WHY PROSECUTORS ARE PERMITTED TO OFFER WITNESS INDUCEMENTS: A MATTER OF CONSTITUTIONAL AUTHORITY*

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INTRODUCTION

Prosecutors[1] in the twenty-first century will undoubtedly face ever more resourceful criminals who will devise increasingly sophisticated and complex methods of operation designed to shield their activities and identities from detection by law enforcement.[2] As now, next century's prosecutors will find accomplice testimony to be an essential tool in piercing the veil of secrecy surrounding the leaders of organized crime and narcotics trafficking, as well as detecting corruption by public officials and white-collar criminals.[3] Obviously,

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1. This Article primarily examines the federal prosecutor's role in offering inducements to government witnesses. The issues addressed in this Article are, however, equally relevant to state prosecutors in light of similar challenges to witness inducement agreements raised in various state jurisdictions. *See, e.g.,* Neil B. Eisenstadt, *Let's Make a Deal: A Look at* United States v. Dailey *and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 777 (1987) (analyzing state court decisions reversing convictions based on accomplice testimony provided pursuant to contingent plea and immunity agreements).

2. *See* Bennett L. Gersham, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992) ("Crime has grown more complex and sophisticated since the early 1970s, particularly narcotics, racketeering, official corruption, and business fraud crimes, requiring a coordinated, powerful, and equally sophisticated response.").

3. *See* John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104 (1995) (stating that successful prosecution of organized crime leaders requires the use of accomplice testimony to reveal the "behind-the-scene control and guidance" of crime bosses who shield their involvement in the day-to-day operation of their organizations through the

few accomplices will choose to cooperate with the prosecutor unless they have the expectation of receiving some benefit for their efforts, either in the form of a reward, immunity, or a reduced sentence for their own crimes.[4]

The prosecutor's authority to offer inducements to witnesses in exchange for testimony has a long history of acceptance in American jurisprudence.[5] The Supreme Court has traditionally sanctioned witness inducement agreements as a constitutionally permissible exercise of prosecutorial authority,[6] and courts have acknowledged the importance of such agreements in securing the testimony of witnesses essential to the prosecution of conspiratorial crimes.[7] Recognizing the vital importance of accomplice cooperation agreements to effective law enforcement, Congress has enacted an "extensive and detailed statutory framework authorizing sentence reductions and recommendations, immunity, and other incentives for cooperating witnesses."[8]

Today, federal prosecutors are permitted to extend a variety of benefits or inducements to prospective government witnesses in exchange for their truthful testimony about the criminal activities of others.[9] These benefits to the government witness may take the

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use of intermediaries).

4. *See* United States v. Reid, 19 F. Supp. 2d 534, 537 (E.D. Va. 1998) ("It is naive to assume that most co-conspirators would be so altruistic as to abandon their own self-interest and testify for the very government that seeks a stiff sentence against them without a bargain being made.").

5. *See* United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (en banc) ("No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.").

6. *See* Lisenba v. California, 314 U.S. 219, 227 (1941) (holding that there is no due process violation where an accomplice confesses and testifies against a defendant in return for leniency); Brady v. United States, 397 U.S. 742, 751–53 (1970) ("[We] cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the state.").

7. *See, e.g.*, United States v. Dailey, 759 F.2d 192, 196 (1st Cir. 1985) (recognizing that co-defendants are frequently the most knowledgeable witnesses available to testify about criminal activity); *Reid*, 19 F. Supp. 2d at 538 ("[T]here are situations where those individuals [co-conspirators] may be the only credible witnesses of criminal activity and, without their testimony, the government would not be able to obtain convictions.").

8. United States v. Singleton, 165 F.3d 1297, 1305 (10th Cir. 1999) (Lucero, J., concurring), *cert. denied*, No. 98-8758, 1999 WL 185874 (U.S. June 21, 1999).

9. *See generally* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL ch. 9, § 27.00 (1997) [hereinafter U.S. ATTORNEY'S MANUAL].

form of a reward; immunity from prosecution for his criminal acts or an assurance that his testimony will not be used to build a case against the witness; a recommendation to dismiss or reduce charges against the witness; a favorable sentencing recommendation to the court; a motion for a sentence reduction or downward departure from applicable mandatory minimum sentences or sentencing guideline provisions; an agreement for other favorable government action, such as return of seized property that is subject to forfeiture; or an agreement involving some combination or permutation of these benefits.[10] In discussing the prosecutor's role in offering inducements to government witnesses, this Article will focus primarily on inducements offered to witnesses who participated in criminal activity in return for their testimony against their former accomplices. The body of such agreements will be referred to generically as witness inducement agreements.

Despite the widespread acceptance and recognized value of witness inducement agreements to effective law enforcement, the last half of this century has witnessed a continuous assault on the practice of prosecutors offering inducements to their witnesses in return for their truthful testimony.[11] Critics of witness inducement agreements have argued that testimony gained pursuant to some types of witness inducement agreements should be excluded on due process grounds.[12] Recently, such agreements have been assailed as being violative of federal bribery statutes and rules of professional conduct.[13]

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10. *See id.*; *see also* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993).

11. *See* Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 813 (1987) (contending that contingent plea agreements violate defendants' due process rights and testimony offered under such agreements be excluded as unreliable); Eisenstadt, *supra* note 1, at 752 (asserting that exclusion of testimony pursuant to contingency plea agreements is necessary to ensure defendants' constitutional right to fair trial); Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L.J. 211, 230–31 (1994) (arguing that courts should place limits on the use of contingent plea agreements and testimony offered thereunder).

12. *See* Beeman, *supra* note 11, at 813; Eisenstadt, *supra* note 11, at 752; Perroni & McNutt, *supra* note 11, at 230–31.

13. *See* United States v. Singleton, 144 F.3d 1343, 1358–59 (10th Cir.) (holding government's offer of leniency to accomplice in exchange for his testimony violated 18 U.S.C. § 201(c)(2) and Rule 3.4(b) of the *Kansas Model Rules of Professional Conduct*), *vacated,* 144 F.3d 1361 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999),

The question of whether witness inducement agreements violate federal bribery statues or rules of professional conduct is beyond the scope of this Article — that matter is presently being decided by the courts.[14] Instead, this Article will address the more basic question raised by critics of witness inducement agreements: Why are prosecutors permitted to offer inducements to their witnesses and defense attorneys are not?[15] This Article argues that the reason for the disparate treatment of prosecutors and defense attorneys is that the Executive Branch, in an exercise of its constitutional duty to "faithfully execute" the laws of our country, has determined as a matter of public policy that the practice is an appropriate exercise of prosecutorial discretion.[16] Under the doctrine of separation of powers, the authority to make the decision to permit prosecutors to enter into witness inducement agreements falls within a "special province" of the Executive Branch.[17] Decisions by the Executive Branch within this special province are presumed valid absent proof of a constitutional violation.[18]

