

# PROSECUTORIAL MISUSE OF THE FEDERAL CONSPIRACY STATUTE IN ELECTION LAW CASES

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## I. INTRODUCTION

Federal prosecutors do not like to bring misdemeanor cases in white collar criminal investigations. Experienced white collar defense lawyers will tell you this, and candid federal prosecutors will admit it. Misdemeanor charges are seen as “small potatoes” that do not impose sufficiently onerous penalties on offenders and do not justify the employment of limited prosecutorial resources. Perhaps more importantly from a prosecutor’s perspective, a misdemeanor charge may be insufficient to force a low-level offender to cooperate with prosecutors and “deliver the goods” on higher-ups against whom the government may not be able to make a case without such cooperation.<sup>1</sup> Although prosecutors tend to shun and ignore misdemeanor offenses, Congress has sprinkled them liberally through the *United States Code* (U.S.C.).<sup>2</sup> In fact, it

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1. See generally CRAIG C. DONSANTO & NANCY S. STEWART, U.S. DEPARTMENT OF JUSTICE MANUAL ON FEDERAL PROSECUTION OF ELECTION OFFENSES 108-109 (Laura A. Ingersoll ed., 6th ed. 1995) (encouraging federal prosecutors to charge aggravated campaign financing violations as felonies because doing so offers strategic advantages for the prosecution) (hereinafter “DOJ MANUAL”). The long-standing practice of federal prosecutors offering plea bargains and favorable treatment at sentencing in exchange for cooperation with the government’s investigation was called into question by a decision of a panel of the United States Court of Appeals for the Tenth Circuit. See *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (holding that prosecutors’ promises of leniency in sentencing in exchange for testimony violate the federal bribery statute). That decision, however, was subsequently reversed by the Tenth Circuit sitting en banc. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999).

2. See, e.g., 2 U.S.C. § 167(g) (1994) (violation of Library of Congress laws); 4 U.S.C. § 3 (1994) (use of the American flag within the District of Columbia for advertising purposes); 7 U.S.C. § 620 (1994) (falsely ascribing deductions or charges on tax return); 15 U.S.C. § 1338 (1994) (advertising cigarettes through a medium of electronic communication); 16 U.S.C. § 256(b) (1994) (hunting, trap-

has classified entire areas of proscribed conduct as misdemeanors. One such area is election law offenses.<sup>3</sup> Congress has defined as misdemeanors an entire array of "garden-variety" campaign finance violations<sup>4</sup> such as contributions exceeding legal limits,<sup>5</sup> contributions using corporate or labor union funds,<sup>6</sup> contributions by foreign nationals,<sup>7</sup> and straw contributions in the name of another.<sup>8</sup>

The Congressional definition of criminal election law offenses as misdemeanors challenges federal prosecutors to find a way to punish offenders with something more than "wrist slap" penalties. In the politically-charged environment of the campaign fundraising scandal that arose out of the 1996 presidential election, this problem assumed even greater significance. In the face of repeated calls for appointment of an Independent Counsel,<sup>9</sup> Attorney General Janet Reno and the Department of Justice created a special "Campaign Financing Task Force" to investigate political fundraising for the 1996 presidential election.<sup>10</sup> Since its inception, the press and the public have scrutinized the work of the Task Force closely,<sup>11</sup> with pressure for "results" present through-

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ping, fishing, or injuring wildlife in national parks); 18 U.S.C. § 228(b)(1) (1994) (failure to pay child support obligations); 18 U.S.C. § 601 (1994) (deprivation of employment for making political contributions); 21 U.S.C. § 117 (1994) (introduction into the United States of falsely labeled or branded food or dairy products); 26 U.S.C. § 7203 (1994) (willful failure to file tax return, supply information or pay tax); 29 U.S.C. § 666(e) (1994) (willful violations of OSHA regulations that result in the death of an employee); 33 U.S.C. § 1481 (1994) (willful violations of or refusal to comply with regulations concerning pollution on the high seas).

3. See 2 U.S.C. §§ 431-455 (1994).

4. See 2 U.S.C. § 437g(d) (1994) (penalties for violating Federal Election Campaign Act). It is important to note at the outset of any discussion of election law offenses that not all violations of the federal election laws are misdemeanors subject to criminal prosecution. To the contrary, Congress has specified that only "knowing and willful" violations warrant criminal prosecution, and most violations are to be addressed by the Federal Election Commission in civil administrative proceedings, and not by the Department of Justice in criminal prosecutions. See *infra* Section III.B.

5. See 2 U.S.C. § 441a (1994) (limitations on contributions and expenditures).

6. See 2 U.S.C. § 441b (contributions or expenditures by national banks, corporations, or labor organizations).

7. See 2 U.S.C. § 441e (contributions by foreign nationals).

8. See 2 U.S.C. § 441f (contributions in the name of another prohibited).

9. See Edwin Chen & David G. Savage, *Counsel Law Is Tied up in Congressional Tug of War Politics: GOP, Democrats Bicker over Need for Outside Prosecutor in Fund-Raising Probe. Reno Is Caught in the Middle*, L.A. TIMES, Mar. 14, 1997, at A15; Helen Dewar, *Reno Gets GOP Request Under Counsel Statute*, WASH. POST, Mar. 14, 1997, at A22; Helen Dewar, *Senate Seeks Special Counsel on Presidential Election Funds*, WASH. POST, Mar. 20, 1997, at A8; Neil A. Lewis, *Senate Panel Focuses on Reno-Free Dispute over Prosecutor*, N.Y. TIMES, July 16, 1998, at A1; Lynn Sweet, *Newt Puts Heat on Reno; Congress May Question Her Handling of Fund-Raising Probe*, CHI. SUN TIMES, Apr. 14, 1997, at 1.

10. See Robert L. Jackson & Alan C. Miller, *Reno Rejects Call for Outside Probe of Fund-Raising*, L.A. TIMES, Nov. 13, 1996, at A1; *Reno Rejects a Request for Independent Counsel*, WALL ST. J., Nov. 11, 1996, at A11; Pierre Thomas, *Justice Dept. Rejects One Request for Party Finance Probe*, WASH. POST, Nov. 9, 1996, at A17.

11. See, e.g., Robert L. Jackson & Marc Lacey, *Reno Adds Staff to Donor Probe; Hearing Delayed Fund-raising; Justice Dept. Task Force Gets New Leadership, More Attorneys to Speed up Probe. House Panel Cancels its First Day of Testimony*, L.A. TIMES, Sept. 17, 1997, at A14; Robert Suro, *'Crisis in Confidence' Prompted Reno's Decision; Shake-up of Campaign Finance Task Force Intended to*

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out the investigation.<sup>12</sup>

The “results” that the Task Force has been under pressure to deliver are not misdemeanor charges.<sup>13</sup> Prosecutors need felony cases to justify the enormous effort and resources that they have devoted to the campaign fundraising investigation.<sup>14</sup> It comes as no surprise, then, that prosecutors have spurned the misdemeanor penalties that Congress intended to apply to campaign fundraising violations.<sup>15</sup> Treating the election law provisions as unwanted stepchildren, prosecutors instead have turned to their favorite child, what Judge Learned Hand aptly called “the darling of the modern prosecutor’s nursery,”<sup>16</sup> the federal conspiracy statute.<sup>17</sup>

The federal conspiracy statute is an unusually accommodating<sup>18</sup> and elastic criminal law<sup>19</sup> that can be stretched to cover a wide variety of misconduct, including election law violations.<sup>20</sup> Most important, if applied in a creative fash-

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*Inject Aggressiveness into Probe*, WASH. POST, Sept. 18, 1997, at A10; Bob Woodward, *FBI Had Overlooked Key Files in Probe of Chinese Influence*, WASH. POST, Nov. 14, 1997, at A1.

12. See David Jackson, *Fund-Raising Indictments May Be Near. Probe into Clinton, Gore Phone Calls Also Finishing*, DALLAS MORNING NEWS, Nov. 24, 1997, at A1 (“Rejection of an independent counsel would put more political pressure on a task force that has been criticized for slowness by congressional Republicans and other critics of Mr. Clinton’s campaign fund raising.”); Robert Suro & Bob Woodward, *Justice Dept. Campaign Task Force Pressing for Cooperative Testimony*, WASH. POST, Oct. 31, 1997, at A9 (“The threatened indictments follow a management shake-up in the year-old Justice task force on campaign finance that has been harshly criticized by congressional Republicans for foot-dragging and ineptitude.”).

13. See generally Robert L. Jackson & Ronald J. Ostrow, *Primary Target Charged in Probe of Clinton Donors*, L.A. TIMES, July 14, 1998, at A1 (quoting an attorney defending an individual charged with conspiracy to defraud the United States by funneling illegal foreign money into a reelection campaign, as saying that his client’s indictment “continues a pattern of the government inflating alleged [Federal Election Commission] violations into massive felony charges”).

14. See Don Van Natta, Jr. & David Johnston, *Inquiry on Campaign Finance is Running Dry. Officials Say*, N.Y. TIMES, July 14, 1998, at A1 (quoting a Department of Justice spokesperson stating that “[h]is continues to be the department’s largest criminal investigation, with more than 120 task-force members, offices on two coasts and resources drawn from around the country”).

15. See *infra* Part III.

16. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (“It appears to us that the maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremest degree, no matter in how many different ways a draughtsman may plead it, and even though he may add a count for conspiracy, that darling of the modern prosecutor’s nursery.”); see also Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 409 (1959) (“‘Conspiracy’ has been a favorite of prosecutors for centuries. The reasons for its popularity lie partly in history, partly in the increased punishment potential afforded by its status as a separate crime. Most potent of all, however, has been the tactical advantage it brings to the prosecutor. By charging ‘conspiracy,’ he can reach persons who might escape conviction if they were proceeded against separately or if they were charged with accomplished harm to the community.”).

17. See 18 U.S.C. § 371 (1994).

18. See *Grunewald v. United States*, 353 U.S. 391, 404 (1957) (“[W]e will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.”); *Krulewicz v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring) (“The modern crime of conspiracy is so vague that it almost defies definition.”).

19. See *Krulewicz*, 336 U.S. at 445 (Jackson, J., concurring) (“[The crime of conspiracy is an] elastic, sprawling, and pervasive offense.”); see also Goldstein, *supra* note 16, at 428 (referring to the defraud clause and stating that “the resourceful prosecutor could turn to this crime of many meanings and seemingly infinite elasticity”).

20. See *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (charging the defendant with conspir-

ion, it can be used to charge garden-variety misdemeanor campaign finance violations<sup>21</sup> as felonies punishable by a term of imprisonment of up to five years and a fine of up to \$250,000<sup>22</sup> for each count. Like a legal alchemist, an aggressive federal prosecutor can take the base metal of a mundane case of misdemeanor election law violations and turn it into the gleaming gold of a multi-count federal felony indictment—precisely the kind of white collar criminal case federal prosecutors like to bring.

This practice of “turning misdemeanors into felonies” merits skepticism and close scrutiny. How federal prosecutors employ this tactic and whether the federal judiciary should permit them to do it are important issues.<sup>23</sup> As this Article will show, the language and legislative history of two federal statutes demonstrate conclusively that Congress did not intend for campaign finance violations to be prosecuted as felonies. Despite this clear evidence of legislative intent, the Department of Justice has developed “felony theories for FECA prosecutions.”<sup>24</sup>

This “overcharging” of campaign financing violations is seldom challenged, however. In the current political environment, a member of Congress is unlikely to object to overly aggressive prosecution of campaign finance violations. Any member of Congress who does so would be vulnerable to political attack for being “soft” on enforcement of election laws. In addition, most federal judges do not carefully scrutinize the Department of Justice’s felony conspiracy theories, in part because a large body of precedent superficially appears to support expansive application of the federal conspiracy statute.<sup>25</sup> These practical realities should not embolden the Department of Justice to ignore the law and to seek far harsher punishment than Congress intended. This Article explains why the Department of Justice’s policy is wrong and why the federal courts should scrutinize these felony theories for election law prosecutions

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acy to impede the lawful functions of the Federal Election Commission by causing campaign treasurers to submit false reports to the Commission); *United States v. Goland*, 959 F.2d 1449 (9th Cir. 1992) (charging the defendant with a conspiracy to cause the treasurers of two campaign committees to file false reports with the Federal Election Commission concerning the sources of campaign financing supplied to them by the defendant); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990) (charging the defendants with a conspiracy to disguise corporate political contributions as individual contributions and to interfere with the proper reporting of campaign contributions to the Federal Election Commission, as well as charging them with various banking offenses).

21. Federal law defines felonies as offenses for which the authorized term of imprisonment is more than one year and misdemeanors as offenses for which the authorized term of imprisonment is not more than one year. *See* 18 U.S.C. § 3581 (1994) (defining five classes of felonies and four classes of misdemeanors based on the length of the authorized term of imprisonment). For a defendant in an election law case, this distinction between a misdemeanor and a felony is enormously important. A misdemeanor offense under the election laws is subject to a term of imprisonment of “not more than one year.” 2 U.S.C. § 437g(d) (1994). A felony conspiracy offense is subject to a fine and a term of imprisonment of up to five years. *See* 18 U.S.C. § 371 (1994).

