. 139 (1911); United States v. Winter, 348 F.2d 204 (2d Cir. 1965); Kronick v. United States, 343 F.2d 436 (9th Cir. 1965); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); United States v. Provenzano, 326 F. Supp. 1066 (E.D. Wis. 1971); United States v. Kelly, 254 F. Supp. 57 (S.D.N.Y. 1966); United States

While many of the issues remain unsettled, it does appear that a carefully worded warning to public officials followed by questions relating to their official duties can be the basis for a subsequent discharge if the officials refuse to answer the questions. As long as the official can be discharged for refusing to answer, the prosecutor has significant leverage over the official.

In light of the significance of what may occur at the federal grand jury proceeding, some mechanism had to be devised to allow disclosure of the officer's action before the grand jury, particularly to those local officials who have the power to effect the discharges. While federal grand jury proceedings generally remain secret, Rule 6(e) of the Federal Rules of Criminal Procedure specifically provides that disclosure will be allowed "preliminary to or in connection with a judicial proceeding." [54] The use of this rule to uncover what occurred at the grand jury proceedings can be illustrated in the following way. In an investigation, subpeonas which are issued by the grand jury can be delivered to the police department, which will normally issue an order requiring the designated officers to appear before the grand jury.[55] This information will also be turned over to the city's corporation counsel. After each appearance before the grand jury, the corporation counsel can interview the officers and ask them if they answered all the questions propounded by the grand jury through the federal prosecutor. Once this is accomplished, the corporate counsel can then file a motion with the federal district court seeking disclosure of whether the officer had in fact answered all the questions. At the hearing on the motion to disclose pursuant to court order, the government will read into the record any questions which the officer had refused to answer.[56] If the officer had refused to provide answers, the police department will then draw charges against the officer for failure to cooperate with the grand jury.[57] In designing this procedure, advantage is taken of the fact that once it becomes known to local officials that an officer had refused to answer questions before the grand jury, there could be a subsequent administrative hearing and a later appeal to the courts by the officer, which would satisfy the "preliminary to or in connection with a judicial proceeding" requirement under the federal rule.

Numerous cases support the disclosure of grand jury testimony in this way. For example, in *In re Grand Jury Transcripts*,[58] the Chief of Police of Columbus, Ohio applied for an order releasing a transcript of a federal grand jury proceeding for use in an administrative hearing in connection with

*ex rel.* Rohrlich v. Wallach, 251 F. Supp. 1009, 1011 n.1 (S.D.N.Y. 1966); *cf.* Robinson v. United States, 401 F.2d 248 (9th Cir. 1968). *But see* Goldberg v. United States, 472 F.2d 513, 516 n.4 (2d Cir. 1973).

[54] The rule provides:

> (e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

FED. R. CRIM. P. 6(e).

[55] Although this technically means a subpoena is not properly served on the police officer until his appearance before the grand jury (thus removing the possibility for court sanctions for non-appearance), it avoids the necessity of serving subpoenas on officers whose home addresses are unknown and who, while on duty, are difficult to locate quickly.

[56] The government needed an order entered by the Chief Judge to protect it against any possible charge that it was conniving with the local authorities to oust police officers from their jobs and to subvert grand jury secrecy.

In Chicago the question of disclosure first arose in open court. The first group of officers to be subpoenaed were all represented by the same attorney who, upon the completion of their appearances promptly filed a suit in federal court to enjoin the police department from taking any action against the officers for refusing to answer questions. The federal government was not a party to this action but under court order read into the record in a public proceeding the questions the officers had refused to answer. The court then dismissed the suit by the officers holding that an officer could be fired for refusing to answer questions relating to his official duties. *But see* Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973).

[57] *See* Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973). The charge would have to be for the officer's failure to answer questions about his official duties in the grand jury not for failure to answer the inquiry by the corporation counsel. *See* notes 40–52 *supra*.

[58] 309 F. Supp. 1050 (S.D. Ohio 1970). *See also* Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958); In re Bullock, 103 F. Supp. 639 (D.D.C. 1952). *But see* United States v. Crolich, 101 F. Supp. 782 (D. Ala. 1952).

disciplinary charges against various police officers. The court held that the federal rule was met because the administrative hearing might result in the suspension of the officer which would then be subject to appeal.