Part I of this Article examines the history of witness inducement agreements, tracing their origins to the English common law practices of approvement and the crown witness system.[19] It then explores the impact those practices had on the development of witness inducement agreements in the United States, and the sanctioning of witness inducement agreements by Supreme Court.[20] Part II of this Article examines modern-day challenges to the various forms

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cert. denied, No. 98-8758, 1999 WL 185874 (U.S. June 21, 1999); *see also* Cynthia Cooper, *Let's Not Make a Deal: Appeals Court Says Some Inducements for Testimony Constitute Bribery*, A.B.A. J., Sept. 1998, at 34; J. Richard Johnston, *Paying the Witness — Why Is It OK for the Prosecution, but Not the Defense?*, 11 CRIM. JUST. 21 (1997) (contending that there is no apparent reason for the differences in rules that permit prosecutors to offer inducements to witnesses but prohibit defense attorneys from offering similar inducements to defense witnesses). Johnston's article has been credited with having led defense counsel to file the motion to suppress accomplice testimony in *Singleton*. *See* Cooper, *supra*, at 34.

14. *See, e.g.*, United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999); United States v. Carroll, 166 F.3d 334 (4th Cir. 1998); United States v. Briones, 165 F.3d 918 (9th Cir. 1998); United States v. Haese, 162 F.3d 359 (5th Cir. 1998); United States v. Ware, 161 F.3d 414 (6th Cir. 1998).

15. *See* Johnston, *supra* note 13, at 21.

16. *See infra* Part III.

17. *See infra* notes 154–64 and accompanying text.

18. *See infra* notes 156–68 and accompanying text.

19. *See infra* Part I.

20. *See infra* Part I.

of witness inducement agreements, and the almost universal rejection of those challenges by the courts.[21] Part III of this Article argues that the current debate questioning why prosecutors are permitted to offer inducements to their witnesses, while defense attorneys may not, has mistakenly focused on the respective roles of the attorneys in the criminal justice system while overlooking the constitutional authority of the Executive Branch to act within the "special province" of prosecutorial discretion.[22] This Article contends that the higher role of the prosecutor in the criminal justice system is not a reason for permitting her to offer inducements to her witnesses; rather this higher role is only one of the many procedural safeguards designed to ensure that jury verdicts in criminal cases are based upon reliable evidence.

I. HISTORY OF WITNESS INDUCEMENTS

A. Common Law Development

The practice of offering inducements to prosecution witnesses in return for their truthful testimony traces its origins to the common-law practice of "approvement."[23] Under the law of approvement, a person charged with a capital offense (treason or any other felony) could seek leniency as an "approver" by confessing his guilt and agreeing to testify against his accomplices.[24] The approver was sworn by the court and then assigned to an examining coroner to provide testimony about his accomplices, a process referred to as "appeal of felony."[25] Admission as an approver was discretionary by the court, and was limited to only those cases in which the approver was a direct participant in the crime under investigation.[26]

At the trial of his accomplices, the approver was considered competent to testify as a witness and his testimony was viewed as

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21. *See infra* Part II.

22. *See infra* Part III.

23. *See* United States v. Ford, 99 U.S. 594, 599 (1878) [hereinafter *The Whiskey Cases*] (citing 4 WILLIAM BLACKSTONE, COMMENTARIES **324–25; Beeman, *supra* note 11, at 800–01.

24. *See* 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 225 (Sollom Emlyn ed., 1736); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7 (1992).

25. *See* 2 HALE, *supra* note 24, at 227.

26. *See id.* at 226.

"probably credible," because he had confessed to a capital crime.[27] The approver's fate was dependent on the outcome of the trial.[28] If the accused, also known as the "appellee," was acquitted, the approver was executed on his confession of guilt;[29] if the appellee was convicted, the approver's life was spared, but he was nonetheless subject to banishment.[30]

The law of approvement fell into disuse by the close of the Medieval Period.[31] Although most commentators attribute the demise of approvement to a societal recognition that the benefits of the practice were outweighed by the risks of perjury created by making a pardon for the approver contingent upon the conviction of the accused,[32] at least one commentator attributes the demise of the practice as resulting, at least in part, from the hazards faced by the approver as a result of entering his guilty plea.[33]

By the late sixteenth century, a practice known as the crown witness system, or turning "king's evidence," had evolved in the place of the law of approvement.[34] Unlike the law of approvement, a person turning king's evidence was not required to plead guilty; instead, he received in effect a grant of "non-prosecution" conditioned upon his best effort to assist in the prosecution of his accom-

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27. *See id.* at 234.

28. *See id.*

29. *See id.*

30. *See id.* at 234–35.

31. *See* 2 HALE *supra* note 24, at 226.

32. *See* Eisenstadt, *supra* note 1, at 760; *see also* Hughes, *supra* note 24, at 7 n.19 ("[T]he truth is, that more mischief hath come to good men, by these kinds of approvement by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders . . . ." (quoting 2 HALE, *supra* note 24, at 226)).

33. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 91–92 (1983) (noting that "the approver had, so to speak, a noose around his neck; he was not only indicted, he had pleaded guilty, and he would be executed if his approvement miscarried for any reason"). The risks faced by prospective approvers were indeed great. *See id*. The approver faced execution not only if the defendant was acquitted but also if: 1) the approver failed to provide his statement to the examining coroner in a timely fashion; 2) he later claimed his statements to the examining coroner were given under duress; 3) the approver's testimony before the court differed in any material manner from his statement to the examining coroner; 4) the approver accused a person who was outside of the country; or 5) the accused could not be found. *See* 2 HALE, *supra* note 24, at 229–32. Nevertheless, one must remember that the fate of a failed approver was no worse than an accused convicted of a capital offense — both were executed. *See* Langbein, *supra*, at 91–92.

34. *See, e.g.*, Langbein, *supra* note 33, at 91; *see also The Whiskey Cases*, 99 U.S. at 599.

plices.[35] Although the crown witness was competent to testify as a witness, the courts recognized that the reliability of this testimony was affected by the incentive for him to commit perjury.[36] As early as 1751, English courts instituted a safeguard measure, requiring the testimony of a crown witness be corroborated through independent evidence.[37]

Undoubtedly, abuses occurred under the common-law practices, which extended leniency to accomplices in return for their testimony.[38] Nevertheless, the argument that abuses occurring during the common-law period undermines the soundness of the Executive Branch's decision to permit witness inducement agreements in our modern-day criminal justice system,[39] overlooks the fundamental differences in the procedural safeguards offered by the two systems of justice.[40] Early common-law criminal trials have been accurately characterized as being "nasty, brutish, and essentially short."[41] In-

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35. *See* Langbein, *supra* note 33, at 92 (noting the practical differences between the law of approvement and the crown witness system: "The coinage of approvement was pardon; the coinage of the crown witness system was nonprosecution.").