22. *See* 18 U.S.C. § 3571(b)(3) (1994).

23. *See infra* Part III.

24. *See* DOJ MANUAL, *supra* note 1, at 108.

25. *See infra* Part II.

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more carefully on motions to dismiss.

Part II of this Article examines the historical development of the federal conspiracy statute. In Section A, we outline the broadening of the statute from its origin as a measure to curtail tax fraud to a general anti-crime measure. Section B examines federal prosecutors' use of the statute during the Prohibition era to bring felony conspiracy charges for misdemeanor violations of the National Prohibition Act. In Section C we detail the cautionary skepticism that federal courts expressed in response to this Prohibition-era tactic. Finally, Section D analyzes the 1948 amendments to the conspiracy statute and shows that Congress amended the statute to stop prosecutors from using it to bring felony conspiracy charges for conduct that Congress had classified as misdemeanor offenses.

Part III critiques the current use of the federal conspiracy statute, often in conjunction with the federal false statements statute,<sup>26</sup> to bring felony charges in election law cases. In Section A we outline the history of campaign finance laws and the misdemeanor penalties that currently apply to violations. Section B details criteria that distinguish civil from criminal election law violations and explains felony charging theories that prosecutors have developed. Finally, Section C analyzes recent court decisions in campaign finance cases where felony conspiracy charges were brought.

In Part IV we conclude that despite ad hoc checks on prosecutorial abuse reflected in recent case law, both courts and prosecutors should be more mindful of congressional intent and stop the practice of straining to bring felony charges when Congress clearly intended for misdemeanor penalties to apply.

## II. HISTORICAL BACKGROUND

### *A. Origins and Expansion of the Federal Conspiracy Statute*

Congress enacted the predecessor to 18 U.S.C. § 371, the modern conspiracy statute,<sup>27</sup> in 1867 as one part of a thirty-four-section statute aimed at “plugging loop-holes in the tax laws.”<sup>28</sup> Congress intended the conspiracy pro-

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26. See 18 U.S.C. § 1001 (1994).

27. See Act of March 2, 1867, ch. 169, § 30, 14 Stat. 484. Section 30 provided in part that “if two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to impriso[n]ment not exceeding two years.” See *id.*; see also Goldstein, *supra* note 16, at 417-418 (outlining the history of and motivations behind the statute). In the 1875 codification the statute was altered to read “to defraud the United States in any manner or for any purpose.” *Id.* at 418, n. 36. By 1918 the penalty provisions of the statute had been increased so that offenders could be “fined not more than ten thousand dollars, or imprisoned not more than two years or both.” *United States v. Bathgate*, 246 U.S. 220, 223 (1918) (quoting statute).

28. Goldstein, *supra* note 16, at 418.

visions to provide a federal remedy for efforts to defraud the United States out of tax revenue, conduct not covered elsewhere in the federal criminal code.<sup>29</sup>

In 1879, the Supreme Court decided *United States v. Hirsch*,<sup>30</sup> the first case to expand the scope of the conspiracy statute beyond tax fraud. This holding ultimately led to the statute's current status as a mainstay of federal law enforcement.<sup>31</sup> The Court concluded that the reach of the conspiracy statute<sup>32</sup> extended beyond frauds to cheat the United States out of revenue and could be applied to "any fraud" against the government.<sup>33</sup> The Court based its decision on the lack of reference to internal revenue in the language of the statute and the fact that the 1867 law was entitled, "An Act to amend existing laws relating to internal revenue, and for other purposes."<sup>34</sup> The Court found this language a sufficient indication of Congressional intent to enact a "general penal provision" against conspiracies that was not limited to internal revenue offenses.<sup>35</sup>

The 1910 decision in *Haas v. Henkel*<sup>36</sup> further expanded the reach of the conspiracy statute. In *Haas*, the defendants had bribed a Department of Agriculture official to provide them with advance notice of information in cotton crop reports.<sup>37</sup> Even though the charges did not allege any direct pecuniary loss to the government, the Court allowed the conspiracy count to stand: "[I]t is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."<sup>38</sup> *Hirsch* had already freed the conspiracy statute from its original mooring to the government's revenue-raising function; *Haas* freed it altogether from a limitation to financial crimes.<sup>39</sup> After *Haas*, the

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29. See *United States v. Minarik*, 875 F.2d 1186, 1194 (6th Cir. 1989) (discussing targeted conduct); see also Goldstein, *supra* note 16, at 417-418.

30. 100 U.S. 33 (1879).

31. See generally Goldstein, *supra* note 16, at 417-36 (describing in detail the history of the conspiracy statute).

32. See *Hirsch*, 100 U.S. at 35 (quoting the statute as modified in the 1875 codification: "If two or more persons conspire, either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties shall be liable").

33. *Id.*

34. *Id.* at 36 (emphasis added).

35. *Id.*; see also Goldstein, *supra* note 16 at 419-20. As Goldstein, the leading commentator on the federal conspiracy statute, has observed, while this decision deprived the prosecution of the longer limitations period then in effect for revenue offenses, it "gave to the Government far more than it took away" because thereafter "prosecutors, unconfined by legislative history, would be able to press for new applications of the statute." *Id.* This observation has proved prescient in light of federal prosecutors' recent use of the conspiracy statute in election law cases. See *infra* Part III.

36. 216 U.S. 462 (1910).

37. See *id.* at 472.

38. *Id.* at 479.

39. Cf. *McNally v. United States*, 483 U.S. 350, 358 (1987) (explaining that the words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching") (citation omit-

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only limits on the application of the conspiracy statute were federal court interpretations of what constituted interference with lawful government functions.

The Supreme Court did recognize some limits on this concept of “interference with government functions.” In *United States v. Gradwell*,<sup>40</sup> the Court declined to extend the reach of the conspiracy statute to cover voter fraud during federal elections in Rhode Island and West Virginia. The Court concluded that the conspiracy statute should not apply because the policy of Congress at that time was to leave regulation of elections to the states, while the conspiracy statute applied to offenses against the operation of the federal government and not the states.<sup>41</sup> In *Hammerschmidt v. United States*,<sup>42</sup> the Court refused to extend the conspiracy statute to cover efforts to prevent young men from registering for the draft.<sup>43</sup> The *Hammerschmidt* Court agreed with the conclusion in *Haas* that pecuniary loss is not required, and that to defraud the United States “also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.”<sup>44</sup> However, this broad language, which has often been quoted in later conspiracy law decisions,<sup>45</sup> was deemed insufficiently expansive to encompass the actions of the defendants in *Hammerschmidt*, which the Court characterized as “a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it.”<sup>46</sup>

### B. Prosecutorial Misuse of the Conspiracy Statute During Prohibition

Prosecutors stretched the conspiracy statute beyond recognition during the Prohibition era, unchecked by the courts. From 1920 through 1933,<sup>47</sup> federal

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ted). In *McNally* the Court explained that the mail fraud statute requires some sort of property deprivation even though the conspiracy statute has no such requirement. The Court distinguished the conspiracy statute, asserting that its original aim was “protecting the federal government alone” while the mail fraud statute “had its origin in the desire to protect individual property rights, and [therefore] any benefit which the Government derives from the statute must be limited to the Government’s interests as property holder.” *Id.* at 358, n.8. Congress subsequently amended the federal mail fraud statute to in effect overrule *McNally*’s requirement of a property deprivation. See 18 U.S.C. § 1346 (1994) (“For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”).

40. 243 U.S. 476 (1917).

41. See *id.* at 485. The subsequent enactment by Congress of a comprehensive set of federal election laws, discussed *infra* Part III, obviously has limited the reach of the *Gradwell* holding.

42. 265 U.S. 182 (1924).

43. See *id.* at 189.

44. *Id.* at 188; *cf. McNally*, 483 U.S. at 358 n.8 (quoting *Hammerschmidt*).

45. See, e.g., *United States v. Haga*, 821 F.2d 1036, 1039 (5th Cir. 1987) (quoting *Hammerschmidt*).

46. *Hammerschmidt*, 265 U.S. at 189; see also *United States v. Caldwell*, 989 F.2d 1056, 1059 n.3 (9th Cir. 1993) (holding that, under *Hammerschmidt*, conspiring to obstruct a function of the government is not sufficient to support a section 371 conspiracy charge if the government fails to show that “deceitful or dishonest means” were used to effectuate the scheme).

47. See generally Kenneth J. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 474 (1982) (summarizing legislative develop-

prosecutors often used the conspiracy statute to bring felony charges against persons who had committed misdemeanor violations<sup>48</sup> of the National Prohibition Act (NPA).<sup>49</sup> Defense counsel in the Prohibition cases argued that it was unjust to impose on a defendant a greater punishment for a conspiracy to commit an offense than the punishment prescribed for the offense itself,<sup>50</sup> and that the offense of conspiracy should merge into the lesser misdemeanor offenses prescribed under the NPA. The courts, however, rejected these contentions.<sup>51</sup>

Defense counsel in these cases reasoned that if Congress had intended to impose a harsher conspiracy punishment than that of the underlying offense, it would have done so.<sup>52</sup> In *Murry v. United States*<sup>53</sup> the Eighth Circuit rejected this argument.<sup>54</sup> Subsequent courts inferred that Congress's silence concerning the punishment for a conspiracy conviction meant that a conspiracy to commit any offense against the United States, whether misdemeanor or felony, could be punished as a felony. For example, in *Welter v. United States*,<sup>55</sup> the defendant was convicted of conspiracy to violate provisions of the NPA that made it a misdemeanor offense to possess and transport intoxicating liquors.<sup>56</sup> He was sentenced to confinement in a penitentiary for one year and one day and required to pay a \$2000 fine.<sup>57</sup> On appeal he argued that the indictment was defective because under the NPA possessing and transporting intoxicating liquors was only a misdemeanor, punishable by a fine only, while violation of the conspiracy statute subjected him to imprisonment, and therefore was a felony. The *Welter* court, relying on *Murry*, upheld the indictment and felony conviction for conspiracy.<sup>58</sup>

### C. Judicial Discomfort with Proliferating Conspiracy Prosecutions

*Welter* was decided on January 28, 1925. In June of that year, the Conference of Senior Circuit Judges recommended that Congress consider whether changes in the law were needed to address "the prevalent use of conspiracy in-

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ments relating to Prohibition); Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 174-80 (1991) (summarizing the history of Prohibition in the United States).

48. See *Welter v. United States*, 4 F.2d 342, 343 (8th Cir. 1925) (holding that the conspiracy indictments are valid).

49. National Prohibition Act of 1919, ch. 85, § 1, 41 Stat. 305 (codified at 27 U.S.C. § 1 and repealed in 1935); see also *Murry v. United States*, 282 F. 617, 618 (8th Cir. 1922) (holding that the felony conspiracy charge does not merge into the lesser charges).

50. See *Murry*, 282 F. at 618.

51. See *Welter*, 4 F.2d at 343 (citing *Murry*).

52. See *Murry*, 282 F. at 618.

53. 282 F. 617 (8th Cir. 1922).

54. See *id.*

55. 4 F.2d 342 (8th Cir. 1925).

56. See *id.* at 343.

57. See *id.*

58. See *id.*

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dictments for converting a joint misdemeanor into a felony.”<sup>59</sup> The judges added that “we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.”<sup>60</sup> The judges strongly condemned the practice of using the conspiracy statute in cases where the “substantial base” of “a serious and substantially continued group scheme for cooperative law breaking” was not present.<sup>61</sup>

The 1925 Report of the Senior Circuit Judges identified two serious potential problems with overly aggressive use of the conspiracy statute: (1) charging as a felony conduct that should be punished as a misdemeanor, and (2) practical difficulties faced by innocent defendants attempting to defend against a conspiracy charge.<sup>62</sup> The former concern has received less attention and is the focus of this Article. The latter concern pertains to the tactical difficulties<sup>63</sup> of defending against a conspiracy charge.<sup>64</sup> These practical difficulties, which have been described elsewhere,<sup>65</sup> include the broadening of venue to anywhere any action connected to the conspiracy occurred,<sup>66</sup> the admission of

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59. 1925 ATT’Y GEN. ANN. REP. 5.

60. *Id.*

61. *Id.* at 6.

62. *See id.* at 5-6.

63. *See* Goldstein, *supra* note 16, at 440-441:

But where [the conspiracy statute’s] primary function once was to reach conduct not covered elsewhere in the criminal code, it now serves its original purpose in very limited fashion. *Its main significance today is in the field of tactics.* Given the choice, a prosecutor will invariably choose to proceed under the statute which affords him the maximum flexibility in framing his charge and presenting his proof. The addition of the conspiracy count (already described as the “prosecutor’s darling”) to the loosely-defined concept of fraud makes conspiracy “to defraud the United States” peculiarly attractive to the prosecutor and particularly subversive of principles deeply rooted in our criminal law. (internal citation omitted) (emphasis added).

