The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*

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> Overwhelmingly, cases where corruption has been unearthed and successfully prosecuted have been those where an outside investigative body—often the Federal Government—has been involved . . . . The reason is evident. When the police department is corrupt, who can police it? When the criminal investigators are corrupt, who can investigate them? When the prosecutors are corrupt, who can prosecute them? As long as law enforcement power is kept in the hands of those who are themselves corrupt, the public interest is frustrated. The only hope lies in vesting jurisdiction in an outside body that has the capacity and the will to investigate and prosecute as needed.[1]

I. INTRODUCTION

A peculiar feature of cases involving the investigation and prosecution of governmental corruption is that they generate concern about who should investigate and prosecute the matter. If the ordinary process is followed, both the suspect/accused and the investigator/prosecutor may be persons employed by the same

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1. WHITNEY NORTH SEYMOUR, UNITED STATES ATTORNEY 174–75 (1975). This quotation was used by Professor Charles F.C. Ruff in his article, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1212 (1977), but to a slightly different effect, and consequently, he reached somewhat different conclusions from those reached in this paper. *See infra* note 81 (explaining Professor Ruff's view of "federal interest" as articulated in his 1977 article that led him to distinguish between local mayors, state legislators, and state judges).

governmental entity—that is, the same jurisdiction, city, county, state, or federal.[2]

Other contexts demonstrate this concern well. For example, persons employed by the same law firm cannot represent parties on opposite sides of a case. Similarly, two public defenders employed by the same office normally are not permitted to each represent different defendants in the same case, if those defendants have divergent interests in the matter. Such instances involve a conflict of interest, or at least the appearance of one that routinely requires a selection of someone outside that office to handle the matter.

The investigation and prosecution for corruption of government officials by agents employed by the same unit of government have some overtones of a conflict of interest. But these conflicts of interest, by themselves, are not always significant enough to require the case to be handled by another jurisdiction. The situation is different from the aforementioned conflict-of-interest settings: the closeness of city police or prosecutors to, for example, errant building inspectors employed by the same governmental unit is not the same as the proximity of persons employed in the same law firm or public defender's office.

There are, however, numerous situations in the investigation and prosecution of governmental corruption cases in which the particular circumstances of the matter create "too close" a connection between the officials who investigate or prosecute and the persons who are suspected or accused, or there are particular facts in the setting that produce the same kind of concerns. Besides the conflict-of-interest issues, the type of facts that can trigger these kinds of concerns generally fall into the categories of potential bias or special influence in the matter. In all such instances, if the concerns are serious enough, the normal agencies of investigation and prosecution should not be employed to handle the matter.

As a general matter, our intuition tells us that we should avoid situations where there is a possibility of connections between the defendants and the agencies of investigation and/or prosecution that might raise concerns about the fairness and objectivity of the preliminary fact-finding, the decisions being made and the handling of the case. This is what is meant by the "distance imperative." As coined

2. Sometimes, the agency that normally investigates or prosecutes is not from the same jurisdiction. For example, a county prosecutor in Los Angeles may be the normal prosecutor of city employees who engage in activities of governmental corruption, but usually in such cases, the county geographically overlaps the city, and the distinctions between the two jurisdictions are not great.

here, this is a shorthand label for the bundle of concerns that, individually or taken together, create the need to achieve some "distance" between the public officials suspected or accused of corrupt acts and the public criminal enforcement agencies pursuing them.

Not every context in which public official corruption is prosecuted necessarily presents the need for distance-achieving methods. The need for distance varies with the kind of governmental agency involved, the role of the suspected corrupt official(s), and the particular circumstances of the case. A premise of this paper is that a normal pattern for the investigation and prosecution of criminal activity of public officials is that such investigations or prosecutions are conducted by the law enforcement agencies of the jurisdiction in which the activity occurred. What distance concerns trigger, however, is a situation in which it is preferable not to follow the normal pattern.[3]

The notion underlying this paper is that the need for distance arises in many different contexts in the criminal process, and an overarching approach to the subject can provide useful insights; identify issues that might otherwise be overlooked; stimulate thinking about innovative ideas for addressing those issues; and be helpful in deciding how best to achieve distance in the investigation and prosecution of a matter in which distance is needed.

Additionally, the survey of distance imperative issues suggests that the federal government's role in this area is deserving of special attention: investigation and prosecution of local or state corruption cases by the federal government is a way to achieve distance, and, of course, the federal government is extensively engaged in such cases. Generally, because of the variety and breadth of application of federal jurisdictional elements attached to federal offenses, jurisdictional requirements do not, as a practical matter, serve to limit the kind or number of federal prosecutions of state and local political corruption. Rather, any limits imposed are founded in (a) general notions of distance requirements; (b) local or state criminal enforcement agencies' willingness or ability to pursue the matter; (c) the availability of investigatory and prosecutorial resources on the state, local, and federal levels; (d) current federal principles, policies and priorities; and most importantly, (e) U.S. Attorneys' exercise of prosecutorial discretion in selecting cases.

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3. An "abnormal" pattern is usually followed in such cases, and enforcement is not pursued by the normally-used agencies of that jurisdiction. Of course, when this unusual pattern is followed in a great many cases, the "abnormal" may become viewed as the "normal."

In practice, the determination of whether federal agencies investigate and prosecute local and state public official corruption cases is influenced by numerous factors in addition to those related to the distance imperative. By artificially focusing exclusive attention on the distance imperative in this paper we do not mean to suggest that it is always the operative reason why a normal pattern of investigation/prosecution did not occur. There are many other explanations for why and where federal investigations and prosecutions are brought in individual cases.[4] Addressing the distance imperative alone can be viewed as a kind of thought experiment with attention focused on the distance imperative, largely to the exclusion of other factors.[5]

Part II describes some foundational elements—a definition of official corruption and the premise of self-defensive jurisdiction—upon which the analysis in the paper is based.[6] Part III describes the various kinds of circumstances out of which distance concerns arise through a survey of different categories of governmental agencies. Different agencies tend to present different kinds of distance concerns.[7] Part IV reviews different ways in which distance is usually achieved. Just as there are different kinds of sources for the concerns that generate the need for distance, similarly there are different methods for achieving distance.[8] Finally, Part V addresses the large federal role in dealing with political corruption and some of its implications, relates it to distance imperative analysis, and proposes the formulation of investigatory and prosecutorial policies that should, at a minimum, directly address distance imperative concerns but should also go beyond them.[9]

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4. For example, an instance of local official corruption might be prosecuted federally because the corrupt scheme was so complex and widespread that local agencies did not have the resources to investigate and prosecute. Or, fortuitously, a major local instance of local official corruption may have first come to the attention of federal agents who investigated the matter, and having invested significant resources, they also prosecuted the matter, not because of a failure or inability of local agencies to handle the matter or because of distance imperative concerns, but simply because the federal agencies happened on the matter first. *See* NORMAN ABRAMS, SARA SUN BEALE & SUSAN R. KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 76–86 (5th ed. 2010) (describing the policy and resource allocation considerations that affect the choice between federal and state prosecution of crimes).

5. This article sets forth the idea that this kind of focus can be a helpful construct in identifying concerns that otherwise tend to be subsumed and lost in other kinds of analyses.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part V.

II. FOUNDATIONAL ELEMENTS

A. Defining Official Corruption

Official or governmental corruption can be variously defined. Because the definition used can occasionally have an impact on distance concerns, it is helpful at the outset to settle on a definition. For purposes of this paper, a broad and open-ended definition is adopted: any criminal offense(s) committed by governmental officials related to, or growing out of, their governmental duties.

Governmental officials may be engaged in different kinds of criminal activity. When one thinks of corruption involving government officials, the offenses that leap to mind are those committed for economic gain, usually involving bribery or some form of embezzlement or theft by governmental officials from the public coffers. Other kinds of offenses committed by public officials, however, can also relate to, or grow out of, governmental duties. Government officials may, for example, engage in crimes based on ideology, such as spying for a foreign government. Or they may become the law unto themselves, wrongly believing that they are serving the public interest, such as police who engage in unlawful means to apprehend or search or interrogate persons, or who falsify evidence in order to convict people thought to be criminals. Or they may commit crimes designed to serve interests relating to their official position, albeit not economic in nature.[10] For purposes of this paper, all of these different offenses constitute official corruption.[11]

On occasion, however, a government official will engage in criminal conduct unrelated to the performance of his or her official duties.[12] Such cases are not treated in this paper since *official* corruption is not

10. A notorious example is the burglary that triggered the Watergate scandal.

11. Query whether the distance imperative should operate differently depending on the nature of the corrupt activity.

12. *See* Ian Austen, *Former Attorney General in Canada Is Cleared in Traffic Death*, N.Y. TIMES, May 26, 2010, at A9, *available at* http://www.nytimes.com/2010/05/26/world/americas/26canada.html. An example of a public official having engaged in possibly criminal conduct unrelated to his official duties, where the handling of the matter reflected distance imperative concerns, recently occurred in Canada. The Attorney General of a province was involved in a traffic altercation in which a bicyclist died of his injuries. He was charged with criminal negligence causing death and dangerous driving causing death. Because as Attorney General he had appointed prosecutors and judges in the province, a special prosecutor was brought in from another province to handle the case. In the end, the special prosecutor moved to drop the charges because "given all of the evidence," a conviction was unlikely. *Id.*

involved, but similar concerns about the need for distance in such cases may be applicable.[13]

B. The Premise of Self-Defensive Jurisdiction and the Need for Distance

Generally, a jurisdiction has a special responsibility to pursue enforcement against the corruption of its own processes or its own agencies by its own officials or employees. It can be described as a form of self-defensive responsibility or jurisdiction[14]: corruption in governmental institutions is a special kind of threat to a government and, accordingly, the government itself has a special responsibility to pursue such crime. Paradoxically, it is those very kinds of cases that are likely to present distance problems and make self-defensive enforcement difficult or impractical to achieve.

III. THE KINDS OF DISTANCE CONCERNS: VARIATION DEPENDING ON THE AGENCY

Corrupt conduct may be engaged in by officials of any body or agency of government of any jurisdiction, that is, local, state, or federal, and at any level within those units of government. Thus, the corrupt activity may arise in any agency, high or low, in the governmental hierarchy, in a village, town, city, county, parish or state, or involve federal officials at any level.

Which agency and at what level in the local/state/federal hierarchy the agency sits may affect the varying kinds of concerns that create the need to achieve sufficient distance between the agencies of investigation and prosecution, on the one hand, and the officials who are alleged to have perpetrated the corrupt conduct, on the other. These factors may also affect how and by what means the needed distance can be achieved.

The reasons why distance is needed in the investigation and prosecution of police department corruption, for example, are not

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13. There may be similar kinds of concerns about the need for distance in cases not involving prosecution of government officials—for example, where a person who is not a government official but is politically or otherwise prominent and influential is prosecuted, and one worries about the possibility of political influence over the law enforcement agencies involved. Such cases are not directly treated here, but much of the analysis may be relevant to such situations.

14. *See generally* L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 66–67 (1948). Professor Schwartz, in his landmark article, used the term "self-defensive" to describe federal "self-defensive" jurisdiction in a somewhat broader sense than is being used here. At its core, it involved offenses that undermined federal governmental authority, i.e., offenses that involved a challenge to direct federal interests: "treason, espionage, contempt of court, bribery of federal officials, resistance or obstruction to federal process, interference with recruiting or defrauding the revenue." *Id.* at 67.

necessarily the same as those involving corruption of local or state legislators. The source of the need for distance where the alleged corruption arises in a police department—where there are often close, personal relationships among officers—is quite different from that which exists when the suspect is a legislator. The political influence of legislators and their personal ties to other public officials may create a need for distance when they are the targets of a corruption investigation. Similarly, corrupt conduct by judges raises different distance concerns than either the police or legislator cases or executive branch cases.

A more general issue can be identified at this point. In some instances, based on the agency and the person's role, distance concerns are likely to be substantial, irrespective of particular conditions; it can be concluded as a general matter that distance needs to be implemented in all such cases. In other instances, only the circumstances of the particular situation may warrant taking steps to achieve distance.

We survey below the major categories of governmental agencies in which corruption may occur and the concerns that generate the need for distance in connection with each category. The agencies are reviewed according to general categories[15] that reflect the most important types of agencies.[16]

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15. It is not feasible to survey all kinds of agencies at the local, state, and federal levels; accordingly, this article proceeds by general categories.

