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Special Problems for Prosecutors in Public Corruption Prosecutions

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Special Problems for Prosecutors in Public Corruption Prosecutions

MODERATOR: Mimi Rocah

PANELISTS: Carrie Cohen
Steve Cohen
Daniel Cort
Professor Bennett Gershman

MS. ROCAH: The focus of this panel is not so much on the academic part of *McDonnell*,¹ the case law. Of course, you'll hear the name *McDonnell* and we'll talk about that.

But we're trying to talk a little more broadly about public corruption prosecutions in general. Some of these are unique issues. You heard a little bit about them from the former people who have done them, what special unique problems are involved in them and challenges the prosecutors face and what effect, if any.

One of the topics that Richard touched on in his very eloquent talk at lunch is, what are the affects that these prosecutions are having, if any, and what else can we do to try to remedy what I think everyone in this room and elsewhere would agree is pretty extreme corruption in government.

So, we're fortunate to have first Carrie Cohen, who I have had the pleasure of working with in the United States Attorney's Office Southern District for many years. Carrie has a very diverse background. She was a Federal prosecutor and prosecuted one of the more high-profiled cases that we've talked here, the Shelly Silver case.² She also before that worked at the New York Attorney's General office. She's also been in private practice which she is back now, and she's held many leadership positions in bar associations and she's just an all-round, knowledgeable, wonderful person to have here.

1. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

2. *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017).

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Next, we have Steve Cohen, who I don't even know how to describe. He has so many different aspects of his background that are interesting and an all-around extremely interesting individual to hear talk. He's currently the executive Vice President and Chief Administrative Officer and General Counsel at MacAndrews & Forbes. He previously was also a prosecutor in the U.S. Attorney's Office Southern District of New York, before my time, not to date you, and even more relevant, he served as secretary to Governor Cuomo. He was counselor and Chief of Staff to Cuomo before he was Governor, when he was the Attorney General of New York.

Next, we have Dan Cort who has been the Chief of the Public Integrity Bureau at the New York Attorney General's office since 2014, where he supervises lawyers who obviously work on public corruption cases. Prior to that he worked at the New York County District Attorney's office for nineteen years where he was most recently Chief of the Public Integrity Unit there, as well.

Last and definitely not least, we have Professor Ben Gershman. He is a Professor here at Pace Law School and he was previously in the Manhattan District Attorney's office for six years. He currently writes and speaks about many different issues including prosecutorial and judicial ethics and misconduct. He is very knowledgeable in that area.

So, we will get started with our panel I think by having each of our panelists give a short little summary of what their viewpoints are on this topic.

MS. COHEN: Since I am sitting first in line here, I will jump in. It's sort of a rare panel when you see Federal and State people, both Federal and State prosecutors sitting together, hopefully remaining on friendly terms at the end of this panel.

I just want to kick off and I know we've been talking a lot this morning about what is public corruption as a criminal matter and I think what I would like to share is what makes public corruption – an act that is corrupt by a public official – what makes it criminal. What are the prosecutors looking at that put it over that line, that make conduct that we don't like in our public officials, or conduct that we may think is unethical,

conduct that may violate different ethical laws, what makes the conduct criminal and having sat in that prosecutor's seat for many years trying to figure that out, I will share with you some of it, which is not a big surprise because it's not that much different than it is in any criminal case.

What makes something criminal besides someone committing a crime can be the same as lies, deception, omission. If you look at some of the cases, if you look at, I know people talked about the *Silver* case that I tried, what made that criminal. A lot of it was his lies to the public about how he earned his outside income, his lies on the state discloser form and his lies were actually in omission, failing to disclose that he was receiving money from a real estate law firm.

Those are things that are indicia of when someone is not just committing an ethical violation or doing something that as the public, we may not want our public officials to do but someone that is actually committing a crime. You look at lying to others, keeping things secret and I think that's public corruption prosecution, keeping things secret.

So, for example, in the *McDonnell* case no one knew about the case. Of course, in that case there was no violation because Virginia had no gift law. Keeping that secret in *Menendez*.³ He didn't disclose the alleged gifts of golf and Rolex watches. I'm sure we're all wondering if every public corruption case has three rounds of golf and a watch involved. But it's the failure to disclose the things. It's the lying about it. It's lying about your relationships with people.

Talking about sort of a friendship defense that we see in a lot of public corruption cases where people say I wasn't doing this for a corrupt purpose. I was taking gifts, I was taking money or taking quote unquote loans because we're friends. And friends do that for each other. But what is the nature of the friendship? Who knows about the friendship?

For example, in the Sheldon Silver case, he also had a friendship defense, what was that he was friends with the doctor who was sending him the referrals. Unfortunately, there was no evidence at trial that they were actually friends and individuals

3. United States v. Menendez, 291 F. Supp. 3d 606 (2018).

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who were called who were friends with Sheldon Silver did not know about these friends of his. It's the lies and omissions, the traditional things that prosecutors look for. It's the same for the public corruption loan. With that insight, I will pass it down to my esteemed colleague.

MR. COHEN: I just want to pick up on what Carrie said and it is an unusual panel because of the depth and experience that also happens to be very practical. I really do want to spend a couple of minutes discussing what has struck me as one of the most interesting curiosities of the way this area of law plays out in the real world.

It really was obvious to me when I was spending time in Albany working for the governor prior to that when he was the Attorney General.

First, one of the most fascinating things about this is why is it so complicated. If – stop and think about it – I am public official and somebody gives me a gift. And now the question is: What was my intent in taking that gift? Was there a quid pro quo? What was the expectation? And it becomes a search for a kind of intent that you wouldn't have if you simply had a law that said if you are a public official, you cannot take gifts.

And so, one of the really interesting things is if you step back and if you started to ask yourself, what is it that led to all of this complexity in an area that you would think there is a premium on simplicity. If you think about that, let me point out to you the following. And before I got here, I jotted down a bunch of cases.

Here is the preparation. I wrote down the cases I could think of since I was in state service which began about 2007. Prosecutions of elected officials; Shelly Silver, care of my sister to my right.

