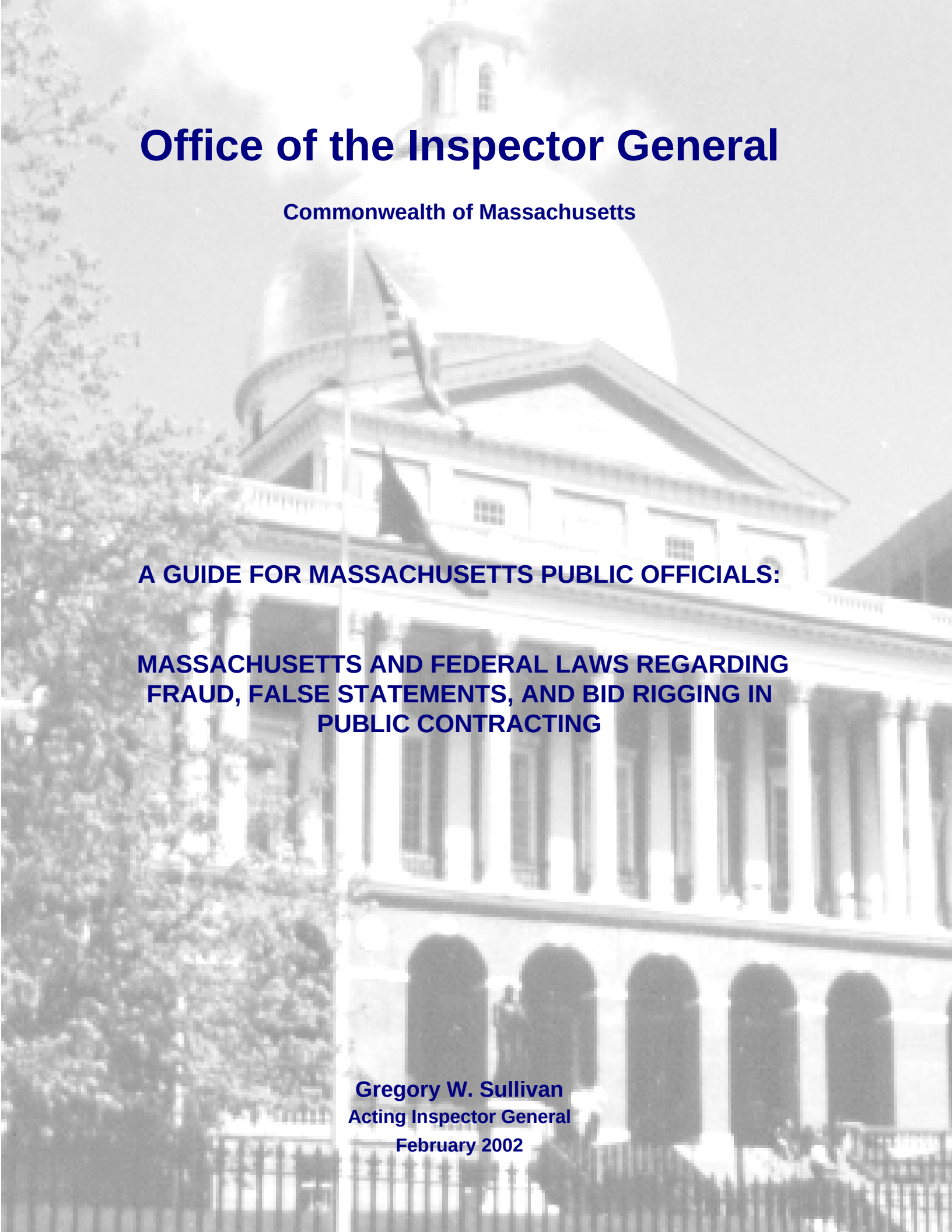

Office of the Inspector General

Commonwealth of Massachusetts

A GUIDE FOR MASSACHUSETTS PUBLIC OFFICIALS:

MASSACHUSETTS AND FEDERAL LAWS REGARDING FRAUD, FALSE STATEMENTS, AND BID RIGGING IN PUBLIC CONTRACTING

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February 2002

The Commonwealth of Massachusetts

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February 2002

In keeping with the mandate of this office, I am today releasing a Guide for Massachusetts Public Officials containing an analysis of Massachusetts and federal laws pertaining to bid rigging, fraud, and false statements in public contracting. This Guide was prepared by Staff Counsel, John M. Callahan, Jr.

While the vast majority of public servants and private individuals who conduct business in the Commonwealth and its political subdivisions are persons of integrity, this guide was written to sensitize public officials in general, and those involved with public purchasing, to anti-competitive and fraudulent practices which can occur in the public purchasing arena.

By raising the level of knowledge of public officials in Massachusetts, it is my hope that they will be better able to protect themselves from inadvertently becoming involved in improper activity.

Sincerely,

Gregory W. Sullivan
Acting Inspector General

Publication No. 18294-54-5C-2/02-IGO, Approved by Philmore Anderson, III, State Purchasing Agent.
Printed on recycled paper.

INTRODUCTION

The vast majority of public servants and private individuals who do business with the state and its political subdivisions are persons of integrity. Nevertheless, since its inception in 1980, the Office of the Inspector General has investigated numerous instances of corrupt activity in state and local government. The purpose of this article is to raise the level of awareness and knowledge of public officials in Massachusetts regarding federal and state criminal laws that pertain to public corruption. Moreover, it is our hope that government officials involved with public purchasing and public contracting will become more sensitized to criminal anti-competitive practices which occur in the public purchasing arena. Similarly, this Office wishes to alert public officials to the federal and state laws that apply to false statements and claims made in connection with spending public funds.

This article contains an in depth and straight forward discussion of federal and state criminal laws that pertain to corrupt activities engaged in by state and municipal officials. The federal and state crimes reviewed are serious felony crimes and some of them carry potentially severe prison sentences. The article also reviews federal and state laws that prohibit false statements and false claims pertaining to the spending of public funds. Finally, the article examines the anti-competitive practice of bid rigging and provides suggestions on how to detect it.

By raising the level of knowledge of public officials in Massachusetts regarding these important matters, it is our hope that they will be better able to protect themselves from inadvertently becoming involved in inappropriate activity. Moreover, public officials will be better able to recognize criminal activity when they see it and report it to the appropriate authorities.

BID RIGGING and the ANTITRUST LAWS

The Sherman Act

The most important goal of any public procurement system should be open and fair competition. Open and fair competition provides all qualified bidders with an equal opportunity to obtain public contracts. Moreover, real competition provides public entities with the opportunity to purchase quality goods and services at the best available prices. The General Laws of Massachusetts require public entities to follow a competitive bidding process in order to achieve these objectives.[1] The statutory bidding process will be circumvented if competitors are permitted to engage in collusive practices. The United States Department of Justice has pointed out that "when competitors collude, prices are inflated."[2] Public purchasers and ultimately the taxpayers are cheated. For these reasons, bid rigging is illegal in the United States and those who

[1] See, e.g., MASS. ANN. LAWS ch. 30B (Law Co-op. 1995)

[2] Robert E. Connolly Esq., U. S. Department of Justice, *Bid Rigging – It Happens: What it is and What To Look For, An Antitrust Primer For Procurement Professionals, 1*

become involved in it are subject to criminal prosecution under federal and state antitrust laws. The federal statute that prohibits bid rigging is the Sherman Act (the Act) which was originally enacted in 1890. Section 1 of the Act (15 U.S.C. §1) prohibits agreements among competitors to restrain trade or commerce among the several states or with foreign nations.

The federal courts have often declared bid rigging to be a per se violation of the Act.[3] (The term per se is a Latin term that means by itself or intrinsic to itself). The Department of Justice has declared that per se agreements to restrain trade "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Where a per se violation is shown, defendants cannot offer any evidence to demonstrate the reasonableness or the alleged necessity of the challenged conduct."[4] Competitors cannot "justify price fixing by arguing that it was necessary to avoid cut - throat competition, or that it actually stimulated competition, or that it resulted only in reasonable prices."[5] The Department of Justice has expressed the view that the heart of a bid rigging Sherman Act violation is a criminal conspiracy that results in an agreement to restrict or eliminate competition. Accordingly, federal prosecution under the Sherman Act for bid rigging requires proof of the existence of an unlawful agreement within the previous five year period. There is no requirement to prove that overt acts were taken in furtherance of the unlawful agreement.[6] The crime can be established by first hand evidence from involved parties or by circumstantial evidence, including bidding practices that establish a pattern of illegal conduct between bidders.[7] The Act "declares violations committed after November 1, 1990 to be felonies punishable by a fine of up to $10 million for corporations, and a fine of up to $350,000 or 3 years imprisonment (or both) for individuals."[8] Federal bid rigging prosecutions are brought by the Antitrust Division of the United States Department of Justice.

As mentioned above, bid rigging involves an advance agreement among competitors pertaining to which one of them will submit the winning bid in what would otherwise be a competitive process.[9] Public entities targeted for bid rigging will pay higher prices for supplies, materials, services, or construction because of the market manipulation by conspirators. There are several kinds of bid rigging conspiracies, which are examined below.

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[3] United States v. W.F. Brinkley & Son Construction Company, Inc., 783 F.2d 1157 (4th Cir. 1986); United States v. Brighton Building & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979); United States v. Mobile Materials, Inc., 871 F.2d 902 (10th Cir. 1989).
[4] Antitrust Division, U.S. Department of Justice, *An Antitrust Primer for Federal Prosecutors,* 5 (1994).
[5] *Id.*
[6] *Id.* at 5, 6.
[7] *Id*. at 6.
[8] *Id.* at 3.
[9] Connolly, *supra* note 2 at 2.

Types of Bid Rigging

An attorney for the United States Department of Justice has described the various kinds of bid rigging as follows:

1. "Bid Suppression---In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted."[10] For example, in *United States v. Romer*,[11] a case which involved a nonpublic victim, real estate speculators conspired to limit competitive bidding at public foreclosure auctions in Fairfax County, Virginia. The conspirators agreed to hold down the price of certain foreclosed private properties by agreeing not to bid against each other at the auctions. During the auctions, conspirators would withhold bids; while one pre-selected conspirator would enter a bid and obtain the property at a lower price. The defendants were convicted of violating the Sherman Act and the convictions were affirmed on appeal.

2. "Complementary Bidding---Complementary bidding … occurs when some competitors agree to submit bids that are either too high to be accepted, or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and defraud purchasers by creating the appearance of legitimate competition to conceal secretly inflated prices."[12] An example of complementary bidding is found *in United States v. W.F. Brinkley & Son Construction Company, Inc.*[13] Elizabeth City, North Carolina issued an invitation for bids which involved the construction of a pumping station and laying pipeline for a water treatment plant. Prior to the bid submissions, two employees of a competing firm contacted William Brinkley by phone and asked him to provide a "safe" number for them to bid, which would be higher than the bid to be submitted by Brinkley. Brinkley provided them with the requested information and they submitted a bid. Brinkley was later determined to be low bidder and was awarded the contract. Brinkley and his company were later charged with a Sherman Act violation. At trial, the two employees' of Brinkley's competitor testified under a grant of immunity. They claimed that they originally intended to submit a competitive bid but were unable to do so because a subcontractor failed to give them a price for pipeline work. At that point they decided that they had to submit a bid because they were afraid of offending the City Project Engineer if no bid was offered. They testified that they had unilaterally decided not to submit a competitive bid on the project prior to contacting Brinkley. At the conclusion of the trial, Brinkley and his company were convicted of bid rigging in violation of the Sherman Act.

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[10] *Id.*
[11] 148 F.3d 359 (4th Cir. 1998).
[12] Connolly, *supra*, note 2 at 2.
[13] 783 F.2d 1157 (4th Cir. 1986).

On appeal, Brinkley argued that unilateral action cannot violate the Sherman Act and that there was no agreement to rig bids because the Competitor Company had already decided not to submit a competitive bid before contacting Brinkley and requesting a safe number. The Court of Appeals rejected this defense and observed that the competitor's conduct was more than unilateral because the company contacted Brinkley and requested a safe number. The court explained that once Brinkley provided the safe number, an illegal agreement was formed. The convictions were affirmed.

3. "Bid Rotation---In bid rotation schemes, all conspirators submit bids, but take turns being the low bidder. The terms of rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. A strict bid rotation pattern defies the law of chance and suggests collusion is taking place."[14] An example of bid rotation is found in *United States v. Fishbach and Moore, Inc.*[15] In this case representatives of several electrical contractors met in Pittsburgh for the purpose of allocating electrical construction projects through bid rigging. The scheme followed this pattern. After the contractors pre-selected the low bidder, the low bidder's representative would contact the other firms and inform them of the amount that each should bid, thereby ensuring that his firm's bid would be the lowest. The conspirators monitored the allocations to ensure that the work was fairly divided between the participating firms. Several of the participating firms and their employees were charged with violating the Sherman Act. Some of the defendants pled guilty and after a jury trial, others were convicted. The convictions were affirmed on appeal.

4. "Market Division---Market division schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products or territories among themselves. For example, one competitor will be allowed to sell to or bid on contracts let by certain customers or types of customers. In return, he or she will not bid on contracts let by customers allocated to the other competitors. In other schemes, competitors agree to sell to customers in certain geographic areas, and refuse to sell to or quote intentionally high prices to customers in geographic areas allocated to conspirator companies."[16] An example of geographic market division is found in *United States v. Portsmouth Paving Corp.*[17] In this case, several corporations and corporate employees were indicted in connection with a geographic market division scheme. Evidence presented at trial disclosed that the defendants conspired to divide bidding on public contracts according to geographic territories in the Tidewater area of Virginia. The parties agreed that the firms located in Virginia Beach would bid on paving contracts in that area and the firms located in Norfolk would bid on contracts

[14] Connolly, s*upra* note 2 at 2.
[15] 750 F2d. 1183 (3d Cir. 1984).
[16] Connolly, s*upra* note 2 at 2-3.
[17] 694 F.2d 312 (4th Cir. 1982).

in the Norfolk, Portsmouth and Chesapeake areas. The defendants were convicted of Sherman Act violations and the convictions were affirmed on appeal. The Court of Appeals described the illegal arrangement in this case as "egregiously contrary to vital competition … ."[18] The court explained that such agreements not only abolish fair competition, but also have a negative impact upon the quality of products and services provided to government entities. The court concluded by stating that the clear result of the illegal agreements was to require the public victims to pay higher prices for the goods and services they needed.

Interstate Commerce Requirement

As mentioned previously, Section 1 of the Sherman Act prohibits trade restraints, which impact interstate or foreign commerce. In these cases, "the government bears the burden of proving beyond a reasonable doubt a connection between the defendant's activities and interstate commerce."[19] An example of the interstate commerce requirement is found in *United States v. Young Brothers, Inc.,*[20] which involved an unlawful agreement among competitors to restrain trade regarding a bidding process initiated by the Texas Highway Department. The Highway Department issued an invitation to bid on seal coat work involving several miles of interstate highway located primarily in Gillespie County, Texas. The Defendant Corporation was convicted of bid rigging and the conviction was affirmed on appeal. The Court of Appeals rejected the defendant's contention that its conduct did not sufficiently affect interstate commerce to support a conviction. The court observed that work was done on parts of U.S. Highway 290, which is joined with Interstate Highway 10 in two locations. Moreover, several out of state cars passed over the seal coated section of highway on a daily basis. The court also observed that the defendant purchased heavy equipment from manufacturers in other states to do the job. The court explained that the "bid rigging conspiracy … affected competition in the interstate marketing of heavy equipment because equipment suppliers were forced to bargain with a contractor who … possessed a monopolistic position as a buyer or lessee of the equipment."[21] The court ruled that these factors substantially affected interstate commerce.