16. There is extensive sociological literature which addresses the subject of corruption in organizations. While it does not provide direct support for the factual observations in this paper, by extension, some of the research has some relevance for this paper, and is otherwise useful background material. *See generally* Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, *in* 25 RESEARCH IN ORGANIZATIONAL BEHAVIOR 1 (Roderick M. Kramer & Barry M. Staw eds., 2003) (discussing how corruption in an organization comes to be taken for granted; describing three processes that occur—institutionalization, rationalization, and socialization—which underlie normalization); Patricia M. Fandt, Chalmer E. Labig, Jr. & Andrew L. Urich, *Evidence and the Liking Bias: Effects on Managers' Disciplinary Actions*, 3 EMP. RESP. & RTS. J. 253 (1990) (reporting an empirical study that concludes managers are more likely to recommend some form of discipline for disliked employees than liked employees when the evidence of misconduct is weak, and more likely to recommend severe discipline for disliked employees than liked employees when the evidence of misconduct is strong); Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 708 (2009) (providing empirical support for the idea that unethical behavior is less likely to be perceived or reported when it develops gradually; ergo, those lacking distance are more likely to be inured to misconduct in their own organization); *Methods of Investigating Municipal Corruption*, 20 U. CHI. L. REV. 717 (1952–1953) (providing an overview of the types of agencies established to investigate corruption within municipal governments, and considering their effectiveness according to the degree to which each type of agency is able to punish offenders); Diane L. Miller & Stuart Thomas, *The Impact of Relative Position and Relational Closeness on the Reporting of Unethical Acts*, 61 J. BUS. ETHICS 315 (2005) (concluding that individuals are less likely to report team members than superiors or peers, and that relational closeness does not have significant

A. Corruption in a Police Department

Suppose a police officer in a large urban police department is suspected of corruption—taking bribes from an organized crime figure to "look the other way" when instances of prostitution, gambling, or drug dealing come to his or her attention.

1. Investigation by Police in the Same Department[17]

It is obvious that special distance problems may arise if police officers in the same department investigate one of their own. Such investigations do occur, but often under conditions that are designed to address the distance issues.

Some of the special distance problems arise from the nature of a typical large, urban police force that is often quasi-military and hierarchical in its organization and operations.[18] Police departments tend to have their own special culture. Usually a strong esprit and sense of duty and responsibility for one another are inculcated into the officers. At the individual level in police departments, close, personal relationships and feelings of dependence and trust often exist among officers. As in the military, the life of each officer may be in the hands of his or her colleague. In smaller departments, all of the individual officers may know each other and be friendly or unfriendly to each other; either possibility presents issues. Even if the department is large so that the suspect officer and the putative investigating officer are strangers to each other, distance issues may still be present. Investigating officers might be concerned that they may in the future

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effect except that a subordinate is less likely to report a superior with whom she is in a close relationship); Maurice Punch, *Police Corruption and Its Prevention*, 8 EUR. J. CRIM. POL'Y & RES. 301 (2000) (rejecting the "bad apple" notion of police corruption and supporting the notion of how in a police department plagued by corruption, it can help to bring in a reforming chief who implements aggressive investigative programs and demands a higher ethical standard); Canice Prendergast, *Investigating Corruption* (World Bank Pol'y Res., Working Paper No. 2500, 2000) (discussing how unavoidable features of independent investigations may distort organizational incentives). For an extensive listing of earlier articles on the subject, see the references listed in Ashforth et al., *supra*, at 43–52.

17. Police are considered generically, though specific examples and contexts are mentioned in the text. Thus all kinds of police agencies are included here, and there may be additional variations depending on the category such as sheriff's departments, federal police agencies (e.g., FBI, DEA), state police and highway patrols, specialized police such as park police, etc.

18. *See* sources cited *supra* note 16. The sociological literature listed in note 16 has general relevance to organizations, including governmental organizations. Accordingly, the issues discussed in this literature may be relevant to the various kinds of governmental bureaucratic organizations in local, state, or federal organizational structures. Smaller groups that are also treated in this paper—for example, most prosecutors' offices or judges—may not fit as comfortably into a large-organization model.

(assuming the investigation does not lead to dismissal) have occasion to work alongside the target of their investigation. Or while being themselves strangers, the investigating officers and their target may be friends of friends or know many people in common.

The culture might also discourage acts that cause detriment to fellow officers. This may be seen as an act of disloyalty to the organization, and in conflict with the tenet, "protect your own!"

In addition, there may be significant competitiveness among individual officers because of promotion policies and limitations on the number of available positions, which could affect or appear to affect investigators' decisions. While such general factors may make a positive contribution to the effective running of the department, in the context of suspicion of corrupt activity by a member of the organization, they may have a negative effect on the investigation of a member of the group by other members of the group.

Generally, the dynamics of proper investigation, whether the department is large or small, are likely to be compromised by relationships among officers. All such factors, both the nature of the organization and of individual relationships, can distort or affect decisions made during an internal criminal investigation.

Even where the investigating officers themselves maintain fairness and objectivity, there may be an appearance of real or potential bias in the normal investigatory decision-making processes. In addition to the risk of actual distortions or the appearance of the same, the fact that the investigation was conducted in-house may prove to be of use to defense counsel if there is a subsequent criminal prosecution of the suspected police officer. Suppose, for example, competition among officers for promotion to higher rank is an important factor in a department. Defense counsel might consequently suggest that the investigating officer was biased because he was in competition with the defendant.

Involvement of members of the same police force in investigating suspected corruption of officers of the department can—because of the culture[19] or sense of esprit in a police organization—engender hostility toward those who make the crucial decisions. Because of the nature of

19. For a paper on how a culture of corruption can become pervasive in an organization and make it difficult to root out corruption, see Ashforth et al., *supra* note 16. The authors note: "Given the self-sustaining nature of normalized corruption, overcoming it typically requires the administration of a strong shock—typically from external sources." *Id.* at 38. They cite "media exposure" as a common form of such shock and note that "public exposure often results in the forcible intervention of governmental/regulatory agencies that compel a reversal in normalized corruption." *Id.* Of course, criminal prosecution would be an example of "forcible intervention of governmental . . . agencies." *Id.*

the relationships within the department, there is a chance that relations between the suspect and his friends on the one hand, and the investigating officers on the other, will be adversely affected for a very long time regardless of which way the decisions go. This can affect general departmental morale and result in continuing tension and conflict.[20] The very nature of a police department may contribute to a post-investigation residue of distrust and anger at those insiders who make decisions against one of their own.[21]

2. Prosecution by Those Who Routinely Work with the Same Police Department

Similar concerns arise with regard to who prosecutes the police officer. Even though the accused and the prosecutor come from different agencies, if it is routine for personnel from the particular police and prosecutorial agencies to work together on cases, it may be problematic to have the prosecutor prosecuting police officers with whom she has worked or may work in the near future.[22]

The size of the police department is, of course, relevant to this issue. Generally, police departments are larger than prosecution offices. In very large police departments, the likelihood that a particular prosecutor will have had or is likely to have future involvement with a particular police officer may be small. The concern in these situations is not necessarily actual relationships but rather the potential for such relationships and the appearance of possible bias (for or against the defendant) that would flow from that potential.

The paths of investigation and prosecution and determining who is involved in those law enforcement functions can develop in different ways, and the paths may not be clear at the outset of a case. Consequently, it is often better to avoid the risk of a problem developing by creating distance in the situation. In large department

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20. An important question is whether the potential for harm done to the police organization by its own internal investigation of departmental miscreants should be taken into account in deciding upon the need for distance between the investigators and the suspected officers.

21. Because police are often unionized, there may be special rules governing the investigation of police, including rules limiting public disclosure of information relating to the investigation.

22. *See, e.g.*, Terry Hillig, *Prosecutor Is Investigating Allegations that Suspect Was Beaten by Alton Police*, ST. LOUIS POST DISPATCH, July 17, 2001, at B1. Hillig reported on a case involving criminal charges against police officers who were accused of beating a suspect. A special prosecutor was appointed at the request of the county prosecutor who "requested the special prosecutor because of a possible conflict of interest." According to the county prosecutor, the officers allegedly involved "had professional and personal relationships with members of his staff."

settings, the need to create such distance may not be absolutely necessary, but nevertheless, it is not amiss to create it.

A well-known counter-example, i.e., where the "normal" office of prosecution pursued the cases against a number of officers, occurred some years ago in connection with the Los Angeles Police Department in the so-called Ramparts Division scandal. Police officers were accused by a fellow officer (who was trying to reduce his own sentence on drug charges) of having manufactured evidence to convict individuals who had criminal records but were innocent of the specific crimes charged against them. The Los Angeles County District Attorney prosecuted the cases against the offending police officers.[23] This was a case where distance imperative concerns did not apparently lead to an "abnormal" handling of the matter.[24] It is not suggested that distance imperative concerns *always* determine how a case is processed; rather, these are factors that very often result, and very often should result, in an other-than-normal handling of the matter.

Two kinds of concerns arise when police are prosecuted by the prosecutorial office with which they usually work. First, as developed above, the question may be raised whether the relationship between the police department and the prosecutor may affect the integrity of the particular prosecution. Second, there will also be a concern about the effect of such cases on future relations between the police and prosecutorial agencies with whom they closely work.[25]

B. Corruption in a Prosecutor's Office

Although the incidence of prosecution of allegedly corrupt prosecutors is significantly less than that of police officers, such cases do occur;[26] and when they do occur, they can shake the foundations of the criminal justice system.

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23. Note that the County District Attorney normally handles felony prosecutions that arise in the City of Los Angeles as well as in the county outside the city.

24. One can speculate as to why the District Attorney prosecuted this case. For example, given the nature of the police corruption—that is, a basic corruption of the very processes of justice—the District Attorney may have thought that it would be reassuring to the public if a regular agency of the criminal justice system handled the matter. Or, because the Los Angeles Police Department is, of course, very large, and the Los Angeles County District Attorney's Office is the largest local prosecution office in the nation (with over 1,000 deputy district attorneys), it is somewhat easier to take special internal steps to try to achieve the needed distance. Or, the notoriety of the case may have made it an attractive case to handle, despite distance concerns.

25. *See* Hillig, *supra* note 22. As noted in the previous section, there is a question whether the latter concern should be taken into account in making a decision on the need for distance.

26. There are numerous examples of prosecutions of local prosecutors during the past decade,

1. Prosecution by a Prosecutor from the Same Office

Prosecution of a corrupt prosecutor by someone from the same office would, on its face, appear to be highly problematic.[27] Prosecution offices tend to be much smaller than police departments, although offices in large urban centers may involve hundreds of lawyers[28] and sometimes are organized into a main office and branches. Nevertheless, lawyers in the larger offices are likely to know each other or at least have met. They are also likely to have many friends, acquaintances, and fellow workers in common. Accordingly, prosecution of someone from the same office is not only likely to entail a serious risk of actual bias (favorable or unfavorable) but also a very strong appearance of bias or potential for bias.

Although there may be many differences between the organization, culture, and esprit of police departments and prosecutors' offices, some of the same kinds of observations regarding peer relationships and the like noted for police departments may be applicable to prosecutors' offices.

2. Investigation by Police Who Routinely Work with the Same Prosecutorial Agency

Investigation by police who routinely work with the same prosecutorial office presents a mirror image of the types of concerns and issues previously discussed regarding prosecution of police corruption.[29] In the previous context, the concern was that past, ongoing relationships, or the potential for future police-prosecutor relationships, might affect the integrity of prosecution of allegedly corrupt police; here, the concern would be that these same kinds of relationships might compromise the police investigation of allegedly

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all brought by federal authorities. *See, e.g.*, United States v. Villafranca, 260 F.3d 374, 376–77, 382 (5th Cir. 2001) (convicting a state court prosecutor, in charge of "Drug Impact" prosecutions, under the Hobbs Act for fixing cases—the bribes involved $2,000–$3,000 per case); United States v. Carmichael, 232 F.3d 510, 513–15 (6th Cir. 2000) (convicting a local prosecutor of extortion for demanding and accepting several bribes from a local bookmaker); United States v. Genova, 167 F. Supp. 2d 1021, 1024–34, 1039 (N.D. Ill. 2001) (convicting a local prosecutor of several charges arising from an "attorney fees kickback scheme," i.e., bribing the mayor in order to maintain his position and receiving payment from city for legal work not performed); *see also infra* note 88 (noting the federal specific offense policies that contain elements relating to prosecutions against local or state officials for corruption).

27. For a fictionalized example, see SCOTT TUROW, PRESUMED INNOCENT (1987). While the novel involved an alleged homicide arguably not related to the official duties of the defendant, the problematic feature of such a prosecution would be the same as if the case had involved official corruption.

28. *See supra* note 24.

29. *See supra* Part III.A.

corrupt prosecutors. The issues and concerns previously discussed would be generally similar.

