

THE PROSECUTION
AND DEFENSE OF
PUBLIC CORRUPTION

The Law and Legal Strategies

PETER J. HENNING
LEE J. RADEK

OXFORD

THE PROSECUTION
AND DEFENSE OF
PUBLIC CORRUPTION

This page intentionally left blank

THE PROSECUTION
AND DEFENSE OF
PUBLIC CORRUPTION

The Law and Legal Strategies

Peter J. Henning

AND

Lee J. Radek

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne
Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy
Japan Poland Portugal Singapore South Korea Switzerland Thailand Turkey Ukraine
Vietnam

Copyright © 2011 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Oxford is a registered trademark of Oxford University Press
Oxford University Press is a registered trademark of Oxford University Press, Inc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press, Inc.

Library of Congress Cataloging-in-Publication Data

Henning, Peter J.

The prosecution and defense of public corruption : the law and legal strategies / Peter J. Henning,
Lee J. Radek.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-19-537841-2 (hardback) : alk. paper)

1. Political corruption—United States—Criminal provisions.
2. Political corruption—United States—Trial practice.
3. Misconduct in office—United States.
4. Corruption investigation—United States. I. Radek, Lee J. II. Title.

KF9409.H46 2011

345.73'02323—dc22

2010048492

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

**You may order this or any other Oxford University Press publication by
visiting the Oxford University Press website at www.oup.com**

*To Karen, first and foremost, and Grace, Alexandra, and Molly,
who make it all worthwhile.*

—P.J.H.

*To Jill, Megan, Matt, and Caitlin, my wonderful wife and perfect children,
for their patience and inspiration.*

—L.J.R.