64. *See* Todd R. Russell & O. Carter Snead, *Federal Criminal Conspiracy*, 35 AM. CRIM. L. REV. 739, 740 (1998) (“It is clear that a conspiracy charge gives the prosecution certain unique advantages and that one who must defend against such a charge bears a particularly heavy burden.”) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 6.4 (b), at 526 (2d ed. 1986)).

65. *See generally* Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 25 (1992) (arguing that there are many important advantages for the government when it seeks a conspiracy charge); *see also* United States v. Rosenblatt, 554 F.2d 36, 41 n.6 (2d Cir. 1977):

The potential for abuse in allowing the government to manipulate a prosecution by easy access to the conspiracy-to-defraud clause is clear. The crime of conspiracy to defraud is broader and less precise than that of conspiracy to commit a particular offense. By invoking the former, the scope of the conspiracy appears to increase – thereby increasing the defendant’s apparent liability for substantive crimes committed by co-conspirators and the apparent admissibility of declarations made by co-conspirators . . . the period of the statute of limitations seems to lengthen . . . and an argument might be made that the number of districts in which venue can be laid had been increased.

66. *See* Marcus, *supra* note 65, at 25 (discussing venue as being one of the evidentiary advantages of bringing a conspiracy charge, “[v]enue is proper in any jurisdiction in which an overt act, any overt act, took place”); *see also* Krulewitch v. United States, 336 U.S. 440 (1949); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., SUBSTANTIVE CRIMINAL LAW 64-65 (2d ed. 1986) (stating that the prosecution may elect to have the trial in any locale where any overt act by any of the conspirators took place); Goldstein, *supra* note 16, at 409-10 n.11 (“Venue attaches at the place either of the agreement or of any

statements of co-conspirators that otherwise would be excluded by the hearsay rule,<sup>67</sup> and the extension of statutes of limitations far beyond the time they would expire if conspiracy was not charged.<sup>68</sup>

The 1925 Report explicitly suggested that it is unfair to use the conspiracy statute to charge as a felony conduct that Congress has specifically defined as a misdemeanor:

We note the prevalent use of the conspiracy indictments for converting a joint misdemeanor into a felony, and we express our conviction that . . . the conspiracy statute is being much abused . . . We think it proper for us to bring this matter to the attention of the District Judges, with the request that they present it to the district attorneys, and for us to bring it also to the attention of the Attorney General, with the suggestion that he call it to the attention of the district attorneys, as in his judgment may be proper, and all to the end that this form of indictment be hereafter not adopted hastily but only after a careful conclusion that the public interest so requires, and to the end that *transformations of a misdemeanor into a felony* should not be thus accomplished, unless the propriety thereof clearly appears. *We also think proper to bring the subject matter to the attention of Congress, that it may consider whether any change of the law in this respect is advisable.*<sup>69</sup>

After the Report, federal courts began to criticize the misuse of the conspiracy statute in published opinions. In 1928, for example, the Third Circuit recognized the misuse of the conspiracy statute by federal prosecutors in the prosecution of NPA offenses:

[T]he preference of some government officials, charged with the enforcement of the National Prohibition Act, to enforce that law through internal revenue statutes,

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of the overt acts committed pursuant to the agreement. The problem, once again is to determine the scope of the agreement so that the *loci* of the overt acts may be identified.") (citing *Hyde v. United States*, 225 U.S. 347, 356-57 (1912) and *Hyde v. Shine*, 199 U.S. 62, 76-77 (1905)).

67. See LAFAYE & SCOTT, *supra* note 65, at 65-66:

[A]ny act or declaration by one co-conspirator committed during and in furtherance of the conspiracy is admissible against each co-conspirator . . . the co-conspirator hearsay exception as applied often extends beyond that rationale. The requirement that the act or statement be in furtherance of the conspiracy is often applied broadly, with the result that any evidence somehow relating to the conspiracy comes in.

See also Goldstein, *supra* note 16, at 409 n.11 ("Statements made by any alleged conspirator are attributed to his coconspirators on the same basis.") (citing *Delli Paoli v. United States*, 352 U.S. 232, 237 (1957); *Lutwak v. United States*, 344 U.S. 604, 617-19 (1953); Joseph H. Levie, *Hearsay and Conspiracy*, MICH. L. REV. 1159 (1954)); Russell & Snead, *supra* note 64, at 757-62 (presenting the evidentiary and constitutional guidelines governing admissibility of co-conspirators hearsay testimony at trials involving conspiracy charges).

68. See *Krulewitch v. United States*, 336 U.S. 440, 456 (1949) (Jackson, J., concurring) (explaining that if the statute of limitations cannot expire while the conspiracy is underway and the conspiracy continues as long as people are trying to cover up their conduct, then the statute may never run).

[T]he assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.

*Id.*; see also Goldstein, *supra* note 16, at 409 n.11 ("The statute of limitations begins to run from the last overt act committed 'to effect the object of the conspiracy.'")

69. *United States v. Motlow*, 10 F.2d 657, 662-63 (7th Cir. 1926) (quoting the Report of Circuit Judges).

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customs laws and the general law of conspiracy found in the Criminal Code, rather than through the National Prohibition Law itself, thus at times converting misdemeanors into felonies and hazarding the greater certainty of convictions under the prohibition law in order to obtain heavier penalties under other laws. Against this practice the federal judiciary has formally expressed itself.<sup>70</sup>

As the use of the conspiracy statute to covert misdemeanors into felonies spread beyond the NPA, other courts condemned the practice in even stronger terms. In 1941, a federal district court in Kentucky summarized the abuses of the conspiracy statute:

There has grown up in this country a practice among United States Attorneys to use 18 U.S.C.A. § 88, the so-called conspiracy statute, as a catch-all or dragnet for everything and everybody, wheresoever found, who might have had some remote connection with the substantive crime or crimes charged. This most important and useful criminal statute has been prostituted beyond recognition. There is an attempt to ensnare not only those enacting the crime but any who might be standing in its shadow. It has been suggested that this practice grew up under Prohibition and now is used so extensively that a large percentage of the indictments drawn include a conspiracy count. Regardless of origin it should not be permitted to flourish.<sup>71</sup>

By the 1940s, these cases reflected a growing concern in the federal courts that the conspiracy statute was being misused by overreaching prosecutors who were dissatisfied with the misdemeanor punishments that Congress had prescribed for certain federal offenses.

In 1946, concerns with prosecutorial misuse of the conspiracy statute found their way into an opinion of the United States Supreme Court. In *Pinkerton v. United States*,<sup>72</sup> the Court decided that a defendant could be prosecuted for both a completed substantive offense and a conspiracy to commit that offense.<sup>73</sup> However, the Court cautioned that the addition of conspiracy counts to a substantive offense “may at times be abusive and unjust.”<sup>74</sup> The Court, quoting the report of the Conference of Senior Circuit Judges, went on to cite the “prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony” as an example of when the addition of conspiracy counts could be “much abused.”<sup>75</sup> Thus, by 1946, even the Supreme Court had expressed concerns regarding the prosecutorial practice of bringing felony conspiracy charges for conspiracies to commit offenses that Congress intended to punish only as misdemeanors.<sup>76</sup>

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70. *United States v. Glass*, 25 F.2d 941, 943 (3d. Cir. 1928) (emphasis added).

71. *United States v. Moore*, 40 F. Supp. 543, 545 (E.D. Ky. 1941).

72. 328 U.S. 640 (1946).

73. *See id.* at 643.

74. *Id.* at 644 n.4.

75. *Id.*

76. *Pinkerton* is not the only Supreme Court opinion from that era raising concerns about zealous prosecutorial use of the federal conspiracy statute. *See Glasser v. United States*, 315 U.S. 60, 76 (1942) (recognizing that in conspiracy cases, “the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant”).

Congress had taken no action for over twenty years prior to *Pinkerton*, during which time federal judges continued to express concerns about the potential for prosecutorial misuse of the conspiracy statute.<sup>77</sup> In particular, the practice of charging misdemeanor conduct as a felony that had been questioned by the Conference of Senior Circuit Judges in 1925 continued to concern the federal judiciary. As Justice Jackson observed critically in 1949, “[t]he act of confederating to commit a misdemeanor, followed by even an innocent overt act in its execution, is a felony and is such even if the misdemeanor is never consummated.”<sup>78</sup>

#### *D. The 1948 Amendments to the Conspiracy Statute*

In 1948 the federal judiciary’s two decades of criticism finally yielded results when Congress amended the federal conspiracy statute as part of an overall reorganization of the federal criminal code. The statute as amended permits a conspiracy to be prosecuted as either a felony or a misdemeanor:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.<sup>79</sup>

Section 371 defines two separate types of conspiracy offenses: one based on the “defraud” clause and one based on the “offense” clause.<sup>80</sup> A conspiracy “to defraud the United States,” is itself a felony offense punishable by up to five years imprisonment. A second type of conspiracy crime entails a conspiracy

77. See, e.g., *Frankfurt Distilleries, Inc. v. United States*, 144 F.2d 824, 835-42 (10th Cir. 1944) (recognizing the difficulty of defending against a generalized conspiracy charge) (Phillips, J., dissenting); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (criticizing prosecutors’ efforts to “sweep within the drag-net of conspiracy” everyone associated with an offense); *Hartson v. United States*, 14 F.2d 561, 562 (2d Cir. 1926) (criticizing the “cumulation of sentences” that resulted from prosecutorial use of a conspiracy charge in addition to charges for the underlying substantive offenses).

78. *Krulewitch v. United States*, 336 U.S. 440, 449 (1949).

79. 18 U.S.C. § 371 (1994).

80. The felony can be a conspiracy to defraud the United States or a conspiracy to commit an offense against the United States. See *United States v. Harnas*, 974 F.2d 1262, 1266 (11th Cir. 1992) (“The Statute is written in the disjunctive and should be interpreted as establishing two alternative means of committing a violation.”) (citing *United States v. Elkins*, 885 F.2d 775, 781 (11th Cir. 1989)); see also *United States v. Bilzerian*, 926 F.2d 1285, 1301-1302 (2d Cir. 1991) (“Although it is recognized that the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute, it may simultaneously prosecute the same conduct under both clauses.”); cf. *United States v. Minarik*, 875 U.S. 1186, 1193-94 (6th Cir. 1989) (explaining that section 371 “creates one crime that may be committed in one of two alternate ways” and that “an individual whose alleged wrongful agreement is covered by the offense clause . . . as well as arguably by the broad defraud clause, cannot be convicted or punished for both”). The courts have permitted charging violations based on both the offense and defraud clauses in a single count of an indictment because having more than one object or more than one means does not convert a single conspiracy into more than one offense. See *United States v. Smith*, 891 F.2d 703, 711-12 (9th Cir. 1989) (analyzing authorities); see also *United States v. Dale*, 782 F. Supp. 615, 617-18 (D.D.C. 1991).

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“to commit any offense against the United States.” A violation of this “offense” clause of the conspiracy statute can be either a felony or a misdemeanor. The second subsection of the statute explicitly provides that if “the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”<sup>81</sup> Thus, a conspiracy to commit a felony offense against the United States is felony, while a conspiracy to commit a misdemeanor offense against the United States is a misdemeanor.<sup>82</sup>

Although the legislative history to this particular amendment is sparse, the punishment provision of the offense clause clearly was rewritten to increase the penalty from two years to five years except where the object of the conspiracy is a misdemeanor.<sup>83</sup> The Revisers’ Notes to the amended statute made clear that: “If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section cannot exceed one year.”<sup>84</sup>

The Revisers’ Notes further refer to an address by United States District Judge Grover M. Moscowitz of the Eastern District of New York, which pointed out the injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor.<sup>85</sup> This reference in the Revisers’ Notes suggests that Congress added the misdemeanor punishment provision to end the practice of felony conspiracy prosecutions for misdemeanor offenses.

Other information in the legislative history also supports this view. Charles J. Zinn, the committee counsel who assisted with the 1948 amendments to the criminal code, addressed the American Bar Association section on criminal law at the ABA annual convention in Cincinnati, Ohio on December 17, 1945. In discussing the proposed changes to the conspiracy statute, Mr. Zinn explained that:

In the present law [before the amendment], the general conspiracy statute provides a punishment of up to two years imprisonment or a fine up to \$10,000, or both, regardless of the punishment provided for commission of the offense itself. The result is that a person convicted of conspiracy to commit a misdemeanor is subject to a felony penalty, while conviction of a conspiracy to commit a most heinous felony carries with it the same penalty as conspiracy to commit a misdemeanor. . . . In the new code [after the amendment] there is a general conspiracy provision *which takes into consideration the gravity of the substantive crime* which is the subject of the conspiracy.<sup>86</sup>

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81. 18 U.S.C. § 371 (1994)

82. *See id.*

83. *See* H.R. REP. NO. 304 (Reviser’s Notes), 80th Cong., 2d Sess. (1948), *reprinted in* 18 U.S.C. CONGRESSIONAL SERVICE 2476 (West 1948).