United States v. Nippon Paper Industries Co., LTD. [22] is also instructive. In 1995, the Defendant Company was indicted by a federal grand jury for alleged price fixing regarding thermal fax paper. This illegal conduct took place entirely in Japan. The indictment alleged that the Defendant Corporation, a Japanese company, met with unnamed co-conspirators and agreed to fix the price of fax paper in the United States. The defendant obtained agreements from all its unaffiliated Japanese distributors to sell the fax paper to their United States distributors at fixed prices. The United States District Court dismissed the indictment and ruled that a Sherman Act prosecution cannot be based

[18] *Id.* at 317.
[19] United States v. Romer, 148 F.3d 359, 365 (4th Cir. 1998).
[20] 728 F.2d 682 (5th Cir. 1984).
[21] *Id.* at 689.
[22] 109 F.3d 1 (1st Cir. 1997).

upon conspiratorial conduct occurring entirely outside the United States. The Court of Appeals reversed and held that the Sherman Act reaches extraterritorial criminal conduct when that conduct has a substantial effect upon prices in American markets. The Court explained that ruling any other way, "would create perverse incentives for those who would use nefarious means to influence markets in the United States, [by] rewarding them for erecting as many extraterritorial firewalls as possible."[23]

Detecting Bid Rigging

Bid rigging conspiracies are extremely hard to uncover. They are covert by design, and knowledge of the conspiracy intentionally restricted to the conspirators alone. Nevertheless, observant public purchasing agents are in a position to alert law enforcement authorities to suspicious bidding practices of vendors that may suggest illegal conduct is occurring.[24] To be vigilant in this regard, public officials must be able to recognize suspicious bidding practices. According to the United States Department of Justice, some of these suspicious practices include:

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.[25]

- The same suppliers submit bids and each company seems to take a turn being the successful bidder.[26]

- Some bids are much higher than published price lists, previous bids by the same firms or engineering cost estimates.[27]

- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the difference.[28]

- Bid prices appear to drop whenever a new or infrequent bidder submits a bid.[29]

- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.[30]

The Department of Justice has pointed out that despite the efforts of conspirators to keep their illegal agreements hidden, "occasional slips or carelessness may be a tip-off to collusion. Additionally, certain patterns of conduct or statements by bidders or their

[23] *Id. at 8.*
[24] Connolly, s*upra* note 2 at 3.
[25] *Id*.
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] *Id.*
[30] *Id*.

employees suggest the possibility of collusion."[31] According to the Justice Department, the following events each have triggered a successful prosecution:

- Similarities in the bid paper work submitted by different vendors bidding on the same matter or project that may include "identical calculations or spelling errors … or similar handwriting, typeface, or stationery … ." "This indicates that the designated low bidder may have prepared some or all of the losing vendor's bid."[32]

- "Bid or price documents [that] contain white-outs or other notations indicating last-minute price changes."[33]

- "A bidder requests a bid package for himself and a competitor or submits both his and another's bid."[34]

- Statements by a bidder that a particular bid "'belongs' to a certain vendor; statements that a bid was [submitted as] a 'courtesy' [for another vendor] … ; [or] any statement indicating vendors have discussed prices among themselves."[35]

Conspiring vendors have great incentive to keep their illegal agreements from becoming known to public purchasing officials. For this reason, even the most vigilant buyers can be victimized. Nonetheless, public purchasers can reduce the probability of a successful scam by expanding their bidder lists. Buyers should solicit as many reliable sources as possible. The Department of Justice has declared that "[a]s the number of bidders increases, the probability of successful collusive bidding decreases."[36] Conversely, when there are fewer sellers, it is much easier for them to come together and agree on prices, bids, customers, or territories.

The General Laws of Massachusetts also prohibit conspiracies that are in restraint of trade.[37] Any corporation that knowingly violates Massachusetts law in this regard "shall be punished by a fine not exceeding one hundred thousand dollars … , or if any other person, by a fine not exceeding twenty-five thousand dollars or by imprisonment not exceeding one year, or both."[38] Criminal actions of this nature are brought by the Massachusetts Attorney General.[39] Massachusetts's antitrust laws do not apply to conspiracies in restraint of trade "unless they occur … primarily … within the commonwealth and at most, only incidentally outside New England … ."[40] Likewise, the laws are inapplicable to alleged conduct or activities, "which are the subject of a formal

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[31] *Id.*
[32] *Id*.
[33] *Id*.
[34] *Id.*
[35] *Id*. at 4.
[36] *Id.*
[37] MASS. ANN. LAWS ch. 93, § 4 (Law Co-op. 1994)
[38] *Id.* § 10
[39] *Id*. § 10
[40] *Id*. § 3

investigation, proceeding, or other assertion of federal jurisdiction by the Federal Trade Commission, the United States Department of Justice or other federal agency."[41]

BRIBERY, GRATUITIES, and GIFTS - STATE and MUNICIPAL VIOLATIONS

State and municipal employees in Massachusetts should be aware of the possibility that they could become targets of unlawful attempts to corruptly influence their official conduct. The Massachusetts Legislature attempted to minimize the likelihood of such corrupt action by enacting M.G. L. c. 268A in 1962. This statute is commonly referred to as the Conflict of Interest Law and it applies to corrupt actions engaged in by state, county, and municipal public officials and employees.[42] According to the Massachusetts State Ethics Commission (Commission), "[t]he term 'employee' at each level is defined expansively."[43] State and municipal employees include those who hold any position of employment in any state or municipal agency.[44] The law covers full and part time employees and applies to persons who are paid and unpaid.[45] The Commission has declared for example, that persons who serve as "unpaid members of local town or city boards or commissions … ."[46] are covered by the law. Similarly, persons appointed by municipal leaders to serve "on a special advisory committee to make recommendations on a specific issue"[47] are covered also. According to the Commission, "[p]eople who work as consultants or on an intermittent basis with municipalities are generally covered as well."[48] "[U]npaid members of state commissions are state employees, as are private citizens serving on a special advisory committee appointed by the governor to make recommendations on a specific issue."[49]

Bribery

The Conflict of Interest Law specifically prohibits bribery of state, county, and municipal officials.[50] The bribery section of the statute prohibits persons from corruptly, giving, offering, or promising something of value to public employees for the purpose of influencing official acts or to influence them "to commit or aid in committing … any fraud on the commonwealth or any state, county, or municipal agency… ."[51] Likewise, the law prohibits any state, county or municipal employee from corruptly seeking, demanding, accepting, or receiving something of value "in return for (1) being influenced in his performance of any official act … or (2) being influenced to commit or aid in

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[41] *Id.*
[42] Catherine Bromberg & Stuart Kaufman, State Ethics Commission, *A Practical Guide To The Conflict Of Interest Law For Police Officers 1.*
[43] *Id.*
[44] Supra, note 42. S*ee also, Lee Regan & Ardith Wieworka, A Practical Guide to the Conflict of Interest Law and Financial Disclosure Law For State Employees at 3.*
[45] *Id*.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Regan & Wieworka, *Supra,* note 44 at 3.
[50] MASS. ANN. LAWS ch. 268A, § 2 (Law. Co-op. 1992)
[51] *Id*. § 2(a) (1), (2).

committing … fraud … on the commonwealth, or any state, county, or municipal agency … ."[52] Upon conviction, violators of the bribery statute may be punished by imprisonment of up to three years in state prison, or up to two and one half years in a house of correction. Monetary fines of up to $ 5000 dollars may also be imposed upon bribery statute violators.[53]

A classic example of an application of the Massachusetts bribery statute is found in *Commonwealth v. Borans*.[54] In January 1972, William Reinstein, the newly elected mayor of the city of Revere, hired David Borans, his former campaign manager, as the city purchasing agent. At this time, Revere was building the new city high school. In an effort to contract for interior design service for the new school, Simon Sharigian, the owner of an interior design firm, met with Robert Tobin, a Suffolk County deputy sheriff and a participant in the criminal scheme. During the meeting, Tobin asked Sharigian how much money he could kick back if he received the interior design contract. Sharigian offered to kick back $40,000. Tobin instructed him to submit a bid for the job and send it to Borans. Sharigian's firm was awarded the contract and he kicked back $25,000 to public officials, including the mayor.

Later, Reinstein had a meeting with Sharigian and asked him how much prospective vendors who might bid on contracts to outfit the interior of the high school might be willing to kick back. Sharigian responded that he didn't know but stated that he would "get the ball rolling ... ."[55] Sharigian "prepared the specifications for various categories of interior furnishings and equipment for the high school [and] … interviewed prospective vendors."[56] Sharigian solicited vendor kickbacks during these interviews. The vendors were told that the kickbacks to the mayor were to be disguised as campaign contributions. Borans was kept constantly informed of Sharigian's activities and Borans later requested and received from Sharigian's associate, a duplicate list containing the promised payoffs by various vendors.

Richard Shiers, was one of the vendors from which Sharigian requested kickbacks. Shiers expressed interest in two contracts involving drapes and stage curtains for the high school. Shiers informed Sharigian that he would pay $5000 dollars in kickbacks for the two contracts. Borans and Shiers then met and talked about the kickbacks. Borans told Shiers that the kickback figure had been mentioned to the mayor and the mayor approved it. Borans expressed worry that Shiers would be the sole bidder on the stage curtains contract and requested that Shiers seek another bidder to make his bid appear more legitimate. Borans informed Shiers that in the event that he was not the low bidder, he would still receive both contracts. Shiers found another bidder.

Shiers' bid on the stage curtain contract was filed late and the bid on the drape contract came in high. Shiers met with Borans and Sharigian and they agreed "to find a way to

[52] *Id*. § 2(b) (1), (2).
[53] MASS. ANN. LAWS ch. 268A, § 2(d) (Law. Co-op. 1992)
[54] 379 Mass. 117 (1979).
[55] *Id.* at 127.
[56] *Id.*

reject all timely bids for the stage curtain contract and to disqualify the low bidder for the draperies contract."[57] These things were done and later, Shiers received both contracts. Shiers ultimately kicked back $10,000 to Mayor Reinstein.

Borans was later indicted for several violations of M.G.L. c. 268A, §2(b). Two of the charges pertained to Borans' receipt of kickbacks for the mayor from an employee of Sharigian's company. Other charges included unlawful payments made by Shiers' Company. Borans was convicted of bribery and the convictions were affirmed by the Supreme Judicial Court of Massachusetts.

The Supreme Judicial Court examined the evidence against Borans and observed that the jury could properly have concluded that when "Borans accepted two cash payments for Reinstein [from a Sharigian employee], Borans was aware of the fact that these payments constituted the final installment of Sharigian's kickback agreement."[58] The Court also ruled that the evidence properly supported a jury finding that Borans was an active player "in the kickback scheme by conditioning his approval of the issuance of city checks [to Sharigian] on the receipt of kickback payments … ."[59]

The Court also observed that although Borans did not personally receive anything of value from any vendor, he nevertheless was an active player in the illegal scheme. For example, Borans told Sheirs that "he (Borans) had spoken with Reinstein and the $5,000 kickback would be 'acceptable' [to Reinstein]."[60] Furthermore, notwithstanding that Shiers submitted a late bid on one contract and a high bid on the other, Borans stated that he would get the contracts anyway because he had agreed to the kickback scheme. Finally, the Court noted that "after Shiers was awarded the two contracts, Borans repeatedly insisted that Shiers complete his kickback payments."[61] The Court concluded by stating that under the bribery statute it is simply not necessary that a "public officer personally receive anything of value."[62] The Court stated that the statute clearly prohibits soliciting or seeking "something of value on behalf of another"[63] and the evidence disclosed that Borans did exactly that.

Gratuities

The Conflict of Interest Law also prohibits gift giving to public employees when there is a connection between the gift and an official act.[64] This section of the statute is commonly referred to as the "gratuity statute"[65] and it prohibits giving or promising "anything of substantial value to any present or former state, county or municipal

[57] *Id.* at 128.
[58] *Id.* at 142.
[59] *Id.*
[60] *Id.* at 143.
[61] *Id.* at 143.
[62] *Id.*
[63] *Id.* at 144.
[64] MASS. ANN. LAWS ch. 268A, § 3 (Law. Co-op. 1992)
[65] Scaccia v. State Ethics Commission, 431 Mass. 351, 352 (2000).

employee … for or because of any official act performed or to be performed by such an employee … ."[66] Similarly, the gratuity statute forbids present and former state, county, and municipal employees from seeking, demanding, accepting, receiving, or agreeing to receive "anything of substantial value … for or because of any official act … performed or to be performed by … ." them.[67] The Appeals Court of Massachusetts has ruled that a public official who solicited and received a $50.00 dollar gratuity in connection with the performance of an official act violated the "gratuity statute" by receiving something of substantial value.[68] "In 1985 the [State Ethics] Commission issued an Advisory which established 'substantial value' as anything worth $50 or more. [The Commission also opined that] [i]tems of 'substantial value' range from cash, additional compensation and tips to meals, free tickets and passes to entertainment events. In addition, free or discounted services … are considered gifts."[69] Criminal violations of the gratuity statute are punishable by a fine of not more than $3000 dollars or imprisonment of not more than two years or both.[70]

The State Ethics Commission is "authorized to impose civil fines of up to $2000 dollars per violation of the conflict law. In addition, the Commission may bring a civil action against any individuals who have acted to their economic advantage in violation of the law, and may recover on behalf of the commonwealth or a municipality, damages in the amount of the economic advantage or $500. 00, whichever is greater."[71]

Gratuities - The Nexus Requirement

The "gratuity statute" described above is identical in many respects to the federal statute which prohibits the giving to and receiving of gratuities by federal officials. Both the Federal gratuity statute[72] and the Massachusetts gratuity statute contain language prohibiting receipt by public officials of gifts connected with official acts already performed or to be performed by such officials**.** This statutory language suggests the need to establish a specific nexus or link between the gift and an official act.

In a recent case, Scaccia v. State Ethics Commission,[73]the Supreme Judicial Court of Massachusetts has ruled that in order to establish a violation of the Massachusetts "gratuity statute", prosecutors must establish a link between a gratuity provided to a public official and an official act. The Massachusetts State Ethics Commission (Commission) brought the case against Massachusetts State Representative Angelo Scaccia for receiving golf outings and dinners from lobbyists.. The Commission held an administrative hearing and concluded that Representative Scaccia violated among other things, the Massachusetts "gratuity statute", M.G.L. c. 268A, §3(b), by receiving dinners

[66] MASS. ANN. LAWS ch. 268A, § 3(a) (Law. Co-op. 1992)
[67] *Id.* § 3 (b).
[68] Commonwealth v. Famigletti, 4 Mass. App. Ct. 584, 354 N.E.2d 890 (1976).
[69] Bromberg & Kaufman, s*upra,* note 42 at 6.
[70] MASS. ANN. LAWS ch. 268A, § 3 (d) (Law. Co-op. 1992)
[71] Bromberg & Kaufman, *supra*, note 42 at 28-29.
[72] 18 U.S.C.A. § 201(c) (1) (A), (B) (West 2000).
[73] 431 Mass. 351, 354 (2000).

and golf outings paid for by legislative lobbyists. The Commission fined Scaccia $3000 and he filed an appeal with the Superior Court.[74] The Superior Court affirmed the Commission's ruling. Representative Scaccia appealed to the Supreme Judicial Court, which vacated the lower court's decision pertaining to the "gratuity statute" and ruled that the statute requires proof of a link between the gratuity and an official act. In reaching its decision, the Court relied heavily upon the U.S. Supreme Court's decision in *United States v. Sun-Diamond Growers of California.*,[75] which involved an interpretation of the meaning of the federal gratuity statute.

The Supreme Judicial Court examined the Commission's administrative hearing record and did not find the required nexus between the gratuities provided to Scaccia and any official act taken by him. The Court recognized the difficulty that enforcement officials face in establishing a link between gifts and official conduct and pointed out that in most cases, the link can only be established on the basis of circumstantial evidence. The Court explained that this evidence could include many factors, such as "the subject matter of pending legislation and its impact on the [gift] giver, the outcome of particular votes, the timing of the gift [in relation to favorable votes], and changes in a voting pattern … ."[76]

In reaching its decision, the Court discussed the Conflict of Interest Law's bribery section[77] and its relationship with the its gratuity section. The Court's discussion in this regard was not essential to the holding in the case and therefore will be examined briefly in the footnote below.[78]

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[74] The Ethics Commission reduced the monetary penalty imposed upon Representative Scaccia from $3000 dollars to $1750.00 on 8/13/01 in response to the decision of the Supreme Judicial Court in this case.

[75] 526 U.S. 398 (1999). The Sun-Diamond agricultural trade association was charged in a federal indictment with giving Michael Espy, the former secretary of Agriculture, approximately $5900 dollars in unlawful gifts. During trial, the judge charged the jury that the defendant corporation could be found guilty if the jury concluded that gratuities were provided to Espy simply because he held the position of Secretary of Agriculture. The jury instruction did not require a finding that the gratuities were linked to any specific official act. The corporation was convicted but the conviction was overturned on appeal. The United States Supreme Court ruled that in order to establish a violation of the federal gratuity statute, the government must prove a link between the gratuity furnished to the public official and a particular official act for or because of which it was provided.

[76] *Supra*, note 73 at 357.

