

What prosecutors learned from the first Menendez corruption trial

The newest indictment is a rare glimpse into the mindset of federal prosecutors.



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By Christopher J. Gramiccioni

“Surgical” is the word that came to mind after reading the 39-page indictment returned against Sen. Robert Menendez, D-N.J., his wife and his alleged co-conspirators. The allegations, laid out in a narrative “speaking indictment,” are exacting and leave little to the imagination.

With corruption cases in particular, prosecutors tend to employ speaking indictments to signal to the public that there is sufficient evidence, even at the charging stage, to meet a heightened burden of proof. Speaking indictments weave a more easily digestible story for the uninitiated reader, including details that go beyond a mere recitation of the elements of the charges. And this new story is compelling – it needed to be.

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In my years spent prosecuting federal public corruption cases, the adage “when you come for the king, you best not miss” was an understood and important mantra. Prosecutors must never take lightly the fact that public officials elected to office reflect the will of the voting public; if an elected official is prosecuted, it must be based on substantial, well-grounded proof, not simply circumstantial evidence or a hunch.

Six years ago, DOJ “came for the king” and did miss when a jury deadlocked on earlier corruption charges against Menendez. Without directly acknowledging those previous charges, this newest indictment is a rare glimpse into the mindset of federal prosecutors, who appear to have learned from their mistakes. (Menendez, his wife and his co-defendants have all pleaded not guilty.)

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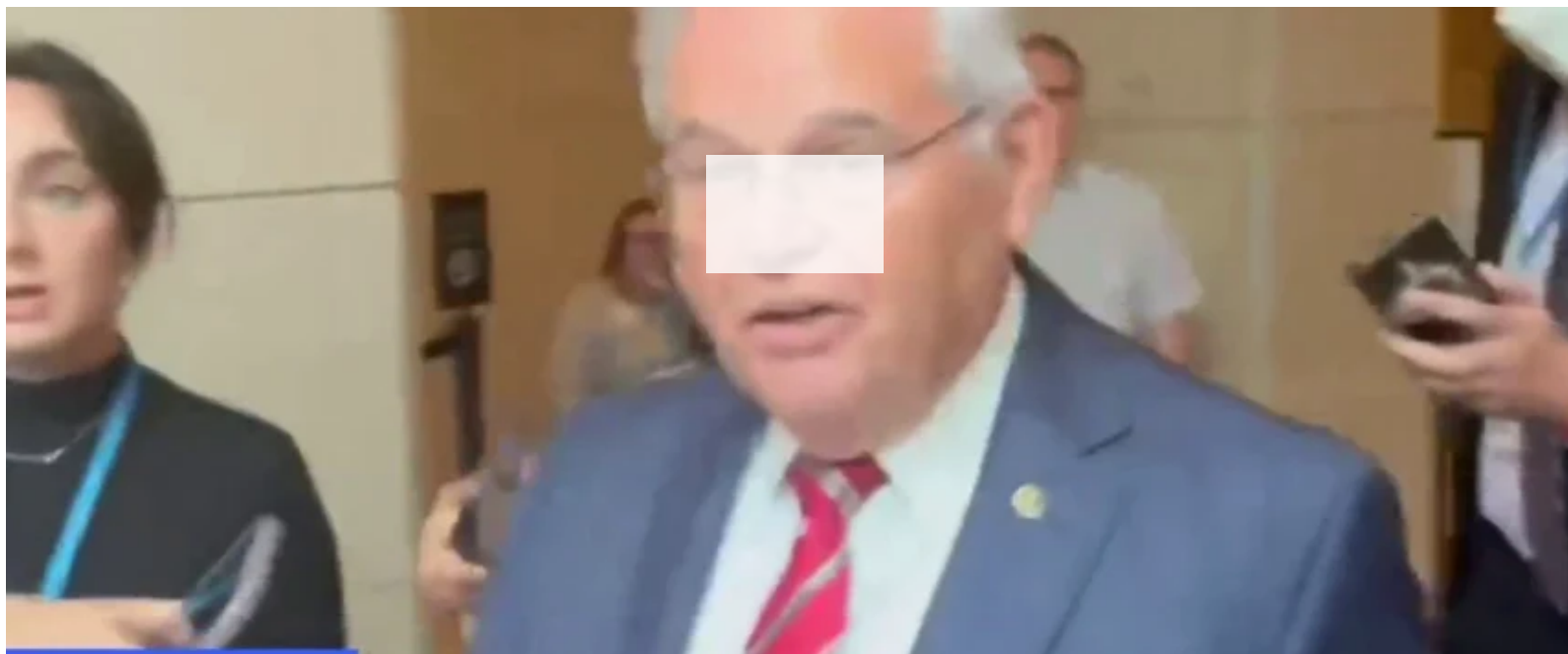


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Corruption cases are historically among the most challenging to investigate and prosecute for several reasons. Perhaps the biggest is that there is a fine line between a corrupt criminal offense involving bribery and an ethical or administrative violation. In recent years, that line has become even more razor-thin in the wake of the Supreme Court's decisions in both *McDonnell v. United States* and *Kelly v. United States* (the latter better known as "Bridgegate"). These cases narrowed the definition of a public corruption crime, complicating the initial prosecutorial decision whether to charge public officials with corruption. Prosecutors must distinguish between acts that seem distasteful but lack corrupt intent, and more pernicious acts done with the requisite criminal intent.