In the event that an officer takes the risk of being fired and invokes the fifth amendment at the grand jury proceeding, the prosecutor can compel testimony through the use of immunity in order to uncover certain evidence vital to the investigation and prosecution of the case.[59] Under federal law, the government has the power to grant use or transactional immunity in support of its investigation of local corruption. According to several United States Supreme Court cases, the decision by federal prosecutors to give certain witnesses immunity may have significant effects on the ability of state or local officials to prosecute the offenders under their own laws. In *Murphy* v. *Waterfront Commission*[60] the Court held that evidence or its fruits elicited by state or federal officials under a grant of immunity could not be used by either government in any subsequent prosecution.[61] As a result, when federal officials decide to grant use or transactional immunity to tavern owners or policemen during the course of their prosecutions, they may be effectively eliminating any effort by state or local officials to discipline those given immunity. The problem becomes less serious when there is cooperation between state and federal officials, or when local officials refuse to investigate or prosecute their own officials. Thus, unless the federal investigation is carried forward with the purpose of maximizing the benefits in the

[59] The statutory provisions regarding transactional immunity are found in 18 U.S.C. § 2514 (1970) and state that, once given such immunity, a witness cannot be prosecuted for any offense about which he testified:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

The statutory provisions regarding use immunity are found in 18 U.S.C. § 6002 (1970). Use immunity differs from transactional immunity in that an immunized federal witness may still be prosecuted if his testimony or any of its fruits are not used against him. Thus, Section 6002 provides:

> Whenever a witness refused, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee oz a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with the order.

[60] 378 U.S. 52 (1964).

[61] *See also* Kastigar v. United States, 406 U.S. 441 (1971); Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472 (1971).

The Justice Department has instructed its attorneys in a policy statement not to issue transactional immunity. This policy was put into effect because the Justice Department, in recommending to Congress the passage of the use immunity statute, had represented that one of the benefits of use immunity would be the easing of friction between federal and state law enforcement agencies, since use immunity would still allow the state to prosecute the witness. This, the Department argued, was important because state law enforcement officials often resented the subversion of their investigations by the granting of transactional immunity by the federal government which precluded any prosecution, federal or state.

In addition, the Justice Department has a policy which precludes, except in unusual cases, the prosecution of a witness who has been given use immunity. This policy was put into effect because of the Department's fear that it would be criticized for indicting a witness given use immunity. The net effect is that a witness given use immunity need not fear federal prosecution. There are, however, exceptions. *See* United States v. DeMet, 486 F.2d 816 (7th Cir. 1973) (where an officer who had been previously indicted and convicted was granted use immunity, was subsequently unresponsive in his grand jury testimony, and was indicted again). *See also* United States v. Holder, No. 73 CR 634 (N.D.Ill. 1973). In both of these cases the defendants ultimately entered guilty pleas.

particular community effected by local corruption, the granting of immunity may serve the purpose of singling out a key official in the police department at the expense of allowing other officers to escape any type of criminal prosecution.

In any event, in police corruption cases individuals who are in the lower echelons of the department or who may be the victims of the corruption may be immunized to obtain evidence against higher ranking members. This procedure can serve as an effective way to build a case beyond the testimony of the victim, who may only have evidence against the officer who collected the money.

Although immunity can be an effective tool, the prosecutor may prefer to use an accomplice witness who has already pleaded guilty because an immunized witness may suffer from tarnished credibility at trial. For the same reason, testifying victims are usually not granted immunity.[62] If the victim refuses to provide any information initially, the threat of immunity may enable the prosecutor to obtain cooperation from a witness prior to any grand jury proceeding.[63]

To aid federal prosecutors in conducting investigations of organized crime, Congress has also authorized the empaneling of a special grand jury for an initial term of eighteen months with extension possibilities for another eighteen months.[64] Before the enactment of this statute, a prosecutor who wished to have an extended investigation by a grand jury was compelled to select one of the thirty day juries and extend its term specially. Although this could easily be accomplished, grand jurors who had originally assumed that they would only be required to serve for one month would be very upset at the increased length of service, thereby pressuring the prosecutor to bring the investigation to an end. In addition to the increased length of term of the special grand jury, several other benefits inure to the prosecutor investigating public corruption. First, if a witness refuses to testify pursuant to a grant of immunity, he may be held in contempt and incarcerated[65] either until he agrees to testify or until the term of the grand jury expires, whichever is shorter.[66] This may place greater burdens on the witness who refuses to testify, and force him to review carefully his decision. Second, the prosecutor can establish rapport with the grand jurors who know that they will be sitting for a substantial period of time. This will give the grand jurors a feeling of identification with the purposes of the investigation. Third, the special grand jury may convey an aura of importance to a witness appearing before it, especially where the witness is unsophisticated and has not retained counsel.[67] Finally, the special grand jury presents the possibility that a report can be written relating in detail the information gathered by the grand jury which an indictment and trial could not disclose.[68]

