

UNITED STATES of America, Plaintiff-Appellee,

v.

Sonya Evette SINGLETON, Defendant-Appellant

United States Court of Appeals, Tenth Circuit

144 F.3d 1343 (1998)

vacated, ___ F.3d ___ (No. 97-3178, Jan. 8, 1999) (en banc - see page 17)

KELLY, Circuit Judge.

Section 201(c)(2) of Title 18 of the United States Code prohibits giving, offering, or promising anything of value to a witness for or because of his testimony. Defendant-Appellant Sonya Singleton argues the government violated this statute by promising leniency to a witness in return for his testimony against her. Ms. Singleton was convicted of one count of conspiracy to distribute cocaine, see 21 U.S.C. §§ 841(a)(1), 846, and seven counts of money laundering, see 18 U.S.C. § 956(a)(1)(B)(I). The district court sentenced her to forty-six months imprisonment on each count, to be served concurrently, and to be followed by three years of supervised release.

Ms. Singleton appeals her convictions, arguing the district court erred (1) in denying her motion to suppress testimony allegedly obtained in violation of 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b), and (2) in denying her motion for judgment of acquittal on both the conspiracy and money laundering counts. Our jurisdiction arises under 28 U.S.C. § 1291. We reverse and remand for a new trial.

Background

In April 1992, a detective of the Wichita Police Department contacted local Western Union agents to determine if drug dealers were using Western Union services to transfer drug money. He found a large number of wire transfers over \$1000 which bore similar identifiers, including similar names of recipients, and similar names, addresses and phone numbers of senders. The records led authorities to a group of people whom they believed were involved in a conspiracy to sell drugs. Further investigation indicated the drug business was begun by men who had moved from California to Wichita. They recruited local women to wire proceeds of drug sales back to California to pay for more cocaine; some of these women also received wire transfers on behalf of the conspiracy and transported cocaine from California to Wichita. Ms. Singleton was identified as one [p. 1344] who transferred and received money for the conspiracy. She was the common-law wife of Eric Johnson, who regularly bought, packaged, and sold drugs, and she was listed as either the sender or recipient on eight wire transfers suspected to have been sent on behalf of the conspiracy. Handwriting experts confirmed that her handwriting was present on paperwork accompanying the eight wire transfers.

Ms. Singleton and others were charged in a superseding indictment with multiple counts of money laundering and conspiracy to distribute cocaine. Before trial she moved to suppress the testimony of Napoleon Douglas, a coconspirator who had entered into a plea agreement with the government. The basis for her motion was that the government had impermissibly promised Mr. Douglas something of value--leniency--in return for his testimony, in violation of 18 U.S.C. § 201(c)(2) and Kansas Rule of Professional Conduct 3.4(b), which prohibits offering unlawful inducements to a witness. The district court denied the motion, ruling that § 201(c)(2) did not apply to the government.

At trial Mr. Douglas testified against Ms. Singleton. He stated that the government, through an assistant United States attorney, had promised to file a motion for a downward departure if he testified truthfully. See IV R. 204-06. His testimony of the government's promise in this regard is somewhat confused, however, and in Mr. Douglas's written plea agreement the government made no firm promise to file a motion for a downward adjustment. The agreement merely stated the government would file a motion under USSG § 5K1.1 or 18 U.S.C. § 3553(e) if, in its sole discretion, Mr. Douglas's cooperation amounted to substantial assistance. See I R. doc. 109, at 2. Both the testimony and plea agreement make clear Mr. Douglas understood that the actual grant of any downward adjustment was entirely within the purview of the sentencing court.

The plea agreement does, however, state three specific promises made by the government to Mr. Douglas in return for his explicit promise to testify. See *id.* at 1-3. 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. See *id.* at 1-2. Second, it promised "to advise the sentencing court, prior to sentencing, of the nature and extent of the cooperation provided" by Mr. Douglas. *Id.* at 2. Third, the government promised "to advise the Mississippi parole board of the nature and extent of the cooperation provided" by Mr. Douglas. *Id.* Mr. Douglas agreed, "in consideration of the items listed in paragraph 2 above ... [to] testify[] truthfully in federal and/or state court...." *Id.* at 2-3.

Discussion

The issues before us are (1) whether the government's conduct was prohibited either by § 201(c)(2) or Kansas Rule of Professional Conduct 3.4(b); (2) if it was, whether Mr. Douglas's testimony should have been suppressed; and (3) whether the record contains sufficient evidence to remand for a new trial.

I. Statutory Construction of 18 U.S.C. § 201(c)(2)

A. The Language and Plain Meaning

We review *de novo* the district court's interpretation of a federal statute. See *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir.1995). Our inquiry begins with the language of the statute, see *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991), which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-36, 112 S.Ct. 515 (citation omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). In the absence of that rare and exceptional circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, --- U.S. ---, 118 S.Ct. 838, 841, 139 L.Ed.2d 849 (1998).

The Supreme Court has recently emphasized the primacy of statutory plain language. In *Salinas v. United States*, --- U.S. [p. 1345] ---, 118 S.Ct. 469, 473-74, 139 L.Ed.2d 352 (1997), the Court concluded that a bribe need not affect federal funds to violate the federal bribery statute, 18 U.S.C. § 666, because the "expansive, unqualified" plain language of the statute criminalized the acceptance of a bribe by a covered official in connection with "any" transaction involving \$5,000 or more. *Id.* at 473, 118 S.Ct. 469. The statute made no mention of federal funds, and the court emphatically refused to rewrite Congress's enactment or judicially add elements to the crime. See *id.* at 473-75, 118 S.Ct. 469. Similarly, in *Brogan v. United States*, --- U.S. ---, 118 S.Ct. 805, 809, 139 L.Ed.2d 830 (1998), the Court invalidated the longstanding "exculpatory no" doctrine under 18 U.S.C. § 1001 "[b]ecause the plain language of § 1001 admits of no exception" for the doctrine. *Id.*, 118 S.Ct. at 812. Section 1001, which imposes criminal liability for making a false statement to federal investigators, had long been interpreted by the courts of appeal to exclude liability for a suspect's mere denial of wrongdoing. The Court, however, rejected "the broad proposition that criminal statutes do not have to be read as broadly as they are written," and stated:

it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy--even assuming that it is possible to identify that evil from something other than the text of the statute itself.... Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.

Id., 118 S.Ct. at 809-12. Most recently, the Court in *Oubre* found that where a general waiver of all causes of action against an employer by an employee did not conform to specific enumerated requirements for waivers under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626, the waiver did not release the employee's ADEA claims. See *Oubre*, 118 S.Ct. at 842. The Court wrote, "Courts cannot with ease presume ratification of that which Congress forbids." *Id.*, 118 S.Ct. at 841.

Section 201(c)(2) could not be more clear. It says:

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.

18 U.S.C. § 201(c)(2). We note at the outset that § 201 is to be broadly construed to further its legislative purpose of deterring corruption. See *United States v. Hernandez*, 731 F.2d 1147, 1149 (5th Cir.1984); *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

The class of persons who can violate the statute is not limited. "Whoever" completes the following elements commits a crime. 18 U.S.C. § 201(c)(2). First, the statute requires a gift, offer, or promise, either direct or indirect, to a person. See *id.* Second, the gift, offer, or promise must be "of value." *Id.* Third, the gift, offer, or promise must be made "for" or "because of" the person's sworn testimony at a trial or other proceeding before an authorized court. *Id.* The state of mind required to violate the statute is knowledge that the thing of value is given for or because of testimony. See *United States v. Campbell*, 684 F.2d 141, 150 (D.C.Cir.1982) (construing parallel subsection); *United States v. Brewster*, 506 F.2d 62, 82 (D.C.Cir.1974) (quoting *United States v. Brewster*, 408 U.S. 501, 527, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972)) (same).

The first issue facing us is whether the assistant United States attorney, acting on behalf of the government, is within the statutory class "whoever." The Supreme Court has recognized a limited canon of construction which provides that statutes do not apply to the government or affect governmental rights unless the text expressly includes the government. See *Nardone v. United States*, 302 U.S. 379, 383, 58 S.Ct. 275, 82 L.Ed. 314 (1937); *United States v. Herron*, 87 U.S. (20 Wall.) 251, 255, 22 L.Ed. 275 (1873). The canon applies only to two classes of cases, [p. 1346] however. See *Nardone*, 302 U.S. at 383, 58 S.Ct. 275. The first class in which the government is presumptively excluded from general statutory language involves statutes which would deprive the sovereign of "a recognized or established prerogative title or interest." *Id.* A classic example is the exemption of the sovereign from statutes of limitation. The second class is comprised of those statutes which would create an absurdity if applied to the government, as, for example, a speed limit applied to a policeman pursuing a suspect. See *id.* at 384, 58 S.Ct. 275.

Even if § 201(c)(2) could be said to deprive the sovereign of an established prerogative, two further exceptions remove § 201(c)(2) from this class of statutes. First, the presumption that the sovereign is excluded unless named does not apply "where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself." *Id.* at 383, 58 S.Ct. 275. See *United States v. Arizona*, 295 U.S. 174, 184, 55 S.Ct. 666, 79 L.Ed. 1371 (1935); *Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239, 22 L.Ed. 80 (1873); see also *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 376, 113 N.E.2d 520, 523-24 (1953). In the case before us, § 201(c)(2) does not restrict any interest of the sovereign itself; it operates only upon an agent of the sovereign, limiting the way in which that agent carries out the government's interests. "There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others." *Arizona*, 295 U.S. at 184, 55 S.Ct. 666 (holding that the Secretary of the Interior was clearly subject to a law prohibiting "any person" from constructing a dam on navigable waterways without the consent of Congress).

The second exception provides that the government is subject to a statute, even if it infringes upon a recognized government prerogative, if the statute's purpose is to prevent fraud, injury, or wrong. *Nardone*, 302 U.S. at 384, 58 S.Ct. 275; *Herron*, 87 U.S. (20 Wall.) at 255-56. *Nardone* itself relied upon this principle to hold that federal agents were covered by the statutory term "anyone" in the 1934 federal wiretap statute. See *Nardone*, 302 U.S. at 382-84, 58 S.Ct. 275. The anti-gratuity provision of § 201(c)(2) indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony. 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. Because § 201(c)(2) addresses what Congress perceived to be a wrong, and operates to prevent fraud upon the federal courts in the form of inherently unreliable testimony, the proscription of § 201(c)(2) must apply to the government. See *id.* at 384, 58 S.Ct. 275. Further, the interests of the United States as sovereign militate in favor of applying § 201(c)(2) against federal prosecutors. The sovereign's interests are in the enforcement of its laws and the just administration of its judicial system; applying § 201(c)(2) to all parties in that judicial system advances both interests.

Having escaped the first class of cases in which the canon applies, we determine whether our case falls within the second: cases in which "public officers are impliedly excluded from language embracing all persons"

because such a reading would "work obvious absurdity." *Id.* A brief overview of legal principles and the common law will confirm the rationality of the statute's result and indicate the scope of the tradition behind its application to the government. See *Kuzma v. IRS*, 821 F.2d 930, 932 (2d Cir.1987) ("[E]stablished principles of statutory construction compel us to seek a rational and sensible construction of the language in question....").

One of the very oldest principles of our legal heritage is that the king is subject to the law. See Romans 13. King John was taught this principle at Runnymede in A.D. 1215, when his barons forced him to submit to Magna Carta, the great charter that imposed limits on the exercise of sovereign power. See William Sharp McKechnie, *Magna Carta*, 36-42 (1914). One of the first modern expositions of this hallowed principle is found in *Lex, Rex*, [n. 1] whose title indicated [p. 1347] the fundamental shift in our legal heritage toward the primacy of the law and the subordinate position of the king. Justice Brandeis expounded as follows on the principle:

1. Samuel Rutherford, *Lex, Rex, or The Law and the Prince* (1644) (Sprinkle Publications 1982).

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; 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. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). This venerable principle will not give way to the expediency of the government's present practices without legislative authorization. See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982).