3. Other Concerns: Prosecutors' Relationships with Judges

A special kind of concern that presents important distance concerns is the fact that over time, prosecutors may develop rapport or relationships (not always positive) with judges in the judicial system in which they work. For a prosecutor accused of corruption to be prosecuted before a judge before whom he or she has appeared, or with whom he or she is otherwise acquainted, involves relationships between participants in the enforcement system and the accused that should be avoided. Such involvements may appear to compromise the integrity of the trial process. Indeed, a judge is likely to be uncomfortable where such a relationship exists and may recuse herself. The concerns may not be adequately addressed through recusals, however; there is a strong need for distance in this situation.

Another kind of concern that is special to public officials such as prosecutors, judges, and legislators merits mention here: prosecutors are lawyers and professionals, and most devote their careers to their professional work. As is well-known, some prosecutors use their professional work as a basis for launching a political career, and as a consequence tend to develop strong links to persons who operate in the political sphere and to high governmental officials. The existence of these kinds of relationships may also be relevant in assessing the need for distance, a topic further explored later in this paper.[30]

C. Corruption in Other Criminal Enforcement and Criminal Justice Offices Such as Public Defenders, Probation and Parole, Corrections Officials (e.g., Jailers and Prison Guards), Etc.

What about allegations of corruption against officials in other criminal justice and criminal enforcement offices? Do they present the same types of distance issues as do police and/or prosecutors? Different criminal justice offices have different potential for corrupt activities. For example, bribing a public defender not to perform his or her role properly does not frequently happen, though one can conjure up scenarios where this might occur. Defense lawyers are more likely to be the bribers than the bribees. For example, see *United States v. Yonan*,[31] which involved a private practitioner who bribed prosecutors on behalf of his clients' interests. One might possibly imagine Yonan

30. *See infra* Part III.F (discussing corruption involving high-level officials).

31. 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

as a public defender who might have done the same thing. But bribery by a defense counsel can also follow a different, though related, path. See, for example, *Castro v. United States*, where a criminal defense attorney was convicted of offering kickbacks to a judge in exchange for appointment as a special assistant public defender.[32] Corruption in a public defender office, when it does occur, would seem to present most of the same kinds of distance concerns as corruption in a prosecutor's office.[33]

Corruption may also arise in other offices of the criminal enforcement system, probation and parole offices, corrections and the like. Unlike police, prosecutors, public defenders, and judges,[34] these officials are not directly involved in the criminal investigation and prosecution processes. But individuals in the different law enforcement agencies may become acquainted even though they operate at different stages of the criminal process.

There may be a concern, for example, that the investigating police or the local prosecutor may see a suspected or accused probation official as "on the same side" and therefore adopt a more lenient attitude in addressing the matter. Generally, however, the reasons for requiring distance should be grounded in more concrete concerns.[35]

Corruption cases against local jailers may require distance. Sometimes, those who guard the local jail are members of the same local police force or, for example, an overlapping or neighboring county police jurisdiction. Further, jailers may have extensive interactions with local police and, on occasion, some prosecutors. Prison guards in state prisons involve state rather than local officials and accordingly are treated in a later section.[36]

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32. 248 F. Supp. 2d 1170 (S.D. Fla. 2003). The kickbacks involved sixty-four cases and were uncovered as part of "Operation Court Broom," jointly carried out by state and federal investigators. *Id.* at 1172–73; *see also* United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996) (describing the undercover investigation of the prosecutors and judges later indicted under "Operation Court Broom").

33. Perhaps it is less frequent that a public defender's office is used as a springboard for a political career, and therefore, there is less of a tendency for public defenders to be active in politics with the additional concerns that such political linkages present.

34. *See infra* Part III.D (noting that, although infrequent, cases of judicial corruption call for distance and sensitivity).

35. If in the particular circumstances it were determined that there were frequent interactions and close relations between these two groups, a contrary conclusion might be required.

36. *See infra* Part III.E (explaining that because individuals at mid-level agencies are less likely to have strong political connections, taking steps to achieve distance are only necessary where special circumstances are present).

Absent special circumstances, corruption cases involving probation and correctional officers appear to resemble those involving low- or mid-level civil servants at the local, state, or federal levels. These cases do not seem to warrant the same need for distance as cases involving officials who have a direct role in the investigation, prosecution, and trial of corruption cases, nor do they have those attributes of high-level officials which may also affect the need for distance.

D. Corruption within the Judiciary Branch

Judges, who serve at the very heart of the criminal justice process, are among the most important public officials in a democratic society. It is difficult to imagine a system that involves investigation and prosecution of an allegedly corrupt judge by a police officer and prosecutor who regularly appear before that same judge.[37] The relationship of the particular judge to the particular police force and prosecutors may be tainted by previous interactions, either positive or negative. Even if there has been no prior contact, the possibility of future interactions exists if the judge is exonerated, and that fact is likely to hang heavily over the police officer and prosecutor in the case.

Obviously, it is inappropriate to conduct the trial of a judge who is charged with corruption before a judicial colleague who is likely to be a friend or acquaintance with whom the defendant may sometimes have lunch and otherwise interact socially. This would surely be an instance where a mandatory rule requiring distance might be justified. To impose a distance requirement in such an instance, one need not look to the waters of politics in which many judges have dipped and to the strong political connections that judges, whether appointed or elected, are likely to have. But those kinds of factors further strengthen the case

37. There are many examples of federal prosecutions of state court judges during the past fifteen years. *See, e.g.*, United States v. Walker, No. 08-31030, 2009 WL 3150357, at *1 (5th Cir. Oct. 1, 2009) (per curiam) (convicting two judges on RICO charges for "[using] their influence to direct money to A-Instant Bail Bonds in exchange for bribes"), *cert. dismissed*, 130 S. Ct. 1536, *and cert. denied*, 130 S. Ct. 1551 (2010); United States v. Whitfield, 590 F.3d 325, 337–43 (5th Cir. 2009) (convicting two judges of charges stemming from acceptance of loans guaranteed by a local attorney where judges made efforts to hear cases in which the attorney was involved), *appeal filed*; United States v. Frega, 179 F.3d 793, 798 (9th Cir. 1999) (charging two judges with RICO violations arising from their acceptance of more than $100,000 in payments and benefits from a local attorney in exchange for unfair advantage in the cases in which the attorney was involved); State v. Maestas, 149 P.3d 933, 934–35 (N.M. 2006) (convicting a municipal judge under the "Government Conduct Act" for receiving sexual favors from a defendant over whose case he was presiding—a conviction that was reversed on appeal by the New Mexico Supreme Court). Note that the last-cited case involved a state rather than a federal prosecution.

for achieving distance by adopting some "abnormal" ways to handle the case.

Further, the general influence of judges is often widespread. They tend to have many friends and some enemies. They are public figures whom many people in the community know, and most tend to be deferential to them and to their office. It could be a source of concern for other judges in the jurisdiction for local police and prosecutors to move against one of their brethren. All of these factors favor shifting responsibility for investigating and prosecuting judicial corruption reasonably far from the handling of the matter by police and prosecutors in the same jurisdiction.[38]

Cases involving judicial corruption are, fortunately, not frequent, though in recent years there seem to have been a number of such cases.[39] Criminal investigation of a judge is an extraordinarily sensitive matter. The risk of leaks is a concern if the investigation is handled locally. It is important to maintain confidentiality, not only to preserve the integrity of the investigation but also to preserve the judge's reputation, if the investigation fails to uncover evidence of criminality.

E. Corruption in Low- or Mid-Level Agencies at the Local, State, or Federal Level

Suppose corruption is suspected or charged against a person in the official bureaucracy who functions at a low- or mid-administrative level—whether in the local, state, or federal systems—who is an individual who has nothing to do with the law enforcement and criminal justice processes. What kinds of distance issues arise? We assume that this could be an official who serves in any one of a myriad of government offices, e.g., building inspectors, officials who rule on letting public contracts or who issue various kinds of permits or certifications to the public, etc. To what extent, as a general matter, is distance needed in the investigation and prosecution of such officials?

Besides not having much to do with the law enforcement process, persons in low- or mid-level governmental positions are less likely to have strong political connections that could raise concerns about

38. It may also be appropriate to take steps to achieve distance in the investigation and prosecution of corrupt acts by staff persons who work for judges, for example, court clerks and bailiffs. While these personnel may not have the status of or move in the same circles as their superiors, they are usually well-known to the other official participants in the criminal justice process and may have the type of friendly relations with them that warrant a distance approach. Further, there may be a risk or perceived risk of alienating the judge who employs the suspect official, or his or her judicial brethren, by such enforcement action.

39. *See supra* note 37.

investigating and prosecuting the case in the jurisdiction where the alleged corrupt conduct occurred. Of course, in any given situation, even low- or middle-level bureaucrats may have such political ties, particularly if they obtained their positions through a political patronage system.[40]

Thus, for example, suppose the individual is a city building inspector who is suspected of taking bribes (a very common form of local official corruption). Investigation and prosecution by the local police and prosecutor should present no problems unless the individual is somehow enmeshed in local politics, has important local "connections," or the particular corruptive activity is part of a larger pattern that itself is tied to local politics and local influential people.

Generally, enforcement of corruption allegations or charges against low- or mid-level governmental officials may not require steps to achieve distance in the ordinary case. Achieving distance will only be mandated where special circumstances are present that warrant such action.[41]

F. Corruption Involving High-Level Local, State, or Federal Officials

When a high-level[42] government official at the local, state, or federal level is under suspicion for corruption, the public will often have concerns that political connections may operate behind the scenes to influence law enforcement decisions. The same may be true for judges[43] and legislators.[44] The more powerful and highly connected the suspected official is, the greater the concern that either the suspect/accused or someone acting on his or her behalf will have relationships and influence with a wide range of people. Such influence

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40. *See, e.g.*, United States v. Sorich, 523 F.3d 702, 705–06 (7th Cir. 2008) (involving a widespread political patronage scheme in Chicago, which included doling out jobs that were supposed to be civil service appointments via fake interviews, falsifying of test results, etc., with charges brought under the federal mail fraud statute), *cert. denied*, 129 S. Ct. 1308 (2009).

41. Prison guards are an example of a category of mid-level state employees that may trigger a need for distance in connection with a corruption investigation or prosecution. In California, for example, prison guards are a large, well-organized, politically powerful group, and they have a strong union that is very active in supporting candidates for public office. Because of the political influence of the union, a corruption investigation directed against their members conceivably might trigger attention from influential political figures and officeholders. *See generally* Fox Butterfield, *Political Gains by Prison Guards*, N.Y. TIMES, Nov. 7, 1995, *available at* http://www.nytimes.com/1995/11/07/us/political-gains-by-prison-guards.html?pagewanted=1.

42. "High," that is, in the particular setting. A mayor, for example, is a "high"-level governmental official in the local governmental setting.

43. *See supra* Part III.D.

44. *See infra* Part III.G (noting that legislators are by nature political persons who have strong political connections and influence).

may affect the integrity of the investigation or the prosecution; there may be concern that supervising officials or those with authority over the investigative and prosecutorial units may improperly intrude into the matter.

The suspected/accused official may be state, local, or federal. He or she may function in high-level executive offices as diverse as that of mayor, governor, or President of the United States, or at somewhat lower levels in the governmental hierarchies, in agencies as different as ranking officials of the state department of motor vehicles, or of a federal regulatory agency—wherever there seems to be a significant risk of political influence, significant political connections, or the capacity to directly influence or exercise authority over the police or prosecutor.

A case that illustrates such complex issues surfaced in March 2010 in Los Angeles County. The Los Angeles County Board of Supervisors is a five-person executive-legislative governmental unit that exercises very broad powers over the vast expanse of Los Angeles County. The *Los Angeles Times* reported that each supervisor was allocated an annual discretionary fund of $3.4 million that could be used for various purposes (e.g., staff salaries), but not, of course, for non-public purposes.[45] The *Times* report stated that some of these funds appeared to have been used for non-public purposes, and that the Los Angeles County District Attorney's Office had begun an investigation to determine whether any laws had been violated by the members of the Board of Supervisors.

The District Attorney is an elected official. The scheme of authority under the relevant statutes and state law is complex, but it is clearly designed to give the District Attorney a measure of independence from the Board of Supervisors.[46] Ultimate authority over the size of the

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45. Jack Leonard & Garrett Theroff, *L.A. County Supervisors' Spending Is Probed*, L.A. TIMES, Mar. 19, 2010, at A1.

46. *See, e.g.*, L.A. County Charter, Art. XII, § 56, *available at* http://file.lacounty.gov/lac/charter.pdf. Section 56 of the Los Angeles County Charter provides that the Charter does not allow for the early removal of elective officers. Of course, early removal under provisions of state law is a possibility. For pertinent state law, see, for example, CAL. GOV'T CODE § 25303 (West 2003), which provides that county boards of supervisors "shall supervise the official conduct of all county officers," but expressly notes that

> This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

The section goes on, however, to qualify this by noting that "[n]othing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff." *Id.*

District Attorney's budget, however, resides in the Board,[47] a fact that could potentially compromise this independence.