36. *See id*. at 97 (quoting from an 1837 common-law precedent: "The danger is that when a man is fixed, and knows his own guilt is detected, he purchases impunity by falsely accusing others.").

37. *See id.* at 97–98.

38. *See* 2 HALE, *supra* note 24, at 226.

> And therefore this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men, and therefore provision made by [an act of parliament].

Id.; *see also* Langbein, *supra* note 33, at 133–34 (concluding that the modern-day adversarial proceeding traces its roots to the ad hoc development by common-law courts of procedures designed to safeguard common-law defendants from the dangers posed by crown witnesses and reward seekers).

39. *See* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 152–68 (1994) (suggesting that there is little difference between common-law approvers and modern-day informers, and arguing that abuses occurring under the common-law practices have not been resolved by the American criminal justice system).

40. *See generally* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) (examining the emergence in England during the eighteenth century of the procedures which he characterizes as the "most fundamental attributes of modern Anglo-American Criminal Procedure" — the law of evidence, the adversarial system, the privilege against self-incrimination, and the rules governing the relationship of judge and jury).

41. Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 498 (1990) (quoting J.S.

dictment at common-law meant that a defendant was likely guilty; the purpose of a trial was to allow him to answer or explain the charges against him.[42] Early common-law defendants were required to conduct their own defense; defense counsel did not begin to appear until the early 1700s and did not appear regularly until the mid-1730s.[43] Common-law defendants were incompetent to receive the oath; therefore, their testimony was not of equal weight as prosecution witnesses.[44] Rules of evidence, such as accomplice corroboration requirements, only began to be formulated after the introduction of defense counsel.[45] Once convicted, common-law defendants did not have the equivalent of modern appellate remedies and had to rely upon clemency to correct perceived wrongs.[46] This setting is in stark contrast to the procedural safeguards offered in modern-day trials.

B. Development of American Jurisprudence

The English common-law experiences had a significant impact on the development of the law governing witness inducement agreements in the United States.[47] Courts in the United States adopted the common-law practices and expanded them to include leniency agreements as well as immunity agreements.[48]

In deciding *The Whiskey Cases*[49] in 1878, the Supreme Court had occasion to review the common-law practices of approvement and the crown witness system, and concluded that a defendant who testified against his accomplices had an equitable right to a delay in his trial to apply for an executive pardon.[50] In reaching its deci

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COCKBURN, A HISTORY OF THE ENGLISH ASSIZES 1558–1714, at 109 (1972)).

42. *See* Langbein, *supra* note 33, at 123–24.

43. *See id*. at 124; Landsman, *supra* note 41, at 533.

44. *See* Landsman, *supra* note 41, at 498–99.

45. *See* Langbein, *supra* note 33, at 130–34.

46. *See id*.

47. *See, e.g., The Whiskey Cases*, 99 U.S. 594, 599–606 (1878) (reviewing common-law decisions and treatises on the law of approvement and crown witness system, and their influence on the development of American law concerning accomplice testimony).

48. *See* Beeman, *supra* note 11, at 801; Eisenstadt, *supra* note 1, at 761–62.

49. 99 U.S. 594 (1878).

50. *See id*. at 599–606.

> Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same

sion, the Court recognized the importance of prosecutorial discretion in determining the conduct of criminal prosecutions, including the decision to offer inducements to government witnesses:

> [T]he rule being that the court will not advise the Attorney-General how he shall conduct a criminal prosecution. Consequently, it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State. Of all others, the prosecutor is the best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge.[51]

The Supreme Court's recognition that prosecutorial discretion in "faithfully executing" the laws of our country is a "special province" of the Executive Branch that generally should not be disturbed by the courts has continued to the present.[52]

Since deciding *The Whiskey Cases*, the Supreme Court has not

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> offence, and some of the decided cases and standard text-writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolete practice called approvement . . . .

Id. at 599.

51. *The Whiskey Cases*, 99 U.S. at 603. The Court also offered the following advice to prosecutors on appropriate procedures to be employed in determining whether to accept an offer by a defendant to cooperate:

> Applications of this kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purposed mentioned are for mutual explanation, and do not absolutely commit either party . . . . Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Id. at 603–04. With the exception of the matter of pardon, these recommended procedures closely resemble the procedures generally used by modern-day federal prosecutors in debriefing potential cooperating defendants.

52. United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that "broad discretion" is granted to federal prosecutors to enforce criminal laws because of presidential delegation of constitutional responsibility to "take care that the Laws be faithfully executed" (quoting U.S. CONST. art. II)).

wavered in its acceptance of witness inducement agreements,[53] despite its recognition of the inherent risk of perjury created by such agreements.[54] In *Hoffa v. United States*,[55] the Court had occasion to revisit the historical acceptance of witness inducement agreements by the courts, and their necessity in prosecuting certain crimes: "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly."[56] Having addressed the historical acceptance of witness inducement agreements in prosecuting certain crimes, the Court then turned to the issue of the reliability of the verdict:

> [The witness in this case], perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissable. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.[57]

These cases make clear the Supreme Court's view that witness inducement agreements are a proper exercise of prosecutorial discretion by the Executive Branch under its constitutional power to "faithfully execute" the criminal laws of our country.[58] These deci-

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53. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 227–28 (1941) (holding the government's offer of leniency in return for an accomplice's confession and testimony against defendant does not amount to a due process violation); Benson v. United States, 146 U.S. 325, 334 (1892) (finding that an "accomplice is a competent witness, for the prosecution, although his expectation of pardon depends upon the defendant's conviction").

54. *See* Washington v. Texas, 388 U.S. 14, 22–23 (1967) (holding state statute disqualifying an alleged accomplice from testifying on behalf of a defendant violative of the Sixth Amendment right to compulsory process to obtain witnesses). "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Id*.

55. 385 U.S. 293 (1966).

56. *Id*. at 311 (quoting United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

57. *Id*.

