



GARY STEIN

**PENSION FORFEITURE AND
PROSECUTORIAL POLICY-MAKING**

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Abstract: The U.S. Attorney’s Office for the Southern District of New York recently announced the adoption of new policies designed to forfeit the pensions of New York state and local officials convicted of federal corruption charges. In this article, Gary Stein analyzes the SDNY’s new pension forfeiture policies in light of the long-established doctrine that the power to prescribe the punishments for federal crimes belongs exclusively to Congress. No federal statute expressly authorizes pension forfeiture as a punishment for corrupt state and local officials, and general federal forfeiture law -- the principal legal basis underlying the SDNY’s new policies -- does not appear to authorize forfeiture either, as pension benefits cannot, at least in the majority of cases, logically be viewed as the “proceeds” of a corrupt official’s wrongdoing. Tracing the development of pension forfeiture legislation at the federal and New York levels, the article also argues that the SDNY’s approach conflicts with congressional intent and with principles of federalism. Further, since general forfeiture law is mandatory rather than discretionary, the SDNY approach is incapable of balancing competing interests in a manner that legislation is able to accomplish. For all these reasons, the article concludes, the SDNY’s new pension forfeiture policies exceed the limits of permissible policy-making by federal prosecutors.

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estifying before the Moreland Commission to Investigate Public Corruption last September, U.S. Attorney Preet Bharara of the Southern District of New York took aim at what he condemned as “a galling injustice that sticks in the craw of every thinking New Yorker”: the “almost inviolable right of even the most corrupt elected official—even after being convicted by a jury and jailed by a judge—to draw a publicly-funded pension until his dying day.” This right, Mr. Bharara proclaimed, was an “error of state law.” To help rectify it, he announced that his office (the “SDNY”) has adopted “a new set of policies”—which the SDNY has begun to implement—using fines and forfeitures to eat away at corrupt officials’ public pensions.¹

The U.S. Attorney described these new policies as stemming from the “common-sense principle” that convicted politicians “should not grow old comfortably cushioned by a pension paid for by the very people they betrayed in office.”² There is no doubt that such a principle appeals to the common sense—and perhaps the emotions—of many New Yorkers. Yet when examined against the backdrop of existing New York State and federal law governing pension forfeiture, the SDNY’s new policies raise intriguing questions concerning the separa-

¹ The U.S. Attorney’s prepared testimony may be found on the SDNY’s website. *See* U.S. Attorney Preet Bharara Testifies at the Public Hearing of the Moreland Commission to Investigate Public Corruption, U.S. ATTY’S OFFICE S.D.N.Y. (Sept. 18, 2013), <http://www.justice.gov/usao/nys/pressspeeches/2013/MorelandCommTestimony.php> [hereinafter *Moreland Commission Testimony*].

² *Id.*

tion of powers, federalism, and the policy-making function of federal prosecutors.

The essential question is: By what authority may a U.S. Attorney's Office decide to punish a corrupt state public official or employee by taking away his or her pension? There is no federal statute that expressly authorizes such a punishment. Indeed, until relatively recently, Congress had not seen fit to authorize pension forfeiture as a punishment for corrupt *federal* officials. Moreover, Congress has (in the judgment of the courts that have construed the Employee Retirement Income Security Act) protected *private* pensions from forfeiture, even where the defendant's crime involved a breach of duty owed to his or her employer.

Rather than invoking any congressional authorization relating to pension forfeiture specifically, the SDNY is instead planning to proceed under the general federal forfeiture statutes. But at the time those statutes were adopted, Congress had specifically refused to authorize pension forfeiture for any corrupt officials, public or private. In that context, how can the federal forfeiture laws reasonably be construed to reflect congressional intent to authorize pension forfeiture for corrupt state officials?

Similarly, until 2011, the New York State Legislature had not deemed pension forfeiture to be an appropriate punishment for a corrupt official's wrongdoing. And when New York did enact pension forfeiture legislation, it limited the remedy to officials who took office after the statute's effective date, and even then gave courts discretion to consider various factors in deciding whether and to what extent forfeiture is appropriate in a particular case. Is it institutionally sound for a U.S. Attorney's Office to pursue a policy that conflicts with state policy on an issue that is fundamentally of state concern?

Despite the SDNY's apparent presumption that pension forfeiture is an unmitigated good, the reality is more complex, and the issue more properly painted in shades of gray than in black and white. In some cases, pension forfeiture may create rather than redress injustice. The pension is not a revocable gift from the state, but a form of compensation paid on account of the official's labor. Is it fair or just to deprive a public official of his or her pension if the official engaged in one isolated wrongful act over a long career of otherwise exemplary public service? If his or her actions—while resulting in illicit profits that can be forfeited through other means—caused no actual loss to the public fisc? If the official has innocent dependents who are relying on the pension as their principal source of income after the official has retired?

In short, reasonable people can, and do, disagree over whether and to what extent punishing corrupt state officials with pension forfeiture is good policy or bad policy. Whatever one's views on the policy debate, a decision to impose pension forfeiture clearly is a *policy choice*. Under our system, such policy choices are typically entrusted to our democratically accountable legislative branches, not to unelected federal prosecutors.

How well the SDNY's new pension forfeiture policies correspond with that core precept is the focus of the discussion below. Part I describes the general

limitation on the ability of federal prosecutors to devise punishments for conduct that runs afoul of federal criminal law. Part II sets out the competing policy considerations raised by pension forfeiture, and discusses how Congress and the New York State Legislature have balanced those considerations in addressing this issue. Part III appraises the different components of the SDNY's pension forfeiture policies in light of this legal and policy background.

I.

UNITED STATES V. HUDSON: THE BACKGROUND PRINCIPLE

It is now a commonplace that federal prosecutors, through their charging decisions, plea bargaining determinations and sentencing advocacy, wield tremendous influence over what punishment, from the menu of possible punishments created by Congress, a defendant receives in a particular case.³ But congressional control over the *types* of punishment authorized for criminal offenses—*i.e.*, what punishments appear on the menu—is a principle almost as old as the republic itself.

The doctrine that “there is no federal common law of crimes”⁴ has been firmly embedded in our jurisprudence ever since the Supreme Court’s decision more than 200 years ago in *United States v. Hudson*.⁵ Traditionally, this doctrine is viewed as a limitation on federal judicial power.⁶ *Hudson* thus speaks in terms of “limit[ing] the jurisdiction” of the federal courts, and holds that “all exercise of criminal jurisdiction in common law cases . . . is not within their”—*i.e.*, the courts’—“implied powers.”⁷

As a practical matter, however, *Hudson* has even more to do with the allocation of federal lawmaking responsibilities between the executive and legislative branches. In our system, it is federal prosecutors who decide whether or not to initiate a criminal prosecution, not the federal court, which merely engages in the relatively passive exercise of deciding whether to allow the prosecution to proceed. *Hudson*’s prohibition on federal common law crimes thus operates first

³ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 882–83 (2009) (“With his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power.”).

⁴ *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1984); Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 196–97 (2002).

⁵ 11 U.S. (7 Cranch) 32 (1812).

⁶ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-23, at 156–57 (2d ed. 1988) (analyzing *Hudson* in terms of “limits on the power of federal courts to make common law”); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1010 (1985) (noting that *Hudson* “has come to be viewed as the earliest expression of the principle that federal courts have only limited common law powers”).

⁷ 11 U.S. (7 Cranch) at 33–34.

and foremost to restrict executive power in deference to Congress' exclusive authority to define what constitutes a federal crime.

If the power to define what constitutes a federal crime belongs to Congress, then so too should the power to set the punishment for the crime. This corollary of the *Hudson* doctrine is, indeed, well recognized, and as old as *Hudson* itself. "The power of punishment," Chief Justice Marshall declared, "is vested in the legislative, not in the judicial department," and so "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment."⁸ As modern federal courts have explained, "Just as the federal judiciary may not create crimes outright or enlarge the reach of enacted crimes, neither may it impose punishments not provided for by the federal statute applicable to the described conduct."⁹

Notably, one of the earliest articulations of what ultimately became the *Hudson* doctrine came in a 1798 opinion by Justice Chase (while riding circuit) in *United States v. Worrall*.¹⁰ That case—like the SDNY's new pension forfeiture policies—also involved an attempt by a federal prosecutor to crack down on bribery without explicit congressional authorization. The defendant was charged with an attempt to bribe the Commissioner of the Revenue by offering to split the profits from a government contract (that the Commissioner had the power to award) to build a lighthouse on Cape Hatteras. This, Justice Chase acknowledged, was "an offence highly injurious to morals, and deserving the severest punishment."¹¹ But at the time, Congress had not enacted a law criminalizing bribery of the Commissioner of the Revenue. Justice Chase thus found that the court had no jurisdiction to entertain the case, pronouncing it "essential" that "Congress should define the offences to be tried, and apportion the punishments to be inflicted."¹²

It would blink reality to contend that every act deemed to have violated federal criminal law, and every punishment imposed for such violations, have been ones that Congress comprehended and intended. The breadth of many fed-

⁸ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (emphasis added). For a more recent articulation, see *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.") (emphasis added).