Initially, it appeared preferable to have some distance between the County Supervisors as targets of the investigation and the investigators in the District Attorney's office. Additionally, there may have been other relationships and connections between the District Attorney's office and the Board that also suggested the need for distance.

Of course, what was involved was a preliminary investigation to ascertain whether anything serious was afoot. Absent any indications of any significant violations of the law (and the news report did not reveal anything of that nature), there seemed nothing inappropriate in having the District Attorney's office conduct a preliminary investigation.

Political influence may, of course, be just as significant in a local setting as at the major statewide or national levels. Because of the likely, broad-ranging political influence that powerful officials may be able to exercise in their particular political domains, it is often desirable to shift the investigation and prosecution out of the suspect's area of influence.

Sometimes, the relationships are more complex. Consider the events that developed in the state of New York in February–March 2010. Allegations were made in the press that the Governor had intervened, personally and through subordinates, in a civil matter in which a high-ranking aide of his had been accused of a violent assault against a

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The last-mentioned qualification might seem to give boards of supervisors fairly substantial de facto control over District Attorney's offices, but a California Attorney General's opinion letter suggests limitations: "A county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are assigned." 77 Op. Cal. Att'y Gen. 82, 1 (1994). The letter is careful to distinguish, however, between approving a budget and post-allocation management; a board's discretion with respect to the former is broad. *Id.* at 4–6. Language in *Modoc County v. Spencer* is also relevant:

> The district attorney, in the discharge of the duties of his office, performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While, in the former capacity, he represents the county, and is largely subordinate to and under the control of the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

103 Cal. 498, 501 (1894). Language from a more recent case, *Graham v. Municipal Court*, also bears on this issue: "A county district attorney prosecuting a criminal action within a county, acts as a state officer, exercising ultimately powers which may not be abridged by a county board of supervisors." 123 Cal. App. 3d 1018, 1022 (Ct. App. 1981).

47. *See* sources cited *supra* note 46.

woman.[48] The implication was that the Governor, by his actions, had attempted to persuade the woman not to pursue the matter further.

In what was widely interpreted as a political ploy, the Governor asked the state Attorney General to investigate the allegations. The Attorney General was not only, as a general matter, a political antagonist of the Governor, but was also expected to run against him for the governorship in the upcoming election. Normally, the political relationship between a state's attorney general and governor would make an investigation by the former somewhat uncomfortable. By asking the Attorney General to investigate him, the Governor went even further and put him in an untenable position. If he followed through and carried out the investigation, no matter what conclusions he reached, they would be deemed suspect.

Finally, after a couple of weeks during which it appeared that his staff had begun to investigate the matter and the political aspects of the situation intensified, the Attorney General announced that he was appointing the former Chief Judge of the New York Court of Appeals as an independent counsel[49] to investigate the matter.

If enforcement actions are to be undertaken in situations involving complex relationships such as these, they cry out for them to be carried on by officials who have significant distance from the matter, the people involved, and probably the jurisdiction itself. Both the Los Angeles County investigation and the New York gubernatorial matter are illustrative of a large category of cases involving high-level governmental officials where there is a need to achieve distance.

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48. The New York Times ran a series of articles on the matter. *See, e.g.*, Nicholas Confessore & Jeremy Peters, *Paterson's Ethics Breach Turned Over to Prosecutors*, N.Y. TIMES, Mar. 4, 2010, at A1; Danny Hakim & William K. Rashbaum, *Paterson Is Said to Have Ordered Calls in Abuse Case*, N.Y. TIMES, Mar. 2, 2010, at A1; Danny Hakim & Jeremy W. Peters, *Paterson Weighs Race as Top Aide Quits in Protest*, N.Y. TIMES, Feb. 26, 2010, at A1; William K. Rashbaum & Nicholas Confessore, *In Swirl of Paterson Scandal, 2nd Police Superintendent Quits*, N.Y. TIMES, Mar. 10, 2010, at A23. In the fall-out from the disclosures and ensuing investigation, the Governor announced that he was ending his campaign to run for re-election, and two high-level officers in his personal state police detail resigned (in the wake of disclosures of allegations of their involvement in pressuring the woman in the matter not to pursue charges). For a piece summing up the entire matter, see David M. Halbfinger, *In Patterson Case Cuomo Sidesteps Vulnerability*, N.Y. TIMES, July 28, 2010, at A26, *available at* http://www.nytimes.com/2010/07/29/nyregion/29assess.html.

49. *See infra* Part IV (dealing generally with appointments of independent or special counsel to investigate and prosecute matters in which distance is needed).

G. Corruption in Legislative Bodies at the Local, State, or Federal Levels

Legislators deal with a broad range of matters, and lobbyists are paid to try to garner support for or against particular legislation. There are, of course, a large number of legislators and numerous interactions between legislators and lobbyists nationwide. All of these interactions have a potential to cross over into corrupt activities. For whatever reason, the number of instances of prosecution of legislators for corruption is very high in modern times. Legislators who engage in corrupt conduct may be local legislators—for example, city council persons or county supervisors—or state legislators, or members of the U.S. House of Representatives or the U.S. Senate.

Legislators are political persons who invariably have many political connections with potential for influence that may spread very broadly. As in the case of other high governmental officials, there is a need to put significant distance between the legislator's likely sphere of influence and the government personnel who investigate and prosecute allegations of corruption against him or her.

Insofar as the concern relates to the public's perception of the possibility of political concerns or influence affecting a case, the perception may point in either of two directions: some members of the public, depending on their political bent, may suspect that the investigation and prosecution of the particular individual is politically motivated;[50] others may believe that the suspect-defendant's political connections may make it unlikely that a conviction can be obtained.

IV. THE DIFFERENT WAYS TO ACHIEVE DISTANCE

A. Introduction

1. An Overview

The ways to achieve distance are almost as varied as the governmental agencies in which corruption can occur and the many reasons why achieving distance may be desirable. We do not suggest that in every case where distance is needed, one of the described methods will be invoked. Distance values are not necessarily applied consistently and evenly in the legal system. Judgments are made and

50. It has been suggested that "it is virtually unavoidable that public corruption trials will be considered by some to be politically motivated, regardless of what sovereign prosecutes." Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 378 n.29 (1989).

discretion is exercised by investigative agencies and prosecutorial offices that may also take into account additional factors or may undervalue or discount the need for distance. Nevertheless, it is an important value that merits recognition and implementation where appropriate.

a. Another Jurisdiction

One common way to achieve distance is for another jurisdiction to handle the investigation and prosecution, for example, instead of city officials—e.g., an overlapping county (if the county has jurisdiction to handle the case).[51] Or the matter may be pursued by an agency[ies] in a neighboring jurisdiction,[52] if the jurisdictional rules of the neighbor permit it. In an official corruption case involving accusations against a local public official, responsibility for investigation and prosecution might be undertaken by state-level agencies, if there are such, e.g., by the state police and the office of the state attorney general. Or, as happens relatively frequently, federal law enforcement agencies might undertake that responsibility.

b. A Special Prosecutor; A Special Commission

Another option for achieving distance for the prosecutorial function is to appoint a special prosecutor coming from the same jurisdiction (i.e., a special prosecutor appointed by the local jurisdiction) or from a different jurisdiction (i.e., a special prosecutor appointed by the governor or by the state attorney general in a local corruption case). Although not part of the regular criminal process, some jurisdictions have used special commissions to investigate widespread local or state corruption. For example, the Knapp Commission, which served from 1970–1972, consisted of four members led by Whitman Knapp and was appointed in response to allegations of corruption against the New York City Police Department.[53] The Commission focused less on

51. *See, e.g.*, Bettina Boxall, *L.A. County Sheriff's Department Investigates Shooting by Maywood Police*, L.A. TIMES (May 31, 2010, 6:30 PM), http://latimesblogs.latimes.com/lanow/2010/05/man-shot-by-maywood-police.html (reporting that the L.A. County Sheriff's Department was investigating a shooting by a police officer of the city of Maywood, a small city within Los Angeles County).

52. It may not be feasible to call upon another local prosecutor's office to prosecute an official corruption case occurring at the local level. In the United States, local prosecution offices with felony jurisdiction usually are county-level offices (or the equivalent jurisdictional unit) and are unlikely to have statutory authority to act in a neighboring county that is outside their own geographic jurisdiction.

53. REP. OF THE COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROC. (Dec. 26, 1972) (Whitman Knapp, Chair); *see* Jinhua Cheng,

investigating individual instances of corruption and more on the "broader problem of identifying the nature and extent of corruption in the Department."[54]

c. A Walled-Off Unit

As another method for achieving distance, some large agencies have a separate unit, walled-off from the operational units, to handle investigations for suspected corruption of personnel in the agency. An internal affairs unit in a large police department is one example of this method of achieving separation and distance. Typically, to maintain the necessary distance, officers within such a unit are separated from and do not fraternize with their operational colleagues.

Generally, prosecutorial agencies are not large enough to warrant creating a special internal affairs unit within the agency to investigate agency personnel. Similarly, most local and state agencies do not have an exact analogue to the internal affairs unit, but some governmental agencies do have inspector general units or audit units that may conduct inspections, inquiries, and investigations. There may also be a general unit that conducts such investigations for all state agencies. These units generally investigate as a form of administrative enforcement, but where corrupt conduct is uncovered, it can lead to criminal prosecution.

An advantage of the special internal investigating unit is that its members are likely to be very knowledgeable about the local scene and background facts; they do not have the disadvantage of being strangers to the locale. A concern about such units, however, is that the wall of separation may not be impervious and may not adequately protect against bias or similar concerns. Also, operational officers may have an attitude about officers who are members of such units, which in some contexts can interfere with the effectiveness of the investigative process.

2. A Disadvantage of Some Methods of Achieving Distance—Lack of Familiarity with the Background, Context, and Culture

Shifting the investigation and/or prosecution from the normal agencies that handle these functions in order to achieve distance suffers

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Police Corruption Control in Hong Kong and New York City: A Dilemma of Checks and Balances in Combating Corruption, 23 BYU J. PUB. L. 185, 207 (2009) (discussing the formation and function of the Knapp Commission).

54. Cheng, *supra* note 53, at 207. It has been observed that in New York City, a commission to investigate police corruption has been appointed every twenty years or so over the past century. The most recent instance is the Mollen Commission, appointed in 1992. In Illinois, in 1969, then private attorney (later Supreme Court Justice) John Paul Stevens headed a five-person commission that investigated corruption on the Illinois Supreme Court.

from a certain disadvantage in many, but not all, instances. In many cases, the distance achieving agencies will lack familiarity with background factors including the local people, the culture, and the value system that may be important to understand the particular case and its setting. By definition, the personnel of agencies, which bring with them the value of distance, are likely to lack useful familiarity with the local scene that flows from being part of it.

Thus, the very characteristics that make the substitute agencies desirable investigators or prosecutors—because they are not embedded in the local culture or familiar with all of the local players—also involve countervailing disadvantages. In deciding whether to invoke distance achieving measures, the investigative and/or prosecutorial agencies must weigh the value gained by achieving distance against the loss entailed because the agencies of enforcement lack familiarity with the factual setting.

B. Achieving Distance in Local Corruption Cases: The Next-Proximate Jurisdiction

For investigation and prosecution of official corruption at the local level, where there is not another local police or prosecution agency available to handle the matter, it would seem most appropriate to refer the matter to the next level up in the hierarchy of government, i.e., to the next-proximate jurisdiction—namely, state-level police and state prosecutorial agencies, which could be expected, generally, to have statewide, overlapping jurisdiction with local police and prosecutors. In the majority of states, however, this is not done routinely or with great frequency.

A majority of states do not have a significant capacity at the state level routinely to carry on investigations of official corruption occurring at the local level. In some states, at one time there had existed state police agencies with broad law enforcement powers, but ironically, because of perceived abuses involving corruption, these agencies had been abolished or their enforcement role narrowed.[55] In about half the states, there is not even an agency called the State Police or State Troopers. Instead, most have a state-level police agency often called

55. For a discussion of the state police movement in Colorado, see H. KENNETH BECHTEL, STATE POLICE IN THE UNITED STATES 126–30 (1995). It is indeed ironic that the historical evidence suggests that rampant corruption in state-level police agencies led to their abolition or a narrowing of their authority so that they no longer could be used to investigate local corruption in the state when distance was needed, and, as a result, federal agencies came to be used frequently as a substitute.

the Highway Patrol[56] or its equivalent, which usually performs highway traffic and vehicle code enforcement. In about half of those states that do have a state police agency (i.e., one fourth of the total number), the agency does not have significant general police investigating capabilities or, if it does have such capacity, it is routinely targeted only at providing assistance to local law enforcement agencies.[57] Similarly, in many states, the state attorney general does not have independent, statewide investigative and prosecutorial power.[58]

In a great many states, significant capability to carry on criminal investigations and prosecutions of public official corruption under state law exists only at the local level, i.e., the city and county levels of government. Thus, in a majority of the states, there is an absence of authority at the state level to pursue cases of local public official corruption. Moreover, even in states where there is such authority, it may not be extensively exercised.

