

NOTES

LENIENCY IN EXCHANGE FOR TESTIMONY: BRIBERY OR EFFECTIVE PROSECUTION?

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INTRODUCTION

"If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."¹ With those words, a panel of the Tenth Circuit Court of Appeals struck down the prosecutorial practice of offering leniency to witness-accomplices in exchange for testimony against other crime participants by labeling it bribery. The decision set off a panic through the Department of Justice, and federal prosecutors throughout the country feared the consequences that might follow the abrogation of this age-old form of plea bargaining.² The Tenth Circuit panel's decision brought to the forefront intense issues in need of examination. The full circuit reheard the case on its own motion, and, on January 8, 1999, the court reinstated the trial court ruling, thereby upholding Singleton's conviction.³ Courts across the country have followed the rationale of the full circuit's rehearing, thus foreclosing this challenge to the bribery statute.⁴ However, defense lawyers have now filed similar challenges in state courts where the state bribery laws are similar to the federal statute.⁵ Because the United States

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1. *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

2. *See generally* William Glaberson, *Leniency Ruling Jolts U.S. Legal Procedures*, JOURNAL RECORD (Okla. City), Nov. 4, 1998 (stating that the original panel's ruling "caused chaos in the district courts and U.S. attorney's offices in [the 10th] circuit and significant disruption throughout the rest of the country"); Warren Richey, *Rethinking Testimony for Sale—Federal Court Ruling Could Undermine the Longstanding U.S. Practice of Plea-bargaining*, CHRISTIAN SCI. MONITOR, July 22, 1998, at 1 (stating that cooperating witnesses have played indispensable roles "in virtually every major federal case prosecuted in recent history, including the convictions of Manuel Antonio Noriega and John Gotti").

3. *See Singleton*, 165 F.3d at 1302.

4. *See, e.g., United States v. Bidloff*, 82 F. Supp.2d 86, 93 (W.D.N.Y. 2000).

5. *See generally* Glaberson, *supra* note 2.

Supreme Court denied Singleton's petition for certiorari,⁶ the Court has yet to decide whether government prosecutors must conduct themselves procedurally in the same manner as defendants or whether other statutes imply an acceptance of exchanging leniency for testimony.

This Note examines the federal bribery statute and how it affects federal prosecutors who make plea deals with co-defendants in exchange for their testimony. Part I offers background and history on the exchange of leniency for testimony. Part II analyzes the bribery statute through the lens of the plain meaning doctrine of statutory interpretation, focusing upon the question whether federal prosecutors should be subject to the statute. Part III examines whether the exclusion of purchased testimony is the proper remedy for violations of the bribery statute. Finally, Part IV asks whether the exclusion of purchased testimony comports with notions of justice.

I. BACKGROUND OF PLEA AGREEMENTS IN EXCHANGE FOR TESTIMONY

On July 1, 1998, the United States Court of Appeals for the Tenth Circuit stunned federal prosecutors by excluding testimony of a co-conspirator given in exchange for a plea bargain.⁷ The full Circuit vacated the judgment on the Court's own motion,⁸ and on rehearing, the full Circuit affirmed the district court, thereby upholding Singleton's conviction.⁹ Nevertheless, the decision sent federal prosecutors and defense attorneys scrambling.¹⁰

In the panel decision, Sonya Singleton was convicted in a drug conspiracy case in Wichita, Kansas. The conviction was based largely on testimony given by a co-defendant who testified against Singleton in exchange for a lighter sentence.¹¹ Singleton's lawyer, John V. Wachtel, argued before the Tenth Circuit Court of Appeals that the exchange of testimony for a lighter sentence was bribery under 18 U.S.C. § 201(c)(2), and the court unanimously agreed.¹² Judge Kelly, writing for the court, said that "if justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."¹³ Based on this perversion of justice, the court excluded

6. See *Singleton v. United States*, 524 U.S. 1024 (1999).

7. See *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); *see also supra* note 2.

8. See 144 F.3d at 1343.

9. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024 (1999).

10. See Warren Richey of the *Christian Science Monitor* wrote that "the Department of Justice is asking lawyers across the U.S. to keep track of every related motion filed by defense lawyers adopting the 10th Circuit reasoning." Richey, *supra* note 2, at 10. Furthermore, if the ruling is reinstated, "it could free 90 percent of the convicted felons in jail." *Id.*

11. See Tom Jackman, *Ruling Threatens Federal Plea Deals: Bargains Are Bribery, Appeals Court Decides in Case That Began in Wichita*, KANSAS CITY STAR, July 9, 1998, at A1.

12. See *id.*

13. *Singleton*, 144 F.3d at 1346.

the testimony and ordered a new trial.¹⁴ On rehearing (*Singleton II*), the full Circuit reinstated the district court's admission of the testimony, holding that the federal government was not intended to fall within the meaning of the word "whoever" in the bribery statute.¹⁵

The statutory challenge follows previous unsuccessful arguments to exclude testimony given in exchange for a plea deal based on the Constitution's due process clauses.¹⁶ Courts have allayed the due process concerns in plea bargains by requiring (1) defense notice of the deal, (2) adequate opportunity for cross-examination, and (3) proper instructions to the jury.¹⁷ While some commentators understand the refusal of the courts to exclude purchased testimony as a sign that the same result will occur in the statutory challenge,¹⁸ an argument can be made that minimum due process requirements have little to do with the need to control the integrity of the judicial process. This is done by changing the court's focus from the rights of the defendant to the duties of the judge and prosecutor. It would be more difficult for courts to acquiesce in the wrongdoing of the prosecutor if they were to recognize that testimony given in exchange for leniency is actually purchased testimony, and the risk of perjury is great enough to warrant the exclusion of the testimony.

A. History of Plea Agreements in Exchange for Testimony

The English common law allowed accomplice testimony, but it had varying consequences.¹⁹ Accomplices in felony trials were deemed competent to testify and were pardoned if a conviction was obtained against the defendant.²⁰ However, if the defendant was acquitted, the witness was usually executed.²¹ This practice, known as approvement, was discontinued in the 1500s because a majority of the bench came to believe that the testimony of an accomplice under such circumstances was so conducive to perjury as to outweigh its value.²²

The approvement doctrine evolved into the practice of "turning king's evidence," which allowed an accomplice to be pardoned in exchange for truthful

14. *See id.* at 1361.

15. *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *and cert. denied*, 527 U.S. 1024 (1999). Section 201(c)(2) of Title 18 provides that "whoever . . . (2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath . . . shall be fined under this title or imprisoned." 18 U.S.C. § 201(c)(2) (1994).

16. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

17. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985).

18. *See United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

19. *See* Neil B. Eisenstadt, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 761 (1987).

20. *See id.*

21. *See id.*

22. *See id.* (citation omitted).

testimony, regardless of the outcome of the trial.²³ Eliminating the execution of a witness upon acquittal of the defendant lessened the motivation to commit perjury. Turning king's evidence withstood scrutiny in the treason trials of the Seventeenth Century, with courts holding that the accomplice was a competent witness with diminished credibility.²⁴ American decisions have followed the rule of these treason trials with little examination of the cases, adapting the doctrine to cover pardons, leniency, and immunity.²⁵

Modern law has seen the incorporation of the king's evidence doctrine into the major treatises on criminal law and evidence.²⁶ Furthermore, the doctrine has been significantly furthered by the codification of the Organized Crime Control Act of 1970.²⁷ Better known as the Witness Protection Program, the Act grants the accomplice-witness liberty, money, and property for his "truthful" testimony. This program has grown from the legislature's intended expectations of relocating thirty to fifty witnesses a year to actually relocating 240 to 300 each year with an annual budget of at least \$61.8 million.²⁸ One of the most notable participants in the program is Salvatore "Sammy the Bull" Gravano, who may have been given liberty, money, and even plastic surgery for his testimony against John Gotti.²⁹ The ironic twist lies in the fact that Gravano actually committed at least nineteen acts of murder on Gotti's order.³⁰ Nevertheless, Gotti is behind bars and Gravano purportedly has a new name and face.³¹ Pushing the king's evidence doctrine to this extreme has led to challenges on several fronts, including due process claims.

B. Due Process Challenges

Although the Supreme Court has never explicitly ruled on whether accomplice testimony received in exchange for leniency violates the due process clause, constitutional challenges are now undertaken less frequently.³² *United*

23. *Id.*; see also *Rudd's Case*, 1 Leach 115, 168 Eng. Rep. 160 (K.B. 1775) (holding that an accomplice can be pardoned for truthful testimony).

24. See *Eisenstadt*, *supra* note 19.

25. See *id.* at 762.

26. See *id.*

27. Pub. L. 91-452, §§ 501-04, 84 Stat. 922, 933-34 (1970).

28. See Risdon N. Slate, *The Federal Witness Protection Program: Its Evolution and Continuing Growing Pains*, 16 CRIM. JUST. ETHICS 20 (1997).

29. The United States Marshals Service would neither confirm nor deny that Gravano was a participant, but in television interviews on ABC's "Prime Time Live" and "Turning Point," Gravano, himself, has admitted he was in the program for a time. See *id.* at 20 n.11.

30. See Slate, *supra* note 28.

31. Although Gravano did receive a sentence for his crimes, it was "remarkably light" and the use of Gravano's testimony at all "placed a premium on fabrication and criminality." Harvey A. Silverglate, *Use of Informers Hurts Accuseds' Rights*, NAT'L L.J., Jan. 30, 1995, at A21.

32. See *id.*

States v. Waterman,³³ illustrates the controversy that existed before due process challenges to leniency deals were abandoned. Indeed, *Waterman* played a major role in causing the death of due process challenges.