The policy expressed in § 201(c)(2) has long been enforced at common law. See *Hamilton v. General Motors Corp.*, 490 F.2d 223, 227-28 (7th Cir.1973). [n. 2] The public policy against payments to fact witnesses is expressed in the majority of states in both the law of contracts and in ethical rules, which we address below. The policy is weighty enough that contracts to pay fact witnesses are void as violative of public policy. See 6A Arthur Linton Corbin, *Corbin on Contracts* § 1430 (1962); *Restatement of Contracts* § 552(1) (1932); *Restatement (Second) of Contracts*, § 73 cmt. b (1981); 7 Richard A. Lord, *Williston on Contracts* § 15:6 (4th ed.1997). Such contracts also fail for lack of consideration. See, e.g., *Williston*, *supra*, at § 15:6. Every citizen has the legal duty to testify to facts within his knowledge, and any witness may be compelled to do so by subpoena and civil contempt proceedings. We note that agreements for testimony are not always used in federal prosecutions. In *United States v. Bambulas*, 471 F.2d 501, 505 (7th Cir.1972), the court held:

2. From the general rule against payments to fact witnesses, *Hamilton* excepts reimbursements for travel, subsistence, and the reasonable value of time lost in attendance. *Hamilton*, 490 F.2d at 227. These exceptions track 18 U.S.C. § 201(j), currently renumbered as § 201(d), which provide the corollary statutory exceptions from § 201(c)(2) for such reimbursements.

From the testimony at trial and the sentences imposed on *Bambulas* and *Russell*, there is no indication that immunity or a promise of leniency had been offered by federal authorities to *Russell*. In addition, *Fortner* testified that federal agents had emphatically stated to him that there would be "no deals" as reward for his testimony.

Id. See also *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir.1980). The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money. Because prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of § 201(c)(2) to their activities.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)). We conclude the statute's application to government [p. 1348] officials, far from being absurd, is at the center of our legal tradition.

Because of our duty to harmonize apparently conflicting statutes whenever possible, see *Chemical Weapons Working Group, Inc. v. Department of the Army*, 111 F.3d 1485, 1490 (10th Cir.1997), we consider whether applying § 201(c)(2) to federal prosecutors works an absurdity in view of the federal immunity statute, 18 U.S.C. §§ 6001-6005. Although it could be argued that §§ 6001-6005 authorize federal prosecutors to give immunity for testimony while § 201(c)(2) criminalizes offering anything of value for testimony, we believe the statutes operate in sufficiently separate spheres to avoid both conflict and absurdity. The immunity statute allows removal of a witness's Fifth Amendment privilege so that a silent witness may be forced to speak. Under §§ 6001-6005 the government does not give immunity directly for the witness's testimony; the government may move the court to grant immunity, which in turn removes the witness's testimonial privilege so the ordinary compulsion may be brought to bear to require the witness to testify. Both statutes can operate fully and independently; together they manifest a Congressional intent to allow testimony obtained by the court's grant of immunity, but to criminalize the gift, offer, or promise of any other thing of value for or because of testimony. It is not necessary to our decision to further explore the interplay between §§ 6001-6005 and § 201(c)(2), and we leave for other courts the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination...." *United States v. Fausto*, 484 U.S. 439, 453, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988).

We note that if the assistant United States attorney were not covered by the statutory term "whoever," then the statute would not prohibit her even from bribing a witness with money in exchange for favorable testimony, which the government concedes the statute prohibits. See *Aplees*. Brief at 8; see also *United States v. Gorman*, 807 F.2d 1299, 1304-06 (6th Cir.1986) (affirming conviction of assistant United States attorney for taking illegal gratuity under parallel subsection), cert. denied, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987). We conclude § 201(c)(2) applies to federal prosecutors who make promises for or because of testimony on behalf of the government.

The assistant United States attorney made at least three promises to Napoleon Douglas. Because it is not clear that the government promised to move for a downward adjustment in return for his testimony, we rely for our analysis only on the three promises specifically made in the plea agreement: (1) the promise not to prosecute Mr. Douglas for certain offenses, (2) the promise to inform Mississippi authorities of his cooperation, and (3) the promise to inform the district court of his cooperation. These promises were made "for" his testimony: Mr. Douglas promised to testify "in consideration of" the three promises. See I R. doc 109, at 2-3 (Plea Agreement). The statute's "for or because of" language does not require a quid pro quo relation between the testimony and the promises, but merely requires that the promises be motivated by the testimony, even though the testimony might have been given without the promises. See *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir.1980) (construing parallel subsection); *Evans*, 572 F.2d at 479-82; *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.) (same), cert. denied, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976); *Brewster*, 506 F.2d at 71-72 (same). Here, however, the record indicates the testimony and the promises mutually induced one another, a relation stronger than the "for or because of" required by § 201(c)(2). See *United States v. Sun- Diamond Growers*, 138 F.3d 961, 966 (D.C.Cir.1998) (construing parallel language in § 201(c)(1)(A)).

It remains only to determine whether the promises fall within the scope of the statutory term "anything of value." Because the term is not specifically defined in the statute, we assume the ordinary meaning of the words expresses the legislative purpose, and we interpret them according to their everyday meaning. See *Russello v. United States*, 464 U.S. 16, 21, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *United States v. Pommerening*, 500 F.2d 92, 97 (10th Cir.), cert. denied, 419 U.S. 1088, 95 S.Ct. 678, 42 L.Ed.2d 680 (1974). "Value" embodies notions of worth, utility, [p. 1349] and importance generally. Congress could have, but did not limit or modify the word in any way. Accordingly, courts have recognized that "anything of value" under § 201 must be broadly construed to carry out its congressional purpose. See, e.g., *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir.) (noting that the phrase "has consistently been given a broad meaning"), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983). Our sister circuits have interpreted the phrase

synonymously with "thing of value," and have noted that the pervasive use of the term in criminal statutes of both the states and the federal government has made it a term of art, covering intangible as well as tangible things. See *United States v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir.1992) (construing 18 U.S.C. § 876), cert. denied, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993); *United States v. Schwartz*, 785 F.2d 673, 679-81 (9th Cir.) (construing 18 U.S.C. § 1954), cert. denied, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.) (construing 18 U.S.C. § 641), cert. denied, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).

The government argues that cases involving § 201(c) have all involved monetary payments. However, courts have uniformly rejected arguments that "anything of value" should be restricted to things of monetary, commercial, objective, actual, or tangible value. See *Schwartz*, 785 F.2d at 679-81; *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir.1996) (construing 18 U.S.C. § 666), aff'd sub nom. *Salinas v. United States*, --- U.S. ---, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), and cert. denied, --- U.S. ---, 118 S.Ct. 599, 139 L.Ed.2d 487 (1997); *Nilsen*, 967 F.2d at 542-43 ("This broad interpretation is based upon a recognition that monetary worth is not the sole measure of value."); *Williams*, 705 F.2d at 622-23 (holding "anything of value" under § 201 is not limited to what objectively has actual value); *Girard*, 601 F.2d at 71.

Value has been accorded a broader, more common interpretation. See *Schwartz*, 785 F.2d at 679. We agree with those circuits which have held that the test of value is whether the recipient subjectively attaches value to the thing received. See *United States v. Picquet*, 963 F.2d 54, 55 (5th Cir.) (construing 18 U.S.C. § 1029), cert. denied, 506 U.S. 902, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992); *Gorman*, 807 F.2d at 1304-05; *Schwartz*, 785 F.2d at 680; *Williams*, 705 F.2d at 623 (holding that proper construction of § 201 focuses on whether recipient subjectively attached value to the thing received). But cf. *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir.1980) (declining to adopt the view, under 18 U.S.C. § 912, that anything of value includes anything that has subjective value to the defendant, and instead requiring that the value be recognized or appreciated by others).

Courts construing the phrase have held a variety of intangibles to be things of value, including information regarding the whereabouts of a witness, information contained in DEA reports, assistance in arranging a merger, a witness's testimony, conjugal visits, amusement, the promise to reinstate an employee, and the promise not to run in a primary election. See *Sheker*, 618 F.2d at 609; *Girard*, 601 F.2d at 70-71; *Schwartz*, 785 F.2d at 679; *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir.1974) (construing 18 U.S.C. § 876); *Marmolejo*, 89 F.3d at 1191; *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715, 716-17 (1942) (construing "thing of value" in state gambling statute); *People ex rel. Dickinson v. Van De Carr*, 87 A.D. 386, 84 N.Y.S. 461, 463-64 (N.Y.App.Div.1903) (construing "thing of value" in state bribery statute); *People v. Hochberg*, 62 A.D.2d 239, 404 N.Y.S.2d 161, 167 (N.Y.App.Div.1978) (same).

Although this precedent alone would require a conclusion that the promises made to Mr. Douglas are of value, four further considerations confirm the matter. First, much of the precedent cited construes the phrase "thing of value"; and the use in § 201 of "anything of value" indicates an even broader scope of coverage.

Second, much of the precedent construes statutory language in which the term appears at the end of a series of enumerated specifics, such as "any fee, kickback, commission, gift, loan, money, or thing of value." *Schwartz*, 785 F.2d at 679 (construing 18 U.S.C. § 1954, and noting that legislative history indicated the enumeration was one of [p. 1350] illustration, not limitation); see *Marmolejo*, 89 F.3d at 1191 (construing "anything of value of \$5,000 or more"); *Nilsen*, 967 F.2d at 542 (construing "any money or other thing of value"); *Picquet*, 963 F.2d at 55; *Girard*, 601 F.2d at 70-71. That these courts have broadly construed the phrase to include intangibles in spite of the interpretive canon *eiusdem generis* indicates the strength of the term's plain meaning. In contrast to these cases and statutes, "anything of value" in § 201(c)(2) stands alone, unlimited by any enumeration.

Third, the purpose of the statute confirms Congress's broad language. One obvious purpose of the blanket prohibition in § 201 is to keep testimony free of all influence so that its truthfulness is protected. See *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir.1988), cert. denied, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989); *Evans*, 572 F.2d at 480. The promise of intangible benefits imports as great a threat to a witness's truthfulness as a cash payment. See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir.1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence"), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988); *Schwartz*, 785 F.2d at 680 ("A violation of trust which is influenced by the offer of an intangible service is no less damaging ... than 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 immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case."); see also *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir.1983) (stating witness "admitted lying in over thirty different statements motivated by his sense of self-preservation" under plea arrangement requiring his testimony in return for lenient sentence), cert. denied, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

Fourth, § 201(c)(1) opens by providing "otherwise than as provided by law for the proper discharge of official duty." In contrast, § 201(c)(2) includes no such exemption for official acts authorized by law. Because Congress specifically exempted public duties from one subsection but did not exempt them from the subsection at issue in this case, we should interpret the plain language of the statute to cover promises of leniency by prosecutors.

We find no basis in law, policy, or common sense to judicially limit "anything of value" to things reducible to monetary or tangible value. Justice Holmes's words are appropriate: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722 (1929).

In this light we apply the statutory phrase "anything of value" to the promises made to Mr. Douglas. The obvious purpose of the government's promised actions was to reduce his jail time, and it is difficult to imagine anything more valuable than personal physical freedom. See *Cervantes-Pacheco*, 826 F.2d at 315. Although the information promised by the government would certainly not guarantee Mr. Douglas's release, it was an invaluable step toward that end. The Ninth Circuit, in holding that information can be a thing of value, indicated by example the broad rationale of its holding: "For instance, state secrets might trade hands without cash consideration. Information obtained for political advantage might have value apart from its worth in dollars." *Schwartz*, 785 F.2d at 679 (quoting *Sheker*, 618 F.2d at 609); see also *United States v. Fowler*, 932 F.2d 306, 309-10 (4th Cir.1991) (joining Second and Sixth Circuits in holding information can be a thing of value under 18 U.S.C. § 641). But see *United States v. Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991, 108 S.Ct. 1299, 99 L.Ed.2d 509 (1988). The information and intervention promised by the government for Mr. Douglas's legal advantage was of great value. See, e.g., *Sheker*, 618 F.2d at 609. In the case of the promise not to prosecute, the value was even greater: besides guaranteed physical freedom he was guaranteed freedom from the burden of defending himself and from the stigma of prosecution and conviction as well.

Our basis for determining these promises were of value is that the record indicates Mr. Douglas subjectively valued them. They were all he bargained for in return for his testimony and guilty plea. See *Nilsen*, 967 F.2d at 543 ("[T]he conduct and expectations [p. 1351] of a defendant can establish whether an intangible objective is a 'thing of value.' "). In addition, he testified that he wanted the government's assistance to help "everything work out for [him]." IV R. 206. In these circumstances the promises made to him fall well within the statutory term "anything of value." Having fulfilled every statutory element, we conclude the government's conduct was covered by the plain language and meaning of § 201(c)(2).

