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DEFENDING A PUBLIC OFFICIAL AGAINST CHARGES OF PUBLIC CORRUPTION IN THE UNITED STATES AND THE MODEL CASE OF UNITED STATES OF AMERICA V. MCDONOUGH

INTRODUCTION

I. FEDERAL INVESTIGATIONS AND PROSECUTIONS OF STATE AND LOCAL OFFICIALS

A. Observations

1) Since the 1970s the United States Justice Department has made it a priority to target state and local officials for acts of public corruption.

2) This broad jurisdiction of the United States into the activities of local and state officials is supported by vast investigative resources of the Federal Bureau of Investigation, the Internal Revenue Service and the United States Attorney's Offices throughout the country and the Criminal Division of the United States Justice Department.

3) As evidenced by the McDonough model, the federal statutory scheme aids this jurisdiction and is more broad and comprehensive than state penal laws that contain generic statutes proscribing such traditional acts of corruption as perjury, theft (larceny), schemes to defraud, bribery and influence peddling. The broad federal statutory framework is identified in statutes known as RICO, which stands for Racketeer Influenced and Corrupt Organization Act, Mail Fraud, Wire Fraud, and Extortion ("Hobb's Act"). The federal government may also rely on false statement and perjury statutes where public officials have made false unsworn and/or sworn statements during the course of an investigation although the underlying acts of fraud and corruption have not been shown.

B. Role of the Defense Attorney

The defense counsel's immediate response to an investigation against his client for public corruption involves:

(i) understanding the elements of the federal statutes and their broad meaning. For example, the language adopted by the courts in interpreting the Hobb's Act is to the average lay person confusing, abstract and different from commonly understood criminal standards. Extortion under the Hobb's Act

requires that a showing be made that a public official obtained money to which he was not entitled and know that the payment is or was in return for "official" acts. However, the Hobb's Act outlaws extortion "under color of official right" and prohibits officials who exercise direct or indirect power from receiving payments by a victim who is motivated as a result of the public official's exercise of political power when he is aware of this fact. In McDonough, two victims testified that they did not give money to Chairman McDonough because of his political power or believing that such payments were improper. It was McDonough's role as Chairman of the Democratic Party in his county, a fact known to the victims, which allowed the government to argue that the victims would know that McDonough was able to steer business to them and that he would share in the proceeds of the business;

(ii) controlling the client who is a public official who must continue to balance his public position against media and public claims of corruption. The defense attorney's role at this juncture is critical because he must convince his client to avoid public discussion of the acts underlying the claims against him. In the United States, the media takes an aggressive role in such investigations and often initiates an investigation. The McDonough case is another example of this anomalous situation in the United States. In every public corruption case in which this speaker has participated, including the McDonough case, the public pronouncements of the charged official have been introduced in court against him as either evidence of the crime, prior inconsistent statements, or statements that were introduced to rebut or contradict a claim made by a defendant in court;

(iii) taking a proactive position in the prosecutor's office by learning as early as possible of the factual basis for the claim of corruption. The defense attorney must interview witnesses, examine relevant documents, and assess the strength of the government's case at the earliest possible time. Much consideration should be given by the defense attorney to an early settlement. Such an approach by a defense attorney requires a thorough knowledge of potential sentences under the Federal Sentencing Guidelines and this knowledge enables the defense attorney to balance the risks of going forward and contesting the charges. Early compromise may involve lesser charges, restitution, cooperation of the investigated party into the activities of others, and resignation from public office, all factors that mitigate a harsher sentence, which the client might receive at the conclusion of an unsuccessful trial;

(iv) establishing a strategy to develop the information that is otherwise not available to him. The defense has no subpoena power in the investigative stage of a case. Using the McDonough case again as an example of this proposition, the two victims in the case were identified early as critical witnesses against McDonough and complete statements were taken from

them in which they made exculpatory admissions to the defense attorney. Notwithstanding the conviction against McDonough, the two victims testified forcefully that their acts of paying money to McDonough were voluntary and not paid because he was a public official but rather because he was an insurance broker who had the power to steer insurance business to them;

