

COURTS RUSH TO EXTINGUISH *SINGLETON*, BUT ARE THE
EMBERS OF THE PANEL'S DECISION STILL GLOWING?

JEFFREY M. SCHUMM *

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I. INTRODUCTION

It was supposed to be big. The media hailed *United States v. Singleton*¹ a "bombshell,"² comparing the decision to the likes of *Miranda*.³ Indeed, a panel of the Tenth Circuit Court of Appeals shocked the criminal justice community when it ruled that federal prosecutors who cut deals with witnesses in exchange for the witnesses' testimony are committing a crime.⁴ Specifically, the court held that the government's offer of leniency to a witness, in exchange for a witness' testimony against the accused, violated the federal "anti-gratuity" statute.⁵ The panel theorized that if a prosecutor dangles a reduced sentence before a defendant, it is likely that the defendant will testify the way the government wants—even

* J.D. Candidate, May 2000, Florida State University College of Law. The author thanks Rocco Cafaro and the *Florida State University Law Review* editorial staff for their assistance in editing this Note. Also, the author expresses special gratitude to his wife, Joanne, for her never-ending patience and support.

1. 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

2. *Judicial Trouble*, WASH. POST, July 8, 1998, at A16 (referring to the *Singleton* panel decision as a "bombshell"); *see also* Naftali Bendavid, *Ruling on leniency deals raises outcry*, CHI. TRIB., July 15, 1998, at 1 (saying that the *Singleton* decision "stunned the legal community"); Julie Delcour, *No deal? Controversial leniency ruling put on hold by 10th Circuit*, TULSA WORLD, July 12, 1998 (stating that the *Singleton* decision "lit up the legal landscape like a thousand Roman candles").

3. *Miranda v. Arizona*, 384 U.S. 436 (1966); *see also* Jeffrey H. Kass, *Trades of Leniency for Testimony are Jeopardized by Court Ruling*, SALT LAKE TRIB., July 19, 1998, at A2 (predicting that the *Singleton* decision "may in fact be as well-known as *Miranda* [sic] in the years to come").

4. *See Singleton*, 144 F.3d at 1352.

5. *See id.*; *see also* 18 U.S.C. § 201 (1994).

if it means being untruthful.⁶ In summarizing the panel's major contention, Judge Paul J. Kelly Jr. wrote, "If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."⁷ "The judicial process is tainted and justice is cheapened when factual testimony is purchased, whether with leniency or money."⁸

Believing that such a decision was long overdue, criminal defense lawyers exulted and claimed vindication.⁹ Leading members of the National Association of Criminal Defense Lawyers exclaimed, "The court has ended decades of government-sanctioned bribery . . . [a] system in which the government could exchange freedom for a story they wanted to hear is a system rampant with injustice and half-truths."¹⁰ "The enormous power of the government to lock up a defendant for life, or to free him altogether, creates an enormous incentive [for a testifying co-conspirator] to lie."¹¹ "This decision puts us where we should have been all along—bring in your facts, don't bring in these bought and paid for witnesses."¹²

Accordingly, federal judges in almost every state were confronted with hopeful defense lawyers filing so-called "*Singleton* motions" in their respective cases to have informant testimony thrown out. Debate regarding the validity of the *Singleton* opinion raged like a wildfire throughout the criminal justice community. Several district courts outside the Tenth Circuit fanned the fire by choosing to follow the panel's reasoning, reaching the same conclusion: Federal prosecutors violate federal statutory law when they offer a witness leniency in exchange for testimony.¹³

But the assault on the commonly used prosecution tactic was short-lived, and courts across the nation have been climbing over top of each other to snuff out the potential *Singleton* inferno. The Tenth Circuit itself swiftly vacated (and eventually reversed) the panel's decision.¹⁴ In

6. See *Singleton*, 144 F.3d at 1360.

7. *Id.* at 1346.

8. *Id.* at 1347.

9. Prosecutors, on the contrary, were not so enthusiastic. The *Chicago Daily Law Bulletin* noted, "to prosecutors, the decision was as welcome as Albert Belle at a children's Halloween Party." David C. Gleicher, CHI. L. BULL., January 20, 1999.

10. Lyle Denniston, *Leniency: Is it a break or a bribe?*, BALTIMORE SUN, July 12, 1998, at 2A (quoting Larry Pozner, President of the National Association of Criminal Defense Lawyers).

11. Joan Biskupic, *Justice Dept. to Appeal Court Ban on 'Deals' With Witnesses*, WASH. POST, July 10, 1998, at A3 (quoting Gerald B. Lefcourt, past-president of the National Association of Criminal Defense Lawyers).

12. *World News Tonight With Peter Jennings. Bombshell Ruling by Federal Appeals Court, No More Buying Testimony With A Plea Bargain* (ABC television broadcast, July 9, 1998) (quoting Larry Pozner).

13. See *United States v. Mays*, No. 97-CR-127 (E.D. Tenn. 1998); see also *United States v. Lowery*, 15 F. Supp. 2d 1348, 1354 (S.D. Fla. 1998) (agreeing with *Singleton* that the plain meaning of § 201(c)(2) encompasses government), *rev'd*, 166 F.3d 1119 (11th Cir. 1999); *United States v. Fraguela*, No. Crim. A. 96-0339, 1998 WL 560352, at *1 (E.D. La. Aug. 27, 1998) (adopting *Singleton* and *Lowery*), *order vacated on reconsideration*, No. Crim. A. 96-339 (E.D. La. 1998); *United States v. Revis*, 22 F. Supp. 2d 1242 (N.D. Okla. 1998).

14. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758). Six members of the Tenth Circuit Court of Appeals joined Judge Porfilio's majority opinion (Anderson, Baldock, Tacha, Briscoe, Brorby,

addition, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have all addressed the *Singleton* issue within the last year, rushing to extinguish any further combustion that might be created as a result of the panel's decision and, arguably, giving short shrift to the heart of the panel's argument.¹⁵ A veritable onslaught of district courts have dutifully responded to the alarm in a fashion, which—in the kindest way—can only be termed as “piling on.”¹⁶ In doing so, courts have employed a variety of hypertechnical and conflicting arguments to counter the *Singleton* decision and avoid what many would consider a catastrophic result.¹⁷

Largely unanswered, however, is the *Singleton* panel's major contention: “Government leniency in exchange for testimony can create a powerful incentive to lie and derail the truth-seeking purpose of the criminal

and Murphy, JJ). *See id.* Judge Henry and Lucero both filed concurrences with Judge Henry joining Judge Lucero's. *See id.* Judge Kelly furnished the dissent, joined by Chief Judge Seymour and Judge Ebel, keeping the original panel intact. *See id.* at 1308.

15. *See* United States v. Carroll, 166 F.3d 334, 337 (4th Cir. 1998); United States v. Webster, 162 F.3d 308, 357-58 (5th Cir. 1998) (rejecting *Singleton* on plain error review); United States v. Haese, 162 F.3d 359, 366 (5th Cir. 1998) (rejecting *Singleton* and noting that circuit precedent has “consistently . . . upheld government efforts to provide benefits to witnesses in exchange for testimony”); United States v. Ware, 161 F.3d 414, 418-19 (6th Cir. 1998); United States v. Condon, 170 F.3d 687 (7th Cir. 1999); United States v. Johnson, 169 F.3d 1092, 1098 (8th Cir. 1999); United States v. Briones, 165 F.3d 918, 920 (9th Cir. 1998); United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999); United States v. Ramsey, 165 F.3d 980, 987 (D.C. Cir. 1999).