[77] MASS. ANN. LAWS ch. 268A, § 2(b) (Law. Co-op. 1992)

[78] The Court attempted to distinguish between the conflict law's gratuity and bribery sections. The Court stated that a "gratuity violation is, essentially, a lesser-included offense of bribery." *Supra,* note 73 at 356. The Court observed that the bribery section requires the prosecution to prove that the perpetrator had corrupt intent while the gratuity section does not. The Court noted that "[b]ribery also typically involves a quid-pro-quo, in which the [gift] giver corruptly intends to influence an official act … and that 'gift' motivates an official to perform an official act." (Quid–pro-quo means an equal exchange or something for something). *Id.* The Court explained that, "[i]n effect, what is contemplated is an exchange, involving a two-way nexus." *Id.* The Court stated by way of contrast, that a gratuity could be given to a public official as a reward for official conduct already taken, or to influence current conduct, or to prompt future conduct. The Court stated that "[o]nly a one-way nexus need be established for a gratuity violation." *Id.*

The Court's attempt to distinguish the two sections is not particularly helpful when a gift is provided to a public official for the purpose of influencing a future official act. Language in the gratuity section prohibiting giving anything of substantial value to a public official for any official act to be performed, is very similar to language in the bribery section which prohibits giving anything of value to a public official

Gifts

The Gifts from legislative agents statute[79] (commonly referred to as the gift statute) specifically prohibits public officials and public employees from soliciting or accepting gifts from legislative agents, when the gifts have "an aggregate value of one hundred dollars or more in a calendar year."[80] A "legislative agent" is defined to include "any person who for compensation or reward does any act to promote, oppose or influence legislation … or [acts] to influence the decision of any member of the executive branch where such decision concerns legislation ... ."[81] "Public employee" under the statute is defined as "any person who holds a major policymaking position in a governmental body … .,"[82] and "public official" includes all persons who hold public office after being selected in a state election.[83] The term "'gift' means a payment, entertainment, …, services or anything of value … ."[84] The term excludes a "political contribution reported as required by law, a commercially reasonable loan made in the ordinary course of business, anything of value received by inheritance, or a gift received from a member of the reporting person's immediate family… ."[85]

In the *Scaccia* case which is described above, the State Ethics Commission charged Representative Scaccia in a civil action with violating the State gratuity statute,[86] among other things. The Commission also alleged that Scaccia violated the gift statute, M.G.L. c. 268B, §6, because he and his family received nearly $600 in free meals and rounds of golf from legislative agents who represented the insurance and tobacco industries.[87] Scaccia argued that dinners and rounds of golf paid for by lobbyists did not meet the definition of a gift in the context of the statute. The Supreme Judicial Court disagreed

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with intent to influence an official act. In this instance, the distinction between a bribe and a gratuity becomes blurred and it becomes difficult to conceptually distinguish between the two. In both situations, something of value is provided to a public official for the purpose of influencing a future official act. It appears that in this instance prosecutors may have a choice concerning which section to use in bringing charges against alleged violators.

[79] MASS. ANN. LAWS ch. 268B, § 6 (Law. Co-op. 1992)

[80] *Id.*

[81] MASS. ANN. LAWS ch. 268B, § 1(k) (Law. Co-op. 1992) The compensation mentioned in this statute is not intended to mean something more than the regular salary of an employee hired to lobby public officials or public employees regarding legislation.

[82] Id. § 1(o) Section 1(h) defines "governmental body" to include "any state or county agency, authority, board, bureau, commission, council, department, division or other entity, including the general court and the courts of the commonwealth." Section 1(l) defines "major policy making position" to include the executive and administrative heads of a governmental body and "any person whose salary equals or exceeds that of a state employee classified in step one of job group [25] under state law and who reports directly to said executive or administrative head … ."

[83] *Id*. § 1(p), (q)

[84] *Id*. § 1(g)

[85] *Id*.

[86] MASS. ANN. LAWS. ch. 268A § 3(a) (Law. Co-op. 1992)

[87] MASS. ANN. LAWS ch. 268B § 6 (Law Co-op. 1992) prohibits legislative agents from giving gifts with an aggregate value of $100 dollars or more annually to the immediate family members of public employees and public officials.

and observed that the definition of a gift in §1(g) of M.G.L. c. 268B includes the words "entertainment" and "anything of value." The Court explained that "[c]learly, the plain meaning of the word 'entertainment' would include a social round of golf. Further, the term 'anything of value' creates a broad category that would include meals."[88] The Court affirmed the finding of the Superior Court that Scaccia violated the gift statute.

The gift statute has no state criminal penalty provision. The State Ethics Commission can issue an order requiring a violator to pay a civil penalty of not more than $2000 per violation.[89] Notwithstanding the absence of a state law criminal penalty, federal criminal penalties can nevertheless arise out of violations of this statute. [90]

BRIBERY - FEDERAL VIOLATIONS

Bribery of State and Local Officials - Federal Programs

Federal law prohibits bribery in connection with state or local government entities that receive federal funds. Specifically, Title 18 U.S.C.A §666 applies to bribery which is linked to state or local government entities which receive in any one year period, benefits in excess of $10,000 under a federal program**.** The federal programs include grants, contracts, subsidies, loans, guarantees, "insurance, or other forms of federal assistance."[91] The statute prohibits employees of a covered entity from soliciting, demanding, accepting or agreeing to accept, something of value, with the intention of being "influenced or rewarded in connection with any business, transaction or series of transactions … ."[92] of the covered governmental entity involving anything valued at $5000 or more.[93] The statute likewise prohibits the giving, offering, or agreeing to provide "anything of value to any person, with the intent to influence or reward [employees of covered government entities] in connection with any business, transaction or series of transactions … ."[94]of the covered entity regarding something valued at $5000 or more. The maximum penalty for violation of this statute is a fine and 10 years in federal prison.

Professor Brown, Boston College Law School, has expressed the opinion that "[t]his surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption."[95] It has been used by federal prosecutors to charge municipal officials involved in public purchasing with bribery offenses. For example, James Coyne, The County Executive, Albany County, New York, was convicted of accepting a bribe while working for a County that was receiving federal

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[88] *Scaccia*, 431 Mass. at 358.
[89] MASS. ANN. LAWS ch. 268B, § 4(j)(3) (Law Co-op. 1992)
[90] *See* analysis of United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996), infra, p. 34.
[91] 18 U.S.C.A. § 666(b) (West 2000).
[92] 18 U.S.C.A. § 666 (a)(1)(B) (West 2000).
[93] 18 U.S.C.A. § 666(a)(1)(B) (West 2000).
[94] 18 U.S.C.A. § 666 (a)(2) (West 2000).
[95] George D. Brown, Professor of Law, Boston College Law School, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 58 Tul. L. Rev. 747, 764 (2000)

funds.[96] In June 1988, Albany County bought new vehicles at the Kearney Ford dealership and as part of the deal, traded several County owned cars. Coyne had used one of them, a 1984 Ford LTD, for official business before the trade-in. After the dealership credited the trade-in, it returned the Ford LTD to Coyne. Coyne gave the car to his daughter but both of them operated it for personal reasons. The car was valued at $5,625.

During the time frame that Coyne received the Ford, he told John Kearney, the dealership owner's son, that the County would soon be inviting bids on a new car for his official use. He expressed the desire for a Mercury Sable and identified several specific characteristics that the new car should have. On July 5, the County issued an invitation for bids for the new car. Previously, on June 7, the Kearney dealership, acting on the information provided by Coyne, placed an order for a vehicle that had the exact specifications Coyne had described to Kearney. The County opened the bids on July 28, and the low bid was almost $800 dollars lower than the Kearney bid. Nevertheless, it was rejected because it failed to meet Coyne's specific requirements. Instead, the County accepted the Kearney bid. Albany County received over $24 million in federal funds in1988 but none of it was specified for the purchase of County vehicles.

Coyne filed an appeal of his conviction and argued that §666 did not apply to his situation because the federal funds provided to the County were not earmarked for the purchase of County vehicles. The court rejected this argument and affirmed his conviction. The court stated that in order to sustain a conviction under §666, the government need only show that the bribe recipient was a representative of a local municipal entity that was given more than $10,000 in federal money within the particular year that the crime was committed. The court observed that the statute does not expressly or by implication mandate that the federal funds be specifically connected to the program that involved the payoff.[97]

Bribery of State and Local Officials - Impact on Federal Funds

In December 1997, the United States Supreme Court decided *Salinas v. United States.*[98] At the outset of its opinion, the Court framed the issue to be decided as follows: "[I]s the federal bribery statute, codified at 18 U.S.C.A §666, limited to cases in which the bribe [of a state or local official]has a demonstrated effect upon federal funds?"[99] In this case, Mario Salinas was a Deputy Sheriff in Hidalgo County, Texas. His co-defendant, Brigido Marmolejo, was the County Sheriff. In 1984, Hidalgo County agreed to accept federal prisoners into its jail system. In return, the U.S. Marshals Service furnished a federal grant to the County for jail renovation and agreed to remunerate the County for housing federal prisoners. During the time frame involving illegal conduct in this case,

[96] United States v. Coyne, 4 F.3d 100 (4th Cir.), *cert. denied*, 510 U.S. 1095 (1994).
[97] *See also,* United States v. Westmoreland, 841 F.2d 572 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988). In Westmoreland, a Perry County, Mississippi Supervisor was convicted under § 666 for taking bribes in connection with the purchase of road and bridge-building materials for the County.
[98] 522 U.S. 52.
[99] *Id*. at 54.

federal money provided to the County was over $10,000. Homero Beltran was a federal prisoner located in the County jail. Marmolejo received approximately $14,000 in bribes per month for several months from Beltran for allowing Beltran to receive special separate visits from his wife and his girl friend. Beltran also gave Salinas two expensive watches and a pickup truck because he handled the special visits when the Sheriff was not around. Salinas and Marmolejo were convicted of violating §666 but only Salinas' case was reviewed by the Supreme Court.

The Court in a rare unanimous opinion, ruled that §666 is not limited to bribery cases in which the bribe has a demonstrated effect upon federal funds. The Court explained that the statute's broad and unrestricted language, regarding bribes prohibited and government bodies covered, offers no support for the view that federal monies must be affected for a violation to occur. The Court stated that "§666(a)(1)(B) was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds."[100]

Notwithstanding that the Court decided that federal funds need not be affected by the bribe, the Court concluded its opinion with language creating some doubt about its applicability to future cases. For example, the Court stated that it did not have to consider whether §666 calls for "some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves."[101] In addition, the Court stated that there is no serious doubt about the constitutionality of the statute in this case because "[t]he preferential treatment accorded to [Beltran] was a threat to the integrity and proper operation of the federal program."[102]

The Court's use of this limiting language may signal the Court's concern that indiscriminate application of §666 to state and local bribery cases may raise constitutional questions in situations in which the only federal connection involves the fact that federal funds were provided to the state or local entity. Boston College Law Professor George Brown has pointed our that "[l]urking beneath the almost bland surface of *Salinas* are major issues of constitutional federalism [involving states' rights] and the limits on congressional power."[103]

Given these constitutional concerns and the limiting language of the Supreme Court in *Salinas*, it is not surprising following *Salinas* that some federal appellate courts have

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[100] *Id. at 57-58.*
[101] *Id. at 59.*
[102] *Id. at 61.*
[103] *Supra*, note 95 at 766. Professor Brown points out that all large and medium sized state and local governmental entities in America receive sufficient federal funding to bring them inside the scope of § 666. He suggests that it is necessary to determine the origin of federal authority for the Congress to pass such a potentially broadly applied statute. He opines that the only obvious candidate is the power of the Congress to spend. He suggests that in cases where there is no connection between the bribery and federal funding, except for the provision of federal funds to the state or local agency, the federal crime is very distant from the source of federal power. He states that this situation raises constitutional questions about whether it transgresses the limits of the federal spending power.

continued to require a connection between the illegal bribery and the federal government which extends beyond the provision of federal funds to the governmental agency involved. For example, in *United States v. Santopietro*,[104] the defendant, the former Mayor of Waterbury Connecticut, was convicted of receiving bribes in violation of §666. Specifically, Mayor Joseph Santopietro and other city officials were convicted for accepting large amounts of money from real estate developers in return for influencing several city commissions and departments to act favorably regarding certain development projects. During the time frame of the indictment, the City received substantial federal money for projects within the scope of authority of these agencies.

The Court of Appeals reinstated Santopietro's conviction that had been vacated by the lower court. In so doing, the court followed the Supreme Court's holding in *Salinas* and ruled that the bribe did not have to directly affect the disbursement or other use of federal funds. Next, the court focused on language in *Salinas* which indicated that §666 was constitutional because the bribe in that case "'was a threat to the integrity and proper operation of a federal program**.**'"[105] The court stated that "*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied."[106] The court, purporting to follow the Supreme Court's lead in *Salinas,* created a requirement that the bribe must be a threat to the integrity and proper operation of a federal program, before §666 can be constitutionally applied**.** The court examined the evidence in this case and observed that federal funds were provided for Waterbury housing and urban development programs and the bribes "concerned real estate transactions within the purview of agencies administering federal funds… ."[107] The court ruled that the necessary link between the payoffs and the "integrity of federally funded programs [was] satisfied."[108]

Bribery of State and Local Officials - The Travel Act

Federal law prohibits interstate travel in aid of racketeering enterprises. This criminal prohibition is codified at 18 U.S.C.A. §1952 and is commonly referred to as "The Travel

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[104] 166 F.3d 88 (2d Cir. 1999). *See also*, United States v. Zwick, 199 F.3d 672, 686, 687 (3d Cir. 1999). Zwick was a member of the Ross Township, Pennsylvania, Board of Commissioners. He solicited bribes in connection with various land development projects and a Township landscaping contract. He was convicted for violating § 666 but the conviction was reversed on appeal. The Third circuit ruled that the prosecutors must demonstrate that a federal interest was affected by Zwick's unlawful actions and this was not done. The court explained that if it accepted the prosecution's position that § 666 mandates no link between the corrupt activity and federal money or programs, the statute would make federal crimes out of a number of unlawful acts committed by state and local officials simply because their jurisdictions accept at least $10,000 in federal money annually. The court stated such a result raises an important federalism issue by turning local criminal conduct into federal crimes. For a contrary view post *Salinas, see*, United States v. Dakota, 188 F.3d 663 (6th Cir. 1999).

[105] *Id. at 92* (quoting Salinas, 552 U.S. at 61).

[106] *Id at 93* (quoting Salinas, 552 U.S. at 61).

[107] *Id at 93.*

[108] *Id.*

Act".[109] The law makes it a federal crime to travel "in interstate … commerce" or use "the mail or any facility in interstate … commerce, with intent to … distribute the proceeds of any unlawful activity; or … [to] promote, manage, establish, carry on or facilitate … any unlawful activity."[110] The statute further requires proof that the defendant thereafter performed or attempted to perform the above-described activities.[111] The term "unlawful activity" includes, among other things, bribery in violation of state law where the crime is committed.[112] Violators of this statute face a maximum prison term of not more than five years in federal prison.[113]

This statute has been used to prosecute public officials in Massachusetts on several occasions. For example, in *United States v. Arruda*,[114] John Arruda, the Executive Director of the Fall River Housing Authority (FRHA) and Edward Ringland, an employee of the Massachusetts Department of Community Affairs (MDCA) were convicted of Travel Act violations in connection with a scheme to obtain kickbacks regarding renovation work on FRHA properties. In this case, Ringland met several times with William Hammond and Robert Olshever, two employees of an architectural firm known as Hammond Associates. This firm had previously contracted with the FRHA to provide architectural services in connection with renovation work for three FRHA projects that were being funded by MDCA. Prior to these meetings, the Hammond employees had already bribed some FRHA employees in connection with other work they performed and had agreed to further kickbacks in connection with the three projects mentioned above. Hammond Associates prepared the plans and specifications for the projects and convinced a New York company known as Parkway Windows Inc. to bid on the renovation work. Olshever informed a Parkway employee that if the contract was awarded to them, $45,000 would have to be kicked-back to various public officials and private individuals.

Parkway was awarded the contract even though its bid was almost $100,000 more than the low bidder. The low bidder was disqualified for allegedly not conforming to specifications. In fact, testimony elicited at trial indicated that the low bidder never had a legitimate chance. Prior to starting work, Parkway was unable to perform on the contract and a Parkway employee informed Hammond and Olshever of the problem. The architects found another contractor who agreed to do the work and they all agreed to form a new company and gave it the same name as the company that couldn't perform. They agreed to kickback $82,000 to various individuals, including FRHA officials. The new company was unable to obtain payment and performance bonds. Olshever created phony bonds and a substitute bid document to replace the one accepted by the FRHA during the actual bid procedure. These documents were provided to corrupt FRHA officials and placed in FRHA records.

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[109] United States v. Arruda, 715 F.2d 671, 681 (1st Cir. 1983).
[110] 18 U.S.C.A § 1952(a)(1)(3) (West 2000).
[111] *Id.* § 1952(a)(1)(3)(A).
[112] *Id* § 1952(b)(2).
[113] *Id* § 1952(a)(3)(A).
[114] 715 F.2d 671, 673-681 (1st Cir. 1983).

Olshever later traveled from New York to Boston and met with Ringland, the MDCA official. He told Ringland about the phony papers and paid him $5,000 to insure that the papers would flow through MDCA without a problem. Later, while work on the projects was progressing, FRHA employees, including Arruda, approved an inflated change order in return for kickbacks. Arruda received $1000 for signing the change order and a Parkway employee provided the money after traveling to Fall River from New York. The scheme was discovered when another contractor on the job was offered a chance to participate in the corrupt scheme and instead became a confidential cooperating witness for the FBI.

On appeal, Ringland and Arruda attacked the sufficiency of the evidence regarding their Travel Act convictions. The Court of Appeals examined the evidence pertaining to each defendant and found it sufficient to support both convictions. With respect to Ringland, the court observed that he accepted a $5000 dollar bribe from Olshever in return for his promise that the false documents would travel without trouble through MDCA's system of review. Moreover, the court opined that Olshever's travel from New York to Boston to pay the bribe was not incidental to the scheme but rather was "an important link"[115] to the illegal activity between the parties. The court explained that "[t]here is 'no requirement that the use of interstate facilities be essential to the scheme: it is enough that the interstate travel or use of interstate facilities makes easier or facilitates the unlawful activity.'"[116] The court concluded that there was sufficient evidence that Ringland performed an act in furtherance of the bribe after it was paid, by facilitating passage of the phony paperwork through the MDCA system. Furthermore, the court explained, "Ringland's mere acceptance of the money was a sufficient overt act following the travel; acceptance is an act taken in furtherance of the distribution of the proceeds of an unlawful bribery scheme."[117] The court ruled that Ringland's conduct violated the Massachusetts bribery statute, M.G.L. c. 268A §2, and determined that the bribery violation when coupled with the other conduct described above, amounted to a violation of the Travel Act.