B. The Structure of § 201

Our construction of the particular statutory language at issue is fortified by the language and structure of the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988); *Russello*, 464 U.S. at 22-26, 104 S.Ct. 296. Section 201 addresses corruption of public officials and witnesses, and its provisions have been divided generally into bribery prohibitions and gratuity prohibitions. See, e.g., *Johnson*, 621 F.2d at 1076 (quoting *United States v. Strand*, 574 F.2d 993, 995 (9th Cir.1978)). The bribery prohibitions, collected under § 201(b), are distinguished by their statutory requirements of corruptness on the part of the giver and intent to influence the receiver's action. The gratuity prohibitions collected under § 201(c), on the other hand, contain no requirements of corruption and intent to influence the receiver, and Congress attached concomitantly lesser penalties to their violation. See *United States v. Irwin*, 354 F.2d 192, 197 (2d Cir.1965) (construing current statutory language under prior subsection), [n. 3] cert. denied, 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 (1966). The gratuity prohibitions have been held to be lesser included offenses of the bribery provisions. See, e.g., *Brewster*, 506 F.2d at 67-76.

3. Section 201, with its present statutory language, was enacted in 1962. In 1986 Congress renumbered § 201 into its present form. See *Criminal Law & Procedure Technical Amendments Act of 1986*, Pub.L. 99-646, § 46(h), 100 Stat. 3592, 3603 (1986). The pre-1986 statute, which *Irwin* interpreted, contained the same

distinctions between bribery and gratuity provisions. Section 201(c)(2), which was designated § 201(h) before 1986, has not been altered since its enactment in 1962.

The statute at issue in this case, § 201(c)(2), is a gratuity prohibition, and like every other gratuity provision in § 201(c)(2), it contains no requirements of corruptness or intent to influence. See Johnson, 621 F.2d at 1076; Brewster, 506 F.2d at 71-72; Irwin, 354 F.2d at 197; Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F.Supp. 1516, 1523 (S.D.Fla.1994), aff'd in part, rev'd in part, and remanded, 117 F.3d 1328 (11th Cir.1997).

In contrast, a separate bribery provision under § 201(b), dealing with bribery of witnesses, does require heightened intent. Section 201(b)(3) provides that whoever "corruptly gives, offers, or promises anything of value to any person ... with intent to influence the testimony under oath or affirmation of such ... person as a witness" shall be fined or imprisoned. Congress thus deliberately included the corruptness and intent-to-influence elements in § 201(b)(3) and excluded them from § 201(c)(2). " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " Brown v. Gardner, 513 U.S. 115, 120, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (quoting Russello, 464 U.S. at 23, 104 S.Ct. 296). Moreover, the predecessor statute to § 201(c)(2) did require an agreement that the testimony would be influenced by the thing of value. See 18 U.S.C. § 209 (1952). Congress deliberately deleted that language, and it is not our place to reinsert it.

Section 201(d) further illumines the plain meaning of § 201(c)(2). This subsection provides:

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 [p. 1352] fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C. § 201(d). 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.

We find no clearly expressed legislative intention contradicting the statute's language. The legislative history confirms Congress's purpose that giving or receiving anything of value by "witnesses 'for' or 'because of' ... testimony ... should also be prohibited." H.R.Rep. No. 87-748, at 16 (1961). The committee report also indicates Congress's policy: "The conduct which is forbidden has the appearance of evil and the capacity of serving as a cover for evil." Id. at 19, 104 S.Ct. 296. The purpose and policy of the statute confirm its plain language and structure. We conclude § 201(c)(2) prohibited the government's promises to Mr. Douglas of leniency and intervention on his behalf in return for his testimony. See Dixon v. United States, 465 U.S. 482, 496, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984) ("Congress' longstanding commitment to a broadly drafted federal bribery statute, its expressed desire to continue that tradition with the 1962 revisions, its affirmative adoption of the language at issue in this case, and the House Report[] ... combine to persuade us that Congress never intended § 201(a)[] ... to be given the cramped reading proposed by petitioners."). The Supreme Court's more recent words are instructive as well: "No rule of construction ... requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope...." See Salinas v. United States, --- U.S. ---, 118 S.Ct. 469, 475, 139 L.Ed.2d 352 (1997) (citing United States v. Raynor, 302 U.S. 540, 552, 58 S.Ct. 353, 82 L.Ed. 413 (1938)). [n. 4]

4. The argument that § 201(c)(2) applies to government inducements for testimony appears first to have been made (excepting several older cases which we address later) in an article by a former government prosecutor. See J. Richard Johnston, Paying the Witness: Why Is It OK for the Prosecution, but Not the Defense?, 12 WTR Crim. Just. 21 (1997).

II. The Law Enforcement Justification

The government asserts, without argument or authority, that agreements for testimony between the government and a witness are not contemplated by this statute. Its position is that its agreement in return for testimony was justified and legitimate, and that Congress could not have intended § 201(c)(2) to hamper the

punishment of crime by bringing within its sweep this government practice. Even assuming such a practice, our answer is that the matter was one of policy for Congress to decide. See *Nardone*, 302 U.S. at 383, 58 S.Ct. 275. In *Nardone* the Court rejected an argument that the government should be exempt from the federal wiretap statute, suggesting, "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Id.* We likewise discern what § 201(c)(2) contemplates from its language, and its language makes no exception for the government's conduct. Although the government's apparent practice of giving inducements for testimony, as opposed to other forms of cooperation, and the judiciary's seeming approval of such practice give us pause, they do not alter the words of a clear statute. See *Brogan v. United States*, --- U.S. ---, 118 S.Ct. 805, 811, 139 L.Ed.2d 830 (1998). "The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Hampton v. United States*, 425 U.S. 484, 490, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) (quoting *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)).

To answer the government's vague argument that some overriding policy should prevent application of this statute to the government's conduct, we will raise *sua sponte* the justification of law enforcement authority. "Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law." *Brogan*, 118 S.Ct. at 811. If the justification applies, conduct which violates [p. 1353] the terms of a criminal statute is nevertheless not forbidden. The justification can be generally described as follows: a peace officer, prison guard, or private citizen authorized to act as a peace officer may, to the extent necessary to make an arrest, prevent an escape, or prevent the commission of a crime, violate a criminal statute if the conduct which constitutes the violation is reasonable in relation to the gravity of the evil threatened and the importance of the interest to be furthered. See Paul H. Robinson, *Criminal Law Defenses* § 142(a) (1984). The government's conduct does not fall within this justification for at least two reasons: it was not undertaken by a peace officer or one acting in that capacity, and it was not required by an exigent need to make an arrest or prevent an escape or other crime.

The Supreme Court's more general statement of the rule that "[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law," embraces field enforcement activity. *Brogan*, 118 S.Ct. at 811. The Court has held, for example, that the government's limited undercover participation in an unlawful drug operation is "a recognized and permissible means of investigation." *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); see *Lewis v. United States*, 385 U.S. 206, 208-09, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). *Brogan* itself states that 18 U.S.C. § 1001 "does not make it a crime for an undercover narcotics agent to make a false statement to a drug peddler." *Brogan*, 118 S.Ct. at 811 (internal quotes and alterations omitted); see *United States v. Monaco*, 700 F.2d 577, 580-81 (10th Cir.1983) ("To obtain evidence of certain crimes undercover agents frequently must participate in illegal activities."); *United States v. Szycher*, 585 F.2d 443, 449 (10th Cir.1978) ("Government officers can, of course, employ appropriate artifice and deception to ferret out illegal activities."); cf. *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir.1984) (holding defense of public authority requires government agent to have actual authority to authorize statutory violation); *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir.) (holding because CIA agents have no authority to violate federal statutes, defense fails), cert. denied, 493 U.S. 1004, 110 S.Ct. 566, 107 L.Ed.2d 560 (1989); Fed.R.Crim.P. 12.3 (regulating presentation of law enforcement defense).

The conduct of police, investigators, and law enforcement agents is regularly evaluated against the standard of what is legitimate and reasonably necessary to enforce the law. See, e.g., *United States v. Mosley*, 965 F.2d 906, 908-15 (10th Cir.1992); *United States v. Warren*, 747 F.2d 1339, 1341-44 & nn. 4-10 (10th Cir.1984) (collecting cases); *Monaco*, 700 F.2d at 580-81; *United States v. Biswell*, 700 F.2d 1310, 1314 (10th Cir.1983); *Szycher*, 585 F.2d at 449; see also *United States v. Asencio*, 873 F.2d 639, 640-41 (2d Cir.1989). But we have found no case in which prosecutors, in their role as lawyers representing the government after the initiation of criminal proceedings, have been granted a justification to violate generally applicable laws. See *United States v. Ryans*, 903 F.2d 731, 739-40 (10th Cir.) (holding that disciplinary rule applies to prosecutors upon commencement of criminal proceedings), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990).

The law enforcement justification exists to allow field officers a practically necessary means to detect and prevent crime, and to apprehend suspects. It is justified by the difficulties inherent in detecting certain types of

crime. See *Russell*, 411 U.S. at 432, 93 S.Ct. 1637 (narcotics); *United States v. Kelly*, 707 F.2d 1460, 1468 (D.C.Cir.) (public corruption), cert. denied, 464 U.S. 908, 104 S.Ct. 264, 78 L.Ed.2d 247 (1983); *Monaco*, 700 F.2d at 580-81 (prostitution). The government's violation of § 201(c)(2), however, is entirely unrelated to detecting crime. Once the exigencies of field enforcement are satisfied, we can find no policy by which prosecutors may be excused from statutes regulating testimony presented to the federal courts. Although there are difficulties inherent in proving certain types of crimes, violating § 201(c)(2) is not necessary to overcome those difficulties: compulsory process is lawful and available, and avoids the taint on truthfulness which attends unlawful witness gratuities. The law enforcement justification has never altered the playing field on which crimes are proved in court. We decline to [p. 1354] expand the meaning of "enforcement action" beyond its historical scope of detection, apprehension, and prevention of crime.

Because the government's statutory violation occurred not in a field investigation but in the context of testimony which was to be presented to the court, we further hold its action was not "reasonable." *Brogan*, 118 S.Ct. at 811. The chasm between the government's present conduct and reasonable law enforcement actions can be illustrated by analogy to the FBI's Abscam operation, under which operatives and undercover agents offered bribes to public officials and arrested those who accepted the bribes. See *Kelly*, 707 F.2d at 1461-63. Although Abscam created controversy and dissent in the courts, it was held a legitimate means of detecting public corruption. See, e.g., *id.* at 1469-71. The government's present inducement for testimony goes much further. Reasonable law enforcement actions stop with detecting crime and observing enough to prove it. The government's statutory violation unreasonably exceeds this purpose, and is the more egregious because the intended product of the violation is testimony presented in court. We conclude the government's violation of § 201(c)(2) was neither "reasonable" nor an "enforcement action." *Brogan*, 118 S.Ct. at 811. Consequently it falls outside the scope of legitimate investigatory practices and is not justified by law enforcement authority.

Cases involving the application of ethical rules to federal prosecutors fortify our conclusion. The Department of Justice attempted, first through a policy statement known as the Thornburgh Memorandum, then through a federal regulation, 28 C.F.R. pt. 77 (1997), to exempt its litigators from state ethical rules prohibiting ex parte communication with represented parties. The federal courts have unanimously rejected the notion that federal prosecutors are exempt from these ethical rules. [n. 5] See, e.g., *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir.1998); *United States v. Lopez*, 4 F.3d 1455, 1458-63 (9th Cir.1993). In doing so, courts have rejected arguments that the rule "was not intended to apply to prosecutors pursuing investigations," or that their contact "was authorized by law." *Lopez*, 4 F.3d at 1458; see also *Matter of Doe*, 801 F.Supp. 478, 484-87 (D.N.M.1992). If federal prosecutors are bound by an ethical rule governing ex parte contact in the course of a prosecution, we think it even more clear that they are bound by a federal statute regulating the evidence presented in federal court. The Supreme Court has reiterated, in another context, the prevailing rule that "a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz v. Economou*, 438 U.S. 478, 489, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

5. A subcommittee of Congress also expressed its disapproval of the Department of Justice's position:

We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with ethical requirements adopted by the State bars to which they belong and in the rules of the Federal courts before which they appear. While recognizing that it is ultimately the courts who finally decide disputes over such authority, we nevertheless urge reconsideration and withdrawal of the Attorney General's June 8, 1989 memorandum, "Communication with Persons Represented by Counsel."

H.R.Rep. No. 101-986, at 32 (1990).

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

The government argues that several provisions of law authorized it to make its agreement with Mr. Douglas. The government apparently refers to an unwritten agreement with Mr. Douglas to make a sentence reduction recommendation. See *Aplees*. Brief at 7, 9. Although any such agreement is not before us because it is not clear from the record that it was made, we will construe the government's argument as one that it had statutory authorization for the three written promises it did make to Mr. Douglas for his testimony.

