THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION

The Law and Legal Strategies

PETER J. HENNING
LEE J. RADEK

OXFORD

THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION

This page intentionally left blank

THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION

The Law and Legal Strategies

Peter J. Henning
AND
Lee J. Radek

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy Japan Poland Portugal Singapore South Korea Switzerland Thailand Turkey Ukraine Vietnam

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Library of Congress Cataloging-in-Publication Data

Henning, Peter J.
The prosecution and defense of public corruption : the law and legal strategies / Peter J. Henning, Lee J. Radek.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-19-537841-2 ((hardback) : alk. paper)
1. Political corruption—United States—Criminal provisions.
2. Political corruption—United States—Trial practice.
3. Misconduct in office—United States.
4. Corruption investigation—United States. I. Radek, Lee J. II. Title.
KF9409.H46 2011
345.73'02323—dc22 2010048492

---

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

To Karen, first and foremost, and Grace, Alexandra, and Molly,
who make it all worthwhile.

—P.J.H.

To Jill, Megan, Matt, and Caitlin, my wonderful wife and perfect children,
for their patience and inspiration.

—L.J.R.

This page intentionally left blank

CONTENTS

This page intentionally left blank

AUTHOR BIOGRAPHIES

Peter J. Henning joined the Wayne State University Law School faculty in 1994, where he is a Professor of Law. He is a magna cum laude graduate of Georgetown University Law Center. His teaching focuses on criminal and corporate law, with a specialization in white collar crime. Before entering law teaching, he was a senior attorney in the Division of Enforcement at the U.S. Securities and Exchange Commission from 1987 to 1991, and a trial attorney in the Criminal Division of the U.S. Department of Justice from 1991 to 1994. Professor Henning is a co-author of three casebooks on criminal law and white collar crime, two student treatises, and three volumes of the *Federal Practice & Procedure* treatise (with the late Professor Charles Alan Wright) on the Federal Rules of Criminal Procedure.

Lee J. Radek is a cum laude graduate of the Loyola University of Chicago School of Law. He joined the U.S. Department of Justice under the Attorney General's Honors Program in 1971. In 1976 he was one of three attorneys selected to form the Public Integrity Section of the Department's Criminal Division. He became a Deputy Chief of that Section in 1978. In 1992, he was appointed to the position of director, Asset Forfeiture Office, and in 1994, he returned to the Public Integrity Section as its chief, where he served until 2001, when he became senior counsel in the Asset Forfeiture and Money Laundering Section. Among his other duties, Mr. Radek was a member of the FBI Criminal Undercover Operations Review Committee, and was the Department's representative to the Financial Action Task Force—the international anti–money laundering body. Mr. Radek retired in 2005 and now enjoys playing golf and watching morning traffic reports.

This page intentionally left blank

PREFACE

> "No people will tamely surrender their liberties, nor can any be easily subdued, when knowledge is diffused and virtue is preserved. On the contrary, when people are universally ignorant and debauched in their manners, they will sink under their own weight without the aid of foreign invaders."
>
> Samuel Adams

While the notion of the "consent of the governed" is a foundational principle for a democracy, such consent must be informed and given for a proper purpose. When those who exercise public authority act for their own benefit rather than the good of the community, that consent can break down and government becomes something to be feared or despised. There is, perhaps, no greater internal threat to a democracy than the cynicism that arises from the perception of favoritism, that decisions are swayed by officials working to line their own pockets rather than working for the greater good. Similarly, a perception that the will of the people is being subverted by an executive that abuses its power by prosecuting innocent officials also results in a loss of faith in government.

This book focuses on the many and varied ways that the federal government seeks to prevent and punish corruption at all levels of government. Over the past forty years, the prosecution of public corruption has been a priority of the U.S. Department of Justice. There has been no shortage of cases, from prosecutions of members of Congress to governors and state legislators to local officials throughout the country. Compared to other nations, the United States is certainly not one that is pervaded by corruption, but it still occurs far too often and has a negative impact on the public perception of government.

Our goal in writing this book is to provide a thorough legal analysis concentrating primarily on the federal laws applied to prosecute public corruption. We survey the wide range of federal statutes that authorize prosecution for the misuse of public authority and the protection of

government officials from corrupting influences, covering bribery and unlawful gratuities, conflicts of interest, campaign finance, and federal employment practices restrictions. We analyze both the substantive provisions and related topics that can come up in any case, such as venue and sentencing.

The focus is on how these laws work at a practical level, identifying the important issues and leading cases that provide the foundation for understanding how the case will unfold. There is no other work providing a systematic treatment of the federal law of public corruption. For those interested in broader history and social implications of the subject, two leading works are Bribes, by Judge John T. Noonan, Jr., and The Pursuit of Absolute Integrity, by Professors Frank Anechiarico and James B. Jacobs.

We hope that this book fills a gap in the legal literature by providing practicing lawyers and those interested in how public corruption cases proceed with a comprehensive guide to how the law works and the issues under a particular provision. Our aim is to give a thorough treatment of the main legal issues in the wide range of federal laws that affect the exercise of governmental authority and the actions of public officials at all levels of government. We also hope that, in some small way, this may contribute to the effectiveness of the system of justice that, if administered properly and effectively, is the best hope to maintain the confidence of the citizenry in its government.

A work of this scope involves the assistance of a number of people. Joshua Hochberg, a former deputy chief in the Public Integrity Section of the Criminal Division of the Department of Justice who later became Chief of the Fraud Section, was kind enough to introduce the authors and send us on our way. The book was aided immeasurably by the research assistance of Bob Rogosich (Wayne State University Law School 2011), and the proofing and editing skills of Olive Hyman and Molly M. Henning (Alma College 2011). Viswanath Prasanna provided outstanding editorial assistance.

In a work of this type, there are bound to be errors and omissions, for which we are completely responsible, and we are grateful for any assistance readers can provide in making this work better by sharing your thoughts, comments, and criticisms.

| 1 |

INTRODUCTION

> "You shall not take a bribe, for a bribe blinds the clear-sighted and subverts the cause of the just."
>
> Exodus 23:8

I. THE MEANING OF CORRUPTION

While there is a growing body of literature on the topic of "corruption" that addresses its scope, effect, and efforts to deter it, there is no universally accepted definition of the concept.[1] As a political term, it is a particularly potent concept that defines an opponent as untrustworthy. For example, the deadlock after the 1824 presidential election was broken by what opponents—the losing side—termed the "Corrupt Bargain" when the House of Representatives chose John Quincy Adams as president over Andrew Jackson, the winner of the popular vote and recipient of the most electoral votes. This characterization helped to pave the way for Jackson's victory in 1828.[2]

In the criminal law, corruption is frequently identified with bribery. The meaning of bribery itself is not fixed, however, and a number of reciprocal arrangements may be acceptable without constituting a crime. As Judge John Noonan points out in his definitive book *Bribes*, "Bribery is an act distinguished from other reciprocities only if it is socially identified and socially condemned."[3]

1. Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l & Comp. L. 793, 793 (2001).

2. *See* Marc W. Kruman, *The Second American Party System and the Transformation of Revolutionary Republicanism*, 12 J. Early Republic 509, 521 (1992).

3. John T. Noonan, Jr., Bribes 3 (1984).

In the modern American political system, giving money to a political candidate who promises to support (or oppose) a particular policy is an exchange of money for the exercise of political authority, yet that is a legal campaign contribution and not a crime, unless the candidate expressly conditions performance on the payment.[4]

While every civilized nation has a criminal prohibition against bribing government officials, bribery is only one manifestation of corruption. Giving gifts in exchange for access to public officials or rewarding the provision of a benefit is a crime in many jurisdictions. Those who hold public office are also often prohibited from using their position to promote private interests, or from representing private clients in disputes with the government they serve. Thus, conflicts of interest that allow an official to use public office to attract clients or realize a private benefit often face prosecution as a criminal offense. Campaign finance laws and lobbying reforms enacted in recent years in the United States limit interactions between private interests and public officials by enhancing the transparency of campaign contributions and prohibiting certain types of social contacts with lobbyists.

Although many acts can be described as corrupt, this book focuses primarily on the application of the criminal law to the improper exercise of public authority and the misuse of office for improper gain. There will be no attempt to define "corruption," and the term will be applied broadly to consider how the criminal law treats officials and those they deal with when public authority is abused. Corruption prosecutions do not involve policy disputes, but rather the improper use of the authority entrusted to an official that often—although not always—results in realizing a personal benefit.

The corruption of public officials is one of the most serious offenses in any organized political system. The U.S. Constitution describes two crimes specifically as the basis for impeachment: treason and bribery.[5] Both go to the core of the government's legitimacy, one seeking to undermine it directly, the other by subterfuge through the misuse of office for personal benefit.

The principle focus here is on federal criminal corruption prosecutions. While all states have statutes prohibiting bribery, misuse of office, and conflicts of interest, the federal government has been the prime mover in corruption investigations and prosecutions since the early 1970s. Whether a matter of greater resources, independence from local political influence, and more powerful criminal statutes, or some combination of these, the U.S. Department of Justice has played a leading role in many of the highest profile and widest ranging public corruption cases.[6]

The number of corruption prosecutions of elected officials has been nothing short of amazing. Since 1970, public corruption has emerged as a significant priority for federal prosecutors. In December 2008, FBI agents arrested Illinois Governor Rod Blagojevich at his home after an investigation produced recordings of him discussing attempts to sell the Senate seat vacated by

4. *See, e.g.*, United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995) ("Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contribution.").

5. U.S. Const. art. II, § 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

6. *See generally* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 Notre Dame L. Rev. 247, 253 (1998).

President Barack Obama.[7] Former Vice President Spiro Agnew resigned from office because of accepting bribes while serving as governor of Maryland, although he entered a *nolo contendere* plea to tax evasion.[8] A dozen members of the House of Representatives have been convicted since 1970, including the former chair of the Ways and Means Committee, Dan Rostenkowski, and five members caught up in the Abscam investigation. On the Senate side, Senator Harrison Williams of New Jersey was convicted for his part in Abscam, while Senator Ted Stevens of Alaska was convicted in 2008 for filing false statements regarding gifts he received, although the Department of Justice later decided to drop the charges due to irregularities in the prosecution.

Although these high-profile federal cases garner significant media attention, there have been a number of wide-ranging corruption investigations conducted by federal prosecutors and agents throughout the country that resulted in a number of state and local officials being convicted. Targets of these investigations include judges, state legislatures, city councils, school boards, and police departments, just to name a few.

While the federal government has played an important role in prosecuting public corruption cases, federal corruption law is at best a hodgepodge.[9] For example, 18 U.S.C. § 201 targets bribery and unlawful gratuities to federal officials, while 18 U.S.C. § 666 addresses corruption connected to state and local programs that receive federal funds. The mail and wire fraud statutes, 18 U.S.C. § 1341 and 1343, now include a scheme to deprive the right of citizens to the honest services of their public officials, which allows for a wide range of corruption prosecutions. The federal extortion statute, the Hobbs Act, 18 U.S.C. § 1951, has been held to reach bribery even though Congress did not adopt the provisions expressly to address corruption. It is not uncommon for a corruption case to be charged under more than one of these statutes, along with other provisions like conspiracy, money laundering, tax offenses, and even the broad anti-racketeering statute, 18 U.S.C. § 1962— Racketeer Influenced and Corrupt Organizations Act (RICO).

II. THE DEVELOPMENT OF FEDERAL CORRUPTION LAW

Among the first laws adopted after the ratification of the Constitution was a provision making it a federal crime to bribe customs officers and federal judges.[10] Congress adopted a broader bribery

7. The jury in the first trial of Governor Blagojevich convicted him on one count of making a false statement to government investigators and could not reach a verdict on the other twenty-three counts, so a mistrial was declared.

8. United States v. Agnew, Crim. No. 73-0535 (D. Md. 1973).

9. Professor Brown pointed out,

> [I]t is important to recognize that there is no general federal statute dealing with state and local corruption. There have been numerous proposals for such a law, but Congress has not enacted any of them. As a result, federal prosecutors utilize a patchwork approach, relying on an array of statutes whose principal target is not state and local corruption.

Brown, *supra* note 6, at 254; *see also* Henning, *supra* note 1, at 798.

10. Act of July 30, 1789, ch. 5, § 35, 1 Stat. 46 (1789); Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117 (1790). The customs provision required that the official "connive at a false entry of" a ship or goods, while the judicial bribery law prohibited payments "to obtain or procure" a decision from the court.

statute in 1853, making it a crime to offer or give a thing of value to any federal officer "with intent to influence his vote or decision" on an official action.[11] As the Supreme Court noted in *Dixson v. United States* about the general bribery statute:

> Although primarily concerned with individuals who were bringing fraudulent claims against the United States, Congress did not limit this early statute to fraudulent claims, but chose to draft a general provision encompassing the bribery not only of Members of Congress, but also of "any officer of the United States, *or person holding any place of [public] trust or profit, or discharging any official function* under, or in connection with, any department of the Government of the United States."[12]

A. *Crédit Mobilier*

One of the first major corruption scandals in the post–Civil War era involved the secret distribution of shares in the Crédit Mobilier of America Corporation, which acted as a front for the Union Pacific in building the transcontinental railroad, to a number of congressmen and senators. The shares were given during the first few years after the war to discourage any congressional inquiries into the vast expenditure of funds for the railroad. The ringleader was Representative Oakes Ames of Massachusetts, and it was not until 1872 that the transactions in Crédit Mobilier stock came to light.

Among those implicated in the resulting congressional investigation were Ames, Representative James A. Garfield, and Vice President Schuyler Colfax. The publicity caused Colfax to be dropped from the Republican ticket for the 1872 election. The scandal became a campaign issue, but did not linger so as to prevent Garfield's election as president in 1880. There were no criminal prosecutions arising from the share distribution, and congressional investigations, completed in only a few weeks, were viewed as "little more than cosmetic cover-ups."[13]

At least through the nineteenth century, members of Congress were effectively immune from prosecution for corruption. No senators were expelled from that body, and the only penalty imposed on Representative Ames was a censure by the House of Representatives.[14]

B. *Oregon Land Frauds*

The transfer of land by the federal government to private ownership which occurred in the nineteenth century was rife with fraud. By 1900, the Pacific Northwest was one the last areas in which

11. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171 (1853). The provision was part of the "Act to Prevent Frauds on the Treasury." In 1863, Congress expanded the criminal law of corruption by passing the first statute prohibiting gratuities to customs officers from any person "engaged in the importation of goods, wares or merchandise" into the United States. Act of Mar. 3, 1863, ch. 76, § 6, 12 Stat. 740 (1863).

12. 465 U.S. 482, 491 n.8 (1984) (italics in original).

13. Anne M. Butler & Wendy Wolff, United States Senate Election, Expulsion and Censure Cases, 1793–1990 194 (1995).

14. *See* Noonan, *supra* note 3, at 493.

the federal government controlled what was considered prime acreage on a large scale. The push to protect public land, led by President Theodore Roosevelt, signaled a change in attitude toward questionable transactions that led to the first significant corruption trials of the twentieth century.

The General Land Office in Washington, D.C., processed transfers of federal property at that time. In 1902, the federal government began to investigate fraud in connection with the transfer of land in California and Oregon. The resulting prosecutions produced the first conviction of a sitting U.S. senator for a crime related to misuse of office. In 1905, John H. Mitchell of Oregon, who had served over twenty years in the Senate, was convicted for taking money to expedite claims in the Land Office.[15]

The charge against Senator Mitchell was not bribery, but accepting compensation for representing a private party before the United States on a claim, which would now violate 18 U.S.C. § 205(a).[16] The government's lead attorney was appointed specially to pursue the investigation because the local U.S. Attorney was viewed as resistant to the case, a pattern that would be used in a number of subsequent corruption cases.

Senator Mitchell's conduct was not unique for that time, but he "belonged to a passing generation that did not comprehend a change in public temper. He was caught in a shift in public mores, which is a cruel thing."[17] There were a number of other defendants from Oregon prosecuted, and the cases "were important for the ending of the flagrant abuses of our public lands."[18] The Oregon Land Fraud cases were the first instance in which the federal government used criminal statutes to change the way in which national power was exercised. This pattern would be repeated in the 1970s when the Department of Justice undertook to prosecute state and local corruption on a much larger scale.

C. Teapot Dome

The sale of oil leases from the Naval Petroleum Reserve in Wyoming and California in the 1920s spawned perhaps the greatest corruption scandal to taint the executive branch until Watergate, and included the first conviction of a former cabinet officer for bribery. Secretary of the Interior Albert Fall was convicted in 1930 of accepting a $100,000 bribe from Edward Doheny to transfer the leases at Teapot Dome and Elk Hill.[19] After a Senate investigation revealed the suspicious transactions, President Calvin Coolidge appointed two special prosecutors to pursue the case,

15. Senator Mitchell died a few months after his conviction, before his appeal could be completed.

16. *See* Chapter 9.

17. Jerry A. O'Callaghan, *Senator Mitchell and the Oregon Land Frauds, 1905*, 21 Pac. Hist. Rev. 255, 261 (1952).

18. John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903–1910*, 35 Pac. Hist. Rev. 35, 62 (1966).

19. Fall v. United States, 49 F.2d 506 (D.C. Cir. 1931).

one of whom was a former senator, Atlee Pomerene. The other prosecutor was Owen Roberts, later appointed to the Supreme Court by President Herbert Hoover.[20]

The Supreme Court upheld the invalidation of the transactions in 1927, declaring, "[T]he interest and influence of Fall as well as his official action were corruptly secured by Doheny for the making of the contracts and leases."[21] The first prosecution of Fall and Doheny for conspiracy ended in an acquittal of both, but a second prosecution of Fall in a separate trial for accepting the bribe ended in a jury finding him guilty. Fall's conviction was upheld over the claim that the earlier acquittal on the conspiracy charge precluded the bribery conviction.[22] Ironically, Doheny was acquitted in a separate trial for paying the bribe. After President Hoover denied a pardon petition, Fall served ten months of his one-year sentence, the first time a cabinet officer was incarcerated based on conduct while in office.[23]

D. Second Circuit Bribery

Bribery and misuse of office was not limited to the executive and legislative branches. In 1939, a jury found former Second Circuit Judge Martin T. Manton guilty of conspiracy and obstruction of justice for accepting bribes to affect the outcome of civil and criminal cases.[24] President Warren G. Harding briefly considered appointing Manton to the Supreme Court, and he ultimately served over twenty years on what many considered at the time to be the leading federal court of appeals.

The information about Manton's acceptance of bribes came about through the organized crime investigations led by Thomas Dewey, then the Manhattan District Attorney and later a two-time nominee for president. Manton resigned from office almost immediately after Dewey provided information to the House Judiciary Committee showing that the judge received large cash payments from parties in cases before the appellate court.[25] Manton's resignation did not protect him from a criminal prosecution, and he became the first federal judge convicted in connection with accepting bribes to influence cases before the court.

Although the government did not charge Manton with bribery, the conspiracy charge encompassed the illicit payments he received. At trial, prosecutors introduced evidence of the numerous payments and their connection to patent, contract, and criminal cases pending before the Second Circuit. Unlike a district court judge, however, Manton served as one of three judges on an appeal, and so could not control the outcome of the case on his own. Moreover, Manton asserted in his own appeal that the decisions in the cases were legally correct, and he needed at least one other

20. Noonan, *supra* note 3, at 545.

21. Pan-American Petroleum & Transport Co. v. United States, 273 U.S. 456, 500 (1927).

22. *Fall*, 49 F.2d at 511 ("[B]efore a plea of res adjudicata can be successfully interposed in a criminal case, the prosecution must have been for the same offense . . . The crime of conspiracy and the crime of bribery are separate and distinct offenses. There was therefore no error in overruling the plea in abatement on this point.").

23. *See* M. R. Werner, Privileged Characters 190 (1935).

24. *See generally* Joseph Borkin, The Corrupt Judge (1962).

25. Noonan, *supra* note 3, at 567–68.

judge on the panel to agree with him so that any payment did not influence the outcome of the case. In response, the Second Circuit, in upholding his conviction, stated:

> The conspiracy here contemplated the payment of money to induce a judge to exercise his judicial power in favor of the bribe-givers, without regard to the merits. If the decisions finally rendered in pursuance of the conspiracy be legally sound the fact is immaterial. The evidence here, indeed, does not forbid the inference that generally Manton refrained from agreeing to the final step except where the correctness of the decision to be rendered seemed to him to be fairly clear, and, in consequence, discovery and exposure less probable.[26]

Manton's argument that the underlying decision was not dictated by the bribe is one raised with some regularity in corruption cases, that the exercise of authority was either unaffected by any outside influence or was the correct choice. The Second Circuit's analysis shows that finding corruption does not depend on there being a questionable result, but that the agreement to be influenced or controlled by the personal gain shows the violation, even if the public official ultimately does the job correctly.

E. Enhancing the Tools of Federal Prosecution

While there were occasional corruption prosecutions during the first half of the twentieth century, they were almost completely confined to federal officers or those who acted as agents for federally funded programs. The Department of Justice did not begin to involve itself in the prosecution of state and local officials until around 1970, and then the impetus to pursue these corruption cases at lower levels of government was hardly the result of a clear policy choice by the president or the attorney general, at least not initially. Instead, in local U.S. Attorneys' offices, aggressive prosecutors began to use the Hobbs Act along with the mail and wire fraud statutes to pursue public corruption cases. In 1976, the Department of Justice formed the Public Integrity Section, which is still devoted to investigating and prosecuting corruption cases at all levels of government, giving a strong basis for the federal role in combating state and local corruption.[27]

1. The Hobbs Act

Congress enacted the Hobbs Act in 1946 as a successor to the Anti-Racketeering Act of 1934, which the Supreme Court interpreted narrowly in *United States v. Local 807, International Brotherhood of Teamsters*[28] to exclude racketeering activity related to labor disputes. The Hobbs Act

26. United States v. Manton, 107 F.2d 834, 846 (2nd Cir. 1939).

27. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 So. Cal. L. Rev. 367, 377 n.26 (1989).

28. 315 U.S. 521 (1942).

reaches robbery and extortion that affect commerce, and it defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*."[29]

The Hobbs Act does not specifically address public corruption, but in 1970 the U.S. Attorney in New Jersey indicted members of the Jersey City political machine for extorting kickbacks and accepting bribes from city contractors.[30] In *United States v. Kenny*, the Third Circuit upheld the application of the "under color of official right" form of extortion to public corruption, accepting the government's argument that a public official's receipt of an unauthorized benefit was a type of extortion.[31] As the Supreme Court noted in *McCormick v. United States*:

> Beginning with the conviction involved in *United States v. Kenny*, . . . the federal courts accepted the Government's submission that because of the disjunctive language of § 1951(b)(2), allegations of force, violence, or fear were not necessary. Only proof of the obtaining of property under claims of official right was necessary.[32]

The Hobbs Act became one of the primary weapons for prosecuting bribery of state and local officials.[33] In the view expressed by one U.S. Attorney, the law became "a special code of integrity for public officials," reaching more than just bribery but also the provision of favors to gain access to public officials.[34]

2. Mail and Wire Fraud

Just as federal prosecutors applied the Hobbs Act beyond its original scope to reach public corruption, at approximately the same time they used the mail fraud statute—along with its close analogue the wire fraud statute—to reach public and private corruption involving dishonesty. Congress enacted the original mail fraud statute shortly after the Civil War to combat illegal interstate lotteries that used the mails.[35] The law expanded over time to reach a broad array of deceitful

29. 18 U.S.C. § 1951(b)(2) (italics added).

30. *See generally* George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 Wash. & Lee L. Rev. 417, 422 (2003); Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L. Rev. 75, 130 (2003).

31. 462 F.2d 1205 (3rd Cir. 1972). The lead prosecutor in the case was U.S. Attorney Herbert Stern, who later became a District Court Judge. He explained the theory of bribery as a type of extortion in a law review article, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1 (1971).

32. 500 U.S. 257, 266 n.5 (1991)

33. *See* United States v. Jannott, 673 F.2d 578, 595–596 (3rd Cir. 1982) (reviewing Hobbs Act prosecutions).

34. United States v. O'Grady, 742 F.2d 682, 694 n.14 (2nd Cir. 1984) (en banc) (quoting from a letter from Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, to the U.S. Court of Appeals for the Second Circuit).

35. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196. The act provided that "it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."

schemes involving some use of the mails, and it is the primary federal statute for prosecuting economic crimes involving deception. Congress adopted the wire fraud statute in 1952 as an extension of the mail fraud provision to newer forms of electronic communications, and courts interpret the two statutes identically in determining whether the conduct constitutes a scheme to defraud.[36]

The relationship between corruption and fraud—a type of larceny—is not immediately apparent. The theory of prosecution was that governmental officials who received kickbacks or other gratuities in connection with their offices or duties engaged in a scheme to defraud the citizenry of its right to honest and faithful services.[37] Courts accepted the position that a deprivation of the honest services owed by a fiduciary constituted the fraudulent taking that is normally associated with larceny and therefore sufficient to establish a scheme to defraud.[38]

Like the Hobbs Act, the mail and wire fraud statutes, once used successfully, were applied with regularity in pursuing public corruption cases, until the Supreme Court abruptly rejected the honest services theory in *McNally v. United States* in 1987. The Court held that the mail fraud statute reached only schemes designed to deprive victims of money or property, and not the deprivation of intangible rights "such as the right to have public officials perform their duties honestly."[39] The Court noted that it was only interpreting the statute and not ruling on the federal government's authority to prosecute state and local corruption, so that "[i]t may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority . . . ."[40]

Congress accepted the Court's invitation in *McNally* a year later by adopting 18 U.S.C. § 1346, which provides that the fraud provisions "includes a scheme or artifice to deprive another of the intangible right of honest services."[41] Although the legislative history of the provision is minimal, it clearly sought to restore the law to its state prior to *McNally*, thus providing federal prosecutors with one of their most potent tools for combating corruption. In 2010, the Supreme Court, in *Skilling v. United States*, again moved to narrow the scope right of honest services fraud prosecutions by limiting prosecutions under that theory to cases involving bribery or kickbacks.[42] This is likely to pose a serious impediment to continued use of § 1346 for cases in which prosecutors cannot show the public official received a benefit from the use of authority, such as situations that only involve undisclosed conflicts of interest with no direct financial gain. Whether Congress will fill any perceived gap in the law created by *Skilling* remains to be seen.

36. *See* Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis . . . .").

37. The first published opinion to adopt this analysis was *Shushan v. United States*, 117 F.2d 110, 114–15 (5th Cir. 1941). The mail fraud statute was not used again for a public corruption case until the 1970s.

38. *See generally* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435, 461 (1995).

39. 483 U.S. 350, 358 (1987). *See* Chapter 6.

40. *Id.* at 361 n.9.

41. The Anti-Drug Abuse Act of 1988, 102 Stat. 4508 (1988).

42. 130 S. Ct. 2896 (2010).

F. Undercover Corruption Investigations

Along with the development of the federal corruption law in the 1970s, the explosive Abscam investigation highlighted the use of tactics first developed in drug and organized crime cases to public corruption. The investigation of legislative bribery came about only a few years after the Watergate scandal, this time focusing on the sale of congressional favors.

The FBI operation, using the code name Abscam, targeted members of Congress and local elected officials to determine whether they would be susceptible to the offer of a bribe. As described by the Third Circuit:

> The basic nature of the plan was that F.B.I. agents posed as employees of Abdul Enterprises, a fictional multinational corporation whose principal, a fictional Arab Sheik, Yassir Habib of the Arab nation of Abu Dhabi, was represented as interested in investing large amounts of money in this country and in emigrating here. According to the government, the plan was "conceived to create opportunities for illicit conduct by public officials predisposed to political corruption." From the very beginning the government utilized the services of Melvin Weinberg, accurately characterized by the district court as a "career swindler," who, with F.B.I. agents, "spread the word" that the Sheik was interested in meeting public officials who could facilitate his planned investments.[43]

As a result of the undercover operation, five representatives and one senator were caught on tape accepting bribes, along with two members of the Philadelphia City Council and others who facilitated the illicit payments.[44]

The targeting of elected federal officials by baiting them into accepting bribes was heavily criticized at the time.[45] Third Circuit Judge Ruggero Aldisert argued that the FBI's conduct constituted entrapment, and that

> to the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear. That the

43. United States v. Jannotti, 673 F.2d 578, 581 (3rd Cir. 1982). One district judge described Weinberg as follows:

> For most of his life Weinberg had been a "con man" operating in the gray area between legitimate enterprise and crude criminality. For a number of years in the 1960s and early 1970s, he had been listed as an informant by the FBI and had provided his contact agent from time to time with intelligence about various known and suspected criminals and criminal activities in the New York metropolitan area and elsewhere, for which he had received in return occasional small payments of money. When he was arrested on the charge that led to his guilty plea, his informant status was cancelled, later to be reinstated after his guilty plea and agreement to cooperate with the FBI.

United States v. Myers, 527 F. Supp. 1206, 1208 (E.D.N.Y. 1981); *see also* Robert W. Greene, The Sting Man: Inside Abscam (1981).

44. *See* United States v. Myers, 692 F.2d 823 (2nd Cir. 1982) (Congressmen John M. Murphy, Michael O. Myers, Frank Thompson, Jr., and Raymond F. Lederer); United States. v. Williams, 705 F.2d 603 (2nd Cir. 1983) (Senator Harrison A. Williams, Jr.); United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983) (Representative Richard Kelly).

45. *See generally* Bennett L. Gershman, *Abscam, The Judiciary, and the Ethics of Entrapment*, 92 Yale L.J. 1565 (1982); note, *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122 (1982); Lawrence W. Sherman, *From Whodunit to Who Does It: Fairness and Target Selection in Deceptive Investigations*, *in* Abscam Ethics: Moral Issues and Deception in Law Enforcement 118 (Gerald M. Caplan ed., 1983).

> FBI has earned high praise for its performance in the traditional discharge of its duties should not immunize the secret police tactics employed in its ABSCAM operation from appropriate and vigorous condemnation.[46]

Similarly, District Judge William B. Bryant found that targeting members of Congress without any basis to suspect they were already engaged in corrupt activities was improper, noting that "I know of no reported case where at least some inkling of corruption was not the forerunner of undercover activity in a bribery prosecution."[47]

Congress also scrutinized the targeting of individuals, especially elected officials, when there was no prior indication of interest on their part to engage in criminal activity. Both the House and Senate considered legislation to require that there be prior approval of federal undercover operations as a means to limit the discretion of prosecutors and investigative agencies to engage in such conduct without some basis to believe the target was engaged in criminal activity.[48] Congress never enacted the legislation, and undercover operations continue to be used in public corruption cases. However, the Department of Justice adopted guidelines during this period for undercover operations that imposed various levels of approval and addressed when the subject of such operations could be targeted, largely in response to congressional concerns about how the Abscam operation took place.

The Department of Justice has used undercover operations a number of times since Abscam, and the public furor over the use of such tactics appears to have subsided. For example, an investigation of corruption in Rhode Island, dubbed "Operation Plunder Dome," resulted in the conviction of longtime Providence Mayor Vincent J. "Buddy" Cianci and others on RICO charges.[49] "Operation Lost Trust" grew out of a narcotics investigation to include five members of the South Carolina legislature in which the FBI created a dummy corporation to pay bribes to obtain passage of legislation.[50] In 2005, a search of Representative William Jefferson's home turned up $90,000 in marked bills—found wrapped in a freezer—out of a $100,000 payment given to him by an informant.[51]

G. Lobbying Reform

State and federal legislatures have been the subject of lobbying since the founding of the Republic. The First Amendment gives the people the right "to petition the government for a redress

46. United States v. Jannotti, 673 F.2d 578, 613–614 (3rd Cir. 1982) (Aldisert, J., dissenting).

47. United States v. Kelly, 539 F. Supp. 363, 371 (D.D.C. 1982). In reversing the district court's finding that Abscam violated the congressman's due process rights, the D.C. Circuit held, "Where, as in Abscam, the government simply provides the opportunity to commit a crime, prosecution of a defendant does not violate principles of due process." 707 F.2d 1460, 1470 (D.C. Cir. 1983).

48. *See* Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 Emory L.J. 75 (1987).

49. *See* In re Providence Journal Co., Inc., 293 F.3d 1 (1st Cir. 2002).

50. *See* United States v. Derrick, 163 F.3d 799 (4th Cir. 1998).

51. *See* United States v. Jefferson, 571 F. Supp. 2d 696 (E.D.Va. 2008).

of grievances."[52] While the term has gained a rather nefarious meaning, lobbyists[53] can be an important component of the legislative process by providing information and expertise to elected officials and a gauge of support (or opposition) to a proposal.

Lobbyists have been at the center of a number of political scandals. The conduct of Jack Abramoff in seeking favors on behalf of a variety of clients brought renewed attention to the use of money and other benefits to corrupt the legislative process. Among those caught up in Abramoff's web was Representative Bob Ney, who pleaded guilty to accepting money and gifts during overseas trips from Abramoff in exchange for helping his clients, including inserting favorable material in the *Congressional Record*. In a separate case, former Representative Randy "Duke" Cunningham pleaded guilty to accepting over a million dollars in bribes from a government contractor in exchange for directing contracts to his company. Cunningham received an eight-year prison term.

There are a number of disclosure rules imposed on those who seek to lobby Congress that are backed up by criminal and civil penalties.[54] In 2007, in response to the Abramoff and Cunningham cases, Congress passed the Honest Leadership and Open Government Act.[55] The Act addressed Senate and House ethics rules, imposed new restrictions on postemployment lobbying, expanded gift and travel restrictions, and strengthened lobbying disclosures by requiring disclosure of the identity of affiliates of lobbying organizations.[56]

III. THE FEDERAL ROLE

The federal government's role in enforcing criminal laws against state and local officials has triggered questions about whether the national government violates the principle of federalism. Federalism is a structural protection inherent in the design of the Constitution and reflected in the protection afforded by the Tenth Amendment.[57] It limits the authority of the federal government by permitting the exercise of only the powers enumerated in the Constitution, while reserving to the states separate sovereign authority. Federalism thereby protects the rights of individuals through the division of governmental power at different levels. The Supreme Court stated, "Just as the separation and independence of the coordinate branches of the Federal Government serve to

52. U.S. Const. amend I.

53. Congress defines "lobbyist" as "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period." 2 U.S.C. § 102(10).

54. *See* 2 U.S.C. § 1606(a) (up to a $200,000 civil penalty for a knowing failure to either remedy a defective filing within sixty days after notice of such a defect or to comply with any other disclosure provision); § 1606(b) ("Whoever knowingly and corruptly fails to comply with any provision of this chapter shall be imprisoned for not more than 5 years or fined under Title 18, or both.").

55. Pub. L. No. 110-81, 121 Stat. 735 (2007) (codified as amended in scattered sections of 2 U.S.C.).

56. *See* National Ass'n of Mfrs. v. Taylor, 549 F. Supp. 2d 33 (D.D.C. 2008).

57. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[58]

In *United States v. Morrison*, the Court explicitly relied on federalism as a rationale for invalidating the civil remedy provision of the Violence Against Women Act. The Court stated, "The Constitution requires a distinction between what is truly national and what is truly local."[59] This understanding of federalism reserves certain subjects for regulation by the states, apparently to the exclusion of the federal government, in much the same way the Constitution grants specified powers exclusively to the federal government. In this sense, the federal government and the states operate in separate spheres of authority. Although the federal government's power to regulate is broad, there is no federal police power, so federal prosecution of a crime such as bribery, which has traditionally been subject to state and local control, could arguably violate the limitations on national government's authority imposed by federalism.

A federal prosecution involving a state or local official charged with a crime such as bribery raises an additional concern with the propriety of one sovereign seeking a criminal conviction of a person acting on behalf of a different sovereign. One can ask whether federal prosecutors invade the province of the states not only by prosecuting a crime already subject to prosecution by local authorities, but perhaps more importantly, by policing another government's representatives and employees.

One of the authors argued that the federal role in the investigation and prosecution of state and local corruption protects federalism by ensuring that government at all levels operates for the benefit of the citizenry.

> The notion of mutually exclusive spheres advanced in * * * *Morrison*—at least with respect to criminal statutes—overstates the role of federalism in demarcating the authority of the national and state governments. At least with regard to prosecutions involving corrupt officials, the authority of the federal government to prosecute such crimes advances rather than undermines the principle of federalism. The Constitution reflects the deep concern of the Founders with preventing corruption—what I term the Constitution's "Anti-Corruption Legacy"—a concern that supports congressional power to reach misconduct by officials at all levels of government for the misuse of public authority. * * *
>
> Federal prosecution of corruption does not invade the sovereignty of the states because corruption undermines the balance established by federalism, and the national government must protect the integrity of both sides of the federalism equation. The constitutional design to eliminate corruption demonstrates the Framers' intent to guard against the threat to liberty from the misuse of public authority.[60]

Courts remain sensitive to federal interference in the conduct of state and local government, and imposed some limits on the scope of federal laws used to prosecute corruption.

58. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

59. 529 U.S. 598, 617–18 (2000).

60. Henning, *supra* note 30, at 80–81.

Questions regarding the relationship between the Department of Justice and lower levels of government remain important in corruption cases because of the sensitive nature of the investigations and the potential interference in the affairs of another sovereign.

IV. CONCLUSION

As Judge Noonan points out in his seminal book *Bribes*, corruption has been with us since the beginnings of organized government. The last forty years have brought the federal government's role in prosecuting public officials to the forefront. Corruption can exist at any level of government, from the smallest municipal office to the highest reaches of the national government. There are a range of laws addressing the almost infinite variety of corruption, from broad statutes such as the Hobbs Act and mail and wire fraud provisions to enactments targeting a narrow range of officials or types of official action.

In this book, our goal is to provide a detailed framework for understanding how the primary federal corruption laws apply, and the defenses available to those who are investigated or charged with violating these provisions. While we cannot address every possible law or case, we will discuss the significant ones so that practitioners and those interested in understanding the law can have a firm grasp on how the government pursues the investigation and prosecution of public corruption.

| 2 |

BRIBERY AND UNLAWFUL GRATUITIES INVOLVING FEDERAL OFFICIALS (18 U.S.C § 201)

I. HISTORY OF THE STATUTE[1]

Section 201 prohibits bribery and unlawful gratuities provided to federal officials, those who act on behalf of the federal government, and witnesses in federal judicial actions. As noted in Chapter 1, criminal statutes enacted by Congress shortly after the ratification of the Constitution included a prohibition on bribing customs officials and judges. The customs provision required that the official "connive at a false entry of" a ship or goods,[2] while the judicial bribery law prohibited payments "to obtain or procure" a decision from the court.[3] The judicial bribery provision clearly required what has come to be known as a *quid pro quo*—literally "what for what"—between the offeror and the judge. The customs statute used the term "connive" to incorporate the notion of a surreptitious arrangement, so that the exchange is similar to the *quid pro quo* requirement for a bribe.

The broad bribery and unlawful gratuity provision now codified in § 201 traces back to the congressional enactment in 1853 making it a crime to offer or give a thing of value to any federal

1. This chapter is based in part on Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75 (2003), and Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l & Comp. L. 793 (2001).

2. Act of July 30, 1789, ch. 5, § 35, 1 Stat. 46 (1789).

3. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117 (1790).

officer "with intent to influence his vote or decision" on an official action.[4] In 1863, Congress expanded the criminal law of corruption by passing the first statute prohibiting gratuities to customs officers from any person "engaged in the importation of goods, wares or merchandise" into the United States.[5] Unlike the earlier bribery provisions, this crime did not require that the payment be in exchange for the avoidance of customs duties; instead, it criminalized the payment to a customs officer because of its potential impact on future treatment of the payer.

Congress streamlined and reorganized the federal bribery and conflict of interest laws in 1962.[6] Regarding the bribery provision, the Senate Report on the bill states that it creates "a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts."[7]

Prior to the enactment of § 201, there were separate provisions for different types of federal officials, such as government employees, members of Congress, and judges, including different terminology for what constituted bribery. The new law brought together the different categories of officers into a single provision that utilizes a single definition of the prohibited conduct.[8] In 1986, Congress amended § 201 by renumbering the subsections, so that the bribery provisions are now in subsection (b) and the unlawful gratuity provisions are in subsection (c).[9]

II. SCOPE OF THE STATUTE

Section 201 defines two crimes: bribery and unlawful gratuity. The statute reaches both the offer (and payment) of a thing of value to an official, and the solicitation (and receipt) of the benefit. The bribery provision is in § 201(b), and prohibits providing or receiving a thing of value for any of the following:

- "to influence any official act";
- to influence any official to "collude in, or allow, any fraud" on the United States; or
- to induce one "to do or omit to do any act in violation of the lawful duty of such official or person."

Section 201(b) also reaches the offer and acceptance of a bribe "to influence the testimony under oath or affirmation of" a witness in any federal trial, hearing, or proceeding.

4. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171 (1853).

5. Act of Mar. 3, 1863, ch. 76, § 6, 12 Stat. 740 (1863).

6. Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified as amended at 18 U.S.C. § 201).

7. S. Rep. No. 87-2213 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852.

8. *Id*. at 3856.

9. Act of Nov. 10, 1986, 100 Stat. 3592 (1986). Prior to 1986, bribery was in subsections (b) and (c) and unlawful gratuity in subsections (f) and (g). Prosecutions for violations occurring between 1962 and 1986 will reference these subsections, and the amendment did not make any substantive changes in the law.

The unlawful gratuity provision is in § 201(c), and prohibits giving or receiving a thing of value "for or because of any official act performed or to be performed" by the official. A bribe, including the offer or solicitation of one, can only occur *before* an official act because the crime involves a *quid pro quo* arrangement to influence a decision or induce action.[10] A gratuity can be given either before or after the official act. The crime is providing the reward to the official regardless of when, or even how, the official act occurred.

One cannot bribe an official for a decision already reached, but one can certainly reward an official for previous conduct. Because the provision covers after-the-fact payments related to an official act, former officials who have been solicited or received a gratuity after they have left office can be prosecuted for a violation of the gratuity provision, but not for bribery under those circumstances.[11] Section 201(c) also prohibits the payment or receipt of a gratuity "for or because of" testimony in a proceeding.

III. STATUTORY TERMS

Section 201(a) defines three operative terms in the statute: "public official," "person who has been selected to be a public official," and "official act." The statutory prohibition applies to "any thing of value," which is not defined in the statute but has been elucidated by the courts.

A. "Public Official"

Section 201(a)(1) defines a public official as:

> Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

Courts face two issues in determining whether a defendant is a "public official" under § 201: first, whether every officer or employee is subject to prosecution regardless of whether they were

10. United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982) ("This does not mean, however, that all bribes must inevitably be paid prior to the official act in question. The statute proscribes offers and promises of bribes as well as the giving of bribes, and it is only logical that in certain situations the bribe will not actually be conveyed until the act is done.").

11. *See* United States v. Hipkins, 756 F. Supp. 233 (D. Md. 1991). The District Court rejected the government's argument that not allowing a bribery prosecution under § 201(b) for a payment made to a former official created a loophole: "[A] plain reading of § 201(b) will not improperly create a loophole, for two reasons. First, the mere promise or offer of a bribe is illegal under the bribery statute. Second, and more importantly, there is not a loophole because the alleged conduct at issue—giving money to former public officials—is already clearly illegal under the gratuity statute, § 201(c), which was not charged in this case."

acting "in any official function"; second, when is a "person acting for or on behalf of" the federal or District of Columbia governments even though there is no direct federal employment or appointment to office.[12]

1. "Official Function"

The statute covers all officers and employees of the federal government, as well as members of Congress. Section 201(a)(1) is ambiguous, however, regarding whether the federal officer or employee must be acting "in any official function" when receiving the offer or payment of a bribe. The "official function" language may apply to any of the categories of officials listed in the statute, or it may only apply to a "person acting for on behalf of" the government. Either reading of the statute is plausible, and courts have been somewhat divided on whether the officer or employee's actions must also include an "official function."

The Supreme Court first considered the issue of what constitutes an "official function" in *Krichman v. United States* in 1921, construing an earlier version of the bribery statute covering "any officer of the United States, or to any person acting for or on behalf of the United States in any official function . . . ."[13] The defendant was charged with offering a bribe to a railroad porter to deliver trunks containing furs at a time when the nation's railroads had been placed under the control of the federal government during World War I. The porter was technically an employee of the United States due to the wartime nationalization of the railroad, but the Court overturned the conviction because he was neither a government officer nor acting in any official function when he took the payment and delivered the trunk. According to the Court, "Not every person performing any service for the government, however humble, is embraced within the terms of the statute. It includes those, not officers, who are performing duties of an official character."[14] The Court then quoted from the dissenting opinion in the court of appeals, which asserted that if a porter was acting "in any official function" then "window cleaners, scrub women, elevator boys, doorkeepers, pages—in short, any one employed by the United States to do anything—is included."[15]

The *Krichman* Court noted that "if [the statute] is to include every governmental employee, it must be amended by act of Congress." In 1948, Congress recodified the federal criminal statutes, and in the process added "employee" after "officer." This change arguably responded to the Supreme Court's invitation and would allow a bribery charge for paying a railroad porter to deliver a trunk of furs.[16] The legislative history, however, is silent on the reason for adding "employee" to the provision,[17] and as one court noted, "This silence suggests that Congress did not intend to expand

12. *See generally* Jay M. Zitter, "Who Is Public Official Within Meaning of Federal Statute Punishing Bribery of Public Official (18 U.S.C.A. § 201)," 161 A.L.R. Fed. 491 (2000).

13. Act of Mar. 4, 1909, 35 Stat. 1088 (1909) (codified at 18 U.S.C. § 91 (1946)).

14. 256 U.S. 363, 366 (1921).

15. *Id.* at 367 (quoting *Krichman v. United States*, 263 F. 538, 544-545 (2nd Cir. 1920) (Ward, J., dissenting)).

16. Act of June 25, 1948, 62 Stat. 683 (1948) (codified at 18 U.S.C. §§ 201-202).

17. H.R.Rep. No. 304, 80th Cong., 1st Sess. (The only mention of the bribery provision was to note that the substitution of "department or agency" for "department or office of the Government thereof" was meant to indicate that officers and

the bribery statute in 1948 to cover all government employees."[18] Moreover, the revised bribery statute did not have a comma after "officer or employee" to separate those terms from "any official function" as the earlier provision at issue in *Krichman* did. Therefore, while the inclusion of "employee" in the definition seems to render *Krichman* moot, the case in fact appears to retain some vitality.

A. EMPLOYEE MEANS EMPLOYEE

Interpreting an earlier version of the statute which now included the word "employee" in the "public official" definition, the Fourth Circuit stated in *Hurley v. United States*, "The phrases 'officer or employee' and 'person acting for or on behalf of the United States . . . in any official function' must be read in the disjunctive. . . . The phrase 'in any official function,' therefore, modifies only the word 'person' and not 'officer or employee.' "[19]

In *United States v. Romano*, the defendant argued that his bribery conviction should be overturned because he offered a bribe to an employee of a federal agency who had earlier entered a guilty plea and agreed to act as an undercover informant for the government. Because the employee had no official duties and only retained his job to inform on others, the defendant asserted he could not be influenced or induced to act on behalf of the government. The Second Circuit rejected the argument, holding that "[t]he fact that he had agreed to plead guilty to a crime does not change the fact that he remained a federal employee until 1987. We believe that [the informant]'s status as an employee is sufficient to make him a 'public official' under the statute."[20]

In *United States v. Gjieli*, a bribe was offered to a federal agent to secure the release of a state prisoner, which the agent had no authority to effectuate. The Sixth Circuit held,

> § 201(a) imposes no requirement that a bribed "employee" be acting in "any official function" before the "public official" requirement may be satisfied. Rather, the phrase "in any official function" was intended to modify only "person acting for or on behalf of the United States . . ." and not officer or employee.[21]

In upholding the conviction, the circuit court explained its rationale as follows:

> The deterrent value of punishing the bad intent of bribers is the same regardless of whether or not the acts to be accomplished are within the scope of the actual lawful duties of the bribed public

persons acting on behalf of independent agencies or Government-owned corporations were covered by the statute). *Id.* at A14–A15.

18. United States v. Neville, 82 F.3d 1101, 1105 (D.C. Cir. 1996).

19. 192 F.2d 297, 299 (4th Cir.1951); *see also* Nordgren v. United States, 181 F.2d 718, 720–21 (9th Cir. 1950); United States v. Raff, 161 F. Supp. 276, 280 n. 3 (M.D. Pa.1958).

20. 879 F.2d 1056, 1059 (2nd Cir. 1989). *See also* United States v. Heffler, 270 F. Supp. 79, 81 (E.D. Pa. 1967) ("The fact that Cecchini had already received his termination notice and was shortly to leave government service does not detract from the fact that he was a public official, as defined in the statute, at the time of the alleged offense.").

21. 717 F.2d 968, 972 (6th Cir. 1983).

official and regardless of whether the briber has correctly perceived the precise scope of the official's lawful duties.[22]

The Ninth Circuit reached the same conclusion regarding an Army private.[23]

In *United States v. Neville*, the District of Columbia Circuit analyzed the ambiguity in the statute. The court pointed to the legislative history of § 201(a)(1) as supporting the broad reading of the statute's coverage. For example, the House Judiciary Committee report states, "'Public official' is given a comprehensive definition, covering all Government officers and employees."[24] The Senate Judiciary Committee, which added District of Columbia officials to the statute, stated in its report that "[t]he term 'public official' is broadly defined to include officers and employees of the three branches of government, jurors, and other persons carrying on activities for or on behalf of the Government."[25] The circuit court also found that the contrary argument was also supported and abjured selecting between the two, holding that "[w]e need not choose between the two readings, because under either Neville is a public official."

B. EMPLOYMENT + OFFICIAL FUNCTION = PUBLIC OFFICIAL

The fact that the recipient or solicitee of a bribe or unlawful gratuity is a federal employee is not necessarily the end of the analysis. Some courts look to whether the employee exercises some measure of authority on behalf of the federal government to establish that the person was acting in an official function to distinguish the case from *Krichman*. In *Neville*, the D.C. Circuit rejected the argument that only an employee exercising authority over government policy or spending is covered by § 201. The defendant was a corrections officer for the District of Columbia, and the circuit court held, "Protecting the public from incarcerated criminals is a quintessentially sovereign function, carrying with it a significant measure of public trust" sufficient to make his position one with an "official function" under the statute.[26]

Courts generally find that an employee has enough discretionary authority to meet the "official function" requirement. For example, in *United States v. Baymon*, the Fifth Circuit held that a cook foreman at a federal correctional institution was covered by § 201. In addition to being an employee, the circuit court found that "although his position as supervisory cook arguably does not give him the same amount of official functions to carry out as a correctional officer,

22. *Id*. at 976.

23. United States v. Kidd, 734 F.2d 409, 411–12 (9th Cir. 1984) ("[Defendant] contends that a private, as opposed to an officer, is not included within the meaning of 'public official.' There is no support for this contention. Section 201(a) defines 'public official' to include any government employee."). *See also* Fulks v. United States, 283 F.2d 259, 261 (9th Cir. 1960) (warehouseman employed by the Air Force was a "public official" under § 201); United States v. Kemler, 44 F. Supp. 649, 652 (D. Mass. 1942) (physician appointed to conduct physical examinations for inductees into the armed services was an "officer" of the United States).

24. H.R.Rep. No. 748 at 17.

25. S.Rep. No. 2213 at 7–8.

26. *Neville*, 82 F.3d at 86.

he nonetheless holds a position with some degree of responsibility."[27] Thus, the argument that a federal employee does not come within § 201 is largely unavailing, although *Krichman* remains on the books and could be the basis for a court dismissing an indictment or overturning a conviction if the employee is at the lowest rungs of the government employment ladder.

2. *"For or On Behalf Of"*

The more frequently litigated issue in determining who is a "public official" is whether a defendant who is not directly a federal employee, or who does not hold a federal appointment or elective office, can come within § 201 because the person acts "for or on behalf of the United States . . . in any official function, under or by authority of any such department, agency, or branch of Government." Whether the person is exercising authority on behalf of the federal government is the key to the analysis.

A. *DIXSON V. UNITED STATES*

The leading case interpreting § 201(a)(1) is *Dixson v. United States*, in which the defendants were officers of a nonprofit corporation administering federal community development grants who solicited bribes from businesses for the award of contracts to be paid with federal money.[28] The defendants argued that they fell outside of § 201 because there was no "formal bond" between them and the United States, such as an agency relationship, employment agreement, or other direct contractual obligation, to establish that they were acting "for or on behalf of" the federal government.

The Supreme Court found that the sparse legislative history of the provision was not particularly helpful, but did note that prior versions of the bill indicated that Congress could not have intended to restrict the definition of "public official" in the way the defendants argued. Moreover, judicial interpretations of predecessor statutes "had generally avoided formal distinctions, such as the requirement of a direct contractual bond, that would artificially narrow the scope of federal criminal jurisdiction."[29] This led the Court to determine that "Congress never intended section 201(a)'s open-ended definition of 'public official' to be given the cramped reading proposed by petitioners."[30]

The Court set forth the following test for determining whether a person who is not an employee or officer of the United States comes within the statutory definition: "[T]he proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies *a position of public trust* with official

27. 312 F.3d 725, 729 (5th Cir. 2002).
28. 465 U.S. 1172 (1984).
29. *Id.* at 494.
30. *Id.* at 496.

federal responsibilities."[31] The Court further explained that working for an organization which receives federal assistance alone is insufficient, that "an individual must possess some degree of official responsibility for carrying out a federal program or policy" to be a "public official."[32] In finding the defendants came within § 201(a)(1), the Court explained that they were "charged with abiding by federal guidelines" regarding the distribution of federal funds, and "[b]y accepting the responsibility for distributing these federal fiscal resources, petitioners assumed the quintessentially official role of administering a social service program established by the United States Congress."[33]

B. APPLYING *DIXSON*

The Court's "position of public trust" test for whether a person is acting "for or on behalf of" the federal government is intentionally broad to protect federal funds. Thus, determining whether it is proper to prosecute individuals under § 201 who have some measure of interaction with a federal program will be fact specific. Lower court decisions turn on a combination of the measure of federal involvement in the funding and oversight of a program and the individual's authority to implement policies and procedures reflective of the goals of the federal government. A defendant need not exercise a significant amount of federal authority to come within § 201's prohibition, and cases tend to find the person occupied a position of public trust when the misconduct is clear. It is not, however, a foregone conclusion that any federal involvement in a program will result in the application of § 201, and defense counsel need to focus on the role of the person in the program, as well as the nature and degree of the federal involvement in it.

1. LOW-LEVEL EMPLOYEE

In *United States v. Hang*, the Eighth Circuit held that an "eligibility technician" with a local public housing authority was a "public official" under § 201(a)(1) based on the degree of federal involvement in dispensing federal low-income housing funds and the defendant's discretionary authority to admit applicants into the program.[34] The circuit court rejected the defendant's argument that he was only a "low-level" employee without any federal authority, noting that he was involved in determining eligibility for aid and that his supervisors made only a cursory review of his decisions. The court focused on the actual discretionary power of the official and not the formal title, finding that "Hang had primary authority for determining who would be the beneficiaries of federal funds.

31. *Id.* (italics added).

32. *Id.* at 499. The Court explained that its analysis was consistent with *Krichman*, asserting that the porter in that case "lacked any duties of an official character," and "[s]imilarly, individuals who work for block grant recipients and business people who provide recipients with goods and services can not be said to be public officials under section 201(a) unless they assume some duties of an official nature." *Id.* at 500.

33. *Id.* at 497.

34. United States v. Hang, 75 F.3d 1275, 1280 (8th Cir. 1996) ("[T]he MPHA was organized for the exclusive purpose of implementing federal programs and is subject to exacting oversight by a federal agency. In addition, during the time period relevant to this case, Hang was largely responsible for determining who qualified for federally subsidized housing.")

Obviously, this is an undertaking in which Hang could not have engaged had he not possessed some federal authority."[35]

II. PRIVATE SECTOR EMPLOYEE

Private sector employees can come within the definition if they are working on behalf of the federal government in administering one of its programs. In *United States v. Kenney*, the defendant was a manager of a corporation that provided services to the Air Force in procuring and approving equipment who told a supplier he would approve the use of cheaper materials if he was given one-half of the cost savings. The defendant argued he had no authority to approve or change contracts, and did not decide whether to accept or reject materials supplied, which was reserved to Air Force officers. The Fourth Circuit found that he did hold a "position of trust" regarding the exercise of federal authority, stating that

> [Kenney's] job also included federal responsibilities in that he was responsible for monitoring and providing information regarding the technical aspects of the edge-marker contract. In providing such information, the evidence shows that his opinion was highly regarded, the decision makers relied upon his technical expertise and deferred to him on many day-to-day decisions.[36]

Other private sector employees found to be a "public official" under § 201 include a real estate appraiser[37] and a grain inspector.[38]

III. FUNDING SOURCE

A person can qualify as a "public official" even though the program receives funding from sources other than the federal government and the official has state-imposed responsibilities. In *United States v. Strissel*, the Fourth Circuit rejected the defendant's argument that he could not be prosecuted under § 201 because his agency administered state-funded programs in addition to a federally funded housing program. The bribes paid by contractors, however, were for contracts to perform work funded by the federal government, and the circuit court stated: "True, Strissel also had some state responsibilities and state funding. However, he does not argue that he was not distributing federal monies in a program established by the federal government."[39]

35. *Id.*

36. 185 F.3d 1217, 1222 (4th Cir. 1999).

37. United States v. Madeoy, 912 F.2d 1486, (D.C. Cir. 1990) ("[H]is is a 'position of public trust': a fee appraiser must certify that he knows the applicable regulations and must promise not to accept any assignment for which he has a conflict of interest or to take any payment other than the appraiser's fee set by the Government.").

38. United States v. Kirby, 587 F.2d 876, 879 (7th Cir. 1978) (in a pre-*Dixson* decision, defendants were "licensed under the United States Warehouse Act, meet the definition of public official in 18 U.S.C. § 201(a) since they were acting 'on behalf of' the Department of Agriculture by issuing the certificates required by the Warehouse Act and its implementing regulations.").

39. 920 F.2d 1162, 1165 (4th Cir. 1990). Note that a defendant who works for a state or local government office may be subject to prosecution for violation of 18 U.S.C. § 666. *See* Chapter 3.

It is not clear whether the same "public official" analysis would apply if the bribes were paid in connection with contract awards funded by the state, so that no federal resources were affected. In other words, does one become a "public official" under § 201(a)(1) by virtue of the federal involvement in the program and the nature of the person's duties, or does the government have to show that federal funding was involved in the transaction tainted by corruption? The focus in *Dixson* on protecting the integrity of federal authority and fiscal resources supports the argument that there must be substantial federal involvement in program or policy for which the bribe was made or offered, and not just that the person happened to exercise federal responsibility at one time or over a different aspect of the program.

IV. SCOPE OF RESPONSIBILITY

A person can be a "public official" even if they have no direct responsibility over the expenditure of federal funds or award of contracts so long as the bribe affects the exercise of federal authority. This element has been shown in cases involving persons charged with oversight of federal prisoners. In *United States v. Velazquez*, the defendants were federal inmates housed in a county prison who bribed a guard as part of an escape plan. They argued that the guard, who was not a federal employee and had no responsibility for administering federal funds, was not a "public official." The Fourth Circuit noted that the county jail contracted to house the federal prisoners, received payment from the federal government and was subject to its regulations, and the guard "supervised the federal prisoners as a federal jailer would."[40]

The same analysis applies to guards employed by corporations that contract with the federal government to house and supervise federal inmates and detainees. In *United States v. Thomas*, the Fifth Circuit, relying on *Velazquez*, held that "[a]lthough he did not have any authority to allocate federal resources, Thomas nevertheless occupied a position of public trust with official federal responsibilities, because he acted on behalf of the United States under the authority of a federal agency which had contracted with his employer."[41]

C. QUESTION OF FACT OR LAW

Although the issue of who is a "public official" has not been discussed extensively in the cases, two courts have taken the position that the determination of whether a person comes within this category under § 201(a)(1) is a question of law reserved for the court and not one of fact that is subject to a jury determination. In *United States v. Madeoy*, the D.C. Circuit rejected the defendant's argument that the assessment of whether there was a bribe offered or paid to a public official was for the jury to decide. Looking to *Dixson*'s extensive analysis of the statute's history and purpose, the circuit court stated that "the Court reached its conclusion through an exercise in statutory interpretation, which conclusively shows that this is not a question for the jury." This led the D.C. Circuit to hold "that whether an individual is a public official within the meaning of the

40. 847 F.2d 140, 142 (4th Cir. 1988).

41. 240 F.3d 445, 448 (5th Cir. 2001).

statute is a question of law, and as such, a matter for judicial resolution."[42] Relying on *Madeoy*, the Eighth Circuit stated in *United States v. Hang*, "The classification of an individual as a 'public official' is a legal determination, and we thus review this issue de novo."[43]

Madeoy's continuing authority is questionable for two reasons. First, the D.C. Circuit's reliance on *Dixson*'s statutory analysis confuses what an appellate court does with the function of a trial court. The Supreme Court's statutory construction of § 201(a)(1) was based on the facts proven at trial regarding the defendants' involvement in the local housing program. The Court determined the scope of the statute based on the particular facts of the case to adopt a rule that a person must occupy a position of trust in exercising federal authority to come within the criminal provision rather than whether as a matter of law every official holding a similar position would always be subject to the statute.

Second, and more importantly, asserting that the determination of whether a person is a "public official" is purely a question of law conflicts with the Supreme Court's subsequent interpretation of a defendant's Fifth Amendment due process right and Sixth Amendment jury trial right, which together require a jury—and not the court—to decide whether there is sufficient proof of the elements of a crime. In *United States v. Gaudin*, decided after *Madeoy*, the Court stated that these constitutional protections "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[44]

While § 201(a)(1) is the definitional portion of the statute and it is the subject of the Supreme Court's analysis in *Dixson*, the operational provisions in § 201(b) and (c) both require the government to prove as an element of the offense that a bribe or unlawful gratuity was made (or offered) to a "public official." To prove a violation of § 201, the government must introduce evidence to establish beyond a reasonable doubt that the person involved in the corruption was a "public official," which is a quintessential factual determination to be made by the jury.[45]

In *United States v. Moore*, the Eleventh Circuit's approach to a different definitional section of § 201, whether there was an "official act," illustrates how the issue should be analyzed. The circuit court stated, "Having established that a broader definition of 'official act' is the controlling precedent, we now must determine whether a reasonable fact finder could have concluded beyond a reasonable doubt that an official act took place."[46] *Moore*'s analysis of this term demonstrates the proper interplay between court and jury, with the judge determining the appropriate definition for the element of the offense and the jury deciding whether there is sufficient evidence to establish that element beyond a reasonable doubt.

42. 912 F.2d 1486, 1494 (D.C. Cir. 1990).

43. 75 F.3d 1275, 1279 (8th Cir. 1996).

44. 515 U.S. 506, 510 (1995).

45. In *Gaudin*, the Supreme Court provided the fundamental steps in the analysis: "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality." *Id.* at 511. Substitute "public official" for "materiality" and the result is clear that the jury must determine this element of the offense.

46. 525 F.3d 1033, 1041 (11th Cir. 2008).

In a § 201 prosecution, it is important for defense counsel to seek an appropriate instruction to have the jury decide whether the person involved in receiving the alleged bribe or unlawful gratuity was a "public official." A court's refusal to instruct the jury on this element of the offense would provide an issue on appeal if there was a conviction. In addition, the question of whether a person was a "public official" can be raised in a pretrial motion to dismiss and in a Rule 29 motion for a judgment of acquittal during or after trial that asks the court to decide as a matter of law that the government's proof is insufficient to establish this element. Failure to raise the issue in the trial court and seek an appropriate jury instruction means that any claim of error on appeal will be subject to the stringent plain error analysis, a very difficult standard for a defendant to meet.[47]

B. "Selected to Be a Public Official"

Section 201(a)(2) includes persons "who have been selected to be a public official" as subject to the criminal prohibition. The term is defined as "any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed." There is scant legislative history of the provision, with the Senate Report on the statute stating rather unhelpfully that the definition is "self-explanatory"[48]—something that is truly rare in the law.

There is only one case that discusses the scope of the provision. In *United States v. Williams*, the district court denied the motion of two defendants to dismiss an unlawful gratuity charge for giving tickets to a presidential inauguration to the man who would be nominated as secretary of agriculture in the incoming administration. The cabinet officer had not been nominated officially because the new president had not yet taken the oath of office at the time of the gratuity, and the defendants argued that "officially informed" required that the president have taken office so that he had the authority to act "officially." The district court rejected the argument:

> The gratuities statute does not require, however, that it be the President who "officially" informs a Cabinet officer of his prospective nomination. Congress held hearings on the Espy nomination as early as January 14, 1993. If someone acting in an official capacity informed Secretary Espy of his impending nomination before January 18, 1993, the statutory element of official notice is satisfied.[49]

While the statute does not require a particular official to inform the person about their pending nomination or appointment, there must be some action taken by a person with federal authority to inform the nominee before § 201 applies to any bribe or gratuity.[50]

47. *See generally* Wright, Klein, King, & Henning, Federal Practice & Procedure: Criminal 3d § 856.

48. S. Rep.No. 87-2213, *reprinted in* 1962 U.S.C.C.A.N. 3852 (1962).

49. 7 F. Supp. 2d 40, 51 (D.D.C. 1998), *rev'd as moot*, United States v. Schaffer, 240 F.3d 35 (D.C. Cir. 2001).

50. One defendant was acquitted at trial, and the second convicted. *United States v. Williams*, 29 F. Supp. 2d 1 (D.D.C. 1998). Before the appeal of the convicted defendant could be decided, President Bill Clinton pardoned him, and the

C. "Official Act"

A bribe or unlawful gratuity must be linked to an actual or proposed exercise of governmental authority to come within the statutory prohibition. Section 201(a)(3) defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

1. Type of Authority

The definition of "official act" has been part of the bribery statute since 1866.[51] In *United States v. Birdsall*, decided in 1911, the Supreme Court gave a broad reading to what constitutes an "official act," rejecting the lower court's position that the exercise of authority sought through the bribe was not specifically authorized by statute, and therefore fell outside the bribery law. The Court stated:

> To constitute official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.[52]

This broad reading of "official act" appears to encompass any action taken by a federal official in connection with his job, but some limitations have been applied.

A. SCOPE OF CONDUCT

In *United States v. Sun-Diamond Growers of California*, the Supreme Court imposed a modest limit on the meaning of "official act" in explaining that not every action by a federal official comes within the statutory definition. The issue in *Sun-Diamond* concerned gratuities provided to the secretary of agriculture to curry favor with him.

The Court required the government to identify a specific official act involving a "question, matter, cause, suit, proceeding or controversy" related to the benefit, explaining that if any conduct by a federal official were an "official act," it would lead to absurdities. For example, when a championship

court of appeals dismissed the appeal as moot and vacated all of the prior opinions and judgments. *United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001). Thus, the precedential value of the district court opinion in *Williams* is open to question, although the decision appears to be a reasonable analysis of the statute.

51. Act of July 13, 1866, 14 Stat. 168 (1866).

52. 233 U.S. 223, 230–31 (1911) (citations omitted).

sports team visits the White House and presents the president with one of its jerseys—usually with the president's name and the number "1" on the back—that is certainly a gratuity given for hosting the team and would violate the statute if the event constituted an "official act."

The Court held that this would not come within the statutory definition, however, so that when the violation is linked to a particular "official act," it is possible to eliminate the absurdities *through the definition of that term*. When, however, no particular "official act" need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.[53]

After Sun-*Diamond*, the government must identify a specific exercise of governmental authority and not just that an official might have been able to provide some assistance at a later point in time. As discussed in section V.C below, this analysis effectively eliminates prosecution for a unlawful gratuities violation for a gift given before the official act.

B. BROAD VIEWS OF AUTHORITY

It is not necessary that the official have the power to implement a specific policy or program in order for the bribe or unlawful gratuity be made for an "official act." Courts take a pragmatic view of the official's position and the scope of authority to determine whether there was an "official act." In *United States v. Biaggi*, the Second Circuit upheld the unlawful gratuities conviction of a Congressman who wrote letters on behalf of a company to New York City officials seeking benefits for the company from the municipal government. The circuit court noted that the authority of a member of Congress is not limited to just federal legislative acts, and the statute encompassed "all of the acts normally thought to constitute a congressman's legitimate use of his office."[54]

In *United States v. Jefferson*, the district court held that the determination of what constitutes an "official act" includes not just legally prescribed duties, but also comprehends "settled customary duty or practice" so long as it affects a government decision or action.[55] In *Jefferson*, the court rejected a defendant Congressman's motion to dismiss bribery charges under § 201(b) related to lobbying of the Export-Import Bank because that did not involve any official duties of a member of Congress: "§ 201 applies when an official may influence *any* government decision through the performance of his duties; the official charged under § 201 need not be the official empowered to make the decision at issue."[56] Thus, whether the public official has the ultimate authority to make

53. 526 U.S. 398, 407–08 (1999) (italics in original).

54. 853 F.2d 89, 97 (2nd Cir. 1988).

55. 562 F. Supp. 2d 687, 693 (E.D. Va. 2008).