## The Role of the Prosecutor

The role of the federal prosecutor in an investigation of official corruption differs in both degree and kind from that which he plays in a case involving the more traditional types of violations of the federal criminal code. For example, where a bank robbery has occurred, the assistant United States Attorney in charge of the case need do little else than wait for an investigative agent to present a case report to him. He can then file a complaint

[62] Even if granted use immunity the witness could still be subjected to state prosecution. The one impediment to state prosecution is the appearance of such a prosecution as being an attempt to subvert the federal investigation. As a result, in the federal investigation of police corruption in Chicago, no tavern owner has been prosecuted by the state for bribery.

[63] The fact that a police officer may be discharged for refusing to testify reduces the instances in which immunity can be employed. Because a witness must first refuse to answer questions before he can be given immunity, the witness who testifies fully to avoid being discharged cannot receive immunity. Thus, in an investigation of an organized scheme of payments the officers who may escape indictment and become government accomplice witnesses are those who preferred to be discharged rather than indicted and asserted their fifth amendment rights when they appeared before the grand jury. *See* United States v. Braasch, No. 72 CR 979 (N.D.Ill. 1973) (where several government witnesses were in this category and where many of the defendants may possibly have avoided indictment if they had refused to testify and negotiated with the prosecution for immunity).

[64] 18 U.S.C. § 3331 (1970), enacted as part of the Organized Crime and Control Act of 1970.

[65] The witness will go to county jail when there are no adequate federal lock-up failities to house the witness for an extended period of time. *Id.*

[66] *Id.*

[67] If a witness testifies before the grand jury, the prosecution at trial will be compelled to disclose to the defendants his testimony before the grand jury prior to any cross examination. 18 U.S.C. § 3500 (1970). Obviously, the chances that the defense will be able to impeach the witness on the basis of prior inconsistent statements are increased. Thus, prosecutors try to avoid having a cooperative witness testify before a grand jury if at all possible.

[68] 18 U.S.C. § 3333 (1970). Because of possible constitutional problems with naming unindicted individuals in a report, and the possibility of the prosecution being attacked for using the grand jury as a weapon of libel and character assassination, prosecutors have not used this provision.

or place the agent before the grand jury to summarize the evidence which will secure the indictment. On the other hand, the prosecutor who is charged with overseeing an extensive investigation of local corruption in a particular area must actively participate in all phases of the investigation. He must guide the operations of the investigative agents on almost a daily basis.[69] He must decide when to bring any evidence before a grand jury and in what way that evidence should be presented.[70] He must make judgments concerning the immunity of witnesses, the scope and extent of the investigation, and finally whether he too should act as an investigator. Because of the scope of his activities, the federal prosecutor, even one with little experience, possesses wide powers which can affect the narrow outcome of the investigation, alter the relationship between federal and local officials, and materially affect public opinion.

In the investigation of police corruption, often it is difficult to motivate the investigative agency to commit itself wholeheartedly to the pursuit of fellow law enforcement officers. This problem may be especially acute when the Federal Bureau of Investigation is involved. Because the FBI has generally concentrated on coordinating the activities of various local law enforcement agencies and because the FBI, in many instances, relies on information and evidence developed by local officials, fairly close and cordial ties between agents and police develop.[71] Agents who are assigned the duty of conducting an intensive investigation of the police may find the job distasteful, and must be willing to suffer a considerable amount of disapproval from fellow agents. In a long and drawn out investigation with unpredictable results, this situation can lead to a loss of morale and a certain degree of apathy in the carrying out of the agent's duties. Occasionally, overt resistance surfaces.[72]

