

# Why George Santos Can't Bargain Away His Job

By Evan T. Barr

May 18, 2023

In the wake of the recent indictment of Representative George Santos on 13 counts of wire fraud, money laundering, theft and false statement crimes in the Eastern District of New York, some journalists have speculated as to whether Santos might try to negotiate a plea bargain with federal prosecutors in which he would offer to resign from his office in exchange for a reduction in the severity and/or number of charges he is facing. But under an obscure Eastern District decision issued in 1982, a court might well invalidate any such deal as a violation of the separation of powers doctrine.

## 'United States v. Richmond'

Frederick Richmond, a liberal Democrat, was elected to the House of Representatives from Brooklyn in 1974. According to the *New York Times*, in April 1978, he was arrested in Washington on charges of soliciting sex from a 16-year old boy and an undercover police officer. He admitted to a misdemeanor morals charge which was later dismissed by a District of Columbia court after he completed 30 days of counseling.

Subsequently, it was reported that a federal grand jury began investigating allegations that Richmond had purportedly helped a career criminal from Massachusetts who had escaped from prison to get a clerical job in the House of Representatives.

The grand jury also focused on allegations that Richmond had used employees of a company in which he was a director and major shareholder to work on his congressional campaigns, in violation of federal election laws. Even as the scandal swirled around him, Richmond blamed the Reagan Justice Department for his predicament and defiantly announced he would run for a fifth term in 1982.

But on Aug. 25, 1982, his campaign ended abruptly when he appeared in court to plead guilty, pursuant to a written agreement with the government, to charges of income tax evasion, unlawfully supplementing the salary of a federal employee, and possession of marijuana. As part of the agreement, he undertook to immediately resign from Congress and withdraw as a candidate for re-election. The government, in return, agreed not to prosecute him for a variety of other crimes that had been part of the investigation. Richmond promptly upheld his side of the deal, quitting his office and terminating his candidacy.



Evan T. Barr

On Nov. 10, 1982, the day before sentencing, and a week after the election, Chief Judge Jack Weinstein issued an opinion *sua sponte* invalidating that portion of the plea agreement relating to Richmond's resignation and withdrawal. See *United States v. Richmond*, 550 F.Supp. 605 (E.D.N.Y. 1982). Specifically, Judge Weinstein held that this arrangement (1) conflicted with the fundamental right of the people to elect their representatives; (2) interfered with the principle of separation of powers; and (3) contravened public policy by utilizing a technique latent with the possibility of Executive domination of members of Congress through the threat of forced resignations.

After explaining that the qualifications for holding Congressional office, and the power to expel a member of Congress, were specifically enumerated in the Constitution, the judge held that "[j]ust as Congress and the states are prohibited from interfering with the choice of the people for congressional office, federal prosecutors may not, directly or indirectly, subvert the people's choice or deny them the opportunity to vote for any candidate." The judge noted that the recent ABSCAM sting operation had demonstrated "the powerful investigative and prosecutorial machine available to the executive" and concluded that "forced resignations through plea bargaining would provide an intolerable threat to a free and independent Congress."

After opining that even Richmond's voluntary consent to the terms could not cure those portions of the plea bargain pertaining to his resignation and candidacy that violated the Constitution, Judge Weinstein stated that those terms, being contrary to public policy, would form no part of his judgment of sentence. The judge expressly approved the remaining components of the plea

agreement, including the government's willingness not to pursue other charges. The following day, Judge Weinstein sentenced Richmond to a year and a day in prison and ordered him to pay a \$20,000 fine.

### **Department of Justice Policy**

Judge Weinstein throughout his remarkably long tenure on the bench often bedeviled prosecutors and other litigants with bold, unprecedented and at times legally tenuous pronouncements, and this case was no exception. The Department of Justice announced in the aftermath of the ruling that it considered *Richmond* to have been incorrectly decided. See Criminal Resource Manual 624 (archived at DOJ website). According to the Department, the case "was particularly troublesome from the standpoint of the orderly and efficient discharge of the Justice Department's responsibilities to protect the public from the criminal abuse of the public trust by high federal officials."

In particular the Department complained that the case "purports to limit, without adequate legal justification, the latitude of federal prosecutors to reach voluntary settlements with defendants in significant corruption cases which equitably address and protect the important public interests that such prosecutions normally entail." The Department noted that despite these defects, the "unusual procedural and factual setting of the case" (in which Richmond had already resigned without raising the issue and the election had taken place) had foreclosed judicial review in the Second Circuit, leaving a flawed decision on the books. Department personnel were encouraged to continue to consider voluntary offers of resignation from office as a desirable feature in plea agreements with elected officials.

This language has since been modified. Under the current more circumspect provision in the Justice Manual, the Department states that “plea bargains with defendants who are elected public officers can present issues of federalism and separation of powers when they require the public officer defendant to take action that affects his or her tenure in office.” Justice Manual 9-16.110 (updated January 2020).

As a general rule, the guidance states, resignation from office, withdrawal from candidacy for elective office or an agreement to forbear holding office in the future “remain appropriate and desirable objectives in plea negotiations with public officials who are charged with federal offenses that focus on abuse of the office(s) involved.” Such collateral conditions thus may be incorporated into plea agreements with Members of Congress in those cases but may not be imposed *involuntarily* against the will of the defendant due to the separation of powers concerns.

### **The Road Ahead for Santos and the DOJ**

Santos has pled not guilty and says he plans to seek vindication at trial. For now the Republican leadership in the House is standing by the defendant, allowing him to keep his seat. Of course, once Santos has had a chance to review the discovery and consider the likelihood of conviction and a stiff sentence, he may change his mind.

Unlike many public corruption cases, in which the politician-defendant can be an effective and articulate witness on his or her own behalf, Santos cannot plausibly take the stand given the number of demonstrable and outrageous falsehoods he has already acknowledged.

So for good reasons, Santos may not go the distance. To the extent that counsel for Santos decides to seek an off-ramp, and the prosecutors are willing to put an offer on the table, perhaps his best (maybe only) card to play in that negotiation would be a willingness to quit and not seek re-election and avoid the need for trial or an expulsion vote by Congress.

At that point, assuming the prosecutors follow Department policy, they would have to submit any proposed plea deal terms to Washington for approval. Because the charges in the indictment do not “focus on abuse of the office(s) involved” and arise instead from actions taken during his 2022 and 2020 campaigns, it is unclear whether the Department would approve a condition in the plea agreement requiring Santos to resign.

Even if the Department does sign off on such a provision, however, Judge Joanna Seybert, who is presiding over the Santos case, still would have an independent duty to decide whether to accept such a plea. She would do well to keep *Richmond* in mind, especially at a time in which the Department has been attacked by both Republicans and Democrats for alleged interference in the political process.

If Judge Weinstein were still around, he would no doubt say that the voters, and not the prosecutors or the court, should decide whether Representative Santos deserves to stay in the House.

**Evan T. Barr** is a partner at Reed Smith. He previously served as an Assistant U.S. Attorney in the Southern District of New York.