Waterman involved a contingency agreement whereby the witness was to be granted a two-year reduction in his sentence if his testimony led to further indictments.³⁴ The Eighth Circuit panel found that "placing 'a premium on testimony adverse to a defendant' created 'a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause.'"³⁵ On rehearing, however, the full Circuit was evenly divided; therefore, the District Court's rejection of the Fifth Amendment challenge was reinstated.³⁶ Interestingly, the half of the court that voted to reinstate the district court's ruling gave no explanation, leaving one to suspect whether they were confident in their own ruling.³⁷

The First Circuit came to the same conclusion one year later in *United States v. Dailey*.³⁸ Similarly, the Supreme Court in *Hoffa v. United States*,³⁹ ruled that the government's use of paid informants did not violate the due process clause of the Fifth Amendment.⁴⁰ Although the Court recognized that a motive to lie existed, it placed great confidence in cross-examination and a properly instructed jury to weigh the witness's credibility.⁴¹

A due process violation is exemplified in the Supreme Court's ruling in *Giglio v. United States*.⁴² The Court ordered a new trial because the chief witness for the prosecution had entered into a plea agreement for his testimony against the defendant but the defendant was not notified of the agreement.⁴³ The Court again stressed the importance of aggressive cross-examination and proper jury instruction to weigh the credibility of a witness.⁴⁴

The legacy of due process cases shows a tremendous faith in the powers of cross-examination and proper jury instruction. As long as the defendant is given notice of the plea agreement, due process will not be offended. Thus, the routine use of paid informants and accomplice-witnesses by federal prosecutors seems

33. 732 F.2d 1527 (8th Cir. 1984).

34. See Silverglate, *supra* note 31, at A21.

35. *Id.* (quoting *Waterman*, 732 F.2d at 1530).

36. See *id.*

37. See *id.*

38. 759 F.2d 192, 197 (1st Cir. 1985) (holding that the risk of perjury, while substantial, was not so great as to offend due process).

39. 385 U.S. 293 (1966).

40. See *id.* at 310-11.

41. See *id.* at 311; see also *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (holding that an informant who was promised a contingency fee by the government is not per se disqualified from testifying).

42. 405 U.S. 150 (1972).

43. See *id.*

44. See *id.* at 154-55.

to indicate that due process challenges have been abandoned.⁴⁵

*C. Statutory Challenge—United States v. Singleton*⁴⁶

When due process challenges met their demise, defense attorneys sought an alternative avenue of attack. John V. Wachtel, a Wichita defense attorney, chose the bribery statute⁴⁷ as a possible way of excluding purchased testimony in the case of his client, Sonya Singleton.⁴⁸ In 1992, Singleton was indicted on multiple counts of money laundering and conspiracy to distribute cocaine.⁴⁹ Investigators viewed her repeated use of Western Union to wire money between California and Wichita, and subsequent deliveries of drugs, as an exchange for cocaine.⁵⁰ Before trial, Singleton moved to suppress the testimony of a co-conspirator, Napoleon Douglas, because Douglas had entered into a plea agreement in exchange for his testimony.⁵¹ The basis of Singleton's motion was that the government impermissibly gave a "thing of value" to a witness for his testimony, thus violating 18 U.S.C. § 201(c)(2), the bribery statute.⁵² Section 201(c)(2) states that "whoever, directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony . . . to be given . . . shall be fined . . . or imprisoned."⁵³ The district court denied the motion and allowed Douglas to testify.⁵⁴ Singleton was subsequently convicted.⁵⁵

The Tenth Circuit panel reversed the district court's opinion, holding that federal prosecutors who offer leniency in exchange for testimony violate the bribery statute and that testimony received via plea agreements should be excluded.⁵⁶ In so holding, the court broadly construed the bribery statute to further the legislative purpose of deterring corruption and used the plain meaning of the statute to hold the government accountable for purchasing testimony.⁵⁷ Specifically, the court ruled that the word "whoever" included the government,⁵⁸ and that the phrase "anything of value" included promises of leniency.⁵⁹

45. See Silverglate, *supra* note 31, at A21.

46. 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), and *cert. denied*, 527 U.S. 1024 (1999).

47. 18 U.S.C. 201(c)(2) (1994).

48. See generally Glaberson, *supra* note 2.

49. See *Singleton*, 144 F.3d at 1344.

50. See *id.*

51. See *id.*

52. *Id.*

53. 18 U.S.C. § 201(c)(2) (1994). This is also known as the gratuity provision of the bribery statute, which means that no intent to influence the testimony is necessary for a violation to occur.

54. See *Singleton*, 144 F.3d at 1344.

55. See *id.*

56. See *id.* at 1361.

57. See *id.* at 1345.

58. *Id.* (quoting 18 U.S.C. § 201(c)(2)).

59. *Id.* at 1349-51 (quoting § 201(c)(2)).

Additionally, the court noted that provisions of the code that allow for leniency in the sentencing of accomplice-witnesses who have substantially assisted the prosecutor can coexist with the holding that leniency in exchange for testimony is bribery.⁶⁰ Finally, the court ruled that exclusion was the proper remedy because it preserved judicial integrity.⁶¹ The court noted that "the anti-gratuity provision of § 201(c)(2) indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony."⁶²

Ten days after the Tenth Circuit panel decision, the entire circuit, on its own motion, granted rehearing en banc.⁶³ On rehearing, the full circuit held that "whoever" does not include the government, and offers of leniency for testimony, a common practice long before the bribery statute was codified, have become an established prosecutorial tool, prohibited only by clear and unmistakable language.⁶⁴

The *Singleton I* decision was a bold move, going against years of routine practice by federal and state prosecutors. The first court to criticize the *Singleton I* panel's decision did so just three weeks after the *Singleton I* decision. The Eastern District of Michigan in the Sixth Circuit decided the same issue differently in *United States v. Arana*.⁶⁵ The district court ruled that purchased testimony is not bribery because (1) the term "whoever" in the bribery statute should not be construed to include federal prosecutors,⁶⁶ and (2) the phrase "anything of value" should not include promises of leniency because the prosecutor merely has the power to recommend leniency rather than ensure it.⁶⁷

Initially, after the *Singleton I* panel decision and *Arana* rulings, courts came down on both sides of the debate, but the majority of cases have since fallen in line with the full circuit's ruling in *Singleton II*, refusing to exclude testimony received through witness cooperation.⁶⁸ There is a disparity, however, among the rationales behind the court rulings which prompts a critical review of the bribery statute as it pertains to testimony received in exchange for promises of leniency.

60. *See id.* at 1354-56.

61. *See id.* at 1359-61.

62. *Id.* at 1346.

63. *See United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024 (1999).

64. *Id.* at 1298-1301.

65. 18 F. Supp.2d 715 (E.D. Mich. 1998).

66. *Id.* at 717-18.

67. *Id.* at 719-21.

68. *See United States v. Crumpton*, 23 F. Supp.2d 1218 (D. Colo. 1998) (holding that Congress has implicitly authorized plea agreements); *United States v. Revis*, 22 F. Supp.2d 1242 (N.D. Okla. 1998) (holding that although prosecutor's conduct met the bribery statute, it is a general statute and is subordinate to specific sentencing guidelines which allow plea bargaining); *United States v. Reid*, 19 F. Supp.2d 534 (E.D. Va. 1998) (holding that plea agreements do not violate the bribery statute).

II. IS THE GOVERNMENT BRIBING WITNESSES BY OFFERING LENIENCY?

A. Legislative History

Whenever a court interprets a statute, it seeks to apply the intent of the legislature. Courts differ, though, in their definition of legislative intent. Generally, however, there are two means for finding intent: (1) examining the legislative history, and (2) examining the plain language of the statute. First, it must be noted that a court should not examine the legislative history of a law when the language is clear and unambiguous.⁶⁹ Of course, differing interpretations of what is clear and unambiguous are always possible, so the legislative history is frequently examined regardless. Ultimately, a court tries to rule *ex post* in a manner consistent with the way the legislature would have ruled *ex ante*, with the understanding that the judicial branch is separate from the legislative branch of government.

The legislative history in this case lends little to the resolution of the conflict. The bribery statute was first codified in 1909, when both offering and receiving bribes with the intent to influence testimony was prohibited.⁷⁰ The statute was amended in 1948, with 18 U.S.C. § 209 prohibiting the giving or offering any money or thing of value to influence testimony.⁷¹ The 1948 code also had a gratuity provision that prohibited giving any money or thing of value to a revenue officer.⁷² However, the gratuity provision did not prohibit giving a gratuity to a witness.⁷³

The bribery statute is presently codified under Chapter 11 of Title 18 which is entitled "Bribery, Graft, and Conflicts of Interest." Specifically, the current statute is the result of four bills converging in 1961 to strengthen conflicts of interest legislation and consolidate the bribery laws.⁷⁴ The Senate Report on the bill which became the present law states that "[t]he necessity for maintaining high ethical standards of behavior in the Government becomes greater as it[s] activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy."⁷⁵ Moreover, the Senate report, speaking on conflicts of interest, specifically recognizes the dangers of abuse of Government not only in accepting money, but also in awarding a valuable license

69. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

70. See *United States v. Kennings*, 861 F.2d 381, 387 (3d Cir. 1988); *United States v. Revis*, 22 F. Supp.2d 1242, 1249 (N.D. Okla. 1998) (citing Pub. L. No. 350, §§ 134, 35 Stat. 1088, 1113 (1909)).

71. See *Revis*, 22 F. Supp.2d at 1249 (citing Pub. L. No. 772, §209, 62 Stat. 683, 693 (1948)).

72. See *id.*

73. See *id.*

74. See S. REP. NO. 87-2213, reprinted in 1962 U.S.C.C.A.N. 3852.

75. *Id.* Arguably, Congress was speaking more to the conflicts of interest portion of the bill in its statement. Nevertheless, the joining of conflicts of interest and bribery in the same bill seems to show a common purpose, that ethical standards of behavior are of primary concern.

or other privilege.⁷⁶

The 1962 amendment marked the point at which gratuities to witnesses were first prohibited by statute, meaning that no intent to influence testimony was necessary for a violation to occur. Whether speaking in terms of conflict of interest or bribery, the dangers of abuse exist in payments of money and also in less tangible considerations, and should be swept from the halls of government. That said, the history of the bribery statute does not suggest specifically whether federal prosecutors were contemplated under the statute; nor does the history suggest whether offers of leniency are of any value.⁷⁷ However, Senators Kohl and Leahy, in separate bills, sought during the 1998 term to establish the proposition that the traditional practice of offering leniency in exchange for testimony should be upheld.⁷⁸ Both Senators proposed amendments to 18 U.S.C. § 201, but both bills stalled and died in the judiciary committee; thus, leaving open the question of whether the legislature intended to subject prosecutors to the bribery statute.