This page intentionally left blank

CONTENTS

Author Biographies xvii

Preface xix

1. Introduction 1

I. The Meaning of Corruption 1

II. The Development of Federal Corruption Law 3

A. *Crédit Mobilier* 4

B. Oregon Land Frauds 4

C. Teapot Dome 5

D. Second Circuit Bribery 6

E. Enhancing the Tools of Federal Prosecution 7

F. Undercover Corruption Investigations 10

G. Lobbying Reform 11

III. The Federal Role 12

IV. Conclusion 14

2. Bribery and Unlawful Gratuities Involving Federal Officials (18 U.S.C § 201) 15

I. History of the Statute 15

II. Scope of the Statute 16

III. Statutory Terms 17

A. “Public Official” 17

B. “Selected to Be a Public Official” 26

C. “Official Act” 27

D. “Anything of Value” 32

E. Offer to Pay 36

IV. Bribery 37

A. Quid Pro Quo 38

B. Object of the Bribe 39

C. Official Duty 44

D. Witness Bribery and Unlawful Gratuities 44

V. Unlawful Gratuity 47

A. Sun-Diamond Growers 48

B. Proving the Link 49

C. The Bribery–Unlawful Gratuities Distinction After *Sun-Diamond Growers* 51

D. Unlawful Gratuities as a Lesser-Included Offense of Bribery 52

3. Specialized Federal Corruption Statutes 55

I. Theft, Conversion, and Embezzlement of Federal Property (18 U.S.C. § 641) 55

A. Government Control of Funds 57

B. Intangible Property 59

II. Specialized Bribery and Unlawful Gratuities Statutes 61

A. Offer and Acceptance of a Loan or Gratuity by Financial Institution Examiner (18 U.S.C. §§ 212 and 213) 61

B. Federal Reserve Bank Loan and Discount of Commercial Paper (18 U.S.C. § 214) 63

C. Acceptance of Consideration for Adjustment of Farm Indebtedness (18 U.S.C. § 217) 64

D. Officers and Employees Acting as Agents of Foreign Principals (18 U.S.C. § 219) 65

E. Bribery Affecting Port Security (18 U.S.C. § 226) 66

F. Influencing Employment Decisions by a Member of Congress (18 U.S.C. § 227) 67

G. Bribery of Meat Inspectors (21 U.S.C. § 622) 68

H. Bribery of Harbor Inspectors (33 U.S.C. § 447) 70

4. Theft or Bribery Concerning Programs Receiving Federal Funds (18 U.S.C. § 666) 71

I. History of the Statute 71

II. Scope of the Statute 72

III. Statutory Terms	74
IV. The Federal Funds	74
A. <i>Salinas v. United States</i> : Effect on Federal Funds	75
B. <i>Sabri v. United States</i> : Federalism and the Nexus Requirement	76
C. <i>Fischer v. United States</i> : Benefits	79
D. \$10,000 in Any One-Year Period	83
V. Agent	84
A. Authority over Funds	84
B. Agent’s Authority	85
C. Agent of the Organization	87
VI. The Offense Conduct	90
A. Embezzle, Steal, Defraud, Conversion, or Misapplication (18 U.S.C. § 666(a)(1)(A))	90
B. Bribery and Unlawful Gratuities	94
C. The \$5,000 Requirement	98
VII. Statutory Exemption	103
A. Bona Fide Salary	103
B. Usual Course of Business	106
5. The Hobbs Act (18 U.S.C. § 1951)	107
I. History of The Statute	107
II. The Hobbs Act’s <i>Quid Pro Quo</i> Requirement	109
A. <i>McCormick v. United States</i> : An Explicit <i>Quid Pro Quo</i> for Campaign Contributions	109
B. <i>Evans v. United States</i> : The <i>Quid Pro Quo</i> Element Applied	112
C. Reconciling <i>McCormick</i> and <i>Evans</i>	113
D. Campaign Contributions	115
E. Defendant’s Authority for a <i>Quid Pro Quo</i>	118
F. Personal Gain from the <i>Quid Pro Quo</i>	121
III. Obtaining Property	122
IV. Liability of Nonofficials	124
V. Interstate Commerce	127
A. Federalism and the Hobbs Act	128
B. Direct and Indirect Effect on Interstate Commerce	131
C. Practical Considerations Regarding the Commerce Element	139

6. Mail and Wire Fraud and The Right of Honest Services	
(18 U.S.C. § 1346)	143
I. Origins of the Mail Fraud Statute	145
A. Constitutionality	145
B. Defining the Elements of Mail Fraud	147
C. The Scope of the Mailing Element	151
II. The Development of the Right of Honest Services Theory	152
A. McNally and the Limits of a Scheme to Defraud	152
B. The Right of Honest Services Statute (18 U.S.C. § 1346)	155
III. <i>Skilling v. United States: Limiting Honest Services Fraud to Bribes and Kickbacks</i>	157
A. Preserving the Constitutionality of § 1346	158
B. The Meaning of Bribes and Kickbacks	160
C. The Future of Honest Services Fraud	162
7. The Travel Act (18 U.S.C. § 1952)	167
I. History of the Statute	168
II. Interstate Commerce Element	170
A. <i>Rewis v. United States</i> and <i>Erlenbaugh v. United States</i>	171
B. The Federal Nexus in the Lower Courts	173
C. Subsequent Case Law	178
III. State Law Bribery	181
A. <i>United States v. Nardello</i> and <i>Perrin v. United States</i>	181
B. Bribery under State Law	184
C. Unlawful Gratuities	187
IV. Intent	189
A. Specific Intent	189
B. Intent and Interstate Travel or Use of a Facility of Interstate Commerce	189
C. Mixed Motives	191
V. Subsequent Act	192
8. False Statements (18 U.S.C.A. § 1001)	195
I. History of The Statute	195
II. False Statement or Concealment	197
A. False Statement	197
B. Concealment	199

- III. Materiality 201
- IV. Intent 204
 - A. Willfully 204
 - B. Intent for Jurisdiction 206
 - C. Causing Another to File a False Statement (18 U.S.C. § 2(b)) 206
- V. Jurisdiction 208
- VI. § 1001 and Other Federal Reporting Requirements 212

9. Conflict of Interest Statutes 215

- I. Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government (18 U.S.C. § 203) 216
 - A. Persons Covered 217
 - B. Compensation 219
 - C. Representational Service 220
 - D. Particular Matter 221
 - E. Federal Forum 222
 - F. Intent 224
- II. Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government (18 U.S.C. § 205) 225
 - A. Agent or Attorney 226
 - B. Particular Matter 227
 - C. Exceptions 228
- III. Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches (18 U.S.C. § 207) 229
 - A. The Basic Prohibition (18 U.S.C. § 207(a)) 230
 - B. Additional Restrictions (18 U.S.C. § 207(b)-(1)) 236
 - C. Exemptions 239
- IV. Acts Affecting a Personal Financial Interest (18 U.S.C. § 208) 240
 - A. Officer or Employee 241
 - B. Exercise of Authority 242
 - C. Negotiating or Arranging for Prospective Employment 243
 - D. Financial Interest 244
 - E. Intent 244
 - F. Exemptions 245