Shifting a local corruption case to the state level, even where it is possible, can have certain drawbacks. State officials may come out of social and/or political networks that are tied into the local government scene. Where this is the case, there is a chance that the needed distance will not be present.

Overall, part of the explanation for why federal authorities are so often involved in investigating and prosecuting cases of *local* public

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56. *E.g.*, California, Florida, Kansas, Missouri, North Dakota, Oklahoma, Wyoming.

57. *Id.*

58. *See* Vito Mussomeli, *A Ground Called Justice*, W. VA. LAW., Apr. 2001, at 24 (calling for the Attorney General to be granted "state-wide criminal jurisdiction so we have a concerted task against corruption and better co-ordination in cross-county prosecutions"). New Jersey is an example of a state where the Attorney General has very broad authority to investigate and prosecute criminal cases, *see* N.J. STAT. ANN. § 52:17B-107 (West 1970); and in Pennsylvania, the authority of the Attorney General to prosecute official corruption cases is expressly provided for, *see* 71 PA. STAT. ANN. § 732-205 (West 1982). The authority of the Attorney General of Virginia to prosecute criminal cases is expressly limited to a list of specified categories of crimes or where there is a request from the Governor. *See* VA. CODE ANN. § 2.2-511 (West 1998). The situation is similar in West Virginia. *See, e.g.*, Michael W. Carey, Larry R. Ellis & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform* (pt. 1), 94 W. VA. L. REV. 301, 304 (1992) ("One of the most significant factors impeding effective state prosecution of corruption is that West Virginia prosecutors and the state attorney general lack any statewide prosecuting authority."). The following comment seems to suggest that it is sometimes easier to prosecute official corruption under Pennsylvania corruption laws than under federal law: "This is critical [i.e., to have a state prosecutorial mechanism to prosecute the state Attorney General] because state crimes include a wide variety of offenses not covered in federal statutes." John M. Coles, *Preserving Integrity: Why Pennsylvania's Independent Counsel Law is Working*, 104 DICK. L. REV. 707, 722 (2000). While California has a Highway Patrol, not a state police force, the state Department of Justice under the state Attorney General does have investigative and prosecutorial authority.

official corruption is that the logical, next-proximate, distance-providing jurisdiction is at the state level, and most states lack a broad authority to investigate or prosecute, or are not exercising such authority very broadly.[59] In the absence of state performance of those functions, the federal government appears to have stepped into the breach. This fact provides a plausible explanation for how the federal government has come to occupy such an important role in addressing local corruption.

We deal below more generally with the role of the federal authorities in investigating and prosecuting allegedly corrupt state-level officials.

C. Enforcement against State-Level Public Official Corruption

If corruption allegations involve accusations against high-level public officials or legislators at the state level, in ordinary course, concerns would arise that relationships—authority over relevant personnel or political influence—might compromise the investigation and/or prosecution if state-level agencies pursue the matter. Therefore, if distance is sought, the next-proximate jurisdiction, and therefore the logical choice for referring the case, would be the federal government. Shifting the matter to investigation by the FBI and prosecution by the U.S. Attorney's office is seen as a way to protect against such risks.[60] It

59. Of course, state officials might contend that it is because the federal enforcement agencies have stepped in that they have effectively been prevented from acting. So it becomes a question of whether federal handling of local corruption cases is the cause or effect of state inaction in those states where state agencies have the authority and the capability to act. Without reaching final conclusions in the matter, an initial observation might be that if, at some time before the federal government became active in this area, there had been active state enforcement, federal involvement might have been less likely to have developed.

60. The distance model may not always work as desired. During the Bush administration, there were suspicions and allegations—in some instances supported by strong circumstantial evidence—that political influence was being exercised regarding who was and who was not being prosecuted. To the extent that that kind of influence was operative, the protective value of distance was being defeated. The very purpose of avoiding political influence and bias affecting prosecutions was being subverted by political influence and bias. Putting it another way, there was political corruption in the prosecution of political corruption. Given that it was federal governmental officials who were suspected of being improperly influenced, the best way to handle the matter, if enough evidence could be accumulated to prosecute, would be through the institution of a special prosecutor. *See infra* Part IV.E (discussing the various methods for addressing corruption at the federal level). See generally Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135 (2009), and particularly the section titled "Politicization in the Prosecution of Political Crimes," *id.* at 151. The authors focus on issues arising from the Bush administration's controversial firing of several U.S. Attorneys in late 2006. The primary concerns the authors address are partisan bias (prosecutors' tendency to pursue members of their own party and others more or less vigorously in order to further their political goals) and the implications of efforts to centralize control over such prosecutors with respect to selection and incentives. On the latter point, it is worth noting that the authors acknowledge that centralization may, depending on the situation, either work to

is not by chance that in the modern era, there appears to be an increasing number of federal prosecutions of state governors, state legislators, and other high state government officials.[61]

Combining the conclusion reached in the previous section with the foregoing observations, we find a plausible explanation based in distance imperative analysis for the relatively frequent involvement of the federal government in an enforcement role in both *local* and *state* official corruption cases.

D. A Special Case: Federal Civil Rights Enforcement against Police Misconduct

A special example of the operation of the distance imperative is enforcement by the federal Department of Justice Civil Rights Division against police misconduct at the local level. Recall that we defined official corruption to include any criminal misconduct by public officials that arises in connection with the performance of official

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increase or decrease the degree to which prosecutors are politicized. *Id.* at 151–52; *see also* Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 192 (2008) (analyzing the allocation of authority and discretion in federal prosecutions); Kenneth J. Meier & Thomas M. Holbrook, *"I Seen My Opportunities and I Took 'Em:" Political Corruption in the American States*, 54 J. POL. 135, 150 (1992) (detailing an empirical study of the extent to which partisan and racial targeting played a role in prosecution of corrupt public officials under the Carter and Reagan administrations: "little indication of partisan targeting during the Carter administration," but evidence that prosecution of corrupt officials was more intense in Democratic states than in Republican states during the Reagan years"); Sanford C. Gordon, Assessing Partisan Bias in Federal Public Corruption Prosecutions (Apr. 22, 2009) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1166343 (challenging Shields & Cragan's 2007 research that suggested "that Democrats were up to seven times more likely to be investigated by the Bush Justice Department than were Republicans" and presenting findings indicating partisan bias in prosecution of political corruption under both the Clinton and Bush administrations). *See generally* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009) (analyzing the partisan political pressures on U.S. Attorneys, and advocating serious consideration of mechanisms to insulate the position from such improper influences).

61. *See* United States v. Ford, No. 07-6087, 2009 WL 2610970, at *1 (6th Cir. Aug. 26, 2009) (upholding sentence of state senator resulting from FBI investigation of corruption in Tennessee legislature); United States v. Siegelman, 561 F.3d 1215, 1228 (11th Cir. 2009) (upholding mail fraud conviction of former Alabama governor), *cert. granted*, No. 09-182, 2010 WL 2571880, (U.S. June 29, 2010) (granting petition for certiorari, vacating judgment below, and remanding for further consideration in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010)); United States v. Montoya, 945 F.2d 1068, 1071 (9th Cir. 1991) (affirming conviction of state senator resulting from FBI investigation of corruption in California legislature); United States v. Kohring, No. 3:07-cr-00055 JWS, 2007 WL 2949528, at *1–3 (D. Alaska Oct. 9, 2007) (discussing federal prosecution of four members of the Alaska Legislature); *see also, e.g.*, Monica Davey & Susan Saulny, *Blagojevich Indictment Lays out Broad "Enterprise" of Corruption*, N.Y. TIMES, Apr. 3, 2009, at A1 (discussing the federal indictment of former Illinois governor Rod Blagojevich).

duties. It therefore includes police criminal misconduct directed against arrestees or prisoners in jail.

Federal involvement in such cases can arise in a number of different legal contexts depending on the local handling of the matter. Local police and prosecutors may have investigated the matter and decided not to pursue it. Local or state authorities may have prosecuted the police officers involved, and the result may have been an acquittal, a conviction on a minor charge, or a minimal sentence imposed by the judge. Thus, federal investigation and possible prosecution of the matter can arise either where the local officials have not pursued the matter, or where they have prosecuted the matter but the outcome is deemed not adequate given the perceived seriousness of the underlying conduct.

Therefore, federal involvement may involve the initial criminal proceeding against the officers, or it may be a second, largely duplicative prosecution of the officers using federal investigators and a federal prosecutor in a federal courtroom applying federal criminal procedure and substantive law, with a federal judge, and a jury selected through federal process.

While federal civil rights prosecutions can take place in an environment arising out of distance imperative concerns, in a number of respects, these concerns differ from the ordinary situation. Ordinarily, in distance imperative cases, there has not been a prior state criminal proceeding against the suspected public officials. Nor do the substantive legal aspects of the ordinary official corruption cases present the type of controversial and inflammatory issues usually found in the civil rights enforcement cases. Often, in the civil rights context, the victims of the alleged police misconduct are minorities, and the local police arguably were engaged in law enforcement activities when they allegedly "crossed the line" into criminal conduct.

Unlike the standard distance imperative situation—where it is largely the nature of the agency where the suspected officials work or political relationships and the like that contribute to the need for distance—in the civil rights context, it tends to be much more the nature of the charges and the risk that the defendant officers are being improperly protected by one or more of the participating local law enforcement/criminal justice agencies.

Still another unusual element is present where the local case has been tried, and the defendant, let us assume, has been acquitted. A series of questions can be posed: an important participant in that process was the lay jury; is there a need for distance from a jury selected in a local/state

criminal process? To the extent that the jury was the key element in the local/state proceeding, why did it acquit? Does use of a federally-selected jury provide the necessary distance? Is a federally-selected jury less likely to protect local police from serious punishment for conduct in the course of their law enforcement duties?

Or was the vote to acquit not attributable to biases of the jury but rather to the possible bias of the local prosecutor and/or judge that affected how the case was presented? Are federal prosecutors and judges less likely to be biased in favor of police officer defendants? Or can one anticipate a different, more successful prosecution in the federal proceedings, not because of possible biases of the previous prosecutor and judge or not because of a flaw in the local jury, but rather, because the prior local/state prosecution already having taken place, the federal prosecutor may have been able to learn from mistakes made in the previous case, and is therefore able to avoid pitfalls? Or is the chance of a successful, subsequent federal prosecution increased by a combination of all of these factors?

Whatever the answers to the foregoing questions, federal civil rights enforcement provides an illustration of a special category in which the distance imperative may be one of the factors that helps to explain the nature and operation of the federal criminal enforcement role.

E. Addressing Distance Needs in Other Ways

1. The Size and Extensive Nature of the Federal System as a Source of Distance: Dealing with Corrupt Conduct by Federal Officials

Where the offending officials are themselves federally employed, there is no higher next-proximate jurisdiction to which to turn in order to achieve distance. In this context, it is as if one is dealing with a unitary governmental structure. There are no obvious, regular, alternative investigating and prosecuting agencies. Nevertheless, because of its very extensive, geographically-dispersed nature, there is some built-in distance-achieving capacity within the U.S. federal system itself.

If there is corruption in a U.S. Attorney's office, the investigation might be carried on by FBI agents brought from another part of the country—i.e., strangers to the office being investigated—in order to achieve some distance. The prosecution of either FBI agents or U.S. Attorney staff can be carried on by lawyers from another U.S. Attorney's office or from the Criminal Division of the Department of Justice, the central headquarters of the criminal arm of the federal government.

There, of course, may still be some of the same types of concerns we have previously seen—the possible influence of loyalty to members of the same agency; the possibility of enforcement agents being acquainted with the accused or having friends in common; or that later there will be residual feelings against those who participated in the enforcement process. The issues here are similar to those discussed *supra*, regarding police departments and prosecutors,[62] with one important difference. If the federal arm does not investigate or prosecute, who will do so? We discuss below some additional possibilities.

Largely because of the sheer size of the federal government, corruption at the lower or middle levels of the federal government, whether occurring in regional offices or in Washington, D.C., can usually be handled without undue concerns about investigators and prosecutors being too close to those against whom they proceed.