B. Plain Meaning Doctrine

In construing statutes, courts must look to the plain language of the statute.⁷⁹ The text of the statute itself is the best evidence of congressional intent.⁸⁰ Courts have repeatedly stated that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."⁸¹ Moreover, the Supreme Court has ruled that a statute can be unambiguous without addressing every interpretive theory.⁸² "[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"⁸³ In exceptional circumstances, a court will stray from the plain language of the statute. These circumstances have been generally limited to two situations: (1) when a contrary legislative intent is

76. *See id.*

77. The 1962 Senate report referred to the bribery provision at issue as § 201(h). It later became § 201(c)(2) without any substantive changes.

78. S. 2484, 105th Cong. (1998); S. 2311, 105th Cong. (1998).

79. *See* 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992).

80. *See* *Guidry v. Sheet Metal Workers Int'l Assoc.*, 10 F.3d 700, 708 (10th Cir. 1993).

81. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (holding that the Court's inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (holding that if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive).

82. *See* *Salinas v. United States*, 522 U.S. 52, 60 (1997).

83. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

clearly expressed,⁸⁴ and (2) where the plain language interpretation would lead to an absurd result.⁸⁵ The bribery statute fits neither of these exceptions.

While courts have limited their examination of statutes to the plain language, they have not limited it to the expressed intent of the legislature.⁸⁶ *Brogan v. United States*,⁸⁷ dealing with the “exculpatory no doctrine,”⁸⁸ said that “[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . .”⁸⁹ Moreover, that Court said that it “cannot be [the Court’s] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than text of the statute itself.”⁹⁰ Because the bribery statute is aimed at deterring corruption, the statute should be construed broadly enough to further the legislative purpose of deterring corruption.⁹¹

Other courts, however, have found this broad construction to be at odds with the general rule that criminal statutes are to be narrowly construed.⁹² The district court for the Northern District of Oklahoma ruled that the legislature’s approval of the court’s broad construction of the bribery statute only pertained to acts by public officers while in their “official capacity.”⁹³ This distinction, however, fails to exclude prosecutors from the bribery statute. Indeed, the main controversy concerns the conduct of prosecutors while performing their professional duties. Furthermore, *Brogan* stands for the proposition that it is impossible to try and narrowly construe statutes in a case by case manner because there is no way of knowing when or how the rule is to be invoked.⁹⁴

Even if the prosecutor could argue that he was not performing his official duty, it may not be necessary. Section § 201(c)(2) does not require the prosecutor to be performing his official duty whereas § 201(c)(1) does express

84. See *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991).

85. See *SINGER*, *supra* note 79, at § 46.07. See generally *Nardone v. United States*, 302 U.S. 379 (1937).

86. Furthermore, courts have refused to limit a statute to the words in the title. See *Yeskey*, 524 U.S. at 212 (“[T]he title of a statute . . . cannot limit the plain meaning of the text.” (quoting *Trainmen v. Baltimore & Oh. R.R. Co.*, 331 U.S. 519, 528-29 (1947))).

87. 522 U.S. 358 (1998).

88. The “exculpatory no” doctrine previously provided that defendants could not be prosecuted for making false statements to federal investigators when the statements consisted of merely denying any wrongdoing. The Supreme Court in *Brogan v. United States* abrogated the “exculpatory no” doctrine. *Id.* at 812.

89. *Id.* at 811-12.

90. *Id.* at 809.

91. See *United States v. Singleton*, 144 F.3d 1343, 1345 (10th Cir. 1998), *rev’d en banc*, 165 F.3d, 297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

92. See *United States v. Revis*, 22 F. Supp.2d 1242, 1251 (N.D. Okla. 1998). See generally *United States v. Fruit Growers’ Express Co.*, 279 U.S. 363, 369 (1929).

93. *Revis*, 22 F. Supp.2d at 1252.

94. See *Brogan v. United States*, 522 U.S. 358 (1998).

that requirement.⁹⁵ Because courts find it significant when a statute contains a provision in one section of the statute and omits it in another, they may find that the failure to include this requirement indicates Congress' intent that the requirement not pertain to this provision.⁹⁶

While courts seek refuge in the plain language of statutes, they refuse to look merely to a particular phrase. Instead, courts will examine the whole statute so as to give effect to the will of Congress.⁹⁷ Specifically, the Supreme Court has ruled that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."⁹⁸ Clearly, most phrases in a complex statute are not amenable to parsing, lest the remainder of the statute be labeled superfluous, and there is "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."⁹⁹ The bottom line is that the courts are charged with giving effect to the plain language of statutes in order to further the legislative intent behind the statutes. In so doing, the courts will examine the entire statute.

One final canon of statutory interpretation involves the relationship between statutes of general application and those of specific application. Courts generally hold that "if a specific statutory provision conflicts with a general one, the specific statute governs."¹⁰⁰ This concept will be discussed more fully below in Part II.D.

C. Plain Meaning as Applied to the Bribery Statute

The language of the bribery statute, 18 U.S.C. § 201(c)(2) is clear and unambiguous. It states that:

Whoever directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness . . . shall be fined under this title or imprisoned for not more than two years, or both.¹⁰¹

Courts challenging the application of the bribery statute to plea agreements have generally done so on three grounds: (1) the government is not meant to be

95. Section 201(c)(1) states that "[w]hoever, otherwise than as provided by law for the proper discharge of official duty . . ." 18 U.S.C. § 201(c)(1) (1994).

96. See generally *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

97. See *id.*

98. *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

99. *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

100. *United States v. Revis*, 22 F. Supp.2d 1242, 1251 (N.D. Okla. 1998) (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)).

101. 18 U.S.C. § 201(c)(2) (1994).

included in the statutory term "whoever," (2) offering leniency in exchange for testimony is not "anything of value," and (3) even if the plain language includes prosecutors, they should be excepted by the statute.¹⁰²

The use of the word "whoever" in the bribery statute seems to be all-encompassing. The term neither implies nor expresses an exclusion of the prosecutor on the basis that he or one is not a "who." Indeed, as the court stated in *United States v. Revis*,¹⁰³ "it is too plain for argument that if a United States Attorney corruptly pays money to a prosecution witness for false testimony, such conduct would be covered under the bribery and gratuity prohibitions in 18 U.S.C. § 201."¹⁰⁴ The court went on to say that "once it is conceded that the statute covers such government conduct in at least one instance, the argument that the statute cannot apply to the government at all is lost."¹⁰⁵

The Supreme Court in *Nardone v. United States*¹⁰⁶ held that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong."¹⁰⁷ In so holding, the Court construed § 605 of the Wiretapping Statute¹⁰⁸ to include investigators and prosecutors in its prohibition of divulging or publishing the content of interstate communications, where the statute said "no person" shall do so to "anyone."¹⁰⁹ More recently, the Court said that a federal agency is not a "person" within the meaning of a statute that allows removal to federal court when a civil suit involves "[a]ny officer of the United States or any agency thereof, or person acting under him"¹¹⁰ The Court, however, stated that "'there is no hard and fast rule of exclusion' of the sovereign . . . and our conventional reading of 'person' may therefore be disregarded if 'the purpose . . . indicate[s] an intent, by the use of the term, to bring state or nation within the scope of the law.'"¹¹¹

Primate Protection League can be distinguished from both *Nardone* and the bribery statute in that the phrase "person under him" was obviously referring to the antecedent "officer," and cannot grammatically be connected to the agency. Moreover, the purpose of the bribery statute is to prevent corruption through purchased testimony, and a plain language analysis holds that there is no more inclusive word or phrase than the word "whoever."

The majority in *Singleton II*,¹¹² however, excluded the federal government

102. *E.g.*, *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

103. 22 F. Supp.2d at 1242.

104. *Id.* at 1254.

105. *Id.*

106. 302 U.S. 379 (1937).

107. *Id.* at 384.

108. 47 U.S.C. § 605 (1934). The Federal Wiretapping Prohibitions are now codified at 18 U.S.C. §§ 2515, 2518 (1994).

109. *Nardone*, 302 U.S. at 380-81.

110. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79, 82-83 (1991).

111. *Id.* at 83 (citation omitted).

112. *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S.

from the term “whoever” by finding the government to be an inanimate entity rather than a being, which the word “whoever” connotes.¹¹³ This argument, though, clashes with The Dictionary Act,¹¹⁴ which states that the definition of the word “whoever” includes corporations, companies, associations, firms, partnerships, and societies.¹¹⁵ Moreover, Judge Lucero’s concurring opinion in *Singleton II* attempts to break down the majority’s reasoning altogether. In his opinion, Lucero notes that the purpose of the bribery statute, at least in part, is “to criminalize certain behavior of government officials.”¹¹⁶ The government, itself, admitted that a prosecutor who corruptly bribes a witness with payment is subject to penalties under 18 U.S.C. § 201(b), even though the identifier is also “whoever.”¹¹⁷ Judge Lucero states that “[i]f ‘whoever’ can refer to government agents in one part of the statute, then it surely can refer to government agents in § 201(c)(2).”¹¹⁸ In comparing Judge Lucero’s argument with the majority’s reliance on the inanimate nature of the government, Judge Lucero may have the better argument.