Similarly, the court jettisoned Arruda's attack on his Travel Act conviction by rejecting his claim that he was not guilty of bribery because he did nothing illegal in return for the $1,000 dollar payment. He claimed that signing a change order was part of his normal lawful duties. The court agreed that signing a change order was part of his official duties but stated, "Arruda overlooks that this is exactly what a bribery scheme under Massachusetts law involves; a corrupt intent to accept money in return for the performance of an official act. The bargained for action is not supposed to be corrupt or illegal**;** the corrupt acceptance of money in return for that which is a public official's duty is the forbidden action."[118]

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[115] *Id. at 682.*
[116] *Id. at 682-683* (quoting United States v. Wander, 601 F.2d 1251,1256 (3d Cir. 1979) (quoting United States v. Perrin, 580 F.2d 730,736 (5th Cir. 1978).
[117] *Id.* at 682.
[118] *Id*.

The Travel Act bribery law also prohibits the use of the mail in connection with a local bribery violation.[119] For example, in *United States v. Hathaway*,[120] Meridian Engineering Inc. (MEI) received two no-bid contracts from the New Bedford, Massachusetts Redevelopment Authority (NBRA). Prior to the award of the contracts, Thomas Graham, MEI's President, offered to pay Baptista, Executive Director of the NBRA, $25,000 dollars in return for receiving the contracts. Baptista accepted and Graham proposed four separate payments that would be forwarded by checks sent through the United States mail. Graham charged the payments to unrelated Meridian jobs and made the checks payable to Stephen Hathaway in Massachusetts for fictitious services rendered to his firm. Hathaway was an associate of Baptista and Baptista gave Graham blank invoices on Hathaway's letterhead to assist him in hiding the bribe. These invoices were used to justify the payoffs in MEI records.

Baptista and Hathaway were convicted of Travel Act violations after a jury trial. The Court of Appeals affirmed the convictions and ruled that the prearranged plan to "use the mails to forward checks to the defendants strongly supported a jury finding of a requisite interstate activity."[121] The court explained that Baptista knew that the checks would be mailed from Pennsylvania to Massachusetts.[122] The court stated that the use of the mails was more than incidental to the bribery scheme and was an important link in the criminal activity.

The Travel Act makes it a criminal offense to use "any facility in interstate … commerce … ." [123] to violate the other provisions of the Act. Facilities in interstate commerce clearly include the use of the telephone as long as the telephone call crosses a state line.[124]

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[119] § 1952(a).
[120] 534 F.2d 386 (1st Cir. 1976).
[121] *Id. at 397.*
[122] The court in *Hathaway* did not have to decide whether intrastate use of the mails would also violate the Travel Act. Other federal circuits have ruled that purely intrastate use of the mails when coupled with proof that the other elements of the statute have been violated, is a violation of the Travel Act. *See,* United States v. Riccardelli, 794 F.2d 829 (2d. Cir. 1986) and United States v. Heacock, 31 F.3d 249 (5th Cir. 1994). *See also*, United States v. Cisneros, 203 F.3d 333, 340, 341 (5th Cir. 2000). In *Cisneros,* the court observed that Congress amended the Travel Act in 1990 for the purpose of clarifying that an intrastate use of the mails would violate the Act. The statute was previously worded, " Whoever … uses any facility in interstate commerce, … including the mail … ." *Id*. at 341 (citing United States v. Heacock, 31 F.3d 249, 254 (5th Cir. 1994). The statute was amended to read, " Whoever **…** uses the mail or any facility in interstate … commerce … ." *Id.* at 342 (quoting 18 U.S.C. § 1952). This change in language suggests a congressional intent to treat the mail separately from other potential interstate facilities. A Federal District Court opinion in Massachusetts has also decided to adopt the above position. *See*, United States v. Goldberg, 928 F. Supp. 89 (D. Mass. 1996). For a contrary opinion, *see* United States v. Barry, 888 F.2d 1092 (5th Cir. 1989).
[123] § 1952(a).
[124] *See for example*, United States v. Perrin, 444 U.S. 37, 41 (1979); United States v. Jenkins, 943 F.2d 167 (2d Cir. 1991); and United States v. Pecora, 693 F.2d 421 (5th Cir. 1982).

EXTORTION - FEDERAL VIOLATIONS

Extortion by State and Local Officials - Color of Official Right

In 1946 the United States Congress passed an extortion statute, known as the Hobbs Act, to counter organized crime's attempt to infiltrate the organized labor movement.[125] The Hobbs Act makes extortion, which affects interstate commerce, a federal crime.[126] Under the Act extortion is defined as "'the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.'"[127]

According to the University of Dayton Law Review, "the Hobbs Act has become the federal government's chief weapon in fighting corruption in state and local governments."[128] The statute has a maximum penalty of not more than twenty years in jail. "The basis for federal jurisdiction under the Hobbs Act is the Commerce Clause of Article 1, Section 8, Clause 3 of the United States Constitution, which grants Congress the power to 'regulate commerce … among the several states.'"[129] The Hobbs Act can be used to prosecute state and local public officials because, as mentioned above, it defines extortion to include property obtained from another "under color of official right."[130]

The University of Dayton Law Review has reported that, until 1992, "[f]ederal appellate courts had maintained differing interpretations of extortion by public officials 'under color of official right.' The majority view held that the public official need not induce payments to be guilty of extortion under the Hobbs Act. The public official simply had to accept property to which he was not entitled … .",[131] under color of or by virtue of the power of his public office. "In contrast, the minority view maintained that there must be 'an affirmative act of inducement by the public official [in order] to support a conviction of extortion under color of official right.'"[132] In other words, the government had to

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[125] Thomas A. Secrest*, Bribery Equals Extortion: The Supreme Court Refuses To Make Inducement A Necessary Element Of Extortion "Under Color Of Official Right" Under The Hobbs Act, 18 U.S.C. § 1951(b):* Evans v. United States*, 112 S.Ct. 1881 (1992*), 19:1 U. Dayton L. Rev. 251, 254 (1993).
[126] *Id.* at 254.
[127] *Id*. (quoting 18 U.S.C.A. § 1951(b)(2)). The Hobbs Act is codified at 18 U.S.C.A. § 1951(b).
[128] Secrest, *supra* note 125 at 251.
[129] *Id.* at 254 n.26 (quoting the U.S. Constitution art. 1, § 8, cl. 3). A de minimis (very small) impact on interstate commerce is all that is required to place an extortionate scheme within the reach of the Hobbs Act. For example, in United States v. Atcheson, 94 F.3d 1237, 1243 (9th Cir. 1996) *citing* U.S. v. Huynh, 60 F.3d 1386, 1389 (9th Cir. 1995), the court stated "[t]o establish a de minimis effect on interstate commerce, the Government need not show that a defendant's acts actually affected interstate commerce. Rather, the jurisdictional element is satisfied by proof of a probable or potential impact." For other cases which agree with *Atcheson, see*, United States v. Bolton, 68 F.3d 396 (10th Cir. 1995) and United States v. Stillo, 57 F. 3d 553 (7th Cir. 1995).
[130] *Id.* at 255.
[131] *Id at 252.*
[132] *Id*. (quoting Evans v. United States, 504 U.S. 255, at 259).

prove that the official demanded, requested or affirmatively induced another person to make an illegal payment.

In 1992, the United States Supreme Court resolved this disagreement between the federal circuit courts regarding whether mere acceptance of a corrupt payment by a public official is sufficient to constitute extortion pursuant to the Hobbs Act**.** In *Evans v. United States*,[133] the defendant, an elected member of the DeKalb County Georgia, Board of Commissioners, was approached by an undercover FBI agent posing as a real estate developer. The agent initiated numerous conversations with Evans and sought his help in an attempt to rezone land for residential purposes. The conversations were secretly recorded by the agent. Eventually, the agent gave Evans $7,000 in cash and a check payable to Evans' campaign, in the amount of $1,000. Evans reported the check on his state campaign disclosure form but failed to report the receipt of the cash on that form. He also failed to report the cash payment on his federal tax return. There was no evidence that Evans made an express promise to assist the agent in the rezoning effort.

Evans was indicted by a federal grand jury for Hobbs Act extortion and an income tax violation. He was convicted on both charges. During the trial, Evans claimed that the $8,000 payment was a campaign contribution. At the conclusion of the trial, the judge informed the jury that they could return a guilty verdict on the extortion charge if they found that the defendant demanded or accepted money in return for a specifically requested use of his official authority. Evans filed an appeal of the Hobbs Act conviction and the Court of Appeals affirmed. The Court of Appeals ruled that passive acceptance of money by a county official constitutes a violation of the Hobbs Act when the official has knowledge that the payment is being furnished in return for a "specific requested exercise of his official power."[134] The court stated that the official is not required to induce the offer of a payment before a violation can occur.

The Supreme Court accepted the case for review and affirmed. The Court stated that the issue for decision was "whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' … ."[135] The Court ruled that no such demand or request from the public official is required. The Court observed that although Evans "did not initiate the transaction, his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver."[136] The Court concluded by ruling that a color of official right extortion violation occurs when it is shown "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[137] The Court also ruled that the government must establish a quid pro quo between the parties. This requirement is examined in the next section.

[133] 504 U.S. 255 (1992).
[134] *Id.* at 258.
[135] *Id.* at 256.
[136] *Id.* at 257.
[137] *Id.* at 268.

The Hobbs Act and the Quid Pro Quo Requirement

As mentioned earlier in discussions in this article, Quid pro quo is a Latin term, which means an equal exchange or something for something.[138] In Hobbs Act public corruption prosecutions, the government must not only prove that the public official received a benefit that he was not entitled to but also that the provider of the benefit received something from the official as well. This mutual exchange between the parties is commonly referred to as the quid pro quo requirement. The United States Supreme Court has recently attempted to shed light on the meaning of this requirement in two cases that it reviewed in the early 1990s.

The first case decided by the Court is *McCormick v. United States.*[139] Robert McCormick was an elected member of the West Virginia House of Delegates. The House of Delegates moved to discontinue a temporary permit program that permitted unlicensed graduates of foreign medical schools to practice medicine while they were studying for the state medical exam. McCormick met with a lobbyist for the unlicensed doctors and talked about creating a bill that would provide them with a medical license based on their level of experience rather than requiring them to pass the exam. McCormick decided to sponsor the bill. Later, McCormick told the lobbyist that his reelection campaign was costly and that the foreign doctors had not contacted him. The lobbyist subsequently made four payments to McCormick in 1984. The first two payments were made on the same day and totaled $2900 dollars. None were listed by McCormick as campaign contributions and none were reported on his 1984 federal tax return. State law prohibited campaign contributions in excess of fifty dollars. In the spring of the following year, McCormick sponsored the requested legislation, which was passed. Shortly after the bill passed, McCormick received an additional payment.

McCormick was later charged with 5 counts of violating the color of official right extortion provision of the Hobbs Act. During trial, the jury was instructed that it could find McCormick guilty of extortion, if it concluded that the payments were made to McCormick with the belief that his official action would be influenced and if he knew that they were made based on that belief. This charge did not require the jury to find that McCormick made an express promise to assist the doctors in return for the payments. The jury returned a guilty verdict on one count of extortion and the Court of Appeals affirmed.

The Supreme Court accepted the case for review and reversed. The Court observed that the American political system has traditionally permitted campaign contributions to finance campaigns. The Court stated that holding elected officials criminally responsible for extortion, simply because official actions appear to coincide with solicitation and receipt of campaign contributions, without more, is not what Congress intended in enacting the Hobbs Act. Accordingly, the Court ruled that receipt of campaign contributions can be viewed as extortion under the color of right provision of the Hobbs Act only if "made in return for an explicit promise or undertaking by the official to

[138] The American Heritage Dictionary, Second College Edition, 1982, p.1017.
[139] 500 U.S. 257 (1991).

perform or not to perform an official act."[140] With this language the Court created an express quid pro quo requirement in Hobbs Act public corruption cases involving campaign contributions.

Three Justices dissented from the express promise requirement and stated that there is no statutory requirement that the illegal agreement be express rather than implicit. They opined that "[s]ubtle extortion is just as wrongful – and probably more common – than the kind of express understanding that the Court's opinion seems to require."[141]

One year later the Supreme Court decided *Evans v. United States*,[142] another Hobbs Act public corruption case involving alleged campaign contributions. In this case, as reported in the preceding section, John Evans, an elected public official, accepted $7000 in cash and a $1000 check from an undercover FBI agent after discussing with the agent his interest in having a piece of property rezoned. The check was payable to Evans' campaign and he reported it on his campaign disclosure form. He failed to report the cash payment on his disclosure form and his federal income tax return. Nonetheless, after being indicted for Hobbs Act extortion under color of official right, he claimed at trial that the entire $8,000 payment was a campaign contribution. At the conclusion of the trial, the judge instructed the jury that a guilty verdict was appropriate if they found that Evans accepted money in exchange for a "specific requested exercise of his … official power, … regardless of whether the payment is made in the form of a campaign contribution."[143] This jury instruction did not require that the jury find that Evans made an express or explicit promise to take official action in return for the money. Evans was convicted and later argued before the Supreme Court that the jury instruction did not properly describe the quid pro quo requirement for conviction if the jury found that the payment was a campaign contribution.

The Supreme Court affirmed the conviction and concluded that the instruction satisfied the quid pro quo requirement of *McCormick* "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts … ."[144] The Court did not mention any need to find that Evans made an express promise to take official action in return for the payment. The Court next stated, "[w]e hold today that the Government need only show that a public official has obtained a payment to which he was not entitled**,** knowing that the payment was made in return for official acts."[145]

The Court, while not expressly overruling *McCormick*, appears to have discarded *McCormick's* express or explicit promise quid pro quo requirement. In fact, at another place in the opinion the Court stated that Evans' "acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver."[146]

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[140] *Id*. at 273.
[141] *Id*. at 282 (Stevens, J., dissenting).
[142] 504 U.S. 255 (1992).
[143] *Id*. at 258.
[144] *Id*. at 268.
[145] *Id*.
[146] *Id.* at 257.

The Court seems to be saying that a color of official right extortion violation can be proven, even in the campaign contribution context, when the official accepts a benefit knowing that official action or inaction is expected in return. This decision opens the door for color of official right prosecutions without the need for proof that the official expressly promised official action in return for the benefit received. In other words, proof of a quid pro quo can be inferred or implied from the circumstances of the case, including acceptance of a benefit with knowledge of what is expected in return.

Justice Kennedy wrote a concurring opinion in Evans in which he expressed his view that the public official "need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it."[147]

The Court also rejected an argument by Evans that no violation can occur in the absence of proof that the public official took affirmative steps to fulfill the expected quid pro quo or that it must be actually fulfilled. The Court ruled that proof of an affirmative step is not required. Moreover, the Court stated, "fulfillment of the quid pro quo is not an element of the offense."[148]

Following *Evans*, several federal appellate courts have been faced with the issue of whether proof of an express promise from a public official to do or refrain from doing an official act is necessary for a Hobbs act violation. For example, in *United States v. Bradley*,[149] Jackie Mattison, the Chief of Staff for the Mayor of Newark, New Jersey, provided William Bradley, a private financial consultant, with assistance with respect to two city contracts in return for corrupt payments. Specifically, Mattison referred Bradley to Great West, a company seeking a City contract to provide a deferred compensation plan to City employees. Bradley became a consultant for Great West and Mattison provided him with inside information that aided Great West in obtaining the contract with the City. Mattison also suggested to another company seeking an insurance contract with the City Board of Education, that it hire Bradley as its minority contractor for the contract. The company hired Bradley and it later secured the contract. Bradley was paid a very lucrative commission but did little work to justify it. Bradley paid Mattison over $16,000 in return for his assistance.

Both Bradley and Mattison were charged with, among other offenses, a violation of the color of official right provision of the Hobbs Act. After a jury trial, both were convicted. Mattison was sentenced to 41 months confinement and Bradley received 46 months in jail. The defendants appealed on the ground that the lower court refused to use a jury instruction which required the jury to find that the defendants made an express agreement that Mattison would take official action in return for illegal payments from Bradley. Instead, the lower court told the jury that a violation occurs if a public official explicitly or implicitly agrees to take official action in return for illegal payments. The jury was

[147] *Id*. at 274.
[148] *Evans*, 504 U.S. at 268.
[149] 173 F.3d 225 (3d.Cir. 1999).

informed that "it is sufficient if the public official understands that he is expected, as a result of a payment, to exercise particular kinds of influence or to do certain things connected with his office ... ."[150]

The Court of Appeals affirmed the convictions and approved the lower court's jury charge. The court focused upon the Supreme Court's holding in *Evans* which required proof that a public official obtained a payment, with knowledge that it was made in return for official action. The court ruled that "the government proved the quid pro quo relationship, though it did not show and did not have to show that the defendants had an express agreement."[151] The court explained that there is no requirement that the government prove that Mattison made an express promise to assist Bradley in return for the money.

