



Enhancing the Investigation and Prosecution of Corruption Cases

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Illinois Governors In Prison: 4 Of State's Last 7 Governors Were Convicted, Imprisoned

By The Associated Press 01/30/13 03:07 AM ET EST AP



Building blocks of a successful anti-corruption prosecution



- Need the kind of persuasive evidence that results from intelligence led proactive policing
- Robust use of income & asset declarations
- Rigorous integrity and accountability mechanisms
- Cultivating cooperation from private sector
- Protection of informant witnesses
- Tracking and recovery of ill-gotten assets
- Penetration of safe-havens
- Independent judiciary / adherence to rule of law

Common causes of unsuccessful corruption prosecutions



- Lack of prosecutorial independence
- Failure to cultivate “insider” witnesses
- Failure to anticipate defenses and adequately corroborate the case
- Failure to adhere to high ethical standards



#1. Lack of Prosecutorial Independence



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Prosecutorial Independence



Assessing Partisan Bias in Federal Public Corruption Prosecutions

SANFORD C. GORDON *New York University*

*T*he 2007 U.S. Attorney firing scandal raised the specter of political bias in the prosecution of officials under federal corruption laws. Has prosecutorial discretion been employed to persecute enemies or shield allies? To answer this question, I develop a model of the interaction between officials contemplating corruption and a prosecutor deciding whether to pursue cases against them. Biased prosecutors will be willing to file weaker cases against political opponents than against allies. Consequently, the model anticipates that in the presence of partisan bias, sentences of prosecuted opponents will tend to be lower than those of co-partisans. Employing newly collected data on public corruption prosecutions, I find evidence of partisan bias under both Bush (II) and Clinton Justice Departments. However, additional evidence suggests that these results may underestimate the extent of bias under Bush, while overstating it under Clinton.



Prosecutorial Independence

REPORT TO CONGRESS
ON THE ACTIVITIES AND OPERATIONS
OF THE
PUBLIC INTEGRITY SECTION
FOR 2011



Public Integrity Section
Criminal Division
United States Department of Justice

- ***Bottom up rather than top down***
Decisions to open an investigation and recommend charges are made by line-level, career prosecutors
- ***US DOJ Public Integrity Section***
UNCAC Article 26 encourages “Specialized Authorities” in combating corruption through law enforcement.
- ***Recusal & highly sensitive cases***
- ***Statutory accountability***
Required to submit annual report to US Congress (pursuant to Ethics in Government Act of 1978)



Public criticism comes with the territory

LEGAL/REGULATORY | WHITE COLLAR WATCH | APRIL 30, 2012, 1:55 PM | 3 Comments

Taking Aim at the Foreign Corrupt Practices Act

BY PETER J. HENNING

The Foreign Corrupt Practices Act has been at the center of a tug of war between business interests and federal authorities.

The United States Chamber of Commerce has led efforts to change the law, in response to ramped up prosecutions by the Justice Department and the Securities and Exchange Commission in the last few years. While the proposed changes are described as a means to “improve” the law, they would also make it more difficult to pursue cases.



“[A]fter more than two decades of bipartisan and business support, the US Chamber of Commerce has launched an effort to weaken the Foreign Corrupt Practices Act”

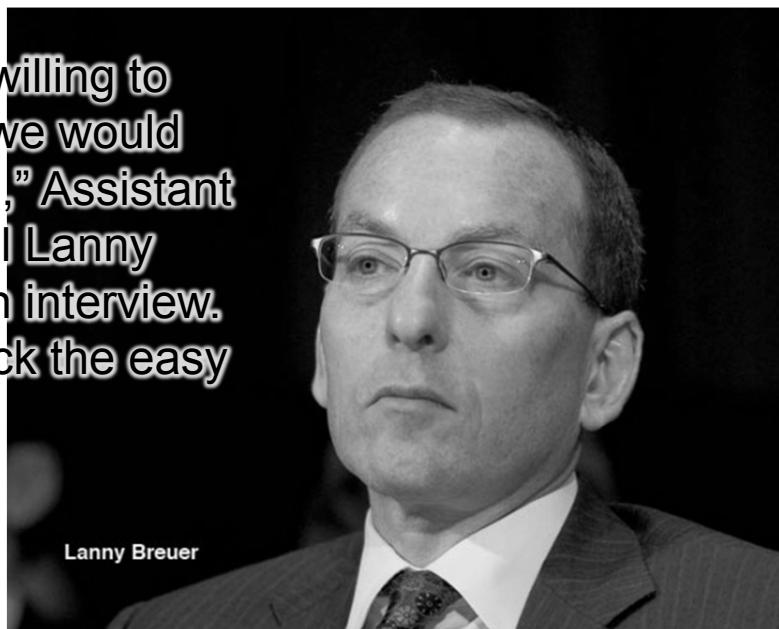


6 September 2012



Public criticism comes with the territory

"We have to be willing to take cases that we would be willing to lose," Assistant Attorney General Lanny Breuer said in an interview. "We can't just pick the easy cases."