When accusations of corruption involve high-level officials at the upper reaches of the federal government, particularly those who are at the cabinet or sub-cabinet levels, serious concerns about adequate distance develop. It is in such cases that either the perception or reality of political influence takes hold, and there is a strong need to achieve distance and separate the investigators and the prosecutors from those who have direct authority or political influence over them and/or who may have a direct or indirect interest in the matter at hand. There are two principal approaches that have typically been taken in addressing these issues: special prosecutors, or application of the principle of necessity.

2. Independent Counsel; Special Counsel

A mechanism that has been used, usually in high-level official corruption cases that arise at the local, state, or federal levels—sometimes in lieu of shifting the matter to a different jurisdiction—is the appointment of a special prosecutor on a temporary basis to investigate and prosecute the matter.

A number of states have statutory provisions that expressly deal with this subject, providing for a court-appointed special prosecutor to replace the county prosecutor where there is a conflict of interest, or where the latter is disqualified to perform his or her duties.[63] A special

62. Note, for example, that while the total number of FBI agents roughly approximates the size of the Los Angeles Police Department, there is a greater dispersal and consequent localization of FBI agents throughout the country.

63. At the local level, these temporary officials are usually called special prosecuting attorney, special district attorney, attorney pro tem, or special counsel.

prosecutor's office is often provided with funds to hire investigative personnel, which may obviate the need to rely on the local police or special investigators separately appointed on an ad hoc basis.

The most notable modern example of the special prosecutor approach was the federal government's adoption of the Independent Counsel scheme. Congress created an Independent Counsel to deal with corruption at the highest federal levels, to be appointed in accordance with specified criteria and procedures.[64] There was much controversy regarding investigations conducted under this statute. After the statute had been on the books for a number of years, Congress chose to let the statute lapse rather than renew it.[65] Perhaps the most well-known example, and one of the last instances of the use of the Independent Counsel, was the investigation of President Clinton by Independent Counsel Kenneth Starr.

The federal Independent Counsel statute and the controversy surrounding it generated substantial literature.[66] Generally, commentators were critical of the statute in the form that it existed when it was allowed to expire. Some advocated retention of the statute while correcting its flaws.[67] Others argued for alternative new mechanisms.[68] Still others argued for abandonment of the Independent Counsel idea and a return to the traditional Department of Justice structure.[69]

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64. 28 U.S.C. §§ 592–593 (2006).

65. The Independent Counsel legislation expired in 1999. *See* David Johnston, *Attorney General Taking Control as Independent Counsel Law Dies*, N.Y. TIMES, June 30, 1999, at A1.

66. *See, e.g.*, Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998); Symposium, *The Independent Counsel After Sunset: New Approaches to a Persistent Problem*, 5 WIDENER L. SYMP. J. i (2000); Symposium, *The Independent Counsel Process: Is it Broken and How Should it be Fixed?*, 54 WASH. & LEE L. REV. 1515 (1997); Symposium, *The Independent Counsel Statute*, 51 ADMIN. L. REV. 627 (1999); Symposium, *The Independent Counsel Statute*: *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427 (1998); Symposium, *The Independent Counsel Statute: Reform or Repeal*, 62 LAW & CONTEMP. PROBS. 1 (1999).

67. *See, e.g.*, Erwin Chemerinsky, *Learning the Wrong Lessons From History: Why There Must Be An Independent Counsel Law*, 5 WIDENER L. SYMP. J. 1 (2000).

68. For example, Professor Merrill discusses various options and labels—what he calls the civil service option: "an office of career civil service prosecutors headed by a presidential appointee . . . within the Justice Department," the "Least Worst Choice." Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1079 (1999). In some ways, this proposal resembles a walled-off internal unit in a prosecution office, comparable to the internal affairs unit in large police departments.

69. *See* H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WIDENER L. SYMP. J. 79, 80–86 (2000).

Many of the arguments and issues regarding the Independent Counsel statute involved problems associated with the specific version of the Independent Counsel which Congress had created. The criticisms included the fact that, while trying to achieve independence for the Counsel, the statute failed to provide sufficient accountability; Congress had not succeeded in the effort to create a system of appointment of the Counsel free from political influence. Indeed, at the level of U.S. presidential politics, it may not be possible to accomplish such a goal.

There were additional concerns about the scope of jurisdiction to investigate granted to the Counsel, the absence of direct control mechanisms, and the absence of any limitation on how much money could be spent or how long an investigation could continue. When a special prosecutor is appointed to handle a single case, the costs of the investigation and prosecution may not be out of the ordinary, but if the special prosecutor is given authority to investigate beyond a single case, the costs of the additional layer of investigation and prosecution (beyond those of the normal expenditures by the Department of Justice and the U.S. Attorneys) begin to mount.[70] Another area of concern involves an issue previously discussed—that the special prosecutor is often thrust into a situation where he or she may lack adequate familiarity with the factual background and sense of context.[71]

The final, and arguably the most telling concern, ironically, which is special to the use of this approach, is the fact that the special prosecutor does not have a significant caseload or incur significant opportunity costs. Normally this would be viewed as an advantage, but it also means that this official is free to devote all of the resources provided to one case, or one target. It has been suggested that this aspect "maximizes the risk of overaggressive investigation and prosecution."[72]

While the Independent Counsel statute is no longer operative in the federal system, a special prosecutor, known as a "Special Counsel" can be appointed under existing regulations, but that official functions under

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70. Anthony Sarno, Jr., Comment, *The Economic Costs of Independent Counsel Investigations*, 5 WIDENER L. SYMP. J. 339, 353–59 (2000).

71. *See supra* Part IV.A.2.

72. *See* Moulton & Richman, *supra* note 69, at 84. The authors go on to say:

> [T]he need to consider the opportunity costs of every case brought is a great solace to prosecutors, particularly federal prosecutors, for whom the gap between jurisdiction and resources is the greatest. This constraint . . . provides a reality check to their judgment calls, bringing home the consequences of every decision. Independent Counsel offices, of course, lack any such constraint . . . .

Id. Professor Merrill makes a similar argument while also noting that a permanent office has an institutional infrastructure in place, an institutional memory, an incentive to preserve prosecutorial norms and a reputation over time with the public. Merrill, *supra* note 68, at 1070.

the authority of the Department of Justice and the Attorney General.[73] The relevant administrative provisions that deal with the relationship between the Special Counsel and the Department of Justice provide:

> The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. . . .
>
> The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice. Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.
>
> The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.[74]

The extent of independence of the Special Counsel is determined under this legal framework.

The most recent highly publicized case involving an investigation and prosecution by a Special Counsel involved the accusations of obstruction of justice, perjury, and false statements against Lewis "Scooter" Libby, the Chief of Staff for the then Vice President of the United States, Dick Cheney. Clearly, this was a case where there was a potential for political influence, and, no doubt, the Special Counsel exercised a large degree of independence and successfully achieved a conviction. This case, however, does not necessarily demonstrate that the Special Counsel institution can achieve sufficient distance in every instance; it may serve to show that much depends on the person named as the Special Counsel and the degree of independence that particular person may be able to exercise.[75]

3. The Principle of Necessity

As previously noted, at the federal level, there is no other jurisdiction to which the case can be shifted. While a special counsel may be appointed, who will conduct the investigation? Will the special counsel be authorized to hire new investigators, or be required to use FBI agents despite the distance concerns that may arise?

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73. 28 C.F.R. § 600.1(a) (1999).

74. *Id.* § 600.7(b)–(d).

75. It should be noted that the Special Counsel in the *Libby* case was appointed by the then Deputy Attorney General because the Attorney General had recused himself from any participation in the matter.

The use of existing agencies despite concerns about conflict of interest and the like has some legal precedent to support it. There is a traditional legal doctrine—the "principle of necessity"—that the U.S. Supreme Court has even applied to itself when a matter came before it in which it had an interest. The leading case is *United States v. Will*,[76] in which the Supreme Court favorably quoted an early Pennsylvania case:

> The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be.[77]

Although there are some differences, the concerns about influence upon the Department of Justice and over the FBI may be likened to the concerns about judges sitting in a matter where they have an interest. If there is no one else to perform the task, the principle of necessity dictates that they should perform their duty.

Where there are allegations of official corruption at the highest levels of the U.S. federal government, it may be necessary to invoke the principle of necessity and use an existing agency—or, at least, some of its personnel—who, arguably, may lack some distance. If personnel of an existing agency are used, additional distance-related steps can be taken. For example, the reporting relationship of the FBI agents who investigate might be changed to insulate the agents involved from influences that might arise from the normal reporting relationships, given the nature of the case.

While the use of some of the personnel of the usual agencies may run afoul of some of the concerns at which the distance imperative aims, that option may sometimes be the only practical one available.

V. A FEDERAL PERSPECTIVE ON THE INVESTIGATION AND PROSECUTION OF OFFICIAL CORRUPTION CASES AND THE DISTANCE IMPERATIVE

A. The Traditional Approach to the Federal Role in Addressing Local/State Public Official Corruption

Traditionally, the primary responsibility for law enforcement in this country has belonged to the state and local governments. While one hears this notion expressed less frequently today than in earlier times, it still has significant force. Federal enforcement is very active in a variety of areas, but given the size of the country, the fact that Congress

76. 449 U.S. 200, 214 (1980).

77. Philadelphia v. Fox, 64 Pa. 169, 185 (1870).

has only authorized a limited number of enforcement personnel and limited other resources on the federal level means that most cases must continue to be pursued by state and local governments. Assigning primary responsibility for enforcement against local and state public official corruption to local and state governments can thus be viewed as a subset of their general primary responsibility for enforcement against crime.[78]

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78. Among others, two well-known sources can be cited in support of the view that state and local government have primacy in striking the state-federal balance in criminal enforcement. In his classic 1948 article, Professor Louis B. Schwartz drew a distinction between federal self-defensive criminal jurisdiction and federal criminal jurisdiction auxiliary to state enforcement. L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 73 (1948). The principal grounds that he identified for invoking such auxiliary federal authority (in cases where no other federal interest was involved) were: when the states are unable or unwilling to act; when the criminal operation extends into a number of states; or when the case was complicated, and investigated and developed on the theory of federal prosecution. *Id.* Certainly, the first two of these grounds reflected a general recognition of the primacy of state authority. The Schwartz approach is thus mainly based on the notion that state prosecution is to be preferred, and the feds in their auxiliary role should only prosecute in situations when the state cannot or is not willing to act, or state prosecution is not convenient because of the multi-state aspects of the case.

The Principles of Federal Prosecution, first promulgated by the Department of Justice in 1980 and incorporated into the U.S. Attorneys' Manual, U.S.A.M. §§ 9-27.001-.760 (2009), appear to reflect an approach similar to that advanced by Professor Schwartz but depart from it in certain ways. Thus, U.S.A.M. § 9-27.240, in the Principles, deals with the issue of whether federal prosecution should be declined "because the person is subject to effective prosecution in another jurisdiction." It sets forth the following two determinants of that conclusion: (1) "[t]he strength of the other jurisdiction's interest in prosecution"; and (2) "[t]he other jurisdiction's ability and willingness to prosecute effectively . . . ." *Id.* While noting that "these factors are illustrative only," the Comment to this section also states, "[s]ome offenses, even though in violation of Federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur . . . because of the nature of the offense." *Id.* The Comment further provides:

> In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and *effectively*. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the Federal prosecutor should be alert *to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.*

Id. (emphases added). It appears from the Principles that while the federal prosecutor is instructed to take into account another jurisdiction's interest in prosecution and its capacity to prosecute effectively, there is no requirement of deference to the state or any presumption in favor of the state handling the matter. The language is rather loose and provides to the federal official a great deal of leeway in deciding whether to pursue the matter. Nor do the Principles of Prosecution contain very much that reflects distance imperative values. The italicized language in the Comment to § 9-27.240, quoted *supra*, includes circumstances that may fall into the general category of distance imperative concerns, but the reference is far from clear, nor is this section restricted to public official corruption cases.

In recent years, there has been extensive debate among scholars about what the federal role

The argument for primary state and local responsibility in this area can be buttressed[79] by the notion that there is logic in placing the burden of enforcement on the unit of government where the corrupt acts occurred. It can be argued that the government unit involved—in this instance, let us assume, the local government—has a responsibility to prevent such corruption from occurring, and its failure in this regard warrants making it bear the burden of enforcement. The goal would be to encourage the local government to police its officials more carefully to prevent this category of criminal acts.

Note that this view of the state/local role only identifies the premise from which one would start in addressing the question whether concerns about the need for distance require that a matter be handled in an other-than-normal manner.