Hobbs Act Extortion – Fear of Economic Loss

There is a separate provision of the Hobbs Act (18 U.S.C. §1951) that is frequently used by federal prosecutors to bring extortion charges against corrupt state and local public officials. The Hobbs Act defines extortion to mean, "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear … ."[152] Fear of economic loss requires proof that the defendant induced corrupt payments by means of threats of economic harm to the victim if the payments are not made. An example of the fear of economic loss provision of the Hobbs Act is found in *United States v. Collins.*[153] Billy Collins was the husband of Kentucky Governor Martha Collins who served from 1983 to 1987. After the Governor was elected, Lester Thompson was appointed State Secretary of Finance. After the election, Mr. Collins and Mr. Thompson asked another state official to contact Wall Street investment bankers to determine whether they would contribute to the Kentucky Democratic Party in return for a chance to extend their operation into Kentucky. William Johnston, an employee of the firm, Donaldson, Lufkin, and Jenette (DLJ), was contacted and informed that for a $25,000 contribution, his firm would be able to do business in Kentucky. After the payment was made, Mr. Collins met with Mr. Johnston to talk about the award of a $300 million dollar bond issue. Later, Johnston's firm was named lead manager for the bond issue.

In the spring of 1984, Mr. Collins, and Mr. Thompson agreed to create horse investment partnerships in order to obtain payoffs from companies doing business with the state. DLJ employees invested $600,000 into the horse partnerships after being named the lead manager on the $300 million bond issue. Other firms seeking business with the state made similar payments and received similar treatment. Companies that refused to contribute were denied the right to do business in the state.

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[150] *Id.* at 231.
[151] *Id. For* other recent cases holding that no express promise is required, *see,* United States v. Delano, 55 F.3d 720, 731 (2d Cir. 1995) and United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995).
[152] *Supra*, note 127.
[153] 78 F.3d 1021 (6th Cir. 1996).

Collins was charged with violating the fear of economic loss provision of the Hobbs Act. After a jury trial, he was convicted and sentenced to 63 months imprisonment. He filed an appeal of the conviction and the Court of Appeals affirmed. The court stated that "[f]or purposes of the Hobbs Act, extortion by wrongful use of fear encompasses threats of economic loss."[154] The court ruled that the evidence presented at trial was sufficient to establish that DLJ acted out of fear that without the payments, they could lose the opportunity to obtain government contracts in the state. The court explained that although DLJ was legally entitled to compete for public business in Kentucky, the company "faced the threat that if they failed to contribute to the party or invest in Collins' horse partnerships, they would not be considered for state contracts."[155] The court stated that DLJ "received a clear message that in order to compete for bond business in Kentucky, they would have to pay the gate keeper, Bill Collins."[156]

MAIL AND WIRE FRAUD - FEDERAL VIOLATIONS

Federal prosecutors have frequently used the federal mail and wire fraud statutes to prosecute state and local officials who become involved in corrupt activities for personal gain.[157] The mail and wire fraud statutes are found at 18 U.S.C.A. §1341, and §1343 respectively. To support a mail or wire fraud conviction, there must be proof beyond a reasonable doubt of: "(1) the defendant's knowing and willing participation in a scheme … to defraud with specific intent to defraud and (2) the use of the mails or interstate wire communications in furtherance of the scheme."[158] In the corruption of public officials' context, the term scheme to defraud includes a scheme by a public official to deprive citizens of his/her jurisdiction of the intangible common law right to honest and faithful services.[159] Public officials have an obligation to act as trustees for the citizens that they represent and as such, have a common law fiduciary duty to act honestly on their behalf.[160] "Theft of honest services occurs when a public official strays from this

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[154] *Id.* at 1030.
[155] *Id.*
[156] *Id.*
[157] *Supra*, note 95, at 785.
[158] United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) (citing United States v. Montminy, 936 F.2d 626, 627 (1st Cir. 1991). It should be noted that Congress amended the mail fraud statute (§ 1341) in September 1994 to include the use of private or commercial interstate carriers to further the scheme to defraud.
[159] *Id.* at 723-24. In a more recent decision involving Sawyer, United States v. Sawyer , 239 F3d. 31, 39 (1st Cir. 2001), (citing United States. v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987), (quoting U.S. v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979), the First Circuit provided a brief historical description of the honest and faithful services doctrine. The court explained that prior to 1987, most federal courts construed §1341 expansively to cover fraudulent schemes involving the deprivation of the intangible property rights of citizens, including the honest services of public servants. However, in 1987, the United States Supreme Court in McNally v. United States, 483 U.S. 350, 355, ruled that §1341 did not extend to these schemes because the mail fraud statute was intended by Congress to cover deprivation of tangible property rights alone. Congress quickly reacted to McNally by enacting 18 U.S.C. § 1346, which declared unlawful, fraudulent schemes to deprive citizens of their intangible right to honest services. The First Circuit concluded by stating "that § 1346 was intended [by Congress] to overrule McNally by placing honest services mail fraud within the ambit of § 1341." Sawyer, 239 F.3d at 41.
[160] United States v. Sawyer, 239 F.3d 31, 39 (1st Cir. 2001).

duty."[161] Decisions made by these officials must be made in the best interests of the citizens. If a decision is instead made primarily to enhance the personal interests of an official, "'the official has defrauded the public of his honest services.'"[162]

There are at least two ways that a public official can deprive citizens of honest services. First, "the official can be influenced or otherwise improperly affected in the performance of his duties … or … [secondly], the official can fail to disclose a conflict of interest, resulting in personal gain ... ."[163] With respect to the improper influence method, this would include classic quid pro quo bribery, "where a legislator was paid for a particular decision or action"[164] and a more generalized pattern of gifts not connected directly with any particular action. The purpose of the latter would be to "coax ongoing favorable official action in derogation of the public's right to impartial official services."[165]

Under the failure to disclose method, the "'public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which [he] she has decision making power, the public is deprived … .'"[166] of the honest and faithful service of that official. The government has the burden of proving beyond a reasonable doubt that the official had the intent to be improperly influenced or to fail to disclose a personal interest.[167] Intent can be proven by indirect and circumstantial evidence.[168]

As mentioned above, in order to prove a violation of the mail or wire fraud statutes, the government must establish that the mails or interstate wire communications were used in furtherance of the fraudulent scheme. In 1989, the United States Supreme Court ruled that "[t]o be part of the fraud, the use of the mails need not be an essential element of the

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[161] *Id.*
[162] *Sawyer*, 239 F.3d at 39 (quoting United States v. Lopez-Lukis, 103 F.3d 1164, 1169 (11th Cir. 1997).
[163] United States v. Woodward, 149 F.3d 46, 57 (1st Cir. 1998) (citing U.S. v. Sawyer, 85 F.3d 713 at 724, 729 (1st Cir. 1996). Although the vast majority of cases involving failure to disclose conflicts of interest by public officials also involve direct personal gain by the officials, it is not essential that the officials benefit personally for an honest services violation to occur. *For example*, in United States v. Silvano, 812 F.2d 754, 760 (1st Cir. 1987), McNeill, the Acting Budget Director for the City of Boston, permitted his close friend Silvano to become an insurance consultant on a City health insurance contract without disclosing that Silvano had a hidden deal with the owner of the Company that received the no-bid contract to share in 50% of the profits. Silvano made over $2 million dollars from the deal. The First Circuit affirmed McNeill's conviction and declared that it did not matter whether McNeil received any personal benefit from his failure to disclose or whether the City actually incurred any loss. The court ruled that the" loss to the City of McNeill's good faith services alone establishes the [crime]." *Id.*. Likewise, in United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996), the court opined that although there was no evidence "that Grandmaison, [a Nashua, New Hampshire, Alderman], received direct monetary benefit from his actions, there can be little doubt that he … deprived the citizens of Nashua of his honest services … ." *Id* at 567. Grandmaison publicly recused himself from the process of choosing a contractor to renovate a school, while secretly funneling gifts to other Aldermen from his contractor employer. His employer eventually received the $6.3 million contract to renovate the school.
[164] *Woodward,* 149 F.3d at 54.
[165] United States v. Sawyer, 239 F.3d 31, 41 (1st Cir. 2001).
[166] *Woodward,* 149 F.3d at 62 (quoting Sawyer v. United States, 85 F.3d 713, 724) (citing United States v. Silvano, 812 F.2d 713, 759).
[167] *Id* at 57.
[168] *Id.*

scheme."[169] The Court stated that "[i]t is sufficient for the mailing to be 'incident to an essential part of the scheme… .'"[170] Routine mailings that contain no false or fraudulent information but nonetheless further the scheme in some way are sufficient to supply the mailing element.[171] There is no need to prove that the defendant personally used the mail or made an interstate phone call. Proof that it was reasonably foreseeable that the mails would be used or that interstate wire communications would occur is enough for a violation to occur.[172]

United States v. Woodward,[173] provides a good example of deprivation of honest services corruption. Francis Woodward was an elected member of the Massachusetts House of Representatives and served as the Chairman of the Insurance Committee from 1985 until early 1991. William Sawyer was a lobbyist for the John Hancock Life Insurance Company (Hancock) during that same time frame. From 1984 until 1992 Sawyer spent over $8700 dollars on Woodward. The money was spent on dinners, golf, and other forms of entertainment, including a trip to the Super Bowl in New Orleans. During the relevant time period, Woodward's conduct on the Insurance Committee conformed in most instances, with Hancock's interests. The evidence disclosed that Woodward supported the life insurance industry position on 569 of the 600 bills that came through the Committee. Woodward was indicted by a federal grand jury for mail and wire fraud violations. After a jury trial, Woodward was convicted of mail and wire fraud and later filed an appeal of the conviction.

The Court of Appeals affirmed the conviction. Initially, the court evaluated the evidence disclosed at trial, which proved that Woodward accepted free gifts from Sawyer with the intent to perform official acts to favor Hancock's legislative interests. The court stated that Woodward's intent could be proved by circumstantial rather than direct evidence. The court observed that "Woodward knew that Sawyer was giving him items of substantial value, continuing over a long period of time; he knew that Sawyer had a long-term ongoing interest in his official acts; and that he had the ability to take action favorable to Hancock. Woodward also knew that his relationship with Sawyer began after he became a member of the Insurance Committee and that the gifts increased substantially shortly after Woodward became chair of the committee that handled insurance legislation."[174] Finally, Woodward was aware that Sawyer was treating other Committee members similarly, and those legislators had a business relationship rather than a personal friendship with Sawyer. The court concluded that "Woodward knew

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[169] Schmuck v. United States, 489 U.S. 705, 710 (1989) (citing Pereira v. United States, 347 U.S. 1, 8 (1954).

[170] *Id. at 710-11 (*quoting Badders v. United States*, 240 U. S. 391, 394 (1916)).* The First Circuit Court of Appeals recently held in United States v. Sawyer, 85 F.3d 713, 723 n. 6 (1st Cir. 1996), that "[t]he use of the mails or wires to further the fraudulent scheme need only be 'incidental'." (citing United States v. Grandmaisson, 77 F.3d 555, 566 (1st Cir. 1996). By so doing, the court is stating its belief that mail and wire fraud should be viewed similarly in this respect.

[171] *Id*. at 714-15. *E.g.,* mailed credit card bills resulting from the use of a lobbyist's credit card to provide gifts to a public official. *See*, Woodward, 149 U.S. at 65.

[172] United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996).

[173] 149 F.3d 46 (1st Cir. 1998).

[174] *Id* at 58.

what the deal was – that the gratuities would continue as long as he voted favorably to Hancock's interests and that he intended to be influenced by the gratuities."[175]

The court rejected Woodward's claim that the gifts were provided because he had a close personal friendship with Sawyer. The court observed that the gifts flowed only one way. Sawyer paid for Woodward's dinners, and golf outings but Woodward did not reciprocate. The court explained that if Sawyer and Woodward were such close friends, one would expect that there would be a similar amount of times that Woodward would pay for Sawyer but this didn't happen.

The court also agreed with the government that Woodward's intent to deprive the public of his honest services was "demonstrated by his failure to disclose his conflict of interest although he was required to do so."[176] The court observed that Woodward had an obligation pursuant to M.G.L. c. 268B, §5 to disclose all gifts that he or his immediate family received, aggregating more than $100 per year from lobbyists. Woodward failed to report Sawyer's gifts. Moreover, the court noted that Woodward had a general fiduciary obligation as a public official to disclose conflicts of interest to his public employer. This fiduciary duty was not followed.[177]

The court next examined the evidence that an interstate wire communication was made in furtherance of the scheme. The indictment charged that a telephone call was placed by a Hancock employee from Massachusetts to Florida for the purpose of making a hotel reservation for Sawyer to attend a conference that was also attended by Woodward. Woodward argued "that he did not 'cause' this telephone call to be made and that it was not made for the purpose of executing a scheme … to defraud the public of its right to his honest services."[178] The court observed that defendants in these cases do not have to make the calls themselves so long as the calls are reasonably foreseeable as part of the illegal scheme. The court observed that Woodward could have reasonably foreseen that hotel reservations for Sawyer would be made by phone by Sawyer or another Hancock employee and that the call would be made across state lines. The court also concluded that the call furthered the fraudulent scheme because Sawyer would have been unable to furnish illegal gifts to Woodward at the conference if he didn't have a room to stay in.

Regarding mail fraud, the court observed that it was reasonably foreseeable for Woodward that Sawyer would receive mailed invoices for credit card purchases made by Sawyer for him. The government need not prove that the defendant used the mail himself, as long as it was reasonably foreseeable that the mail would be used. Nonetheless, Woodward argued that these mailings were not in furtherance of the scheme because they occurred three to four weeks after Sawyer used his credit card to pay for Woodward's gifts. The court rejected this claim and opined that the claim focused too

[175] *Id.* (citing Sawyer, 85 F.3d 713, 730).
[176] *Id.* at 62.
[177] *Id.* The court also ruled that the failure to disclose the gifts not only provided the jury with a solid basis for finding that he intended to deprive the public of his honest services, but likewise "supports the finding that Woodward had the intent to deceive [which is necessary] for a mail and wire fraud conviction." *Id* at 63.
[178] *Id.* at 63.

narrowly, on each individual gratuity. The court explained that "[h]is contention assumes a new fraudulent scheme began and ended every time Sawyer used his credit card to pick up the tab for Woodward."[179] Instead the court ruled that the scheme to defraud in this case was a continuing one, lasting for several years. Sawyer repeatedly used his credit card to provide Woodward with gifts. The mails were used several times over the years to bill Sawyer for the charged gifts. "[I]f Sawyer did not pay those bills, his credit line would have been terminated… ."[180] and the stream of gifts would have ceased. "It was thus a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail."[181]

The Sawyer Case

The flip side of the Woodward case discussed above involves the long and tortuous federal prosecution of William Sawyer.[182] Sawyer was a senior lobbyist for the Hancock Life Insurance Company. Over a multi-year period, Sawyer spent in excess of $8000 dollars on gifts for Massachusetts State Representative Francis Woodward. Woodward was the Chairman of the Insurance Committee from 1986 to 1990. He also acted similarly with respect to other legislators. Sawyer paid for numerous dinners, golf outings and other entertainment for Woodward between 1986 and 1990. During that same time frame, Woodward's official actions frequently and consistently supported the positions of the life insurance industry.

Federal prosecutors indicted Sawyer for mail and wire fraud. The indictment charged that Sawyer engaged in a scheme to deprive the citizens of Massachusetts of the right to the honest services of their legislators. Specifically, the indictment charged that Sawyer deprived the public of Woodward's honest services by violating or causing Woodward to violate two Massachusetts laws. These statutes included, M.G.L. c. 268B, §6 (the "gift statute") and M.G.L. c. 268A §3 (the "gratuity statute"). The gift statute prohibits a legislative agent, from giving gifts to a public official which aggregate $100 or more annually. The gratuity statute proscribes furnishing a public official "anything of substantial value … for or because any official act performed or to be performed."[183] After a jury trial, Sawyer was convicted of mail and wire fraud violations and filed an appeal.

The First Circuit Court of Appeals reversed the convictions. The court examined the jury instruction on the "gift statute" and found that the instruction permitted a finding of guilty for honest services deprivation, if the jury concluded that a violation of the state gift statute had occurred. The court determined the instruction to be fatally flawed because it permitted the jury to equate a state gift statute violation with a federal honest services

[179] *Id.* at 65.
[180] *Id.*
[181] *Id.* Woodward was attempting to take advantage of the United States Supreme Court's decision in United States v. Maze, 414 U.S. 395 (1974). In *Maze*, the Court held that mailings, which occur after a scheme has come to an end, are not to be considered in furtherance of the scheme to defraud.
[182] United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996).
[183] MASS. ANN. LAWS ch. 268A, § 3(a) (Law. Co-op. 1992)

mail and wire fraud violation. The court explained that the federal violation requires proving more than a violation of the state gift statute. The court ruled that honest services fraud requires the jury to find that Sawyer not only violated the state gift statute but also that he intended to influence Woodward's official performance of his duties. The court concluded that "[a]llowing the jury to find that Sawyer intended to defraud the public of its right to honest services based on gift statute violations alone constituted reversible error."[184]

The court also examined the "gratuity statute" jury instruction and concluded that it was adequate but nevertheless, reversed the conviction because of the erroneous "gift statute" instruction. The court concluded by noting that "[i]n general, proof of a state law violation is not required for conviction of honest services fraud."[185] The court further observed that "incorporation of a state law violation in [a federal mail fraud] prosecution may cause legal complications."[186] The court explained that when the federal indictment links the federal honest services charge with a state law violation, the elements of **both** offenses must be correctly charged and proved.