84. *Id.*

85. *See id.*

86. 92 CONG. REC. A60-A62 (1946) (remarks of Charles J. Zinn, Committee Counsel, regarding H.R. 2200, 79th Cong.) (emphasis added), *reprinted in* 18 U.S.C. CONGRESSIONAL SERVICE 2748-51

Both the legislative history and the judicial criticism that precipitated the 1948 amendment indicate that Congress amended the federal conspiracy statute to eliminate the practice of prosecuting conspiracies to commit misdemeanors as felony offenses. Unfortunately, however, the significance of the 1948 amendment to the conspiracy statute<sup>87</sup> seems to have been largely ignored,<sup>88</sup> and the practice of converting misdemeanors into felony conspiracies has recently resurfaced, albeit in a new context—election law cases.<sup>89</sup>

### III. FEDERAL PROSECUTION OF ELECTION LAW CASES

As Part II demonstrated, the plain language of section 371 as amended in 1948 indicates that Congress intended that a conspiracy to commit an election law offense, which is a misdemeanor, should be punished as a misdemeanor conspiracy offense. Not surprisingly, however, federal prosecutors who are dissatisfied with the misdemeanor punishment Congress has provided for election law offenses,<sup>90</sup> have not used the conspiracy statute in this manner. Instead, they bring felony conspiracy charges under a “conspiracy to defraud the United States” theory<sup>91</sup> or a conspiracy to commit a felony offense against the

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(West 1948).

87. Act of June 25, 1948, ch. 645, 62 Stat. 683, 701 (codified as amended at 18 U.S.C. § 371 (1994)).

88. Just over ten years after the 1948 amendment to the statute, a 1959 survey of criminal conspiracy law recognized the different objects of a conspiracy contemplated by the offense and defraud clauses of the federal statute, but it did not address the significance of the misdemeanor offense provision that Congress added in 1948. See *Criminal Conspiracy*, 72 HARV. L. REV. 920, 944 (1959). Moreover, Professor Goldstein, in his exhaustive analysis of the defraud clause, which included an argument for an “either-or” mutually exclusive construction of the offense and defraud clauses, did not address the significance of the 1948 amendment either. See Goldstein, *supra* note 16, at 448-455. The misdemeanor offense provision of the federal statute was noted but not discussed in a 1961 article on the Model Penal Code’s treatment of criminal conspiracy, in its analysis of the penalty provisions of criminal conspiracy statutes then in effect. See Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COL. L. REV. 957, 1026-28 n.365 (1961) (“But if the conspiracy’s object is a misdemeanor the penalty shall not exceed that provided for such misdemeanor.”).

89. The practice has been revived despite strong and well-reasoned criticism by the leading commentator of the continued use of the defraud clause where Congress has defined specific offenses. See generally Goldstein, *supra* note 16; see also Michael W. Carroll, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 GEO. L.J. 551, 557 n.52 (1996) (citing both the Curran and Hopkins cases, discussed *infra* Part III); *United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977) (“The terms ‘conspiracy’ and ‘defraud’ when used together have a ‘peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringements on basic values of our criminal law.’”) (citing Goldstein, *supra* note 16, at 409).

90. See DOJ MANUAL, *supra* note 1, at 69-75; see also Carroll, *supra* note 89, at 588 n.49 (“Presumably, the difficulty here is that careerist concerns for prosecutors and allocation of prosecutorial resources make securing a misdemeanor conviction [for an election law offense] an insufficient incentive for the effort required in proving a *malum in se* activity.”).

91. See DOJ MANUAL, *supra* note 1, at 109.

The “conspiracy to defraud” approach to FECA crimes is based on *Hammerschmidt v. United States*, 265 U.S. 182 (1924), which held that a conspiracy to defraud the United States under section 371 includes a conspiracy “to interfere with or obstruct one of [the federal government’s] lawful governmental functions by deceit, craft, or trickery, or at least be means that are dishonest.”

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United States by causing campaign officials to file false statements with the Federal Election Commission (FEC) in violation of 18 U.S.C. § 1001.<sup>92</sup> Analysis of recent case law demonstrates that the courts do not clearly support such expansive application of the conspiracy statute in garden variety cases, and that judges and juries may be reining in the worst prosecutorial abuses by imposing very high burdens of proof.

### A. *Historical Primer on the Criminal Provisions of the Federal Election Campaign Act*

The federal statutes regulating campaign fundraising are a relatively recent addition to the federal regulatory scheme. Prior to enacting the Federal Election Campaign Act (FECA)<sup>93</sup> in 1971, Congress had made only sporadic attempts to regulate political fundraising and federal elections, usually in response to widely publicized scandals.<sup>94</sup> Between 1868 and 1870 Congress enacted a number of election laws known collectively as the Enforcement Acts.<sup>95</sup> These laws prohibited a variety of corrupt and fraudulent practices with respect to elections—including bribery, falsification of voting returns, false registration, and interference with election officers.<sup>96</sup> Congress repealed almost all of these laws in 1894.<sup>97</sup>

Congress next attempted to regulate elections by enacting the Tillman Act in 1907.<sup>98</sup> That Act prohibited national banks and corporations from contributing to campaigns for federal office.<sup>99</sup> In 1910 Congress imposed campaign

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This conspiracy theory, as applied to the functioning of the FEC, is as follows: The FEC, an agency of the United States, has two principal statutory duties, to enforce the FECA's campaign financing and disclosure requirements, and to provide the public with accurate information regarding the source and use of contributions to federal candidates. To perform these duties the FEC must receive accurate information from the candidates and political committees required to file reports. A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties.

*Id.* (internal citations omitted).

92. See, e.g., *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994) (“[T]he government used [18 U.S.C.] section 2(b) in conjunction with [18 U.S.C.] section 1001 to charge defendant with causing the campaign treasurers to file false reports. Section 2(b) prohibits ‘willfully caus[ing] an act to be done which if directly performed by . . . another would be an offense against the United States . . .’”).

93. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971).

94. See, e.g., Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279, 280 (1991) (discussing the history of campaign finance regulation).

95. See S. REP. NO. 92-229 (1971), reprinted in 1972 U.S.C.C.A.N. 1821, 1840; see also DOJ MANUAL, *supra* note 1, at 19.

96. See *supra* note 94.

97. See *supra* note 94. *United States v. Gradwell*, 243 U.S. 476, 482-85 (1917), discussed *supra* Section II.A., reviews the history leading up to the 1894 repeal.

98. See S. REP. NO. 92-229 (1971), reprinted in 1972 U.S.C.C.A.N. 1821, 1841.

99. See *id.*

contribution disclosure requirements on interstate political committees.<sup>100</sup> In 1925 Congress combined these provisions to form part of the Corrupt Practices Act.<sup>101</sup> The Corrupt Practices Act purported to provide a comprehensive scheme for regulating federal elections, but its enforcement provisions proved to be ineffective.<sup>102</sup> Most of the violations of the act were unintentional, and because the Act provided only for criminal penalties, it failed to reach the majority of violations.<sup>103</sup>

In 1971 Congress enacted the FECA to provide for comprehensive regulation of campaign financing by imposing on candidates spending limits and various disclosure requirements.<sup>104</sup> The FECA also provided for both civil and criminal enforcement of its provisions.<sup>105</sup>

In 1974, in the aftermath of the Watergate scandal, Congress amended the FECA by imposing limits on individual contributions and by creating the Federal Election Commission.<sup>106</sup> In 1976 the Supreme Court struck down portions of the FECA on First Amendment grounds.<sup>107</sup> In response, Congress again amended the statute.<sup>108</sup> Although the 1976 amendments were designed primarily to comply with the Supreme Court's constitutional directives, it appears that Congress also had other objectives. Before 1976 criminal election law offenses were punishable as felonies.<sup>109</sup> In the 1976 amendments, however, Congress reduced the penalty for these offenses to misdemeanors,<sup>110</sup> limited criminal prosecution to "knowing and willful" violations,<sup>111</sup> and imposed a relatively short three-year statute of limitations.<sup>112</sup> Congress also removed the criminal enforcement provisions from Title 18 of the United States Code, the Title that contains the general federal criminal statutes, and consolidated them with the FECA's civil provisions in a single provision in Title 2.<sup>113</sup>

100. *See id.*

101. *See id.*

102. *See* Kenneth A. Gross and Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 54 (1998).

103. *See id.*

104. *See* United States v. Hsia, 24 F. Supp. 2d 33, 39 (D.D.C. 1998) (summarizing the legislative history of the FECA), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

105. *See id.*

106. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; *Hsia*, 24 F. Supp. 2d at 39.

107. *See* Buckley v. Valeo, 424 U.S. 1, 58-59 (1976).

108. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

109. *See, e.g.*, 18 U.S.C. §§ 610 (contributions by national banks, labor organizations and corporations), 611 (contributions by government contractors), 613 (contributions by foreign nationals) (1975), *repealed* by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

110. *See* 2 U.S.C. § 437g(d)(1)(A) (1976).

111. *Id.*

112. *See id.* The legislative history does not explain why the limitations period was changed; it just states that the House Amendment to the 1974 Act provided a three-year limitations period while "[u]nder existing law the period of limitations is 5 years." 1974 U.S.C.C.A.N. at 5668.

113. *See* 2 U.S.C. §§ 441a-441h (1994) (formerly 18 U.S.C. §§ 608, 610-617). Prior to the 1976 amendments, all FECA violations were subject to criminal prosecution under a misdemeanor provision

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### *B. Prosecution Theories in Election Law Cases*

Under DOJ policy, before a criminal case based upon alleged FECA violations can be brought, the facts must reveal some type of “aggravating factor” that would warrant converting the case from an FEC civil proceeding to a criminal prosecution.<sup>114</sup> The Department of Justice manual on federal prosecution of election offenses states that “[m]ost violations of the FECA and the public financing provisions of Title 26 are handled civilly by the FEC.”<sup>115</sup> Without the existence of an aggravating factor, a criminal case is not warranted and “[c]ivil enforcement is clearly appropriate for FECA violations that involve small amounts of money, or that are committed openly and in obvious ignorance of the law.”<sup>116</sup> Criminal prosecutions under the FECA are the exception, not the rule, and only “intentional and factually aggravated violations of the FECA are crimes, subject to prosecution by the Justice Department.”<sup>117</sup> In other words, only the existence of aggravating factors will convert a typical civil FECA case into a criminal prosecution, and consequently, “only those FECA violations that are committed knowingly and willfully and involve at least \$2000 are crimes.”<sup>118</sup> In a Memorandum of Understanding (“MOU”) between the DOJ and FEC, both agencies acknowledged that not even all

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that required no criminal intent. See 2 U.S.C. § 441 (Supp. 1972) (repealed); *United States v. Hsia*, 24 F. Supp. 2d 33, 41 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999); see also DOJ MANUAL, *supra* note 1, at 107. One federal appellate court had held that a criminal conviction under this provision required proof of “knowing” conduct by the defendant. See *United States v. Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1197-98 (D.C. Cir. 1974); see also DOJ MANUAL, *supra* note 1, at 107. In the 1976 amendments Congress made nonwillful violations subject to civil enforcement by the FEC and made knowing and willful violations that involved \$2000 or more in a calendar year subject to both FEC civil enforcement and criminal prosecution by the Department of Justice as misdemeanor offenses. See DOJ MANUAL, *supra* note 1, at 107.

114. The DOJ Manual does not identify specific “aggravating factors” than make criminal prosecution appropriate for offenses that otherwise would be subject to civil enforcement, but it does state that “FECA violations will most likely warrant criminal prosecution where they involve schemes to influence a federal candidate’s election by making contributions that are patently illegal, through means calculated to conceal the scheme from the FEC and the public.” DOJ MANUAL, *supra* note 1, at 7. This explanation of when an offense should be prosecuted criminally is not entirely satisfying, however, as it would seem that any instance of making a contribution in the name of another, in violation of 2 U.S.C. § 441f, would meet this test. The DOJ Manual also states, “A campaign financing violation is generally prosecuted criminally only if it is a willful violation of a core provision of the FECA . . . , involved a substantial sum of money, and resulted in the reporting of false campaign information to the FEC.” *Id.* at 93. Again, this test is not as helpful as it might first appear—the only factor listed that represents a significant limitation on criminal prosecution is the “substantial sum of money” requirement. The DOJ Manual does not define what “substantial” means in this context, however. To confuse matters even more, the DOJ Manual also states, “If a campaign financing offense violates one of the core prohibitions of the FECA, and is willful, *aggravated in amount*, and concealed from the public, the Justice Department may pursue it as a conspiracy to defraud the United States, under 18 U.S.C. § 371, or as a false statement, under 18 U.S.C. § 1001—both felonies.” *Id.* at 13 (emphasis added). It is difficult to see how these policy statements provide any meaningful guidance notice as to when offenses will be prosecuted criminally, either as misdemeanors or as felonies.