To avoid these difficulties a careful selection of agents to participate in the investigation of police corruption is necessary. However, because of the FBI's bureaucratic reluctance to be controlled by the Justice Department, the actual selection of these agents is often beyond the control of the prosecutor. The agent, expected to be responsive to two masters, is himself unsure whether he should be loyal to his own superiors or to the prosecutor who may see the proper method of conducting the investigation differently.[73]

[69] The Federal Bureau of Investigation has traditionally operated as an intelligence gathering organization and a coordinator of various local police departments where crimes are of a multi-jurisdictional nature. However, as Congress has increased the scope of the federal criminal code, so too have the duties and powers of the FBI grown. Even with this development, the FBI trains its agents and feels most comfortable with investigations that require the solution of crimes by the correlation of evidence gathered by local law enforcement officials, or by the analysis of physical and objective evidence. In an investigation which requires a significant expenditure of man power over a long period of time with the same agents involved to assure continuity and the unearthing of evidence of events four or five years in the past which can only be reconstructed through the hazy recollections of reluctant witnesses and for which informants can provide little help, the FBI often finds itself in a difficult position. And, if such an investigation is attended by political controversy, the FBI has been known to put up a solid wall of resistance to participating in the investigation in any meaningful way. *See generally* Navasky, KENNEDY JUSTICE (1971). An investigation of police corruption involves all of the above difficulties and thus requires an aggressive prosecutor who is willing to forfeit much of his activity as a lawyer in favor of being a politician and a supervisory investigator.

[70] Often a grand jury will not be convened or evidence or testimony presented until a solid factual base is laid and the community is aware that an investigation is being seriously conducted. In the case of the investigation of police corruption which is manifested by the collection of money from businessmen, the technique of conducting a large number of interviews on the street both avoids undue expenditure of grand jury time and alerts the community in a very direct way to the intensity of federal pressure. A prosecutor's decision to conduct such an investigation by using the grand jury as a forum for interrogation can lead to counterproductive results, such as (1) too much publicity before any substantial amount of evidence is obtained and (2) the obtaining of lawyers by witnesses which will often increase the incidence of asserting the fifth amendment and reduce the possibility of the investigative agents subtly applying pressure in informal interrogation.

[71] This developing relationship that can occur is one of the reasons that agents are often assigned to duty in cities where they have no familial or friendly ties. *See* note 69 *supra*.

[72] In one case reported to this author, an FBI agent who investigated a civil rights complaint that resulted in an indictment of a police officer refused to sit at the prosecutor's table during the trial for fear that he would be criticized by his fellow agents and suffer the enmity of other police officers with whom he had developed cordial relationships.

[73] The FBI requires that a report of the interview be prepared each time an agent speaks to a witness. Because all of these reports are producible at trial for use by the defense under the Jenks Act (18 U.S.C. § 3500 (1970)), the prosecutor prefers that the FBI agent conduct as many interviews as necessary to obtain all of the witness' recollections but to reduce all of the sessions to only one written report. The existence of numerous reports increases the chances for impeachment of the witness by raising the possibility that there will be inconsistencies between the reports and the testimony. In order to have one report prepared for each witness, the prosecutor is forced to solicit the active cooperation of the agent involved in violating

The prosecutor who needs agents who can devote full time and energy to a long investigation encounters difficulty because of the workload of agents. Finally, a prosecutor, who requests a large number of agents to work on an investigation that might not produce an indictment for a year or more, often meets with stiff resistance by those in charge of the investigative agency.[74]

### Conflicts with Local Authorities

The investigation by the federal government of police corruption often has as a by-product veiled, even open, hostility between various governmental agencies. In more general terms, the federal investigation and prosecution of crimes which are in violation of both federal and state laws can easily lead to resentment by local officials of the intrusion of the federal government into what they conceive as their private and exclusive domain. Whatever the reasons for such resentment,[75] the conflict generated can have far reaching consequences for the investigation.

Because any investigation of police corruption usually involves the testimony of one who has paid money to police, that individual is often technically susceptible to prosecution under state bribery laws. Of course, where it is clear that the police forced the payment by an explicit threat, it is highly unlikely that any action would or could be taken against the victim. But in the area of the expanding coverage of the Hobbs Act, where a police officer may be prosecuted for receiving money that closely approaches a bribe under traditional views, the victim is more vulnerable. This situation is exacerbated if the victim is a businessman licensed by the state or city to sell alcoholic beverages. Because one's license can in many jurisdictions be suspended or revoked without conviction for a crime, the witness cannot be fully protected from state action, even if he is granted immunity.[76] Of course, the fact that any action against the witness by local officials could well be considered purely retributive and obstructionist may deter harassment of those holding liquor licenses.

