International Municipal Lawyers Association
2013 Mid Year Seminar
Washington, DC

Work Session X: Media Relations and Ethical Considerations Ten Years After the D.C. Sniper

April 16, 2013

Fame, Fortune and the Government Employee: The Ethics Fallout from the October 2002 Washington DC Sniper Incident

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The Ethics Fallout from the October 2002 Washington DC Sniper Incident

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In October 2002, John Mohammad and Lee Malvo terrorized the Washington, D.C., region over a three-week span. Mohammad and Malvo randomly murdered by ambush ten individuals and critically wounded three others. The search for, and eventual arrest of, the "D.C. snipers" generated an extraordinary amount of media coverage. The Montgomery County Police Media Services received interview requests from as far away as Australia and Japan. The sniper incident was front-page news in South America and Europe. It was covered by every major media outlet in the United States. The Montgomery County Police Department issued a total of 1,300 passes for press conferences held at Police Headquarters in Rockville, Maryland. Montgomery County Police Chief, Charles A. Moose, became the reassuring face and voice of law enforcement's efforts to apprehend the snipers.

Less than a month after the arrest of Mohammad and Malvo, Montgomery County police officers, and especially Police Chief Moose, were sought after by the media for interviews, speeches, and, in Chief Moose's case, a movie and book deal. The invitations to speak were accompanied by offers to pay "honorarium" to police officers, and the movie and book deals offered Chief Moose were (of course) accompanied by offers of compensation.

The potential for money to be paid to County employees triggered the possibility that the Montgomery County Ethics law would come into play.[1] The provision of the Ethics law that became central to the issue of whether County employees could accept compensation for talking about the sniper incident was a provision prohibiting an employee from using the prestige of his or her office for private gain. For some, the prospect that public employees would reap financial advantages for "just doing their job" was troubling. Would allowing government employees to "trade on" performing their public duties in such a direct and immediate fashion erode public confidence that County employees were discharging their duties in the public interest? To a somewhat lesser extent, concern was raised about the pressure employees might feel to disclose

[1] Montgomery County, like every state in the union and most local governments, has adopted an ethics law. The County's ethics law identifies conflicts of interest that public employees must avoid; requires public employees to obtain approval for outside employment; regulates what gifts a public employee may solicit and receive; and provides for financial disclosure on an annual basis by certain public employees. The Ethics law creates a Commission of five residents appointed by the County Executive and confirmed by the County Council that administers the ethics law. The Commission is authorized to provide advisory opinions and, in appropriate circumstances, grant waivers from the prohibition of the Ethics law to specific employees.

"inside information" about the investigation and that premature disclosure of confidential information might compromise the prosecution of Mohammed and Malvo.

The First Act—the Ethics Commission is asked for advice.

The prospect of police officers receiving compensation in exchange for speaking about the sniper case led the Director of the Legal and Labor Relations Division of the Police Department to ask the Montgomery County Ethics Commission for an advisory opinion. The Director asked three questions: (1) May a command officer accept an honorarium for giving a speech or participating as a panel member at a law enforcement seminar or event about the sniper shootings investigation? (2) May a command officer who accepts such an honorarium also receive reimbursement for travel, meals, and miscellaneous expenses? (3) Is there a limit on the amount of permissible honorarium or the number of honoraria an officer may receive?

Responding to these questions required the Ethics Commission to interpret three provisions of Montgomery County Ethics law. The first provision—misuse of prestige of office—provides that "[a] public employee must not intentionally use the prestige of office for private gain or the gain of another."[2] The second relevant provision of the Ethics law provides, "Except when authorized by law, a public employee or former public employee must not disclose confidential information relating to or maintained by a County agency that is not available to the public."[3] The third applicable provision provides that a public employee may accept a gift of "reasonable expenses for food, travel, lodging, and scheduled entertainment . . . given in return for the public employee's participation in a panel or speaking at a meeting."[4]

The Ethics Commission concluded that giving a presentation or participating as a panelist for a fee in a discussion of the sniper incident was a prohibited misuse of the officer's prestige of office, because that activity is "directly and immediately related to one's governmental activities"—this the Commission concluded constitutes the use of the prestige of one's office for private gain. The Ethics Commission concluded, as well, that a public employee could not disclose confidential information relating to the sniper incident whether or not the employee was compensated with an honorarium or other form of compensation. Finally, the Ethics Commission concluded that the Ethics law does not prohibit a public employee from accepting reimbursement for reasonable expenses for food, travel, lodging, and scheduled entertainment in return for the public employee speaking at a meeting about a subject that is directly related to the employee's public duties—provided that the employee is not otherwise compensated for speaking at the event.