⁹ *United States v. Best*, 573 F.2d 1095, 1101 (9th Cir. 1978); accord, e.g., *United States v. Elkin*, 731 F.2d 1005, 1010–11 (2d Cir. 1984) ("Just as the federal court has no inherent power to try criminal charges that are not based on a federal statute, . . . it has no inherent power to impose punishments that are not provided for by a federal statute applicable to the offense for which the defendant was convicted.") (citation omitted).

¹⁰ 28 F. Cas. 774 (C.C.D. Pa. 1798).

¹¹ *Id.* at 778.

¹² *Id.* at 779 (emphasis added). Indeed, Justice Chase posited that "if Congress had declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject." *Id.* Despite Justice Chase's views, Worrall's conviction was affirmed because the two-judge reviewing court was split, with Justice Peters agreeing with the government's position. *Id.* at 779–80.

eral criminal statutes, and the general language frequently employed, mean that much of what actually constitutes federal criminal law, from a practical perspective, is left to the discretion and judgment of federal prosecutors (in deciding what cases to bring) and federal judges (in deciding whether or not to entertain them).¹³ As one commentator has observed: “There is no federal criminal common law. But there is.”¹⁴ Such instances may, as a matter of form, be justified as exercises of statutory interpretation, but one does not have to be a legal realist to recognize that “[t]here is no sharp distinction between expansive statutory interpretation, on the one hand, and the creation of federal common law, on the other.”¹⁵

Moreover, as Professor Dan Kahan has observed, much of this “de facto lawmaking power” winds up being exercised by individual U.S. Attorneys.¹⁶ Not only does Congress enact broadly worded and unspecific criminal statutes, but federal judges are reluctant to read limiting principles into them, out of fear that doing so would infringe upon Congress’ exclusive lawmaking prerogatives.¹⁷ This leaves a “lawmaking void” that individual U.S. Attorneys have been happy to fill by “deciding for themselves just how far to stretch the incredibly elastic statutes that Congress enacts.”¹⁸ Thus, as Professor Kahan writes: “Because Congress systematically fails to specify the content of criminal statutes, and because courts routinely eschew the authority to give content to those statutes through policy-laden common lawmaking, U.S. Attorneys exercise effective criminal-lawmaking power by default.”¹⁹

Yet, however blurry the line may be between legitimate statutory interpretation and impermissible lawmaking, it is one that federal prosecutors should respect and federal courts must police. U.S. Attorneys’ offices are ill equipped to

¹³ The statute defining mail and wire fraud to encompass deprivations of “the intangible right of honest services” is one obvious example where prosecutors and courts have, perhaps of necessity, and quite arguably with legislative license, employed a degree of creativity that cannot meaningfully be distinguished from policy-making. See *Skilling v. United States*, 561 U.S. 358 (2010).

¹⁴ Rosenberg, *supra* note 4, at 202.

¹⁵ *Id.* at 211. See also Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 *BUFF. CRIM. L. REV.* 5, 6 (1997) (describing legislative-supremacy conception reflected in *Hudson* as a “fiction”: “To be sure, Congress must speak before anyone can be convicted of a federal crime, but so long as Congress troubles itself to utter even a single word, the Judiciary will obligingly write the sentence—indeed, the paragraph, the book, and the screen play – that brings a criminal prohibition to life.”).

¹⁶ Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 *LAW & CONTEMP. PROBS.* 47, 52 (1998); see also Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. REV.* 757, 761–62 (1999) (concurring that “[t]he result, intended or otherwise,” of broadly worded federal criminal legislation “has been to transfer a considerable degree of lawmaking authority to the other branches of government,” and principally to federal prosecutors).

¹⁷ Kahan, *supra* note 16, at 48–52.

¹⁸ *Id.* at 48.

¹⁹ *Id.* at 51–52. Professor Kahan proposed that the Department of Justice in Washington be formally invested with interpretive lawmaking power to ameliorate this problem. See *id.* at 53–58.

engage in the sort of policy analysis and balancing of interests that are the stock-in-trade of the legislative branch or rulemaking bodies such as the U.S. Sentencing Commission. Unlike Congress, a U.S. Attorney's office cannot hold a legislative hearing, take testimony from experts, or commission an empirical study. Unlike even the Department of Justice in Washington, which has certain policy-making components within it,²⁰ U.S. Attorneys' offices are staffed almost entirely by trial attorneys and their fundamental mission is to enforce federal law by investigating and prosecuting violations.

As a rich tradition of legal scholarship emphasizes, such considerations of comparative institutional competence and legitimacy are central to the all-important question of "Who Decides?" in American public law.²¹ "The key to good government," this school instructs, "is not just figuring out the best policy, but also identifying which institutions should be making which decisions."²² When it comes to defining federal crimes and their punishments, *Hudson* long ago answered the "Who Decides?" question: It is Congress who decides.²³ Consequently, when a U.S. Attorney announces the adoption of a set of new policies in an area of substantive criminal law, those policies should be carefully scrutinized for the judgments they reflect and their adherence to the *Hudson* doctrine.

II.

PENSION FORFEITURE: THE LEGISLATIVE BACKGROUND

In order to properly assess the validity of the SDNY's new policies, it is useful to consider them in the context of existing law and policy concerning pension forfeiture. Pension forfeiture—whether to impose it and, if so, under what circumstances—brings into play a myriad of factors and competing policy considerations. Legislatures balancing these considerations, including Congress and

²⁰ These include the Office of Policy and Legislation, the Office of Legal Policy, the Office of Legal Counsel, and the Bureau of Justice Statistics, among others.

²¹ The "Legal Process" school of the 1950s, most commonly associated with the influential set of course materials by that name authored by Professors Henry Hart and Albert Sacks of Harvard Law School, first focused attention on the key role of institutional choice in American law-making. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see generally Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 *CARDOZO L. REV.* 601 (1993). A more recent example of comparative institutional analysis is found in the work of Professor Neil Komesar, which is heavily informed by public choice theory. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); see also Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 *CALIF. L. REV.* 919 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988)).

²² William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 *HARV. L. REV.* 2031, 2033 (1994).

²³ See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 *COLUM. L. REV.* 452, 456–59 (2010).

the New York State Legislature, have adopted a variety of different statutory approaches in addressing this issue.

A. Competing Policy Interests

In a 1997 article, NYU Law Professor James Jacobs and his co-authors laid out several forceful criticisms of public pension forfeiture.²⁴ These include that pension forfeiture: (1) impinges on the public official's vested contractual rights since pension benefits are, in substance, a form of deferred compensation; (2) provides a disincentive for persons to enter into and remain in public service; (3) fails to recognize that public officials and, more importantly, their innocent dependents rely on pension benefits as a source of retirement income; (4) is inconsistent with federal law protecting private pensions from forfeiture in the case of employee misconduct; and (5) is insufficiently calibrated to the degree of wrongdoing to properly serve deterrent and retributive purposes.²⁵

There are also substantial arguments in favor of pension forfeiture for corrupt officials. These include not only what the article describes as the "poetic justice" rationale²⁶—later echoed by U.S. Attorney Bharara—but also more traditional utilitarian arguments, such as that pension forfeiture deters official misconduct and reduces public cynicism towards government and public officials.²⁷

Assessing the competing rationales, the Jacobs study concludes that, despite its "symbolic importance," public pension forfeiture "is more problematic than legislators, scholars and the public have recognized,"²⁸ and recommends that lawmakers "should reject pension forfeiture as a sanction and instead rely on imprisonment and criminal fines as punishment for corruption offenses."²⁹

As the study also describes, in designing a pension forfeiture scheme, a lawmaker must confront and resolve a host of issues. Who should impose the forfeiture and when? What types of public officials should be subject to forfeiture? What offenses should trigger forfeiture? Should there be full forfeiture of all pension benefits or partial forfeiture? Should forfeiture be mandatory or discretionary?³⁰ To the extent legislators remain committed to pension forfeiture as a sanction for official corruption, the authors recommend a "balancing approach" like

²⁴ James B. Jacobs, Coleen Friel & Edward O'Callaghan, *Pension Forfeiture: A Problematic Sanction for Public Corruption*, 35 AM. CRIM. L. REV. 57 (1997).

²⁵ *Id.* at 81–88.

²⁶ *Id.* at 58 ("At first blush, pension forfeiture does justice, even poetic justice. Bribery and other forms of corruption are serious offenses; why should an official who has enriched himself through violation of the public trust draw payments from the public treasury for the rest of his life?").

²⁷ *Id.* at 76–80.

²⁸ *Id.* at 91–92.

²⁹ *Id.* at 59.

³⁰ *Id.* at 60–69.

that set forth in a New Jersey Supreme Court decision.³¹ Such a balancing approach requires consideration of a variety of aggravating and mitigating factors on a case-by-case basis, and invests the decision-maker with discretion to order partial forfeiture or no forfeiture at all.