Dean Skelos;⁴ Joe Percoco,⁵ currently going on, my former colleague; John Sampson,⁶ New York State Senator; Shirley

4. United States v. Skelos, 707 F. App'x. 733 (2d Cir. 2017).

5. United States v. Percoco, No. 16-CR-776, 2018 U.S. Dist. LEXIS 79666 (S.D.N.Y. May 10, 2018).

6. United States v. Sampson, No. 13-CR-269, 2016 LEXIS 23678 (E.D.N.Y. Feb. 26, 2016).

Huntley,⁷ New York State Senator; Carl Kruger,⁸ a New York State Senator; Joe Bruno,⁹ the Majority Leader of the New York State Senate; Malcolm Smith,¹⁰ for a brief period of time, Majority Leader of the New York State Senate; Hiram Monserrate,¹¹ in and out of positions of power.

Every one of those cases I've just named, here's what's odd about it: They are all Federal prosecutions. They are all Federal prosecutions with one exception. And it's an interesting exception because it proves the rule except for Joe Bruno.

Joe Bruno was indicted at a time when half the U.S. Attorneys were in the Southern District of New York. He was somebody who did not aspire into the position and somebody did not have political aspirations.

You then rack your brains and say let's come up with some other examples. Pedro Espada,¹² a case I was involved with, was civilly charged by the Attorney General's office with the expectation that it would then be taken to Federal, and it was, in the Eastern District of New York.

The Steve Pigeon¹³ case which similarly had a State and Federal component – but again, who prosecuted cases? The New York State AG's office.

7. United States v. Huntley, 961 F. Supp. 2d 409 (E.D.N.Y. 2013).

8. United States v. Kruger, No. S1-11-CR-300, 2011 U.S. Dist. LEXIS 115832 (S.D.N.Y. Oct. 3, 2011).

9. United States v. Bruno, No. 1:09-CR-29, 2010 U.S. Dist. LEXIS 24518 (N.D.N.Y. Feb. 24, 2010).

10. United States v. Smith, 985 F. Supp. 2d 547 (S.D.N.Y. 2014).

11. Monserrate v. United States, No. 13-CV-8767, 2014 U.S. Dist. LEXIS 173326 (S.D.N.Y. Dec. 10, 2014).

12. United States v. Espada, 607 Fed. Appx. 89 (2d Cir. 2015).

13. Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Indictment Of Political Consultant Steven Pigeon And Guilty Plea Of State Supreme Court Justice John A. Michalek (June 30, 2016) (<https://ag.ny.gov/press-release/ag-schneiderman-announces-indictment-political-consultant-steven-pigeon-and-guilty>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Felony Charges Against Steve Pigeon, Kristy Mazurek, And David Pfaff (Apr. 19, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-announces-felony-charges-against-steve-pigeon-kristy-mazurek-and-david>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Grand Jury Indictment Of Steve Pigeon, Kristy Mazurek, And David Pfaff (Dec. 1, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-announces-grand-jury-indictment-steve-pigeon-kristy-mazurek-and-david>).

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Hank Morris¹⁴ and Alan Hevesi.¹⁵ Hevesi, was also in the care of Carrie, and Hank Morris was when I was in the AG's office.

What was odd about *Morris* was the people said it was a political corruption case and, in fact, it was a security fraud case because we couldn't prosecute it as political corruption.

So, you start to ask yourself, how can that be. You would think that the primary prosecutions in this area would be from the state and not the Federal. Certainly, there are far more state prosecutors, sixty-two in the DA's office, plus four in the U.S. Attorney's General office. Far more Assistant District Attorneys than Assistant U.S. Attorneys. It gets complicated when you start looking at the Attorney General's office, as well, but then you have an overwhelming bigger number on the state side.

So, the question then becomes: why? I'm sure Dan will get into the jurisdiction here because the jurisdiction becomes fascinating.

The Attorney's General office that has a good number of resources, broad experience, broad expanse of the whole state, guess what, extremely limited jurisdiction, jurisdiction that typically relies upon somebody else sending you the case.

The DA's office, which has broader jurisdiction, not only do they have limited recourses when you think about it from a structural and political matter, if you are a DA, and you want to get reelected on the positive side, you tend to do cases like drugs, property offenses, physical offenses on people. If you have time to do public corruption, that's great but who has time. Plus, you're in an inherently political office that is reliant upon the New York State Legislature to approve your budget and so what you end up with in this state is this very curious result. Where

14. *People v. Morris*, 958 N.Y.S.2d 62 (N.Y. Sup. Ct. 2010).

15. Press Release, New York State Office of the Attorney General, Cuomo Announces Felony Guilty Plea By Former Comptroller Alan Hevesi In Pay-to-play Pension Fund Kickback Scheme (Oct. 7, 2010) (<https://ag.ny.gov/press-release/cuomo-announces-felony-guilty-plea-former-comptroller-alan-hevesi-pay-play-pension>); Press Release, New York State Office of the Attorney General, Former Comptroller Alan Hevesi Sentenced To Up To Four Years In Prison For Role In Pay-To-Play Pension Fund Kickback Scheme (Apr. 15, 2011) (<https://ag.ny.gov/press-release/former-comptroller-alan-hevesi-sentenced-four-years-prison-role-pay-play-pension-fund>).

in Albany, any criminal prosecution of corruption is inevitably an out-of-town event.

MR. CORT: So, Steve talked about the complexity of prosecuting public corruption cases. One of the challenges facing the Attorney General's Office when prosecuting public integrity cases is its limited criminal jurisdiction.

We, meaning the New York State Attorney General's Office, have very limited original criminal jurisdiction. All of our power to prosecute criminal cases is statutorily derived, as opposed to the constitutionally derived jurisdiction that district attorneys have to prosecute. The AG's Office has statutory authority to prosecute the Donnelly act (the state antitrust act).¹⁶ We can prosecute the Martin act¹⁷ by statute, that's the securities act. We can prosecute certain crimes under the Labor Law,¹⁸ but generally that's it, unless we get an Executive Law section 63(3)¹⁹ referral from the governor, the comptroller, or a state agency. We have certain standing Executive Law 63(3) referrals, such as from the Department of Health to prosecute Medicaid fraud. We have standing referrals from the governor to prosecute auto insurance fraud and money laundering, but generally, for us to prosecute, we get a 63(3) referral from the governor, from the Comptroller, from the Secretary of State, the Commissioner, any Commissioner and any head of any agency.