16. *See* United States v. Barbaro, No. 98C.R.412 (JFK), 1998 WL 556152, at *3 (S.D.N.Y. Sept. 1, 1998) (rejecting *Singleton* because of the historical acceptance of leniency in exchange for truthful testimony); United States v. Juncal, No. 97C.R.1162 (JFK), 1998 WL 525800, at *1 (S.D.N.Y. Aug. 20, 1998) (relying on the historical acceptance of leniency in exchange for testimony and on canon of statutory construction requiring that government be expressly included in statutory text to come with statute's purview); United States v. Reid, 19 F. Supp. 2d 534, 535 (E.D. Va. 1998); United States v. Arana, 18 F. Supp. 2d 715, 721 (E.D. Mich. 1998); United States v. Dunlap, 17 F. Supp. 2d 1183 (D. Colo. 1998); United States v. Pungitore, 15 F. Supp. 2d 705, 711 n.2 (E.D. Pa. 1998); United States v. Guillaume, 13 F. Supp. 2d 1331, 1335 (S.D. Fla. 1998); United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) (criticizing *Singleton*'s reasoning, particularly application of the exclusionary rule); United States v. Gabourel, 9 F. Supp. 2d 1246 (D. Colo. 1998); Hall v. United States, 30 F. Supp. 2d 883, 895-96 (E.D. Va. 1998); Tulali v. United States, 29 F. Supp. 2d 1177, 1181 (D. Haw. 1998); United States v. Clark, 29 F. Supp. 2d 869, 870-71 (S.D. Ohio 1998); United States v. Abraham, 29 F. Supp. 2d 296, 209-14 (D.N.J. 1998); United States v. White, 27 F. Supp. 2d 646, 647-49 (E.D.N.C. 1998); United States v. Hammer, 25 F. Supp. 2d 518, 535-36 (M.D. Pa. 1998); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998); United States v. Revis, 22 F. Supp. 2d 1242, 1264 (N.D. Okla. 1998); United States v. McGuire, 21 F. Supp. 2d 1264, 1266 (D. Kan. 1998).

17. Trading leniency for testimony is a major tool employed by federal prosecutors. The *Dallas Morning News* reported:

More than 86 percent of a sampling of federal criminal cases in Dallas and Fort Worth between 1995 and 1997 involved use of informants and co-conspirators who received deals from prosecutors in return for testimony, according to a review of nearly 300 cases

Some of the informants were paid thousands of dollars for their cooperation. Most received a reduction in the amount of time they would serve in prison for their crimes. The cases mostly involved drug offenses, illegal-gun charges and various white-collar conspiracies.

Mark Curriden, *Court to Decide Legality of Rewarding Informants, Experts Say Thousands of Cases Could Be Jeopardized*, DALLAS MORNING NEWS, Nov. 17, 1998, at 1A.

justice system.”¹⁸ “Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for an accomplice to shift blame to the defendant or other co-conspirators.”¹⁹ Quoting the Supreme Court in *Washington v. Texas*,²⁰ the *Singleton* dissent noted:

“Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if [the accused accomplice] is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.”²¹

As such, this Note will examine and analyze the major arguments used by courts to date to justify their respective decisions regarding the *Singleton* issue. Part II reviews the two *Singleton* decisions (the three-judge panel and en banc review). Part III examines the various major arguments employed by courts to counter the *Singleton* panel decision. In doing so, Part III offers commentary as to the validity of the counter arguments relating to the statutory construction of 18 U.S.C. § 201(c)(2) and whether the meaning of the word “whoever” applies to the federal government. Part III also examines the implication presented by federal legislation binding federal prosecutors to state ethics rules, the structure of § 201, legislative history, application of the exclusionary rule, and policy and effect considerations of conflicting interpretations of § 201(c)(2). Part IV concludes, however, that courts have failed to address the underlying premise of the *Singleton* panel decision: Government offers of leniency to accomplices or co-conspirators create a real incentive to lie. Furthermore, as the *Singleton* panel noted, the very nature and complexity of this policy debate reinforces the belief that this is an argument better left to Congress.

II. REVIEW OF THE *SINGLETON* DECISIONS

In April 1992, the government charged Sonya Evette Singleton, a single twenty-five-year-old mother of two children, with multiple counts of money laundering and conspiracy to distribute cocaine for her part in an alleged drug trafficking operation between California and Wichita, Kansas.²² Subsequently, the government secured a plea agreement with one of her co-conspirators, Napoleon Douglas, whereby the government

18. *United States v. Singleton*, 165 F.3d 1297, 1310 (10th Cir. 1999) (Kelly, J., dissenting) (reiterating the policy reasoning behind the panel’s original decision).

19. Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 802 (1987).

20. 388 U.S. 14 (1967).

21. *Singleton*, 165 F.3d at 1309 (Kelly, J., dissenting) (quoting *Washington*, 388 U.S. at 22-23).

22. Allegedly, Ms. Singleton either sent or received eight wire transfers of drug proceeds in connection with the conspiracy. See *United States v. Singleton*, 144 F.3d 1343, 1344 (10th Cir. 1998).

agreed not to prosecute Mr. Douglas for related offenses in exchange for his testimony against Singleton.²³

A. *The Singleton Panel Decision*

Before trial, Singleton moved to suppress Mr. Douglas' testimony arguing that the government had impermissibly promised Mr. Douglas leniency in return for testimony, in violation of 18 U.S.C. § 201(c)(2), the anti-gratuity provision of the federal bribery statute, which prohibits unlawful inducements to a witness.²⁴

In particular, § 201(c)(2) reads:

Whoever . . . , directly or indirectly, gives, offers or promises *anything of value* to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.²⁵

"The district court denied the motion, ruling that § 201(c)(2) did not apply to the government."²⁶ Accordingly, Mr. Douglas testified against Ms. Singleton during the trial, and she was found guilty of conspiracy to distribute cocaine and money laundering.

On appeal, the central issue before the court was whether the government's conduct was prohibited by § 201(c)(2).²⁷ Accordingly, on July 1, 1998, a panel of the United States Court of Appeals, Tenth Circuit (hereinafter "the panel") stunned the criminal justice world by reversing Ms. Singleton's conviction²⁸ holding that the prosecuting attorney violated 18 U.S.C. § 201(c)(2) by offering leniency to a co-defendant in exchange for testimony.²⁹ In reaching their conclusion to suppress Mr.

23. The plea agreement stated three specific promises made by the government to Mr. Douglas in return for his promise to testify:

First, the government promised not to prosecute Mr. Douglas for any other violations of the Drug Abuse Prevention and Control Act stemming from his activities currently under investigation, except perjury or related offenses. Second, it promised, "to advise the sentencing court, prior to sentencing, of the nature and extent of the cooperation provided" by Mr. Douglas. Third, the government promised, "to advise the Mississippi parole board of the nature and extent of the cooperation provided" by Mr. Douglas. Mr. Douglas agreed, "in consideration of the items listed . . . [to] testify[] truthfully in federal and/or state court"

Id. (alterations in original) (citations omitted).

24. *See id.* at 1343; Singleton's attorney, John V. Wachtel, "credits the idea to an article by J. Richard Johnston of Johnston, Horton, Roberts & Hand in Oakland, Calif[ornia]. The article, titled, 'Paying the Witness: Why is it OK for the prosecution, but not the defense?' [sic] appeared in the Winter 1997 issue of [an ABA Magazine] *Criminal Justice*" Cynthia L. Cooper, *Lets Not Make a Deal*, A.B.A. J., Sept. 1998, at 34.