The court in *Singleton II* also held that the government should not be included within the term “whoever” based on the role that the federal prosecutor plays.¹¹⁹ The court found that the prosecutor, acting within the scope of his authority, is the alter ego of the government; therefore, the defense is actually attempting to subject the sovereign to the statute, which would be “patently absurd.”¹²⁰ The concurring opinion in *Singleton II*, however, correctly argued that the majority’s ruling “would transform virtually all federal ‘officers and agents’ relating to law enforcement and prosecution into alter egos of the government. . . .”¹²¹ Moreover, the ruling cannot be squared with the Supreme Court ruling in *Nardone v. United States*¹²² in which the Court found that the phrase “no person” included the government in a prohibition on wiretapping.¹²³ Using the logic from *Nardone*, federal prosecutors are not the alter ego of the government, but are agents whose conduct can sometimes invite punishment.

The majority’s argument, in *Singleton II*, that the prosecutor who gives cash payments to witnesses is acting beyond the scope of his employment and, therefore, is not acting as the alter ego of the sovereign is debatable.¹²⁴ The logic behind the court’s argument holds that a prosecutor acting directly contrary to

1024 (1999).

113. *Id.* at 1300.

114. 1 U.S.C. § 1 (1994).

115. *See Singleton*, 165 F.3d at 1310 (Kelly, J., dissenting).

116. *Id.* at 1305 (Lucero, J., concurring).

117. *Id.*

118. *Id.*

119. *Id.* at 1299.

120. *Id.* at 1299-1300.

121. *Id.* at 1305 (Lucero, J., concurring).

122. 302 U.S. 379 (1937).

123. *Id.* at 381.

124. *See Singleton*, 165 F.3d at 1299-1303.

law is no longer an alter ego of the government and is subject to the criminal laws. A logical extension of the argument might be that since prosecutors are violating the plain meaning of the bribery statute when they offer leniency in exchange for testimony, the prosecutor could be subject to the law, but the government never could. The fact remains, however, that the government is subject to punishment for many acts done by prosecutors which are outside the scope of their authority. When a prosecutor mishandles evidence or obtains it illegally, the government is often punished in the form of exclusion.¹²⁵ Moreover, if a criminal defendant is convicted and the prosecutor is found to have paid a witness in cash, the government will surely be punished in the form of a reversal of the conviction.¹²⁶

Because the term "whoever" in the bribery statute seems even more inclusive than the term "no person" in the wiretapping statute, and since it is not subject to the limitations of other language in the statute, there should be little doubt that prosecutors are subject to the bribery statute. Congress was attempting to wipe out the corruption that exists when a witness is bought off; the legislative history of the bribery statute admits as much.¹²⁷ The prosecutor should be punished for doing that which would get a defendant punished. Moreover, because it must be conceded that the statute applies to the prosecutor in cases where he pays money to a witness,¹²⁸ there can be no argument that the prosecutor is not subject to the statute at least in some instances.

The second challenge to the application of prosecutors to the bribery statute generally holds that offers of leniency are not "anything of value." The court in *United States v. Arana*¹²⁹ held that prosecutors may only recommend to the sentencing judge that a defendant receive leniency in exchange for substantial assistance.¹³⁰ The court reasoned that the sentencing judge is the only officer with the power to provide the defendant with anything of value, and that the prosecutor has nothing more than the power of persuasion.¹³¹ Strong arguments can be made, however, that value does exist in exchanging leniency for testimony. Getting out of jail is surely a thing of value. Furthermore, witnesses believe that the prosecutor is in fact offering something of value because they are willing to testify after an agreement is made despite previously being unwilling.

Value can also be found in the prosecutor's offer by examining the sentencing guidelines and requirements. While the court is ultimately

125. See generally *United States v. Blue*, 384 U.S. 251 (1966).

126. Punishments of this sort could possibly be compared with the civil notion of respondeat superior. Government employees acting outside of the scope of their authority, yet within the grounds of foreseeability, have nevertheless subjected the government to tort liability.

127. See *supra* Part II.A.

128. See *United States v. Revis*, 22 F. Supp.2d 1242, 1254 (N.D. Okla. 1998).

129. 18 F. Supp.2d 715 (E.D. Mich. 1998).

130. See *id.* at 720-22.

131. See *id.* at 721-22. The *Arana* court cited the holding in *United States v. Blanton*, 700 F.2d 298 (6th Cir. 1983), which held that the assurance of a public official that the witness would not lose his liquor license was not a "thing of value." *Arana*, 18 F. Supp.2d at 721.

responsible for the sentence, it can only grant leniency after a substantial assistance motion has been filed by the prosecutor.¹³² The statutory filing requirements allow the prosecutor to stand between the court that wishes to grant leniency and the defendant who wishes to receive it. The prosecutor's role thus becomes that of a gatekeeper.¹³³ Moreover, the prosecutor's discretion as to whether to file a substantial assistance motion is virtually unreviewable.¹³⁴ Thus, the prosecutor is given a tool—something of value—to use against a defendant to get him to cooperate. This cooperation can lead to false testimony as the defendant may say anything to receive leniency. Indeed, evidence suggests that prosecutors sometimes use their substantial assistance power to manipulate the guidelines.¹³⁵ This tool and its potential for abuse clearly meets the bribery statute's "anything of value" criteria.

Prosecutors in the *Singleton I* panel decision argued that the statute should not apply to the plea deal at hand because the statute "had traditionally been interpreted to apply only to monetary payments . . ."¹³⁶ However, the phrase "anything of value" has not been limited to monetary contributions. In fact, courts have ruled that the phrase must be construed broadly enough to encompass tangible and intangible benefits, not just money.¹³⁷ The *Singleton I* panel, itself, recognized that "courts have uniformly rejected arguments that 'anything of value' should be restricted to things of monetary, commercial, objective, actual, or tangible value."¹³⁸ In *United States v. Nilsen*,¹³⁹ the Eleventh Circuit ruled that

132. See 18 U.S.C. § 3553(e) (1994) (stating that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as [the] minimum . . ."); see also U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1998) ("Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the guidelines.").

133. See Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 217-18 (1997). Professor Lee argues that prosecutors control *not only* which defendants get to enter the gate of substantial assistance, but also whether the court will be allowed to depart from the guidelines; thus, they are a concierge as well as a gatekeeper. See *id.* at 234.

134. See *id.* at 251. Judicial review will be available only if the court finds that the refusal to file a motion was based on an unconstitutional motive or not reasonably related to a "legitimate governmental objective." *Id.*

135. See *id.* at 236. Prosecutors have admitted using substantial assistance motions to get the court to depart from guidelines when the defendant is sympathetic even if they have not substantially assisted the prosecutor. See *id.*

136. Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors' Power—Testimony Can't Be Bought; Immunity's Scope Widened*, NAT'L L.J., July 20, 1998, at A1.

137. See *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992).

138. *United States v. Singleton*, 144 F.3d 1343, 1349 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); see also *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996), *aff'd sub nom. Salinas v. United States*, 522 U.S. 52 (1997) (holding that "anything of value" includes transactions involving intangible items); *United States v. Schwartz*, 785 F.2d 673, 680-81 (9th Cir. 1986) (holding that the proper construction of the

the conduct and expectations of a defendant can establish whether an intangible objective should be considered a "thing of value."¹⁴⁰ Moreover, the Fifth Circuit ruled in *United States v. Cervantes-Pacheco*¹⁴¹ that the promise of intangible benefits imports as great a threat to a witness's truthfulness as a cash payment.¹⁴² This holding by the Fifth Circuit supports the theory that benefits lead to corruption which is the basis for the bribery statute.

If the courts are to further the purpose of preventing corruption, a broad construction of the bribery statute is required. Specifically, the focus should be placed on the value that the defendant subjectively attaches to the items to be received.¹⁴³ When subjective value is measured, it becomes clearer that the prosecutor's offer of leniency is something of value because the witness is motivated to testify when he was not previously so inclined. Therefore, the *Singleton* panel correctly ruled that "the government had impermissibly promised [the witness] something of value—leniency—in return for his testimony."¹⁴⁴

The plain meaning doctrine also suggests that, when reading § 201 as a whole, federal prosecutors should be subjected to the bribery statute for offers of leniency. Section 201(c)(1) of the bribery statute opens by excluding from the statute acts done in the "discharge of official duty."¹⁴⁵ However, § 201(c)(2) contains no similar phrase.¹⁴⁶ This would indicate that § 201(c)(2) should not exclude acts done in the discharge of official duty. The omission prevents the prosecutor from arguing that although he was acting in his official capacity and therefore could not be subject to the statute. In reality, the statute includes prosecutors even if they are not performing their official duty correctly.¹⁴⁷

Furthermore, § 201(c)(2) "contains no requirement that [bribery] be done solely with the intent of influencing the witness's testimony—only that it be 'for or because of the testimony under oath or affirmation given or to be given by such person as a witness . . .'"¹⁴⁸ The language of § 201(b)(3) reinforces the

bribery statute included the subjective value that the defendant attached to the prosecutor's offer), *rev'd*, 853 F.2d 768 (9th Cir. 1988).

139. 967 F.2d 539 (11th Cir. 1992).

140. *Id.* at 543.

141. 826 F.2d 310 (5th Cir. 1987).

142. *See id.* at 315.

143. *See United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986); *see also United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983).

144. *United States v. Singleton*, 144 F.3d 1343, 1344 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

145. 18 U.S.C. § 201(c)(1) (1994).

146. *See id.* § 201(c)(2).

147. Federal prosecutors who act in their official capacity perform the broad designations charged to their office, namely, the investigation and prosecution of offenders. Acting outside the scope of their duty pertains to using improper means to accomplish the investigation and prosecution of offenders.

