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## Leniency for Testimony: Hypocrisy Or Judicial Necessity

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# LENIENCY FOR TESTIMONY: HYPOCRISY OR JUDICIAL NECESSITY?

## I. INTRODUCTION

Does justice prevail when criminals are given a lighter sentence in exchange for information? Quid pro quo plea bargaining arrangements have been historically prevalent and are well established in our system of justice.<sup>1</sup> Recently, however, this concept has come under scrutiny in light of the Tenth Circuit's holding in *United States v. Singleton*.<sup>2</sup>

When a defendant is confronted by a government prosecutor and offered a downward departure from the U.S. Sentencing Guidelines (U.S.S.G.) in exchange for testimony, a potentially coercive environment is created.<sup>3</sup> This coercive environment is created when a witness is

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<sup>1</sup> See *United States v. Ware*, 161 F.3d 414, 419 (6th Cir. 1998) (citing *Whiskey Cases* dating plea bargaining process back to common law England). This process has been adopted by the United States and recognized by the courts, the Congress, and the Sentencing Commission. *Id.* See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (setting forth well established practice of plea bargaining leniency for testimony); *The Whiskey Cases* 99 U.S. 594, 604 (1878) (acknowledging ancient practice of plea bargaining or "power of pardon").

<sup>2</sup> See *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), petition for cert. filed, U.S.L.W. (U.S. Mar. 31, 1999) (No. 98-8758), *cert. denied*, 119 S.Ct. 2371 (U.S. June 21, 1999) (No. 98-8758). (setting forth history of claim). The defendant in the present claim was convicted in the United States District Court of Kansas for money laundering and conspiring to distribute cocaine. *Id.* at 1298. On appeal, a panel of the Tenth Circuit reversed the decision by implementing a novel interpretation of Section 201(c)(2). *Id.* It is this panel decision that has generated intense scrutiny by contradicting the historically accepted practice of plea-bargaining, most notably, the agreement involving the exchange of leniency for testimony. *Id.* On rehearing en banc, the court vacated the panel decision and reheard the claim. *Id.* The en banc court held that Section 201(c)(2) does not apply to the United States government or Assistant United States Attorney's functioning within the scope of their office. *Id.*

<sup>3</sup> See Justin M. Lungstrum, Note, *United States v. Singleton: Bad Law Made in the Name of a Good Cause*, 47 KAN. L. REV. 749, 750 (1999) (indicating potentially coercive environment created surrounding offer of leniency made to defendant for downward departure). It is a prosecutor-dominated relationship where the defendant must cooperate with the prosecutor and appear as a testimonial witness to receive the agreed upon leniency. *Id.* at 751. The prosecutor, however, is under no obligation to reward the defen-

strongly motivated to falsify or embellish testimony to curry favor with the prosecutor.<sup>4</sup> A defendant facing serious criminal charges who has first-hand information regarding the criminal activity of others is in a better position than he would be without such information.<sup>5</sup> Prosecutors typically enter into plea bargain arrangements and grant the defendant leniency when, after court evaluation, it is shown the witness's testimony has proven to be of substantial assistance to the prosecutor.<sup>6</sup> Section 5K1.1 of the U.S.S.G. allows a reduction in the sentence of a defendant

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dant if the prosecution shows the testimony given has not risen to the level of substantial assistance. *Id.*

<sup>4</sup> See *id.* at 750; see also *Cervantes-Pacheco*, 826 F.2d at 315 (indicating witnesses' proclivity to falsify evidence to curry favor with government prosecutors). The motivation to falsify evidence to receive a reduced sentence is implicit in a situation where a witness faces incarceration. *Id.* See also *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (noting motivation to falsify testimony). "It is obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case." *Id.*

<sup>5</sup> See Daniel C. Richman, Note, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 77 (1995) (pointing to willingness of many defendants to exchange valuable information for sentencing discount).