The Second Act—Police push back.

[2] Montgomery County Code, § 19A-14 (a).

[3] Montgomery County Code, § 19A-15 (a).

[4] Montgomery County Code, § 19A-16 (d) (4).

After receiving this advice, the Police Department's Legal and Labor Relations Division pushed back. The Division suggested to the Ethics Commission that its advice was potentially flawed for two reasons: (1) The County Ethics law, the Division pointed out, only prohibited the *intentional* use of the prestige of one's office for private gain, which point the Ethics Commission advice did not address; and (2) The Ethics Commission opinion did not take into account a provision in the County Ethics law that allowed a public employee to accept an honorarium as a gift.

The Ethics Commission responded that the Ethics law merely requires an intention to commit an act, not an intention to violate the law. Accordingly, the Ethics Commission advised that if a police officer intends to give a speech for pay about his or her official duties, that activity was brought within the reach of the Ethics law's prohibition against the intentional misuse of the prestige of one's office for private gain.

With respect to the issue raised by the Division concerning honoraria, the Ethics Commission, relying on advice from the Office of the County Attorney, pointed out that honoraria was simply one type of gift that a public employee may accept. The Commission observed that the honoraria exception was intended to cover situations where a public employee is presented with a gratuitous payment in recognition of some charitable, scientific, educational, artistic, civic, or similar achievement, and for which the public employee has neither rendered nor is expected to render any significant service to the organization making the gift. Even assuming, the Ethics Commission advised, that payment to a police officer on a panel speaking about the sniper incident qualified as an honorarium, the Ethics Commission concluded it would still violate the prohibition against the intentional use of the prestige of one's office "when an employee accepts it [the honorarium] for services directly and immediately related to that employee's governmental activities."

The Third Act—Chief Moose's movie and book deals.

Meanwhile, Chief Moose had requested the Ethics Commission's permission to engage in outside employment.[5] This employment consisted of writing a book and consulting on a movie. Chief Moose indicated that the book and the movie were to be "life spanning memoirs," but he acknowledged that they would recount the Chief's lead role in the D.C. sniper case. Responding to this downplaying of the importance of the sniper case, the Ethics Commission dryly noted, "It is fair to say that these events, which garnered world-wide attention, will be the main draw of the book and the movie."

In addressing Chief Moose's request, the Ethics Commission found that the Ethics law's prohibition against a public employee intentionally using the prestige of his office for private gain could not be avoided in responding to the Chief's request. In reaching this conclusion, the Commission reasoned that speaking about one's governmental service is part of a public employee's job. In this regard, the Commission was quick to note,

> That is not to say, for example, that a County Attorney cannot teach a class on local government law or a police officer cannot write a book on hostage

[5] Before engaging in outside employment, a public employee must obtain the consent of the Ethics Commission.

> negotiation tactics. But it is a different matter if the County Attorney is to be paid for recounting his handling of a specific case or the police officer paid to recount her day-to-day involvement in a high-profile hostage drama.

The Commission, therefore, concluded that it must grant the Chief a waiver from the prestige of office prohibition if the Chief were to engage in the book and movie enterprise.

Under the Ethics law, the Commission is authorized to waive the prohibition against the use of prestige of office for private gain, if the Commission finds that each of the following elements apply: (1) the best interests of the County would be served by granting the waiver; (2) the importance to the County of the Chief performing his official duties outweighed the actual or potential harm of any conflict of interest; and (3) granting the waiver would not give the Chief an unfair economic advantage over other public employees or members of the public.

Best Interests of the County.

The Chief, with the support of the County Executive, suggested that the book and movie would be good for the County because it showed County employees in a positive light. The investigation showed government employees overcoming a difficult situation with a good result. The Chief also suggested that recounting the cooperation between local, state, and federal law enforcement officers in finding and arresting Mohammed and Malvo would improve what had historically been a sometimes strained relationship among these different levels of law enforcement.

