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Some Practical and Ethical Problems of Prosecuting Public Officials

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SOME PRACTICAL AND ETHICAL PROBLEMS OF PROSECUTING PUBLIC OFFICIALS*

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I.

Introduction

A.

The Problem of Prosecutorial Power

In our legal system, the prosecutor wields tremendous power. His authority to compel testimony of witnesses under oath and to subpoena documents creates enormous risk of harassment and serious injury to innocent people if misused. In addition to extraordinary power, the prosecutor possesses extraordinary discretion that is sweeping, unreviewable and, for the most part, is exercised in secret. By himself, he may initiate an investigation, determine its course and scope, decide whom to call as witnesses, define the crimes to be charged, dispose of cases through negotiated pleas, and decide whom to recommend for indictment.

Much of the prosecutor's power derives from his relationship with the grand jury. While many of the leading judicial decisions over the past two decades have operated to benefit criminal suspects, the courts have reaffirmed and expanded the power of the grand jury.[1] Originally conceived by the Founding Fathers as a protective buffer to insulate the suspect from arbitrary or malicious government action, the

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1. United States v. Mandujano, 44 U.S.L.W. 4629 (U.S., May 19, 1976); United States v. Calandra, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972). *See* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc).

grand jury in the 20th century has become more and more a rubber stamp for the prosecutor.[2] Grand jury proceedings are required to be conducted under the most stringent veil of secrecy; courtroom rules of evidence are inapplicable; and a witness may not be accompanied by his attorney during the interrogation.[3] The prosecutor may inquire into any matter that is related to the investigation.[4] The grand jury may compel production of evidence such as handwriting and voice exemplars, fingerprints and under certain circumstances corporate records, even though a prosecutor or a policeman would otherwise have to obtain a judicial warrant showing probable cause under the fourth amendment to seize the material.[5]

The grand jury rarely comes into contact with anyone but prosecutors for any extended period of time. The jurors rely on the prosecutors for charging recommendations and for presentation of evidence — there is no legal obligation, for example, that prosecutors present evidence exculpatory of a person whom they will ask the grand jury to indict. If a grand jury refuses to indict a suspect, the prosecutor can usually resubmit the matter to another grand jury.[6]

The grand jury is central to cases involving corruption by public officials. It provides the prosecutor with invaluable tools for uncovering sophisticated wrongdoing, not the least of which is nationwide subpoena power.[7] Moreover, in an ordinary grand jury investigation, suspects are likely to heed their lawyers' advice to invoke the fifth amendment privilege, since any false statement made to the grand jury may be used against them, either to prove guilt at subsequent trials or as the basis for perjury prosecutions. But where a public

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2. *See, e.g.,* NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 34–37 (1931) (The "Wickersham Commission").

3. FED. R. CRIM. P. 6(d). *See* United States v. Levinson, 405 F.2d 971, 980 (6th Cir. 1968); *In re* Black, 47 F.2d 542 (2d Cir. 1931); *cf. In re* Groban, 352 U.S. 330 (1957).

4. Blair v. United States, 250 U.S. 273, 282–83 (1919); Hale v. Henkel, 201 U.S. 43, 65 (1906); Marcus v. United States, 310 F.2d 143, 147 n.2 (3d Cir. 1962), *cert. denied,* 372 U.S. 944 (1963); United States v. Neff, 212 F.2d 297, 301 (3d Cir. 1954).

5. *See* United States v. Calandra, 414 U.S. 338 (1974); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); United States v. White, 322 U.S. 694, 704 (1944) (records of unincorporated association subpoenaed from officer of same); Wilson v. United States, 221 U.S. 361, 385 (1911) (corporate records may be subpoenaed from corporate officer who has custody or control regardless of whether they may tend to incriminate him); United States v. Fago, 319 F.2d 791 (2d Cir.), *cert. denied,* 375 U.S. 906 (1963).

6. United States v. One 1940 Oldsmobile Sedan Automobile, 167 F.2d 404, 406 (7th Cir. 1948).

7. FED. R. CRIM. P. 17(e)(1).

official is under investigation, the spectacle of being identified by the media as one who has refused to cooperate with investigators may deter him from asserting the privilege.

B.

Restrictions on the Exercise of Prosecutorial Powers

While the prosecutor functions in an adversary system, his responsibility for the exercise of the sweeping discretionary power granted to him "differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[8] To be more specific, it is the prosecutor's obligation to serve the ends of impartial justice by protecting the innocent and guarding the rights of the accused in addition to convicting the guilty. The prosecutor is required to make many of the decisions that a client normally makes in our legal system: in a sense, he is the lawyer and the client rolled into one. The prosecutor, then, is both an advocate *in* the criminal justice system and also an administrator *of* that system.

Naturally, there are a variety of legal and ethical restraints on the prosecutor's freedom designed to serve the public interest and protect individual rights. The prosecutor is not supposed to go off on a "fishing expedition" by initiating an investigation or issuing a subpoena just because he believes that some area may be ripe for discovery of criminal activity.[9] He may not act out of self-interest or exploit his office by means of personal publicity.[10] A witness whom the prosecutor believes may have been involved in criminal activity, when called before the grand jury, should be advised of the nature and scope of the grand jury's investigation.[11] He should further be advised of his right to remain silent and to have an attorney outside the grand jury room with whom he may consult.[12] A suspect should be advised that, if

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (Final Draft, 1969) [hereinafter cited as CODE].

9. *See, e.g.*, ABA Standards Relating To The Prosecution Function, § 3.1(a), Commentary (Approved Draft, 1971) [hereinafter cited as Prosecution Standards]. In fact, there are few judicially-imposed limitations on the prosecutor's discretion to initiate investigations. *See* United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) ("[T]he Grand Jury . . . can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); cases cited note 4 *supra*. Subpoena *duces tecum* can be quashed if "unreasonable or oppressive." FED. R. CRIM. P. 17(c).

10. PROSECUTION STANDARDS, *supra* note 9, § 1.3(a).

11. *See id.*, § 3.6(d).

12. *Id.*; *see* United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955). The Supreme Court this term has held that false testimony given by a target of a grand jury inquiry may be used to prosecute him for perjury even

it is his intention to assert his fifth amendment privilege when subpoenaed before the grand jury, by stating this intention in advance he can avoid being brought into the jury room; thus he will not be prejudiced by refusing to answer questions in front of the jurors.[13] And indictments, of course, may be based only upon probable cause.[14]

But the fact is that neither court decisions nor established ethical norms such as the Code of Professional Responsibility and the various American Bar Association standards really provide any meaningful guidance to prosecutors faced with certain difficult decisions during a white collar or public corruption investigation. The ABA Committee that developed the *Standards Relating To The Prosecution Function* has urged that "it is the duty of the prosecutor to become intimately familiar with and adhere to the legal and ethical standards governing the performance of his official duties."[15] Yet these rules are often vague and general. In many instances, the standard of conduct they impose on prosecutors is a loose one. In searching for practical guides to ethical behavior, more often than not, the prosecutor is thrown back on his own subjective values and notions about fundamental fairness. In the end, the principal guarantee to the public that the prosecutor's power will be exercised properly and ethically is not the prosecutor's obligation to adhere to any well-developed system of ethical rules, but is rather the prosecutor's own personal integrity, professional competence and intellectual devotion to concepts of fairness.

This article discusses a few of the more significant practical problems prosecutors face in political corruption cases. These problems give rise to difficult questions of ethics and equitable treatment that are seldom resolved by any general rules of prosecutorial conduct. The article also deals with specific prosecutorial functions — such as plea bargaining procedures — that pose more direct and well-publicized ethical issues. Here again, reference to established ethical norms seems to answer few of the hard questions involved.

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though he was not given the full warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). United States v. Mandujano, 44 U.S.L.W. 4629 (U.S. May 19, 1976). However, Chief Justice Burger in his plurality opinion for the Court stressed the fact that the defendant had in fact been warned that he did not have to answer questions that might incriminate him and that he was entitled to have an attorney present outside the jury room, with whom he might consult. The Court thus left open the question of whether a prosecutor's total failure to give warnings to a target of an investigation who is later indicted for perjury, or whose admissions the prosecution seeks to offer as evidence at trial, would be permissible.