That can be a challenge. When I was in the Manhattan DA's office – and the thing I miss most about it being in the District Attorney's office – is the ability to issue a Grand Jury subpoena pretty much whenever you need to. You have to have a good faith basis, but it's generally very easy to issue a Grand Jury subpoena. At the AG's office, if I want to issue a Grand Jury subpoena, I can't do that without a 63(3) referral.

So, then I have to think, well, how am I going to get a referral, which state agency has jurisdiction over this issue? Frequently the crimes we prosecute involve state money and state money is overseen by the Office of the State Comptroller.

16. N.Y. GEN. BUS. LAW § 340 (Consol. 2018).

17. N.Y. GEN. BUS. LAW § 352 (Consol. 2018).

18. *See generally* N.Y. LABOR LAW § 1 (Consol. 2018).

19. N.Y. EXEC. LAW § 63(3) (Consol. 2018).

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So, in those cases involving state money, we can use the Comptroller as a referral source. But not everything involves money. So, we can't always go to the Comptroller's office for a 63(3) referral. There are certain things that we simply cannot prosecute. If anybody has an idea of how we can prosecute theft from labor unions, I would like to hear the legal theory. The state Department of Labor does not have jurisdiction over labor unions. I believe that authority over labor unions is preempted by the Federal government.

The Attorney General's office does have some authority that a DA's office doesn't have. We have civil jurisdiction. We can issue civil subpoenas. We can issue subpoenas under our jurisdiction overseeing charities, if we think that there is a problem relating to a charity or non-profit entity. Often, such a subpoena will result in the sort of information that will get us enough evidence to go to a state agency to ask for a 63(3) referral. If we find there's a business engaged in ongoing illegal conduct, if we believe there's securities fraud or a false claims act violation, we can issue a subpoena under that jurisdiction. One other thing that we don't have to worry about at the Attorney General's office, that I was constantly mindful of at the Manhattan DA's office, is venue. When I was a Manhattan prosecutor, I was always trying to find something to link an element of the crime to Manhattan to find venue in New York County. Mr. Morgenthau's philosophy was that was venue-wise most everything went through Manhattan. Well, that actually wasn't always true, not everything. At the AG's Office, while we have to figure out which county has venue over a crime, we have the ability to prosecute in all sixty-two counties, and that can be really helpful. In general, my biggest concern is getting a 63(3) referral. I just want to add to what Steve said in terms of some cases. There have been, and there are, numerous public integrity prosecutions by the New York State Attorney General, such as the case of former state assemblyman William Scarborough,²⁰

20. Press Release, New York State Office of the Attorney General, A.G. Schneiderman, Comptroller DiNapoli And U.S. Attorney Hartunian Announce Arrest And Indictment Of New York State Assemblyman William Scarborough (Oct. 1 2014) (<https://ag.ny.gov/press-release/ag-schneiderman-comptroller-dinapoli-and-us-attorney-hartunian-announce-arrest-and>); Press Release, New York State Office of the Attorney General, U.S. Attorney Hartunian, New

which was a joint Federal and AG case. That case, for one, shows that we do sometimes work with our Federal colleagues. Other notable Attorney General prosecutions include former New York State Senator George Maziarz,²¹ New York City Councilmember Ruben Wills.²² We've also prosecuted quite a number of judges. Some of whom were elected.

So, I think that *McDonnell* has opened up – as Amie Ely said – a real possibility for state prosecution, because while our bribery statute has problems, it is a real alternative to the Federal bribery statute. I think *McDonnell* has opened up a gap

York A.G. Schneiderman & Comptroller DiNapoli Announce Guilty Pleas On State And Federal Charges By Former Assemblymember William Scarborough (May 7, 2015) (<https://ag.ny.gov/press-release/us-attorney-hartunian-new-york-ag-schneiderman-comptroller-dinapoli-announce-guilty>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Former Assemblyman William Scarborough Sentenced On Fraud And Theft Convictions (Sept. 14, 2015) (<https://ag.ny.gov/press-release/ag-schneiderman-announces-former-assemblyman-william-scarborough-sentenced-fraud-and>).

21. Press Release, New York State Office of the Attorney General, Attorney General Schneiderman Announces Felony Indictment Of State Senator Robert Ort and Former State Senator George Maziarz (Mar. 23, 2017) (<https://ag.ny.gov/press-release/attorney-general-schneiderman-announces-felony-indictment-state-senator-robert-ortt>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Guilty Plea And Admission By Former State Senator George Maziarz (Mar. 2 2018) (<https://ag.ny.gov/press-release/ag-schneiderman-announces-guilty-plea-and-admission-former-state-senator-george>).

22. Press Release, New York State Office of the Attorney General, A.G. Schneiderman & Comptroller DiNapoli Announce Indictment Of NYC Councilman Ruben Wills In Public Corruption Scheme (May 7, 2014) (<https://ag.ny.gov/press-release/ag-schneiderman-comptroller-dinapoli-announce-indictment-nyc-councilman-ruben-wills>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman and Comptroller DiNapoli Announce Jury Conviction Of Councilman Ruben Wills In Public Corruption Scheme (July 20, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-and-comptroller-dinapoli-announce-jury-conviction-councilman-ruben>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman And Comptroller Dinapoli Announce 2 To 6 Year Prison Sentence For Former Councilman Ruben Wills In Public Corruption Scheme (Aug. 10, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-and-comptroller-dinapoli-announce-2-6-year-prison-sentence-former>); Press Release, New York State Office of the Attorney General, A.G. Schneiderman And Comptroller Dinapoli Announce Guilty Plea Of Former NYC Council Member Ruben Wills (Nov. 14, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-and-comptroller-dinapoli-announce-guilty-plea-former-nyc-council>).

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for state prosecutors to fill.

MS. ROCAH: You mentioned a need of referral. What, if you know, what causes them to give you a referral? Why wouldn't they do it themselves? I'm not talking about U.S. Attorney's office, but I'm talking about the agencies that you mentioned.

MR. CORT: State agencies don't have prosecutorial authority. An Executive Law 63(3) referral gives the AG's Office the authority to investigate and prosecute criminal cases. For example, we've gotten referrals from the State of Education Department when there's a teacher stealing from the state or from a school. The State Education Department wouldn't have the ability to prosecute such a case.