The Commission countered that the best interests of the County could not depend upon the content or viewpoint of a book or movie. The Commission stated, "For example, how could the Commission deny a waiver, finding that the book or movie did not serve the best interests of the County, simply because it cast the employee as the one capable investigator among a sea of incompetent co-employees?"[6]

The County Executive also argued to the Commission that the best interests of the County would be served by granting Chief Moose a waiver because it would aid in the retention of "this high-ranking employee." The County Executive indicated that he did not know for certain that the Chief would leave County service if the Commission denied his waiver request, but he indicated that he "would like to avoid forcing that possibility." The Commission was sympathetic to this argument, and acknowledged that avoiding this possible result would serve a public interest. But, ultimately, the Commission was not persuaded by this line of reasoning, because the Commission felt there would be more harm than good in granting the waiver.

The Commission indicated that it was not in the best interest of the County to allow its employees to "trade on their government activities for private gain in such a direct and immediate fashion." The Commission went on to state:

[6] Although not explicitly raised by the Ethics Commission, adopting a viewpoint based criterion in connection with approving an employee's desire to publish a book would lead to almost certain First Amendment litigation. *See Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563 (1968).

> Such conduct leads citizens to question whether public employees are discharging their duties in the public interest or in furtherance of some private interest. This diminishes citizens' faith in their public servants and erodes their trust in County government. These principles are at the core of the prohibition against using the prestige of one's office for private gain and neither the County Executive nor the Employee [Chief Moose] has convinced the Commission that this situation is a good platform to begin waiving those principles.

Finally, the Commission argued that waiving the prestige of office prohibition could lead to "undesirable behavior." The Commission suggested that public employees "might be tempted to consider their personal interest above the County's interest when dealing with matters in the public eye." The Commission concluded, "The County's best interests are not served if employees are jockeying for position in high profile projects, anticipating the possibility of some larger return for their County service. Employees might act differently in high visibility matters because of concern about how it would affect their ability to trade on their experiences"[7]

I can't help but engage in a parenthetical comment at this juncture—the danger of trading on one's government experience does not always turn on the possibility of gaining some pecuniary advantage. "Jockeying for position in high profile projects" may be an unavoidable human condition. Andrew Roberts in The Storm of War wrote that, in September 1944, after Paris had been liberated by the allies, General Eisenhower took over day-to-day command of all allied ground forces on the western front. At that point, British Field Marshall Bernard Montgomery and American Generals Patton and Bradley each presented General Eisenhower with plans to invade Germany. Perhaps unsurprisingly, each of these generals proposed plans that placed their armies in the starring role. Andrew Roberts noted, "It is sadly impossible to believe that the best demands of grand strategy, rather than their own egos, actuated these soldiers, and Eisenhower had the difficult task of holding the ring between them and imposing his own view."[8] Although three of these four generals who survived the war long enough to write books or memoirs, did so, it is hard to believe that the prospect of profits from a book motivated their "strategic" thinking at this important point in history.[9]

Potential Harm.

In addressing the second requirement for granting a waiver (the potential harm of granting a waiver), The Ethics Commission was concerned that the Chief's movie or book deal might impede efforts to bring John Mohammad and Lee Malvo to justice to the extent that the Chief revealed details of the investigation outside of the courtroom. The Commission noted,

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[7] The Commission explicitly eschewed any notion that Chief Moose may have at any time during the sniper investigation considered his personal interests when performing his official duties.

[8] Roberts, Andrew, The Storm of War, (© 2011). General Patton, commenting on his plan to lead the U.S. Third Army into Germany, called it "the best strategicall [sic] idea I've ever had." *Id*. at 497.

[9] Dwight D. Eisenhower wrote Crusade in Europe; General Omar Bradley wrote A Soldier's Story; and Field Marshall Montgomery wrote three books, including High Command in War. General Patton died in December 1945 in Germany.

"Yet the employee's personal gain may well be measured, in part, by the extent to which the employee is willing and able to quench the public's thirst for all of those 'inside' details."

Free Speech Considerations.

Chief Moose argued to the Commission that denying him permission to write a book and consult on a movie would violate his First Amendment right of speech. In support of this position, the Chief cited *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*.[10] In that case, the Supreme Court struck down New York's "Son of Sam" law, which required a publisher that contracted with a convicted person to submit a copy of the contract and turn over any income due the felon under the contract to the New York State Crime Victims Board. The law was intended to prevent criminals from profiting from their crimes and provide victims of the crime with a source of funds to reimburse the victims for damages they incurred as a result of the crime. The Supreme Court concluded that the Son of Sam law was inconsistent with the First Amendment because it singled out speech on a particular subject and imposed a special financial burden on that speech.