B. The Distance Imperative and Its Effect on the Federal Role

The distance imperative analysis in Parts III and IV of this paper started with the premise that a government whose officials engage in criminal misconduct in connection with their official duties has the primary responsibility for enforcement against them. That distance imperative analysis, however, led to the conclusion that in many instances, enough distance imperative concerns may be present to

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should be and how it should be implemented. *See, e.g.*, Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 976–78 (1995); Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing with Violent Street Crime: Principles, Questions and Cautions*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 112–16 (1996). For a survey of the various positions reflected in this debate, see NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 109–18 (4th ed. 2000).

79. Conversely, there is also a basis in the Constitution for arguing in favor of a stronger federal role in enforcement against local and state public official corruption (entirely apart from distance imperative concerns). It can be argued that such a claim can be derived from the clause of the Constitution guaranteeing a republican government to the states. U.S. CONST. art. IV, § 4. Professor Adam H. Kurland, in his 1989 article, argued that the Guarantee Clause provides an independent basis for federal criminal jurisdiction so that Congress could rely on that use in legislating against state and local corruption "without having to rely on establishing the 'traditional' bases for federal jurisdiction." Kurland, *supra* note 50, at 373. Whether or not Kurland is correct in making a constitutional/jurisdictional argument, the thrust of his analysis also serves to provide a focused justification for directing significant federal law enforcement resources toward this specific area of local and state criminality.

Of course, recognition of a basis in the Guarantee Clause for the federal role in enforcement against local and state corruption does not tell us how strong that role should be. It might, for example, be relied upon to justify the federal role that flows from application of the distance imperative, while still acknowledging the primacy of state and local law enforcement. Or it might be relied upon partially to trump the traditional notion that primacy in this arena belongs to the state and local governments so that neither the federal government nor the state and local governments can claim primacy. Finally, it might be used as the basis for a claim that the federal responsibility in this area should be seen as primary.

warrant shifting the case to another jurisdiction or otherwise depart from the normal manner of handling the matter. A way of characterizing the situation where one begins with the premise that the host government has the primary enforcement responsibility is that this creates a presumption that that government should handle the matter. This presumption can be overcome, however, because of the need to achieve some distance between the agencies of investigation and/or prosecution and the accused official. In Part IV, *supra*, an explanation (not necessarily the only explanation) framed in terms of distance imperative analysis was presented as to why the federal role has become a key element in addressing official corruption at all levels of government. It was concluded that federal enforcement today can be viewed as serving multiple roles—as a surrogate for the role that state-level agencies might have been expected to play in enforcement against *local* corruption;[80] as the next-proximate jurisdiction for dealing with *state-level* corruption; and, finally, as the only available jurisdiction (absent use of a special prosecutor) to pursue enforcement against *federal* official corruption.[81]

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80. For a listing of appellate criminal cases involving prosecutions brought by federal authorities during the past decade against local prosecutors, see *supra* note 26, and against judges, see *supra* note 37. The *Carmichael* case, *supra* note 26, was prosecuted by federal authorities but had been investigated by state police.

81. Contrast the conclusions we have reached using a distance imperative measure with those reached by Professor Ruff in his important 1977 article. He begins by articulating "a belief that local corruption is not a matter of federal concern unless it impacts directly on a primary federal interest . . . that the existence of jurisdiction is not a mandate to federalize all forms of state crime but is, rather, intended to be auxiliary to state enforcement." Ruff, *supra* note 1, at 1213–14. He does not take note of the Guarantee Clause as a basis for an argument regarding a federal interest or even expressly to acknowledge distance imperative–type concerns as grounds for invoking a federal auxiliary-to-state-law-enforcement role. In trying to identify a federal interest in some kinds of state and local corruption, he does use a categorization approach that bears some similarity to that used in Parts III and IV, *supra*, but for a different purpose and with different conclusions. He divides local corruption cases into four categories: members of the executive; members of the legislature; members of the judiciary; and members of police and law enforcement agencies. Ruff, *supra* note 1, at 1214.

He then concludes that there is no legitimate federal interest in prosecuting *mayors*, because "the potential for intervention by state authorities exists," but as to *governors*, "absence of effective alternatives takes on greater significance . . . . The probability that state prosecutors will discover or pursue corruption at the highest levels of state government is slim." *Id.* at 1215. Further, he concludes that federal prosecution of corrupt state *legislators* is not appropriate because of an absence of concerns "similar" to those applicable to governors and the risk of interfering with the state political process. *Id.* at 1216.

Ruff also states that "[i]t is difficult to imagine a case that could justify prosecution of a member of the state *judiciary* for an auxiliary federal offense unless his acts had some direct impact on federal law enforcement." *Id.* at 1217 (emphasis added). While he recognizes the "delicate issues" raised by state investigation and prosecution in such cases, "the solution to that problem is not the interposition of an outside force." *Id.* Finally, he concludes that "[c]orruption

C. Factors in Current, Actual Practice That Affect the Selection by Federal Enforcement Agencies of Local and State Corruption Cases to Pursue

Federal agencies investigate and U.S. Attorneys' offices prosecute a significant number of local and state public official corruption cases of all kinds. As far as one can tell, from an impressionistic assessment of the reported cases, there is no particular pattern in the cases investigated and prosecuted, nor do the cases selected by federal agencies appear to reflect any particular policies.[82]

What goes on in the trenches, that is, in the offices of the U.S. Attorneys and the district attorneys or other state or local prosecutors, undoubtedly varies with the particular office and the individuals leading those offices. One suspects that the cases selected are the result of a range of different practical considerations, in addition to (or even not taking into account) distance imperative concerns, including: (1) the fortuity of which cases come directly to federal attention, sometimes as an off-shoot of non-political corruption investigations, or through whistleblower complaints directed to federal offices, or aggressive, proactive investigation, sometimes involving "stings" by the FBI and U.S. Attorneys' offices to pursue high-level government officials based upon reports of criminal activity; (2) the allocation of cases between local or state investigators/prosecutors and their federal counterparts based on discussions between them, especially if both jurisdictions were involved in developing the case; (3) consideration of such factors as to

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in the *law enforcement system* [i.e., police and prosecutorial agencies] may have the most direct impact on federal interests" through facilitating the commission of federal crimes and discouraging cooperation between federal and local police and prosecutorial agencies. *Id.* (emphasis added).

Ruff thus approaches the issue of federal intervention based on the different roles and levels of the corrupt officials, but, using his yardstick of federal interest, he draws distinctions that we reject. Needless to say, the pattern of federal prosecution of state and local corruption over the years has not been consistent with his federal interest-categorization approach.

82. The FBI's website also reports the following official corruption enforcement statistics:

> Public corruption indictments have increased by 30 percent since 2002 and the number of convictions has increased by 25 percent. In 2007, there were over 2,556 pending cases, with 1,053 indictments and 895 convictions. The number of agents working such cases has increased by 42 percent. FBI investigations have led to the conviction of more than 1,060 government employees involved in corrupt activities, to include 177 federal officials, 158 state officials, 360 local officials, and more than 365 police officers.

FED. BUREAU OF INVESTIGATION, TODAY'S FBI 28 (2008–2009), *available at* http://www.fbi.gov/facts_and_figures/facts_figures.pdf. Note the very large number of state and local officials, as well as police officers, most of whom are local or state, listed as convicted in the foregoing statement. The actual number of cases is likely to be smaller since many cases involve multiple defendants.

which jurisdiction has procedural or substantive advantages, including the potential for imposition of heavier penalties than in the other jurisdiction; and (4) a variety of other similar, pragmatic factors.

It is important to note that in such current real-life contexts, not much attention may be paid to factors like which jurisdiction has the primary responsibility, or whether distance imperative concerns warrant handing over the matter to the feds.

D. The Need for Federal Agencies to Formulate Policies to Guide Selection among the Possible Local/State Corruption Cases to Pursue

What is clear is that despite the heavy involvement of federal enforcement agencies in this area, the feds do not have the resources to, and cannot, investigate and prosecute all such cases.[83] Of necessity, ad hoc choices are being made as to the cases selected by federal agencies, most likely as the result of the type of pragmatic considerations mentioned above but without trying to take into account larger issues of federal enforcement policy.

Missing from this description of the current federal approach in U.S. Attorneys' offices are a rationale and a set of affirmative criteria to guide the exercise of federal authority in this area. It would be desirable to apply reasoned criteria and a modicum of consistency in the selection of such cases.[84] If one attempted to formulate such an approach, one might begin with a statement of policies arising out of the distance imperative analysis in this paper. Such a statement of policies would not necessarily be expected to specifically control individual selection of cases. It could be expected, however, to force federal investigative and prosecutorial agencies to think more carefully about what they are doing and why they are selecting the cases that are chosen, and to consider the larger and longer term implications of their case selection.[85]

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83. Of course, sometimes the state or local government may not have sufficient resources to pursue a matter, particularly if it involves a wide-ranging and complex scheme involving many people perpetrated over a long period of time.

84. *See* Norman Abrams, *Internal Policy, Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 4 (1971).

85. We propose in this paper the formulation by the Department of Justice of policy on this subject to be added to the DOJ statements of investigative/prosecutorial priorities and to be applied throughout the country. Priorities are also established in U.S. Attorneys' offices. *See, e.g.*, Scott Glover, *U.S. Attorney to Target Corruption*, L.A. TIMES, June 12, 2010, at AA3 (reporting that a specialized unit to prosecute public corruption had been reestablished in the Los Angeles U.S. Attorney's office).

1. The Form of Policy regarding Federal Enforcement against Public Official Corruption

The only kind of general federal policy statement that is currently directed toward political corruption is a statement of a federal criminal enforcement priority—that investigating and prosecuting this form of criminal activity is an important federal mission.[86] But, as is true of all of the statements of federal criminal enforcement priorities, this statement is general and affirmative in nature; it contains no specifics that suggest the kinds of political corruption to be emphasized, nor any qualifying language or criteria that would help to provide guidance in deciding which cases to pursue. It is a statement of priority, not of policy.

Federal criminal enforcement policies are cast in two other forms: (1) The Federal Principles of Prosecution[87] is an across-the-board statement of policies applicable to all federal prosecutions. Necessarily, it contains only the most general kinds of policies, and accordingly, it is not an appropriate repository for a statement of policy that is targeted to a particular category of federal prosecution, namely, cases involving charges of local or state public official corruption. (2) Prosecutorial policies are attached to particular offenses.[88] With one exception—the

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86. See, for example, the FBI's website:

> Public corruption is one of the FBI's top investigative priorities—behind only terrorism, espionage, and cyber crimes. Why? Because of its impact on our democracy and national security. Public corruption can affect everything from how well our borders are secured and our neighborhoods protected . . . to verdicts handed down in courts . . . to the quality of our roads and schools. And it takes a significant toll on our pocketbooks, too, siphoning off tax dollars.

FED. BUREAU OF INVESTIGATION, PUBLIC CORRUPTION, http://www.fbi.gov/hq/cid/pubcorrupt/pubcorrupt.htm (last visited Nov. 16, 2010). The same website reports press releases on four recent public corruption cases involving a Florida police officer, a Pennsylvania school board member, a scheme in Louisiana involving a kickback to prosecutors and a New Jersey bribery case.

Note that the statement of priority does not tell us whether federal interest in such matters is restricted to cases where there is a distance imperative justification or some other reason why federal investigation and prosecution is warranted, or whether *all* such cases are legitimately within the purview of possible federal involvement. There is nothing in the statement of priorities that suggests that the federal government has an auxiliary role in this area. As far as one can tell from a perusal of the statement of priorities and cases being prosecuted—see, e.g., the aforementioned press release regarding a federal prosecution of a Pennsylvania school board member, *supra*, and *infra* note 89 (describing the U.S. Attorneys' RICO policy)—there are no significant restricting principles being applied in the selection of such cases for federal attention.

87. See *supra* note 78 for a description of and excerpts from the Federal Principles of Prosecution.

88. While the U.S. Attorneys' Manual contains policies attached to particular federal offenses, there is a dearth of substantive policies that relate to the use of specific offenses in prosecutions against local or state officials for corruption. There are a few policies that relate to some of the

policy for enforcement of the RICO statute[89]—none of the offense-specific policies touch upon distance imperative considerations or contain a significant statement of policies specially aimed at political corruption cases.

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offenses typically used in public official corruption cases, but they do not substantively address when these offenses are to be invoked. See, for example, the Hobbs Act policy, which provides that extortion under color of official right or extortion by a public official through misuse of his/her office is supervised by the Public Integrity Section, Criminal Division. Hobbs Act, 18 U.S.C. § 1951 (2006); U.S.A.M. § 9-131.020 (2009). U.S.A.M. § 9-7.302 provides that Criminal Division approval is required to intercept a non-telephonic verbal communication without the consent of all parties to the communication but with the consent of at least one party to the communication

> when it is known that: 1) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV, or above, or a person who has served in such capacity within the previous two years; 2) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties.

