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A warning to public officials everywhere

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Former New York State Senate Majority Leader Joseph L. Bruno gained a powerful reputation as a tough fighter in the hard-knuckle politics of Albany.

He'll need his best pugilistic skills to avoid the seemingly-endless reach of the federal "honest services" mail fraud statute, the latest weapon for federal prosecutors bent on chasing the ethical lapses of state and local politicians.

The case highlights the nether world of political life: the razor-thin edge between legal conduct — lobbying, accepting legal campaign contributions, gifts or benefits from those with business before the government — and illegal extortion and bribery.

In the interest of disclosure, I served with Bruno in the Senate for 10 years. As the Republican majority leader, he was always fair and friendly and a solid legislative leader, even when we disagreed.

The indictment alleges that Bruno had a fiduciary duty to New Yorkers to engage "in disinterested decision making" when performing official duties. He was further required by state ethics laws to make full disclosure of conflicts of interest. *U.S. v. Bruno*, Indictment, Cr. No. 09-CR-29 (NDNY 2009). See also N.Y. Public Officials Law §§73 and 74.

The indictment alleges Bruno failed to disclose gifts and payments from investment companies with whom he had a business relationship and further "exploit[ed] his official position for personal compensation ... knowing and believing that his reasonably perceived ability to influence official action would, at least in part, motivate those he contacted to enter into financial relationships beneficial to his personal financial interests," Indictment, ¶19, p. 8.

The indictment also alleges that Bruno received \$3.1 million in compensation from five businesses with which he had an undisclosed relationship over an 11-year period. He is accused of directing pension funds for unions that had business before the Legislature, to an investment firm with which he had an undisclosed consulting relationship.

Several aspects of the indictment raise questions about the prosecution: The only crime alleged is that Bruno failed to provide honest services to the public in violation of the federal mail fraud statute, 18 U.S.C. §1341. Unlike many other indictments for corruption, no charges for bribery or extortion, which require higher levels of proof, are included. See, e.g., *U.S. v. Mariano*, 2008 U.S. App. LEXIS 13170 (Third Cir. 2008).

Curiously, there are no other "schemers" or co-conspirators charged, although other individuals, corporations, unions and agreements are mentioned — some frequently. In many cases, the presence of other conspirators, who take pleas and agree to testify,

no doubt can assist the prosecution in gaining convictions. See e.g., *U.S. v. Urciulli*, 513 F3d 290 (First Cir. 2008)(indictment against state senator included charges against nursing home operators and the nursing home itself and a charge of aiding and abetting mail fraud).

While the indictment indicates Bruno received personal benefits from various sources, there is no specific allegation of anything Bruno did in his capacity as a public official to help or assist those who had specific business before the state government.

The seemingly-incomplete nature of the indictment suggests that further proceedings, superseding indictments and other steps may yet await grand jury action. As Bruno has stated publicly, the indictment's apparent deficiencies cast doubt on the strength of the government's case, especially if the grand jury was asked to indict others and charge other crimes but declined.

While the reading of the indictment may suggest some limitations on the government's proof and likelihood of conviction, the net created by the honest services amendment to the federal mail fraud statute has captured scores of public officials in the last decade, even as the judges of the federal courts have debated its meaning since 1988.

In the wake of *McNally v. U.S.*, 483 U.S. 350 (1987), which restricted federal prosecutions for honest services wire fraud, Congress revised the statute, adding a definition that a "scheme to defraud" included a "scheme ... to deprive another of intangible right of honest services," 18 U.S.C. §1341; see *U.S. v. Sorich*, 523 F2d 702, 707 (Seventh Cir. 2008)(explanation of the changes after *McNally*).

Emboldened by the change, prosecutors began to examine the interaction between public officials — especially in part-time legislatures such as New York's — and their outside business relationships.

As public corruption grand juries were convened, the federal courts grappled with the honest services requirement, describing it as an "amorphous and open-ended" standard for judging public official's conduct, *U.S. v. Rybicki*, 354 F3d 124, 132 (Second Cir. 2003)(rejecting any claim that the statute was void for vagueness); see cases cited in *U.S. v. Warner*, 498 F3d 666 (Seventh Cir. 2007)(upholding conviction of former Illinois Gov. George H. Ryan).

In seeking guidance on the standards of proof to support a conviction, the prosecution and the defense will contend with the Second Circuit's directives in *U.S. v. Ganim*, 510 F3d 134 (Second Cir. 2007), cert. denied, 128 S. Ct. 1911 (U.S. 2008).