56. *Id.* (italics in original). The district court explained that

> if the government is able to prove, for instance, that (i) lobbying government agencies such as the Export-Import Bank of the United States (Ex-Im Bank) on behalf of constituents is among the settled customary duties or practices of a Member of Congress, and that (ii) the Ex-Im Bank's decision to award financial support to American companies is a government decision, then the government will have proved the necessary elements of an official act under § 201.
>
> *Id.*

the decision or exercise authority over the matter is not dispositive, so long as the official's conduct involved or affected a government decision.[57]

Even lower-level employees who misuse their access to government documents and computers can engage in an "official act" even though they have no authority to grant benefits or implement policy. In *United States v. Parker*, the Fifth Circuit upheld the conviction of a clerk to an Administrative Law Judge who altered documents to provide social security benefits in exchange for payments. The circuit court stated, "We therefore hold that the term 'official act' encompasses use of governmental computer systems to fraudulently create documents for the benefit of the employee or a third party for compensation, even when the employee's scope of authority does not formally encompass the act."[58]

In *United States v. Carson*, the Second Circuit rejected the argument of a defendant, an aide to a senator, who stated that he was not using his official power but instead was on a "personal frolic" when he tried to intercede in a criminal case before the Department of Justice in exchange for a $100,000 payment. The circuit court upheld his conviction under § 201(b) because

> even if the objective of the use of influence here might be categorized as "personal," the determinative factor is that the primary source of any conceivable influence on the Justice Department was the official position held by appellant, enhanced as it was by the status of his employer's membership in the one most powerful congressional committee affecting that Department's operations.[59]

The Fourth Circuit held in *United States v. Miller* that it did not matter whether the exercise of governmental authority would result in a correct decision or was otherwise required, so long as the bribe or unlawful gratuity was connected with an "official act." The circuit court stated,

> It is immaterial whether the official action which the briber seeks to influence is right or wrong, in the sense that it is expected to result in pecuniary injury to the Government or that it calls upon the bribe recipient to do something other than what he is legally obligated to do.[60]

57. The district court offered the following hypothetical:

> [A] member of Congress accepts money to contact the Department of Homeland Security on behalf of a constituent and attempts to influence the Department to expedite the immigration application of the constituent's family-member. Under defendant's theory, this would not violate § 201 because the member of Congress lacks actual authority to grant or deny the immigration application. This is incorrect, for "[i]t is the corruption of official decisions through the misuse of influence in governmental decision-making which the bribery statute makes criminal." *United States v. Muntain*, 610 F.2d 964, 968 (D.C.Cir.1979).

Id. at 694 n.15.

58. 133 F.3d 322, 326 (5th Cir. 1998).

59. 464 F.2d 424, 434 (2nd Cir. 1972).

60. 340 F.2d 421, 424 (4th Cir. 1965). *See also* Daniels v. United States, 17 F.2d 339, 343 (9th Cir. 1927) ("It is generally held that to constitute the offense of attempted bribery it is immaterial whether the official action sought to be influenced be right or wrong.").

The Second Circuit also found in *Biaggi* that an "official act" is not limited to conduct related to federal agencies. The congressman's letters, on his official stationery, were sent to local officials. The circuit court noted that § 203, the conflict of interest provision, is limited to acts before specified federal agencies, a limitation which is not in the definition of "official act."[61] It stated that "we see no basis for ruling that a congressman's official acts—especially those 'demonstrating Congressional interest'—may not include efforts that are directed toward local rather than federal officials."[62] Thus, in light of *Carson* and *Biaggi*, even an illegitimate use of federal authority comes within the definition of "official act," and members of Congress and their staff have broad authority to intervene in any area in which there is a potential federal interest.[63] Along the same lines, even if the public official does not have the power to affect the exercise of governmental power, the offeror can still be convicted of bribery or unlawful gratuity if the intent was to obtain the result.[64]

2. *"Question, Matter, Cause, Suit, Proceeding or Controversy"*

As the Supreme Court noted in *Sun-Diamond*, just because a federal official is involved in the conduct does not necessarily mean that it is an "official act" under § 201. The statute requires that there be a decision or action on any "question, matter, cause, suit, proceeding or controversy" that involves the exercise of federal authority. In *United States v. Valdes*, a majority of the D.C. Circuit, sitting *en banc*, relied on *Sun-Diamond* to adopt a narrower view of what constitutes an "official act," questioning along the way whether the broader reading in *Birdsall* should still be applicable to any use of government authority.[65]

The defendant in *Valdes* was a District of Columbia police detective convicted of accepting an unlawful gratuity for looking up the criminal history of individuals in police databases. The information was publicly available, and the defendant did not stop an investigation or otherwise

61. *Id*. at 99 ("We assume that Congress's failure similarly to limit § 201's definition of 'official act' reflects an intention that § 201 not be restricted to acts directed at federal agencies.").

62. *Id*.

63. The definition of an official act in § 201 is broader than the protection afforded members of Congress under the Speech or Debate Clause, which provides that senators and representatives "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6. In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court noted

> [t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

Id. at 625. The scope of the Speech or Debate Clause is discussed in Chapter 16.

64. *Carson*, 464 F.2d at 433 ("There is no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a Government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision."). *See also* United States Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir. 1985); United States v. Louie Gim Hall, 245 F.2d 338, 339 (2d Cir. 1957); Wilson v. United States, 230 F.2d 521 (4th Cir. 1956); Hurley v. United States, 192 F.2d 297 (4th Cir. 1951).

65. 475 F.3d 1319 (D.C. Cir. 2007) (en banc). The court was divided 7 to 5.

interfere with the exercise of proper police authority. In overturning the conviction, the D.C. Circuit stated that *Birdsall* "did not, however, stand for the proposition that every action within the range of official duties *automatically* satisfies § 201's definition; it merely made clear the coverage of activities performed as a matter of custom."[66] The circuit court stated the six-term series

> refers to a class of questions or matters whose answer or disposition is determined by the government. That class includes such questions as "Should the Congress enact new legislation regulating corporate directors?," "Should this person be prosecuted?," and "What firm should supply submarines for the Navy?" But it would not include questions like "What is your name?," an issue that the government does not normally resolve.[67]

While the defendant used his position on the police force to benefit himself, he did not accept the gratuity in connection with the implementation of any government policy or procedure. According to *Valdes*, "§ 201 is not about officials' moonlighting, or their misuse of government resources, or the two in combination."[68] That type of misconduct is subject to prosecution under other statutes, such as § 641, which prohibits conversion of government property. Moreover, the officer's inquiry into the police databases did not involve the conduct of an investigation, which would be the type of matter that would be an exercise of government authority and therefore an "official act."[69]

The Eleventh Circuit disagreed with the *Valdes* analysis of "official act" in *United States v. Moore*, asserting that *Birdsall*'s broad analysis is the proper test. In *Moore*, the defendants were federal correctional officers who made arrangements to engage in sexual relations with female inmates in exchange for allowing them to receive contraband. The circuit court held that, under *Birdsall*, the officers engaged in official acts by changing their assignments, permitting prisoners to contact officers, and providing keys to an office to meet with an inmate. The court found that "[a]ll of these actions fall within the broad definition of 'official act' set forth in *Birdsall*."[70]

The decision in *Moore* can be reconciled with *Valdes*'s narrower approach. The actions of the corrections officers were not simply moonlighting, but involved a direct exercise of their authority

66. *Id*. at 1323 (italics in original). Circuit Judge Henderson's dissent argued, "First, and most important, *stare decisis* requires us to comply with the United States Supreme Court's broad interpretation of the term 'official act' as set forth in *United States v. Birdsall*." *Id*. at 1331 (Henderson, J., dissenting).

67. *Id*. at 1324.

68. *Id*. The circuit court asserted, "While there does not appear to be any direct precedent on the point, it seems implausible to assert that any interrogative action done by an officer using government resources constitutes an action on an 'investigation' of the kind which would be covered by § 201(c)." *Id*. at 1326

69. The circuit court stated,

> At the very least, we believe that a police officer's ascertainment of answers to questions cannot amount to a "decision or action" on an investigation unless the ascertainment itself, or other activity in the real world, could have some prospect of bringing about (or, for that matter, squelching or redirecting) some sort of government investigation.

Id.

70. 525 F.3d 1033, 1041 (11th Cir. 2008).

to gain the benefit of sexual encounters with the inmates. Changing work assignments, allowing otherwise unauthorized contacts with guards, and accessing prison offices are all matters or questions determined by the official. In *Valdes*, the detective did not interfere with regular police business, instead using his position to transfer information that could have been obtained by other means. Thus, there was no abuse of government authority, only a misuse of the resources available to the officer as a public official. The conduct of the officers in *Moore* was not, as they argued, "low level actions" that somehow could not reach being an official act. *Valdes* does not focus on how important the action is, but whether it relates to a traditional exercise of authority.

Despite the D.C. Circuit's criticism of *Birdsall*, that decision certainly remains as a binding precedent, giving a broad reading to what can be an "official act" unconstrained by any formal requirements of legislative or administrative description. *Birdsall*'s pragmatic approach emphasizes the actual authority and influence of a public official and not the narrow description of the officeholder's official duties. *Valdes* is not necessarily inconsistent with *Birdsall*, despite the District of Columbia's assertion that it was, because the test it adopted focuses on whether there is an abuse of federal authority and influence that looks to what type of action or decision the public official undertook, not just whether the official gained a benefit that might otherwise be considered improper or unethical. *Valdes* challenges the prosecution to identify what particular "question, matter, cause, suit, proceeding or controversy" was the subject of the bribe or unlawful gratuity, and not just that the person meets the definition of a "public official," which is a different element of the offense.[71]

D. "Anything of Value"

Section 201(a) does not define "anything of value," but that term appears in a number of other statutes and has been broadly construed by the courts.[72] Of course, a direct payment or offer of money or other tangible property—as that term is traditionally defined—constitutes a thing of

71. The D.C. Circuit acknowledged the limits of its decision, describing prior cases as unaffected by its focus on the exercise of governmental authority:

> By focusing on those questions, matters, causes, suits, proceedings, and controversies that are decided by the government, our interpretation of the statute easily covers: a clerk's manufacture of official government approval of a Supplemental Security Income benefit, as in United States v. Parker, 133 F.3d 322 (5th Cir.1998); a congressman's use of his office to secure Navy contracts for a ship repair firm, as in United States v. Biaggi, 853 F.2d 89 (2d Cir.1988); and a Veterans' Bureau official's activity securing a favorable outcome on a disability claim, as in Beach v. United States, 19 F.2d 739 (8th Cir.1927) (based on a predecessor statute). All of those cases are clearly covered by the statute because they concern inappropriate influence on decisions that the government actually makes. Questions like "Should this person receive a contract or disability benefit, and for how much?" are simply in a different class from questions like "Where do you live?" and "What kind of car do you drive?" Section 201(a)(3) clearly encompasses the former, but not the latter.

475 F.3d at 1325.

72. For example, a "contribution" to a political campaign is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(a)(i). Criminal provisions using the term include 18 U.S.C. § 657 (embezzlement and misapplication of bank funds), § 704 (sale of military medals), § 875 (interstate extortion threat), and § 912 (impersonating a federal officer).

value. Even a loan that the official repaid can constitute a thing of value when he was suffering financial difficulties and could not otherwise have obtained unsecured credit.[73] In *United States v. Kemp*, a mail fraud prosecution premised on bribery of a municipal official, the Third Circuit held that "as a legal matter, we conclude that providing a loan to a public official (or his friends or family) that would have otherwise been unavailable to that official or available at a higher interest rate may constitute a bribe."[74]

The criminal prohibition is not limited to physical items or those with a specified market value, and also includes intangible items or services that would have a subjective value to the recipient even though they would not constitute property in the traditional sense.[75] One circuit court noted that "Congress' frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelope both tangibles and intangibles."[76] In *United States v. Williams*, the prosecution of a Senator for accepting shares in a corporation as part of the Abscam investigation, the Second Circuit stated, "Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe."[77]

1. Intangible Value

Value can be in the eye of the beholder, which under § 201 is the payer (or offeror) and the "public official."[78] In *United States v. Moore*, the Eleventh Circuit noted that "monetary worth is not the sole measure of value" in finding that the district court did not commit plain error in instructing the jury that sexual relations can constitute "anything of value" under § 201(a).[79] Similarly, in *United States v. Sun-Diamond Growers of California*, the district court found that providing funds to the secretary of agriculture's girlfriend so she could travel with him on official business constituted a thing of value based on the companionship she would provide.[80]

73. United States v. Gorman, 807 F.2d 1299, 1304–1305 (6th Cir. 1986). *See also* United States v. Crozier, 987 F.2d 893, 901 (2nd Cir. 1993) ("[A]s we have held in connection with § 201, any payment that the defendant subjectively believes has value, including a loan, constitutes a thing 'of value' within the meaning of § 666(c)").

74. 500 F.3d 257, 285 (3rd Cir. 2007).

75. Note that under the mail and wire fraud statutes, property includes intangible property, such as information, *see* Carpenter v. United States, 484 U.S. 19, 25 (1987) ("[T]he object of the scheme was to take the Journal's confidential business information—the publication schedule and contents of the 'Heard' column—and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes."), and "right of honest services" as prescribed in 18 U.S.C. § 1346. *See* Chapter 6.

76. United States v. Nilsen, 967 F.2d 539, 542 (11th Cir. 1992).

77. 705 F.2d 603, 623 (2nd Cir. 1983).

78. Note that for a charge under § 666, the benefit provided (or offered) must be "in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." While the bribe need not be for $5,000 or more, the statute does require that the corruption affect a financially valuable transaction. Section 201 does not have a similar financial minimum. *See* chapter 4.

79. 525 F.3d 1033, 1048 (11th Cir. 2008). *See also* United States v. Marmolejo, 89 F.3d 1185, 1192 (5th Cir. 1996) (sexual relations as thing of value in § 666 prosecution).

80. 941 F. Supp. 1262, 1270 (D.D.C. 1996); *rev'd on other grounds* 526 U.S. 398 (1999).

The broad interpretation of the term means that courts do not focus solely on objective measures, such as monetary worth of the benefit conferred. In *United States v. Gorman*, the Sixth Circuit stated, "All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment."[81] In *United States v. Williams*, the Second Circuit rejected a senator's argument that the stock he received in exchange for assisting a fictitious Arab sheik had no commercial value and therefore the transfer was not a bribe, holding that the trial court properly instructed the jury "to focus on the value that the defendants subjectively attached to the items received."[82] In *United States v. McDade*, the district court pointed out that a green jacket which was a replica of the one awarded to the winner of the Master's golf tournament would have a high value to a fan of the sport.[83]

There is a difference between who must receive the thing of value under the bribery provision, which encompasses the receipt "personally or for any other person or entity," and an unlawful gratuity violation that occurs only if the public official "personally" receives the benefit. This distinction requires a closer analysis of the transaction in an unlawful gratuity prosecution to identify the specific benefit provided to the official for or because of the official action, and not just that another person received the gift.

In *Sun-Diamond Growers*, the government had to show a benefit to the secretary of agriculture himself and not just to his girlfriend, so identifying the intangible benefit of her companionship was required to establish the offense. In *United States v. McDade*, the district court allowed an unlawful gratuities charge to proceed to trial based in part on a congressman's son receiving a college scholarship. The court held that the congressman was obligated by state law to provide for his son's education, so there was a personal receipt because "the payment of scholarship money to a child bestowed a personal benefit on the scholarship recipient's parents, since the parents were relieved, at least partially, of their duty to pay for the child's education."[84]

2. Limits on "Anything of Value"

Despite the apparent breadth of the term "anything of value," the lower courts have recognized some limits on the application of § 201 so that not every putative benefit comes within § 201. In *United States v. Biaggi*, a Small Business Administration (SBA) official was offered a job in a law firm that would be paid for in part by a company receiving SBA loans on which the official had provided assistance. The Second Circuit questioned whether the offer of a job constitutes a sufficient thing of value for § 201 in light of the fact that such conduct is already covered by 18 U.S.C. § 208, which prohibits a federal employee from being involved in any decision regarding

81. 807 F.2d 1299, 1304 (6th Cir. 1986).

82. 705 F.2d at 623.

83. 827 F. Supp. 1153, 1174 (E.D. Pa. 1993) ("The green jacket is one of the most recognizable and hallowed items of clothing in the world of sports, presumptive covetable by a golf buff—although, concededly, the jacket without the Masters victory is something of an empty vestment.").

84. 827 F. Supp. 1153, 1175 (E.D. Pa. 1993), *aff'd* 28 F.3d 283 (3rd Cir. 1994).

a company "with whom he is negotiating or has any arrangement concerning prospective employment."[85] Although the court found the job offer constituted a thing of value in this instance, it noted that "the issue is close not only because a job promise is not unlawful under all circumstances but also because it was part of [defendant]'s duties as an SBA official to assist companies participating in the section 8(a) program."[86]

In *United States v. Gorman*, the Sixth Circuit found that an offer of future employment was a thing of value because the defendant would receive a salary three times his government pay and "[c]onsidering Gorman's precarious financial situation, such future employment would clearly be a thing of value for purposes of Section 201." In *United States v. Cicco*, a § 666 case, the Third Circuit upheld a judgment of acquittal in a prosecution for bribery when the thing of value was a municipal job conditioned on providing election day services to one party's candidate.[87] Although the circuit court did not specifically address whether such a benefit could constitute "anything of value," it did hold that because there is a specific federal statute making it a crime for such an arrangement—18 U.S.C. § 601[88]—Congress could not have intended for a more general bribery statute to comprehend the same conduct. Thus, this type of *quid pro quo* arrangement may also fall outside the scope of § 201.

In *United States v. Choy*, the Ninth Circuit overturned a defendant's bribery conviction based on his supplying the funds to a private individual to purchase a computer that would be used to facilitate the bribery of a government official. The computer would link to a government computer to allow the importation of items, and a bribe would be paid to an official to authorize the transactions. No bribe was ever paid directly to an official, and at trial the government argued that an item provided to enable the official to receive a bribe constitutes a thing of value.[89] The circuit court found the government's theory too attenuated, explaining that "[t]here is no end to the chain of reasoning underlying the government's theory: payment of virtually any expense in preparation for offering a bribe would become a consummated crime of bribery. We cannot interpret the bribery statute so loosely."

In *United States v. Head*, the Fourth Circuit held that it was error not to give a jury instruction that an appearance fee paid to a congressman to attend a banquet could not constitute "anything of value" under § 201. Although the government argued that the payment was not intended to be

85. *See* Chapter 9.

86. 909 F.2d 662, 685 (2nd Cir. 1990). The circuit court concluded that "the jury could reasonably find that the job promise was more than a gratuitous offer of post-government employment, it was a bribe accepted by [defendant] in exchange for his willingness to be influenced in performing his duties for Wedtech's benefit." *Id*. The court also indicated a willingness to find the job offer an unlawful gratuity for past acts by the defendant in favor of the company.

87. 938 F.2d 441 (3rd Cir. 1991).

88. The statute makes it a crime to cause a person "to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of (1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work. . . ." 18 U.S.C. § 601(a). *See* Chapter 12.

89. 309 F.3d 602, 606 (9th Cir. 2002) ("The government urges the theory that anything that Choy paid to equip Clopp necessarily conferred a benefit on the FDA official by enabling him to receive a bribe."). In essence, the government argued a type of attempt theory of bribery so that any substantial step involving a thing of value is itself a bribe.

an honorarium but a bribe, evidence showing the congressman did in fact attend the banquet means that the payment was *bona fide* and therefore not a thing a value.[90]

E. Offer to Pay

To constitute a bribe, there need not be an actual payment, so that the crime is complete upon an offer or promise to pay or the solicitation of the payment in exchange for the exercise of government authority. The statute thus reaches conduct that would otherwise constitute an attempt to commit the crime, so that even if the other party has no intention of complying with the request the crime has been committed. Moreover, the government need not prove that the defendant took a "substantial step" toward paying or receiving the bribe because the crime is complete upon the offer or solicitation of the bribe, not the actual payment or receipt.[91] In *United States v. Jacobs*, the Second Circuit stated the governing standard, that there is a sufficient offer to pay a bribe when the offeror "expresses an ability and desire to pay."[92]

A statement that the money to pay an IRS agent "was . . . available" has been held sufficient to constitute an offer to pay.[93] On the other hand, a statement that "some people . . . want to know if you can be bought, if you will change your testimony" was insufficient to be an offer to pay and instead constituted "mere preparation to commit the crime—a 'feel out' " that did not rise to the level of an offer.[94] In *United States v. Muhammad*, the Seventh Circuit found sufficient evidence of the solicitation of a bribe by a juror in the following circumstances:

> At trial, the Government provided substantial evidence demonstrating that Muhammad eagerly sought a bribe from Cumberland. Significantly, Muhammad twice contacted the company, leaving a pager number and a telephone number, so the company could inquire what kind of "help" he could provide regarding the *Favala* case. Moreover, Muhammad agreed to receive $2,500 for his assistance in assuring a favorable Cumberland verdict, he arranged to meet an undercover agent in order to accept half of the bribe, he went to receive the money at the specified time and place, and he admitted that he went to the rendezvous point to receive the money. Contrary to defendant's assertions,

90. 641 F.2d 174, 180 (4th Cir. 1981). It is arguable whether the Fourth Circuit's analysis is correct. A payment of money, regardless of whether it is a legitimate honorarium or a bribe, is a thing of value. The better analysis would be that the jury should be instructed that if the payment was in fact legitimate then there was no *quid pro quo* to establish a bribe. There was an exchange of value, and the real issue in *Head* was whether it was a corrupt transaction.

91. *See* United States v. Muhammad, 120 F.3d 688, 694 (7th Cir. 1997) ("§ 201 does not require the Government to prove that Muhammad took a substantial step towards receiving the bribe. Rather, the statute criminalizes the mere solicitation of a bribe.").

92. 431 F.2d 754, 760 (2nd Cir. 1970); *see also* United States v. Rasco, 853 F.2d 501, 505 (7th Cir.1988) (construing the bank bribery statute, "The crime of offering a bribe is completed when a defendant expresses an ability and a desire to pay the bribe.").

93. United States v. Shulman, 624 F.2d 384, 388 (2nd Cir. 1980).

94. United States v. Hernandez, 731 F.2d 11471150 (5th Cir. 1984).

> these facts reveal that Muhammad eagerly sought the bribe and that he was not merely "feeling out" Cumberland to determine their interest in such an arrangement.[95]

While the term "offer" has a particular meaning in the law of contracts, courts do not require that a strictly legal offer be made to come within the statutory prohibition. In *United States v. Synowiec*, the Seventh Circuit explained that "[i]t is not necessary for a briber to be familiar with *Williston on Contracts* in order to make an illegal offer."[96] The circuit court found that a defendant's statements coupled with rubbing his index finger and thumb together "in a universally understood gesture implying money[] passes the test" of being an offer of a bribe, explaining that "[u]sing technical civil law hornbook definitions of 'offer' would be at odds with the goal that § 201 be an effective net for snaring those who would subvert the public good."[97]

IV. BRIBERY

Section 201(b) makes it a crime for both the offeror and the public official to corruptly engage in a transfer of "anything of value" with the intent:

(A) to influence any official act; or
(B) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person . . . .

The key distinction between a bribe and an unlawful gratuity is the intent element of the offense.[98] As the Supreme Court explained in *United States v. Sun-Diamond Growers of California*,

> [F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.[99]

95. 120 F.3d 688, 693–94 (7th Cir. 1997).

96. 333 F.3d 786, 789 (7th Cir. 2003).

97. *Id.* at 790.

98. *See* United States v. Alfisi, 308 F.3d 144, 150 (2nd Cir. 2002) ("The element of a quid pro quo or a direct exchange is absent from the offense of paying an unlawful gratuity. To commit that offense, it is enough that the payment be a reward for a past official act or made in the hope of obtaining general good will in the payee's performance of official acts off in the future."); United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) ("The bribery section ((c)(1)) makes necessary an explicit Quid pro quo which need not exist if only an illegal gratuity is involved").

99. 526 U.S. at 404–05.

To establish the payment and receipt of a bribe, the government must prove that the defendant acted "corruptly," which requires proof that there was a *quid pro quo* arrangement between the offeror and the public official to influence the exercise of public authority. There is no requirement that the public official undertake the official act sought, as the Supreme Court explained in *United States v. Brewster*, when it noted that "acceptance of the bribe is the violation of the statute, not performance of the illegal promise."[100]

A. Quid Pro Quo

The term "corrupt" requires proof that the defendant had a specific intent in the transaction, therefore the prosecution must introduce evidence from which the jury can infer the defendant's subjective state of mind, usually by circumstantial evidence. The *quid pro quo* that establishes the defendant acted corruptly is "the intent to receive a specific benefit in return for the payment."[101] As one court stated, "[B]ribery involves the giving of value to procure a specific official action from a public official."[102]

While courts sometimes refer to the *quid pro quo* as a "meeting of the minds," the offeror and the public official do not have to have the type of agreement one would expect for an enforceable contract. Indeed, the agreement can be tacit, so that a "wink and a nod" may be sufficient to establish the intent to confer a benefit for an exercise of authority.[103] The offer or agreement must *precede* the official act sought, but there need not be an actual payment prior to the exercise of authority so long as the parties had a sufficient understanding about the nature of the exchange.[104] Similarly, the public official need not implement or affect any government action for the crime to be complete. The Supreme Court noted in *Evans v. United States* that "fulfillment of the *quid pro quo* is not an element of the offense,"[105] while in *United States v. Brewster* it stated that "it is taking the bribe, not performance of the illicit compact, that is a criminal act."[106]

The government is not required to show that the offer or payment was for a particular official act, and that "it is sufficient to show that the payor intended for each payment to induce the official to

100. 408 U.S. 501, 526 (1972).

101. United States v. Jennings, 160 F.3d 1006, 1013 (4th Cir. 1998); *see also* United States v. Niederberger, 580 F.2d 63, 68 (3rd Cir. 1978) ("It is clear, then, that § 201 requires as one of its elements a quid pro quo.")

102. United States v. Alfisi, 308 F.3d 144, 149 (2d Cir. 2002).

103. *See* United States v. Massey, 89 F.3d 1433, 1439 (11th Cir. 1996) (direct evidence of an agreement is unnecessary, and "[t]o hold otherwise 'would allow [defendants] to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.'") (*quoting* United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992)).

104. United States v. Bonito, 57 F.3d 167, 171 (2nd Cir. 1995) ("[T]he corrupt agreement, offer or payment must precede the official act to be influenced or rewarded.").

105. 504 U.S. 255, 268 (1992). *Evans* was a Hobbs Act prosecution, and the Court's analysis of bribery applies to other statutes.

106. 408 U.S. 501, 526 (1972).

adopt a specific course of action."[107] For example, in *United States v. Quinn*, the Fourth Circuit upheld the defendants' convictions based on seeking benefits from government contractors in exchange for favorable consideration in the award of future contracts. The circuit court rejected the argument that the indictment did not allege with sufficient particularity that the defendants intended to exchange a specific payment for a particular official act. A course of conduct showing benefits to the payer or a pattern of favoritism is sufficient to establish the *quid pro quo* without requiring that the two parties agreed upon the particular acts that the public official would perform.[108]

Although most bribes are paid in advance of the expected exercise of government authority, only the *agreement* must be in place before the public official acts and the actual payment could be made at a later time. In *United States v. Jennings*, the Fourth Circuit stated that "the timing of the payment in relation to the official act for which it is made is (in theory) irrelevant. Bribes often are paid before the fact, but 'it is only logical that in certain situations the bribe will not actually be conveyed until the act is done.' "[109] In *United States v. Harvey*, the same court rejected the argument that no bribe could be inferred from payments made after the approval of a contract, stating that "reliance on the timing of the alleged bribes is misplaced."[110]

B. Object of the Bribe

Section 201(b) proscribes the offer (and payment) or solicitation (and receipt) of a bribe that is given for three purposes: (1) to influence any official act; (2) to seek the public official's assistance in committing a fraud against the United States; and (3) to induce the public official to act or fail to act "in violation of the lawful duty of such official or person." An official need not agree to change his position in order for an offer (or solicitation) to constitute a bribe, nor must the official act sought be harmful to the government or otherwise a violation of the official's duty.[111] Similarly, even if the official could have a lawful claim to the payment received, if there is a *quid pro quo* agreement then the statute has been violated.[112]

107. United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir 1998).

108. 359 F.3d 666, 673–74 (4th Cir. 2004).

109. 160 F.3d 1006, 1014 (4th Cir. 1998) (quoting *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982)).

110. 532 F.3d 326, 335 (4th Cir. 2008); *see also* United States v. Holck, 398 F. Supp. 2d 338, 354 (E.D. Pa. 2005) (rejecting the defendants' argument that the attenuation between providing loans to the public official and the official act prevented the jury from finding the requisite *quid pro quo*).

111. *See* United States v. Orenuga, 430 F.3d 1158, 1165–66 (D.C. Cir. 2005) (Court properly instructed the jury that "[i]t is not a defense to the crime of bribery that had there been no bribe, the public official might have lawfully and properly performed the same act."); United States v. Quinn, 359 F.3d 666, 675 (4th Cir. 2004) ("It is not necessary for conviction under § 201(b) that the official act offered in exchange for the bribe be harmful to the government or inconsistent with the official's legal obligations . . . . By the same reasoning, it does not matter whether the government official would have to change his or her conduct to satisfy the payor's expectations."); United States v. Cashin, 308 F.3d 144, 150 (2d Cir. 2002) (rejecting defendant's argument "that the term 'corruptly' requires evidence of an intent to procure a violation of the public official's duty.").

112. *See* Palliser v. United States, 136 U.S. 257, 264–265 (1890) ("A promise to a public officer that, if he will do a certain unlawful act, he shall be paid a certain compensation, is an offer to bribe him to do the unlawful act; and an offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the

While the defendant must act "corruptly," the statute is ambiguous about whether the public official must intend to commit (or forego) the act that is the object of the bribe, or whether the proposed act or assistance need only be the reason for the corrupt transaction. In other words, while there must be a *quid pro quo* agreement, however framed, it is not clear whether the government must prove that the public official intended to undertake the conduct that would complete the agreement at the time of the *quid pro quo* arrangement.

1. Intent to Act

If a second intent is required, then it could be a defense to a bribery charge if the public official did not have the authority or power to complete the *quid pro quo* and therefore could not have intended to be influenced or induced. This would be a type of impossibility defense, that although the public official entered into a *quid pro quo* with the offeror, that agreement could not be fulfilled and therefore a violation could not have occurred. In traditional criminal law terms, this would be a hybrid factual legal impossibility defense because the factual mistake regarding the official's authority would make it legally impossible to commit the offense.[113]

The Fifth Circuit rejected this argument in *United States v. Valle*, in which an Immigration and Customs Enforcement (ICE) officer was charged under § 201(b)(2)(C) for demanding a $20,000 payment from an alien to remove criminal charges from his record when in fact there were no pending charges against the alien and the defendant did not have the authority to do so. The circuit court held that

> an official may be convicted under § 201(b)(2), if he has corruptly entered into a quid pro quo, knowing that the purpose behind the payment that he has received, or agreed to receive, is to induce or influence him in an official act, even if he has no intention of actually fulfilling his end of the bargain.[114]

The demand was a violation of the ICE agent's official duty, even though he did not have the authority to complete the object of the *quid pro quo*. A dissenting opinion argued for reversal of the conviction because "it was an objectively logical impossibility for Valle to have formed the specific intent to deliver on his part of . . . [an] indispensable element of a *quid pro quo*."[115]

statute because the portion of that money which he would ultimately have the right to retain, by way of commission, from the United States, would be no greater than he would have upon a lawful sale for cash of an equal amount of postage stamps.").

113. *See* Joshua Dressler, Understanding Criminal Law § 27.07[D][3][a] (5th ed. 2009). The classic example of hybrid legal impossibility is where a defendant is charged with receiving stolen property, but the property was not in fact stolen and therefore the charge cannot stand. *See* People v. Jaffe, 78 N.E. 169 (N.Y. 1906).

114. 538 F.3d 341, 347 (5th Cir. 2008).

115. *Id.* at 351 (Weiner, J., dissenting).

2. The Playacting Defense

A congressman tried an interesting variant on this issue, dubbed the "playacting" defense by the Third Circuit, in one of the Abscam prosecutions. Former Representative Michael "Ozzie" Myers claimed that he took the money intended as a bribe while ostensibly promising to provide assistance on immigration matters, but had no intention of ever following through on the *quid pro quo* agreement—in effect, he was a thief who defrauded the payers but not a bribe recipient. Rejecting this approach, the circuit court stated that for a violation of § 201(b) " 'being influenced' does not describe the Congressman's true intent, it describes the intention he conveys to the briber in exchange for the bribe."[116] The *Myers* court relied on the Supreme Court's statement in *United States v. Hood*, a prosecution for soliciting bribes in exchange for appointments to office, that "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption."[117] Thus, the Third Circuit concluded that "[w]ith respect to the bribery statute, we believe the defense of fraud is equally unavailable. If Myers was 'playacting' and giving false promises of assistance to people he believed were offering him money to influence his official actions, he violated the bribery statute."[118]

3. Impossibility

The Third Circuit undertook an impossibility analysis in *United States v. Ozcelik*, in which a Customs and Border Protection officer sought a payment from an alien who faced deportation for two of his "friends" in the Immigration and Naturalization Service to enter changes into the alien's records that would allow him to remain in the country. The circuit court analyzed the "official act" the defendant undertook, because he did not have the authority to assist the alien to remain in the United States. There was no evidence as to the identity of the "friends" the defendant purportedly solicited the bribe for, and the government's theory was that he aided and abetted the unknown officials in violation of his official duty. The Third Circuit upheld the conviction on the ground that "[a]lthough there is no evidence that the friend actually adjusted the visa status, there is evidence from which the jury could infer that the friend agreed to adjust the visa, and it was at that point that the crime of the principal was complete."[119]

116. 692 F.2d 823, 841 (2d Cir. 1982).

117. 343 U.S. 148, 151 (1952).

118. 692 F.2d at 842.

119. 527 F.3d 88, 95 (3rd Cir. 2008). *Ozcelik* raises an interesting question whether a public official who lies about his authority to obtain a bribe violates § 201(b) when any payment could not influence an official act or induce the official to violate a lawful duty. It was not clear in *Ozcelik* whether an official with authority actually existed, and if there was not a principal who could commit the crime then there cannot be a conviction for aiding and abetting the offense. This again is a type of impossibility defense, in which the third element of the crime—the influencing of an official act—cannot occur so the solicitation does not constitute a violation. It may be that § 201(b)(2)(B)'s proscription on seeking assistance to aid in the commission of a fraud against the United States would cover this situation. A fraud involves deception, and the official's misstatement regarding his authority can be viewed as providing aid in an effort to commit a fraud against the United States, even if the scheme could not succeed.

4. Mixed Motives

An official may seek a payment for a legitimate purpose, such as a fee for work performed, and for an illegitimate one, such as to secure continued support for a program. In *United States v. Biaggi*, the Second Circuit stated, "A valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability."[120] The circuit court noted, however, that "the evidence must suffice to permit the jury to find beyond a reasonable doubt that the unlawful purposes were of substance, not merely vague possibilities that might attend an otherwise legitimate transaction."[121]

Whether a payment is a bribe or constitutes a legitimate transaction may depend on the circumstances of the relationship between the payer and the public official, and whether there is evidence that the official provided permissible services for which fair compensation was paid.[122] Many elected officials are permitted to maintain a private business, such as a law practice, accounting service, and the like. If the payment is for services rendered by that business, and the amount is consistent with the fees another firm would charge, then there is not a bribe (or unlawful gratuity), even if the reason for hiring the firm was to gain access to the official.[123]

5. Campaign Contributions

Perhaps the most difficult issue in determining the scope of § 201 and other bribery statutes is its application to campaign contributions. When a person gives money to a political candidate, it is usually with the expectation that the candidate will support or oppose certain policies and legislation. The payment is often "for or because of" the candidate's potential exercise of authority, and indeed many candidates solicit contributions with the promise that they will take certain specific

If a type of impossibility defense based on the lack of authority were recognized, it could lead to an anomalous result. An official could solicit a payment with the knowledge that he could not engage in the promised official act, thereby avoiding criminal liability, while one with the authority would be guilty in soliciting the payment. In each case, the public official engages in improper conduct with the goal of self-enrichment that involves the actual or perceived misuse of authority. If the solicitation is analyzed as a fraud upon the United States, then the official can be convicted of the offense under § 201(b).

120. 909 F.2d 662, 683 (2nd Cir. 1990).

121. *Id.*

122. In *United States v. O'Keefe*, 825 F.2d 314 (11th Cir. 1987), a Hobbs Act prosecution, the Eleventh Circuit upheld the grant of a judgment of acquittal:

> The defendants called a number of witnesses who specifically testified to the voluminous, non-real estate work performed by the defendants. The only evidence for the jury's consideration was that the defendants performed hours of legitimate non-real estate work and had become, in essence, Richmond's local agents for this project. The fact that Montgomery and O'Keefe performed legitimate work to which they were entitled to compensation leads this court to conclude, as did the district court, that no rational fact-finder could reasonably have found beyond a reasonable doubt that the defendants accomplished the alleged extortion.

Id. at 320.

123. *See Biaggi*, 909 F.2d at 683 ("A client paying his law firm's legal fee does not commit bribery simply because a Congressman is 'of counsel' to the firm and the client hopes the Congressman will some day be helpful.").

actions when elected—"vote for me and I will cut taxes" or "I will oppose the proposed highway expansion if elected." As the Fifth Circuit noted in *United States v. Tomblin*, "Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contribution."[124] While campaign contributions have all the hallmarks of a bribe or unlawful gratuity, the American political system could not survive if such payments were illegal under § 201.

Courts have been careful to distinguish campaign contributions from bribes, requiring that juries be instructed clearly that a campaign contribution does not come within the statutory prohibition. Of course, this gives defendants an incentive to characterize any allegedly corrupt payment as a campaign contribution in the hope that it protects them from criminal prosecution. The key is whether the payment or solicitation was a legitimate campaign contribution or whether there was a *quid pro quo* that satisfies the corrupt intent element of the offense. In *Tomblin*, the Fifth Circuit stated that "a jury instruction must adequately distinguish between the lawful intent associated with making a campaign contribution and the unlawful intent associated with bribery."[125]

Distinguishing between a lawful and unlawful intent when the underlying conduct—paying a bribe or making a campaign contribution—is the same is difficult, and juries have broad discretion to draw reasonable inferences from the evidence that will be difficult to overcome on appeal.[126] Courts have emphasized that the *quid pro quo* needs to be clear so that just the timing of the payment alone would not be sufficient to establish the corrupt intent for a bribe. In *United States v. Allen*, the Seventh Circuit stated, "[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe."[127]

With respect to unlawful gratuities, it is difficult to imagine a factual setting in which campaign contributions could ever constitute a basis for prosecution. Aside from the statute's requirement that gratuities be given personally to the public official—most contributions go to campaign committees and not directly to the candidate—the judicial requirement in *Sun-Diamond Growers* that a specific official act be linked to the gift virtually eliminates the possibility of a § 201(c) offense. The proper analysis of this issue should be based upon the element of intent. Campaign contributions, given in the expectation of or because of official acts, are an accepted practice in American politics. Only when the contribution is *dependent* upon the official act, or the official act is conditioned on the promise or payment of the contribution, is the transaction unacceptable by society and a criminal bribe.

124. 46 F.3d 1369, 1379 (5th Cir. 1995).

125. *Id.*

126. *See Biaggi*, 909 F.2d at 695 ("There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear.").

127. 10 F.3d 405, 411 (7th Cir. 1993). The circuit court determined that the Supreme Court's holding in *McCormick v. United States*, 500 U.S. 257 (1991), a Hobbs Act case, should apply to other bribery statutes absent clear statutory language permitting application of the bribery prohibition to campaign contributions.

C. Official Duty

Section 201(b)(2)(C) makes it a crime to offer or solicit a bribe to induce a public official "to do or omit to do any act in violation of the official duty of such official or person." Courts have taken a broad view of what constitutes an "official duty," largely rejecting the argument that the official's lack of power to effectuate the object of the bribe prevents a conviction. In *United States v. Gjieli*, the Sixth Circuit held that for a charge under § 201(b)(2)(C), "There is simply no requirement here that the act induced fall within the federal employee's official function."[128] In *United States v. Analytis*, a district court asserted that "it is now clear that to support a conviction for federal bribery, it is not necessary that the bribee have the authority to actually achieve the object of the bribe."[129]

The offer or solicitation must relate to an exercise of government authority and not just that official's obligation to act properly and avoid misconduct. In *United States v. Morlang*, the Fourth Circuit found that jury instructions which referenced broad ethical standards for an official's duty were improper. The circuit court stated, "[I]n order to be relevant in a criminal prosecution for conspiracy, these standards must prescribe duties and modes of conduct as opposed to broad ethical and moral precepts." Thus, an instruction that it was the official's

> duty not to "imped(e) Government efficiency or economy" (24 C. F. R. § 0.735-202) or "affect adversely the confidence of the public in the integrity of the Government" (24 C. F. R. § 0.735-202) invokes standards too indefinite and vague to be a part of our criminal law in this context when there was no charge or evidence that the bribes alleged may have been for such purpose.[130]

D. Witness Bribery and Unlawful Gratuities

While the primary focus of the statute is on the offer and acceptance of "anything of value" in connection with the exercise of governmental authority, § 201(b)(3) and (c)(2) also prohibit the payment of a bribe or unlawful gratuity to a witness in a federal judicial, administrative, or congressional proceeding. The statute makes it a crime for a person

> who directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom . . . .

128. 717 F.2d 968, 973 (6th Cir. 1983). *See also* United States v. Parker, 133 F.3d 322, 326 (5th Cir. 1998) ("Official acts that violate an official's official duty are also not limited to those within the official's specific authority.").

129. 687 F. Supp. 87, 90 (S.D.N.Y. 1988). Nineteenth-century cases found the official's lack of authority to carry out the object of the bribe a basis for dismissing the charge. *See In re* Yee Gee, 83 F. 145 (D. Wash. 1897); United States v. Gibson, 47 F. 833 (N.D. Ill. 1891).

130. 531 F.2d 183, 192 (4th Cir. 1975).

The unlawful gratuities provision makes it a crime to give anything of value "for or because of" the testimony. The statutory prohibition includes a witness before a grand jury.[131]

1. Truth Not a Defense

Like the bribery of a government official to undertake action that was otherwise proper, the fact that the witness's testimony is claimed to be truthful does not affect whether the person solicited or accepted a bribe in exchange for being influenced to testify. In *United States v. Donathan*, the defendant offered to provide favorable testimony for a party to a civil sexual harassment lawsuit. The Sixth Circuit rejected the argument that the government could not show the payment influenced the testimony because it was the truth: "That she ultimately accepted money to tell what she now claims to be the truth does not negate her corrupt motive. The government was not required to prove that the testimony she agreed to give was false."[132]

2. Cooperation Agreements

The witness bribery provision became a source of significant, albeit brief, controversy in 1998 when a panel of the Tenth Circuit held in *United States v. Singleton* that testimony given in exchange for a promise of leniency from federal prosecutors violated § 201(c)(2) as an unlawful gratuity.[133] Ten days later, the circuit court voted to rehear the case en banc, vacating the panel opinion and overturning its decision in an opinion issued a few months later.[134] Despite the fact that *Singleton* was only a precedent for ten days, the panel decision led to the federal courts being briefly "inundated with a flood of what have come to be called '*Singleton* arguments.' . . ."[135]

All of the circuit courts have rejected the assertion that § 201 applies to the offer of leniency by federal prosecutors in exchange for testimony, recognizing that the criminal justice system could not operate if the possibility of cooperation in exchange for a benefit was illegal.[136] Because the offer of a benefit to a witness is an exercise of the federal government's sovereign power,

131. *See* Wilson v. United States, 77 F.2d 236, 242 (8th Cir. 1935) ("It is our conclusion that one who is or is about to be a witness before a grand jury upon a criminal proceeding pending in the United States court is a witness upon a proceeding before that court within the ordinary meaning of the words of the statute here involved. Any other construction of the statute [the predecessor to § 201(b)(3)] would be not only inconsistent with the obvious purpose of Congress in enacting it, but would also be an undue restriction of its language, leading to an absurd result.").

132. 65 F.3d 537, 540 (6th Cir. 1995).

133. 144 F.3d 1343 (10th Cir. 1998).

134. 165 F.3d 1297 (10th Cir. 1999). The Tenth Circuit held that "in light of the longstanding practice of leniency for testimony, we must presume if Congress had intended that section 201(c)(2) overturn this ingrained aspect of American legal culture, it would have done so in clear, unmistakable, and unarguable language." *Id*. at 1302.

135. United States v. Lara, 181 F.3d 183, 197 (1st Cir. 1999). The circuit court stated that the "most basic reason" that § 201 does not prohibit such conduct is that the provision "does not apply at all to the federal sovereign *qua* prosecutor." *Id*.

136. *See, e.g.*, United States v. Febus, 218 F.3d 784, 796 (7th Cir. 2000); United States v. Anty, 203 F.3d 305, 311 (4th Cir. 2000); United States v. Albanese, 195 F.3d 389, 394–95 (8th Cir. 1999); United States v. Smith, 196 F.3d 1034, 1038

the practice falls outside of § 201's proscription. Since *Singleton*, the courts have upheld agreements in which a witness testifies in exchange for cash payments,[137] a reduced sentence,[138] decision not to prosecute,[139] plea bargain,[140] and leniency in immigration proceedings.[141]

Despite the rejection of *Singleton*'s analysis of § 201, courts have noted that the statute imposes some limits on what a federal prosecutor can do to secure testimony. While the statute does not impinge on the sovereign's right to seek testimony to aid its prosecutions, § 201 would clearly apply if a prosecutor bribed a witness.[142] In addition, courts have expressed concern about whether the government can pay a witness only for favorable testimony.[143] When a benefit is provided to a witness, the government must ensure that it complies with its disclosure obligation under *Brady v. Maryland* to provide exculpatory evidence to a defendant so that the defense has an opportunity to examine the witness on any possible bias as a result of the agreement.[144]

(9th Cir. 1999); United States v. Hunte, 193 F.3d 173 (3rd Cir. 1999); United States v. Haese, 162 F.3d 359, 366–67 (5th Cir. 1998).

137. *See* United States v. Ihnatenko, 482 F.3d 1097, 1100 (9th Cir. 2007) ("Paid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates like this one.").

138. *See* United States v. McGee, 189 F.3d 626, 631 (7th Cir. 1999) ("[T]he government's promise to inform the sentencing judge of the extent of each witness' cooperation and to more for downward departure if the witness provided substantial assistance in the prosecution of Mr. McGee did not violation § 201(c)(2).").

139. *See* United States v. Harris, 210 F.3d 165, 166 (3rd Cir. 2000) ("[B]y implication another type of leniency, the decision not to prosecute, which allegedly took place in Baxter's case, is also not prohibited by the statute.").

140. *See* United States v. Harmon, 194 F.3d 890, (8th Cir. 1999) ("This court and nearly every other circuit to consider the improper compensation issue has held that a plea arrangement offered in exchange for testimony does not violate 18 U.S.C. § 201(c)(2).").

141. *See* United States v. Feng, 277 F.3d 1151, 1154 (9th Cir. 2002) ("[W]e hold that immigration leniency falls within the concept of 'leniency' that is not prohibited by 18 U.S.C. § 201(c)(2).").

142. *See* United States v. Smith, 196 U.S. 1034, 1039 n.5 (9th Cir. 1999) ("18 U.S.C. § 201(c)(2) might apply to a wayward prosecutor who bribes a witness to lie on the stand.").

143. *See* United States v. Condon, 170 F.3d 687, 689 (7th Cir. 1999) (noting that if federal prosecutors fall completely outside of § 201's prohibition on witness bribery and unlawful gratuities, "That approach, if taken seriously, would permit prosecutors to pay cash for favorable testimony, a practice that lacks the statutory and historical support of immunity and sentence reduction."); *see also* United States v. Harris, 210 F.3d 165, 168 (3d Cir. 2000) ("This case does not require us to decide, however, whether the antigratuity statute allows the government to pay a witness solely or essentially for favorable testimony, as distinct from paying a witness for collecting evidence and testifying about what was found.").

144. *See* United States v. Ihnatenko, 482 F.3d 1097, 1100 (9th Cir. 2007) ("We today join our sister circuits and hold that 18 U.S.C. § 201(c)(2) does not prohibit the government from paying fees, housing, expenses, and cash rewards to any cooperating witness, so long as the payment does not recompense any corruption of the truth of testimony."); United States v. Harris, 210 F.3d 165, 167 (3rd Cir. 2000) ("We agree with these circuits that the government can pay informants to gather information and can have those informants testify at trial."); United States v. Anty, 203 F.3d 305, 312 (4th Cir. 2000) ("[T]he government can pay informants to gather information and can have those informants testify at trial. In reaching this conclusion we stress, as the Fourth Circuit did, that 'a defendant's right to be apprised of the government's compensation arrangement with the witness, and to inquire about it on cross-examination, must be vigorously protected.' And of course perjury and the use of perjured testimony remain illegal."). In *Anty*, the Fourth Circuit pointed out the potential pitfalls in paying witnesses for testimony:

> Legitimizing the payment of money to witnesses can be a risky business, particularly when the payment greatly outstrips any anticipated expense. The payment becomes a reward, and as with any reward, the danger is that the recipient, out of gratitude or greed, might be inclined to alter or bend the truth. Accordingly, the government must act with great care when engaging in the practice of paying for more than expenses. Moreover, a defendant's right to be apprised of the government's compensation arrangement with the witness, and to inquire

V. UNLAWFUL GRATUITY

In addition to proscribing the offer and receipt of a bribe, § 201 also makes it a crime to provide (or accept) a gratuity "for or because of" the official engaging in an official act "otherwise than as provided by law for the proper discharge of official duty." The crucial distinction between a bribe and an unlawful gratuity is the intent the government must establish for the offense:[145] bribery requires proof of a *quid pro quo* that is entered into "corruptly," while the unlawful gratuities offense does not include a corrupt intent, only that the official accepted (or solicited) the gift in connection with the exercise of authority.[146] Thus, while the government must prove knowledge of the relationship between the offer or provision of the benefit and the official act, the defendant need not intend to influence any exercise of governmental authority or to induce a violation of the official's duty. Indeed, the gratuity can be given after the act, so there would be no issue of an impermissible influence in that instance.

The punishment for violating the different parts of § 201 are also substantially different: a bribery conviction is punishable by up to fifteen years in prison and a defendant "may be disqualified from holding any office of honor, trust, or profit under the United States," while an unlawful gratuity conviction can lead to a prison term of only up to two years.

As with the bribery offense under § 201(b), the unlawful gratuities crime in § 201(c) reaches both parties to the arrangement. It is not necessary, however, to show any agreement between the offeror (or payer) and the public official, so while the person providing the benefit may view it as a bribe, the public official may understand that the transaction only involves a gift or reward. Therefore, one defendant can be liable for giving a bribe while the other for receiving an unlawful gratuity.[147] As the Fifth Circuit stated in *United States v. Evans*, "§ 201[(c)] makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee."[148]

Two other important distinctions between the bribery and unlawful gratuity offenses are the timing of the transaction and who must receive it. First, the gratuity provision can be violated by a gift given before or *after* the official act, so that rewarding an official for "any official act performed or to be performed" is a crime. A reward provided after the official act also can be made to a *former*

about it on cross-examination, must be vigorously protected. The adversary process must be allowed to probe for possible corruption of testimony, because it is this corruption at which 18 U.S.C. § 201(c)(2) aims.

Id. at 311–12.

145. United States v. Sun-Diamond Growers of California, 506 U.S. 398, 404 (1999) ("The distinguishing feature of each crime is its intent element.").

146. *See* United States v. Brewster, 506 F.2d 62, 71 (D.C. Cir. 1974) ("It appears entirely possible that a public official could accept a thing of value 'otherwise than as provided by law for the proper discharge of official duty,' and at the same time not do it 'corruptly.' ").

147. *See* United States v. Anderson, 509 F.2d 312, 332 (D.C. Cir. 1974) ("The payment and the receipt of a bribe are not interdependent offenses, for obviously the donor's intent may differ completely from the donee's . . . Here, on the evidence, the jury could reasonably conclude that Anderson gave Brewster monies with corrupt intent to influence his vote on the proposed rate-increase legislation, and that Brewster, though insensitive to any influence, accepted the monies with knowledge that Anderson's purpose was to reward him for his stance on such legislation.").

148. 572 F.2d 455, 480 (5th Cir. 1978).

official, and that constitutes a violation, even though the person is no longer acting in an official capacity. A bribe, on the other hand, requires a *quid pro quo* in anticipation of the official engaging in an official act or in violation of a duty.[149] Second, the gratuity must be given to the public official and not to a third party, unlike the bribery section that reaches the transfer of "anything of value" to the official or "for any other person or entity."

An issue that divided the circuit courts was whether the unlawful gratuity had to be given for a specific official act, or whether gifts designed to buy access to an official and a favorable view of the donor was sufficient, even if there was no particular decision motivating the gift.[150] The Supreme Court resolved the issue in *United States v. Sun-Diamond Growers*, the principle case interpreting the scope of the unlawful gratuities provision.[151]

A. Sun-Diamond Growers

The defendant in *Sun-Diamond Growers* was a trade association charged with giving a number of gifts to the secretary of agriculture to curry favor with him on issues of interest to the agricultural cooperatives that comprised the membership of the association. The value of the gifts was just less than $6,000, and included tickets to the U.S. Open Tennis Tournament, luggage, meals, a framed print, and crystal bowl. While the indictment identified two matters that the secretary would decide that affected the association, "the indictment did not allege a specific connection between either of them—or between any other action of the Secretary—and the gratuities conferred."[152]

The Supreme Court concluded that the district court gave a flawed instruction by allowing the jury to find the defendant guilty of giving the gifts just "because of his official position—perhaps, for example, to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future."[153] The Court found this instruction effectively removed the "for or because of" element of the offense by allowing a conviction without linking the gift to a specific official act that would be undertaken or had been done.

The Court read the "for or because of" language to mean " 'for or because of some particular official act of whatever identity'—just as the question 'Do you like any composer?' normally means 'Do you like some particular composer?' "[154] To avoid making the provision of any

149. *See* United States v. Schaffer, 183 F.3d 833, 841 (D.C. Cir. 1999) ("Bribery is entirely future-oriented, while gratuities can be either forward or backward looking.")

150. *Compare* United States v. Bustamante, 45 F.3d 933, 940–41 (5th Cir. 1995), United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986), and United States v. Niederberger, 580 F.2d 63, 68–69 (3rd Cir. 1978) *with* United States v. Jennings, 160 F.3d 1006, 1013 (4th Cir. 1998), United States v. Sun-Diamond Growers, 138 F.3d 961, 966–67 (D.C. Cir. 1998).

151. 526 U.S. 398 (1999).

152. *Id*. at 403. The prosecution was conducted by an Independent Counsel appointed to investigate the secretary, and the Department of Justice appeared before the Supreme Court to support the Independent Counsel's position on appeal.

153. *Id*. at 406.

154. *Id*. This rather pithy comparison by Justice Scalia, the author of the opinion, is not entirely on point because asking whether one likes a composer is not the same as asking whether a gift is related to the exercise of government authority.

gift—regardless of value or context—to a federal official a violation of § 201(c), the Court held that "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[155] *Sun-Diamond Growers* effectively rewrites this part of the statute to require proof that the gratuity was "for or because of *an* official act."

The Court clearly found troublesome the government's position, stated at oral argument, that a free lunch provided to the secretary of agriculture in conjunction with a speech to a farm organization would be a criminal violation because the secretary could have before him a matter affecting farmers at some later point in time.[156] The Court was concerned that a broad interpretation of the statute that accepted the government's interpretation of § 201(c) could make even an innocuous gift a crime, regardless of whether it may be corrupt, because the gratuity offense does not have an intent requirement to limit its application to only those gifts intended to compromise the integrity of an official. The Court refused to rely on only the reasonable exercise of prosecutorial discretion as the primary protection for what appeared to be innocent conduct.[157]

B. Proving the Link

Sun-Diamond Growers left unexplained what evidence can establish the requisite "link" to an official act. As the District of Columbia Circuit noted in *United States v. Schaffer*, "[T]he magnitude of the necessary link, and its proper translation into a concrete rule of decision, remains in some doubt."[158] At a minimum, the prosecution must identify in the indictment a particular "question, matter, cause, suit, proceeding or controversy" that is before the official at the time of the gift. The "for or because of" element is ultimately a jury issue, so the government must introduce sufficient evidence to establish the connection between the gratuity and the identified official act(s).

The District of Columbia Circuit dealt with the sufficiency of the evidence of the requisite link in *Schaffer*, which involved gifts to the same secretary of agriculture involved in *Sun-Diamond Growers*. In this prosecution, the gift was tickets to a Presidential Inaugural Ball from a lobbyist for

By framing the issue in this manner, it was easier for the court to read the "for or because of" language narrowly to eliminate the idea that an unlawful gratuity includes buying access and a favorable attitude from a public official.

155. *Id*. at 414. The Court adopted this position to avoid what it termed "absurdities" if the prohibition on unlawful gratuities was read as broadly as the government suggested because it "would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits. Similarly, it would criminalize a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school." *Id*. at 406–07. The Court explained that "when the violation is linked to a particular 'official act,' it is possible to eliminate the absurdities *through the definition of that term*. When, however, no particular 'official act' need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted." *Id*. at 408 (italics in original).

156. *Id*. at 407.

157. *Id*. at 408 ("When, however, no particular 'official act' need be identified, and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.").

158. 183 F.3d 833, 840 (D.C. Cir. 1999).

a large food processing company. The circuit court explained that in light of the Supreme Court's analysis of § 201(c), three types of gifts would constitute a crime:

> First, a gratuity can take the form of a reward for past action—i.e. for a performed official act. Second, a gratuity can be intended to entice a public official who has already staked out a position favorable to the giver to maintain that position. Finally, a gratuity can be given with the intent to induce a public official to propose, take, or shy away from some future official act. This third category would additionally encompass gifts given in the hope that, when the particular official actions move to the forefront, the public official will listen hard to, and hopefully be swayed by, the giver's proposals, suggestions, and/or concerns.[159]

In all three circumstances, once the gift is proven, then the issue is whether the subjective intent of the giver and the official is related to a particular identified exercise of government authority. To meet the "for or because of" element of the unlawful gratuities offense, the government must prove "the acts in question were substantially, or in large part motivated by the requisite intent to influence the Secretary."[160] As with any jury assessment of intent, circumstantial evidence will usually be the primary basis on which the decision is made.

The circuit court found that the government evidence in *Schaffer* was insufficient to establish the requisite link. While there were certain issues the official was likely to take up in the future that the defendant's company had a particular interest in, the District of Columbia Circuit found that they were too remote to meet the requirement, from *Sun-Diamond Growers*, that a particular official act be shown as the basis for the gift. The circuit court explained,

> To hold otherwise would mean that any time a regulated entity became aware of any inchoate government proposal that could affect its interests, and subsequently provided something of value to a relevant official, it could be held to violate the gratuity statute in the event that the inchoate proposal later appeared in a more concretized form.[161]

This was the very analysis the government argued for in *Sun-Diamond Growers*, which the Supreme Court specifically rejected.

In *United States v. Hoffman*, the Eighth Circuit rejected a defendant's argument that the government must show that the defendant reasonably believed the official would undertake the official act connected to the gift. In *Hoffman*, the defendant, who worked for a government contractor,

159. *Id.* at 841–42.

160. *Id.* at 843. The circuit court noted the difficulty in assessing a person's motive, explaining that "[b]oth common sense and practical experience, each of which we ascribe to the jury, instruct that human beings rarely act for a single purpose alone."

161. *Id.* at 844. The defendant ultimately received a pardon while his appeal on other issues was still pending, and the case was dismissed as moot. *United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001). That outcome does not affect the District of Columbia's analysis of § 201(c). Espy was acquitted of accepting unlawful gratuities in a separate trial. *See* George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 Tul. L. Rev. 747, 776 (2000).

gave an official golf clubs while seeking a high rating on the contractor's work in order to obtain future awards. Rejecting the argument that he never reasonably believed the official would provide the favorable rating, the circuit court stated that it "has never interpreted § 201(c)(1)(A) to require a 'reasonable belief' element."[162] The link between the gratuity and an official act incorporates the intent element for the offense, and the government need not show that the defendant believed the gift would be effective to establish a violation.

C. The Bribery–Unlawful Gratuities Distinction After Sun-Diamond Growers

Sun-Diamond Growers was not a wholesale rejection of the criminalization of gratuities, but the Supreme Court rejected the government's "meat axe" approach to before-the-fact gifts; this is because using the criminal provision to reach gratuities given largely based only on the official's position would undermine the extensive administrative regulation of gifts to federal officials. These regulations, which are quite detailed, were adopted to ensure a high level of ethics when officials interact with private parties, especially those subject to the official's authority.[163]

While the Court's analysis of the criminal prohibition on gratuities given before an official act reflects a plausible reading of the statutory language, there is a troubling aspect to the opinion's narrow approach that acquiesces in before-the-fact gifts made to curry favor with officials. By requiring the government to establish a clear link between the gift and a pending decision, the Court essentially eliminated the criminal prohibition on gratuities when the transfer takes place before an official act.[164] If the prosecution can establish that the gift is related to a specific matter, then there should be sufficient evidence to prove a bribe because the transaction in all likelihood was designed to influence the official action, thereby demonstrating a *quid pro quo*. It is difficult to see how providing "anything of value" would be "for or because of any official act," a § 201(c) gratuities violation, if the transfer was not also intended to "influence" the decision, a § 201(b) bribery violation.

Gifts to public officials are given for a reason, and when the motive is related to the authority vested in the official rather than a personal relationship, then the gift is designed either to affect the outcome of a particular decision-making process or, more generally, to gain access and curry favor to affect a future decision. If there is no evidence of a particular pending official act to which the

162. 556 F.3d 871, 876 (8th Cir. 2009).

163. For example, a federal regulation provides that a government worker "may accept unsolicited gifts having an aggregate market value of $20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $50 in a calendar year." 5 C.F.R. § 2635.204(a) (2009). The Supreme Court noted that there were numerous similar regulations "littering this field" and that the broad interpretation of § 201(c) could "expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits." *Sun-Diamond Growers*, 526 U.S. at 412.

164. *See* Brown, *supra* note 161, at 774 ("The Court [in *Sun-Diamond Growers*] has essentially eliminated the separate crime of unlawful gratuity and turned it into a lesser included offense of bribery.").

payment relates, then the government cannot establish either an illegal gratuity—there is no link to prove the gift is "for or because of" the exercise of authority—or a bribe.[165]

Sun-Diamond Growers curtails the scope of the unlawful gratuities prohibition by effectively eliminating the possibility of criminal prosecution for before-the-fact influence buying if no link exists between the transfer and a specific pending decision. The opinion creates a distinction between pre- and post-official action gratuities, and it ignores the corrupting effect of any gift to a public official motivated primarily by the authority conferred on that official. In either instance, the primary reason for giving a gift is to establish conditions under which the official will be favorably disposed to the offeror in future cases.

The timing of the gratuity is irrelevant when the offeror seeks future benefits from the transmission of the gift. *Sun-Diamond Growers*'s interpretation of the statute, however, insulates a gift given sufficiently remote from the decision-making process such that it cannot be linked directly to a specific issue before the recipient. While the bribery provision prohibits payments made to influence a particular decision, a gratuity may purchase something akin to that influence with a similar corrupting effect on the exercise of official authority.

The problem with taking an expansive view of § 201(c)'s prohibition on gratuities is determining how to measure the effect of a gift in order to ascertain whether it was given to obtain an improper benefit from the public official. The gratuity provision does not require proof of the "corrupt" intent required for bribery, and § 201(b)'s more narrowly drawn elements mean that only egregious conduct will be punished. Once the criminal law moves beyond the clearer bribery arrangement to the more amorphous crime of illegal gratuities, the law may be used to punish any gift, including the types of trivial items that concerned the Supreme Court in *Sun-Diamond Growers*. Given the political nature of corruption charges, a criminal prohibition on gifts could be a means to attack political foes. The criminal law employs broad terms to define a violation, so fine distinctions between tokens of appreciation—the championship jersey given to the president or a free lunch provided to a visiting cabinet member—and improper efforts to buy influence will be difficult to incorporate into even the most carefully drafted statute.

D. Unlawful Gratuities as a Lesser-Included Offense of Bribery

The Supreme Court stated in *Sun-Diamond Growers* that § 201 sets forth "two separate crimes . . . with two different sets of elements and authorized punishments."[166] This would appear to preclude viewing the unlawful gratuities crime as a lesser-included offense of bribery because the offenses have different elements, but the Court also noted that the crucial distinction between a bribe

165. *See* Charles B. Klein, *What Exactly Is an Unlawful Gratuity After* United States v. Sun Diamond Growers?, 68 Geo. Wash. L. Rev. 116, 123 (1999) ("[I]t is difficult, if not impossible, to explain how a gift-giver who actually intends to influence a particular official act can violate the unlawful gratuity statute, but not the bribery statute.").

166. 526 U.S. at 404.

and an unlawful gratuity is the higher intent requiring proof of a *quid pro quo* for a § 201(b) conviction.

A number of circuit courts have held that, in certain instances, a jury can convict the defendant for a § 201(c) violation as a lesser offense of bribery. This can only occur when the charge is a before-the-act benefit that is provided or accepted, because bribery requires a *quid pro quo* agreement before the official act takes place. Thus, for any after-the-fact benefit, the only possible charge is under § 201(c).

In *United States v. Brewster*, the District of Columbia Circuit stated that "as a matter of semantics, . . . we would think that if the gratuity offense is narrower than the bribery offense (and it is), then the narrower could fit within the greater, *i.e*, the gratuity offense is a lesser included offense of bribery."[167] If the jury concludes that the evidence of the *quid pro quo* were not sufficiently clear to establish that element of a bribery charge under § 201(b) beyond a reasonable doubt, it is possible to return a guilty verdict for an unlawful gratuity because the gift need not be intended to influence, only that it was linked to a specific official act.

In *United States v. Jennings*, the Fourth Circuit held that "[p]ayment of an illegal gratuity is a lesser included offense of bribery . . . because corrupt intent is a 'different and higher' degree of criminal intent than that necessary for an illegal gratuity."[168] Thus, the circuit court explained that "it is important that a jury be properly instructed on the difference between a bribe and a gratuity in cases when there is a question about the nature of the payment alleged."[169] Other circuits have also upheld convictions under § 201(c) as a lesser-included offense of § 201(b).[170]

It is unlikely that a prosecutor would not charge bribery after *Sun-Diamond Growers*'s analysis for the nexus requirement for a gratuity violation for a before-the-act gift, so the issue of whether § 201(c) is a lesser-included offense of § 201(b) is an important one for counsel to focus on and seek the appropriate jury instruction on each crime.

167. 506 F.2d 62, 69 (D.C. Cir. 1974).

168. 160 F.3d 1006, 1014 (4th Cir. 1998); *see also* United States v. Muldoon, 931 F.2d 282, 287 (4th Cir. 1991) ("Payment of an illegal gratuity is a lesser included offense of bribery within the meaning of Fed.R.Crim.P. 31(c).").

169. 160 F.3d at 1014.

170. *See, e.g.*, United States v. Patel, 32 F.3d 340, 343 (8th Cir. 1994); United States v. Lasanta, 978 F.2d 1300, 1309 (2nd Cir. 1992); United States v. Kenny, 645 F.2d 1323, 1327 n.1 (9th Cir. 1981); United States v. Evans, 572 F.2d 455, 464 (5th Cir. 1978).

This page intentionally left blank

| 3 |

SPECIALIZED FEDERAL CORRUPTION STATUTES

There are a number of specialized federal statutes which address corruption in particular agencies or are related to specific exercises of federal authority. Many of these statutes are used infrequently at best, and most are largely duplicative of the broad prohibition on bribery and unlawful gratuities in 18 U.S.C. § 201. One statute prosecutors use with some regularity is 18 U.S.C. § 641, which prohibits theft, conversion, and embezzlement of government property, along with the receipt of such stolen property. In addition to cases involving those who simply steal property from the government, this provision is used in cases involving employees who convert government property to their own use or otherwise trade in it in ways that do not fall within the prohibition of § 201 because there is no *quid pro quo* arrangement or improper gift motivating the conduct. This chapter reviews § 641 first to the extent it raises issues involving corrupt activities by government officers, and then the specialized provisions dealing with particular forms of corruption.

I. THEFT, CONVERSION, AND EMBEZZLEMENT OF FEDERAL PROPERTY (18 U.S.C. § 641)

The federal theft statute combines a range of common law property offenses into a single provision that provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . . .

The statute also prohibits the receipt, concealment, or retention of such property when the defendant knows "it to have been embezzled, stolen, purloined or converted." The offense is punishable by up to ten years of imprisonment.

In *Sabri v. United States*, the Supreme Court noted in passing the limited scope of § 641, explaining that it "went only to outright theft of unadulterated federal funds."[1] That description of the statute is not entirely correct, however, as the Court's earlier decision in *Morissette v. United States* stated that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[2] For example, the provision reaches not only federal money—"unadulterated federal funds"—but also any "thing of value of the United States," which covers a broader range of benefits than just money or personal property.

Some courts have stated that the statute is "basically the common law crime of larceny" whose elements are "a wrongful taking and carrying away (asportation) of personal property of another with fraudulent intent to deprive the owner of his property without his consent."[3] That analysis is inconsistent with *Morissette*'s discussion of the congressional intent behind § 641, which stated that "[w]hat has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches."[4] Thus, the statute is not limited solely to what would qualify as a larceny or embezzlement under the common law, so that, for example, the asportation element is not required for proof of a violation.[5] Nevertheless, § 641 incorporates elements of the common law offense, and most importantly, the requirement of intent to engage in any of the identified means of taking government property.[6]

1. 541 U.S. 600, 606 (2004). *Sabri* involved bribery of a local official charged with violating § 666, and the Court's reference to § 641 was made in describing the history of that provision as an effort by Congress to expand the scope of the federal anticorruption statutes.

2. 342 U.S. 246, 266 n.28 (1952). In an extensive footnote, the Court reviewed the history of the statute in great detail, noting how the 1948 revision of the federal criminal code incorporated parts of different statutes into a single provision that was not exclusively a codification of the common law offense of larceny.

3. United States v. Barlow, 470 F.2d 1245, 1251 (D.C. Cir. 1972); *see also* United States v. Hall, 549 F.3d 1033, 1040 (6th Cir. 2008) ("Section 641 is the federal codification of the common law crime of larceny.").