Following the reversal, Sawyer entered a plea agreement with the U.S. Attorney's Office and pled guilty to a one-count information[187] charging him with honest services mail fraud. Sawyer was sentenced to one-year probation. In 1999, he petitioned the U.S. District Court that his guilty plea be vacated and his record be expunged on the basis of the U.S. Supreme Court's decision in *United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).*[188] The District Court granted Sawyer's petition and issued a written opinion explaining its' rationale.[189] The District Court reviewed the *Sun-Diamond* decision which construed the federal gratuity statute, 18 U.S.C. §201, and held that federal prosecutors must prove a specific link between a gratuity received by a federal public official and an official act by the official. The District Court compared the language in the federal gratuity law with the language in the Massachusetts gratuity statute, M.G.L. c. 268A, §3, and concluded that the Massachusetts statute likewise requires proof of a specific link between the gratuity and an official act of a Massachusetts' public official. The court ruled that the information that Sawyer pled guilty to required proof of a link between the gratuities furnished and specific official acts. The court concluded that the information contained no such link and set aside the conviction.

The United States filed an appeal of the District Court's ruling on Sawyer with the First Circuit Court of Appeals. The First Circuit reversed and reinstated Sawyer's conviction.[190] Sawyer claimed that the honest services mail fraud information that he pled guilty to was based upon a violation of the Massachusetts gratuity law and thus

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[184] Sawyer, at 729.
[185] *Id*. at 726.
[186] *Id*.
[187] An information is a method of charging a person with a federal crime when the defendant waives charge by indictment. *See*, Rule 7(a), Federal Rules of Criminal Procedure.
[188] United States v. Sawyer, 74 F. Supp.2d 88 (D. Mass. 1999).
[189] *Id*.
[190] United States v. Sawyer, 239 F.3d 31 (1st Cir. 2001).

required proof of a link between the gratuities and specific official acts. The court rejected this claim and observed that proof of a state law violation is only one method that a federal prosecutor might use to assist in establishing honest services mail fraud. The court explained that honest services mail fraud permits but does not require proof of a violation of any state law "[b]ecause the duty of honest services owed by [state and local] government officials [also] derives from fiduciary duties at common law… ."[191]

The court observed that the District Court was in error when it concluded that the information used to charge Sawyer was structured to require proof of a state gratuity violation. The court explained that the information did not in any way refer to the Massachusetts gratuity statute. Instead, it charged Sawyer with creating and carrying out a fraudulent scheme that denied Massachusetts taxpayers their right to the honest services of their state legislators in order to enhance the interests of his company. The court ruled that because the information was based upon honest services fraud derived from common law, not state law, the government was not required to prove a specific link between the gratuities provided and Woodward's specific official acts.

The court next examined the evidence presented at the original trial to determine whether it was sufficient to support a mail fraud conviction based upon an effort by Sawyer to deprive Massachusetts citizens of their common law right to the honest services of their government representatives. The court concluded that a jury could infer beyond a reasonable doubt that Sawyer intended that his repeated gifts would induce legislators to perform official acts to benefit Hancock's interests at the expense of their obligations to the public. Moreover, the court determined that the evidence was sufficient to establish that Sawyer intended to deceive the public about his unlawful expenditures on legislators.

[191] *Id*. at 41.

FALSE STATEMENTS IN PROCUREMENT - STATE VIOLATIONS

The General Laws of Massachusetts specifically prohibit intentional false material statements,[192] or the omission or concealment of "a material fact in a written statement",[193] in connection with obtaining supplies, services, or construction by "any department, agency or public instrumentality of the commonwealth or of any political subdivision thereof … ."[194] Likewise, the law proscribes the submission of "a material writing or recording that is false, forged, altered, or otherwise lacking in authenticity" in connection with a public procurement.[195] The law additionally forbids the use of "any trick, scheme, or device that is misleading in a material respect"[196] in public procurements. The criminal penalty for violation of this statute is "a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two and one-half years, or both."[197]

The General Laws of the Commonwealth also prohibit making false, fictitious, or fraudulent claims to any state or municipal department, agency or public instrumentality.[198] The criminal punishment for a violation of this statute involves "a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two and one-half years, or both."[199]

In July 2000, the Massachusetts Legislature enacted the "False Claims law."[200] This statute prohibits, among other things, false claims to the commonwealth or political subdivisions thereof. The statute provides for civil rather than criminal penalties. It authorizes the Attorney General to bring a civil action against alleged violators. It also permits private citizens to sue alleged violators on behalf of themselves and the commonwealth or any political subdivision.

The General Laws of the Commonwealth prohibit making or causing "a false entry or omission of a true entry in any books, record or account subject to the provisions of section thirty-nine R of chapter thirty … ."[201] Section 39R applies to contractors' who receive contracts, estimated at more than $100,000, pursuant to the public construction laws of Massachusetts.[202] The penalty for a violation is "a fine of not more than five

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[192] MASS. ANN. LAWS ch. 266, § 67A(1) (Law Co-op. 1992)
[193] *Id*. § 67A(2)
[194] *Id.* § 67A
[195] *Id*. § 67A(3)
[196] *Id.* § 67A(5)
[197] *Id.* § 67A
[198] MASS. ANN. LAWS ch. 266, § 67B (Law Co-op. 1992). Section 67B requires proof that the false, fraudulent, or fictitious claims were knowingly presented or made.
[199] *Id.*
[200] MASS. ANN. LAWS ch. 12, § 5B-O (Law Co-op. 2000)
[201] MASS. ANN. LAWS ch 266, § 67C (Law Co-op 1992). Section 67C requires proof that the false entries were knowingly and willfully made.
[202] These laws include, MASS. ANN. LAWS ch. 7, § 38A1/2-O (Law Co-op 1998), the designer selection law; MASS. ANN. LAWS ch. 30, § 39M (Law Co-op 1995), the public works construction law, and; MASS. ANN. LAWS ch. 149, § 44A-44H (Law Co-op 1999), the public building construction law. Also

thousand dollars, or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two years, or both."[203]

FALSE STATEMENTS - FEDERAL VIOLATIONS

Section 1001(a) of Title 18 of the United States Code prohibits false statements made directly or indirectly to the Federal government.[204] Section (a) of the statute specifically prohibits three categories of unlawful conduct: (1) the falsification, concealment, or cover up of a material fact "by any trick, scheme, or device … ."[205]; (2) the making of a "materially false, fictitious, or fraudulent statement or representation;"[206] and (3) the making or use of a writing or document that contains "any materially false, fictitious, or fraudulent statement or entry."[207] The statute requires that the false statements etc. be made "knowingly and willfully"[208] and they must be made "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States ... ."[209] Violations of the statute are punishable by up to five years in jail.

False Statements to Federal Agents

The Federal Bureau of Investigation (FBI) is often called upon to investigate allegations of corruption by state and municipal government officials. During these investigations, FBI agents frequently attempt to interview public officials concerning the corruption allegations. Section 1001 prohibits false statements made to federal agents in connection with public corruption investigations. For example, *in United States v. Lemaster*,[210] John Spurrier, a Kentucky harness horse racing lobbyist, informed FBI agents that in 1990 he gave Arthur Lemaster, a Kentucky State Senator, approximately $7,000 in return for assistance on legislation pertaining to horse racing. Spurrier agreed to cooperate with the FBI and told them that he had planned to offer gratuities to Lemaster to influence additional legislation. He agreed to wear a hidden recorder and met with Lemaster in January 1992. He offered Lemaster $5,000 to kill a certain bill. Lemaster declined to accept the cash but instead solicited a trip to Florida. Spurrier gave Lemaster $1,000 for his plane fare and $500 for his hotel bill. Lemaster eventually received approximately $6,000 from Spurrier and assisted in passing legislation acceptable to Spurrier. The last payment received was $2,500 and five days later FBI agents interviewed Lemaster.

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included is MASS. ANN. LAWS ch. 25A, §11C (Law. Co-op 1996), which pertains to contracts for the procurement of energy management services.

[203] *Supra*, note 201.

[204] 18 U.S.C.A. § 1001(a) (West 2000).

[205] *Id.* at (a)(1).

[206] *Id.* at (a)(2).

[207] *Id*. at (a)(3).

[208] *Supra*, note 204.

[209] *Id***.** When jurisdiction falls within the legislative branch, § 1001(c) establishes that the prohibitions found in §1001(a) of the statute are limited to congressional administrative matters, including procurements, and congressional investigations. Section 1001(b) creates two exceptions to § 1001(a)'s application to the judicial branch. It states that § 1001(a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, writings, or documents submitted to a judge or magistrate in that proceeding.

[210] 54 F.3d 1224 (6th Cir. 1995).

Lemaster denied receiving any cash payments from Spurrier for the Florida trip. He admitted to receiving food and beverages.

Lemaster was later indicted by a federal grand jury for extortion, bribery and lying to the FBI. After a jury trial, he was acquitted of extortion and bribery but convicted of lying to the FBI. On appeal, he argued that simply responding to FBI questions concerning whether he received cash payments by saying, "no sir", did not constitute a false statement under §1001. The Court of Appeals rejected this claim and "'ruled that as a matter of common sense and plain meaning, the word "no" is indeed a statement'" [211]covered by §1001. The court stated that the answers were in context, clearly false.

The court also observed that during his interview with the agents, Lemaster admitted receiving free food and beverages during the Florida trip in response to questions put to him by the agents. The court noted that although this response was not false in and of itself, the response was nonetheless a false statement under §1001. The court ruled that true responses can constitute a false statement if they represent an attempt to conceal additional information required to provide a complete, accurate, and truthful response. The conviction was affirmed.

False Statements within the Jurisdiction of a Federal Agency

As mentioned above, §1001 applies to false statements and false documents made or submitted in connection with any matter within the jurisdiction of an executive branch agency of the federal government. "A department or agency has jurisdiction in a matter, if the matter falls within the general authority of that department or agency."[212] For example, in *United States v. Rogers*,[213] the Supreme Court ruled that §1001 applied to false statements made to FBI agents because they perverted the FBI's statutory authority to investigate federal crimes.[214] The Court ruled that the false statements must relate to the authorized functions of the federal agency and not to peripheral matters.[215]

Some federal circuit courts have ruled that §1001 applies to false statements made directly to non federal government agencies because these agencies received federal funds and/or were subject to supervision and oversight by federal agencies. For example, in *United States v. Herring*,[216] the defendant made application to the Georgia Labor

[211] *Id.* at 1230 (quoting United States v. Rodriguez-Rios, 14 F.3d 1040, 1041 (5th Cir. 1994). In United States v. Brogan, 522 U.S. 262 (1998), the United States Supreme Court resolved a split between the federal circuits regarding whether simple false negative responses to questions posed by federal agents are a violation of § 1001. The Court answered this question in the affirmative.
[212] Carolyn A. Bannon, *Fifteenth Survey of White Collar Crime: False Statements, 37 Am. Crim. L. Rev. 437, 448 (2000).*
[213] 466 U.S. 475 (1984).
[214] *See also*, United States v. Facchini, 874 F.2d 638, 641 (9th Cir. 1989).
[215] *Rogers,* 466 U.S. at 479.
[216] 916 F.2d 1543 (11th Cir. 1990). *See also*, United States v. Shafer, 199 F.3d 826 (6th Cir. 1999). Shafer contracted with the Michigan Department of Military Affairs (MDMA) to remove and install underground storage tanks. The contract called for payment of prevailing wages and submission of payroll certification statements to MDMA. Shafer cheated his workers out of $140,000 and submitted false certifications to

Department (GLD) for unemployment insurance benefits. At the time of his application, he was employed by a construction company. He received a total of $870 in benefits from the GLD and the money came from state funds. The GLD was the recipient of money from the United States Department of Labor (DOL) to pay for administrative expenses, including payroll and office costs. Federal law also mandated DOL examination of the state unemployment plan to ascertain whether it was capable of making full payment of unemployment compensation when obligated to do so. Although Herring had no direct contact with the DOL, he was later indicted for making false statements to an agency of the federal government in violation of §1001. He entered a guilty plea but later tried to modify it to a conditional plea. The District Court refused to allow modification and Herring filed an appeal.

Herring argued on appeal that §1001 was inapplicable to his situation because he made no false statements to the DOL. He argued that his false statements were made only to a state agency and claimed that the statements did not affect an authorized function of the DOL. The Court of Appeals rejected these claims and observed that federal law requires the DOL to provide federal funds to state unemployment insurance agencies to assist with administrative costs, such as payroll and office expenses. Moreover, under federal law, the DOL is required to review and approve the state unemployment plan. The court noted that it had previously held "that false statements need not be presented to an agency of the United States and that federal funds need not actually be used to pay a claimant for federal agency jurisdiction to exist under section 1001."[217] The court ruled that the DOL "has an obligation to ensure that the substantial sums the federal government spends to provide an unemployment compensation program are not depleted through false claims which might … corrupt the functioning of a governmental agency."[218] The court ruled that "[s]ection 1001 is the proper vehicle for prosecuting individuals who make false statements on applications for state unemployment benefits."[219] Finally, the court rejected the defendant's argument that he was unaware of the DOL's involvement in the matter. The court ruled that, "notice of the federal agency's involvement in the state unemployment program is not an essential element of a section 1001 conviction."[220]

MDMA. He was convicted for violation of § 1001 and his conviction was affirmed on appeal. The court ruled that the false certifications pertained to a matter within the jurisdiction of the U.S. Dept. of Labor. Federal funds were used to fund the contract between Shafer and MDMA and the state agency was subject to federal regulation.

For a case which declined to extend the reach of § 1001 to false statements made to a state agency which had federal agency oversight, *see*, United States v. Holmes, 111 F.3d 463 (6th Cir. 1997). In *Holmes*, the court ruled that although the Michigan Unemployment Insurance Dept. received federal funds to assist it in administering the state program, § 1001 did not apply to false statements made to the state agency. The court explained that federal funds were not used to provide benefits to the defendant and federal regulations did not authorize the U.S. Dept. of Labor to intervene upon discovery that the state program had been defrauded. The court held that the false statements were only peripheral rather than directly related to an authorized function of a federal agency.

[217] *Id.* at 1547 (citing United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985)).

[218] *Id.*

[219] *Id.* at 1548.

[220] *Id.*

Material False Statements

In 1996 the Congress amended §1001 by making clear that there can be no violation of this statute unless the falsified fact, false statement, or false document submission is material.[221] The American Criminal Law Review has reported that "[a]s a general principle, courts consider a statement to be material if it has a natural tendency or capacity to influence a decision or function of a federal agency."[222] For example, in *United States v. Arcadipane*,[223] the defendant received a disability retirement from the U. S. Postal Service. Later, he submitted false forms to the U. S. Department of Labor (DOL) which indicated that he was not employed. In fact, he was self-employed at that time in a firearms repair business. After a DOL investigation, Arcadipane was indicted by a federal grand jury for making false statements to the DOL. He was convicted and the conviction was affirmed on appeal.

On appeal, Arcadipane argued that his statements, if false, were not material. The court disagreed and stated that "[m]ateriality requires only that the [statements] in question have a natural tendency to influence, or be capable of affecting or influencing a government function."[224] The court ruled that the false statements in this case clearly had "a natural tendency to affect benefit levels."[225] The court credited trial testimony to the effect that the defendant's level of benefits would have changed if he had informed the DOL of his self employment.

A false statement need not actually influence a federal agency in order to meet the materiality requirement.[226] For example, in *United States v. Edgar*,[227] the First Circuit Court of Appeals affirmed the defendant's conviction. The court rejected his claim that his false statements were not material because the Department of Labor had already decided not to provide him workers'compensation benefits before he made the false statements. The court ruled that the materiality standard does not require that a false statement actually influence a federal agency decision, but instead only requires that it have the tendency to influence the federal decision.

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[221] Carolyn A. Bannon, *Fifteenth Survey of White Collar Crime: False Statements*, 37 Am. Crim. L. Rev. 437, 443 (2000). Prior to the congressional amendment, the statute contained the word material only in the section covering false facts. As amended, the statute reads:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than five years or both.

[222] *Id*. at 443-444.

[223] 41 F.3d 1 (1st Cir. 1994).

[224] *Id.* at 7 (citing United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976).

[225] *Id.*

[226] Bannon, s*upra* note 221, at 444.

[227] 82 F.3d 499 (1st Cir. 1996). *See also*, United States v. Baker, 200 F.3d 558 (8th Cir. 2000).