B. Pension Forfeiture for Federal Officials Under Federal Law

Pension forfeiture for federal officials convicted of criminal conduct begins with the so-called “Hiss Act” of 1954.³² This legislation was adopted after the perjury conviction of Alger Hiss, the State Department aide famously accused of passing confidential documents to Whittaker Chambers, a Communist agent.³³ As originally enacted, the statute swept broadly, prohibiting the distribution of any federal retirement annuities to any federal officer or employee convicted of any offense relating to disloyalty, national security or defense, conflict or interest, bribery and graft or the exercise of the defendant’s “authority, influence, power, or privileges as an officer or employee of the Government.”³⁴

Seven years later, however, Congress dramatically scaled back the scope of the Hiss Act. Concerned that “the original law ‘went too far’ and unduly punished former federal officials (and their innocent families) when the former employee or official, in addition to facing fine and imprisonment for an offense, may be left destitute without any retirement income at all for the violation of ‘comparatively minor offenses,’”³⁵ Congress amended the Hiss Act to limit pension forfeiture to offenses related to national security.³⁶ As to those situations, the Hiss Act provides for mandatory forfeiture of government-funded retirement benefits (although the official or employee may receive back his or her own contributions), regardless of the impact on the person’s innocent dependents (except

³¹ *Id.* at 89–92 (discussing *Uricoli v. Bd. of Trs., Police & Firemen’s Ret. Sys.*, 449 A.2d 1267 (N.J. 1982)).

³² See JACK MASKELL, CONG. RESEARCH SERV., 96-530, LOSS OF FEDERAL PENSIONS FOR MEMBERS OF CONGRESS CONVICTED OF CERTAIN OFFENSES 1 (2012), available at <https://www.fas.org/sgp/crs/misc/96-530.pdf>.

³³ See *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950) (affirming conviction); *Hiss v. Hampton*, 338 F. Supp. 1141 (D.D.C. 1972) (discussing legislative background to Hiss Act, and holding that its retroactive application to Hiss himself was a violation of the *ex post facto* clause of the Constitution).

³⁴ Hiss Act, Pub. L. No. 83-769, 68 Stat. 1142 (1954) (codified at 5 U.S.C. § 8311 *et seq.*).

³⁵ MASKELL, *supra* note 32, at 1–2 (quoting legislative history). Experience under the Hiss Act, Congress observed, “has developed rather clear evidence, based on reports of the Civil Service Commission and from other sources, that many individuals have lost valuable annuities for offenses in no way related to security and under circumstances constituting gross miscarriage of justice in some cases.” *Hearings on H.R. 4601 and Related Bills Before the H. Comm. on Post Office and Civil Serv.*, 86th Cong. 2 (1959) (statement of Rep. Tom Murray, Chairman, H. Comm. on Post Office and Civil Serv.).

³⁶ Act of Sept. 26, 1961, Pub. L. No. 87-299, 75 Stat. 640.

in the case of a spouse who has “fully cooperated” with federal authorities).³⁷ But the amendment eliminated pension forfeiture for federal officials or legislators convicted of corruption-related offenses.³⁸

These matters stood until 2007, when Congress adopted the Honest Leadership and Open Government Act of 2007 (“HLOGA”).³⁹ HLOGA was prompted by publicity concerning several members of Congress, convicted on corruption charges, who were allowed to continue to receive their federal pensions.⁴⁰ As amended in 2012,⁴¹ HLOGA expands pension forfeiture for members of Congress to a wide array of offenses, including not only bribery, conflict of interest and election law violations, but also a host of other crimes, such as mail fraud, wire fraud, securities fraud, money laundering, extortion and tax evasion.⁴² However, whereas the Hiss Act applies to all federal legislative and executive branch officials and employees, HLOGA applies only to members of Congress.⁴³ Thus, Congress still has not decreed pension forfeiture for federal executive branch officials and employees (or legislative personnel other than members of Congress) convicted of corruption-related offenses.

Notably, Congress had before it broader pension forfeiture proposals at the time it adopted HLOGA. Competing bills would have simply amended the Hiss Act to cover corruption-related offenses, which would have resulted in pension forfeiture for all federal employees who committed such crimes.⁴⁴ The year before, the House Committee on Government Reform had approved a bill that would have mandated forfeiture for corruption-related offenses for congressional employees and political appointees in the executive branch, as well as members of Congress.⁴⁵ Yet ultimately Congress rejected these broader approaches and limited corruption-based forfeiture to members of Congress only.⁴⁶

In addition, even as applied to members of Congress, pension forfeiture under HLOGA is less strict and more nuanced than under the Hiss Act. First, the Hiss Act requires forfeiture of the employee’s entire federal annuity payment.

³⁷ See 5 U.S.C. §§ 8312(a), 8312(b), 8316(b), 8318(e) (2012); MASKELL, *supra* note 32, at 2–5.

³⁸ See *Hiss v. Hampton*, 338 F. Supp. at 1152 (noting that “the 1961 amendments withdrew from the Act’s coverage not only those convicted of minor crimes but also persons convicted of offenses such as murder, embezzlement and bribery; only those convicted of offenses relating to the national security or defense remained within the Act’s prohibitions.”).

³⁹ Pub. L. No. 110-81, 121 Stat. 735.

⁴⁰ See MASKELL, *supra* note 32, at 5–6.

⁴¹ The 2012 amendments were made pursuant to the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, § 15(b), 126 Stat. 291, 301–03.

⁴² See 5 U.S.C. §§ 8332(o), 8411(l)(2) (2012); MASKELL, *supra* note 32, at 8–10.

⁴³ See 5 U.S.C. §§ 8311(1) (2012) (Hiss Act); 5 U.S.C. § 8411(l)(1) (2012) (HLOGA).

⁴⁴ See H.R. 232, 110th Cong. (2007) (introduced by Rep. Terry with 34 co-sponsors); H.R. 4548, 109th Cong. (2005). (same bill introduced in prior Congress).

⁴⁵ See The Federal Pension Forfeiture Act of 2006, H.R. 4975, 109th Cong.; H. Rep. 109-439, 109th Cong., 2d Sess.

⁴⁶ See 153 CONG. REC. 1902 (2007) (statement of Rep. Tom Davis) (criticizing legislation for covering only members of Congress).

HLOGA forfeits only the annuity earned for being a member of Congress; if the person had other “creditable federal service time” while serving the federal government in a different capacity, such as an executive branch employee, those annuity payments are unaffected.⁴⁷ Second, not only does HLOGA, like the Hiss Act, exempt from forfeiture an employee’s own contributions to the retirement system, it also—unlike the Hiss Act—allows members of Congress to retain both the government’s and their own contributions to their Thrift Savings Plan (“TSP”) accounts.⁴⁸ Third, whereas the Hiss Act mandates forfeiture regardless of the impact on the employee’s spouse or dependents (except in the unusual case of a “cooperating” spouse), HLOGA permits the Office of Personnel Management (“OPM”) to make an exception where, “taking into account the totality of the circumstances,” it deems it “necessary and appropriate” to make annuity payments to the spouse or children of a convicted member of Congress.⁴⁹

C. Anti-Alienation Pension Protections Under Federal Law

In the context of private pensions, federal law also recognizes that the interests of law enforcement in forfeiting a convicted defendant’s pension assets must yield to the interests of the employee and his or her dependents in safeguarding these assets as a source of retirement income. Based on the strict anti-alienation and anti-assignment provision of the Employee Retirement and Security Act (“ERISA”),⁵⁰ courts have recognized that private pension assets held in an ERISA plan are exempt from criminal or civil forfeiture under federal law.

In *Guidry v. Sheet Metal Workers Nat’l Pension Fund*,⁵¹ a union employee embezzled hundreds of thousands of dollars from the union, which sought to use his pension benefits to satisfy a money judgment the union obtained against him. The Supreme Court held that under ERISA, the union could not do so, notwithstanding the employee’s breach of trust. The Court held:

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA’s prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.⁵²

⁴⁷ MASKELL, *supra* note 32, at 7–8.

⁴⁸ *Id.* at 10.

⁴⁹ *Id.*; see 5 U.S.C. §§ 8332(o)(5), 8441(l)(5) (2012).

⁵⁰ 29 U.S.C. § 1056(d)(1) (2012) (“Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”).

⁵¹ 493 U.S. 365 (1990).

⁵² *Id.* at 376.