(v) managing the media. In the event the media continues to participate in the public clamor against the client, it may be the desire of the client to have his defense attorney make a statement that will protect his interests in the eyes of the voters/constituents. While it is this attorney's experience that silence by the defense attorney and his client is the best course of action because the case will then not invite continued scrutiny, from a strategic point of view the public official may wish to be heard in the press. For this reason it is highly recommended that during the investigation stage any statements made to the press be made by the defense attorney and that the statement emphasize (aa) the client believes he will be vindicated; (bb) the charges against the client are only accusatory; (cc) that only a trial of the facts will resolve the issues; (dd) that the client wishes to continue to represent his constituents and voters as faithfully as possible; and

(vi) determining whether the investigation underway is a result of partisan politics spawned by opponents of the client. This is especially so in a state rather than federal investigation. There are more opportunities for local politicians of a different party to generate an investigation in the local county prosecutor's office than at the federal level. The advantage of a federal prosecution is that prosecutors are immune from petty party politics and the FBI and other federal agencies operate under standards of strict scrutiny. State prosecutions that are the result of partisan politics are suspect in the minds of American jurors who deliberate not only upon the facts but with respect to issues of fairness.

II. THE FEDERAL STATUTORY SCHEME: HOBB'S ACT, MAIL FRAUD, WIRE FRAUD, RICO, FALSE STATEMENT, BRIBERY, PERJURY AND CODES OF ETHICS

A. Mail Fraud and Wire Fraud. 18 United States Code §1341 and §1343

Mail Fraud and Wire Fraud are the most commonly used charges to combat public corruption in the United States. Under these statutes the government may charge federal, state, or local officials with devising any scheme to defraud, or a scheme to obtain money or property by means of false or fraudulent pretenses. To gain federal jurisdiction, the prosecution must prove a single use of the mails or wires (telephone, facsimile transmissions, e-mail) to execute the plan. In 1988, the federal law was amended in 18 United States Case §1346 so that the term "Scheme to Defraud" now includes a scheme to deprive another of the intangible right of honest services. This standard encompasses a public official who obtains money under circumstances that may not reflect commonly understood proscribed conduct such as bribery, or larceny. Likewise a failure to disclose a benefit of where the public official has a duty to disclose may also satisfy this element of the mail fraud and wire fraud statutes.

A scheme to defraud under the mail fraud or wire fraud statutes is described by the courts as "a plan to deprive a person of something of value by trick, deceit, chicane, or overreaching". United States v. Autuori, 22 F3d 105, 115 (2nd Cir. 2000). The actual transmissions that use the mails or wires do not themselves have to be false or contain misrepresentations. It is the fraudulence of the scheme itself and not any individual falsehood that must be charged. The government need not prove that the victim was actually defrauded, but only that the harm or injury to the victim was contemplated by the schemer. The complexity of these two statutes presents a difficult job for a defense attorney representing a public official. The defense must be mindful of the various elements of the mail fraud statute to assure that in defending a charge the prosecution presents evidence of the specific allegation set forth in the indictment and not some other set of facts. The McDonough case presented a classic example of the confusion which is presented in the defense of these cases. For example, in McDonough, the government not only charged that McDonough devised a scheme to defraud others of money and property, but also that he intended to deprive a local county (political subdivision) of its right to control its money, property, or thing of value by means of concealment or non-disclosure. This charge provided the defense with an extraordinary burden. Also, this type of anomalous charging may result in a number of jurors agreeing upon one theory of prosecution and with others agreeing on another theory of the prosecution and compromising their verdict to convict on the scheme to defraud. The difficulty presented to the public official and his defense is that the mail fraud and wire fraud statutes contemplate two types of schemes, the first one being a scheme to obtain money by false or fraudulent pretenses, and the second, being a scheme to deprive one of certain intangible property rights, such as control over one's money or the right to have his affairs conducted honestly, impartially, and free

from deceit or corruption.