4. *Id*. at 271. The Court pointed out that "[i]t is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions." *Id*. at 272. Thus, *Morissette* concluded that § 641 was not just a codification of the common law, but that it reflects the "purpose which we here attribute to Congress [that] parallels that of codifiers of common law in England and in the States and demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses." *Id*. at 272–73.

5. *See* United States v. Herrera-Martinez, 525 F.3d 60, 63 (1st Cir. 2008) ("[T]he enactment of § 641 did more than aggregate existing crimes. The statute also added 'knowingly converts,' to the list of proscribed activities, as well as 'steals,' words that do not implicate the common law definition of larceny."). The First Circuit stated, "Where Congress has gone beyond the common law terms used to define a crime, we will not presume the crime is limited to its common law contours." *Id*.

6. In *Morissette*, the Court stated:

> Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in

While the statute covers theft and other crimes involving government property, the circuit courts have held that it is not an element of the offense that the government proves the defendant knew it was property of the federal government and not that of another authority or even a private party. In *United States v. Howey*, the Ninth Circuit specifically rejected a defense argument to read into the provision that knowledge requirement, asserting that it was not an essential part of the common law larceny-type offense that the thief knew who owned the property he took; it was enough that he knew it did not belong to him. According to the circuit court, the legislative history provided no support for finding that Congress intended in § 641 to add a new requirement to the common law offenses that a thief know who owned the property he was stealing.[7]

The cases involving government officials prosecuted under § 641 involve a range of property, and frequently include a misuse that does not entail the typical taking found in a traditional larceny or embezzlement prosecution. Courts grappled with the scope of the statute in defining what constitutes the property of the federal government to reach situations involving misuse and theft of government money.

A. Government Control of Funds

The paradigm embezzlement case involves a cashier or bank teller who takes money from the company and converts it to his or her own use. The employer controlled the funds, and although entrusted to the employee, they remain the property of the owner. Section 641 is not limited to only funds currently owned by or in the custody of the federal government; instead the statute has been read more broadly to cover money transferred to a third party but over which the government continues to exercise a measure of supervision and control. Thus, the common law requirement of possession by the victim for a larceny is inapplicable to a charge under § 641.

In *United States v. Largo*, the Tenth Circuit rejected the defendant's argument that he did not violate § 641 because the funds he embezzled were held in a bank account for the use of a nonprofit organization, of which he was president of the board of trustees, and therefore were no longer the property of the United States. The court held,

> It simply cannot be argued that federal grant money becomes nonfederal the minute it is deposited in the bank. The technical relationship between the bank and its depositors does not alter the fact

> this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.

342 U.S. at 261–62.

7. 427 F.2d 1017, 1018 (9th Cir. 1970). *See* United States v. Jermendy, 544 F.2d 640, 641 (2d Cir. 1976); United States v. Crutchley, 502 F.2d 1195, 1201 (3rd Cir. 1974); United States v. Boyd, 446 F.2d 1267, 1274 (5th Cir. 1971); United States v. Smith, 489 F.2d 1330, 1333–34 (7th Cir. 1973); United States v. Denmon, 483 F.2d 1093, 1094 (8th Cir. 1973); United States v. Speir, 564 F.2d 934, 938 (10th Cir. 1977) (en banc); United States v. Baker, 693 F.2d 183, 186 (D.C. Cir. 1982).

> that the money in the account that the defendant embezzled was money disbursed pursuant to a federal grant.[8]

In *United States v. Collins*, however, the Ninth Circuit held that a forgery on a check to draw on an account funded by the government did not violate § 641 because "[w]hen a bank pays a draft bearing a forged endorsement, it expends its own money rather than that of its depositor. The Government's money in legal contemplation remains in its account."[9]

Even if the money taken is not directly traceable to funds provided by the government, so long as the United States exercises supervision and control over the use of the funds it provides, then any theft or embezzlement of the money is a violation of § 641. In *United States v. Scott*, the Seventh Circuit stated, "Evidence that the federal government monitors and audits programs, regulates expenditures, and has the right to demand repayment of funds is adequate evidence that stolen funds or property were a thing of value of the United States under § 641."[10]

In *United States v. Wheadon*, the defendant was the executive director of the East St. Louis Housing Authority convicted of taking kickbacks from a contractor hired to build a housing project. The Seventh Circuit rejected the defendant's argument that the money he received was not directly traceable to HUD funds, stating that "we look to see whether the federal government still maintained supervision and control over the funds at the point when the funds were converted." The court found sufficient evidence of continuing supervision and control based on the following:

> quarterly reports; HUD's access to all Housing Authority records; the Housing Authority's responsibility to maintain and keep accurate records; HUD's right to terminate any contract; HUD's right to cut off funding and to approve any and all disbursements; HUD's right of prior approval on all contracts, proposals, and appropriations; and HUD's right to conduct on-site inspections. All of these factors suggest that HUD had the right to maintain sufficient supervision and control over the funds for the funds to retain their federal character, even though in fact HUD could qualify as a bungler for its indifference for the proper expenditure of government funds.[11]

The Seventh Circuit also rejected the defendant's argument that the government must retain a reversionary interest in the money to have sufficient supervision and control over it for a § 641 prosecution. The circuit court noted that while this was an important factor—even "a particularly compelling one"—it was not dispositive.[12]

8. 775 F.2d 1099, 1101 (10th Cir. 1985).

9. 464 F.2d 1163, 1165 (9th Cir. 1972).

10. 784 F.2d 787, 791 (7th Cir. 1986). The Seventh Circuit rejected *Collins*: "This court, however, has repeatedly rejected the holding in *Collins* and instead has clearly held that proof of an actual loss is not required under § 641." United States v. Scott, 784 F.2d 787, 791 (7th Cir. 1986).

11. 794 F.2d 1277, 1284–85 (7th Cir. 1986).

12. *Id.* at 1285. *See also* Hayle v. United States, 815 F.2d 879, 882 (2nd Cir. 1987) (transfer of funds to a local administrator remains money of the United States "so long as the government exercises supervision and control over the funds and their ultimate use.").

While the government must retain some measure of supervision over the funds, that does not mean federal officials must be actively exercising oversight over the program receiving them in order to come within § 641. In *United States v. McKay*, the defendant was the chairman of the Board of Commissioners of the Huntington (N.Y.) Housing Authority, which administered the Section 8 rent subsidy program on behalf of HUD, and he directed the payment of funds for properties in which he had an interest in violation of conflict-of-interest rules for the housing program. The Second Circuit rejected the argument that the government must show that federal officials were actually involved in supervising the Housing Authority's administration of the program, holding that it was sufficient for the evidence to show that HUD imposed obligations on the recipient to comply with federal regulations and restricted who could receive the funds. According to the court, "Despite the lack of evidence that federal officials actively supervised compliance with the federal requirements, the evidence of the restrictions and conditions placed by HUD on the use of the funds it furnished satisfied the requirements of" federal supervision and control of the money.[13]

Whether the funds taken by the defendant constitute money of the United States is an issue of fact for the jury to determine.[14] In *United States v. Owen*, the Tenth Circuit reversed the conviction of the executive director of an Urban Renewal Authority for taking funds from its account when the agency received some funding from HUD. The circuit court rejected the trial judge's instruction that the Authority was an agent of the United States and therefore all funds were money of the United States, holding that "there was insufficient evidence to warrant a finding that any of the money in [the Authority's] account at the relevant time was HUD grant money."[15]

B. Intangible Property

Common law larceny was limited to tangible property, and required proof of the defendant's "asportation"—movement—of the property for the crime to be complete.[16] As the First Circuit

13. 274 F.3d 755, 759 (2nd Cir. 2001). *See also* United States v. Johnson, 596 F.2d 842, 846 (9th Cir. 1979) ("The statutes and regulations here under scrutiny manifest an underlying congressional intent that the urban funds granted to the agencies under 42 U.S.C. §§ 1450 and 1453 should be utilized under the strictest of supervision, including submission by the union of verified payrolls before additional sums are advanced by the redevelopment agency . . . We hold that under the relevant statutes and regulations, the government contemplated and manifested sufficient supervision and control over the funds for the park and mall maintenance program to justify the convictions under § 641."); United States v. Kranovich, 244 F. Supp. 2d 1109, 1119 (D. Nev. 2003) ("Evidence that a federal agency restricted use of grant money and placed conditions upon use of the funds it furnished has been held enough to show a substantial exercise of control over the funds.").

14. *See* United States v. Eden, 659 F.2d 1376, 1380 (9th Cir. 1981) ("Whether or not there had been a proper disbursement of the funds, in full compliance with the regulations of the Department of [Health and Human Services], was a factual issue left to the jury.").

15. 536 F.2d 340, 343 (10th Cir. 1976). The Court went on to state that "[a]t best the evidence is inconclusive and there is nothing upon which a jury could base a finding beyond a reasonable doubt that appellant obtained federal grant money." *Id*.

16. *See* Joshua Dressler, Understanding Criminal Law § 32.06[A][4] (5th ed. 2009).

pointed out, "[R]eading the statute to require asportation would perforce limit § 641 to tangible property, as intangibles cannot be carried away. This reading of the statute is too narrow and is contradicted by the great weight of authority." Section 641 covers any "thing of value" in addition to money, vouchers, and records of the government. While courts generally agree that § 641 applies to intangible property, it is not clear what limits, if any, may apply to certain types of conduct that involve depriving the government of the use of its property.

The Ninth Circuit held in *Chappell v. United States* that conversion of the services of an Air Force airman for the personal use of another was not a violation of § 641, holding that "[i]t is plain that there is no warrant in the language of this section to sustain the Government's attempt to treat the services and labor of [the airman] as a thing of value."[17] In *United States v. Truong Dinh Hung*, Circuit Judge Winter, in a concurring opinion, argued that the statute did not apply to espionage, arguing that "if § 641 were extended to the unauthorized disclosure of classified information, it would sweep aside many of the limitations Congress has placed upon the imposition of criminal sanctions for the disclosure of classified information."[18]

Information that has a connection to tangible items has been found to constitute a thing of value and therefore sufficient to come within § 641. In *United States v. Tobias*, the Ninth Circuit upheld the conviction of a Navy radioman who tried to sell cryptographic cards used to decode classified messages. The circuit court held that "the value of the cryptographic cards comes from their use as a *device* for the encoding and decoding of classified information. The cards do not themselves contain any information. They are tangible property, and thus fall within the scope of section 641."[19] In *United States v. Digilio*, the Third Circuit affirmed the conviction for theft of government records when photocopies were made of FBI files. The circuit court stated, "A duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen."[20]

In *United States v. Jeter*, the Sixth Circuit upheld the defendant's conviction for selling carbon sheets used in typing up secret grand jury testimony, finding that the information contained on the sheets constituted a thing of value.[21] The Second Circuit in *United States v. Girard* found that a Drug Enforcement Administration (DEA) agent's sale of information from DEA files constituted a violation of § 641, stating that "[a]lthough the content of a writing is an intangible, it is nonetheless a thing of value."[22]

17. 270 F.2d 274, 276 (9th Cir. 1959).

18. 629 F.2d 908, 928 (4th Cir. 1980) (Winter, J., concurring).

19. 836 F.2d 449, 452 (9th Cir. 1988). The Ninth Circuit distinguished *Chappell*, stating that "we do not believe that the 'intangible goods' or 'classified information' exception to section 641 is applicable to the property involved in the case before us." *Id*. at 451.

20. 538 F.2d 972, 977 (3rd Cir. 1976).

21. 775 F.2d 670, 680 (6th Cir. 1985). *See also* United States v. Friedman, 445 F.2d 1076, 1087 (9th Cir. 1971) (upholding conviction for receiving stolen government property when defendant was found with a secret grand jury transcript).

22. 601 F.2d 69, 71 (2nd Cir. 1979).

II. SPECIALIZED BRIBERY AND UNLAWFUL GRATUITIES STATUTES

In Part I of Title 18, Chapter 11, there are a number of statutes covering "Bribery, Graft, and Conflicts of Interest," including provisions making it a crime to offer and receive a bribe or unlawful gratuity by particular officials.[23] These offenses cover conduct that frequently, but not always, comes within the broad prohibition of § 201, which reaches all federal officials and those exercising federal authority. These provisions provide for different penalties, including two with mandatory minimum sentences, and the elements of the offense are frequently the same as § 201 for proving the bribe but broader for unlawful gratuities by not including the "for or because of" nexus requirement.

A. Offer and Acceptance of a Loan or Gratuity by Financial Institution Examiner (18 U.S.C. §§ 212 and 213)

There are two statutes addressing the offer and acceptance of a gratuity by a financial institution examiner, with important distinctions between them. Section 212 reaches those connected to a financial institution who offer a loan or gratuity, and § 213 covers receipt by examiners. These provisions provide:

> **§ 212. Offer of loan or gratuity to financial institution examiner**
>
> [W]hoever, being an officer, director, or employee of a financial institution, makes or grants any loan or gratuity, to any examiner or assistant examiner who examines or has authority to examine such bank, branch, agency, organization, corporation, association, or institution—(1) shall be fined under this title, imprisoned not more than 1 year, or both; and (2) may be fined a further sum equal to the money so loaned or gratuity given.
>
> **§ 213. Acceptance of loan or gratuity by financial institution examiner**
>
> Whoever, being an examiner or assistant examiner, accepts a loan or gratuity from any bank, branch, agency, organization, corporation, association, or institution examined by the examiner or from any person connected with it, shall—(1) be fined under this title, imprisoned not more than 1 year, or both; (2) may be fined a further sum equal to the money so loaned or gratuity given; and (3) shall be disqualified from holding office as an examiner.

Section 212 defines an examiner as "any person—(A) appointed by a Federal financial institution regulatory agency or pursuant to the laws of any State to examine a financial institution; or (B) elected under the law of any State to conduct examinations of any financial institutions."

23. This chapter also includes a statute, 18 U.S.C. § 224, making it a crime to engage in a scheme to influence by bribery any sporting contest. Similarly, there is a statute prohibiting certain practices designed to deceive the listening or viewing public in contests of knowledge, skill, or chance that are broadcast. *See* 47 U.S.C. § 509.

The statute was originally part of the Federal Reserve Act, adopted by Congress in 1913,[24] and in 1935 the prohibition was expanded to include state bank examiners in addition to those acting on behalf of the federal government.[25]

The federal financial institution regulatory agencies covered by the statutes are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Farm Credit Administration, the Farm Credit System Insurance Corporation, and the Small Business Administration.[26] Not every entity that is a financial institution comes within the prohibition, and the statute specifically exempts "a credit union, a Federal Reserve Bank, a Federal home loan bank, or a depository institution holding company."[27]

The two statutes cover not only gratuities but also loans, which can affect the judgment of an examiner responsible for evaluating the safety and soundness of the financial institution's operation, especially if the transaction is not the same as any other customer could receive. In *United States v. Bristol*, the Fifth Circuit explained the intent of the act to "proscribe certain financial transactions which could lead to a bank examiner carrying out his duties with less than total, unbiased objectivity."[28] The statutes do not cover credit card accounts and real property loans as long as these transactions are made on terms that are generally available to the public and the terms are no more favorable to the examiner.[29]

Section 213 prohibits loans or gratuities from a financial institution "examined by the examiner and from any person connected with it." The loan or gratuity need not come directly from the bank, and the statue reaches transactions funneled through third parties. In *Bristol*, the Fifth Circuit rejected a defendant's argument that a loan by a nonbank company owned by the president of a bank the defendant examined did not constitute a "loan or gratuity" from the bank, holding that "[w]ith the intent of Congress evident from the face of the statute, a construction which would allow a bank officer to circumvent that intent simply by channeling a loan through a controlled shell corporation is untenable."[30]

Applying a similar analysis to a prosecution under § 212, the Tenth Circuit in *United States v. Walker* held that loans to bank examiners arranged by a bank's president and directly funded by a compliant customer rather than from the bank itself came within the statute. The circuit court explained that § 212 covers any financial institution that "makes or grants any loan or gratuity," broadly interpreting "makes" so that "the fact that a loan is made by the officer to a bank examiner

24. Federal Reserve Act, 38 Stat. 251 (1913).
25. *See* United States v. Bristol, 343 F. Supp. 1262, 1265–66 (S.D. Tex. 1972).
26. 18 U.S.C. § 212(c)(2).
27. 18 U.S.C. § 212(c)(3).
28. 473 F.2d 439, 442 (5th Cir. 1973).
29. 18 U.S.C. § 212(c)(4).
30. *Id.*

from another bank or a private individual on the face of the statue does not seem inconsistent with criminal liability on the part of the bank officer who 'makes' the loan."[31]

An important distinction between the scope of the two statutes is that § 212 reaches any loan or gratuity to an examiner who actually examines the financial institution or who has the authority to examine it. Section § 213 only prohibits the receipt of a loan or gratuity from those financial institutions actually examined by the examiner but not if the person only has the authority to examine it. Thus, § 212 reaches transactions that may be done to curry favor with an examiner who could examine the bank in the future, while § 213 does not proscribe the receipt of a loan or gratuity if the person has not yet examined the institution.

In *United States v. Napier*, the Ninth Circuit emphasized that distinction in overturning the conviction of a former Montana Commissioner of Financial Institutions for obtaining a loan from the president of a bank holding company which had not been examined by the department at the time of the transaction. Rejecting the government's argument that § 213 should be read to cover the same type of conduct as § 212 because each has a corrupting influence on the examiner, the circuit court stated:

> It very well may be, as the government argues, that Congress' purposes would be better served if the language in section 213 tracked the language of section 212, but it does not. If this is an unintended omission in section 213, Congress can easily correct itself by amending the statute. It is not, however, for this court to rewrite the statute for Congress.[32]

The punishment for a violation of the statutes is up to one-year imprisonment, which is half the maximum penalty authorized for a violation of § 201 for an unlawful gratuity that is given "for or because of" an official act.

B. Federal Reserve Bank Loan and Discount of Commercial Paper (18 U.S.C. § 214)

This provision provides:

> Whoever stipulates for or gives or receives, or consents or agrees to give or receive, any fee, commission, bonus, or thing of value for procuring or endeavoring to procure from any Federal Reserve

31. 947 F.2d 1439, 1443 (10th Cir. 1991). The Tenth Circuit explained the rationale for reading § 212 broadly:

> The obvious purpose of the statute is to proscribe the granting of favors by a bank officer through loans to a bank examiner which could impair the independence or integrity of bank examinations. These could be influenced just as well by a loan arranged for him through another bank, financial institution, or individual with whom the officer could achieve the result sought by the bank examiner—a loan of money with the aid of the bank officer—as through a loan from the officer's own bank.

Id. at 1443–44.

32. 861 F.2d 547, 549 (9th Cir. 1988).

> bank any advance, loan, or extension of credit or discount or purchase of any obligation or commitment with respect thereto, either directly from such Federal Reserve bank or indirectly through any financing institution, unless such fee, commission, bonus, or thing of value and all material facts with respect to the arrangement or understanding therefor shall be disclosed in writing in the application or request for such advance, loan, extension of credit, discount, purchase, or commitment, shall be fined under this title or imprisoned not more than one year, or both.

The statute reaches more than just bribery, and includes giving a commission for procuring the loan or a bonus in connection with the transaction with a Federal Reserve Bank. Unlike § 201, which authorizes up to a fifteen-year sentence for a bribe and a two-year sentence for an unlawful gratuity, § 214 limits the potential sentence to one year.

The statute can be interpreted to cover more than just employees of a Federal Reserve Bank because it addresses the offer of a benefit related to obtaining the loan or other credit transaction without regard to the office held by the person. Thus, while the provision clearly covers a Federal Reserve Bank employee, a broker who became involved in the transaction could be charged with the offense even though the person does not hold a federal office. Section 214 allows for the offer or receipt of the benefit so long as "the arrangement or understanding" is disclosed in writing in the application or request for the credit from the Federal Reserve Bank. Thus, the statute does not prohibit all payments but only those that are not fully disclosed.

There are no reported decisions discussing a prosecution under § 214 or its predecessor.

C. Acceptance of Consideration for Adjustment of Farm Indebtedness (18 U.S.C. § 217)

This provision provides:

> Whoever, being an officer or employee of, or person acting for the United States or any agency thereof, accepts any fee, commission, gift, or other consideration in connection with the compromise, adjustment, or cancellation of any farm indebtedness as provided by sections 1150, 1150a, and 1150b of Title 12, shall be fined under this title or imprisoned not more than one year, or both.

The statute only covers the federal official or person acting on behalf of the United States who accepts any benefit related to a "compromise, adjustment or cancellation" of farm indebtedness. Therefore, the offeror or payer would not be subject to prosecution under this provision. Under 12 U.S.C. § 1150, the secretary of agriculture is authorized to take actions related to farm indebtedness if the following conditions have been established after investigation:

> (1) said indebtedness has been due and payable for five years or more; (2) the debtor is unable to pay said indebtedness in full and has no reasonable prospect of being able to do so; (3) the debtor has acted in good faith in an effort to meet his obligation; and (4) the principal amount of said indebtedness is not in excess of $1,000. The Secretary is further authorized at his discretion to cancel

> and discharge indebtedness arising under said Acts of Congress or programs when the amount of said indebtedness is less than $10, or the debtor is deceased and there is no reasonable prospect of recovering from his estate, or his whereabouts has remained unknown for two years and there is no reasonable prospect of obtaining collection, or he has been discharged of the indebtedness in any proceeding under the Bankruptcy Act or under Title 11.

The punishment for a violation includes up to one-year imprisonment. There are no reported decisions discussing a prosecution under § 217 or its predecessor.

D. Officers and Employees Acting as Agents of Foreign Principals (18 U.S.C. § 219)

Unlike the bribery and unlawful gratuity provisions in this chapter of Title 18, § 219 contains a simple prohibition on a public official from acting as an agent or lobbyist of a foreign principal or entity. This provision provides:

> Whoever, being a public official, is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 or a lobbyist required to register under the Lobbying Disclosure Act of 1995 in connection with the representation of a foreign entity, as defined in section 3(6) of that Act shall be fined under this title or imprisoned for not more than two years, or both.

Congress enacted the statute in 1966 as part of a larger bill amending the Foreign Agents Registration Act of 1938.[33] The legislative history does not describe the reason for the enactment beyond noting that the provision makes it a felony for a federal official to act as an agent of a foreign principal.

Section 219 does not contain an explicit intent level, and a court would likely require the government to prove only a general intent, that the official knew that he or she was acting on behalf of a foreign principal or entity as a lobbyist or otherwise representing its interests before the government. A public official simply advocating a position favorable to a foreign government, without some type of agreement to advance its interests, would not violate the statute absent evidence that the person received some other benefit to establish that the official acted as an agent or lobbyist. At the same time, acting for a foreign government in advocating its interests could be the basis for a conviction even if the official were serving without compensation. While an express employment agreement would not be a prerequisite to a violation, some evidence of a continuing relationship that was mutually beneficial should be necessary for a conviction.

33. Pub. L. No. 89-486, 80 Stat. 249 (1966).

The definition of a public official is the same as that provided in § 201, except it does not include a juror.[34] The punishment for a violation includes up to two years of imprisonment. There are no reported decisions discussing a prosecution under § 219.

E. Bribery Affecting Port Security (18 U.S.C. § 226)

This provision provides:

> (a) **In general**.–Whoever knowingly–
>
> (1) directly or indirectly, corruptly gives, offers, or promises anything of value to any public or private person, with intent to commit international terrorism or domestic terrorism (as those terms are defined under section 2331), to–
>
> (A) influence any action or any person to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud affecting any secure or restricted area or seaport; or
>
> (B) induce any official or person to do or omit to do any act in violation of the lawful duty of such official or person that affects any secure or restricted area or seaport; or
>
> (2) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for–
>
> (A) being influenced in the performance of any official act affecting any secure or restricted area or seaport; and
>
> (B) knowing that such influence will be used to commit, or plan to commit, international or domestic terrorism,

shall be fined under this title or imprisoned not more than 15 years, or both.

Congress enacted the statute in 2006 as part of the USA Patriot Act Improvement and Reauthorization Act.[35] The legislative history does not discuss the reason for adding the provision.[36]

34. Interestingly, when Congress amended the statute in 1984 to include the definition of public official from § 201, it also included jurors within the foreign agent prohibition. Congress corrected that in 1986 by deleting "juror" from the definition. *See* Pub. L. No. 98-473, 98 Stat. 2149 (1984); Pub. L. No. 99-646, 100 Stat. 3598 (1986).

35. Pub. L. No. 109-177, 120 Stat. 241 (2006).

36. The House Conference Report discussion of the provision states in its entirety:

> This section is substantively similar to section 311 of the House bill and the parallel provision of S. 378. Section 309 of the conference report makes it a crime to knowingly, and with the intent to commit international or domestic terrorism, bribe a public official to affect port security; or to receive a bribe in return for being influenced in public duties affecting port security, knowing that such influence will be used to commit, or plan to commit, an act of terrorism. A violation of this section is punishable by a maximum term of 15 years imprisonment.

H.R. Conf. Rep. 109–333, § 309, at 199 (2005).

Unlike other bribery provisions, § 226 targets the offer and receipt of a bribe related to a particular activity—port security—and the corruption must be connected to the commission of international or domestic terrorism. The statute relies on the terrorism definition in 18 U.S.C. § 2331, which involves violent or dangerous acts designed "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." The statute reaches bribery of any "public or private person," so that it covers more than just corruption of public officials and includes anyone connected with port security.

The punishment for a violation includes up to fifteen years of imprisonment. There are no reported decisions discussing a prosecution under § 226.

F. Influencing Employment Decisions by a Member of Congress (18 U.S.C. § 227)

This provision provides:

> Whoever, being a Senator or Representative in, or a Delegate or Resident Commissioner to, the Congress or an employee of either House of Congress, with the intent to influence, solely on the basis of partisan political affiliation, an employment decision or employment practice of any private entity—(1) takes or withholds, or offers or threatens to take or withhold, an official act, or (2) influences, or offers or threatens to influence, the official act of another, shall be fined under this title or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Congress adopted the statute as part of the Honest Leadership and Open Government Act of 2007[37] in the wake of lobbying scandals on Capitol Hill involving former lobbyist Jack Abramoff and former Representative Randy "Duke" Cunningham. The statute targets a narrow range of conduct involving an intent to influence a private hiring decision "on the basis of partisan political affiliation" by offering or threatening to take an official act or to influence an official act. While the statute does not define "official act," it can be expected that courts would look to the definition of that term in § 201, which has been broadly construed to include a range of nonlegislative activities by members of Congress and their staff.[38]

While the legislative history of the provision does not explain the reason for its adoption,[39] there are two types of actual and threatened retaliation against a private employer that the statute appears to target: first, an employer, such as law firm, lobbying organization, or government contractor being pressured to hire someone with political ties to the member of Congress or staff

37. Pub. L. No. 110-81, 121 Stat. 735 (2007).

38. *See* Chapter 2.

39. *See* H.R.Rep. 110–161 at 17 (2007).

person by threatening the interests of that employer or its clients in legislation and other official business on Capitol Hill if the hire is not made. Second, the threat or retaliation may be directed to an employer who is considering for a job a person affiliated with the opposing party, again targeting the interests of the employer's clients to prevent the opponent from being hired.

The punishment for a violation includes imprisonment for up to fifteen years. There are no reported decisions discussing a prosecution under § 227.

G. Bribery of Meat Inspectors (21 U.S.C. § 622)

This provision provides:

> Any person, firm, or corporation, or any agent or employee of any person, firm, or corporation, who shall give, pay, or offer, directly or indirectly, to any inspector, deputy inspector, chief inspector, or any other officer or employee of the United States authorized to perform any of the duties prescribed by this chapter or by the rules and regulations of the Secretary any money or other thing of value, with intent to influence said inspector, deputy inspector, chief inspector, or other officer or employee of the United States in the discharge of any duty provided for in this chapter, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not less than $5,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years; and any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this chapter who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than $1,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years.

The statute was part of the Meat Inspection Act of 1907, one of the first federal consumer safety laws enacted by Congress.[40] The prohibition covers any person involved in the inspection of meat acting under the authority of the Secretary of Health and Human Services. The punishment for a violation includes a mandatory minimum sentence of at least one-year imprisonment and a maximum sentence of three years, a rarity in corruption statutes.

The statute does not require a *quid pro quo* agreement between the offeror and the meat inspector for a conviction.[41] While the government must prove that the offeror acted with the specific intent to influence the inspector, that same level of intent is not required for the official. Section 622 provides that the payment can be "given with any purpose or intent whatsoever," and the

40. Act of Mar. 4, 1907, ch. 2907, Title I, § 22, 20th par., 34 Stat. 1264 (1907).

41. *See* United States v. Forgione, 487 F.2d 364, 365 (1st Cir. 1973) (the fact that the government did not prove there was any "lessening" of the defendant's diligence because of the benefits he received was irrelevant).

government is not required to prove the public official specifically intended to be influenced by the payment or benefit, but "it was only necessary to prove that defendant, a meat inspector, willfully or voluntarily received the alleged gifts from those he inspected."[42] In *United States v. Mullens*, the Fifth Circuit explained why Congress imposed a lower intent on meat inspectors for a violation of § 622:

> [The Meat Inspection Act] is to ensure a high level of cleanliness and safety in meat products. Such a purpose is certainly legitimate and within the power of the federal Government under the commerce clause. The federal meat inspector is a critical enforcement mechanism in the schema of the Act and the inspector's integrity and exercise of independent judgment is vital to its success. Congress could reasonably conclude that the role of the meat inspector was of such significance as to justify a commensurately strict standard which prohibited receipt of anything of value for any reason even though donors were not held to such a standard. This classification is rationally related to a legitimate statutory goal, safe meat products, in that it seeks to preserve the independent judgment of meat inspectors.[43]

The payment must be in connection with the meat inspector's official duties, so the government must establish a nexus between the transaction and the exercise of government authority. In *United States v. Seuss*, the First Circuit explained "we think it clear that the statute prohibits the officials authorized to perform the prescribed inspection duties from accepting things of value *in connection with or arising out of the performance of their official duties*."[44] The circuit court rejected the defendant's argument that the statute could be applied to any trivial item the inspector might happen to receive, noting that

> [w]e do not mean by this to include within the statute's ban gifts which could be merely used in connection with the performance of official duties, such as a watch, given by one whose occupation

42. United States v. Mullens, 583 F.2d 134, 138 (5th Cir. 1978). *See* United States v. Espy, 23 F. Supp. 2d 1, 9 (D.D.C. 1998) ("The Meat Inspection Act makes clear, however, that criminal liability under the statute is determined irrespective of why the public official received the gift. The statute does not distinguish between gifts given with the intent to influence 'official acts' and ones without similar motivations.").

43. *Id.* at 139–40. Congress enacted the Federal Meat Inspection Act in 1967 to update the law, and included specific findings regarding the need for federal regulation:

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally.

21 U.S.C. § 602 (2008).

44. 474 F.2d 385, 388 (1st Cir. 1973) (italics in original). The First Circuit stated that "district courts in the future will, given our interpretation, instruct the jury that to convict they must find, beyond a reasonable doubt, a connection with official functions, although of course proof may, as with other elements, be by circumstantial evidence." *Id.* at 389.

or interests display no nexus to the inspector's functions, such as a friend who works for an airline. It is the donor, rather than the gift, which must be related to the official functions.[45]

H. Bribery of Harbor Inspectors (33 U.S.C. § 447)

This provision provides:

> Every person who, directly or indirectly, gives any sum of money or other bribe, present, or reward, or makes any offer of the same to any inspector, deputy inspector, or other employee of the office of any supervisor of a harbor with intent to influence such inspector, deputy inspector, or other employee to permit or overlook any violation of the provisions of this subchapter, shall, on conviction thereof, be fined not less than $500 nor more than $1,000, and be imprisoned not less than six months nor more than one year.

The statute was originally enacted in 1888 as part of a broader law regulating dumping of harmful materials in harbors.[46] The provision punishes the offeror of a bribe or a gratuity, but not the recipient, unlike other corruption laws. The government must prove an "intent to influence" the harbor official to "permit or overlook" a violation of other harbor related provisions related to transporting or dumping "refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind."[47]

Similar to the bribery provision in the Meat Inspection Act, a conviction for violating this law imposes a mandatory minimum sentence of six months, with a maximum sentence of one year. There are no reported decisions discussing a prosecution under § 447.

45. *Id*. at 388 n.4.
46. Act of June 29, 1888, 25 Stat. 209 (1888).
47. *See* 33 U.S.C. § 441.

| 4 |

THEFT OR BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS (18 U.S.C § 666)

I. HISTORY OF THE STATUTE[1]

Section 666 is a broad federal statute aimed explicitly at corruption at the state and local levels, including private organizations that receive federal funds.[2] Congress adopted the provision in 1984 out of fear that a narrow interpretation of § 201 by the Supreme Court in *Dixson v. United States*, which was then pending, would exempt virtually all nonfederal officers from prosecution under the anticorruption statute. The increasing number of state and local programs funded, at least in part, by the federal government in the 1970s raised the question of whether § 201 was broad enough to cover corruption at the local level.[3]

1. This chapter is based in part on Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75 (2003).

2. For an overview of the statute, see George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After* Sabri, 54 Cath. U. L. Rev. 403 (2005).

3. In *Dixson v. United States*, the Court reviewed convictions for violations under § 201 for accepting bribes related to the distribution of federal funds by a local social service organization designated to administer federal block grants for housing. The defendants were officials of a local organization funded by the federal government, but they were neither employees of the federal government nor parties to any contract with it. The Supreme Court rejected the argument that the defendants fell outside the jurisdictional boundaries of § 201, holding that they could be prosecuted under the law because a "public official" includes any person who "occupies a position of public trust with official federal responsibilities," regardless of whether there was an employment or other direct agency relationship. 465 U.S. 482, 496 (1984). The Court noted that the statute required proof that the defendant actually carried out federal policy, stating that "we do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute or even that all employees of local organizations responsible for administering federal grant programs are public officials within the meaning of section 201(a)." *Id.* at 499.

Before the Court issued its opinion in *Dixson*, Congress expressed its concern that a narrow interpretation of § 201's applicability to nongovernmental officials involved in the administration of federal programs and grants would give "rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly retains a strong interest in assuring the integrity of such program funds."[4] Thus, Congress enacted § 666 to augment "the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving federal monies that are disbursed to private organizations or state and local governments pursuant to a federal program."[5]

Section 666 is a logical extension of the federal interest in combating corruption, an interest recognized by the Supreme Court in 1947 in *Oklahoma v. United States Civil Service Commission*.[6] The federal law at issue in that case, which is now part of the Hatch Act (see Chapter 11), prohibited any

> officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency . . . [from] tak[ing] any active part in political management or in political campaigns.[7]

Although Congress did not have the constitutional authority to impose the requirement directly on the states, it could attach conditions to the states' receipt of federal benefits "by requiring those who administer funds for national needs to abstain from active political partisanship."[8] The rationale for the federal anticorruption statutes is to enhance the integrity of all levels of government, an important interest of the national government.

II. SCOPE OF THE STATUTE

Congress adopted § 666 to broaden the scope of federal anticorruption law by permitting the prosecution of those working for state or local governments, or organizations receiving federal funding, who receive corrupt payments, along with those who offer or make such payments. The statute further prohibits other forms of corruption such as embezzlement, theft, and fraud from governmental organizations. The statute provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists–
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof–

4. S. Rep. No. 98-225, at 369 (1983). The Senate Report specifically discussed, and sought to mitigate the effect of, the Second Circuit's decision in *United States v. Del Toro*, 513 F.2d 656 (2nd Cir. 1975), which read § 201 narrowly so that it did not cover state and local officials.

5. S. Rep. No. 98-225, at 369 (1983).

6. 330 U.S. 127 (1947).

7. *Id*. at 129 (citing 18 U.S.C. § 61).

8. *Id*. at 143.

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Unlike § 201, which reaches only federal employees and those who directly exercise federal authority, § 666 applies to any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof. . . ."[9] Instead of limiting the statute to those occupying particular official positions, § 666 conditions federal jurisdiction on the requirement that the defendant be an agent of an "organization, government, or agency [that] receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."[10] The statute also limits federal jurisdiction by requiring proof that the bribe occurred in connection with transactions of the agency or governmental unit with a value of $5,000 or more. The corrupt payment itself need not have any specific value—the statute only requires the offer and acceptance of "anything of value"—but the subject matter of the corruption must meet the $5,000 threshold for federal jurisdiction.[11]

9. The original statute did not include Indian tribal governments, which was added in 1986. Pub. L. No. 99-646, § 59(a), 100 Stat. 3612 (1986). *See* United States v. Barquin, 799 F.2d 619 (10th Cir. 1986) (directing dismissal of indictment of defendant charged with bribing an official of an Indian tribe because the business council of an Indian tribe was not a "local government agency" under § 666).

10. 18 U.S.C. § 666(b).

11. 18 U.S.C. § 666(a)(1)(B) ("[I]ntending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more."). Note that the offer or solicitation involves "anything of value," while the business or transaction of the agency involves "any thing of value of $5,000 or more." It is not clear whether the space between "any" and "thing" carries a particular meaning.

III. STATUTORY TERMS

Section 666(c) defines the following terms used in its operative provisions:

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;
(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;
(3) the term "local" means of or pertaining to a political subdivision within a State;
(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States;[12] and
(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.[13]

IV. THE FEDERAL FUNDS

The first element the government must prove is the "circumstance" of federal funding of the agency, government, or organization. This "circumstance" is the basis for federal jurisdiction over the offense, grounded in the congressional power to oversee the expenditure of federal funds. The requirement is that the federal government provided "benefits" in excess of $10,000 in any one-year period "under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." An issue the Supreme Court has dealt with is the connection between the federal funding and the offense, including the constitutional question whether the statute comes within the power of Congress to enact legislation reaching corrupt actions of state and local officials.

12. Congress expanded the definition of "State" to include federal possession and territories for a number of different statutes, including § 666, as part of the Crime Control Act of 1990. Pub. L. No. 101-647, Title XII, § 1205(d), 104 Stat. 4831 (1990). In *United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988), the Ninth Circuit reversed the conviction of the former governor of Guam for bribery under § 666 because Guam is not a state, and the statute did not include territories of the United States. *See id*. at 524 ("Guam is not a state. In the absence of express congressional intent to include Guam within the proscriptions of this statute, we cannot hold that the statutory provisions apply to Guam.").

13. Congress added this definition of the twelve-month period for receiving $10,000 of federal benefits that provides the basis for federal jurisdiction as part of the Crime Control Act of 1990. Pub. L. No. 101-647, Title XII, § 1209, 104 Stat. 4832 (1990).

A. Salinas v. United States: *Effect on Federal Funds*

In *Salinas v. United States*, the defendant was a deputy sheriff convicted of accepting bribes from a federal prisoner, housed in the county jail, in exchange for preferential treatment toward the prisoner. The amount of federal funds received by the jail easily exceeded the statutory $10,000 minimum, so the jurisdictional element was undisputed. The Court rejected the defendant's argument that, to establish federal jurisdiction under the statute, the government must also prove that the subject matter of the bribe involved the federal funds provided to the agency or government. The Court held, "The prohibition is not confined to a business or transaction which affects federal funds. The word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction."[14]

The Court recognized that Congress adopted § 666 to expand federal anticorruption law, so restricting the statute to only those bribes which directly implicated the use or expenditure of federal funds "would be incongruous" with the legislative intent for the provision.[15] The Court also rejected the defendant's argument that the statute implicitly required a nexus between the alleged misconduct and federal funds because it did not plainly state the contrary. The Court, however, dodged the issue of whether the government needed to prove any other type of nexus to the federal funds, stating that "[w]e need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to [a program] paid for in significant part by federal funds themselves."[16]

Although the Court found the statute unambiguous, it further asserted "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case."[17] It is not clear why the Court saw a need to address further the constitutionality of the provision, especially if there was "no serious doubt" on an issue that was not relevant to the statutory analysis and outside the question presented by the defendant. Despite *Salinas*'s holding that the government need not show a connection between the bribe and the federal funds, the Court referred obliquely to federalism, stating that "[w]hatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds."[18]

14. 522 U.S. 52, 57 (1997).

15. *Id.* at 58.

16. *Id.* at 59.

17. *Id.* at 60.

18. *Id.* at 61. The constitutionality of § 666 was a question of congressional authority to regulate, not the propriety of an application of a statute in a particular prosecution. *Salinas*'s offhand reference to the constitutionality of the statute "as applied" misstated the proper constitutional analysis by giving the impression that the Constitution might require additional proof of some relationship between the federal interest and a defendant's conduct beyond the elements contained in the statute. The majority in *Salinas* may have been trying to assuage fears that § 666 created a crime wholly outside the federal interest, but the Court's vague invocation of an as-applied constitutional challenge had the effect of encouraging lower courts to consider arguments that the Constitution requires an extra-statutory limit on the application of the statute, at least until its decision in *Sabri v. United States*, discussed below.

B. Sabri v. United States: *Federalism and the Nexus Requirement*

The federal government's role in applying corruption laws to prosecute state and local officials raised questions about whether § 666 violated the constitutional principle of federalism. In *Salinas*, the Court gave a slight nod in the direction of a potential federalism limit on § 666 when it stated that perhaps "some other kind of connection" to the federal funds might be required.[19] In two other cases not involving corruption statutes, *United States v. Lopez* and *United States v. Morrison*, the Supreme Court invalidated provisions of federal law because they exceeded congressional authority to regulate in areas already subject to the police power of the states. In *Lopez*, the Court found the Gun Free School Zone Act unconstitutional, noting that the states are the "primary authority for defining and enforcing the criminal law," so that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"[20] In *Morrison*, the Court explicitly relied on federalism as a rationale for invalidating the civil remedy provision of the Violence Against Women Act, holding that "[t]he Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[21]

In light of the federalism views expressed in *Lopez* and *Morrison*, along with *Salinas*'s acknowledgment that there was no federalism problem in that particular case, lower courts faced a number of constitutional challenges to § 666, both facially and as applied to particular defendants. The statute does not expressly require that the corruption affect the federal funds provided to the government, agency, or organization, and defendants argued that, to avoid any federalism problem from application of the statute to an area usually reserved to the states, the prosecution should be required to prove a nexus between the violation and the federal funding. A split in the circuit courts developed on whether the government must prove as an element of the offense a nexus between the corruption and federal funding.[22]

Some courts adopted a limited reading of the statute which required the government to establish some federal connection, although not a direct effect, between the corruption and the federal role in the program or organization. In *United States v. Zwick*, the Third Circuit held that the prosecution must prove a federal interest in the defendant's conduct, but the extent of that relationship was unclear because "we surmise that a highly attenuated implication of a federal interest will suffice for purposes of § 666."[23] Although the government introduced proof that the

19. *Id.* at 59.

20. 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), and *United States v. Enmans*, 410 U.S. 396, 411–12 (1973)).

21. 529 U.S. 598, 617–18 (2000).

22. *Compare* United States v. Dakota, 197 F.3d 821 (6th Cir. 1999) (the government need not show any nexus between federal funds and the alleged corruption) *with* United States v. Santopietro, 166 F.3d 88 (2nd Cir. 1999) (the government must show "at least some connection between the bribe and a risk to the integrity of the federal funded program").

23. 199 F.3d 672. 687 (3rd Cir. 1999).

township in which the defendant was a member of the Board of Commissioners received federal funds for emergency snow removal and a stream erosion project, the circuit court found this insufficient because the funds "bear no obvious connection to Zwick's offense conduct, which involved sewer access, use permits and landscaping performance bonds."[24] The Second Circuit adopted a similar interpretation of § 666 in *United States v. Santopietro*, holding that the government must demonstrate "at least some connection between the bribe and a risk to the integrity of the federal[ly] funded program. . . ."[25]

Other circuit courts rejected any nexus requirement as an element of the offense. In *United States v. Valentine*, the Sixth Circuit held, "[W]e find that the statute does not require the government to demonstrate the federal character of the stolen property. The statute addresses the relationship between the federal government and the local government from which the property was stolen, not the relationship between the federal government and the converted property."[26] In *United States v. Westmorland*, the Fifth Circuit held, "Subsection (b) [of § 666] contains nothing to indicate that 'any transaction involving $5,000' means 'any federally funded transaction involving $5,000' or 'any transaction involving $5,000 of federal funds,' and other subsections of the statute contain no inconsistent provisions that might suggest such a qualification."[27]

In *Sabri v. United States*,[28] the Supreme Court resolved the split and put an end to constitutional challenges, both facial and as-applied, in § 666 prosecutions based on the need to avoid federalism concerns by requiring proof of a federal nexus.[29] The defendant was convicted for offering three bribes to a member of the Minneapolis City Council to help build a hotel and retail development in the city. Defendant made a facial challenge to § 666, asserting that the statute

24. *Id*. at 688. The vague connection requirement imposed by *Zwick* required the fact-finder to trace the funds from a federal program to the organization involved in the misconduct, and to determine whether the funds were sufficiently related to the alleged corruption to permit the prosecution to proceed. These facts may not have been apparent until after trial.

25. 166 F.3d 88, 93 (2nd Cir. 1999). *See* United States v. Brunshtein, 344 F.3d 91, 99 (2nd Cir. 2003) ("We conclude that a federal nexus is an element of § 666 that must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.").

26. 63 F.3d 459, 464 (6th Cir. 1995). Interestingly, none of the courts imposing the federal funding connection requirement found § 666 unconstitutional. Instead, they adopted an as-applied approach that purported to rely on the federalism rationale advanced in *Lopez* and *Morrison* to declare the prosecution unconstitutional absent proof of the requisite connection to federal funding. The lower courts never acknowledged that the Supreme Court did not use federalism in those cases to rewrite the elements of the offenses at issue, but instead it declared the entire provision unconstitutional as exceeding congressional authority.

27. 841 F.2d 572, 576 (5th Cir. 1988).

28. 541 U.S. 600 (2004).

29. *See* United States v. Hines, 541 F.3d 833, 836 (8th Cir. 2008) ("Hines's as-applied challenge fails, for the plain language of the statute does not require, as an element to be proved beyond a reasonable doubt, a nexus between the activity that constitutes a violation and federal funds."); United States v. v. Caro-Muniz, 406 F.3d 22, 27 (1st Cir. 2005) (rejecting defendant's as-applied challenge, the court "join[s] our sister circuits in holding that the government is not required to prove a nexus between the bribery charged and the municipality's receipt of federal funds."); United States v. Kranovich, 401 F.3d 1107, 1111–12 (9th Cir. 2005) (citing *Sabri*, "we therefore hold the government was not required to establish any connection between the embezzled funds and a federal interest, apart from the express requirement in section 666(b) that the County received federal benefits in excess of $10,000."); United States v. Spano, 401 F.3d 837, 841 (7th Cir. 2005) ("[A]lthough *Sabri* involved a facial constitutional challenge only, the opinion also forecloses the defendants' as-applied challenge.").

could never be applied constitutionally because it failed to require as an element of the crime proof of any connection between the bribe (or kickback) and federal funds.

The Court rejected the argument that without this additional element the provision exceeded Congress's power to enact the law. The Court stated:

> Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.[30]

The Court explained that corruption can have a broad impact beyond just the misuse of federal dollars or dereliction of a duty funded by the federal government. Therefore, it concluded that Congress's power to punish such conduct is not limited solely to cases in which there is specific proof of an effect on the national government's funding. The scope of § 666 is a permissibly broad exercise of congressional authority because "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there."

The rationale for the anticorruption provision is not simply to punish the misuse or theft of federal funds, a crime already prohibited by 18 U.S.C. § 641, but to accomplish the broader goal of ensuring the integrity of the programs that receive the requisite amount of federal money for their operation. Professor George D. Brown describes the analysis in *Sabri* as applying the "integrity rationale" to ensure that "[w]hat is needed is a broad net that achieves protection through sweeping up *all* corrupt transactions in order to guarantee the integrity of the recipient entity."[31] Therefore, according to the Court, for federal jurisdiction, "It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided" in § 666.[32] *Sabri* eliminated the requirement imposed by some lower courts that the government both explicitly identify the federal nexus in its indictment and then prove it at trial, thereby depriving defendants of an argument that could exempt them from the application of federal power to their conduct.[33]

30. 541 U.S. at 605.

31. Brown, *supra* note 2, at 428.

32. 541 U.S. at 606.

33. Courts requiring the nexus element had split over whether it was a jury question or a question of law reserved for the courts. Compare *United States v. Brunshtein*, 344 F.3d 91, 99 (2nd Cir. 2003) (requiring the federal nexus question be submitted to the jury) with *United States v. Bynum*, 327 F.3d 986, 993 (9th Cir. 2003) (if a federal nexus was required, it was a question of law to be resolved by the court and not an element of the offense to be found by the jury).

C. Fischer v. United States: *Benefits*

1. A Broad Reading of Benefits

In *Fischer v. United States*, the Supreme Court gave a broad reading to "benefits" in determining whether an organization or agency meets the $10,000 federal benefits requirement in § 666(b). At trial, the defendant was convicted for defrauding a hospital authority receiving funds under the Medicare program and for paying a kickback to an officer of an organization receiving Medicare funding. In upholding the conviction, the Supreme Court held that whether a government payment constitutes a "benefit" under § 666 depended on an examination of the program's "nature and purposes."[34] The Court rejected the defendant's argument that because Medicare funds are only reimbursement for services provided to the ultimate beneficiaries there is no benefit to the hospital. Instead, the Court held that the funding was provided "not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community."[35]

The Court noted that the providers who process the federal funds "derive significant advantage" from their participation in the Medicare program, and "[t]hese advantages constitute benefits within the meaning of the federal bribery statute. . . ." Even though the ultimate beneficiaries were the individual participants in Medicare, that did not prevent finding benefits conferred on the hospitals receiving funds through the program. Distinguishing Medicare from the situation in which the government enters into a contract to obtain services, the Court focused on the degree and nature of the government regulation as part of the program in finding that the payments constituted benefits. It stated:

> Medicare is designed to the end that the Government receives not only reciprocal value from isolated transactions but also long-term advantages from the existence of a sound and effective health care system for the elderly and disabled. The Government enacted specific statutes and regulations to secure its own interests in promoting the well being and advantage of the health care provider, in addition to the patient who receives care. The health care provider is receiving a benefit in the conventional sense of the term, unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction. Adequate payment and assistance to the health care provider is itself one of the objectives of the program. These purposes and effects suffice to make the payment a benefit within the meaning of the statute.[36]

Fischer made it clear that merely receiving federal funds was not sufficient to bring a case within § 666: "Any receipt of federal funds can, at some level of generality, be characterized as a benefit.

34. 529 U.S. 667, 671 (2000).
35. *Id.* at 679–80.
36. *Id.* at 680.

The statute does not employ this broad, almost limitless use of the term."[37] Taking such an expansive approach to the meaning of benefit "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." Instead, the determination whether a program receives benefits requires "an examination. . . of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payment. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program."[38]

The Court did not explain what it meant by the "proper federal balance," but like *Salinas*, the reference to a limit on federal authority may have assuaged any apprehension of some Justices that the statute authorized the Department of Justice to prosecute cases in which there was no clear link to a federal interest.[39] *Fischer* never explained exactly what the federalism limits were for offenses involving corruption in programs receiving federal funds, so that defendants can continue to argue that the prosecution in their particular case was unconstitutional.

Unlike § 201, which only reaches federal officials and those actually exercising federal authority, § 666 applies to all public officials and private persons working for a wide range of organizations or programs that receive substantial federal funding. The statute does not condition federal jurisdiction on the source of authority or on a direct connection between the office and the federal funds.[40] *Fischer* made it clear that not every entity receiving federal funds came within § 666, quoting from the Senate Report on the law that distinguished commercial transactions involving the government from those that involve conferring federal benefits.[41]

2. Relationship to Federal Funding

One issue for the defense in a § 666 prosecution is determining the nature of the organization and its relationship to the federal funding program. If the transaction is closer to a standard arms-length contractual agreement in which the government is a purchaser (or seller) like any

37. *Id*. at 668.

38. *Id*. at 681.

39. *See* United States v. Lipscomb, 299 F.3d 303, 313 (5th Cir. 2002) ("The *Salinas* Court merely observed in passing that, even if a federal interest were required, such an interest clearly existed. . . Similarly, the *Fischer* Court construed a term in § 666 broadly, simply musing that federalism principles might somehow limit the statute's sweep. As either a statutory or constitutional matter, then, the Court might be seen as harboring inchoate qualms about whether, for § 666 to apply, there might be some need for a direct interest in the funds involved in the prohibited conduct. . .").

40. In a dissenting opinion, Justice Thomas argued that the breadth of the Court's analysis made him "doubt that there is any federal assistance program that does not provide 'benefits' to organizations. . ." He pointed to stores that accept food stamps as coming within the definition of an organization receiving federal benefits because the program "helps to address the 'grocery gap,' that is, the lack of availability of reasonably priced nutritional foods in some low-income and rural areas." 529 U.S. at 692 (Thomas, J., dissenting).

41. *Id*. at 679 (quoting S. Rep. No. 98-225 at 370 (1984)) ("[N]ot every Federal contract or disbursement of funds would be covered [under § 666]. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime.").

other market participant, then the organization does not come within the statutory prohibition and a § 666 prosecution cannot proceed. For example, in *United States v. Stewart*, a pre-*Fischer* decision, the district court granted a motion to dismiss § 666 charges alleging theft of tools and parts from defendant's employer, Bell Helicopter. The government argued that its contracts with the company was not a normal supplier arrangement because it purchased custom manufactured goods that would be illegal to sell to others because of their classified nature. The district court rejected that argument, finding "the statute was not intended to apply to purely commercial transactions," so that "monies paid in consideration for goods provided, even if customized, are not benefits within the meaning of the statute."[42] *Stewart*'s analysis is correct in focusing on the nature of the government program. The extent to which the organization is supported by federal funds as part of a broad national policy program rather than engaging in market transactions will make it more like the hospital that received Medicare payments in *Fischer*.

After *Fischer*, whether an organization received federal funding directly, or is only an indirect beneficiary of federal dollars, is not the decisive question for the application of § 666. The analysis focuses more on the type of program involved than tracing money directly from federal coffers to an organization's bank account. In *United States v. Dubón-Ortero*, the First Circuit upheld the conviction of two owners of a for-profit corporation that received federal funds only through a local government with which it contracted to provide AIDS testing and education. The circuit court stated, "It makes no difference that [defendants' company] Health Services received this money indirectly. It is now well established that benefits under § 666 are not limited solely to primary target recipients or beneficiaries."[43] The First Circuit found that the contract to provide services "contemplated a relationship between Health Services and the Federal Government" that would further the goals of a federal program for disease control and AIDS prevention, and therefore § 666 applied to the corporation.[44]

United States v. Hildenbrand also illustrated the expansive view of benefits not conditioned on the direct receipt of federal funds. The defendants purchased homes at a discount through the Department of Housing and Urban Development's Single Family Affordable Housing Program (SFAHP) and then improperly inflated the value of the repairs made, thus increasing the allowable price at which the homes could be sold. The defendants argued that § 666 did not apply because they neither received nor disbursed federal funds through the SFAHP, and the discounts on the properties were merely an incentive to purchase the homes in a purely commercial transaction between HUD and the organization. The Fifth Circuit rejected the argument, finding that the organization "received a quantitative monetary benefit from HUD through the discounts," and the program "furthers the public policy objectives of both expanding home ownership opportunities for low- and moderate-income purchasers and strengthening neighborhoods. . . ."[45] While the ultimate purchasers were also beneficiaries of the discounts, as in *Fischer*,

42. 727 F. Supp. 1068, 1072 (N.D. Tex. 1989).

43. 292 F.3d 1, 9 (1st Cir. 2002).

44. *Id.* at 9–10.

45. 527 F.3d 466, 478 (5th Cir. 2008). In a pre-*Fischer* case, the district court in *United States v. Richards*, 925 F. Supp. 1097 (D. N.J. 1996), reached a similar conclusion about the application of § 666 to private partnerships

there can be multiple beneficiaries of a government program, and the fact that an organization facilitates the transfer of the benefit to the ultimate recipient does not preclude it from § 666's coverage.[46]

Not every organization receiving benefits from a federal program comes within § 666. In *United States v. Wyncoop*, a pre-*Fischer* decision, the Ninth Circuit held that the embezzlement of funds from a private college that received no direct federal funding did not come within § 666. The government's theory was that the college's participation in the federal student loan program that guaranteed loans made by private banks to its students, which funds are paid to the school, was a federal benefit sufficient to meet the jurisdictional requirement of § 666. The Ninth Circuit held that "the statute was not intended to cover thefts from institutions like Trend College that do not themselves receive and administer federal funds."[47]

The circuit court pointed out that the school was only an "indirect" beneficiary of the federal funds, an analysis that does not remain good law in light of *Fischer*'s focus on the structure, operation, and purpose of the organization rather than how the funding is actually received or disbursed. But the Ninth Circuit's analysis of the school's tenuous connection to federal funds, that § 666 does not reach every act of fraud involving an organization receiving in some way federal benefits, may still survive in light of the Supreme Court's admonition in *Fischer*.[48] The embezzlement in *Wyncoop* had nothing to do with the student loan program, which was only incidentally involved, nor was the integrity of the federal program affected by the diversion of money from the school's account, so the circuit court's decision overturning the conviction appears to be the correct result even after *Fischer*.[49]

that owned low-income rental housing subsidized by the Farmers Home Administration. In *United States v. Dransfield*, 913 F. Supp. 702, 709 (E.D. N.Y. 1998), another pre-*Fischer* decision, the district court found that a school construction authority retained to repair school buildings received benefits even though the payments were not made to the authority itself, holding that "it cannot reasonably be inferred from the language of the statute that the federal funding element is restricted to funds which are *directly* received by the agency under a federal program." (italics in original).

46. In *United States v. Webb*, 691 F. Supp. 1164 (N.D. Ill. 1988), a federal district court held that a private accounting firm that managed and administered federal funds as part of a subsidized housing program did not receive federal benefits because there was no "direct" benefit and the firm did not control the federal funds, to which title remained in the federal government. The district court further found that 18 U.S.C. § 641, applicable to thefts of government property, could be applied to the case, and therefore § 666 was not available. It is not clear why the availability of another statute prohibits charging under § 666, and the focus on control of the funds is not consistent with *Fischer*'s analysis of the nature of the federal program. *See also* United States v. Paradies, 98 F.3d 1266, 1289 (11th Cir. 1998) (declining to apply a connection to federal funds element in a conviction of a state official accepting entirely private money from individuals).

47. 11 F.3d 119, 122 (9th Cir. 1993).

48. "Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." 529 U.S. at 681.

49. Much of the Ninth Circuit's analysis focused on the fact that the school was only an indirect beneficiary of the federal funds, which calls into question whether *Wyncoop* has much precedential value. The circuit court compared the school's participation in the program to stores that are part of the federal food stamp program, which Justice Thomas, in his dissenting opinion in *Fischer*, asserted would now come within § 666. At a minimum, *Wyncoop* represents the outer limit of § 666(b)'s application to an organization.

3. Conclusion

The challenge for both the government and defense counsel in a § 666 prosecution is determining the nature of the organization that is alleged to have received the federal benefits.[50] *Fischer*'s analysis is highly fact specific, looking to the overall goals of the federal program and manner in which the federal funds are disbursed to achieve those goals. The focus is not just on whether the organization received federal money directly, although that can go a long way toward bringing it within § 666. To the extent the transfer is more like a commercial transaction, in which the government is only a buyer (or seller) of goods or services, the greater the possibility that it will not come within the statute. But, as *Hildenbrand* illustrates, the fact that the transaction is similar to an ordinary sale of property does not preclude finding that there is a federal benefit conferred on the organization because broader policy goals can be achieved through the federal participation in ordinary market transactions. While *Fischer* recognized that there were limits on the scope of § 666, it is difficult to see how the *benefits* analysis furnishes much of a constraint on the application of the statute.

D. $10,000 in Any One-Year Period

The federal jurisdictional nexus is receipt of $10,000 of benefits from the federal government by the state or local government, agency, or organization within one year of the offense. This nexus is defined in § 666(d)(5) as including "time both before and after the commission of the offense." The statutory requirement is effectively a swinging door, requiring proof of the receipt of identified benefits provided by the federal government in *any* twelve-month period the prosecutor designates, so long as the offense occurred at any point in time during that identified period. The statute does not peg the one-year period to a fiscal or calendar year, nor must all of the criminal activity occur within that one-year period.[51]

Section 666 is a continuing offense, so the offense conduct, such as solicitation of a bribe or fraud, need not occur in a single moment but can take place over an extended period of time. For example, a misapplication of the funds of a program receiving $10,000 in government benefits can take place through a series of financial transactions, and so long as any one of them take place within the one-year period identified in the indictment as providing federal jurisdiction, then this element of the offense is established.

As an element of the offense, the government must prove beyond a reasonable doubt that the organization, government, or agency identified in the indictment received over $10,000 in benefits during the specified one-year period. While that proof seems fairly simple, *United States v. Jackson* illustrates that this element is not proven by simply showing that an unrelated unit of the

50. *See* Anthony A. Joseph, *Public Corruption: The Government's Expansive View in Pursuit of Local and State Officials*, 38 Cumb. L. Rev. 567, 575 (2008) ("§ 666 does not give the federal government jurisdiction to bring a charge against any 'organization' simply by alleging that the state (for example, a 'government' with no formal connection to a non-profit organization) received federal funds.").

51. *See* United States v. Baldridge, 559 F.3d 1126, 1138 (10th Cir. 2009).

government received federal funding. In *Jackson*, the Fifth Circuit overturned convictions because the government failed to offer sufficient proof of the actual amounts received by the city during the alleged period when the offense occurred. The government sought to prove the benefits received by showing indirect benefits received by the city, based on amounts paid by the federal government to the state for local or regional arts projects. The prosecution failed to introduce sufficient evidence of the actual amount of funds received, the dates when the funds were disbursed to the city, or how much of the money received was traceable to federal grants. The circuit court stated that "the Government must present more than a mere scintilla of evidence" of the federal benefits by introducing evidence that "affords a substantial basis" to support the jury's finding.[52] Thus, it is important for the prosecution to offer clear proof of this element through testimony or documents showing the particular dates and amounts of any disbursements used to establish federal jurisdiction.[53]

V. AGENT

Section 666 applies to any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof" that receives the $10,000 of federal benefits in the one-year period. The statute defines an agent as "a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative."[54] The breadth of the statutory definition of an "agent" would seem to preclude most arguments over its scope, but in fact this is among the most litigated issues in § 666 prosecutions because it provides one of the few grounds, after *Fischer*, for the defense to argue that the person falls outside the statute once the federal nexus argument failed.

A. Authority over Funds

Prior to the Supreme Court's decision in *Salinas*, one district court limited the scope of § 666 by requiring that the government prove the agent was responsible for the administration of the organization's funds, although it was not necessary to show that federal funds were involved. This limitation was designed to ensure that the prohibition protected a federal interest by linking the agent's wrongdoing to the risk that federal funds would be misspent. In *United States v. Frega*, the district court dismissed a charge of conspiracy to violate § 666 against two state court judges and an attorney arising from bribery of the judges to favor the lawyer's clients in cases before them.

52. 313 F.3d 231, 236–38 (5th Cir. 2002); *see also* Fischer v. United States, 529 U.S. 667, 677 (2000) (holding that Medicare payments are benefits under § 666 with accepting the government's proposed reading of benefits of including anything that has the federal government as the source of the payment).

53. *See* United States v. Frega, 933 F. Supp. 1536, 1542 (S.D. Cal. 1996) (funding must be shown at a fairly specific level, and not just at the general government level).

54. 18 U.S.C. § 666(d)(1).

The district judge noted that the statute was designed to protect the integrity of federal funds, and found the indictment insufficient because it did "not allege that federal funds were corruptly administered, were in danger of being corruptly administered, or even could have been corruptly administered."[55] After *Salinas*, that analysis is flawed because the Supreme Court held that the organization or agency's receipt of the $10,000 in federal funds is sufficient in itself to establish federal jurisdiction, and no further federal nexus is required for a prosecution under the statute. In *United States v. Vitillo*, the Third Circuit stated quite succinctly that "§ 666(d)(1) does not define an 'agent' as someone who necessarily controls federal funds."[56]

The Eleventh Circuit relied on *Frega*, however, to overturn the conviction of two Mississippi judges and the trial attorney who bribed them to receive favorable treatment in two cases before them because there was an insufficient nexus between the bribery and the federal funding. In *United States v. Whitfield*, the circuit court held that the defendants were agents of the Mississippi Administrative Office of the Courts (AOC) in their *nonjudicial* roles of hiring staff and administering funds provided by that office. The bribery involved their *judicial* authority, which was unrelated to the funding they received. The Eleventh Circuit held that "insofar as [Judges] Whitfield and Teel may have been agents of the AOC, their role as such had nothing to do with their capacity as judicial decisionmakers."[57] The circuit court noted that the result would be different if they had been bribed to hire someone to work their chambers, but the bribes related to cases that had no connection with the affairs of the state agency.

Whitfield takes a bifurcated view of the term "agent," finding that an individual may be acting as an agent in one capacity but not in another, even if the person only occupied a single position and acted in that capacity. This appears to be contrary to the language of § 666, which only requires that the person be an "agent of an organization, or of a State, local, or Indian tribal government" receiving the $10,000 of federal funding. The Eleventh Circuit focused on the fact that the bribery had nothing to do with "any business, transaction, or series of transactions" of the state office that provided the funding, but that is contrary to *Salinas*'s analysis that dispenses with requiring a nexus to the federal funding. *Whitfield*'s approach allows a defendant to argue that the bribe or gratuity is unrelated to the person's role as an agent of the organization or government receiving the funding, thus opening a potential avenue to avoid liability under the statute.

B. Agent's Authority

1. Employees

An important issue is the relationship of the defendant to the organization, but there is no requirement that the person occupy a particular position or have specified responsibilities, such as

55. 933 F. Supp. 1536, 1543 (S.D. Cal. 1996).

56. 490 F.3d 314, 323 (3rd Cir. 2007). *See also* United States v. Ollison, 555 F.3d 152, 160 (5th Cir. 2009) ("The statute itself does not distinguish between 'high-level' and 'low-level' employees.").

57. 590 F.3d 325, 346 (11th Cir. 2009).

authority over budgets or management of the organization, to be an agent. In *United States v. Ollison*, the Fifth Circuit rejected the argument by a secretary to a school district superintendent that she did not come within § 666 because she was a low-level employee who did not have authority over programs that would affect the federal funds received by the district. The circuit court found that the defendant's misuse of district funds for personal expenses had a sufficient relationship to the federal funding so that the statute properly applied to her, rejecting a constitutional as-applied challenge to the conviction.[58]

2. Nonemployees

Once the case moves away from the more traditional situation of an employee, a defendant's relationship to the organization or agency's exercise of authority assumes great importance in determining whether the label "agent" can be applied. In *United States v. Ferber*, the district court dismissed § 666 charges against an outside financial adviser for the Massachusetts Water Resources Agency (MWRA) accused of taking bribes in connection with the award of securities underwriting business on the agency's behalf. The district judge found that the defendant was not "authorized to act" on MWRA's behalf under general principles of agency law. While the defendant owed a fiduciary duty to the agency, he only provided financial planning advice, and "[t]here was no evidence presented in the government's case that tended to show that Ferber was ever given the authority to alter the legal relationship between the [agency] and third parties."[59]

For nonemployees, the authority to act on behalf of the organization or agency is crucial to come within § 666. In *United States v. Vitillo*, the Third Circuit considered whether the defendants, an individual and the corporations he controlled, were agents of an airport owned by a municipality that they managed as independent contractors. Rejecting the argument that an "independent contractor" does not come within the statute, the circuit court found that the use of the word "includes" in § 666(d)(1) meant that the list of relationships which makes a person an agent was "not exhaustive," nor was the government required to prove that the defendants controlled federal funds as a condition for being found an agent. The Third Circuit concluded that "as a matter of

58. *Id*. at 161. The Fifth Circuit noted the language in two other cases that appeared to require the defendant to have some authority over the organization's transactions that would threaten the integrity of the federal funds. In *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988), one of the earliest appellate decisions construing § 666, the circuit court, in the course of rejecting a defendant's claim that the government had to trace the federal funds to prove a violation, stated that the statute is limited "to agents who have the authority to effect significant transactions." In *United States v. Lipscomb*, 299 F.3d 303, 336 (5th Cir. 2002), a pre-*Sabri* case reviewing the constitutionality of the statute, the Fifth Circuit referred to the defendant's "high rank and his broad influence over many programs that receive federal funds" as a basis for rejecting an as-applied challenge to the prosecution. In neither case was the issue of the defendant's status as an "agent" squarely presented to the court, and the statements about the authority of the defendants were made in passing to buttress the circuit court's ultimate conclusion upholding the convictions. While *Ollison* pays lip service to the apparent requirement that the defendant have some authority over funds, it was sufficient that the defendant's conduct affected the disbursement of district funds. It does not appear to be a specific requirement to prove agency that the government show the person exercised some measure of control over the organizations funds, only that the funds were affected by the agent's conduct. No other circuits recognize this as a limitation on the scope of § 666.

