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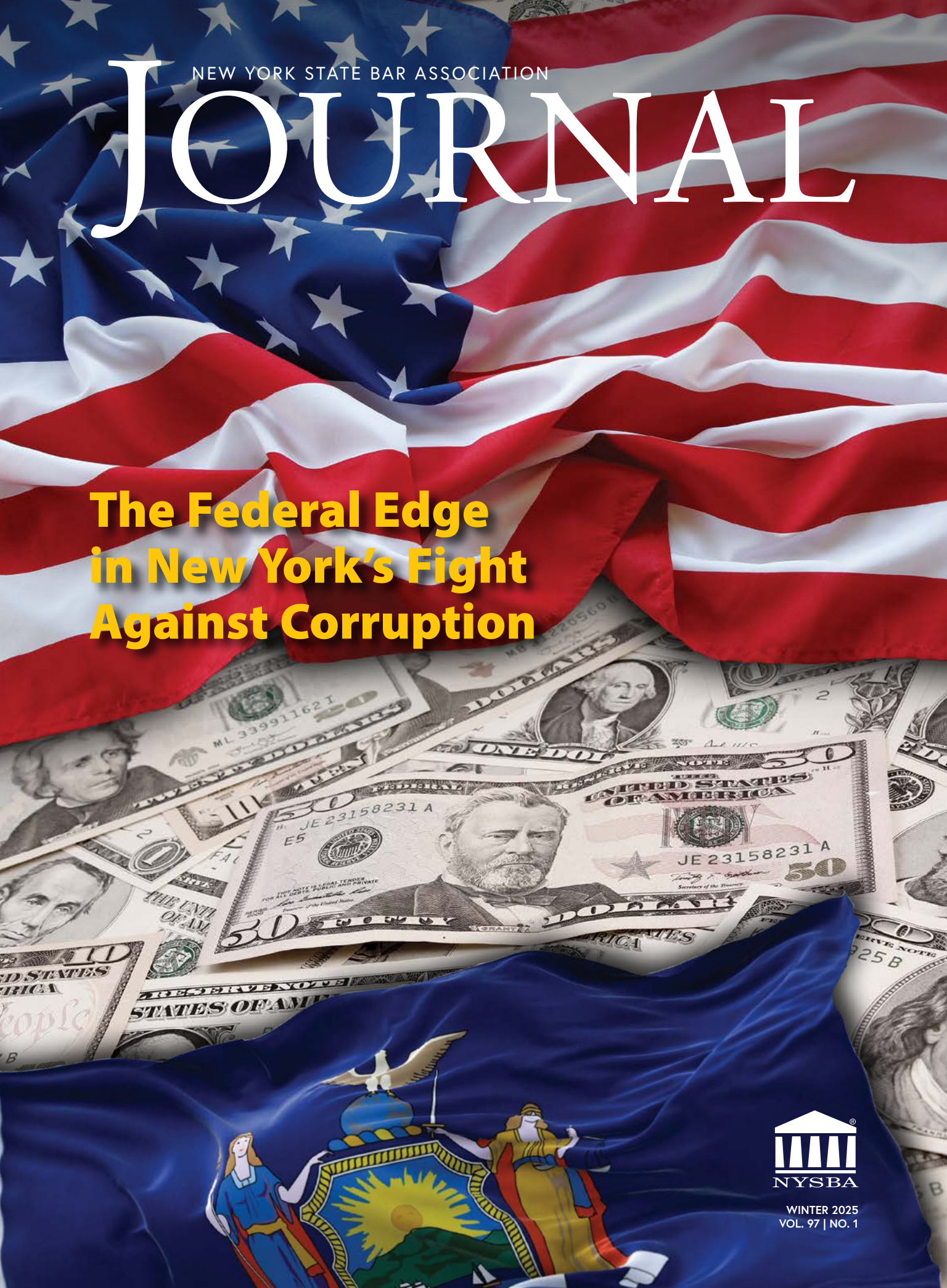
The Federal Edge in New York's Fight Against Corruption



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Tilted Scales: The Federal Edge in New York's Fight Against Corruption

By Daniel R. Alonso

The recent indictment of New York City Mayor Eric Adams on bribery and campaign finance charges is only the latest example of the prosecution of state and local New York officials in federal rather than state courts in New York for corruption crimes.