25. 18 U.S.C. § 201(c)(2) (Supp. 1998) (emphasis added).

26. *Singleton*, 144 F.3d at 1344.

27. *See id.* at 1344. Other issues before the court were whether the government's conduct was prohibited by KANSAS RULES OF PROFESSIONAL CONDUCT Rule 3.4(b); "whether Mr. Douglas' testimony should have been suppressed" if in violation of § 201(c)(2) or 3.4(b); and "whether the record contains sufficient evidence to remand for a new trial." *Id.*

28. *See id.* at 1361.

29. *See id.* at 1351.

Douglas' testimony and reverse Ms. Singleton's conviction,³⁰ the three judge panel, composed of Chief Judge Stephanie K. Seymour, Judge David M. Ebel, and Judge Paul J. Kelly, Jr., focused on four major areas of analysis.³¹

First, in focusing on the language and structure of § 201(c)(2), the panel broadly defined "anything of value," declaring that Congress did not intend to limit this phrase to monetary damages but sought to include things such as potential reduction in jail times or leniency, so that the plain meaning of § 201(c)(2)'s prohibition encompasses federal prosecutors.³² Secondly, the panel rejected the government's argument that a traditional law enforcement justification—the end justifies the means—warrants excluding the government from § 201(c)(2), finding no such basis for this reasoning.³³ Next, the panel very convincingly reconciled § 201(c)(2) with other statutes that the government claimed conflicted with the panel's interpretation of § 201(c)(2).³⁴ Finally, the panel concluded that the appropriate remedy for the testimony obtained in violation of § 201(c)(2) was suppression of the testimony at Ms. Singleton's trial.³⁵

B. *The Singleton En Banc Decision*

Nine days after the panel decision, however, the United States Circuit Court of Appeals for the Tenth Circuit, acting sua sponte, swiftly vacated the panel decision so it could address the issue en banc.³⁶ Not so unexpectedly, on January 8, 1999, an en banc panel of the Tenth Circuit concluded that "18 U.S.C. § 201(c)(2) does not apply to the United States or to an Assistant United States Attorney functioning within the official scope of the office."³⁷ In a relatively short opinion and analysis, Judge Porfilio, writing for the majority, reasoned that although the prohibitions of § 201(c)(2) literally encompass "whoever," such a reading would restrict the power of the United States and yield absurd results by conflicting with other federal statutes.³⁸

In the more compelling concurring opinion, Judge Lucero, with Judge Henry joining, agreed with the *Singleton* panel's reasoning that the word "whoever" does not exclude federal prosecutors.³⁹ However, Judge Lucero further reasoned that *specific* related statutes allow the government to trade leniency for a witness' testimony. These specific statutes conflict with the general prohibitions of § 201(c)(2); thus, the

30. *See id.* at 1361.

31. *See id.* at 1343.

32. *See id.* at 1348-51.

33. *See id.* at 1352-54.

34. *See id.* at 1354-56.

35. *See id.* at 1359-61.

36. *See id.* at 1361-62.

37. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

38. *See id.* at 1299-1302.

39. *See id.* at 1303-05 (Lucero, J., concurring); see also *United States v. Singleton: Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749, 772-73 (1999) (suggesting that the *Singleton* en banc majority decision relied on "strained reasoning, placing it on unfirm ground," failing to produce a satisfactory result).

conflicting specific statutes control and permit the prosecution's action in this case.⁴⁰

The same three-judge panel that issued the first *Singleton* opinion dissented⁴¹ and lauded the court's role as "law-interpreting" rather than "lawmaking."⁴² The panel insisted that the plain language of § 201(c)(2)'s prohibitions encompassed government officials.⁴³ Opining that trading leniency for testimony creates dangerous incentives for witnesses to provide false testimony, the panel noted that "bought testimony is so fraught with the potential for perjury that Congress imposed a blanket prohibition that also applies to the government."⁴⁴ In its final analysis, the panel reasoned that "it remains completely open for Congress to reweigh the conflicting values sought to be addressed in § 201[(c)(2)]."⁴⁵

II. ANALYSIS OF THE ARGUMENTS EMPLOYED BY THE COURTS TO ANSWER THE "SINGLETON ISSUE"

A. Statutory Construction of 18 U.S.C. § 201(c)(2): The Meaning of "Whoever"

A large part of the debate surrounding whether the prohibitions of § 201(c)(2) include the United States government concerns the meaning of the word "whoever." In pertinent part, § 201(c)(2) reads:

(c) *Whoever* . . .

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.⁴⁶

In what can only be termed "the battle of the dictionaries," courts have used various interpretations of the meaning of the word "whoever" to arrive at differing conclusions as to the reach of 18 U.S.C. § 201(c)(2). The *Singleton* panel relied on the Dictionary Act, 1 U.S.C. § 1, for the definition of "whoever", which "includes, but is not limited to, corporations, companies, associations, firms, partnerships, societies, and joint stock companies—all inanimate objects."⁴⁷ Accordingly, the *Singleton* panel correctly reasoned that "whoever" should logically extend to the government.⁴⁸

40. See *Singleton*, 165 F.3d at 1305-07 (Lucero, J., concurring).

41. *Id.* at 1308.

42. *Id.* at 1309.

43. See *id.* at 1308 (dissenting opinion).

44. *Id.* at 1311.

45. *Id.* at 1310.

46. 18 U.S.C. § 201(c)(2) (Supp. 1998) (emphasis added).

47. *Singleton*, 165 F.3d at 1310 (Kelly, J., dissenting).

48. See *id.* Curiously, one district court has also held that the plain meaning of "whoever" does include the government saying, however, that leniency is not among those "gratuities that have an obvious potential to corrupt testimony" and thus is "not a thing of value" as prohibited by § 201(c)(2). *United States v. Medina*, 41 F. Supp. 2d 38, 47 (D. Mass. 1999).

However, in rejecting the *Singleton* panel's decision and reasoning that because the Dictionary Act definition does not expressly include the United States Government, the D.C. circuit reached the opposite conclusion.⁴⁹ Also rejecting the *Singleton* panel decision, the en banc majority referred to *Webster's Dictionary* to find that "'whoever' connotes a being," and since "[t]he United States is an inanimate entity," § 201(c)(2) cannot apply to the United States Government.⁵⁰ Therefore, apparently "whoever" does not mean whoever if the "whoever" is a government officer.⁵¹

1. *Nardone Analysis*

Fortunately, the statutory construction analysis employed by the courts advances beyond "the battle of the dictionaries" and becomes substantive but no less conflicted. In one of the most reasoned opinions of those addressing the *Singleton* issue, Judge Lucero (concurring in the *Singleton* en banc decision), cited *Nardone v. United States*.⁵² In *Nardone*, the Supreme Court held that a federal wiretapping statute, which used a term of general applicability (no person), included government agents.⁵³ Accordingly, Judge Lucero analogized that a similar statement of "general applicability" in § 201(c)(2) ("whoever") should logically encompass the government also.⁵⁴

In yet more sophisticated analysis, several courts have employed the so-called "*Nardone* analysis." The *Nardone* Court identified two classes of statutes wherein general terms of applicability, like "whoever," do not apply to the government.⁵⁵ The first class includes statutes that, "if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest."⁵⁶ The second class includes statutes which, when interpreted to include government officers, "would work [an] obvious absurdity."⁵⁷ Accordingly, if 18 U.S.C. § 201(c)(2) is interpreted to fall in either or both of these statutory "classes," the statute then is inapplicable to the government.