59. 966 F. Supp. 90, 100 (D. Mass. 1997).

statutory interpretation, § 666(d)(1) does not by definition exclude an independent contractor who acts on behalf of a § 666(b) entity as a manager or representative of that entity."[60]

The Seventh Circuit reached the same conclusion in *United States v. Lupton* regarding a real estate broker retained by the state to assist in the sale of one of its buildings who sought a kickback from a potential purchaser in exchange for recommending him as having the best offer for the property. The contract between the state and the real estate agency provided that it was only an "independent contractor" and did not have any authority to act on behalf of the state in a transaction, and the defendant argued that this agreement meant he could not be an agent under § 666(d)(1).[61] The circuit court rejected that argument, stating that whether a person was an agent was determined by the statute and "not by the terms of a private contract."[62] The Seventh Circuit explained that "[p]arties cannot contract around definitions provided in criminal statutes; even if Lupton could not be considered a common law agent under Equis's contract, it is nonetheless possible for him to be an 'agent' under the terms of 18 U.S.C. § 666(d)(1)."[63] Similarly, the Sixth Circuit explained that to be an agent under this provision "[e]mployment labels . . . may bring some employment relationships within the sphere of agency status but they do not necessarily squeeze all other employment relationships out of that sphere."[64]

C. Agent of the Organization

The agency element focuses on the person's role in the organization, and the effect of corruption on federal funding for its operations. The Supreme Court's emphasis in *Sabri* on the rationale of § 666 as a means of preserving the integrity of the organization makes it clear that the agent must be acting on behalf of the organization that receives the federal funds, and not just an organization that realizes an indirect benefit from federal disbursements.

In *United States v. Abu-Shawish*, the Seventh Circuit explained that "the agent who is potentially criminally liable must have fraudulently obtained property that is under the care, custody or control of the same organization for which he is an agent."[65] The defendant was the director of a nonprofit organization receiving funds from the City of Milwaukee to put on a festival, and the city received federal block grants that were used for the festival. The defendant fraudulently diverted some of the money into his personal account, and was charged under § 666(a)(1)(A) with theft from an organization receiving federal funds. Although he was an agent of the nonprofit organization from which he took the money, the federal funding was directed to the city, not Abu-Shawish's organization. The circuit court explained that when the charge is theft "[t]he plain language of the statute at issue here seems to require that the individual act as an agent on behalf

60. 490 F.3d 314, 323 (3rd Cir. 2007).
61. 620 F.3d 790, 800 (7th Cir. 2010).
62. *Id.*
63. *Id.*
64. United States v. Hudson, 491 F.3d 590, 595 (6th Cir. 2007).
65. 507 F.3d 550, 556 (7th Cir. 2007).

of the organization that he or she defrauded for the purposes of obtaining funds."[66] While the government is not required to show that federal funds were directly affected,[67] only an agent of the organization that actually receives federal funds, and not a future beneficiary of that funding, comes within § 666, at least when the charge involves theft rather than bribery.[68]

The government must prove that the defendant is an agent of the particular organization, government, or agency identified in the indictment as receiving the $10,000 of federal funding during the twelve-month period.[69] In determining whether a person is authorized to act on behalf of the organization, the government must introduce evidence about the person's employment, job description, and authority. Once it is shown that the person is an employee, their position in the organization does not matter in applying § 666 to the conduct.[70]

In *United States v. Phillips*, the Fifth Circuit overturned the conviction of a Louisiana parish tax assessor because he was not an agent of the parish but of the state tax assessor's office, a separate governmental unit. The prosecution introduced evidence that the parish received over $10,000 in funding for food stamps from the federal government, but

> because Phillips, as a matter of law, was not an employee or officer of the parish and because he was not authorized to act on behalf of the parish with respect to its funds, Phillips's actions did not and could not have threatened the integrity of federal funds or programs. Without an agency relationship to the recipient of federal funds, § 666 does not reach the misconduct of local officials.[71]

Phillips highlights the importance of establishing the relationship of the defendant to the organization that received the federal funding, and simply showing that a governmental office

66. *Id.* at 555. The circuit court noted that "surely Congress did not intend to criminalize, with this provision, an act that does not implicate the integrity of federal funds (either directly or indirectly) in any way." *Id.* at 557.

67. The Seventh Circuit made it clear in a footnote that "[t]he government is not required to prove, in the context of this provision, that federal funds were actually affect by the agent's actions." *Id.* at 557 n.6.

68. The Seventh Circuit rejected the government's argument that a defendant could be held liable for defrauding an organization that later received funds traceable to a federal grant. Among the reasons the circuit court rejected this position was that

> the government's interpretation would require a temporal leap of logic. In particular, the statute punishes an agent who fraudulently obtains property that is owned by their organization. There is no change of tense in the statute: only one time frame is contemplated. The government's reading, however, would also punish an agent who fraudulently obtains property that is then subsequently owned by their organization (i.e., the events that transpired in the instant case).

Id. at 556.

69. An agent can be an independent contractor of the organization receiving the federal funds. *See* United States v. Lupton, 2009 WL 357904 *1 (E.D. Wis. 2009).

70. *See* United States v. Brann, 990 F.2d 98 (3rd Cir. 1993) ("The definition thus includes in the term 'agent' an employee of any level from the lowest clerk to the highest administrator. It does not, however, include or require that the employee hold a position of trust.").

71. 219 F.3d 404, 413 (5th Cir. 2000). *Phillips* is a pre-*Sabri* decision, and the Fifth Circuit discusses the need to avoid any federalism problems by limiting the statute. While the circuit court discusses the need for a federal nexus, the agency analysis was not affected by *Sabri* and remains good law.

received federal money is not enough without considering whether the defendant is an agent of that particular organization.

Courts can rely on state and local laws to ascertain whether the person is an agent of the organization. In *United States v. Madrzyk*, the district court relied on the City of Chicago Municipal Code to conclude that an alderman was an agent of the city and not just the city council.[72] In *United States v. Petty*, the Tenth Circuit found that a deputy state treasurer acted on behalf of the state, and not just the Treasurer's Office, because she invested funds provided to the state that were placed in a general account for all of its agencies.[73]

Courts undertaking the agency analysis must consider the legal status of the organization to understand how it fits within the hierarchy of a government, which allows a court to determine whether the organization is a separate body or integrated into a larger unit that received federal funding. Once its status is ascertained, the court can examine the federal funding provided to ensure that the person is an agent of the identified organization that meets the jurisdictional requirement of § 666.

In *United States v. Moeller*, defendants who were agents of the Texas Federal Inspection Service (TFIS) challenged their convictions for violating § 666 on the ground that the evidence only showed that the Texas Department of Agriculture (TDA) received over $10,000 of federal funds. The Fifth Circuit looked to the cooperative agreement between the U.S. Department of Agriculture and the TDA that created the TFIS to find that the agency "performed discretionary functions on behalf of TDA" and remitted its funds directly to the state.[74] Thus, the circuit court concluded that the defendants were also agents of the TDA, so the evidence established the federal funding element. In *United States v. Forste*, a district court found that a serviceman in a state Air National Guard unit was an agent of the state and not of the federal government because "at least during times that it is not ordered to active duty," the National Guard is a state agency.[75]

The analysis of which state agency actually employed the defendant was crucial in *United States v. Langston*. The Eleventh Circuit overturned the defendant's § 666 conviction for diverting funds from the Alabama Fire College, where he was the executive director, because the indictment charged him with being an agent of the State of Alabama rather than the Fire College. The circuit court reviewed the statute creating the organization and found that the Fire College was independent, so that he was not a dual agent of both, unlike *Moeller*. The Eleventh Circuit found that "[b]ecause Langston's employment with the Fire College does not authorize him to act on behalf of the state under the applicable state law, evidence of his employment with the Fire College is not relevant to the charges asserting he acted as an agent of the state."[76] The evidence that the circuit

72. 970 F. Supp. 642, 644 (N.D. Ill. 1997) ("Section 2-74-030 categories all City employees in City service. The first category of City employees is elected officials. See City of Chicago, Ill., Municipal Code § 2-74-030(1). It is undisputed that Madrzyk was the elected Alderman for the 13th Ward during the relevant time period. As an elected official, Madrzyk was an agent of the City.").

73. 98 F.3d 1213, 1219 (10th Cir. 1996) ("Because Whitehead was in charge of investing the state's funds, not merely the Treasurer's funds, we find that she was indeed an agent of the state.").

74. 987 F.2d 1134, 1137–38 (5th Cir. 1993).

75. 980 F. Supp. 395, 398 (D. Kan. 1997).

76. 590 F.3d 1226, 1234 (11th Cir. 2009).

court considered in finding insufficient evidence to establish an agency relationship with the state included the W-2 forms he received and his employment contract, both of which only referenced the Fire College. *Langston* makes it clear that prosecutors must be careful in identifying the proper agency relationship as the foundation for the § 666 charge, and defense counsel should scrutinize the proof of that relationship to determine whether the wrong office or organization was charged.

VI. THE OFFENSE CONDUCT

Section 666 punishes two different types of criminal conduct, both of which involve harm to an organization, government, or agency receiving federal funding. First, § 666(a)(1)(A) punishes any person who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies property" worth $5,000 that is owned by, or under the care, custody, or control of an organization. This offense is similar to other federal theft statutes, such as § 641. Second, § 666(a)(1)(B) is the bribery and unlawful gratuities part of the statute, making it a crime for any person who

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more.

Section 666(a)(2) extends the corruption offense to the offeror or payer, similar to the coverage of § 201 for both parties to a bribe or unlawful gratuity involving a federal official.

A. Embezzle, Steal, Defraud, Conversion, or Misapplication (18 U.S.C. § 666(a)(1)(A))

Embezzlement, theft, and fraud are traditional common law offenses, and the incorporation of them into § 666 means that the usual elements of those crimes are also applicable to agents of organizations, governments, and agencies which receive the requisite federal funding. These crimes are not frequently charged by federal prosecutors because embezzlement and theft in local governments is usually dealt with by state or local prosecutors. There are no reported federal cases analyzing the scope and application of these two crimes in a § 666 prosecution.

Fraud is a much broader concept than embezzlement and theft, covering not only the traditional offense of larceny by trick but also, under other federal statutes, omissions causing a loss and even the deprivation of the right of honest services under 18 U.S.C. § 1346.[77] While fraud has been

77. In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court stated that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of

applied expansively under the federal statutes related to the mails (§ 1341), interstate wires (§ 1343), banks (§ 1344), insurance (§ 1346), and securities (§ 1348), the § 666 prosecutions based on fraud involve more run-of-the-mill schemes, such as the diversion of funds through false billings.[78]

The prohibition on conversion or misapplication is the broadest crime listed in § 666(a)(1)(A), and they are not defined in the statute. The legislative history of § 666 makes no mention of these crimes.[79] This portion, which is set off from embezzlement, theft, and fraud, makes it an offense if a person "otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies." These are really two different offenses, one being larceny by conversion and the other misapplication of property. The conversion offense involves lawfully obtaining possession of property and then subsequently converting it to one's own use.[80] A misapplication, on the other hand, does not entail taking possession of the property or any personal use of it, instead, it involves only directing its use improperly. Unlike the other offenses in § 666(a)(1)(A), which all involve some form of theft, misapplication focuses on the

something of value by trick, deceit, chicane or overreaching.'" (quoting *Hammerschmidt v. United States*, 265 U.S. 182 (1924)).

> It does not appear that an allegation of fraud in violation of § 666 can be based on the right of honest services theory in 18 U.S.C. § 1346, which has been used in a number of corruption prosecutions (see Chapter 6). That provision states, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." The reference to "this chapter" means that the provision applies to the crimes in Title 18, Part I, Chapter 63, but § 666 is not part of that chapter of the federal criminal code. While corruption can be charged under both § 666 and the mail and wire fraud statutes, the limitation of the right of honest services theory to statutes in "this chapter" should preclude its application to § 666, although it would not be much of a stretch to apply § 1346 to § 666. *See* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of § 666*, 73 Notre Dame L. Rev. 247, 274 (1998) ("It might not be a big step to transfer the concept of honest services fraud to § 666."). The Supreme Court's decision in *Skilling v. United States*, ___ S. Ct. ___ (2010), limiting right of honest services prosecutions to conduct involving bribery or kickbacks does bring § 666 much closer to the mail and wire fraud cases that involve § 1346.

78. *See, e.g.*, United States v. Abu-Shawish, 507 F.3d 550 (7th Cir. 2007). The defendant's conviction was overturned because he was not the agent of an organization receiving $10,000 of federal benefits, but the circuit court pointed out that his fraud could easily have been charged under other federal statutes:

> It is likely that Abu-Shawish could have been charged with mail or wire fraud, since he used both the mail and telephone as a part of his fraudulent scheme. It is not for this Court to reflect on why the government chose to charge him with a violation of § 666(a)(1)(A) as opposed to mail fraud and/or wire fraud. At bottom, Abu-Shawish defrauded the City of Milwaukee, but the government is still required to charge him with the appropriate crime.

Id. at 558.

79. The Senate Report on § 666 states only that the provision "create[s] new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations of State and local governments pursuant to a Federal program." S.Rep. No. 225, *reprinted in* 1984 U.S.C.C.A.N. 3182. There is no specific mention of conversion or misapplication.

80. *See* People v. Christenson, 312 N.W.2d 618, 620 (Mich. 1981) ("The purpose of the larceny by conversion statute is to cover one of the situations left unaccounted for by common-law larceny, that is, where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use."); Itin v. Ungar, 17 P.3d 129, 135 n.10 (Colo. 2000) (the common law offense of conversion "is distinct from the crime of theft in that it does not require that a wrongdoer act with the specific intent to permanently deprive the owner of his property.").

misuse of authority to direct the expenditure of funds for a purpose other than that designated by the organization.

In *United States v. Thompson*, the Seventh Circuit engaged in an extensive analysis of what constitutes misapplication of an organization's funds under § 666. The defendant was a state official convicted for violating state administrative rules related to the selection of a travel agent for state agencies. After the first round of bids was received, a travel agency from outside the state was the lowest bidder. The official wanted the contract awarded to an in-state agency, and made reference to "politics" or how "political" the decision would be in ordering that the contract be re-bid. The owner of the in-state travel agency who bid on the contract was a contributor to the governor's campaign. After reviewing the new bids, a board on which the state official served awarded the contract to the in-state travel agency based on the scores each received, which was done properly, and three months later the official received a $1,000 raise. The government argued that the raise was a reward for the misapplication of state funds when the contract was given to the in-state travel agency.

The Seventh Circuit began by noting that even if there was a "mistake" in the bidding process that violated state administrative rules, that alone would not constitute a misapplication of state funds. It stated, "Approving a payment for goods or services not supplied would be a misapplication, but hiring the low bidder does not sound like 'misapplication' of funds."[81] The circuit court explained that there are two possible readings of "misapplies" in § 666:

> We could read that word broadly, so that it means any disbursement that would not have occurred had all state laws been enforced without any political considerations. Or we could read it narrowly, so that it means a disbursement in exchange for services not rendered (as with ghost workers), or to suppliers that would not have received any contract but for bribes, or for services that were overpriced (to cover the cost of baksheesh), or for shoddy goods at the price prevailing for high-quality goods.[82]

Relying on the caption for § 666 that connotes targeting corruption and applying the Rule of Lenity, the Seventh Circuit opted for the narrower reading.[83] The focus on harm from the violation is consistent with *Sabri*'s emphasis on the statute's role in preserving the integrity of the organization which receives federal funds.

In analyzing what it means to misapply funds, *Thompson* emphasized that § 666 is designed to prosecute conduct which results in the government not getting what it paid for, or the use of its funds through a process tainted by corruption, not just a violation of administrative rules based on questionable considerations. According to the court,

> An error—even a deliberate one, in which the employee winks at the rules in order to help out someone he believes deserving but barely over the eligibility threshold—is a civil rather than a

81. 484 F.3d 877, 881 (7th Cir. 2007).

82. *Id.*

83. The Seventh Circuit noted that "Section 666 is captioned 'Theft or bribery concerning programs receiving Federal funds,' and the Supreme Court refers to it as an anti-bribery rule." *Id.*

> criminal transgression. Likewise the sin is civil (if it is any wrong at all) when a public employee manipulates the rules, as Thompson did, to save the state money or favor a home-state producer that supports elected officials.[84]

The notion of harm advanced in *Thompson* does not require that the government lose money, only that the misapplication must involve a corrupt decision-making process or a diversion of resources from their proper application as determined by those responsible for their allocation. In *United States v. Urlacher*, the Second Circuit rejected a police official's defense that there was no violation of § 666(a)(1)(A) when funds were applied to other purposes of the police department than those for which they were supposed to be used. The circuit court stated, "Intentional misapplication, in order to avoid redundancy, must mean intentional misapplication for otherwise legitimate purposes; if it were for illegitimate purposes, it would be covered by the prohibitions against embezzlement, stealing, obtaining by fraud, or conversion."[85]

While the defendant usually gains a benefit from the misapplication, intentionally directing the funds in a way that subverts the organization's legitimate interest or the requirements imposed by the organization receiving the funds about how they should be expended constitutes a violation of § 666 because it calls into question the integrity of the organization's internal procedures for controlling the disbursement of funds.[86] Misapplication does not require a personal benefit to the agent from the misconduct.

For example, in *United States v. Frazier*, the Tenth Circuit upheld the defendant's conviction for misapplying funds from a federal job training grant to purchase computers for his organization rather than providing the computer training required by the grant.[87] In *United States v. Cornier-Ortiz*, the First Circuit affirmed the defendant's conviction for misapplying funds to hire the brother of a government employee to perform work in violation of a conflict-of-interest policy. The circuit court held, "The prohibition against intentional misapplication covers the situation presented here: payments made for what was an underlying legitimate purpose but intentionally misapplied to undermine a conflict of interest prohibition."[88]

84. *Id.*

85. United States v. Urlacher, 979 F.2d 935, 938 (2nd Cir. 1992).

86. If the Second Circuit meant to limit misapplication to only those situations in which the use of the funds was legitimate, then its analysis is mistaken. What constitutes a misapplication can involve both legitimate and illegitimate uses of property and is not confined to only legitimate ones. In *Thompson*, the Seventh Circuit stated that "[a]s long as the state gets what it contracts for, at the market price, no funds have been misapplied, even if the state's rules should have led it to buy something more expensive (and perhaps of higher quality, too)." 484 F.3d at 881–82. *Thompson*'s focus on whether organization received the intended benefit from the use of its funds is consistent with *Urlacher*'s focus on whether the money is being spent in a permissible manner, regardless of whether the ultimate use of the funds is for something legitimate or illegitimate. If the organization gets what it intended to receive through the use of its funds, then there is no misapplication under *Thompson*, but if the funds are used for a purpose for which they should not have been expended, then under *Urlacher* it is not a defense to argue that the organization at least got something in return for its money.

87. 53 F.3d 1105, 1109 (10th Cir. 1995).

88. 361 F.3d 29, 37 (1st Cir. 2004).

The misapplication must be done "intentionally," so the government is required to prove the defendant's specific intent to misapply the property of the organization and not just that it was used negligently. If an agent's use of the property is authorized, then that can be strong evidence that he did not have the requisite intent. In *United States v. De la Cruz*, the Seventh Circuit stated, "Authorization, or ratification, from those with authority can be an important evidentiary factor in favor of the defense, militating against a finding of intentional misapplication."[89] It is not a complete defense, however, and in *De la Cruz*, the circuit court found the ratification of the contracts questionable because "officials attempted to immunize themselves from federal prosecution by simply stamping their criminal misapplication of funds as approved."[90]

B. Bribery and Unlawful Gratuities

1. The Broader Approach of § 666(a)(1)(B)

Congress enacted § 666 to extend the prohibitions on bribery and unlawful gratuities contained in 18 U.S.C. § 201 to state and local governments, along with organizations that received significant federal funding. The two statutes are not coextensive, however, due to differences in the text making § 666 broader than § 201. Section 666(a)(1)(B) provides that an agent of an organization, government, or agency who "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded" is guilty of the crime, while § 201 does not include solicitations. Like § 201, § 666 also reaches the offeror or payer of a bribe or gratuity.[91]

The inclusion of the term "solicit" in § 666 expands the statute's coverage beyond *quid pro quo* arrangements. The Sixth Circuit explained in *United States v. Abbey* that "the statute does not require the government to prove that Abbey contemplated a specific act when he received the bribe; the text says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise. . . ."[92] The Seventh Circuit, in *United States v. Gee*, summarized the scope of § 666(a)(1)(B) succinctly when it stated that a "*quid pro quo* of money for a specific legislative act is *sufficient* to violate the statute, but it is not *necessary*."[93] The use of the term "solicit" means that even the preliminary steps that would lead to a *quid pro quo* arrangement are enough to violate the statute, so long as the solicitation is corrupt.

89. 469 F.3d 1064, 1068 (7th Cir. 2006). The Seventh Circuit referred to the bank misapplication statute, 18 U.S.C. § 656, which does not recognize a complete defense based on approval of a transaction by the bank's board of directors or officers.

90. *Id.*

91. Section 666(a)(2) provides that "Whoever . . . corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof" shall be guilty of the offense.

92. 560 F.3d 513, 520 (6th Cir. 2009).

93. 432 F.3d 713, 714 (7th Cir. 2005).

The Eleventh Circuit in *United States v. McNair* adopted the same position when rejecting a requirement that the government prove a *quid pro quo* agreement. The circuit court found that the plain language of § 666 did not require that the solicitation or receipt of a bribe be "in exchange for a specific official act," and noted that "[t]o accept the defendants' argument would permit a person to pay a significant sum to a Court employee intending the payment to produce a future, as yet unidentified favor without violating § 666."[94]

The original language of § 666 mimicked § 201 by making it a crime to solicit, demand, or accept anything of value "*for or because of* the recipient's conduct in any transaction or matter or a series of transactions or matters."[95] The gratuities offense under § 201(c)(1)(B) applies to any demand or acceptance of a thing of value "for or because of any official act." The 1986 amendment of § 666 changed the language of the offense to its current form that covers any corrupt solicitation or demand by an agent "intending to be influenced or rewarded."[96] The use of the term "rewarded" means that § 666 applies to both bribes ("influenced") and gratuities ("rewarded"). In *United States v. Bonito*, the Second Circuit held that the language of the amended provision was to the same effect as the original statute, so that "the current statute continues to cover payments made with intent to reward past official conduct, so long as the intent to reward is corrupt."[97]

An important change in the 1986 amendment was the deletion of "for or because of" as an element of the offense. That phrase was the key to the Supreme Court's decision in *United States v. Sun-Diamond Growers of California*, which required in a § 201(c) prosecution for an unlawful gratuity that the government prove "a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[98] As discussed in Chapter 2, a gift given for the purpose of buying access to an official would not come within § 201 if it were given at a point in time when the official did not have a particular "official act" before him to which the gift was related. Section 666(a)(1)(B), however, does not require proof that the gratuity was related to a specific official act, only that the benefit is connected to some business or transaction of the organization.

In *United States v. Abbey*, the Sixth Circuit stated, "*Sun-Diamond*. . . is not germane to our decision," and that "[t]here is thus no good reason, either in text or policy, to inject *Sun-Diamond*'s heightened requirements into § 666. . . ."[99] In *United States v. Redzic*, the Eighth Circuit explained that

> [t]o prove the payment of an illegal bribe, the government must present evidence of a *quid pro quo*, but an illegal bribe may be paid with the intent to influence a general course of conduct. It was not

94. 605 F.3d 1152, 1187–88 (11th Cir. 2010). The Eleventh Circuit pointed out that "[t]o be sure, many § 666 bribery cases will involve an identifiable and particularized official act, but that is not required to convict." *Id.* at 1188.

95. Pub. L. No. 98-473, § 1104(a), 98 Stat. 2143 (1984).

96. Pub. L. No. 99-646, § 59(a), 100 Stat. 3612 (1986).

97. 57 F.3d 167, 171 (2nd Cir. 1995). In *United States v. Ganim*, 510 F.3d 134, 150 (2nd Cir. 2007), the Second Circuit affirmed its reading of § 666 in *Bonito* that the statute covers both bribery and unlawful gratuities.

98. 526 U.S. 398, 414 (1999).

99. 560 F.3d at 521.

> necessary for the government to link any particular payment to any particular action undertaken [by the defendant].[100]

Similarly, the Eleventh Circuit in *United States v. McNair* rejected reliance on *Sun-Diamond* to limit the scope of the provision by requiring proof of a specific official act, pointing out that "§ 666 sweeps more broadly than §§ 201(b) or (c). Section 666 requires only that money be given with intent to influence or reward a government agent 'in connection with any business, transaction, or series of transactions.'"[101]

The requirement that the solicitation or payment be sought with the intent "to be influenced" does not mean that the agent must have the actual authority to direct the business or transactions on behalf of the organization. In *United States v. Gee*, the Seventh Circuit took an expansive view of the term "influence" to include the clout that a state legislator wields over the government, even though the actual decision on whether to award a contract resided in the executive branch of the state government. Rejecting the defendant's argument that the payments to a state senator did not come within § 666 because he "had no power or authority to influence" the final decision, the circuit court stated that "[t]his confuses influence with power to act unilaterally."[102]

2. Intent

Section 666(a)(1)(B) requires proof of two intents: that the defendant acted "corruptly" in soliciting or demanding anything of value, and that it be done "intending to be influenced or rewarded." The original language in § 666 did not include any express intent requirement for a conviction, so that it could have been read to require only a general intent. Using the term "intending" indicates that Congress imposed a higher proof requirement on the government, requiring evidence of the defendant's specific intent that the solicitation or demand be for the purpose of influencing the business or transactions of the organization.

100. 569 F.3d 841, 849 (8th Cir. 2009).

101. 605 F.3d 1152,1191 (11th Cir. 2010).

102. 432 F.3d at 715. The Seventh Circuit explained rather colorfully how a member of the legislature can use the authority of his office to influence decisions of the other branches of government, and therefore the acceptance of a bribe or gratuity can be prosecuted:

> A legislator with the ability to control the senate's agenda can throw a monkey wrench into a Governor's program, and this power confers influence over executive decisions even when the legislature does not pass any particular law. The absence of new laws may show the successful application of influence. One does not need to live in Chicago to know that a job description is not a complete measure of clout. The evidence permitted a reasonable jury to find that George had plenty of clout and used it to OIC's benefit, for which he was well paid.

Id.

A. INTENT TO INFLUENCE

In *United States v. Ford*, the Second Circuit held that "intending to be influenced" means "there must be a *quid pro quo*" to establish the intent of the person demanding the thing of value.[103] The jury was instructed that the defendant's awareness of the offeror's purpose in giving a thing of value was sufficient to establish the intent to be influenced, which the Second Circuit rejected as insufficient. The circuit court's statement about the need to show a *quid pro quo* was not imposing a requirement on the government to prove an actual agreement between the offeror and agent because § 666(a)(1)(B) also covers solicitation by an agent, which would take place before any agreement. The Second Circuit meant that the *intent* of the defendant must be sufficient to show that the person entered into, or at least sought to enter into, a *quid pro quo* agreement. As the circuit court explained,

> The recipient's "awareness" that the donor gave something of value for the purpose of influencing the recipient might well constitute strong circumstantial evidence that the recipient acted with the requisite culpable state of mind in accepting the item, but a jury should be clearly instructed that it is the recipient's intent to make good on the bargain, not simply her awareness of the donor's intent that is essential to establishing guilt under Section 666.[104]

B. CORRUPTLY

"Corruptly" is a word used in a number of federal statutes, and the courts have struggled to explain its exact meaning. In *Arthur Andersen LLP v. United States*, a case involving obstruction of justice, the Supreme Court noted that "'[c]orrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil."[105] Interpreting a statute that required proof of "knowingly. . . corruptly persuading" another person to obstruct justice as "limiting criminality to persuaders *conscious of their wrongdoing*" was the most sensible interpretation.[106] In *United States v. Ogle*, the Tenth Circuit described "corruptly" as "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another."[107]

Proof that a defendant acted "corruptly" involves showing that the person consciously deviated substantially from the duties and responsibilities of the position or authority entrusted to them, or that the offer of a thing of value was to induce such deviation. In *United States v. Rooney*, the Second Circuit held that "a fundamental component of a 'corrupt' act is a breach of some

103. 435 F.3d 204, 213 (2nd Cir. 2006).
104. *Id.*
105. 544 U.S. 696, 705 (2005).
106. *Id.* at 706.
107. 613 F.2d 233, 238 (10th Cir. 1979).

official duty owed to the government or the public at large."[108] In *United States v. Ford*, the Second Circuit explained that "[a] recipient who knows of the donor's intent to arrange a *quid-pro-quo* or to seek special consideration may, in certain circumstances, be said to be acting 'corruptly'" when the person accepts the thing of value.[109]

C. POLITICAL LOYALTY

The Third Circuit in *United States v. Cicco* analyzed whether a demand for political loyalty by a public official constituted a bribe under § 666(a)(1)(B). The defendants, a mayor and a town councilman, denied two special police officers further work from the city because they had not supported the party's candidates in a recent election. Determining that § 666 was ambiguous, the circuit court found if solicitation of party loyalty came within the statute, then it would be unconstitutionally vague. The Third Circuit concluded that there was not a violation of § 666 because demanding political support in exchange for a governmental position was not within the usual meaning of bribery.[110]

That does not mean, however, that soliciting campaign contributions as a *quid pro quo* for a government job falls outside of § 666. In *United States v. Grubb*, the Fourth Circuit upheld § 666 convictions because the payment to the campaign was clearly designed to obtain the government job, a form of bribery that came "squarely within the literal meaning of section 666[(a)(1)(B)]."[111] Unlike party loyalty, which is not clearly the typical "thing of value" used in a bribe, campaign contributions can be the basis for a bribery prosecution.

C. The $5,000 Requirement

1. Embezzlement, Theft, Fraud, and Misapplication

In creating a federal offense by agents of state and local governments and organizations receiving federal funding, Congress imposed a minimum threshold of $5,000 affected by the misconduct in order to limit federal prosecutions to substantial cases and not those involving petty amounts.[112]

108. 37 F.3d 847, 852 (2nd Cir. 1994).

109. 435 F.3d 204, 212 (2nd Cir. 2006).

110. 938 F.2d 441, 445–46 (3rd Cir. 1991). The Third Circuit also noted that 18 U.S.C. § 601, which prohibits depriving a person of employment for not making a campaign contribution, proscribes the type of conduct that occurred in *Cicco*, and that "[t]he omission of any mention of § 601 in [§ 666's] legislative history is further evidence that § 666 is addressed to a separate and distinct category of criminal activity." *Id*. at 446. Section 601 is discussed in Chapter 11.

111. 11 F.3d 426, 434 (4th Cir. 1993).

112. *See* United States v. Ferraro, 990 F. Supp. 146, 150 (E.D.N.Y. 1998) ("Yet, a plain reading of the statute seems to indicate that the purpose of the $5,000 requirement is to assure that only corrupt transactions which may be categorized as significant—as measured against that dollar amount—will activate."); United States v. Webb, 691 F. Supp. 1164, 1168 (N.D. Ill. 1988) ("Congress recognized that the statute constituted a significant intrusion of federal law enforcement into traditional areas of local concern; thus, it made the new statute applicable only to crimes involving substantial sums of money.")

For violations of § 666(a)(1)(A) for embezzlement, theft, fraud, and misapplication, the government must prove that the property involved had a value of $5,000 or more, and that it "is owned by, or is under the care, custody, or control of such organization, government, or agency" at the time of the offense. For a bribery or unlawful gratuity violation under § 666(a)(1)(B), the corruption must be "in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more."

Common law larceny was limited to thefts of personal, tangible property—"goods and chattels"—but modern statutes take a much more expansive view to include intangible property, such as patents or trademarks along with electronic files and the use of telecommunications facilities.[113] The theft of federal property statute, 18 U.S.C. § 641 (see Chapter 3), is not limited to tangible property, and includes "any record, voucher, money, or thing of value," which has been interpreted to include intangible property. While the use of the single term "property" in § 666(a)(1)(A) can be read to indicate that it is limited to tangible property, the Sixth Circuit in *United States v. Sanderson* interpreted the statute as having the same broad coverage as § 641 because the prohibition on theft by agents of organizations, governments, and agencies was designed to enhance federal authority over crimes that could not be reached through § 641.[114] Therefore, the circuit court upheld the conviction of a defendant who was a supervisor in a county sheriff's office and used deputies to do work on behalf of his private construction firm even though it involved no tangible property taken, only the time of the deputies.

2. Bribery and Unlawful Gratuities

Courts apply the same analysis in bribery and unlawful gratuities cases. In *United States v. Marmolejo*, the Fifth Circuit held "that the plain meaning of the statute compels our conclusion that the term 'anything of value' in § 666(a)(1)(B) includes transactions involving intangible items, such as the conjugal visits at issue in this case."[115] In *United States v. Mongelli*, the district court found a bribery scheme involving the award of licenses came within the statute because the "term 'thing of value,' used in § 666 but not in 18 U.S.C. §§ 1341–4[3], has long been construed in other federal criminal statutes to embrace intangibles."[116]

113. *See* Wayne R. LaFave, Criminal Law § 19.4(a) (4th ed.) ("At common law, larceny was limited to misappropriations of goods and chattels—i.e., tangible personal property.").

114. 966 F.2d 184, 189 (6th Cir. 1992) ("Congress seems to have intended section 666 to *expand* the ability of prosecutors to prosecute persons who were for technical reasons out of section 641's reach. Consequently, we find section 666's notion of 'property' was intended to dovetail with the notion of property in section 641 and to be coextensive in its reach—Sanderson's theft of employee time is as much a theft of property as his theft of paint supplies, for the purposes of his section 666(a)(1)(A) conviction.").

115. 89 F.3d 1185, 1191 (5th Cir. 1996).

116. 794 F. Supp. 529, 531 (S.D. N.Y. 1992). The district court distinguished § 666 from the mail and wire fraud statutes, which the Supreme Court held in *Cleveland v. United States*, 531 U.S. 12 (2000), did not include unissued licenses as "property" within the meaning of those provisions. *See* Chapter 6.

3. Aggregation

To meet the $5,000 requirement for § 666(a)(1)(A) charges, the government can aggregate separate acts of theft if they are part of a single scheme or plan. In *Sanderson*, the Sixth Circuit stated that "under section 666, where multiple conversions are part of a single scheme, it seems appropriate to aggregate the value of property stolen in order to reach the $5,000 minimum required for prosecution."[117] In *United States v. Webb*, the district court stated that "[b]ecause aggregation is permissible where the thefts are part of a single plan, an individual who seeks to avoid the statute by so structuring his crime will find his efforts unavailing."[118] The Eighth Circuit took the same approach to a § 666(a)(1)(B) charge in *United States v. Hines*, holding that the statute "permits the government to aggregate multiple transactions in [a] single count to reach the $5,000 minimum as long as they were part of a single plan or scheme."[119] When aggregating the amounts, the government must show that the thefts or transactions occurred in the one-year period during which the organization received federal funding and not over a more extended period of time.[120]

For bribery and unlawful gratuities charges under § 666(a)(1)(B), the amount of the payment given or received need not be worth $5,000, although if it was, then that can be one way to establish the requisite value for this element of the offense. The statute requires that the solicitation or demand be made "in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." The focus is on the underlying business or transactions of the organization tainted by the corruption, so that even a small bribe could be prosecuted if the underlying business had the requisite value.

4. Proof of $5,000

The value of the business or transactions is an element of the offense, so it is a question for the jury to decide whether the government proof establishes the minimum amount. A wide range of evidence can be used as the basis for the jury's determination that the $5,000 value was involved. In *United States v. Fernandes*, the Seventh Circuit upheld the conviction of a deputy prosecutor accepting payments to help defendants avoid drunken driving convictions over the objection that the government did not prove the value element. The circuit court concluded that documentary evidence showed the defendant received a number of payments from which the jury could infer totaled over $5,000, so there was no need to consider the issue further.[121]

117. 966 F.2d at 189.

118. 691 F. Supp. 1164, 1168 (N.D. Ill. 1988).

119. 541 F.3d 833, 837 (8th Cir. 2008).

120. *See* United States v. Valentine, 63 F.3d 459, 464 (6th Cir. 1995) ("[W]e hold that a natural reading of the statute requires the $5,000 theft to occur during a one-year period.").

121. 272 F.3d 938, 944 (7th Cir. 2001) ("The overpayment and the existence of the list, in and of themselves, could allow a jury to conclude, beyond a reasonable doubt, that the 'thing of value' in this bribery scheme exceeded $5,000.").

In *United States v. Mills*, however, the Sixth Circuit found that the only evidence sufficient to establish the value was the amounts paid as bribes, and "[t]he indictment returned against the defendants clearly and specifically assigns values ranging from $3,500 to $3,930 to those jobs. Because those amounts are below the $5,000 statutory floor, the district court correctly dismissed those counts premised upon alleged violations of 18 U.S.C. § 666."[122]

In *United States v. Marmolejo*, a Fifth Circuit decision affirmed by the Supreme Court in *Salinas*, the circuit court rejected the defendants' argument that payments made to county sheriff deputies to allow a federal prisoner to receive conjugal visits from his wife and girlfriend could not meet the $5,000 value requirement. The circuit court stated, "We conclude that the conjugal visits in this case did have a value which exceeded $5,000. We arrive at this estimate in the same way that an appraiser would value an asset—by looking at how much a person in the market would be willing to pay for them."[123] The prisoner paid the sheriff $6,000 per month plus $1,000 per visit, so the amounts easily met the statutory minimum for federal prosecution. Taking a similar approach, the district court in *United States v. Mongelli* explained that licenses issued by the state could be valued in a variety of ways, including looking at the amount of the bribes paid, the amount of business or profits obtainable under the license, or the market value of the license if it were sold.[124]

Proof of the value of the business or transaction is not limited to just the valuation that the organization, government, or agency involved in the corruption places on it.[125] In *United States v. Zwick*, the Third Circuit held that "the plain language of the statute does not require that value be measured from the perspective of the organization, government, or agency."[126] In assessing the jury's value determination, the circuit court looked to the amount of the bribe, the loss the payer would suffer if the government action was not undertaken, the tax benefits to the local government, and the permit fees for the project, all of which were greater than $5,000.[127]

122. 140 F.3d 630, 633 (6th Cir. 1998).

123. 89 F.3d 1185, 1194 (5th Cir. 1996).

124. 794 F. Supp. 529, 531 (S.D. N.Y. 1992). *See also* United States v. Marlinga, 2006 WL 2086027, at *4 (E.D. Mich. 2006) (rejecting defendant's argument that the drafters of § 666 only intended it to apply to 'business' or 'transactions' that are commercial in nature, not the work of a county prosecutor allegedly bribed to support reversal of the convictions of two defendants).

125. In *United States v. Foley*, 73 F.3d 484 (2nd Cir. 1996), a pre-*Sabri* decision, the Second Circuit sought to avoid any federalism problems by requiring that the "thing of value" be worth $5,000 to the organization, government, or agency receiving the $10,000 in federal benefits and not just any other person or entity. In overturning the conviction of a state legislator, the circuit court held that "the government did not show that the exemption legislation had any financial value to the State of Connecticut; nor did it show that the exemption had any connection whatever with a federal program. In short, insofar as the evidence presented in this case reveals, the exemption affected neither the financial interests of the protected organization nor federal funds directly." *Id.* at 493. This analysis is clearly wrong after *Sabri* and even *Salinas*, which upheld the conviction of a county sheriff for accepting bribes to allow conjugal visits for a federal prisoner, a transaction that had no financial impact on the jail or any federal funds.

126. 199 F.3d 672, 689 (3rd Cir. 1999).

127. The circuit court summarized the various amounts this way:

> There is substantial evidence establishing that the present value of the transactions and business involved in each of counts one, two, and three was at least $5,000. The sewer taps that Zwick offered to obtain for Kaclik were clearly worth more than $5,000, as Kaclik was willing to pay $17,500 to ensure that he received them; the contracts that were the subject of the bribery at count three were worth $45,000; and the permits in count two were worth more than $5,000 to the Fosnights, because, as detailed above, they were willing to pay Zwick

The Second Circuit took the same approach in *United States v. Santoprieto*, holding that "there is no requirement that the corrupt transactions are worth $5,000 or more to the entity receiving the federal funds," and the evidence was sufficient when it showed that the "favorable treatment was clearly worth more than $5,000 to them."[128] In *United States v. Hines*, the Eighth Circuit rejected the argument that value is limited to what the briber or recipient considered it worth, holding that "[t]he plain language of the statute does not require a restricted, technical interpretation that would prevent the consideration of the 'thing's' value to other parties with an immediate interest in the transaction."[129]

The valuation of the business or transactions can include the potential value of property if the corrupted official takes the intended action favoring the offeror or payer of the bribe. In *United States v. Zimmerman*, the Eighth Circuit noted that while the alleged gratuities to a city councilman in two counts were only $1,200 and $1,000, respectively, and given by a developer to obtain rezoning of property which would result in condominiums the developer hoped to sell for $200,000 each. The circuit court stated that "[s]ince there was sufficient evidence that the benefit to Carlson from the gratuities paid to Zimmermann for the development of a new Somali mall was of greater value than $5000, the jury could reasonably find Zimmermann guilty of those counts."[130] The Third Circuit in *Zwick* noted that the future benefits of the transaction can be taken into account in determining a parcel of property's current value for ascertaining whether it meets the $5,000 element.

5. Intent Not Required

While there are a variety of means to establish the $5,000 value element, the government is not required to prove that the defendant intended or knew that the bribe or gratuity affected business or transactions of that value. This element establishes a minimum for federal prosecution, but it is jurisdictional and does not require proof of any knowledge or even awareness on the defendant's part regarding value. In *United States v. Abbey*, the Sixth Circuit rejected the defendant's argument that the government failed to prove that a city administrator subjectively thought the land he received from a developer was worth more than $5,000. The circuit court stated:

> Indeed, it is not evident how § 666's mens rea element ("corruptly") would modify a person's subjective interpretation of how much something was worth. (No one would say that someone

$15,000 to ensure that they received them and would have lost $10,000 if they did not receive them in a timely manner.

Id. at 691.

128. 166 F.3d 88, 93 (2nd Cir. 1999). The Second Circuit reversed its earlier holding in *United States v. Foley*, 73 F.3d 484 (2nd Cir. 1996), in light of the Supreme Court's decision in *Salinas*, that the valuation could only be assessed from the perspective of the organization, government, or agency that was the victim of the offense because the statute had to be limited to actual threats to federal funds to avoid any federalism issues. The circuit court stated in *Santoprieto*, "[T]o the extent that *Foley* required the Government to plead and prove that the transaction involved something of value *to the governmental entity that received the requisite amount of federal funds*, that narrowing construction of the statute must also be discarded." *Id.*

129. 541 F.3d 833, 837 (8th Cir. 2008).

130. 509 F.3d 920, 927 (8th Cir. 2007).

"nefariously" believed that some property was worth over $5000.) Instead, that term does the job Congress intended it to do: officials are only guilty if they take a bribe with corrupt intent. The government and jury need not read Abbey's mind to know how much he thought the property was worth to sustain a proper conviction.[131]

VII. STATUTORY EXEMPTION

Section 666(c) provides that the criminal prohibition "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Congress added this subsection in the 1986 amendment to the statute, and the only legislative history to the exemption is the statement in the House Report that the provision "amends 18 U.S.C. § 666 to avoid its possible application to acceptable commercial and business practices."[132] The key issue is whether the payment is "bona fide," which is defined in *Black's Law Dictionary* as "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine."[133]

Defendants usually raise the exemption in cases charging a violation of § 666(a)(1)(A) involving allegations of inflated salaries (or reimbursements) or payments to "ghost" employees. For example, in *United States v. Tampas*, the Eleventh Circuit upheld convictions of a defendant for using his organizations funds to pay workers doing work at his home, and for using the credit card issued by the organization for personal purchases, rejecting his claim that the payments were bona fide.[134]

A. Bona Fide Salary

Determining whether a payment was legitimate compensation or involved the misuse of an organization's resources constituting theft or misapplication is often dependent on an assessment of the work done in light of the amount paid. Courts emphasize that whether payments are bona fide salary is a jury question.[135] In *United States v. Williams*, the Fifth Circuit upheld the embezzlement conviction of a defendant, a deputy city clerk, who authorized the issuance of extra paychecks to herself and the city clerk. Rejecting the argument that she was only taking "advance" paychecks which constituted bona fide salary, the circuit court stated that "a salary is not bona fide or earned

131. 560 F.3d 513, 522 (6th Cir. 2009).

132. H.R.Rep. No. 99-797, at 30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6153.

133. Black's Law Dictionary (8th ed. 2004).

134. 493 F.3d 1291, 1299 (11th Cir. 2007). *See* United States v. Baldridge, 559 F.3d 1126, 1139 (10th Cir. 2009) ("Because this was not work for which he could have been paid by the County, the payment was not a bona fide wage paid in the usual course of business.").

135. *See* United States v. Cornier-Ortiz, 361 F.3d 29, 36 (1st Cir. 2004).

in the usual course of business under § 666(c) if the employee is not entitled to the money."[136] In *United States v. Grubb*, the Fourth Circuit upheld a bribery conviction in which the defendant arranged for a campaign contribution in exchange for the candidate hiring the contributor to work in the county sheriff's department. The circuit court found that the "wages were not 'bona fide' 'and 'in the usual course of business' within the meaning of the statutory exception of § 666(c)" when the contributor did little work for the sheriff's department for the two years he worked there.[137]

Even if the decision to hire a worker is based on improper considerations, the salary the person receives is bona fide so long as the person does the work required for the position. In *United States v. Mills*, the defendant took payments in exchange for arranging to have the payers hired as deputy sheriffs. The Sixth Circuit rejected the government's argument that because the appointments were tainted the payments to the deputy sheriffs were not bona fide salary, holding that

> the indictment does not allege that the jobs in question were unnecessary or that the individuals who obtained those employment positions did not responsibly fulfill the duties associated with their employment. In the absence of such allegations, the government has no support for its claims that the salaries paid to the deputy sheriffs were not properly earned 'in the usual course of business.'[138]

Applying *Webb*'s analysis in *United States v. Mann*, the Sixth Circuit, in an unreported decision, took a similar approach to charges against a vocational school principal when alleging that he was only certified to be a teacher, and therefore the payment to him of the higher principal's salary that he was not qualified to receive constitutes a violation of § 666(a)(1)(B). Upholding the dismissal of the indictment, the circuit court held:

> [T]he position of principal. . . is clearly a real and necessary one, and the government concedes that Mann performed the duties of his job. He was paid 'in the usual course of business' despite the fact

136. 507 F.3d 905, 908 (5th Cir. 2007). The Fifth Circuit distinguished the case from one in which an employee works fewer hours than required: "An employee who receives three years of additional compensation amounting to over $30,000—which represents more than twice Williams's regular annual salary—is more culpable than an employee who simply works fewer hours than her regular paycheck requires." *Id.* at 909.

137. 11 F.3d 426, 434 (4th Cir. 1993).

138. 140 F.3d 630, 633–34 (6th Cir. 1998). The Sixth Circuit considered whether the salaries were bona fide in the context of a challenge to the government's evidence that the transactions had a value of $5,000 to the sheriff's office. The circuit court found that § 666(c) applies to all aspects of the statute, and therefore bona fide salaries could not be used to account for the $5,000 value element of the offense. This analysis seems flawed because the exemption in § 666(c) determines whether the conduct constitutes an offense as defined in § 666(a), not whether the jurisdictional element is present. Even an otherwise legitimate expenditure can satisfy the $5,000 value element, which is not contingent on proof that it is tainted by corruption. If the charge in *Webb* had been that the payments to the deputy sheriffs constituted a misapplication of government funds, or that by paying to obtain their jobs they embezzled money from the county, then the bona fide salary analysis would be correct. The charge, however, involved the bribery to obtain the positions, which is irrelevant in this case to whether the salaries are bona fide. *Id.* at 631.

> that his employer had knowledge of his lack of certification. . . [T]hus, Mann's salary comes within the purview of 18 U.S.C. § 666(c), and he is exempted from prosecution under this statute.[139]

The district court in *United States v. Harloff* reached a questionable conclusion that there was no § 666(a)(1)(A) violation when the defendant worked *fewer* hours than what he should have because the statute does not apply to that situation. In a terse decision that contains little legal analysis, the district court asserted:

> While the exception stated at subsection (c) would not preclude a prosecution involving wages which are clearly not "bona fide," its plain language would prevent making a federal crime out of an employee's working fewer hours than he or she is supposed to work, and the scant case law. . . does not support a contrary conclusion.[140]

It is not clear how the court determined that being paid for work not performed was bona fide when it only involved leaving early. Presumably, a "ghost" employee who did little or no work would violate the provision, but if the person only did half the work required by the position, would that salary be bona fide or a violation of § 666(a)(1)(A)?[141] The district court relied on the Rule of Lenity in determining that "[a]bsent a clearer mandate from Congress, either in its statutory language or in the history of its deliberations, I cannot be persuaded that it intended to criminalize an employee's early departure from work, or even a group of employees' agreement to depart work early."[142] *Harloff* gives defendants a plausible basis for arguing that minimal violations at the workplace are insufficient for § 666(a) charges.

139. 1999 WL 17647 *3 (6th Cir. 1999).

140. 815 F. Supp. 618, 619 (W.D. N.Y. 1993). *Compare* United States v. Darnsfield, 913 F. Supp. 702, 712 (E.D.N.Y. 1996) (payments received by an organization to pay contractors are not protected by the exemption for bona fide salary).

141. The district court stated, "[T]he statute certainly authorizes the federal prosecution of an employee who invents fictitious workers and collects their 'wages' for his/her own use. The government argues that the difference between such 'ghost employees' and the defendants in this case is 'only one of degree.' I disagree." *Id*. The basis for finding that working fewer hours is a difference of kind and not of degree is not explained, and the district court does not explain whether there is a particular economic impact or abuse of authority that must occur before a violation arises. The distinction is not based on any language in the statute, which applies to any embezzlement, theft, fraud, conversion, or misapplication so long as the jurisdictional elements are met.

142. *Id*. The indictment alleged the defendants, who were police officers, worked "substantially fewer hours" than the forty hours of work they were paid for. Presumably the government was not bringing the case based on only a difference of an hour or two, and the district court may have been concerned that permitting the charges to go forward in this case would allow the government to prosecute a person for an long lunch or extra breaks. The $5,000 value element would appear to eliminate—or at least limit—the possibility of a prosecution based on a *de minimis* violation, but the district court may have decided to draw a clearer line by limiting § 666(a) to obvious violations, such as "ghost" employees.

B. Usual Course of Business

Section 666(c) requires that the payment be made "in the usual course of business" of the organization.[143] Even if a defendant is entitled to the payment as bona fide salary, the transfer of the funds must be proper. In *United States v. Paul*, an unreported decision, the Ninth Circuit held that "[a]lthough she may have been entitled to overtime compensation, Paul admittedly misappropriated the funds in an unauthorized manner and thus did not receive bona fide wages in the ordinary course of business."[144]

A bribe can take the form of a salary given to a government official. Section 666(c) does not provide any protection for this means of giving a thing of value in exchange for influencing the exercise of authority. In *United States v. Bryant*, the government alleged that a state legislator was hired for a position in a state medical school by its dean in order to ensure that the school continued to receive state funding for its operations. The district court refused to dismiss the charges, holding that

> because the. . . salary itself constitutes the bribe—the "thing of value" accepted with the intent to be influenced for purposes of § 666(a)(1)(B), and offered with the intent to influence for purposes of § 666(a)(2)—it was not "bona fide" or paid "in the regular course of business."[145]

In *United States v. Cornier-Ortiz*, the First Circuit found that payments for work actually performed were not protected by § 666(c) when the payments were "made for what was an underlying legitimate purpose but intentionally misapplied to undermine a conflict of interest prohibition" of the organization. The misapplication of funds was not made in the usual course of business, even if the transaction involved payment of a salary.[146]

143. In *United States v. Edgar*, 304 F.3d 1320 (11th Cir. 2002), the Eleventh Circuit rejected defendant's argument that "usual course of business" was unconstitutionally vague. The circuit court stated:

> [A]ny reasonable person would understand that the phrase "usual course of business" in § 666(c) would not bar prosecution for the conduct alleged in the § 666 counts in the Indictment. Among the transactions for which Ward was convicted were the following: converting hospital monies into unauthorized bonuses to himself; profiting from the Hospital's use of a warehouse that he, Edgar, and another officer in effect sold to the Hospital on two separate occasions; participating in the diversion of Hospital funds to himself and others through the use of fictional invoices; collecting a finder's fee from the Hospital in connection with an investment of the Hospital's parent company; using Hospital monies to pay premiums on insurance policies for which he was solely responsible; and profiting from the Hospital's purchase, at an inflated price, of a real estate option from a partnership in which he held an undisclosed interest.

Id. at 1328.

144. 2007 WL 2384234, at *1 (9th Cir. 2007).

145. 556 F. Supp. 2d 378, 428–29 (D. N.J. 2008).

146. 361 F.3d 29, 37 (1st Cir. 2004).

| 5 |

THE HOBBS ACT (18 U.S.C. § 1951)

I. HISTORY OF THE STATUTE[1]

An important tool in the federal effort to prosecute corruption at lower levels of government is the Hobbs Act, 18 U.S.C. § 1951, which specifically prohibits extortion, not bribery. Congress adopted the Hobbs Act as a successor to the Anti-Racketeering Act of 1934, which was designed to combat extortion and violence perpetrated by criminal organizations against private individuals.[2] The Supreme Court's decision in *United States v. Teamsters Local 807*, which held that the Anti-Racketeering Act did not apply to extortion committed by unionized truckers who demanded payments from out-of-town drivers before permitting them to enter the state, led to Congress enacting the Hobbs Act in 1946.[3] The Supreme Court explained the historical basis for the Hobbs Act:

> Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code. Both the New York statute and the Field Code defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." 4 Commissioners of the Code, Proposed Penal Code of the State of New York § 613 (1865) (reprint 1998) (Field Code); N.Y. Penal Law § 850 (1909). The Field Code explained that extortion was one of four property crimes,

1. This chapter is based in part on Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75 (2003).

2. Act of June 18, 1934, 48 Stat. 979 (1934).

3. 315 U.S. 521, 530 (1942). The Hobbs Act is named for its sponsor, Representative Samuel F. Hobbs of Alabama, who was one of several Congressmen to introduce bills to overturn *Teamsters Local 807*. In a floor statement on the legislation, one representative asserted that "this bill is made necessary by the amazing decision of the Supreme Court in [*Local 807*] . . . [which] practically nullified the anti-racketeering bill of 1934." 91 Cong. Rec. 11,900 (1945) (statement of Rep. Hancock).

> along with robbery, larceny, and embezzlement, that included "the criminal acquisition of . . . property."[4]

Like the Anti-Racketeering Act, the Hobbs Act prohibits robbery and extortion to obtain property. The Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 1951(b)(2) defines extortion as obtaining property with the consent of the victim in two ways: first, by physical coercion through the "wrongful use of actual or threatened force, violence, or fear"; and second, "under color of official right."

The meaning of this second type of extortion involving the use of public office was unclear because the common law development of bribery and extortion did not distinguish between the two crimes. As Professor James Lindgren noted in his exhaustive study of the development of the Hobbs Act, "Coercion is often present in common law extortion cases, but at other times it seems that bribery or false pretenses may have been the mode of taking."[5] Courts found the "under color of official right" form of extortion satisfied upon proof that the official had the authority to affect the outcome of an exercise of governmental authority. This type of extortion is effectively a form of bribery, and the Supreme Court explicitly recognized that a public official charged with violating the Hobbs Act was in reality alleged to have taken a bribe.[6]

Federal prosecutors first applied the Hobbs Act successfully to reach corruption by local officials in 1972 in *United States v. Kenny*, a prosecution of the political "boss" of a county in New Jersey who required that a percentage of all government contracts be paid to him for the privilege of doing business with local governments.[7] The defendants argued that the government had to

4. Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 403 (2003).

5. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 849 (1988).

6. *See* Evans v. United States, 504 U.S. 255, 266 (1992) (defendant's acceptance of a "bribe" met the requirements for conviction for extortion under color of official right).

7. 462 F.2d 1205 (3rd Cir. 1972). There is an extortion statute applicable to federal employees, 18 U.S.C. § 872, which provides:

> "Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both."

The reference to "under color or pretense of office or employment" is an element of the offense that must be present in addition to the extortion, so the statute appears to be much narrower than the Hobbs Act by focusing on more traditional extortion by threats. The maximum prison term of one year is much less than the twenty-year maximum for a Hobbs Act

prove they used force or a threat to obtain the money, but the Third Circuit held that extortion could be proved by either evidence of a threat or that the defendants obtained the money because of their position of official authority. Although there was no overt threat made to those who paid off the local political boss, the circuit court upheld the conviction because "while private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right."[8]

The elements of a Hobbs Act violation are: (1) that the defendant induced someone to part with property; (2) that the defendant knowingly and willfully did so by extortionate means; and (3) that the extortionate transaction affected interstate commerce. For corruption prosecutions, proof of extortion means the government must show that the defendant acted "under color of official right," which means the person occupied a position of public authority, or aided and abetted or conspired with someone in that position, and that the official misused that position in a way to wrongfully obtain the consent of the victim to part with property. Because elected officials accept money from individuals and organizations on a regular basis in the form of campaign contributions, a particularly difficult aspect of applying the Hobbs Act has been drawing a line between permissible payments in the form of campaign contributions and impermissible bribes. The expansion of the Hobbs Act into an anticorruption statute forced the Supreme Court to confront the question of how broadly to apply the provision to campaign contributions.

II. THE HOBBS ACT'S *QUID PRO QUO* REQUIREMENT

A. McCormick v. United States: *An Explicit* Quid Pro Quo *for Campaign Contributions*

The interpretation of extortion "under color of official right" as a form of bribery triggered the issue of what constitutes a violation when the payment appears to be a campaign contribution. The Supreme Court first considered the problem in *McCormick v. United States*.[9] The defendant, a state legislator, sponsored legislation permitting doctors who received a medical degree from a foreign school to practice medicine with a state-issued temporary permit while studying for a permanent license. During his reelection campaign, McCormick contacted a lobbyist for the doctors and said that "his campaign was expensive, that he had paid considerable sums out of his

violation, and § 872 has not been used in public corruption cases since the application of the Hobbs Act to bribery beginning in the early 1970s. The Second Circuit rejected the argument in *United States v. Stephenson*, 895 F.2d 867 (2nd Cir. 1990), that a federal official could not be prosecuted under the Hobbs Act but only under § 872, holding that "we believe Congress meant what it said, and here, the language of the statute makes clear that 'official' extortion is outlawed—whether federal, state, or local." *Id*. at 871.

8. 462 F.2d 1229.

9. 500 U.S. 257 (1991).

own pocket, and that he had not heard anything from the foreign doctors."[10] The lobbyist gave McCormick five cash gifts, none of which he listed on campaign disclosure forms as required by state law.[11]

The defendant argued that the payments were campaign contributions, and therefore they were not extorted under color of official right. The Court began its analysis by noting the central role donations play in the American electoral system, and the resulting problem a broad criminal prohibition on extortion "under color of official right" would present for those running for office:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."[12]

The Court held that a Hobbs Act violation involving the payment of funds that are ostensibly campaign contributions requires proof that "the payments were made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act."[13] The Court noted that this was a special case because the defendant was an elected official, and that "if the payments to McCormick were campaign contributions, proof of a *quid pro quo* would be essential for an extortion conviction."[14] Although the Court did not preclude a Hobbs Act charge for payments in the form of a campaign contribution,[15] the requirement of an "explicit promise or undertaking" mandates a higher level of proof than would normally be required to prove bribery.

McCormick's adoption of a *quid pro quo* element for proof of a Hobbs Act violation is consistent with the requirements under the common law for proving a bribe.[16] If extortion "under color

10. *Id.* at 260.

11. The state prohibited cash contributions in excess of $50, W. Va. Code § 3-8-5d (1990), and the doctors' organizations did not list the payments as campaign contributions in its record of expenditures. The government also charged McCormick with tax evasion for failing to report the income he received. This is a common tactic in public corruption cases because it is a means to show that the receipt of the money was not aboveboard because otherwise the official would have reported it on a tax return.

12. 500 U.S. at 272.

13. *Id.* at 273 (italics added).

14. *Id.*

15. "This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign." *Id.* at 273.

16. *See* Jeremy N. Gayed, Note, *"Corruptly": Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 Notre Dame L. Rev. 1731 (2003).

of official right" incorporates conduct that would constitute bribery—it has the same structure as a bribe because the official conditions future action on the receipt of a payment—then requiring proof of a *quid pro quo* is proper, even though the statute makes no reference to bribery or the elements of that crime. Justice Antonin Scalia, in a concurring opinion, disagreed with the adoption of this additional element of the offense, arguing that "§ 1951 contains not even a colorable allusion to campaign contributions or *quid pro quo*s."[17]

The Court took a limited approach to the Hobbs Act in *McCormick* by noting that it was only deciding a campaign contribution case and not one involving "payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign contributions."[18] The Court concluded that the failure to charge the jury on the *quid pro quo* element meant that the conviction had to be overturned and the defendant tried again.

McCormick did not have to consider whether the cash payments even constituted campaign contributions, and the Court simply assumed they were for the purpose of reviewing the conviction. The Fourth Circuit had proposed seven factors that can be considered in assessing whether a payment was in fact a campaign contribution:

> (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.[19]

The Supreme Court noted that intent, including whether a payment is designed as a campaign contribution, is an issue of historical fact for the jury to decide, so these factors can be helpful in making that determination.[20]

In a dissenting opinion, Justice John Paul Stevens disagreed with what he viewed as an overly strict approach to the *quid pro quo* element for a Hobbs Act prosecution. He acknowledged that the payment had to be contingent "on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a benefit that the defendant has the apparent power to deliver," but argued that the government did not have to prove any steps were taken to complete the agreement to establish that there was a *quid pro quo* arrangement.[21] According to Justice Stevens, "[T]he crime of extortion is complete when [defendant] accepted

17. *Id* at 277 (Scalia, J., concurring).

18. *Id*. at 268. The Court explained later in the opinion that "we do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id*. at 274 n.10.

19. *Id*. at 269 n.7 (quoting *United States v. McCormick*, 896 F.2d 61, 66 (4th Cir. 1990)).

20. *Id*. at 270.

21. *Id*. at 283 (Stevens, J., dissenting).

the case pursuant to an understanding he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise," and any subsequent action on the understanding "would have evidentiary significance, but could neither undo a completed crime nor complete an uncommitted offense."[22] In his view, a *quid pro quo* is not an agreement that must be implemented, but only an understanding between the parties to the arrangement that official authority will—or can—be used improperly.

B. Evans v. United States: *The* Quid Pro Quo *Element Applied*

The similarity between the Hobbs Act's extortion "under color of official right" provision and bribery was further illuminated by the Supreme Court's decision in *Evans v. United States*, decided a year after *McCormick*. The defendant, an elected local official, took $8,000 from an undercover agent who purportedly sought the official's assistance in rezoning a tract of land, an issue that normally would come before the defendant for a vote. Evans asserted that the funds were campaign contributions, and $1,000 of the proceeds was in the form of a check payable to his campaign committee.

The Court, in an opinion by Justice Stevens, first rejected the argument that the Hobbs Act requires an official to make an affirmative inducement to qualify as extortion under color of official right. It held that the word "induced" only applied to obtaining property by "force, violence, or fear," and that even if it did apply to the "under color of official right" type of extortion, the term did not mean "that the transaction must be *initiated* by the recipient of the bribe." According to the Court, "[T]he wrongful acceptance of a bribe establishes all the inducement that the statute requires." [23] The Court's analysis in *Evans* makes it clear that the Hobbs Act parallels the crime of bribery by requiring proof that the parties reached an agreement, although that agreement need be neither express nor fulfilled for criminal liability.

Turning to the issue of whether a *quid pro quo* must be shown, Justice Stevens reiterated his argument from the dissent in *McCormick* that "fulfillment of the *quid pro quo* is not an element of the offense." Instead, proof of this element means that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[24] Justice Anthony Kennedy, in a concurring opinion, viewed the majority as acknowledging that proof of a *quid pro quo* was required for any Hobbs Act charge involving extortion "under color of official right," although "[t]he official and the payer need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."[25]

22. *Id.*

23. 504 U.S. 255, 265–66 (1992) (italics in original).

24. *Id.* at 268.

25. *Id.* at 274 (Kennedy, J., concurring).

C. *Reconciling* McCormick *and* Evans

The unresolved issues after *McCormick* and *Evans* concerned: (1) the impact on the level of proof the prosecution must introduce to establish the *quid pro quo* element when the payment was at least arguably a campaign contribution, and (2) whether the *quid pro quo* element applied to all Hobbs Act cases brought pursuant to the "under color of official right" prong of extortion.[26] In *McCormick*, the Court stated that the illegal exchange must involve "an explicit promise or undertaking" by the elected official to take action. If by "explicit" the Court meant "express," then it imposed a significant, and perhaps insurmountable, evidentiary burden on the government. As Justice Stevens's dissenting opinion pointed out, "Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require."[27] In *Evans*, Justice Stevens softened the *quid pro quo* requirement in finding there was sufficient proof that the payment was in exchange for the defendant's agreement to perform an official act, and that "fulfillment of the *quid pro quo* is not an element of the offense."[28]

Taken together, *McCormick* and *Evans* show that the Court incorporated the core element of bribery—the *quid pro quo*—as the key for corruption prosecutions of elected officials without going into detail regarding whether bribery and extortion under color of official right were coterminous. *Evans* did not create a different standard but only emphasized that bribery, at least outside the campaign contribution context, does not require consummation of the exchange or proof that the parties entered into an express agreement.

The lower courts have interpreted *Evans* to require proof of a *quid pro quo* in all cases, and that the only issue is the level of proof necessary to establish this element, which depends on the type of transfer involved. In *United States v. Kincaid-Chauncey*, the Ninth Circuit joined all other circuits to address the issue: "We hold that a conviction for extortion under color of official right, whether in the campaign or non-campaign contribution context, requires that the government prove a quid pro quo."[29]

Outside the campaign contribution arena, courts recognize that the proof need not establish an express agreement between the parties, so that circumstantial proof of the arrangement can be sufficient to show a *quid pro quo*. In *United States v. Antico*, a case involving the prosecution of an official in a city's licensing department, the Third Circuit held, "The *quid pro quo* can be implicit, that is, a conviction can occur if the Government shows that Antico accepted payments or other

26. *See* United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2001) ("To distinguish legal from illegal campaign contributions, it makes sense to require the government to prove that a particular contribution was made in exchange for an explicit promise or undertaking by the official. Other payments to officials are not clothed with the same degree of respectability as ordinary campaign contributions. For that reason, perhaps it should be easier to prove that those payments are in violation of the law.").

27. *McCormick*, 500 U.S. at 282.

28. *Evans*, 504 U.S. at 268.

29. 556 F.3d 923, 937 (9th Cir. 2009). *See* United States v. Ganim, 510 F.3d 134, 143 (2nd Cir. 2007); United States v. Antico, 275 F.3d 245, 258 (3rd Cir. 2001); United States v. Hairston, 46 F.3d 361 (4th Cir. 1995); United States v. Collins, 78 F.3d 1021, 1035 (6th Cir. 1996); United States v. Giles, 246 F.3d 966, 972–73 (7th Cir. 2001); United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994).

consideration with the implied understanding that he would perform or not perform an act in his official capacity 'under color of official right.' "[30]

Courts have rejected attempts to elevate proof of the *quid pro quo* by requiring the government to link the payment or benefit to a specific exercise of authority. In *United States v. Abbey*, a developer provided a city official with a building lot for free in the hope that his company would receive favorable consideration for a future property development plan. The Sixth Circuit explained:

> So Abbey is wrong in contending that, to sustain a Hobbs Act conviction, the benefits received must have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose. The public official need not even have any intention of actually exerting his influence on the payor's behalf.[31]

In *United States v. Ganim*, the Second Circuit rejected a similar argument in a case involving a series of gifts, payments, and other benefits provided to the mayor of a city, a type of influence-peddling that did not condition the payment on performance of a specific act. The circuit court stated:

> [S]o long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act. To require otherwise could subvert the ends of justice in cases—such as the one before us—involving ongoing schemes. In our view, a scheme involving payments at regular intervals in exchange for specific official's acts as the opportunities to commit those acts arise does not dilute the requisite criminal intent or make the scheme any less "extortionate." Indeed, a reading of the statute that excluded such schemes would legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended.[32]

30. 275 F.3d at 257. The circuit court explained that "no 'official act' (i.e., no 'quo') need be proved to convict under the Hobbs Act. Nonetheless, the official must know that the payment—the 'quid'—was made in return for official acts." *Id*.

31. 560 F.3d 513, 518–19 (6th Cir. 2009). In *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), the Ninth Circuit, discussing the *quid pro quo* requirement for a right of honest services prosecution, stated:

> It is sufficient, for example, if the evidence establishes that the government official has been put on "retainer" —that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked. Only individuals who can be shown to have had the specific intent to trade official actions for items of value are subject to criminal punishment on this theory of honest services fraud. The retainer theory of *quid pro quo* eliminates the possibility that an innocent lobbyist or politician will be convicted for depriving the public of honest services.

Id. at 943 n.15.

32. 510 F.3d 134, 147 (2nd Cir. 2007). The author of the Second Circuit opinion was the future Justice Sonia Sotomayor, who rejected the defendant's argument that it apply *Sun-Diamond Grower*'s requirement that an unlawful gratuity be linked to a particular exercise of authority, noting that there was no "principled reason to extend *Sun-Diamond*'s holding beyond the illegal gratuity context." *Id*. at 146. *See* United States v. Coyne, 4 F.3d 100, 114 (2nd Cir. 1993) ("[I]t is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence—i.e., on behalf of the payor—as specific opportunities arise.").