MS. COHEN: When I was at the Attorney's General office you as the prosecutors and the investigators at the Attorney's General office are obviously looking and looking at what's out there. You can work with your counterpart agencies and you can actually seek the referral. So, for example, the State Comptroller, which control all state funds, we used to work really closely, investigating the state Comptroller. Before then we did work very closely. He had a great investigative team. They would give us the referrals to do the investigation and prosecute, if appropriate. The same thing with the New York State Police, when they had jurisdiction over crimes. So, we had a very good relationship with the State Police, and we would show them what we thought and they would do their own investigation and we could get referrals from them. There are limitations but I think there are ways that you can, the Attorney's General office can be a force in this space.

MR. COHEN: I'm going to jump in because there's one fascinating point to be made here which is the elected Attorney General of the State of New York now has to go to the executive and they either are going to refer something to them or you got to say, "hey, can you give me a referral?" What points the Commissioners, and ultimately the Counsel, in those offices is the governor and elected state-wide officials of the State of New

York. Somebody long ago decided that there needed to be some kind of check on the power of the Attorney General. It's a fascinating issue that adds once again a layer of complexity that typically you don't see in this field.

MS. COHEN: When I was in the Attorney General's office it was a democratic Attorney General. It was a republican governor, but the Comptroller was also elected. It was not a return to the democratic consult for a lot of our referrals.

MR. GERSHMAN: I don't think that the *McDonnell* decision is that big a deal. I prosecuted corruption cases for four years. We prosecuted lots of cops, lots of judges, the District Attorney of Queens County. We prosecuted lawyers and other public officials. Now we recognize that prosecuting corruption cases is more difficult than prosecuting murders or assaults. With crimes of violence or property crimes, you have a victim. You put them on the stand. Juries tend to believe victims. Corruption crimes are committed in secret. You don't have complaining witnesses so that makes it more difficult to start with. With crimes of violence you've got tangible evidence. Maybe you've got drugs and weapons. You don't have that in corruption crimes. With corruption crimes you might have cooperating witnesses who made a deal and might be lying. You don't have that in a crime of violence. You have witnesses whose testimony might not be accurate but they're certainly telling the truth. I think that prosecuting a corruption crime puts a heavier burden on the prosecutor. You get witnesses to cooperate. You get witnesses who wear a wire. You get wiretaps. Maybe if they had wiretaps in the *McDonnell* case that they had in the case involving the governor from Pennsylvania,²³ you might have had a better chance of getting the conviction upheld. It's hard work, but the statutes are there. And again, I don't think *McDonnell* really

23. United States v. Hafer, No. 16-cr-202, 2017 U.S. Dist. LEXIS 26285 (M.D. Pa. Feb. 24, 2017); Commonwealth v. Kane, No. 3575 EDA 2016, 2018 Pa. Super. LEXIS 542 (May 25, 2018); Press Release, U.S. Attorney's Office, Middle District of Pa., Pennsylvania Treasurer Robert M. McCord Charged With Two Counts Of Attempted Extortion (Feb. 2, 2015) (<https://www.justice.gov/usao-mdpa/pr/pennsylvania-treasurer-robert-m-mccord-charged-two-counts-attempted-extortion>).

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makes it that much more difficult. You got to prove the quid pro quo and you prove the quid pro quo from substantial evidence. I know that with state prosecutions of corruption, let's just say that if you call a witness into the Grand Jury, and the witness refuses to testify, you give him immunity. They could have called McDonnell into the Grand Jury if they wanted to. They could have called his wife into the Grand Jury, questioned them and who knows where it would go. In New York, calling witnesses into Grand Jury is more difficult. Also, in New York the evidentiary rules require that we have to corroborate the testimony of accomplices, which makes proving corruption more difficult than in the federal system. The way we used to do it – we used to get everybody on perjury. That's what we did. We'd call them into the Grand Jury, maybe we couldn't prove substantive crimes, but we had all that information that the witness didn't know we had. We'd question the witness. I'm not going to say the person was trapped, but we got perjury indictments and convictions where the witness, you know, lied. Maybe we didn't go out of our way to help the witness remember details that the witness claimed to have forgotten but perjury prosecutions are out there. You don't read about them much anymore. I don't know why. But it seems to be that – Muller is doing that.

So, getting back. They spent about \$12 billion to prosecute this tiny little bank in Chinatown and after all of this stuff, you know, the bank was acquitted. A quarter of those resources could have been used to prosecute other serious crimes. Not one prosecutor in New York State prosecuted any high-level official for corruption. Why is that? I think it's politics. I don't think it's resources. I think it's politics. I think the local DAs don't want to ruffle feathers of their benefactors. I love prosecuting corruption. Somebody who swears to serve the public and then lines his own pocket is somebody that should not be around. I don't know that that may be inherent to prosecuting corruption.

MS. COHEN: Let me just jump in on that. Is it more difficult to prosecute public corruption cases? I actually disagree. The answer is yes, it is more difficult. The reasons, Professor, that you raised which is there's no victim. It's somewhat of a

victimless crime. You the people are the victims in public corruption. You are not getting the honest services of the public officials a subset of you all elected. So, when you are trying a public corruption case, there is this issue of jury nullification, right? There's no victim there. There's no economic loss to point to. It's a victimless crime and a lot of the defense with public corruption is, well, this is how business is done. You might not like politics. Politics can be seen as quote a dirty business. There are lobbyists. There are campaign donations. That is how our politics and our democratic system works. It is not criminal. We see a lot of defenses of public corruption cases as this is business as usual. This is how Albany works. This is how we get things done. You don't like it, vote me out of office, but corruption prosecutions are more difficult I think for that reason. I think also for the reason the Professor said that you don't always have – I think more now people are using traditional tools of law enforcement like wiretaps. The *Skelos* case had a wiretap. They thought the U.S. Attorney's office must be listening to everything they said because all their friends and family were getting called into the Grand Jury. The Federal prosecutors have the resources to put up wiretaps. There is, I think, a resource defense between the Feds and it's different in the wiretap statutes. Federal crimes are permitted to use wiretaps. There is a resource difference between the Federal agencies that the U.S. Attorney's office is partnered with and those are the agencies that, to do wiretaps and search warrants, have confidential informants, wire people. The Federal government and the FBI, for example, is very well suited to do a complex financial crime, but I think there is a resource difference. Also, they're looking for people in the District Attorney's offices like they are the front line for all the crime that's committed. They are the front line with rape and murder and the U.S. Attorney's offices are not that. They investigate what they want. They don't have an arresting plan on the street that they then have to triage in Court. I think there is a real resource difference. The reality that especially, I would say, I do not think the politics as much in the New York City area but in the upstate region, with the upstate DAs, they know all the local politicians. They are in the same political club. They all go to the same church. They all dine together. There is a lot of friendship. There's much smaller