Several lower federal courts, including the Second Circuit, have extended *Guidry*'s logic to prohibit federal prosecutors from seeking forfeiture of a defendant's ERISA pension assets.⁵³ As one recent decision reasoned, since the forfeiture of a plan interest involves an alienation or assignment of that interest, "[i]t follows that ERISA's anti-alienation and assignment provision unambiguously prohibits civil or criminal forfeiture of any ERISA plan."⁵⁴ Rejecting the government's argument that there should be an exception for forfeiture, the court held: "Given that Congress has not provided such an exception [for forfeiture], it is not proper for a court to create such an exception on equitable or other grounds."⁵⁵

Federal courts have, however, reached a different result in addressing the government's ability to reach ERISA-protected assets to satisfy a criminal fine or restitution order.⁵⁶ As part of the Mandatory Victims Restitution Act of 1996, Congress directed that, "[n]otwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined"⁵⁷ Courts have construed this provision as Congress "accept[ing] the Supreme Court's invitation in *Guidry*" to create an exception for fines and restitution.⁵⁸

Federal law also contains anti-alienation and anti-assignment provisions protecting the pensions of federal government employees. Those protections apply only "except as may otherwise be provided by Federal laws."⁵⁹ Obviously they would not apply to protect a member of Congress or other federal employee from pension forfeiture under the Hiss Act or HLOGA, where Congress clearly has "otherwise . . . provided." Congress has made other exceptions to the anti-alienation rule for federal employee pension benefits, most notably through the Debt Collection Act, which allows OPM to use such benefits to offset a valid claim against the employee by the federal government (and in certain instances by a state government).⁶⁰ However, if a federal prosecutor sought to forfeit a federal employee's pension benefits outside the bounds of the Hiss Act and

⁵³ See, e.g., *United States v. All Funds Distributed on Behalf of Weiss*, 345 F.3d 49, 56-58 (2d Cir. 2003); *United States v. Herrmann*, 910 F. Supp. 2d 844 (E.D. Va. 2012); *United States v. Jewell*, 538 F. Supp. 2d 1087, 1092-93 (E.D. Ark. 2008); *United States v. Hargrove*, 2006 WL 2524133 (N.D. Ill. June 26, 2006).

⁵⁴ *Herrmann*, 910 F. Supp. 2d at 847.

⁵⁵ *Id.* at 848.

⁵⁶ See, e.g., *United States v. DeCay*, 620 F.3d 534, 539-41 (5th Cir. 2010); *United States v. Novak*, 476 F.3d 1041 (9th Cir. 2007); *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006).

⁵⁷ 18 U.S.C. § 3613(a) (2012) (emphasis added).

⁵⁸ *United States v. Irving*, 452 F.3d at 126.

⁵⁹ See 5 U.S.C. § 8470(a) (2012) (amount payable under the Federal Employee Retirement System "is not assignable, either in law or equity, . . . or subject to execution, levy, attachment, garnishment or other legal process, except as otherwise may be provided by Federal laws"); 5 U.S.C. § 8346(a) (2012) (similar anti-alienation provision with respect to benefits under the Civil Service Retirement system).

⁶⁰ See 31 U.S.C. § 3716 (2012); *Miller v. Office of Pers. Mgmt.*, 449 F.3d 1374, 1379-80 (Fed. Cir. 2006).

HLOGA, presumably the anti-alienation provisions would operate, as under ERISA, to protect the employee and defeat the government's forfeiture claim.

D. Pension Forfeiture for New York Officials Under New York Law

After many years of inaction,⁶¹ the New York Legislature finally adopted pension forfeiture legislation in 2011 as part of the Public Integrity Reform Act ("PIRA") championed by Gov. Andrew Cuomo. The statute authorizes the commencement of a separate action in state court against a public official convicted of "any crime related to public office" to reduce or revoke the pension benefits to which the public official would otherwise be entitled.⁶²

PIRA's approach to pension forfeiture follows the discretionary facts-and-circumstances model; it is not a mandatory scheme. The statute authorizes state prosecutors, upon a public official's conviction, to bring a separate pension forfeiture action in state court.⁶³ The decision whether to order forfeiture, and in what amount, is made by the court, after considering and making findings of fact and conclusions of law concerning a variety of factors, including:

- whether the defendant was convicted of a felony related to public office;
- the severity of the crime;
- the amount of monetary loss suffered by the state or municipality;
- the degree of public trust reposed in the public official by virtue of his or her position;
- whether the crime was part of a fraudulent scheme against the state or a municipality and, if so, the public official's role in the scheme;
- the defendant's criminal history;
- the impact of the forfeiture on the public official's dependents, present or former spouses, or domestic partners;
- the proportionality of forfeiture to the crime committed; and
- any other factors as, in the court's judgment, justice requires.⁶⁴

Moreover, the court may dismiss the action if it finds such relief warranted "by the existence of some compelling factor, consideration or circumstance or other information or evidence which demonstrates that forfeiture would not serve the ends of justice."⁶⁵ The court may also order that some or all of the reduced or revoked pension be paid to satisfy an outstanding order for the pay-

⁶¹ See Jacobs et al., *supra* note 24, at 68 (noting pending pension forfeiture legislation in New York as of 1997).

⁶² N.Y. RETIRE. & SOC. SEC. LAW § 157(2) (McKinney 2011).

⁶³ The decision whether to bring such an action in the first instance is itself entrusted to prosecutorial discretion—the statute provides that upon a public official's conviction, an action "may be commenced" by the district attorney or state attorney general. *Id.*

⁶⁴ *Id.* § 157(8).

⁶⁵ *Id.* § 157(9).

ment of alimony, child support or restitution or for the benefit of any dependent persons, “as may be in the interests of justice.”⁶⁶ Further, similar to the federal pension forfeiture statutes, PIRA requires that the public official’s own contributions to the retirement system be returned to the official, provided that there is no outstanding order of restitution to the state or a municipality based on the crime.⁶⁷

It is unclear if PIRA’s pension forfeiture provisions apply to a New York public official convicted of a federal crime related to public office. On the one hand, the statute defines the term “crime related to public office” to encompass certain felonies “whether committed in this state *or in any other jurisdiction* by a public official through the use of his or her public office,” suggesting a legislative intent to reach beyond offenses under New York law.⁶⁸ On the other hand, the statute only authorizes the forfeiture action to be commenced “in [the] supreme court of the county in which such public official was convicted of such felony crime, by the district attorney having jurisdiction over such crime, or by the attorney general if the attorney general brought the criminal charge which resulted in such conviction.”⁶⁹ This provision suggests that the conviction must have been procured by a New York District Attorney or the New York Attorney General. If the public official was convicted of a federal crime in federal court, even if it was a crime relating to the official’s use of his or her office, no district attorney in New York would “hav[e] jurisdiction over such crime,” nor would the New York attorney general have “brought the criminal charge which resulted in such conviction.”⁷⁰

Even more significantly, PIRA’s pension forfeiture provisions apply only to those public officials who became a member of the state’s retirement system after the statute’s effective date, which is November 3, 2011.⁷¹ Thus, whether convicted in state or federal court, all New York legislators and other public officials already in office when PIRA was adopted are protected against pension forfeiture. It was apparently this feature of PIRA that U.S. Attorney Bharara condemned as an “error of state law” in his testimony to the Moreland Commission.

Yet this limitation in PIRA is not the product of some drafting mistake. It flows from Article V, Section 7 of the New York Constitution, which provides that “membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not

⁶⁶ *Id.*

⁶⁷ *Id.* § 158.

⁶⁸ *Id.* § 156(1) (emphasis added).

⁶⁹ *Id.* § 157(2).

⁷⁰ In order to resolve this ambiguity, a bill entitled the “Federal Corruption Loophole Closure Act” has been introduced in the New York State Senate. *See* Press Release, New York State Senator Brad Hoylman, Senator Hoylman Introduces ‘Ethics Patch’ to Close Loopholes in 2011 Laws (Apr. 29, 2013), <http://www.nysenate.gov/press-release/senator-hoylman-introduces-ethics-patch-close-loopholes-2011-laws>.

⁷¹ N.Y. RETIRE. & SOC. SEC. LAW. § 156(6) (McKinney 2014).

be diminished or impaired.”⁷² New York courts have held that this constitutional protection prohibits changes to the pension rights of employees after they have joined the retirement system.⁷³ Thus, the “error of state law” identified by the U.S. Attorney represents the will of the people of the State of New York as expressed in their foundational legal charter.⁷⁴

III.

THE SDNY’S NEW PENSION FORFEITURE POLICIES: A CRITICAL APPRAISAL

An analysis of the SDNY’s new pension forfeiture policies, informed by the background set forth above, suggests that those policies exceed the limits of permissible prosecutorial policy-making. The SDNY’s attempt to impose pension forfeiture on state and local officials as a criminal punishment lacks grounding in any statutory authority or viable theory of statutory interpretation; promotes policy judgments that have been rejected by legislators at the federal and state level; and is inherently incapable of balancing the competing interests at stake in a manner that legislation is able to accomplish. As such, the SDNY’s pension forfeiture policies infringe upon Congress’ authority under the *Hudson* doctrine to prescribe the punishments for federal offenses.