D. Campaign Contributions

McCormick erected a high but not insurmountable barrier to proving a Hobbs Act violation for cases involving campaign contributions when it required the government to prove an "explicit promise or undertaking" in exchange for the funds. In *United States v. Siegelman*, the Eleventh Circuit rejected the defense argument that the government must prove an *express* agreement between an elected official and a contributor for a Hobbs Act conviction. The circuit court paraphrased the requirement for an express agreement as a statement along the lines of "I will make this contribution and in exchange for this contribution you will appoint me. Are we agreed on that? Yes we are."[33]

The prosecution involved the former governor of Alabama, Don Siegelman, and a prominent CEO of a local hospital corporation, Richard Scrushy, who was appointed to a state hospital board after giving the governor $500,000 in campaign contributions. The Eleventh Circuit pointed out that "inferring actors' state of mind from the circumstances of their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury," and the evidence was sufficient to infer "that Siegelman and Scrushy explicitly agreed to a corrupt *quid pro quo*."[34]

Siegelman is an important application of *McCormick*'s "explicit" *quid pro quo* requirement because the circuit court did not require that the agreement be express, as the defendants argued, but only that the circumstantial evidence be sufficient to allow a reasonable juror to infer there was an explicit agreement. While a campaign contribution is presumptively legal, it is not immune from prosecution under the Hobbs Act.[35]

The ambiguity of campaign contributions presents a significant challenge to a Hobbs Act prosecution because elected officials routinely solicit donations and often meet with contributors who have an interest in seeking the official's support, and the money is given with at least an expectation the official will act in a certain way. In *United States v. Carpenter*, the Ninth Circuit rejected the argument of a former state senator that an elected official cannot be convicted under the Hobbs Act "unless an official has specifically stated that he will exchange official action for a contribution." The circuit court held, "To read McCormick as imposing such a requirement would allow officials to escape liability under the Hobbs Act with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money."[36]

While a specific statement is not required for the *quid pro quo* involving campaign contributions, *Carpenter* explained that the agreement must "be *clear and unambiguous*, leaving no

33. 561 F.3d 1215, 1227 (11th Cir. 2009).

34. *Id*. at 1228–29. The circuit court pointed to various conversations Governor Siegelman had with an aide regarding the money provided by Scrushy and his expectation of an appointment, explaining that "Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON board. The jurors were free to give it a different construction, but they did not." *Id*. at 1228.

35. *See* McCormick v. United States, 500 U.S. 257, 273 (1991) ("[P]ayments * * * made in return for an explicit promise or undertaking by the official to perform or not to perform an official act, are criminal.").

36. 961 F.2d 824, 827 (9th Cir. 1992).

uncertainty about the terms of the bargain."[37] The circuit court distinguished between campaign contributions given with the donor's "anticipation" of official action and those made in exchange for the official's "promise" of that action.[38] For a Hobbs Act violation, only a promise of action is sufficient:

> When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond "anticipation" and into an arrangement that the Hobbs Act forbids. This understanding need not be verbally explicit. The jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a *quid pro quo*. As we read *McCormick*, the explicitness requirement is satisfied so long as the terms of the *quid pro quo* are clear and unambiguous.[39]

In *Carpenter*, the government argued that the defendant conditioned meetings with lobbyists on their making campaign contributions, which was sufficient to prove a *quid pro quo*. The Ninth Circuit disagreed, stating that just granting or denying access to an elected official based on the amount of campaign contributions was not an "official act" under *McCormick* and "cannot, by itself, form the basis for a charge of extortion or attempted extortion under the Hobbs Act." However, the circuit court explained that the contribution could be evidence of extortion if

> in such a context that it sends a clear and unambiguous message that a legislator is conditioning his support for legislation on those levels of contributions. Under such circumstances, granting or denying access may be evidence from which a jury could find that a legislator was conditioning his support for legislation on the receipt of contributions.[40]

The *quid pro quo* would not be getting the attention of the elected official, but the circumstantial evidence that the contribution—and resultant access—is a condition for support for a legislative proposal.[41]

In *United States v. Inzunza*, the Ninth Circuit stated, "We confess considerable uneasiness in applying this standard [in *Carpenter*] to the acceptance of campaign contributions because, in our

37. *Id.* (italics added).

38. This reflects the analysis of Justice Scalia in his concurring opinion in *McCormick*, in which he stated that the Hobbs Act should not "be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action." 500 U.S. at 276 (Scalia, J., concurring).

39. 961 F.2d at 827.

40. *Id.*

41. The Ninth Circuit stated:

> Agreeing to support legislation in return for contributions is entirely different from granting or denying access. Agreeing to vote for or against legislation in exchange for a contribution clearly falls within the ambit of the Hobbs Act, for voting is a legislator's quintessential "official act." Likewise, agreeing to intervene with one's colleagues to secure their support for legislation involves an "official act." The effectiveness of such intervention depends in large measure on a legislator's ability to exchange his support on future legislation for his colleagues' support on pending legislation he favors. Thus, the legislator's vote lies at the heart of this practice as well.

flawed but nearly universal system of private campaign financing, large contributions are commonly given in expectation of favorable official action."[42] Yet, despite this concern, the circuit court upheld the Hobbs Act conviction of a city council member for soliciting (and accepting) campaign contributions in exchange for sponsoring legislation that would relax the city's laws on lap-dancing at the contributor's clubs. The Ninth Circuit explained:

> How, then, in the potentially polluted atmosphere of campaign contributions, can we tell a criminal agreement from a large campaign contribution accepted from a contributor who expects favorable results? The Supreme Court's answer lies in the level of explicitness, which permits a line to be drawn legally if not according to ethical perfection.[43]

The circuit court found that "[t]here was no absence of very explicit promises, made directly to the person delivering the contributions, regarding actions Inzunza would take toward repealing the No-Touch ordinance."[44]

In rejecting the defendant's argument that the evidence was insufficient to show the payments were not just campaign contributions, the Ninth Circuit reached the same conclusion as the Eleventh Circuit in *Siegelman* regarding what is necessary to show an explicit *quid pro quo*. The circuit court explained that the explicitness requirement applies to the official's agreement to act, not to the connection between the promise and the payment that is ostensibly a campaign contribution:

> An official may be convicted without evidence equivalent to a statement such as: "Thank you for the $10,000 campaign contribution. In return for it, I promise to introduce your bill tomorrow." The connection between the explicit promise of official action and the contribution must be proved, but the proof may be circumstantial.[45]

So long as the campaign contribution is conditioned on an exercise of authority for the benefit of the contributor, it is subject to prosecution under the Hobbs Act, even if the agreement does not involve any misuse of governmental power. In *United States v. Farley*, the Sixth Circuit rejected the argument of an elected county sheriff charged with a Hobbs Act violation that the government must prove those who made the campaign contributions received in exchange something of value comparable to their contribution. The defendant and his coconspirators offered honorary sheriff commissions to those who made $500 campaign contributions, and argued that the commissions did not carry any rights, duties, or powers for the recipient, so they were of insufficient value to

Id. The circuit court upheld the conviction on the ground that the evidence showed the state senator did more than just ration access to himself based on campaign contributions, but also stated that things were "going smoothly" with legislation and that he had the "right friends" on the committee considering legislation of interest to the lobbyist. *Id.* at 828.

42. 580 F.3d 894, 900 (9th Cir. 2009).

43. *Id.*

44. *Id.* at 901.

45. *Id.* at 900–01.

meet *McCormick*'s explicit *quid pro quo* element. The Sixth Circuit held that *McCormick* did not incorporate a "comparable value" requirement when a campaign contribution is involved, and noted that the honorary commissions were valuable because the badges awarded were identical to those provided official sheriff's deputies and were paid for by the county.[46]

E. Defendant's Authority for a Quid Pro Quo

1. Scope of Authority

While the Supreme Court made it clear in *Evans* that the *quid pro quo* need not actually occur for a violation of the Hobbs Act, it is often the most powerful evidence the prosecution can introduce to show an illicit arrangement. Defendants have sought to avoid conviction on the ground that they did not have the requisite authority to provide a benefit to the payer of the bribe, and therefore could not engage in extortion "under color of official right."

Although this argument has generally been unavailing, in *United States v. Rabbitt*, one of the earliest Hobbs Act corruption prosecutions, the Eighth Circuit recognized an outer limit to the authority that can be exercised by a defendant, thereby limiting application of the statute. Richard J. Rabbitt, speaker of the Missouri House of Representatives, was convicted for, among other charges, assisting an architectural firm in obtaining a contract from the state. While the defendant did not have the power to award contracts for the state, the government argued that he had the "apparent power" to do so, and the firm retained him for that purpose. Having Rabbitt advocate for the firm clearly aided it, but the Eighth Circuit found that "no testimony established that any state contracting officer awarded any contract to Berger-Field because of Rabbitt's influence or that Berger-Field believed Rabbitt's introduction was enough to secure the work."[47] The circuit court explained that "[t]he official need not control the function in question if the extorted party possesses a reasonable belief in the official's powers," but this case did not violate the Hobbs Act because the firm was only paying Rabbitt in the hope that being associated with his name would be helpful. In effect, retaining Rabbitt bought entrée to the contract award process, but not the exercise of official authority that would constitute extortion.[48]

Rabbitt established a fine line between permissible purchasing of an official's influence, which could constitute a violation of ethics rules and even rise to the level of a mail or wire fraud violation, and extortion under color of official right. Subsequent decisions make it clear that a Hobbs Act violation does not require proof that the official had actual authority over the decision sought to be obtained through the payment. In *United States v. Loftus*, the Eighth Circuit stated, "Actual authority over the end result—rezoning—is not controlling if Loftus, through his official position,

46. 2 F.3d 645 (6th Cir. 1993).

47. 583 F.2d 1014, 1028 (8th Cir. 1978).

48. *Id.*

had influence and authority over a means to that end."[49] In *United States v. Bibby*, the Sixth Circuit explained that

> [w]hat matters is not whether the official has "actual de jure" power to secure the desired item, but whether the person paying him held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the authority to determine recipients of the [contracts] here involved.[50]

In determining whether there was a *quid pro quo*, the issue is whether the payer had a reasonable belief about the official's authority to engage in the promised conduct and not the actual scope of the official's authority. In *United States v. Freeman*, the Ninth Circuit explained that "the Hobbs Act reaches those public employees who may lack the actual power to bring about official action, but create the reasonable impression that they do possess such power and seek to exploit that impression to induce payments."[51] The defendant was an assistant to a state legislator, and the circuit court found that "[t]here was ample evidence that legislative aides exercise a degree of control over pending bills in the legislative process."[52]

2. Victim's Understanding of Authority

The understanding of the victim is crucial when the defendant does not have actual authority over the exercise of governmental authority but claims the ability to effectuate a decision in favor of the payers in exchange for a payment. In *United States v. Tomblin*, the Fifth Circuit overturned a Hobbs Act conviction of a private citizen who claimed he had influence over a U.S. senator but did not otherwise exercise any official authority. The circuit court explained that "although he may have 'cloaked' himself in the Senator's authority . . . no one believed that he was a public official, especially not his purported victims."[53]

Because *Evans* does not require that the official initiate or demand the corrupt payment, the crucial question is determining what led the payer to provide the benefit to the public official. This focus on the victim is important because that person's motive for making the payment can determine whether the transaction constitutes extortion under color of official right, in addition to the defendant's understanding of the payment's purpose. In *United States v. Braasch*, the Seventh Circuit held, "So long as the motivation for the payment focuses on the recipient's office,

49. 992 F.2d 793, 796 (8th Cir. 1993).

50. 752 F.2d 1116, 1127 (6th Cir. 1985). *See* United States v. Rubio, 321 F.3d 517, 521 (5th Cir. 2003) ("When a defendant holds an office, it is not necessary that the person from whom the money was taken be aware of the extortionist's official position as long as the victim believes that the individual had the power to carry out the threat or promise made to the victim.").

51. 6 F.3d 586, 593 (9th Cir. 1993).

52. *Id.*

53. 46 F.3d 1369, 1383 (5th Cir. 1995).

the conduct falls within the ambit of 18 U.S.C. § 1951."[54] *United States v. Carter*, a later Seventh Circuit decision, explained that the focus on motivation means the payment must be based at least in part on the payer's understanding of the official's purported or actual authority. The circuit court stated that

> it is irrelevant whether providing the property lists or the Purge of Lien Notice did in fact fall under the Recorder of Deeds's duties and responsibilities, or whether Carter did in fact deliver what he promised. Instead, the question is whether sufficient evidence was presented for the jury to conclude that Livas, when he provided Carter with the payments, reasonably believed that Carter could deliver these items based on his position as the Recorder of Deeds.[55]

The Third Circuit took the same approach in *United States v. Mazzei*, involving a state senator who told a property owner that the custom was that 10 percent of the amount of a lease on office space for his legislative office would go to his campaign committee. Defendant argued that a state senator did not have the power to award the lease, and therefore he did not act under color of official right. The circuit court rejected that position, holding that

> the jury need not have concluded that he had actual de jure power to secure grant of the lease so long as it found that Kelly held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved.[56]

While most Hobbs Act cases involve a public official, there are less formal arrangements involving the exercise of governmental authority that can come within the parameters of the statute. In *United States v. Margiotta*, a local political party official, who held no government office, was convicted based on his positions that "afforded him sufficient power and prestige to exert substantial control over public officials in Hempstead and Nassau County who had been elected to office" from his party.[57] The Second Circuit noted that the government officials who actually did the defendant's bidding by hiring those he designated could not be prosecuted under the Hobbs Act because they were not aware that he was demanding kickbacks for the appointments, but the defendant caused the officials to make the appointments and so he could be held liable under the

54. 505 F.2d 139, 151 (7th Cir. 1974). The panel that decided *Baasch* included two Supreme Court Justices: Justice Tom Clark, the author of the opinion who had stepped down from the Court in 1967, and Justice John Paul Stevens, who was a member of the Seventh Circuit at the time before his nomination in 1975. The circuit court's broad reading of the Hobbs Act is later reflected in Justice Stevens's opinions in *McCormick* and *Evans*.

55. 530 F.3d 565, 574–75 (7th Cir. 2008). *See* United States v. Rindone, 631 F.2d 491, 495 (7th Cir. 1980) ("De jure ability to perform the promised act need not be present; sufficient is 'a reasonable belief that the state system so operated that the power in fact of the defendant's office included the effective authority' to fulfill the promise.") (quoting *United States v. Mazzei*, 521 F.2d 639, 643 (3rd Cir. 1975)); *United States v. Price*, 617 F.2d 455, 457 (7th Cir. 1979) (that the victim was not entitled to receive permits was irrelevant; "The fact that Price provided permits to Harper in violation of the law will, thus, avail him nothing. He was able to provide the permits due to his official position.").

56. 521 F.2d 639, 643 (3rd Cir. 1975).

57. 688 F.2d 108, 113 (2nd Cir. 1982).

Hobbs Act. According to the circuit court, "[H]e could be found guilty of having caused the public officials unknowingly to use their power of office in such a manner that would induce the payments."[58]

In *United States v. Collins*, the Sixth Circuit upheld the conviction of the husband of a governor who arranged to receive kickbacks from firms seeking to do business with the state. The circuit court explained that "[a]lthough Collins held no state office, he held himself out to officers of various engineering firms and investment banking firms as being capable of controlling the award of certain contracts and other state business."[59]

F. Personal Gain from the Quid Pro Quo

Extortion is similar to larceny in that the victim is deprived of something of value that the perpetrator misappropriates, whether that is done under a threat of force or violence or under color of official right.[60] In *Wilkie v. Robbins*, the Supreme Court explained that "the crime of extortion focused on the harm of public corruption, by the sale of public favors for private gain, not on the harm caused by overzealous efforts to obtain property on behalf of the Government."[61] In *Wilkie*, the owner of a ranch sued officials of the federal Bureau of Land Management under the Racketeer Influenced and Corrupt Organizations Act (RICO) for attempting to force him to grant an easement to the agency through an alleged campaign of harassment and intimidation. Finding there was no Hobbs Act violation by the federal officials, the Court noted that it could not find any cases finding extortion under the common law or the Hobbs Act "undertaken for the sole benefit of the Government" and not to enrich the official. It refused to read the Hobbs Act—or RICO—as extending to conduct by government officials who are carrying on their jobs for the benefit of the government, even if their conduct was misguided.[62]

Relying on *Wilkie,* a district court in *United States v. Peterson* dismissed a Hobbs Act charge against a sheriff who charged inmates in the county jail for their room and board. According to the indictment, the defendant remitted the funds to the county commissioners, and therefore

58. *Id*. at 133.

59. 78 F.3d 1021, 1032 (6th Cir. 1996).

60. *See* Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office.").

61. 551 U.S. 537, 540 (2007).

62. *Id*. at 566. The Court stated that

> drawing a line between private and public beneficiaries prevents suits (not just recoveries) against public officers whose jobs are to obtain property owed to the Government. So, without some other indication from Congress, it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees, whether in the Bureau of Land Management, the Internal Revenue Service, the Office of the Comptroller of the Currency (OCC), or any other agency, to extortion charges whenever they stretch in trying to enforce Government property claims.

Id. at 2607.

"[a] public official who obtains property on behalf of the government does not commit the offense of extortion, even if the government does not have a lawful or legal claim to the property."[63] The defendant's disposition of the property obtained by extortion may be a defense to a Hobbs Act charge if the official's agency or department received the funds, regardless of whether that office is otherwise entitled to collect them. Extortion under color of official right deals with misuse of authority for some form of personal gain, not simply depriving a person of property through an exercise of governmental power. Such conduct may be a taking in violation of the Fifth Amendment's just compensation requirement, but it would not be a Hobbs Act violation.

Wilkie does not require, however, that the official realize the benefit directly from the extortion. In *United States v. Green*, the Supreme Court explained that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property."[64] In *Green*, the defendants, a local union and one of its officers, were charged with coercing employers to pay wages for "superfluous and fictitious services," and the Court stated that nothing in the labor laws "indicates any protection for unions or their officials in attempts to get personal property through threats of force or violence. Those are not legitimate means for improving labor conditions."[65] The fact that the employer was coerced into giving up personal property pursuant to a threat was sufficient to violate the Hobbs Act, even if the money did not go directly to the defendants.[66]

III. OBTAINING PROPERTY

The Hobbs Act defines extortion as "the obtaining of property from another." In *Scheidler v. National Organization for Women, Inc.*, the Supreme Court analyzed whether conduct constituted extortion when it only involved an indirect deprivation of the victim's property. *Scheidler* involved a RICO class action suit alleging a Hobbs Act violation against anti-abortion defendants who sought to shut down abortion clinics by engaging in protests to harass patients of the clinics.[67] The lower court found that an interference with economic rights by force or threat was sufficient to establish a Hobbs Act violation, a position the Supreme Court rejected.

Tracing the history of the Hobbs Act back to New York and common law extortion, the Court said, "[W]e have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation but also the acquisition of property."[68] While the defendants admittedly interfered with the abortion clinics' right to operate their business, they did not obtain

63. 544 F. Supp. 2d 1363, 1370 (M.D. Ga. 2008).

64. 350 U.S. 415, 420 (1956).

65. *Id.*

66. The Court rejected the trial judge's position that "the charged acts would be criminal only if they were used to obtain property for the personal benefit of the union or its agent, in this case Green. This latter holding is also erroneous." *Id.*

67. In an earlier decision in the litigation, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), the Court held that to prove a RICO violation a plaintiff need not prove that either the racketeering enterprise or any of the predicate acts of racketeering were motivated by an economic purpose.

68. 537 U.S. 393, 404 (2003).

their property in the sense of an actual deprivation from the victims. The Court found that the defendants

> neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.[69]

Scheidler's description of the property obtained by extortion appears to limit the statute to tangible personal property, but the Court went out of its way in a footnote to explain that it was not reaching that question. The Court stated that its decision did not reject the holding of the Second Circuit in *United States v. Tropiano*, in which the circuit court stated that "[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution" and therefore property within the meaning of the Hobbs Act.[70] In *Tropiano*, the defendants threatened a competing waste removal company to get it to refrain from soliciting business, and the Second Circuit stated that "[t]he concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth."[71]

The analysis of "obtaining" that requires both a deprivation and acquisition of property means there must be a link between what the victim lost through the extortionate transaction—whether by force or threat or "under color of official right"—and what the defendant gained, although the Supreme Court stated in *United States v. Green* that the defendant need not directly realize the benefit of the acquisition. Moreover, the victim need not own the property obtained by extortion, and a defendant's claim of right to the property is not a defense.[72]

69. *Id*. at 405.

70. 418 F.2d 1069, 1076 (2nd Cir. 1969).

71. *Id*. at 1075. *See* United States v. Virgil, 523 F.3d 1258, 1264 (10th Cir. 2008) ("The government presented evidence that Mr. Vigil attempted to force Mr. Everage to hire Ms. Sais as a condition for receiving the SLOM contract. A reasonable jury could conclude that this evidence demonstrates that Mr. Vigil attempted to obtain Mr. Everage's intangible right to make business decisions free from outside pressure and to decide with whom to work.").

72. *See* United States v. Cruzado-Laureano, 404 F.3d 470, 481 (1st Cir. 2005) ("The statute does not require that a victim of extortion part with his own property."); United States v. Sturman, 49 F.3d 1275, 1284 (7th Cir. 1995) ("[I]n an extortion case, a defendant's claim of right to the property is irrelevant. One may be found guilty of extortion even for obtaining one's own property."). In *United States v. Enmons*, 410 U.S. 396 (1973), the Supreme Court held that a legal strike by union members to obtain higher wages was not a Hobbs Act violation, holding that "the literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks." *Id*. at 400. The Court found that in the union context "there has been no 'wrongful' taking of the employer's property; he has paid for the services he bargained for, and the workers receive the wages to which they are entitled in compensation for their services." *Id.* The Seventh Circuit noted that "[s]everal courts have expressed the view that *Enmons* should be limited to its facts, specifically

While the language of "deprivation" and "acquisition" naturally alludes to some type of physical property, it is not necessarily limited to such tangible items. The Court stated that the property obtained must be of a nature such that it can be exercised, transferred, or sold, which applies to both tangible and intangible property. The Second Circuit's statement in *Tropiano* that the Hobbs Act covers intangible property is not diminished by *Scheidler*, which only requires that the defendant gain something through the extortion, and not just interfere in the victim's use and enjoyment of that property.[73]

Whether a right constitutes property depends on whether the defendant can use what is extorted from the victim. In *United States v. McFall*, the Ninth Circuit overturned the conviction of a consultant who organized opposition by public officials to a company's power plant project in order to force it to drop a bid for a contract to build another plant that the defendant's client also was bidding for. The government alleged that the property extorted was the right to bid on the second plant contract, but the circuit court held that "decreasing a competitor's chance of winning a contract, standing alone, does not amount to obtaining a transferable asset for oneself (or one's client)."[74] While the victim of the extortion suffered a loss, that alone is insufficient when the defendant does not obtain something of value that can be exploited.[75]

IV. LIABILITY OF NONOFFICIALS

The Hobbs Act prohibits conduct that involves "obtaining of property from another" with the person's "consent," so the victim of the offense is the person who pays the money or confers the benefit, even though that person may, in fact, be the one who initiated the bribe and sought to gain an unfair advantage from the corrupt official. Under 18 U.S.C. § 2, a defendant can be charged with aiding and abetting an offense, and 18 U.S.C. § 371 punishes any conspiracy to violate a

cases of obtaining property by force, threat or use of fear in the context of a labor dispute." *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991).

73. In *United States v. Gotti*, 459 F.3d 296 (2nd Cir. 2006), the Second Circuit explained the impact of *Scheidler* on *Tropiano*'s holding about intangible property:

> In construing the scope of the *Scheidler II* holding, we are guided by the majority's explicit statement that *Scheidler II* did not even reach, much less reject, our holding in *Tropiano*. Indeed, we believe that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano*, both as to the "property" and "obtaining" prongs. Thus, as an initial matter, we easily conclude that *Scheidler II* did not overturn *Tropiano*'s broad interpretation of the Hobbs Act's reference to "property," nor otherwise suggest that only tangible property rights can be extorted under the Hobbs Act.

Id. at 323. In *Gotti*, the Second Circuit found Hobbs Act charges sufficient when the defendants sought to deprive union members of their rights under applicable labor law to free speech and democratic participation in the voting process "because the government charges not only that the defendants caused the relinquishment of the union members' LMRDA rights, but also that the defendants did so in order to exercise those rights for themselves—indeed, in a way that would profit them financially." *Id*. as 325. *Gotti* involved extortion through the use of force, not under color of official right.

74. 558 F.3d 951, 957 (9th Cir. 2009).

75. *Id.* ("It is not enough to gain some speculative benefit by hindering a competitor.").

federal statute.[76] Based on these provisions, prosecutors can seek to include nonofficials as defendants in connection with extortion under color of official right, but must show that a public official was involved in the extortion. In *United States v. McFall*, the Ninth Circuit held that failing to charge the jury that a nonofficial either aided and abetted or conspired with a public official is erroneous, and the claims of the private citizen to influence over an official are insufficient unless the person actually assisted (or conspired with) that official in extortion under color of official right.[77]

In *United States v. Saadey*, the Sixth Circuit overturned the defendant's conviction when the government's proof only showed that the defendant solicited money under the pretense that it would be paid to an assistant prosecutor to reduce criminal charges but did not allege that he aided the prosecutor in a violation or conspired with him. The circuit court explained that "a private citizen who is not in the process of becoming a public official may be convicted of Hobbs Act extortion under the 'color of official right' theory only if that private citizen either conspires with, or aids and abets, a public official in the act of extortion."[78]

Building on *Saadey*, the Sixth Circuit has adopted a bright line test that the private citizen who pays the bribe cannot be charged under the Hobbs Act as either an accomplice to the crime or a conspirator. In *United States v. Brock*, the Sixth Circuit rejected the government's argument that the payer of a bribe could be charged with conspiring with the public official to violate the Hobbs Act. The circuit court held that expanding the Hobbs Act "through a conspiracy theory effectively transforms the Act into a prohibition on paying bribes to public officials," and "Congress knows how to prohibit the giving or offering of bribes directly," as it did in § 201.[79] The Sixth Circuit focused on the "property from another" and consent requirements of the statute as leading ineluctably to the conclusion that the payer cannot be charged, because otherwise "[h]ow do (or why would) people conspire to obtain their own consent?"[80]

76. *See* United States v. Hairston, 46 F.3d 361, 366 (4th Cir. 1995) ("A private person can be convicted of aiding and abetting a public official who extorts under color of official right. One who collects the extorted payments is no less guilty than the official he serves.").

77. 558 F.3d 951, 959–60 (9th Cir. 2009). The circuit court explained that "the district court erred in failing to give an aiding and abetting or conspiracy instruction to the jury. . . As instructed, the jury could have concluded that McFall's claims of influence over Bedford were gross exaggerations, and still convicted him of attempted extortion under claim of official right. The Hobbs Act does not sweep so broadly." *Id*. at 960.

78. *Saadey*, 393 F.3d at 675. The Sixth Circuit concluded:

> The United States offered no evidence that Saadey aided and abetted Vitullo—or any other public official—in extorting money from Olsavsky and the district court refused to charge the jury on the issue of aiding and abetting. Count 8 does not allege that Saadey conspired with Vitullo—or any other public official—to extort money, but instead alleges that Saadey attempted to solicit money from Olsavsky under the "pretense" that he would use that money to bribe Vitullo. Finally, the jury acquitted Vitullo on all charges of conspiracy. Accordingly, we hold that Saadey's conviction on Count 8 of the superceding indictment must be reversed.

Id.

79. 501 F.3d 762, 768 (6th Cir. 2007).

80. *Id*. at 767. The Sixth Circuit stated with regard to the "property of another" element, "These three people did not agree, and could not have agreed, to obtain property from "another" when no other person was involved—when the property, so far as the record shows, went from one coconspirator (one of the Brocks) to another (Simcox). We see no reason to ignore the 'property from another' requirement and ample reason to give it content." *Id*.

The Sixth Circuit made it clear in *United States v. Gray* that making the actual payment does not automatically preclude Hobbs Act liability if that person assists in the extortion by serving only as a conduit for the transfer. The circuit court upheld the defendant's convictions for those counts on which he merely passed on the payment to a public official, while reversing others in which the money came from his own accounts.[81]

Not all courts have taken the bright-line approach of the Sixth Circuit in precluding Hobbs Act liability for any nonofficial who was extorted under color of official right. In *United States v. Spitler*, the Fourth Circuit held that "[w]hen an individual protected by [the Hobbs Act] exhibits conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy."[82] In *United States v. Cornier-Ortiz*, the First Circuit rejected the defendant's challenge to his conviction based on an "innocent victim" defense, finding that the "evidence supported the conclusion that some sort of *quid pro quo* arrangement was in place and that Cornier did more than merely acquiesce to it."[83] The circuit court focused on the close personal relationship between the defendant and the official, and that the defendant gained numerous benefits from the official's exercise of authority, so that "it would only take a small inference for the jury to conclude that Cornier agreed to the [] payment arrangement with [the official] in gratitude for this help."[84]

In *United States v. Nelson*, a district court declined to dismiss a Hobbs Act charge against the person who paid a bribe to a state senator to sponsor legislation because "the defendant in this case is more than just a payor of extorted money. He is an initiator of an extortion. As such, he is in no position to contend that he is the innocent 'victim' of Nelson's alleged extortion."[85] The district court's focus on whether the person initiated the bribe is misguided in light of the Supreme Court's decision in *Evans* that a Hobbs Act violation did not require the public official to take any steps to solicit or induce the bribe. If the official's very authority is sufficient to establish any inducement to pay the bribe, then the fact that the payer initiates the transaction seems equally irrelevant to determine whether the person aided and abetted the crime. Because there is no need to show force or fear for extortion under color of official right, the payer can be the one who initiates the transaction and voluntarily consents to it. As the Sixth Circuit pointed out in *Brock*, "[I]t will be difficult to ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution."[86]

81. United States v. Gray, 521 F.3d 514, 538–39 (6th Cir. 2008). In upholding the Hobbs Act convictions, the Sixth Circuit stated, "Gray's corporate clients, seeking government contracts, funneled the illegal payments through defendants to McGilbra. We therefore conclude that the evidence was sufficient to sustain defendants' convictions on these counts." *See also* United States v. Wright, 797 F.2d 245, 253 (5th Cir. 1986) ("Although Wright actually made out the $3,000 check to Armstrong, it was Wright's law firm that was the real payor."). For the counts overturned, the Court explained that "although others were involved in the joint venture with Gray, there was no evidence that the allegedly extortionate payments to and on behalf of Spellman came from a source other than Gray. The proof therefore cannot support the convictions . . ." 521 F.3d at 539.

82. 800 F.2d 1267, 1276 (4th Cir. 1986).

83. 361 F.3d 29, 40 (1st Cir. 2004).

84. *Id.*

85. 486 F. Supp. 464, 490 (W.D. Mich. 1980).

86. 501 F.3d at 771. The circuit court went on to state, "Either the Act picks up all perpetrators, acquiescors and victims, or it picks up none of them. We say it picks up none of them and would leave it to Congress (if it wishes) to do what it has done before: Make it a crime to offer or give a bribe to a public official."

V. INTERSTATE COMMERCE

The Hobbs Act reaches offenses, such as robbery and extortion, already punishable under state law. The federal interest is the need to protect interstate commerce, and congressional authority to enact the provision is based on its power to regulate under the Commerce Clause.[87] The statute defines the offense as covering any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce" by one of the prohibited means. In *Stirone v. United States*, the Supreme Court explained that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."[88] As an element of the crime, the government must prove the effect on interstate commerce beyond a reasonable doubt.[89]

The statute extends to the limit of Congress's power under the Commerce Clause, so the government need not prove a substantial impact on interstate commerce from the activity, only a *de minimis* effect.[90] In reviewing the commerce element, the Ninth Circuit explained in *United States v. Atcheson* that "[t]o establish a *de minimis* effect on interstate commerce, the Government need not show that a defendant's acts actually affected interstate commerce. Rather, the jurisdictional requirement is satisfied by proof of a probable or potential impact."[91]

If extortion results in a transfer of money or property across state lines, then the commerce element is easily established because of the direct effect of the transaction on interstate commerce. It is not necessary for the prosecution to show actual interstate movement of funds, and the potential

There is good reason to conclude that *Nelson* is no longer good law after *Brock* because the district court is in the Sixth Circuit, and the appellate court specifically stated that the distinction between perpetrators, acquiescors, and victims was irrelevant, so that the person who paid the bribe cannot be a defendant. The Sixth Circuit cited and analyzed *Nelson*, however, and did not specifically overrule its analysis, so the lower court case may still have some vitality, although it appears to be quite limited after *Brock*.

87. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

88. 361 U.S. 212, 215 (1960).

89. *See* United States v. Parkes, 497 F.3d 220, 227 (2nd Cir. 2007) ("Proving an effect on interstate commerce is thus an element of a Hobbs Act offense, which must be proven beyond a reasonable doubt to a jury.").

90. *See* United States v. Rivera-Rivera, 555 F.3d 277, 286 (1st Cir. 2009); United States v. Cruz-Arroyo, 461 F.3d 69, 75 (1st Cir. 2006); United States v. Panaro, 266 F.3d 939, 948 (9th Cir. 2001); United States v. Gray, 260 F.3d 1267, 1272 (11th Cir. 2001).

91. 94 F.3d 1237, 1243 (9th Cir. 1996). *See* United States v. Lynch, 437 F.3d 902, 905 (9th Cir. 2006) ("[J]urisdiction for a Hobbs Act prosecution of an individual by showing either that the crime had a direct effect or an indirect effect on interstate commerce."); United States v. Foster, 443 F.3d 978, 983 (8th Cir. 2006) ("[T]he government satisfies its burden by showing a potential effect on interstate commerce."); United States v. Verbitskaya, 406 F.3d 1324, 1335 (11th Cir. 2005) ("A Hobbs Act conspiracy can be proved by showing potential impact on interstate commerce."); United States v. Urban, 404 F.3d 754, 765–66 & n.3 (3rd Cir. 2005); United States v. Re, 401 F.3d 828, 835 (7th Cir. 2005); United States v. Perrotta, 313 F.3d 33, 36 (2nd Cir. 2002); United States v. Toles, 297 F.3d 959, 969 (10th Cir. 2002); United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001); United States v. Harrington, 108 F.3d 1460, 1466 (D.C. Cir. 1997); United States v. Brantley, 777 F.2d 159, 162 (4th Cir. 1985). But there must be a realistic link to interstate commerce, something more than just a highly attenuated connection concocted by the government. *See* United States v. Quigley, 53 F.3d 909 (8th Cir. 1995); United States v. Collins, 40 F.3d 95 (5th Cir. 1994); United States v. Buffey, 899 F.2d 1402 (4th Cir. 1990).

impact of the extortion on future transactions can be the basis for proving the effect on interstate commerce. The interstate commerce element was shown in *United States v. Staszcuk*, an early Hobbs Act corruption case in which a person interested in building an animal hospital paid $5,000 to a middleman who then passed on $3,000 to a Chicago alderman whose support for a change in the zoning law was necessary for the hospital to be built in his district. In fact, the zoning change was not adopted and the facility was never built, but the Seventh Circuit, sitting en banc, found a sufficient effect on interstate commerce to uphold the conviction. The circuit court stated:

> An effective prohibition against blackmail must be broad enough to include the case in which the tribute is paid as well as the one in which a victim is harmed for refusing to submit. Since the payment would normally enable the business to continue without interruption, the inference is inescapable that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect.[92]

A. Federalism and the Hobbs Act

Given the breadth of the federal government's authority to reach virtually any business transaction because of its potential effect on interstate commerce, questions have been raised about whether the Hobbs Act improperly extends federal power in violation of the Constitution's limitation on the authority of the national government under the principle of federalism. The issue of the federal government's role in enforcing criminal laws against state and local officials has become especially relevant after the Supreme Court's decisions in *United States v. Lopez* and *United States v. Morrison*, which invalidated federal statutes because they exceeded congressional authority to regulate in areas already subject to the police power of the states.[93] The Court relied in part on the principle of federalism embedded in the constitutional structure to limit Congress's power to regulate certain types of conduct, specifically crimes of violence.

92. 517 F.2d 53, 57 (7th Cir. 1975). The Seventh Circuit noted that it was not just the individual transaction that must be considered, but more broadly the class of transactions that could affect interstate commerce. It stated:

> Moreover, congressional concern was not merely a matter of providing federal protection to each of the "relatively small shops" being victimized, but rather reflected the legislative judgment that these entrepreneurs, in the aggregate, represented a component of industry of sufficient importance to merit federal protection. The concern which gave rise to the statute is marketwide. Thus, although enforcement necessarily proceeds on a case-by-case basis, our evaluation of both the intent of Congress and its power to implement that intent, requires more than a consideration of the consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.

Id. at 57–58.

93. United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act because the conduct subject to prosecution—possession of a weapon within 500 feet of a school—was not economic activity, and therefore fell beyond congressional authority under the Commerce Clause absent some requirement of interstate movement of the weapon); United States v. Morrison, 529 U.S. 598, 617–618 (2000) (invalidating the civil remedy provision in the Violence Against Women Act on the ground that that "[t]he Constitution requires a distinction between what is truly national and what is truly local . . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

Federalism is a structural protection inherent in the design of the Constitution and reflected in the protection afforded by the Tenth Amendment. The principle limits the authority of the federal government by permitting the exercise of only those powers enumerated in the Constitution, while reserving to the states separate sovereign authority. Federalism is understood to protect the rights of individuals through the division of governmental power at different levels.[94]

The broad commerce element in the Hobbs Act, which allows almost any imagined impact on interstate commerce to suffice for federal prosecution of the offense, caused some lower court judges to assail the application of the statute to robberies, which have traditionally been prosecuted by local authorities, as a violation of federalism. For example, in *United States v. McFarland* and *United States v. Hickman*, a substantial block of Fifth Circuit judges in en banc decisions questioned the statute's application to a series of small-scale robberies.[95] In *McFarland*, the dissenting judges asserted,

> There is no sufficient rational basis to aggregate the effects on interstate commerce of any of the four individual prototypically local crimes of violence here prosecuted with the effects on interstate commerce of all the undifferentiated mass of robberies covered by the Hobbs Act's general proscription of any and all robberies that "in any way or degree . . . affect . . . commerce."[96]

In *Hickman*, the dissenting judges argued that these "Hobbs Act prosecutions exceeded Congress's authority" because permitting prosecutors to establish the commerce element by aggregating the effect of the robberies meant that "[t]aking a child's lemonade is as potentially covered as any other robbery, at least as long as we are free to aggregate all robberies."[97] In *United States v. Rivera-Rivera*, a dissenting opinion in a First Circuit case asserted that "virtually every business uses some item that was made in another state—perhaps a table or a rug or paint on the walls. If speculation about future replacement of such items suffices to establish the interstate commerce nexus, the Hobbs Act would embrace virtually all local robberies."[98]

None of these cases involved public corruption or even extortion by force or fear, and the dissenting judges' position relied on the need to limit federal authority over crimes of violence that did not involve sufficient commercial activity. Even before the Court's decisions in *Lopez* and *Morrison*, Justice Clarence Thomas raised federalism concerns about the application of the Hobbs Act to local officials not directly responsible to the federal government in *Evans v. United States*. Justice Thomas asserted that "[o]ver the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials."[99] He took the position that

94. Henning, *supra* note 1, at 76.

95. In both cases, the judges dissented from the affirmation of the Hobbs Act robbery convictions by an equally divided *en banc* review.

96. 311 F.3d 376, 409 (5th Cir. 2002) (*en banc*) (Garwood, J., dissenting).

97. 179 F.3d 230, 231 (5th Cir. 1999) (*en banc*) (Higginbotham, J., dissenting).

98. 555 F.3d 277, 298 (1st Cir. 2009) (Lipez, J., dissenting).

99. *Evans*, 504 U.S. at 290 (Thomas, J., dissenting).

application of the Hobbs Act to local officials amounted to a regulation of state governments that "mocks" earlier decisions limiting the power of Congress to regulate the states.[100]

Justice Thomas misconstrued the application of federalism to criminal laws because he mistakenly viewed the Hobbs Act prohibition on extortion under color of official right as regulating the conduct of the states and their officials in matters of official policy. The bribery portion of the statute reaches the *misuse* of governmental authority, not its proper exercise. Thus, the Hobbs Act's prohibition on extortion under color of official right is not a regulation of the states or a limit on their power. That the defendants may be local officials, who also are subject to prosecution by the states for their conduct, does not remove them from the power of the federal government.[101]

In *United States v. Gillock*, the Court rejected the argument that federalism required the federal courts to recognize a privilege similar to the Speech or Debate Clause that would prohibit the use of state legislative acts and statements as evidence of a Hobbs Act violation by a state senator. The Court noted that criminal prosecutions act only on the individual official and not the state, so that "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process."[102] The Court concluded, "In the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions, we discern no basis in these circumstances for a judicially created limitation that handicaps proof of the relevant facts."[103]

Gillock recognized that federal authority to prosecute corruption by state and local officials may have some tangential effect on the operation of the states, but the national government has a powerful interest in enforcing its corruption laws, even when there is some interference with the exercise of state power. Federalism does not operate as a separate limit on the prosecution of corruption, nor does it mean that crimes already subject to state prosecution presumptively should be removed from the authority of the federal government.[104]

Since *Lopez* and *Morrison*, lower courts have not seriously entertained federalism arguments that would limit the application of the Hobbs Act to corruption prosecutions, although that issue

100. Justice Thomas cited two earlier decisions by the Court that raised questions about the federal government's power to regulate the activities typically under the authority of the states, *United States v. Bass*, 404 U.S. 336 (1971), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Bass*, the Court interpreted the elements of a gun possession statute and noted "a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349. In *Gregory v. Ashcroft*, the Court cited *Bass* for the proposition that an interpretation of legislation that significantly altered the federal-state balance required a clear expression of congressional intent. 501 U.S. at 461. In both cases, the Court invoked the federal-state balance in support of its narrow interpretation of the statute at issue. The Court did not, however, find that Congress lacked the authority to legislate in the area if it chose to do so, but instead only that Congress must make that intention clearer. The cases do not appear to construct an impenetrable barrier to federal regulation, as Justice Thomas's dissent in *Evans* implies.

101. Henning, *supra* note 1, at 132.

102. 445 U.S. 360, 373 (1980).

103. *Id*. at 374.

104. Henning, *supra* note 1, at 132.

has been raised in cases involving robberies.[105] Extortion under color of official right involves a *quid pro quo* exchange of something of value for the exercise—or nonexercise—of governmental power. The corrupt transaction is fundamentally an economic one in which the official often seeks to benefit personally from the misuse of authority.

Bribery's common law heritage does not change the fundamental nature of the transaction as essentially an economic exchange among willing actors. The Hobbs Act prohibits transactions which have a sufficient economic impact on interstate commerce, so while it may seem odd to view a criminal statute as a type of commercial regulation, the anticorruption form of extortion meets the criteria for a proper exercise of the commerce power as set forth in *Lopez* and *Morrison*. The fact that states have long prosecuted corruption in state and local government is not relevant to the constitutional analysis of the relationship of extortion under color of official right to the Commerce Clause.

B. Direct and Indirect Effect on Interstate Commerce

In ascertaining whether extortion (or robbery) meets the commerce element of the statute, only a *de minimis* effect on interstate commerce must be shown for a conviction. Courts have distinguished between direct and indirect effects on interstate commerce, with either being sufficient to establish the element. For direct effects, courts have focused on whether there was actual business crossing state lines, or at least the strong likelihood that those engaged in interstate commerce were impacted by the extortion.[106] If there is evidence of a direct effect on commerce, then a court need not consider whether there was also an indirect effect.[107] The more difficult issue arises in cases involving proof of only an indirect effect on commerce.

105. For example, in *United States v. Lynch*, 437 F.3d 902 (9th Cir. 2006), the Ninth Circuit, rehearing the case en banc, struggled with the issue of whether the robbery of an individual had the requisite *de minimis* effect on interstate commerce. Unlike robbery cases, there are no reported decisions after *Lopez* and *Morrison* in which a lower court analyzed whether extortion under color of official right had the requisite effect on interstate commerce or violated the principle of federalism.

106. *See, e.g.*, United States v. Carcione, 272 F.3d 1297, 1301 (11th Cir. 2001) (that the defendants traveled from Illinois to Florida to rob an elderly, nonbusiness Florida resident, made interstate phone calls, and returned to Illinois with the robbery proceeds was sufficient to establish a direct effect on interstate commerce); United States v. Diaz, 248 F.3d 1065, 1091 (11th Cir. 2001) ("The Court finds that a reasonable jury could conclude that, as part owner of West Star Oil, Gonzalez was directly engaged in interstate commerce through his business."); United States v. Atcheson, 94 F.3d 1237, 1243–44 (9th Cir. 1996) ("Where the crime itself directly affects interstate commerce, as in the Hobbs Act, no requirement of a substantial effect is necessary to empower Congress to regulate the activity under the commerce clause."); United States v. Stephens, 964 F.2d 424 (5th Cir. 1992) (extortion of interstate travelers directly affected interstate commerce); United States v. Heidecke, 900 F.2d 1155 (7th Cir. 1990) (extortion of funds for driver's license from traveling salesman directly violative of Act); United States v. Lee, 818 F.2d 302, 305 (4th Cir. 1987) (an interstate phone call was found to be enough to directly affect interstate commerce).

107. *See* United States v. Hollis, 725 F.2d 377, 379 (6th Cir. 1984) ("[T]he possibility of an indirect effect need not be considered if the extortion had a direct effect on commerce."). The Sixth Circuit in *Hollis* found a direct effect on interstate commerce when the extortion under color of official right by a state official demanding a kickback reduced the amount paid to a doctor in Florida by the state of Kentucky for his services. The circuit court stated, "Payment for the services was an essential part of the interstate transaction. But for the extortion, Pugh would have been paid $5000 for

1. Indirect Effect through Depletion of Assets

To establish an indirect effect, courts have held that conduct which depletes the assets of a business were sufficient as long as a commercial entity was the victim, because the conduct can be *aggregated* to show an effect on commerce.[108] This approach is consistent with the Supreme Court's statement in *Lopez* on the scope of federal authority under the Commerce Clause that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[109]

Under the "depletion of assets" theory, any extortion which results in the transfer of funds or other valuable property that could have been used by the victim to conduct interstate business transactions satisfies the commerce element, regardless of whether the government shows an actual interstate transaction.[110] The effect on interstate commerce is indirect, and "commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods."[111] In *United States v. Carter*, the Seventh Circuit explained:

> [I]t is sufficient for the Government to show that a business that customarily purchases items through interstate commerce had its assets depleted through the acts of extortion, thus limiting its ability to purchase goods in interstate commerce. There is no requirement that the business directly purchase its items through interstate commerce, rather, it is enough if the business purchases such items through a wholesaler or other intermediary.[112]

Carter is a good example of the chain of inferences a court can engage in to find the requisite impact on interstate commerce when the victim is an individual and there is no proof of a purchase or other financial transaction that crossed state lines to show a direct impact on commerce. For one Hobbs Act charge, the victim (Livas) paid the county recorder of deeds (Carter) $400 to remove a lien on his personal residence, which would not appear to deplete the assets of a business engaged in interstate commerce. The circuit court explained, however, that "the jury could

the final group of depositions. Because of the extortion, Pugh only received $2100. Hollis' extortion therefore directly affected the amount of payment that moved in interstate commerce." *Id.* at 380.

108. *See* United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994) ("The government's 'depletion-of-assets' theory falls into the indirect category. This theory relies on a minimal adverse effect upon interstate commerce caused by a 'depletion of the resources of the business which permits the reasonable inference that its operations are obstructed or delayed.' This thesis usually is applied to businesses or similar entities engaged in interstate commerce . . . ").

109. 514 U.S. at 558.

110. The Seventh Circuit first hinted at the depletion of assets theory in *United States v. Staszcuk*, 517 F.2d 53 (7th Cir. 1975) (en banc), one of the earliest Hobbs Act prosecutions for corruption in which the defendant challenged the proof of an effect on interstate commerce when there was no economic activity beyond the bribe payment. The circuit court noted that "the payment of the extortion demand may, in some cases, have a direct actual effect on interstate commerce by reducing the assets available for the purchase of goods originating in other states. In this case, however, the government does not contend that the $3,000 payment so depleted the resources of either Allen or Harris." *Id.* at 58 n.10.

111. United States v. Elders, 569 F.2d 1020, 1025 (7th Cir. 1978).

112. 530 F.3d 565, 572 (7th Cir. 2008).

reasonably infer that the benefit of the lien being purged on Livas's personal residence would ultimately benefit Livas's business ventures, since he hoped to refinance his residence in order to provide him with more money to purchase properties."[113] This analysis is certainly speculative, and the Seventh Circuit acknowledged that it "may not be particularly strong" evidence of a link to interstate commerce, but a jury can draw the inference, which is sufficient to uphold a conviction.[114]

Courts usually apply the depletion of assets analysis in connection with a business, and its use in cases only involving crimes against individuals whose personal assets were obtained are more difficult because the chain of inferences to establish the indirect effect on commerce may be open to greater challenge. In *United States v. Mattson*, an extortion under color of official right case, the Seventh Circuit overturned the Hobbs Act conviction because the government failed to establish the commerce element of the offense through the depletion of assets theory. The circuit court found the theory unavailing because a business was not the victim, only an individual employee who sought an electrician's license at the employer's request. According to the court:

> The victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce. Thus, to find an effect on interstate commerce, we would be required not only to consider indirect effects within a single business entity, but also effects arising from the business entity's relationship with an employee not engaged in interstate commerce.[115]

Mattson refused to extend the commerce element to cover any economic transaction, explaining that such a broad reading of the Hobbs Act "would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually."[116]

The evidentiary failure in *Mattson* was in not linking the extortion to the conduct of a business that engages in interstate commerce. In *Carter*, the Seventh Circuit—which also decided *Mattson*—noted that the victim operated his business as a Subchapter S corporation, so "it is more difficult to distinguish between Livas's personal and corporate funds, since, as Livas testified at trial, any earnings made by the corporations were reported on Livas's personal income taxes, rather than separate corporate tax returns."[117] The circuit court took a forgiving approach in finding sufficient

113. *Id.* at 573.

114. *Id.*

115. 671 F.2d 1020, 1025 (7th Cir. 1982).

116. *Id.*

117. 530 F.3d at 573. In *United States v. Rodriguez-Casiano*, 425 F.3d 12 (1st Cir. 2005), a Hobbs Act robbery case, the First Circuit found sufficient evidence of a depletion of assets when the funds stolen were those of a business, even though they were taken from a personal residence and a personal briefcase. The circuit court explained:

> Bonilla provided uncontradicted testimony that the $30,000 stolen from his house was the property of the hardware store and was to be used to pay the company's invoices. Rivera-Lopez provided similar testimony that the $6,000 taken from the briefcase belonged to his company and was to be used to provide a check cashing service to clients, with the proceeds of the checks being used to pay the bills of Rivera Gas. This is all that is required to show a *de minimis* effect on interstate commerce under a depletion-of-assets theory.

Id. at 15.

evidence for the depletion of assets theory, distinguishing *Mattson* on the ground that there was *no* evidence of an effect on a business, while in *Carter* there was at least the potential for such an effect, slight as it may be.[118]

In *United States v. Perrotta*, the Second Circuit overturned a Hobbs Act extortion by force conviction where the government's proof of the effect on commerce was only the fact that the victim was an employee of a business who was involved in a bitter personal dispute with the defendant. The circuit court explained how the government can meet the commerce element based on conduct involving an individual victim rather than a business itself:

> The jurisdictional nexus could be satisfied by showing that the victim directly participated in interstate commerce; that the victim was targeted because of her status as an employee at a company participating in interstate commerce; that the harm or potential harm to the individual would deplete the assets of a company engaged in interstate commerce; that the crime targeted the assets of a business rather than an individual; or that the individual was extorted of a sum so large, or targeted in connection with so many individuals, that the amount at stake cumulatively had some effect on interstate commerce.[119]

The government's evidence did not link the extortion to the victim's work at the business, so any effect on interstate commerce through its activities was irrelevant in proving the *de minimis* impact on interstate commerce. The circuit court held:

> Merely showing employment with a company that does business in interstate commerce, without more, stretches the Hobbs Act too far. Under such a theory, the extortion or assault of anyone who worked in any capacity at any company that participates in interstate commerce would suffice for federal jurisdiction, blurring the boundaries between state and federal jurisdiction.[120]

118. *Id*. at 573 ("Regardless, although this link between the $400 and Livas's corporate accounts may not be particularly strong, it is not nonexistent as was the case in Mattson.").

119. 313 F.3d 33, 37–38 (2nd Cir. 2002). In *United States v. Turner*, 272 F.3d 380 (6th Cir. 2001), the Sixth Circuit held that the size of the amount obtained was insufficient to establish the commerce element absent some connection between the money and a business engaged in interstate commerce: "[E]vidence of the mere size of the loot is insufficient to prove the interstate commerce element of a Hobbs Act prosecution unless it is accompanied by further proof of how the depletion of such an amount would have resulted in an effect on interstate commerce." *Id*. at 387. Similarly, in *United States v. Kaplan*, 133 F.3d 826 (11th Cir. 1998), the Eleventh Circuit held,

> Although a few courts have suggested that the sheer size or scope of an extortion plot might provide the required effect on commerce, no court has converted the state crime of extortion into a federal matter simply by virtue of its size. If such a theory could provide a sufficient nexus to interstate commerce there would be no need to engage in the extensive analyses of how particular acts of extortion affected a victim's position in interstate commerce that are so prevalent in Hobbs Act cases.

Id. at 827–28.

120. *Id*. at 38. In *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), the Fifth Circuit set forth the requirements for showing that a robbery of an individual met the *de minimis* effect on interstate commerce required for a conviction:

> (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce;
> (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in

Along the same lines, the Fourth Circuit overturned Hobbs Act convictions in *United States v. Buffey* in which the defendants extorted the wealthy owner of a business by threatening to reveal his "somewhat indiscreet sexual activity." The circuit court rejected reliance on the depletion of assets theory because the victim had significant personal wealth and, while he had access to the company's assets, it was run by his son at the time and "[i]t is much more likely that [the victim] would have resorted to his readily available personal assets to satisfy any extortion demand."[121] Turning to the defendants, the Fourth Circuit noted that their extortion scheme was unlikely to have any impact on interstate commerce because it involved personal information and was not directed at a business, leading the court to find that "[e]xtorting money to be devoted to personal use from an individual does not affect interstate commerce."[122]

In relying on the depletion of assets theory, successful Hobbs Act cases link the effect of the extortion to the activity of a business, even if the organization is not the specific victim of the criminal conduct. The Seventh Circuit explained the preference under the theory for looking to a business as the basis for finding the commerce element:

> In general, however, though not in every case, businesses purchase on a larger scale than individuals. Hence extortion is likely to have a greater effect on interstate commerce when directed at businesses than at individuals. That is the pragmatic justification for drawing the line between individuals and businesses or other enterprises so far as applying the depletion-of-assets theory is concerned . . . .[123]

Extortion, like robbery, can involve a business or an individual as the victim. Bribery cases revolve around an exercise of governmental authority that frequently involves dispensing a benefit or removing an impediment to a transaction, so the connection to interstate commerce is often easier to establish without the concern in robbery cases that the impact of the crime is so insignificant that the prosecution improperly extends federal power. The core economic nature of corrupt transactions involving public officials supplies the requisite link, but, as an element of

> interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce.

Id. at 100. The Eleventh Circuit took a similar approach in *United States v. Diaz*, 248 F.3d 1065, 1084–85 (11th Cir. 2001).

121. 899 F.2d 1402, 1405 (4th Cir. 1990).

122. *Id.* at 1406. In a footnote, the Fourth Circuit explained that the defendants' intent to affect interstate commerce need not be established, but it can be considered in assessing the sufficiency of the evidence supporting the commerce element. The circuit court stated:

> It is a point of some pertinence that there was no showing that the defendants intended to tap into the Company's assets. We recognize that it is the law of this and other circuits that "it is of no moment whether the defendants intended or contemplated an effect on commerce," provided the government can prove "a reasonably probable effect on commerce." However, courts have relied, in part, on the presence of specific intent to reach the assets of the entity in interstate commerce to find satisfaction of the jurisdictional requirement. We simply note that to the extent indications of a defendant's intent to reach the assets of the entity in interstate commerce are at all relevant to our inquiry, such indications are absent from this case. (citations omitted).

Id. at 1407 n.3.

123. United States v. Boulahanis, 677 F.2d 586, 590 (7th Cir. 1982).

the offense, the burden of proving beyond a reasonable doubt the impact—whether direct or indirect—on interstate commerce remains with the government.

2. *Potential Effects and Attempted Violations*

Courts have emphasized that the government need not prove an actual effect on interstate commerce, relying on the Hobbs Act language which prohibits any *attempted* robbery or extortion in addition to completed offenses. A person can be guilty of an attempt if they take a substantial step toward completion of the crime, which under the Hobbs Act means that the actual obtaining of property by extortion or robbery need not occur for a conviction. Without an actual transfer of funds, the impact on interstate commerce is nonexistent, but courts have not read the commerce element so as to preclude attempt prosecutions. Instead, courts have held that even where there is no actual effect on interstate commerce because the crime has not been completed, so long as there was a "realistic probability" of one, the commerce element has been established.[124]

In *United States v. Mills*, the Sixth Circuit found a sufficient impact on interstate commerce when a county sheriff offered appointments as a deputy sheriff to men willing to pay him $3,500, and directed them to borrow the money from a loan company. The circuit court was persuaded by the government's argument that "the proofs showed a realistic probability that the bribe money would be borrowed from a company engaged in interstate commerce."[125] In a similar case, the same circuit court found that an attempted extortion by a county attorney to forebear cracking down on the victim's illegal gambling operations had a sufficient connection to interstate commerce because "there was a realistic probability that some of the money would have come from the proceeds of interstate gambling."[126]

Courts endorsing this approach as sufficient proof of the commerce element recognize that the government need show only a potential effect to support a Hobbs Act conviction. In *United States v. Urban*, the Third Circuit linked the depletion of assets theory to the requirement that the government need only show a potential effect on interstate commerce: "Our 'potential' effect reading of the Hobbs Act explains our continued adherence to the depletion of assets theory, because it is beyond cavil that the depletion of assets of a person engaged in interstate commerce has at least a "potential" effect on that person's engagement in interstate commerce."[127] In *Urban*, the circuit court upheld the conviction of defendants who were plumbing inspectors in Philadelphia

124. *See* United States v. Peete, 919 F.2d 1168, 1175 (6th Cir. 1990) (The commerce element, "especially in cases of attempts, has been read broadly to allow purely intrastate activity to be regulated under the theory that there was a *realistic probability* that the activity would have affected interstate commerce.") (italics in original).

125. 204 F.3d 669, 672 (6th Cir. 2000). The Sixth Circuit also found it significant that the defendants "had actual knowledge of the interstate character of the funds before the money was turned over," which seemed to assuage any concerns about finding the requisite impact on commerce from an attenuated step in the extortion. *Id*. It is not clear why the defendant's knowledge was worthy of consideration when the government does not have to show anything regarding the defendant's knowledge or intent in connection with the commerce element.

126. United States v. Carmichael, 232 F.3d 510, 516 (6th Cir. 2000).

127. 404 F.3d 754, 767 (3rd Cir. 2005).

who accepted "tips" to certify work, finding that while it was conceivable that the payments the plumbers made—which ranged from $5 to $20—did not actually result in a reduction in their engagement in interstate commerce because they could have absorbed the cost, but the government need only show a potential effect, which the depletion of assets theory established.[128]

Some courts distinguishing between an attempt and completed Hobbs Act offense hold that while only a potential effect on interstate commerce need be shown for an attempt, an actual effect is required when the defendant engages in the substantive offense. In *United States v. Williams*, the Eighth Circuit overturned a defendant's conviction for robbing a taxicab because the government only proved a potential effect on interstate commerce, and "the statute's plain language requires an actual effect on interstate commerce, not just a probable or potential impact."[129] The circuit court's language appeared to apply to all Hobbs Act prosecutions, but its subsequent decision in *United States v. Foster* held that for an attempt charge, the government need only prove a potential impact on interstate commerce.[130] The Eleventh Circuit took a similar approach in *United States v. Carcione,* holding that a "substantive violation of the Hobbs Act requires an actual, *de minimis* affect on commerce,"[131] as did the Sixth Circuit in *United States v. DiCarlantonio* when it stated that "[i]n order to be punishable as a substantive violation of the Hobbs Act, an extortionate scheme must have at least a *de minimis* effect on interstate commerce."[132]

While the commerce element requires proof of some nexus between the offense conduct and interstate commerce, even if it only amounts to a reasonable probability, the actual source of the funds is irrelevant. Where the government supplies the money for the bribe, or the victim is a shell corporation created by investigators to pursue an undercover operation, the potential effect on interstate commerce is sufficient for an attempt charge, but not for a substantive violation.[133] In *United States v. Rindone*, the Seventh Circuit held that "the fortuitous use of FBI funds after completion of the extortion attempt does not in any way diminish the 'realistic probability' that, at the time of the attempt, Harper's assets would be potentially depleted."[134] For Hobbs Act conspiracy

128. *Id.*

129. 308 F.3d 833, 838 (8th Cir. 2002).

130. 443 F.3d 978, 984 (8th Cir. 2006).

131. 272 F.3d 1297, 1301 n.5 (11th Cir. 2001).

132. 870 F.2d 1058, 1061 (6th Cir. 1989).

133. For example, in *United States v. Uselton*, 927 F.2d 905 (6th Cir. 1991), the government made sure to indict the defendant for attempted Hobbs Act violations "because the money extorted was supplied by the FBI." *Id.* at 906 n.1.

134. 631 F.2d 491, 493 (7th Cir. 1980). The circuit court found the source of the funds irrelevant, explaining that "the extortion could not at the moment of the payoff have actually affected commerce is not enough to defeat the jurisdictional nexus. All that is required is the showing made here that at the time of the attempt, a realistic probability existed that interstate commerce would be affected." *Id. See* United States v. Shields, 999 F.2d 1090, 1098 (7th Cir. 1993) ("It is true that Cooley's money was never at risk because the FBI was supplying the bribes, but as noted we rejected the same argument" in *Rindone*); United States v. Hocking, 860 F.2d 769, 777 (7th Cir.1988) (following *Rindone*); United States v. Crowley, 504 F.2d 992, 994 (7th Cir. 1974) (affirming a conviction based on a police protection scheme under a depletion of assets theory notwithstanding the fact that the victim tendered the extortion payment with FBI-provided money); United States v. Phillips, 577 F.2d 495 (9th Cir. 1978) (involving a corporation that was an FBI-created shell which in fact had no interstate dealings); United States v. Brooklier, 459 F. Supp. 476, 478 (C.D.Cal.1978) ("This extortion completed a plan that would have actually affected commerce but for a fact unknown to defendants, i.e., that (the victim) was a company not actually engaged in commerce.").

cases, the fact that an impact on interstate commerce would be impossible because the conspirators were dealing with a sham government enterprise does not prevent a conviction. The Third Circuit, in *United States v. Jannotti*, one of the Abscam cases, held

> [W]e see no reason to interpret Congress' legislative power as dependent upon whether the F.B.I. agents actually contract for a hotel site, purchase machinery to dump garbage, or establish their own fencing operation for the purchase of stolen goods. To require that the government take that additional step before it can constitutionally reach a proven conspiracy which would have affected interstate commerce had the facts been as represented misdirects the focus of the conspiracy cases.[135]

When the government furnishes the funds for the extorted payment, the prosecution should be careful to charge an attempted Hobbs Act violation to avoid any problems with showing an effect on interstate commerce when it could occur because the money was not placed in interstate commerce. The depletion of assets theory does not apply to the government's potential loss of money, as the Sixth Circuit explained in *United States v. DiCarlantonio* when it noted that "the mere receipt of government funds has never been enough to establish an actual effect on interstate commerce."[136] Instead, it is the *realistic probability* that, but for the government's presence to prevent any actual harm, the extortion would have affected interstate commerce, including through the depletion of assets theory.

While the prosecution must prove the extortion affected interstate commerce, it need not show there was an *adverse* effect on business or interstate commerce. In *United States v. Bailey*, the Fourth Circuit noted that "[a]lthough the word 'adverse' has been loosely used in expressing the effect on interstate commerce, such adverse effect is not an essential element of the crime that must be proved by the prosecution in a Hobbs Act case."[137] Similarly, in *United States v. Kaplan*, the Eleventh Circuit held that the Hobbs Act's "language is broad, and it is evidence that Congress intended to protect commerce from any and all forms of effects, whether they are direct or indirect, actual or potential, beneficial or adverse. For courts to require the effect on commerce to be adverse would significantly narrow the statute."[138]

135. 673 F.2d 578, 594 (3rd Cir. 1982) (en banc).

136. 870 F.2d 1058, 1060 (6th Cir. 1989).

137. 990 F.2d 119, 126 (4th Cir. 1993). *See* United States v. Foster, 443 F.3d 978, 983 (8th Cir. 2006) ("[A]dverse as well as beneficial effects on commerce are proscribed under the Hobbs Act."); United States v. Gray, 260 F.3d 1267, 1276 (11th Cir. 2001) ("[I]f the defendant's conduct had a minimal effect on commerce, nothing more is required."); United States v. Diaz, 248 F.3d 1065, 1084 (11th Cir. 2001) (court stated the more then just adverse effects on interstate commerce fall under the ambit of the Hobbs Act); United States v. Mattson, 671 F.2d 1020, 1024 (7th Cir. 1982) ("Even a beneficial effect on interstate commerce, e.g., facilitating the flow of building materials across state lines, is within the prohibition of the statute.").

138. 171 F.3d 1351, 1357 (11th Cir. 1999) (en banc). The en banc circuit court determined that a statement in an earlier case, *United States v. De Parias*, 805 F.2d 1447, 1450 (11th Cir. 1986), that one of the requirements of the Hobbs Act is that the "coercion occur[] in such a way as to affect adversely interstate commerce" was an improper statement of the law. The *Kaplan* court stated, "We question whether the statement in the *De Parias* opinion was indeed binding. But, even if it was, to the extent that *De Parias* required an adverse effect, we now overrule it." 171 F.3d at 1356–57.

C. Practical Considerations Regarding the Commerce Element

While courts take a forgiving approach to the sufficiency of the evidence on the commerce clause element of a Hobbs Act conviction, they will undertake a closer evidentiary review when the case appears weak, particularly if an individual is the victim. Like the $10,000 federal funding element for a § 666 charge, proving that the offense conduct affected interstate commerce can be easily established in most instances, so it is rarely the focus of the government's case at trial. Proof of the commerce element sometimes appears to be more of an afterthought, with reliance on a single witness and occasionally a shift during trial of the government's theory of the extortion's effect on interstate commerce. A haphazard approach to this element perhaps inevitably can lead to problems when a conviction is reviewed.[139]

For example, in *Stirone v. United States*, the indictment specifically cited the interstate shipment of sand for the manufacture (or mixing) of concrete as affected by the defendant's extortion, but then at trial the government also introduced evidence that the concrete would be used to construct a steel mill that would ship its products in interstate commerce. The Supreme Court noted that the sand shipment would be sufficient under the Hobbs Act, but held that allowing the jury to convict based on the future steel shipments constituted a fatal variance between the grand jury indictment and the jury's conviction in violation of the defendant's Fifth Amendment right to indictment by a grand jury.[140] It is unclear why the prosecution in *Stirone* brought in additional evidence of a different effect on interstate commerce, which triggered a reversal of the conviction.

The failure to introduce sufficient evidence of the impact on interstate commerce is illustrated by the Second Circuit's decision in *United States v. Perrotta*, in which the government significantly narrowed its case after an earlier mistrial, to the point of not being able to show the commerce element. The defendant and the victim were high school friends who had a mortgage business until one sold the business to a competitor and began to work for the buyer. Unable to settle their differences, the defendant sought to hire a man to assault the victim to obtain money that he claimed was his share of the business that was sold. The first indictment alleged that the defendant sought to extort money from the victim and his employer, but after the mistrial a superseding indictment

139. In *United States v. Leslie*, 103 F.3d 1093 (2nd Cir. 1997), the Second Circuit gave its blessing to a district judge re-opening the government's case-in-chief after it rested to allow it to introduce additional evidence in support of the interstate commerce element. The circuit court, reflecting the relaxed attitude toward this element of the crime, stated, "While the interstate commerce element of a criminal statute is critical, it is, after all, only a jurisdictional prerequisite to the exercise of federal power. In that sense, it is a simple matter, like venue or the identification of the defendant, and a district court may allow the government to reopen its case to establish this jurisdictional predicate." *Id*. at 1104.

140. 361 U.S. 212, 214–15 (1960). The Court stated:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id. at 218.

only alleged an attempted assault on the victim.[141] This change was fatal, according to the Second Circuit, because it narrowed the case from a business being extorted, for which there was proof offered of an effect on interstate commerce, to the case of an individual being extorted, so showing the requisite impact on interstate commerce would be more difficult. The circuit court stated:

> We need not decide if Hobbs Act jurisdiction would be appropriate if the jury heard evidence directly linking Perrotta's alleged extortion of Marcus to Marcus's employment at FHB. Here, the proof shows only that Perrotta conspired to assault Marcus because the two were embroiled in a bitter personal dispute. The government, in narrowing the indictment at the second trial, effectively foreclosed any possibility of a direct link between the dispute and Marcus's employment at FHB.[142]

The Second Circuit in *Perrotta* found that the government's decision to limit the case to one in which only an individual was the victim meant that its evidence regarding a potential impact from the assault on the employer's business was irrelevant to proving an impact on interstate commerce. While a different theory might have been sufficient, "[W]e find merely showing a victim of a Hobbs Act conspiracy, assault or extortion worked at a business engaged in interstate commerce is not enough to meet the *de minimis* showing required to support federal jurisdiction."[143]

Perrotta makes it clear that the prosecution's theory for proving the extortion must be linked to proof of an impact on interstate commerce. Identifying a victim and showing the effect the extortion would have are certainly related. The evidence of an actual or potential impact on commerce should be woven into the case for it to be successful, rather than treated as an afterthought or offered through a single witness in a few moments during trial.