148. J. Richard Johnston, *Paying the Witness—Why Is It OK for the Prosecution, but Not the Defense?*, 12 CRIM. JUST., Winter 1997, at 21-22 (quoting 18 U.S.C. § 201(c)(2) (1994)).

prohibition of giving of anything of value "with intent to influence the testimony" of the witness.¹⁴⁹ The omission from the former section of any intent language suggests the absence of any intent requirement, especially in light of the fact that the latter section expressly includes an intent requirement. However, the Eleventh Circuit has concluded that § 201(c)(2) does contain an intent requirement because "[g]iving something of value 'for or because of' a person's testimony obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion."¹⁵⁰ In contrast, a possibly more appealing argument holds no intent requirement exists in § 201(c)(2) because "[t]he gratuity prohibitions collected under § 201(c) . . . contain no requirements of corruption and intent to influence the receiver, and Congress attached concomitantly lesser penalties to their violation."¹⁵¹

Further evidence of the legislature's intent to bring offers of leniency by prosecutors into the bribery statute is provided by a close examination of 18 U.S.C. § 201(c) and § 201(d). Congress made an exception to the bribery statute by allowing payment for a witness's travel expenses, subsistence, and lost time.¹⁵² However, the exception does not include payment for testimony, so it should not be implied. J. Richard Johnston, scholar of the bribery statute as it pertains to leniency deals, commented on the interplay between §§ 201(c) and (d) stating that:

The fact that intent to influence testimony is not an element of the offense under § 201(c)(2) would seem to follow by necessary implication from the provisions in § 201(d), which provides:

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.¹⁵³

Because Congress did not include an exception for prosecutors who offer leniency in exchange for testimony when Congress created exceptions for travel expenses, lost time, and lodging, a plain language analysis allows the conclusion

149. 18 U.S.C. § 201(b)(3).

150. Johnston, *supra* note 148 (quoting *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992)).

151. *United States v. Singleton*, 144 F.3d 1343, 1351 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); *see also United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965).

152. *See* 18 U.S.C. § 201(d) (1994).

153. Johnston, *supra* note 148, at 22 (quoting 18 U.S.C. § 201(d)).

that offers of leniency clearly involve bribery.¹⁵⁴ Indeed, when the Senate introduced bills during the 105th Congress attempting to amend the bribery statute to allow prosecutors to offer leniency in exchange for testimony, they proposed the inclusion of such language in subsection (d).¹⁵⁵ The Supreme Court has stated that the courts "are not at liberty to create an exception where Congress has declined to do so."¹⁵⁶ Because Congress has not created an exception in the bribery statute, the courts should refrain from creating one in Congress's stead.

D. Is the Government Excepted from the Bribery Statute?

The final challenge to the application of federal prosecutors to the bribery statute comes via common law exceptions. Principally, courts have traditionally held that either (1) general laws do not apply to the government unless the statute expressly so provides, or (2) specific sentencing statutes overrule the general bribery statute.

The district court in *Arana*¹⁵⁷ stated that the Supreme Court "has long recognized a canon of construction which provides that statutes which tend to restrain or diminish the powers, rights, or interests of the sovereign do not apply to the government or affect governmental rights unless the text expressly includes the government."¹⁵⁸ This doctrine goes back to at least 1873.¹⁵⁹ As early as 1937, however, the Supreme Court recognized that this canon applies only in two classes of cases. In *Nardone*,¹⁶⁰ the Court held that "the cases in which [the exception from general statutes] has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest."¹⁶¹ The Court noted that the classic instance of this type involved the exemption of the government from general statutes of limitation.¹⁶² The second class excepts the government "where a

154. The Tenth Circuit held that the omission of leniency offers by prosecutors from the exceptions stated in subsection (d) was important in that without the exceptions, subsection (c)(2) would prohibit paying witnesses for their time. See *Singleton*, 144 F.3d at 1351-52. Moreover, because leniency offers in exchange for testimony were not explicitly included in subsection (d), those offers are, indeed, prohibited. See *id.*

155. See S. 2484, 105th Cong. § 2304 (1998).

156. *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); see also *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) (stating that "courts cannot with ease presume ratification of that which Congress forbids."); *Brogan v. United States*, 522 U.S. 398, 401 (1998) (holding that "courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.").

157. *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

158. *Id.* at 716.

159. See generally *United States v. Herron*, 87 U.S. 251, 263 (1873).

160. 302 U.S. 379 (1937).

161. *Id.* at 383.

162. See *id.*

reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."¹⁶³

Addressing the first class of cases, the Court in *Singleton II* held that the "ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government."¹⁶⁴ Thus, the government cannot be subject to the statute. The dissent in that case found fault with the majority's erroneous conflation of two concepts: "the vested sovereign prerogative of the government to prosecute and the obvious non-prerogative of how to prosecute."¹⁶⁵ Furthermore, the dissent noted that "[o]nce the government falls into the crucible of the trial, the government, like the defendant, must follow the generally applicable rules governing the process."¹⁶⁶ Since the bribery statute was enacted to protect the integrity of the judicial process, the government should not be excepted from the statute.

The application of the bribery statute to federal prosecutors would not deprive the government of an established title or interest. Although courts have said that plea deals do not violate due process, those holdings did not stand for the proposition that merely because pleas escape due process, they are a governmental entitlement. Rather, the decisions reflect the notion that the government has not yet violated the Constitution.¹⁶⁷ Moreover, the Court in *Nardone* stated that the exclusion of the government from general statutes "is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself."¹⁶⁸ The concurring opinion in *Singleton II* saw a danger in classifying all government employees as alter egos of the sovereign and, therefore, immune from criminal statutes.¹⁶⁹

Federal prosecutors should be classified as agents of the sovereign rather than as the sovereign, itself. A contrary finding would render cases like *Nardone*, which hold federal officers liable for illegal wiretapping even when

163. *Id.* at 384. In contrast, however, the district court in *Arana* believed that *Nardone* read the canon too narrowly and that the classes of cases that excluded the government was not a conclusive list. See *United States v. Arana*, 18 F. Supp.2d 715, 717 (E.D. Mich. 1998). Rather, the court felt that other classes might warrant excluding the government from general statutes. See *id.* This argument is weakened, however, because no new classes have been added to the canon in sixty years.

164. *United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir.) (en banc), *cert. denied*, 529 U.S. 1024 (1999).

165. *Id.* at 1301 (Kelly, J., dissenting).

166. *Id.* at 1312 (Kelly, J., dissenting).

167. See *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that the use of government informants does not necessarily violate due process); *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (holding that a witness' testimony that was based on a contingency agreement did not per se violate due process). See generally the discussion on due process concerns, *supra* Part I.C.

168. *Nardone v. United States*, 302 U.S. 379, 383 (1937).

169. See *supra* text accompanying note 121.

done within the scope of authority, mere surplusage.¹⁷⁰ Allowing them to obtain a conviction while other defendants would be sentenced to jail for similar conduct would throw the rule of law and the credibility of the justice system on their collective ears. The *Singleton I* court recognized the potential for injustice when it stated that the bribery statute "does not restrict any interest of the sovereign itself; it operates only upon an agent of the sovereign, limiting the way in which that agent carries out the government's interests."¹⁷¹ The court went on to say that "[t]here is no presumption that regulatory and disciplinary measures do not extend to such officers."¹⁷² Finally, even if the statute were to infringe upon a government right, the government would nevertheless be subject to it because the statute's purpose is to prevent fraud, injury, and wrong.¹⁷³

Courts refusing to apply the bribery statute to federal prosecutors who offer leniency in exchange for testimony generally attack its application by the second class of cases noted in *Nardone*, that it would work an obvious absurdity.¹⁷⁴ Such absurdity exists when comparing the bribery statute with three statutes that allow lesser sentences for substantial assistance including testimony. These statutes are also used by courts as examples of specific statutes that overrule the general bribery statute.

The first statute involves §§ 6001-6005 of Title 18 of the United States Code, which authorize federal prosecutors to grant immunity to unwilling witnesses in order to encourage them to testify.¹⁷⁵ The *Arana* court found that an absurdity exists in that § 201 criminalizes giving anything of value while §§ 6001-6005 allow the granting of immunity, a seeming contradiction.¹⁷⁶ Because courts have a duty to harmonize apparently conflicting statutes whenever possible,¹⁷⁷ the only way to avoid an absurd result from existing is to prove an absence of conflict. Although the §§ 6001-6005 allow the granting of immunity for testimony, those statutes can operate fully and independently. The grant of immunity is actually done in exchange for the witness' Fifth Amendment right against self-incrimination, not for his testimony. Since the witness remains free to testify or not to testify, the bribery statute has not been violated, and the witness has not been coerced to give potentially false statements. Furthermore, immunity only protects a witness from having his own testimony used against him. On the other hand, leniency in exchange for testimony provides the defendant with a self-serving incentive to testify falsely against others, especially because the prosecutor becomes the primary door through which a defendant can obtain

170. See *United States v. Singleton*, 165 F.3d 1297, 1305 (10th Cir.) (en banc) (Lucero, J., concurring), *cert. denied*, 527 U.S. 1024.

171. See *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d at 1297, *and cert. denied*, 527 U.S. at 1024.

172. *Id.* (quoting *United States v. Arizona*, 295 U.S. 174, 184 (1935)).

173. See *id.*; see also HENRY CAMPBELL BLACK, *INTERPRETATION OF LAWS* 97 (2d ed. 1911).

174. See *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

175. See 18 U.S.C. §§ 6001-05 (1994).

176. See *Arana*, 18 F. Supp.2d at 718.

177. See *Singleton*, 144 F.3d at 1348.

leniency.¹⁷⁸ Admittedly, there is but a fine distinction in allowing prosecutors to grant immunity while refusing to allow them to recommend leniency. However, the distinction is important. Testimony induced by leniency encourages the witness to testify in a light favorable to the prosecution, thus setting up a risk of unreliable testimony. When immunity is granted, the witness is free to speak openly with no fear of penalty. The critical distinction lies in the placement of the motivation. Once a witness is given immunity, he is no longer obligated to the prosecutor in any way. Since immunity does not hold the same dangers of coerced, potentially false testimony, it makes sense that courts are allowed to offer immunity while prosecutors cannot offer leniency for testimony.

The panel in *Singleton* explained their finding that no inconsistency existed between the laws by saying that the government has no power to offer immunity for testimony; rather, the court is the one actually granting immunity.¹⁷⁹ While this is true, the court may have erred in its reasoning and weakened its argument by its stance that the court, rather than the prosecutor, grants immunity. This is especially true when the court previously held that "anything of value" includes recommendations by the prosecutor, even though the court has the sole authority to grant leniency. Where the power of persuasion is held to be something of value when pertaining to leniency, it should also be considered of value when pertaining to immunity.