13. PROSECUTION STANDARDS, *supra* note 9, § 3.6(e).

14. U.S. CONST. amend. V.

15. PROSECUTION STANDARDS, *supra* note 9, § 1.1, Commentary at 45.

II.

Practical Problems of Prosecuting Public Corruption

Prosecutorial investigation of white collar and organized crime, of which public corruption cases are typical, is closely linked to trial. It is thus unlike legislative investigation, where the object is simply to unearth the facts. For the legislative investigator, from whom, how, and in what sequence the evidence is obtained is of secondary importance. If at a legislative hearing there is conflicting testimony, if witnesses change their stories, if committee members must cross-examine cooperative as well as hostile witnesses, so much the better. These conflicts show that the committee is on the ball, and that the investigation has struck pay dirt. But the prosecutor is customarily judged by whether he obtains convictions, in spite of the maxim that the Government "always wins" when justice is done whether the defendant is found guilty or not guilty. The prosecutor's purpose is not just to find out what happened, but in the course of getting the facts to construct a successful courtroom case. The second objective is usually much harder to attain than the first.

Public corruption cases are made on the testimony of insiders who are usually participants in the crimes, supported by whatever corroboration is available from physical and circumstantial evidence. The prosecutor must be able to induce insiders to come forward and tell what they know. Then, after the facts are assembled, he must have witnesses who will take the stand at trial on behalf of the Government. Some of those responsible have to be used to convict the others. Sometimes the public fails to understand that, except in the rarest case, everyone who is culpable cannot be a defendant. Consequently, the prosecutor faces a series of very hard choices. Unfortunately, although these choices affect the overall direction of the case, they often have to be made early in the investigation, while it is still unravelling, without the benefit of complete information. Having to make such choices before the facts are fully developed creates what is probably the greatest risk of miscalculation in investigating this type of crime.

Good judgment alone cannot make a public corruption investigation successful, however. The heart of any corruption case is plain hard work: attention to detail, persistence in building up the facts from a host of different sources, and meticulous preparation, as well as a healthy measure of good luck. One reason for this is that guilt or innocence in public corruption cases often hinges on very small differences in testimony and subtle interpretations of motive and intent. These delicate distinctions are especially troublesome for the prosecutor when the targets of the investigation are already familiar with the testi-

mony that will be given against them and can construct a defense to meet it. For example, the Watergate cover-up succeeded in part because lawyers for the Committee to Re-Elect the President participated in interviews by investigators of individual employees of the Committee.[16] The architects of the cover-up were thereby able to learn most of the details of the case as it was being built. Often, out of residual loyalty to their former confederates, cooperating witnesses will keep them informed of the information they are providing to authorities. In the Watergate cover-up investigation the Ervin Committee's decision to call their more cooperative witnesses such as Jeb Magruder and John Dean before they called H. R. Haldeman and John Ehrlichman gave the latter a golden opportunity to tailor their stories to the testimony of others.

Leaks are the bane of the prosecutor's existence in a public corruption case. Publication in the press of inside information about an investigation usually harms the prosecutors more than those who are the suspects in the investigation, because it puts the prosecutors in a vulnerable position with the public and apprises the suspects of the status of the case against them. Prosecutors ordinarily have a strong tactical interest as well as an ethical obligation to prevent leaks from emanating from the Government side. Lawyers for cooperating witnesses may use the technique of leaks for a variety of reasons, including bargaining for a better deal for their clients. In addition, both witnesses and prospective defendants in an investigation may leak information in order to counteract rumors implicating them more deeply in improper activity than was actually the case.

No matter how much hard work and preparation have gone into a case, it may prove fruitless if the prosecutors cannot produce at trial live witnesses whose testimony will be believed by the jury. Usually, where the defendant is a public official, he comes into the courtroom as a pillar of the community, one who by the position he holds has already demonstrated that he commands the trust and respect of a large segment of the electorate. For example, during the voir dire in the Watergate cover-up trial[17] Judge John Sirica, in questioning a potential juror, referred to the defendants as "these fine gentlemen." After the juror had been excused the chief Government prosecutor got up and objected

16. For a discussion of the ethical problems involved when an attorney representing an organization under investigation by a grand jury also represents employees of the organization who are potential prosecution witnesses, see WATERGATE SPECIAL PROSECUTION FORCE, UNITED STATES DEPARTMENT OF JUSTICE, REPORT 140–41 (October 1975).

17. United States v. Mitchell, Crim. No. 74-110 (D.D.C. 1974).

to the judge's reference. Defense lawyers angrily replied that at this stage of the trial the defendants were *presumed* to be fine gentlemen. The government prosecutor responded evenly that they were presumed to be innocent, but that did not mean they were presumed to be fine gentlemen. This impression of rectitude, nurtured by the defense through character witnesses and through the defendant's own testimony when he takes the stand, will usually be conveyed to the jury.

In contrast, the principal Government witnesses will usually have acknowledged their role in the criminal activity in which they seek to implicate the defendants. If the trial boils down to a contest of credibility between the government witnesses and the defendants, the defense counsel will seek to define the issue to the jury in terms of whether they believe the "fine gentlemen" on trial, or a bunch of confessed criminals and others who have violated the public trust.

The inherent credibility problem involved in using insider-witnesses makes skillful use of corroboration, no matter how seemingly trivial, a necessity. In Watergate the prosecution had the best corroboration available: tape recordings of the defendants' own conversations. In other public corruption cases however, the critical role of corroboration often places strong pressure on prosecutors to engage in surrepitious electronic surveillance or the use of planted informants.

Many experienced prosecutors argue that without use of these techniques, comprehensive enforcement of anti-corruption statutes against public officials is virtually impossible. Without judging the merits of this dispute, it suffices to say that the issue was never faced in the Watergate cover-up investigation because the opportunity never arose. Nevertheless, the painful parallel between prosecutorially-initiated electronic surveillance and the Watergate bugging was not lost upon the Watergate prosecutors; they were convinced that in that particular investigation electronic snooping by the Government — even though sanctioned by court order — would never be tolerated by the public. An example occurred during the United States Attorney's investigation into corruption in Baltimore County, Maryland that eventually led to conviction of Vice President Spiro Agnew. Use of evidence obtained by electronic surveillance — by a cooperating witness who "wired" himself and recorded a conversation with a suspect whom prosecutors believed was attempting to importune the witness — resulted at trial in a swift acquittal by the jury.[18]

Legal requirements relating to pre-trial discovery compound the prosecutor's difficulties. The so-called "Jencks Act"[19] requires the

18. United States v. Overton, No. 74-0344 (D. Md. 1974).

19. 18 U.S.C. § 3500 (1970).

Government to turn over to the defense for use at trial all grand jury testimony and written or recorded "statements" of Government witnesses that are related to their trial testimony. While the law technically limits discoverable statements to recordings or transcriptions that are "substantially verbatim" and made "contemporaneously" with the oral declaration of the witness,[20] in the past prosecution notes of discussions with witnesses, memoranda summarizing witness interviews and like material, no matter how sketchy or incomplete, often have been held discoverable.[21] The careful prosecutor does not take any chances, so everything goes over to the defense.

Similarly, while the letter of the Jencks Act requires only that discoverable material be produced after the Government witness has testified on direct examination, some trial courts interpret this provision broadly to mean that the material should be produced sufficiently in advance of the witness's appearance that the defense can make effective use of it.[22] Consequently, the Government often hands over to the defense all notes, memoranda, and recorded grand jury testimony of everyone who *might* be called at trial as a government witness at least a few weeks before trial. In addition, the constitutional mandate of *Brady v. Maryland*[23] requires the Government to turn over to the defense for use at trial any arguably exculpatory evidence in its possession. This requirement may as a practical matter oblige the prosecutor to turn over grand jury testimony, interviews of most potential defense witnesses and any other evidence gathered during the investigation that does not fit into his own case.