Defense counsel should not be misled about the difficulty in overturning a conviction on the ground that the government did not prove the requisite *de minimis* effect on interstate commerce. The vast majority of appellate opinions reject the argument, in many cases because this is a factual question for the jury, so the forgiving standard of review on appeal means any reasonable inference can support the verdict. In considering a challenge on the commerce element, the first question is whether the extortion involved an interstate transfer of funds or other valuable item. If so, there is a direct impact on interstate commerce, and the conviction will almost certainly be upheld. If the government's proof is an indirect impact on commerce, either through an attempt charge or under the depletion of assets theory, then there is a greater possibility of mounting a successful challenge. At this point, the issue is whether the victim is a business or an individual. If it is the latter, there is

141. 313 F.3d 33, 35 (2nd Cir. 2002). The man who was to commit the assault instead cooperated with the FBI, so no actual payment was ever made.

142. *Id.* at 38.

143. *Id.* at 40. The government's decision not to focus on the impact on the victim's employer was a conscious choice to limit the defense from generating sympathy for the defendant by showing that the victim essentially sold him out, and that he had a legitimate claim to money from the sale of their business. The Second Circuit noted that "[a]t every opportunity, the government used the narrowed indictment to support evidentiary objections to events outside the time frame charged. This strategy ultimately led to very limited testimony on the background of Marcus's employment at FHB." *Id.* at 39. While the decision to pursue a narrower case may have been made with the best of intentions, it had the unintended consequence of making proof of the commerce element more difficult, which was never addressed in the second trial through the introduction of evidence showing the potential impact on interstate commerce from the planned assault.

a possibility of showing that the government's evidence is insufficient, either through a Rule 29 post-trial motion for a judgment of acquittal or on appeal.[144]

Courts are willing to accept a chain of inferences from the extortion to find the *de minimis* impact on interstate commerce to uphold a verdict, but simply showing hypothetical impact may be insufficient. Defense counsel exploring this issue should focus on how the government demonstrated that some form of business or commercial transaction was affected by the extortion, and not simply that money changed hands. As the chain of inferences becomes more attenuated, especially in a case involving an individual victim rather than a business, the stronger the basis will be to mount a successful challenge to the sufficiency of the evidence. This challenge is certainly a long shot, but it is an issue defense counsel needs to pay attention to, especially if the prosecution has been sloppy by not presenting a clear theory to show the effect on interstate commerce from the extortion.

144. A pretrial challenge on the commerce element is almost sure to fail because the government can rely on any statement regarding the impact on commerce in the indictment to show what it will prove at trial, and a district court would be hard-pressed to find that there is no set of circumstances that can show a *de minimis* effect on interstate commerce. An appellate challenge is much more likely to succeed because the government has to live with the evidence introduced at trial and cannot later make up for any deficiencies.

This page intentionally left blank

| 6 |

MAIL AND WIRE FRAUD AND THE RIGHT OF HONEST SERVICES (18 U.S.C. § 1346)[1]

The mail fraud statute, 18 U.S.C. § 1341, prohibits fraudulent schemes, and the jurisdiction of the federal government has traditionally been premised on the use of the postal service in executing the scheme. Since 1994, the statute can also be prosecuted if the scheme involved use of any "private or commercial interstate carrier," such as FedEx or UPS.[2] The statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing

1. This chapter is adapted from the following: Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75 (2003); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435 (1995).

2. The Violent Crime Control and Law Enforcement Act of 1994 amended the mail fraud statute by providing the following:

> Section 1341 of title 18, United States Code, is amended–
> (1) by inserting "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," after "Postal Service,"; and
> (2) by inserting "or such carrier" after "causes to be delivered by mail".

Pub. L. No. 103-322, § 250006, 108 Stat. 1796 (1994).

> such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

The appeal of the mail fraud statute is its malleability—federal prosecutors can pursue investigations with the knowledge that they will not be hampered by technical jurisdictional restrictions found in other corruption statutes.[3] Moreover, mail fraud is a predicate act for money laundering and the Racketeer Influenced and Corrupt Organizations Act (RICO), which permits prosecutors, as well as civil litigants under RICO, to use those powerful statutes against individuals and businesses that fall within the mail fraud statute's applicability to a wide variety of conduct.

The broad reach of the mail fraud statute and its companion, the wire fraud statute (18 U.S.C. § 1343),[4] has been attributed to the willingness of courts to impose few restrictions on the application of the "scheme and artifice to defraud" element of the crime. As federal prosecutors have devoted increased attention to white collar crime over the past forty years, the mail fraud statute became a strategic tool in fighting political corruption and increasingly sophisticated economic misconduct that, in some way, employed the postal service or interstate delivery services, almost regardless of the mailing's or shipment's relationship to the underlying scheme.

In addition to prosecutions of traditional frauds involving the deprivation of money or property, the lower courts developed the "intangible rights" doctrine to prosecute both private parties and public officials whose acts involved a breach of fiduciary duty that deprived either the public, an employer, or others owed a fiduciary duty of the intangible right to honest and

3. Other leading corruption provisions require proof of specific activities as an element of the offense, in addition to proof of the underlying harm. For example, the Travel Act, 18 U.S.C. § 1952, requires evidence of interstate activity to promote bribery, the Hobbs Act, 18 U.S.C. § 195, requires proof of extortion under color of official right that obstructs interstate commerce, and § 666 only applies to agencies and governments that receive $10,000 from the federal government in a twelve-month period. *See* Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 Am. Crim. L. Rev. 423, 432 (1983) (arguing that broad mail fraud statute permits prosecutors and investigators to "enmesh themselves in lengthy, complex investigations with hardly a thought as to what statute may ultimately be used to indict").

4. 18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Courts apply the same analysis to schemes charged under the mail fraud and wire fraud statutes. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis.").

faithful services.[5] In 1987, however, the Supreme Court, in *McNally v. United States*, prohibited use of the statute in the prosecution of crimes involving nonproperty rights, such as the right to honest service by public officials, which had long been subject to state and local prosecution.[6]

Congress reacted quickly to *McNally*, however, by passing legislation reinstating the "right of honest services" as a basis for a conviction under the mail fraud statute. The statute, 18 U.S.C. § 1346, provides, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[7] In *Skilling v. United States*, the Supreme Court finally interpreted the provision by confining it to schemes involving bribes and kickbacks, although it did not define what those terms mean.[8]

This chapter reviews the development of the mail and wire fraud statutes, and the application of those provisions to public corruption prosecutions. It then assesses the impact of *Skilling* on future use of the right of honest services theory of fraud for public corruption prosecutions.

I. ORIGINS OF THE MAIL FRAUD STATUTE

A. Constitutionality

For a law of such wide-ranging application and expansive utility for federal prosecutors, the mail fraud statute descended from quite modest origins.[9] In 1868, Congress enacted legislation to prohibit use of the mails to send letters or circulars for lotteries.[10] Four years later, as part of a broad revision of the postal code, Congress adopted a new provision creating a misdemeanor for "any person having devised or intending to devise any scheme or artifice to defraud, or be effected

5. *See, e.g.*, United States v. Clapps, 732 F.2d 1148, 1153 (3rd Cir 1984) (finding scheme to deprive citizens of right to fair election through casting of "false, fictitious, or spurious ballots"); United States v. Bronston, 658 F.2d 920 (2nd Cir. 1981) (affirming conviction of lawyer who breached duty to client of law firm by advising competing company in a matter that involved a conflict of interest).

6. 483 U.S. 350, 360 (1987).

7. 18 U.S.C. § 1346. Congress enacted the provision as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181 (1988).

8. 130 S. Ct. 2896 (2010).

9. *See* Hurson, *supra* note 3, at 423 (statute was a "seemingly innocuous provision[] in a mundane revision of the postal code"). As a historical matter, the post–Civil War period involved a rapid expansion of federal power, especially of the criminal law, into areas traditionally governed by the states. A prime example of the new federal criminal provisions enacted during the Reconstruction Period is the Civil Rights Act of 1866, which included the provision now codified at 18 U.S.C. § 242. *See* Chapter 10. It was not anomalous, therefore, for Congress during this period to address an issue that had traditionally been regulated by the states.

10. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194 (1868), stated: "[I]t shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." As part of the general revision of statutes relating to the post office in 1872, Congress also expanded the lottery law to prohibit use of the mail "concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses . . ." Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302 (1872).

by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States . . . ."[11]

There is no legislative history concerning the scope of the 1872 criminal mail fraud statute or the relation of the use of the mails to the underlying fraud to aid in the interpretation of the statute. The language of the original mail fraud statute, however, appears designed to protect the post office from being abused as part of a fraudulent scheme. The provision states that "such person, so misusing the post-office establishment, shall be guilty of a misdemeanor . . . ."[12] Congress gave the courts the power to proportion the punishment based on "the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."[13]

The House sponsor of the legislation stated that the provision was designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people of the country."[14] It appears highly unlikely, however, that Congress in 1872 believed that the federal government should prosecute traditional state matters that did not involve directly the misuse of the federal post office. Potential constitutional problems arising from interference with an area traditionally regulated solely by the state governments may have been the principal motivating factor behind Congress's limiting the provision to schemes which directly exploit the post office as a necessary element for conviction.[15]

Six years after the enactment of the mail fraud statute, the Supreme Court considered the constitutionality of the 1868 lottery law in Ex parte *Jackson*.[16] The government argued that Congress's exclusive power to regulate the mails, provided in Article I, § 8 of the Constitution, authorizes enactment of a criminal statute punishing misuse of the post office. The Court had no trouble agreeing with the government, holding that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[17]

11. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 (1872).

12. *Id*.

13. *Id*. The caption for the new provision was "Penalty for Misusing the Post-Office Establishment."

14. Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Fransworth). Representative Fransworth's statement concerned a bill similar to the mail fraud statute introduced but not passed by the preceding Congress.

15. Jed S. Rakoff, *The Federal Mail Fraud Statute (pt. 1)*, 18 Duq. L. Rev. 771, 786 & n.65 (1980) ("It should not be forgotten that at the time of the enactment of the original mail fraud statute in 1872, doubts of its constitutionality would have been far from idle.").

16. 96 U.S. 727 (1878). The defendant, convicted in federal court in New York for depositing into the mail a circular advertising lottery prizes, challenged the constitutionality of the lottery statute in a habeas corpus petition to the Supreme Court. *Id*. at 728–29.

17. *Id*. at 732. The Court distinguished the lottery statute from regulations that interfere with First Amendment privileges, such as the freedom of the press, and Fourth Amendment protections from warrantless searches and seizures. "All that Congress meant by this Act was, that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished." *Id.* at 737. After *Jackson*, only one reported decision discussed the constitutionality of the mail fraud statute. *See* United States v. Loring, 91 F. 881 (N.D. Ill. 1884).

The Court relied on this holding in *In re Rapier* to reject an argument that Congress lacked the power to regulate acts involving the post office that traditionally had been subject to state criminal laws.[18] Thus, at least in the Supreme Court's view in 1878, the constitutionality of the expansion of federal jurisdiction over what had been state crimes was tied directly to Congress's power to regulate the post office.

B. Defining the Elements of Mail Fraud

Over the thirty years after Ex parte *Jackson* upheld the constitutionality of the mail fraud statute, both Congress and the Supreme Court viewed the mailing requirement as a substantive limitation, rather than just a jurisdictional element, on the exercise of federal prosecutorial powers. Congress first amended the statute in 1889, and expressly included fraudulent schemes that involved

> any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person . . . or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .[19]

There is no legislative history for the amendment, so it is not entirely clear whether Congress was reacting to restrictive lower court decisions that required a clear misuse of the post office by identifying the specific types of fraud covered by the statute, or was providing additional guidance to law enforcement authorities and courts as to the schemes it contemplated being punished in federal courts.[20] After the amendment, however, the district court in *United States v. Beach* held

18. 143 U.S. 110,134 (1892). "It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality." *Id.* at 133. In reaching this conclusion, the Court expressly reaffirmed its holding in *Jackson*. *Id.* at 135.

19. Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873 (1889).

20. Although Ex parte *Jackson* eliminated most doubts as to the constitutionality of the mail fraud statute, defendants challenged the nature of the schemes charged in indictments as falling outside the scope of the statute because of their attenuated relation to the post office. *See* United States v. Clark, 121 F. 190, 190–91 (M.D. Pa. 1903) ("It is not every fraudulent scheme in which the mails may happen to be employed that is made an offense against the federal law, but only such as are 'to be effected' through that medium as an essential part."); United States v. Smith, 45 F. 561, 562 (E.D. Wis. 1891) (fraudulent drug scheme advertised in newspapers sent through post office not covered by the mail fraud statute); United States v. Mitchell, 36 F. 492, 493 (W.D. Pa. 1888) (scheme to defraud insurance company through mailing of premium after accident and altering date on postage stamp not covered by statute because "something more is necessary than the mere sending through the mail of a letter forming part, or designed to aid in the perpetration, of a fraud.").

An early example of the limiting effect of requiring proof of misuse of the post office to support a federal prosecution is *United States v. Owens*, 17 F. 72 (E.D. Mo. 1883). In that case, the district court dismissed an indictment charging mail fraud for a scheme by which the defendant sought to mislead a distillery into believing he had sent $162.50 through the

that the specificity of the enumerated schemes meant that the "general language of the act must be limited to such schemes and artifices as are *ejusdem generis* with those named."[21] The district judge noted that the term "scheme to defraud" might have covered the acts for which the defendant was indicted, but because they were not similar to those described in the amended mail fraud statute the indictment had to be dismissed.[22]

In *Stokes v. United States*, the Supreme Court rejected such a restrictive reading of the statute. Instead, the Court found that a violation of the mail fraud statute requires proof of three elements:

> (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post office establishment, or by inciting such other person to open communication with them. (3) and that in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.[23]

In *Durland v. United States*, decided a year later, the Court reaffirmed the analysis in *Stokes*, and enlarged the scope of the statute by reading the fraudulent scheme element broadly. The defendant mailed advertisements to purchase bonds that misstated the expected investment return. The Supreme Court read the phrase "scheme to defraud" more broadly than the common law crime of false pretenses, which only involves a misrepresentation of past or present facts, but not statements about future events.[24] The Court stated:

> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that the statute was passed; and it

mail when in fact he only sent $.50. The court found the effort to encompass within federal jurisdiction an individual dispute between a debtor and creditor repugnant, stating that such a broad approach "may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances." *Id.* at 74. As the basis for its decision to limit the scope of the mail fraud statute, the court noted "the degree in which the abuse of the post-office establishment enters as an instrument into the fraudulent scheme." *Id.* Other courts that concluded the underlying scheme constituted a fraud punishable under the statute noted that the key element was the relationship of the mailing to the scheme. In *United States v. Jones*, 10 F. 469, 470 (C.C.S.D.N.Y. 1882), the defendant mailed a letter offering to sell counterfeit money at a low price, known as a "green article" scheme. The court stated that "the gist of the offence consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme." *Id.* at 470. Similarly, the district court in *United States v. Loring*, 91 F. 881 (N.D. Ill. 1884), stated that "[t]he gist of this offense does not consist in the fraudulent scheme alone, but in using the post-office establishment of the United States for the purpose of executing a fraud." *Id.* at 885. The scheme sought to induce investors to send money to a commodities speculation fund, which defendants diverted to their own use.

21. 71 F. 160, 161 (D. Colo. 1895).

22. *Id.* at 160–61. In *Culp v. United States*, 82 F. 990, 991 (3rd Cir. 1897), however, the Third Circuit stated that "the purpose of the amendment was not to restrict, but to extend, the operation of the statute." *Compare* Milby v. United States, 120 F. 1, 4 (6th Cir. 1903) (finding effect of the amendment was to extend statute, "and not to diminish the force of its original terms not in conflict with the amendment") *with* Stockton v. United States, 205 F. 462, 467–68 (7th Cir. 1913) (rejecting *Milby*'s analysis of the effect of the 1889 amendment).

23. 157 U.S. 187, 188–89 (1895).

24. 161 U.S. 306, 313 (1896).

> would strip it of value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise. This, which is the principal contention of counsel, must be overruled.[25]

The Court went on to consider the nature of the proof necessary for the mailing element of the offense: "We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme."[26] It was sufficient if the defendant deposited letters in the post office that he believed "may assist" in effecting the scheme.[27]

In *Durland*, the Court shifted the intent inquiry to the scheme to defraud element. That is, the statute covered defendant's misstatements as to future value because he intended to mislead investors when he made them. The mailing element was a component of the execution, but the Court was unwilling to require proof of a separate intent to use the mails in addition to the intent to execute the fraudulent scheme. Nevertheless, the Court stated clearly that the purpose of the statute is to "prevent the post office from being used to carry" out fraudulent schemes.[28]

Congress amended the mail fraud statute again in 1909 and made three changes.[29] First, the amended provision incorporated the Supreme Court's holding in *Durland* that the scope of punishable activities included acts "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

Second, it dispensed with an element of the offense, as interpreted by the Supreme Court in *Stokes*, by eliminating the language requiring proof that the scheme would be "effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States . . . ." In its place, Congress substituted language requiring that the mails be used "for the purpose of executing such scheme or artifice or attempting so to do." *Durland* had effectively limited part of the mailing element already by only requiring that the mailing "assist" in the completion of the fraud. The amended provision reflected congressional agreement with the Court's most recent interpretation of the statute.

Third, Congress streamlined the language and removed unnecessary verbiage. Much of the wording about specific types of fraud in the earlier versions of the statute was surplus now that the government only needed to prove that the defendant mailed or caused a mailing for the purpose of completing the scheme. Specific references to misuse of the post office and conditioning the punishment on an ephemeral estimate of the degree of such misuse were unnecessary to a clear description of the crime.

Legislative history to the 1909 amendment to the mail fraud statute does not exist, but *Durland* and *Stokes* make it clear that the Supreme Court considered the mailing element to be a

25. *Id.* at 314.
26. *Id.* at 315.
27. *Id.*
28. *Id.* at 314.
29. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088 (1909).

substantive limitation on the scope of the crime.[30] To the extent that the 1909 amendment incorporated *Durland*'s more expansive understanding of "scheme to defraud," that does not demonstrate that Congress also sought to expand the statute even further by making the mailing element simply a jurisdictional requirement, thereby overruling language to the contrary in *Durland* and *Stokes*. Rather, given Congress's general approval of *Durland*, the better conclusion is that Congress adopted the Supreme Court's consistent view of the mailing element as a substantive limitation on the scope of the statute.[31]

The 1909 amendment to the mail fraud statute was the last significant change until 1988, when Congress, after the Supreme Court's decision in *McNally*, added the new provision extending the reach of the scheme to defraud element to include schemes to deprive victims of the "right of honest services."[32] Although the wording of the statute remained essentially unchanged over the next eighty years, the Supreme Court has been unable to agree on a clear analysis of the connection required between the mailing element and the execution of the fraud.

30. Commentators have argued that the 1909 changes reduced the mailing element to merely a jurisdictional requirement, in that use of the mails no longer served as a substantive limitation on federal prosecution. *See* Rakoff, *supra* note 15, at 817 ("[T]he mailing requirement functioned as nothing more than a simple 'jurisdictional element' plus 'overt act'—the conduct minimally necessary to permit the exercise of federal sovereignty and to distinguish the crime of mail fraud from one of pure intent"); Jeffrey J. Dean & Doye E. Green, Jr., Note, McNally v. United States *and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 Mercer L. Rev. 697, 702 (1988) (removal of mailing language in amendment "leaves the statute so bare that it can only be seen as a tool to fight corruption and not as a means of protecting the integrity of the mails"). The language of the statute, however, does not indicate that Congress understood the 1909 changes to be so drastic. The amended mail fraud statute did not completely eliminate the required nexus between the scheme to defraud and the mailing element, nor did it explicitly reduce the use of the mails to a mere predicate for federal jurisdiction.

31. After the 1909 amendment of the mail fraud statute, the Supreme Court shed little light on the degree of interdependence required between the scheme to defraud and the use of the mails. In *United States v. Young*, 232 U.S. 155 (1914), the Court noted that the recently amended mail fraud statute required proof of two elements, not the three elements described in the earlier versions of the statute. The defendant sent financial statements that inflated the value of his company to a brokerage firm that in turn attempted to sell the company's bonds to other investors. The Court acknowledged that the defendant need not intend that the post office be used, as was earlier required. *Id*. at 161. The Court did not, however, discuss how the second element, that the mailing is for the purpose of executing the scheme, should be understood. The lower court had dismissed the indictment because it appeared to have read the statute too narrowly, requiring, among other things, that the government prove that the false statements actually induced the victim of the fraud to purchase worthless notes offered by the defendant. *Id*. at 162. *Young* gave little guidance on the relationship between the statutory elements created in the 1909 amendment beyond its acknowledgment, in reversing the district court's dismissal of the indictment, that Congress had streamlined the elements of the offense.

The procedural posture of *Young* may explain the Court's peremptory treatment of the scope of the amended statute. The case reached the Court on direct appeal, under the Criminal Appeals Act of 1907, which permitted the United States to bring direct appeals to the Supreme Court challenging, among other things, dismissal of an indictment before jeopardy attaches. The defendant did not enter an appearance before the Court. The opinion contains no real legal analysis, simply reiterating the statements of the district court in dismissing the indictment and the Solicitor General's argument on the scope of the statute. *Young* does not support an expansive reading of the mail fraud statute that reduces the mailing element to a jurisdictional requirement only, especially when that reading is not supported by any explicit statement by Congress to that effect when it amended the mail fraud statute.

32. Congress amended the statute in 1948 to eliminate the language specifying various fraudulent schemes, e.g., "green article" scams, which had been added in 1889. Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 683 (1948). Congress also substituted the phrase "postal service" for "post office department" to reflect the reorganization of the postal service in 1970 as a quasi-independent corporation rather than a cabinet-level department. Act of August 12, 1970, § (6)(j)(11), 84 Stat. 719 (1970).

C. The Scope of the Mailing Element

The mail fraud statute is cryptic about the relationship between the scheme and the mailing, requiring that the government prove beyond a reasonable doubt that the use of the mails be "for the purpose of executing such scheme." Although the Supreme Court's decisions in the nineteenth century make clear that protection of the post office underpins the statute, and, therefore, the mailing element was not merely jurisdictional, the requisite degree of interdependence between the two elements was never clear. For example, the Court held in *Pereira v. United States* that the mailing need not be "an essential part of the scheme,"[33] while in *Badders v. United States* it stated that the mailing could suffice "if it is a step in a plot."[34] The use of the mails had to be foreseeable, but the defendant need not personally make or receive the charged mailing to be prosecuted.[35]

Mailings that were routine or otherwise required by law might be insufficient to support a mail fraud prosecution,[36] and they had to occur during the course of the fraud and not as a subsequent byproduct of the underlying transactions.[37] There was no simple means to discern the relationship between the elements, and the Supreme Court struggled to articulate a consistent analysis for describing the requisite degree of "purpose" necessary for conduct to fall within the statute.

Rather than use the mailing element as a means to limit federal prosecutions, the Court, in its most recent decision on the mailing element in *Schmuck v. United States*, found that mailings which were at best tangentially related to the underlying fraud could support a mail fraud prosecution. In *Schmuck*, the defendant sold used cars to auto dealers; however, he had rolled back the odometers to inflate the vehicle's value. The auto dealers sent title application forms to the state department of transportation to register the cars after the dealers sold them to individual purchasers. The Court held that the ultimate sales of the vehicles

> naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailing may not have contributed directly to the duping of either the retail dealers

33. 347 U.S. 1, 8 (1954).

34. 240 U.S. 391, 394 (1916).

35. *See Pereira*, 347 U.S. at 8–9 ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."). *Compare* United States v. Koen, 982 F.2d 1101, 1107 (7th Cir. 1992) (fact that defendant did not mail item irrelevant where use of mails was foreseeable) *with* United States v. Smith, 934 F.2d 270, 273 (11th Cir. 1991) (mailings by bank insufficient to support prosecution where defendant did not know insurer's administrative procedure and its use of the mails was not common knowledge).

36. *See* Parr v. United States, 363 U.S. 370, 391 (1960) ("[W]e think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys"). *But see* United States v. Freitag, 768 F.2d 240, 244 (8th Cir. 1985) (upholding mail fraud conviction where mailings related to a legitimate business purpose).

37. *See* United States v. Maze, 414 U.S. 395, 402 (1974) (defendant's scheme reached fruition before the mailings occurred); Kann v. United States, 323 U.S. 88, 94 (1944) (mailing after completion of fraud*);* United States v. Manarite, 44 F.2d 1407, 1413 (9th Cir. 1995) (scheme to obtain casino gambling chips through false credit application filed on a weekend insufficient to support a conspiracy to commit mail fraud charge when "the scheme was completed upon receipt of the $5,000 credit advance and the cashing of the chips").

> or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme.[38]

The Court's analysis in *Schmuck* effectively reduced the mailing element to a mere jurisdictional requirement. The mailings underpinning the prosecution bore no relation to the odometer tampering at the root of the fraud. The mailings, a happenstance of the state's registration system, were completely unaffected by the defendant's actions. Indeed, the Court had to incorporate the defendant's need to maintain goodwill with the auto dealers to argue plausibly that the mailings were for the purpose of executing the scheme. Otherwise, the fraud came to fruition upon the transfer of the vehicles to the dealers, a point well before any mailings occurred. Justice Antonin Scalia, in dissent, attacked the breadth of the majority opinion, arguing "it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur . . . ."[39]

II. THE DEVELOPMENT OF THE RIGHT OF HONEST SERVICES THEORY

A. McNally and the Limits of a Scheme to Defraud

Just as they used the Hobbs Act as an anticorruption tool, federal prosecutors applied the mail and wire fraud statutes to instances of both public and private corruption involving dishonesty, even though the statute's terms did not specifically embrace corruption.[40] The relationship between corruption and fraud, a type of larceny, is not immediately apparent. Federal prosecutors linked the mail and wire fraud statutes to corrupt activities by alleging that public officials and employees who breached a fiduciary duty by acting dishonestly for their own benefit deprived the public or an employer of the intangible right of honest services.[41]

38. 489 U.S. 705, 712 (1989).

39. *Id*. at 723 (Scalia, J., dissenting). In *Schmuck*, the mailings were one transaction away from the defendant's fraud and possibly weeks or months removed from the odometer tampering. Under the majority's analysis, any mailing traceable to the original fraudulent transaction, save perhaps an exculpatory statement, appears sufficient to support a federal mail fraud prosecution.

40. An article in *Time* magazine in 1975 touted the anticorruption efforts of then-U.S. Attorney Jim Thompson, who later served as governor of Illinois, that relied on the mail fraud statute and the Hobbs Act to prosecute corrupt public officials in Chicago. The article noted that "Big Jim's impressive score reflects the fact that he works in an area exceptionally rich in corruption. In addition, he and his aides have honed sharp weapons out of two statutes often overlooked by federal prosecutors." *The Law: Big Jim's Laws*, Time, Feb. 3, 1975, *available at* http://www.time.com/time/magazine/article/0,9171,946476-2,00.html.

41. *See* Daniel W. Hurson, Comment, *Mail Fraud, the Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 Hous. L. Rev. 297, 303–04 (2001) ("The [intangible rights] doctrine is based on the belief that certain individuals are entitled to the honest and faithful services of another. . . . Failure to provide the entitled services, coupled with the use of the mails in furtherance of the failure, is a crime subject to prosecution under the mail fraud statute."). The first published opinion to adopt this analysis was *Shushan v. United States*, 117 F.2d 110, 114–15

The deprivation was of an intangible right, not a property right, and the scheme involved the official's breach of a fiduciary duty by failing to disclose the corrupt activity.[42] Courts expanded the intangible rights doctrine to reach breaches of fiduciary duties by private-sector employees and professionals who owe clients a duty of loyalty and candor.[43] Perhaps the most expansive use of the intangible rights theory as applied to an outside professional is *United States v. Bronston*. The defendant was an attorney and New York state senator convicted of mail fraud for giving legal advice to a personal client when at the same time his firm represented another client competing for a city contract with the defendant's client.[44] The breach of fiduciary duty involved solely the attorney's conflict of interest, as there was no allegation that he misused privileged information or personally gained from the breach. The intangible rights doctrine was strongly criticized by commentators,[45] but the circuit courts unanimously accepted it as a proper application of the mail fraud statute.[46]

Courts readily accepted the proposition that a deprivation of the honest services owed by a fiduciary constituted the fraudulent taking that is normally associated with larceny, and therefore sufficient to establish a scheme to defraud. Once recognized by the courts, this anticorruption theory of mail and wire fraud permitted a wide range of federal prosecutions of state and local officials. The federal fraud statutes provided prosecutors with two advantages over other anticorruption statutes. First, the mailing or wire element was relatively easy to establish because the use of either need only be incidental to an essential part of the scheme. Second, the statutes did not require proof of a *quid pro quo* or other nefarious arrangement between an official and a third party, only that officials and employees breached a fiduciary duty by being dishonest in carrying out their responsibilities. Thus, mail and wire fraud were useful in cases involving kickbacks or other types of skimming in which there was not a corrupt agreement.

(5th Cir. 1941), in which the defendants were convicted under the mail fraud statute for a scheme to bribe commissioners of a levee district to adopt the defendants plan for refunding bond.

42. *See* United States v. Margiotta, 688 F.2d 108 (2nd Cir. 1982) (Republican party leader); United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979) (Detroit-area congressman); United States v. Mandel, 591 F.2d 1347 (4th Cir.) (Maryland Governor Marvin Mandel); United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (Illinois secretary of state); United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (Chicago city alderman); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (Illinois Governor Otto Kerner, Jr.).

43. *See* United States v. Weiss, 752 F.2d 777 (2nd Cir. 1985) (corporate officer); United States v. Von Barta, 635 F.2d 999 (2nd Cir. 1980) (securities trader); United States v. Bryza, 522 F.2d 414 (7th Cir. 1975) (purchasing agent); United States v. George, 477 F.2d 508 (7th Cir. 1973) (purchasing agent). One of the first decisions applying intangible rights theory in the private sector was *United States v. Procter & Gamble Co*., 47 F. Supp. 676 (D. Mass. 1942), in which a company was indicted under the mail fraud statute for paying bribes to a competitor's employees in order to obtain confidential business information. The district court stated that the charged scheme sought to defraud the competitor of its employees' "honest and loyal" services. *Id*. at 678.

44. 658 F.2d 920, 922–23 (2nd Cir. 1981).

45. *See* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 126 ("[C]ourts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances"); Ralph E. Loomis, Comment, *Federal Prosecution of Elected Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 Am. U. L. Rev. 63, 66 (1978) (through broad construction of mail fraud statute, "courts have failed to consider when and where such federal intervention is appropriate").

46. McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting) (stating every court that has considered intangible rights theory has upheld its application).

Although the lower federal courts readily embraced the intangible rights theory, the Supreme Court abruptly rejected it in *McNally v. United States*. The government charged a scheme to defraud the citizens of Kentucky of the right of honest services through a kickback scheme by state officials involving the award of workers compensation insurance contracts. Although the defendants received a significant amount of money from an insurance broker, it was unclear whether the state paid higher insurance premiums because of the arrangement, and the government did not try to prove that the state suffered any loss from the defendants' conduct.[47]

The Court held that the mail fraud statute reached only schemes to deprive victims of money or property, and not the deprivation of intangible rights "such as the right to have public officials perform their duties honestly."[48] The rationale for limiting the statute referred vaguely to federalism concerns—although not labeled as such—when the Court noted:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[49]

McNally did not reject congressional authority to reach state and local corruption through criminal statutes. The Court hypothesized in a footnote that Congress could make the conduct of a state official a federal crime even if the state itself authorized the conduct:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it.[50]

The reticence to read the mail fraud statute broadly reflected the Court's concern with expansively interpreting a law that had no clear connection to corruption. Therefore, *McNally* adopted a narrow—if somewhat crabbed—reading of the provision and then invited Congress to respond.[51] The Court did not, however, find that Congress lacked the authority to reach state and local

47. 483 U.S. 350, 352–54 (1987).

48. *Id*. at 358.

49. *Id*. at 360.

50. *Id*. at 361 n.9. The latter part of the Court's dicta is hard to defend under federalism principles because it would entail a federal proscription of conduct that a state explicitly chose to permit. In that case, the federal government would be coercing a state official to refrain from acting in a way that the state determined is proper. Unlike other instances of corruption, in which there is a misuse of power for personal gain, when a state authorizes conduct there is no abuse of public authority.

51. Justice Stevens dissented in *McNally*, attacking the "crabbed construction" of the statute and noted that "the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present." *Id*. at 374, 376 (Stevens, J., dissenting).

corruption; instead, it recognized that a clearer statement from Congress would remove any doubt about the scope of the provision, apparently including any constitutional doubt.

McNally brought the intangible rights theory to a sudden and unexpected, albeit short-lived, halt. One immediate effect of the decision was to permit defendants to challenge convictions based on schemes that involved only nonproperty rights.[52] The most notable case involved former Maryland governor Marvin Mandel, in which the Fourth Circuit held that the defendant was entitled to have his conviction vacated under *McNally* because otherwise "petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals simply because their federal trial occurred before rather than after the Supreme Court's ruling in McNally."[53]

B. The Right of Honest Services Statute (18 U.S.C. § 1346)

Congress reacted swiftly to *McNally* by taking up the Court's challenge to amend the statute, if it wished, to reach fraudulent deprivations of nonproperty rights. As part of the Anti-Drug Abuse Act of 1988,[54] Congress added a new section, 18 U.S.C. § 1346, which states in its entirety, "For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services." This provision does not create a new crime, instead only clarifying what constitutes a fraudulent scheme that can be prosecuted under the mail and wire fraud statutes.[55]

Congress did not define what the "right of honest services" encompassed in the provision. As with other amendments to the mail fraud statute, the legislative history of this provision is sparse, although one sponsor stated Congress intended to restore the law to its pre-*McNally* state.[56]

52. The two means to vacate a federal conviction are a writ of error *coram nobis* for defendants who had already served their sentences, *see United States v. Morgan*, 346 U.S. 502, 506–11 & n.6 (1954) (federal courts have authority under All Writs Act, 28 U.S.C. § 1651(a), to grant writ of error *coram nobis* to vacate conviction), or a writ of habeas corpus, 28 U.S.C. § 2255, for defendants still in custody.

53. United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988); *see also* United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989) (granting writ of error *coram nobis* vacating conviction of former state legislator convicted under intangible rights theory). The Supreme Court blunted somewhat the effect of its restrictive reading of the fraud element by upholding mail and wire fraud convictions in *Carpenter v. United States*, 484 U.S. 19 (1987), on the grounds that the principal defendant had breached a fiduciary duty by depriving his employer of nontangible property rights. *Id*. at 25. R. Foster Winans, a reporter for the *Wall Street Journal*, leaked information to friends about upcoming stories that would affect the price of the stock of companies mentioned in the articles. *Id*. at 23. The Court held that Winans breached a fiduciary duty to his employer by using the information for personal gain, thereby defrauding the *Wall Street Journal* of its intangible property right in the information. *Id*. at 28.

54. Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181 (1988).

55. There are other fraud provisions in Chapter 63 of Part I of Title 18, which contains § 1346, including securities fraud in § 1348 and bank fraud in § 1344. The right of honest services theory of fraud could also be employed under those provisions, although it is almost exclusively used in mail and wire fraud prosecutions.

56. *See* 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). Congress considered broader anticorruption measures at that time, but rejected them and instead adopted § 1346, which does little more than reverse *McNally*'s rejection of the right of honest services form of mail fraud without discussing how courts should interpret the scope of the provision.

To the extent that the intangible rights theory permits the government to define the scope of the statute by identifying new or broader constituencies with a claim to "honest services," the mail and wire fraud statutes would expand in scope, at least until the Supreme Court's decision in *Skilling v. United States* confined their use in honest services fraud prosecutions to conduct involving bribes or kickbacks.

Prior to *Skilling*, the appeal of the mail and wire fraud statutes was that the prosecution need only prove a scheme to defraud that involves some degree of dishonesty and a use of the mails related to the scheme, but not specific intent to receive or demand an item of value. Moreover, the right of honest services theory of fraud casts a wider net because it reaches any participant in a scheme involving breaches of both public and private fiduciary duties. The theory does not require specific proof of the relationship of the acts to the defendant's duties, i.e., a *quid pro quo*, but only that the activity was dishonest. Rather than write specific legislation addressing particular forms of corruption or dishonesty, Congress relied on a very broad statute to reach conduct that is arguably criminal because that route was more expedient for the prosecutors who enforce the law.

Expanding the mail fraud statute also allowed Congress to avoid confronting the issue of federalism, implicated through congressional extension of the power of the federal government into an area that is traditionally reserved for the states.[57] The very breadth of the intangible rights theory permitted Congress to throw to the executive branch the issue of whether, and under what circumstances, the federal government's power should be used to prosecute what are essentially local crimes. More specific legislation would, of course, raise the question of whether Congress should federalize crimes traditionally handled at the state and local level and whether that is the best use of scarce federal resources.

After *McNally*, courts refined the right of honest services analysis by focusing more on what constituted the breach of a fiduciary duty and less on whether the defendant gained any benefit from the breach. In *United States v. Sawyer*, the First Circuit stated that giving improper gifts to a state legislator did not violate the mail fraud statute unless the government could also prove that the defendant "intended to deceive the public about that conduct."[58] In *United States v. Czubinski*, the same court found that § 1346 required that "either some articulable harm must befall the holder of the information as a result of defendant's activities, or some gainful use must be intended by the person accessing the information."[59]

In *United States v. Brumley*, the Fifth Circuit held that a violation of the honest services provision by a state official required proof that the "services must be owed under state law and . . . that they

57. There is no question that the Federal Government has the power to enact criminal laws that can extend to virtually any crime, the Tenth Amendment to the Constitution notwithstanding. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Perez v. United States, 402 U.S. 146 (1971).

58. 85 F.3d 713, 733 (1st Cir. 1996).

59. 106 F.3d 1069, 1074 (1st Cir. 1997). The defendant worked for the Internal Revenue Service (IRS) and made unauthorized searches of income tax returns. The government charged that the conduct violated the wire fraud statute because the IRS regulations prohibited unauthorized browsing of tax returns, thereby depriving the employer of the right of honest services. The First Circuit reversed the conviction because the defendant did not realize any personal gain from his violation of the internal rules of the agency: "[N]o rational jury could have found beyond a reasonable doubt that, when Czubinski was browsing taxpayer files, he was doing so in furtherance of a scheme to use the information he browsed for private purposes, be they nefarious or otherwise." *Id.* at 1075.

were in fact not delivered."[60] The circuit court focused on whether the breach of fiduciary duty was serious enough to violate the state's law and not just a breach of ethical guidelines for state officers, which would violate principles of federalism by involving the federal government in enforcing a code of conduct for state officials.

Some courts did emphasize the need to show that the defendant gained a benefit from the deprivation of the right of honest services, at least when the defendant was a public official. In *United States v. Bloom*, the Seventh Circuit summarized the requirement for a mail fraud violation for corruption this way: "Misuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime."[61]

The deprivation of the right of honest services need not cause pecuniary harm to the victim in the same sense that a theft results in the victim suffering a loss.[62] Moreover, unlike a traditional larceny, § 1346 allows for the gain to the miscreant not be traceable to the harm or loss suffered by the victim. Prior to *Skilling*, a violation could be found based on a deception by the defendant that breached a fiduciary duty and triggered either harm to the victim or personal gain to which the defendant was not otherwise entitled. Thus interpreted, the right of honest services theory became a potent anticorruption measure because it does not require the kind of two-party exchange on which the other federal statutes in this area are premised. The misuse of authority to reward friends or divert benefits for one's own benefit is a scheme to defraud because the breach of fiduciary duty is deceptive, and the gain is a fraud perpetrated on those who expect the person to exercise authority honestly.

III. *SKILLING V. UNITED STATES:* LIMITING HONEST SERVICES FRAUD TO BRIBES AND KICKBACKS

The Supreme Court granted certiorari in three cases during its 2010 term to finally consider the scope of § 1346, over twenty years after the statute's enactment.[63] It used the prosecution of Jeffrey Skilling, the former chief executive officer of Enron, as the vehicle for restricting the scope of the right of honest services theory of fraud. Although the prosecution involved misconduct in the

60. 116 F.3d 728, 734 (5th Cir. 1997) (en banc).

61. 149 F.3d 649, 655 (7th Cir. 1998).

62. In cases involving the deprivation of the right of honest services in a private setting, rather than misuse of office by a public official, courts required some proof that it was reasonably foreseeable that the breach of fiduciary duty would result in an economic harm to the victim. *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 141 (2nd Cir. 2003) (en banc) ("In the self-dealing context, though not in the bribery context, the defendant's behavior must thus cause, or at least be capable of causing, some detriment—perhaps some economic or pecuniary detriment—to the employer."); United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997) ("The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.").

63. In addition to *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), the Court reviewed the honest services fraud convictions in *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), and *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008).

private context, and not a public corruption prosecution, the Court made *Skilling v. United States* the vehicle for explaining how § 1346 should be analyzed in future prosecutions under that provision, regardless of whether the defendant was a public official or operated in the private sector.[64]

Skilling and another former Enron CEO, Ken Lay, were tried together in 2005 on charges related to the spectacular collapse of Enron in early 2002.[65] The key charge was a wide-ranging conspiracy count alleging that they deceived the investing public and the company's shareholders about its true financial performance by "(a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading."[66] They were accused of enriching themselves "through salary, bonuses, grants of stock and stock options, other profits, and prestige," and one object of the conspiracy was the commission of wire fraud in violation of the duty of honest services owed to the company. Skilling was also charged in twenty-five other counts with securities fraud, wire fraud, making false statements to the company's auditors, and insider trading, and convicted on nineteen, including conspiracy.[67]

A. Preserving the Constitutionality of § 1346

Skilling argued that the statute was unconstitutionally vague because the phrase "intangible right of honest services" did not adequately define the conduct proscribed by the provision, and the language was so broad that it would allow for arbitrary prosecutions.[68] The void-for-vagueness argument had been raised in the lower courts on a number of occasions, and rejected each time, as the Supreme Court acknowledged.[69] Rather than invalidate § 1346, the Court opted instead to narrow its scope to avoid any vagueness problems. Focusing on the pre-*McNally* decisions that the statute sought to restore, the Court held that "[i]n the main, [they] involve fraudulent schemes to

64. 130 S. Ct. 2896 (2010). The prosecution in *Weyhrauch* involved an Alaska state representative charged with soliciting future legal work after his term expired from a company in exchange for voting on tax legislation that would favor it. The Supreme Court remanded the case to the Ninth Circuit for further consideration in light of its decision in *Skilling*. 130 S. Ct. 2971 (2010). The Court also remanded *Black* to the Seventh Circuit. 130 S. Ct. 2963 (2010).

65. A few weeks after the jury returned its guilty verdicts, Lay died from a heart attack, so the district court vacated his conviction under the abatement doctrine, which requires a conviction be removed when a defendant dies before appellate review of a conviction has been completed. *See* United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004).

66. 130 S. Ct. at 2908.

67. *Id*. at 2908, 2911. In addition to challenging his conviction because of problems with § 1346, Skilling contended that the trial court violated his right to a fair trial by refusing his change-of-venue motion. The Supreme Court rejected that challenge, finding that there was no presumption of prejudice and that the trial judge adequately screened the jury for any bias based on pretrial publicity.

68. *Id*. at 2928.

69. The Court cited the following cases as rejecting the constitutional challenge to § 1346: United States v. Rybicki, 354 F.3d 124, 132 (2nd Cir. 2003) (en banc); United States v. Hausmann, 345 F.3d 952, 958 (7th Cir. 2003); United States v. Welch, 327 F.3d 1081, 1109, n. 29 (10th Cir. 2003); United States v. Frega, 179 F.3d 793, 803 (9th Cir. 1999); United States v. Brumley, 116 F.3d 728, 732–33 (5th Cir. 1997); United States v. Frost, 125 F.3d 346, 370–72 (6th Cir. 1997); United States v. Waymer, 55 F.3d 564, 568–69 (11th Cir. 1995); United States v. Bryan, 58 F.3d 933, 941 (4th Cir. 1995).

deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived."[70] It acknowledged that the vagueness argument "has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency," but by confining it to "bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions," the constitutional problem would be avoided.[71]

In reviewing the honest services decisions that preceded the congressional enactment in 1988, the Court concluded that bribes and kickbacks were the most prevalent types of misconduct prosecuted, and thus "[t]o preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."[72] It then rejected the government's argument to read the statute more broadly to cover "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interest while purporting to act in the interests of those to whom he owes a fiduciary duty."

The Court noted that *McNally* "involved a classic kickback scheme," and while there were some cases upholding convictions just for nondisclosure, the lower courts did not reach a consensus on the application of the honest services theory of fraud developing before 1987. Finding that these cases were relatively infrequent "and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases."[73]

70. 130 S. Ct. at 2928. The Court based its focus on pre-*McNally* decision on its determination that "[t]here is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud." *Id*.

71. *Id*. at 2929. In rejecting the argument to invalidate the entire statute, the Court explained that "[i]t has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." *Id*. at 2929.

72. *Id*. at 2931. In discerning Congress's intent in enacting the provision, the Court stated that "there is no doubt that Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine." *Id*.

73. *Id*. at 2932. In an interesting footnote, the Court cautioned Congress against including within the statute a criminal prohibition on undisclosed self-dealing along the lines the government argued for in the case. In discussing the problems it might present, the Court stated:

> The Government proposes a standard that prohibits the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

Id. at 2934 n.45. It was rather unusual for the Court to admonish Congress in advance about how it should write a statute to avoid constitutional problems. In *McNally*, in rejecting the honest services theory of fraud, it simply stated that "[i]f Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360. The footnote quoted above came after the Court quoted *McNally*'s invitation to Congress to change the law if it saw fit to do so. It may be that while the Court in *Skilling* had to recognize Congress's power to enact a new provision, it wanted to head off adoption of another provision along the lines of § 1346 employing vague terminology like "undisclosed self-dealing" to keep the Court from being put on the spot yet again by a poorly drafted law.

B. The Meaning of Bribes and Kickbacks

While the Court referred repeatedly to the "core" of honest services as covering "bribes and kickbacks," *Skilling* did not define those terms, although the analysis of the development of the right of honest services theory shows what can be considered central to § 1346's application. In describing how the mail and wire fraud statutes were expanded before *McNally*, the Court explained that the lower courts developed the theory to cover situations in which a third party made the corrupt payment, rather than the victim in a more traditional fraudulent scheme: "While the offender profited, the betrayed party suffered no deprivation of money or property, instead, a third party, who had not been deceived, provided the enrichment."[74] This is different from the typical fraud, in which the victim is deceived into turning over the property or benefit to the defendant.

The Court then gave an example of the type of conduct covered, involving a mayor accepting a bribe in exchange for awarding the payer a contract whose terms were the same as would have been negotiated with any other provider, so the city suffered no tangible loss from the payment. The new approach to fraud under § 1346 meant that "[e]ven if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's 'honest services.'"[75]

The focus on *gain* to the defendant means that just acting dishonestly or in breach of a state law will no longer suffice for a fraud prosecution alleging a deprivation of the right of honest services. It is not simply the loss of the honest services alone that can trigger a conviction, but the unauthorized benefit received by a defendant. The Court contrasted bribery and kickbacks, which it described as the "paradigmatic" prosecution under § 1346, with the government's approach that would have included undisclosed conflicts of interest to favor one's own financial interests, which did not require proof of any actual (or potential) gain to the defendant. The Court was unwilling to open up the statute to this type of conduct because it was outside the "core" of honest services, thus equating dishonesty with some improper gain for the defendant.

Identifying bribery as one means of depriving the right of honest services focuses on a crime that has been reviewed by the Court in other contexts. It is likely the Court would rely on its earlier decisions in *McCormick v. United States* and *Evans v. United States* to provide the basis for analyzing whether a gain to the offender constituted a bribe. Those decisions concerned the meaning of extortion "under color of official right" in the Hobbs Act, and the Court required the government to prove a *quid pro quo* to establish bribery.[76] *Evans* held that the government is not required to prove that the payment was actually made or official act taken, so the offense of bribery is complete once the parties make a corrupt agreement. That same analysis should apply to a right of honest services fraud prosecution involving bribery, so the prosecution would not have to show an actual transfer of funds or exercise of authority for the offense of mail or wire fraud to be complete.

74. 130 S. Ct. at 2926.

75. *Id.* (italics in original).

76. *See* Chapter 5.

Bribery is a commonly prosecuted offense in both federal and state law, with well-accepted parameters, but the term kickback is not nearly as well established. Courts sometimes use bribery and kickback interchangeably, although they are not identical and cover somewhat different situations.[77] A bribe involves a *quid pro quo* arrangement, while a kickback has been found for payments made as rewards and to gain favor with the recipient in the hope of receiving future benefits.

Like a bribe, a kickback involves some unauthorized financial gain from the transaction, but it need not be clearly linked to a particular exercise of authority. The Eleventh Circuit, in *United States v. Conover*, quoted a jury instruction that distinguished between bribes and kickbacks in this way:

> A "bribe" is defined as the corrupt giving of a thing of value to another to improperly induce or influence that person's action. A "kickback" is defined as a payment to an individual for dealing in the course of his employment with the person making the payment with the result that his personal financial interest interferes with his duty to secure the most favorable bargain for his employer.[78]

While the bribe must "induce or influence" the defendant's action, the kickback need only interfere with the person's exercise of authority, so that the government would not have to prove a *quid pro quo* agreement that links the benefit to a particular governmental action.

Other statutes that proscribe kickbacks take this broader approach to reach conduct that is beyond what would constitute a bribe. *Skilling* specifically referred to the Anti-Kickback Act, which deals with government contracting, as an example of conduct which comes within § 1346. The statute defines a "kickback" as

> any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.[79]

This definition covers conduct that might not rise to the level of a bribe by prohibiting rewards, which would be paid after the contract award, and payments made for "improperly obtaining" a contract. While a bribe would clearly be punishable under the Anti-Kickback Act, the payment need not be made as the result of a *quid pro quo*, instead only that it be made for the broader

77. *See* United States v. Rodrigues, 159 F.3d 439, 450 (9th Cir. 1998) (kickback "is often used colloquially as the simple equivalent of 'bribe.'"); Howard v. United States, 345 F.2d 126, 128 (1st Cir. 1965) ("We think, therefore, that the purpose of the 'Anti-Kickback Statute' is basically the same as that of the bribery statute, 18 U.S.C. § 201, and should be construed according to the same principles."). *But see* United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) ("Although a bribe and a kickback are both corrupt payments to a party to induce a desired reaction, they cannot be treated interchangeably . . .").

78. 845 F.2d 266, 270 (11th Cir. 1988).

79. 41 U.S.C. § 52(2).

"purpose" of obtaining a contract. Thus, payments made to obtain a favorable view of a proposal, or even to buy access to an official, could constitute a kickback.[80]

The Medicare anti-kickback statute, 42 U.S.C. § 1320a-7b, makes it a crime for any person who "knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind" in return for referring a patient to a facility or recommending medical equipment.[81] In *United States v. Hancock*, the Seventh Circuit interpreted what constitutes a "kickback":

> The term is commonly used and understood to include "a percentage payment . . . for granting assistance by one in a position to open up or control a source of income," Webster's Third New International Dictionary (1966), and we think it was used in the statute to include such a payment.[82]

C. The Future of Honest Services Fraud

Skilling's assertion that § 1346 must be limited to schemes involving bribery and kickbacks to avoid constitutional concerns requires the lower courts to examine how broadly or narrowly those terms should be applied in future cases. The focus on finding some gain by the defendant from the deprivation of the right of honest services means prosecutors will need to prove more than just a breach of fiduciary duty or deceptive conduct by the defendant. Future prosecutions under § 1346 must show that the defendant derived an improper benefit from the misconduct to bring it within the core of bribery and kickbacks.

The Ninth Circuit's decision in *Weyhrauch v. United States*, one of the honest services fraud cases on which the Supreme Court granted certiorari along with *Skilling*, illuminates how the government will have to reorient its prosecutions in the future. The original indictment alleged that the defendant, a former Alaska state legislator, devised "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment."[83] The government alleged that Weyhrauch sought

80. *See* United States v. Gemmell, 160 F. Supp. 792, 794 (E.D. Pa. 1958) (payments "were either inducements for the award of the subcontracts from General Engineering and Pioneer Engineering or as an acknowledgment of subcontracts previously awarded to the Kunzig Company, and were 'kickbacks' within the prohibition of the Anti-Kickback Act.").

81. 42 U.S.C. § 1320a-7b(b)(1).

82. 604 F.2d 999, 1002 (7th Cir. 1979). The circuit court rejected the narrower approach of the Fifth Circuit in *United States v. Porter*, 591 F.2d 1048, 1054 (5th Cir. 1979), which limited kickbacks to "the secret return to an earlier possessor of part of a sum received." Under *Porter*'s analysis, the person must have held the funds disbursed to the person who then makes the kickback, which would rarely happen in public corruption cases.

Another federal statute, 18 U.S.C. § 1954, makes it a crime for anyone connected to an employee benefit plan who "receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan . . ." Taxpayers are also prohibited from deducting the costs of any kickback from their taxes under 26 U.S.C. § 162(c).

83. 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated and remanded*, 130 S. Ct. 2971 (2010).

future legal work from an oil company in exchange for his vote on a pending oil tax bill before the legislature. One issue in the case was the trial court's order precluding the prosecution from introducing evidence of the ethics policies of the Alaska state legislature, which would be used to establish that the defendant acted dishonestly. The district court subsequently dismissed the indictment, which the government appealed.

The circuit court reviewed a controversy that grew up in the lower courts around what evidence would suffice to show a breach of the duty to provide honest services. It summarized the divergent views by stating:

> [O]ur sister circuits have expressed divergent views on the proper meaning of "honest services" for public officials. The Fifth Circuit has adopted the so-called "state law limiting principle," which requires the government to prove that a public official violated an independent state law to support an honest services mail fraud conviction. The Third Circuit has adopted a similar rule requiring the government to prove the public official violated a fiduciary duty specifically established by state or federal law. The majority of circuits, however, have held that the meaning of "honest services" is governed by a uniform federal standard inherent in § 1346, although they have not uniformly defined the contours of that standard.[84]

After *Skilling*, the issue of what constitutes a breach of the duty to provide honest services is no longer of any importance because the Supreme Court has defined it as bribery and kickbacks, which is a uniform federal standard and not dependent on state law.

Although the original focus of the indictment in *Weyhrauch* was on establishing a breach of the honest services obligation owed by a legislator, the case could still be prosecuted under *Skilling*'s bribery or kickbacks limitation on the scope of § 1346 if the government has sufficient evidence to show an agreement between the defendant and the oil company to exchange his vote for future legal work. The mail and wire fraud statutes proscribe schemes to defraud, and there is no requirement that the fraud actually be completed for a violation to occur. Similarly, for a bribe, the offense is the *quid pro quo* and not fulfillment of the arrangement, so the government would not have to prove a vote was actually cast or that the company retained the legislator for legal work.

The Ninth Circuit pointed out that while the indictment did not allege "that Weyhrauch received any compensation or benefits from VECO or its executives during this period, [it] alleges facts suggesting that Weyhrauch took the actions favorable to VECO on the understanding that VECO would hire him in the future to provide legal services to the company."[85] The favorable actions for VECO could be sufficient to show a bribe, although prosecutors need to use the language of bribery and kickbacks in an indictment to meet the requirements imposed by the Supreme Court for prosecutions that rely on § 1346 and not merely suggest such a relationship.

A closer case would be posed by facts similar to those in *United States v. Brumley*, in which an official with a state worker's compensation board accepted money styled as "loans" from an

84. *Id.* at 1243–44.

85. *Id.* at 1239.

attorney with numerous cases before the board. In seeking to establish the breach of the duty of honest services, the Fifth Circuit summarized the government's fraud theory:

> At trial, the government stipulated that it would not try to prove that any IAB award was enhanced by Brumley or that any claimant was awarded more money by Brumley or that Brumley referred any unrepresented claimant to an attorney in return for cash. Rather, the government's "position [was] that the quid pro quo [was] intangible, such as favoritism or other types of intangible matters."[86]

It is not clear what an "intangible" *quid pro quo* would be, and prosecutors would need to show that the payments were designed to influence the official's conduct, or were at least made to ensure favorable treatment in the future to show they were kickbacks. *Skilling* now requires prosecutors to move away from more nebulous assertions about why payments were made or solicited, and focus instead on establishing that they rose to the level of being a bribe or kickback. The Supreme Court's narrowing interpretation of § 1346 will not preclude these types of prosecutions, but will reorient prosecutors to gather evidence establishing that link between the transfer of a benefit and some exercise of authority.

A situation that fits easily into *Skilling*'s framework for honest services fraud is illustrated by *United States v. Ganim*, a prosecution of a mayor for, among other things, violating 18 U.S.C. § 666 and the Hobbs Act along with mail fraud related to bribes and kickback he received for the award of city contracts. The Supreme Court cited the decision approvingly as one properly "reviewing honest-services conviction involving bribery in light of elements of bribery under other federal statutes."[87] The government's theory was that the bribery (and extortion) deprived the citizens of the mayor's honest services, which comes squarely within the Supreme Court's view of a permissible prosecution under § 1346. The defendant argued that the government could not link any payments to a specific government contract, but the Second Circuit held that "the requisite *quid pro quo* for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise."[88]

Bringing charges under other bribery provisions, along with mail or wire fraud, make it much easier to fit within the confines of § 1346 after the Court's limited reading of the scope of the statute. The Supreme Court noted in *Skilling* that "[a] criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." An honest services charge could be duplicative of the other corruption counts in an indictment, but the Court also pointed out that "[o]verlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example,

86. 116 F.3d 728, 735 (5th Cir. 1997) (en banc). The primary issue in the case concerned whether the government must prove a violation of state law to establish a breach of the right of honest services, an issue that also occupied the Ninth Circuit in *Weyhrauch* but is now irrelevant.

87. 130 S. Ct. at 2934. The Court cited two other cases involving both bribery and honest services fraud counts as examples of the proper application of § 1346: *United States v. Whitfield*, 590 F.3d 325, 352–53 (5th Cir. 2009); *United States v. Kemp*, 500 F.3d 257, 281–86 (3rd Cir. 2007).

88. 510 F.3d 134, 142 (2nd Cir. 2007).

generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished."[89]

By confining § 1346 to the core areas of bribery and kickbacks, the Supreme Court appears to have effectively limited honest services to the types of cases that can already be prosecuted under other statutes, although there may be some greater flexibility for honest services fraud prosecutions although there may be some greater flexibility honest services fraud because kickbacks covers a wider range of conduct than just bribery. In addition, the mail and wire fraud statutes can be used when the public official takes money directly from a victim, such as through embezzlement or by skimming funds. The focus on gain in *Skilling* makes the financial aspects of a scheme the focal point of the prosecution.

89. 130 S. Ct. at 2934 n.45.

This page intentionally left blank

| 7 |

THE TRAVEL ACT (18 U.S.C. § 1952)

The Travel Act, originally adopted in 1961, incorporates state bribery law as one part of a broad federal provision targeting organized crime that reached across state borders.[1] The title "Travel Act" is a misnomer because a violation does not require proof of any actual travel and includes the use of any facility in interstate commerce or the mail, thus expanding its potential reach enormously. The statute, 18 U.S.C. § 1952, provides:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform –
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

1. Although the Travel Act was passed to aid in the prosecution of organized crime, there is no requirement that the government show the defendant was connected to such criminal activity in order to proceed under the statute. *See* United States v. Nader, 542 F.3d 713, 721 (9th Cir. 2008) ("The statute, however, is worded broadly. Its plain text prevents us from reading it to encompass only cases that involve organized crime or interstate criminal enterprises. To the extent the statute is ambiguous about whether the telephone is a facility 'in' interstate commerce, the other sources of meaning discussed above weigh more heavily against a narrow construction than its legislative purpose weighs in favor of one."); United States v. Daily, 24 F.3d 1323, 1328 (11th Cir. 1994) ("Dailey's lack of involvement with organized crime does not exempt him from punishment under the Act."); United States v. Davis, 780 F.2d 838, 843 (10th Cir. 1985) ("While we recognize that the legislative history of the Travel Act indicates it was aimed at combating organized crime, it has been clearly established that its reach is not limited to that end.")

> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.
>
> (b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

A violation of the Travel Act involving bribery as the unlawful activity under § 1952(a)(3) requires the government to prove the following elements:

- travel in interstate commerce, or the use of the mails or the facilities of interstate commerce;
- with intent to "promote, manage, establish, carry on or facilitate" unlawful activity;
- bribery, extortion, or arson in violation of the laws of the state in which the crime is committed, or in violation of federal law; and (4) subsequent performance of or an attempt to perform the unlawful activity.[2]

The Travel Act has not been used as frequently as other statutes in recent years in federal corruption cases; the most commonly used provisions are the right of honest services theory for mail and wire fraud prosecutions and the Hobbs Act. But the Travel Act's reach is nearly as broad as those provisions, and the commerce element is one that can easily be met in most cases. It may well be that the statute's title misleads prosecutors into thinking the government must show actual interstate travel, which is not necessarily the case. Also, the Travel Act's reliance on state law as the basis for the federal prosecution could deter its use because federal prosecutors may be more familiar with the standards for proving a violation under the commonly charged corruption statutes than the requirements of a particular state's bribery law.

I. HISTORY OF THE STATUTE

Attorney General Robert Kennedy recommended the adoption of the Travel Act as part of a legislative package to combat organized crime. The attorney general submitted a statement in support of the proposal, explaining that criminal organizations operating across state lines were able to

2. *See, e.g.*, United States v. Zolicoffer, 869 F.2d 771, 774 (3rd Cir. 1989); United States v. Stafford, 831 F.2d 1479, 1481 (9th Cir. 1987); United States v. Stevens, 612 F.2d 1226, 1231 (10th Cir. 1979); United States v. Palfrey, 499 F. Supp. 2d 34, 43 (D.D.C. 2007).

avoid prosecution by local governments, and that "[b]ecause many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity."[3] In testimony before the House Judiciary Committee, Attorney General Kennedy spoke about "racketeers living in one State and controlling the rackets and reaping the profits from those rackets located in another State. The racketeer would be beyond the control of the police in the State or operation and living as a respected citizen in the State of his abode."[4] In adopting the legislation, the House Report described the need for federal involvement in prosecuting essentially local crimes: "The interstate tentacles of this octopus known as 'organized crime' or 'the syndicate' can only be cut by making it a Federal offense to use the facilities of interstate commerce in the carrying on of these nefarious activities."[5]

The original draft of the bill limited it to cases involving interstate travel, but the Senate Judiciary Committee expanded its coverage by adding a provision creating federal jurisdiction if any facility of interstate or foreign commerce were used in connection with the offense.[6] The House amended the bill to limit the prosecutions of the identified "unlawful activity" of bribery, extortion, or arson to those cases in which that conduct was "in connection with gambling, liquor, narcotics, or prostitution." In the Conference Committee to resolve the differences between the two versions of the legislation, however, the House accepted the Senate's broader language, which was ultimately enacted, allowing for prosecution of bribery, extortion, or arson without reference to any other criminal activity.[7]

Congress amended the Travel Act in 1990 to clarify the scope of its coverage involving use of the mail as the means for engaging in the proscribed activity. The original statutory language covered the use of "any facility in interstate or foreign commerce, *including the mail*." In *United States v. Barry*,

3. Letter from Attorney General Robert F. Kennedy, April 6, 1961, *reprinted in* H.R.Rep. No. 87-966; *see also The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the Comm. on the Judiciary*, United States Senate, 87th Cong. 15–16 (1st Sess. 1961) (statement of Attorney General Robert F. Kennedy).

4. The attorney general's testimony is recounted in the House Report on the Travel Act. *Id.*

5. *Id.*

6. A general review of the legislative history of the Travel Act can be found in *United States v. Barry*, 888 F.2d 1092, 1093 (6th Cir. 1989).

7. In *United States v. Nardello*, 393 U.S. 286 (1969), the Supreme Court recounted the legislative history of the Travel Act:

> The House version of the Travel Act contained an amendment unacceptable to the Justice Department. The Senate bill defined 'unlawful activity' as 'any business enterprise involving gambling, liquor * * * narcotics, or prostitution offenses in violation of the laws of the State * * * or * * * extortion or bribery in violation of the laws of the States.' S.Rep. No. 644, 87th Cong., 1st Sess., 2 (1961). However, the House amendment, by defining 'unlawful activity' as 'any business enterprise involving gambling, liquor, narcotics, or prostitution offenses or extortion or bribery in connection with such offenses in violation of the laws of the State,' required that extortion be connected with a business enterprise involving the other enumerated offenses. H.R.Rep. No. 966, 87th Cong., 1st Sess., 1 (1961). In a letter to the Chairman of the House Judiciary Committee the Justice Department objected that the House amendment eliminated from coverage of the Travel Act offenses such as 'shakedown rackets,' 'shylocking' and labor extortion which were traditional sources of income for organized crime. (ellipsis in original).

Id. at 291–92. Interestingly, the letter from the Department of Justice objecting to the House amendment was signed by then-Assistant Attorney General Byron White, who—not surprisingly—recused himself from the Court's decision in *Nardello* and all subsequent cases reviewing the scope of the Travel Act.

the Sixth Circuit limited prosecutions relying on the mail as the basis for federal jurisdiction to those items that actually traveled between the states, holding that "we may conclude that a statute that speaks in terms of an instrumentality in interstate commerce rather than an instrumentality of interstate commerce is intended to apply to interstate activities only."[8] In *United States v. Riccardelli*, however, the Second Circuit reached the opposite conclusion, stating that "Congress intended any use of the United States mails to be sufficient to invoke federal jurisdiction under the Travel Act."[9]

The 1990 amendment resolved the split by providing that any defendant who "uses the mail" in relation to the illegal conduct comes within the Travel Act, thereby making it clear that any mailing, and not just one moving between two states, is sufficient to establish this element of the offense, unlike when the basis for federal jurisdiction is the interstate travel of an individual who must actually cross a state line.[10]

An amendment in 1994 increased the penalty for a violation of 1952(a)(2), involving commission of a crime of violence in furtherance of a criminal act, from five to twenty years.[11] The original punishment for any violation of the Travel Act was five years, and this subsection was rarely prosecuted because its maximum penalty was far less than what could be imposed under other federal statutes or state law involving crimes of violence.

II. INTERSTATE COMMERCE ELEMENT

The statute provides three different means to establish federal jurisdiction: (1) a person "travels in interstate or foreign commerce," (2) "uses the mail," or (3) uses "any facility in interstate or foreign commerce." As originally enacted, the Travel Act was an exercise of Congress's power under the Commerce Clause to reach activities affecting interstate commerce. The 1990 amendment made it clear that the jurisdictional basis for a prosecution included the use of the mail, which is a second constitutional underpinning for the provision that references the exclusive federal authority over the post office. [12]

The statutory language on the commerce element is straightforward, and courts have little trouble applying the provision in particular cases. For example, the use of a telephone is sufficient to establish federal jurisdiction even if the call itself was intrastate because it is a facility of interstate commerce,[13] while the travel must involve actually crossing state lines. As discussed above,

8. 888 F.2d 1092, 1095 (6th Cir. 1989).

9. 794 F.2d 829, 830 (2nd Cir. 1986).

10. Pub. L. No. 101-647, Title XVI, § 1604, 104 Stat. 4831 (1990).

11. Pub. L. No. 103-322, Title XIV, § 140007(a), 108 Stat. 2033 (1994).

12. U.S. Const. art. 1, § 8, cl. 7 (Congress has the power to "establish Post Offices and post Roads."). It has long been the understanding of the courts that this power authorizes the regulation of the entire postal system and, subject to certain constitutional limits, the right to determine what may be carried in the mails and what may be punished for use of the mails. *See* Public Clearing House v. Coyne, 194 U.S. 497 (1904); Ex parte *Rapier*, 143 U.S. 110 (1892); Ex parte *Jackson*, 96 U.S. 727 (1877).

13. In *United States v. Nader*, 542 F.3d 713 (9th Cir. 2008), the Ninth Circuit rejected the defendants' argument that the term "in" should be interpreted to require the use of the interstate facility involve some conduct that actually crossed a

the 1990 amendment to the Travel Act makes it clear that the mails need only be used, and the actual movement of the letter is irrelevant.

What has proven to be more controversial is whether the statute requires anything more than the bare use of an instrumentality of interstate commerce, the mails, or travel between the states. Unlike the Hobbs Act, which employs Congress's full power under the Commerce Clause and only requires a slight impact on interstate commerce, the Travel Act has a narrower jurisdictional basis that raises the issue regarding the requisite nexus between the commerce element and the underlying criminal activity.

A. Rewis v. United States *and* Erlenbaugh v. United States

The Supreme Court rejected the position that any conduct involving interstate travel tangential to the criminal violation alleged was sufficient for federal jurisdiction in *Rewis v. United States*.[14] The prosecution involved two defendants charged with operating a numbers operation in Yulee, Florida, a small town north of Jacksonville located close to the Georgia border. There was no evidence the defendants crossed the state line in connection with the gambling operation, and jurisdiction was based on the travel of some bettors from Georgia into Florida. According to the Court, the Travel Act prohibits interstate travel undertaken with the intent to "promote, manage, establish, carry on, or facilitate" the illegal conduct, "and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity."[15]

The Court noted that Congress "would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies."[16] While travel by patrons of an illegal gambling operation could conceivably be reached by Congress under its Commerce Clause power, the legislative intent for enacting the statute—to allow federal assistance to prosecute organized crime—did not support "such a broad-ranging interpretation of § 1952."[17]

While the Court made it clear that such incidental travel, even if foreseeable, was insufficient for the Travel Act, it did not preclude a federal prosecution because someone other than one of the perpetrators of the underlying offense engaged in the interstate movement. For example, *Rewis* noted that active encouragement that was "more than merely conducting the illegal operation"

state line, instead concluding "[w]e hold that intrastate telephone calls made with intent to further unlawful activity can violate the Travel Act because the telephone is a facility in interstate commerce." *Id*. at 722. The circuit court stated that it attached "no special significance to the use of the preposition 'in' rather than 'of' in the Travel Act." *Id*. at 719.