However, the *Singleton* panel was correct in ruling that both statutes can operate independently, and therefore, no absurdity is worked. That court stated that both statutes "manifest a Congressional intent to allow testimony obtained by the court's grant of immunity, but to criminalize the gift, offer, or promise of any other thing of value for or because of testimony."¹⁸⁰ As previously stated, immunity contains none of the dangers of coercion that come with offers of leniency for testimony. Because the two statutes can coexist without conflict, no absurdity is worked.

The other two statutes that have been used to challenge the viability of applying the bribery statute to prosecutors who offer leniency in exchange for testimony include 18 U.S.C. § 3553 and section 5k1.1 of the U.S. sentencing guidelines. The federal criminal sentencing statute, 18 U.S.C. § 3553(e) states that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another. . . ." ¹⁸¹ The court in *United States v. Revis*¹⁸² interpreted this section, along with the Government's mandate under 28 U.S.C. § 994 that a defendant's substantial assistance be considered when imposing a sentence, to mean that substantial assistance includes testimony.¹⁸³ The court argued that

178. See Lee, *supra* note 133, at 207.

179. See *Singleton*, 144 F.3d at 1348.

180. *Id.*

181. 18 U.S.C. § 3553(e) (1994).

182. 22 F. Supp.2d 1242 (N.D. Okla. 1998).

183. See *id.* at 1258.

because the statute uses the disjunctive when speaking of "investigation" or "prosecution," and since "investigation" means out of court statements, then "prosecution" must mean testimony given in court.¹⁸⁴

Even if the *Revis* court's interpretation of § 3553(e) does include testimony, it does not necessarily allow the prosecutor to promise leniency for it.¹⁸⁵ The statute, however, may not contemplate testimony as the exclusive means of substantially assisting a prosecution. When a prosecutor takes a case to trial, he is not always in full command of all aspects of the evidence. Indeed, he may sometimes lack the evidence to convict at the time the grand jury returns an indictment against a defendant. By using the disjunctive "or" between "investigation" and "prosecution," § 3553(e) expressly contemplates the situation where not all persons who are assisting a prosecution have assisted in the investigation. Testimony exchanged for leniency is not necessarily included; more important is the search for truth, and § 3553(e) sets out to allow a downward departure from a statutory minimum sentence for the witness who aids in that search for the truth.

The best argument for the inclusion of testimony within the bounds of substantial assistance lies in the government's sentencing guidelines. Specifically, section 5k1.1 of the U.S. sentencing guidelines defines substantial assistance more clearly than 18 U.S.C. § 3553(e).¹⁸⁶ Section 5k1.1 allows, on a government motion, the departure from the general sentencing guidelines. Furthermore, the section defines the types of conduct may be included under substantial assistance. Subsection (a)(2) states that the appropriate sentence reduction should be determined by, among other things, "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant."¹⁸⁷ Although this section contemplates testimony as a form of substantial assistance, two factors help reconcile this section with the bribery statute and prevent absurdity.

First, the sentencing guidelines were not drafted by legislators; they are guidelines promulgated by a commission. Although the definitions that place testimony within the "substantial assistance" language may control throughout the guidelines, the definition does not make reference to the United States Code and should not be presumed to read the same way when pertaining to statutes. Second, the provision for granting departure from the sentencing guidelines for truthful, complete, and reliable testimony pertains to the sentence handed down

184. *Id.* Curiously, the court claims that the plain language of the statute contemplates testimony as being part of assistance in prosecution. The statute does not mention testimony, and there are many ways a witness-defendant can assist the prosecutor in a prosecution without actually testifying.

185. *See supra* notes 175-80 and accompanying text. The disparity between leniency and immunity remains.

186. *See* U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1996). The section is part of the criminal sentencing guidelines promulgated by an independent committee, giving clarity to the broad Congressional enabling provisions set forth in 28 U.S.C. § 994 (1994).

187. U.S. SENTENCING GUIDELINES MANUAL § 5k1.1(a)(2).

by the court after the assistance has been given. The guidelines contain no permission to induce testimony by offering leniency in exchange.

An Oklahoma District Court overlooked the importance of this last point when it ruled on the case of *United States v. Revis*.¹⁸⁸ That court held that 18 U.S.C. § 3553(e) and section 5k1.1 of the sentencing guidelines were specific statutes that authorized the use by the prosecutor of plea deals in exchange for testimony even though the general bribery statute pertained to the prosecutor in plain language.¹⁸⁹ In actuality, the downward departure statute (18 U.S.C. § 3553(e)) and the sentencing guidelines were put in place for the benefit of judges, who are responsible for sentencing the defendant.¹⁹⁰ Section 5k1.1 clearly speaks to judges by stating that upon government motion that the defendant has substantially assisted the investigation or prosecution, "the court may depart from the guidelines."¹⁹¹ Indeed, the entire body of the sentencing guidelines was meant for the post-prosecution of defendants, giving judges direction as to the sentence imposed. The guidelines were not meant to empower prosecutors, especially in a way that is contrary to the plain language of a criminal statute.

Thus, it seems absurd not to apply the bribery statute to prosecutors who offer deals in exchange for testimony, but to allow the sentencing guidelines meant for judges to be used in a way that empowers prosecutors to act in direct conflict with a criminal statute. Because the sentencing guidelines were enacted to aid judges, their influence over the criminal justice system should remain within the judicial branch of government.¹⁹²

Another argument made by courts that the application of the bribery statute to prosecutors creates an absurdity involves a conflict as to the actual violators of the statute. The court in *Arana*¹⁹³ found that the bribery statute should not be applied to prosecutors because, among other reasons, the actual perpetrators of the statute were the judges who offered leniency.¹⁹⁴ That court correctly stated that it would be absurd to subject judges to the bribery statute.¹⁹⁵ Rather than simply label it an absurdity to say judges can violate the bribery statute by offering leniency, the court could have recognized that the sentencing guidelines specifically allow judges to depart from the guidelines when substantial assistance has been given.¹⁹⁶ In fact, section 5k1.1 speaks directly to the situation

188. 22 F. Supp.2d 1242 (N.D. Okla. 1998)

189. *See id.* at 1261.

190. *See id.* at 1258.

191. U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1996).

192. Federal prosecutors, as members of the United States Attorney's office in the Executive branch of the government, should not be allowed to use a guideline intended for the Judicial branch to justify the violation of a criminal statute.

193. 18 F. Supp.2d 715 (E.D. Mich. 1998).

194. *See id.* at 719.

195. *See id.*

196. *See* U.S. SENTENCING GUIDELINES § 5k1.1; *see also supra* note 191 and accompanying text.

and is better used to allow judges to depart from sentencing guidelines rather than as a way to allow prosecutors to exchange testimony for leniency.¹⁹⁷

The panel in *Singleton I* addressed an additional argument made in support of exempting prosecutors from the bribery statute. That argument is that “[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.”¹⁹⁸ The court in *Singleton I* dismissed this argument in the case of prosecutors offering leniency in exchange for testimony based on the historical scope of the doctrine and the reasonableness of the prosecutor’s action.¹⁹⁹ First, while acknowledging the fact that federal appellate courts have allowed police investigating conduct to go beyond the bounds of the law as long as it is legitimate and reasonably necessary,²⁰⁰ the court in *Singleton I* “decline[d] to expand the meaning of ‘enforcement action’ beyond its historical scope of detection, apprehension, and prevention of crime.”²⁰¹ The court found that federal prosecutors are not officers of the law, and because the exception was meant to cover only field enforcement operations such as work by police officers, federal prosecutors do not fit this exception. Indeed, the court in *Singleton I* stated that they “found no case in which prosecutors, in their role as lawyers representing the government after the initiation of criminal proceedings, have been granted a justification to violate generally applicable laws.”²⁰²

The court also found the prosecutor’s offer of leniency in exchange for testimony to be manifestly unreasonable, and therefore, in violation of the allowance for “reasonable enforcement actions.”²⁰³ The court held that “[r]easonable law enforcement actions stop with detecting crime and observing enough to prove it. The government’s statutory violation unreasonably exceeds this purpose, and is the more egregious because the intended product of the violation is testimony presented in court.”²⁰⁴ Since prosecutors who offer leniency in exchange for testimony are not engaging in reasonable enforcement actions, they should not be excepted from the bribery statute.

The final argument made by the government involves the exception of federal prosecutors from state ethics rules. Section 3.4(b) of the American Bar Association’s Model Rules of Professional Conduct states that “A lawyer shall

197. Although testimony is not actually being exchanged for leniency, the prosecutor must move to allow a downward departure from the guidelines before the court can grant leniency.

198. *Brogan v. United States*, 522 U.S. 398 (1998). The Court’s example showed the legality of undercover narcotics officers who made false statements to drug peddlers.

199. See *United States v. Singleton*, 144 F.3d 1343, 1353-54 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir.), and *cert. denied*, 527 U.S. 1024 (1999).

200. See *id.* at 1353; see also *United States v. Mosley*, 965 F.2d 906, 908-15 (10th Cir. 1992) (holding that only a “particularly egregious” level of illegal government involvement or coercion can give rise to improper conduct on the part of the government).

201. *Singleton*, 144 F.3d at 1353-54.

202. *Id.* at 1353.

203. *Id.* at 1354.

204. *Id.*

not . . . offer an inducement to a witness that is prohibited by law."²⁰⁵ In the *Singleton I* case, the panel, using a substantially similar ethics rule, held that the government violated the rule.²⁰⁶ The Department of Justice, however, maintains that its prosecutors are not subject to state ethics rules in the states in which the prosecutors appear, even if the prosecutor is a member of that state's bar.²⁰⁷

The government's position on this matter, however, is untenable. Rules governing the conduct of lawyers make no distinction between prosecutors and defense counsel in prohibiting inducements to witnesses.²⁰⁸ Moreover, Congress passed a bill into law on October 28, 1998 making it clear that federal prosecutors are subject to state ethics rules to the same extent as any other attorney with a state license.²⁰⁹ Inducing testimony by offering leniency is a violation of the plain language of the bribery statute, and it is also a violation of state ethics rules. Because federal prosecutors are subject to state ethics rules, they could violate both the bribery statute and ethics' rules by the same act. This violation of ethics rules becomes quite serious as it can subject the federal prosecutor to discipline regardless of the testimony would be excluded at trial.