A. The SDNY’s Proposed Use of General Federal Forfeiture Law

In his Moreland Commission testimony, U.S. Attorney Bharara promised that the SDNY will, “where appropriate,” use federal forfeiture law “to claw back an appropriate dollar amount” from a public official’s pension to the extent the official “has a pension interest that accrued while engaging in criminal conduct.”⁷⁵ This was not an empty promise. Simultaneously with this announcement, the government filed bills of particulars in two SDNY public corruption cases amending the forfeiture allegations in the indictments in those cases. The amendments gave notice that the government intends to seek forfeiture of “the

⁷² N.Y. CONST. art. V, § 7. Following the U.S. Attorney’s Moreland Commission testimony, Governor Cuomo was quoted as saying that “[w]e tried to do exactly this,” but “[i]t was not constitutional to take” away the pensions of existing officials, “because that was a right that was already vested.” Zack Fink, US Attorney’s Proposal Renews Debate Over Seizing Public Pensions from Elected Officials, NY1 (Sept. 18, 2013, 8:20 PM), http://www.nyl.com/content/politics/political_news/189034/us-attorney-s-proposal-renews-debate-over-seizing-public-pensions-from-elected-officials.

⁷³ See *Kleinfeldt v. New York City Employees’ Ret. Sys.*, 324 N.E.2d 895 (N.Y. 1975); *Birnbaum v. New York State Teachers’ Ret. Sys.*, 152 N.E.2d 241 (N.Y. 1958).

⁷⁴ See *Birnbaum*, 152 N.E.2d at 245 (noting that Article V, Section 7 was “adopted by the Constitutional Convention and approved by the people” in 1938 and that “[b]y the constitutional amendment the people determined to confer contractual protection upon the benefits of pension and retirement systems of the State and of the civil divisions thereof, and to prohibit their diminution or impairment prior to retirement.”).

⁷⁵ Moreland Commission Testimony, *supra* note 1.

proceeds from” any pension fund to which the defendant public officials—including a New York Senator, a New York Assemblyman, a member of the New York City Council, and the Mayor and Deputy Mayor of a New York municipality—may be entitled.⁷⁶

The government’s theory is that the state and municipal officials’ pension benefits are forfeitable pursuant to the federal forfeiture statutes, and in particular 18 U.S.C. § 981(a)(1)(C). Under Section 981(a)(1)(C), any property that (among other things) “constitutes or is derived from proceeds traceable to a violation of” various federal offenses is forfeitable to the United States.⁷⁷ The offenses that give rise to forfeiture include the federal crimes typically used to charge corruption at the state and local level, including honest services fraud (18 U.S.C. §§ 1341, 1343 and 1346), bribery in connection with federal programs (18 U.S.C. § 666), Hobbs Act extortion (18 U.S.C. § 1951) and bribery in violation of the Travel Act (18 U.S.C. § 1952).⁷⁸ For a number of reasons, however, the government’s theory is deeply flawed.

1. Pension Benefits As “Proceeds” of Official Corruption

First, as a threshold matter, the SDNY’s policy depends on the novel and highly questionable legal proposition that pension benefits constitute “proceeds” of a public official’s criminal offenses within the meaning of Section 981(a)(1)(C).

“Proceeds,” as used in federal forfeiture law, is defined by statute. In cases involving illegal goods or services, the term “proceeds” means “property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture.”⁷⁹ In cases involving lawful goods or services provided in an illegal manner, the term “proceeds” means “the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services.”⁸⁰ Which definition of “proceeds” would apply in a bribery or corruption case is debatable,⁸¹ but under either

⁷⁶ Government’s Forfeiture Bill of Particulars, *United States v. Smith*, No. 13 Cr. 297 (S.D.N.Y. Sept. 17, 2013); Government’s Forfeiture Bill of Particulars, *United States v. Stevenson*, No. S2 13 Cr. 161 (S.D.N.Y. Sept. 17, 2013).

⁷⁷ 18 U.S.C. § 981(a)(1)(C) (2012).

⁷⁸ *See id.*; 18 U.S.C. §§ 1956(c)(7), 1961 (2012). These are among the crimes charged against the New York state and local officials who are defendants in the two cases referred to above. *See* Indictment, *United States v. Smith*, No. 13 Cr. 297 (S.D.N.Y. 2013); Indictment, *United States v. Stevenson*, No. S2 13 Cr. 161 (S.D.N.Y. 2013).

⁷⁹ 18 U.S.C. § 981(a)(2)(A) (2012).

⁸⁰ 18 U.S.C. § 981(a)(2)(B).

⁸¹ Compare *United States v. Zai*, 932 F. Supp. 2d 824, 827 (N.D. Ohio 2013) (applying 981(a)(2)(A) definition in case involving loans secured by bribes), with *United States v. St. Pierre*, 809 F. Supp. 2d 538, 542–43 (E.D. La. 2011) (applying 981(a)(2)(B) definition in case involving federal program bribery). *See generally* Gary Stein, *Forfeiture: A Primer on Proceeds*, BUSINESS CRIMES BULLETIN, Sept. 2012, at 1, available at http://www.lawjournalnewsletters.com/issues/ljn_buscrimes/20_1/pdf/Sept12BCB.php.

definition, the government would have to show that the allegedly forfeitable property was “obtained . . . as a result of” or “acquired through” the offense.

Many courts have applied a “but for” causation test in applying these provisions (a position validated by very recent Supreme Court precedent).⁸² In other words, “proceeds” consist of “property that a person would not have but for the criminal offense.”⁸³ Under the “but for” test, which is generally viewed as favorable to the government,⁸⁴ “there must be a causal connection between the offense and the property alleged to be its proceeds,” and “property that a person would have obtained or retained in any event even if the offense had never occurred generally cannot be regarded as the proceeds of that offense.”⁸⁵

In the vast majority of bribery and corruption cases, forfeiture of a public official’s pension would flunk this test. Generally there is no causal connection between an act of official corruption and the public official’s receipt of pension benefits. A public official receives pension benefits as the result of being employed by the state and would receive those same benefits even if the offense had never occurred. Thus, the pension benefits do not represent “property that [the defendant] would not have but for the criminal offense,” and do not constitute “proceeds.” Put differently, the “proceeds” that a corrupt official generates from his or her misdeeds consists of bribes and kickbacks, not pension benefits. There may be instances where an official’s employment is itself tainted by the wrongdoing, such that it could be said that the official would not have received a pension but for the offense; but those instances will be few and far between.⁸⁶

Absent such a situation, pension benefits could be viewed as “proceeds” of the official’s wrongdoing only in the sense that, if the official’s employer had known of the wrongdoing, the official presumably would have been fired (or, in the case of an elected official whose “employer” is the electorate, been voted out of office or forced to resign) and never received the benefits to begin with. But

⁸² See *Burrage v. United States*, 134 S. Ct. 881 (2014). In *Burrage*, the Supreme Court emphasized that criminal statutes using language to the effect that a given outcome must “result from” the offense impose “a requirement of actual causality,” that is to say, “proof that the harm would not have occurred in the absence of – that is, but for – the defendant’s conduct.” *Id.* at 887–88 (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)). “This but-for requirement is part of the common understanding of cause.” *Id.* at 888.

⁸³ *E.g.*, *United States v. Coffman*, 859 F. Supp. 2d 871, 875 (E.D. Ky. 2012); *United States v. Farkas*, 2011 WL 5101752, at *3 (E.D. Va. Oct. 26, 2011), *aff’d*, 474 F. App’x 349 (4th Cir. 2012); *United States v. Yass*, 636 F. Supp. 2d 1177, 1184 (D. Kan. 2009); *United States v. Nicolo*, 597 F. Supp. 2d 342, 346 (W.D.N.Y. 2009); *United States v. Grant*, 2008 WL 4376365, at *2 n.1 (S.D.N.Y. Sept. 25, 2008).

⁸⁴ As the Supreme Court noted in *Burrage*, but-for causation “represents ‘the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.’” *Burrage*, 134 S. Ct. at 888 (emphasis in original) (quoting MODEL PENAL CODE § 2.03(1)(a) explanatory note (1985)).

⁸⁵ STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* 901 (2d ed. 2013).