Conflict between the federal and local investigative officials can also arise during the time when information is collected. In the interviewing of witnesses, the victim who has paid an officer only once may not be able to provide the officer's name. A material aid in identifying the suspected officer is the availability of photographs, police incident reports, assignment sheets, and supervisors' logs. Although this information could possibly be obtained by subpoena, it is obviously more efficient and desirable if those responsible for keeping these documents and records agree to make this information accessible to the investigators, as needed, on an "ask for" basis.[77] Although none of these points of conflict can entirely stop the progress of a well coordinated federal investigation, severe delays can result, and witnesses may be discouraged from testifying.

### The Trial of a Police Corruption Case

The prosecution of a police corruption case generally assumes one of two forms. The simplest prosecution is against one police officer for extorting money from one or more persons where only the victim's testimony implicates the defendant.[78] The more sophisticated case involves as witnesses not only those who paid the police but also one or more police accomplices who are willing to testify

the FBI regulation. Most agents do not want to run this risk.

[74] In a single three month period of the investigation in Chicago during 1972, this author had eight meetings of an hour or more to discuss manpower requirements for the investigation, wrote three detailed memoranda to the Justice Department in Washington explaining the problems of dealing with the FBI, and conducted initial interviews of witnesses that could have been easily accomplished by agents had they been made available. It was not unusual to wait from six to eight weeks for a report after the formal interview of a witness had occurred.

[75] The reasons may include (1) fear of the local officialdom that their misdeeds may be discovered and become the subject of investigation and prosecution, (2) fear that however clean their hands may be, their power and position may be damaged, (3) concern that the federal government will go still further and look into every phase of state and city government, and (4) a feeling of nonparticipation in an interesting and challenging effort for which they will get no credit.

[76] *See* notes 60–62 *supra*.

[77] In the investigation of police corruption in Chicago, this arrangement was made with the Chicago Police Department, although the federal investigation was sometimes compromised by leaks from the police department. In one instance an officer was called before a grand jury to be questioned about a single incident that had occurred three years earlier and a report of that incident had been requested from the police department. When the officer testified before the grand jury, he was well prepared and it was apparent that he knew that the particular incident in question was going to be the focus of the interrogation. The origin of the leak was never learned.

[78] Different individuals who pay the same officer money in wholly unrelated incidents may be the subject of a single indictment with a separate count concerning each payment.

against fellow officers.[79] In the first situation, the strength of the prosecution rests on the credibility of the victim. There is no physical evidence, and there are often weaknesses in the identification of the officer involved. Yet, even where there is only one victim who can testify that he gave money to the defendant, the chances for conviction are good. The reason for this lies in the inherent credibility of a witness who has no motive to unjustly accuse the defendant. For example, a tavern owner may testify that an officer apprehended him for sale of liquor to a minor and then demanded money in exchange for not proceeding with the arrest.[80] No police report was written by the officer and thus no record exists that any part of the incident occurred. The officer is free to deny ever being at the tavern and then hope that, if accused, the identification testimony of the victim will be weak. Moreover, the tavern owner has been previously cited on numerous occasions for violations of the liquor license laws. The defendant, on the other hand, has a good record and appears comfortable and self-assured on the stand.[81] But the prosecution has an unassailable advantage—the victim has no reason to lie.[82] The defense counsel cannot maintain that the tavern owner has a reason for falsely implicating the officer since he was not arrested by him, nor can the defendant avoid the impact of the tavern owner's explanation that he was afraid he would lose his license and his business if he did not accede to the officer's demand for money.

Part of the prosecution's appeal in a case like the one described above is its disarming simplicity, involving as it does the payment of money to a police officer by a person at the mercy of police power. The prosecution's task becomes increasingly more difficult and complex when it attempts to trace the money to higher ranking police officers who did not do the collecting, but participated in a planned scheme to extort money from many victims. In such a case, evidence is produced against the defendants by means of the testimony of subordinates who funneled part of the money they collected to their superiors. If distribution of the collected money follows the established hierarchy of a police department, it is clear that in order to move up the ladder, testimony must come from witnesses with significant power and position in the police district where they served.[83] The prosecution thus inevitably finds itself in a very delicate situation. It must grant immunity or recommend leniency for the officer who is in charge of collecting money from the victims in order to prosecute not only his colleagues who do not take part in the actual collections, but also the supervising and higher ranking officers.