False statements which are voluntarily made to a federal agency and not required by law or regulation, can also be material pursuant to §1001.[228] Moreover, The American Criminal Law Review has reported that "a statement may be material even if the maker derived no pecuniary or economic benefit at the government's expense."[229]

FALSE CLAIMS – FEDERAL VIOLATIONS

The American Criminal Law Review has reported that "Congress enacted the first False Claims Act … in 1863 in response to widespread procurement fraud in Civil War defense contracts."[230] Currently, two federal statutes cover allegations of false claims against the United States. Title 31 U.S.C.A §3730 empowers the United States Attorney General and/or a private party to bring a civil action under 31 U.S.C. §3729 when allegations of false claims made to the federal government arise.[231] Title 18 U.S.C.A. §287 is the federal criminal statute that governs false claims against the United States. Section 287 makes it a federal crime to present "to any person in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States … knowing such claim to be false, fictitious, or fraudulent … ." Persons convicted for violating this statute face a maximum penalty of not more than five years in jail and are subject to fines set forth in 18 U.S.C. §3571. Pursuant to §3571, felony convictions carry a maximum fine of $250,000 per charge for individuals[232] and $500,000 for organizations. According to the American Criminal Law Review, "[t]he government must prove three elements to establish a §287 violation: (1) the defendant presented or caused to be presented a claim against the United States or any agency or department [thereof]; (2) the claim was false, fictitious, or fraudulent; and (3) the defendant knew the claim was false, fictitious, or fraudulent."[233]

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[228] *Supra*, note 220, at 444-445. *See also*, United States v. Arcadipane, 41 F.3d 1, 5 and United States v. Diaz, 690 F.2d 1352, 1358 (11th Cir. 1982).

[229] *Supra*, note 220, at 455.

[230] Joshua D. Hess, *Fifteenth Survey of White Collar Crime: False Claims* 37 Am. Crim. L .Rev. 421 (2000).

[231] *Id*. at 422. According to Hess, "the United States can pursue significant civil monetary damages from defendants who have submitted false claims to the government." *Id.* Hess opined that "[t]he most novel characteristic of civil false claims litigation is the broad ability of private citizens to bring civil actions on behalf of the United States for violations of § 3729." *Id.* A private party plaintiff may receive a ceiling of 25% of a damage award pursuant to § 3730(d)(1) when the government intervenes in the case. Section 3730(d)(2) permits private plaintiffs to receive between 25-30% of the damage award if the government does not intervene. Hess has stated that "[b]ecause a defendant may be liable for treble damages under the statute, the potential recovery [for the private plaintiff] can be considerable." *Id.* at 423.

[232] *Id.* at 434.

[233] *Id.* at 426. § 287 does not contain any specific language prohibiting a person from causing another to present a false claim to the federal government. Nonetheless, several federal appellate courts have joined the elements of § 287 with the elements of 18 U.S.C. § 2(b) and ruled that causing another person to submit a false claim is a federal felony. § 2(b) states, "Whoever willfully causes an act to be done which if directly performed by him … would be an offense against the United States, is punishable as a principal." *See*, e.g., United States v. Sartori, 443 F.2d 373 (9th Cir. 1971): United States v. Beasley, 550 F.2d 261 (5th Cir. 1977).

Presentation of a False Claim to a Non-Federal Agency

Several federal defendants convicted for violating §287 have unsuccessfully argued on appeal that their conduct did not violate this section because they did not personally present a false claim to an agency of the federal government. Generally, these cases involve the presentation of false claims to private sector companies or state or local agencies, that in turn pass the false claims on to a federal agency for federal reimbursement of funds.[234] For example, in *United States v. Beasley*,[235] the defendant and others were involved with a non-profit foundation, known as the Family Health Foundation. The Foundation entered into an agreement with the State of Louisiana to construct several modular mobile medical clinics to assist families receiving aid to dependent children. The federal department of Health, Education, and Welfare (HEW) provided a substantial portion of the funding for the construction project, pursuant to a federal statute. The state would pay Foundation expenses on the project and then seek reimbursement from HEW. The Foundation billed the state for over $659,000 for mobile modular units that were never built. In addition, the state was billed for $118,000 in costs that were never incurred. Beasley and others were indicted by a federal grand jury for violating 18 U.S.C. §287. They were subsequently convicted in federal court and filed an appeal.

On appeal, the defendants argued that §287 was not applicable to their conduct because the Foundation submitted claims only to the state. The Court of Appeals rejected this claim and ruled that it is a violation of federal criminal law to present false claims to a state agency, knowing that the state would utilize the claims to support reimbursement from HEW.

The court's rationale appears to require knowledge by the defendant of federal involvement before a conviction could be sustained. However, the American Criminal Law Review takes the position that "[k]nowledge of the federal nature of the claim is not required. The Eighth and Tenth Circuits have held that ignorance of federal involvement in a program or project is not a defense to a §287 violation when the defendant's intent was to present a false claim."[236]

In *United States v. Montoya*,[237] the defendant contracted with a New Mexico state agency to renovate homes belonging to economically deprived senior citizens. Pursuant to a federal statute, the United States Department of Energy (DOE) provided funding for the project. The DOE issued the money in the form of a grant at the inception of the project. Later, Montoya submitted false claims to the state for work allegedly completed on this project. The state conducted an investigation and determined that Montoya performed no work at all on the project. Montoya was later indicted by a federal grand jury and convicted for violating 18 U.S.C. §287.

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[234] *See, e.g.,* United States v. Catena, 500 F.2d 1319 (3rd. Cir. 1974); United States v. Littlefield, 840 F.2d 143 (1st Cir. 1988).
[235] 550 F.2d 261 (5th Cir. 1977).
[236] *Supra,* note 230, at 432. (citing United States v. Martin, 772 F.2d 1442, 1445 (8th Cir. 1985) and United States v. Montoya, *infra*, note 237).
[237] 716 F.2d 1340 (10th Cir. 1983).

On appeal, Montoya argued that because his agreement was with the state and he presented no claim to DOE, §287 didn't apply to him. In rejecting this argument, the court traced the history of the False Claims statute and examined the language of §5438 of the Revised Statutes, the precursor to §287. The court observed that §5438 made it a federal crime to present or cause to be presented a false claim to the federal government. The court noted that the current statute does not contain the cause to be presented language. The court stated that "[t]he 'cause' language of the former version of §287 has clearly been replaced by 18 U.S.C. §2(b), which states that, '[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'"[238] The court determined that §287, when coupled with §2(b), covers causing fraudulent claims to be furnished to the federal government.[239]

Montoya next argued that §287 should not apply to his situation because the federal presence in the matter was very minimal. He claimed that "[s]ince the Department of Energy … made a grant to the state before the … project was to commence and then did not monitor its administration on a day-to-day basis, … the federal involvement was insufficient … to confer jurisdiction under §287." [240] The court rejected this argument and stated that "the timing of the federal payment - whether by reimbursement or grant - [was] not critical. Indeed the Department of Energy has discretion to choose whether to make a grant before implementation or to wait and seek reimbursement afterwards."[241] Instead, the court explained that the origin of the funds "and the nature of the program …"[242] were critical factors in determining the outcome. The court observed that origin of the project's funding was federal in nature. Moreover, the state agency was required by the terms of the federal grant to "account [to DOE] for all monies spent."[243] The court further observed that the project had its origin in federal law and "contractors were required to follow federal regulations in implementing [it]."[244] The court ruled that the involvement of the federal government was sufficient to trigger application of §287.

Finally, the defendant claimed that the government must prove that he had knowledge of the federal involvement in the project before he can be convicted under §287. The court disagreed and opined that a defendant's awareness of the federal involvement was not required. The court explained that "[i]n enacting §287, Congress sought to protect the [federal] government from fraudulent claims"[245] and a person's knowledge of federal involvement was irrelevant to that goal.

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[238] *Id.* at 1343.
[239] *Id*. at 1343. The court in *Montoya* noted that the indictment did not charge the defendant with a violation of §2(b). Nonetheless, the court concluded that this omission was not fatal because the indictment provided sufficient notice of the criminal violation by incorporating the phrase, "presented and caused to be presented ... ." *Id.* at 1343, note 1.
[240] *Id.* at 1344.
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*

THE RICO STATUTE – STATE AND LOCAL CORRUPTION

The American Criminal Law Review has reported that the "Racketeer Influenced and Corrupt Organizations Act (RICO), enacted as Title IX of the Organized Crime Control Act of 1970,"[246] was intended by Congress to combat organized crime.[247] "RICO also has broad application beyond the organized crime context, since Congress has mandated that RICO 'be liberally construed to effectuate its remedial purposes.'"[248] The United States Supreme Court has also stated that the RICO statute was drafted expansively by Congress to cover a broad spectrum of illegal conduct, including but not limited to organized crime.[249] Accordingly, federal prosecutors have used the RICO statute to prosecute many different types of federal crimes.[250] According to the American Criminal Law Review, "[s]ince 1970, [RICO prosecutions] are running at the rate of about 125 per year. Roughly 39 percent have been in the organized crime area, … while 48 percent have been in the white collar crime area - [including] corruption of government, general fraud in the private sector, and securities and commodities fraud, etc."[251]

According to the United States Attorney's Manual, no criminal or civil prosecution should be commenced under RICO without the prior approval of the Organized Crime and Racketeering Section, Criminal Division, of the United States Department of Justice (DOJ).[252] The Manual lists several factors, which if present in a particular case will support the approval by DOJ of the filing of a federal RICO indictment. Among the listed factors are two that relate to violations of state law. The first involves state crimes in which DOJ has a compelling interest but state or municipal authorities will probably not pursue. The second involves state crimes allegedly perpetrated by state or local officials, which can create unique concerns for state or local prosecutors.[253] Corrupt activities involving state and local public officials fit squarely within these two factors.

RICO is a very broadly written statute with many components. This analysis will focus primarily upon 18 U.S.C. § 1962(c). This section prohibits "any person employed by or associated with any enterprise engaged in … interstate or foreign commerce, [from conducting or participating in the affairs of the enterprise] through a pattern of racketeering activity or the collection of an unlawful debt."[254] The Congress has given several of the words in the statute a precise meaning. The statute defines the word "person" to mean "any individual or entity capable of holding a legal or beneficial interest in property."[255] An "enterprise" is defined to mean "any individual, partnership,

[246] The statute was codified at 18 U.S.C.A. §§ 1961-1968 (West 2000).
[247] Richard L. Bourgeois, Jr. ET AL., *Fifteenth Survey of White Collar Crime: Racketeer Influenced and Corrupt Organizations*, 37 Am. Crim. L. Rev. 879, 880 (2000).
[248] *Id*. at 880, 881 (quoting Pub. L. No. 91-542, § 904(a), 84 Stat. at 947).
[249] H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).
[250] *Supra*, note 247, at 882.
[251] *Id.* at note 18 (quoting G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An overview of the Statute and Its Operations,* 64 DEF. COUNS. J. 36, 43 (1997)).
[252] The Department of Justice Manual, v. 3, title 9, p. 426, 2nd Ed.
[253] *Id*. § 9-110.310.
[254] 18 U.S.C.A. § 1962(c) (West 2000).
[255] 18 U.S.C.A. § 1961(3) (West 2000).

corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[256] The words "pattern of racketeering activity" require "at least two acts of racketeering activity", that occurred within a ten-year period.[257] The words "racketeering activity"[258] are further defined to include a large number of other serious state and federal crimes, which are generally called predicate crimes or predicate offenses.[259] For example, in the area of corruption of state and local officials, the following state and federal crimes are listed as racketeering acts in the statute: (1) state bribery; (2) state extortion; (3) mail fraud (18 U.S.C. §1341); (4) wire fraud (18 U.S.C. §1343); (5) federal extortion (18 U.S.C. §1951); and, (6) interstate travel in aid of racketeering – bribery (18 U.S.C. §1952).[260]

The recent federal indictment of Providence, Rhode Island, Mayor, Vincent "Buddy" Cianci, Jr. is instructive in this regard. Cianci and several other city officials were indicted by a federal grand jury in Providence, Rhode Island for RICO violations in April 2001.[261] Cianci and others were charged with violating §1962(c) by conducting the affairs of an enterprise (an association in fact involving the named defendants, the City of Providence and several other City of Providence legal entities) which affected interstate commerce, through a pattern of racketeering activity.[262] The Cianci indictment charged a pattern of racketeering activity that included the predicate crimes of federal extortion, mail fraud, state bribery, and others. The defendants are awaiting trial in the United States District Court in Rhode Island.

In a federal RICO prosecution, the alleged racketeering activity must affect interstate commerce.[263] According to the American Criminal Law Review, "[c]ourts initially held that the enterprise itself, and not the predicate acts, must affect interstate commerce. In contrast, many courts now exercise RICO jurisdiction if the predicate acts have a de minimis [minor] impact on interstate commerce … ."[264]

The penalty provisions of the statute are particularly severe. Section 1963(a) provides for a maximum period of not more than 20 years imprisonment for anyone who violates

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[256] *Id*. § 1961(4).
[257] *Id*. § 1961(5).
[258] *Id.* § 1961(1).
[259] Note, *Fighting Corruption at the Local Level: The Federal Government's Reach Has Been Broadened*, 64 MO. L. Rev. 157, 158 (1999).
[260] *Supra*, note 258.
[261] The indictment was returned by a federal grand jury in Providence, Rhode Island on 4/2/01. United States v. Cianci, CR. No. 00-083L (D. R. I.).
[262] According to the indictment, the other legal entities that made up the enterprise included, the Offices of the Mayor, the Director of Administration, the City Solicitor, the Department of Planning and Development, the Providence Redevelopment Agency, the Tax Collector, the Tax Assessor, the Finance Department, the Department of Public Safety, the School Department, the Department of Inspection and Standards, and the Building Board of Review.
[263] 18 U.S.C.A. § 1962 (a)-(c) (West 2000); *See also*, Bourgeois Jr., ET AL., *supra*, note 247 at 902.
[264] Bourgeois Jr., ET Al., *supra*, note 247 at 902.

§1962. Moreover, §1963(a) permits "forfeiture [to the federal government] of any interest the defendant acquired by virtue of a RICO violation."[265]

Pattern of Racketeering Activity

There has been extensive legal analysis and interpretation by the United States Supreme Court and other federal appellate courts regarding the meaning of certain words and phrases in the RICO statute. One of those phrases is "pattern of racketeering activity." As described earlier, the Congress defined this phrase to include, "at least two acts of racketeering activity"[266] which occur within ten years of each other. The term "racketeering activity" is further defined to include a multitude of other specific federal and state crimes that are set forth in the statute.[267] As mentioned earlier, these individual crimes are generally called predicate crimes or predicate offenses.[268]

The Supreme Court examined the meaning of the phrase "pattern of racketeering activity" in *H.J. Inc. v. Northwestern Bell Telephone Co.*[269] In this case, customers of Northwestern Bell sued the Company under the RICO statute and alleged that the Company made cash bribe payments to various members of the Minnesota Public Utilities Commission (MPUC). The MPUC was the state entity responsible for setting telephone rates in the state. The District Court dismissed the lawsuit and the Court of Appeals for the Eighth Circuit affirmed. The Court of Appeals ruled that the alleged payoffs amounted to a single scheme to influence favorable telephone rates and a single scheme was insufficient to constitute a pattern of racketeering activity under RICO. Instead, the court ruled that there must be evidence of multiple illegal schemes before a pattern of racketeering activity can be established.

The Supreme Court granted review of the case and reversed. The Court rejected the position of the Court of Appeals, which espoused that "predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes."[270] Initially, the Court ruled that a pattern of racketeering may also include situations involving predicate acts of racketeering "within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity."[271]

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[265] Bourgeois Jr., ET AL. *supra,* note 247 at 882. Section 1963(a)(1) permits forfeiture of "any interest the person has acquired or maintained in violation of § 1962." §1963(a)(2) authorizes forfeiture of "any interest in … any enterprise which the person has established, operated, controlled, conducted, or participated in … in violation of section 1962." §1963(a)(3) permits forfeiture of "any property constituting, or derived from, any proceeds" obtained from a RICO violation. §1963(b) states that the "[p]roperty subject to criminal forfeiture … includes- (1) real property … and (2) tangible and intangible personal property … ."

[266] 18 U.S.C.A. § 1961 (5) (West 2000).

[267] *Id.* § 1961 (1)

[268] 18 U.S.C.A. § 1961 (1) (West 2000). *See also, supra* note 259.

[269] 492 U.S. 229 (1989) (Scalia J., Rehnquist C .J., O'Connor J., and Kennedy J. concurring).

[270] *Id.* at 236.

[271] *Id.* at 237.