Disclosure requirements pose particular problems in a case that depends on the testimony of insider-witnesses. Because of initial reluctance in the early stages of the investigation, some or all of the Government's witnesses may not be entirely candid with the investigators. If the prosecutors take notes during these early sessions with a witness and later turn them over to the defense at trial, the defense may take advantage of any conflicting statements when it cross-examines the witnesses. The defense will suggest to the jury that a witness changed his testimony to coincide with what the prosecutors wanted to hear in order to get a better deal for himself. Many prosecutors are consequently reluctant to take even the sketchiest notes of interviews

20. 18 U.S.C. § 3500(e)(2) (1970).

21. *But see* Goldberg v. United States, 96 S. Ct. 1338 (1976).

22. *Cf.* United States v. Seafarers Int'l Union, 343 F. Supp. 779, 788 (E.D.N.Y. 1972) (failure of government to meet pretrial discovery obligations held prejudicial to defense).

23. 373 U.S. 83 (1969); *accord*, United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Ashley v. State, 319 F.2d 8 (5th Cir. 1963).

with a potential trial witness until they feel confident that the witness is being completely candid. Some wait until the witness's testimony is finally taken under oath before the grand jury, where in almost all federal jurisdictions it is transcribed verbatim. Other prosecutors take notes in the form of "questions" they will ask before the grand jury, on the theory that such material is not discoverable.

The question of whether the Watergate Special Prosecutor's Office should institute an across-the-board policy of making written memoranda of the substance of all witness interviews illustrates the type of hidden ethical problems that could have an important impact on the outcome of an investigation and trial. Early in the Watergate investigation, Special Prosecutor Archibald Cox issued an official policy statement requiring all investigators to make such memoranda for their files. The practice seemed necessary to guard against lapses of memory and to generate a solid data base. However, the experienced prosecutors on the staff protested that by this policy the office might be cutting its own throat. No law or ethical obligation required a prosecutor to write a substantive memorandum every time he talked to a witness. Balky witnesses might be questioned many times before they divulged the full extent of their knowledge. Other witnesses who were trying to be candid might find that their recollections had been inaccurate, until refreshed by evidence obtained later in the investigation. Moreover the system was subject to normal human infirmity, in that different prosecutors might write slightly different accounts of the same story. In each of these instances, the Government witness would face the defense at trial with the burden of having given apparently "conflicting" statements.

In the final analysis, Special Prosecutor Cox was not persuaded by these tactical considerations. He decided that the unusual responsibilities placed upon the Watergate prosecution required the creation of a clear internal record that would bear the scrutiny of history, reflecting the thoroughness of the investigation. Cox believed that the only way to prove that the prosecutors had persisted in a policy of utmost fairness to the potential defendants was to write down everything the witnesses said when they came to our offices. If witnesses vacillated in their accounts, that was something the defendants would ultimately be entitled to know in fashioning their defense.

All of these factors, common to most white-collar cases, are accentuated in the public corruption case by a number of additional considerations. Publicity in such cases is extraordinary. Witnesses and potential defendants are usually represented by uncommonly able and sophisticated defense counsel. Finally, highly publicized criticism of

the investigation and of investigators — their tactics, their motives, and the substance of their case — can usually be expected from the investigation's targets. The prosecutors, on the other hand, are ethically bound not to defend themselves in the press.[24] As long as criticism is aimed principally at the cooperating witnesses, the prosecutors are at least partially shielded. This was true to some extent early in the Agnew case and in the Watergate case, which presented the extraordinary spectacle of the Government itself, through the White House, mounting a coordinated public relations campaign to destroy the credibility of John Dean, the Government's own chief witness. Where a target of an investigation stages a media campaign to convince the public of his innocence through criticism directed at the prosecutors themselves, it is of course much more difficult for the prosecutors to endure. And yet, as much as the prosecutors may rage in private over the unfairness of the system that forbids them to strike back, that is the unavoidable price they pay for the extraordinary power and discretion at their command.

Perhaps contrary to popular belief, most prosecutors are reluctant to go after high-ranking elected officials unless it appears that very solid evidence of criminality can be adduced. This reluctance is based not so much on fear of the public official's power as on respect for his role in the political system. The dilemma faced by the Watergate prosecutors and the grand jury investigating President Nixon — whether the inquiry should be pursued through the criminal justice system or through the constitutional process of impeachment — was not unique. Our system of separate powers has fostered a strong institutional and historical understanding that the ultimate and most appropriate sanction against the wrongdoing of elected public officials and their direct appointees is through the political process, not the criminal law. This understanding is expressed in the Constitution only in cases involving a sitting President[25] and certain actions of senators and congressmen[26] but it is also an implicit factor in other cases where misconduct by elected officials is at issue.

The decision to investigate and charge a public official with a crime inevitably takes the prosecutor into unfamiliar and dangerous territory. The public interest in the integrity and continued effective functioning of government comes into play. This is a factor that the prosecutor, who is not directly accountable to the electorate, finds discomforting to assess. As for the politician or public official, he is likely to suffer irreparable injury if indicted, regardless of the outcome of the

24. *See* CODE, *supra*, note 8, DR 7-107.

25. U.S. CONST. art. I, § 2 and art. II, § 4.

26. U.S. CONST. art. I, § 6.

trial. And no matter how strong his case, the prosecutor also rarely emerges unscathed. If he obtains a conviction he will likely be accused of political bias, of "fronting" for the political enemies of the defendant, and of usurping the role of the electorate in policing the morality of its public officials. If the jury refuses to convict, all of these accusations may be confirmed in the public mind, and the prosecutor himself may be destroyed. A responsible prosecutor will seldom be eager to incur these risks to himself and to the public without a case founded on particularly compelling evidence.

On the other hand, in the wake of Watergate the prosecutor faces an additional hazard. When the media has identified a public official as having engaged in questionable conduct, fear of public criticism for failure to indict may drive an insecure prosecutor to institute charges that would not otherwise have been brought against the official. This problem may be especially acute, ironically, where criticism of the investigation by the suspected official has been heavy. To save face, to show that evidence of wrongdoing really does exist, a prosecutor may be maneuvered against his better judgment into proceeding to trial with evidence that is substantial, but is insufficient to assure a conviction. Watergate Special Prosecutor Archibald Cox often commented that the most difficult decisions in the Watergate prosecution were decisions *not* to indict.

Apart from the necessity for meticulous and often boring hard work, prosecuting public corruption is very much a craft, with its own set of techniques. Skillful use of these techniques can be crucial to the outcome of the case. One example is the technique of persuading witnesses who may be criminally involved to cooperate in the investigation. The prosecutor's object here is to get more for less: to obtain useful information and the witness's trial testimony without losing the option to prosecute him. The witness's object ordinarily is to determine how he will be treated by the prosecutors before he risks incriminating himself by disclosing his and others' involvement. If the assurances extended by the prosecutor are too narrow, he may fail to win the witness's cooperation; if they are too broad, he may unnecessarily forfeit his option to prosecute the witness, should the witness turn out to have been guilty of pervasive criminal conduct.

The prosecutorial technique most familiar to the public in this situation is "immunity." In practice, that word has a broad range of meaning and uses. Until 1970, federal statutes provided for so-called "transactional" immunity.[27] Under these laws, a witness who refused

27. For a listing of the federal immunity statutes in effect prior to 1970, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS

to testify before a grand jury could be compelled under threat of contempt to give up his fifth amendment right and answer the jury's questions *if* he was guaranteed by a formal court order that he would not be prosecuted for any transaction about which he testified.[28] In the Omnibus Crime Control Act of 1970 the Nixon-Mitchell Justice Department replaced transactional immunity with "testimonial" immunity.[29] Witnesses could still be compelled to talk, but the protection accorded them by the immunity order was narrower. The witness was assured only that neither his compelled testimony nor any other evidence derived directly or indirectly from it could be used against him in a subsequent prosecution.[30] The Government can prosecute a witness who has received testimonial or "use" immunity, but it must first demonstrate that its case is based only upon evidence obtained independently from the compelled disclosures.[31]

Aside from this complicated statutory mechanism, by making a simple promise to a witness or his lawyer a prosecutor can confer *informal* testimonial immunity that is just as binding on the Government as a formal court order, even though it may never be committed to writing. To find out what a witness can testify to, the prosecutor may simply agree that nothing the witness says in an office interview will be used against him directly or indirectly. The witness's lawyer may then take copious notes to make a record of everything his client discloses during the interview. The promise made by the prosecutor is judicially enforceable. Here, the prosecutor has to be careful not to "buy a pig in a poke." Once accorded informal use immunity, a witness may confess his own guilt, making it difficult ever to prosecute him for what he has admitted, and then claim that he knows nothing about the criminal conduct of others. An immunized witness is not protected from prosecution for perjury, but if the prosecutors cannot prove that the witness is lying they will have lost the option of charging him with a crime to encourage his complete candor.