Federal prosecutors who offer leniency in exchange for testimony should be subject to the bribery statute. Because no established title or interest exists in prosecutors violating the bribery statute and the prosecutors are mere agents of the sovereign and not the sovereign itself, they fail to fall within the first class of *Nardone* cases. Furthermore, since no absurdity is worked in applying the statute to prosecutors, they do not fall within the second class of *Nardone* cases. Although §§ 6001-05 of Title 18 allow the granting of immunity for a relinquishment of the right against self-incrimination, a distinction can be made between immunity and leniency. The granting of immunity holds none of the dangers of coerced, potentially false testimony that is found in exchanges of leniency for testimony. Furthermore, although § 3553(e) of Title 18 allows the court to grant leniency upon evidence of substantial assistance, it does not necessarily contemplate testimony as substantial assistance. U.S. Sentencing Guidelines section 5k1.1 allows a judge to depart from the sentencing guidelines when substantial assistance has been rendered; however, it does not contemplate granting prosecutors a power to coerce testimony by exchanging leniency for it. Lastly, the Tenth Circuit's argument that prosecutors are alter egos of the sovereign and, therefore, an absurdity results when applying the statute to the sovereign can be refuted.²¹⁰ At the end of the day, it is wrong to call the

205. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b).

206. See *Singleton*, 144 F.3d at 1358-59 (construing KAN. RULE OF PROFESSIONAL CONDUCT Rule 3.4(b)).

207. See Johnston, *supra* note 148, at 23-24.

208. See *id.* at 23.

209. See Pub. L. 105-277, 112 Stat. 2681 (codified at 28 U.S.C. § 530); see also Harvey Berkman, *Thornburgh Rule Is Nixed—It Is No Longer OK for Federal Prosecutors to Flout State Ethics Rules*, NAT'L L.J., Nov. 2, 1998, at A8.

210. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc) (Lucero, J., concurring), *cert. denied*, 527 U.S. 1024 (1999).

prosecutor's action a plea bargain when the same action would be called a bribe if done by the defendant.

III. IS SUPPRESSION THE PROPER REMEDY WHEN FEDERAL PROSECUTORS VIOLATE THE BRIBERY STATUTE?

A. Suppression and the Due Process Cases

In due process cases,²¹¹ courts generally hold that exclusion of testimony received in exchange for leniency is not the proper remedy.²¹² The courts, instead, place great confidence in the value of cross-examination and a properly instructed jury to weigh the witness's credibility. Courts generally place little importance on the possibility that jurors might overlook the crimes of the witness. In fact, the jury may conceivably implicate the defendant more quickly based on his association with a shady witness who has committed crimes himself. The jury, in certain instances, may well decide to convict the defendant because he is the only person upon whom they can inflict punishment.

The main difference between due process cases and the bribery statute is that courts have heretofore ruled on the exclusionary rule in terms of what is fair to the defendant. In statutory violations, however, where the federal prosecutor has committed wrongdoing, the proper focus is on deterring the conduct rather than ensuring due process for the defendant. While notice to the defendant of the plea bargain and the ability to cross-examine may repair due process, these devices will not deter the prosecutor from denigrating the judicial process by making deals in exchange for testimony. If anything, the failure of the court to suppress the testimony will encourage the prosecutor to expand the practice. Because failure to suppress testimony can be an affirmation of the practice of offering deals in exchange for testimony, the use of notice and opportunity for cross-examination should be the minimum allowable standards in which to maintain a defendant's due process rights. The court should consider whether the procedure demeans the judicial process even though it may satisfy minimum due process standards. The first question, however, must be whether the court has the power to suppress the testimony if and when it does find that the procedure is a denigration of the judicial process.

B. The Inherent Power of Courts to Ensure the Integrity of the Judicial Process

In many instances, the Supreme Court has validated the use of judicially imposed exclusionary rules. In fact, it is well settled that the courts have an inherent power to control the integrity of the process. In *United States v. Blue*,²¹³ the Court confirmed this inherent power by stating that they have "recognized or developed exclusionary rules where evidence has been gained in violation of the

211. See *supra* Part I.C.

212. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966).

213. 384 U.S. 251 (1966).

accused's rights under the Constitution, federal statutes, or federal rules of procedure."²¹⁴ In *Blue*, a prosecutor's use of evidence violated the defendant's Fifth Amendment right against self-incrimination, but the Court held that judicially imposed exclusion would be proper in cases of statutory violations, as well.²¹⁵ In fact, the Court stated expressly in *McNabb v. United States*²¹⁶ that the principles governing the admissibility of evidence in federal trials have not been restricted to constitutional violations.²¹⁷

Opponents of exclusionary practices argue that where the legislature sets out a remedy, courts cannot make up a different one. The Second Circuit, in 1987, refused to suppress evidence when the government violated a statute for which there was a statutory remedy.²¹⁸ The *Singleton* panel, however, distinguished the Second Circuit case by stating that the policy of Congress in enacting the bribery statute was to protect the courts and parties from unreliable evidence. Unlike the issue in *Benevento*, violation of the bribery statute directly relates to the taint and reliability of evidence.²¹⁹ Moreover, federal prosecutors can hardly be expected to prosecute themselves for violating the bribery statute. Exclusion of testimony, even in the face of a statutory remedy, is proper and effective at removing unreliable evidence.

Judicially imposed exclusion has been utilized many times in the name of preserving the integrity of the judicial process. Simply put, the judiciary must have the authority to protect its integrity in order to execute its functions. As early as 1888, the Supreme Court noted that courts necessarily have inherent equitable power over their own process to prevent abuses, oppression, and injustices.²²⁰ More recently, a district court in New York maintained the inherent authority of the courts to prevent abuses in the case of *Fayemi v. Hambrecht*.²²¹ In that case, the court suppressed illegally obtained evidence in an employment discrimination suit. In considering the appropriate sanction for wrongfully obtained evidence, the court took into account two factors: (1) the severity of the wrongdoing and (2) the prejudice to the adversary.²²² The court found the first factor important because it sought to deter future conduct of a similar nature by the violating party.²²³ The second factor ensured that the wrongful acquisition

214. *Id.* at 255; *see also* *United States v. Payner*, 447 U.S. 727 (1980) (relying on the Court's supervisory power to exclude evidence because it promoted judicial integrity in its flexibility of formulation of the relevant and important objectives).

215. *See Blue*, 384 U.S. at 255.

216. 318 U.S. 332 (1943).

217. *See id.* at 340-41.

218. *See United States v. Benevento*, 836 F.2d 60, 69-70 (2d Cir. 1987).

219. *See United States v. Singleton*, 144 F.3d 1343, 1360 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999).

220. *See Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

221. 174 F.R.D. 319, 324 (S.D.N.Y. 1997).

222. *See id.* at 325.

223. *See id.*

of evidence did not benefit the acquiring party.²²⁴ Ultimately, the court found that Mr. Fayemi's attempt to introduce evidence that was obtained by illegally accessing private areas of the defendant's property without permission was serious enough to warrant suppression.²²⁵

When the court applies its inherent power to federal prosecutors who violate the bribery statute, suppression becomes the best means of ensuring future compliance. An analysis of the *Fayemi* factors shows a seriousness at least equal to that of accessing private areas. Mr. Fayemi attempted to submit evidence that would further the search for truth, while federal prosecutors, by making deals, set up an incentive to act with bias, possibly masking the truth. Furthermore, the plain language of the bribery statute is violated when prosecutors negotiate plea deals in exchange for testimony; thus, the wrongdoing by the prosecutor is severe. The defendant is also prejudiced by the introduction of testimony where the witness had an incentive to lie. Although courts have found that due process is not offended, that is but a minimum standard, and the court should limit the availability of witness testimony that has been exchanged for leniency.

C. *Exclusion of Evidence as a Remedy for Statutory Violations*

The Supreme Court has suppressed illegally obtained evidence not only when it violated the Constitution, but also when it violated a statute.²²⁶ Furthermore, courts may be allowed to suppress evidence even when Congress is silent. In *McNabb v. United States*,²²⁷ the Court reversed convictions because the suspects were not taken before a United States Commissioner or a judge, in violation of federal statute. The Court felt the interests of justice were best served by excluding the inculpatory statements made by the defendants while being held illegally.²²⁸ Explaining its holding, the Court stated that judicial supervision of criminal justice "implies the duty of establishing and maintaining civilized standards of procedure and evidence . . . guided by considerations of justice . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."²²⁹

The Supreme Court has dealt with judicial exclusion for statutory violations on a number of occasions.²³⁰ In *Nardone*,²³¹ the Court reversed a conviction

224. *See id.*

225. *See id.*

226. *See supra* Part III.B.

227. 318 U.S. 332 (1943).

228. *See id.* at 341-42.

229. *Id.* at 340-41.

230. *See, e.g., Sabbath v. United States*, 391 U.S. 585 (1968) (holding that unlawful police entry into a dwelling even with a warrant results in inadmissibility of the evidence obtained); *Miller v. United States*, 357 U.S. 301 (1958) (police forcing their way through a chained door was unlawful and warranted exclusion of seized evidence).

231. 302 U.S. 379 (1937).

obtained by prosecutors with the help of illegal wiretapping.²³² Wiretapping was illegal under the Communications Act of 1934.²³³ At the time, the statute contained no provision for the courts to suppress evidence obtained in violation of the statute, but the Court ordered suppression nevertheless.²³⁴ Regarding the challenge that Congress never intended federal agents to be hampered in the detection and punishment of crime, the Court said, "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."²³⁵ Although federal prosecutors are only violating a statute rather than the Constitution, the distinction is irrelevant. There is ample precedent permitting the exclusion of evidence obtained in violation of statutes.