Likewise, the Court rejected the position of other lower appellate decisions that ruled that a "pattern of racketeering activity" can be established by proof of two predicate acts alone. The Court examined the legislative history of the statute and observed that Senator McClellan, the statute's principal sponsor, stated "that 'proof of two acts of racketeering activity, without more, does not establish a pattern.'"[272] Moreover, Senator McClellan stated that a person cannot be guilty of a RICO violation simply because he committed "two widely separated and isolated criminal offenses."[273] The Court noted that the legislative history "reveals Congress' intent that to prove a pattern of racketeering activity a … prosecutor must show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity**.**"[274] The Court adopted these concepts of relationship and continued criminal activity and included them within the meaning of a "pattern of racketeering activity." The Court explained that proof of a "pattern of racketeering activity" will require proof of at least two predicate acts as set forth in the statute, that are related and amount to or threaten continued criminal activity. The Court stated that RICO predicate acts will meet the relationship requirement, if they "have the same or similar purposes, results, participants, victims, or methods of commission … ."[275]

The Court observed that the continuity requirement refers "either to a closed period of repeated conduct, or to past conduct that … projects into the future with a threat of repetition."[276] The Court explained that continuity over a closed period could be demonstrated by "proving a series of related predicates extending over a substantial period of time."[277] Continuity involving threats of repeated future criminal action can be established by showing that the related predicates involve a threat of long-term repetition, even though their number is currently minimal and they occurred "close together in time."[278]

The Court observed that on the facts of this case the alleged bribes paid to MPUC members occurred over a six year period and may be able to satisfy both the relationship and continuity principles discussed above. The Court explained that, "[t]he acts of bribery … are said to be related to a common purpose, to influence the commissioners in carrying out their duties … . Furthermore, [it is claimed] that the racketeering predicates occurred with some frequency over at least a 6 year period, which might be sufficient to satisfy the continuity requirement."[279] The Court remanded the case for further proceedings.

Following the Supreme Court's opinion in *H. J. Inc.,* the United States Court of Appeals for the First Circuit had an opportunity to apply the new factors of relationship and continuity when considering whether the government had sufficiently proved the

[272] *Id.* at 238 (quoting 116 Cong. Rec. 18940 (1970)).
[273] *Id.* at 239 (quoting 116 Cong. Rec. 18940 (1970)).
[274] *Id.* at 239.
[275] *Id.* at 240 (quoting Sedima, S.P. R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)).
[276] *Id.* at 241 (citing Bartichek v. Fidelity Union, 832 F.2d 36, 39 (3d Cir. 1987).
[277] *Id.* at 242.
[278] *Id.*
[279] *Id.* at 250.

defendant's participation in a pattern of racketeering activity. In *United States v. Owens*,[280] the defendant was indicted for RICO violations in connection with his involvement in a major cocaine enterprise from 1988 until his arrest in 1995. The indictment alleged that Owens ran the drug operation that obtained cocaine from out of state suppliers for sale in Massachusetts. He was also charged with using violence, including murder, and threats of violence to protect the cocaine business. He was convicted after a jury trial and sentenced to life imprisonment.

The First Circuit affirmed his conviction on appeal and discussed the concepts of relationship and continuity in connection with the RICO statutory requirement of proving that the defendant engaged in a pattern of racketeering activity. The court observed that during trial, the evidence "overwhelmingly demonstrated Owens's [long-term] involvement in large-scale drug trafficking and with associated violence… ."[281] "Moreover, the evidence all but compelled the conclusion that Owens would have continued to engage in such activities had the police not intervened by arresting him and ending the enterprise."[282] The court ruled that Owens racketeering acts were related and posed a threat of continued criminal activity.

The Rico Enterprise

As mentioned earlier in this section, 18 U.S.C. §1962(c) prohibits "any person employed by or associated with any enterprise engaged in … interstate or foreign commerce, [from participating in the affairs of the enterprise] through a pattern of racketeering activity… ."[283] 18 U.S.C. §1961(4), defines "enterprise" to include, "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[284] According to the American Criminal Law Review, "[t]he [United States] Department of Justice [in its RICO Manual] noted that '[t]he courts have given a broad reading to the term 'enterprise.'"[285] Moreover, the United States Congress has required that RICO be interpreted expansively[286] and the Department of Justice has observed that "' the courts have held that the list of enumerated entities [enterprises] is not exhaustive but merely illustrative."[287]

In general, there are two types of enterprises, legal and associations in fact.[288] The American Criminal Law Review has reported that "courts have found that public entities

[280] 167 F.3d 739 (1st Cir. 1999).
[281] *Id.* at 754.
[282] *Id.* at 754-755.
[283] *Supra*, note 254.
[284] *Supra*, note 256.
[285] Bourgeois Jr., ET AL., *supra* note 247, at 893, n. 103. (quoting the *DEPARTMENT OF JUSTICE MANUAL, RACKATEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS,* § 9-110A.100*,* at 29 (1991-1 Supp.)).
[286] *Id.*
[287] *Id.* (quoting the *DEPARTMENT OF JUSTICE MANUAL, RACKATEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS,* § 9-110A.100, at 29 (1991-1 Supp.).
[288] Libertad v. Welch, 53 F.3d 428, 441 (1st Cir. 1995).

and governmental agencies, as well as private entities, can constitute RICO enterprises."[289] "For example, the 'enterprise' concept has been found to encompass the following types of associations: private businesses, sole proprietorships, corporations, labor organizations, schools … ."[290] and other legal entities. According to the American Criminal Law Review, "[w]hen a 'legal' entity is the enterprise [named in an indictment], 'there is little difficulty in proving the existence of the enterprise. Proof that the entity in question has a legal existence satisfies the enterprise element.'"[291] "Several [federal] circuits [have] held that [combinations] of legal entities, including a group of corporations or partnerships, can constitute 'associated-in-fact-enterprises'."[292]

In 1981, the United States Supreme Court decided *United States v. Turkette.*[293] In this case, the Court reversed a lower court ruling, which held that the RICO statute did not apply to an enterprise that was entirely illegal in nature, i.e., comprised of individuals associated in fact for the purpose of distributing illegal narcotics. In *Turkette*, there were 13 persons named as defendants. The indictment characterized the enterprise as a group of persons who associated in fact in order to distribute illegal drugs, perpetrate arsons, engage in the corruption of public officials and commit other predicate RICO offenses. The Court ruled that the definition of a RICO enterprise does indeed include organizations that are exclusively illegal in nature.

In *Turkette,* the Court made it clear that "[I]n order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity'."[294] The Court stated that the existence of the enterprise must be proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[295] An example of such an ongoing organization is found in *United States v. Owens.*[296] In this case, two groups of individuals came together for the purpose of selling cocaine. The government charged that the two groups formed an association in fact that existed from 1988 to 1995, which amounted to a RICO enterprise. In affirming the conviction of Owens, the First Circuit observed that "the two groups depended on one another both financially and structurally. They regularly exchanged money for cocaine, coordinated in the transporting of cocaine to Boston, accompanied one another on cocaine buying trips, and assisted one another in acts of violence … ."[297] The court ruled that the government sufficiently proved the existence of the enterprise.

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[289] Bourgeois Jr., ET AL*., supra* note 247 at 893. For a case involving a government entity, *see*, United States v. Freeman, 6 F.3d 586 (9th Cir. 1993).
[290] *Id.* at 893-894.
[291] *Id.* at 896 (quoting the DEPARTMENT OF JUSTICE MANUAL, *supra* note 287, at 36-37).
[292] *Id.* at 894 (citing United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993)).
[293] 452 U.S. 576 (1981) (Stewart J., dissenting).
[294] *Id.* at 583.
[295] *Id.*
[296] 167 F. 3d 739 (1st Cir. 1999).
[297] *Id.* at 751.

United States v. Patrick,[298] is also instructive with respect to the nature of an illegal enterprise. Patrick and his co-defendant Arthur were convicted of several substantive RICO counts in violation of § 1962(c). The charges were brought in connection with their involvement in a crack cocaine distribution enterprise known as the Intervale Posse (IVP). The IVP was a group of individuals that sold controlled substances for approximately six years in Boston neighborhoods. On appeal of their convictions, the defendants' argued that the trial judge erred in rejecting a proposed jury instruction that proof of the existence of an enterprise under RICO requires proof that the alleged enterprise had an "ascertainable structure"[299] for the making of decisions. The defendants' argued that the IVP was "simply a loose connection of individual, young drug entrepreneurs, one competing with another,"[300] and that the IVP had no ascertainable structure for making decisions.

The court rejected the defendants' argument and ruled that proof that an enterprise has an ascertainable structure is not required. The court explained that "Congress intended the term 'enterprise' to include both legal and criminal enterprises and because the latter may not observe the niceties of legitimate organizational structures, we refuse to import the 'ascertainable structure' requirement into jury instructions."[301]

The court observed that in RICO cases, "the government must prove both [the existence of] an 'enterprise' and a 'pattern of racketeering activity'."[302] The court explained that although the "'enterprise' and 'pattern of racketeering activity' are separate elements of a RICO offense, proof of these two elements need not be separate or distinct but may in fact 'coalesce'."[303] The court ruled that the evidence presented by the government that the IVP was an enterprise was sufficient to sustain the convictions.

The Enterprise and Person Charged must be Distinct

Section 1962(c) prohibits "any person employed by or associated with any enterprise"[304] from participating in the affairs of the enterprise through a pattern of racketeering activity. "[A] majority of [federal appellate] courts require that the 'person' be separate from the 'enterprise' … ."[305] named in the indictment. For example, in *Doyle v. Hasbro*,[306] the First Circuit stated that the "failure to identify any enterprise [in the charge], distinct from a named person defendant, is fatal under RICO."[307]

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[298] 248 F.3d 11 (1st Cir. 2001).
[299] *Id.* at 17.
[300] *Id.* at 15.
[301] *Id.* at 19.
[302] *Id.* at 18.
[303] *Id.* at 19.
[304] 18 U.S.C.A. §1962(c) (West 2000).
[305] Bourgeois Jr., ET AL., *supra* note 247, at 900 n. 165.
[306] 103 F.3d 186 (1st Cir. 1996).
[307] *Id*. at 191; *See also*, Libertad v. Welch, 53 F.3d 428 (1st Cir. 1995).

The United States Supreme Court has recently decided a case involving a closely related issue. In *Cedric Kushner Promotions, LTD. v. King*,[308] the Supreme Court was faced with the issue of whether a person charged in a RICO civil matter was distinct from the enterprise named in the lawsuit. Specifically, the RICO lawsuit named professional boxing promoter Don King as the person illegally conducting the affairs of the enterprise and named the enterprise as King's closely held corporation. King was the President and sole shareholder of his own corporation, which was known as Don King Productions.

The District Court dismissed the RICO lawsuit and the Court of Appeals affirmed on the grounds that the RICO statute requires the person named in the suit to be distinct from the enterprise identified. The Court of Appeals ruled that King and his sole shareholder corporation were one and the same. The Supreme Court disagreed and reversed.

The Court began its opinion by stating that it did not "quarrel with the basic principle that to establish [a violation of] §1962(c), one must allege and prove the existence of two distinct entities: (1) a 'person' and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[309] However, the Court refused to accept the ruling of the lower courts which held that naming Donald King as the person in the alleged RICO violation and his sole shareholder corporation as the enterprise, violated the distinct entities principle articulated above. The Court explained that King, the corporate owner, was a natural person and was therefore separate from the corporation. The Court observed that the corporation is "a legally different entity with different rights and responsibilities due to its different legal status."[310] The Court concluded by stating that it could "find nothing in the [RICO] statute that requires more 'separateness' than that."[311]

The Enterprise and the Operation or Management Test

As mentioned earlier, 18 U.S.C. §1962(c) prohibits "any person employed by or associated with any enterprise,"[312] from conducting or participating in the affairs of the enterprise through a pattern of racketeering activity. Congressional use of the words "to conduct or participate"[313] in the affairs of an enterprise raises a question concerning the level or degree of participation in the enterprise's affairs that is necessary before one can be convicted for violating §1962(c). This issue came before the United States Supreme Court in 1993 when it decided *Reves v. Ernst & Young.*[314] In this case, the Farmer's Cooperative of Arkansas and Oklahoma (The Co-op), hired the accounting firm of Ernst & Young (Ernst) to conduct an audit. During the audit, Ernst used inappropriate accounting methods to value Co-op assets, which resulted in an improper inflation of its assets. Ernst failed to disclose its inappropriate valuation methods to the Co-op and the Co-op's Board of Directors was left with the erroneous impression that the company was

[308] 150 L. Ed. 2d 198 (2001).
[309] *Id.* at 203.
[310] *Id.* at 204
[311] *Id.*
[312] *Supra*, note 304.
[313] *Id.*
[314] 507 U.S. 170 (1993).

worth more than it was. Later, after the Co-op filed for bankruptcy, the bankruptcy trustee filed a civil RICO action against Ernst pursuant to §1962(c). It was alleged that Ernst conducted or participated in the affairs of the enterprise (the Co-op) through a pattern of racketeering activity. The District Court granted Summary Judgement in favor of Ernst on the ground that the plaintiff failed to establish that Ernst had participated in the operation or management of the enterprise. The Court of Appeals affirmed. The Supreme Court accepted the case for review and affirmed.

The Court initially determined that "the word 'conduct' [in §1962(c)] [requires] some degree of direction [of the affairs of the enterprise] and the word 'participate' [requires] some part in that direction … ."[315] The Court explained that "[i]n order to 'participate', directly or indirectly, in the conduct of such enterprise's affairs, one must have some part in directing those affairs."[316] The Court concluded that a violation of §1962(c) cannot occur, "unless one has participated in the operation or management of the enterprise itself."[317]

The Court also determined that its "operation or management" test does not limit application of §1962(c) to the upper management levels of an enterprise because "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants … who are under the direction of upper management."[318] The Court furnished no guidance concerning whether very low level members of the enterprise can be included among those participating in the operation and management of the enterprise.

With respect to "outsiders" who have no official position with an enterprise, e.g. the defendant in this case, the Court stated that application of §1962(c) to them depends upon whether their association with the enterprise has risen to the level of operation or management in the affairs of the enterprise. The Court concluded that on the facts of this case, the plaintiff failed to establish that Ernst participated in the operation or management of the affairs of the enterprise.

Following *Reves*, the First Circuit Court of Appeals had occasion to apply the new operation and management test in a case involving an alleged drug trafficking enterprise.[319] In this case, the court reported that the trial judge instructed the jury that "'[a] person may be found to participate in the conduct of the enterprise even though he has no part in the management or control of the enterprise.'"[320] The defendant argued that this instruction violated the *Reves* decision because it allowed a finding of guilt without requiring a finding that the defendant participated in the management and control of the affairs of the enterprise. The court rejected this claim and ruled that the *Reves* decision had no application to the facts of the drug case because it was limited to RICO cases involving defendants who were outsiders to the RICO enterprise. The court interpreted the *Reves* decision and its operation and management test to apply only when a defendant

[315] *Id.* at 179.
[316] *Id.*
[317] *Id.* at 183.
[318] *Id.* at 184.
[319] United States v. Owens, 167 F.3d 739 (1st Cir. 1999).
[320] *Id.* at 753.

is considered an outsider to the RICO enterprise. The court explained that "*Reves'* does not apply where a party is determined to be inside a RICO enterprise."[321] The court reviewed the facts in *Owens* and concluded that he was an insider. The First Circuit has basically refused to apply the operation and management test of *Reves* beyond the actual facts of the case, which involved a defendant accounting firm outside the RICO enterprise.

Rico Conspiracy

18 U.S.C. §1962(d) is the RICO conspiracy statute and it states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Prior to 1997 there was a split among the federal appellate courts concerning the scope of the RICO conspiracy statute. Some of them took the position that in order to be convicted of conspiracy under RICO, "the defendant must himself **commit** or agree to commit two or more predicate acts."[322] Several others took a contrary view.[323] The split was resolved in 1997 when the Supreme Court decided *Salinas v. United States*.[324] In this case, a Texas County Sheriff accepted several cash bribes from a County jail inmate in return for permission to have special separate visits with his wife and a girl friend. Salinas was a Deputy Sheriff and he accepted two watches and a truck for permitting the visits when the Sheriff was away. He also sometimes acted as a lookout during the visits. Salinas was charged with one count of violating §1962(c) of RICO and §1962(d), RICO conspiracy. He was later acquitted of the substantive RICO count (§1962(c)), but was convicted of RICO conspiracy. Later, the Supreme Court accepted the case for review and affirmed the conspiracy conviction.

Salinas argued before the Court that he could not be guilty of RICO conspiracy unless he personally "committed or agreed to commit the two predicate acts [necessary] for a substantive RICO offense under §1962(c)."[325] The Supreme Court rejected this argument and affirmed the conspiracy conviction. Initially, the Court stated that in RICO conspiracy cases, there is no requirement for the government to prove that one or more of the conspirators committed an "overt or specific act"[326] to further the conspiracy. The Court observed that the overt act requirement is a necessary element of proof in general federal conspiracy cases brought under 18 U.S.C. §371, but it is not required in RICO conspiracy cases.

Next, the Court directly addressed Salinas' claim that a RICO conspiracy conviction requires proof that the defendant committed or agreed to commit two substantive predicate RICO crimes pursuant to §1962(c). The Court stated that "[I]t makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to

[321] *Id.* at 754 (citations omitted).
[322] Salinas v. United States, 522 U.S. 52, 61 (1997) (citations omitted).
[323] *Id* at 62 (citations omitted).
[324] *Id*.
[325] *Id.* at 61.
[326] *Id.* at 63.

excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit two or more predicate acts requisite to the underlying offense."[327] Instead, the Court stated that a person can be guilty of RICO conspiracy, if he adopts "the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion."[328]

The Court ruled that "even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired to violate subsection (c). The evidence showed that Marmolejo committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme."[329] This was sufficient to support a RICO conspiracy conviction.

[327] *Id.* at 65.
[328] *Id.*
[329] *Id.* at 66.