58. *See infra* Part III.

sions are grounded on historical recognition and acceptance of such agreements by the courts, illustrating the necessity for such agreements in investigating and prosecuting certain types of crimes.[59] Although the Court has recognized the incentive for perjury created by witness inducement agreements, the Court clearly views existing procedural safeguards concerning these agreements sufficient to ensure the constitutional rights of defendants.[60]

II. MODERN PRACTICE

During the last half of this century, prosecutors have become more resourceful in drafting witness inducement agreements to ensure that witnesses cooperate fully and provide truthful testimony concerning criminal activity about which they have knowledge. One method prosecutors have come to rely upon with increasing frequency is to make the government's obligations under the witness inducement agreement contingent upon the degree of cooperation provided by the witness.[61] Termed "contingent agreements," these witness inducement agreements make the payment of a reward or the government's offer of leniency conditional upon the prosecutor's evaluation of the value of the witness's cooperation to the government's investigation and prosecution of other individuals.[62]

Despite the long-standing acceptance of witness inducement agreements by the Supreme Court, the last half of this century has witnessed continuous challenges to the propriety of such agreements on both constitutional and statutory grounds.[63]

A. Constitutional Challenges

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59. *See generally Hoffa*, 385 U.S. at 311 (upholding witness inducement agreements based in part upon their historical significance).

60. *See id.*

61. *See* Beeman, *supra* note 11, at 800; Eisenstadt, *supra* note 1, at 750.

62. *See generally* U.S. ATTORNEY'S MANUAL, *supra* note 9, ch. 9, § 27.00.

63. *See, e.g.*, United States v. Dailey, 589 F. Supp. 561 (D. Mass. 1984), *vacated*, 759 F.2d 192 (1st Cir. 1985); United States v. Waterman, 732 F.2d 1527 (8th Cir.), *aff'd en banc*, 732 F.2d 1527 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); United States v. Baresh, 595 F. Supp. 1132 (S.D. Tex. 1984); State v. Glosson, 441 So. 2d 1178 (Fla. 1st Dist. Ct. App. 1983).

1. Williamson v. United States

Although surely unknown at the time, the Fifth Circuit's decision in *Williamson*[64] became a harbinger of the life-cycle of the various challenges to witness inducement agreements to come in the future — initial acceptance by a particular court only to be followed by rejection and a renewed recognition of the propriety of witness inducement agreements. In *Williamson,* the Court announced a per se rule prohibiting the testimony of witnesses who were offered a monetary fee contingent upon gathering evidence of criminal wrongdoing about specific individuals whom the government had no reason to suspect were committing crimes.[65] Although *Williamson* continued to be controlling authority in the Fifth Circuit for over twenty-five years, the Fifth Circuit carefully limited its holding to "only when the specific defendant was picked out for the informer's efforts by a government agent,"[66] and did not reverse any convictions based on the rule announced in *Williamson*.[67] During that time period, the *Williamson* rule was expressly rejected or distinguished by four other circuit courts.[68] Thus, *Williamson* became an anomaly — often cited as authority against contingent inducement agreements but of no real precedential value beyond its limited facts.

Williamson was ultimately overruled by the Fifth Circuit in *United States v. Cervantes-Pacheco.*[69] In reaching its decision to re

64. 311 F.2d 441 (1962).

65. *See id*. In *Williamson*, the government offered to pay an informant specified amounts of money if he was successful in purchasing illicit whiskey from certain named persons, including Williamson. *See id*. at 442. At trial, the government offered the informant's deposition against Williamson but failed to offered any evidence concerning why they had targeted Williamson or what instructions, if any, they had provided to the informant to guide his contact with Williamson. *See id*. at 444. On appeal, the Fifth Circuit found that the evidence presented at trial failed to establish entrapment except for the employment of the informant on a contingent fee basis. *See id*. Noting the absence of any evidence at trial showing that the agents had reason to suspect Williamson of criminal activity, the court found that "[w]ithout some such justification or explanation, we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed." *Id*.

66. United States v. Oroni, 535 F.2d 938, 942 (5th Cir. 1976) (surveying cases applying *Williamson*).

67. *See Cervantes-Pacheco*, 826 F.2d at 313.

68. *See* United States v. Dailey, 759 F.2d 192, 192, 200 (1st Cir. 1985); United States v. Hodge, 594 F.2d 1163, 1165–67 (7th Cir. 1979); United States v. Jones, 575 F.2d 81, 86 (6th Cir. 1978); United States v. Reynoso-Ulloa, 548 F.2d 1329, 1338 nn.18–19 (9th Cir. 1977).

69. *See Cervantes-Pacheco*, 826 F.2d at 314. In arriving at its decision to reverse

verse *Williamson*, the court made the following observations about witness inducement agreements:

> No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility.[70]

Having recognized the importance of witness inducement agreements to law enforcement and the adequacy of procedural safeguards to ensure the reliability of criminal verdicts, the court overruled *Williamson*'s per se exclusionary rule.[71]

Aside from *Williamson*, other courts have generally rejected constitutional challenges to contingent fee agreements.[72] For example, the Eight Circuit found that an implied agreement to pay a witness a bonus if the defendant was convicted did not violate the due process clause.[73] Similarly, the Eleventh Circuit rejected claims that grants of immunity and monetary rewards that could possibly total millions dollars did not violate the due process clause.[74] In reaching its holding, the court acknowledged the long standing practice of permitting rewards to witnesses and determined that the jury was in the best position to determine credibility of the witnesses.[75]

2. United States v. Waterman

Williamson, the court noted its own inconsistent application of the *Williamson* rule, the rejection of *Williamson* by its sister circuits, and its apparent conflict with *Hoffa v. United States,* 385 U.S. 293 (1966). *See Cervantes-Pacheco*, 826 F.2d at 314.

70. *Cervantes-Pacheco*, 826 F.2d at 315 (citing United States v. Dailey, 759 F.2d 192, 198–200 (1st Cir. 1985)).

71. *See id*.

72. In large part, courts have upheld the validity of witness inducement agreements because they play a vital role in the efficiency of the American judicial system.

73. *See* United States v. Risken, 788 F.2d 1361, 1373–74 (8th Cir. 1986).

74. *See* United States v. Wilson, 904 F.2d 656, 660 (11th Cir. 1990).

75. *See id*.

The 1980s witnessed an onslaught of constitutional challenges to contingent plea agreements.[76] *United States v. Waterman*[77] and *United States v. Dailey*[78] are representative of the constitutional challenges faced by contingent plea agreements. In *Waterman*, a panel of the Eighth Circuit found that the government's offer of favorable treatment contingent upon the accomplice's testimony leading to further indictments violated the due process clause.[79] In *Waterman*, the accomplice had previously pleaded guilty and had been sentenced to a twelve-year term of imprisonment.[80] Under the agreement, the government agreed to recommend a two-year sentence reduction if the accomplice's testimony led to further indictments.[81] The government also agreed to advise the court of the extent of the accomplice's cooperation if his testimony did not lead to further indictments.[82] Distinguishing the previous holding in *United States v. Librach*[83] that government offers of leniency in exchange for truthful testimony are not per se illegal,[84] the *Waterman* panel found that the government's offer of favorable treatment contingent upon the success of prosecution amounted to an unacceptable "invitation to perjury" which was not consistent with due process.[85] The panel reversed the district court's denial of Waterman's section 2255 petition.[86] On rehearing en banc, the district court's decision denying Waterman's petition was affirmed by an evenly divided court.[87]

3. United States v. Dailey

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76. *See, e.g.*, *Cervantes-Pacheco*, 826 F.2d 310; *Dailey*, 759 F.2d 192; *Waterman*, 732 F.2d 1527.