U.S.A.M. § 9-7.302. Similarly, approval of the relevant assistant attorney general is required to enter into a nonprosecution agreement in exchange for cooperation when the person involved is: (a) "A high-level Federal, state, or local official"; (b) "An official or agent of a Federal investigative or law enforcement agency"; or (c) "A person who otherwise is, or is likely to become of major public interest." *Id.* § 9-27.640. The substantive policies relating to other relevant offenses—e.g., mail fraud, *see id.* § 9-43.100, and federal program bribery, *see* 18 U.S.C. § 666 (2006); U.S.A.M. § 9-46.110, do not specifically mention the use of these statutes to prosecute official corruption. Interestingly, the policy for federal program bribery provides that there must be a substantial and identifiable federal interest before bringing charges. U.S.A.M. § 9-46.110. Only the substantive policy for enforcement of the RICO statute specifically mentions the use of the statute against state and local official corruption and touches upon distance imperative-type factors.

89. The RICO policy, as delineated in the U.S. Attorneys' Manual, is one of the few instances where there is in a specific crime policy statement an articulation of the traditional principle "that the prosecution of state crimes is primarily the responsibility of state authorities," and only the RICO policy contains a provision that seems in a general way to capture the idea of the distance imperative. The provisions in the RICO statute provide in pertinent part:

> Except as hereafter provided, a government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:
>
> . . . .
>
> 6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;
>
> 7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (2006). The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities, and RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so. *See also* U.S.A.M. § 9-110.330.

The prosecutorial policies attached to particular federal offenses are also an inappropriate locus for a distance imperative policy or any other policy directed toward political corruption cases. While there are a number of federal crimes that are typically used, often together, in state and local public official corruption cases, namely, mail fraud,[90] Hobbs Act,[91] Travel Act,[92] RICO,[93] and federal program bribery,[94] such prosecutions are not limited to those crime categories. A variety of other crimes are also often used—for example, various tax offenses, money laundering, perjury, false statements and obstruction of justice. It is not practical to attach specific policies oriented toward political corruption cases to policy statements for every offense that might possibly be charged in such cases.

Rather than trying to amend any of the existing statements of principles, policies, or priorities, a preferred course of action would be to formulate a new set of policies applicable not to specific offense categories but rather individualized to each of the several priority areas. It makes more sense to proceed by areas of priority rather than offense categories. The existing statements of priorities are important ways to target and direct federal resources into particular areas of enforcement. In their present form, however, they give federal prosecutors carte blanche to direct their resources to the identified areas without any further criteria of selection. Generally, adopting a new set of policies directed to federal priorities would be a means to target federal resources and limit their use in ways that maximize their effectiveness.

New policies might take the form of, for example, the Principles of Prosecution for Political Corruption Cases or the Principles of Prosecution for Terrorism Cases. In effect, they would follow the general format of the Principles of Federal Prosecution, but they would be more focused and specific, and each set would be limited to a particular priority enforcement area.[95]

The Principles of Prosecution for Political Corruption Cases should include some statements of policy relating to the distance imperative. These statements could be used as a model for other policies applicable to political corruption cases and also for policies that might be

90. 18 U.S.C. §§ 1341, 1343, 1346 (2008).

91. *Id.* § 1951 (2006).

92. *Id.* § 1952.

93. *Id.* §§ 1961 *et seq*.

94. *Id.* § 666.

95. *Compare* U.S.A.M. §§ 9-27.001-.760 (Principles of Federal Prosecution), *with* U.S.A.M. § 9-28.000 (Principles of Federal Prosecution of Business Organizations).

developed applicable to other federal investigative and prosecutorial priority areas.

2. The Content of a Policy—A Preliminary Draft of a Statement of Distance Imperative Policy

We do not propose to present here a complete or detailed draft of policies directed to the federal role in pursuing state and local official corruption. To do so would require a series of policy judgments that federal officials need to make. We do, however, set forth a preliminary, tentative, and partial draft simply to illustrate some of the matters that a policy relating to distance imperative concerns in this area might address and the general form such a policy might take.

If primacy attaches to the state/local role in addressing state/local public official corruption, the distance imperative bears primarily on state or local decision-making and reflects concerns and a possible policy to which those governmental units should be attentive. Nevertheless, even if the state/local role is primary, federal agencies have an important role to play, albeit secondary, and ideally, there should be some statement of how distance imperative factors should be taken into account by federal authorities in connection with the invocation of this secondary federal role.

A preliminary, tentative, and partial version of a possible statement of policy regarding the federal role might look something like the following:

> I. Local or state agencies have the primary responsibility for enforcement against local or state corruption. Federal agencies may investigate and/or prosecute such cases when (a) the state or local agencies are unable or unwilling to pursue particular instances of suspected or alleged official corruption, or (b) the circumstances relating to these instances raise concerns about the public officials involved in regard to possible bias or conflict of interest or other relationships which may make local or state investigation and prosecution inappropriate.
>
> A. In deciding whether to investigate and prosecute a case involving a local public official, the federal agencies of investigation and prosecution should consider:
>
> > 1. Whether there is a substantial need for a jurisdiction other than the one where the alleged criminal acts occurred to investigate and prosecute the case. In making this assessment, consideration should be given to whether the suspected or charged officials were themselves part of the local law enforcement process. If not, what other facts or considerations create a substantial need for a different jurisdiction to handle the matter?

2. Where there is a substantial need for another jurisdiction to handle the matter, it should be considered whether the case might appropriately be handled at the state level. If so, an effort should be made to encourage state investigation and/or prosecution of the matter. If state agencies are unwilling, unable, or not available to handle the matter, further attention should be paid to the reasons why that is the case.

Comment: Given the tradition that primary responsibility for law enforcement belongs to local and state agencies, and the fact that the handling of the matter by federal agencies changes the applicable law[96] and requires the expenditure of federal resources,[97] the reasons for federal agencies to undertake an investigation and prosecution of a criminal matter involving local public officials should be strong before the federal agencies decide to take on the case. For example, the fact that state-level agencies with authority to pursue the matter are not available may represent a resource allocation decision by the state that can result

96. When the distance imperative or other reasons lead to a federal investigation and prosecution of a local or state public official corruption case, it not only means that different personnel will pursue the matter (which contributes to achieving the needed distance), but it also changes the source of the applicable law and, potentially, changes the details of the law and the applicable penalties. A ground for preferring to apply local law in public official corruption cases is that it is likely to reflect and be adapted to local political culture, values, and practices. Because some kinds of official corruption cases may raise issues relating to such topics, and it is arguable that the accused officials should be adjudged by the standards of the locale, it would seem preferable to use local law in such cases. Bringing in the federal government brings in federal law, and the substance of local nuance may be lost.

Sometimes the question of whether state standards should be applied becomes a central and determinative issue in a case. Applying state standards in some contexts would be a way to incorporate the culture, values, and practices of the locale. It would make a lot of sense to do so, but federal court decisions applying federal criminal law on this kind of issue have usually rejected the idea of a state-centric approach and in the majority of cases have ruled in favor of a single federal standard. The most recent surfacing of this kind of issue involves the question of whether state standards should apply under the mail fraud statute, an issue which recently reached the Supreme Court. United States v. Weyhrauch, 129 S. Ct. 2863 (2009); *see also* Weyhrauch v. United States, 130 S. Ct. 2971, 2971 (2010) (vacating and remanding the case to the Ninth Circuit Court of Appeals in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010)).

97. We have assumed that primary responsibility falls on local governments to prosecute the corruption of their own officials. If, because of distance imperative concerns, it is inappropriate for the local government to investigate and prosecute the matter, then it would be normal practice for the state government to be the secondary party responsible for handling the matter. However, we also concluded that in a majority of states, it is not feasible to proceed in this way because the state does not maintain state-level law enforcement agencies that can perform those tasks. In lieu of the state performing that role, the federal government frequently steps into the breach.

If it were determined that this enforcement should properly have been a state responsibility, the federal law enforcement agencies, by investigating and prosecuting the matter, can be viewed as providing a subsidy to the state government that should have handled the case. The state saves money for its taxpayers by not providing the necessary law enforcement agencies, and the federal government expends the resources required to carry out the enforcement role.

> in shifting responsibility to the federal government. By itself, this may be an insufficient reason for the expenditure of federal resources in the matter.
>
> B. In deciding whether to investigate and prosecute a case involving a state-level public official, the federal agencies should consider:
>
> 1. Whether there is a substantial need for a jurisdiction other than the one where the alleged criminal acts occurred to investigate and prosecute the case.
>
> 2. Where there is a substantial need for another jurisdiction to handle the matter, it should be considered whether appointment of a special prosecutor by the state might be an appropriate way to handle the matter. If so, this alternative should be explored.
>
> Comment: Criminal cases involving state-level public officials are different from those involving local public officials. Because state law enforcement agencies would seem to be most appropriate to pursue cases involving local officials, it is provided in A. above, that "an effort should be made to encourage" state handling of the matter. For handling state-level official corruption cases, federal agencies as the next-proximate jurisdiction are likely to be most appropriate, absent appointment of a special state prosecutor. Accordingly, it is suggested only that the special prosecutor option should be explored.

3. Other Policies That Might Be Drafted regarding Federal Enforcement against Local/State Corruption

The formulation of new federal policies addressing public official corruption matters should not be limited only to distance imperative concerns. Issues like those raised by the pragmatic factors previously mentioned[98] could also be addressed. Some of these pragmatic factors may be appropriate for inclusion in a statement of federal policies for dealing with state and local official corruption while others, subjected to a process of review and assessment, may ultimately be rejected.[99] It would be preferable if the factors were systematized and formulated into guidelines rather than leaving their implementation entirely to the discretion and ad hoc reactions of prosecutors in the field.

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98. *See supra* Part V.C.

99. For example, under current practice in the field, in selecting the jurisdiction of prosecution, local, state, and federal prosecutors may take into account which jurisdiction provides the heaviest potential penalties. When subjected to the light of day, this practice appears to involve a kind of forum shopping that, as a matter of policy, would be frowned upon in many other contexts. Is it an appropriate factor to weigh in the balance in selecting the jurisdiction of prosecution?

VI. CONCLUSION

What have we learned from this distance imperative thought experiment? We have identified through this survey different potential types and sources of biases, relationships, possibilities of influence, and the like, which present a risk of distorting decisions and proceedings, making them unfair or non-objective. These potentially distorting elements create the need for distance, the distance imperative—the notion that those who investigate and prosecute public official corruption at any level of government should not be "too close" to their investigative and prosecutorial targets.

The distance imperative helps to explain a wide range of practices and patterns in the criminal justice system. For example, it helps to explain and establish conceptual and analytical links between such diverse legal phenomena as the reasons for establishing internal affairs bureaus in large police departments; the reasons why the *federal* government is heavily involved in enforcement efforts against *local* public official corruption; and the reasons for establishing special prosecutors to investigate and pursue instances of corruption by high-level members of the federal Executive Branch.

While distorting elements may arise out of particular circumstances, the need for distance is also affected by the type of agency in which the suspected official is located. Thus, corruption in a police agency presents a set of special distance issues both because of the nature of a police organization and the concerns that arise when the police investigate "one of their own." Different but related issues arise when corruption is suspected in any of the other agencies of the justice system, particularly prosecutors or judges. Similarly, when legislators or other high-level officials in local, state, or federal governments are alleged to be involved in corrupt activities, the need for some distance is heightened because of the possibility that political influence or prevalent pervasive corruption may affect the operation and integrity of the criminal enforcement process.

Most importantly, the distance imperative provides one possible explanation for the origins of the extensive federal role in pursuing local and state official corruption. One can better comprehend the reasons for this federal involvement when one takes note of the pattern of relatively weak state-level agencies for dealing with local or state corruption. The distance imperative provides at least part of an explanation of why the federal government stepped in to fill the gap in what might otherwise have been state enforcement.

While it seems likely that the extensive federal role in investigating and prosecuting local and state corruption arose at least in part because of distance imperative concerns—whether or not investigators and prosecutors expressly had them in mind—we believe that today, distance imperative concerns are no longer at the forefront of the minds of federal enforcement officials. Many take it for granted that the federal government is no longer performing an "auxiliary" role in this arena, but rather has at least coordinate responsibility with local and state agencies.

There is a need to promulgate policies governing the different areas of Department of Justice enforcement priorities. Policies involving the distance imperative could be established to provide some guidance in implementing the Department of Justice's political corruption priority. These could serve as a model for developing comparable principles in other areas of federal priority relating to the prosecution of state and local crime. The effect of promulgating such limiting principles could give renewed life to the notion that federal investigation and prosecution is "auxiliary" to state and local law enforcement. Were that to happen, an outside commentator observing this development might be tempted to say that the distance imperative has come a long way.