Before agreeing to informal immunity, a prosecutor can evaluate a witness's testimony in a number of ways. For example, the witness's attorney may make an "offer of proof," a hypothetical statement of what his client might say if granted certain assurances. Of course, everyone understands that there is nothing hypothetical about the state-

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1444–45 (1970); and Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

28. *See* Ullman v. United States, 350 U.S. 422 (1956); Counselman v. Hitchcock, 142 U.S. 547 (1892).

29. Organized Crime Control Act of 1970, 18 U.S.C. §§ 6000–05 (1970).

30. 18 U.S.C. § 6003 (1970).

31. *See* Kastigar v. United States, 406 U.S. 441, 460 (1973).

ments; the lawyer is describing what his client really knows. But the client is protected, because what his lawyer tells the prosecutor cannot be used against the client if negotiations break down. It is highly improper, and almost surely grounds for a mistrial, for a prosecutor to cross-examine a defendant who has taken the stand at trial by referring to his lawyer's prior out-of-court "hypothetical" statements concerning the client's knowledge or conduct.

Occasionally the client himself may make his own hypothetical statement. In effect, the prosecutors interview the witness "off the record," agreeing that his statements made during the interview will never be used directly against him as admissions in any trial. This technique is used principally when the defense lawyer is aggressively seeking to sell the prosecutor on the value of his client as a trial witness rather than a defendant. The off-the-record interview does not bar prosecutors from using a witness's disclosures to develop more evidence against him. In that respect it is less protective of the witness than informal testimonial immunity.

If the prosecutor decides, based on these informal techniques, that a particular individual's culpability is minimal compared to that of others, and that his testimony will be useful at trial, the prosecutor may extend a conditional assurance that the individual will be a witness, rather than a defendant in the case. The assurance is conditioned on the individual's complete candor and cooperation throughout the proceedings. If the prosecutor subsequently finds that the individual has been holding back, the deal is off, and the individual will probably be prosecuted. This promise of witness status is called "equitable immunity." Again, a simple oral promise by the prosecutor, sometimes but not always recorded in a letter to counsel or an internal office memorandum, binds the Government and represents an important decision in the case.

When a prosecutor concludes that a potential witness has been deeply involved in criminal acts, he will usually abandon consideration of either formal or informal immunity and notify the individual that he is being viewed as a potential defendant. This does not mean that the prosecutor has given up hope of getting the individual's testimony in the trials of his confederates; cooperation may still be sought through plea-bargaining, which is discussed at more length below.

The extent of the prosecutor's power to grant immunity illustrates not only the wide discretion granted to prosecutors but also the largely invisible way in which that discretion is exercised. Yet there are no guidelines, rules, nor articulated values that command a consensus

among prosecutors to which one can turn for assistance in making the difficult decisions that arise in the course of this process.

III.

Four Areas of Prosecutorial Ethics

A.

Building Safeguards Into the Investigatory and Charging Processes

The investigation of the Watergate bugging and cover-up by the Watergate Special Prosecutor's Office was conducted according to internal prosecutorial guidelines designed to provide more stringent safeguards for individual rights than those afforded in run-of-the-mill criminal cases. The Watergate prosecutors' unwillingness to employ procedures customarily followed in other prosecutors' offices or to take as their standards the minimum required by law resulted in part from the importance of the case and from the intense scrutiny by the public, through the media, of the prosecutors' actions. In addition, because the Special Prosecution Force was endowed with an unusual degree of autonomy, making it accountable virtually to no one except the public, continued public support was absolutely essential to the success of the investigation. The Watergate prosecutors believed, therefore, that it was incumbent upon them to conduct a showcase prosecution, scrupulously fair in appearance as well as in fact. At every stage they attempted to build into the investigation procedures to insure that the rights of those involved would not be infringed in any way, and to lean over backwards to make certain that no one could accuse them of overzealousness, impropriety, or unfairness.

Few of these procedures were followed by other prosecutors' offices, or were required by existing ethical standards. None were mandated by legal restraints on the prosecutor's power. Yet all were deemed necessary to make certain that the Watergate investigation was scrupulously fair and that the benefit of uncertainty would be given to the accused, not to the Government.

One example of this approach was the policy described above of taking notes during every office interview with a witness. Another example was a policy of informing individuals that they were under investigation and inviting them to make any statement or presentation they desired if they chose to appear before the grand jury. If a prospective defendant decided that he should assert his fifth amendment privilege, he was not called before the grand jury, but was asked to submit

a letter to the prosecutor stating his intention, in lieu of a grand jury appearance.[32] Although there is no obligation to present *exculpatory* evidence to the grand jury,[33] prosecutors in the Watergate investigation made it their firm policy to do so. The prosecutors advised all suspects that the Government would be willing to bring any evidence favorable to those individuals before the grand jurors, if it was called to the prosecutors' attention by defense counsel. On a number of occasions, persons under investigation took advantage of this offer.

In the ordinary criminal case there are very few safeguards for the accused at the charging stage. The requirement that an indictment be based on probable cause is in truth an indefinite limitation: probable cause can be based on secondary evidence, hearsay evidence, circumstantial evidence, even on tainted evidence.[34] Probable cause is something more than suspicion, but something far less than convincing proof of guilt. Established ethical standards offer little guidance to the prosecutor respecting the charging decision. The *ABA Standards Relating to the Prosecution Function* caution that the "prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted."[35] But neither

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32. PROSECUTION STANDARDS, *supra* note 9, § 3.6(e) recommends this procedure in all cases. Watergate prosecutors demanded a *written* statement of intention for their files, rather than an oral representation, to record formally the fact that they had not simply been remiss in seeking the witness's testimony.

33. PROSECUTION STANDARDS, § 3.6(b) provides that "[T]he prosecution should disclose to the grand jury any evidence which he knows will tend to *negate* guilt." (emphasis added). This is a narrower category than "exculpatory" evidence, which may constitute anything materially helpful to the defense case.

In addition, the CODE OF PROFESSIONAL RESPONSIBILITY urges that "a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." CODE, EC 7-13. Pursuit of evidence tending to weaken the prosecution's case is a tactical as well as an ethical responsibility, because the prosecutor cannot competently judge the strength of his case at trial or decide upon an optimum trial strategy without knowing the weaknesses in his own evidence and the defenses he will likely face. Similarly, the competent prosecutor is usually eager to interrogate a prospective defense witness before the grand jury in order to commit his version of events to testimony under oath. Thus, at trial, the prosecutor will know what to expect from the witness; and if the witness changes his story, the prosecutor can impeach him with his prior conflicting grand jury testimony.

34. *See* United States v. Calandra, 414 U.S. 338 (1974) (illegally obtained evidence); Lawn v. United States, 355 U.S. 339 (1958) (same); Costello v. United States, 350 U.S. 359 (1956) (hearsay or incompetent evidence). PROSECUTION STANDARDS, *supra* note 9, § 3.6(a) states that the prosecutor, "should present to the grand jury only evidence which he believes would be admissible at trial." As a practical matter, this provision is universally ignored by prosecutors, particularly where the grand jury is being used as an investigative tool, as it nearly always is in political corruption cases.