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communities up there. So, there are reasons why they recuse themselves of what they can't or would be unseemly to them. So, there's good reasons why the Feds stepped in. Although I think what you saw in the *McDonnell* decision was talking about Federalism and feeling uncomfortable that the Federal government is constantly prosecuting state offices, especially in *McDonnell*, where there was no state gift rule and that was the state's choice. You do see the sort of tension between the Feds constantly coming in and prosecuting state officials although I think there are good and legitimate reasons for that.

MR. CORT: One of the other problems I think – or challenges that you have – and agreeing with what you are saying, Carrie, is that it's very difficult to find the crimes in the first place and when you do find them the competition is fierce. We've lost plenty of cases to the Federal government.

MS. ROCAH: What do you mean by that?

MR. CORT: Well, two things. First, public corruption is the kind of crime where two men are alone in a room, I should say two people are alone in a room. There are various ways to find these cases – newspapers for one – but every prosecutor is reading the same newspapers. That's one good way. I started doing this eight years ago. I was told to get a subscription to the New York Post. I'm now a fan, mostly because it's a great way to find cases. The Federal authorities are doing that, as well.

MS. ROCAH: I think it also means that in public corruption and organized crime the problem is often – “I know this person is doing something wrong, but I can't find a crime. I'm looking for a statute.” It's one thing to find that someone's behavior is wrong, but finding something that's absolutely worthy of a prosecution is a whole other layer of this.

MR. CORT: That's right. I think, in a way, in New York State it's very difficult to prosecute so-called pay for play. You just, you can't do that. You need to find a crime. Not something that should be criminal but often it isn't.

MS. ROCAH: Right. And you don't agree with something that was said which is that you think that the limited number of cases being brought by the District Attorney's Offices is due to the politics?

MR. COHEN: I agree that there's something that prevents those offices from doing cases. I think you got to be careful about how we use the word politics or what we are describing is the politics of life. I have three children. I learned about politics when I went from two to three. Suddenly there's a different kind of interaction. They were forming a coalition against their parents. So, long way of saying, I think there are certain realities you live with as a local district attorney, especially when you get outside of New York County. You get out of New York City, the world starts to look very different. And part of it what Carrie just said which is you don't have a choice about certain kinds of crimes. The police bring them to you. People knock on your door. Are you going to prosecute those cases? You do not have discretion. And a huge portion of your doctrine is the DA. Certainly the cases with the Albany DA are drugs and property crimes. Now, if you don't do those cases, by the way, you will not be elected. End of discussion. Someone will come in and say incidents of crime it's going up and prosecution is going down. He's the bum. She's the bum. Vote for me. I'll put the right people in jail. You will be successful. So, that scoops up a whole lot of resources. Then when you have a limited issue – and this is, I think, the story also of the U.S. Attorney's Office in the Northern District – you now got all these young prosecutors and what are they learning to do, what kinds of cases are they learning to prosecute? They are learning to prosecute a certain kind of case that there's a certain pattern. Like any other skill, once you learn the skill, you tend to see the world understanding you got a particular tool bag that will make you effective. Now, you've got a problem as a District Attorney. Do I want to be let into an area that's going to be high profile where I may not have the people who have the right set of skills to do the case and then you are going to throw on top of that the other things that have been mentioned which are the capital political issues which is I am part of a political power structure here? Do I really want to

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upset the apple cart unless I know that I'm going to be successful? Going back to the other point about whether or not I'm going to be successful, and number two, what does it mean for me in terms of my position? And the truth is, if you are a DA, you tend to be reelected. The rate of incumbency is staggering, and there are no term limits. A lot of people in those jobs don't say to themselves, let me see if I can really risk it and do something a little edgy right now because maybe I want to move on with my life and do something else. All of that leads to the notion that it becomes very hard for the local DA to prosecute these kinds of cases.

Meanwhile you got the four Attorneys General over here doing the equivalent if you were sent up by the imperial wizard to go get the broom from the witch before you can bring a case.

MR. GERSHMAN: What you said was a very delicate way of saying that prosecutors don't prosecute because of politics. And in New York State I think it's a disgrace.

MR. COHEN: You're not disagreeing then.

MR. GERSHMAN: No.

MR. COHEN: That's the first time that anyone has accused me of being delicate.

MR. GERSHMAN: Here's what I think. I think DAs typically do have the resources. And the Westchester County District Attorney's Office has always had a public integrity section – I don't think that because police bring prosecutable cases, the prosecutors are going to prosecute the cases. There's a level of discretion. And prosecutors dismiss a lot of those cases. We are not talking about every case. I do not think that a District Attorney's office lacks the will and lacks the expertise to be able to prosecute a corrupt judge in the county or corrupt police in the county or whatever it is. If they want to do it, they can do it.

MR. CORT: A lot of these counties have one or two assistants. Up in the smaller counties, they really are very busy with the DWIs and similar crimes.

MR. GERSHMAN: I'm talking about the DA in St. Lawrence County. She's certainly done a lot of things that go very far beyond adhering to the law. I'm not talking about a county with one or two assistants. I'm just saying that you can't always argue there are no resources. If you have a case in your county, I think you can prosecute it. I think they sometimes don't want to prosecute some cases, but I think they have the ability to do it. I did not say that they don't have the resources.

MR. COHEN: I'm not saying it's a question of resources. I'm saying there are certain institutional realities and we all live with them and that most local DAs first and foremost, if you said, I am going to forgo prosecuting property crimes, drug crimes and those kinds of crimes that people rely upon in the DA's office, it would be something that would be both unacceptable and inappropriate.