The Ethics Commission swept Chief Moose's First Amendment argument aside, noting that the County's Ethics law was neither a content nor viewpoint based restriction on speech. Instead, the Commission relied on *United States v. National Treasury Employees Union*.[11] In *National Treasury Employees Union*, the Supreme Court struck down as unconstitutional a federal ethics law that prohibited federal employees from accepting compensation for making speeches or writing articles, even when the speech had no connection with the employees' official duties. This case involved, among others, a postal employee who gave lectures on the Quaker religion and received in exchange "small payments"; an aerospace engineer who lectured on black history for a fee of $100 per lecture; a microbiologist who earned $3,000 a year making radio and television appearances reviewing dance performances; and a tax examiner who received compensation for writing articles about the environment.[12] The Supreme Court criticized the federal ethics statute because it failed to create a connection between an employee's work and the subject matter of the expression for which the employee received compensation. In striking down the federal statute, the Court noted, "The speeches and articles for which they [the federal employees] received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."[13]

The Ethics Commission noted that the federal ethics rules adopted after *National Treasury Employees Union* only prohibit federal employees from accepting outside compensation for teaching, speaking, or writing that relates to the employee's official duties. For this reason, the Ethics Commission concluded that it was constitutional to prohibit County

[10] 502 U.S. 105 (1991).

[11] 513 U.S. 454 (1995).

[12] *Id.*, at 461-62.

[13] *Id.* at 466.

employees from receiving compensation for speaking on matters that are "directly and immediately related to one's governmental activities."

The Ethics Commission concluded its opinion denying Chief Moose's waiver request by quoting the legislative findings on which the Ethics law is based—calling these findings "bedrock principles of the County's Ethics law."

> Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
>
> The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

The Fourth Act—Litigation and settlement.

Chief Moose responded to the Ethics Commission's denial of his request to enter into a book and movie deal by filing two legal actions. Chief Moose filed a petition for judicial review of the Commission's denial of his waiver request with the Circuit Court for Montgomery County, Maryland. He also filed an action with the U.S. District Court for the District of Maryland in which he asserted a violation 42 U.S.C., § 1983 for denial of his First Amendment rights.

Rather than pursuing this litigation, Chief Moose resigned his position as Chief of Police effective June 28, 2003. As a result, Chief Moose and the Ethics Commission entered into a settlement agreement. In the settlement agreement: (1) Chief Moose represented that he had entered into only one book contract with Dutton Publishing Company to co-author a book that would include the Chief's role in apprehending John Mohammad and Lee Malvo. Chief Moose further represented that, prior to the date of his resignation, he had not received any income under the book contract. (2) Chief Moose represented that he had only one movie contract, an option contract with Cates/Doty Productions, in which he had received a payment in the amount of $4,250. At the time of his resignation, Cates/Doty had not yet exercised its option. (3) Chief Moose represented that he had not received and was not entitled to receive any fees for any speech made while he was an employee of the County. (4) Chief Moose represented that he had not disclosed and would not disclose information that would violate the confidentiality provisions of the County Ethics law.

Based on these representations, the Commission agreed that it would not file any ethics complaint or institute any action to recover any monies arising out of the book or movie contracts, provided that Chief Moose pay to Montgomery County the $4,250 which he had received prior to his resignation as a County employee—Chief Moose, in fact, paid this money to the County. Recognizing that it was theoretically possible that a third party might file an ethics complaint against Chief Moose with the Commission, the settlement agreement provided that the Commission was free to lawfully perform its responsibilities in connection with any such

complaint. In the event a complaint was filed by a third party, Chief Moose, in his turn, would be free to assert any claim or defense, including reinstatement of his legal actions. No third party complaint was ever filed.

Postscript.

Subsequent to Chief Moose's resignation, a television movie entitled D.C. Sniper: 23 Days of Fear starring Charles S. Dutton as Chief Moose aired on television in October 2003. And Chief Moose co-authored a book entitled Three Weeks in October, which was published in 2004.

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