The federal criminal sentencing statute, 18 U.S.C. § 3553(e), provides, "Upon 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." In addition, 28 U.S.C. § 994(n) instructs [p. 1355] the United States Sentencing Commission to ensure that 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." Accordingly, USSG § 5K1.1 provides that the government may move for a downward departure from the guidelines if it determines the defendant has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense...." USSG § 5K1.1. "The appropriate reduction shall be determined by the court for reasons stated that may include ... the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." *Id.* at § 5K1.1(a)(2). The government also cites Fed.R.Crim.P.35(b), which says, "The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense...."

Each of these provisions of law authorizes only that substantial assistance can be rewarded after it is rendered; none authorizes the government to make a deal for testimony before it is given, as the government did with Mr. Douglas. Consequently the statutes cannot justify the government's promises in this case.

However § 201(c)(2) prohibits even the rewarding of testimony after it is given: it prohibits anything of value to be given, offered or promised "because of" testimony "given." 18 U.S.C. § 201(c)(2). The sentencing provisions may thus appear to conflict by authorizing something of value (a motion for and grant of sentence reduction) to be given "because of" testimony rendered. We believe the statutes can be read together in this way: in light of § 201(c)(2), "substantial assistance" does not include testimony. Congress enacted the sentencing provisions against the backdrop of its general prohibition against giving anything of value for or because of testimony. See generally 2B Norman J. Singer, *Sutherland Statutory Construction* § 53.01 (5th ed.1992). Against this background, § 994 authorizes the Sentencing Commission to reward all forms of substantial assistance other than testimony.

Our reading of the statutes will not impair the substantial assistance provisions, because a defendant can substantially assist an investigation or prosecution in myriad ways other than by testifying. Nor will our holding drastically alter the government's present practices. The government may still make deals with accomplices for their assistance other than testimony, and it may still put accomplices on the stand; it simply may not attach any promise, offer, or gift to their testimony. Because the operation of the sentencing statutes is not positively repugnant to § 201(c)(2), we must give effect to both. See *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). The question whether USSG § 5K1.1(a)(2) exceeds statutory authority or conflicts with § 201(c)(2) by making testimony, as opposed to other forms of cooperation, a basis for a finding of substantial assistance is not directly before us, and we do not decide it.

The government's reliance on the substantial assistance sentencing statutes is, in essence, an argument that they impliedly amend or repeal the plain prohibition of § 201(c)(2). Courts generally and quite consistently disfavor implied repeals and amendments. See, e.g., *United States v. Estate of Romani*, --- U.S. ---, 118 S.Ct. 1478, 1486, 140 L.Ed.2d 710 (1998) (declining to consider implied amendment or repeal, and instead harmonizing statutes); 1A Norman J. Singer, *Sutherland Statutory Construction* § 22.13 (5th ed. 1992) ("Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases"); *id.* at § 23.09 ("Courts are reluctant to find repeal by implication even when the later statute is not entirely harmonious with the earlier one. If two statutes conflict somewhat, the court must, if possible, read them so as to give effect to both...."). Courts will generally not find an implied repeal or amendment unless either the text or legislative history indicates Congress's intent [p. 1356] to obviate the legal power of the earlier statute. See *id.* at § 23.10. We find no glimmer of such an indication in the sentencing statutes or their legislative history.

IV. Precedent

Although neither party cited any case in which a criminal defendant argued the government violated § 201(c)(2) by offering leniency or other inducements to a witness, we have been able to find three such reported cases. We find each unpersuasive.

In *United States v. Isaacs*, 347 F.Supp. 763 (N.D.Ill.1972), one of the defendants in a prosecution for conspiracy, bribery, and other offenses argued that the government violated § 201(h), the identical predecessor of § 201(c)(2), by exercising influence on state officials to procure something of value for a witness. The United States Attorney, in cooperation with the Department of Justice, allegedly went to California and met with state officials to persuade them to grant the witness a license to become a director of the Hollywood Park Turf Club without a public hearing and in spite of the witness's implication in the bribery. See *id.* at 767. It was necessary to avoid a public hearing on the license so the witness would not be subject to cross-examination on her involvement in the bribery. See *id.*

The defendant, relying only on newspaper reports, argued the government had violated § 201(h) by giving something of value to a witness for her testimony, and requested an evidentiary hearing to develop facts on the matter. In making its ruling, the court mischaracterized § 201(h), stating the defendant's argument was based on an inference that the award of the license to the witness was "a bribe intended to influence her testimony...." *Id.* at 767. The statute is abundantly clear that it proscribes gratuities regardless of intent to influence testimony. The court then denied the defendant's motion on two grounds. First, it held the conjectural allegations based on newspaper reports were insufficient to warrant an evidentiary hearing. See *id.* Second, it held that *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) indicated that suppression was not an appropriate remedy when the government promises leniency to a witness in return for her testimony. See *Isaacs*, 347 F.Supp. at 767.

Giglio held the government must disclose a promise of leniency made to a key witness in return for his testimony. See *Giglio*, 405 U.S. at 153-54, 92 S.Ct. 763. Section 201(h) was not implicated in *Giglio*; the defendant there argued only that the promise was material exculpatory evidence going to the credibility and reliability of the key witness, and that he was entitled to a new trial to present the evidence to the jury. The Supreme Court agreed, holding that due process was violated when the jury was erroneously told no promises of leniency were made to the witness, because evidence of the promise was "relevant to his credibility and the jury was entitled to know of it." *Id.* at 155, 92 S.Ct. 763. The *Isaacs* court took this statement to preclude application of § 201(h).

We believe *Giglio's* holding--that *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) applies to impeachment evidence--is not dispositive of the statutory question before us, a question not presented to the Court in *Giglio*. It is quite clear that due process as interpreted in *Brady* and *Giglio*, as well as federal legislation, see *Jencks Act*, 18 U.S.C. § 3500, require a large class of materials to be turned over to the defense in a criminal case. Evidence of the government's valuable promises to a witness falls within this class. But this does not prohibit Congress from also criminalizing certain conduct within the class. For example, the government in a criminal case must disclose known perjury to the defense. See *United States v. Agurs*, 427 U.S. 97, 103-04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Yet the occurrence of perjury remains a crime. See 18 U.S.C. §§ 1621, 1623. Likewise the criminality of offering anything of value for testimony is not inconsistent with *Giglio's* rule that the offer be disclosed. An unambiguous statute is before us, and within constitutional boundaries we have no authority to refuse to apply it. Consequently we must reject *Isaac's* inference from *Giglio* that § 201(c)(2) does not apply in this situation.

Section 201(h) was also raised by the defendant in *United States v. Barrett*, 505 F.2d 1091, 1100-02 (7th Cir.1974), cert. denied, 421 [p. 1357] U.S. 964, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975), in which the government entered into a plea agreement similar to its agreement with Mr. Douglas. In *Barrett*, the primary witness against the defendant pled guilty and agreed to testify in return for the government's recommendation of an extraordinarily lenient sentence, transactional immunity, and civil tax immunity. The witness's testimony was that he paid large bribes to various public officials; in return for this testimony, he was exempted from paying tax and penalties on the money constituting the bribes. The defendant moved to suppress on the ground that this arrangement violated § 201(h). The district court denied the motion but allowed the government's bargain to be used to impeach the witness's credibility. See *id.*

The Seventh Circuit approved this disposition and in a footnote repeated *Isaacs's* inference from *Giglio*. See *id.* n. 9. It went on to state that the premise of the defendant's § 201(h) argument was that the government had no authority to grant civil tax immunity in return for testimony. The defendant conceded the government did not violate § 201(h) by granting criminal immunity, because the United States Code authorizes the government to grant such immunity. See 18 U.S.C. § 6002. Following this reasoning, the court found a provision of the tax code authorizing the government to settle any tax case, 26 U.S.C. § 7122, and held that because Congress

authorized the government to settle tax liability, it could settle tax liability in return for testimony. See Barrett, 505 F.2d at 1101-02.

We believe this conclusion is incorrect because both the court and the parties reasoned from a faulty premise. Section 201(h) did not prohibit the government from giving unauthorized things of value for testimony; it proscribed giving anything of value for testimony. To read the section as prohibiting only the giving of unauthorized things (besides ignoring its plain language) is to read it right out of the code. It is a truism that the government may not do unauthorized things. And it is § 201(h) that makes gifts, offers, and promises unauthorized in certain circumstances. If the section is to have any meaning it must be read to prohibit giving otherwise authorized things "for" or "because of" testimony. Otherwise, under Barrett's reasoning, the government's authorization to expend money means the government may pay money to a witness for his testimony. We will not eviscerate the statute in this way. Section 201(c)(2) discriminates not on the basis of what things of value are authorized, but on whether the thing of value is given "for" or "because of" testimony.

Finally, the Sixth Circuit addressed an argument like Ms. Singleton's in *United States v. Blanton*, 700 F.2d 298, 310-11 (6th Cir.), reheard in part, 719 F.2d 815 (6th Cir.1983), [n. 6] cert. denied, 465 U.S. 1099, 104 S.Ct. 1592 (1984), in which the former governor of Tennessee, Leonard Blanton, was convicted on various charges of corruption. The primary witness against him received a liquor license through a corrupt arrangement with Mr. Blanton. In return for the witness's truthful testimony, the United States persuaded Tennessee's Alcoholic Beverage Commission not to revoke his liquor license. The witness wanted the government's persuasion because fraud in procuring a liquor license was ground for its revocation. See *id.*

6. Although the mandate of the panel opinion was vacated when the Sixth Circuit reheard the case en banc, the rehearing was limited to issues unrelated to § 201(h). The en banc opinion specifically adopted the panel's dispositions and reasoning on all other issues, including the § 201(h) matter. See *Blanton*, 719 F.2d at 817, 833.

Mr. Blanton argued the witness's testimony should have been suppressed because the government procured it in return for something of value, in violation of § 201(h). The court rejected his argument, holding the "purported 'thing of value'--a liquor license--was not offered by the government." *Id.* at 311. It supported this by stating that the government used only persuasion and exercised no coercive power. Further, it held the government did not "give" a thing of value because it merely preserved the status quo: the witness kept the license he previously had. See *id.*

Neither ground of the holding persuades us. It seems apparent to us that the issue was whether the government's persuasion, [p. 1358] which was offered and given, was a thing of value. The court's focus on the liquor license and on the state's control of it obscures this point: the government's intangible persuasion might have been enormously valuable to the witness, since he sought it and it was effective in the goal of retaining his license. We are likewise unpersuaded that preservation of the status quo cannot constitute a thing of value. The persuasion of the United States was brought to bear in return for testimony at a time when the witness's status quo (which happened to be ill-gotten gain) was about to change drastically for the worse. We find no principled basis in *Blanton* on which to hold the government's conduct in our case was not covered by the unambiguous prohibition of § 201(c)(2). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

We further disagree with the Eleventh Circuit to the extent it has held that § 201(c)(2) is violated only when the resultant testimony is false. See *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1335 n. 2 (11th Cir.1997); *United States v. Moody*, 977 F.2d 1420, 1424-25 (11th Cir.1992), cert. denied, 507 U.S. 944, 113 S.Ct. 1348, 122 L.Ed.2d 730 (1993). It seems the court in *Golden Door* took out of context Moody's statement that § 201(c)(2) "obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion." *Moody*, 977 F.2d at 1425. Moody upheld § 201(c)(2) against overbreadth and vagueness challenges by a defendant who had paid a witness to fabricate a story in court. The court held that as applied to these facts the statute was not vague or overbroad: no one of ordinary intelligence could contest that the statute clearly prohibited this conduct. See *id.* at 1424. Moody nowhere intimated the statute applied only to false testimony. In the context of the as-applied challenge, the court had no occasion to determine what other conduct the statute proscribed, and the defendant did not demonstrate any real or substantial unconstitutional applications. See *Moody*, 977 F.2d at 1424-25.

Moreover, requiring false testimony under § 201(c)(2) would interpose elements not required even by the bribery provisions, which do not require the bribe recipient's action to be influenced in fact. See *United States v. Hernandez*, 731 F.2d 1147, 1149 (5th Cir.1984); *Johnson*, 621 F.2d at 1076. "We ought not to open the door to an evasion of the statute by this device." *Oubre v. Entergy Operations, Inc.*, --- U.S. ---, 118 S.Ct. 838, 842, 139 L.Ed.2d 849 (1998). It is anomalous to require under a gratuity provision both that testimony actually be given, and that it be false, when the bribery provisions require neither. See *Hernandez*, 731 F.2d at 1149 ("The crime [of bribery] is consummated whether or not the offer is accepted by the offeree.").