I'm not saying local DA's offices don't do public corruption cases, and I'm not saying there aren't people in local DA's offices who don't have the experience to do it. Kathleen Rice was a DA in Nassau County. She tried cases, and she had the experience. I'm saying more often than not if you want to understand what's going on, if you want to understand that list I read in the beginning. Oddly enough, I came up as a gang prosecutor in a Federal prosecutor's office. You never did gang cases out of the U.S. Attorney's office. And by gang, I mean street crimes, organized crimes, but street gangs and there was a decision that we wanted to do these cases and so the U.S. Attorney devoted the resources and we put together a unit. And if the result were four fewer or eight fewer prosecutors in the narcotics unit, not a lot of people are going to say, "hey, Mary Jo White, you're not going to get reelected" because she doesn't have to worry about it.

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MS. ROCAH: I think, so far, we established that it's hard to prosecute public corruption cases. It's hardest for the Attorney's General office to prosecute public corruption cases.

MR. COHEN: Yet they do it admirably.

MS. ROCAH: The District Attorney's offices, perhaps maybe some, not all, could be slightly more aggressive in doing so, but they're not doing it. They are arriving at reasons why as some would like. So, let me ask this question, Carrie. How should the Federal and State work together, the U.S. Attorney offices and the AG's office or the DA's offices work together on this? Would that be the best solution and if so, which of those state offices is the best partner for a Federal office?

MS. COHEN: The question does make our world less corrupt, right, the prosecutors getting together and working together. I'm not sure that that's true or not. It does matter, I think, that the Federal government is the one prosecuting a lot of State and Local officials. It's not ideal, but I think there are good reasons for it. They don't necessarily want it. I think in practicality at least – the offices do work together sometimes. It is a fraud relationship often, but they are able to work together. For example, does a Federal prosecution have to be an AUSA? You can't have spouses, meaning a state prosecutor appointed to be a special AUSA, which happened a couple of times in the Southern District when the state had been working on certain prosecutions and state Feds had another piece of it. So, they worked together. That happened, giving the Eastern District the case to get a great conclusion. You think the state had worked it up and had certain resources and abilities. The Eastern District had other pieces of it and they decided to come together and work together. So, it does happen and it works well. A Federal prosecutor cannot step down and be an Assistant ADA without some sort of allowance to them and a Federal prosecutor become an AAG, again without some – I think the Attorney General has to do that, which again has been done, but they are different offices with different jurisdictions and there are difficulties.

MS. ROCAH: Professor Gershman, what were some of the tools that you as a prosecutor or that you at the DAs office tried to get around public corruption statutes? What would be some of the tools that you had used?

MR. GERSHMAN: As I said, one of the things we did was call witnesses into the Grand Jury who we believed had engaged in corrupt behavior which at the time we couldn't prove for different reasons. We gave these people immunity. We questioned them and we indicted them for perjury. I would say that happened a lot of the time. I think because of corroboration rules we felt that this was an appropriate way to respond. At times we did prove indictments for bribery and extortion and so on, but it depends on the facts of the case.

All I'm saying is I'm hearing the speaker at lunch talk about how the skies are falling and everybody is corrupt and nobody can prosecute corruption crimes any more. That's ridiculous. It does seem to me with the will and direction – I do not think *McDonnell* is an obstacle. I think we have to work harder, struggle more. Percoco will be convicted despite the credibility problems of the government's star witness. Sheldon Silver will be convicted again. Many of the cases were reversed because of *McDonnell* on retrial will result in convictions. I think the bar is always higher when prosecuting corruption cases. I think the burdens are higher. I don't think that it's something that we should become cynical about or feel that these people are getting away with their criminal acts.

MS. COHEN: I just want to dovetail something that the Professor said, which I think started out which was how do you know it's a crime and it's a lie? You also know it's a crime when someone lies to you. In the Federal system if someone lies to a Federal agent, they will knock on your door. That can be a Federal charge for obstruction of justice. Lying to a Federal agent is a Federal crime. Lying on a Federal discloser form like Menendez did or omitting his gifts from the doctor, that was charged in *Menendez*. The AAG chose not to retry and have a mistrial. There was no corruption. It wasn't a bribery count. It wasn't an extortion count. So, the lying that makes something a

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crime sort of puts you over the edge in trying to prove it's a bribery or kickback scheme.

MR. CORT: Carrie somewhat stole my thunder. I wanted to go back to that about lying and that dovetail with the perjury. I want to give a shout out to my favorite statute in the whole world, which is Offering a False Instrument for Filing in the First Degree in violation of section 175.35 of the Penal Law.²⁴ It is very difficult to prove state bribery because you have to prove an agreement or understanding. You need a very specific quid pro quo. Without a tape recording, good e-mails, or a confidential informant, bribery prosecutions are difficult. But I have found that very frequently public officials who accept bribes choose not to disclose those bribes on their financial discloser statements. I don't know why, but they don't. Both the Manhattan DA's office and the Attorney General's office have prosecuted numerous false filing cases because people don't disclose bribes they received.

MS. ROCAH: I want to talk a slightly different topic that I think is important: it relates to press coverage in public corruption prosecution in particular and how that affects the cases. We touched on this a little bit, how that affects what charges to bring, how the cases are tried and then also the timing with respect to the charges and whether you need to and how you take into consideration on elections. Steve, do you want to respond?

MR. COHEN: Yes. I think the reality with these cases is that they have a large amount of press attention. I think if you are a responsible prosecutor and for the most part we've been lucky in the city that prosecutors have tended to be responsible, but you have to be very careful. Long before these cases, Stanley Freedman's case was tried up in New Haven because of concern about prejudices covered by the coverage, but I think on the one hand you have to be mindful of it and on the other hand, there's certainly a reality that prosecutors often times use that press for

24. N.Y. PENAL LAW § 175.35 (Consol. 2018).

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good and sometimes bad affect in terms of messaging what they are doing and often times an attempt to some kind of – and more often than not it's not particularly effective. In terms of the second half, was that about time?

MS. ROCAH: Yes.

MR. COHEN: What do you mean by time?

MS. ROCAH: Well, actually there are specific requirements in Federal or state prosecutor's offices with respect to bringing a prosecution close to election.