⁸⁶ For an example of such a situation, see *United States v. McKay*, 506 F. Supp. 2d 1206, 1212 (S.D. Fla. 2007) (forfeiting union president’s salary where his election as president was tainted by fraud), *aff’d*, 285 F. App’x 637 (11th Cir. 2008).

research discloses no reported case in which such a strained interpretation of the term “proceeds” has been adopted (or even advanced by the government).⁸⁷ There is a line of restitution cases that require unfaithful employees to return salary (and, in one case, pension benefits) to their employers as pecuniary loss compensable under the Mandatory Victims Restitution Act.⁸⁸ But these cases generally involve situations where the defendant obtained or prolonged his employment by reason of his crime.⁸⁹ Moreover, the courts have not required restitution of all of the employee’s salary or pension, but only that portion representing the difference in the value of the services that the employee rendered and the value of the services that an honest employee would have rendered.⁹⁰

A theory positing that a defendant’s pension benefits are causally connected to non-disclosure of wrongdoing would fail to satisfy the doctrine of but-for causation. A well-reasoned Fifth Circuit decision by Judge Patrick Higginbotham, *In re Fisher*,⁹¹ elucidates why. In *Fisher*, a real estate developer sought restitution for his expenses in bidding on housing contracts with the city of Dallas, claiming that he would not have incurred those expenditures had he known that the defendant had conspired to bribe members of the city government to obtain the contracts for defendant’s company.⁹² Rejecting that claim, the court explained that its core fallacy lay in focusing on the concealment, while overlooking the bribes themselves.⁹³ But-for causation requires the court to ask what would have happened “[i]n the absence of the entirety of [the defendant’s] crime,

⁸⁷ In those cases in which the government has sought forfeiture of private pension assets, it has either relied on a substitute assets theory, *see United States v. Herrmann*, 910 F. Supp. 2d 844, 846–49 (E.D. Va. 2012); *United States v. Holder*, No. 3:08-00143, 2010 WL 478369, at *3 (M.D. Tenn. Feb. 4, 2010), or alleged that the defendant deposited proceeds of a fraudulent scheme into the defendant’s pension account, *see United States v. All Funds Distributed on Behalf of Weiss*, 345 F.3d 49, 52–53 (2d Cir. 2003); *United States v. Jewell*, 538 F. Supp. 2d 1087, 1089. (E.D. Ark. 2008).

⁸⁸ 18 U.S.C. § 3663A(b)(1) (2012).

⁸⁹ *See United States v. Bahel*, 662 F.3d 610, 648-50 (2d Cir. 2011) (requiring defendant to repay salary he received after he was suspended pending investigation into his fraud, a period when he performed no services at all); *United States v. Crawley*, 533 F.3d 349, 358–59 (5th Cir. 2008) (requiring defendant to repay salary and pension where he obtained election to union office through voter fraud); *United States v. Sapoznik*, 161 F.3d 1117, 1121–22 (7th Cir. 1998) (requiring defendant, a police chief, to repay portion of salary where he obtained his position under the false pretense that he was honest); *see also United States v. Skowron*, 529 F. App’x 71, 73 (2d Cir. 2013) (unpublished opinion affirming restitution award for portion of salary of Morgan Stanley employee who had engaged in insider trading and “actively deceived Morgan Stanley and frustrated its investigation and attempts to cooperate with the SEC, thereby prolonging the period during which he was paid by Morgan Stanley”).

⁹⁰ *See Sapoznik*, 161 F.3d at 1121–22 (defendant ordered to repay 25% of his salary); *Skowron*, 529 Fed. App’x at 74 (defendant ordered to repay 20% of his salary).

⁹¹ 649 F.3d 401 (5th Cir. 2011).

⁹² *Id.* at 402. Fisher, the allegedly victimized developer, sought an order of restitution in the criminal case pursuant to his rights under the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2012).

⁹³ 649 F.3d at 404 (Fisher “stresses that the concealment of the conspiracy was an essential part of the conspiracy itself. True enough, but that’s all it was: one part. Fisher’s argument overlooks the other essential part of the conspiracy: the payment and receipt of bribes.”).

both the bribery and the concealment.”⁹⁴ Because the competing developer would have incurred the expenditures if there had been no bribery, it followed that the crime was not a but-for cause of those expenditures.⁹⁵ So too in the pension forfeiture context: Because the same pension benefits would have been paid if the public official had *not* engaged in bribery, then the bribery cannot be said to be a but-for cause of the benefits.

In short, when viewed through the lens of the *Hudson* doctrine, the SDNY’s pension forfeiture theory seems to cross the line of creative yet legitimate statutory interpretation, and stray into the area reserved exclusively to Congress—that of “ordain[ing] [the] punishment”⁹⁶ to be imposed for a federal crime.

2. Pension Forfeiture and Congressional Intent

That conclusion is substantially strengthened when considerations of congressional intent are taken into account. As noted above, while Section 981(a)(1)(C) generally casts its net broadly to encompass “[a]ny property” that constitutes or is derived from illicit proceeds, Congress has made plain its intent in the specific context of pension forfeiture for federal officials and employees. Congress did not authorize forfeiture of pension benefits for federal officials until 2007, and still has not authorized pension forfeiture for corruption offenses committed by federal officials except for members of Congress. At the time Section 981(a)(1)(C) was adopted in 1986 and last amended in 2000, pension forfeiture for federal officials was limited strictly to national security offenses, Congress having affirmatively decided in 1961 to *not* impose pension forfeiture as a punishment for corruption-related offenses.

Given this statutory evolution, the government would almost surely lose an argument that Section 981(a)(1)(C) contemplates pension forfeiture for federal officials convicted of corruption-related offenses. Any such argument would not only plainly misread congressional intent, but also would run smack into the “‘basic principle of statutory construction that a specific statute . . . controls over a general provision.’”⁹⁷ In the Hiss Act and HLOGA, Congress has specifically said what should happen to a federal official’s pension upon conviction of a crime. That specific intent cannot be nullified by the general language of Section 981(a)(1)(C). Not surprisingly, there appears to be no reported case in which the

⁹⁴ *Id.* As the court stated: “Our inquiry is not, What would have happened if there had been a conspiracy but no concealment? Rather, we must ask what would have happened if there had been no conspiracy at all. Would Fisher still have made his \$1.9 million investment? The answer, quite obviously, is yes.” *Id.*

⁹⁵ *Id.*

⁹⁶ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820); *see supra* text accompanying notes 8–12.

⁹⁷ *In re Stoltz*, 315 F.3d 80, 93 (2d Cir. 2002) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981)).

government has even sought to impose pension forfeiture against a federal official under the general forfeiture statute.

Granted, Congress has not spoken explicitly on the issue of pension forfeiture for state officials in the same way it has for federal officials. But if Congress did not intend through Section 981(a)(1)(C) to authorize pension forfeiture for federal officials—as it manifestly did not—how is it reasonable or plausible to suggest that Congress intended through Section 981(a)(1)(C) to authorize pension forfeiture for state officials? The SDNY’s proposed novel use of Section 981(a)(1)(C) would create precisely this anomaly, without any apparent endorsement from either Congress or, for that matter, the Department of Justice in Washington.

If anything, Congress should be presumed to tread more carefully where state interests are at stake. Pension forfeiture for state officials convicted of criminal wrongdoing is an area of traditional state concern and regulation, as illustrated by the plethora of state pension forfeiture legislation and the existence of state constitutional protections for state pensions, as in New York.⁹⁸ Courts should be loath to impute to Congress an intent to override a state’s determination as to whether and under what circumstances pension benefits should be made available to, or denied to, its officials.

Another well-known case involving federal prosecution of state and local bribery, *McNally v. United States*,⁹⁹ illustrates the point. In rejecting the government’s expansive reading of the mail fraud statute to encompass “honest services” fraud, the Supreme Court in *McNally* emphasized its distaste for interpreting statutory language so as to “involv[e] the Federal Government in setting standards of disclosure and good government for local and state officials.”¹⁰⁰ If Congress wants to intrude in such an area of state and local concern, the *McNally* Court held, “it must speak more clearly than it has.”¹⁰¹ The same can be said of the SDNY’s attempt to use the general forfeiture law to dictate standards of good government to New York State on the subject of pension forfeiture for state and local officials.

⁹⁸ See Jacobs, et al., *supra* note 24, at 59–69, 74–75 (discussing varying approaches taken by different states’ pension forfeiture legislation, as well as constitutional protections in a number of states); see also NAT’L ASS’N OF STATE RET. ADM’RS, SELECTED STATE POLICIES GOVERNING TERMINATION OR GARNISHMENT OF PUBLIC PENSIONS (2013), available at <http://www.nasra.org/files/Compiled%20Resources/Forfeiture%20statutes.pdf> (summarizing numerous state pension forfeiture provisions).

⁹⁹ 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, *as recognized in* *Skilling v. United States*, 561 U.S. 358 (2010).

¹⁰⁰ *Id.* at 360.

¹⁰¹ *Id.*

3. Pension Forfeiture and Principles of Federalism

The federalism concerns raised by the SDNY policy are all the more pronounced to the extent that it conflicts with (and indeed was motivated by its disagreement with) existing state pension forfeiture law. To be sure, under the Supremacy Clause,¹⁰² the federal government's own policy preferences—where validly enacted into law—trump even a directly conflicting state policy. That is as true in the area of federal forfeiture law as in any other.¹⁰³ But, in this context, the preemptive force of the Supremacy Clause must be rooted in an act of Congress; federal prosecutors have no authority on their own to override state law.¹⁰⁴

In announcing the SDNY's new pension forfeiture policies, the U.S. Attorney did not purport to give voice to the interests of the federal government, or to explain how PIRA's limited pension forfeiture provisions interfered with the accomplishment of federal objectives. Instead, he spoke of what he claimed "every thinking New Yorker" should want—full and mandatory pension forfeiture for corrupt New York officials, regardless of when they entered the retirement system.¹⁰⁵

But that is not the policy that New Yorkers themselves have chosen to adopt through their democratic processes. This is true in two major respects. First, the pension forfeiture scheme that New Yorkers have adopted applies only to those state and local officials that entered the retirement system after November 2011. Second, the scheme that New Yorkers have adopted emphasizes the need for flexibility in pension forfeiture and a balancing of all relevant aggravating and mitigating factors—unlike the mandatory forfeiture scheme implicit in the new SDNY policy.¹⁰⁶ A federal prosecutor is on less than firm ground when he attempts to fix what he believes to be an "error of state law" in the name of the citizens of that state, whom neither he nor the President who appointed him represents.