Aside from Adams, in the last 20 years federal authorities have prosecuted the lieutenant governor, the speaker of the state Assembly, four state Senate majority leaders and more than a dozen other members of the state Legislature. Although there have been state prosecutions as well – most notably that of Alan Hevesi, the former state comptroller – those have been rare exceptions. New York's prosecutors have a long history of combating corruption, going back to Boss Tweed, but it is rare today for political or other high-level corruption to be prosecuted at the state level. A mix of practical and legal issues unique to New York have created this circumstance.

Adams is charged with conspiracy and wire fraud involving alleged bribes in the form of luxury travel in exchange for preferential treatment to the Turkish government. He is also accused of essentially stealing money from New York taxpayers in the form of 8:1 campaign contribution matching payments, by falsely certifying that the contributions subject to matching satisfied all applicable rules, including the prohibition against foreign contributions. By knowingly submitting and causing to be submitted false certifications, the indictment alleges, Adams defrauded city taxpayers of more than $10 million.[1] The indictment also includes the separate federal crime of soliciting donations from foreign nationals.

The Challenge of Public Corruption Prosecutions

Public corruption prosecutions, particularly high-level prosecutions of political actors, are very hard in any jurisdiction. By its nature, bribery is a secretive exercise, and in many cases only two people – the briber payer and the recipient – really know what, if any, agreement existed. It is therefore difficult to discover what happened absent some combination of informants, recordings and solid paper trails. And as prosecutors in this area are aware, the high stakes involved often invariably lead to attempts to hinder the investigation. In the Adams case, for example, although the mayor himself has not been charged with obstruction crimes, the indictment recounts in detail the efforts of a staffer to delete – during a break from an FBI interview – the encrypted messaging application used to communicate with Turkish nationals and the mayor.[2] Adams himself is said to have supposedly forgotten the password to his own phone, thereby precluding access by investigators.[3]

Another complicating factor is that, in the case of elected officials, democracy itself is arguably implicated. A conviction, and often merely a prosecution, of such an official could lead to the removal from office of someone put there by the people through lawful democratic processes. Given these higher stakes, the prosecutor must be beyond reproach, and independence is key.

An important practical hurdle is that, although the relevant state authorities – namely district attorneys and the

attorney general – are honorable people, investigating a county official or state legislator from the same jurisdiction can raise potential conflicts of interest among public servants who might otherwise be either political allies or political foes. Independent authorities such as state special prosecutors or, to be sure, federal authorities, can alleviate these issues. Another practical hurdle, particularly in smaller counties with modest budgets, is that corruption cases are time-consuming and expensive, often taking years to build and drawing on a wide range of evidence to pursue claims against a single official. This may simply be beyond the practical abilities of a small district attorney's office to handle, whereas the FBI or other federal agencies can bring resources to bear that only the largest offices in New York State can hope to match.

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But the more significant hurdles are legal. Although New York's corruption laws were modernized under the 1965 Penal Law and some later legislative enactments, Congress has simply provided federal prosecutors with more powerful tools to combat public corruption than the state Legislature has provided state counterparts. The advantages that federal prosecutors enjoy in the battle against public corruption can be roughly divided into substantive and procedural categories.

Substantive Laws

Substantively, federal laws provide more options for prosecuting bribery of federal and state or local officials, and they are generally worded quite broadly. And, notwithstanding the tendency in recent years, discussed below, for the Supreme Court to interpret these federal statutes narrowly, the U.S. Department of Justice's arsenal remains strong. Following is a discussion, not meant to be exhaustive, of some key provisions.

Bribery

Although the federal bribery statute only applies to federal officials, it is useful to contrast its relative flexibility with the narrower New York equivalent. Under Section 201(b), guilt is established when, with respect to a federal official or someone selected for such position, any person "corruptly gives, offers or promises anything of value . . . or promises . . . to give anything of value to any other person or entity, with intent . . . to influence any official act," aid in a fraud or induce the official "to do or omit to do any act in violation of [their] lawful duty." A corresponding section similarly criminalizes the receipt of such thing of value. "Corruptly" has been regularly interpreted to mean "with a bad or evil purpose," and the Supreme Court has limited the "official act" requirement to "acts that a public official customarily performs" rather than things that are more properly *political* favors.[4] Additionally, and in contrast to New York law, the federal bribery law also makes a felony the receipt of gratuities, i.e., payments that are not agreed to in advance but are nevertheless conferred "for or because of any official act performed or to be performed."[5]