115. *Id.*

116. *Id.* at 107.

117. *Id.* at 93.

118. *Id.* at 95.

knowing and willful violations of the FEC should be prosecuted criminally:

The Commission and the Department mutually recognize that all violations of the Federal Election Campaign Act and the antifraud provisions of Chapters 95 and 96 of the Internal Revenue Code, even those committed knowingly and willfully, may not be proper subjects for prosecution as crimes under 2 U.S.C. § 441[j] . . . .<sup>119</sup>

The problem, however, is not in the selection of violations that warrant criminal charges—it is with the manner in which the Department of Justice prosecutes those violations that are selected for criminal prosecution. Federal prosecutors often utilize other felony criminal provisions in Title 18 to avoid the misdemeanor penalties contained in 2 U.S.C. § 437g(d)(1)(A) and the shorter three-year statute of limitations that Congress specified for federal election law offenses.<sup>120</sup> In fact, the Public Integrity Section of the Criminal Division of the Department of Justice, which is responsible for overseeing prosecutions of election law offenses,<sup>121</sup> explicitly advances “Felony theories for FECA prosecutions” in its manual on Federal Prosecution of Election Offenses.<sup>122</sup> The focus of these alternative felony theories for election law prosecutions is 18 U.S.C. § 371, the federal conspiracy statute, often used in conjunction with 18 U.S.C. § 1001, the federal false statements statute.<sup>123</sup>

The Justice Department can invoke a number of federal criminal statutes to bring felony charges in campaign finance cases. Prosecutors charging individuals involved in illegal campaign contribution schemes can use a wide variety of felony federal criminal statutes including, but not limited to: false statements,<sup>124</sup> false entries in the books and records of a bank,<sup>125</sup> misapplication of bank funds,<sup>126</sup> money laundering,<sup>127</sup> bank fraud,<sup>128</sup> mail fraud,<sup>129</sup> and wire

119. 43 Fed. Reg. 5441 (1978); *see also* DOJ MANUAL, *supra* note 1, at 120.

120. Title 2 U.S.C. § 455(a) provides that “[n]o person shall be prosecuted, tried, or punished for any violation of subchapter I of this chapter, unless the indictment is found or the information is instituted within 3 years after the date of the violation.” 2 U.S.C. § 455(a) (1994). Most other offenses contained within the federal criminal code are subject to five-year statute of limitations except for certain specified violations involving financial institutions, which are subject to a ten-year statute of limitations.

121. *See* DOJ Manual, *supra* note 1, at 13. Local United States Attorneys’ Offices and Federal Bureau of Investigation field offices can conduct “preliminary investigations” of election law violations without consulting the Public Integrity Section. *Id.* at 14.

122. *See id.* at 108. It is noteworthy that the 1995 sixth edition of the DOJ Manual contains three pages of discussion of “Felony Theories for FECA Prosecutions,” while its predecessor, the 1988 fifth edition, contains only a little over one page on “Alternative Prosecutive Theories for FECA offenses.” *See* CRAIG C. DONATO, FEDERAL PROSECUTION OF ELECTION OFFENSES 75 (5th ed. 1988). The 1984 fourth edition contains no discussion of felony theories. *See* CRAIG C. DONATO, FEDERAL PROSECUTION OF ELECTION OFFENSES (4th ed. 1984). This increased focus on felony prosecution theories appears to reflect the DOJ’s steadily expanding efforts to pursue such theories in election law cases.

123. *See* DOJ Manual *supra* note 1, at 108; *see also infra* Subsection III.B.3 (discussing the use of false statements charges in election law cases).

124. *See* 18 U.S.C. § 1001 (1994).

125. *See* 18 U.S.C. §§ 1005-1006.

126. *See* 18 U.S.C. §§ 656-657.

127. *See* 18 U.S.C. § 1956(a)(1).

128. *See* 18 U.S.C. § 1344.

129. *See* 18 U.S.C. § 1341.

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fraud.<sup>130</sup> Prosecutors cannot charge these felony offenses in every election law case, however, because they require the government to prove additional elements<sup>131</sup> beyond the core conduct that constitutes an election law violation. But thanks in large measure to the federal courts' expansive interpretation of the federal conspiracy statute,<sup>132</sup> aggressive prosecutors can allege the elements of a conspiracy offense, by contrast, in almost any election law case.<sup>133</sup>

### *C. Analysis of Recent Election Law Conspiracy Decisions*

Consistent with Congressional intent in the 1948 amendments to the conspiracy statute, severe limitations should be imposed on its use in election law cases. Analysis of recent case law suggests that such limits are being imposed by judges and juries, but only implicitly and on a case-by-case basis, often by imposing high burdens of proof at trial. These limits are steps in the right direction, but they are inadequate to address the core problem of prosecutorial overreaching. Most cases are resolved by plea bargains before trial, and a defendant should not be forced to go through an expensive and wrenching legal process to defend against a charge that never should have been brought in the first place. Instead, Justice Department policy should preclude bringing felony conspiracy charges in garden variety conduit contribution cases, and courts should not hesitate to dismiss indictments that charge felony conspiracies in such cases.

Federal appellate courts have allowed felony conspiracy charges in campaign finance cases involving schemes to defraud the government that extended well beyond simple "garden variety" election law violations. These cases entailed such aggravating factors as the use of federally insured funds to make contributions, the laundering of the funds and, most important, the interference or obstruction of specific governmental functions other than campaign

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130. See 18 U.S.C. § 1343.

131. See generally JOEL ANDROPHY, WHITE COLLAR CRIME §§ 8.01, 10.05, 11.01[1], 11.02[2], 11.04[1], 21.04[2], 22.02 (1992) (explaining the elements of various white collar crimes).

For example, the elements of 18 U.S.C. § 1001 (false statements) are:

- (1) a false statement (which can be written or oral, sworn or unsworn, voluntary or required by law, signed or unsigned) or concealment by failure to fully disclose required information;
- (2) involving a matter within the jurisdiction of the executive, legislative, or judicial branch of the United States government;
- (3) that is material (judged by the capability of the statement to influence governmental activity); and
- (4) that is made knowingly and willfully (although the statement need not be made directly to the governmental entity and the defendant need not know of the governmental entity's jurisdiction).

See *id.* § 21.04[2].

132. See *supra* Section II.A.

133. Cf. DOJ MANUAL, *supra* note 1, at 109 (recognizing that charging election law cases under felony theories "requires proof of additional elements beyond those required by the FECA's misdemeanor provision").

expenditure reporting. Although these cases are markedly different and more egregious, federal prosecutors repeatedly rely on them to support their charging policies in garden variety conduit contribution cases. The government's position is misguided, the cases they rely upon are clearly distinguishable, and they should not be used to justify the pattern of charging simple election law cases as felony conspiracies.

1. *The seminal case: United States v. Hopkins.*

Despite the clear language of the misdemeanor offense clause of section 371, federal courts have permitted prosecutors to bring felony conspiracy charges based on election law violations in particularly egregious situations. In the seminal case of *United States v. Hopkins*,<sup>134</sup> the defendants, officers and directors of a federally insured savings and loan association, used their institution's funds to reimburse employees for contributions made to various political candidates and organizations. Instead of relying on the criminal provisions contained in section 437g(d) of the FECA to prosecute the illegal campaign contributions, the prosecutors charged the defendants with numerous felony counts of conspiracy, misapplication of thrift funds, false entries in the thrift's books and records, and knowingly and willfully causing another to conceal material facts from the FEC.<sup>135</sup> As these charges suggest, Hopkins involved more than simple conduit campaign contributions. The presence of conduct that interferes with governmental functions—here, federal regulation of financial institutions—arguably made a conspiracy to defraud the United States charge appropriate in Hopkins even though it clearly would not be appropriate in garden-variety election law violation cases that involve only conduit contributions or unlawful use of corporate funds to make contributions.<sup>136</sup>

The *Hopkins* court primarily focused its attention on whether the government had met its burden of proof on the conspiracy charge.<sup>137</sup> The court concluded that there was ample evidence to show that the defendants "knew that their conduct was illegal and unauthorized, and that they intended to interfere with the proper functioning of at least three federal agencies."<sup>138</sup> This evidence satisfied the court that "the Government adequately proved the necessary elements of the [conspiracy] offense charged under § 371."<sup>139</sup>

Exactly what kind of conspiracy the court was discussing is less clear,

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134. 916 F.2d 207 (5th Cir. 1990).

135. *See id.* at 211 nn.2-5.

136. *Cf. U.S. v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998) (refusing to dismiss a conspiracy charge when the allegations in the indictment included interference with the functions of the Immigration and Naturalization Service, as well as garden-variety election law violations), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

137. *See Hopkins*, 916 F.2d at 213.

138. *Id.*

139. *Id.* at 214.

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however. In a footnote, the court said, “[t]he Hopkins were not charged with violating the election laws or conspiring to violate them; they were charged, among other things, with conspiring to commit an offense under § 371.”<sup>140</sup> In the same footnote the court explained that “the evidence was sufficient to show that the Hopkins knew that corporations could not make political contributions, and that their scheme to disguise corporate contributions as individual contributions would interfere with the proper reporting of campaign contributions to the FEC. That evidence is sufficient to sustain their conviction under § 371.”<sup>141</sup>

As these quotations show, the court was not precise in its characterization of the section 371 conspiracy charge.<sup>142</sup> Contrary to the court’s assertion that the Hopkinses were charged with committing an offense against the United States under section 371,<sup>143</sup> the charging theory the court seems to have approved was conspiracy to defraud the United States by interfering with the proper functioning of the FEC and other federal agencies.<sup>144</sup> The *Hopkins* court probably saw no need to distinguish between the defraud clause and the offense clause in its review of the conspiracy charge because the law was well-settled that a violation of both prongs of the conspiracy statute could be charged in a single count of an indictment.<sup>145</sup>

After approving the felony conspiracy charges, the *Hopkins* court turned its attention to the question of whether the “defendants should have been prosecuted only under the federal election laws (which create only misdemeanors),” and not under the felony provisions of the federal criminal code.<sup>146</sup> The court

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140. *Id.* at 214 n.7.

141. *Id.*

142. *See id.* at 213 (“Having presented ample proof of an agreement between the defendants, the next question is whether the Government also satisfactorily proved the *defendants’ intent to commit an offense against, or defraud the United States.*”) (emphasis added).

143. The court discusses the conspiracy charge in a section of the opinion that follows the heading “Conspiracy to Commit an Offense Against the United States,” but in the first sentence of that discussion describes Count 1 of the indictments as charging the defendants with “conspiracy to defraud or commit an offense against the United States.” *Id.* at 212.

144. *See id.* at 213. Other courts have been more precise in analyzing the purpose of the conspiratorial agreement. *See, e.g.,* *United States v. Haga*, 821 F.2d 1036, 1038 (5th Cir. 1987) (reversing conspiracy conviction where the indictment charged a violation of the offense clause (only) and the district court’s conclusions of law found a violation of the defraud clause); *United States v. Rosenblatt*, 554 F.2d 36, 42 (2d Cir. 1977) (holding that the government must prove agreement between the alleged co-conspirators “with respect to the essential nature of the alleged fraud” because “just as the particular offense must be specified under the ‘offense’ branch . . . the fraudulent scheme must be alleged and proved under the conspiracy-to-defraud clause”).

145. *See United States v. Smith*, 891 F.2d 703, 712-13 (9th Cir. 1989) (collecting cases and holding that charging violations of both clauses of the conspiracy statute in a single count is not duplicitous); *see also May v. United States*, 175 F.2d 994, 1002 (D.C. Cir. 1949) (ruling that the conspiracy statute creates a single offense). The fact that charging violations of both clauses of the conspiracy statute in a single count is not duplicitous does not, however, mean that a felony conspiracy to defraud charge should be permitted when the underlying conduct is a misdemeanor offense and there is no evidence that the object of the conspiracy was to obstruct or impede governmental functions. This distinction is discussed in greater detail below.

146. *See Hopkins*, 916 F.2d at 218-19.

dismissed this argument as “meritless” because “[i]t is well settled that ‘when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.’”<sup>147</sup> The court recognized that an exception to this rule applies where Congress clearly intended that one statute supplant another, although the mere fact that one statute is more specific than the other is not sufficient to invoke that exception.<sup>148</sup> Focusing on the federal election laws, the *Hopkins* court concluded that there is no indication that Congress intended that those laws should supplant the general federal criminal statutes in Title 18.<sup>149</sup>

Although this conclusion is correct with respect to the effect of the passage of the federal election laws on the general provisions of the federal criminal code, in focusing on the intent of Congress when enacting the federal election laws the *Hopkins* court failed to consider the intent of Congress in amending the federal conspiracy statute in 1948.<sup>150</sup> For the reasons discussed in Part II, the legislative history of the 1948 amendments indicates that Congress intended to curtail the practice of prosecutors using the conspiracy statute to punish conduct that constitutes a misdemeanor offense under other federal statutes.<sup>151</sup> The *Hopkins* opinion does not address the significance of the 1948 amendment to the conspiracy statute, and most courts that have reviewed conspiracy charges in election law cases since *Hopkins* also have failed to do so.<sup>152</sup>

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147. *Id.* at 218 (quoting *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)).