<sup>6</sup> See Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1258 (1994) (recognizing majority of downward departures constitutes "substantial assistance" departures under Section 5K1.1 of U.S.S.G.); see also Lisa M. Farabee, Note, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 575 (1998) (noting rigid construction of U.S.S.G.). Section 5K1.1 defines a judge's power to depart from the U.S.S.G. and allows the judge to take into consideration a defendant's substantial assistance in the investigation or prosecution of another person. *Id.* Section 5K1.1 has become a crucial mechanism for avoiding the rigidity of the U.S.S.G. *Id.* See also U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (setting forth criteria for departure from U.S. Sentencing Guidelines for substantial assistance to authorities). Section 5K1.1 provides in pertinent part:

[U]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance; taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

*Id.*

if, after evaluation of the court, the information supplied by the defendant is material, significant and useful in the investigation or prosecution of another.<sup>7</sup> Recently, the scope of § 5K1.1 has been questioned due to the language set forth in Title 18, § 201(c)(2) of the United States Code (Section 201(c)(2)).<sup>8</sup>

This controversy stems from the holding in *United States v. Singleton*,<sup>9</sup> and has stirred nationwide interest as defense attorneys feverishly file what have come to be known as "Singleton Motions."<sup>10</sup> These motions seek to suppress testimony procured by government prosecutors claiming such testimony is a product of bribery in direct contravention of Section 201(c)(2). Section 201(c)(2) prohibits offering anything of value for, or because of, testimony.<sup>11</sup>

In *Singleton*, the defendant was convicted of money laundering and conspiring to distribute cocaine.<sup>12</sup> The Assistant U.S. Attorney violated Section 201(c)(2) by offering leniency to a co-defendant in exchange for truthful testimony.<sup>13</sup> On appeal, the United States Court of Appeals applied a novel interpretation of Section 201(c)(2).<sup>14</sup> On rehearing en banc, however, the United States Court of Appeals for the Tenth Circuit reversed the decision, holding that the term "whoever"

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<sup>7</sup> See U.S. SENTENCING GUIDELINES MANUAL SECTION 5K1.1 (1998) (explaining substantial assistance provision).

<sup>8</sup> See 18 U.S.C. § 201(c)(2)(West 1999) (addressing bribery and gratuitous transfers to public officials and witnesses). Section 201(c)(2) provides in pertinent part:

[W]hoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony shall be fined under this title or imprisoned for not more than two years or both.

*Id.*

<sup>9</sup> 165 F.3d at 1298.

<sup>10</sup> See *id.* at 1299 (explaining Singleton Motion used to suppress testimony of government witness for violating meaning of Section 201(c)(2)).

<sup>11</sup> See *id.* at 1300 (explaining rationale behind Singleton Motion).

<sup>12</sup> See *id.* at 1298 (noting subject matter of arrest).

<sup>13</sup> See *Singleton* 165 F.3d at 1298 (highlighting circumstances surrounding conviction).

<sup>14</sup> See *id.* (noting controversial reading of Section 201(c)(2)). The Appeals Court broadly construed the term "whoever" stating Assistant U.S. Attorneys are within the statute's scope. *Id.* at 1299. Such an application would forbid Assistant U.S. Attorney's from offering leniency in exchange for truthful testimony and undermine a well established practice ingrained in our legal system. *Id.*

does not include the United States acting in its sovereign capacity.<sup>15</sup> This means that Assistant U.S. Attorneys, acting as alter egos of the United States government, are excluded from Section 201(c)(2) and may offer leniency to a defendant in exchange for truthful testimony.<sup>16</sup> Since the Tenth Circuit panel issued their opinion in *Singleton*, three circuits have adopted this view and rejected the notion that government plea agreements violate Section 201(c)(2).<sup>17</sup>

This note analyzes the history of Section 201(c)(2) and the problem arising from advocating a literal reading of the statute against a longstanding, historically accepted practice.<sup>18</sup> This controversy focuses on whether the government is included in the statutory class "whoever."<sup>19</sup> Part II of this Note outlines the history surrounding Section 201(c)(2).<sup>20</sup> Part III(a) discusses the analysis and statutory interpretation used in the *Singleton* decision.<sup>21</sup> Part III(b) acknowledges the apparent danger of obtaining false testimony to curry favor and maximize leniency.<sup>22</sup>

The *Singleton* issue continues to plague criminal defense attorneys who realize if the situation was reversed and they were found to have induced or attempted to have induced a witness to testify, there would be serious disciplinary ramifications.<sup>23</sup> The main issue of *Single-*

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<sup>15</sup> See *Singleton* 165 F.3d at 1299-1300 (stressing government's prosecutorial power exercised solely through Assistant U.S. Attorneys or Department of Justice officers).