Lanny Breuer

2. Failure to cultivate insider witnesses



- Whistleblowers
- Outraged competitor
- Agent provocateurs / undercover officers
- Accomplice witnesses



Cultivating insider witnesses

Accomplice Witnesses, Organized Crime and
Corruption: Theory and Evidence from Italy*

Antonio Acconcia[†] Giovanni Immordino[‡] Salvatore Piccolo[§] Patrick Rey[¶]

June 19, 2009

Abstract

The optimal accomplice-witnesses regulation is characterized in a model with hierarchical criminal organizations and corruption. We identify the determinants of the optimal amnesty rate and show that such a policy stifles incentives for crime as well as corruption. We argue that rewarding informants is sometimes necessary to fight organized crime and show how the optimal amnesty rate varies with the effectiveness of the witnesses-protection program, the reliability of the informants' testimonies and the degree of trust and cohesion between the members of the organizations. The implications of our analysis are tested by exploiting a quasi-experimental panel data set relative to 95 Italian provinces. The evidence allows to identify the positive effect of the policy on prosecution as well as its deterrence effect on crimes. Moreover, by using data on the number of accomplices we also underscore the positive impact of the policy on corruption prosecution.

Keywords: Accomplice-witnesses, Criminal Organizations, Leniency, Whistleblower.

- 2009 study on impact of accomplice-witness leniency program adopted in Italy in 1991
- “The analysis robustly shows that the introduction of a leniency program stifles both the crime and the corruption rates . . .”

Cooperation Plea Agreements: An Essential Tool



“[W]itness inducement agreements have been an integral part of the American criminal justice system since its inception. American jurisprudence has adopted and expanded the practice beyond its common-law ancestors, and has developed procedural safeguards to insure that criminal verdicts in trials involving witness inducement agreements are based upon reliable evidence. Witness inducement agreements will continue to be an important tool to prosecutors in the twenty-first century.”

WHY PROSECUTORS ARE PERMITTED TO OFFER WITNESS INDUCEMENTS: A MATTER OF CONSTITUTIONAL AUTHORITY

Hon. H. Lloyd King, Jr., 156 Stetson Law Review [Vol. XXIX] 1999

Cooperation Plea Agreements: International Consensus



FOURTH REGIONAL SEMINAR ON GOOD
GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

Co-hosted by UNAFEI
and the Department of Justice of the Republic of the Philippines
6-9 December 2010, Manila, the Philippines

November 2011
TOKYO, JAPAN

RECOMMENDATION:

“13. Mitigation of punishment and grants of immunity from prosecution encourage accomplices and “insiders” to supply useful information and testimony. Providing for the possibility, in appropriate cases, of mitigating punishment or granting immunity to persons who provide substantial cooperation in the investigation and prosecution of criminal offences should be duly considered.”

Cooperation Plea Agreements: International Consensus

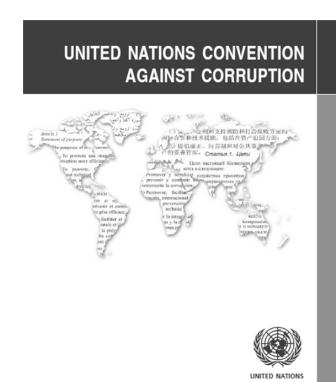


Article 37. Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.



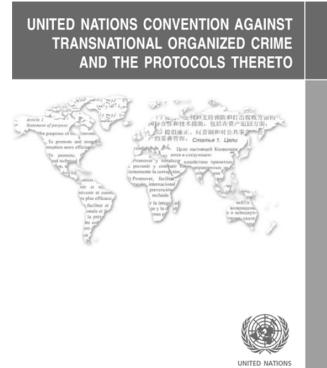
Signatories: 140
States Parties: 162

Cooperation Plea Agreements: International Consensus



Article 26. Measures to enhance cooperation with law enforcement authorities

“Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.”