V. Salary of Government Officials and Employees Payable only by United States (18 U.S.C. § 209)	246
A. <i>Crandon v. United States</i> : Timing of the Payment	247
B. For Services as a Government Employee	248
C. Exemptions	250
VI. Penalties and Injunctions	250
10. Election-Related Crimes	253
I. History of Election-Related Statutes	253
II. Enforcement Acts (18 U.S.C. §§ 241 and 242)	257
A. The Right to Vote	260
B. Voting Rights Conspiracies	264
C. Intent	270
III. Voting Rights Act (42 U.S.C. §§ 1973i)	274
A. § 1973i(c)	275
B. Voting More than Once	281
IV. National Voter Registration Act (42 U.S.C. § 1973gg-10)	284
V. Federal Corrupt Practices Act (18 U.S.C. § 597)	286
VI. Registration and Voting by Noncitizens (18 U.S.C. §§ 611 and 1015(f))	290
11. Patronage and Related Federal Political Employment Offenses	293
I. History of the Statutes	294
II. Patronage Crimes	298
A. Promise of Employment or Benefits (18 U.S.C. § 600)	299
B. Deprivation of Employment or Benefits (18 U.S.C. § 601)	300
C. Promise of Employment by Candidate (18 U.S.C. § 599)	303
D. Deprivation of Relief Benefits (18 U.S.C. § 246)	304
III. Federal Political Employment Crimes	305
A. Interference with Elections by Officials (18 U.S.C. § 595)	305
B. Using Relief Appropriation to Interfere with Any Election (18 U.S.C. § 598)	306
C. Solicitation of Campaign Contributions (18 U.S.C. § 602)	306
D. Making Campaign Contributions (18 U.S.C. § 603)	309
E. Solicitation from Persons on Relief (18 U.S.C. § 604)	310
F. Disclosure of Names of Persons on Relief (18 U.S.C. § 605)	310

- G. Intimidation to Secure Political Contributions (18 U.S.C. § 606) 311
- H. Place of Solicitation (18 U.S.C. § 607) 311
- I. Coercion of Political Activity (18 U.S.C. § 610) 313

12. Campaign Finance and Lobbying 315

- I. History of Federal Campaign Finance Statutes 317
- II. Criminal Prosecution of Federal Campaign Finance Violations 318
- III. Pay-to-Play Regulation 324
 - A. Federal Contractor Donations 326
 - B. Municipal Securities Rulemaking Board Rule G-37 326
 - C. Investment Advisers 328
 - D. State Pay-to-Play Statutes 329
- IV. Lobbying 330
 - A. History of the Statutes 331
 - B. Criminal Prosecution 333

13. RICO and Public Corruption 335

- I. History and Scope of The Statute 335
- II. RICO Definitions 337
 - A. Racketeering Activity 337
 - B. Enterprise 338
 - C. Pattern of Racketeering Activity 340
- III. Conducting an Enterprise Through a Pattern of Racketeering Activity (18 U.S.C. § 1962(c)) 344
 - A. The Operation or Management Test 345
 - B. Public Office as the RICO Enterprise 346

14. Venue in Federal Corruption Prosecutions 349

- I. The Process of Determining Venue 351
- II. Venue for Bribes and Unlawful Gratuities 354
 - A. 18 U.S.C. § 201 355
 - B. 18 U.S.C. § 666 357
- III. The Hobbs Act (18 U.S.C. § 1951) 358
- IV. The Travel Act (18 U.S.C. § 1952) 359
- V. Mail And Wire Fraud 360
 - A. Mail Fraud (18 U.S.C. § 1341) 360
 - B. Wire Fraud (18 U.S.C. § 1343) 364

VI. False Statements (18 U.S.C. § 1001) and Campaign Finance	366
VII. Conspiracy (18 U.S.C. § 371)	369

15. Investigative and Trial Issues 371

I. Initiating an Investigation	371
II. Special Considerations in Public Corruption Investigations	372
A. Authorizing an Investigation	373
B. Approving an Undercover Operation	373
C. Conducting an Undercover Operation	375
III. Dangers in Public Corruption Prosecutions	376
IV. The Importance of Witnesses	378
V. The Ethics of Witness Preparation	379
VI. Preparing Witnesses and Clients to Testify	382
A. Preparing the Cooperating Witness and the Brady Disclosure Obligation	383
B. The Witness Who Does Better than Expected	386