<sup>16</sup> See *id.* at 1300 (holding government not included within scope of Section 201(c)(2)); *e.g.*, *United States v. Lowery*, 166 F.3d 1119, 1121-24 (11th Cir. 1999) (rejecting claim that prosecutors violated Section 201(c)(2) reversing district court's holding); *Unites States v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999) (rejecting claim of § 201(c)(2) violation); *United States v. Webster*, 162 F.3d 308, 358 (5th Cir. 1998) (similarly rejecting claim on merits).

<sup>17</sup> See *United States v. Haese*, 162 F.3d 359, 366-67 (5th Cir. 1998) (disagreeing with appellate court decision in *Singleton* noting opinion renders most federal prosecutors criminally liable); *United States v. Ware*, 161 F.3d 414, 418-25 (6th Cir. 1998) (rejecting appellate decision in *Singleton* noting historical acceptance of exchange of leniency for truthful testimony).

<sup>18</sup> See *supra* notes 1-17 and accompanying text.

<sup>19</sup> See *Singleton*, 144 F.3d at 1348 (contrasting narrow, plain meaning approach against notion that text must expressly include government to apply).

<sup>20</sup> See *infra* notes 25-42 and accompanying text

<sup>21</sup> See *infra* notes 43-61 and accompanying text.

<sup>22</sup> See *infra* notes 62-66 and accompanying text.

<sup>23</sup> See Harvard Law Review Association, Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses For the Prosecution*, 94 HARV. L. REV. 888, 889 (1981) (portraying disparity in power between prosecutors and defense attorneys attributable to differing roles and duties). A prosecutor seeks justice and is not

ton focuses the statutory language of Section 201(c)(2) and whether the government falls under the statutory class "whoever."<sup>24</sup>

## II. HISTORY

Exchanging leniency for testimony continues to be a flourishing practice in our legal system.<sup>25</sup> Despite the statutory language remaining the same since the statute's inception in 1962, there is still no uniform interpretation of the Section 201(c)(2) more than three decades later.<sup>26</sup> The rules governing the lawyer's conduct makes no distinction between prosecutors and defense counsel regarding the issue of offering promises, rewards, or inducements for testimony.<sup>27</sup> The minority position, follow-

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concerned solely with winning the case. *Id.* To grant the defendant the same bargaining power would result in widespread abuse where the main focus is to preserve personal freedom and avoid incarceration. *Id.* at 889. See also *United States v. Dailey*, 759 F.2d 192, 200 (1st Cir. 1985) (maintaining need for jury notification regarding testimony of accomplices who have entered plea agreements); *United States v. Grimes*, 438 F.2d 391, 394 (6th Cir. 1971) (questioning credibility of testimony by government witness paid on contingent fee arrangement); *Paying the Witness: Why is it OK for the Prosecution, but not the Defense?*, 11 WTR CRIM. JUST. 21, 22-23 (Winter, 1997) (indicating liberal approach of courts admitting testimony of prosecution witnesses paid to testify). This includes those individuals who receive promises, inducements, or rewards in exchange for testimony even when the extent of leniency is contingent upon the materiality and usefulness of testimony. *Id.*

<sup>24</sup> See 18 U.S.C. § 201(c)(2) (West 1999) (addressing controversial interpretation of statutory language); *Singleton*, 144 F.3d at 1348 (observing narrow reading of statute).

<sup>25</sup> See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (describing common practice of plea bargaining). The *Cervantes-Pacheco* court states:

No practice has been more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.

*Id.* See also *United States v. Ford*, 99 U.S. 594, 604-605 (1878) (noting practice of "improvement" under English common law where accused could implicate accomplice for pardon).