77. 732 F.2d 1527 (8th Cir.), *aff'd en banc*, 732 F.2d 1527 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

78. 759 F.2d 192 (1st Cir. 1985).

79. *See Waterman*, 732 F.2d at 1532–33.

80. *See id.* at 1528.

81. *See id.*

82. *See id.* at 1529.

83. 536 F.2d 1228 (8th Cir. 1976).

84. *See Waterman*, 732 F.2d at 1531.

85. *See id.*

86. *See id.* at 1533.

87. *See id.*

Relying on the *Waterman* panel's decision as persuasive authority, a district court in the First Circuit suppressed the testimony of three government witnesses who had executed contingent plea agreements with the government in *United States v. Dailey*.[88] In the plea agreements, the government made its offer to recommend leniency contingent upon the "`value' to the government" of the accomplices' cooperation and testimony.[89] On appeal by the government, the First Circuit vacated the district court's order.[90] Calling the since-vacated *Waterman* panel decision "unprecedented in modern times,"[91] the court observed and reviewed the long-standing history of permitting accomplices to testify pursuant to leniency agreements: "Recognizing that such individuals [are] frequently the most knowledgeable witnesses available, the courts have chosen to allow them to testify and to rely upon cross-examination to ferret out any false testimony they may give."[92] Acknowledging that contingent plea agreements produce some inducement to lie or to embellish the facts, the court found that the risk of perjury created by the agreements was not so great as to result in a due process violation if the accomplices testified at trial with appropriate procedural safeguards.[93]

B. Statutory and Ethical Challenges to Witness Inducement Agreements

1. United States v. Singleton

More recently, accomplice plea agreements have been challenged as being violative of the anti-gratuity provision of the federal bribery statutes[94] and Section 3.4(b) of the ABA's *Model Rules of*

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88. 589 F. Supp. 561, 564–65 (D. Mass. 1984) [hereinafter *Dailey I*], *vacated*, 759 F.2d 192 (1st Cir. 1985) [hereinafter *Dailey II*].

89. *Dailey I*, 589 F. Supp. at 563–64.

90. *See Dailey II*, 759 F.2d at 201.

91. *Id*. at 196.

92. *Id*.

93. *See id*.

94. *See* 18 U.S.C. § 201(c)(2) (1994).

> 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 to take testimony . . . shall be fined under this title or impris-

Professional Conduct.[95] Although the issue had been raised in past cases, none gained as much national notoriety as *United States v. Singleton*.[96] Defendant Sonya Singleton raised the issue in a motion to suppress accomplice testimony in her federal drug and money laundering conspiracy trial.[97] Prior to trial, Singleton moved to suppress the testimony of coconspirator Napoleon Douglas, arguing that the government had impermissibly offered him leniency in return for his testimony,[98] in violation of 18 U.S.C. § 201(c)(2) and Rule 3.4(b) of *Kansas Model Rules of Professional Conduct*.[99] The district court denied Singleton's motion finding that § 201(c)(2) did not apply to government prosecutors.[100] Douglas testified at Singleton's trial and Singleton was convicted.[101]

a. Tenth Circuit Panel Decision

On appeal, a three-judge panel of the Tenth Circuit unanimously held that the government's plea agreement with Douglas violated the plain language of § 201(c)(2) and, consequently, amounted to an unlawful inducement to a witness prohibited by Rule 3.4(b) of *Kansas Model Rules of Professional Conduct*.[102] The

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oned for not more than two years, or both.

Id.

95. Section 3.4(b) of the *Model Rules of Professional Conduct* provides that "[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

96. 144 F.3d 1343 (10th Cir.) [hereinafter *Singleton I*], *vacated*, 144 F.3d 1361 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999) [hereinafter *Singleton II*], *cert. denied*, No. 98-8758, 1999 WL 185874 (U.S. June 21, 1999). Numerous articles have been written about the two *Singleton* decisions. *See, e.g.*, David A. Sklansky, *Starr*, Singleton, *and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509 (1999); Justin M. Lungstrum, Note, United States v. Singleton: *Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749 (1999).

97. *See Singleton I*, 144 F.3d at 1344.

98. Douglas had executed a plea agreement with the government in which the government made three specific promises to Douglas: (1) "not to prosecute Mr. Douglas for any other violations . . . `stemming' from his activities currently under investigation, except perjury or related offenses"; (2) "`to advise the sentencing court . . . of the nature and extent of [Douglas's] cooperation'"; and (3) "`to advise the Mississippi parole board of the nature and extent of the cooperation provided by Mr. Douglas.'" *Id*. In return for these concessions, Douglas agreed to testify truthfully in federal and state court. *See id*.

99. "A lawyer shall not . . . offer an inducement to a witness that is prohibited by law . . . ." KAN. MODEL R. PROF'L CONDUCT Rule 3.4(b) (1999).

100. *See Singleton I*, 144 F.3d at 1344.

101. *See id*. at 1343–44.

102. *See id*. at 1359.

panel reversed Singleton's conviction, finding that suppression of Douglas's testimony was the appropriate remedy for the violation in order to deter the ingrained practice of the government "buying testimony" through promises of leniency to its witnesses and to preserve the integrity of the judicial process.[103]

In addressing the elements of § 201(c)(2), the *Singleton* panel found that federal prosecutors acting on behalf of the government fall within the plain meaning of the word "whoever" as used in § 201(c)(2).[104] Although it acknowledged that the Supreme Court in *Nardone v. United States*[105] had recognized a canon of statutory construction that statutes generally do not apply to the government or affect governmental rights unless the text of the statute expressly includes the government,[106] the *Singleton* panel determined that § 201(c)(2) did not fall within the classes of statues covered by the *Nardone* canon of construction: 1) those statutes that would deprive the sovereign of a recognized or established prerogative or title, and 2) those statutes that would create an "absurdity" if applied to the government.[107] The *Singleton* panel reasoned that § 201(c)(2) was exempted from the first class of statutes involving an established prerogative or title because § 201(c)(2) operates upon the agents of the government instead of the sovereign itself, and because the purpose of § 201(c)(2) was to prevent fraud, injury, or wrong.[108] Noting the established principle that government officials be subjected to the same rules of conduct as ordinary citizens, the panel found application of § 201(c)(2) to prosecutors to be "particularly appropriate."[109]

Having found that the government is included in the term "whoever," the panel then addressed the question of whether the government's offers of leniency to Douglas amounted to "anything of value" as prohibited § 201(c)(2).[110] Finding that the phrase should be interpreted broadly and that it included both tangible and intangible benefits, the panel concluded that the government's promises to

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103. *See id.*
104. *See id.* at 1346–49.
105. 302 U.S. 379 (1937).
106. *See id.* at 383.
107. *See id.* at 383–84.
108. *See Singleton I*, 144 F.3d at 1346.
109. *Id.* at 1347.
110. *See id.* at 1348.