Under the New York bribery statute, the more flexible "intent to influence" language of Section 201 is nowhere to be found. Instead, the law requires that the actor "offers or agrees to confer" a benefit, "upon an agreement or understanding that such public servant's" actions or discretion "will thereby be influenced."[6] And this has, in turn, been narrowly interpreted by state courts. In *People v. Bac Tran*, the New York Court of Appeals reversed the conviction of a hotel fire safety director who slipped cash into the pocket of a fire inspector, holding, notwithstanding the "offers" language of the statute, that New York bribery requires a mutual agreement between the bribe-giver and public official or at least a unilateral belief by the bribe-giver that the bribe will in fact influence the public official – both absent in *Tran*. Notably, New York's other bribery laws (sports bribery, commercial bribery, labor bribery) merely require, like the federal law, that the bribe-giver "intend[s] to influence" the bribe-receiver.[7] The practical result has been that in New York, "those who bribe public officials are *less* likely to be prosecuted than those who bribe athletes, businesspeople or labor officials."[8]

Federal prosecutors have other tools to combat bribery. The Hobbs Act prohibits extortion under color of official right, which essentially means demanding a quid pro quo bribe while holding a public position.[9] The Travel Act prohibits traveling in interstate commerce or using the mails in connection with state bribery schemes. For broader schemes, recourse through the Racketeer Influence and Corrupt Organizations Act is available, and under that statute, state and local bribery, as well as mail and wire fraud (see below), are available predicate

acts. New York's "little RICO" – the Organized Crime Control Act of 1986 – is much narrower in breadth and carries much lower penalties.[10]

Finally, federal program bribery prohibits the agents and employees of organizations or governments that take in more than $10,000 per year, like the City of New York, from taking bribes in connection with transactions worth $5,000 or more. Specifically, the statute applies to one who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of" such an organization, as well as one who "corruptly solicits or demands, for the benefit of any person, or accepts or agrees to accept, anything of value . . . intending to be influenced or rewarded" in connection with such transactions.[11] This language, which the Supreme Court has called "expansive [and] unqualified," goes well beyond New York bribery as interpreted by the Court of Appeals in *Tran.*[12]

Mail and Wire Fraud

The broadly worded mail and wire fraud statutes historically enabled prosecutors to combat not only traditional frauds committed for the purpose of wrongfully obtaining money and property, but also, and less obviously, activities deemed corrupt – including bribery and self-dealing in local government – through the deprivation of what became known as the "intangible right of honest services." After a period of uncertainty that included Congress's enactment of 18 U.S.C. Section 1346 to make clear that "honest services" were protected, the Supreme Court ultimately held, in a case arising out of the Enron scandal, that courts could only apply these statutes to corruption when bribery and kickbacks were involved. The court rejected the government's argument that other forms of unethical conduct, such as undisclosed self-dealing, were covered.[13]

The use of the honest services theory is central to the federal government's stated priority of combating state and local corruption and is employed more frequently in this area than other applicable laws.[14] One enormous advantage it has over state bribery law is that a bribery scheme involving a course of dealing over many years, including discussions, payments, actions taken by the public official and any aborted efforts, may be pled and prosecuted in a single count of wire fraud or wire fraud conspiracy. Moreover, honest services and other federal bribery theories discussed above, including extortion under color of official right and federal program bribery, include the powerful "as opportunities arise" theory of bribery, which posits that a bribe does not have to relate to one specific official action – or indeed, even one specific payment – but rather may include an agreement to assist the bribe payer over time, when the opportunity arises.[15] A corollary is that the payments themselves may constitute a "stream of benefits" over time to the public official. This appears to be the theory in the Adams case, as the benefits to Mayor Adams are alleged to have begun when he was Brooklyn borough president and continued for several years, although he was not called upon to take official action until he was mayor and the opportunity arose to assist the Turkish government.[16]

In contrast, New York's mail fraud analogue, Scheme to Defraud,[17] does not include an honest services component,[18] and it appears that New York courts interpreting other state corruption laws have yet to grapple with the "as opportunity arises" or "stream of benefits" theories of bribery. Although not foreclosed by New York bribery law, the Court of Appeals' strict interpretation of different New York bribery statutes in *Tran* and other cases would seem to make the prospect of applying such theories an uphill battle.[19] At the very least, the uncertainty provides a disincentive to file such a case in state court.