<sup>26</sup> See Pub. L. No. 87-849, § 1(a), 76 Stat. 1119, 1120 (codified at 18 U.S.C. § 201(h)) (effective Oct. 23, 1962) (current version at 18 U.S.C. § 201(c)(2)) (West 1999).

<sup>27</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) cmt. (1997). Model Rule 3.4(b) cmt. provides in pertinent part: "[A] lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." *Id.* The comment explains it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. *Id.* The common law rule in most jurisdictions is that it is improper to pay an expert witness a contingent fee. Jeffrey Standen, Note, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L.

ing the "plain meaning" approach to statutory interpretation, believes the plain meaning of the word "whoever" includes the government acting in its sovereign capacity.<sup>28</sup> It is a basic tenet of statutory interpretation that courts follow the plain and unambiguous meaning of statutory language.<sup>29</sup> In interpreting the legislative intent behind statutory construction, a word cannot be analyzed in isolation.<sup>30</sup> The exception to this rationale surfaces when the meaning of the word taken in isolation is clear and indisputable.<sup>31</sup>

The plea bargaining process predates the drafting of the United States Constitution and continues to be upheld on the theory that the relative equality of the bargaining power between the prosecutor and defendant prevents the process from being fundamentally unfair.<sup>32</sup> These plea bargaining arrangements are typically entered into before sentencing pursuant to Federal Rule of Criminal Procedure 11(e).<sup>33</sup> Plea bargaining arrangements may also be made up to one year after the sentencing of the defendant pursuant to Federal Rule of Criminal Procedure 35(b).<sup>34</sup> The

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REV. 1471, 1504 (1993) (asserting no increase in prosecutorial discretion despite judicial acceptance of leniency for testimony).

<sup>28</sup> See *Singleton*, 165 F.3d at 1298 (noting argument set forth alleging government included in statutory interpretation).

<sup>29</sup> See *Salinas v. United States*, 552 U.S. 52, 55 (1997) (indicating proclivity of courts to follow unambiguous meaning of statutory language when applying criminal laws); see also *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quoting *United States v. American Trucking Assns., Inc.* 310 U.S. 534, 543 (1940)). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Id.*

<sup>30</sup> See *Deal v. United States*, 508 U.S. 129, 132 (1993) (holding courts must view statutory language in its entirety to determine meaning of individual word); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (analyzing statutory language to determine level of ambiguity); *National Coal Ass'n v. Charter*, 81 F.3d 1077, 1081 (11th Cir. 1996) (stating ordinary meaning given to terms not defined within statute).

<sup>31</sup> See *Nardone v. United States*, 302 U.S. 379, 383 (1937) (noting general wording of statute precludes government unless language clearly expresses inclusion).

<sup>32</sup> See *Roberts v. United States*, 445 U.S. 552, 570 (1980) (discussing vital role of informer); *Santabello v. New York*, 404 U.S. 257, 261 (1971) (explaining informer's vital role in reducing crime, especially narcotics trade). The government recognizes this role and states it is fully appropriate to encourage such behavior by offering leniency in exchange for cooperation. *Id.* See also *Lungstrom*, *supra* note 3, at 751-52 (discussing *Rex v. Rudd*, 98 Eng. Rep. 1114 (K.B. 1775) (describing act of issuing equitable pardon)).

<sup>33</sup> See Fed. R. Crim. P. 11(e) (explaining how Rule 11 plea bargains can also be entered into).

<sup>34</sup> See Fed. R. Crim. P. 35(b) (explaining sentence reductions may be made due to changed circumstances).

court may reduce a defendant's sentence under the "substantial assistance" theory if the government files a motion.<sup>35</sup> Furthermore, it is important to note that a promise to recommend leniency is discretionary and does not guarantee the defendant favorable treatment.<sup>36</sup>

Accordingly, when government-procured testimony is admitted, the defendant is entitled to present evidence of promises of leniency in exchange for testimony.<sup>37</sup> This maintains the defendant's fundamental Due Process rights and allows the jury to evaluate the witness's credibility.<sup>38</sup> The phrase "thing of value" contained within Section 201(c)(2) has been broadly construed to include both tangibles and intangibles.<sup>39</sup> The focal point should not be the actual value of the thing offered, but the

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<sup>35</sup> See 18 U.S.C. § 3553(e) (1996). Section 3553(e) provides: "[U]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Id.* See Lungstrom, *supra* note 3, at 751 (citing *In re Sealed Case*, 149 F.3d 1198, 1199 (D.C. Cir. 1998) (noting court may engage in downward departure from statutory minimum sentence upon motion by government)).