14. 401 U.S. 808 (1971).

15. *Id*. at 811. Two other defendants charged in the case were bettors who traveled from Georgia to Florida, and the Fifth Circuit overturned their convictions on the ground that the Travel Act did not reach patrons of gambling operations.

16. *Id*. at 812.

17. *Id*.

could support jurisdiction when the travel was undertaken by agents or employees of the illegal operation.[18] Moreover, the Court did not rule out a prosecution based on encouraging out-of-state patrons to cross state lines when "the conduct encouraging interstate patronage so closely appropriates the conduct of a principal in a criminal agency relationship that the Travel Act is violated."[19] That was not the government's theory, so the Court did not have to decide the outer limits of the Travel Act's commerce element, but it did acknowledge that the particular circumstances of a case could bring interstate travel by one not directly involved in the misconduct under the proscription of the Travel Act.

Three years after *Rewis*, the Court considered whether the use of a facility of interstate commerce was sufficient for a Travel Act conspiracy charge in *Erlenbaugh v. United States*.[20] The Court rejected the defendants' argument that the transmittal of gambling information contained in a sports news publication by having it shipped by railroad from Illinois, where it was published, to Indiana, where the bookmaking occurred, was insufficient for federal jurisdiction.[21] Among other things, the Court noted it was undisputed that the news publication "was important to the operation of those bookmaking businesses" and the scheme "involved the use of a facility of interstate commerce, the railroad." [22]

The main issue in the case was whether a companion provision to the Travel Act, 18 U.S.C. § 1953, making it a crime to transport wagering paraphernalia, also applied to § 1952. That provision exempts "the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication," and the defendants argued that similar movement of the news publication could not serve as the basis for a Travel Act prosecution. The Court held that "[t]o introduce into § 1952 an exception based upon the nature of the material transported in interstate commerce would carve a substantial slice from the intended coverage of the statute."[23]

Rewis involved interstate travel that was, at best, tangential to the underlying criminal conduct, while *Erlenbaugh* involved the use of a facility of interstate commerce to gain the very information necessary to allow the gambling operation to continue in business. In neither case did the Court address how closely the interstate movement had to be to the criminal conduct to establish the requisite federal interest in prosecuting crimes that are based on state law. The interstate travel in *Rewis* was too attenuated, while the interstate shipment in *Erlenbaugh* was "important" in engaging in the crime. Between those two extremes lies quite a bit of ground, and the Court's decisions did not shed much light on how close the relationship between the interstate commerce element and the underlying criminal activity had to be. *Rewis* made it clear that there must be some limit on the

18. *Id*. at 813. The Court referenced lower court decisions that "correctly applied" the Travel Act to travel by those who worked for the defendants, citing *United States v. Chambers*, 382 F.2d 910, 913–14 (6th Cir. 1967), *United States v. Barrow*, 363 F.2d 62, 64–65 (3rd Cir. 1966), and *United States v. Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964).

19. *Id*. at 814.

20. 409 U.S. 239 (1972).

21. The lower court's decision created a circuit split because the Fourth Circuit held in *United States v. Arnold*, 380 F.2d 366, 368 (4th Cir. 1967), that use of the telephone to order transmittal of a sports publication intended to be used for football betting did not come within § 1952. 409 U.S. at 478 & n.2.

22. *Id*. at 242.

23. *Id*. at 247.

scope of federal jurisdiction, lest prosecutions under the Travel Act "alter sensitive federal-state relationships," leaving it to the lower courts to discern when it was proper to exercise federal authority.

B. The Federal Nexus in the Lower Courts

After *Rewis*, some lower courts took a closer look at the interstate commerce element of the offense to ensure that federal jurisdiction did not "alter the sensitive federal-state relationship" by impermissibly expanding federal prosecutions into primarily local offenses. Other courts, however, took a much broader view of the interstate commerce element, refusing to view *Rewis* as requiring a particularly close link between interstate travel or the use of a facility of interstate commerce and the underlying offense. These courts understood the commerce element as being more akin to the approach taken by the Hobbs Act that only required some use of a facility of interstate commerce, which need not be more than an incidental part of the criminal conduct. While there was something of a circuit split on how closely the commerce element would be applied, the lower courts, at least since the 1990s, have taken a more liberal approach to the interstate commerce element under the Travel Act, which may well reflect greater care taken by prosecutors to ensure that their proof conforms to the requirements imposed by the more strict interpretations of the statute.

1. The Stricter Approach: Second and Seventh Circuit Interpretations

A. THE SECOND CIRCUIT

The leading decision advocating a restrictive view of the interstate commerce element is the Second Circuit's decision in *United States v. Archer*, written by the late Judge Henry Friendly, one of that court's preeminent jurists.[24] The case was part of a broad federal-state investigation of public corruption in the New York City judicial system. The scheme involved bribing an assistant District Attorney, and federal jurisdiction under the Travel Act was premised on two telephone calls: one by an undercover FBI agent made from Paris, France, to New York to arrange a meeting, and the second from Newark, New Jersey, to New York that occurred "for the sole purpose of having [the defendant] talk in an interstate telephone call."[25] Judge Friendly, author of the Second Circuit's opinion, expressed grave concerns regarding whether the undercover operations constituted outrageous government conduct, and acknowledged the "widespread concern whether the federal

24. 486 F.2d 670 (2nd Cir. 1973). Among those listed as representing the U.S. Attorney's Office for the Southern District of New York were Rudolph W. Giuliani, later the U.S. Attorney for that district and then Mayor of New York, Richard Ben-Veniste, a Watergate assistant special prosecutor and later a leading criminal defense lawyer, and Kenneth R. Feinberg, who later administered claims related to the September 11 attacks before working as the so-called "pay czar" in the Obama administration and overseeing claims related to the Gulf of Mexico oil spill.

25. *Id.* at 674.

criminal law has not outrun reasonable bounds" by making what was essentially a local corruption case into a federal matter.[26]

Rather than decide either of those issues, the Second Circuit found that the telephone calls initiated by federal agents for what appeared to be the sole purpose of creating federal jurisdiction, were not related to a federal interest in a "sufficiently meaningful way" to allow the prosecution.[27] The circuit court explained that "[w]hatever Congress may have meant by § 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime."[28] Reiterating *Rewis*'s concern about federal-state relations, the Second Circuit found that Congress "did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present."[29]

B. THE SEVENTH CIRCUIT

The Seventh Circuit reversed Travel Act convictions in a series of cases in the early 1970s on similar grounds, finding that the interstate commerce element was not sufficiently related to the criminal conduct to allow a federal prosecution to proceed. In *United States v. Altobella*, the defendants extorted a victim after photographing him in a sexually compromising position by forcing him to cash a check to pay to keep the incident quiet. The victim was from Philadelphia, and the extortion occurred in Chicago, so the government alleged that the interstate commerce element was satisfied by the clearing of the check through the Chicago bank back to Philadelphia. The Seventh Circuit found the evidence insufficient as a matter of law, holding that "when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed."[30] The author of the Seventh Circuit's opinion was then-Judge John Paul Stevens, later appointed to the Supreme Court, and so the decision took on greater significance in that court because of his involvement.

In *United States v. McCormack*, the Seventh Circuit reversed Travel Act convictions based on the mailing of a local newspaper outside the state in which the defendant placed advertisements seeking salesmen to aid in his illegal lottery operation. Finding that the use of the mails was "minimal and incidental" to the gambling, the circuit court introduced a new consideration that affected its analysis: "the interstate activities relied upon by the Government were the acts of

26. *Id.* at 677.

27. *Id.* at 680.

28. *Id.* at 681.

29. *Id.* at 682. In analyzing the history of the Travel Act, Judge Friendly's opinion noted that "[t]he legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted." *Id.* at 678. This language, written in 1973, does not appear consonant with the current approach taken by courts to applying the language Congress adopted rather than substituting the court's own understanding of what the legislature would have wanted to accomplish had it thought through the issue.

30. 442 F.2d 310, 315 (7th Cir. 1971) (italics added).

others and were not actively sought or made a part of the illegal activity of the accused. There was no showing that defendant's lottery in any way *depended upon or included* interstate operations."[31]

The Travel Act does not specify who must travel in interstate commerce or use its facilities, and there is no requirement that the jurisdictional element be incorporated into the scheme in the way that the mail and wire fraud statutes require the mailing or interstate wire be a part of the execution of the scheme to defraud.[32] The Seventh Circuit's opinion is brief, but it appears to mean, when assessing the federal nexus, a court should look to evidence of the defendant's knowledge of the interstate travel or use of a facility, along with its relation to the underlying activity, to determine whether the conduct merits federal prosecution.

In *United States v. Isaacs*, the Seventh Circuit again found that the clearing of checks through an out-of-state bank was insufficient to support a Travel Act conviction. The defendants included former Illinois governor Otto Kerner, who was later appointed to the Seventh Circuit, and the appeal was decided by three senior judges from other circuits because all the judges on that court recused themselves.[33] The three checks used to make bribe payments were written on an Illinois bank and cleared through the Federal Reserve Bank in St. Louis, and the circuit court explained that "[t]hey, too, were incidental to the scheme; checks which would have cleared through Chicago, rather than through St. Louis could just as easily have been utilized. Here, no one involved in the scheme had reason to suppose that checks drawn on the Alton bank would clear through St. Louis."[34] In describing why the checks were incidental, the opinion picks up on the approach in *McCormack* in noting the defendant's lack of knowledge of the interstate movement of the checks. Knowledge that the instrument passed in interstate commerce is not an element of the offense, but certainly can be a basis for finding that the commerce element has been established by sufficient evidence.[35]

Altobella, *McCormack*, and *Isaacs* laid the foundation for subsequent attacks on federal jurisdiction for Travel Act offenses when the interstate movement or facility involved the clearing of money or checks. But those decisions did not signal a widespread movement to overturn convictions, and the government successfully prosecuted cases when it could show that the interstate transfers were more intimately related to the bribery or extortion.

In *United States v. Peskin*, the Seventh Circuit upheld the Travel Act convictions of the defendants for bribing local government officials in Illinois with checks drawn by a subsidiary of the

31. 442 F.2d 316, 318 (7th Cir. 1971) (italics added). The decision was issued before the amendment to the Travel Act that specifically included mailings as a basis for the prosecution, but the circuit court's analysis regarding the importance of the interstate connection remains viable.

32. 18 U.S.C. §§ 1341, 1343. In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court explained the relationship between the mailing or interstate wire and the fraudulent scheme: "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Id*. at 710–11 (quoting *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Badders v. United States*, 240 U.S. 391, 394 (1916)).

33. 493 F.2d 1124 (7th Cir. 1974). The judges deciding the case were Senior Judge Harvey M. Johnsen of the Eighth Circuit, Senior Judge J. Edward Lumbard of the Second Circuit, and Senior Judge Jean S. Breitenstein of the Tenth Circuit. *Id*. at 1131 n.*.

34. *Id*. at 1148.

35. *See* United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970) (finding that the exchange and cashing of checks across interstate lines was a key element of the illegal gambling operation).

corporation located in Michigan on an account at a Detroit bank. Rejecting the argument that the circuit's prior decisions required dismissal of the charges, the Seventh Circuit held that "[t]he deposit and interstate clearance of the Detroit checks were essential in fact to the payment of Peskin, though he and perhaps Stulberg were unaware of the details."[36] The Seventh Circuit also noted that the Travel Act "does not expressly provide that the defendant must knowingly use interstate facilities," so that "[c]onsidering the [Travel] Act's purpose, it is plain that such a scienter requirement should not be implied."[37] Similar to *Peskin*, in *United States v. Bursten*, the Seventh Circuit upheld the convictions of defendants who paid bribes to a local housing authority official from their company's account in a local bank, described as "the significant utilization of a Milwaukee bank account to effectuate a bribery scheme in Indiana."[38]

2. The Liberal Approach: The Fourth and Sixth Circuits

A. THE FOURTH CIRCUIT

In *United States v. LeFaivre*, the Fourth Circuit upheld Travel Act convictions involving a large-scale gambling operation in Baltimore in which the defendants cited *Rewis* and the Seventh Circuit decisions as support for their position that the statute did not apply. Federal jurisdiction was premised on fourteen out-of-state checks and negotiable instruments used to pay off bets. The Fourth Circuit noted that its pre-*Rewis* decision in *United States v. Wechsler* upheld a bribery conviction based on the deposit of an out-of-state check, a result the Seventh Circuit criticized in *Isaacs*.[39] The circuit court found that *Rewis* did not change its earlier position, interpreting the Supreme Court's analysis as not imposing a limitation on the Travel Act, but instead only reading the statute to avoid an unnecessary expansion of the scope of federal jurisdiction.[40]

The Fourth Circuit rejected the Seventh Circuit's analysis in *Altobella* that the connection between the interstate travel or facility must be substantial and not "minimal and incidental," holding that the statute does not impose that requirement and neither did the Supreme Court in *Rewis*. The circuit court stated:

> However desirable it may seem to curb the reach of this criminal statute, we think we lack the power to do so. Once it is determined that the Congress has acted constitutionally and within the scope of

36. 527 F.2d 71, 77 (7th Cir. 1975).

37. *Id.* at 78. The circuit court stated, "The statute was intended to assist local authorities in combatting criminal activities that extend beyond the borders of one state. This purpose would be severely undermined if the statute were read to require that each participant, in order to be found guilty, must be proved to know in fact that interstate facilities were used." *Id.*

38. 560 F.2d 779, 784 (7th Cir. 1977).

39. 507 F.2d 1288, 1291 (4th Cir. 1974).

40. *Id.* at 1295. The Fourth Circuit stated, "[B]oth the language and the structure of the opinion show that the Court in *Rewis* considered itself faced with the question of whether to broaden the coverage of the Travel Act beyond the ordinary meaning of its language. In such a situation, where a statute can be liberally interpreted to reach conduct outside its plain language, it is entirely appropriate to look, as did the Supreme Court, to the legislative history to determine whether such an extension would further congressional purposes."

> its powers (and that is here conceded), and that its statute reaches given activity, we think the inquiry must come to an end.[41]

The Fourth Circuit also rejected the Second Circuit's analysis of the statute's legislative history in *Archer*, explaining that

> when a statute on its face clearly covers certain activity, as in the instant case, we believe a court should accept the statute as written and avoid plunging into the murky waters of legislative history in an attempt to fathom whether Congress really intended to reach what the language of its statute does reach.[42]

Taking a position at odds with the Second and Seventh Circuits, the Fourth Circuit in *LeFaivre* made clear at the end of the opinion its holding:

> In an ordinary case falling within the clear ambit of the Travel Act, it is sufficient to invoke federal jurisdiction that there be some utilization of a facility in interstate commerce and it is not requisite that such use be substantial or integral to the operation of the illegal enterprise.[43]

B. THE SIXTH CIRCUIT

In *United States v. Eisner*, the Sixth Circuit sided with the Fourth Circuit in upholding a Travel Act conviction for operating a prostitution enterprise in which federal jurisdiction was based on the clearing of fifteen checks drawn on an Ohio bank that were used to pay for services at the Kentucky exotic dance club where the sex acts occurred. After analyzing the approach to the interstate commerce element in the Fourth and Seventh Circuits, the Sixth Circuit stated it "decline[d] to adopt the approach taken by the Seventh Circuit and, rather, apply the rule stated by the Fourth Circuit in *LeFaivre*."[44] The circuit court found that "[f]acilities in interstate commerce were used every time an out-of-state check was cashed or deposited and then subsequently traveled interstate,"

41. *Id*. at 1294.

42. *Id*. at 1295. Specifically rejecting Judge Friendly's position in *Archer* that the court should focus on the particular problem Congress sought to address in the statute to limit its scope, the Fourth Circuit stated that "it is not normally a proper judicial function to try to cabin in the plain language of a statute," and that "to do otherwise could lead to great uncertainty concerning exactly what activity is proscribed by a given statute. It could also transform every criminal appeal into a scouring of the legislative history of the relevant statutes to determine whether the legislature addressed itself to the precise activity engaged in by the particular defendant. There is already enough to litigate about without that." *Id*. at 1295–96.

43. *Id*. at 1299. Because the illegal activity involved gambling, the government was required to prove an "enterprise." If the case had involved bribery, then there would not be any need to show an enterprise and the only element required would be the subsequent act of bribery.

44. 533 F.2d 987, 992 (6th Cir. 1976).

which came within the plain language of the Travel Act to provide federal jurisdiction over the offense.[45]

While it would appear that any use of a facility of interstate commerce or the mails would suffice in the Sixth Circuit, a subsequent panel distinguished *Eisner* and overturned the Travel Act convictions on facts quite similar to the Seventh Circuit's decision in *McCormack*. In *United States v. O'Dell*, the defendants advertised massage parlors in Kentucky, at which there was also prostitution, in three Louisville area newspapers. Copies of all the papers were also delivered into Indiana, forming the basis for federal jurisdiction. The circuit court stated that "[i]f the nexus between a defendant's criminal activity and interstate travel or commerce becomes too *tenuous or indirect*, an application of the Act to that activity would be beyond the intent of Congress."[46] The panel distinguished *Eisner* on the ground that the defendants in that case "deliberately used interstate means, directly in furtherance of their criminal activities. Conversely, the facts in the present case show merely a use of interstate facilities not directly related to the criminal activities and with no proven purpose of having interstate effects."[47]

O'Dell is inconsistent with *Eisner* because, in that case, the Sixth Circuit did not focus on whether the facility of interstate commerce was "directly related to the criminal activities," and the defendants' purpose was not an issue in either *Eisner* or the Fourth Circuit's decision in *LeFaivre*, which was purportedly being followed.[48] The approach of *O'Dell* reflects then-Judge Stevens's analysis in *Altobella* that focused on whether the interstate movement or facility was "minimal and incidental" to the crime, language quite similar to *O'Dell*'s reference to the interstate shipment of the newspapers being "tenuous and indirect." The Sixth Circuit's adherence to *LeFaivre*, at a minimum, has been tempered by *O'Dell*, so that a defendant can argue that the government must provide some plausible link between the interstate movement or facility and the criminal activity beyond mere happenstance, although how much evidence of that nexus will be sufficient remains a matter of judicial choice between *O'Dell* and *Eisner*, both of which are good law in the circuit.

C. Subsequent Case Law

The Sixth Circuit's schizophrenic approach reflects the hesitancy courts feel about applying the Travel Act to *every* case involving interstate movement, or use of a facility of interstate commerce or the mails, and so a decision to prosecute a violation the statute should reflect some consideration of how the particular illegal activity related to interstate commerce. The Seventh Circuit's stricter approach did not prevent it from finding that *Archer* was largely inapplicable outside the context of what appeared to be entrapment by government agents in creating federal jurisdiction. In *United States v. Podolsky*, which was not a Travel Act prosecution, the circuit court stated,

45. *Id.*

46. 671 F.2d 191, 193 (6th Cir. 1982) (italics added).

47. *Id.* at 194.

48. *Cf.* Steven G. Shapiro, *Travel Act*, 24 Am. Crim. L. Rev. 735, 744 (1987) ("The Sixth Circuit, however, reexamined the issue in *United States v. O'Dell*, an opinion that adheres weakly to the broad interpretation [of *Eisner*].").

"The course of decisions casts doubt if not on the result in *Archer* then on the vitality of the independent principle announced there that forbids the 'manufacture' of federal jurisdiction in circumstances not constituting entrapment and not canceling any element of the crime such as criminal intent."[49]

Other circuits have referenced the narrower approach of the Second and Seventh Circuits but avoided overturning convictions by finding the interstate travel or use of a facility of interstate commerce was sufficiently related to support a federal prosecution, even if it arguably appears to be rather tangential to the unlawful activity. In *United States v. Wander*, the Third Circuit upheld a Travel Act conviction for extortion premised on two telephone calls placed out of the state. The circuit court stated that "where the use of interstate facilities or interstate travel has been deemed an essential part of the scheme, such use or travel cannot be considered 'minimal,' 'incidental,' or 'fortuitous.'"[50] In support of its conclusion, the Third Circuit referenced the defendants' intent regarding the use of the interstate facility as a further ground for upholding the conviction, stating that "[w]e hold that a knowing and intentional use of interstate facilities, even though of limited duration, to carry out an extortion scheme is within the reach of the Travel Act."[51] While the government need not prove any intent on the defendant's part to engage in the conduct triggering federal jurisdiction, that proof can support a finding that the commerce element has been established, even by an otherwise minimal use of a facility of interstate commerce or travel across state lines.

The Fifth Circuit has not taken a consistent approach to the Travel Act's commerce element in its opinions. In *United States v. Garrett*, the circuit court explained the balancing act the court would have to undertake when jurisdiction was based on a telephone call involving a government agent. The circuit court stated that

> [prior precedents] do not expressly adopt or reject the *Archer* 'stricter standard' for testing the sufficiency of an interstate nexus involving government agents. In instances when the interstate nexus is furnished by a telephone call to a government agent, these decisions do, however, require the court to scrutinize the government's apparent reasons for its actions and forbid the government agent's movement out-of-state for the sole purpose of manufacturing Travel Act jurisdiction.[52]

49. 798 F.2d 177, 181 (7th Cir. 1986). The defendant was convicted of arson and conspiracy, and one issue was whether agents impermissibly directed the defendant to engage in conduct that would create federal jurisdiction. In *United States v. Shields*, 999 F.2d 1090 (7th Cir. 1993), the Seventh Circuit reiterated its doubts about *Archer* in upholding Travel Act convictions in a case involving interstate travel of an FBI undercover agent from another state to Chicago as the basis for federal jurisdiction. While the conduct was by an agent, it was travel at the request of one of the defendants, who wanted the agent present at a court hearing in Chicago, and the government used an out-of-state agent to protect against possible exposure of its undercover operation. *Id*. at 1098.

50. 601 F.2d 1251, 1256 (3rd Cir. 1979). The Third Circuit cited to *Altobella*, *McCormack*, *Isaacs*, and *LeFaivre* as precedent for its holding that the use of an interstate facility was not "fortuitous," without noting the split in the approaches of the circuit courts.

51. *Id*. at 1257.

52. 716 F.2d 257, 267 (5th Cir. 1983).

In *United States v. Jones*, the same court held that "[a]s long as the interstate travel or use of the interstate facilities and the subsequent facilitating act make the unlawful activity easier, the jurisdictional requisites under § 1952 are complete."[53] In *United States v. Pecora*, the Fifth Circuit took a view more consistent with *LeFaivre*, stating that "we discern in the Travel Act no exception for casual and incidental occurrences or for 'happenstance' ones. Its language is straightforward and comprehensive."[54] In all three cases, the circuit court upheld the Travel Act convictions.

A district court judge in the Fifth Circuit, in *United States v. Blake*, examined the precedents and concluded that "despite the [circuit] court's apparent position that fortuitous or incidental interstate involvement is sufficient to invoke the Travel Act, the court went on to determine whether the call was in fact incidental or fortuitous and concluded it was not."[55] The district court dismissed the Travel Act charges premised on the out-of-state clearing of checks used to bribe bank employees to obtain loans on the ground that "the clearing of local checks given by a local resident to local residents which happened to have crossed state lines in the clearing process is too tenuous a connection with interstate commerce to support Travel Act jurisdiction."[56] The district court's approach is certainly reflective of the Seventh Circuit's view in *Isaacs*, and arguably consistent with the Fifth Circuit's precedents that do not give any clear guidance on exactly what considerations apply.

There are few recent cases on the commerce issue, with the vast majority of the opinions on the subject issued before 1990. A more recent opinion, the 1996 decision by the Eighth Circuit in *United States v. Baker*, upheld a Travel Act extortion conviction in which the victim made a single $300 withdrawal from an ATM machine that was linked to a national network as the facility in interstate commerce. The circuit court distinguished *Altobella*, finding that use of the ATM was not incidental to the scheme but integral to it, unlike the subsequent clearing of the check.[57] The Eighth Circuit did not explain how the use of an ATM is different from making an extortion payment by a check, which was the only way the victim could meet the extortion demand in *Altobella*—there were no ATMs in 1971 when that opinion was issued. It seems incongruous that the advance of technology alone changes the use of the banking system from one that was insufficient for federal jurisdiction in the 1970s, because the clearing of the check was "incidental" to the crime, but sufficient in the 1990s (and today) because the defendant wanted cash quickly.

The paucity of recent precedents may be the result of prosecutors proceeding more carefully in how they establish this element of the offense, perhaps reflecting a focus on cases in which the federal interest is stronger so that the connection between the underlying criminal conduct and the interstate travel or facility is less subject to a successful challenge as tenuous or incidental.

53. 642 F.2d 909, 913 (5th Cir. 1981).

54. 693 F.2d 421, 424 (5th Cir. 1982).

55. 684 F. Supp. 441, 444 (S.D. Miss. 1988).

56. *Id.*

57. 82 F.2d 273, 275 (8th Cir. 1996). The Court held, "[U]se of this interstate facility was not merely incidental to Baker's unlawful activity, like the subsequent use of the mails to clear a personal check in *Altobella*. Here, Baker wished to extort a cash payment from Crawford before releasing him. That could only be accomplished at 2:20 in the morning by accessing an interstate ATM facility. Thus, there was sufficient evidence for the jury to find that Baker caused Crawford to use this interstate facility to carry on Baker's unlawful activity." *Id.*

Regardless of the reason, the commerce element can present defense counsel with a potential ground for challenging Travel Act charges, both before trial and on appeal. To the extent the government identifies only a minimal or slight connection between the alleged criminal conduct and interstate commerce, a plausible argument can be raised under *Rewis* that the case falls outside the scope of the federal government's interest, even if the technical requirements for use of a facility of interstate commerce or travel across state lines are arguably present. There are precedents from both the Supreme Court and the lower courts that can support the argument, so it is one that can reasonably be raised in cases in which the proof of the commerce element appears to be less than robust.

III. STATE LAW BRIBERY

The Travel Act was the first statute that made proof of a state law violation an element of the federal offense. Subsequent criminal statutes that rely on state law violations as a means of proving the crime include Racketeer Influenced and Corrupt Organizations Act (RICO) and money laundering, both of which allow proof of a state crime as a means of showing the federal violation. Section 1952(a)(3) makes it a crime for a defendant to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," which is defined in § 1952(b)(i)(2) to include "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Congress did not define "extortion, bribery, or arson," which means the courts are left with the task of determining how those terms should be applied. The rationale of the Supreme Court's interpretation of the Hobbs Act's "extortion under color of official right" to include bribery (see Chapter 5) was based on the common law interpretation of extortion that included bribery as one form of the offense. By specifically including bribery along with extortion in the Travel Act, it is clear Congress intended any form of bribery to come within the prohibition. The issue the Supreme Court faced was deciding whether extortion and bribery were limited to what a state's law provided for the offense, including its labels, or whether newer iterations that expanded the scope of the crimes also came within the statutory prohibition.

A. United States v. Nardello *and* Perrin v. United States

In *United States v. Nardello*, the defendants were charged with violating the Travel Act for extortion based on a scheme to obtain money from victims who were put in a compromising sexual situation and then threatened with exposure if they did not make payments.[58] The "shakedown" scheme took place in Pennsylvania, and the defendants traveled from other states on three occasions as part of the plan. Under Pennsylvania law, "extortion" reflected the common law crime that was

58. 393 U.S. 286, 287 (1969).

limited to conduct by public officials. While the state had separate offenses labeled "blackmail" that would apply to the defendants' conduct, the district court held that the Travel Act was intended "to track closely the legal understanding under state law" of the offense, and therefore dismissed the indictment.[59] The Supreme Court rejected the defendants' argument that Congress intended to limit "extortion" to its common law meaning excluding conduct by private parties, finding that this analysis conflicted with the congressional intent to deal with the activities of organized crime on a national level to supplement state law enforcement efforts.[60]

The Court also rejected the argument that the label a state applied to an offense was controlling because it would tie the federal statute to the vagaries of state law, pointing out that the same conduct would constitute a Travel Act violation in Utah because its statute was labeled "extortion," but not in Pennsylvania because it was called "blackmail" there. It pointed out that "[w]e can discern no reason why Congress would wish to have § 1952 aid local law enforcement efforts in Utah but to deny that aid to Pennsylvania when both States have statutes covering the same offense."[61] Rather than limit the Travel Act to the peculiarities of state law, the Court held that "the acts for which [defendants] have been indicted fall within the *generic term* extortion as used in the Travel Act."[62]

The Court described the defendants' conduct as "a type of activity generally known as extortionate," so that extortion should be understood by reference to what acts the crime broadly prohibits without being limited by the particular limitations a state may recognize in its statutes. What constitutes "generic" extortion requires the lower courts to look at the state's law and compare it to a broader understanding of the crime, as discerned by the court, to determine whether the state's law comes within the broader generic term.

While *Nardello* makes it clear that the operative terms of the Travel Act are not tied exclusively to the statutes of the state in which the illegal activity occurred, the meaning of extortion, bribery, and arson is not confined to the traditional common law elements of those offenses. In *Perrin v. United States*, the Court stated that "the generic definition of bribery, rather than a narrow common-law definition, was intended by Congress."[63]

The issue in *Perrin* was whether the Travel Act incorporated commercial bribery, which was an offense under Louisiana law—where the crime occurred—but was unknown under the common

59. *Id*. at 288.

60. The Court stated:

> Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, "whoever" crosses state lines or uses interstate facilities, includes private persons as well as public officials.

Id. at 293.

61. *Id*. at 295. The Court cited to Seventh Circuit's decision in *United States v. Schwarz*, 398 F.2d 464 (7th Cir. 1968), which upheld a Travel Act conviction for conduct identical to that in *Nardello*, and had a pending petition for certiorari at the time the Court issued its opinion. If the Court accepted the defendants' argument, then in cases involving the same basic conduct, it would have to affirm a conviction in one while allowing dismissal of charges in another, an anomalous result that could open the law to serious question regarding its fairness.

62. *Id*. at 296 (italics added).

63. 444 U.S. 37, 49 (1979).

law, which limited bribery to conduct by public officials, much like the common law of extortion analyzed in *Nardello*. The Court surveyed the development of the bribery laws in the various states when Congress adopted the Travel Act, noting that fourteen states punished commercial bribery and another twenty-eight made it a crime to engage in corrupt payments involving specified types of private employees, such as telephone company workers and labor officials.[64] The Court concluded that "by the time the Travel Act was enacted in 1961, federal and state statutes had extended the term bribery well beyond its common-law meaning."[65] In looking at the legislative history, *Perrin* found that the congressional purpose to supplement the ability of the states to combat organized crime supported a broad reading of bribery, so that Congress "used 'bribery' to include payments to private individuals to influence their actions."[66]

The Court rejected the defendant's argument that the federalism concerns recited in *Rewis* supported a narrower approach to bribery to avoid altering "sensitive federal-state relationships." It described reliance on *Rewis* as "misplaced" because that case was concerned with the interstate commerce element of the Travel Act, but "so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement."[67] While the scope of the statute is subject to some limits on its reach in relation to the commerce element, the underlying criminal activities, such as bribery, are designed to incorporate state law into the federal offense, and the Court stated that it was unconcerned that federal prosecutors might somehow trample on the rights of the states in using their laws in a federal case.

Taken together, *Nardello* and *Perrin* show that the Court viewed the Travel Act as creating a federal crime which incorporates a broad range of state laws, but is not constrained by the peculiarities of a particular statute's title or terminology that arguably deviate from the traditional meaning of bribery, extortion, or robbery. Similarly, whether a state treats the offense as a misdemeanor or a felony is irrelevant to the analysis.[68]

The reference to "generic" crimes means the federal courts must determine the scope of the offense by reference to broad legal principles and consideration of how the law has developed in the states and by Congress in deciding whether the particular provision can be the basis for a Travel Act prosecution. This is arguably the creation of a federal common law of bribery, extortion, and arson—although there are few cases on the last offense—by empowering judges to determine the parameters of the crime with reference to the general consensus of what it should prohibit,

64. *Id*. at 44.

65. *Id*.

66. *Id*. at 46.

67. *Id*. at 50.

68. *See* United States v. Polizzi, 500 F.2d 856, 873 n.17 (9th Cir. 1974) ("Once a violation of a state criminal statute has been proved it is irrelevant whether that violation is classified as a felony or misdemeanor."); United States v. Karigiannis, 430 F.2d 148, 150 (7th Cir. 1970) (per Clark, J., sitting by designation) ("It is further claimed that the indictment is insufficient because it failed to distinguish the unlawful extortion as being either a felony or a misdemeanor. However, the gravamen of a charge under § 1952 is the violation of federal law and 'reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage.'") (quoting *United States v. Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969)).

without being limited to the terms or designation that a state legislature may have adopted in its law. A court would then determine whether the particular state statute falls into the generic offenses within the term "unlawful activity" in § 1952(a)(3), allowing for a Travel Act prosecution based on what the federal court decides the state law means. While it is an oft-repeated aphorism that there are no federal common law crimes,[69] the Court's adoption of the "generic" crimes of extortion and bribery comes perilously close to creating one as an element of a violation of the statute.

B. Bribery under State Law

The Travel Act requires the government to prove that the defendant's conduct violated either federal or state law that comes within the generic offenses of bribery, extortion, or arson, so proof that the defendant's conduct would constitute a violation of that law is an element of the federal offense. But the government need not prove beyond a reasonable doubt that the defendant actually violated the state statute referenced as the basis for the federal violation. In *United States v. Welch*, the Tenth Circuit noted that a violation of the cited state bribery law "is not an element of the alleged Travel Act violations in this case and need not have occurred to support the Government's § 1952 prosecution."[70] Thus, it is irrelevant that the state has not prosecuted individuals for violating the provision, so long as its statute comes within the generic definition of bribery. The reference to state law "is necessary only to identify the type of illegal activity involved,"[71] so that "the underlying state law merely serves a definitional purpose in characterizing the proscribed conduct."[72]

In *United States v. Campione*, the Seventh Circuit explained the state law analysis:

> But § 1952 refers to state law only to identify the defendant's unlawful activity, the federal crime to be proved in § 1952 is the use of interstate facilities in furtherance of the unlawful activity, not the violation of state law; therefore, § 1952 does not require that the state crime ever be completed. . . .

69. This aphorism is traced back to the Supreme Court's decision in *United States v. Hudson & Goodwin*, 11 U.S. (Cranch) 32 (1812), which rejected prosecution in federal court for a common law crime when there was no congressional statute prohibiting the conduct.

70. 327 F.3d 1081, 1092 (10th Cir. 2003); *see* United States v. Davis, 965 F.2d 804, 809 (10th Cir. 1992) ("The Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense."); United States v. Loucas, 629 F.2d 989, 991–92 (4th Cir. 1980) ("[A]ccomplishment of the State substantive offense is not a prerequisite to a § 1952 conviction.").

71. United States v. Gordon, 641 F.2d 1281, 1284 (9th Cir. 1981); *see* United States v. Pomponio, 511 F.2d 953, 957 (4th Cir. 1975) ("The 'unlawful activity' specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of 'unlawful activity' in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952.").

72. United States v. Loucas, 629 F.2d 989, 991 (4th Cir. 1980).

> Since § 1952 does not incorporate state law as part of the federal offense, violation of the Act does not require proof of a violation of state law.[73]

In *United States v. Jones*, the District of Columbia Circuit described the appropriate jury instruction that should be given on the state law issue:

> A proper instruction would make it clear to the jury that in order to convict, they must find that the defendant specifically intended to promote (et cetera) an activity that involves all of the elements of the relevant state offense. Such an instruction would inform the jury that the defendant must have performed or attempted to perform an act in furtherance of the business, with the intent that each element of the underlying state crime be completed, but that they need not conclude that each was in fact completed.[74]

By their nature, offenses such as bribery and extortion can easily cross state lines, and one issue in Travel Act prosecutions is *which* state's law should be referenced in the indictment and at trial. In *United States v. Woodward*, the defendant, a Massachusetts state legislator, was charged with violating that state's gratuity statute for accepting gifts from a lobbyist seeking to influence legislation before a committee he chaired. The gifts identified in the indictment were received in Florida, however, and he argued that the government failed to introduce evidence that his conduct violated Florida's bribery statute, so it failed to prove an element of the offense. The First Circuit rejected that position, holding that the conviction was proper "where the evidence demonstrates 'unlawful activity' in violation of the laws of the state where the effects of the fraudulent scheme are felt, in this case, the state whose citizens are defrauded of their legislator's honest services."[75] Similarly, in *United States v. Walsh*, an Abscam prosecution, the Travel Act conviction based on a violation of New Jersey's bribery law was proper even though the actual payment occurred in New York because the *quid pro quo* agreement was reached in New Jersey, and thus could be prosecuted in that state.[76]

The particular state law referenced in a Travel Act prosecution provides the structure of the government's prosecution because one element of the federal crime is showing that the defendant's conduct violated the state provision, even though the person need not be convicted of that crime as a prerequisite for the federal case. While the elements of that offense are not part of the proof of the generic crime of bribery, the limitations and defenses provided under the state law do apply in the federal prosecution. Therefore, it is important to analyze the scope of any state statute charged as part of the Travel Act offense to determine whether there are any shortcomings in the government's proof.

The Travel Act puts the federal courts in the odd position of interpreting state bribery laws to determine whether a defendant's conduct comes within its terms. In *United States v. Torny*, the Fifth Circuit found that Lousiana's bribery law did not apply to the alleged bribery of an Indian

73. 942 F.2d 429, 434 (7th Cir. 1991).
74. 909 F.2d 533, 539 (D.C. Cir. 1990).
75. 149 F.3d 46, 66 (1st Cir. 1998).
76. 700 F.2d 846, 855 (2nd Cir. 1983).

tribal official. The government's Travel Act charge cited Louisiana's commercial bribery statute, which the Supreme Court in *Perrin* found came within the scope of the generic crime of bribery. That statute, however, only covers conduct by private persons, while the Louisiana public official bribery statute was limited to officials of its state or local governments, not an Indian tribe that is not subject to federal or state oversight. According to the Fifth Circuit, the Indian tribal official did not come within the proscription of either provision, and therefore the illegal activity based on a state law violation was not shown so it reversed the Travel Act conviction.[77] In *United States v. Boots*, the First Circuit reached the opposite conclusion regarding the applicability of the Maine public official bribery statute to an Indian tribal official because that state's statute covered every "public servant" and not just those who are officials of the state or a municipality.[78]

In *United States v. Traitz*, the Third Circuit analyzed the Pennsylvania and New Jersey bribery statutes that made it a crime for a defendant "to offer, confer or agree to confer upon another any benefit in consideration for the violation of an official duty."[79] The defendants argued that the "in consideration for" element required proof of mutual assent between the payer and recipient of the bribe, which the district court failed to explain in its jury charge. The circuit court disagreed, finding that "the Pennsylvania and New Jersey bribery statutes do not require for their satisfaction, that an agreement be reached between the briber and the bribee but only require that the briber offer money or property to another with the subjective intent that s/he will induce some prohibited act in return."[80] The federal court reached this conclusion by analyzing both state court opinions on the provisions and the Model Penal Code, effectively delivering an opinion on the *mens rea* element of the state crimes in order to determine whether the federal conviction was proper. The Tenth Circuit followed *Traitz*'s analysis in *United States v. Davis* in analyzing similar language in the Wyoming bribery statute.[81]

The federal courts also recognize that defenses to a charge under a state bribery statute should also be available to defend against a Travel Act charge based on that provision. In *United States v. Bertman*, the Ninth Circuit held that "the defendant may assert any relevant substantive state law defense." Thus the defendant charged with a Travel Act violation premised on Hawaii's public

77. 837 F.2d 1281, 1283–84 (5th Cir. 1988). The circuit court explained:

> Burgess was, indisputably, a public official. But Louisiana limited its definition of "public" officials to Louisiana officials. It did not, however, expand the definition of "private" to include everybody that was not a Louisiana public official. In other words, under the plain meaning of the words "public" and "private," Burgess was a public official. The Louisiana legislature specifically excluded non-Louisiana public officials like Burgess from the Public Bribery Statute. That does not make Burgess a "private" fiduciary. All living things are divided into two basic groups: plants and animals. If the legislature defines the word "animal" as limited to mammals, we may not conclude that a fish is a plant. Burgess was not a "private" fiduciary within the plain meaning of Louisiana Commercial Bribery Statute.

Id.

78. 80 F.3d 580, 591 (1st Cir. 1996) ("Since a law enforcement officer employed by a municipality would undoubtedly qualify as a 'public servant,' see 17-A M.R.S.A. §§ 2(13) & 2(21), so too, we believe, would a tribe-appointed law enforcement officer.").

79. 871 F.2d 368, 385 (3rd Cir. 1989).

80. *Id.* at 386.

81. 965 F.2d 804, 810–11 (10th Cir. 1992).

official bribery provision could assert the coercion defense provided by that provision.[82] In *United States v. Kahn*, the Third Circuit had to interpret Pennsylvania's public official bribery statute to determine whether it allowed an extortion defense when there were no state court precedents specifically addressing the issue, only inconclusive dicta. Deciding the scope of the state statute, the circuit court found that "the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges, but would find the defense relevant only on the issues of intent and willfulness."[83] These decisions are similar to what the federal courts must do when deciding a civil case brought under diversity jurisdiction; but here the issue arises in a federal criminal prosecution.

While the defendant need not be convicted of a state law offense for a Travel Act violation, when federal prosecutors identify a state statute as the basis for the charge, the scope of that provision and any relevant defenses it provides are incorporated into the federal prosecution. *Perrin* laid to rest any federalism claim regarding the exercise of federal authority in an area traditionally policed by the states because the Travel Act expressly relies on proof of conduct that would violate state law. By incorporating state law into the federal statute, the Travel Act requires federal courts to analyze those laws and recognize any limitations on prosecutions, such as defenses, that those provisions may contain.

C. Unlawful Gratuities

One issue that may cause problems for prosecutors is whether a gratuities offense comes within the generic offense of bribery. As discussed in Chapter 2, 18 U.S.C. § 201, which covers federal officials, proscribes both bribery and unlawful gratuities. A key difference between the two offenses is that the bribery offense requires proof of a corrupt intent, but not for the gratuities crime. The Supreme Court, in *United States v. Sun-Diamond Growers*, held that the language in § 201(c) requiring proof that a gratuity was "for or because of" an official act meant that the government must show a link between a particular decision of the official and the gift given.[84] This brings the crime much closer to the typical bribery case in which there is a *quid pro quo* arrangement that relates to an exercise of governmental authority.

In a pre–*Sun-Diamond Growers* decision upholding a Travel Act conviction, the Second Circuit held that "the policy, evolution, and legislative history of § 201 indicate that Congress intended a violation of any portion of that section, which it entitled 'Bribery [of various persons]' and viewed as a compilation of bribery offenses, to constitute a 'bribery' offense within the meaning of § 1952."[85] Therefore, at least for Travel Act prosecutions that rely on a violation of § 201(c)'s

82. 686 F.2d 772, 774 (9th Cir. 1982).

83. 472 F.2d 272, 278 (3rd Cir. 1973).

84. 526 U.S. 398, 414 (1999) ("We hold that, in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given.").

85. United States v. Biaggi, 853 F.2d 89, 102 (2nd Cir. 1988).

unlawful gratuity prohibition as the underlying criminal activity, the crime appears to be analogous to a bribe and comes within the generic definition of that offense.[86]

In *United States v. Sawyer*, the First Circuit found that the Massachusetts unlawful gratuities statute constituted bribery for purposes of a Travel Act prosecution because, like § 201(c), it proscribed gifts given "for or because of" an official act. Unlike *Sun-Diamond Growers*, decided after *Sawyer*, the First Circuit found that the Massachusetts statute "may be established without proof that a specific official act was the motivation for the gratuity."[87]

The district court in Massachusetts reached a different conclusion in *United States v. Ferber*, finding that the state's gratuity statute did not reach a gift given to a financial adviser working with government agencies on the issuance of government bonds. While the gratuity statute's plain language appeared to cover this conduct, the district court found that no similar cases had been prosecuted by state prosecutors, leading it to find that "[t]he fact that the Commonwealth of Massachusetts has not charged anyone situated as was Ferber with a criminal gratuity violation suggests that the Commonwealth, at least at this point in time, does not view such conduct as a prosecutorial priority."[88] The district judge also relied on the need to limit the scope of federal involvement in state concerns, explaining that

> Massachusetts appears to have made a policy decision not to criminally prosecute section three violators in cases such as the one at bar. In addition, because Congress enacted the Travel Act to aid states in the enforcement of their laws, *Rewis*, 401 U.S. at 811, it would be contrary to that purpose for the federal government to attempt to aid Massachusetts in the enforcement of a law which Massachusetts has chosen not to enforce. Applying the Travel Act to the conduct in this case would result in the type of expansive reading of the Travel Act that would upset the delicate balance of power between the state and federal governments.[89]

Ferber's analysis is incorrect for two reasons. First, the Travel Act is not premised on what crimes a state has decided to prosecute, but on whether the conduct violates one of its laws that comes within the generic definition of bribery. Whether or not the Massachusetts prosecutorial

86. In *United States v. Espy*, which involved the prosecution of the former secretary of agriculture who received the gifts that were at issue in the Supreme Court's *Sun-Diamond Growers* decision, the district court held that "when used in the context of preventing acts intended to influence a public official's conduct for preferential treatment, the gratuity provision is consistent with the purpose of the bribery component under the Travel Act." 23 F. Supp. 2d 1, 8 (D. D.C. 1998). The defendant was acquitted at trial.

87. 85 F.3d 713, 737 (1st Cir. 1996). The circuit court explained:

> [T]he Massachusetts gratuity statute does not require proof that the offender gave the item of 'substantial value' because of a specifically identified official act. Of course, the identification of certain official acts in relation to the gratuity might make a gratuity offense easier to prove, and we suspect that most cases will include such proof although it is unnecessary.

Id. at 738–39.

88. 966 F. Supp. 90, 105 (D. Mass. 1997).

89. *Id*. at 106. The district court further admonished that "it is worth noting that federal prosecutors should avoid relying on obscure or strained interpretations of state law in order to commence a federal prosecution. It is state, not federal, prosecutors who are charged with deciding the manner in which state criminal laws are to be enforced."

authorities have pursued similar cases—a factual matter that may not be reflected in reported decisions—is irrelevant to determining whether the defendant's conduct falls within the terms of the state bribery provision.

Second, reference to federalism concerns is misplaced once the district court determined that the state statute reached conduct that came within the generic definition of bribery. While the district court cited to *Rewis* in support of the need to interpret the Travel Act narrowly to avoid federalism concerns, it completely ignored the Supreme Court's statement in *Perrin* that "[r]eliance on the federalism principles articulated in *Rewis* to dictate a narrow interpretation of 'bribery' is misplaced" when determining whether a state provision proscribes bribery.[90] Federalism is properly an issue regarding whether the conduct established the requisite nexus to the federal interest in protecting interstate commerce, but it is irrelevant to whether the statute comes within the definition of bribery. As *Perrin* points out, the Travel Act "reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement." Requiring reliance on state prosecutors in the first instance, before a federal prosecution may commence, is exactly what the Travel Act was enacted to avoid, yet the district court in *Ferber* relied on this rationale to support its decision, completely contrary to the Supreme Court's position on the issue.

IV. INTENT

A. Specific Intent

The Travel Act requires the government to prove the defendant acted with the "intent to. . . otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." The statute requires proof of a specific intent to engage in the bribery, extortion, or arson, even if the underlying offense does not require proof at that intent level.

B. Intent and Interstate Travel or Use of a Facility of Interstate Commerce

All circuits, except one, hold that the intent requirement does not apply to the interstate travel or use of a facility in interstate commerce.[91] In *United States v. LeFaivre*, the Fourth Circuit

90. 444 U.S. at 50.

91. *See* United States v. Clark, 646 F.2d 1259, 1268 n.16 (8th Cir. 1981) ("The Travel Act does not require specific intent to cause interstate travel; the intent to carry on the unlawful activity is sufficient."); United States v. Herrera, 584 F.2d 1137, 1150 (2nd Cir. 1978) ("Substantive cases brought under § 1952 have been uniform in their holdings that it is unnecessary to prove a defendant had actual knowledge of the jurisdictional element, and that he actually agreed and intended to use interstate facilities to commit a crime."); United States v. Perrin, 580 F.2d 730, 737 (5th Cir. 1978), *aff'd*, 444 U.S. 37 (1979); United States v. McPartlin, 595 F.2d 1321, 1361 (7th Cir. 1979); United States v. Sellaro, 514 F.2d

explained the rationale for not requiring proof of any intent regarding the interstate commerce element:

> Congress's omission of any knowledge requirement with respect to the use of facilities in interstate commerce makes good sense. The use of facilities in interstate commerce is, as we noted above in this opinion, nothing more than the jurisdictional peg on which Congress based federal jurisdiction over the unlawful activities enumerated in the Travel Act. The use of interstate facilities adds nothing whatsoever to the "criminality" of the person who is already engaged in one of the named unlawful activities. Thus, there is no need to require any mental element with respect to use of interstate facilities, since any mental element that Congress did write in would still not be any part of the *mens rea* of the criminal activity itself.[92]

The Sixth Circuit is the lone outlier on the issue, holding in *United States v. Prince* that "the Travel Act only reaches those who engage in interstate activities with intent to perform other illegal acts. Thus there is a requirement of a separate intent related to the use of interstate facilities which is different from the intent required to commit the underlying State offense."[93] In *United States v. Gallo*, the Sixth Circuit called into question whether its earlier holding in *Prince* remained good law in light of a later Supreme Court decision finding that there was no intent element for a different federal statute with a reach similar to the Travel Act, but it concluded that it need not decide the question.[94]

In *United States v. Winters*, the Sixth Circuit again noted its reasoning in *Prince* was "questionable," and it would not apply that analysis to a companion provision to the Travel Act with similar language for the interstate commerce element. The circuit court stated:

> Notwithstanding the historical connection between these two statutes—the Murder for Hire Act was originally a subset of the Travel Act—we decline to extend our interpretation of the Travel Act to this context. All other Circuits that have considered the question have determined that

114, 120–21 (8th Cir. 1973); United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970); United States v. Villano, 529 F.2d 1046, 1054 (10th Cir. 1976).

92. 507 F.2d 1288, 1297 n.14 (4th Cir. 1973).

93. 529 F.2d 1108, 1112 (6th Cir. 1976).

94. 763 F.2d 1504, 1521 n.26 (6th Cir. 1985). The circuit court stated:

> This court is alone in requiring knowledge of the interstate nexus as a necessary element in the proof of a Travel Act violation. . . . In *United States v. Yermian*, 468 U.S. 63 (1984), the Supreme Court indicated that knowledge is not necessary to confer jurisdiction under the federal false statement statute, 18 U.S.C. § 1001. This holding may suggest that the basis of the knowledge requirement under the Travel Act may no longer be valid. We need not reach this question, however, because we find sufficient evidence from which a jury reasonably could have found that Lonardo was aware of the interstate travel involved in the conspiracy.

Id.

> the Travel Act's interstate requirement is purely jurisdictional and carries with it no scienter requirement.[95]

The circuit court's refusal to apply its interpretation of the intent element for the Travel Act to a companion provision certainly indicates that it would gladly revisit the issue if it were presented again, but it is unlikely federal prosecutors in the Sixth Circuit will run the risk of having charges dismissed or a judgment of acquittal entered just to test the appellate court's reasoning. Thus, at least in the states comprising the Sixth Circuit, the government must prove a defendant's intent to travel interstate or use a facility of interstate commerce for a successful prosecution for violating the Travel Act.

C. Mixed Motives

The Second Circuit's decision in *United States v. Walsh* can be read as implying that the government must show the defendant's purpose in traveling across a state line or using a facility of interstate commerce to engage in the proscribed unlawful activity. *Walsh* was an Abscam case, and the defendant argued that travel between New Jersey and New York City, where the bribe was paid, was for unrelated business reasons. The Second Circuit stated:

> [T]he unlawful activity need not be the sole purpose of interstate travel for the Travel Act to be violated. Where travel is motivated by two or more purposes, some of which lie outside the ambit of the Travel Act, a conviction is still possible if the requisite illegal purpose is also present.[96]

The circuit court's reference to the "purpose" of the defendant's travel was not to require that there should be an intent to cross a state line as an element of the Travel Act offense, but that the intent to promote the unlawful activity should be shown *in relation to* the interstate commerce element.

Walsh should not be read to say that the defendant must intend to engage in interstate travel or use of a facility of interstate commerce. Instead, the Second Circuit found that engaging in the unlawful activity must be one purpose for the defendant's actions, so that the interstate travel or use of a facility of interstate commerce bears some relation to the criminal act. In that sense, *Walsh*'s

95. 33 F.3d 720, 722 (6th Cir. 1994). The federal Murder for Hire Act, 18 U.S.C. § 1958, provides:

> [w]hoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States. . . .

The principle difference between the Travel Act and Murder for Hire Act is that the latter includes causing another to travel in interstate commerce, while this conduct only implicitly applies to the Travel Act because it has been charged in cases beyond this in which the defendant merely traveled in interstate commerce or used one of its facilities or the mails.

96. 700 F.2d 846, 854 (2nd Cir. 1983).

language is better understood to be directed more at the interstate nexus requirement for the commerce element of the Travel Act and not, despite the circuit court language implying a *mens rea* for that element of the crime.

V. SUBSEQUENT ACT

Section 1952(a) requires the government to prove that once the interstate travel or use of a facility of interstate commerce occurs that the defendant "thereafter performs or attempts to perform" the bribery, extortion, or arson. Thus, the government must show the defendant engaged in conduct that constitutes the crime or an attempt to commit it, *after* the acts that establish the interstate commerce element of the offense. In *United States v. Hayes*, the Fourth Circuit vacated the conviction and dismissed a Travel Act indictment because the government failed to allege the subsequent act in the charges, finding that the indictment "does not state on its face a violation of § 1952(a), for it omits a necessary element of the offense charged."[97] However, the government need not specifically identify the particular subsequent act in its indictment.[98]

The focus on timing is crucial for a successful prosecution. In *United States v. Botticello*, the Second Circuit overturned a conviction because the interstate travel occurred *after* the defendant threatened the victim to extort money from him. The circuit court rejected the government's argument that there was a "continuing act" in which the defendant's plan to extort the victim included subsequent travel across a state line, holding that "Botticello's return to New York did nothing to further his scheme of extortion; no overt act was performed in New York to make the scheme's success more likely. The threat made in New Jersey bore no relationship at all to Botticello's return to New York."[99]

While the statute provides that the defendant must perform, or attempt to perform, the unlawful activity, courts have found that the entire offense need not occur after the travel or use of an interstate facility. Instead, courts conclude that an overt act which is a step in the commission of the offense can be sufficient for a Travel Act violation. For example, the First Circuit, in *United States v. Arruda*, upheld the defendant's conviction when an employee of a company traveled from New York to Massachusetts to deliver $5,000 to a government official as a kickback for the award of a contract to the company. The circuit court stated that "it seems obvious that Ringland's mere acceptance of the money was a sufficient overt act following the travel; acceptance is an act taken in furtherance of the distribution of the proceeds of an unlawful bribery scheme."[100]

97. 775 F.2d 1279, 1282 (4th Cir. 1985).

98. United States v. Muskovsky, 863 F.2d 1319, 1327 (7th Cir. 1988) ("The indictments here did set forth the Travel Act offense in the statutory language. Thus, the failure to specify the 'thereafter' acts was not error."); United States v. Williams, 798 F.2d 1024, 1036 (7th Cir. 1986) ("Williams and Russell argue that since the word 'thereafter' was not included in the count, the trial judge should have dismissed it. This argument is clearly meritless, since the count did allege that subsequent to the interstate travel, the two committed an unlawful activity. We can discern nothing in the cases that requires the use of the word 'thereafter.'").

99. 422 F.2d 832, 834 (2nd Cir. 1970).

100. 715 F.2d 571, 682 (1st Cir. 1983).

In *United States v. Davis*, the Tenth Circuit rejected the defendants' argument that their Travel Act convictions were impermissible because the interstate travel did not end in the commission of a crime. The circuit court held:

> The legality of the immediate object of interstate travel or use of interstate facilities is irrelevant to the determination of coverage by the Travel Act where the interstate activities are part of a larger plan to engage in a prohibited activity. We have previously held that conduct at the end of interstate travel need not be illegal to support a Travel Act violation.[101]

The interstate travel or use of a facility of interstate commerce does not have to be crucial to the commission of the illegal activity, but only needs to be sufficiently related to the object crime so that it facilitates its commission. In *United States v. Jones*, the Fifth Circuit stated:

> [T]he facilitating act in the other state need not be unlawful itself. As long as the interstate travel or use of the interstate facilities and subsequent facilitating act make the unlawful activity easier, the jurisdictional requisites under § 1952 are complete. . . . Thus, we do not accept the appellant's contention that the subsequent facilitating conduct must be illegal, much less illegal in the state of destination.[102]

In *United States v. Griffin*, the Eleventh Circuit summarized the analysis quite colorfully in a case involving the drugging of horses as part of a gambling operation, stating:

> Griffin argues that no act illegal under Pennsylvania law was committed subsequent to the travel because the scheme was abandoned 'in advance' of any horse actually being drugged, implying that leading a horse to drugged water is permissible so long as one does not make him drink.[103]

The circuit court found that efforts were undertaken to drug the horses after the travel to Pennsylvania, and therefore upheld the conviction.

The subsequent acts need not be undertaken immediately after the interstate travel or use of a facility of interstate commerce, and even later acts that attempt to conceal the crime can be sufficient to establish this element of the offense. In *United States v. Coon*, the Eighth Circuit found that an attempt to hide bribery payments, including a discussion of how to report them for tax purposes, during a conversation between a cooperating witness and a defendant constituted an overt act in performance of the bribery. The circuit court held, "Efforts to hide involvement in a bribery scheme constitute 'thereafter acts' under the statute."[104]

The interstate travel or use of a facility of interstate commerce is distinct from the subsequent act, so the government's proof of these two elements must involve different conduct. For example, it would be improper for the government to allege that the clearing of a check by crossing state

101. 780 F.2d 838, 843 (10th Cir. 1985).
102. 642 F.2d 909, 913 (5th Cir.1981).
103. 699 F.2d 1102, 1106 (11th Cir. 1983).
104. 187 F.3d 888, 896 (8th Cir. 1999).

lines that established the interstate commerce element also constituted the subsequent overt act in performance of the illegal activity. In *United States v. Zolicoffer*, the Third Circuit overturned a defendant's Travel Act conviction because the government failed to prove the subsequent act. The defendant was owed $37,000 from the sale of illegal drugs, and traveled from Florida to Pennsylvania by airplane to collect the money from the purchaser, who was cooperating with the government at that point; the defendant was arrested shortly after getting off the plane. The circuit court rejected the government's argument that the defendant's movements after the flight arrived constituted sufficient acts in performance of the crime:

> [T]he government fails to distinguish between the interstate travel and the act which must be undertaken thereafter, both of which are essential and separate elements of the offense. Every traveler arriving at the airport must deplane and enter the terminal; thus, such actions are more appropriately considered part of the travel than acts taken "thereafter." In order to prove that after arriving in Pennsylvania Zolicoffer acted or attempted to act to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," 18 U.S.C. § 1952(a)(3), as the indictment charged, the government cannot rely on those acts that are inseparable from the interstate travel itself.[105]

The Third Circuit noted that it is not impossible to find that acts in the airport could constitute sufficient evidence of acts subsequent to the interstate travel to establish this element of a Travel Act offense, but that it

> need not decide on this record whether proof that Zolicoffer, while still in the airport, was purposefully en route to an appointed site where he was expecting to receive the fruits of his unlawful activity would satisfy the requirement of the Travel Act that there be a separate act after the interstate travel.[106]

In *United States v. Johns*, the district court rejected the defendant's argument relying on *Zolicoffer* that the deposit of checks into bank accounts he controlled, which were received as part of a commercial bribery scheme, was indistinguishable from the mailing of the checks that were the basis for federal jurisdiction under the Travel Act. The district judge found that the process of depositing the check was sufficiently distinct from its delivery:

> While the acts of transmitting and receiving a check by interstate mail may appropriately be considered an integral part of the travel, the act of depositing that check or distributing its proceeds involves more and so may not. Before a check can be deposited, it must be endorsed, a deposit slip must be filled out, and the check must be taken to the place of deposit. If the proceeds of a check are to be obtained immediately, it still must be endorsed and presented for cashing.[107]

105. 869 F.2d 771, 775 (3rd Cir. 1989).

106. *Id.*

107. 755 F. Supp. 130, 134 (E.D. Pa. 1991). The district court further stated that "[i]t strains logic to assume that Congress would have intended to shield individuals such as Johns from prosecution under the Act simply because they happened to own or control the accounts into which unlawful proceeds they received were deposited." *Id.*

| 8 |

FALSE STATEMENTS (18 U.S.C.A. § 1001)

I. HISTORY OF THE STATUTE

Section 1001 is a broad false statement provision that is used to prosecute defendants in a wide variety of situations.[1] In the public corruption cases, the statute has been used primarily in two areas: filings with the Federal Election Commission (FEC) in relation to campaign finance reporting, and false statements made by government officials on required reports submitted to their office or agency. Section 1001 provides in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

1. There are a number of statutes that prohibit false statements made to particular departments or agencies, or in connection with certain programs, such as 18 U.S.C. § 1010 (HUD and FHA loans), § 1014 (financial institution), § 1015 (naturalization and citizenship applications), § 1026 (farm indebtedness), § 1919 (unemployment compensation), § 1920 (federal employee compensation), §2386 (registration of certain organizations), along with provisions outside Title 18, such as 16 U.S.C. § 831t (Tennessee Valley Authority) and 29 U.S.C. § 666 (OSHA).

A violation of § 1001 requires the government to prove the following elements:

- A statement or concealment of information;
- Falsity of the statement or a duty to disclose the concealed information;
- Materiality;
- Knowingly and willfully; and
- The statement or concealment comes within the jurisdiction of the executive, legislative, or judicial branch.

The provision was originally part of a false claims statute adopted during the Civil War, and in 1918, the statute was broadened to cover false or fraudulent statements or misrepresentations made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof. . . ."[2] In 1934, in response to the New Deal expansion of the federal government, Congress broadened the prohibition to cover false statements made to any "department or agency of the United States," moving the statute away from its roots as a means to punish theft and false claims.[3] Congress split off the false claims

2. Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015 (1918). The Supreme Court summarized the development of the statute in *United States v. Yermian*:

> The earliest predecessor of the 1918 Act limited its criminal sanctions to false claims made by military personnel and presented to "any person or officer in the civil or military service of the United States." Act of Mar. 2, 1863, 12 Stat. 696. The Act was extended in 1873 to cover "every person"—not merely military personnel—who presented a false claim to an officer or agent of the United States. Act of Dec. 1, 1873, approved June 22, 1874. In 1908 and 1909, the penalties of the Act were changed, and the statutory provision was redesignated as § 35. Act of May 30, 1908, 35 Stat. 555; Act of Mar. 4, 1909, 35 Stat. 1088. The 1918 Act revised § 35 and added the false-statements provision relevant here. 40 Stat. 1015.

468 U.S. 63, 70 n.8 (1984). *See generally* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 Hastings L.J. 157 (2001).

3. Act of June 18, 1934, ch. 587, 48 Stat. 996 (1934). In *Yermian*, the Supreme Court explained the development of the statute after the 1918 congressional amendment:

> Interpreting that provision in *United States v. Cohn*, 270 U.S. 339 (1926), this Court held that only false statements made with intent to cause "pecuniary or property loss" to the Federal Government were prohibited. The Court rejected the Government's argument that the terms "with the intent of. . . defrauding" the Federal Government "should be construed as being used not merely in its primary sense of cheating the Government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." The Court reasoned that if Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used the broad language then employed in § 37 of the Penal Code, which "by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose,' with no words of limitation whatsoever."
>
> Concerned that the 1918 Act, as thus narrowly construed, was insufficient to protect the authorized functions of federal agencies from a variety of deceptive practices, Congress undertook to amend the federal false-statements statute in 1934. The 1934 provision finally enacted, however, rejected the language suggested in Cohn, and evidenced a conscious choice not to limit the prohibition to false statements made with specific intent to deceive the Federal Government.
>
> The first attempt to amend the false-statements statute was unsuccessful. After debates in both Houses, Congress passed H.R.8046. That bill provided in pertinent part:
>
> "[E]very person who with the intent to defraud the United States knowingly or willfully makes. . . any false or fraudulent. . . statement,. . . concerning or pertaining to any matter within the jurisdiction of any department,

portion of the statute in 1948 into a separate provision, 18 U.S.C. § 287, and so § 1001 focuses exclusively on material false statements and concealments without requiring proof of any claim to government funds or property.

Congress amended § 1001 in 1996 to apply the provision to any false statement made within the jurisdiction of the executive, legislative, or judicial branch.[4] The amendment overturned the Supreme Court's decision in *Hubbard v. United States*,[5] which interpreted the statute to exclude statements made to federal courts because it would chill advocacy on behalf of clients. The statute now explicitly covers false statements to all three branches, with two important exceptions: first, the submission to the legislative branch must be for administrative purposes or in connection with a congressional investigation;[6] and second, the prohibition "does not apply to a party to a judicial proceeding or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding."[7]

II. FALSE STATEMENT OR CONCEALMENT

A. False Statement

Most § 1001 cases involve an affirmative false statement, rather than concealment of information. There is no requirement that the statement be in writing,[8] and both voluntary and compelled statements can be the basis of a prosecution. The Supreme Court has made it clear that the literal

> establishment, administration, agency, office, board, or commission of the United States,. . . shall be punished by. . . fine. . . or by imprisonment. . ., or by both. . . ."
>
> President Roosevelt, however, vetoed the bill because it prohibited only those offenses already covered by the 1918 Act, while reducing the penalties. This was hardly the measure needed to increase the protection of federal agencies from the variety of deceptive practices plaguing the New Deal administration.
>
> To remedy the President's concerns, Congress quickly passed a second bill that broadened the scope of the federal false-statements statute by omitting the specific-intent language of the prior bill. The 1934 provision finally enacted into law provided in pertinent part:
>
> "[W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make. . . any false or fraudulent statements or representations,. . . in any matter within the jurisdiction of any department or agency of the United States. . . shall be fined. . . ."

468 U.S. at 71–73 (citations and footnotes omitted).

4. Pub. L. No. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147 (1996).

5. 514 U.S. 695 (1995). The statute had applied to false statements made to any "department or agency of the United States," and the Court held that "a federal court is neither a "department" nor an "agency" within the meaning of § 1001." *Id*. at 715

6. 18 U.S.C. § 1001(c) provides that the statute only applies to:

> (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
> (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

7. 18 U.S.C. § 1001(b).

8. *See* United States v. Daily, 921 F.2d 994, 1000 (10th Cir. 1990) ("[W]e have not distinguished between false oral statements and false written statements.").

terms of the statute apply, so the prosecution need not show any perversion of a governmental function was intended or likely from the false statement.[9]

Section 1001 has been used to prosecute defendants for a number of different types of false statements, including those made to regulatory agencies, law enforcement agents, and on loan and aid applications. At one time, a defense to a § 1001 charge, known as the "exculpatory no" doctrine, was fashioned by the lower courts so that a false declaration of a person in response to law enforcement questioning which was limited to just a simple denial of involvement in criminal activity did not constitute a "false" statement. There were very few decisions actually applying the doctrine, but it allowed courts to impose a limiting construction on a broad statute. The rationale of the defense was based in part on the Fifth Amendment privilege against self-incrimination, that a person should not be compelled to respond to an agent's question, so a limited denial of involvement in criminal conduct did not otherwise pervert a government function. The Supreme Court rejected the "exculpatory no" defense in *Brogan v. United States*,[10] stating that "[w]hether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie."[11]

The government must establish the falsity of the statement, which may turn on technical legal principles to determine whether it is literally true, which would preclude a successful prosecution. In *United States v. Hixon*, the Sixth Circuit reversed the conviction of a government employee for stating that he was not "self-employed" while he was receiving disability payments. The defendant operated a business during the period of his disability, which he did not disclose on required forms to continue his support payments. The § 1001 charge alleged that his denial of self-employment was a false statement, but the defense introduced evidence that he operated his company as a corporation, so that he was legally an employee and not technically "self-employed," even though the form also asked whether he was "employed" at the time. The circuit court explained, "The indictment here simply failed to charge the making of false answers to the questions which were falsely answered but instead charged the making of false answers to the questions where the answers were not false."[12]

United States v. Gahagan showed the effect of focusing on the literal truth of a statement. The Sixth Circuit overturned a conviction for failing to disclose ownership of an automobile because the defendant had transferred title to another person before completing the form, rejecting the government's argument that it was a sham transaction that should be ignored.[13] In *United States v. Vesaas*, the Eighth Circuit overturned the defendant's conviction for falsely denying in a deposition that he owned stock with his mother "in joint tenancy." While he did own the stock, his

9. In *Brogan v. United States*, 522 U.S. 398 (1998), the Supreme Court rejected the defendant's contention "that only those falsehoods that pervert governmental functions are covered by § 1001." *Id.* at 402.

10. 522 U.S. 398 (1998).

11. *Id.* at 404.

12. 987 F.2d 1261, 1266 (6th Cir. 1993).