35. PROSECUTION STANDARDS, *supra* note 9, § 3.4(b).

the *Code of Professional Responsibility* nor the *ABA Standards* indicate specifically how these standards and procedures should be defined. The *Code* simply echoes the legal requirement of probable cause.[36] The *ABA Prosecution Standards* go no further: they provide that the prosecutor should not bring charges he cannot "reasonably support with evidence at trial."[37] The commentary to this Standard observes that the prosecution ought to have a *prima facie* case — i.e., enough evidence to survive a defense motion for directed verdict of acquittal at the end of the prosecution's direct case. However, this formulation overlooks knowledge the prosecutor may have about potential defenses, such as an airtight alibi.

In the Watergate investigation the evidence against potential defendants was not weighed against the standard of probable cause but against a much higher standard: whether the prosecutors were convinced to a reasonable certainty that after hearing the Government's evidence and the probable defense case, a jury would conclude beyond a reasonable doubt that the defendant was guilty. This higher standard is probably close to that actually employed by many other responsible prosecutors, especially in public corruption cases. Regardless of the strength of the evidence, prosecutors rarely recommend indictment even in ordinary cases unless they are personally convinced that the prospective defendant is guilty[38] and that there is a good chance of conviction. The salient point is that neither legal nor ethical requirements impose a standard higher than probable cause.[39]

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36. The prosecutor should not institute charges "when he knows or it is obvious that the charges are not supported by probable cause." CODE, *supra* note 2, DR 7-103(A).

37. PROSECUTION STANDARDS, *supra* note 9, § 3.9(e).

38. *See* Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U.L. REV. 174, 178 (1965). The ABA PROSECUTION STANDARDS, *supra* note 9, § 3.9(b)(i) allows that the prosecutor "may" decide not to go forward if he has "reasonable doubt that the accused is in fact guilty." Whether a decision not to charge under such circumstances should be mandatory rather than permissive is the subject of some lively dispute. *Compare* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 85–88 (1975) *with* Uviller, *The Virtuous Prosecutor in Quest of An Ethical Standard: Guidance From the ABA*, 71 MICH. L. REV. 1145 (1973).

39. Prosecutors in the Watergate cover-up investigation were not faced with the related problem that occurs in some official corruption cases of whether it is proper to charge the target of an investigation with offenses ancillary to the investigation's original focus, evidence of which has been developed by prosecutors motivated by a desire to punish the defendant for more serious crimes that they cannot prove: for example, charging a public official accused of being "on the take" not with accepting bribes but with tax evasion or perjury. *See, e.g.*, FREEDMAN, *supra* note 38, at 80–84.

Use of conspiracy law is sometimes criticized as an example of this practice and is unquestionably subject to substantial abuse by prosecutors. In the Watergate cover-up prosecution, all but one of the seven defendants originally indicted in United States v. Mitchell, Crim. No. 74-110 (D.D.C. 1974) were charged with the sub-

If the Watergate prosecutors were inclined to recommend an indictment based on a reasonable certainty of obtaining a conviction, they invited the prospective defendant's lawyer to come (with his client, if he desired) into the office to present an oral argument against indictment. Permitting an accused to make a pre-indictment "presentation" to the prosecutors is not unheard of in white collar cases, but the Special Prosecutor's Office carried the policy to unusual lengths, making it into the equivalent of an informal adversary hearing on the indictment decision itself. Customarily, the prosecutors began by summarizing the evidence against the prospective defendant and describing the charges they contemplated bringing against him. Typically, this presentation provoked a heated give-and-take, in which the prosecutors usually ended up describing their theory of the case and the evidence in even more detail. In one particular instance the prospective defendant and his lawyer engaged in a several-hour-long debate with the prosecutors, in which both sides freely discussed their respective interpretations of the evidence. This was particularly unusual because the target of an investigation seldom meets personally with the prosecutors unless his attorney has carefully determined beforehand that the interview will be off-the-record. Another pre-indictment "presentation" took place in a series of informal meetings and debates with defense counsel that lasted several weeks. Defense counsel even turned up at one point with several large, multi-colored charts by which they dramatized their client's asserted innocence.

Certainly it is reasonable to suggest that every prosecutor ought to be under an affirmative ethical obligation to ensure that both he and the grand jury are exposed to both sides of a prospective criminal case, and whenever possible the defendant should also have some opportunity for input into the charging decision, even if the opportunity falls short of a full adversary hearing. However, present ethical standards do not even touch on this subject.

Finally, in the cover-up case the Watergate prosecutors took an extremely liberal position regarding pre-trial discovery, turning over to the defendants virtually everything in their files relating to the trial. The object was to insure that nothing relevant to the issue of guilt or innocence was kept from the defense for tactical advantage. Discovery rules now embodied in the *Federal Rules of Criminal Procedure*,[40]

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stantive offense of obstruction of justice as well as with conspiracy; actual evidence of meetings and conversations among the defendants unequivocally designed to further the illegal purposes of the cover-up conspiracy was ample; and the jury was carefully instructed that the culpability of each defendant could be premised only on his own action and statements, not those of others.

40. FED. R. CRIM. P. 16 and 17.

though recently liberalized, require far less, but in fact progressive judges have begun to apply the discovery rules more liberally for the general purpose of preventing unfairness or surprise to the defense.[41] In this respect, the courts have moved much faster than the bar to insure prosecutorial fairness.

One innovation that a few state courts have recently adopted in selected cases is to permit witnesses to be accompanied by an attorney before the grand jury.[42] The Watergate Special Prosecutor's Office did not adopt this policy. In white collar grand jury investigations, the prohibition against having counsel present during interrogation works little hardship on the intelligent witness who has employed a first-class counsel to prepare him exhaustively for his grand jury appearance. Only the less sophisticated and less well-prepared witness, without aggressive counsel, will likely be easily intimidated in the grand jury room. As an interesting example of how aggressive defense counsel and ample resources outside the jury room can be utilized by a suspect in a white collar case, one corporate executive called before the Watergate grand jury investigating illegal campaign contributions showed up with several lawyers, a battery of stenographers and a wrist watch with an alarm on it. Every fifteen minutes during his grand jury appearance the executive's wrist alarm would go off, the witness would ask to be excused, and he would rush out of the jury room and dictate to the stenographer everything he could remember about the questions asked and his answers. He and his lawyer would then consult on strategy for the *next* fifteen minute ordeal. This strange ritual was necessary because the *Federal Rules of Criminal Procedure* do not permit a grand jury witness to obtain a copy of the transcript of his *own* testimony![43] The point of this anecdote is that the failure of the prosecutors to do the reasonable, basically fair thing, simply because the rules do not require it, seldom harms those with top-flight defense lawyers and money

41. *See, e.g.*, United States v. Bryant, 439 F.2d 642, 649 (D.C. Cir. 1971); United States v. Percevault, 61 F.R.D. 338 (E.D.N.Y.), *rev'd*, 490 F.2d 126 (2d Cir. 1974); United States v. Moceri, 359 F. Supp. 431 (N.D. Ohio 1973); United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971); United States v. Federman, 41 F.R.D. 339, 341 (S.D.N.Y. 1967); United States v. Tanner, 279 F. Supp. 457, 470 (N.D. Ill. 1967); United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967); United States v. Baker, 262 F. Supp. 657, 671–72 (D.D.C. 1966), *remanded on other grounds*, 401 F.2d 958 (D.C. Cir. 1968). *See generally* FED. R. CRIM. P. 16, ADVISORY COMMITTEE NOTE; A.B.A. STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, §§ 2.1–2.6 (Approved Draft 1970).

42. Three states provide for such procedure by statute in limited classes of cases. MICH. COMP. LAWS ANN. § 767.3 (1968); UTAH CODE ANN. § 77-19-3 (Supp. 1975); REV. CODE WASH. ANN. § 10.27.120 (Supp. 1972).

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

to spend on their defense. Those whose rights are more likely to be adversely affected are witnesses who have not obtained counsel, or who have less aggressive lawyers, or who do not have great financial resources and time to invest in their own defense.

B.

The Prosecutor and the Media

The likelihood that targets of a public corruption investigation will argue their innocence in the media by criticizing the prosecutors raises the question of whether there are any circumstances when a prosecutor should also be allowed to make public comments about his investigation. The Watergate Special Prosecution Force limited its public statements to an occasional confirmation on the record, in response to media inquiries, that a particular matter or area was "under investigation." Even this statement often resulted in a considerable increase in media attention, and was treated, sometimes inaccurately, as having momentous significance.