Significantly, the Second Circuit noted that the government, before the district court, prosecuted Ganim, a former mayor of Bridgeport, Conn., under a theory that honest services fraud

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occurred if the defendant violated the extortion or bribery laws, *Id.* at 136.

In what may presage a fight in the Bruno case, however, the court noted that violations of the honest services language could occur if a “corrupt intent on the part of the payer to influence official acts” or “gifts and favors flowing to a public official in exchange for a pattern of official actions favorable to the donor” are found, *Id.* at 149-150.

The Second Circuit approved the district court’s distinction between bribery and legal lobbying and campaign contributions. Bribery occurs if the official knows he “is expected as a result of the payment to exercise particular kinds of influence or decision making to the benefit of the payer and, at the time the payment is accepted, intended to do so as specific opportunities arose,” *Id.*

If a donor intends a gift or benefit to “buy favor or generalized goodwill from an official who has been, is, or may at some unknown, unspecified later time, be in a position to act favorably on the giver’s interests — favorably to the giver’s interests — then “legal lobbying “ occurs and there is no statutory violation, *Id.*

The court also noted that officials lawfully may accept campaign contributions and personal benefits if the “intent in taking those items is solely to cultivate a relationship with the persons who provided them,” *Id.* at 149.

The circuit court, including one former member of the state Legislature (former Geneseo Assemblyman Richard Wesley), attempts to draw a line between payments for a specific action, to buy favor and goodwill, and “personal benefits designed solely to cultivate a relationship,” rendering the first illegal and the others as either legal lobbying or lawful campaign contributions.

In reality, it will be much more difficult for public officials and their lawyers to discern that line, especially because the deciding factor, according to the Second Circuit, may be the expectations and intent of the giver as much as the recipient.

Bruno, other public officials and those who work with them should not take too much consolation from the *Ganim* court’s conclusion that violation of the mail fraud statute can be sustained by proof of bribery or extortion. Prosecutors chose that theory; the circuit court did not suggest that convictions under the honest services statute required such linkage in all cases. The court also did not consider whether misdemeanor violations of state disclosure and ethics laws — one of the prominent charges against Bruno — are sufficient to sustain federal felony mail fraud charges.

Other circuits have supported that theory, even in the face of claims that such charges “federalized” state ethical violations, see *U.S. v. Mariano*, 2008 App. LEXIS 13170 (Third Cir. 2008)(state disclosure laws may alone serve as the basis for such prosecutions); see e.g., *U.S. v. Urciulli*, 513 F3d 290, 298 n. 5 (First Cir. 2008); *U.S. v. Panarella*, 277 F3d 678 (Third Cir. 2002)(concealing a financial interest while taking discretionary action that the official knows will directly benefit that interest violates the honest services statute).

Recently, other circuits have applied even broader and looser standards when necessary to sustain convictions, and nothing in *Ganim* suggests the Second Circuit will not follow suit, see *U.S. v. Weyhrauch*, 548 F3d 1237 (Ninth Cir. 2008)(violation if public official is paid for a decision while purporting to be exercising independent discretion and non-disclosure of material information even if no violation of state law); *U.S. v. Geddings*, 278 Fed. Appx 281 (Fourth Cir. 2008)(conviction of the North Carolina lottery commissioner for failure to disclose a conflict of interest even though he received no personal gain); *U.S. v. Black*, 530 F3d 596 (Seventh Cir. 2008)(conviction of Canadian financier Conrad Black even though no evidence of theft presented); *U.S. v. Walker*, 490 F3d 1282 (11th Cir. 2007)(violation of honest service statute does not require proof of a state law violation); *U.S. v. Sorich*, 523 F3d 702 (Seventh Cir. 2008)(misuse of public office for private gain is the line that separates run-of-the-mill violations of state fiduciary duties from federal crimes and if a public official intends to reap private gain the law is violated even if no harm occurs).

At the end of his long public career, Bruno now finds himself caught in a web created by an ill-defined federal statute, weak state disclosure laws and a hair-splitting resolution among the federal courts of the consequences when public officials — or anyone with fiduciary duties to others — accept benefits and payments knowing they are intended, even in part, to influence the official’s decisions or public positions.

Legislators, the individuals who work with them, their financial contributors, lawyers, union officials, corporate leaders and lobbyists — the denizens of Albany’s political culture and those closer to home — should pay careful attention to the outcome.

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