Conspiracy

Federal prosecutors have increasingly charged conspiracy to commit wire fraud under 18 U.S.C. Section 1349, sometimes without charging any substantive counts. Section 1349, added by the Sarbanes-Oxley Act of 2002, does not require the government to plead or prove an overt act, unlike the general federal conspiracy statute, 18 U.S.C. Section 371, and it carries a maximum 20-year prison term rather than five years.

Under this conspiracy-focused approach, a public official alleged to be corrupt could be charged with agreeing with others to devise a scheme or artifice to defraud the populace of the public official's own honest services through the receipt of bribes or kickbacks. There would be no requirement that the scheme was devised, that anyone took a step in that direction or that a bribe was offered or paid.

In New York, it is of course a crime to conspire to bribe another or to receive bribes, but a conspiracy to commit simple bribery requires an overt act and constitutes a mere misdemeanor unless the object bribe was valued in excess of $10,000. And even then, conspiracies involving even outsized bribes would constitute the lowest-level New York felony, punishable by up to 1 1/3 to four years in prison.[20]

Recent Supreme Court Interpretations

Notably, in recent years the Supreme Court has interpreted these federal laws in a way that limited some of the Department of Justice's more expansive readings. This includes limiting honest services fraud to bribery and kickbacks;[21] limiting bribery cases to official acts;[22] holding that only sitting public servants (i.e., not mere political operatives) owe the public a duty of honest services sufficient to trigger the doctrine;[23] and, most

recently, rejecting the notion that the federal program bribery statute includes a gratuities component.[24] But these are ultimately just demarcations of contours, and at bottom they mean that the Supreme Court will not easily expand plain language and takes seriously basic precepts such as the quid pro quo and official act requirements.

Procedural Rules

Because proving corruption schemes, including knowledge and intent, is so difficult, prosecutors and investigators require sophisticated methods to uncover them. The availability of investigative techniques can make the difference between a successful case and the proverbial dry hole. This is particularly the case when, as noted, corrupt schemes are accompanied by bad faith attempts to defeat the investigation. In this area, too, New York falls short.

Grand Jury Practice

In many ways, no anti-corruption tool is more powerful than compelling investigative testimony before grand juries. But in New York, alone among the 50 states, all grand jury witnesses automatically receive transactional immunity for any matters relating to the subject of their testimony.[25] For that reason, and because of long experience with inadvertently immunizing bad actors, "state prosecutors regularly refrain from calling witnesses before the grand jury for fear of unwittingly immunizing someone who is either a serious criminal or is the subject of an investigation in another county."[26] While understandable, this hampers the ability to investigate corruption cases.

Similarly restrictive is the New York rule that bars most hearsay before the grand jury.[27] In federal cases, other than compelled investigative testimony, the grand jury typically only hears from a federal agent who summarizes the investigation and leaves the grand jurors to vote based on the prosecutor's instructions. In the routine cases for which the New York rule was intended, calling, say, the victim of a robbery serves an important purpose. But for complex corruption cases, the rule not only compels the time-consuming presentation of multiple witnesses, sometimes from far-flung locations, but it also makes superseding indictments – commonplace in federal court – rare and cumbersome events. While federal prosecutors simply read the transcripts from the previous grand jury to the new grand jury and present whatever other evidence is required, state prosecutors need to call all the witnesses a second time.

Obstruction of Justice

As noted above, false statements to investigators, destruction of evidence, tampering with witnesses and other obstructive conduct are commonplace in corruption investigations. Federal prosecutors regularly prosecute under one of a number of powerful statutes available to them, including the crime of making false statements to government agents or obstruction of an official proceeding (including grand jury investigations).[28] Although detectives in television police dramas regularly threaten

arrest for "obstruction of justice" if witnesses don't cooperate, the reality is that "obstruction" as such is not a crime in New York,[29] nor is lying to police officers. But because lying to federal agents is itself a felony, prosecutors have one more lever to use to seek cooperation. As Martha Stewart found out when her insider trading charges were dismissed but she went to prison for lying to the Securities & Exchange Commission, false statements prosecutions should not be taken lightly.[30] Such prosecutions in state court are limited to sworn testimony.

A Bright Spot?