B. Racketeer Influenced and Corrupt Organizations Act (RICO) 18 United States Code §1962

This statute was enacted by the United States Congress in 1970 and initially was aimed at organized crime in the United States. However, two subdivisions under the RICO statute have been adopted to deal with public corruption. Under 18 United States Code §1962 (c) it shall be unlawful for any person employed by or associated with any enterprise engaged in interstate commerce to conduct such enterprises or affairs through a pattern of racketeering activity. Under subdivision (d) it is unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c). The term "interstate commerce" is simply a jurisdictional standard which requires that the prosecution prove only a minor impact upon interstate commerce. The impact may be slight, subtle or even only potential. To constitute a "pattern of racketeering activity" there must be at least two acts of racketeering activity that occurred during the applicable time periods. Such predicate acts include mail fraud, wire fraud, bribery, financial institution fraud, money laundering, illegal gambling, common law/state penal law violations such as bribery, extortion, obstruction of justice, tampering with a witness, et al.

In the McDonough case, the government charged five racketeering acts under the Mail Fraud, Extortion, and Bribe Receiving statutes. RICO charges were thus interrelated with the Mail Fraud and Wire Fraud charges against Chairman McDonough. By charging the RICO statute, defendants and McDonough are exposed to enhanced punishment and, under the civil RICO statue, substantial monetary damages. Under the criminal charge of RICO, criminal forfeiture of an interest acquired or maintained in violation of § 1962, including any enterprise operated in violation may be forfeited. The public official may also be barred from using available assets to obtain legal representation without the consent of the prosecution and the approval of the court.

The racketeering statutes present a particularly unique problem to the defense in a public corruption case. Often, the RICO charges are based upon the substantive acts of mail fraud and wire fraud contained in other parts of the indictment. Thus, conviction upon those substantive counts, may result in a finding of guilt upon the RICO statutes. However, not all predicate acts may be found in the other substantive counts in the indictment and the defense must be alert to the fact that the prosecution may attempt to prove other discrete criminal acts, such as bribery, extortion, larceny, money laundering, or state based offenses.

C. The Hobb's Act, 18 United States Code §1951

This is an extortion statute that makes it a crime to obstruct, delay, or affect commerce by robbery or extortion. This statute is often used together with the mail fraud and wire fraud statute to charge that a public official has obtained money or

property to which he was not entitled knowing that the payment was made in return for official acts. It is most often compared to the bribery statutes contained in both federal and state law.

The Federal Government uses the extortion statute in the following manner. Extortion "under color of official right" is that either a public official, or a private individual who has political power, such as Edward McDonough, received money from a "victim" who is motivated to give the official or private individual money as a result of the official's exercise of power. The defense of these charges centers around a claim by the defense that the public official must know and realize that at the time of the payments from the victims, the victims knew or perceived that the official exerted such control and that payments were motivated by this exercise of power.

A second and more commonly used theory of the extortion statute is that payment constitutes extortion if it is accompanied by fear of economic loss. This is a separate and distinct branch of the Hobb's Act and may be used against a public official who obtains money (such as in a bribery case) by instilling in the victim an expectation that he will receive something in return (such as a public contract) or, in the alternative, lose such a benefit if he does not make such payment. Such payment may be made to a third party, and it is not unlikely that the prosecution could charge a public official with a Hobb's Act violation by alleging that large political contributions to his organization constituted payments made in contemplation of fear of economic loss.

Again, the defense is faced with a particularly difficult task in the United States of defending against Hobb's Act violations because the government need only prove that the public official knew at the time of the payments that he exerted such control and that payments were motivated by this exercise of power. Thus, even if the victims deny this motivation, an American jury may find extortion by inferring that the public official exerted such control and power and that the payments to him were motivated by this exercise of power. A Hobb's Act violation may also serve as a predicate act for the RICO offenses and, in fact, such was the case in McDonough.

