Appeals court holds prosecutors to the law

by Edward Spannaus

In a ruling which has sent shockwaves through the Department of Justice, a Federal appeals court has ruled that it is illegal for Federal prosecutors to bribe witnesses. While it might seem obvious to the layman that this should be the case, government lawyers have taken the position that they are exempt from the anti-bribery law.

This "bombshell" ruling was issued on July 1 by the 10th Circuit U.S. Court of Appeals which sits in Denver. Citing the law which prohibits anyone from giving or offering anything of value for testimony, the 10th Circuit panel ruled that it is illegal for Federal prosecutors to offer leniency to a witness in exchange for testimony, saying that this amounts to buying testimony.

The court explicitly drew the parallel to the Justice Department's position that its prosecutors are exempt from state laws and codes of professional conduct. The McDade-Murtha bill, H.R. 3396, is intended to remedy this, by declaring explicitly that government attorneys are bound by state laws and rules. The 10th Circuit ruling held that prosecutors had violated both Federal law and the Kansas Rule of Professional Conduct.

Documentation

Excerpts from ruling of U.S. Court of Appeals for the 10th Circuit, in U.S. v. Singleton, *July 1, 1998:*

Section 201(c)(2) of Title 18 of the United States Code prohibits giving, offering, or promising anything of value to a witness for or because of his testimony.

Section 201(c)(2) could not be more clear. It says: "Whoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both."

The anti-gratuity provision of §201(c)(2) indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony. If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so. . . .

One of the very oldest principles of our legal heritage is that the king is subject to the law. See Romans 13. King John was taught this principle at Runnymede in A.D. 1215, when his barons forced him to submit to Magna Carta, the great charter that imposed limits on the exercise of sovereign power. . . .

Justice Brandeis expounded as follows on the principle: "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.". . .

The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money. . . .

Cases involving the application of ethical rules to federal prosecutors fortify our conclusion. The Department of Justice attempted, first through a policy statement known as the Thornburgh Memorandum, then through a federal regulation, 28 C.F.R. pt. 77 (1997), to exempt its litigators from state ethical rules prohibiting ex parte communication with represented parties. The federal courts have unanimously rejected the notion that federal prosecutors are exempt from these ethical rules. . . . If federal prosecutors are bound by an ethical rule governing ex parte contact in the course of a prosecution, we think it even more clear that they are bound by a federal statute regulating the evidence presented in federal court. . . .

Ms. Singleton argues the government violated Kansas Professional Rule 3.4(b) in presenting the testimony of Mr. Douglas. The rule, adopted by the Supreme Court of Kansas, provides, "A lawyer shall not . . . offer an inducement to a witness that is prohibited by law.". . . Moreover, because we have held that the government's promises ran afoul of 18 U.S.C. §201(c)(2), and were thus prohibited by law, we must conclude the government violated Rule 3.4(b).

In the circumstances before us, the appropriate remedy for the testimony obtained in violation of §201(c)(2) is suppression of its use in Ms. Singleton's trial. "[T]he principal reason behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.' ". . . We believe exclusion will effectively deter the unlawful conduct before us. Agreements to seek leniency or refrain from filing charges in return for testimony are entered into with the intention of presenting to a court the testimony so acquired. Excluding that tainted testimony removes the sole purpose of the unlawful conduct and leaves no incentive to violate §201(c)(2).