Concerning the first class, the *Singleton* en banc majority recognized "[f]rom the common law . . . a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leni-

49. See *United State v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999).

50. *Singleton*, 165 F.3d 1297 (en banc) cert. denied, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

51. Georgetown University Law Professor, Paul Rothstein, commented, "The [*Singleton* en banc] majority opinion appears to give the words an illogical reading in order to preserve a practice it feels is necessary and desirable for law enforcement purposes and society in general." Mark Hansen, *Shot Down in Mid Theory*, A.B.A. J., May 1999, at 51. In addition, one court has perceptively pointed out a further absurdity with this interpretation: "the [*Singleton* en banc] majority thereby exempts from the coverage of 201(c)(2) corporations, associations, and all other 'artificial persons' which are as much inanimate entities as the United States." *United States v. Medina*, 41 F. Supp. 2d 38, 46 n.25 (D. Mass. 1999).

52. 302 U.S. 379 (1937) (noting the use of the term "no person" in the federal wiretapping statute).

53. See *id.* at 380-83.

54. See *Singleton*, 165 F.3d 1297, 1310 (Lucero, J., concurring).

55. See *Nardone*, 302 U.S. at 383-84.

56. *Id.* at 383.

57. *Id.* at 384.

ency.”⁵⁸ “This ingrained practice,” the court reasoned, “has created a ‘vested sovereign prerogative’ in the government.”⁵⁹ Therefore, according to the majority, § 201(c)(2) “would deprive the sovereign of a recognized or established prerogative, title, or interest.” According to the *Singleton* en banc majority, § 201(c)(2) cannot, therefore, be read to include the government.⁶⁰

The court’s analysis, however, fails to acknowledge an important caveat established by the *Nardone* Court: “the sovereign exclusion rule applies less stringently when applied to government servants or agents rather than to the sovereign itself.”⁶¹ Countering, the en banc majority’s opinion that United States Attorneys are sovereign, Judge Lucero correctly reasoned: “For purposes of *Nardone*, United States Attorneys must be regarded as agents of the government, not as its alter egos.”⁶²

Regarding the second class of *Nardone* cases—“where public officers are impliedly excluded from language embracing all persons . . . [because such a reading] would work obvious absurdity”⁶³—the *Singleton* en banc majority simply relied on various district court decisions to conclude that the panel’s reading of § 201(c)(2) would create an “absurdity” in relation to other statutes.⁶⁴ Nevertheless, whether such an absurdity is actually created is not so clear, and the *Singleton* panel persuasively reconciled any potential conflict.⁶⁵

In his concurring opinion, Judge Lucero agreed with the panel that an interpretation of § 201(c)(2) that includes the government does not yield an obvious absurdity.⁶⁶ Again, Judge Lucero offered persuasive analysis regarding not only statutory construction of § 201(c)(2), but also concerning the application of “whoever” to other subparts of § 201.⁶⁷ Accordingly, Judge Lucero correctly notes that part of the purpose of § 201 is, in fact, to criminalize certain behaviors of government officials.⁶⁸ The government itself recognized that a prosecutor may be found in violation of §201(b)(3) by corruptly bribing a witness for the witness’ testimony. Section 201(b)(3) also uses the word “whoever.”⁶⁹ Thus, “if whoever can refer to government agents in one part of the statute, then it can surely refer to government agents in § 201(c)(2).”⁷⁰

Although the plain meaning of “whoever” would seem to include even the government, the diversity in opinion among the circuits in regarding

58. *Singleton*, 165 F.3d at 1301 (en banc), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

59. *Id.*

60. *Id.*

61. *Nardone*, 302 U.S. at 383.

62. *See Singleton*, 165 F.3d at 1304 (Lucero, J., concurring).

63. *Nardone*, 302 U.S. at 384.

64. *See Singleton*, 165 F.3d at 1304 (Lucero, J., concurring).

65. *See infra* text accompanying notes 72-102.

66. *See Singleton*, 165 F.3d at 1304 (Lucero, J., concurring).

67. *See id.* at 1305.

68. *See id.*

69. *See* 18 U.S.C. § 201(b)(2) (Supp. 1998); *Singleton* 165 F.3d at 1305.

70. *Singleton*, 165 F.3d 1297, 1305 (Lucero, J., concurring). Judge Lucero also referred to another inconsistent reading of § 201 by the en banc *Singleton* majority. For example, § 201(b)(2) and § 201(c)(1)(B) limit their scope to “public official[s].” Lucero correctly noted that Congress could have included the same limiting expression in § 201(c)(2) had it desired. *See id.*

the statute's construction illustrates that § 201(c)(2) may not mean what it says. A court's disposition regarding the doctrine of separation of powers is likely to influence its interpretation. Courts inclined toward judicial restraint and respect for Congress' legislative function will not be inclined to exclude the government from § 201(c)(2). In light of the *Singleton* panel's persuasive analysis, this appears to be the correct position for the court to take. As the *Singleton* panel mindfully pointed out, the "court must perform its own constitutional duties and no more. Ours is not to explore the farthest meanings that the term 'whoever' can bear so as to effectuate the policy we think best. Our duty is to interpret the plain meaning of the statute."⁷¹

2. Application of State Ethics Rules to Federal Prosecutors

The *Singleton* panel uniquely identified a trend toward requiring federal prosecutors to abide by state ethics rules as further justification for including federal prosecutors within the reach of § 201(c)(2).⁷² Specifically, the panel reasoned that, "if federal prosecutors are bound . . . [by state] ethical rule[s], we think it even more clear that they are bound by a federal statute regulating the evidence presented in federal court."⁷³

Somewhat unknowingly, Congress may have added fuel to the *Singleton* fire when it recently enacted the Citizen Protection Act of 1998, which statutorily subjects United States Attorneys to state ethics rules.⁷⁴ This legislation, in effect, nullifies the exemption from state ethics rules that United States Attorneys enjoyed under former Attorney General Richard L. Thornburgh.⁷⁵

It is not entirely clear how this legislation will ultimately affect issues like those raised in *Singleton*, but at least one commentator has suggested that since state ethics rules may be interpreted as more restrictive than applicable federal rules, state ethics laws may potentially preclude prosecutors from obtaining witness testimony through promises of leniency.⁷⁶ Demonstrative of this notion is the *Singleton* panel's conclusion that the government also violated *Kansas Professional Rule* 3.4(b) in presenting Napoleon Douglas' testimony against Ms. Singleton.⁷⁷ As the

71. *Id.* at 1310 (Kelly, J., dissenting).

72. *See Singleton*, 144 F.3d at 1354 (citing *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (holding that federal prosecutors are bound to state ethics rule regarding ex parte contact in the course of a prosecution); *see also United States v. Lopez*, 4 F.3d 1455, 1458-63 (9th Cir. 1993).

73. *See Singleton*, 144 F.3d at 1354.

74. *See* Citizen Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-118 (codified as amended at 28 U.S.C. § 530B (1994 & Supp. IV 1998)).

75. *See* Thornburgh Memorandum, 28 C.F.R. pt. 77 (1997) (decreeing that Department of Justice lawyers were not subject to state ethics rules when the lawyers acted in their capacity of federal attorneys enforcing federal law); *see also* Cramtandl Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); ABA Formal Opinion 95-396, *Is DOJ Above the Rules?*, A.B.A. J., Nov. 1997, at 26.