148. *See id.* (citing *United States v. Zabel*, 702 F.2d 704, 707-08 (8th Cir. 1983)).

149. *See id.* at 218.

150. This is not to suggest that *Hopkins* was wrongly decided. Although the opinion’s analysis of the conspiracy charge does not clearly distinguish between a conspiracy to defraud the United States and a conspiracy to commit an offense against the United States, the court seems to have been approving the former based upon the facts before the court. Those facts demonstrated that officials of a federally regulated savings and loan institution engaged in activities that had the effect of impairing and impeding the activities of at least three federal regulatory agencies, including the FEC. *See id.* at 213. The *Hopkins* court concluded that a rational jury could well have inferred from the evidence that the defendants intended to interfere with the proper functioning of two federal savings and loan regulatory agencies. *See id.* at 214. This evidence may well have been sufficient to support a charge of conspiracy to defraud the United States by impairing or impeding lawful government functions. *Hopkins* should not, however, be read to stand for the proposition that a case involving nothing more than garden-variety election law violations, such as reimbursements of political contributions or the use of corporate funds to make political contributions, will always support a defraud clause felony conspiracy charge. *Cf. United States v. Hsia*, 24 F. Supp. 2d 33, 53 (D.D.C. 1998) (refusing to dismiss a conspiracy charge when the allegations in the indictment included interference with the functions of the Immigration and Naturalization Service, as well as garden-variety election law violations), *rev’d on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). Unfortunately, the Department of Justice does just that when it relies on *Hopkins* to support conspiracy charges in garden-variety conduit contribution cases.

151. *See supra* Section II.C.

152. One federal court has criticized another aspect of the *Hopkins* court’s analysis. In *United States v. Nichols*, Criminal No. 98-642 (C.D. Cal. Dec. 7, 1988), the court disagreed with “the passage in *Hopkins* stating that ‘[t]he jury was entitled to infer from the defendants’ elaborate scheme for disguising their corporate contributions that the defendants deliberately conveyed information they knew to be false to the [FEC].’” The *Nichols* court set a higher bar for conduct that would support a felony false statements charge: “Although the Defendants’ ‘elaborate scheme’ certainly suggests that they knew their conduct was generally improper, that conduct is insufficient in itself to establish that the Defendants were sufficiently versed in the minutia of FECA regulations so as to understand that the treasurers’ re-

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The result has been a failure to scrutinize closely the Department of Justice's use of the *Hopkins* precedent to support conspiracy to defraud the United States charges in more mundane conduit contribution cases – a use that appears contrary to the legislative intent of the 1948 amendments.

### 2. *The Neglected Case: United States v. Minarik.*

Just before the *Hopkins* appeal was decided, another federal appeals court considered the issue of whether prosecutors should be permitted to bring felony conspiracy charges based on conduct that otherwise would constitute a misdemeanor offense in the context of the federal tax laws. *United States v. Minarik*<sup>153</sup> involved charges brought under the defraud clause of the conspiracy statute.<sup>154</sup> The defendants were charged with conspiring to defraud the United States by concealing assets from the Internal Revenue Service after receiving notice of assessment for taxes owed.<sup>155</sup> The *Minarik* court undertook a detailed analysis of the defraud clause<sup>156</sup> but commenced its analysis with the premise that the “stingy” legislative history of the clause would not provide any guidance on the scope of the statute.<sup>157</sup> Thus the *Minarik* court, like the *Hopkins* court a few months later, did not consider the legislative intent of the 1948 amendments that added the misdemeanor offense clause to the statute.

Although it did not explicitly discuss the 1948 amendments, the *Minarik* court did recognize the potential for misuse of the conspiracy statute if a prosecutor ignores the misdemeanor offense clause and instead proceeds under the felony defraud clause so as to obtain a felony conviction:

[I]f conspiracy agreements the object of which fall under a specific offense defined by Congress are allowed to be prosecuted under the “defraud” clause, the purpose of the misdemeanor offense provision of § 371 will be defeated. That provision says that when the “offense . . . which is the object of the conspiracy” is a misdemeanor, the punishment under § 371 must be limited to the punishment provided for the misdemeanor. Congressional intent will be defeated if the government can prosecute under the defraud clause conduct which Congress has isolated and defined as a misdemeanor.<sup>158</sup>

While this warning was well-reasoned and in accordance with the intent of Congress when it amended the statute in 1948, it nonetheless suffered from two shortcomings. First, it was not supported by any citations to the legislative

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ports were literally false.” *United States v. Nichols*, Criminal No. 98-642, Opinion of Dec. 7, 1998 at 6 n. 5 (C.D. Cal.). Cf. *Hsia*, 24 F. Supp. 2d at 63 (dismissing false statements charges because of “[t]he remoteness of [the defendant’s] position in relation to the FEC, the case law with respect to ‘literal truth,’ the fact that a check is not a statement, and the willful intent hurdle”).

153. 875 F.2d 1186 (6th Cir. 1989).

154. *See id.* at 1186.

155. *See id.* at 1187.

156. *See id.* at 1190-94.

157. *See id.* at 1190 (citing *Tanner v. United States*, 483 U.S. 107, 131 (1987)).

158. *Id.* at 1194.

history of the 1948 amendments, even though the Revisers' Notes support the court's analysis.<sup>159</sup> Second, the *Minarik* court's conclusion that the felony defraud clause should not be used to punish a conspiracy to commit a misdemeanor was mere dictum.<sup>160</sup>

The *Minarik* court's analysis went well beyond the import of the misdemeanor offense clause of the conspiracy statute. Focusing on the inherent ambiguity of the defraud clause, the court argued that the judiciary has a responsibility to prevent that clause from expanding to the point that it "obliterat[es] the carefully drawn relationship between [the statute's] two clauses."<sup>161</sup> Applying this precept to the facts before it, the court held that in an area where the law is as "technical and difficult to discern" as compliance with tax law, the existence of "a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause."<sup>162</sup>

This conclusion, placing a restriction on the scope of the defraud clause, is at odds with the reasoning of the *Hopkins* court. The permissive *Hopkins* approach has attracted the greater following, however. Although *Minarik* has not been reversed, it certainly has not been embraced, even in its own circuit.<sup>163</sup> Following the lead of *Hopkins*, most courts that have reviewed prosecutors' use of the conspiracy statute to bring felony charges in cases involving election law violations have accepted the Department of Justice's "felony theories for FECA prosecutions."<sup>164</sup> That is not to say, however, that the government's efforts to apply these theories has been uniformly successful. The small body of case law that has developed since *Hopkins* reflects a growing consensus that the existence of election law offenses alone is not sufficient to support a felony conspiracy charge and that additional elements must be alleged and proved by the prosecution to support such charges. As the discussion of the case law that follows demonstrates, if the government fails to supply these additional elements of proof, the defendants are likely to be acquitted or the conviction overturned on appeal. This may reflect the beginning of a modern trend away from permitting prosecutors to overcharge using the conspiracy statute and could, if it continues, curtail prosecutorial misuse of the conspiracy statute in election law cases.

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159. See *supra* Section II.C.

160. In *Minarik* the specific offense that the defendants could have been charged with committing was concealment of assets in violation of 26 U.S.C. § 7206(4), which by its terms is a felony offense. See *Minarik*, 875 F.2d at 1187.

161. *Id.* at 1193. Cf. Goldstein, *supra* note 16, at 408.

162. *Minarik*, 875 F.2d at 1196.

163. See, e.g., *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991) (collecting cases in the Sixth Circuit and elsewhere that have limited *Minarik* to its facts).

164. See DOJ MANUAL, *supra* note 1, at 108.

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### 3. Cases since *Hopkins and Minarik*.

*United States v. Curran*<sup>165</sup> is a classic example of a case where the government charged conduct squarely covered by the misdemeanor election laws as felony conspiracy and false statements offenses.<sup>166</sup> The defendant, Curran, was charged with reimbursing his employees for campaign contributions to federal candidates that he supported.<sup>167</sup> Rather than charging Curran with election law offenses, however, the government charged him with causing the candidates' campaign treasurer to submit false reports to the FEC, in violation of 18 U.S.C. §§ 2(b) and 1001,<sup>168</sup> and with conspiracy to defraud the United States by impeding the FEC's performance "through obstruction and interference with the Commission's reporting requirements, and by causing fictitious statements to be made on reports required to be sent to the Commission."<sup>169</sup>

A jury found the defendant guilty on both the felony conspiracy and false statements counts, and he appealed to the United States Court of Appeals for the Third Circuit.<sup>170</sup> The Third Circuit vacated the conviction and remanded the case for a new trial because the jury charge on the false statements count—that the defendant had a legal duty to disclose to the FTC the name of the actual contributors—"was a clear error of law."<sup>171</sup> The Third Circuit held that with respect to the false statements count, the government had the burden of proving that defendant was aware that the campaign treasurers were bound by the law to accurately report the actual source of the contributions to the Commission, that the defendant's actions were taken with the specific intent to cause the treasurers to submit a report that did not accurately provide the relevant information, and that the defendant knew that his actions were unlawful.<sup>172</sup>

With respect to conspiracy to defraud the United States, however, the Third Circuit did not question or criticize the charging theory; it merely noted that the charging error on the defendant's legal duty to disclose "undermined not only the substantive counts, but the conspiracy one as well."<sup>173</sup> The Department of Justice thus cites the opinion as implicitly approving the government's felony

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165. 20 F.3d 560 (3d Cir. 1994).

166. Unlike *Hopkins*, however, *Curran* involved no allegations of other substantive federal felony offenses. Cf. *United States v. Hsia*, 24 F. Supp. 2d 33, 53 (D.D.C. 1998) (refusing to dismiss a conspiracy charge when the allegations in the indictment included interference with the functions of the Immigration and Naturalization Service, as well as garden-variety election law violations), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

167. See *Curran*, 20 F.3d at 562-63. This conflict fits precisely the offenses specified by Congress for contributions in the name of another, as well as exceeding contribution limits and use of corporate funds, if corporate funds are used to reimburse an employee. See 2 U.S.C. §§ 441a, 441b, 441f (1994).

168. 20 F.3d at 563.

169. *Id.* at 571.

170. See *id.* at 563.

171. *Id.* at 570.

172. *Id.* at 570-71.

173. *Id.* at 571.

conspiracy charging theory.<sup>174</sup>

The Third Circuit acknowledged that the defendant's conduct "could have established the basis for misdemeanor convictions under the [Federal] Election Campaign Act," but candidly acknowledged that the government instead pursued felony charges "[b]ecause the Act's [three year] statute of limitations had expired."<sup>175</sup> Relying in large measure on *Hopkins*, the appeals court rejected the defendant's argument that "because it targets specific conduct, the [Federal] Election Campaign Act supersedes the more general criminal provisions of Title 18."<sup>176</sup> The court did, however, concede that this argument "has a certain logic and sense of fairness to it in view of the fact that the Federal Election Campaign Act was designed to prevent the underlying conduct that makes the defendant vulnerable in this case."<sup>177</sup>

Logic and fairness did not prevail, however. The court focused on the false statements charge and reviewed both the legislative history of the FECA and case law involving the use of the false statements statute where other specific federal statutes also applied to the conduct at issue. The court concluded that because there was no "express evidence" that the election laws were "intended to preempt the general criminal provisions under 18 U.S.C. §§ 2(b), 371, or 1001," the government was free to pursue the felony charges even though Congress had enacted misdemeanor offenses that applied to the conduct at issue.<sup>178</sup>

Even though the *Curran* court approved the prosecution's felony prosecution theories, it placed a heavy burden on felony charge prosecution in a campaign contributions case. The court began its analysis of the false statements charge by observing that "[section 1001] proscribes two different types of conduct: concealment of material facts and false representations."<sup>179</sup> To convict on a concealment theory the prosecution must prove that a defendant had a legal duty to disclose the information in question at the time of the alleged concealment.<sup>180</sup> The court concluded that the defendant could not be guilty of concealment under section 1001 because he had no duty to disclose information to the FEC—that duty rests with the campaigns that receive contributions.<sup>181</sup>

Having disposed of the concealment theory, the court turned to the question

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174. See DOJ MANUAL, *supra* note 1, at 93.

175. *Curran*, 20 F.3d at 566.

176. *Id.* at 565.

177. *Id.* Arguably the court's analysis addressed only half the question, however. Even if the court is correct on the FECA preemption point, there is ample evidence that Congress did not intend for the felony provisions of Section 371 to be used when the underlying conduct is a conspiracy to commit a misdemeanor offense. In fact, as the legislative history suggests, the Revisers' Notes suggest that the 1948 amendment to Section 371 was intended to avoid just that result. See *supra* Section II.C.

178. *Curran*, 20 F.3d at 566.