Douglas were of subjective value to him.[111] The panel found that the government's agreement with Douglas violated § 201(c)(2) and, consequently, was an inducement prohibited by law in violation of Rule 3.4(b) of the *Kansas Model Rules of Professional Conduct*.[112] Noting the wide-spread practice of the government offering leniency in exchange for testimony, the panel found suppression to be required to prevent future violations.[113]

Reaction to the panel's decision was predictably swift, divided, and vociferous.[114] The decision was vacated almost immediately after its publication, and a rehearing en banc was granted.[115] Commentators either lauded the decision as vindicating their belief that prosecutors have been wrongfully "purchasing" testimony from their witnesses with leniency,[116] or decried it as "wrongheaded" and a roadblock to the successful prosecution of significant crimes.[117] One jurist even ridiculed the prospects of the decision being upheld on review as being as probable "as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns."[118]

b. En Banc Decision

On rehearing, Singleton argued that the plain reading of § 201(c)(2) encompassed the government in criminal prosecutions.[119] The government argued that Singleton's interpretation of the statute exceeded that intended by Congress and was clearly wrong.[120] The Tenth Circuit agreed with the government's argument that its plea agreement with Douglas did not violate § 201(c)(2).[121]

Reasoning that federal prosecutors acting within the scope of their office are the alter ego of the United States exercising its sovereign power of prosecution, the majority found Singleton's argu-

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111. *See id*. at 1349–50.
112. *See id*. at 1359.
113. *See id*. at 1360–61.
114. *See infra* notes 116–19.
115. *See Singleton I*, 144 F.3d at 1361.
116. *See, e.g.*, Paul C. Roberts, *Fairer Trials . . . or Roadblocks?*, WASH. TIMES, July 14, 1998, at A18, *available in* 1998 WL 3453085.
117. *See* Cooper, *supra* note 13, at 34; *see, e.g.*, *Judicial Trouble*, WASH. POST, July 8, 1998, at A16, *available in* 1998 WL 11590599.
118. United States v. Eisenhardt, 10 F. Supp. 2d 521, 521–22 (D. Md. 1998).
119. *See Singleton II*, 165 F.3d at 1299.
120. *See id*.
121. *See id*. at 1302.

ment that Congress intended to subject government prosecutors to the provisions of § 201(c)(2) to be "patently absurd."[122] Noting the failure of Congress to define the term "whoever" in § 201(c)(2), the majority applied the common meaning of "whoever" and found that it did not include the government.[123] Unlike the *Singleton* panel decision, the en banc majority decision found that the long-standing practice by the courts of sanctioning the testimony of accomplices, who have been promised leniency, has created a "vested sovereign prerogative," that Congress would not have intended to overturn absent "clear, unmistakable, and unarguable language" of its intent to do so.[124] The panel affirmed the district court's denial of the motion to suppress Douglas's testimony.[125]

C. Witness Inducement Agreements After *Singleton*

At the present time, *Singleton* claims have been rejected by every circuit court to address the issue,[126] and have found support in only a limited number of district court decisions which address the issue.[127] It remains to be seen whether the Supreme Court will review a *Singleton* claim, or if, on the other hand, *Singleton* claims will quickly fade as the challenge "du jour" against witness inducement agreements.[128] Even if a Singleton claim were to prevail before the Supreme Court, it is highly unlikely that Congress would not immediately remedy the situation by amending § 201(c)(2) to exclude federal prosecutors acting within the scope of their employment from the ambit of the statute in light of Congress' favored

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122. *Id*. at 1300.

123. *See id*.

124. *Id*. at 1301.

125. *See Singleton II*, 165 F.3d at 1302.

126. *See* United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999); United States v. Briones, 165 F.3d 918, 918 (9th Cir. 1998); United States v. Haese, 162 F.3d 359, 366–68 (5th Cir. 1998); United States v. Ware, 161 F.3d 414, 418–25 (6th Cir. 1998).

127. *See Lowery*, 116 F.3d at 1123 (surveying the almost universal rejection of *Singleton* claims by the district courts).

128. *See* Mark Hansen, *Shot Down in Mid-Theory*, A.B.A. J., May 1999, at 46, 48 (noting that Singleton's petition for writ of certiorari is presently pending before the Supreme Court and quoting Professor Gerard Lynch's comment that *Singleton* claims are the defense argument "du jour" and his observation that most of the time unique legal theories claims are short-lived before being reversed, "[but] every once in a great while, the precedent will stand, resulting in a great advance in the law").

treatment of defendants who cooperate in the investigation and prosecution of their former accomplices.[129] More uncertain, however, is the impact that the Citizens Protection Act of 1998[130] will have on federal prosecutors practicing in states that have restrictive rules of professional conduct concerning attorneys offering inducements to witnesses.

The Citizens Protection Act provides that federal prosecutors and certain other government attorneys are subject to the ethical rules of the states in which they practice.[131] Because the ethical rule at issue in *Singleton* applied to inducements to witnesses which were "prohibited by law," the court's determination in *Singleton* that the plea agreement did not violate federal law resolved the ethical question without further inquiry.[132] However, not all states include a "prohibited by law" phrase in their ethical rules prohibiting attorneys from offering inducements.[133] Consequently, the Citizens Protection Act raises serious questions for federal prosecutors who perform their duties in states with restrictive ethical rules concerning inducements to witnesses.[134] Thus, the propriety of permitting prosecutors to offer inducements to their witnesses will continue to be

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129. *See supra* Part I.

130. 28 U.S.C.A. § 530B (West Supp. 1999).

131. The Citizens Protection Act of 1998 became effective on April 19, 1999, and the section that deals with subjecting federal prosecutors to state ethics rules is codified at 28 U.S.C. § 530B. The text of the Act is as follows: "An attorney for the government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." *Id*.

132. *See* KAN. MODEL R. PROF'L CONDUCT, Rule 3.4(b). By definition, if the plea agreement did not violate the law, then the prosecutor had not violated the Kansas statute.