76. *See* Richard C. Montgomery, *Ethical Standards for Federal Prosecutors*, 147 PITT. LEGAL J. 9, 9 (1999); *see generally* David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 537-38 (1999) (comparing the *Singleton* issue to the Starr Referral).

77. *See Singleton*, 144 F.3d at 1358-59.

court noted, "The rule adopted by the Supreme Court of Kansas, provides, 'A lawyer shall not . . . offer an inducement to a witness that is prohibited by law.'" ⁷⁸ Moreover, the commentary to the *Model Rules of Professional Conduct*—also adopted by the Supreme Court of Kansas—states: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . ." ⁷⁹ Recognizing that a promise of leniency may be of equal or, perhaps, greater value than cash and a even greater incentive to offer false testimony, the court concluded that the government also violated Kansas Rule 3.4(b). ⁸⁰ Indeed, when it comes to state ethics rules, "whoever" does appear to include United States Attorneys.

B. The Structure of § 201

Unchallenged by any court is the *Singleton* panel's argument that the inherent structure of § 201 itself supports the panel's interpretation. ⁸¹ The panel argued that construction of a particular part of a statute is supported by the language and structure of the statute as a whole. ⁸² In particular, § 201 addresses corruption of public officials and witnesses. ⁸³ Bribery prohibitions are collected under § 201(b)(1) and require corruption on the part of the giver and intent to influence the receiver's action. ⁸⁴ On the other hand, the gratuity provisions collected under § 201(c) contain no requirements of corruption or intent to influence the receiver. ⁸⁵

The *Singleton* panel reasoned, "Congress thus deliberately included the corruptness and intent-to-influence elements in § 201(b)(3) and excluded them from § 201(c)(2)." ⁸⁶ Though it did not expand on this issue, apparently the court implied that a federal prosecutor need not have any corrupt motive or intent to influence to violate § 201(c)(2). The implication would sweep in the huge majority of leniency-for-testimony bargains that the panel argued occur as a matter of course in federal prosecutions, in violation of § 201(c)(2). ⁸⁷

The panel further commented that "the predecessor statute to § 201(c)(2) did require an agreement that the testimony would be influenced by a thing of value." ⁸⁸ However, the panel reasoned that since "Congress deliberately deleted [this] language . . . it is not our place to reinsert it." ⁸⁹ Again, the panel suggested that Congress consciously re-

78. *Id.*

79. KANSAS RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) cmt. (1997).

80. *Singleton*, 144 F.3d at 1359.

81. *See id.* at 1351.

82. *See id.*

83. *See* 18 U.S.C. § 201(c) (Supp. 1998).

84. *See id.* § 201(b)(1).

85. *See id.* § 201(c).

86. *Singleton*, 144 F.3d at 1351.

87. *See id.*

88. *Id.* (referring to 18 U.S.C. § 209 (1952)).

89. *Id.*

moved testimony from the list of valid items for which the government can offer a witness a thing of value.⁹⁰

The court then referred to § 201(d):

Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.⁹¹

Here the panel reasoned: “The existence of § 201(d) as a specific exception to § 201(c)(2) indicates that § 201(c)(2) would otherwise prohibit travel and other witness fees, which are given to witnesses because of their testimony.”⁹² Thus, Congress specifically made the effort to identify items that were not included under the prohibition of § 201(c)(2), and leniency was not among them.⁹³

C. Section 201(c)(2) in Relation to Other Statutes

One argument the government forwarded against the panel’s decision was that § 201(c)(2) operates in conjunction with other statutes to allow the government, upon proper disclosure and/or court approval, to trade certain items of value for testimony.⁹⁴ Judge Lucero, in the en banc court’s concurring opinion, and Judge Batchelder in the Sixth Circuit, each presented persuasive arguments favoring the government’s position by arguing that the panel’s interpretation of § 201(c)(2) would conflict with an “extensive and detailed statutory framework [developed by Congress] authorizing sentence reductions and recommendations, immunity, and other incentives for cooperating witnesses.”⁹⁵ The Eighth and D.C. Circuits employed similar reasoning in rejecting the panel’s decision.⁹⁶ The *Singleton* panel, contrary to the government’s contention, maintained their ground in suggesting that their reading of § 201(c)(2) could be reconciled with related statutes.⁹⁷

90. *See id.*

91. 18 U.S.C. § 201(d) (Supp. 1998).

92. *Singleton*, 144 F.3d at 1352.

93. *See id.* (noting that witness fees, reasonable cost of travel and subsistence, reasonable value of lost time, and expert witness fees are not prohibited).

94. *See* United States v. *Singleton*, 165 F.3d 1297, 1303 (10th Cir. 1999) (en banc) *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758); *see also* United States v. *Ware*, 161 F.3d 414, 422 (6th Cir. 1998); United States v. *Johnson*, F.3d 1092, 1098 (8th Cir. 1999); United States v. *Ramsey*, 165 F.3d 980, 990 (D.C. Cir. 1999).

95. *Singleton*, 165 F.3d at 1305 (Lucero, J., concurring); *Ware*, 161 F.3d at 422. Judge Porfilio, in the en banc majority opinion, merely cited district court cases (United States v. *Arana*, 18 F. Supp. 2d 715, 718-19 (E.D. Mich. 1998), United States v. *Dunlap*, 17 F. Supp. 2d 1183, 1184-86 (D. Colo. 1998), and United States v. *Guillaume*, 13 F. Supp. 2d 1331, 1334 (S.D. Fla. 1998)) and said: “We simply believe the general principles we have set forth so completely undercut defendant’s reading that further exposition would be redundant.” *Singleton*, 165 F.3d 1297, at 1302.

96. *See Johnson*, 167 F.3d at 1098; *Ramsey*, 165 F.3d at 990.

97. *See Singleton*, 144 F.3d at 1354-56.

1. *Section 201(c)(2) vs. The Sentencing Reform Act*

In their analysis, courts opposing the *Singleton* panel examined several related statutes that seemingly conflict with the panel's interpretation of § 201(c)(2). First, the courts looked at several statutes associated with the Sentencing Reform Act⁹⁸, enacted by Congress in 1984, which established the United States Sentencing Commission, charged with the duty of promulgating and distributing sentencing guidelines to the federal courts.⁹⁹ The Act explicitly requires the Commission to ensure that the guidelines reflect "the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's *substantial assistance* in the investigation or prosecution of another person who has committed an offense."¹⁰⁰

One sentencing statute further provides that, "Upon motion of the Government, the court shall have the authority to impose a sentence below the level established by statute as a minimum sentence to reflect a defendant's *substantial assistance* in the investigation or prosecution of another person who has committed an offense."¹⁰¹ Furthermore, the *Federal Rules of Criminal Procedure*, Rule 35(b), allows the court, on motion of the Government, made within one year of the imposition of sentence to "reduce a sentence to reflect a defendant's subsequent, *substantial assistance* in the investigation or prosecution of another person who has committed an offense."¹⁰²

The guidelines themselves also contain language that governs downward departures of defendants who provide "substantial assistance in the investigation or prosecution of another person who has committed an offense."¹⁰³ Additionally, as pointed out by the Sixth Circuit, "Included in the factors that the court may consider in determining whether to grant the motion for downward departure . . . is the truthfulness, completeness, and reliability of any information *or testimony* provided by the defendant."¹⁰⁴ As the Sixth Circuit concluded, "[t]o apply the general language of 18 U.S.C. § 201(c)(2) to federal prosecutors in the face of the specific provisions of the Sentencing Reform Act and the Sentencing Guidelines is absurd."¹⁰⁵

The *Singleton* panel countered this argument by saying that each of these statutes only authorizes that substantial assistance can be rewarded *after* it is rendered."¹⁰⁶ In reconciling this interpretation with the related sentencing statutes, the *Singleton* panel rationalized that the

98. *See id.* at 1354.