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III. PROCEDURAL ASPECTS OF DEFENDING A POLITICAL OFFICIAL CHARGED WITH OR BEING INVESTIGATED FOR PUBLIC CORRUPTION IN THE UNITED STATES

A. Grand Jury

In the United States, federal indictments are heard before a federal grand jury, consisting of 16-23 citizens who hear evidence presented by the prosecution. Federal Grand Juries are created by the United States Constitution and are regulated by Federal Rules of Criminal Procedure. A vote of 12 or more jurors is necessary to find an indictment. The Grand Jury may investigate cases based upon suspicion, probable cause, or references made to it by the prosecution. The Grand Jury may even on its own undertake an investigation upon being informed of an apparent violation of law by a third party, including a citizen or the media.

With respect to public corruption investigations, the most important aspect of this stage of the proceeding is whether to present a public official to the Grand Jury to testify. In the United States, no witness is required to testify and is protected by the 5th Amendment to the Constitution. The public official often wishes to present himself to the Grand Jury to convince the Grand Jury that no crime has occurred. This decision is clearly the client's and not the defense attorney's decision. However, the important role of the defense attorney at this stage of the proceeding is to inform his client of the dangers of appearing before the Grand Jury and being exposed to vigorous cross-examination by the prosecution who often has in his possession documentary evidence, statements of others, and information that the prosecutor can use to lure the public official into perjurious statements. In fact, it is often the case that a public official presenting himself to a Grand Jury finds himself indicted upon charges of perjury before the Grand Jury. Therefore, the client must again balance risks. Because it is this counsel's experience that public officials and white collar defendants who testify before the Grand Jury do not often convince a Grand Jury of their innocence at this stage because of the low standard of proof before a Grand Jury, it is good practice to counsel the public official to avoid appearing before a Grand Jury, especially because the witness has no counsel or judge present to monitor the proceedings. Also, there is no ability of defense counsel at this stage of these proceedings to prevent his client from being prejudiced by adverse publicity, which may directly taint the Grand Jury notwithstanding the persuasive testimony of the public official. Once the public official testifies, his transcribed testimony may serve as direct testimony against him in a prosecution for political corruption.

B. Discovery

Systematic discovery of the government's case against the public official is the most important stage of the proceedings and the one in which the criminal defense attorney must exercise diligence. Pursuant to Federal Rules of Criminal Procedure, the defense must specifically request all information available to the government either by

motion or by letter to the United States Attorney. Such information, which is available to the defense, includes prior statements of the defendant intended to be used, written or recorded statements, oral statements of the defendant made in response to questioning by the police and/or Federal Bureau of Investigation, Grand Jury testimony, and other relevant oral statements made by the defendant to a government agent.

In a political corruption case, the defense must be especially mindful of the fact that a prosecutor has a duty to disclose, upon request, all evidence favorable to the defendant that is material to guilt or to punishment. In the United States this is known as the Brady Rule (following Brady v. Maryland, 373 U.S. 83 (1963). This is an important tool in defending a political corruption case because the investigative agency has interviewed scores of witnesses - - many of whom are political allies of the defendant. The Supreme Court of the United States has defined "materiality" as meaning that the evidence in question, if presented, would have created a reasonable probability that the result would have been different. Any evidence that can be shown to have a potential impact on the verdict, or which would affect the credibility of a government witness, is Brady Rule material. Under this standard, the government must disclose even "classified" documents in possession of the Department of State, the Department of Defense or the CIA if such documents are relevant to the development of a valid defense. In this case, the court must balance the defendant's need for documents against national security concerns before providing such documentation.

Included in the discovery process is the disclosure by the government of any electronic surveillance that was used in the development of evidence.