133. For example, Florida's ethical rules prohibit attorneys from offering any inducement to witnesses beyond reimbursement of lost wages and reasonable expenses incurred by the witness in connection with his appearance, and reasonable fees for professional services of an expert witness, and do not contain the phrase "prohibited by law." R. REGULATING FLA. BAR Rule 4-3.4(b) (1999); *see also* CAL. R. PROF'L CONDUCT Rule 5-310(b) (1996). *But see* MODEL R. PROF'L CONDUCT Rule 3.4(b) (1999).

134. In dicta, the Eleventh Circuit voiced serious doubts without further explanation about whether Florida's Rule 4-3.4(b) prohibits federal prosecutors from entering into plea agreements offering sentencing concessions in return for the defendant providing assistance to the government's investigation of others. *See Lowery*, 166 F.3d at 1124. Obviously, any attempt to apply state ethical rules that would restrict federal prosecutors from entering into witness inducement agreements authorized by federal law would face constitutional challenges. Further discussion of those issues, however, is beyond the scope of this Article.

the subject of debate.

III. THE CURRENT DEBATE

A. Special Province of the Executive Branch

An examination of the propriety of witness inducement agreements inevitably leads to the question of why prosecutors are treated so differently than defense attorneys in the area of these agreements. In attempting to answer that question, most commentators have mistakenly concluded that the reason for the disparate treatment lies in the differences between the respective roles and ethical obligations of prosecutors and defense attorneys in our criminal justice system.[135] Having failed to properly identify the source of the prosecutor's authority to offer witness inducements, critics then argue, and correctly so, that the differences in the respective roles of the advocates are not a sufficient reason to permit prosecutors to offer witness inducements while denying the practice to defense attorneys.[136] Their conclusion is flawed in that they have overlooked the prosecutor's authority as a member of the Executive Branch to offer witness inducements through the exercise of prosecutorial discretion.[137]

An examination of basic constitutional principles reveals that the higher calling of the prosecutor to serve justice[138] is not an independent source of prosecutorial authority; it is a duty we impose on our prosecutors because of the vast constitutional powers they wield in seeking to convict the guilty while insuring that justice is served.[139] Defense attorneys, on the other hand, serve only the in-

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135. *See* Johnston, *supra* note 13, at 21; *cf*. Perroni & McNutt, *supra* note 11, at 220–24.

136. *See* Johnston, *supra* note 13, at 21; Perroni & McNutt, *supra* note 11, at 222.

137. *See infra* notes 144–69 and accompanying text.

138. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Id. at 88.

139. *See* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 728–36 (1998) (arguing that the Appearance of Impropriety Standard should be included in the *Model Rules of*

terests of their clients within the boundaries of the law.[140] They do not exercise governmental powers; they seek to preserve the rights of their clients.[141] The differences in the ethical obligations of the advocates are only a reflection of the unilateral distribution of governmental powers to the prosecutor and the corresponding lack of governmental powers afforded to defendants.[142] Accordingly, one must examine the source of prosecutorial authority to truly understand why prosecutors are permitted to offer inducements to their witnesses.

B. Executive Branch Power

The doctrine of separation of powers provides the constitutional framework for our tripartite system of government, granting each branch of our government "[the] primary responsibility for exercising one of the three [major] types of governmental power."[143] Although the Constitution neither defines nor makes explicit reference to the doctrine of separation of powers, the separation of powers serves as the one of the constitutional cornerstones of our government.[144] The separation of governmental powers among the three branches of our government has been characterized as being essential to the preservation of liberty.[145] Stated in its simplest form, the Constitution separates power among the three branches by granting legislative power to the Congress,[146] executive power to the Presi-

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Professional Conduct to reflect the prosecutor's unique role in the criminal justice system as a "minister of justice").

140. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY, Canon 7 (1981). "A lawyer shall represent his client zealously within the bounds of law." *Id*.; *see also* Flowers, *supra* note 139, at 728–30 nn.215–23 and accompanying text.

141. *See* United States v. Turkish, 623 F.2d 769, 774–75 (2d Cir. 1980) (stating that the criminal justice system involves both a procedural imbalance in favor of defendants and a unilateral extension of law enforcement powers to the government).

142. The American judicial system functions effectively with this imbalance of power on the part of prosecutors and defense attorneys. This unequal distribution of power is balanced by requiring prosecutors to prove their cases beyond a reasonable doubt and granting the presumption of innocence to defendants.

143. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 415 (1996).

144. *See* Mathew J. Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 961–62 (1995).

145. *See* Morrison v. Olson, 487 U.S. 654, 693–94 (1988).

146. *See* U.S. CONST. art. I, § 1 (providing that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Sen-

dent,[147] and judicial power to the Supreme Court and inferior federal courts,[148] requiring each branch to adhere to constitutional principles in exercising its powers.[149]

Article II of the Constitution establishes the President as the chief constitutional officer of the Executive Branch.[150] Although Article II vests "the executive Power" in the President, it does not expressly define the executive power.[151] Thomas Jefferson viewed executive power as being a "distinctive epithet of that branch of government which is concerned or charged with carrying out the laws, decrees, and judicial sentences."[152] The Supreme Court has viewed the "executive power" clause as granting the President the power to execute the laws of our country.[153]

The Constitution requires the President to "take Care that the Laws be faithfully executed."[154] The "faithfully execute" clause has been accurately described as imposing a duty of "watchfulness" to the President.[155] It entrusts the President with supervisory and policy responsibilities of the utmost discretion and sensitivity in the enforcement of federal law.[156] The Supreme Court has steadfastly recognized that the enforcement of our Nation's criminal laws falls within a "special province" of the Executive Branch; the President's constitutional duty to "faithfully execute" the laws.[157] Those duties have, in turn, been delegated to the Attorney General and the feder-

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ate and House of Representatives").

147. *See id*. art. II, § 2 (providing, in part, that "[t]he executive Power shall be vested in a President of the United States").

148. *See id*. art. III, § 1 (providing, in part, that "[t]he judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

149. *See id*. art. VI, § 3.

150. *See id*. art. II, § 1; *see, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982) (stating explicitly the role of the President).

151. U.S. CONST. art. II.

152. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 580 (1994).

153. *See* Myers v. United States, 272 U.S. 52, 117 (1926).

154. U.S. CONST. art. II, § 3.

155. *See* Calabresi & Prakash, *supra* note 152, at 583; *see also* THE FEDERALIST NO. 70, at 444 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (stating it is "[f]ar more safe there should be a single object for the jealousy and watchfulness of the people").

156. *See Nixon*, 457 U.S. at 750.