99. *See* 28 U.S.C. § 994(a) (Supp. 1998).

100. *Id.* § 994(n) (emphasis added).

101. 18 U.S.C. § 3553(e) (Supp. 1998) (emphasis added).

102. FED. R. CRIM. P. 35(b) (1998) (emphasis added).

103. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998).

104. *United States v. Ware*, 161 F.3d 414, 422 (6th Cir. 1998).

105. *Id.*

106. *United States v. Singleton*, 144 F.3d 1344, 1355 (10th Cir. 1998) (emphasis added), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

term “substantial assistance” does not include testimony.¹⁰⁷ Dubiously, however, the *Singleton* panel conveniently chose to ignore the language of *U.S. Sentencing Guidelines* § 5K1.1(a)(2), which explicitly mentions that factors to be considered in reduction of a witnesses’ sentence are “the truthfulness, completeness, and reliability of any information or testimony provided by the defendant.”¹⁰⁸ But in its subsequent dissent, the panel backtracked and noted that § 5K1.1 apparently creates a narrow exception to § 201(c)(2) by permitting a court to reward a defendant’s truthful testimony *after* it has been given.¹⁰⁹ Thus, the panel went on to say, “This narrow exception does not affect § 201(c)(2)’s prohibition against the prosecutor offering or promising leniency *in advance* to a defendant in exchange for his agreement to testify.”¹¹⁰ This apparent weakness in the panel’s argument certainly cuts against their interpretation of § 201(c)(2), but again highlights the inherent conflict between the language of § 201(c)(2) and related sentencing statutes.

2. Section 201(c)(2) vs. Federal Immunity Statutes

The Sixth Circuit and Judge Lucero also identified 18 U.S.C. §§ 6001-05, enacted in 1970 as part of the Organized Crime Control Act, as conflicting with the panel’s interpretation of § 201(c)(2).¹¹¹ These federal immunity statutes authorize prosecutors to request immunity for cooperating witnesses.¹¹² “Section 6003 specifically authorizes a United States Attorney . . . [with appropriate approval] to request from a United States district court an order granting immunity to a witness whose testimony the United States Attorney considers necessary in the public interest.”¹¹³ The Sixth Circuit presumed that there could be no purpose to grant immunity except to obtain testimony¹¹⁴ and somewhat derisively commented: “Do we then assume that the Congress enacted these immunity provisions with the intention that they be utilized by the United States Attorneys under pain of criminal sanction?”¹¹⁵

The *Singleton* panel countered by noting that its reading of § 201(c)(2) can be harmonized with 18 U.S.C. §§ 6001-05.¹¹⁶ The panel distinguished the federal immunity statutes from other related statutes, noting that “[t]hese statutes allow the government to compel an unwilling witness to cooperate by precluding use of the Fifth Amendment privilege” against self-incrimination under a grant of immunity.¹¹⁷

Again, the panel’s argument has merit. Sections 6001-05 indeed provide a mechanism to strip away a defendant’s right not to incriminate

107. *See id.*

108. U.S. SENTENCING GUIDELINES § 5K1.1(a)(2) (1998) (emphasis added).

109. *See Singleton*, 165 F.3d 1297, 1313 (Kelly, J., dissenting) (emphasis added).

110. *Id.* (emphasis added).

111. *See United States v. Ware*, 161 F.3d 414, 422 (6th Cir. 1998); *Singleton*, 165 F.3d at 1305 (Lucero, J., concurring).

112. *See* 18 U.S.C. §§ 6001-05 (Supp. 1998).

113. *Ware*, 161 F.3d at 422.

114. *See id.*

115. *Id.*

116. *See Singleton*, 165 F.3d at 1313 (Kelly, J. dissenting).

117. *See id.*

himself, and in return, grant that defendant immunity.¹¹⁸ There seems to be no incentive for a witness to color his testimony—he already has complete immunity from prosecution. This does not seem to be the case where, as the *Singleton* panel points out, the government is “purchasing voluntary testimony with leniency.”¹¹⁹

3. § 201(c)(2) vs. *The Witness Relocation and Protection Act*

In his concurrence, Judge Lucero further identified a conflict between the panel’s reading of § 201(c)(2) and the Witness Protection Act,¹²⁰ which expressly authorizes the Attorney General to provide for relocation and protection of certain federal witnesses.¹²¹ Because the Witness Protection Act allows the government to provide “numerous thing[s] of value,”¹²² including housing and living expenses, in exchange for testimony,¹²³ the Act’s effect seemingly contradicts the panel’s reasoning regarding § 201(c)(2).

As expected, however, the *Singleton* panel responded and indicated that no conflict exists with the Witness Relocation and Protection Act.¹²⁴ Rather, the panel concluded, “section 3521 is primarily concerned with the welfare of the witness, not with obtaining testimony.”¹²⁵ Interestingly, the panel also noted that § 201(c)(2) does not conflict with *Federal Rule of Criminal Procedure* 11(e)(1), which permits plea agreements.¹²⁶ According to the panel, “Rule 11(e) does not concern a defendant’s testimony—it simply permits a defendant to bypass trial,” and the reward, if any, is for admitting his guilt—not for testimony.¹²⁷ Although a broad reading of related statutes seems to indicate that their collective “spirit” conflicts with the panel’s interpretation of § 201(c)(2), a literal reading does not totally undermine the *Singleton* panel’s reading of § 201(c)(2).

D. *Inconclusive Legislative History*

The *Singleton* panel attempted to employ arguably scarce legislative history to support its argument, before finally concluding, “We find no clearly expressed legislative intention contradicting the statute’s language.”¹²⁸ The *Singleton* en banc court, however, failed to consider *any* relevant legislative history, and the court only commented, “we must presume if Congress had intended that section 201(c)(2) overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable and unarguable language.”¹²⁹

118. 18 U.S.C. §§ 6001-6005 (Supp. 1998).

119. *Singleton*, 165 F.3d at 1313 (Kelly, J., dissenting).

120. 18 U.S.C. § 3521(a) (Supp. 1998).

121. *See id.* §§ 3521(b)(1)(B),(D).

122. *Singleton*, 165 F.3d at 1306 (citing 18 U.S.C. §§ 3521 (b)(1)(B),(D)).

123. *See* 18 U.S.C. §§ 3521 (b)(1)(B),(D).

124. *See id.*

125. *Id.*

126. *See* FED. R. CRIM. P. 11(e)(1); *Singleton*, 165 F.3d at 1306 (Lucero, J., concurring).

127. *Id.*

128. *United States v. Singleton*, 144 F.3d 1343, 1352 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

129. *Singleton*, 165 F.3d at 1302.