For example, one case tried in the United States District Court for the Northern District of Illinois disclosed the following pattern of corruption. In one particular police district, vice officers who were charged with the enforcement of the liquor laws participated in a scheme which focused on the collection of money from various tavern owners in exchange for protection and better service by the vice squad. Similarly, regular uniformed officers in the same district had also formed a "club" and collected money from the same tavern owners for protection and increased service by uniformed officers. Every tavern owner paid money each month to the "bagmen" for the vice squad and the uniformed officers. None of this money, however, found its way to the district commander who instead received money from organized criminal elements in the district, and who knowingly allowed the collections by the vice and uniformed officers in order to avoid any objection by them that he was making extra money. In the actual indictment and trial of the case the government concentrated on the vice club and the district commander's knowing acquiescence in their activities. The bagman and several other vice officers who occasionally did the actual collecting from the tavern owners were granted immunity and testified for the government. The other vice officers who did nothing but receive their monthly portion of the proceeds for keeping the club secret and for not harassing the member tavern owners were defendants in the case,

[79] These cases usually involve the indictment of higher police officials who did not take part in the actual collection but who received their money from other officers.

[80] If the officer admits that he was there, he often denies the payment and provides a reasonable excuse for not making an arrest. For example, he may claim that the minor was almost twenty-one and in his judgment a warning was sufficient.

[81] This is to be expected since police officers generally have numerous opportunities to appear in court and are practiced witnesses.

[82] For this reason, a defendant who can find a weakness in the victim's identification has a decent chance of being acquitted.

[83] In Chicago, where vice officers are answerable only to the commander of the district, an extortion scheme manned by the vice squad need not involve sergeants, lieutenants and other uniformed officers. The vice coordinator (vice officer who supervises the others) may direct the proceeds to the commander without the knowledge of the uniformed supervisors.

together with the vice coordinator and the district commander. The tavern owners could only give evidence against officers who collected the money and these officers, almost without exception, were immunized government witnesses. The accomplice witnesses played a more direct role in the illegal activity than many of the defendants. No matter how many victims testified, their evidence only implicated other government witnesses. The commander of the district was effectively implicated only by one of the immunized bagmen.[84]

Under this framework, the structure of corruption dictates that a district commander can only be implicated by the vice coordinator or, perhaps, one other officer whom he has taken into his confidence.[85] The prosecutor has a difficult task because (1) most of the non-police witnesses cannot testify against any officers who are defendants, (2) the credibility of the defendants is pitted against government police witnesses who are, arguably, more culpable than they, and (3) the prime target of the case—the district commander—may be confronted with only one or two witnesses against him. Because of these weaknesses, the prosecutor must count on the inferences that may be drawn by the jury in a conspiracy case,[86] and the effect that evidence of a massive "shakedown" scheme will have on a jury's view of the credibility of a defense by the district commander that this situation existed in his district without his knowledge. These last two factors are often sufficient to obtain conviction.[87]

[84] *United States v. Braasch, No.* 72 CR 979 (N.D.Ill. 1973), the district commander did not actually receive any of the proceeds of the collections from tavern owners, but nevertheless was indicted and convicted because he actively allowed the extortion to continue so that his men would not complain about the money he was receiving from criminal elements in the district (*e.g.* gambling, organized crime, etc.). On the other hand, the distribution of money may not stop with the commander of the district but may continue to the highest levels of the police department.

[85] Indeed, the various vice officers may not even know the exact source of the money they receive each month but only know that, in return for receiving it, they may not make an arrest in certain establishments without prior approval of the vice coordinator who is distributing the money.

[86] Once independent evidence establishes a conspiracy, heresay testimony is admissible against all conspirators. *See, e.g.* Dutton v. Evans, 400 U.S. 74 (1970); Barly v. State, 233 Ala. 384, 171 So. 729 (1937); Reed v. People, 156 Colo. 450, 402 P.2d 68 (1965). *See also* 2 F. WHARTON, CRIMINAL EVIDENCE (12th ed. 1955).