We conclude that under § 201(c)(2) the promise need not be intended to affect, and need not actually affect, the testimony in any way. Promising something of value to secure truthful testimony is as much prohibited as buying perjured testimony. See *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F.Supp. 1069, 1078 (S.D. Ohio 1994). In a similar gratuity provision prohibiting gifts, promises, or offers to a public official for or because of an official act, *Irwin* held, "It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anything to do with its nature or extent or the manner or means by which it was performed." *Irwin*, 354 F.2d at 197. We believe there is no principled basis on which to judicially add elements to the statute when Congress has chosen not to include them. "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense...." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90, 5 L.Ed. 547 (1823).

V. Kansas Professional Rule 3.4(b)

Ms. Singleton argues the government violated Kansas Professional Rule 3.4(b) in presenting the testimony of Mr. Douglas. The [p. 1359] rule, adopted by the Supreme Court of Kansas, provides, "A lawyer shall not ... offer an inducement to a witness that is prohibited by law." Kansas Rule of Professional Conduct 3.4(b) (1997). Commentary to the Model Rules, as 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...." Kansas Rule of Professional Conduct 3.4(b) cmt. (1997). We have already established, in agreement with our sister circuits, that intangible value can be equivalent to financial value, and that the promise of leniency is an equal or greater incentive to lie than is cash. Moreover, because we have held that the government's promises ran afoul of 18 U.S.C. § 201(c)(2), and were thus prohibited by law, we must conclude the government violated Rule 3.4(b).

VI. Remedy

In the circumstances before us, the appropriate remedy for the testimony obtained in violation of § 201(c)(2) is suppression of its use in Ms. Singleton's trial. [n. 7] "[T]he principal reason behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.'" *United States v. Russell*, 411 U.S. 423, 430, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) (quoting *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). The exclusionary rule has been applied to constitutional, statutory, and procedural rule violations to deter unlawful conduct. See *United States v. Blue*, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). The Supreme Court itself has applied the rule to various statutory violations, see *Sabbath v. United States*, 391 U.S. 585, 586, 588-90, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); *Miller v. United States*, 357 U.S. 301, 313-14, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); *Nardone v. United States*, 308 U.S. 338, 339-41, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *Nardone v. United States*, 302 U.S. 379, 380-84, 58 S.Ct. 275, 82 L.Ed. 314 (1937), and has held open this application while denying use of the rule for certain regulatory violations, see *United States v. Caceres*, 440 U.S. 741, 754-55 & n. 21, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979). Likewise the courts of appeals have held suppression appropriate where federal statutes have been violated. See, e.g., *United States v. Marts*, 986 F.2d 1216, 1218-19 (8th Cir.1993); *United States v. Riveccio*, 919 F.2d 812, 816 (2d Cir.1990), cert. denied, 501 U.S. 1230, 111 S.Ct. 2852, 115 L.Ed.2d 1020 (1991); *United States v. Chemaly*, 741 F.2d 1346, 1353-54 & n. 2 (11th Cir.1984), reh'g en banc vacated and panel opinion reinstated, 764 F.2d 747 (11th Cir.1985) (en banc); *United States v. Soto-Soto*, 598 F.2d 545, 550 (9th Cir.1979); *United States v. Genser*, 582 F.2d 292, 307-09 (3d Cir.1978). Although its application to statutory violations is not automatic, see *Weiss v. Commissioner*, 919 F.2d 115, 116 (9th Cir.1990), we believe the policies of the rule require its use in this context.

7. The suppression remedy we apply rests wholly on the government's statutory violation, not on the prosecutor's violation of Kansas Professional Rule 3.4(b).

Suppression is a judicially fashioned rule whose primary purpose is to deter official misconduct. See *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *United States v. Calandra*, 414 U.S. 338, 347-48, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). We must balance the good of preventing future unlawful conduct with the evil of disallowing relevant evidence of guilt in an individual case. See *United States v. Duchi*, 944 F.2d 391, 396 (8th Cir.1991).

We believe exclusion will effectively deter the unlawful conduct before us. Agreements to seek leniency or refrain from filing charges in return for testimony are entered into with the intention of presenting to a court the testimony so acquired. Excluding that tainted testimony removes the sole purpose of the unlawful conduct and leaves no incentive to violate § 201(c)(2). Cf. *id.* Courts declining to apply the exclusionary rule for violation of statutes have done so on the ground that it is "inappropriate until such time as 'widespread and repeated violations' " of the statute exist, *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir.) (quoting *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir.1979)), cert. denied, 479 U.S. 839, 107 S.Ct. 142 (1986), and they have specifically held the remedy available for that situation, see *United States v. Griley*, 814 F.2d 967, 976 (4th Cir.1987). This approach is appropriate because deterrence is a preventive function [p. 1360] which cannot be served unless there is a significant likelihood of future violations to be deterred. See *Calandra*, 414 U.S. at 347-48, 94 S.Ct. 613. We have exactly that situation. "No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." *Cervantes-Pacheco*, 826 F.2d at 315. This ingrained practice of buying testimony indicates that suppression is necessary to compel respect for the statutory protections Congress has placed around testimony in federal courts. Exclusion is also necessary to remove the incentive to disregard the statute. See *Calandra*, 414 U.S. at 347, 94 S.Ct. 613 (quoting *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)). The benefits of deterrence outweigh the evil of excluding relevant evidence, and the balance falls heavily in favor of suppression.

A secondary policy protected by the exclusionary rule is "the imperative of judicial integrity." *Elkins*, 364 U.S. at 222, 80 S.Ct. 1437. Courts will not be made party to lawlessness by permitting unhindered use of the fruits of illegality. See *Terry v. Ohio*, 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Mapp*, 367 U.S. at 660, 81 S.Ct. 1684. Although this basis for the exclusionary rule exerts limited force, see *Stone v. Powell*, 428 U.S. 465, 485, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); see also John Kaplan, *The Limits of the Exclusionary Rule*, 26 *Stan. L.Rev.* 1027, 1036 & n. 53 (1974); Henry P. Monaghan, *The Supreme Court 1974 Term--Foreword: Constitutional Common Law*, 89 *Harv. L.Rev.* 1, 5-6 & n. 33 (1975), we find it relevant because of the substance of the policy codified in § 201(c)(2).

The Second Circuit has written, regarding parallel provisions in § 201 prohibiting bribes and gratuities in the context of public officials,

"[T]here is no reason to infer that the policy and purpose behind the 'corrupt intent to influence' offenses [are] substantially different from [those] underlying the 'for or because of' offenses.... '[E]ven if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee....' "

Biaggi, 853 F.2d at 101 (second and third alterations in original) (quoting *United States v. Biaggi*, 674 F.Supp. 86, 89 (E.D.N.Y.1987) (quoting *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 200 (1978))). We find this comparison of policy applicable between the witness bribery and gratuity prohibitions. Congress evidenced an intent in § 201(c)(2) to remove the temptation inherent in a witness's accepting value from a party for his testimony. See *Evans*, 572 F.2d at 480. That temptation, even if unconscious, is to color or falsify one's testimony in favor of the donor. The law already imposes on every witness the solemn and fundamental duty to testify truthfully, and accepting unlawful gratuities or inducements from a party compromises that solemn duty. When testimony tainted in this way is presented to the courts of the United States, judicial integrity is directly impugned in a way it is not by tangible evidence whose reliability is unaffected by an underlying illegality. And when the statutory policy of Congress is to protect courts and parties from that taint, suppression is particularly appropriate because it effectuates that purpose.

For this reason we are unpersuaded by cases holding suppression inappropriate for statutory violations on the ground that where Congress has established other penalties the courts should not create a judicial remedy. See, e.g., *United States v. Benevento*, 836 F.2d 60, 69-70 (2d Cir.1987), cert. denied, 486 U.S. 1043, 108

S.Ct. 2035, 100 L.Ed.2d 620 (1988); *United States v. Michaelian*, 803 F.2d 1042, 1049-50 (9th Cir.1986); *United States v. Kington*, 801 F.2d 733, 737-38 (5th Cir.1986), cert. denied, 481 U.S. 1014, 107 S.Ct. 1888, 95 L.Ed.2d 495 (1987); see also *United States v. Thompson*, 936 F.2d 1249, 1251-52 (11th Cir.1991), cert. denied, 502 U.S. 1075, 112 S.Ct. 975, 117 L.Ed.2d 139 (1992). Unlike all of these cases, the violation of § 201(c)(2) at issue in our case directly tainted the reliability of the evidence. To permit this unlawfully obtained evidence "to be made the basis of a conviction in the federal courts would stultify the policy which [p. 1361] Congress has enacted into law." *United States v. Mitchell*, 322 U.S. 65, 67, 64 S.Ct. 896, 88 L.Ed. 1140 (1944) (quoting *McNabb v. United States*, 318 U.S. 332, 345, 63 S.Ct. 608, 87 L.Ed. 819 (1943)).

We emphasize that the rule we apply today rests in no way on the Constitution; it is a creature solely of statute. The constitutional boundaries of testimony like that presented in this case have been amply delineated in *Hoffa v. United States*, 385 U.S. 293, 297-99, 310-12, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), *Brady*, 373 U.S. at 86-91, 83 S.Ct. 1194, *Giglio*, 405 U.S. at 155-56, 92 S.Ct. 763, *Cervantes-Pacheco*, 826 F.2d at 312-16, and the lines of cases they represent. Our holding today is unrelated to them.

VII. Sufficiency of the Evidence

Having concluded Ms. Singleton's motion to suppress should have been granted, we address her claim that the district court erred in denying her motion for judgment of acquittal as to both her conspiracy and money laundering convictions. We hold at the outset that the failure to suppress Mr. Douglas's testimony was not harmless error as to either the conspiracy or the money laundering convictions. The government relied on Mr. Douglas as its principal witness, and, considering the entire record, we are entirely unable to say that the admission of his testimony did not influence the verdict. See *Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

The remaining question is whether the record contains sufficient other evidence upon which a jury could find guilt beyond a reasonable doubt. If the evidence, excluding the testimony of Mr. Douglas, is legally insufficient to support her convictions, a new trial is prohibited by double jeopardy principles. See *United States v. McAleer*, 138 F.3d 852, 1998 WL 101804, at *4 (10th Cir.1998) (citing *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)). If, however, the record contains sufficient evidence to support a conviction without Mr. Douglas's testimony, then justice requires a new trial. See *United States v. Tateo*, 377 U.S. 463, 465, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

We review de novo the denial of a motion for judgment of acquittal. See *United States v. Lampley*, 127 F.3d 1231, 1242 (10th Cir.1997), cert. denied, --- U.S. ---, 118 S.Ct. 1098, 140 L.Ed.2d 153 (1998). Our standard is whether the evidence is sufficient to sustain a conviction. See Fed.R.Crim.P. 29(a). Excluding the testimony of Mr. Douglas and viewing the remaining evidence and all reasonable inferences from it in the light most favorable to the government, we conclude that a rational jury could have found Ms. Singleton guilty beyond a reasonable doubt of both the conspiracy and money laundering charges. See *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir.1997); see also *United States v. Coleman*, 7 F.3d 1500, 1502-03 (10th Cir.1993); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1531 (10th Cir.1996).

REVERSED and REMANDED for a new trial.

(en banc response)

UNITED STATES of America, Plaintiff-Appellee,

v.

Sonya Evette SINGLETON, Defendant-Appellant

United States Court of Appeals,

Tenth Circuit (en banc)

No. 97-3178, Jan. 8, 1999

(vacating 144 F.3d 1343 (1998))

PORFILIO, Circuit Judge.

Sonya Singleton was convicted of money laundering and conspiring to distribute cocaine. A panel of this court reversed that conviction on the ground the prosecuting attorney violated 18 U.S.C. § 201(c)(2) when he offered leniency to a co-defendant in exchange for truthful testimony. The panel held the testimony of the co-defendant should have been suppressed and that the failure to do so was not harmless error. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The en banc court vacated the panel decision, *id.* at 1361, and has now reheard the appeal. We now hold 18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office.

I

The conspiracy forming the basis of Ms. Singleton's conviction required her to send and receive drug proceeds by Western Union wires. Her co-conspirator Napoleon Douglas entered into a plea agreement in which he agreed to testify truthfully in return for the government's promise not to prosecute him for related offenses, to advise the sentencing court of his cooperation, and to advise a state parole board of the "nature and extent" of his cooperation.

Before trial, Ms. Singleton moved to suppress the testimony of Mr. Douglas on the ground the government had violated 18 U.S.C. § 201(c)(2), the so-called "anti-gratuity statute," by promising him leniency in exchange for his testimony. The district court denied the motion and Mr. Douglas testified, acknowledging the benefits he would receive in exchange for his testimony and implicating Ms. Singleton in the charged offenses. Ms. Singleton asks us to review the court's denial of her motion.