The viability of excluding testimony obtained in exchange for leniency is reinforced by scholars. In fact, the practice has become so ingrained and commonplace in the judicial process, it has prompted George E. Dix of the University of Texas School of Law to write that courts have accepted that exclusion is the usual remedy, even in non constitutional illegalities, so "Congress must, therefore, have assumed that an exclusionary remedy would be applied if the legislation was silent on the matter."²³⁶ Whether Congress had in mind the exclusion of testimony when the bribery statute was violated remains to be seen; it is significant that the principle reason behind the adoption of the exclusionary rule was the government's failure to observe its own laws.²³⁷ Exclusion of testimony promotes judicial integrity, controls the government litigator, and is the proper remedy when the bribery statute has been violated.

It can be argued that because Congress specifically included a punishment in the bribery statute, it would have included exclusion had it desired. However, along with the fact that exclusion is the normal remedy for violations of statutes that stand to denigrate the judicial process, it is also true that courts are in a better position to fashion rules that guide the judicial process. Courts deal with evidentiary matters every day and are well equipped to use their given discretion to adjust to any new situations. Courts are also in a better position to develop common law doctrine through the more particular process of case by case analysis and precedent. Congress, on the other hand, must enact a broad law, then repeatedly revisit the law in future years in order to adjust to the demands

232. See *id.* at 384-85.

233. See 47 U.S.C. § 605 (1934). The current version of the wiretapping statute does contain a provision prohibiting the use as evidence of intercepted wire or oral communications done in violation of law. See 18 U.S.C. § 2515 (1994).

234. See *Nardone*, 302 U.S. at 383-85.

235. *Id.* at 383.

236. George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 80-81 (1989).

237. See *United States v. Russell*, 411 U.S. 423, 430 (1973) (rejecting the exclusion of evidence leading to a drug conviction due, in part, because the undercover agent who infiltrated the enterprise did not break any laws).

of legislators and the public.

The political nature of passing laws for the exclusion of evidence tends to keep the legislature away from the area altogether. There is a public desire to be tough on crime. Many attempts at legislating the exclusion of testimony can be seen by constituents as being soft on crime. Legislators generally do not like to act in unpopular ways. Furthermore, statutes that are passed by the legislature tend to straightjacket the courts, taking away their discretion and possibly preventing the application of proper justice. Lastly, the complexity and length of undertaking a study that would set forth explicit rules for the triggering of the exclusion of evidence provides a disincentive for the legislature to get involved. While the legislature is better suited to further a broad and important social interest, legal matters with evidentiary implications aimed at truth are better left to the courts.

Finally, the Supreme Court has enumerated three purposes for using the Court's inherent supervisory powers: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity; and (3) as a remedy designed to deter illegal conduct.²³⁸ When applied to prosecutors who violate the bribery statute, the use of the court's inherent powers to exclude testimony certainly preserves judicial integrity by removing possibly perjurious testimony. Exclusion also provides a disincentive for prosecutors to violate the bribery statute on future occasions. The policy of Congress through the bribery statute aims to protect courts and parties from the taint of bribery. Excluding tainted testimony removes the sole purpose of the unlawful conduct and leaves no incentive to violate the bribery statute. Exclusion of the illegally obtained testimony is particularly appropriate for this policy. In contrast, "to permit unlawfully obtained evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."²³⁹ While an argument can be made that testimony given in exchange for leniency should not be excluded since the courts have refused to exclude evidence in due process challenges, the proper perspective in leniency cases should focus not on the rights of the defendant, but on the conduct of the prosecutor and how the introduction of possibly perjurious testimony denigrates the judicial process.

In the end, there is an alternative to the exclusion of testimony when federal prosecutors violate the bribery statute. The Model Rules of Professional Conduct prohibit an attorney from offering inducements to a witness in contravention of the law.²⁴⁰ If a court were to find that the bribery statute was violated but exclusion was improper based on notice and the availability of cross-examination, state ethics' rules should loom large, deterring federal prosecutors from offering leniency for testimony lest they be disciplined or even disbarred.

238. See *United States v. Hasting*, 461 U.S. 499, 505 (1983).

239. *United States v. Mitchell*, 322 U.S. 65, 67 (1944) (quoting *McNabb v. United States*, 318 U.S. 332, 345 (1943)); see also *Fayemi v. Hambrecht*, 174 F.R.D. 319 (S.D.N.Y. 1997) (stating that "the court, by allowing the wrongdoer to utilize the information in litigation before it becomes complicit in the misconduct.").

240. See generally *supra* notes 205-09 and accompanying text.

In this way, the end result is the same; potentially perjurious testimony would not come to court, and the prosecutors would refrain from doing that which would land another person in jail.

IV. IS JUSTICE SERVED BY APPLYING THE BRIBERY STATUTE TO FEDERAL PROSECUTORS?

Prosecutors have wide discretion when choosing whether to prosecute certain cases. The courts must tread lightly whenever hampering the discretion of prosecutors, especially when the result may mean that an arguably guilty defendant will go free. However, the Supreme Court has spoken on this issue, saying "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."²⁴¹ In terms of the bribery statute, a prosecutor's discretion may not be in the best interests of justice. In other words, the prosecutor may be unwilling to prosecute another prosecutor for violations of the bribery statute, at least where the only violation deals with leniency granted in exchange for testimony.

The prosecutor has a duty not only to obtain a conviction, but also to seek justice.²⁴² This duty could conceivably give rise to the argument that prosecutors are well in control of their witnesses and know the difference between the truth and a lie. The government may, in fact, assume that prosecutors will not abuse their power and reward witnesses for perjured testimony.²⁴³ However, justice is best served when all are held to the same law rather than relying on the prosecutor's judgment, especially when the incentive to lie is so great. Witnesses have, indeed, admitted to lying in their testimony in order to receive leniency. In *United States v. Kimble*,²⁴⁴ the witness admitted to lying in over thirty different statements, after being motivated by his sense of self-preservation under a plea arrangement requiring his testimony in return for a lenient sentence.²⁴⁵ Despite admissions of this sort, there is only one reported case where a testifying informant for the government was prosecuted for perjury.²⁴⁶ It is well settled that the government cannot deliberately use perjured testimony or encourage the use of perjured testimony,²⁴⁷ so the great incentive to lie in the face of an offer of leniency should cause the prosecutor to refrain from making such a deal lest he risk punishment for causing the perjury himself.

Federal prosecutors are representatives of "a sovereignty whose obligation

241. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

242. *See Berger v. United States*, 295 U.S. 78, 88 (1935).

243. *See Johnston*, *supra* note 148, at 24.

244. 719 F.2d 1253 (5th Cir. 1983).

245. *See id.* at 1255-57.

246. *See Johnston*, *supra* note 148, at 22 (referring to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991)).

247. *See Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

to govern impartially is as compelling as its obligation to govern at all."²⁴⁸ Applying the bribery statute to all parties in a prosecution advances both the enforcement of laws and the proper administration of the judicial system.²⁴⁹ Moreover, "[b]ecause prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of [the bribery statute] to their activities."²⁵⁰

Perhaps the most eloquent statement made in support of excluding evidence for prosecutorial malfeasance was made by Justice Brandeis in 1928. His often quoted dissent in *Olmstead v. United States*²⁵¹ states that:

Aid [to the government] is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.²⁵²

The *Singleton* panel expounded on Justice Brandeis's words by refusing to allow that "venerable principle" to give way to the expediency of the government's present practices without legislative authorization.²⁵³ Clearly, the *Singleton* panel and others have found importance in the control of the possible abuse of prosecutorial discretion through their inherent supervisory powers.

CONCLUSION

Justice is best served when it applies equally to the actions of prosecutors and defendants alike. In the case of testimony received in exchange for a recommendation of leniency, federal prosecutors are violating the bribery statute, 18 U.S.C. § 201(c)(2), and should be held accountable. First, the plain language of the bribery statute subjects everyone who creates a danger of corruption to punishment, prosecutor or not. Second, the sentencing guidelines and immunity authorization sections of the Code can independently coexist with the bribery statute, thereby showing no conflict. Third, offers of recommending leniency are, indeed, things of value, for the judge cannot depart from the sentencing

248. *Berger v. United States*, 295 U.S. 78, 88 (1935).

249. *See United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

250. *Id.* at 1347.

251. 277 U.S. 438 (1928), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) *and Katz v. United States*, 389 U.S. 343 (1967).

252. *Id.* at 484-85 (Brandeis, J., dissenting).

253. *Singleton*, 144 F.3d at 1347; *see also Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982) (requiring strict adherence to the language of the Sherman Act in order to enhance the legislative prerogative to amend the law).

guidelines or from statutory minimum sentences without a motion by the prosecutor. Moreover, the offer of leniency induces a witness to testify where he was not previously willing, which suggests that the offer has motivational value. Fourth, exclusion of testimony removes potentially perjurious influences out of court and deters such conduct in the future. In the alternative, a violation of the bribery statute will also be a violation of state ethics' rules, and because federal prosecutors are subject to state ethics' rules, they will be less likely to risk disciplinary action by granting leniency for testimony. Lastly, excluding testimony given in exchange for leniency comports with notions of justice and fair play. John Wachtel, attorney for Ms. Singleton, said that "[a]ny testimony that is paid for is untrustworthy."²⁵⁴ Also, J. Richard Johnston, an early proponent of subjecting prosecutors to the bribery statute, said that "[i]f the basic policy reason behind the [law] is that paying a witness to testify is likely to induce the witness to slant testimony in favor of the side that pays him or her, that is a perversion of the judicial system, no matter which side does it."²⁵⁵ The further the prosecutor is allowed to go in separating his allowable conduct from the public's, the closer we come to a police state, and we are diminished as a nation.

254. Richey, *supra* note 2.

255. *Id.*