MS. COHEN: In the Federal system the U.S. Attorney manual, you do not want public corruption prosecutors to disrupt an election. You do not want to bring charges and you actually can't bring charges within a certain time period before an election. That can seem weird to you but if someone is up for election in a month, it's actually dropped. Well, basically you usually let them get elected and then you toss them. There will be a special election. Public corruption prosecutions are difficult and why they actually are so important that the prosecutors are trying to not think about the press, are trying to just do the right thing for the right reason and look at the facts and look at the law. You are taking away the rights of the public to elect people of their choosing. So, you are investigating someone who is already elected and has been chosen by the people to represent them, and you by your ability to present a case to the Grand Jury and get a charge and they typically will resign once they are charged. You are the prosecutor and have to take away the will of the people. So, this post-term election and the same is true for dealing with the press, right. If it leaks out that you are investigating and at some point if you do a very complex investigation, that means not only you subpoena a lot of documents from different people and that you talked to different people, it leaks out. Even if it's not the prosecutors leaking it or investigating, but there are people you talk to and it leaks out and then it gets out to the press and they're just allegations, right. It's an investigation, a case that may never be brought.

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You also have to think about the timing even in your investigation and when you think that may be covert but you know may get leaked. You are interviewing a certain witness. You know there is nothing better to let the press know that his or her competitor in the election is under investigation. So, you have to be careful of that and the truth of that as a prosecutor. That is part of the job.

MR. CORT: Now would be a good time to say what I should have said in the beginning. I'm about to give my personal opinion. In fact, everything that I have said here is me speaking for myself personally and is my personal opinion. I'm not speaking for the office of the New York State Attorney General. I'm certainly not speaking for Eric Schneiderman, our Attorney General.

I would just like to add on to what Carrie was saying and sort of look at it in a different way. In the state, there are no uniform guidelines such as the US Attorney's manual to help you determine the timing of prosecutions near an election. I believe you should take the issue of timing on a case-by-case basis. That's the way I've done it in both prosecutorial agencies where I've worked. A failure to prosecute means that you are sitting on reasonable cause, the standard to seek an indictment. By not acting when there is reasonable cause to indict, you are making a decision to potentially affect an election just as much as if you go forward with an indictment on the eve of an election. There are really two ways to look at it. I think you just have to look at on a case-by-case basis. Again, that is my personal opinion, but it doesn't provide much of a guide as to how to proceed.

As to the issue of pretrial and trial publicity, that is something a prosecutor has to be aware of in public integrity prosecutions. It is an issue that public integrity prosecutors have to be very concerned about. The press is frequently very interested in public integrity cases and the prosecutor has to be careful in that area. We've gotten motions about press conferences that defendants have claimed have tainted the jury pool. I think you have to be very mindful of that when you're dealing with the press and just keep your statements strictly to

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what is contained in charging instruments.

MS. ROCAH: I was about to ask you a question.

MR. GERSHMAN: I think in the U.S. Attorney's manual there is a rule against holding press conferences unless you get approval from the higher ups in a high-profile case. I think there is a rule against press conferences.

MS. ROCAH: No. You can have press conferences. You can only talk about things that are in the public record. So, in the charging documents or something in Court or Court filed. You can only talk about public matters.

MR. GERSHMAN: We should not ignore the fact that the former U.S. Attorney in New York was criticized by the Federal district judge for engaging in what people felt was extrajudicial comments about Sheldon Silver that were found to be potentially prejudicial to the jury.

When I was a prosecutor my boss would never release an indictment of a public official within a week of election day simply because he didn't want to in any way influence the election. A person is presumed innocent and you just didn't want to do it.

MS. ROCAH: One thing I think you made a good point about the press conferences in that I think there's been a huge range that meets at the Federal level and maybe at the state level. Nobody is not having press conferences. We have press conferences in cases that – other U.S. Attorneys may have them more frequently.

I think Federally there's a rule as Carrie said, that you can't – there's a certain amount of time before an election. One question that I can pose to anyone that wants to answer it. Should that be the rule? In other words, if the prosecutor's office has probable cause to charge someone who's about to be voted on, why does the public not have a right to know that?

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MR. COHEN: I actually think the rule allows for getting DOJ approval within a certain period of time. You can't just live in a political world – you have a certain amount of discretion. You want to exercise some judgement here, but the fact that you believe – and look we've all served as prosecutors. It's a fascinating experience. I wish schools would spend a little more time talking about the psychology of being in the prosecutor's office and the psychology of law enforcement because what ends up happening to most people I've worked with and there are many of them, most of them overwhelmingly are people of highest integrity. All of them, the people that I worked with, are my closest friends to this day are people that I served with in the U.S. Attorney's office. Yet I can tell you including myself you begin to believe that you have a kind of understanding of the truth. That is not always the case. And that's why you have a Grand Jury and that's why ultimately you have trials by jury unless somebody decides to plead guilty.

I think it is extremely dangerous that our prosecutors in a relatively short period of time will affect an election when either they may be wrong or the witness may be wrong or the jury may not like the case. Under those circumstances you now have affected the choice that the people would otherwise have.

MS. COHEN: Just to go back to the press point. There is a good public policy reason why U.S. Attorneys and Attorneys General and DAs have press conferences to inform the public about what they are doing, to deter others from committing similar crimes, and it is not clear necessarily that cases are filed and are public and indictments are public. It's not always clear what any of that means. Somewhat written in legalese. It's not necessarily a bad thing as long as the Attorney's General or the U.S. Attorney sticks to the accusations and the public record, and I think the case the Professor was referring to where my fellow boss got criticized was that he did not insert enough in the press conference in the statements he made in his speech at his law school than this, that these were allegations. He didn't preface every word by "as alleged in the indictment" or "as alleged." And not prefacing it gave the inference that – that a motion was to dismiss the indictment. The motion was denied.

The jury had no effect on when we got to jury selection. There was a jury questionnaire. We polled the jury and you'd be surprised how many people do not read the paper or watch the news.

MR. GERSHMAN: I think it was more than just prefacing his remarks. These were allegations. Mr. Bherera was mocking Sheldon Silver in a comic rift that he didn't have to do. That's not something that prosecutors should do. Prosecutors should be quiet, get the indictment, and try the case.

MS. COHEN: You and I don't disagree. As a prosecutor humor is not necessarily a tool you should use in your box when you're talking about people you have indicted for criminal acts. It's not funny.

MS. ROCAH: I think we should try some questions. Does anyone have any questions?