The Sixth and D.C. Circuits did, however, offer argument to counter the *Singleton* panel's reading of § 201(c)(2)'s legislative history.¹³⁰ In particular, the Sixth Circuit noted "that nothing in the legislative history [of § 201(c)(2)] indicates it applies to prosecutors."¹³¹ Also, the court correctly noted:

Though S.R. Rep. 87-2213, which mirrors the language of H.R. Rep. 87-748, notes in the section-by-section analysis that subsection (h) of § 201 (the predecessor of (c)(2)) "forbids offers of payments to a witness of anything of value 'for or because of' testimony given or to be given," *that is the extent of the analysis.*¹³²

"The legislative history is void of any declaration that [Public Law Number] 87-849 was intended to thwart the long-sanctioned prosecutorial prerogative challenged by [the defendant] in this case."¹³³

Furthermore, as pointed out by the Sixth and D.C. Circuits, "the legislative history of the 1970, 1986 and 1994 amendments to section 201 is also silent on the issue."¹³⁴ If Congress had intended to abolish such a pervasive practice would they not have said so? In addition, these amendments are deafeningly silent regarding the resulting contradiction with other statutes. As the D.C. Circuit notes, "the 1986 and 1994 amendments [to § 201] were passed after 18 U.S.C. § 3553(e) (reduction below statutory minimum sentence), 18 U.S.C. § 6003 (immunity statute) and 28 U.S.C. § 994(n) (requiring Sentencing Commission to allow sentencing guideline reductions) but the potential conflict with these statutes was never addressed" in the legislative history of either one of these subsequent amendments to § 201.¹³⁵ Not surprised to find the absence of this discussion regarding conflict with other statutes in any legislative history of § 201, both the D.C. and Sixth Circuits explain "that no such conflict exists as § 201(c)(2) was never intended to apply to the government."¹³⁶

E. Application of the Exclusionary Rule

The *Singleton* panel's remedy for the testimony obtained in violation of § 201(c)(2) was suppression of its use in Ms. Singleton's trial¹³⁷, despite the fact that the statute already provides specific remedies—fines or incarceration—for any violation of § 201(c)(2).¹³⁸ The basis of the panel's decision to exclude the evidence centers around the assumption that a

130. See *United States v. Ware*, 161 F.3d at 423-24 (6th Cir. 1998); see also *United States v. Ramsey*, 165 F.3d 980, 990-91 (D.C. Cir. 1999).

131. *Ware*, 161 F.3d at 423.

132. *Id.* (emphasis added).

133. *Id.*

134. *Ramsey*, 165 F.3d at 991; see also *Ware*, 161 F.3d at 423.

135. See *Ramsey*, 165 F.3d at 991.

136. *Ware*, 161 F.3d at 423; (citing Act of Oct. 27, 1986 ch. 570 § 1007, 100 Stat. 3207-7 (1986) (codified as amended at 18 U.S.C. § 3553 (1994)); Act of Nov. 10, 1986 ch. 546 § 48, 100 Stat. 3605 (1986) (codified as amended at 18 U.S.C. § 201 (1994)); see also *Ramsey*, 165 F.3d at 991.

137. See 18 U.S.C. § 201(c)(2).

138. See *United States v. Singleton*, 144 F.3d 1343, 1359 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

“violation of § 201(c)(2) . . . directly taint[s] the reliability of the evidence.”¹³⁹ Further, the panel reasoned that application of the exclusionary rule is “necessary to remove the incentive to disregard the statute” and to protect “the imperative of judicial integrity.”¹⁴⁰

Although the *Singleton* en banc court chose not to address the issue, at least two courts have said that even if the statute encompasses federal prosecutors, there is no basis for applying the exclusionary rule.¹⁴¹ Further, countering the *Singleton* panel’s position that the judicial process becomes tainted by the admission of “purchased testimony,” the Sixth Circuit noted:

“[T]he disclosure of the plea agreements to defense before trial, cross-examination of cooperating witnesses, and jury instructions all provide opportunity to ferret out false testimony that an interested witness might give because of a government promise.”¹⁴²

....

. . . [E]ven if we could make the great leap necessary to include prosecuting attorneys within the scope of § 201(c)(2), we would not apply the exclusionary rule to suppress the testimony of cooperating accomplices. Congress has provided the penalties for violations of this statute and extension of the exclusionary rule is not appropriate.¹⁴³

Enlisting a separation of powers argument, the court noted that “where Congress has both established a right and provided exclusive remedies for its violation, we would ‘encroach upon the prerogatives’ of Congress were we to authorize a remedy not provided for by statute.”¹⁴⁴

Moreover, the Sixth Circuit argued, “statutory violations, absent any underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule.”¹⁴⁵ The court, however, did acknowledge that the exclusionary rule has been applied to remedy statutory violations, but that “these cases typically implicate underlying constitutional rights such as the right to be free from unreasonable search and seizure.”¹⁴⁶ The D.C. Circuit adds, “the Supreme Court has acknowledged the ‘substantial’ cost of exclusion which ‘hamper[s]’ the enforcement of valid laws and keeps ‘concededly relevant and reliable

139. *Id.* at 1360.

140. *Id.*

141. *See Ware*, 161 F.3d at 424; *Ramsey*, 165 F.3d at 991.

142. *See Ware*, 161 F.3d at 424 (quoting *United States v. Reid*, 19 F. Supp. 2d 534, 537 (E.D. Va. 1998)).

143. *Id.* at 425.

144. *Id.* at 424 (quoting *United States v. Frazin*, 780 F.2d 1461, 1466 (9th Cir. 1986)).

145. *Id.* (citing *United States v. Thompson*, 936 F.2d 1249, 1251 (11th Cir. 1991)).

146. *Id.* (citing *Miller v. United States*, 357 U.S. 301 (1958) (“excluding money seized because federal officers violated 18 U.S.C. § 3109 by breaking through a door without indicating their authority and purpose to arrest”)). The Sixth Circuit went on to add:

[T]he *Miller* Court was at pains to emphasize with regard to the statute at issue there that “Congress, codifying a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual’s right of privacy in his house.” . . . No such tradition exists with regard to 18 U.S.C. § 201(c)(2).

Id. at 425 n.6 (citation omitted).

evidence' from the jury," and, thus, assuming federal prosecutors were subject to § 201(c)(2), that fact would not justify excluding a co-conspirator's testimony.¹⁴⁷ Recognizing that no such underlying constitutional right or common law tradition exists with regard to § 201(c)(2), and that Congress has already provided for specific remedies, both the Sixth and D.C. Circuits have correctly asserted that applying the exclusionary rule to § 201(c)(2) is inappropriate.¹⁴⁸

F. Policy and Effect Considerations of Conflicting Interpretations of § 201(c)(2)

Several courts have countered the *Singleton* panel's interpretation of § 201(c)(2) by arguing that such an interpretation conflicts with ingrained practices of law enforcement and would severely hamper the prosecutorial function—amounting to a bad overall policy.¹⁴⁹ Indeed prosecutors have historically traded leniency for testimony without much interference from the courts.¹⁵⁰ The Fifth Circuit noted that the policy of exchanging leniency for testimony is historically rooted in the English common law,¹⁵¹ and “[t]o interpret section 201(c)(2) [as the *Singleton* panel did] would apply shackles to the government in its pursuit to enforce the law.”¹⁵² The court also noted that “frequently the most knowledgeable witnesses available to testify about criminal activity are other co-conspirators.”¹⁵³ Incredibly, the court argued that the “end justifies the means,” by noting, “often, there are situations where these individuals are the only credible witnesses, and without the ability to use their testimony the government would not be able to obtain a conviction.”¹⁵⁴

Likewise, the Sixth Circuit has noted that inclusion of the government within the reach of § 201(c)(2) would significantly impact the prosecutor's ability to prosecute:

It is an occupational hazard of prosecutors that to prove the guilt of a criminal defendant beyond a reasonable doubt, they often must rely on the testimony of other criminal defendants, many of whom are less than enthusiastic about assisting the prosecution. To now deprive prosecutors of all accomplice or co-defendant testimony except that which is voluntarily provided without hope of benefit to the volunteer, would be to seriously undermine the ability of prosecutors to prosecute.¹⁵⁵

147. *United States v. Ramsey*, 165 F.3d 980, 991 (D.C. Cir. 1999) (citing *United States v. Janis*, 428 U.S. 433, 447 (1976)).