Notably, although not equipped with as robust powers to prosecute, and ultimately obtain convictions for, crimes of public corruption, state prosecutors do have one very effective tool: the nearly unlimited powers of New York grand juries to investigate public corruption and other malfeasance, non-feasance or neglect in public office – even if it does not rise to the level of criminality – and issue a grand jury report exposing the misconduct.[31] Unfortunately, this power is rarely used for the reason stated above regarding New York's unique transactional immunity rule. This authority lays dormant waiting for an enterprising state prosecutor to use it under appropriate circumstances.

Conclusion

To be clear, although it is generally "easier" to prosecute public corruption in federal court rather than state court, it is certainly not easy. Federal prosecutors who ignore the Supreme Court's careful adherence to the quid pro quo standard and the official acts standard do so at their peril, and the Adams case has predictably been challenged on these grounds. Based only on the indictment and what prosecutors have said and written, it appears that the allegation is that Adams received a stream of benefits over several years starting while he was Brooklyn borough president, but he was not asked to do anything in return until he became mayor. The defense argues that makes it a mere gratuity, while the prosecution argues that it was always part of an agreement made years earlier. Time will tell whether this will pass muster in federal court. It would likely have trouble in a New York courtroom.

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Endnotes

1. *United States v. Adams*, 1:24-cr-00556-DEH, Ind., ECF No. 2 ¶ 32 (Sept. 24, 2024).
2. Ind. ¶ 48c.
3. Ind. ¶ 48d.
4. *McDonnell v. United States*, 579 U.S. 550 (2016).
5. New York recognizes the felony receiving reward for official misconduct, but it adds an element not present in the federal gratuities provision: rather than merely *exercising* his or her discretion, the public servant must *violate* it. N.Y. Penal Law §§ 200.25, 200.27. New York does have basic gratuity statutes, but they are merely misdemeanors, N.Y. Penal Law §§ 200.30, 200.35, whereas the federal law is a two-year felony. 18 U.S.C. § 201(c).
6. N.Y. Penal Law §§ 200.00, 200.03, 200.04.
7. N.Y. Penal Law §§ 180.00–180.45.
8. Report of the New York State White Collar Crime Task Force (2013), District Attorneys Association of the State of New York, at 73, www.daasny.com/wp-content/uploads/2014/08/WCTF-Report.pdf.
9. *United States v. Benjamin*, 95 F.4th 60 (2024).
10. N.Y. Penal Law §§ 460.00 *et seq.*
11. 18 U.S.C. § 666(a).
12. *Salinas v. United States,* 522 U.S. 52, 56 (1997).
13. *Skilling v. United States,* 561 U.S. 358 (2010).
14. *See, e.g., United States v. Skelos,* 988 F.3d 645 (2d Cir. 2021); U.S. Dep't of Justice, Strategic Plan, Goal 4.2, www.justice.gov/doj/doj-strategic-plan/doj-strategic-plan-glance (last accessed Nov. 8, 2024).
15. *United States v. Silver,* 948 F.3d 538, 568 (2d Cir. 2020); *see United States v. Ring,* 628 F. Supp. 2d 195 (D.C. 2009).
16. Ind. ¶¶ 38-39, 43.
17. N.Y. Penal Law §§ 190.60, 190.65.
18. *People v. Wolf*, 98 N.Y. 2d 105 (2002).
19. *See id.* (narrowly construing New York's commercial bribery statutes).
20. N.Y. Penal Law §§ 105.10, 105.13, 200.00, 200.03.
21. *Skilling v. United States,* 561 U.S. 358 (2010).
22. *McDonnell v. United States,* 579 U.S. 550 (2016).
23. *Percoco v. United States*, 598 U.S. 319 (2023).
24. *Snyder v. United States,* 603 U.S. 1 (2024).
25. N.Y.C.P.L. § 190.40(2).
26. White Collar Crime Task Force, *supra,* at 28.
27. N.Y.C.P.L. § 190.30.
28. *E.g.,* 18 U.S.C. § 1512, 1503.
29. The New York crime of obstructing governmental administration is aimed at different conduct, typically involving physical intimidation, and its penalties are low. N.Y. Penal Law §§ 195.05, 195.07.
30. *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).
31. N.Y. Const., Art. I § 6; N.Y. C.P.L. §§ 190.05, 190.85(1).