II

The question before us is whether section 201(c)(2) applies to the government in the prosecution of criminal offenses. Ms. Singleton argues the plain language of the statute permits no answer but that it does. As expected, the government counters such a reading is beyond the intent of Congress and clearly wrong. We review this issue of law de novo, *FDIC v. Canfield*, 967 F.2d 443, 445 (10th Cir. 1992) (en banc), and begin our analysis with the pertinent portions of the statute itself:

(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.

18 U.S.C. § 201(c)(2) (1994).

Ms. Singleton takes the position that when Mr. Douglas testified after receiving the government's promise of lenient treatment in exchange for his truthful testimony, he became a "paid 'occurrence' witness," and testimony from those of such ilk is contrary to the fundamental precepts of American justice because the payment of something of value would give the witness a strong motivation to lie. She reasons section 201(c)(2) was enacted to deter that result, and we need only apply plain meaning to the word "whoever" contained in the statute to conclude it must apply broadly and encompass the government and its representatives.

In contrast, the United States argues to allow section 201(c)(2) to sweep so broadly would not only be a radical departure from the ingrained legal culture of our criminal justice system but would also result in criminalizing historic practice and established law. The government maintains Congress did not intend to hinder the sovereign's authority to prosecute violations against the United States in this fashion.

Viewing the statute on its face, it is apparent the dispute revolves about the word "whoever." Indeed, the significance of the remaining parts of the statute is not seriously controverted. However, like many words chosen by the legislative branch to convey its intent, this one word evokes more meaning than an innocent first reading of it would portend.

As correctly argued by Ms. Singleton, "whoever" is a broad term which by its ordinary definition would exclude no one. Indeed, if one were to take the word at face value, defendant's argument becomes colorable, at least. However, the defendant's approach, while facially logical, ignores a crucial point that must be considered in any attempt to apply the statute to the issues of this case. She argues the breadth of the word "'whoever' includes within its scope the assistant United States attorney who offered Douglas something of value in exchange for his testimony." To begin the parsing of the statute with this assumption, however, ignores a fundamental fact: the capacity in which the government's lawyer appears in the courts.

The prosecutor, functioning within the scope of his or her office, is not simply a lawyer advocating the government's perspective of the case. Indeed, the prosecutor's function is far more significant. Only officers of the Department of Justice or the United States Attorney can represent the United States in the prosecution of a criminal case. 28 U.S.C. §§ 516, 547 (1994); *United States v. Navarro*, 959 F. Supp. 1273, 1277 (E.D. Cal. 1997), rev'd on other grounds, 160 F.3d 1254, 1998 WL 809553 (9th Cir. 1998). Indeed, a federal court cannot even assert jurisdiction over a criminal case unless it is filed and prosecuted by the United States Attorney or a properly appointed assistant. See *United States v. Providence Journal Co.*, 485 U.S. 693, 699-708, 99 L. Ed. 2d 785, 108 S. Ct. 1502 (1988) (dismissing petition for certiorari for lack of jurisdiction where the petition was filed by a government lawyer acting without the authority to do so); *United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991) (whether Special AUSA had been properly appointed went to jurisdiction of the district court). Therefore, the government's sovereign authority to prosecute and conduct a prosecution is vested solely in the United States Attorney and his or her properly appointed assistants. Of course, it cannot be otherwise because the government of the United States is not capable of exercising its powers on its own; the government functions only through its officers and agents. We thus infer in criminal cases that an Assistant United States Attorney, acting within the scope of authority conferred upon that office, is the alter ego of the United States exercising its sovereign power of prosecution. Hence, in the attempt to apply section 201(c)(2), the United States and the Assistant United States Attorney cannot be separated. Indeed, the alter ego role [n. 1] of the prosecutor is not unusual, for in a similar case, the Sixth Circuit has noted:

When an assistant United States Attorney (AUSA) enters into a plea agreement with a defendant, that plea agreement is between the United States government and the defendant. When an AUSA uses at trial testimony obtained through a plea agreement or an agreement not to prosecute, he does so as the government. An AUSA who, pursuant to the provisions of the United States Sentencing Guidelines, moves for a downward departure under § 5K1.1, does so as the government.

United States v. Ware, 161 F.3d 414, 1998 WL 830587, *8 (6th Cir. Dec. 3, 1998).

1. The concurrence finds some oddity in our reference to a United States Attorney as both the alter ego of the government and a governmental agent. There is no disparity in the two concepts because the United States Attorney has duties other than prosecution. Therefore, when prosecuting a criminal matter in the name of the United States, he is the government, but when performing another duty of his office, he is an officer or agent of the government.

Put into proper context, then, the defendant's argument is: in a criminal prosecution, the word "whoever" in the statute includes within its scope the United States acting in its sovereign capacity. Extending that premise to its logical conclusion, the defendant implies Congress must have intended to subject the United States to the provisions of section 201(c)(2), and, consequently, like any other violator, to criminal prosecution. Reduced to this logical conclusion, the basic argument of the defendant is patently absurd.

There is even a more fundamental reason for arriving at the same conclusion, however. Although Congress may, by legislative act, add to or redefine the meaning of any word, it did not do so in the passage of section

201(c)(2). Therefore, we must presume it intended to employ the common meaning of the word. The word "whoever" connotes a being. See Webster's Third New International Dictionary 2611 (1993) (defining "whoever" as "whatever person: any person" (emphasis added)). The United States is an inanimate entity, not a being. The word "whatever" is used commonly to refer to an inanimate object. See *id.* at 2600 (defining "whatever" as "anything that: everything that" (emphasis added)). Therefore, construing "whoever" to include the government is semantically anomalous. Looking beyond definitions, though, there are rules of statutory construction that will lead to the same conclusion.

Statutes of general purport do not apply to the United States unless Congress makes the application clear and indisputable. In *The Dollar Savings Bank v. United States*, 86 U.S. 227, 22 L. Ed. 80 (1873), the Court instructed:

It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. . . . The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of [*11] *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

Id. at 239 (footnote omitted); see also 8 Matthew Bacon, *A New Abridgment of the Law* 92 (1869) ("Where a statute is general, and thereby (a) any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, (b) unless the statute is made by express words to extend to him."); Henry Campbell Black, *The Construction and Interpretation of the Laws* 94-97 (2d ed. 1911) (same). The Court revisited the concept in *Nardone v. United States*, 302 U.S. 379, 383-84, 82 L. Ed. 314, 58 S. Ct. 275 (1937), when it held this canon of construction generally applies when failure to limit the application of a statute would "deprive the sovereign of a recognized or established prerogative title or interest" or "where a reading which would include [the government] would work obvious absurdity."

We have already established the absurdity in trying to apply section 201(c)(2) to the sovereign's prosecutorial powers, and a number of courts have agreed for an abundance of reasons we also find persuasive. See, e.g., *United States v. Haese*, F.3d , 1998 WL 842185, at *8 (5th Cir. Dec. 7, 1998); *Ware*, 161 F.3d 414, 1998 WL 830587, at *9; *United States v. White*, F. Supp. 2d , 1998 WL 758830, at *2-3 (E.D.N.C. 1998); *United States v. Hammer*, F. Supp. 2d , 1998 U.S. Dist. LEXIS 16279, 1998 WL 725211, at *17 (M.D. Pa. 1998); *United States v. Reid*, 19 F. Supp. 2d 534, 535-38 (E.D. Va. 1998); *United States v. Arana*, 18 F. Supp. 2d 715, 717-19 (E.D. Mich. 1998); *United States v. Dunlap*, 17 F. Supp. 2d 1183, 1184-88 (D. Colo. 1998); *United States v. Guillaume*, 13 F. Supp. 2d 1331, 1332-34 (S.D. Fla. 1998); *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998); *United States v. Barbaro*, 1998 U.S. Dist. LEXIS 13509, 1998 WL 556152, at *3 (S.D.N.Y. Sept. 1, 1998). But see *United States v. Revis*, 22 F. Supp. 2d 1242, 1998 WL 713229 (N.D. Okla. 1998); *United States v. Fraguera*, 1998 U.S. Dist. LEXIS 14347, 1998 WL 560352 (E.D. La. Aug. 27, 1998).

The next question, then, is whether applying the statute to the government would deprive the sovereign of a recognized or established prerogative, title, or interest. The answer to that question is, inescapably yes.

From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency. See *Hoffa v. United States*, 385 U.S. 293, 310-12, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966); *Lisenba v. California*, 314 U.S. 219, 227, 86 L. Ed. 166, 62 S. Ct. 280 (1941); *Benson v. United States*, 146 U.S. 325, 333-37, 36 L. Ed. 991, 13 S. Ct. 60 (1892); *The Whiskey Cases*, 99 U.S. 594, 599-600, 25 L. Ed. 399 (1878). Indeed,

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

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987); *United States v. Juncal*, 1998 U.S. Dist. LEXIS 13036, 1998 WL 525800, at *1 (S.D.N.Y. Aug. 20, 1998) ("The concept of affording cooperating accomplices with leniency dates back to the common law in England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission.").

This ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government. It follows that if the practice can be traced to the common law, it has acquired stature akin to the special privilege of kings. However, in an American criminal prosecution, the granting of lenience is an authority that can only be exercised by the United States through its prosecutor; therefore, any reading of section 201(c)(2) that would restrict the exercise of this power is surely a diminution of sovereignty not countenanced in our jurisprudence.

Moreover, in light of the longstanding practice of leniency for testimony, 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.

Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991) (citations and quotation marks omitted); see also Green v. Bock Laundry Machine Co., 490 U.S. 504, 521-22, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989). It further follows, therefore, the absence of such language makes patent section 201(c)(2) was not intended to apply to the United States or its attorneys.

The government also points out a number of statutes and rules with which defendant's reading of section 201(c)(2) would conflict. Other courts have done so as well. See, e.g., Arana, 18 F. Supp. 2d at 718-19 (conflicts with 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1(a)(2)); Dunlap, 17 F. Supp. 2d at 1184-86 (conflicts with Fed. R. Crim. P. 11(e)); Guillaume, 13 F. Supp. 2d at 1334 (conflicts with 18 U.S.C. §§ 6001-05). We simply believe the general principles we have set forth so completely undercut defendant's reading that further exposition would be redundant.

III

Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government. Thus, fears our decision would permit improper use or abuse of prosecutorial authority simply have no foundation. [n. 2] It is noteworthy, then, that defendant's premise relies upon the shibboleth "the government is not above the law." While we agree with that notion, we simply believe this particular statute does not exist for the government. Accordingly, we AFFIRM the district court's denial of the motion to suppress on 18 U.S.C. § 201(c)(2) grounds. We adopt the ruling of the panel that the evidence in the record was sufficient to sustain the judgment of conviction, notwithstanding the panel's conclusion the testimony of Mr. Douglas should have been suppressed.

2. The concurrence expresses a concern our disposition would "permit the conclusion that consistent with the provisions of § 201, a United States Attorney may pay a prosecution witness for false testimony." We believe the concern is misplaced. It is inconceivable that any court would hold that a prosecutor who pays for the false testimony of a witness is carrying out an official function of the government. Our disposition protects only those prosecutorial acts of the government which have been recognized in common law or authorized by statute. A prosecutor who goes beyond those limitations is clearly not performing a governmental function. Moreover, a prosecutor who procures false testimony is surely subject to penalty under 18 U.S.C. § 1622.

The dissent's observation that both statutes employ the word "whoever" misses our point. "Whoever" includes the prosecutor in § 1622 because subornation of perjury is not an official governmental function.

LUCERO, J., with whom Judge HENRY joins, concurring.

I concur in the judgment that the United States and its agent, an Assistant United States Attorney, did not violate 18 U.S.C. § 201(c)(2) by offering in a plea agreement to exchange leniency for the testimony of Singleton's co-conspirator. See I R. doc. 109, at 1-4. [n. 1] But I write separately to state my disagreement with the majority's holding that the word "whoever" in 18 U.S.C. § 201(c)(2), as it is used to define the class of persons who can violate the statute, cannot include the government or its agents. The majority's interpretation

would permit the conclusion that consistent with the provisions of § 201, a United States Attorney may pay a prosecution witness for false testimony.