<sup>36</sup> See *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (noting promise of leniency creates incentive to curry favor with prosecutor leading to distorted testimony); see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (discussing importance of disclosure of material evidence which tends to exculpate defendant). *But see* *United States v. Meinster*, 619 F.2d 1041, 1043-1044 (4th Cir. 1980) (noting incompatibility of promises for leniency cases in Florida and North Carolina resulting in perjured testimony).

<sup>37</sup> See *United States v. Blackwood*, 426 F.2d 526, 529 (4th Cir. 1972) (indicating defendant's right to discredit testimony procured by government).

<sup>38</sup> See *id.* (citing *United States v. Campbell*, 426 F.2d 547, 549 (2d Cir. 1970) (explaining rule allowing defendant to present evidence showing government made promises of leniency for cooperation); *Campbell*, 426 U.S. at 549 (noting defendant may introduce evidence to show government promise of leniency creates bias). Nondisclosure of evidence affects witness credibility and justifies new trial irrespective of good faith or bad faith of prosecution. *Giglio*, 405 U.S. at 154-155. See also *United States v. Pope*, 529 F.2d 112, 114 (1976) (noting inconsistency of fair trial demands when prosecuting attorney failed to disclose plea bargain arrangement); *Campbell*, 426 F.2d 547, 549 (2d Cir. 1970) (discussing fundamental importance of disclosure so jury can evaluate credibility of witness).

<sup>39</sup> See *United States v. Marmolejo, Jr.*, 89 F.3d 1185, 1192 (5th Cir. 1996) (acknowledging plain and unambiguous interpretation of statutory language applied by courts regarding criminal laws); see also *United States v. Nielsen*, 967 F.2d 539, 542 (11th Cir. 1992), *cert. denied*, 507 U.S. 1034 (1993) (recognizing evolution of term "thing of value" to encompass tangibles along with intangibles). The term "thing of value" has been interpreted to include amusement, information and sexual intercourse. *Id.*

value the defendant subjectively places on the item.<sup>40</sup> Furthermore, the testimony must be given "for or because of" the item offered.<sup>41</sup> Prosecutors continue to enjoy substantial bargaining power as judicial deference to the negotiation process has created even greater flexibility with potential witnesses.<sup>42</sup>

### III. ANALYSIS

#### A. Statutory Interpretation and Application of Section 201(c)(2)

In *Singleton*, the court convicted a Kansas woman was for money laundering and conspiring to distribute cocaine.<sup>43</sup> The defendant appealed the conviction and on July 1, 1998 the Tenth Circuit Court of Appeals overturned the conviction through a novel interpretation of Section 201(c)(2).<sup>44</sup> On rehearing en banc, however, the Tenth Circuit held the term "whoever" does not include the United States acting in its sovereign capacity.<sup>45</sup>

Taking this narrow view of the statutory construction of Section 201(c)(2), it is apparent that laws that tend to restrain a sovereign's powers, rights, or interests do not apply to the government or affect governmental rights unless the text expressly dictates.<sup>46</sup> There are two types of

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<sup>40</sup> See *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983) (explaining broad meaning of term "anything of value" justifies subjective approach to item received).

<sup>41</sup> See *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 966 (D.C. Cir. 1998) (noting gift, offer or promise need not motivate given testimony). The relationship may be merely one of reward and does not require quid pro quo scenario. *Id.*

<sup>42</sup> See *Richman*, *supra* note 5, at 85 (discussing prosecutorial control over plea bargaining negotiations). Judicial deference to prosecutorial recommendations is a common practice leading to greater flexibility in a negotiation process with potential cooperators. *Id.*

<sup>43</sup> See *United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir. 1998).