Similarly, press conferences were never held by the Watergate Special Prosecutor upon return of an indictment. Instead, the office published a "press kit" containing copies of the indictment with a cover sheet listing the name, address and age of those charged, and summarizing the charge contained in each count of the indictment, with a photocopy of the relevant statutes attached. In the case of a disposition by guilty plea, the press kit usually included a copy of the letter from the Special Prosecutor to the defense counsel recording the plea bargain arrangement. This letter was invariably made part of the public record upon entry of the plea. Some prosecutors see nothing wrong with the practice of holding press conferences to comment on a pending investigation or an indictment that has recently been returned, as long as the prosecutor is discreet, sticking to matters on public record and an explanation of the law involved. Special Prosecutor Maurice Nadjari in New York City holds press conferences to announce indictments, and at other times as well.[44] Others have condemned the technique, saying that "only two purposes, both of them improper, are served[:] . . . the defendant is severely defamed, and the likelihood of an unprejudiced jury is reduced."[45]

A more difficult problem is posed by the issue of press relations generally. As usual, *ABA Prosecution Standards* provide little specific

44. Statement of May 8, 1974 by Maurice Nadjari to the Association of the Bar of the City of New York, quoted in FREEDMAN, *supra* note 38, at 94.

45. FREEDMAN, *supra* note 38, at 94.

guidance, stating only that a prosecutor should not "exploit his office by means of personal publicity."[46] The *ABA Standards Relating to Fair Trial and Free Press* are also couched in general terms, prohibiting dissemination of information "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."[47] More specifically with regard to the investigatory stage, the *Fair Trial/Free Press Standards* prohibit any comment that goes beyond the public record or that is "not necessary to inform the public that the investigation is underway, *to describe the general scope of the investigation,* . . . to warn the public of any dangers or otherwise to aid in the investigation."[48] These guidelines, intended to prevent prosecutors from revealing "details" of the investigation,[49] are of little practical assistance in the typical public corruption case where the nature and scope of the investigation are complex and media scrutiny is intense. Suppose that in the course of a well-publicized investigation of low-level public officials *A* and *B*, prosecutors receive incriminating allegations against high public official *C*, which they are attempting unsuccessfully to corroborate. The ABA guidelines apparently place no restriction on their effectively communicating this to the public by announcing enlargement of the "general scope" of the investigation to include new charges against a new suspect. The responsible prosecutor would, however, undoubtedly reject such a course as improper except in extraordinary circumstances. Furthermore, when the public's attention is focused on an investigation it is often difficult to know whether supplying background information or seemingly nonsubstantive details, such as the number of days a week that the grand jury will meet, or how many prosecutors currently are working on an aspect of a large investigation, can amount to improper conduct.

Early in the investigation, the Watergate Special Prosecutor hired a "public affairs officer" to handle the office's relations with the media. Many of the experienced prosecutors of the staff were initially dubious about the need for such a person, being accustomed to the rule that a prosecutor's *only* comment on his case should be what he had to say in formal court appearances. Some were apprehensive that establishment of a permanent liaison with the press would legitimize unnecessary press-prosecutor communication and inevitably lead to leaks. There was

46. PROSECUTION STANDARDS, *supra* note 9, § 1.3(a).

47. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, § 1.1 (Approved Draft, 1968); *see* CODE, *supra* note 8, DR 7-107.

48. *Id.* (emphasis added). CODE, *supra* note 8, DR 7-107(A)-(D), parallels these rules almost verbatim.

49. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, Commentary to § 1.1, at 85 (Approved Draft, 1968).

also a fear that even if the prosecution was not the source of information about the investigation that appeared in the press, it would be blamed for it. Without exception, however, the staff quickly came to appreciate the importance of the public affairs officer's role. For one thing, he kept the dozens of reporters covering the Special Prosecutor's Office off everyone else's back. Reporters grudgingly accepted the office policy that press queries should be routed solely through the press office; no one else on the staff would talk to reporters about the subject of their cases.

Supplying background information on the office, its personnel and procedures, and the general range of matters under investigation was an important part of the press officer's business. Even though the prosecutorial staff felt uneasy about it, the Special Prosecution Force depended heavily on public good will. The Special Prosecutor decided that it was important to court the press, so it was the press officer's job to keep the "hungry piranhas" happy without giving them much to eat — not an easy task. It was his lot to be blamed by his former associates in the media for giving them less information about the prosecution than they had expected. This problem is not a new one. When Thomas E. Dewey was appointed special prosecutor to root out Tammany Hall corruption in New York City his first act was to hold a news conference in which he requested the press to forget for six to nine months that he existed.[50]

One of the most difficult problems the public affairs officer faced was persistent efforts by reporters to nag him for confirmation of investigative leads they were pursuing on their own. Sometimes he could confirm that the prosecutors were indeed "investigating" a particular allegation, but he seldom commented further, particularly with respect to the substance of specific allegations. The only exception to this rule was an occasional willingness to give off-the-record "negative guidance" respecting stories that were about to run, when the allegations appeared to be rebutted by evidence the prosecutors had accumulated. The purpose of this negative guidance was to deter publication of highly prejudicial charges when facts known to the prosecutors seemed to refute them. Technically, it might seem difficult to square this practice with the *ABA Standards,* yet it appeared to be very much in the public interest, and in the interest of those who were the subjects of the stories to prevent the dissemination of this false and damaging information. As a practical matter, though, negative guidance had to be used spar-

50. For a discussion of Dewey's activities as state special prosecutor appointed to root out Tammany corruption and organized vice in New York City, *see generally* R. HUGHES, ATTORNEY FOR THE PEOPLE (1940).

ingly, lest a pattern be established whereby reporters could treat a refusal to give negative guidance as a roundabout confirmation of the truth of the charges in question.

C.

Plea Bargaining

Plea bargaining is another area that illustrates the prosecutor's sweeping discretionary power: It is a power to define the crime to which the defendant will plead and thus to determine the range of punishment to which he will be subjected. Where prosecutors make sentencing recommendations, they have virtual power to decide precisely what punishment will be meted out. Plea bargaining is also an area where, especially in public corruption cases, the practical and ethical considerations sometimes run together.

The pressures that compel plea bargaining in a typical metropolitan court system — crowded dockets, large backlogs, overworked public defenders, and the prosecutorial practice of overcharging that becomes both a cause and an effect of the plea bargaining system — were not present in Watergate. In the public corruption case, though, there are entirely different factors that place just as much pressure on the prosecutor to obtain guilty pleas. The most obvious of these is the need for insider-witnesses. The prosecutor's willingness to reduce a potential defendant's liability in exchange for a plea and cooperation in the investigation may be the only way of developing provable cases against many of those involved in criminal activity. Obtaining guilty pleas also speeds up both the process of investigation and the public *exposure* of wrongdoing — not an inconsequential goal when the public is demanding swift action to purge the government of corruption.

Perhaps the most important reason for plea-bargaining is to avoid the delay and risk involved in going to trial against those the prosecutors have determined to be deeply involved criminally, but whom they also need as trial witnesses against others. In the urban criminal justice system, plea-bargaining is a matter of economy and resource-management: if everyone charged demanded his right to a jury trial, the system would break down. In the public corruption case plea-bargaining is a matter of tactics: the cases of some potential witnesses *must* be disposed of first — by conviction, by plea or by some form of immunity — before the prosecutors can obtain their testimony in the trials of their confederates. If potential witnesses have to be brought to trial first, it means a long delay in prosecuting other defendants. If something goes wrong in these first trials — an acquittal, a hung jury,

or a mistrial — then the ultimate targets of the investigation may escape conviction altogether.