Even if it were Congress (rather than a single U.S. Attorney's Office) considering whether to adopt pension forfeiture as a punishment in federal cases involving corrupt state officials, there would be strong, if not compelling, arguments for leaving this issue to state authorities. For the bevy of traditional punishments available in federal prosecutions of state corruption—*e.g.*, imprisonment, fines, restitution, supervised release—only the federal court is empowered to impose such punishments, upon conviction. A state could not, for example, punish the official with imprisonment based on a federal conviction. That is not

¹⁰² U.S. CONST. art. VI, cl. 2.

¹⁰³ *See, e.g.*, *United States v. Fleet*, 498 F.3d 1225 (11th Cir. 2007) (holding that substitute assets provisions of federal forfeiture law preempted homestead exemption under Florida law).

¹⁰⁴ *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (invalidating Attorney General's rule that would have displaced conflicting Oregon assisted suicide law because governing federal statute did not authorize the adoption of such a rule).

¹⁰⁵ *See supra* text accompanying note 1.

¹⁰⁶ *See* Part III.A.4, *infra*.

true of pension forfeiture, however. There is no reason why a state cannot order pension forfeiture for a state official based on a federal conviction, and many states do precisely that.¹⁰⁷

Leaving pension forfeiture to the state would also enable the sanction to be administered on a consistent basis within the state. It is not immediately apparent why the extent of pension forfeiture should depend on whether the official was prosecuted under federal law or state law. Moreover, states may have their own particular characteristics that justify different approaches to pension forfeiture on a state-by-state basis. For example, the degree to which state government employees are covered by the Social Security varies from state to state. While about 97% of state and local employees in New York are covered by Social Security, coverage in many states is much lower (*e.g.*, 4% in Massachusetts and 3% in Ohio).¹⁰⁸ A state whose employees are not generally covered by Social Security could reasonably decide to refrain from forfeiting a convicted employee's state pension (or to impose a less harsh forfeiture). A federally imposed, "one size fits all" pension forfeiture system would not allow for such state variations.

4. Pension Forfeiture and Prosecutorial Discretion

As noted above, creating a pension forfeiture scheme involves making policy judgments on a number of different issues, as Congress and state legislatures have done. But general federal forfeiture law is far too blunt an instrument to facilitate principled answers to these important questions. By proposing to implement pension forfeiture through the general federal forfeiture law, the U.S. Attorney's Office has effectively delegated to itself the power to determine the proper scope of pension forfeiture in cases within its jurisdiction.

The criminal forfeiture statute makes forfeiture mandatory; it provides that, in imposing sentences, the court "*shall order*" forfeiture of "*any property*"

¹⁰⁷ See, *e.g.*, *Ryan v. Bd. of Trs. of Gen. Assembly Ret. Sys.*, 924 N.E.2d 970 (Ill. 2010) (ordering former Illinois Gov. George Ryan to forfeit his state pension benefits based on his federal felony convictions). As noted above, the pension forfeiture provisions of New York's PIRA statute may not currently extend to federal convictions. That aspect of state law (which really does seem to be a glitch, rather than an intended outcome) may soon change, and in any event does not undermine the point above.

¹⁰⁸ See CHRISTINE SCOTT, CONG. RESEARCH SERV., 7-5700, SOCIAL SECURITY: THE GOVERNMENT PENSION OFFSET (GPO), (2013), at 1, *available at* <http://www.fas.org/sgp/crs/misc/RL32453.pdf>. Approximately 73% of state and local government workers nationwide are covered by Social Security, leaving about one-quarter who are not. These statistics are as of 2009, the most recent year for which such data are available. *Id.* Originally, Social Security was not available to state and local government workers, due to constitutional concerns about the federal government's power to tax state and local governments. Over time, federal law changed to permit states to elect Social Security coverage for their workers, but some states have chosen not to do so, or to cover only limited categories of employees. See *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 44-46 (1986); *Lewis v. Robertson*, 2013 WL 5674495, at *3 (S.D. Miss. Oct. 17, 2013).

constituting or derived from proceeds of the offense.¹⁰⁹ In practice, of course, federal prosecutors have discretion to avoid forfeiture altogether in a particular case because, if the government does not include a forfeiture allegation in the charging instrument, the court has no authority to impose any forfeiture.¹¹⁰ But once the government has chosen to go down the forfeiture path, the statute's mandatory language leaves very little wiggle room for the prosecutor or the court to adapt the sanction so as to do justice in a particular case.¹¹¹

For example, while Congress and the New York Legislature intended through HLOGA and PIRA to ameliorate the impact of pension forfeiture on innocent spouses and dependents,¹¹² Section 981(a)(1)(C) does not allow for such flexibility. To establish standing to contest a government's forfeiture claim, a third party must show that he or she has a legal interest in the specific property at issue.¹¹³ Yet the spouse of a convicted corrupt official likely does not have the requisite legal interest in the official's pension to be able to assert a claim.¹¹⁴ Similarly, while federal and state legislation allows the official to keep his or her own pension contributions, that would also not seem to be an option under Section 981(a)(1)(C)'s broad mandatory language. The pension forfeiture allegations that the SDNY has brought to date are directed at all proceeds in the officials' pension accounts.

The government might argue that it could take into account mitigating factors, such as the interests of innocent dependents and an official's own contributions, in fashioning settlements where the facts so warrant. But a pension forfeiture regime that depends on acts of government mercy—which the govern-

¹⁰⁹ 18 U.S.C. § 982(a)(2) (2012) (emphasis added). *See* United States v. McGinty, 610 F.3d 1242, 1246 (10th Cir. 2010) (“These words express Congress’s intent that criminal forfeiture is both mandatory and broad.”).

¹¹⁰ *See* FED. R. CRIM. P. 32.2(a) (noting that a court has no authority to enter a criminal forfeiture judgment unless the indictment or information contains notice to the defendant that the government intends to seek forfeiture as part of defendant’s sentence).

¹¹¹ *See, e.g.*, United States v. Newman, 659 F.3d 1235, 1240 (9th Cir. 2011) (“Unlike a fine, which the district court retains discretion to reduce or eliminate, the district court has no discretion to reduce or eliminate mandatory criminal forfeiture.”).

¹¹² *See* 153 CONG. REC. 1894 (2007) (statement of Rep. Millender-McDonald) (defending discretion given to OPM to mitigate hardship of pension forfeiture on defendant’s family: “[y]ou will hear arguments that an innocent spouse or child should be punished along with the criminal. On balance, I don’t think that is good policy.”).

¹¹³ *See, e.g.*, United States v. Egan, 811 F. Supp. 2d 829, 838 (S.D.N.Y. 2011); CASSELLA, *supra* note 85, § 23-13.

¹¹⁴ *See, e.g.*, Galtieri v. Kelly, 441 F. Supp. 2d 447, 456 (E.D.N.Y. 2006) (policeman’s current spouse “has no legally protected interest in a share of her husband’s pension” and therefore lacked standing to challenge police department’s decision to comply with order garnishing policeman’s disability benefits); McDermott v. McDermott, 119 A.D.2d 370, 379 (N.Y. App. Div. 1986) (former spouse’s interest in pension plan did not mature into “true ownership interest” until entry of equitable distribution judgment in divorce action). A full discussion of this issue is beyond the scope of this article.

ment is free to withhold if the defendant does not accept its other terms—is no substitute for a system of legal rules, rights and obligations.¹¹⁵

In other respects, the SDNY policy is not fully articulated. As for who will be subjected to pension forfeiture, the SDNY's actions to date make clear that elected state and local officials are clearly in the cross-hairs. But will the SDNY seek to forfeit the pensions of unelected and lower-level state and local employees – such as building inspectors, legislative aides, or police officers, to name just a few examples? Similarly, it is unclear what criminal offenses will give rise to pension forfeiture under the SDNY's new policy: Will it be limited to corruption-related offenses, or apply (as the U.S. Attorney's testimony suggests) whenever a public official "engag[es] in criminal conduct"?¹¹⁶

Normally these questions are answered by the legislature, but here the U.S. Attorney's Office has effectively confided them to its sole discretion. On the government's theory, there would be no basis for a court to disagree with its determination, so long as the defendant's crime is one that falls within the purview of the general federal forfeiture statutes. This would be a highly unusual, indeed unique, system of pension forfeiture.