<sup>44</sup> See *id.* (noting controversial holding of Court of Appeals finding § 201(c)(2) not applicable to government prosecutors).

<sup>45</sup> See *id.* (holding government not included within § 201(c)(2)).

<sup>46</sup> See *id.* at 1300 (noting ambiguity in statutory interpretation); see also *Lungstrom*, *supra* note 3, at 758 (commenting on narrow, rigid reading of statute).

cases when the government is presumptively excluded from general statutory language.<sup>47</sup> The first is where an act deprives the sovereign of a recognized or established title or interest.<sup>48</sup> The second class excludes officers of the government from the statute where such a reading would constitute an obvious absurdity.<sup>49</sup> The defense counsel viewpoint asserts that if testimony induced from a defendant is tainted and unreliable, it is no less tainted by the identical behavior of the prosecutor.<sup>50</sup>

Defense attorneys believe liberty and security demand that government officials be subjected to the same rules of conduct that are demanded of them.<sup>51</sup> This disparity in power between prosecutor and defense attorney is justified by a disparity between roles and duties.<sup>52</sup> A majority of jurisdictions agree Section 201(c)(2) does not include the United States acting in its sovereign capacity, and thus does not include assistant U.S. attorneys acting as an alter ego of the United States.<sup>53</sup>

It should be noted that no other court in the thirty-six year history of Section 201(c)(2) has prohibited to the prosecutorial grant of leniency

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<sup>47</sup> See *Nardone v. United States*, 302 U.S. 379, 383-84 (1937) (expounding on areas where statutes are inapplicable to government).

<sup>48</sup> See *id.* at 383 (noting less stringent application of rule upon agents of government rather than upon sovereign).

<sup>49</sup> See *id.* at 384 (noting speed laws applying to policeman pursuing criminal or fire engine driver responding to alarm). Also included is the exemption of the state from general statutes of limitation. *Id.*

<sup>50</sup> See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). The court held:

[C]rime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; . . . it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

*Id.*

<sup>51</sup> See *id.* (alleging government criminally liable under § 201(c)(2)).

<sup>52</sup> See Harvard Law Review Association, *supra* note 20, at 888 (delineating roles of government prosecutor versus defense attorney). Typically, the portrayal of government prosecutors is that of advocates seeking justice while defense attorneys are portrayed as avoiding conviction at all costs. *Id.* at 889-90.

<sup>53</sup> See *United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir. 1998) (setting forth longstanding practice of government preclusion from § 201(c)(2)); *United States v. Haese*, 162 F.2d 359, 367-68 (5th Cir. 1998) (stressing any other interpretation would “apply shackles” to government rendering every federal prosecutor criminally liable); *United States v. Ramsey*, 165 F.3d 980, 986-87 (D.C. Cir. 1999) (noting established historical acceptance of plea bargain arrangement).

in exchange for truthful testimony.<sup>54</sup> The government concedes that the term "whoever" is a broad term by its ordinary definition.<sup>55</sup> This broad reading, however, ignores the capacity in which the government's lawyer appears in the courts.<sup>56</sup> Therefore, the government's sovereign authority to prosecute and carry out necessary judicial proceedings vests solely in Assistant U.S. Attorneys.<sup>57</sup>

When an assistant U.S. attorney enters into a plea agreement with a defendant, that plea agreement is between the United States government and the defendant.<sup>58</sup> To deprive the government of the opportunity to plea bargain and obtain truthful testimony would eliminate a critically important interest that is well established in our legal system.<sup>59</sup> The courts, Congress, and the U.S. Sentencing Commission have recognized and accepted this concept.<sup>60</sup> Such recognition by the U.S. Sentencing Commission creates the appearance of heightened power by the prosecutor, but, in actuality, the U.S. Sentencing Commission did not give the prosecutor any discretion the prosecutor did not previously possess.<sup>61</sup>

### *B. Threat of False Testimony*

Despite the rejection of the *Singleton* rationale, courts have recognized the dangers of permitting Executive Branch officers to engage in bargaining for testimony are as substantial as when the defendant does

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<sup>54</sup> See *Ramsey*, 165 F.3d at 987 (commenting on historical acceptance of plea bargaining).