1. The Singleton panel limits its analysis to "three specific promises made by the government to Mr. Douglas in return for his explicit promise to testify." *Singleton v. United States*, 144 F.3d 1343, 1344 (10th Cir. 1998). The second and third promises relate expressly to the government's advising sentencing bodies of the extent of Douglas's cooperation. See I R. doc. 109, at 2. It is these promises that are properly before us because the first promise--forbearance from prosecution for certain offenses--may be understood as consideration for Douglas's plea of guilty to six separate criminal counts. See *id.* at 1 ("In exchange for the plea of guilty . . . and the defendant's cooperation . . . , the United States agrees . . .") (emphasis added); Fed. R. Crim. P. 11(e)(1)(A). It should be understood in this manner because, in the absence of evidence to the contrary, plea agreements--like contracts--are construed to render each term lawful. See Restatement (Second) of Contracts § 203(a) (1979) ("An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.") & *id.* at § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

I cannot join the dissent, however, because § 201(c)(2) operates in conjunction with other statutes to allow the government, upon proper disclosure and/or with court approval, to trade certain items of value for testimony. These statutes include 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), passed as part of the Sentencing Reform Act of 1984, which allow courts, acting pursuant to the Sentencing Guidelines and upon motion of the government, to reduce sentences for individuals who provide "substantial assistance in the investigation or prosecution of another"; the federal immunity statutes, 18 U.S.C. §§ 6001-6005, passed as part of the Organized Crime Control Act of 1970, which require courts, upon the request of the government, to confer immunity upon witnesses for their testimony in aid of the prosecution; and the Witness Relocation and Protection Act, 18 U.S.C. §§ 3521-3528, passed as part of the Comprehensive Crime Control Act of 1974, which allows the government to bestow various benefits for the protection of cooperating witnesses. Because these specific statutes are in conflict with the general prohibitions of § 201(c)(2), the specific statutes control, and permit the prosecution's actions in this case. Whereas the majority considers these statutes to be unnecessary to its result, see *Maj. Op.* at 11, I find them dispositive.

I

It is undisputed that the Assistant United States Attorney's offer of leniency to Mr. Douglas was for his testimony. See *Maj. Op.* at 2; *Singleton*, 144 F.3d at 1344. Thus, the only issue is whether 18 U.S.C. § 201(c)(2), the anti-gratuity provision of the federal bribery statute, prohibits the prosecutor's conduct.

A

The majority holds that "whoever" as used in § 201(c)(2) does not include the government. That result, I believe, cannot be reconciled with *Nardone v. United States*, 302 U.S. 379, 82 L. Ed. 314, 58 S. Ct. 275 (1937), which holds that government agents are liable under the wiretapping provisions of the Federal Communications Act. Like the statute at issue here, that under review in *Nardone* uses a term of general applicability--"no person"--to encompass the class of persons subject to the law. See *Nardone*, 302 U.S. at 380-82. The majority's conclusion that "whoever" cannot refer to the government because it "connotes a being" and not an entity, see *Maj. Op.* at 7 (citing dictionary definition of "whoever"), must therefore be incorrect because the statutory language that *Nardone* holds to include the government also connotes a being and not an entity.

Nardone identifies two classes of statutes wherein terms of general applicability do not apply to the government. "The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest." *Nardone*, 302 U.S. at 383. The second is where an interpretation of the statute to include government officers "would work obvious absurdity." *Id.* at 384. The majority holds that the government cannot be included within "whoever" in § 201(c)(2) because the statute falls within both these classes. I respectfully disagree.

With regard to the first class, the majority identifies "a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency" as creating a vested prerogative in the government. *Maj. Op.* at 9. *Nardone*, however, limits the class of statutes under which language of general

applicability excludes the government. "The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself." Nardone, 302 U.S. at 383. The majority would transform virtually all federal "officers and agents" relating to law enforcement and prosecution into alter egos of the government, thereby rendering Nardone's limitation on the prerogative of the sovereign mere surplusage. [n. 3] In effect, the majority would overrule Nardone's holding that federal officers are liable under the wiretapping provisions of the Federal Communications Act. For purposes of Nardone, United States Attorneys must be regarded as agents of the government, not as its alter egos. [n. 4]

3. Although the majority infers that United States Attorneys are in fact "alter egos" of the government, "acting within the scope of authority conferred upon that office . . . [and] exercising [the government's] sovereign power of prosecution," Maj. Op. at 6, it also characterizes United States Attorneys as "officers and agents" of the government. *Id.*

4. The majority's citation of language from *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239, 22 L. Ed. 80 (1873), reaffirming the federal government's right to impose and collect taxes notwithstanding a law of general applicability, is inapposite in this context. See Maj. Op. at 8. Whereas the Constitution explicitly grants the power to tax to the federal government, see U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . ."); U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . ."), it grants no such explicit right or prerogative to federal prosecutors. In addition, during the same term as it decided *Dollar Savings Bank*, the Court explicitly noted that the longstanding principle that the king is not subject to acts of Parliament yields where "a statute is passed . . . to prevent fraud, injury and wrong." *United States v. Herron*, 87 U.S. (20 Wall.) 251, 255, 22 L. Ed. 275 (1873). Section 201, which criminalizes bribery and gratuities given to public officers and witnesses, clearly falls within this exception.

With respect to the second class recognized by Nardone, the majority's holding itself works an obvious absurdity by implying that a federal prosecutor who bribes a witness to supply false testimony is not subject to the criminal prohibitions of § 201. Even the government concedes that a prosecutor who corruptly bribes a witness to provide testimony is liable under 18 U.S.C. § 201(b)(3). See Appellee's Supp. Br. at 15. In short, neither of Nardone's two exceptions supports the majority's result.

B

The government asserts that because the Dictionary Act defines "whoever" in a manner that does not expressly include the federal government, see 1 U.S.C. § 1, Congress could not have intended its use of "whoever" in § 201(c)(2) to include the government and its agents. [n. 5] Part of the purpose of § 201, however, is to criminalize certain behavior of government officials. See 18 U.S.C. § 201(b)(2). In addition, as noted above, the government itself states that a prosecutor who corruptly bribes a witness to provide testimony is liable under 18 U.S.C. § 201(b)(3), which, like § 201(c)(2), merely uses the word "whoever" to identify potentially liable parties. [n. 6] If "whoever" can refer to government agents in one part of the statute, then it surely can refer to government agents in § 201(c)(2).

5. 1 U.S.C. § 1 states in part: "In determining the meaning of any act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

6. An important aspect of the government's argument in this respect is that the corrupt prosecutor is acting "ultra vires." This is unpersuasive not only because it contradicts the statute's plain meaning, but because it would destroy the logic of the regime that Congress has created to regulate the bargaining process with, and testimony of, cooperating witnesses. See *infra*, section II.

Furthermore, the structure of 18 U.S.C. § 201 indicates that "whoever" is inclusive of public officials. Sections 201(b) and (c) plainly state that "whoever" performs certain acts shall be punished under Title 18. For certain offenses, however, §§ 201(b)(2) and (c)(1)(B) limit their scope to "whoever . . . being a public official[, former public official,] or person selected to be a public official." 18 U.S.C. §§ 201(b)(2) and (c)(1)(B). The use of the limiting construction "being a public official" necessarily implies the inclusion of such officials within the catch-all term "whoever." Logically, a person falling within the scope of the construction "whoever . . . being" necessarily falls within the larger scope of "whoever"--thereby indicating that "whoever" cannot be construed to exclude those public officials. More generally, of course, §§ 201(b)(2) and (c)(1)(B) demonstrate Congress's

ability to limit certain offenses under § 201 to certain classes of individuals when it wishes to do so. The choice not to so limit § 201(c)(2) carries a clear implication that is wrongly ignored by the majority.

I

"It is an elementary tenet of statutory construction that 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375, 107 L. Ed. 2d 782, 110 S. Ct. 680 (1990) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974)). Rather, a specific statute controls over the general. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, 6 L. Ed. 2d 72, 81 S. Ct. 864 (1961); see also 2B Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 51.05, at 174 (5th ed. 1992) ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized; but if there is any conflict, the latter will prevail."). This is true regardless of the priority of the individual statutes' enactment. See *Bulova Watch*, 365 U.S. at 758.

A

Congress has developed an extensive and detailed statutory framework authorizing sentence reductions and recommendations, immunity, and other incentives for cooperating witnesses. Federal immunity statutes, for example, which authorize prosecutors to request immunity for cooperating witnesses, see 18 U.S.C. §§ 6001-6005, "reflect[] the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar v. United States*, 406 U.S. 441, 446, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972). The Supreme Court has characterized the immunity statutes as "essential to the effective enforcement of various criminal statutes," *id.* at 447, and "so familiar that they have become part of our 'constitutional fabric,'" *United States v. Mandujano*, 425 U.S. 564, 575-76, 48 L. Ed. 2d 212, 96 S. Ct. 1768 (1976) (plurality op.) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 81-82, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973)).

Although, as the Singleton panel noted, the government moves the court to grant immunity rather than bestowing immunity directly upon a cooperating witness, see *Singleton*, 144 F.3d at 1348, the government's role in the process is more important than that of the court. See *United States v. Doe*, 465 U.S. 605, 616, 79 L. Ed. 2d 552, 104 S. Ct. 1237 (1984) (noting that the immunity statutes grant government authorities "exclusive authority to grant immunities" and that the courts play "only a minor role in the immunizing process"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254 n.11, 74 L. Ed. 2d 430, 103 S. Ct. 608 ("The court's role in granting the [immunity] order is merely to find the facts on which the order is predicated." (quoting H.R. Rep. No. 91-1549, at 43 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4018)). Indeed, the statutory language itself requires the court, "upon the request of the United States attorney," to "issue . . . an order requiring [a witness] to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(a).

When granted statutory immunity, the potential witness is given something of value by the government in that his immunized testimony cannot be used to prosecute him. By the same token, the government plainly gains something of value from immunizing the testimony--the testimony itself. See *Mandujano*, 425 U.S. at 575 (characterizing immunity as "the quid pro quo for securing an answer from the witness"). The immunity statutes give the government leverage with which to obtain testimony from recalcitrant witnesses, and the power to grant immunity serves as one of the bargaining tools in the prosecutorial process. See *id.* at 576 (characterizing the grant of immunity as the government's "ultimate tool for securing testimony that would otherwise be protected"); see also Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1492 (1993) (placing negotiations over immunity grants within the general framework of the plea bargaining process).

The Witness Relocation and Protection Act expressly authorizes the Attorney General to provide for the relocation and protection of certain federal witnesses. See 18 U.S.C. § 3521(a). It allows the government to provide numerous things of value, see 18 U.S.C. § 3521(b)(1)(B) & (D) (authorizing the government to provide housing and pay the basic living expenses for protected witnesses), in exchange for the agreement of the witness "to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings," as set forth in a "memorandum of understanding." 18 U.S.C. § 3521(d)(1) & (d)(1)(A).

Dispositive in this case is the Sentencing Reform Act of 1984, which, as amended, authorizes courts, upon motion of the government, to reduce sentences for individuals who provide "substantial assistance in the investigation or prosecution of another." See 18 U.S.C. § 3553(e) (authorizing reductions below statutory minimum sentence); 28 U.S.C. § 994(n) (requiring the Sentencing Commission to assure that Sentencing Guidelines "reflect the general appropriateness" of such reductions); see also Fed. R. Crim. P. 35(b) (authorizing post-sentencing reductions "in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994"). There can be little doubt that Congress intended to include the provision of cooperative testimony under the rubric of "substantial assistance." Both 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) define such assistance in terms of "the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(3) & 28 U.S.C. § 994(n) (emphasis added). Although there are some forms of assistance in prosecution that are neither testimonial nor duplicative of investigatory assistance, it stretches credulity to suppose that Congress intended to exclude cooperative testimony from "substantial assistance" as used in these statutes. See *Bridger Coal Co./Pac. Minerals v. Dir., Office of Workers' Compensation Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991) (citations omitted) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.").

By allowing prosecutors to reward testimony with sentencing benefits, the statutes must also be read to authorize prosecutors to inform a defendant and potential witness of the possibility of such reward. Barring a prosecutor from discussing leniency prior to testimony would seriously inhibit the intended effect of these statutes by reducing the pool of defendants willing to testify against their co-conspirators to those informed by their counsel of the potential benefits of cooperation. Furthermore, a bar to pre-testimony negotiation would contradict the intent of Fed. R. Crim. P. 11. "Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge." Fed. R. Crim. P. 11(e) advisory committee's note to 1974 Amendment. This openness was intended to recognize plea bargaining as "an ineradicable fact," and prevent it from being "driven underground," where it would otherwise "occur[] in an informal and largely invisible manner" without "effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness." *Id.* Consequently, construing §§ 3553(e) and 994(n) not to cover pre-testimony negotiation would contradict the very purpose of Rule 11 by eliminating its "appropriate and adequate safeguards" embodied therein. *Id.* Defendants would have little incentive to provide cooperative testimony, thereby frustrating Rule 11's purpose in authorizing plea bargaining as "an essential component of the administration of justice." *Id.* (quoting *Santobello v. New York*, 404 U.S. 257, 260, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971)).