B. The SDNY's Proposed Use of Criminal Fines

As an alternative means of effectuating pension forfeiture, the SDNY also intends to "seek appropriate fines that take into account the money a corrupt official might derive from a publicly-funded pension so that the punishment fits the crime and so that we can take the profit out of that crime."¹¹⁷ In principle, there is no reason why a federal court, in determining the amount of a fine, should not take into account a defendant's pension assets in considering the defendant's financial resources and ability to pay.¹¹⁸ Presumably probation officers already regularly provide that information to the sentencing court.

The SDNY's policy, however, suggests that the government will take the position that any fine imposed against a state official convicted of a corruption-related offense must be (at least) in the amount of the official's pension assets. Such an approach would be misguided. Both federal statutory law and the U.S. Sentencing Guidelines dictate that the sentencing court take into account a variety of factors in determining the amount of the fine, and the Guidelines set forth

¹¹⁵ See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 373–74 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999) ("courts should not rely on prosecutorial discretion to ensure that a statute does not ensnare those beyond its proper confines").

¹¹⁶ See *supra* text accompanying note 75.

¹¹⁷ Moreland Commission Testimony, *supra* note 1.

¹¹⁸ See, e.g., *United States v. Caldwell*, 391 F. App'x 671, 672 (9th Cir. 2010) (holding that military pensions may be taken into account in determining a fine amount).

minimum and maximum fine ranges, depending on the defendant's offense level.¹¹⁹ No one factor or asset should take precedence in the court's calculus of the appropriate fine in accordance with the Guidelines and the sentencing factors set forth in 18 U.S.C. § 3553.

Moreover, while the announced purpose of the new policy is to "take the profit out of crime," there is no requirement that a court set the amount of the fine based on the defendant's profit.¹²⁰ In any event, as discussed above, an official's pension benefits do not represent his or her "profit" from the crime. Tying the fine amount to the defendant's pension would simply be a back-door way of imposing pension forfeiture on state officials, even though, for all the reasons discussed above, such a punishment raises serious legal and policy concerns and has not been authorized by Congress.

C. The SDNY's Proposed Use of Substitute Asset Forfeiture

Finally, under its new policies the SDNY promises to bring "federal civil forfeiture actions" against pension assets to ensure that previously convicted defendants "satisfy the financial obligations imposed at sentencing."¹²¹ It is not entirely clear what is contemplated by this aspect of the new policy. There is no authority for the government to bring a federal civil forfeiture action for the purpose of satisfying a fine, order of restitution, or criminal forfeiture judgment imposed as part of a defendant's sentence. Federal forfeiture actions are a creature of statute, and cannot be maintained unless authorized by an applicable statute.¹²² Under the principal federal civil forfeiture statutes, the assets sought to be forfeited typically must constitute the proceeds of prior criminal conduct or have been used to commit the prior criminal conduct (so-called facilitating property).¹²³ If the assets do not meet that description, then they are not forfeitable, regardless of the existence of any financial obligation subsequently imposed against the defendant in his or her criminal case.

The U.S. Attorney may have been referring to targeting pension assets under the so-called "substitute assets" provisions of federal forfeiture law (although those provisions apply in criminal forfeiture proceedings, not civil forfei-

¹¹⁹ See 18 U.S.C. § 3572(a) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5E1.2.

¹²⁰ See, e.g., *United States v. Lopez-Cavasos*, 915 F.2d 474, 475, 479–80 (9th Cir. 1990) (rejecting government's argument that fine amount was insufficient because it did not reflect defendant's profit from his criminal activity).

¹²¹ Moreland Commission Testimony, *supra* note 1.

¹²² *SEC v. Contorinis*, 2014 WL 593484, at *7 (2d Cir. Feb. 18, 2014); *United States v. Lane Motor Co.*, 199 F.2d 495, 496–97 (10th Cir. 1952); *United States v. Brant*, 684 F. Supp. 421, 424 (M.D.N.C. 1988).

¹²³ See 18 U.S.C. § 981(a) (2012); 21 U.S.C. § 881(a) (2012); see also Suzanne M. Warner, *Due Process in Federal Asset Forfeiture*, 8 A.B.A. SEC. CRIM. JUST. 14, 16 (1994) ("[T]wo general categories of property are subject to forfeiture. The first is *proceeds*, defined as property acquired, directly or indirectly, through unlawful activity or property traceable to such proceeds. The second is *facilitating property*, property that is involved in criminal activity.").

ture actions). Three months after his Moreland Commission testimony, the SDNY filed papers seeking to forfeit or locate pension assets belonging to four former officials of the New York City Council and the Yonkers City Council who had been previously convicted of corruption offenses. The government stated in doing so that it intended to use these substitute assets to satisfy unpaid forfeiture money judgments entered against these defendants in their criminal cases.¹²⁴

The “substitute assets” provisions of federal forfeiture law may be invoked where the defendant in a criminal case has been ordered to forfeit proceeds of the offense or other forfeitable property. If the directly forfeitable property is no longer available due to an act or omission of the defendant (*e.g.*, because it has been spent, dissipated, or transferred out of the jurisdiction), the government can forfeit “any other property” of the defendant in lieu thereof.¹²⁵ Substitute assets do not themselves have to represent the proceeds of the offense or be related to the offense in any manner; any property of the defendant is fair game.¹²⁶

The potential legal arguments restricting direct forfeiture of a state official’s pension benefits, as described above, do not apply with the same force when the government seeks to forfeit such benefits as a substitute asset. In seeking substitute asset forfeiture, the government is not required to show any connection between the property and the underlying criminal offense. Hence, the government would not have to show—as it would in proceeding against directly forfeitable assets – that the pension benefits constitute “proceeds” of the official’s corruption offense under Section 981(a)(1)(C).

Any argument premised on congressional intent also would stand on a different footing. Courts have held that ERISA’s anti-alienation provisions prevent the government from forfeiting private pensions on a substitute asset theory, just as they prevent direct forfeiture of private pensions.¹²⁷ But state and local government pension plans are not protected by ERISA.¹²⁸ Moreover, as noted above, the anti-alienation provisions applicable to federal government pension plans are more porous than those found in ERISA. Congress has given OPM au-

¹²⁴ See Press Release, United States Attorney for the Southern District of New York, Manhattan U.S. Attorney Announces Filings and Discovery Requests Seeking Forfeiture of Pension Benefits of Four Former Officials Convicted of Corruption Offenses (Dec. 17, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/December13/PensionForfeituresPR.php>.

¹²⁵ See 21 U.S.C. § 853(p) (2012); 18 U.S.C. § 982(b) (2012).

¹²⁶ See, *e.g.*, *United States v. Saccoccia*, 823 F. Supp. 994, 1005 (D.R.I. 1993).

¹²⁷ See *United States v. Herrmann*, 910 F. Supp. 2d 846–49 (E.D. Va. 2012) (forbidding forfeiture of ERISA-protected employee stock ownership plan as a substitute asset); *United States v. Holder*, No. 3:08-00143, 2010 WL 478369, at *3 (M.D. Tenn. Feb. 4, 2010) (carving out ERISA-protected retirement accounts from scope of substitute asset forfeiture).

¹²⁸ Cf. *United States v. Vondette*, 352 F.3d 772, 775 (2d Cir. 2003) (rejecting argument that court should protect IRA assets from forfeiture by analogy to ERISA’s anti-alienation provisions, since those provisions “do not purport to apply to IRAs or any other type of retirement benefit beyond pension plans”), *vacated on other grounds*, 543 U.S. 1108 (2005).

thority to offset federal retirement benefits against a valid claim by the federal government. That does not mean that such benefits can, consistent with Title 5's anti-alienation provisions, be forfeited as substitute assets in a criminal case—the courts so far have not been called upon to answer that question. But it does suggest that, to the extent that Congress' intent concerning pension forfeiture for federal officials can be viewed as a proxy for Congress' intent concerning pension forfeiture for state officials, the picture is more muddled when it comes to using pension assets to satisfy the defendant's financial obligations to the United States.

Still, it would be odd to pursue a pension forfeiture "policy" through the substitute assets provisions of federal forfeiture law. Those provisions do not come into play at all unless there is a basis for the government to seek direct forfeiture of assets and the directly forfeitable assets are no longer available. The impact of such forfeitures is therefore likely to be episodic and somewhat arbitrary, undercutting their effectiveness as an instrument of policy.

CONCLUSION

From a public policy standpoint there certainly is a case to be made for barring corrupt state officials, those who have betrayed the public trust and "contaminate[d] [their] fingers with base bribes,"¹²⁹ from sticking their hands in the public pension cookie jar. And there is nothing wrong with a U.S. Attorney's Office making that case, whether at the federal or state level, in advocating legislative reform and the adoption of stricter pension forfeiture sanctions.

In adopting its own pension forfeiture policies, however, the SDNY appears to have gone beyond such advocacy and assumed the legislative mantle itself. However well-intentioned, that is a reach that may exceed even the SDNY's well-known wide grasp.



¹²⁹ WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 4, sc. 3.