<sup>55</sup> See *Singleton*, 165 F.3d at 1305 (indicating broad parameters regarding general use of term "whoever").

<sup>56</sup> See *id.* at 1299 (noting only officer of Department of Justice or U.S. Attorney may represent the United States).

<sup>57</sup> See *id.* at 1300 (explaining government cannot exercise its powers on its own).

<sup>58</sup> See *id.* (recognizing U.S. attorneys act on behalf of United States).

<sup>59</sup> See *Ramsey*, 165 F.3d at 988 (indicating historical practice of exchanging leniency for truthful testimony).

<sup>60</sup> See *id.*; *United States v. Ford*, 99 U.S.594, 605 (1874); *Lungstrom*, *supra* note 3, at 764; *Richman*, *supra* note 5, at 85 (setting forth historical acceptance of leniency for testimony).

<sup>61</sup> See *Standen*, *supra* note 27, at 1502, 1506 (noting offense charged dictates sentence of crime while prosecutor controls severity of charge).

the same.<sup>62</sup> Cross-examination determines the veracity of a witness while a properly instructed jury determines the credibility of testimony.<sup>63</sup> The jury instruction, however, does not eliminate the coercive nature of the testimony.<sup>64</sup> It is difficult to imagine something of greater subjective value to a defendant facing incarceration than the promise of a lesser sentence.<sup>65</sup>

#### IV. CONCLUSION

Exchanging leniency for testimony is a custom seemingly as old as the law itself. While these deals are inherently suspect, this plea bargaining process has proven necessary to maintain our system of criminal justice. Without plea bargains, our nation's courts would become endlessly bottlenecked. It would be impossible to try every case. One legal scholar summed up the *Singleton* issue as "something between a serious disruption and total upheaval."<sup>66</sup>

The United States relies on witnesses who testify in return for leniency in thousands of cases each year. In a trial where stakes are high, it makes sense for a defendant to minimize his or her losses by making a deal with the prosecutor. Furthermore, it is necessary to maintain a pragmatic approach to the concept of leniency for testimony and realize that the pros far outweigh the cons. Application of Section 201(c)(2) to the United States or Assistant U.S. Attorneys would deprive our country of a critically important interest that has been well established in the

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<sup>62</sup> See *Singleton*, 165 F.3d at 1299 (alleging testimony coerced); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 313 (5th Cir. 1987) (addressing threat of false testimony).

<sup>63</sup> See *Cervantes-Pacheco*, 826 F.2d at 313 (explaining U.S. methodology regarding criminal trials); see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding prosecutor's failure to disclose promise of leniency for testimony violated due process).

<sup>64</sup> See *United States v. Ortiz-Olivaras*, 717 F.2d 1, 4 (1984) (noting proclivity of defendant promised leniency to falsify evidence to curry favor with prosecutor); *United States v. Meinster*, 619 F.2d 1041 1045 (1980) (emphasizing "promises of leniency or immunity premised on cooperation may provide strong inducement to falsify"); *Lungstrom*, *supra* note 3, at 750 (realizing threat of false testimony).

<sup>65</sup> See *Lungstrom* *supra* note 3, at 752 (noting proclivity to engage in favorable testimony to obtain leniency offered for substantial assistance).

<sup>66</sup> See David E. Rovella, Gail Diane Cox, *Fallout From 'Singleton' Bribe Ruling*, *Nat'l.L.J.*, August 24, 1998.

courts, the Congress, and the United States Sentencing Commission. While suppression of testimony may deter future misconduct, it would also impede the judicial process by disallowing relevant evidence based on the mere appearance of impropriety. The narrow statutory construction of 18 U.S.C. § 201(c)(2) proposed in *Singleton* restrains and diminishes the powers, rights and interests of the government and does not constitute a practical legal approach to our system of criminal justice.

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