Pursuant to these grants of statutory authority, the Sentencing Commission has issued a policy statement entitled "Substantial Assistance to Authorities," see U.S.S.G. § 5K1.1, which allows a downward departure in consideration of "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." U.S.S.G. § 5K1.1(a)(2). Courts have upheld the exchange of testimony for leniency under this authority. See, e.g., *United States v. Courtois*, 131 F.3d 937, 938-39 (10th Cir. 1997) (holding that prosecution may bargain away its discretion not to file a § 5K1.1 motion) (citing *Wade v. United States*, 504 U.S. 181, 185, 118 L. Ed. 2d 524, 112 S. Ct. 1840 (1992)).

In totality, these various statutes create both a substantive and procedural framework for bargaining between government agents and potential witnesses. They limit the "something of value" that the government may offer, and detail the roles of both the prosecution and the courts in determining sentences, providing immunity, and granting other forms of assistance. The result is a coherent, narrowly defined set of laws that operate in the same field as the more general prohibitions of § 201(c)(2). Under long-established principles of statutory construction, where specific statutes overlap with a general statute, the latter must give way, insofar as it would prohibit that which the narrow statutes would allow. [n. 7] It is for this reason that I concur with the majority's result.

7. Where § 201(c)(2) does give way, the requirements of constitutional due process and confrontation, as well as the rules of criminal procedure, will continue to protect the accused. Thus, prosecutors must disclose to the defendant "evidence of any understanding or agreement . . . [that] would be relevant to [a witness's] credibility." *Giglio v. United States*, 405 U.S. 150, 154-55, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972); see also *Davis v. Alaska*, 415 U.S. 308, 316-17, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) ("The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). Additionally, the court plays an important role in reviewing plea agreements. See Fed. R. Crim.

P. 11(c) (requiring court to advise defendant with respect to plea agreement); Fed. R. Crim. P. 11(d) (requiring court to insure that plea is voluntary); Fed. R. Crim. P. 11(e) (permitting court to reject plea agreement).

B

This analysis has several advantages over that of the majority. It provides both a roadmap for the bargaining process and a clearly articulated criminal statute with which to punish straying prosecutors. The majority's reading of § 201(c)(2), on the other hand, creates a conceptually messy legal regime for handling the case of the errant United States Attorney "who offers something other than a concession normally granted by the government," Maj. Op. at 11, such as bribing a witness to provide false testimony.

The majority reasons that this prosecutor can be held liable because he is acting *ultra vires*, and is therefore "no longer the alter ego of the sovereign and is divested of the protective mantle of the government." Maj. Op. at 11-12. The majority's holding, premised on the government's sovereign authority and the common law of exchanges of testimony for leniency, see Maj. Op. at 6, 9-10, is likely to create difficulties for authorities who, in seeking to sanction errant prosecutors, will be forced to study the arcana of the common law to discern the scope of protected prosecutorial activity. On the other hand, the statutory construction proposed here protects the general prohibition of § 201(c)(2), but provides specific exemptions that the government may follow. Prosecutors may offer only those incentives that Congress has approved, and may bargain and execute agreements only within the narrow, specific procedures that Congress and the courts have articulated. If a United States Attorney does not act within the provisions of those specific statutes that conflict with § 201, then § 201—including subsection (c)(2)—applies. Conversely, where the actions of the prosecutor fall within such provisions, as in this case, then § 201(c)(2) does not apply.

KELLY, Circuit Judge, with whom SEYMOUR, Chief Judge, and EBEL, Circuit Judge, join, dissenting.

The court holds that 18 U.S.C. § 201(c)(2) does not apply to the government because government prosecutors are inseparable from the sovereign, and that its application would deprive the sovereign of its power to grant leniency in exchange for testimony and would conflict with various statutory provisions. Because courts must apply unambiguous statutes as they are written and § 201(c) does not admit of an exception for the government or its prosecutors, I respectfully dissent.

As an initial observation, since the panel issued its opinion in this case, prosecutors from coast to coast have attempted to portray it as the death knell for the criminal justice system as we know it. These are the same grave forecasts made by prosecutors after the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and the advent of the exclusionary rule. But experience has proven that the government, just like the private citizens it regulates and prosecutes, can live within the rules. No one would suggest that the criminal justice system has ceased to function because the Court or Congress has effectuated constitutional or statutory guarantees designed to promote a more reliable outcome in criminal proceedings.

In holding that § 201(c)(2) simply does not apply to the government, the court does not hold that leniency in exchange for testimony does not constitute "anything of value." To be sure, the investigation and prosecution of criminal wrongdoing is an important societal function. Yet, largely missing from the debate since the panel opinion was issued is any concern for the other deeply held values that § 201(c) was intended to protect and which, I believe, the panel opinion honored by applying § 201(c) as Congress wrote it. Those concerns center on maintaining the integrity, fairness, and credibility of our system of criminal justice. Criminal judgments are accepted by society at large, and even by individual defendants, only because our system of justice is painstakingly fair. An additional core value honored by the panel opinion is the preservation of the separation of powers carefully articulated in the Constitution between the legislative and judicial branches, and the proper role of the judiciary as the law-interpreting, rather than lawmaking, branch of the federal government.

Contrary to the concerns expressed by some commentators and courts, see *United States v. Ware*, 161 F.3d 414, 1998 WL 830587 (6th Cir. 1998), a straight-forward interpretation of § 201(c), which encompasses a prohibition against the government buying witness testimony with leniency, actually aids the search for truth. In theory, the leniency is only in exchange for "truthful" testimony. See *United States v. Haese*, No. 97-10307, 1998 WL 842185, at *8 (5th Cir. Dec. 7, 1998). But as the Supreme Court has recognized: "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 he is still awaiting his own trial or sentencing. To think that criminals will lie to save theirfellows 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." *Washington v. Texas*, 388 U.S. 14, 22-23, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); see also Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 *Cornell L. Rev.* 800, 802 (1987) ("Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution in his own case."). To be sure, there are devices that partially ameliorate the problem. The government is required to disclose exculpatory information, including impeachment information, to a defendant. Testifying accomplices may be cross-examined. Their credibility may be impeached, and the jury is instructed that it may regard such testimony with caution. However, all of these devices have limitations. In the real world of trial and uncertain proof, and in view of § 201(c), a witness's demeanor and actual testimony are simply too important to hinge upon promises of leniency. Although the court notes that a prosecutor who procures false testimony could be prosecuted for subornation of perjury, 18 U.S.C. § 1622, [n. 2] such a remedy offers little practical advantage to a defendant facing trial. By barring an exchange of leniency for testimony, Congress in § 201(c) has sought to eliminate, at the source, the most obvious incentive for false testimony.

2. Like § 201(c)(2), the subornation of perjury statute applies to "whoever," and makes no exception for federal prosecutors.

On the other side of the ledger is my concern for the institutional role of Article III courts. Much of this case has been about policy. I accept the government's position that accomplices can provide important information and interpreting § 201(c) to include prosecutors might require some changes to elicit testimony of some witnesses. While it would be up to the Department of Justice to devise ways of compliance, the government is not precluded from offering leniency in exchange for information and assistance short of actual testimony at trial. Likewise, the government could prosecute accomplices first, then compel their testimony by subpoena against co-conspirators. [n. 3] Finally, the government could request that the district court order an accomplice to testify under a grant of immunity. Surely the Department has the ability and resources to come up with effective and lawful means for procuring necessary accomplice testimony. However, I also accept the defense attorneys' position that government leniency in exchange for testimony can create a powerful incentive to lie and derail the truth-seeking purpose of the criminal justice system. The very nature and complexity of this policy debate reinforces my initial belief that this is an argument better left to Congress. This court must perform its 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. I continue to believe that meaning is clear: § 201(c), as written, applies to prosecutors and criminal defendants alike. If the balance struck by § 201 is to be reweighed, that reweighing should be done by the policymaking branch of government - the Congress, and not the courts. In that regard, it bears repeating that the panel's original opinion was purely a matter of statutory construction, not constitutional analysis, and it remains completely open for Congress to reweigh the conflicting values sought to be addressed in § 201. [n. 4]

3. One way prosecutors could obtain information and assistance short of actual testimony at trial is to enter into a plea agreement with a defendant under Fed. R. Crim. P. 11(e). Section 201(c) does not prohibit Rule 11(e) plea agreements in which the defendant pleads in exchange for information helpful to the prosecution if the plea agreement is not conditioned on the defendant testifying. However, the prosecutor could record the plea discussions to preserve the information provided by the defendant. After the defendant enters his guilty plea and is sentenced, the prosecutor could subpoena him as a witness in a trial of the other participants in the crime. If the defendant testified contrary to the statements he made during the plea negotiations, the government could impeach him with the record of his prior statements. See *United States v. Mezzanatto*, 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995) (upholding waiver of exclusionary provisions of Rule 11(e)). It is important to note that the defendant's trial testimony in this situation is compelled through subpoena, and is not given in exchange for anything of value.

Such a practice protects every legitimate prosecutorial concern expressed in this case by the government and refutes its contention that the criminal justice system would be crippled if it could not offer leniency to a defendant in exchange for testimony.

4. The panel's interpretation of § 201(c)(2) would not be retroactive. In *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), the Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," *id.* at 310, unless the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or could be considered a "watershed rule[] of criminal procedure," the observance of which is "implicit in the concept of ordered liberty." *Id.* at 311 (internal citations and quotations omitted). *Teague* does not apply to the statutory construction of a substantive criminal statute, and therefore, there would be no retroactivity under *Teague*. See *Bousley v. United States*, 140 L. Ed. 2d 828, 118 S. Ct. 1604, 1610 (1998).

Although the remedy of exclusion of evidence based upon a statutory violation arguably constitutes a non-constitutional rule of criminal procedure, see *Amicus NACDL Br.* at 15-19, such a rule also would not appear to come within *Teague* or its exceptions to finality. Although the concerns of comity are not present when a federal court reviews federal convictions, the concern with finality apparent in *Teague* is no less important. Cf. 28 U.S.C. § 2255 (one-year limitation period applicable to § 2255 motions).

I. "Whoever" Means Whoever

The government argues that construing the word "whoever" to include the government is semantically anomalous because "whoever" connotes a being. As a textual and contextual matter, this is wrong. Textually, "whoever" clearly connotes more than a being and in fact denotes inanimate entities. The Dictionary Act, 1 U.S.C. § 1, definition of "whoever" includes, but is not limited to, corporations, companies, associations, firms, partnerships, societies, and joint stock companies--all inanimate entities. Contextually, the government concedes that "whoever" in § 201(b) applies to the government and it acknowledges that § 201(c) applies to the government if the government pays an informant money to testify. It makes absolutely no sense to give "whoever" one meaning in § 201(b) (and in § 201(c) when the inducement offered by the government is money) and to give the very same word a completely different meaning in § 201(c) when the inducement offered is leniency or some other promise to improve the informant's position. After all, § 201(c) is a prophylactic rule to enforce § 201(b). "The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250, 133 L. Ed. 2d 611, 116 S. Ct. 647 (1996) (internal quotations and citations omitted). Bought testimony is so fraught with the potential for perjury that Congress imposed a blanket prohibition that also applies to the government, just as hearsay testimony is so fraught with the potential for unreliability that the Federal Rules of Evidence generally prohibit its admission, whether offered by the government or private litigants.

The court suggests that the prosecutor and the sovereign are inseparable, and therefore the word "whoever" cannot apply because the United States cannot be prosecuted for providing leniency in exchange for testimony. First and foremost, "the law in this social order is not self-executing--the necessary instrument is the lawyer." *Matter of Doe*, 801 F. Supp. 478, 479 (D.N.M. 1992). To suggest that government attorneys performing prosecutorial functions are beyond scrutiny because of who they represent is anomalous because it merges attorney and client. No one would suggest that an accused and his attorney are one in the same for purposes of compliance with constitutional, statutory and ethical norms. As discussed below, constraints on government prosecutors are not unusual, notwithstanding that the sovereign is the client. Merely because the government cannot be prosecuted if its agents violate a rule does not mean that the rule may be disregarded; to the contrary, the rule may be enforced by means other than prosecution, here by exclusion of evidence. See *Nardone v. United States*, 302 U.S. 379, 384-85, 82 L. Ed. 314, 58 S. Ct. 275 (1937). The remedy of exclusion serves as a deterrent, protects a court's integrity and allows a federal court the only means it has to enforce federal law.