16. The Speech or Debate Clause 391

I. Arrest	393
II. Scope of the Speech or Debate Protection	393
A. Modern Supreme Court Interpretations	394
III. The Meaning of Legislative Acts	404
IV. Testimonial Privilege and Immunity	406
A. Subpoenas	406
B. Searches	409
C. Wiretaps and Consensual Recordings	412
V. Remedies	414
VI. Waiver	419

17. Sentencing 421

I. Bribery, Extortion, and Right of Honest Services Fraud (§ 2C1.1)	423
A. Base Offense Level	423
B. Specific Offense Characteristics	424
II. Offering, Giving, Soliciting, or Receiving a Gratuity (§ 2C1.2)	437

III. Conflict of Interest; Payment or Receipt of Unauthorized Compensation (§ 2C1.3) 438

IV. Payments to Obtain Public Office (§ 2C1.5) 439

V. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election while on Certain Federal Property (§ 2C1.8) 440

Table of Cases 443

Table of Statutes 463

Index 469

This page intentionally left blank

AUTHOR BIOGRAPHIES

PETER J. HENNING joined the Wayne State University Law School faculty in 1994, where he is a Professor of Law. He is a magna cum laude graduate of Georgetown University Law Center. His teaching focuses on criminal and corporate law, with a specialization in white collar crime. Before entering law teaching, he was a senior attorney in the Division of Enforcement at the U.S. Securities and Exchange Commission from 1987 to 1991, and a trial attorney in the Criminal Division of the U.S. Department of Justice from 1991 to 1994. Professor Henning is a co-author of three casebooks on criminal law and white collar crime, two student treatises, and three volumes of the *Federal Practice & Procedure* treatise (with the late Professor Charles Alan Wright) on the Federal Rules of Criminal Procedure.

LEE J. RADEK is a cum laude graduate of the Loyola University of Chicago School of Law. He joined the U.S. Department of Justice under the Attorney General's Honors Program in 1971. In 1976 he was one of three attorneys selected to form the Public Integrity Section of the Department's Criminal Division. He became a Deputy Chief of that Section in 1978. In 1992, he was appointed to the position of director, Asset Forfeiture Office, and in 1994, he returned to the Public Integrity Section as its chief, where he served until 2001, when he became senior counsel in the Asset Forfeiture and Money Laundering Section. Among his other duties, Mr. Radek was a member of the FBI Criminal Undercover Operations Review Committee, and was the Department's representative to the Financial Action Task Force—the international anti-money laundering body. Mr. Radek retired in 2005 and now enjoys playing golf and watching morning traffic reports.

This page intentionally left blank

PREFACE

“No people will tamely surrender their liberties, nor can any be easily subdued, when knowledge is diffused and virtue is preserved. On the contrary, when people are universally ignorant and debauched in their manners, they will sink under their own weight without the aid of foreign invaders.”

Samuel Adams

While the notion of the “consent of the governed” is a foundational principle for a democracy, such consent must be informed and given for a proper purpose. When those who exercise public authority act for their own benefit rather than the good of the community, that consent can break down and government becomes something to be feared or despised. There is, perhaps, no greater internal threat to a democracy than the cynicism that arises from the perception of favoritism, that decisions are swayed by officials working to line their own pockets rather than working for the greater good. Similarly, a perception that the will of the people is being subverted by an executive that abuses its power by prosecuting innocent officials also results in a loss of faith in government.

This book focuses on the many and varied ways that the federal government seeks to prevent and punish corruption at all levels of government. Over the past forty years, the prosecution of public corruption has been a priority of the U.S. Department of Justice. There has been no shortage of cases, from prosecutions of members of Congress to governors and state legislators to local officials throughout the country. Compared to other nations, the United States is certainly not one that is pervaded by corruption, but it still occurs far too often and has a negative impact on the public perception of government.

Our goal in writing this book is to provide a thorough legal analysis concentrating primarily on the federal laws applied to prosecute public corruption. We survey the wide range of federal statutes that authorize prosecution for the misuse of public authority and the protection of