179. *Id.*

180. See *id.*

181. See *id.* at 567.

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of whether the defendant could be convicted of making a false statement. The difficulty faced by the government under a false statements theory of prosecution was that the defendant did not prepare or file any reports with the FEC; again, it is the campaign, not the contributor, that files reports with the FEC.<sup>182</sup> The government attempted to “bridge that gap” by using 18 U.S.C. § 2(b)<sup>183</sup> to charge the defendant with deliberately causing another person to perform an act (the filing of inaccurate reports with the FEC) that violated section 1001.<sup>184</sup> This theory prompted the court to analyze the application of the intent requirement of section 2(b) in a false statements charge under section 1001.

The court first recognized that a defendant charged with causing another to file a false report with a federal agency “can be convicted even if the intermediary was unaware that the report was false.”<sup>185</sup> The focus in such cases is on the mental state of the accused, not the mental state of the intermediary who filed the report. Here, the court explained, the prosecution faces a heavy burden:

When proceeding under section 2(b) in tandem with section 1001, the government must prove that a defendant caused the intermediary to make false statements. The intent element differs from that needed when the prosecution proceeds directly under section 1001. The prosecution must not only show that a defendant had the requisite intent under section 1001 (deliberate action with knowledge that the statements were not true), but must also prove that he “willfully” caused the false representations to be made.<sup>186</sup>

The critical question is what constitutes “willfulness” in that context. A recent Supreme Court decision provided the *Curran* court with the answer to that question.

In *Ratzlaf v. United States*<sup>187</sup> the Supreme Court held that to obtain a criminal conviction of a defendant for a willful violation of the anti-structuring<sup>188</sup> provisions of the Money Laundering Control Act<sup>189</sup> the government must

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182. See *id.* at 567.

183. Section 2(b) provides that “[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” 18 U.S.C. § 2(b) (1994).

184. *Curran*, 20 F.3d at 567.

185. *Id.* at 567 (citing *United States v. American Investors of Pittsburgh*, 879 F.2d 1087, 1097 (3d Cir. 1989)).

186. *Id.* at 567-68.

187. 510 U.S. 135 (1994).

188. The government argued that structuring was not the kind of activity that an ordinary person would engage in innocently and that it was therefore reasonable to hold a structurer responsible for evading the reporting requirements without the need to prove specific knowledge that such evasion is unlawful. In response to that argument the Court stated that “currency structuring is not inevitably nefarious. . . . Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark.” *Id.* at 144-45. The Court went on to say that “we are unpersuaded by the argument that structuring is so obviously ‘evil’ or inherently ‘bad’ that the ‘willfulness’ requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring. Had Congress wished to dispense with the requirement, it could have furnished the appropriate instruction.” *Id.* at 146.

189. See 31 U.S.C. §§ 5322(a), 5324 (1994).

prove that defendant knew that the structuring activity in which he engaged was unlawful.<sup>190</sup> In other words, it is not sufficient to show that a defendant structured transactions and did so with knowledge of, and a purpose to avoid, the banks' reporting requirement.<sup>191</sup> The prosecution must also prove that the defendant knew his conduct was unlawful. It was this heavy burden<sup>192</sup> that the *Curran* court applied to the false statements charge, concluding that "[a]lthough the defendant in *Ratzlaf* was not charged with violations of sections 2(b) and 1001, we find nothing in the Court's discussion of willfulness that would confine the rationale to the currency reporting statute."<sup>193</sup>

The rationale in *Ratzlaf* was that the practice of structuring cash deposits "is not inevitably nefarious,"<sup>194</sup> and the *Curran* court reached the same conclusion about making political contributions in the name of another. The *Curran* court based this conclusion on three similarities between structuring offenses and election law offenses: (1) both involve the defendant's knowledge of a third party's duty to disclose information to a government agency; (2) both involve underlying conduct that is not "obviously 'evil' or inherently 'bad'",<sup>195</sup> and (3) both involved conduct made illegal by a regulatory statute.<sup>196</sup> These similarities led the *Curran* court to apply the *Ratzlaf* rationale and hold that in felony false statements cases based on election law reporting offenses, the prosecution must prove that the defendant "knew of the campaign treasurer's reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful."<sup>197</sup> As the *Ratzlaf* dissent observed with respect to the structuring offenses at issue in that case, by requiring proof of actual knowledge of illegality, this burden as a practical matter makes felony false statements prosecutions for election law offenses difficult.<sup>198</sup>

The *Curran* holding is consistent with an earlier, unreported decision,

190. See *Ratzlaf*, 510 U.S. at 149.

191. See *id.* at 140.

192. The dissent in *Ratzlaf* emphasized the difficulty of the burden the decision places on prosecutors, observing that "as a practical matter [the decision] largely nullifies the effect of the [antistructuring] provision," because "requiring proof of actual knowledge of illegality will make prosecution for structuring difficult or impossible in most cases." *Id.* at 161-162 (Blackmun, J., dissenting). This is the burden the *Curran* court placed on prosecutors who seek felony false statements charges in election law cases.

193. *United States v. Curran*, 20 F.3d 560, 568 (3rd Cir. 1994).

194. *Ratzlaf*, 510 U.S. at 144. Cf. *United States v. Minarik*, 875 F.2d 1186, 1196 (6th Cir. 1989) (holding that in an area where the law is as "technical and difficult to discern" as compliance with tax law, the existence of "a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause").

195. *Curran*, 20 F.3d at 569. The *Curran* court added: "We see little difference between breaking a cash transaction into segments of less than \$10,000 and making a contribution in the name of another." *Id.*

196. See *id.*

197. *Id.*

198. See *supra* note 194. Cf. DOJ MANUAL, *supra* note 1, at 109 ("Proving these additional elements may be difficult in campaign financing cases.").

## Prosecutorial Misuse of the Federal Conspiracy Statute

*United States v. Mandarich*,<sup>199</sup> a 1992 case involving felony conspiracy charges based on FECA violations. In 1992, Judge Richard P. Matsch dismissed a conspiracy and false statements case<sup>200</sup> at the conclusion of the prosecution's presentation of evidence,<sup>201</sup> before the defense even had presented its case, because the government failed to present evidence of a sufficient level of intent on the part of the defendant.<sup>202</sup> Judge Matsch explained to the jury that he was dismissing the case against the defendant, despite evidence presented by the government proving that contributions to federal candidates were reimbursed with corporate funds<sup>203</sup> and evidence supporting an inference that the defendant "knew that reimbursements were being made for these contributions."<sup>204</sup> After reviewing all the evidence presented by the prosecution, Judge Matsch concluded that the evidence was legally insufficient to prove that the defendant acted with the intent to obstruct or impede the operations of the FEC or to cause the campaigns to file false reports with the FEC.<sup>205</sup> Based upon that

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199. No. 91-CR-243 (D. Colo. 1991).

200. Indictment, *United States v. Mandarich*, (No. 91-CR-243) (D. Colo. 1991). The conspiracy to defraud count (count 1) charged that David Mandarich, as the president of M.D.C. Holdings, Inc., conspired with others to defraud the United States and the Federal Election Commission by impeding, impairing and obstructing the lawful governmental functions of the commission in administering and seeking to obtain compliance with the provisions of the Federal Election Campaign Act of 1971, as amended. *See id.* at 1-2. The conspiracy to defraud was accomplished by reimbursing employees who made contributions to candidates for federal office and to those candidates' authorized committees. These employees were promised reimbursement for their contributions. *See id.* at 3-7. Due to Mandarich's acts, the authorized committees of the candidates and the Democratic National Committee prepared reports that were false in that they stated that persons (named in the indictment, pages 3-5) had made contributions. *See id.* at 6. Those incorrect reports were transmitted to the Secretary of the Senate and the Federal Election Commission. *See id.* at 7.

The false statements counts (indictment counts 2-5) charge that Mandarich knowingly and willfully falsified, concealed, and covered up and caused to be falsified, concealed, and covered up by trick, scheme, and device the material fact that Wood Bros. Homes, Inc. made contributions to "Ken Kramer '86,'" and the Hart committees; that Richard Homes Limited made contributions to the Hart committees, the "DNC Victory Fund Federal Account," and "Hank Brown for U.S. Senate;" and that Richmond American Homes of Colorado, Inc. made a contribution to "Hank Brown for U.S. Senate" (the names of the owners, officers, and employees as well as the contribution amounts are reported in the indictment at 7, 9-10, 11, 13). *See id.* at 7-13.

201. The court orally granted the defendant's motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. *See* Trial to Jury—Day 5, Transcript of Proceedings at 2-3, *United States v. Mandarich*, No. 91-CR-243 (D. Colo. 1992).

202. *See id.* at 16-19.

203. *See id.* at 6.

204. *Id.* at 7. Judge Matsch emphasized to the jury that the defendant had denied knowledge of the reimbursements through his plea of not guilty. *See id.*

205. *See id.* at 18-19. Judge Matsch reached this result after taking into account the holding of the Supreme Court in the *Yermian* case. *See United States v. Yermian*, 468 U.S. 63, 68 (1984) (holding that the statute's plain language and its legislative history show that proof of actual knowledge of federal agency jurisdiction is not required to obtain a conviction for making a false statement within the jurisdiction of a federal agency).

The *Yermian* Court analyzed the relevant language of § 1001 (as it read it at that time). "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully...makes any false, fictitious, or fraudulent statements or representations . . . shall be fined . . ." *Id.* (quoting 18 U.S.C. § 1001). The Court concluded that:

The statutory language requiring that knowingly false statements be made "in any matter

conclusion, Judge Matsch entered a judgment of acquittal for the defendant.<sup>206</sup>

The difficulties prosecutors face when pursuing felony charges based on FECA violations are not limited to close scrutiny by careful trial judges, such as Judge Matsch, and appellate courts such as the Third Circuit panel that decided *Curran*. Juries also appear to be less likely to accept the argument that violations of federal election laws support felony conspiracy charges. In *United States v. Goland*,<sup>207</sup> the defendant, a political operative, engaged in a scheme to finance a television commercial for a candidate, which actually was intended to benefit a different candidate, without disclosing the source of funds that paid for the commercial. After an initial mistrial, a second jury acquitted Goland on the first count of a multi-count indictment, which charged him with conspiracy to defraud the United States by impairing and impeding the lawful function of the FEC and conspiracy to knowingly cause the filing of false campaign finance statements with the FEC in violation of 18 U.S.C. § 1001.<sup>208</sup> Goland was also acquitted of two counts of causing campaign committees to file false reports, while the jury hung on a third count of the same offense.<sup>209</sup> The jury found Goland guilty on only a single count of willfully making an excessive campaign contribution, a misdemeanor.<sup>210</sup> The acquittal on the felony charges demonstrates the burden prosecutors face when they bring felony conspiracy charges based on technical election law violations.

The government suffered an even more dramatic loss in the only case brought by the Department of Justice's Campaign Financing Task Force that has gone to trial at the time of this writing. In *United States v. Haney*,<sup>211</sup> the government brought a 42-count criminal indictment against Tennessee real estate developer Franklin L. Haney. The indictment charged that Haney had

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within the jurisdiction of any department or agency..." is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern.... Certainly in this case, the statutory language makes clear that Congress did not intend the terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element of § 1001. The jurisdictional language appears in a phrase separate from the prohibited conduct modified by the terms "knowingly and willfully." Any natural reading of § 1001, therefore, establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements" and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency. *Id.* at 68-69.

In *Mandarich* Judge Matsch concluded that the words "knowingly and willfully falsify, conceal, or cover up by any trick scheme or device" in § 1001 were the "critical words" in his legal analysis of the case. Trial to Jury—Day 5, Transcript of Proceedings at 16, *United States v. Mandarich*, No. 91-CR-243 (D. Colo. 1992). Judge Matsch's analysis anticipated the holding of the Third Circuit in *Curran* the following year.

206. See Trial to Jury—Day 5, Transcript of Proceedings at 23. *United States v. Mandarich*, No. 91-CR-243 (D. Colo. 1992).

207. 959 F.2d 1449 (9th Cir. 1992).