C. Pretrial Motions

In the federal system, the defendant is entitled to submit to the court pretrial and other motions for certain relief. Thus, after indictment, the defense attorney defending a public official must pay attention to how the Grand Jury functioned and whether the Grand Jury was constitutionally and statutorily unbiased. Thus, the defendant may seek to dismiss an indictment based upon: (a) improper selection of grand jurors, including systematic exclusion from the Grand Jury of members of the defendant's race; (b) perjurious testimony permeating the Grand Jury proceedings; (c) prosecutorial misconduct including the failure of the prosecutor to present exculpatory evidence to a Grand Jury when the exculpatory evidence likely would have caused a different result; (d) the indictment was returned by an insufficiently constituted Grand Jury of less than 16; and (e) the secrecy of the Grand Jury proceedings, as required by federal law, was violated by allowing an unauthorized person to be present in the grand jury room.

Motions to Dismiss in the United States are difficult because federal grand jury indictments are clothes with a "presumption of regularity". The heavy burden is on the defendant to overcome this presumption of regularity.

Counsel must always be mindful of the argument that the statutes under which a defendant is charged are unconstitutional because of vagueness if it permits and allows arbitrary and discriminatory enforcement of the law. The statute must define conduct so that the public official is on notice. The statute must provide notice that the behavior for which the public official is to be punished was illegal, and the laws are not arbitrary or discriminatorily interpreted by government officers. For example, when the government prosecutors began alleging under mail fraud statutes that an intangible right protected was the right of “good government” or honest services, defense attorneys representing public officials sought to dismiss such indictments based on this constitutional principle. In response, Congress amended the mail fraud statute by specifically providing that such an intangible right to good government is within the meaning of the mail fraud statue.

Motions to dismiss in public corruption cases are similar to those that are available to every defendant in the United States including motions to dismiss upon the grounds that the speedy trial statutes have been violated; that the charges are either duplicitous or multiplicitous; that conspiracy counts improperly identify multiple conspiracies in violation of established case law. In addition, at the motion stage, the defense attorney must pursue all discovery that the government has failed to turn over as a result of the requests previously made or the orders previously given by the court to produce said evidence. The failure to provide such discovery or to provide exculpatory evidence in violation of the Brady Rule constitutes a separate ground for dismissal.

Where two or more defendants are charged together, consideration should be given for a motion to sever the trials so that the two defendants may be tried separately, especially where one defendant may provide favorable or exculpatory evidence in the trial of the other.

IV CONCLUSIONS AND OBSERVATIONS

Public corruption cases require impartial scrutiny by a prosecutor who applies the law to the facts. The prosecutor must be free of political influence and above criticism. In the United States, the Federal Prosecutor's Office enjoys this reputation, whereas local prosecutors who are elected officials and members of political parties often may be criticized for either favoring officials who are members of their party or conducting unfounded investigations against political officials who are members of the opposite party. While in most cases these criticisms are incorrect, the perception itself warrants active involvement by the Federal Prosecutor's Office in most political corruption cases. An unfounded investigation may ruin the career of an otherwise honest politician who may have been elected by the voters. Thus, a prosecutor's office can undo the choice of the people in electing an official simply by conducting an investigation that is disclosed publicly through the media.

The defense attorney's role in a public corruption case is difficult and has many aspects. Initially, he must counsel his client to remain silent in his dealings with the press and media, to avoid involving himself in the investigation, influencing witnesses or conducting clandestine interviews with potential witnesses, and to examine the facts as they are developed to determine if the best course of action is to avoid investigation, indictment and trial, or settlement and plea bargain. At the earliest possible time, the defense attorney must be proactive and fully understand the difficult statutory framework available in the United States for prosecuting corruption. He must prepare memoranda and briefs and consider updates. If he determines that the investigation is ill founded or based on the misapplication of law or facts, he should address the prosecutor's office and present legal authority at the earliest possible time in order to prevent an unfounded indictment and public disclosure. In the United States, it is often the practice of defense attorneys to await presentation of evidence and legal theories until the time of trial. Because a public corruption investigation can ruin reputations and end careers, and undermine public confidence in public officials, it is necessary that the defense attorney in such cases assume a role, which may well be different than the role he assumes in a different case.