ATTENDEE: You said you didn't think that *McDonnell* has that much of an impact. I'm curious as to what, I guess, the Cohens think about that and maybe Mr. Cort, as well, but of the *Silver*, *Bruno*, and *Skelos* cases, do we think that has an impact on those cases and makes it harder to prove the quid pro quo? Do you think *McDonnell* makes it harder?

MS. COHEN: All *McDonnell* did was say an official act is not just – the quid pro quo in exchange for that still remains. It's not effective, but just what are you exchanging. And the public official has to be exchanging an official act. And that used to mean basically anything official done in the official capacity.

In my official capacity as governor I called the head of the University of Virginia who is sort of within my state, and I asked them to take a meeting. I'm doing that as a governor. I'm not doing that as a friend or as someone who happens to know her. That would be enough. Well, *McDonnell* said it's not enough to do that; you have to put your thumb on the scale. If the governor had asked the person at the University of Virginia to take the meeting and said and when I look at your budget next year, I

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will look on it differently depending on what happened to that Anatabloc vitamin that was going to save the world. Official act, things that politicians do to help their constituents. One part of *Menendez* was about getting needles for the doctor's friend in the Ukraine.

That was something that people do for people in the district. *McDonnell* changes it a little bit in that you need – the prosecutors need to be thinking of what – did the person put the thumb on the scale and how will I prove that. It's not enough to say I'm the governor and the governor makes the call. It will change things and make it a little harder. I don't know that you want your governor calling his or her people and asking them to take meetings and secretly to get all these gifts from, but you do want your governor or any elected official to be able to serve their constituent or people and get meetings. That is something you want and that's how government works. I think for prosecutors it changes it a little bit but I guess the fundamentals were all about passing legislation, getting state grants, taking money under the counter because you have changed some zoning rules. I don't think it's going to change it that much. I do think what we're also looking at *McDonnell*, and I know they talked about this a little bit this morning, as where opportunities arise and where that law will go. You say I did this to the public official and I have a retainer, then where are the official acts and how do you prove those. I think that will be more difficult going forward.

MR. COHEN: And I also think that, in a way, what the standard now becomes is something that is a practical matter and it's probably something that should have been charged always, that the notion of simply asking for a meeting or having something that is that amorphous. Whether we like it or not, if I am the local governor and you are my friend and donor and have given me gifts, whether appropriate or not, I'm assuming we have a long-term relationship and you like sending me things. My Attorney General over here has got a very active effort to look for certain kinds of cases and you say I have one of those cases, and I call and say, do me a favor, take a meeting, but I say nothing more. My saying, "by the way, understand who

you're meeting with and make sure you make them happy." That's a different story. And I think that's what's being flushed out. What is interesting about this is there is a parallel to what has gone on for the past twenty-five years in the security fraud area.

MR. CORT: I will just say that state prosecutors are in a good position to use our bribery statute, now perhaps better than the Feds are.

MR. COHEN: Which brings us back to: why aren't more of these cases being done on the state level rather than the Federal level? On the Federal there's a search for the appropriate statute. And you end up with the kind of situation that plays out over the years, if not decades, that you had in both security fraud and corruption cases.

MR. GERSHMAN: To me, *McDonnell* hit bottom. I think what the Supreme Court would say is that in prosecuting you have to behave responsibly in bringing criminal charges. There were several cases before *McDonnell* where prosecutors were abusing their discretionary power. I think state prosecutors and Federal prosecutors were overreaching. So, I see *McDonnell* in some ways in that light. So, I think it is about prosecutors using good judgment, using their discretion prudently.

ATTENDEE: I was wondering, I think cases should be taken Federally that you really haven't touched and that is the jury pool. Anyone who has ever tried state cases versus Federal Court you see obviously the jury pools for the Feds are taken from multiple counties. You tend to get generally better educated jurors, in my opinion, that are probably maybe a little more conservative and willing to convict.

MS. ROCAH: Even at the Federal level the juries in Manhattan –

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MR. COHEN: I'm surprised my sister as a defense attorney isn't banging on the table saying no, not at all. We want jurors that are representative and that what you're suggesting is that some special class of elites should be making decisions here and that when she is defending somebody she wants jurors who are representatives of the people who understand fundamentally what is going on.

MS. ROCAH: Anyone else have a question or a comment?

ATTENDEE: I spent five years as a Special Assistant U.S. Attorney. I'm a Nassau County Assistant DA prosecuting a joint Federal and state investigation involving a massive fraud bribery case in Nassau County.

There was no question when we went into that – and this was a long time ago – when we went into that it makes sense to do it Federally. All the advantages you're talking about, also the relationship between prosecutors and judges Federally is very different from the relationship between them in our county. So, it makes perfect sense. What's interesting here is whether in light of McDonnell if we had that same discussion today that I had fifteen years ago, whether we might say, you know, there actually would be some advantages in prosecuting this in the state Court because of the difference in the bribery statute.

There was no question fifteen years ago that we were better off going Federally.

MR. COHEN: It does happen, but in my experience, it's happened in other areas. When I was doing street crime cases, we had a great relationship with the Bronx DA's office. It didn't make sense to be in Federal Court and call up more often than not the Bronx DA's office than take the case than similarly it was easier to proceed in Federal Court, but the problem though is more often than not there is a kind of competitive nature. When I was in the AG's office there was a case that really would have been much better Federally and we sent the case and the AAG to the US Attorney's office and was a great assistant but she went kicking and screaming and a year later she came back and said, you know something, in hindsight, you were right but

there are these institutional biases that you have to overcome.

ATTENDEE: It doesn't have to be that way with a team of ten people who worked on this case, Assistant U.S. Attorneys, Assistant DAs, FBI, IRS, we get together three times a year for dinner. So, you have a different kind of –

MR. COHEN: I have a similar thing with the current cases I do, but I also believe we should always get along, but they don't.

MS. ROCAH: Thank you.

DEAN YASSKY: As we close, I want to thank again all of the folks on this panel and those folks who participated earlier.

I really do think that we have today assembled more brain power, more experience, more wisdom on public corruption cases than at any time since Preet Bharara dined alone. Sorry, I couldn't resist.

Thank you again not just to everyone who participated but also to all of you who came to listen, as well.