208. See *id.* at 1451.

209. See *id.*

210. See *id.*

211. See Indictment, *United States v. Haney*, No. 98-0383 (RWR) (D.D.C. filed Nov. 4, 1998).

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made “conduit” campaign contributions to various federal candidates through his family, his employees, and friends and family of his employees. Count 1 of the indictment charged Haney with conspiring to defraud the United States by impairing and impeding the functions of the FEC, conspiring to cause others (campaign treasurers) to file false statements with the FEC, conspiring to violate the FECA prohibitions on contributions in the name of another and contributions in excess of the \$1,000 individual contribution limit.<sup>212</sup>

In this manner, the Department of Justice Campaign Financing Task Force used all of its “big guns”—the “felony theories for FECA prosecutions” outlined in the Department’s manual on “Federal Prosecution of Election Offenses”<sup>213</sup>—on a high-profile defendant in an election law violation case. Much like the *Curran* case, in *Haney* the defendant’s conduct “could have established the basis for misdemeanor violations under the [Federal] Election Campaign Act,” but the government instead pursued felony charges because for some of the contribution at issue that “Act’s [three year] statute of limitations had expired. . . .”<sup>214</sup> In June 1999, after a nine-day trial with six days of testimony, the jury acquitted Haney of all 42 counts in the indictment.<sup>215</sup>

The acquittal in *United States v. Haney* is noteworthy for two reasons. First, unlike *Goland*, in *Haney* the jury acquitted the defendant of both the felony charges and the misdemeanor FECA charges. Second, and most significant to the question of whether the government should continue to pursue its “felony theories for FECA prosecutions,” the use of the conspiracy charge cost the government its case. According to the foreperson of the jury, the jury decided to acquit on all charges because the government was unable to prove the conspiracy charge in count 1 of the indictment. In an interview immediately after the trial, the jury foreperson told a reporter that in the jury’s “thinking, the controlling charge was the conspiracy charge . . . so if you did not have a conspiracy, all these [other] charges fell by the wayside.”<sup>216</sup> This suggests that the tactical advantages and enhanced penalties that prosecutors obtain by using the conspiracy statute in election law cases may come at a high price in obtaining convictions.

The *Haney* case adds a new element to a prosecutor’s analysis of whether or not to try to obtain a felony conspiracy conviction in an election law case. In addition to the inherent difficulties the prosecution faces in proving felony conspiracy and false statements charges,<sup>217</sup> those charges may “infect” the (pre-

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212. *See id.*

213. DOJ MANUAL, *supra* note 1, at 108.

214. *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994).

215. *See Andy Sher, Developer Haney Acquitted on All 42 Charges; Jury Focused on Conspiracy Count, Foreman Says*, CHATTANOOGA TIMES, July 2, 1999, at A1.

216. *Id.*

217. The Department of Justice has explicitly recognized these difficulties. “Proving these additional elements may be difficult in campaign financing cases.” DOJ MANUAL, *supra* note 1, at 109.

sumably more easily proven) misdemeanor charges and cause the government to lose its entire case. Thus, the post-*Hopkins* judicial scrutiny of felony charges in election law cases, coupled with possible juror skepticism of those charges, suggest that as a strategic matter prosecutors should hesitate before bringing such charges in garden-variety election law cases.<sup>218</sup>

#### 4. *Making Sense of the Cases*

Because of the admittedly egregious nature of the underlying conduct in *Hopkins*, the holding in that case does not necessarily legitimate felony conspiracy prosecution of misdemeanors in all instances. Cases since *Hopkins* have demonstrated a marked reluctance on the part of juries and trial judges to convict—*Haney, Goland, and Mandarich*—or uphold convictions—*Curran*—for felony conspiracy charges where the evidence establishes only violations of the technical provisions of the FECA. Read together, these cases suggest that, contrary to a broad reading of *Hopkins*, evidence of an FECA violation alone is not sufficient to support a felony conspiracy charge.

This analysis of election law cases is also consistent with a decision by the United States Court of Appeals for the Ninth Circuit in *United States v. Licciardi*,<sup>219</sup> an appellate decision analyzing federal conspiracy charges that were predicated on alleged violations of another regulatory reporting requirement—wine-labeling reports required by the Bureau of Alcohol, Tobacco and Firearms (BATF).

In *Licciardi* the defendant caused inaccurate field tags to be placed on shipments of grapes, which permitted him to obtain a higher price for grapes he sold to a winery but also caused the winery to file inaccurate reports with the BATF.<sup>220</sup> Focusing on the mens rea element required for a conspiracy conviction, the court observed that for a century it has been settled law that to convict for conspiracy the government must prove at least the degree of criminal intent necessary for the substantive offense itself.<sup>221</sup> The court concluded that under “this consistent construction” of the conspiracy statute, the government had failed to prove its conspiracy case against Licciardi.<sup>222</sup>

The court began its analysis of the conspiracy charge by noting that “[i]f all the government had to prove was that Licciardi had used dishonest means and that these means had the effect of impairing a function of the BATF, the gov-

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218. *But see* *United States v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998) (refusing to dismiss a conspiracy charge when the allegations in the indictment included interference with the functions of the Immigration and Naturalization Service, as well as garden-variety election law violations), *rev'd on other grounds* 176 F.3d 517 (D.C. Cir. 1999).

219. 30 F.3d 1127 (9th Cir. 1994).

220. *See id.* at 1129.

221. *See id.* at 1131 (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893), and *United States v. Feola*, 420 U.S. 671, 686 (1975)).

222. *Licciardi*, 30 F.3d at 1132.

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ernment would easily have prevailed.”<sup>223</sup> In the view of the Ninth Circuit, that showing was not sufficient to support the conspiracy charge, however, because the mere fact “[t]hat the incidental effects of [his] actions would have been to impair the functions of the BATF does not confer upon him the mens rea of accomplishing that object.”<sup>224</sup> The court concluded that the conspiracy to defraud charge based on the BATF reports was fatally flawed, but Licciardi’s conspiracy conviction was not reversed because the court found evidence sufficient to support a second object of the charged conspiracy — obtaining money from the winery by fraudulent representations in violation of 18 U.S.C. § 1341, the federal mail fraud statute.<sup>225</sup> Licciardi’s use of the mails in connection with his scheme left him vulnerable to this charge.

The *Licciardi* court expressed considerable disquiet with efforts by prosecutors to “recurrently push to expand the limits” of the federal conspiracy statute.<sup>226</sup> The court found it “instructive” that on prior occasions the Supreme Court has “rebuffed a prosecutor’s imaginative and unjustified expansion of the statute.”<sup>227</sup> In Licciardi’s case the Ninth Circuit concluded that “a regulatory scheme, which does not have criminal penalties attached to it, has been converted by the government’s theory into a system whose violation by commercial cheating is subject to the severe felony penalties of the conspiracy law.”<sup>228</sup> The Ninth Circuit’s rejection of that theory is, to use the court’s word, “instructive” in the federal election laws context, where prosecutors have sought to use the conspiracy statute to convert a carefully crafted statutory scheme, in which Congress explicitly provided that knowing and willful offenses should be punished as misdemeanors, into a system in which violations are subject to severe felony punishment. The recent election law cases demonstrate that, consistent with the Ninth Circuit’s analysis of the conspiracy charge in *Licciardi*, more than a violation of regulatory requirements should be required to support a conspiracy conviction.

The one conceivable rationale for punishing conspiracies more severely than underlying criminal conduct is the “group danger” theory discussed in a 1959 article in the *Harvard Law Review*.<sup>229</sup> The article observed that it is within the prerogative of the legislature to punish group behavior more harshly than individual behavior of the same nature: “Although severely punishing a group for agreeing to commit what would be at most a misdemeanor . . . seems incongruous, conduct legislatively declared a misdemeanor is by definition an-

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223. *Id.* at 1131.

224. *Id.* at 1132.

225. *See id.* at 1133.

226. *Id.* at 1133.

227. *Id.* (citing *Hammerschmidt v. United States*, 265 U.S. 182 (1923); *Pettibone v. United States*, 148 U.S. 197 (1893); and *Tanner v. United States*, 483 U.S. 107 (1987)).

228. *Id.* at 1133.

229. *See Criminal Conspiracy*, 72 HARV. L. REV. 920, 941 (1959).

tisocial . . . [and] when a group intends such conduct, antisocial effects greater than those envisaged by the legislature [in cases involving individual action] may result, and the effectiveness of normal social inhibiting pressures is lessened.”<sup>230</sup> This concern with “group danger” is not present, however, when the legislature has considered the issue and decided that conspiracies to commit misdemeanors should be punished as misdemeanors, as Part II demonstrates was the case with the 1948 amendments to the federal conspiracy statute. Moreover, Congress implicitly addressed the “group danger” issue when it amended the federal election laws in 1976. At that time Congress decided to impose only misdemeanor punishment for those election law violations, such as contributions in the name of another<sup>231</sup> and contributions with corporate funds,<sup>232</sup> that by necessity require more than one person. In fact, a “conduit contribution” is a paradigmatic example of a “group” crime—in such cases a person will provide funds to several “straw donors” or “conduits” who then make contributions in their own name with the funds that have been given to them.<sup>233</sup> Although more than one person is always involved in such a violation, Congress made the offense a misdemeanor. Further, the Department of Justice does not typically seek to prosecute the conduit straw donors, treating them instead as witnesses.<sup>234</sup> All of these considerations demonstrate that the “group danger” rationale for felony prosecution does not apply to conspiracies to violate the misdemeanor election law offenses that Congress moved in 1976 from the criminal code<sup>235</sup> to the Federal Election Campaign Act.<sup>236</sup>

The government’s losses in the *Curran, Golland* (on the felony charges), *Haney*, and *Mandarich* cases do not mean that prosecutorial misuse of the conspiracy statute in election law cases is not a serious problem. As long as bringing felony charges in garden-variety election law cases is an available option – even one with risks attached – the government can hold the club of felony charges over the heads of defendants who have violated election laws. The defendant in *Curran* “testified that he ‘was not focused on the Federal Election Commission,’ that he didn’t remember ever hearing about it, and that he ‘didn’t focus on’ whether it monitored federal campaign contributions.”<sup>237</sup> This

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230. *Id.* (citations omitted). *Cf.* Goldstein, *supra* note 16, at 413 (“Building on the assumption that a group is more to be feared than individuals acting separately, courts concluded that a plan by two or more persons to commit crime brings with it an increased likelihood that: the participants will reinforce each other’s determination to carry out the criminal object; the object will be successfully attained; the extent of the injury to society will be large; those who commit it will escape detection; and the group’s planning will have a long term educative effect on its members, with schooling in crime the result.”).

231. *See* 2 U.S.C. § 441f (1994).

232. *See* 2 U.S.C. § 441b (1994).

233. *See, e.g.,* DOJ MANUAL, *supra* note 1, at 103-04 (describing conduit contribution schemes).

234. *See id.*

235. Prior to 1976 those offenses were at 18 U.S.C. §§ 608 and 610-617 (1975). *See* DOJ MANUAL, *supra* note 1, at 95.

236. *See* 2 U.S.C. §§ 441a-441h; *see also* DOJ MANUAL, *supra* note 1, at 95.

237. *United States v. Curran*, 20 F.3d 560, 563 (3d Cir. 1994).

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testimony did not stop the Department of Justice from charging the defendant with conspiring to defraud the United States by impeding the FEC's performance "through obstruction and interference with the Commission's reporting requirements and by causing fictitious statements to be made on reports required to be sent to the Commission."<sup>238</sup> He was convicted of that charge after a jury trial in federal court.<sup>239</sup> The fact that the conviction did not withstand appellate scrutiny<sup>240</sup> provides little comfort to the defendant in that case or potential defendants in similar cases. Many potential defendants have neither the resources nor the will to go to trial against the Department of Justice, even if they could be confident that the judge would throw out the government's case (as in *Mandarich*) or the jury would render a verdict of acquittal on all charges (as in *Haney*). The mere fact that the government can threaten to bring felony charges in a case involving nothing more than regulatory offenses that Congress has specifically defined as misdemeanors gives the prosecution a tremendous—and tremendously unfair—advantage. The fact that the government may fail to make good on its threat in the rare case where a defendant has the resources and the will to fight back does not mean that the system is self-correcting or that the government's charging decisions should be immune from scrutiny and criticism.

### IV. CONCLUSION

In focusing on the required elements of a felony conspiracy charge in election law conspiracy cases, the courts have not paid sufficient attention to the misdemeanor offense clause of the conspiracy statute, and to the intent of Congress in adding that clause in 1948. Nor have the courts given sufficient weight to the intent of Congress, in its 1976 amendments to the Federal Election Campaign Act, to reduce the penalties for violations of that Act from felonies to misdemeanors. Taken together, the 1948 amendment to the conspiracy statute and the 1976 amendments to the Federal Election Campaign Act indicate that Congress (1) intended to punish conspiracies to violate that Act as misdemeanors, subject to a three-year statute of limitations, and not as felonies, and (2) did not intend for prosecutors to use the defraud clause of the conspiracy statute to obtain a felony conviction, or to extend the statute of limitations, in election law cases.

The reluctance of the courts to accept felony conspiracy charges in recent campaign finance cases is consistent with an interpretation of the conspiracy statute mandating that only misdemeanor conspiracy charges should be brought when the underlying conduct clearly constitutes nothing more than a misde-

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238. *Id.* at 571.

239. *See id.*

240. *See id.* at 572 (reporting that the trial court judgment was vacated and the case was remanded for a new trial).

meanor. Moreover, the reluctance of juries to convict defendants of conspiracy charges in election law cases should make prudent prosecutors hesitate before employing "felony theories." In the end, however, neither of these developments really addresses the underlying problem of prosecutorial misuse of the conspiracy statute. The real answer to this problem is for prosecutors to stop misusing the conspiracy statute by straining to bring felony charges where Congress clearly intended for misdemeanor penalties to apply.