In the Watergate case, John Dean presented this sort of problem. Early on, the Watergate prosecutors decided that because of Dean's extensive involvement in the Watergate cover-up he must either plead guilty to a felony or be prosecuted. There was no way that they could responsibly give him a free ride, despite their desire to secure his cooperation and testimony against those who might be even more culpable. Yet without Dean as a Government witness, the cases against H. R. Haldeman and John Ehrlichman were very thin indeed, at least without the damaging tapes that at the time still reposed in the White House. Indicting Dean as a defendant jointly with Haldeman, Ehrlichman and John Mitchell might result in acquittal of all four. The first alternative was to indict and try Dean and then use him after conviction as a witness against the others. That could mean a delay of well over a year in prosecuting the "big three" and because Dean had received statutory testimonial immunity from the Ervin Committee, the prosecution might be prevented from using its best evidence against him at trial. If problems with tainted evidence resulted in a failure to convict Dean, it might then become impossible ever to convict the others. If acquitted, Dean would then have no incentive to cooperate with the prosecution; even if he were forced to testify, a jury might well be unwilling to convict his superiors when Dean himself had been acquitted for the same conduct. The only other alternative seemed to be to indict Dean and his superiors simultaneously but separately. Dean's trial would then be delayed, he would be given testimonial immunity, his testimony against the others would be compelled, and he would be brought to trial later. This approach also had serious disadvantages in that Dean would be an easy target on cross-examination if he were telling his story under immunity, and the immunity might well make any later conviction of Dean impossible. Fortunately for the prosecutors, the dilemma was solved by Dean's agreement to plead guilty to a broad charge of conspiracy to obstruct justice.

Again, established ethical guidelines give the prosecutor little or no assistance in regard to the *substance* of plea bargaining. The *ABA Standards Relating to the Prosecution Function*[51] and *to Pleas of Guilty*[52] deal only with the procedures of plea bargaining. The Prosecution Standard relating to "discretion in the charging decision," lists

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51. PROSECUTION STANDARDS, *supra* note 9, § 3.1–4.3.

52. ABA STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft, 1968).

only three generalized factors that could be relevant to plea bargaining.[53] Experience with the Watergate Special Prosecutor's Office indicates that the most important criteria by which the propriety of a plea bargain ought to be judged in a public corruption case are whether the information to which the accused pleads guilty fairly and adequately describes the central aspects of his criminal involvement, and whether the maximum penalty to which he is thereby subjected is not substantially disporportionate to that he would have been likely to receive had he been brought to trial and convicted.

Regarding these two criteria, the public's interest in there being only equitable plea bargains and the prosecutor's tactical interest in securing additional convictions against others involved in wrongdoing appear to coincide. The insider who pleads guilty to only a small portion of the crime in which he has actually participated or who receives an extremely light sentence despite substantial criminal conduct is a much less effective trial witness for the Government. The inequity of the bargain can be forcefully used by the defense counsel, who will suggest to the jury that the witness has "cut a deal" to save his own skin only by implicating the others. If the insider-witness has pleaded guilty to a charge that is seemingly irrelevant to the criminal conduct to which he confesses on the stand while implicating others, the jury may conclude (a) that he has changed his story; (b) that neither the witness nor the prosecutors believed at the time the witness pleaded guilty that the criminal conduct he is describing on the stand was really so bad; or (c) that the witness was not candid with the Government when the bargain was struck and thus may also be lying now.

Therefore, the prosecutor has a significant interest in maximizing the effectiveness of insider witnesses by insisting that they plead guilty to charges that adequately reflect the scope of their wrongdoing and that they be subject to criminal liability commensurate with it. The same considerations apply with even greater force to demands for immunity by a potentially liable insider. Prosecutorial reluctance to confer immunity, even when the insider's testimony is crucial to the case, may be based not only on equitable considerations but on a belief that the individual's effectiveness as a trial witness will be destroyed if he goes free in exchange for giving the prosecutors what they want.

Beyond the two criteria set forth above, a number of additional considerations that might seem unjust to many people enter into plea bargaining in the public corruption case. The most important is the

53. The three factors are: the extent of the harm caused by the offense; the disproportion of the authorized punishment in relation to the offense or offender; and cooperation of the accused. PROSECUTION STANDARDS, *supra* note 9, § 3.9(b).

value of the individual's testimony to the prosecutors. Unfortunately, the more useful testimony a potential witness has to offer the prosecutors, the better deal he is going to get. If the prosecutors do not need his testimony to convict others, then he is out of luck. Whether an individual appears to be forthcoming, whether his personal demeanor is such as to make him an attractive potential trial witness, or "jury pleaser," and whether his counsel is able and aggressive all enter into the calculus. For many, it may be difficult to accept with equanimity the important role played in the process by bargaining power and the fact that those whose testimony the prosecutors desperately need are going to get a relatively good bargain, regardless of all else. But this is the reality that all prosecutors have to take into account in striving to assure convictions of the largest possible number of people responsible for the crimes under investigation.

Two unusual factors complicated the plea bargaining picture in Watergate. First, there were very few "little men": most of those culpably involved in the cover-up would have been "big fish" in any other prosecutor's office in the country. Traditionally, the technique for building an organized crime case has been to work from the bottom up. The prosecutors first obtain hard evidence against the foot-soldiers, give them immunity in exchange for their cooperation or let them plead to minor charges, and use their testimony against the middle-level personnel. The object then is to try to "flip" those who dealt with the real bosses — that is, to secure guilty pleas from them and use them as trial witnesses against the top men. This technique was less useful in Watergate, where almost all of those involved had held important positions and had violated the public trust.

The second factor was an issue of relative versus absolute fairness. In the cover-up investigation, the prosecutors were prepared to accept one-count guilty pleas to a five-year felony charge from even the major defendants, conditioned upon their candid cooperation with the investigation. This policy was not heartily endorsed by everyone on the staff, but there were a number of legitimate reasons for it, such as (a) the importance of obtaining admissions of guilt from the major actors; (b) the importance of getting all the facts before the public, which could not be accomplished in a trial if the major defendants continued to deny their guilt and "stonewall" it; and (c) the belief that even if the major defendants were convicted at trial, they would probably receive not much more than five-year maximum sentences. Haldeman, Ehrlichman, and Mitchell were, in fact, each sentenced to two and one-half to eight years after trial, despite possible sentences from twenty to twenty-five years each. On the other hand, in the case of some

prospective defendants who were considerably less culpable than those three, but who had unquestionably committed serious criminal acts, the prosecutors were unwilling to accept a plea to anything less than a felony. The consequences of doing so would have meant a plea to a misdemeanor, with a maximum sentence of one year and the likelihood that the defendant might spend no more than a month or two in jail, or even get a suspended sentence.

The best example of this difficulty was the case of Herbert Porter, the 32-year old scheduling assistant to Jeb Magruder at the Committee to Re-Elect the President. Magruder had persuaded Porter that he could show his colors as a team player by corroborating some details of a false cover story that Magruder had dreamed up to explain why $200,000 in cash had been given to Gordon Liddy. In the process, Porter lied to FBI agents and committed perjury both before the Watergate grand jury and at the original Watergate trial, thereby assisting the cover-up. However, Porter apparently did not *know* about the cover-up in that he was not aware that the money had been given to Liddy for illegal activity; he believed that he was just acting to save the Re-Election Committee from some other political embarrassment. Porter demonstrated considerably more remorse and contrition than most of those who pleaded guilty to Watergate crimes. In fact, without any request for immunity or special consideration he went before the Ervin Committee and confessed his perjury on national television.

The prosecutors really had little desire to prosecute Porter, but they could not in good conscience simply overlook what he had done. It was impossible to separate the crimes involved in Watergate from the rest of criminal justice, and Porter's crimes went to the heart of the criminal justice system. The issue was whether a young man, who had received the benefits of a fine education and family life as well as career opportunities few Americans ever dream of, should be passed over because his crimes were *relatively* less serious than those committed by his former superiors. The prosecutors could not ignore the fact that young men and women with none of those advantages were often sentenced to long terms of imprisonment for crimes arguably less serious than Porter's.