148. *See Ware*, 161 F.3d at 425; *see also Ramsey*, 165 F.3d at 991.

149. *See United States v. Haese*, 162 F.3d 359, 366-67 (5th Cir. 1998); *see also Ware*, 161 F.3d at 423.

150. *See generally* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992) (discussing history of cooperation agreements between prosecutors and defendants).

151. *See Haese*, 162 F.3d at 367.

152. *Id.*

153. *Id.* at 366 (citing *United States v. Dailey*, 759 F.2d 192, 196 (1st Cir. 1985)).

154. *Id.* at 367.

155. *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998).

Moreover, in his concurrence, Judge Lucero adds, "barring a prosecutor from discussing leniency prior to testimony would seriously inhibit the intended effect of those statutes by reducing the pool of defendants willing to testify against their co-conspirators."¹⁵⁶ Any propensity for a witness to be untruthful so as to increase his chances of receiving leniency, courts have said, is offset by the disclosure to the jury of such an arrangement, the availability of cross examination, and relevant jury instructions.¹⁵⁷

The panel, however, countered much of its opposition's reliance on the common law practice of sanctioning the testimony of accomplices against their co-conspirators in exchange for leniency, with two other equally compelling traditions and policies: 1) "the common law prohibition against paying fact witnesses" and 2) "the fundamental policy of ensuring a level playing field between the government and a defendant in a criminal case."¹⁵⁸

In *United States v. Cervantes-Pacheco*,¹⁵⁹ the Fifth Circuit pointedly previewed the panel's contention that "it is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."¹⁶⁰ Indeed, the disturbing possibility of pervasive false testimony offered under a plea agreement is not a novel concern raised by the *Singleton* panel. United States District Court Judge John Gleeson articulated that the *United States Sentencing Guidelines* have given "prosecutors the key to sentencing leniency."¹⁶¹ Moreover, defendants confronted by cooperating witnesses face the real "danger that the details provided by the witness will be tailored to conform to the prosecutor's expectations."¹⁶² The *Singleton* panel cited disturbing authority supporting the notion that a witness' natural tendency toward self-preservation would fuel an underlying motive to please the prosecutor with his testimony.¹⁶³ A witness cooperating with the prosecution "will know that he has no chance to gain immunity or leniency unless the information that he initially furnishes [and subsequently testifies to] appears weighty enough to aid in convicting a target."¹⁶⁴

156. *United States v. Singleton*, 165 F.3d 1297, 1307 (10th Cir. 1999) (en banc) (Lucero, J., concurring), *cert. denied*, 119 S. Ct. 2371 (U.S. June 21, 1999) (No. 98-8758).

157. *See Ware*, 161 F.3d at 424. Note, however, at least one court opposing the panel's decision, has openly expressed "substantial concerns as to whether the practice of exchanging . . . leniency for testimony is 'adequately' controlled" by these mechanisms. *United States v. Medina*, 41 F. Supp. 2d 38, 50 (D. Mass. 1999).

158. *Singleton*, 165 F.3d 1297, 1313 (Kelly, J., dissenting).

159. 826 F.2d 310 (5th Cir. 1987).

160. *Id.* at 315.

161. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 424 (1997).

162. *Id.* at 457.

163. *See United States v. Singleton*, 144 F.3d 1343, 1349-50 (10th Cir. 1998) (citing *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983) (finding that "witness admitted lying in over thirty different statements motivated by his sense of self-preservation."); *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986) (noting that "[a] violation of trust which is influenced by the offer of an intangible service is no less damaging . . . then if the influence was in the form of a cash kickback."); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) ("We think it obvious that promises of . . . leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case.").

164. *Hughes*, *supra* note 150, at 39.

Moreover, the panel persuasively argued that the anti-gratuity statute only limits *how* the government may prosecute its case by only placing a restriction on one method of gathering admissible evidence.¹⁶⁵ As such, the panel soundly rejected “the end justifies the means” argument, offering reasoning that seems to diffuse the hyperbole offered by courts in opposition to the panel’s decision.¹⁶⁶

Quite helpfully, the panel pointed to several viable alternative means available to prosecutors. First of all, “the government is not precluded from offering leniency in exchange for information and assistance short of actual testimony at trial.”¹⁶⁷ This, of course, removes any “taint” from the trial testimony, yet still rewards the witness for cooperation in the investigation.¹⁶⁸ Secondly, “the government could prosecute accomplices first, then compel their testimony by subpoena against co-conspirators.”¹⁶⁹ In a footnote, the panel suggested a methodology by which a prosecutor could enter into a plea agreement with a defendant under *Federal Rules of Criminal Procedure*, Rule 11(e), subpoena him to testify after his guilty plea, and offer any records of his prior statements made during plea negotiations if they conflict with his testimony.¹⁷⁰ Any leniency offered the witness would only be as a reward for his guilty plea, not for his testimony. As the panel noted, the defendant’s testimony “is compelled through subpoena and is not given in exchange for anything of value.”¹⁷¹ Admittedly, an interpretation that sweeps federal prosecutors under the guise of § 201(c)(2) may challenge law enforcement to utilize means other than trading leniency for testimony, but is unlikely to cripple the criminal justice system in the end.

IV. CONCLUSION

Much to the chagrin of criminal defense lawyers, it appears the outpouring of argument, though often tortiously employed, has virtually extinguished the firestorm ignited by the *Singleton* panel. Beneath the charred remains, however, and still unanswered, is the panel’s primary contention: accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the testifying witness to shift blame, reaping the reward of promised leniency from the government. Given the truth-seeking purpose of the criminal justice system, the *Singleton* panel’s plain meaning statutory construction of 18 U.S.C. § 201(c)(2), to include prohibitions against federal prosecutors exchanging testimony for leniency, seems quite reasonable. Therefore, if § 201(c)(2) means something other than what it says, Congress should say so—not

165. See *Singleton*, 165 F.3d at 1311-12 (Kelly, J., dissenting).

166. Candidly, however, the panel admitted that accomplices can provide important information; thus, interpreting § 201(c)(2) to include federal prosecutors may require some changes by the government in its strategy to elicit testimony of some witnesses. See *id.* at 1309.

167. *Id.*

168. See *id.*

169. *Id.*

170. See *id.* at n.3.

171. *Id.* Another alternative the panel noted is that “the government could also request that the district court order an accomplice to testify under a grant of immunity.” See *id.* at 1309-10 (Kelly, J., dissenting).

the courts. The nature and complexity of the debate reinforces the notion that Congress should reweigh the values that § 201(c)(2) was intended to address. Until then, and despite all the cold water dumped on the *Singleton* panel's conclusion, the embers underlying the panel's decision will continue to glow.