157. *See* Heckler v. Chang, 470 U.S. 812, 832 (1985); *see also* Buckley v. Valeo, 424 U.S. 1, 138 (1976) (describing the initiation of lawsuits on behalf of the United States as part of the President's "take care" function).

al prosecutors acting under her direction.[158] Because they are exercising the constitutional duties granted to the Executive Branch, prosecutors are afforded "broad discretion" in the enforcement of criminal laws.[159] This "latitude" in performing their duties,[160] extends, in part, to their decisions to select particular offenders to be prosecuted,[161] select the "charges to be brought in a particular case,"[162] grant statutory immunity to witnesses,[163] and make sentencing concessions and recommendations.[164]

The principle of prosecutorial discretion is grounded upon a recognition by the courts that the Executive Branch of government is best suited to make policy decisions to further the interest of society through effective enforcement of our criminal laws.[165] Having acknowledged the prosecutor's superior competence to make such decisions, the courts are naturally reluctant to intrude into the prosecutor's decisionmaking process in enforcing our criminal laws.[166]

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158. *See* 28 U.S.C. § 516 (1994) (providing, in part, "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General"); 28 U.S.C. § 547 (1994) (providing, in part, that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall — (1) prosecute for all offenses against the United States").

159. *See, e.g., Armstrong*, 517 U.S. at 464 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)).

160. *See id.*

161. *See Wayte*, 470 U.S. at 607 (citing *Goodwin*, 457 U.S. at 380 n.11 (1982) and Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)).

162. Ball v. United States, 470 U.S. 856, 859 (1985) (citing *Goodwin*, 457 U.S. at 382 (1982)).

163. *See, e.g.*, United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982) (stating that absent discriminatory use of immunity, decision on whether to grant statutory immunity to defense witness is within discretion of prosecutor); United States v. Thevis, 665 F.2d 616, 640 (5th Cir. 1982) ("[T]he immunity decision requires a balancing of public interests which should be left to the executive branch.").

164. *See, e.g.*, Wade v. United States, 504 U.S. 181, 184–86 (1992) (discussing that federal prosecutors have discretion to make sentencing recommendations or to file motions for downward departure).

165. *See Armstrong,* 517 U.S. at 465 ("Judicial deference to the decisions of these executive officers [in deciding whether to prosecute] rests in part on an assessment of the relative competence of prosecutors and courts.").

166. *See Wayte*, 470 U.S. at 607.

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the

This is not to say, however, that the prosecutor's discretion is "unfettered"; indeed it is not.[167] The exercise of prosecutorial discretion, like the exercise of any governmental power, is subject to constitutional restraints.[168] But absent "clear evidence to the contrary," the prosecutor's exercise of his official duties are afforded a presumption of constitutional regularity.[169]

C. Witness Inducement Agreements — An Exercise of Prosecutorial Discretion

As first noted in the decision in *The Whiskey Cases*, the Supreme Court views the authority to offer witness inducement agreements as being within the "province" of the prosecutor and ill-suited to judicial review.[170] Despite the unrelenting assault against witness inducement agreements that has taken place over the two centuries since its decision in *The Whiskey Cases*, the Supreme Court has not wavered in its recognition that witness inducement agreements are a proper exercise of the prosecutor's authority.[171] When viewed in light of the Court's most recent decision in *United States v. Armstrong*,[172] affirming the prosecutor's power to act within the "special province" of the Executive Branch, there should be no doubt that witness inducement agreements are a matter of prosecutorial discretion.

> Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceedings, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Id.

167. *See id*. at 608.

168. *See id*. ("[T]he decision to prosecute may not be `deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *see also Wade*, 504 U.S. 181 (stating that a prosecutor may not refuse to file a substantial assistance motion based upon unconstitutional motives); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that a prosecutor's broad discretion to exercise peremptory challenges may not be used to accomplish unconstitutional ends).

169. *Armstrong*, 517 U.S. at 464 (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14–15 (1926)).

170. *Id*.

171. *See supra* Parts I & II.

172. *Armstrong*, 517 U.S. at 464.

The decisionmaking process used by the prosecutor in offering inducements to government witnesses is the same that she uses in other areas of prosecutorial discretion.[173] It involves policy decisions of the "utmost discretion and sensitivity"[174] in the prosecutor's efforts to further society's interest by convicting the guilty,[175] while seeking to insure that justice is served.[176] Witness inducement agreements are merely an extension of those decisions that are more readily associated as being a matter of prosecutorial discretion — the decision of whether to prosecute, the determination of the charges to be filed, and concessions and recommendations at sentencing.[177]

Although critics may disagree with the Executive Branch's decision to permit prosecutors to offer witness inducement agreements, the arguments they raise against these agreements do not undermine the prosecutor's inherent authority to offer such agreements. The lack of equality between prosecutors and defense attorneys in offering inducements to their witnesses does not diminish the prosecutor's authority to make such agreements; it is merely a reflection of governmental powers of prosecutors that do not extend to the defense attorney.[178]

Critics of witness inducement agreements have failed to offer empirical evidence in support of their claims that these agreements produce inherently unreliable evidence.[179] Although it is undisputed that witness inducement agreements create an incentive for perjury,[180] critics have failed to establish that testimony offered under

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173. *See, e.g.*, STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST., Prosecution Function, Standard 3-3.9(b) (1992) (listing seven factors that illustrate the considerations properly taken into account by prosecutors when exercising prosecutorial discretion in the charging-decision process).

174. *See generally Nixon*, 457 U.S. at 749–50 (discussing the power of the Executive Branch to enforce federal laws).

175. *See Goodwin*, 457 U.S. at 382 ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.").

176. *See supra* note 137 and accompanying text.

177. *See supra* notes 169–75 and accompanying text.

178. *See Turkish*, 623 F.2d at 774 ("A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding.").

179. *See, e.g.,* Beeman, *supra* note 11, at 825–26; Perroni & McNutt, *supra* note 11, at 230–31 (arguing that testimony presented pursuant to contingent plea agreements should be limited by the courts as inherently unreliable).

180. *See Washington*, 388 U.S. at 22–23.

such agreements is any less reliable than testimony offered by witnesses with other biases.[181] More importantly, they have failed to demonstrate that the established procedural safeguards — full disclosure of the terms of the agreement and the criminal background of the witness; cross-examination of the witness regarding his interests and biases; and proper instructions to the jury — are insufficient to insure the reliability of criminal verdicts.[182]

CONCLUSION

As we have seen, witness inducement agreements have been an integral part of the American criminal justice system since its inception. American jurisprudence has adopted and expanded the practice beyond its common-law ancestors, and has developed procedural safeguards to insure that criminal verdicts in trials involving witness inducement agreements are based upon reliable evidence. Witness inducement agreements will continue to be an important tool to prosecutors in the twenty-first century.

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181. *See supra* note 179.

182. *See generally Hoffa*, 385 U.S. at 311–12 (upholding conviction in case despite defense suggestions that witness had motive to lie and finding that safeguards were adequate to ensure fair trial).