Porter had to be prosecuted. The question was, on what charges? The most appropriate thing to do was to accept from Porter a guilty plea to one count of perjury, a five year felony. But at that time there was a similar one-count plea offer on the table for John Dean's acceptance, and it did not seem fair to subject Porter to the very same liability as John Dean when his criminal involvement was so much less than Dean's. Relatively, it seemed unjust, yet in absolute terms it did

not. Nothing short of one felony count could be offered to Porter because no misdemeanor charge seemed appropriate to what he had done. The chances are that Porter would never have been prosecuted at all had he had information the prosecutors badly needed, but he was not so lucky. He had already admitted his guilt; his testimony implicated no one but Magruder, who had already pleaded guilty. Porter had nothing to bargain with and nothing to commend himself for special treatment except his relative youth, relatively negligible involvement, and contrite posture.

Porter's case demonstrates that the range of crimes to which a prospective defendant can plead is not a perfect spectrum. Porter did not object to pleading to a felony, but the idea that he might serve more time in jail than John Dean or John Mitchell caused him a good bit of consternation. Where plea bargaining involves an agreement by the prosecutor to recommend suitable punishment to the sentencing judge, the prosecutor may have more flexibility to fashion a deal that fairly reflects the defendant's degree of culpability. The practice also supplies additional assurance to the defendant. On the other hand, it gives the prosecutor a tremendous amount of discretionary power over sentencing, because judges usually give great weight to such recommendations. The Watergate Prosecutor's Office adopted a firm policy of refusing to make sentencing recommendations under any circumstances, in the belief that prosecutorial sentencing recommendations give the appearance of improper prosecutorial intrusion into what is preeminently a judicial function. In Porter's case, had the prosecutors been able to recommend a sentence, they certainly would have pointed out to the sentencing judge his relatively minor role. As it turned out, Porter did plead guilty to a five year felony, but he spent only about a month in jail.[54]

Public criticism of plea bargaining in public corruption cases has focused on the charge that serious political crimes by high public officials are treated too leniently in comparison to violent street crimes. This is really a criticism of the entire attitude of the judicial system toward white collar crime. Watergate sentences may seem light by comparison to those being served by thousands of prisoners throughout the country for burglary, petty larceny and assault, but they were relatively severe in comparison to other white collar cases where the defendant is prominent in the community, has had an unblemished record, and has taken a repentant attitude toward his illegal acts.

54. The ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.1(c) (Approved Draft, 1968) provides that "[S]imilarly situated defendants should be afforded equal plea agreement opportunities." The Porter example indicates how meaningless the Standard is in practice. Are two prospective defendants "similarly situated": if the testimony of one but not the other is badly needed by the prosecution to convict others?

The case of Richard Kleindienst illustrates the judicial system's lenience toward white collar crime. The former Attorney General received a suspended 30-day sentence and a suspended $100 fine for lying under oath during his own confirmation hearings. There he had falsely denied that the White House had pressured him concerning the filing of an appeal in an antitrust case against the ITT Corporation.[55] Had Kleindienst been prosecuted on several counts of perjury he might have been subjected to a five to ten year maximum prison sentence. Undoubtedly the Kleindienst-ITT affair and its disposition reflect some of the sorriest aspects of the criminal justice system. One could fairly say that in that case the system failed in every respect, down to the rejection of a recommendation by the District of Columbia bar that Kleindienst's license to practice law be suspended for one year. The court suspended it for one month.[56]

But was it wrong for Special Prosecutor Leon Jaworski to seek to resolve the Kleindienst matter by a negotiated plea? Surely there would have been less of a public outcry, whatever sentence was imposed, had Kleindienst pleaded guilty to one count of obstructing a congressional investigation, which is a five-year felony charge, or had the sentencing judge not praised Kleindienst to the hills, calling him a man "of the highest integrity . . . universally respected and admired," a man whose only problem was that he had a heart "too loyal and considerate of the feelings of others."[57] The Kleindienst case is not an argument against plea bargaining. Rather, it illustrates how easily plea bargaining can be abused. The real problem was that the charge to which Kleindienst

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55. United States v. Kleindienst, Crim. No. 74-256 (D.D.C. 1974).

56. *In re* Richard G. Kleindienst, No. S-37-35 (D.C. App. 1975). The final disposition of disciplinary proceedings against the first federal cabinet member to be convicted of a criminal offense since Teapot Dome indicates that many lawyers and judges really do not take the Code of Professional Responsibility seriously when a prominent member of the legal establishment — one of their own — is involved. The Code states that "[b]ecause of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession." CODE, *supra* note 8, EC 1-5. The version adopted in the District of Columbia states further that:

> A lawyer shall not:
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
>
> (5) Engage in any other conduct that is prejudicial to the administration of justice.

CODE, *supra* note 8, DR 1-102(A).

57. Transcript of Sentencing proceeding at 2, United States v. Kleindienst, Crim. No. 74-256 (D.D.C. 1974).

was permitted to enter a plea — contempt of Congress by refusal to answer questions before a congressional committee — did *not* adequately describe the conduct in which he had engaged. The contempt statute enforces the compulsory process of Congress by punishing those who refuse to respond to a valid subpoena. Here Kleindienst had not refused to testify; he had eagerly appeared and answered all questions put to him. Kleindienst had simply failed to tell the truth! Similarly, the maximum penalty to which Kleindienst was subject by his plea did not bear a reasonable relation to the liability to which he would realistically have been exposed had he been prosecuted for perjury or obstruction. In short, neither of the two criteria mentioned above for determining the propriety of a negotiated plea were met.

D.

Preparation of a Government Witness for Trial

Every prosecutor knows that thorough rehearsal of a witness's prospective testimony is essential if the witness is to make his best impression on the jury. The witness has to know what questions are going to be asked, and the prosecutor has to know what to expect from the witness in response. What prosecutors do not often care to admit is that the line between familiarizing oneself with the witness's honest testimony and coaching the witness, or at least participating in shaping the witness's testimony is a very fine one. Witness preparation is also extremely difficult to regulate. Customarily it is a one-on-one process between the witness and the prosecutor; no written records are kept, personality factors enter into the equation, and distinctions between what the witness can genuinely recall and what he believes probably happened can soon blur.

In addition, as one commentator on ethical problems has pointed out, the legal concept of memory as a process analogous to objective retention of impressions by a tape recorder or video camera is based on antiquated psychological thinking[58] — and every good trial lawyer knows it. All "recollection" is a form of creative reconstruction, reconstruction that is influenced by the witness's perceptions, his values, his experience, and his self-interest. Extensive involvement by the prosecutor in preparing testimony is unavoidable, not only because the lay witness cannot be expected to relate precisely what is relevant without a substantial amount of direction, but also because it is the prosecutor who must decide how best to present his case at trial. At the same time, the intrusion of the interrogator into the witness's process of

58. FREEDMAN, *supra* note 38, at 59–76.

creative reconstruction is one that is bound to have a significant impact on the substance of the witness's testimony. Again, the objectivity and integrity of the individual prosecutor is perhaps the only protection available to guarantee that this function is one that is undertaken responsibly and ethically.

IV.

It is not the purpose of this article to paint an unduly pessimistic picture of the ethical conduct of prosecuting. If under the present system we must depend in large measure on the integrity, competence and fairness of individual prosecutors to assure that the power of the Government is exercised ethically, we can be assured that, in the federal courts at least, most prosecutors live up to a high standard. The absence of any well-developed body of rules to control prosecutorial power and discretion is as distressing to the prosecutor as it should be to the public. To find oneself constantly returning to first principles or, worse, to competing subjective notions of basic fairness in order to solve specific problems that arise in a criminal investigation — to be constantly groping about in a region of ethical twilight — is not a very reassuring experience.

Perhaps it is a good experience to have had in the context of Watergate. The public's attention has been preoccupied lately with the usurpation of official power. Lawyers can feel proud of the role played by the criminal justice system in righting wrongs of this type. But we should not forget that dangers just as great, if not greater, are constantly posed by misuse of the very system that has permitted us to bring justice to bear. Brandeis once said:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.[59]

This is a lesson that every thoughtful, responsible prosecutor who has grappled with the ethical problems inherent in the power and discretion made available to him soon comes to appreciate, and it is one that lawyers and the public should take especially to heart.

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59. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).