[87] See *United States v. Braasch*, No. 72 CR 979 (N.D. Ill. 1973), where only four out of more than twenty defendants were acquitted.

In a police corruption case which simply involves the matching of the credibility of one or two businessmen against the police officer, the defense must be simple and straightforward. If, for example, the testimony is that money was extorted in exchange for not making an arrest, the officer can do little else than deny that the extortion took place. If the defendant concedes that he was present at the scene, then he must offer a rational explanation for not making the arrest, for it is the failure to arrest which makes the victim's testimony appear credible. In addition, the defendant will offer evidence of his good reputation in the community. But character evidence will offer little strength to the defendant's case if he can assign no motive for lying to the government witness.

In the more complicated cases, a defendant has the additional opportunity of attacking the government's witnesses who concede that they actively participated in the unlawful activity for which the defendant is charged. Defense counsel may argue that the prosecution's witnesses do have reasons to lie, either because they have been granted immunity or because, if they have entered guilty pleas, they hope for lighter sentences by cooperating with the prosecution.[88] Nevertheless, the defense strategy of attacking an accomplice witness's credibility rarely succeeds. Several reasons account for the willingness of the jury to accept the testimony of a witness who, but for his cooperation with the prosecution, would be in the same position as the defendant. First, once the defendant admits that he was associated with accomplice witnesses, he acknowledges that he did not have at least the good judgment to stay clear of such disreputable individuals.[89] Second, the jury will probably find it difficult to belive that a widespread extortion scheme could take place without those in authority at least knowing that it was occurring. Finally, the government's argument, however unrealistic, that if the accomplice witness lies, he will be prosecuted for perjury carries great persuasive force.[90]

[88] When a government witness has entered a plea of guilty prior to trial, his sentence is typically deferred until after he testifies. This is done to assure his continued cooperation and to give him the hope that he will secure a lighter sentence if he favorably impresses the judge by his testimony.

[89] It follows from this that the best defense in an accomplice witness case is one when the defendant can testify credibly that he does not even know the government's witness or that he did acts inconsistent with the prosecutor's theory, for example, making arrests of businessmen who are paying money each month.

[90] Even an immunized witness may be prosecuted for perjury, since immunity relates only to past criminal conduct. *See* note 61 *supra*.

The judge's most important decision in a police corruption case concerns his view on whether the evidence is sufficient to allow the jury to decide if extortion was committed. If the charge to the jury adopts the liberalized view of extortion,[91] the defense will be hard pressed to effectively argue that the payments of money constituted bribery.

Because so much of any police corruption case involves issues of credibility, the jury is confronted with difficult decisions. It must determine without the benefit of much corroborative evidence who is telling the truth. For this reason, a witness's demeanor, style of speaking and general appearance are of great significance. Of even more importance is the jury's view of public officials and its willingness to believe that they are easily corrupted. Despite careful screening of jurors in such cases, they will inevitably reflect the view of the community about the honesty of its government at the time of trial.[92]

## Conclusion

In considering the legal and practical issues which surround an investigation of police corruption, this article has focused on the investigative and prosecutorial methods employed to meet the demands which these investigations have imposed. A question which has not been explored involves the political implications of these efforts.

When an investigation is undertaken which has as its goal the uncovering, through normal criminal processes, of instances of illegal activity by local law enforcement officials, it must be recognized that the number of those indicted will constitute only a small percentage of individuals who are in fact involved in the kinds of activities which are being investigated. No matter how many individual officers are actually indicted and convicted in any investigation, there will be no appreciable effect on the day-to-day operations and internal disciplinary mechanism of the police department unless efforts are made by those directly in charge of the department to institute major reforms. Consequently, it is difficult to justify a federal investigation of police corruption on the basis that such an investigation will have any long run effect on the quality or integrity of local law enforcement over which the federal government exercises little control.

On the other hand, an investigation which produces significant results may alert the public to the need for reforming their police department.