To prove corrupt intent, prosecutors try to show that a specific *quid pro quo* exists between the public official who's using his influence to benefit another person and the person who's providing something of value. The question we should be asking here is: Did Menendez conspire and agree to accept bribes (in the form of cash, gold bars, mortgage payments, home furnishings and a luxury car) in exchange for corruptly using his official influence and authority to benefit his co-conspirators?

This indictment goes into painstaking detail to answer this question in the affirmative. It describes with precision and contemporaneousness the various official actions allegedly taken and the official influence that Menendez allegedly exercised for the benefit of his co-conspirators, as well as detailing what things of value he and his wife allegedly received in exchange. Prosecutors cannot afford another hung jury, the proverbial nightmare for a prosecutor. This time around, they took steps to crystallize the corrupt bargain with more specificity. For one, they emphasized the alleged acts that the defendants took to conceal their misdeeds.

Evidence of concealment tends to foreclose a defense of 'this was all a mistake.'

Concealment can be the smoking gun in corruption cases. Evidence of concealment tends to foreclose a defense of "this was all a mistake," and it allows jurors to infer what a defendant may have been thinking and what his true intentions and motivations were. Juries easily understand the basic concept that it is human nature to try and hide what you know is wrong and could get you in trouble. For this reason, jurors are instructed before deliberating that they can infer from a defendant's actions and behavior that a defendant was conscious of their guilt. Circumstantial evidence of a defendant's consciousness of guilt is extremely valuable in a public corruption case because bribes and corrupt deals are rarely memorialized in writing.

In this case, prosecutors are likely to have a field day introducing the extensive concealment evidence described in the indictment. Some examples include:

- *The use of intermediaries to conceal a corrupt bribery scheme.* Menendez's wife, Nadine, is described in the indictment as the classic intermediary, or middleperson, acting in an effort to keep the senator's hands clean. Nadine Menendez allegedly served as a buffer for her husband's involvement in the corrupt conspiracy, and as a facilitator who unsubtly arranged meetings and pressured the co-defendants for payments in return for her husband's official action.
- *The use of shell companies and false statements to conceal illegal activity.* According to the indictment, Nadine Menendez allegedly created and used a shell company to conceal and disguise payments from other conspirators; she allegedly made false statements to a jeweler about the source of the gold bars; and allegedly made false statements to fraudulently obtain a loan for a Mercedes-Benz convertible paid for by co-defendant Jose Uribe.
- *Avoiding traceable bank deposits.* The indictment alleges concealment of nearly half a million dollars in cash and more than \$100,000 in gold bars, hidden in clothing, closets and a safe in the Menendez home. Prosecutors will likely argue these illegal proceeds were secreted throughout their house to

avoid detection and were never deposited at a bank to avoid IRS deposit reporting requirements. (Menendez suggested in a statement after the charges were announced that “these were monies drawn from my personal savings account based on the income that I have lawfully derived over those 30 years,” according to CNN.)

- *Using personal email accounts and deleting emails.* The indictment alleges that Menendez anonymously drafted a letter to be used by the government of Egypt to convince U.S. senators to release a hold on \$300 million in aid to Egypt. Menendez allegedly sent this letter through his personal email account to his wife, who in turn forwarded it to co-defendant Hana, who then sent it to Egyptian officials. Both Menendez and his wife allegedly deleted her email asking him to draft this letter. The use of personal email accounts and subsequent deletion of emails are additional acts of concealment that prosecutors can use to argue criminal intent and to foreclose defenses.
- *After-the-fact concealment efforts.* Prosecutors could argue that any checks allegedly written by the senator or his wife to a co-conspirator labeled as reimbursement for a “personal loan” constitute after-the-fact acts of concealment undertaken *after* the search warrant was executed in an attempt to reframe earlier actions as lawful.
- *Failure to disclose receipt of payments and things of value.* Prosecutors will attempt to exploit the fact that none of these cash payments, gold bars, furnishings, the Mercedes or any of the other things of value allegedly provided to the Menendezes were ever disclosed by the senator in any annual financial disclosure forms required of public officials.



Prosecutors included these and other alleged acts of concealment in the indictment to prove what they were unable to prove six years ago: corrupt intent. Evidence of concealment makes it much easier to convince a jury that Menendez and his alleged co-conspirators fully understood they were involved in an illegal bribery conspiracy. Jurors may be more hard-pressed to conclude that this was all a big mistake or that it was lawful constituent services. Concealment evidence often makes the difference in obtaining a public corruption conviction. Whether the prosecutors' strategy will succeed this time around, however, remains to be seen.

Christopher J. Gramiccioni

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