Signatories: 147
States Parties: 172

Cooperation Plea Agreements (US Practice and Procedure)



1. Identify potential cooperator
2. Prosecutor/officer does an “off the record” interview of witness
3. Negotiate terms of written plea agreement
4. Plea hearing before judge (usually closed proceeding)
5. Prosecutor meets with cooperator to prepare for trial
6. Witness testifies at trial of former codefendant
7. Witness is sentenced

Reducing Cooperation Plea Agreement to Writing



- Transparency is key: Every promise must be reduced to writing
- Government obligations and accused's obligations
- Generally charge bargain, not sentence bargain
 - Best option: accused pleads to all charges, gets hope of reduced sentence
 - More charges in plea = more credibility as witness
- Consider a written factual proffer for judge
- Include disclaimer that proffer is under inclusive

Reducing Cooperation Plea Agreement to Writing



- Accused agrees to testify truthfully and completely
- Accused agrees to turn over documents, materials
- Accused agrees to defer sentencing until his cooperation is completed
- Accused agrees to submit to polygraph
- Accused agrees to waive rights to appeal
- Consequences of breach spelled out
 - False statement will result in cancellation of his plea, and he may be charged w/ perjury, obstruction
 - Accused's statements can be used against him

Reducing Cooperation Plea Agreement to Writing



- agreement should ideally include all of accused criminal conduct
 - increases leverage if cooperation not fruitful
 - enhances credibility as a witness
- detention status should be explicit
 - release based solely on potential operational cooperation, and bond revoked if agreement breached or accused commits new crime
- government obligation to provide witness security
 - articulate justification / nature of the threat

Preparation of Cooperator Witness Before Trial



- Prosecutor has a “duty to truth” and an obligation to do justice, and must satisfy himself that the witness he is sponsoring is truthful and credible, and will not mislead the Court
- If for no other reason, DPP’s have a duty to interview witnesses of dubious credibility to satisfy his /her obligation to disclose exculpatory information under CPC Rule 51

Preparation of Cooperator Witness Before Trial



- Specific direction to witness
 - “Tell the truth, tell the truth, tell the truth”
 - Witness not an advocate for either side
- Prosecutor explains courtroom procedures, and what questions to expect from prosecutor and defense attorney
 - Okay to do mock direct, cross-examination
- Never give witness a script, or coach a witness, or suggest answers

3. Insufficient corroborative evidence



The New York Times

February 23, 2012

Bribery Case Falls Apart, and Tactics Are Doubted

By LESLIE WAYNE

The case seemed tailor-made for a movie: 22 business executives were arrested in an undercover sting in which F.B.I. agents posed as greedy bribe-taking officials seeking to arm their tiny African nation with grenade launchers and other military hardware.

The Justice Department hailed it as a turning point, promising that it would apply hardball tactics commonly used to take down organized-crime figures to prosecute executives who had violated a federal ban on paying bribes to obtain foreign business.

“The fight to erase foreign bribery from the corporate playbook will not be won overnight,” Lanny A. Breuer, an assistant attorney general, said in announcing the case with great fanfare two years ago. He added that potential lawbreakers “should stop and ponder whether the person they are trying to bribe might really be a federal agent.”

But this week, the government’s case collapsed in a federal courtroom in what many view as an embarrassing setback for the Justice Department, raising questions about the agency’s tactics and its zeal to pursue such bribery cases.

- Accomplice testimony can never stand alone
- Corroborating innocent details of witness testimony
- Overreliance on audio or videotape
- Sting operations raise additional proof issues
- Prosecutors: know your evidence

4. Adherence to high ethical standards



- Don't allow political partisanship to creep in
- Transparency in charging decisions
- Procedures for disclosure of exculpatory evidence

Discovery Obligations



- Discovery requirement to disclose all “benefits conferred.”
 - plea agreement
 - other promises and considerations
 - witness security payments
- Obligation to produce “material, exculpatory” information
 - prior inconsistent statements
 - contradictions with other witnesses



Voluntary Self-Disclosure

THE WALL STREET JOURNAL.

September 6, 2012, 11:03 AM

Study Says Voluntary Disclosure Doesn't Change FCPA Penalties

By Samuel Rubenfeld

Debate over whether a company should disclose a potential bribery problem to the government has been a topic of discussion for years. It always revolved around one question: Does it help a firm avoid a stiffer penalty in the end?

Well, a draft study done by professors at New York University School of Law attempts to provide an answer. The study, which examines U.S. anti-bribery enforcement actions from 2004 through 2011, found no evidence that voluntary disclosure of wrongdoing results in lesser penalties.

"We cannot rule out the possibility that voluntary disclosure does result in some form of leniency," said Kevin Davis, a vice dean at NYU Law school who co-authored the study, in an email.

- Clarifying incentives from voluntary disclosure and a strong compliance program
- Use of Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)



Questions?

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