[91] The indictment and instructions to the jury in *United States v. Braasch*, No. 72 (CR 979 (N.D. Ill. 1973) incorporated this broadened interpretation of Hobbs Act extortion. The pertinent portions of each were as follows:

*Indictment*

6. That beginning in or about August, 1966, and continuing thereafter to and including the date of the filing of this indictment, at Chicago, and at other places to the Grand Jury unknown, in the Northern District of Illinois, Eastern Division, [naming 24 defendants] defendants herein, and JOHN A. CELLO, JR., ROBERT W. FISCHER, SALVATORE M. MASCOLINO and EDWARD RIFKIN, named herein as co-conspirators but not as defendants, knowingly, willfully and unlawfully did conspire, each with the other and with divers other persons to the Grand Jury unknown, to commit extortion, as that term is defined in Title 18, United States Code, Section 1951, which extortion would and did obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951, and the movement of alcoholic beverages and other articles in commerce, in that the defendants and JOHN A. CELLO, JR., ROBERT W. FISCHER, SALVATORE M. MASCOLINO and EDWARD RIFKIN would and did wrongfully use their positions as Chicago police officers to unlawfully obtain and cause to be obtained property, to wit: various sums of money, which money was not due them or the Chicago Police Department, and which money would be and was obtained by certain members of the aforesaid 18th Police District vice squad from the aforesaid retail liquor dealers and the officers, agents and employees of said retail liquor dealers, with their consent, said consent being induced under color of official right, and which money would be and thereafter was distributed and caused to be distributed among the members of the aforesaid 18th Police District vice squad;

In violation of Title 18, United States Code, Section 1951.

*Instruction*

Extortion under 'color of official right' means that property was unlawfully obtained from another person by a public officer, under the color of his office, and the property so obtained was not due and owing to the public officer, nor was the property due and owing to the office he represented. This type of extortion by a public officer does not require proof of any specific acts on the part of the public official demonstrating force, threats or the use of fear.

If you find beyond a reasonable doubt that the Government's evidence has established that certain members of the conspiracy alleged in Count I of the indictment used the power and authority vested in them, by reason of their office as Chicago police officers, to obtain money from the retail liquor dealers named in Count I, and that this money was not due and owing to these police officers or to the Chicago Police Department, then I instruct you that that is sufficient to satisfy the requirements of the law that money was obtained by extortion under color of official right.

[92] In the civil rights cases arising out of the Democratic Convention of 1968, the United States Attorney's office in Chicago was unable to secure a single conviction against the police. But today numerous convictions are being obtained in both police brutality and corruption cases.

When local officials protest that the federal investigation of police corruption has been commenced because of a purely political desire to embarass those in power at the local level, the only required response is that, if wrongdoing has in fact occurred, the federal government's intrusion into local affairs could be easily avoided by an alert, aggressive and honest local law enforcement apparatus. All of the legal and practical methods and consequences discussed in this article which show an expansion of the activities of the federal government have resulted not so much from the federal government's desire to investigate local corruption as from the complete inaction by local officials. There are in existence, of course, state criminal laws which can be employed to prosecute corrupt police officers. If these laws are not enforced, it is inevitable that another governmental body with power and authority will eventually take action. Whether or not that action is precipitated by the political climate of the time is irrelevant since adequate enforcement at the local level would render such action unnecessary. Once a law such as the Hobbs Act is broadened to include wrongdoing which had originally been thought to be within the province of state law enforcement, it becomes very difficult to avoid continued federal pressure.

The increasing activity of the federal government in investigating those in power at the local level may cause traditional institutions of the judicial process to be reexamined. Thus, the use of immunity and the broad powers of the grand jury to subpeona witnesses or to command the production of books and records, the exercise of which is subject to little or no court scrutiny, has recently been questioned by commentators, politicians and the public. These developments are not new, but rarely before had they been challenged. When, however, these tools are employed in an area which is controversial, strong impetus is given for reevaluation. In this regard, an investigation of local corruption may ultimately result in the revision of the apparatus used in that investigation. It is even conceivable that changes and reforms in the procedures of investigation will be greater than the reforms made in the institutions which are the subject of the investigation.

It is evident, then, that a federal investigation of local corruption is in many respects a double-edged sword. The investigation not only affects the institutions being examined but also the institutions which conduct the inquiry. In the end, both may undergo change. A police department thoroughly investigated and scandalized by indictments and convictions of its officers for extensive wrongdoing may be forced to revise and update its operations and its relationship with the public. Those seeking change may also be changed and, in the process, a new and more sensible balance established between federal, state and local institutions.