13. 881 F.3d 1380, 1383 (6th Cir. 1989) ("[U]nder Colorado law, all of the procedures necessary for the transfer of ownership from Gahagan to Tongish were satisfied before the financial statement was completed, making Tongish, and not Gahagan, the owner of the Jaguar at that time. Therefore, Gahagan could not be guilty of either concealing his ownership rights in the Jaguar or of falsely reporting that his assets did not include the automobile.").

mother had died, and under the law it "cannot constitute a false statement since it is legally impossible to be a joint tenant with a decedent," thus his statement was not false.[14]

In *United States v. Good*, the Fourth Circuit affirmed the dismissal of a § 1001 charge alleging that the defendant falsely answered "No" on an application for an airport security badge in response to a question whether she had ever been convicted of "Burglary, Theft, Armed robbery, Possession or Distribution of Stolen Property" or "Dishonesty, Fraud, or Misrepresentation" even though she had been convicted of embezzlement. While the circuit court acknowledged that embezzlement is a type of theft which certainly involved dishonesty, the question focused on the specifically identified offenses, so that "[e]mbezzlement was not a crime listed on the application. The defendant has never been convicted of any of the crimes listed on the application. Therefore, her answers were literally true."[15]

B. Concealment

Concealment can trigger a § 1001 prosecution if there is an obligation to disclose the information, which does not require the government to show any affirmative misstatement.[16] The statute reaches any act that "falsifies, conceals, or covers up by any trick, scheme, or device a material fact." In *United States v. Curran*, the Third Circuit stated that "[i]n order to convict under a section 1001 concealment charge, the government must show that a defendant had a legal duty to disclose information at the time he was alleged to have concealed them."[17]

Concealment involves a failure to disclose, and one need not *actively* mislead the government by providing any false information. In *United States v. Moore*, the defendant failed to disclose that her mother was a member of the city council when the nonprofit organization she directed received federal funds to support its public housing program. The defendant argued that she did not

14. 586 F.2d 101, 103 (8th Cir. 1978).

15. 326 F.3d 589, 592 (4th Cir. 2003); *see also* United States v. Baer, 274 F. Supp. 2d 778, 782 (E.D. Va. 2003) ("Defendant's response to question 20 of the SIDA form was literally true, thus, the indictment charging a violation of section 1001 must be dismissed. Like the defendant in *Good*, Defendant was convicted of a crime which is not specifically enumerated as a listed offense on the SIDA application.").

16. *See* United States v. Safavian, 528 F.3d 957, 964 (D.C. Cir. 2008) ("Concealment cases in this circuit and others have found a duty to disclose material facts on the basis of specific requirements for disclosure of specific information."); United States v. Stewart, 433 F.3d 273, 318–19 (2nd Cir. 2006) ("[I]t was plausible for the jury to conclude that the SEC's questioning had triggered Bacanovic's duty to disclose and that ample evidence existed that his concealment was material to the investigation."); United States v. Gibson, 409 F.3d 325, 332 (6th Cir. 2005) ("An essential element of a violation of 18 U.S.C. § 1001 is that the defendants had a duty to disclose the particular information allegedly concealed from the government."); United States v. Blackley, 167 F.3d 543, 550 (D.C. Cir. 1999) ("It is also true that some circuits have held that the government must generally prove that a defendant has a legal duty to disclose before it can convict for concealment under § 1001."); United States v. Anzalone, 766 F.2d 676, 683 (1st Cir. 1985) ("[I]n prosecuting a § 1001 concealment violation, it is incumbent upon the government to prove that the defendant had a *legal duty to disclose* the material facts at the time he was alleged to have concealed them." (emphasis in original)); United States v. Irwin, 654 F.2d 671, 678–79 (10th Cir. 1981) ("We believe that it was incumbent on the Government to prove that the defendant had the duty to disclose the material facts at the time he was alleged to have concealed them. And, of course, there can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated.").

17. 20 F.3d 560, 566 (3rd Cir. 1994).

affirmatively misstate her relationship with her mother and that she did not read the form contract that required disclosure of conflicts of interest, so she did not know about the disclosure obligation. The Seventh Circuit rejected that argument and found that her failure to disclose the requested information violated § 1001:

> [C]onflicts of interest must be disclosed to the City, and one type of conflict arises when an elected official or the immediate family of an elected official benefits financially from the CDBG grant. The evidence before the jury easily permitted it to conclude that Moore, who signed this contract to obtain HUD block grant funds, knew what the standards were and deliberately avoided disclosing the conflict to the City, even when she was asked directly about it. Indeed, even if Moore did not—as she argues—read the contract and thus was ignorant for a time of her legal obligation, the continued inquiries from City officials about the relationships . . . and the concerns expressed by City officials about conflicts of interest repeatedly triggered a duty to disclose. Once the City explicitly asked for the information, the failure to respond honestly is something far greater than a failure to volunteer information.[18]

An incomplete statement can be the basis for a § 1001 prosecution if important information is concealed that would render it fully truthful if disclosed. This is one approach to avoiding a literal truth claim if the government can show the defendant's failure to disclose information meant that the statement was misleading because it was incomplete. In *United States v. Calhoon*, the Eleventh Circuit upheld a defendant's conviction for making a false statement in connection with Medicare reimbursement. The defendant argued that a claim for nonreimbursable Medicare costs can be submitted so long as the costs were incurred, therefore the submission was not a false statement even though he knew it could not be paid under the relevant regulations. The circuit court rejected that argument:

> While it is true that a provider may submit claims for costs it knows to be presumptively nonreimbursable, it must do so openly and honestly, describing them accurately while challenging the presumption and seeking reimbursement. Nothing less is required if the Medicare reimbursement system is not to be turned into a cat and mouse game in which clever providers could, with impunity, practice fraud on the government.[19]

The Eleventh Circuit found that "filing of reports claiming costs that were at least presumptively nonreimbursable while concealing or disguising their true nature was a deliberate gamble on the odds that they would not be questioned."[20]

While an affirmative statement made to the government that contains false information can be the basis of a § 1001 prosecution, the defendant's *failure* to disclose all relevant information while making a voluntary disclosure does not violate the statute. In *United States v. Safavian*, the

18. 446 F.3d 671, 678 (7th Cir. 2006).
19. 97 F.3d 518, 529 (11th Cir. 1996).
20. *Id.*

defendant, an administrator in the General Services Administration, was convicted of violating § 1001 on a concealment theory related to obtaining an opinion from the agency's ethics officer regarding his reporting obligations for gifts given by a lobbyist. Obtaining an ethics opinion was optional and not mandated by any internal agency rule or regulation, and the District of Columbia Circuit overturned the conviction because "[i]t is not apparent how this voluntary system, replicated throughout the government, imposes a duty on those seeking ethical advice to disclose—in the government's words—'all relevant information' upon pain of prosecution for violating § 1001(a)(1)."[21] While the defendant may have violated an ethical standard in not making complete disclosure to the ethics officer related to the gifts, the circuit court stated that "[w]e cannot see how this translates into criminal liability under 18 U.S.C. § 1001(a)(1) whenever someone seeking ethical advice or being interviewed by a GSA investigator omits 'relevant information.'"[22]

For two other § 1001 charges in *Safavian* based on concealment of information, prosecutors argued that once the person chose to respond to government questions, any subsequent failure to disclose all relevant information constituted concealment. The D.C. Circuit assailed the prosecution's concealment theory as essentially creating a slippery slope for any person who discloses information to the federal government:

> The government cites no regulation or form or statute to this effect and the defense maintains that no such general principle exists. Attorneys commonly advise their clients to answer questions truthfully but not to volunteer information. Are we to suppose that once the client starts answering a government agent's questions, in a deposition or during an investigation, the client must disregard his attorney's advice or risk prosecution under § 1001(a)(1)? The government essentially asks us to hold that once an individual starts talking, he cannot stop. We do not think § 1001 demands that individuals choose between saying everything and saying nothing.[23]

Safavian illustrates the importance of determining whether the government's theory of a § 1001 violation is based on a false statement or concealment. If it is the former, the literal truth of the statement can furnish a defense to the charge, while the latter requires proof of a duty to disclose. The source of the duty can simply be a line on a form, but the prosecution must show more than just a failure to make complete disclosure of information for a conviction under § 1001.

III. MATERIALITY

In *Kungys v. United States*, the Supreme Court enunciated the general standard of materiality where that is an element of the offense: "The most common formulation of that understanding is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was

21. 528 F.3d 957, 964 (D.C. Cir. 2008).

22. *Id.*

23. *Id.* at 965. The defendant was convicted on retrial of violating § 1001 based on the false statement and not for concealing information. *United States v. Safavian*, 644 F. Supp. 2d 1 (D. D.C. 2009).

capable of influencing, the decision of' the decisionmaking body to which it was addressed."[24] In *United States v. Gaudin*, the Court applied this provision to § 1001 and held that the jury must determine whether a false statement or concealed information was material.[25]

Proving materiality does not depend on convincing the recipient (or listener) that a statement is true, or that it actually influenced the exercise of government authority.[26] "Capable of influencing" looks to a statement's "intrinsic capacity to influence, not its probability of causing influence."[27] Moreover, the government need not show that the recipient was likely to be influenced by the false statement in order for it to be material. In *United States v. McBane*, the Third Circuit rejected the defendant's argument that his false statements to the FBI were not material because the investigation was essentially complete and the agents could not be influenced by what he told them. The circuit court noted the government concession that the statements were incapable of actually influencing the investigation, but nevertheless upheld the conviction because "both the language of the materiality standard and the decisions applying that standard require only that the false statement at issue be of a type capable of influencing a *reasonable* decisionmaker."[28]

The materiality assessment is an objective analysis, and the government does not have to prove that the statement had any influence on the particular decision to which it related.[29] Therefore, a defendant cannot offer a type of impossibility defense based on materiality—that the absence of any likely change in the government's conduct shows the statement was not material—because the issue is whether objectively a falsehood of this type *could* have an impact without regard to its actual effect.[30]

24. 485 U.S. 759, 770 (1988).

25. 515 U.S. 506, 509 (1995) ("It is uncontested that conviction under this provision requires that the statements be 'material' to the Government inquiry, and that 'materiality' is an element of the offense that the Government must prove. The parties also agree on the definition of 'materiality,'") (quoting *Kungys*, 485 U.S. at 770). In *Gaudin*, the Court concluded, "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right." *Id*. at 522–23.

26. *See* United States v. Chen, 324 F.3d 1103, 1104 (9th Cir. 2003) ("The government need not show it was actually misled."); United States v. Sebaggala, 256 F.3d 59, 65 (1st Cir. 2001) ("The test of materiality is whether the false statement in question had a natural tendency to influence, or was capable of influencing, a governmental function. Thus, if a statement could have provoked governmental action, it is material regardless of whether the agency actually relied upon it.").

27. United States v. Peterson, 538 F.3d 1064, 1072 (9th Cir. 2008).

28. 433 F.3d 344, 351 (3rd Cir. 2005).

29. *See* United States v. Wintermute, 443 F.3d 993, 1001 (8th Cir. 2006) ("[T]o prove materiality, the government needed to show only the false statements were capable of influencing the OCC's decision. The government was not required to prove the false statements actually *succeeded* in influencing the OCC, or influenced that decision within any specific period of time." (emphasis in original)); United States v. Mitchell, 388 F.3d 1139, 1143 (8th Cir. 2004) ("The test is not whether the false statement was the determinative factor in an INS decision, but rather, whether the statement had a natural tendency to influence the INS."); United States v. Safavian, 644 F. Supp. 2d 1, 6 (D. D.C. 2009) ("The defendant assumes that his statement to Agent Reising could be material only if it persuaded (or had the potential to persuade) Agent Reising that Mr. Safavian was not able to help Mr. Abramoff, or that Mr. Safavian was lying with respect to his ability to help Mr. Abramoff. But nothing about the materiality standard requires that the defendant's statements must have influenced or had the potential to influence those specific decisions.").

30. For example, in *United States v. Hansen*, a member of Congress argued that his failure to include certain loans and other benefits he received on a disclosure form filed with the Clerk of the House of Representative was not material

Similar to the Supreme Court's rejection of the "exculpatory no" doctrine, lower courts have not adopted a broad recantation defense, so that the crime is complete when the false statement or concealment occurs and subsequent conduct does not mitigate a defendant's liability.[31] In *United States v. Cowden*, however, the Eighth Circuit overturned a § 1001 conviction when a person entering the country was denied the opportunity to amend his false customs declaration to disclose he was bringing currency into the country immediately after submitting it, even though the applicable regulations allowed such an amendment. The circuit court was "disturbed" by the government's refusal to allow the amendment to the form that was the basis of the false statement charge, and noted that it was "incumbent upon the government to live within the letter as well as the spirit of its own regulations. The Customs inspection should be conducted so that the probable result is compliance with the law, not the eliciting of a violation of the law."[32]

The materiality element is designed to prevent prosecutions for trivial misstatements or omissions, although it was described by the Sixth Circuit as a "fairly low bar."[33] And the circuit courts are often loath to delve too deeply into whether a false statement (or concealment) was material, because, as the District of Columbia Circuit explained, "Application of § 1001 does not require judges to function as amateur sleuths, inquiring whether information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot."[34]

While it is rare that a conviction is reversed on materiality grounds, it does happen on occasion, so the issue is worth raising. For example, in *United States v. Finn*, the defendant, a former agent in the Department of Housing and Urban Development (HUD), was convicted of violating § 1001 for placing a false cash expenditure form in a file to account for the money used to pay a towing expense for his government vehicle that he did not want reflected in official records. While the document was certainly false, the Tenth Circuit reversed the conviction because the government failed to show that the form could have affected any government decision. The circuit court stated, "[A] finder of fact reasonably could not have inferred from the government's evidence that HUD at any time could or would have examined the case expenditure form at issue for the purpose of determining the propriety of the underlying expense or for any other articulated purpose."[35]

In *United States v. Talkington*, the government charged the defendant with a single violation of § 1001 based on five false statements to the Interstate Commerce Commission regarding

because there was no current investigation of him that the false filing could have influenced. The District of Columbia Circuit rejected that argument, stating that "[t]his argument misunderstands the nature of the materiality requirement: A lie influencing the possibility that an investigation might commence stands in no better posture under § 1001 than a lie distorting an investigation already in progress." 772 F.2d 940, 949 (D.C. Cir. 1985).

31. *See* United States v. Beaver, 515 F.3d 730, 742 (7th Cir. 2008) ("§ 1001 contains no recantation defense.").

32. 677 F.2d 417, 420 (8th Cir. 1982).

33. United States v. White, 270 F.3d 356, 365 (6th Cir. 2001). The circuit court noted that "the fact that materiality is a low hurdle does not mean that it is *no* hurdle; the government must present at least some evidence showing how the false statement in question was capable of influencing federal functioning." *Id.* (emphasis in original).

34. United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985).

35. 375 F.3d 1033, 1040 (10th Cir. 2004).

whether a purported farm cooperative was exempt from regulations. While two statements were found to be material, the Ninth Circuit concluded the other three were not:

> [T]here was no requirement that directors of exempt cooperatives be farmers, and there was insufficient evidence to establish what, if any, material effect a misrepresentation of a director's occupation would have. Similarly, the evidence was not substantial enough to prove that lying about the names of directors would affect ICC functions. Thus, the government failed to sustain its burden of proof on the factual question of materiality.[36]

In overturning the conviction, the circuit court found that the trial judge's "one-is-enough" instruction to the jury—that it need find only one of the five statements was false to convict—required reversal because the conviction may have been based on an immaterial falsehood.[37]

IV. INTENT

Section 1001 requires the government to prove that the defendant made the false statement or concealed information "knowingly and willfully." Knowledge is a straightforward term that requires the government, through either direct or circumstantial evidence, to establish that the defendant knew his statement was false or that he was concealing information which should have been disclosed. The term "willfully" appears in a number of federal criminal statutes, and has beguiled the Supreme Court regarding what the government must prove when it is an element of the crime. Indeed, the Court once remarked that willful "is a word of many meanings, its construction often being influenced by its context."[38]

A. Willfully

The differing approaches to "willfully" in various statutes has led courts to require either a very high-level of proof of the defendant's subjective intent for an offense or, conversely, a fairly low level that only requires some knowledge that the conduct is wrongful without reference to any specific crime. This lower level of intent was explained in *Bryan v. United States*, in which the Supreme Court stated that "when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'"[39] In *Safeco Insurance Company v. Burr*, the Court explained that "[w]hen the term

36. 589 F.2d 415, 417 (9th Cir. 1978).

37. *Id.*

38. Spies v. United States, 317 U.S. 492, 497 (1943).

39. 524 U.S. 184, 191–92 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). The statute at issue in *Bryan* was 18 U.S.C. § 924(a)(1)(D), which prohibits willfully dealing in firearms without a federal license.

'willful' or 'willfully' has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations."

How much knowledge is required to prove the defendant acted willfully depends on the nature of the offense. If the statute is complex, a willful violation requires proof that the defendant knew about the specific legal provision *and* intended to violate it. In *Ratzlaf v. United States*, the Court interpreted the money-structuring statute to require the government to prove that the defendant "knew the structuring in which he engaged was unlawful" and not just that the defendant's conduct was unlawful in some way.[40] The Court pointed out that structuring cash transactions was not "obviously 'evil' or inherently 'bad'" so proof of a willful violation required something more than just showing the defendant's awareness of what he was doing.[41] This is, perhaps, the highest level of intent imposed for a criminal violation, effectively allowing a defendant to offer an "ignorance of the law" defense to a charge. Along the same lines, proof of tax evasion requires proof that the defendant voluntarily violated a known legal duty, as the Court held in *Cheek v. United States*.[42]

While the Supreme Court has not addressed the issue of how "willfully" should be interpreted for a § 1001 violation, the lower courts have generally not required the higher level of intent embodied in *Ratzlaf* and *Cheek*. Instead, a defendant violates § 1001 willfully if he is aware that the statement was false or the concealed information should have been disclosed, without requiring proof that the defendant knew of the prohibition imposed by § 1001 and intentionally violated that provision. In *United States v. Whab*, the Second Circuit noted that "we are not aware of any appellate court that has held that 'willfully' in § 1001—a term that has long been part of a venerable statute—requires proof that a defendant knew that his conduct was criminal."[43]

In *United States v. Elashyi*, the Fifth Circuit upheld a jury instruction stating that willfully means the defendant acted "with the specific intent to do something the law forbids; that is to say, with the bad purpose either to disobey or disregard the law."[44] The same court in *United States v. Hopkins* upheld the conviction of two defendants for causing a false statement to be filed with the FEC regarding disguised corporate campaign contributions that they orchestrated, rejecting the argument that they did not have the requisite intent to violate the law because they were unaware of the reporting requirements of the campaign finance laws. The Fifth Circuit stated, "The Government may prove that a false representation is made 'knowingly and willfully' by proof that the defendant acted deliberately and with knowledge that the representation was false" without requiring proof of any particular knowledge of the reporting obligation.[45]

40. 510 U.S. 135, 149 (1994). Congress amended the antistructuring provision after *Ratzlaf* by deleting "willfully" from the statute, 31 U.S.C. § 5324, in the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253 (1994).

41. 510 U.S. at 146.

42. 498 U.S. 192, 200 (1991).

43. 355 F.3d 155, 161 (2nd Cir. 2004).

44. 554 F.3d 480, 505 (5th Cir. 2008).

45. 916 F.2d 207, 214 (5th Cir. 1990). The circuit court found that "[t]he jury was entitled to infer from the defendants' elaborate scheme for disguising their corporate political contributions that the defendants deliberately conveyed information they knew to be false to the Federal Election Commission." *Id*. at 214–15.

The definition of willfully as incorporating a knowledge requirement seems to merge this element with the knowledge element of § 1001, yet courts have not found that to be problematic and allow the government to establish both by proof of the defendant's knowledge of the falsity of the statement or requirement to reveal information. While it may be troubling that two separate intent elements of a crime are interpreted to cover essentially the same thing, i.e., the defendant's knowledge of the falsity of the statement or the concealment, courts have not required separate proof of willfulness and knowledge for § 1001.

B. Intent for Jurisdiction

While the government must prove the defendant's knowledge regarding the falsity of the statement or the concealment, the intent requirement does not include knowledge that the statement would be made to a branch of the U.S. government to establish federal jurisdiction. In *United States v. Yermian*, the Supreme Court stated that "[a]ny natural reading of § 1001, therefore, establishes that the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements,' and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency."[46] The defendant in *Yermian* made false statements about a prior conviction on a form that would be used to obtain a security clearance required to begin work for his employer, and his only defense at trial was that he did not know the form would be transmitted to the federal government. Upholding the conviction, the Court held that "§ 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction."[47]

C. Causing Another to File a False Statement (18 U.S.C. § 2(b))

Section 1001 prosecutions have been brought for the filing of false campaign contribution reports with the Federal Election Commission (FEC) against contributors who sought to avoid the limitations on the amount of donations that can be given to a candidate during an election cycle. As discussed in Chapter 12, federal law limits the amount that an individual can give for primary and general elections, and prohibits corporations and foreign nationals from making any campaign contributions directly to candidates. To avoid those restrictions, some contributors had others make the contribution in their own name and then reimbursed them for the contribution, or had a corporation funnel its contributions through individuals. In some cases, repayment of the contributions was disguised as a bonus or other employment-related payment, including

46. 468 U.S. 63, 69 (1984).

47. *Id.* at 69–70.

providing reimbursement for any taxes owed.[48] The false statement occurs when the campaign organization reports the source of the contributions to the FEC,[49] and the theory is that the person who is actually making the donation has caused a violation of § 1001 by failing to provide truthful information about the real source of the contribution.

The federal statute on aiding and abetting is 18 U.S.C. § 2, and subsection (b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." While § 1001 already requires proof of willfulness for a violation, that element has been interpreted as essentially requiring proof of knowledge of the falsity of the statement, and not the higher level of a violation of a known legal duty that the Supreme Court in *Ratzlaf* applied to a willful violation of the cash structuring statute. There is a split in the circuits regarding whether the willfulness element for a causation charge under § 2(b) should be interpreted in the same manner as the element is for § 1001, or whether the higher intent level of *Ratzlaf* is required.

In *United States v. Curran*, the defendant arranged to reimburse employees of the company he owned for campaign contributions that he asked them to make on his behalf, repaying them with cash from the company for the donations. Curran testified he was aware that corporations were prohibited from making campaign contributions, and that candidates make filings about the contributions, but he was "not focused on the Federal Election Commission." The Third Circuit overturned his conviction, applying *Ratzlaf*'s analysis of willfulness to § 1001 charges that rely on the causation analysis of § 2(b) in the context of federal campaign contribution cases. The circuit court concluded that both cash structuring and disguising the source of campaign contributions involved conduct made illegal by a regulatory statute and in each case the underlying acts were not obviously evil or nefarious, so a higher level of intent was required to establish the violation.[50] The circuit court held that when the prosecution sought to prove a violation of § 1001 through § 2(b)'s causation provision,

> the government had the burden of proving that defendant was aware that the campaign treasurers were bound by the law to accurately report the actual source of the contributions to the Commission, that the defendant's actions were taken with the specific intent to cause the treasurers to submit a report that did not accurately provide the relevant information, and that defendant knew that his actions were unlawful.[51]

48. *See* United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998) (transferring corporate funds by cash payments to campaign committees); United States v. Fieger, No. 07-CR-20414, 2008 WL 205244 (E.D. Mich. Feb. 1, 2008) (charges for reimbursement of campaign contributions by law firm; defendant acquitted after trial).

49. Under federal campaign finance law, a political committee that seeks to influence a federal election must have a treasurer who is required to file reports with the FEC about the contributions it receives and its expenditures, including the identity of all persons who contribute over $200 in one year. In addition, contributions that are forwarded to a committee must identify any person who contributes over $50. *See* 2 U.S.C. §§ 432(a), 434(a), and 434 (b)(3)(A) (discussed in Chapter 12).

50. 20 F.3d 560, 569 (3rd Cir. 1994).

51. *Id*. at 570–71. The Third Circuit applied *Curran*'s willfulness analysis to a false claim charge under 18 U.S.C. §§ 2(b) and 287 that was based on causing another person to make the actual filing with the government. Sections 287 and 1001 were originally part of the same statute, and the circuit court held that "to be convicted of willfully causing an

In *United States v. Hsia*, the District of Columbia Circuit took a different view of willfulness in a case involving contributions to President Bill Clinton's reelection campaign from a tax-exempt religious organization, which was prohibited from making them. The circuit court rejected *Curran*'s application of *Ratzlaf* to § 1001 based on § 2(b), holding that the "natural reading" of the statutes means

> the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false (the mens rea for the underlying offense—§ 1001) and (2) that the defendant intentionally caused such statements to be made by another (the additional mens rea for § 2(b)).[52]

Similarly, the Second Circuit, in *United States v. Gabriel*, rejected *Curran*'s application of *Ratzlaf*'s higher intent level for a willful violation under § 2(b) in a case involving a false statement made to the Federal Aviation Administration, not campaign contributions. The circuit court held that "[i]f willfully is interpreted to mean 'intentionally,' it has a role to fill—the government must prove that defendant intentionally caused another to act."[53] Unlike *Curran*'s application of the requirement that the government prove a defendant violated a known legal duty, the District of Columbia Circuit and Second Circuit only require proof that the defendant *intentionally* caused another to make a false statement, not that the defendant intended to violate the election law or other reporting provision.

V. JURISDICTION

The use of the term "jurisdiction" as defining the range of false statements and concealments that are subject to prosecution gives § 1001 a broad scope.[54] The jurisdiction of the federal government exists even if there is no loss of money or property by means of the false statement or omission, so the statute applies even if there is no claim for payment or services from the government and the statement is only made in compliance with a reporting requirement.[55] For example, a contractor

intermediary to present a false claim to a federal department, a defendant must at least know that he is causing the intermediary to present a false claim to someone, even if he does not know that the department to which he is causing the intermediary to present a false claim is in fact a federal department." *United States v. Gumbs*, 283 F.3d 128, 131 (3rd Cir. 2002).

52. 176 F.3d 517, 522 (D.C. Cir. 1999). The same district judge had dismissed similar charges alleging that conduits for campaign contributions had violated § 1001 by causing the filing of false campaign contribution reports with the FEC, *see United States v. Kanchanalak*, 31 F. Supp. 2d 13 (D. D.C. 1998), and *United States v. Trie*, 23 F. Supp. 2d 55 (D. D.C. 1998), and those decisions were also reversed by the District of Columbia Circuit in light of its decision in *Hsia*. *See United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999).

53. 283 F.3d 128, 131 (2nd Cir. 2002).

54. *See* United States v. Bryson, 396 U.S. 64, 70 (1969) ("[W]e think the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001. A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001.").

55. *See* United States v. Fern, 696 F.2d 1269, 1273 (11th Cir. 1983) ("The reach of the statute covers all materially false statements, including non-monetary fraud, made to any branch of the Government.").

who submits false quality control information after the award of a contract can be liable under § 1001, even though the false statement is not part of a claim for payment or reimbursement. The statement need only be capable of influencing a decision to come within the jurisdiction of the federal government, not that it actually affected the outcome of a decision or other exercise of authority. In addition, the statute applies regardless of whether the defendant communicated the statement directly to the government or knows the government had jurisdiction over the false statement. Thus, a false statement to a state or local government agency, which is then passed on to the federal government, can trigger liability even though the defendant does not have actual knowledge of the federal jurisdiction over the state agency's action.[56]

As § 1001 developed as a separate offense from the false claims provision, dispensing with any requirement to prove fraud or an attempt to obtain government funds or benefits, its scope expanded enormously because of the great number of government reporting requirements that came into existence starting with the New Deal era and then the proliferation of programs beginning in the 1960s. The Supreme Court added to the statute's breadth in 1955 in *United States v. Bramblett* when it read the statutory language "jurisdiction of any department or agency of the United States" to include a statement made to Congress or the judicial branch.

The defendant in *Bramblett* was a former member of Congress who placed a woman on the payroll of his congressional office who performed no work, and he was charged with violating § 1001 for making a false statement to the Disbursing Office of the House of Representatives. Rather than decide the case on the narrow ground that the funds came from the Treasury Department, which is an executive department, the Court adopted the expansive view that

> [i]t would do violence to the purpose of Congress to limit the section to falsifications made to the executive department. . . The development, scope and purpose of [§ 1001] show that 'department,' as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.[57]

The false statement statute subsequently was used in a number of prosecutions of members of Congress, such as the prosecution of Representative George V. Hansen for making a false report on his financial disclosure forms filed with the House Ethics Committee.[58]

The more troublesome aspect of *Bramblett*'s broad reading of "agency or department" was that false statements made to federal courts could also be punished under § 1001, potentially including arguments and filings made by counsel and parties. To avoid the possibility that lawyers (and their

56. *See* United States v. Yermian, 468 U.S. 63, 69 (1984) ("[T]he statutory language makes clear that Congress did not intend the terms 'knowingly and willfully' to establish the standard of culpability for the jurisdictional element of § 1001."); United States v. Herring, 916 F.2d 1543, 1547 (11th Cir. 1990) ("The false statements need not be made directly to the federal agency to sustain a section 1001 conviction as long as federal funds are involved.").

57. 348 U.S. 503, 509. The Court looked to the legislative history and development of the false statement prohibitions, and found that the addition of the phrase "any department or agency" was to expand the coverage of the statute, and that "[t]here is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted. There was certainly no suggestion that the new phrase was to be interpreted so that only falsifications made to executive agencies would be reached." *Id.* at 507.

58. 772 F.2d 940 (D.C. Cir. 1985).

clients) could be prosecuted for a statement made in connection with a judicial proceeding, a number of federal courts recognized a "judicial function" exception to the statute. Much like the "exculpatory no" doctrine, this exception was a means to cabin the applicability of § 1001 in an area where courts did not believe it should be applied, despite the absence of any statutory language indicating that such an exception existed. The exception meant that false statements could be prosecuted only if they related to a court's administrative activity and not its adjudicatory role.

All of the lower courts accepted the judicial function exception until the Sixth Circuit rejected it in 1994, creating a split in the circuits that the Supreme Court stepped in to resolve in *Hubbard v. United States*.[59] Rather than give its imprimatur to the judicial function exception, the Supreme Court held in *Hubbard* that *Bramblett* was wrongly decided and overturned that decision, which allowed § 1001 prosecutions for false statements to the legislative or judicial branches. The defendant in *Hubbard* made false statements in unsworn filings to the bankruptcy court, which would have come within the judicial function exception if the Sixth Circuit had adopted it. The Court found that *Bramblett*'s historical analysis of the meaning of "agency or department of the United States" was flawed, and that the proper interpretation of those terms limited the statute to false statements or concealment involving only the executive branch. The Court concluded, "*Bramblett* is hereby overruled. We hold that a federal court is neither a 'department' nor an 'agency' within the meaning of § 1001."[60]

While *Hubbard* only involved a false statement made to a court and not to Congress, the lower courts understood its clear rejection of *Bramblett* as not being limited to just false statements in a judicial proceeding, but also to the legislative branch. In *United States v. Oaker*, the District of Columbia Circuit held that a false statement on a financial disclosure form to the House Ethics Committee could not be prosecuted under the statute because "an entity within the Legislative Branch cannot be a 'department' within the meaning of § 1001."[61] The same court in *United States v. Dean* reversed a § 1001 conviction for making a false statement to a Senate committee because it was not made to an executive branch department or agency, [62] and the district court dismissed a charge against former Representative Dan Rostenkowski for making a false statement to the House Finance Office under *Hubbard*'s analysis.[63]

59. 514 U.S. 695 (1995).

60. *Id.* at 715.

61. 111 F.3d 146, 153 (D.C. Cir. 1997).

62. 55 F.3d 640, 659 (D.C. Cir. 1995).

63. 1996 WL 342110, at *3 (D. D.C. Mar. 12, 1996). The District of Columbia Circuit refused the government's request to rule on whether the § 1001 charge was precluded by *Hubbard*, remanding the case to the district court to make the initial decision on whether to dismiss the count. 68 F.3d 489, 490 (D.C. Cir. 1995). After dismissing the false statement count involving the House Finance Office, but allowing a charge of making a false statement to the FEC to remain, Rostenkowski eventually entered a guilty plea to other charges, so the issue did not reach the circuit court again, although its holdings in *Dean* and *Oaker* show that it would have upheld dismissal of the charge in all likelihood. The district court also granted a writ of error *coram nobis* to former Representative Hansen, removing his earlier false statement conviction, because his financial report to the House Ethics Committee did not come within § 1001 after *Hubbard*; the court ordered the government to refund the fine he paid but did not allow interest to be paid on the amount. *United States v. Hansen*, 906 F. Supp. 688 (D. D.C. 1995).

In response to *Hubbard*'s narrow interpretation of § 1001 that precluded prosecution for false statements to the legislative or judicial branches, Congress adopted, in 1996, the False Statements Accountability Act to overturn the Supreme Court's decision.[64] The House Report accompanying the legislation makes clear its purpose "to ensure that section 1001 applies to the judicial and legislative branches as well as the executive branch, thereby ensuring the integrity of legislative and judicial functions and proceedings."[65]

The revised statute reflects the judicial function exception that the lower courts had read into the provision prior to *Hubbard* by providing in § 1001(b) that it "does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding." For false statements or concealment involving Congress, § 1001(c) limits the prohibition to administrative matters, such as procurement or employment issues, to "a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch," or to statements made to a committee conducting an investigation or review pursuant to the rules of the House or Senate. The amendment restores the status quo before *Hubbard* because the false statements prosecuted in cases like *Bramblett* and *Hansen* are still subject to § 1001, while a false filing by a party to a judicial proceeding would not be.

The Supreme Court has taken a broad view of what comes within the jurisdiction of the particular office that received the false statement or from which information was concealed. In *United States v. Rogers*, the Court reversed a lower court's finding that the defendant's false report about his wife's having been kidnapped and that she had threatened the president did not come within the jurisdiction of the FBI. The Court stated that

> [a] department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation. Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.[66]

Rejecting the more restrictive reading the lower court adopted, the Court explained:

> Limiting the term "jurisdiction" as used in this statute to "the power to make final or binding determinations," as the Court of Appeals thought it should be limited, would exclude from the coverage of the statute most, if not all, of the authorized activities of many "departments" and "agencies" of the Federal Government, and thereby defeat the purpose of Congress in using the broad inclusive language which it did.[67]

64. Pub. L. No. 104-292, 110 Stat 3459 (1996).

65. H.R. Rep. No. 104-680 (1996).

66. 466 U.S. 475, 479 (1984).

67. *Id.* at 482. The Court also noted that "a narrow, technical definition of this sort, limiting the statute's protections to judicial or quasi-judicial activities, clashes strongly with the sweeping, everyday language on either side of the term." *Id.* at 480.

For § 1001 prosecutions involving campaign contributions based on the older version of the statute prior to its 1996 amendment, the lower courts found that the FEC came within the definition of an "agency" so that a false statement regarding the source of contributions could be prosecuted. In *United States v. Rostenkowski*, the district court held that "the FEC is an 'independent establishment' and a 'commission' under [18 U.S.C.] § 6, thus making it an 'agency' for purposes of § 1001."[68] The amendment to § 1001 substituted "executive, legislative, or judicial branch" for "department or agency," and the FEC is clearly within the executive branch even though it is an independent agency. Therefore, it is no longer an issue regarding whether a false statement about the source or amount of campaign contributions comes within the jurisdiction of the United States.

VI. § 1001 AND OTHER FEDERAL REPORTING REQUIREMENTS

Federal prosecutors have brought a number of these § 1001 "conduit" cases for campaign contribution violations rather than pursuing charges directly under the Federal Election Campaign Act (FECA). One reason prosecutors pursue charges for filing a false statement rather than a direct violation of the FECA is that the penalties under § 1001 can be much more substantial. Moreover, a false statement charge based on § 2(b) is a simpler theory of prosecution that avoids many of the technical requirements for showing a violation of the campaign finance reporting provisions.

United States v. Mariani is a good illustration of the type of case in which § 1001 charges are used for false reporting of campaign contributions. The defendants were officers of a waste disposal corporation who arranged to have various employees, business associates, friends, and family make contributions to candidates and then have the amounts reimbursed by the company disguised as bonuses, reimbursements, or payments of legitimate business expenses.[69] The defendants had no obligation to report their contributions to the FEC, but the treasurers of the various campaign committees did, so the § 1001 charge was premised on their causing the filing of the false report under § 2(b).

The broad scope of § 1001 means it covers a number of documents which must be provided to the federal government as prescribed by laws that may contain other penalties that may be assessed under the particular provision. For example, the Ethics in Government Act (5 U.S.C. App. 4 § 101(a)) requires that certain federal officials, including members of Congress, to file periodic financial disclosure forms, and the statute prescribes both civil and criminal penalties for failing to file or providing false information on the report. In *United States v. Hansen*, a congressman argued that the adoption of the Ethics in Government Act operated as an implied repeal of § 1001, at least insofar as that provision could be used to prosecute a person for filing a false report required by

68. 1996 WL 342110 *5 (D. D.C. 1996); *see* United States v. Crop Growers Corp., 954 F. Supp. 335, 354 (D. D.C. 1997) ("One court in this District has already held, in a well-reasoned and persuasive opinion, that the FEC is an agency under § 1001," citing *Rostenkowski*).

69. 212 F. Supp. 2d 361, 378 (M.D. Pa. 2002). The defendants entered guilty pleas to a conspiracy charge that included the § 1001 violation as one of the criminal objects of the agreement, and the district court discussed the relevant sentencing issues related to the false statement violation.

the statute. The District of Columbia Circuit rejected that argument, noting there is a presumption against implicit repeal of statutes because "[w]ithout it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship."[70] The circuit court found that Congress did not expressly consider limiting the coverage of § 1001, and finding an implied repeal required "clear and manifest" evidence of congressional intent to do so.[71]

The District of Columbia Circuit relied on *Hansen* in *United States v. Hsia* to reject the defendant's argument that the FECA impliedly repealed § 1001 for charges based on filing false campaign contribution reports, relying on the requirement that there be clear evidence of congressional intent to repeal, of which there was none.[72] Other cases have taken the same approach to the issue of implied repeal of § 1001 based on other statutes that impose sanctions for making false statements. For example, the Eleventh Circuit held that the criminal false statement provision of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(I), which is a misdemeanor that carries a much lighter penalty, did not operate as a *sub silencio* repeal of § 1001, explaining that "[i]f the statutory language does not demand a finding of preemption, then we must determine whether the legislative history shows 'clear and manifest' evidence of Congress's intent that § 1857(1)(I) preempt § 1001."[73]

Not every case rejects implied repeal of § 1001. In *United States v. Richardson*, the Ninth Circuit found that the Federal Employee Compensation Act did operate as a repeal of § 1001 for false statements related to an application for disability benefits under the Act. The circuit court noted that the statute included a provision providing that "all Acts or parts of Acts inconsistent with this Act are hereby repealed," and found that § 1001 was inconsistent with 18 U.S.C. § 1920, the false statement provision related to federal employee compensation, because "to the extent that the former made false statements relating to the federal employees' compensation context felonies, while the latter made all such false statements misdemeanors."[74]

70. 772 F.2d 940, 944 (D.C. Cir. 1985). The defendant, former Representative George V. Hansen of Idaho, was convicted of violating § 1001 for not disclosing various loans he and his wife received.

71. *Id.* at 947. The District of Columbia Circuit also noted that "if repeal was in fact intended, this absence of express exclusion is even more strange than it would normally be since . . . the threatened application of § 1001 was explicitly brought to the attention of a House committee that reported one version of the bill both by the Department of Justice and by the Clerk of the House, and to the attention of the full House, in floor debate, by two of its Members." *Id.* at 946.

72. 176 F.3d 517, 526 (D.C. Cir. 1999).

73. United States v. Tomeny, 144 F.3d 749, 752 (11th Cir. 1999).

74. 8 F.3d 15, 17 (9th Cir. 1993). The District of Columbia Circuit rejected a similar argument based on the disparate penalties in *Hansen*, but the election law did not contain a broad repeal provision like the Federal Employee Compensation Act analyzed in *Richardson* that showed at least some measure of congressional intent to repeal other provisions that might involve false statements. The D.C. Circuit explained:

> [T]he two sections combine to produce a natural progression in penalties: those who intentionally fail to file EIGA forms are subject only to the civil sanction of § 706, while those who lie on their forms are additionally subject to the criminal penalty of § 1001. If this does not represent evident harmony, it at least does not begin to approach the "irreconcilable conflict" that the Supreme Court has instructed us to require as textual evidence of an implicit repeal.

772 F.2d at 945.

This page intentionally left blank

| 9 |

CONFLICT OF INTEREST STATUTES

The biblical admonition against serving two masters is the foundation for the federal conflict of interest laws prohibiting conduct that *could* result in corruption, regardless of whether any exercise of public authority was in fact tainted by an improper influence.[1] In *United States v. Mississippi Valley Generating Co.*, the Supreme Court explained the rationale for the blanket prohibitions in the conflict of interest laws, that these statutes "attempt[] to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation."[2] Just as the serpent tempted Eve in the Garden of Eden, so too the government official could be enticed by offerings that might not result in immediate corruption but plant the seeds for potential misuse of authority.

Federal conflict of interest statutes date back to 1853, and a number of them were adopted during the Civil War and the subsequent expansion of the national government that resulted in the development of an extensive administrative apparatus. The focus of the early statutes was on federal officials representing private interests in prosecuting claims against the government—which happened when the secretary of the treasury acted on behalf of a claimant—and the award of contracts.[3] As Professor Beth Nolan noted, "[F]ederal ethics legislation had been a scattershot solution to particular crises as they arose."[4]

1. "No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to one and despise the other. You cannot serve God and wealth." Matthew 6:24.

2. 364 U.S. 520, 550 (1961). The Court described the provision at issue in the case, which is now 18 U.S.C. § 208, as establishing a "rigid rule of conduct. . . ." *Id.* at 551.

3. *See* Jeffrey Green, *History of Conflicts Law*, 26 Hamline L. Rev. 555, 563 (2003).

4. Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on Outside Income of Government Officials*, 87 Nw. U. L. Rev. 57, 63 (1992).

In the late 1950s, there was a push to expand federal conflict of interest laws to reach a broader array of transactions beyond just representation in claims proceedings and contracts decisions. The number and variety of federal activities, along with the size of the federal bureaucracy, increased exponentially the potential for conflicts between the public obligations of federal employees and their private interests. In 1960, the Association of the Bar of the City of New York issued a report calling for a review and updating of federal conflict of interest laws,[5] which the recently elected President John Kennedy heeded by issuing an Executive Order imposing a number of limitations on federal workers in their dealings with outside interests.[6]

In 1962, Congress streamlined the scattered corruption and conflict of interest provisions into a single set of statutes in the federal code.[7] In addition to the bribery and unlawful gratuities laws, discussed in Chapter 2, the statutes prohibit conflicts of interest for all federal employees and "special government employees" that can arise from the following: unauthorized compensation (§ 203); outside activities involving the United States (§ 205); activity after government service (§ 207); conduct affecting financial interests (§ 208); and, salary supplementation by third parties (§ 209). Congress has amended the conflict of interest laws a number of times since 1962, most prominently in the Ethics in Government Act of 1978,[8] the Ethics Reform Act of 1989,[9] and the Honest Leadership and Open Government Act of 2007.[10]

I. COMPENSATION TO MEMBERS OF CONGRESS, OFFICERS, AND OTHERS IN MATTERS AFFECTING THE GOVERNMENT (18 U.S.C. § 203)

Section 203 is the primary statute dealing with conflicts of interest for federal employees by prohibiting the offer or receipt of any compensation in relation to the work of the United States or any transaction in which it has a "substantial interest." This section traces its roots to an 1863 statute prohibiting congressmen from appearing in the Court of Claims.[11] Congress later expanded the law to prohibit any federal employee from taking compensation in relation to representation in a matter involving the United States.

The Supreme Court upheld the constitutionality of the earlier statute in 1906 in *Burton v. United States*, which involved the prosecution of a senator for interceding on behalf of a corporation in connection with an investigation of it by the post office for possible mail fraud. The Court

5. Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960).

6. Executive Order No. 10939, 26 Fed. Reg. 3951 (May 5, 1961).

7. Pub. L. No. 87-849, 76 Stat. 1119-26 (1962). Two excellent books discussing the 1962 legislation and the development of federal conflict of interest laws are Bayless Manning, Federal Conflict of Interest Law (1964), and Robert G. Vaughn, Conflict-of-Interest Regulation in the Federal Executive Branch (1979).

8. Pub. L. No. 95-521, 92 Stat. 1862 (1978).

9. Pub. L. No. 101-194, 103 Stat. 1716 (1989).

10. Pub. L. No. 110-81,121 Stat. 735 (2007).

11. Act of March 3, 1863, 12 Stat. 765 (1863).

explained that "the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct."[12]

The operative subsection is § 203(a), which provides:

> Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—
>
> (1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another—
>
> (A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or
>
> (B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,
>
> in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission; or
>
> (2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner Elect, Federal judge, officer, or employee;
>
> shall be subject to the penalties set forth in section 216 of this title.

Similar to the bribery and unlawful gratuities provisions in § 201, this provision reaches both the person making the payment as well as the federal (or District of Columbia)[13] employee receiving the compensation.

A. Persons Covered

Section 203 covers all full-time employees of the federal government, including all federal judges and members of Congress. The connection between individuals and the federal government is not limited to full-time employment, however, so the statute provides for a number of special

12. 202 U.S. 344, 368 (1906). The Court upheld the conviction of Senator Joseph Burton of Kansas, and he resigned from office after his appeal was rejected and served five months in jail. *See* U.S. Senate Historical Office, United States Senate Election, Expulsion and Censure Cases: 1793–1990, 275–76 (1995).

13. 18 U.S.C. § 203(a). Subsection (b) is identical except that it covers employees of the District of Columbia rather than employees of the United States. The other conflict of interest provisions also cover District of Columbia employees. In this chapter, reference will only be made to federal employees.

situations to prevent those who provide only part-time or limited service to the government from coming within the prohibition that could limit their ability to earn a living.

In addition to regular federal officials and employees, the statute reaches "special government employees" (SGE), who are defined in § 202 as

> an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate judge, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28.[14]

SGEs are a hybrid category of persons who are employees of the federal government but act only in a limited capacity or for a short period of time.[15] Receiving pay or other remuneration is not a prerequisite to being an SGE, so that even those serving voluntarily are covered by the conflict of interest laws if they meet the definitional requirement. In addition, two types of nonemployees do not come within the definition of an SGE, even though they provide service to the government: (1) independent contractors, and (2) representatives of industry or other interest groups serving on advisory panels or similar bodies.

The conflict of interest laws have a limited application to SGEs compared to regular federal employees. Section 203(c) limits the application of the statute to an SGE in two ways. First, an SGE is only subject to the prohibition for "a particular matter involving a specific party or parties. . . in which such employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise."[16] Second, the statute applies if the matter is pending at the time the SGE is working for the department or agency, but then only if the person worked for the department or agency for at least sixty days during the immediately preceding year.[17] An SGE can also act as an agent or attorney of another person acting under a federal grant or contract, so long as the head of the department or agency "certifies in writing that the national interest so requires and publishes such certification in the Federal Register."[18] Thus, the prohibition on receiving compensation by SGEs is limited to those situations in which they are involved in the specific matter or are present in the agency for a substantial period of time—more

14. For a thorough analysis of the application of the conflict of interest laws to SGEs, see Office of Government Ethics, *Conflict of Interest and the Special Government Employee: A Summary of Ethical Requirements Applicable to SGEs, available at* http://www.usoge.gov/laws_regs/other_ethics_guidance/othr_gdnc/og_sge_coi_00.pdf.

15. Statutes can designate those who hold certain positions as SGEs. *See* 42 U.S.C. § 12651b(e).

16. 18 U.S.C. § 203(c)(1).

17. 18 U.S.C. § 203(c)(2).

18. 18 U.S.C. § 203(e).

than sixty days—when it is pending so that there is at least a reasonable possibility that the person will have some connection to the issue that denotes a potential conflict of interest.

Certain members of the military are covered by §202(a) in specified circumstances. Unless the person is already a federal employee, a Reserve officer or National Guard officer qualifies as an SGE "while on active duty solely for training" or while serving *involuntarily*. The same officer *voluntarily* serving a period of extended active duty in excess of 130 days is an "officer of the United States" and therefore fully subject to § 203. In *United States v. Baird*, the District of Columbia Circuit held that the 130-day determination for being an officer of the United States includes aggregating separate tours of duty.[19] Enlisted members of the Armed Forces, however, do not come within the terms "officer or employee" for an SGE.

There are two other important limitations on the scope of § 203. First, any employee, whether full-time or an SGE, can act as an agent or attorney for a parent, spouse, or child, or any person (or estate) for whom the person is serving as guardian, executor, administrator, trustee, or other personal fiduciary, unless the employee has participated personally and substantially in the matter or it comes within the person's official responsibility.[20] Second, the statute does not apply to a retired military officer while not on active duty or who is not otherwise an officer or employee of the United States.[21]

While §203 applies to federal employees who receive compensation while working for the government, a charge of conspiracy to violate the statute does not require proof that the person ever actually worked for the federal government. In *United States v. Wallach*, the defendant was charged with conspiracy to violate § 203 for agreeing to take a $300,000 advance from a military contractor to continue lobbying on its behalf after his anticipated appointment to a federal position. Although the defendant never received the appointment, the Second Circuit rejected the argument that he could not conspire to violate the statute until he actually received the appointment. It held, "A conspiracy to engage in conduct violative of the substantive statute is equally threatening to the integrity of the governmental apparatus that section 203 seeks to protect. Thus, recognizing the legitimacy of a conspiracy charge even when none of the alleged parties to the agreement is as yet a federal official is entirely consistent with section 203's purpose and intent."[22]

B. Compensation

The statute prohibits the offer or transfer of "any compensation" to the federal official, unlike § 201 that covers "anything of value." Given the use of distinct terms, it is certainly plausible to argue

19. 29 F.3d 647, 650 (D.C. Cir. 1994). The circuit court rejected the defendant's argument that aggregating tours of duty would be unfair to a Reserve officer who might be covered retroactively by § 203's prohibition: "Nor does the uncertainty of persons in a tour of duty less than 130 days, but who may have enough tacked on to reach that limit (in any 365 days), seem such a great problem. During that period the employee can either (1) comply with the standards applicable to regular employees, or (2) resolve not to allow his or her aggregate time to exceed the 130-day limit." *Id.* at 651.

20. 18 U.S.C. § 203(d).

21. 18 U.S.C. § 206. There are no reported cases under this provision.

22. 935 F.2d 445, 471 (2nd Cir. 1991).

that § 203 is limited to the traditional form of employee compensation, i.e., money. In *United States v. Evans*, however, the Fifth Circuit noted that in addition to the payment of $200, providing the defendant with airline tickets and travel reimbursement constituted compensation in violation of § 203.[23] Because certain perquisites, such as a country club membership or travel on a corporate jet, can be a form of compensation, it may be that the term should be interpreted more broadly to include certain forms of nonmonetary benefits with a market value.[24] The compensation must be received by or for the benefit of the federal employee, although the Second Circuit noted in *United States v. Myers* that this point is "somewhat doubtful."[25]

C. Representational Service

Section 203 prohibits the receipt of compensation "for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another. . . ." The statute developed as a means to prohibit federal officials from representing clients in cases before federal departments or in judicial proceedings. The use of the term "or otherwise" expands the scope of the statute beyond acting as an agent or attorney, which are legal terms denoting a specific legal relationship, so that less formal arrangements come within the statutory prohibition. Section 205, which also covers representational service, is limited to federal employees who act as an agent or attorney but not "or otherwise," making it clear that § 203 covers a broader range of assistance for which compensation is paid or received.[26]

As originally drafted, § 203 did not include the term "representational" before "services," which was added by the Ethics Reform Act of 1989.[27] In *United States v. Myers*, decided before the amendment, the Second Circuit held that the statute "should be limited to services rendered before federal agencies—the mischief toward which the statute was directed—and not mere advice concerning agency proceedings."[28] The addition of "representational" reflects this understanding,

23. 572 F.2d 455, 481 (5th Cir. 1978).

24. For example, the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development defines "compensation" as follows:

> [A]ny payment of money or the provision of any other thing of current or potential value in connection with employment. Compensation includes all direct and indirect payments of benefits, both cash and non-cash, granted to or for the benefit of any executive officer, including, but not limited to, payments and benefits derived from an employment contract compensation or benefit agreement, fee arrangement, perquisite, stock option plan, post-employment benefit or other compensatory arrangement.

12 C.F.R. § 1770.3(d) (2008).

25. 692 F.2d 823, 852 n.24 (2nd Cir. 1982).

26. The predecessor statute to § 205 covered action that "aids or assists" in the representation, and Congress dropped that language from the new statute to avoid bringing within the prohibition conduct that did not involve "a real conflict of interest." H.R. Rep.No. 87-748, at 21 (1961). Section 203's inclusion of "or otherwise" in the list of services can reasonably be read to include types of conduct that provides assistance without rising to the level of acting as an attorney or agent that was specifically excluded from § 205.

27. Pub. L. No. 101-194, § 402, 103 Stat. 1716 (1989).

28. Office of Government Ethics Op. 89x7 (May 31, 1989).

so that a federal official must undertake some action on behalf of another person, such as an appearance before a federal department or agency, or at least some contact with an official in relation to the matter, to come within the statute.

The Office of Government Ethics (OGE) issued an opinion offering informal advice on how it interprets §203's prohibition on rendering "services." The opinion was issued a few months before the Ethics Reform Act amended the provision, but the agency took the position that the services covered by the statute involved only "representational" services, thus using the same approach that Congress later adopted. The OGE opinion states, "Such representations must involve communications made with the intent to influence and must concern an issue or controversy. The provision of purely factual information or the submission of documents not intended to influence are not representational acts."[29]

Section 203 covers both direct representational services and the use of another official to act in relation to the proceeding. In *United States v. Wallach*, the defendant conspired with government contractors to receive payments in advance of his appointment to a federal office to lobby another federal official to urge the award of contracts by the Department of Defense. The Second Circuit held that "the statute as a whole also applies to a two-step arrangement in which an officer, for compensation, personally influences another officer to influence the department before which a contract is pending."[30] Moreover, as the same court noted in *Myers*, services before a federal department or agency does not require a formal appearance, but also covers "informal contacts."[31]

D. Particular Matter

Section 203 originally dealt with federal officials representing parties in claims filed with the federal government. The statute now covers a broad range of activities in which the federal government has an interest, including "any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest."

In *United States v. Williams*, the Second Circuit held that the term "particular matter" modifies the entire list of activities, so that the compensation violates the statute only if it relates to an identified type of federal activity. The circuit court also determined that the prohibition is not limited to just specified matters already in existence, such as a current contract. The court stated, "The fact that the statute applies to future proceedings not yet pending . . . indicates that it applies to a particular category of matters, and need not be narrowed to just one identified contract, which might not be known until a proceeding involving the contract was actually pending."[32] Along the same line, the Second Circuit held in *Wallach* that an indictment stating the compensation related to

29. *Id.* at 855.
30. 979 F.2d 912, 920 (2nd Cir. 1992).
31. 692 F.2d at 858.
32. 705 F.2d 603, 622 (2nd Cir. 1983).

manufacturing contracts from the Department of Defense "easily satisfied the particularity requirement of section 203(a)."[33]

It is not a defense to a § 203 charge that the official did not have the authority to implement a decision on the particular matter for which the compensation was offered or received. In *United States v. Freeman*, the Fifth Circuit explained that the statute does not require proof of a *quid pro quo* arrangement, and as discussed in Chapter 2, a bribery charge under § 201 does not require proof that the exercise of official authority actually occurred or was within the power of the official to implement.[34] Thus, "it is immaterial that the donee-official's position is ministerial or subordinate, or even that he actually lacks the authority to perform an act to benefit the donor."[35]

E. Federal Forum

The statute identifies a broad range of federal forums before which the particular matter must occur for the offer or receipt of compensation to constitute a violation: "any department, agency, court, court-martial, officer, or any civil, military, or naval commission." The forums must be federal, and § 203 does not comprehend representational services by a federal official before a state or local government, where the threat that the person's authority might be misused is diminished.[36]

There appears to be a split in the circuits regarding whether the federal official must actually appear before the forum, and whether the statute is limited to just those forums listed in the statute. In *United States v. Myers*, the Second Circuit, after analyzing the statutory history and language, concluded that "we think it sounder to construe section 203(a) to reach only services performed or to be performed before the federal forums listed in the statute."[37] In *United States v. Freeman*, the Tenth Circuit held that § 203(b) "is not limited to federal employees appearing before the federal forums enumerated in § 203(a)."

The split may be more apparent than real.[38] *Myers* involved a member of Congress caught up in the Abscam undercover investigation who claimed he was only giving advice on seeking legal counsel in immigration matters that turned out to be part of the Abscam undercover operation. The jury instruction allowed a guilty verdict based on a wide variety of services that included giving advice but without reference to a particular proceeding before a federal department or

33. 979 F.2d at 921.

34. 572 F.2d 455, 481 (5th Cir. 1978). The circuit court stated, "Neither the ability to perform nor the actual performance of some identifiable official act as quid pro quo is necessary for a violation of [§ 203]."

35. *Id.*

36. *See* United States v. Biaggi, 853 F.2d 89, 98–99 (2nd Cir. 1988) ("The breadth of § 201 is highlighted by the narrower thrust of 18 U.S.C. § 203, a conflict-of-interest statute enacted contemporaneously with the pertinent version of § 201. Section 203 prohibits an official from accepting payment in relation to matters pending before specific federal forums. We assume that Congress's failure similarly to limit § 201's definition of "official act" reflects an intention that § 201 not be restricted to acts directed at federal agencies.").

37. 692 F.2d at 857.

38. *But see* Colleen B. Dixon et al., *Public Corruption*, 46 Am. Crim. L. Rev. 927, 954 (2009) (two circuits have reached "opposite conclusions" on whether the statutory list of forums is exclusive).

agency, which led the Second Circuit to overturn the conviction.[39] In *Freeman*, the Tenth Circuit held that the federal official need not personally appear before the agency for a conviction for giving compensation in connection with a particular matter. The defendant argued that there must be proof of an actual appearance, which the circuit court rejected. The Second Circuit endorsed that very point in *Wallach*, which was decided after *Myers* and *Freeman*, when it stated that "neither *Myers* nor any other decision of which we are aware requires that the compensated services of a federal official must involve his direct rendering of service before the department where the matter is pending."[40]

Freeman's language should not be read to mean that a § 203 violation can occur outside of a federal action that is not before one of the listed forums. Instead, the statute does not require an actual appearance before a department or agency so long as there is some identified action in which the United States is a party or has a direct and substantial interest. Nor should *Myers* be interpreted to require such an appearance, as *Wallach* makes quite clear. Section 203 requires that there be some federal action that exists or is reasonably contemplated, and that the federal official who receives the compensation was to provide representational services that involves at least some measure of interaction before one of the listed forums. Recall the Second Circuit's statement in *Myers* that "informal contacts, as well as formal appearances, are proscribed."[41] For both the government and defense counsel, it will be important to identify what federal action is alleged to be related to the compensation, and what the nature of the federal official's involvement was, or what was contemplated if not actual intervention or appearance occurred. The further removed the official was from the forum, the more difficult it will be to prove this element of the offense.

It is interesting to note that Congress is not on the list of federal forums before which a federal official cannot accept compensation for providing representational services. Section 202(c), which was added in 1990 as part of a technical amendment to the Ethics in Government Act,[42] provides that "[e]xcept as otherwise provided in such sections, the terms 'officer' and 'employee' in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge." While "officer" is listed as one of the federal forums in § 203, § 202(c) appears to preclude an appearance before a member of Congress as one that is covered by the statute. It is doubtful whether a congressional committee constitutes an "agency" of the federal government because it is comprised of members of the legislature and does not have any separate existence apart from Congress, unlike an agency of the executive branch, like the Federal Trade Commission or Securities and Exchange Commission. Professor Bayless Manning, who was heavily involved in the drafting of the conflict of interest statutes, noted in analyzing the predecessor to § 203 that "[w]hen all the arguments have been made, the result remains that there

39. In interpreting § 203, the Second Circuit found it instructive that a member of Congress could appear in a case before a court in which the United States was a party or had a substantial interest because § 203(a) at that time did not include the term "court" in the list of federal forums. The Ethics Reform Act of 1989, enacted after *Myers*, amended the statute by adding "court" after "agency." Thus, the circuit court's reasoning for taking a more restrictive view of the types of representational services that came within the statute may not be as strong at it was under the earlier version of § 203.

40. 979 F.2d at 920.

41. 692 F.2d at 858.

42. Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, § 5(a), 104 Stat. 158 (1990).

is no reliable basis for predicting whether services rendered before Congress or a Congressional committee violate Section 281."[43]

F. Intent

Similar to the unlawful gratuities prohibition, § 203 does not require proof that the defendant acted "corruptly," which is an element of proof for a bribe. In *United States v. Alexandro*, the Second Circuit stated, "It is clear on the face of § 203(a) that it does not require proof that compensation was 'corruptly' received or solicited as does § 201[]."[44] In *United States v. Evans*, the Fifth Circuit stated that "[s]pecific intent is not an element of. . . § 203(a)," and that "[t]he gravamen of [the] offense, then, is not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation."[45]

Section 203(a)(2) specifically requires proof of knowledge for any person who "gives, promises, or offers any compensation for any such representational services," but does not include that intent term for federal officials who solicit or accept such compensation. Thus, there is an important distinction between the intent level for a violation depending on whether the person is the offeror/donor or the solicitor/recipient. The term "knowingly" applies to "representational services," and it is logical that proof of the defendant's knowledge should also include the federal forum involved and the type of federal activity involved.

Section 203(a)(1) does not specify an intent for the federal official, so the customary rule is that the intent required for the offense would be a general intent—an awareness of the violative act. In *Evans*, however, the Fifth Circuit noted that the defendant "accepted the money and favors with *knowledge* that the payments were made because of his official position."[46] This reference to knowledge, however, appears to have been only a characterization of what the jury reasonably determined from the evidence and not a requirement that the government prove knowledge.

43. Manning, *supra* note 7, at 63.

44. 675 F.2d 34, 43 (2nd Cir. 1982). *See also* United States v. Eilberg, 465 F. Supp. 1076, 1078 (E.D. Pa. 1979) ("Thus, if Congress had intended to incorporate the purpose to influence as an element of the offense, it could have done so clearly and unequivocally.").

45. 572 F.2d at 481. In *United States v. Johnson*, 419 F.2d 56 (4th Cir. 1969), the Fourth Circuit stated that in a prosecution under the predecessor to § 203 that "it is reasonable to assume that Congress intended knowledge of the nature or purpose of the receipt to be a necessary element of the crime." *Id*. at 60. Section 203(a)'s distinction between the intent of an offeror/donor of the compensation and the solicitor/recipient undermines the argument that Congress must have intended that the government prove knowledge for both types of defendants. The goal of preventing conflicts of interest that may be harmful to the exercise of public authority supports the position that a lower intent level should be imposed on federal officials to maintain the integrity of the federal government.

46. *Id*. at 482 (italics added). The district court in *United States v. Eilberg*, 465 F. Supp. 1076 (E.D. Pa. 1979), stated that "[t]he gravamen of the offense punishable by § 203 is the *knowing* receipt of compensation for services rendered or to be rendered before a federal agency." The court's use of "knowing" would appear to import the knowledge element into § 203(a)(1), but the reference is to the receipt of the compensation, which is consistent with the requirement of a general intent that the defendant be aware of the voluntary acts that constitute the offense. As such, the reference to knowledge would not impose that intent level for all elements of the offense, but only that the federal official know that compensation was being paid.

The District of Columbia Circuit noted in *United States v. Baird* the distinction between the different intents in § 203(a)(1) and (a)(2) in holding that the government did not have to prove that the defendant, a reserve Coast Guard officer, knew his conduct violated the law because he had served more than 130 days on active duty.[47]

II. ACTIVITIES OF OFFICERS AND EMPLOYEES IN CLAIMS AGAINST AND OTHER MATTERS AFFECTING THE GOVERNMENT (18 U.S.C. § 205)

Section 205(a)(1) prohibits a federal employee from serving as an "agent or attorney for prosecuting any claim against the United States, or receiv[ing] any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim, or from receiving any gratuity, or share or interest in a claim, as consideration for assistance in prosecuting the claim." The provision covers ground that also comes within § 203's prohibition on conduct by federal employees, including SGEs, but is limited to those circumstances in which the person is acting as an *agent or attorney*, not "or otherwise." Section 205(a)(2) contains a second prohibition on federal employees from personally representing another person or entity as agent or attorney before a court, department, or agency in connection with "any covered matter in which the United States is a party or has a direct and substantial interest." Unlike § 203, this prohibition applies regardless of whether the federal employee received compensation for the representational activity.[48]

Section 205 traces its roots to the original conflict of interest statute enacted in 1853, entitled "An Act to Prevent Frauds on the Treasury of the United States" that prohibited federal officials from representing parties with claims against the United States.[49] The current provision contains a number of exceptions that allow federal employees to undertake certain types of representational services so long as the potential for an actual conflict of interest that will influence the outcome of the matter is not present. The limited application to SGEs present in § 203 also applies to § 205.[50]

47. 29 F.3d 647, 652 (D.C. Cir. 1994). The Ethics in Government Act of 1989 amended § 203 by moving what had been in subsection (b) providing the offense by the offeror/donor into § 203(a), so that the two offense are now designated as (a)(1) and (a)(2). The offense in *Baird* occurred before the amendment, so the circuit court references the previous version of the statute in its analysis of the distinct intents.

48. Section 204 provides that any member of Congress and those elected to it who "practices in the United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit shall be subject to the penalties set forth in section 216 of this title." This section is an even more targeted prohibition than § 205 prohibition on representational services.

49. 10 Stat. 170 (1853). *See* Van Ee v. EPA, 202 F.3d 296305-306 (D.C. Cir. 2000) (reviewing history of conflict of interest statutes).

50. Section 205(c) provides:

> A special Government employee shall be subject to subsections (a) and (b) only in relation to a covered matter involving a specific party or parties–

A. Agent or Attorney

Section 205(a) only applies when the federal employee appears as the "agent or attorney" of the party to the action in which the United States is a party or has a direct and substantial interest. The term "attorney" is clear, requiring that the person establish a lawyer-client relationship with the party being represented and act on that person's behalf by providing legal services. "Agent" is a much broader term, and an agency relationship does not require any formal action for its creation beyond the consent of the parties.[51]

In *O'Neill v. Dept. of Housing & Urban Development*, the Federal Circuit distinguished the scope of representation in § 203, which covers federal employees acting as an "agent or attorney or otherwise," from the more limited proscription on acting as an "agent or attorney" in § 205(a). The circuit court noted that the predecessor statute to § 205 included action that aided or assisted another, terminology that was deleted when Congress enacted the conflict of interest laws in 1962. The Federal Circuit found that "Congress has carefully and consciously distinguished between merely assisting, representing, or appearing before a federal agency on behalf of another party, on the one hand, and acting as agent or attorney for such a party, on the other. At a minimum, the differences in the elements of the offenses described in these related statutes show that Congress knew how to include the broader range of conduct within the scope of the conflict-of-interest provisions when it wished to."[52] *O'Neill* held that "agent" had the common law meaning that required consent of the parties so that the agent exercised actual or apparent authority on behalf of the principal.[53]

Other courts have also focused on the common law to determine whether an agency relationship existed in order to determine whether the representational services came within § 205's prohibition.[54] In *Refine Construction Co., Inc. v. United States*, the Court of Claims stated, "'Agent' in this context is a term of art and is broadly defined as one who is authorized to act for another, or a

> (1) in which he has at any time participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or
>
> (2) which is pending in the department or agency of the Government in which he is serving. Paragraph (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

51. *See* Restatement (Second) of Agency § 1(1) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). The consent can be express or implied. *See Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1119 (Mass. 2000) ("An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal's control.").

52. 220 F.3d 1354, 1362 (Fed. Cir. 2000).

53. *Id.* at 1361 ("proof of actual or apparent authority to act on behalf of the principal is necessary to establish that a person acts as an agent both under the common-law and, as we construe it, under section 205(a)(2).").

54. In *United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991), the Eleventh Circuit applied the common law analysis to a charge under § 207, similar to the approach to § 205. Section 207, however, covers not just an agent or attorney, but also a federal employee acting "otherwise" on behalf of a third party, but the indictment in the case only alleged that the employee acted as an agent or attorney. The "or otherwise" language means that the analysis of the scope of the common law of agency is unnecessary because the statute reaches a broader array of conduct, unlike § 205. Thus, while

business representative empowered to bring about contracts. In short, an agent is a person given the authority to speak or act on behalf of someone else."[55] In *United States v. Bailey*, the District of Columbia Circuit relied on the common law agency analysis in holding that evening law students who were full-time federal employees assisting a defendant in a federal criminal case through a school-sponsored clinical program came within § 205 because they were "subagents" of the defendant's counsel.[56]

In *United States v. Sweig*, a district court took a broader view of what constitutes an agent, stating "the strict common-law notion of 'agency' does not necessarily exhaust the meaning of the prohibition" so that an "agent" under § 205 has a "different and wider meaning." The district court did not explain what the "wider meaning" was, however, because it was unnecessary to resolve the case.[57]

B. Particular Matter

The representational prohibition in § 205(a)(2) applies to any "covered matter," which is defined in § 205(h) as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter." In *Van Ee v. EPA*, the District of Columbia Circuit explained the scope of "other particular matter" that triggers the statutory prohibition on representation as an agent or attorney. Van Ee worked for the Environmental Protection Agency (EPA) and also appeared on behalf of nonprofit organizations before federal agencies on issues related to land use and wildlife protection. He did not appear before his own agency, nor did he use any information from his work in connection with the representation of the groups before the federal agencies. The EPA pursued disciplinary actions against Van Ee for his representational services, and he sought injunctive and declaratory relief against the agency (and the Office of Government Ethics) on the ground that his appearances were not in connection with a "particular matter" with the federal government.

The D.C. Circuit rejected Van Ee's assertion that a "covered matter" only involved adversarial proceedings because "the conflicting interests at which § 205 is aimed could be equally present, for example, were a federal employee to represent a private party in its uncontested application for a broadcast license, patent, or other valuable benefit."[58] At the same time, the circuit court noted that § 205(a)(2) cannot apply to every matter in which the federal government has an interest because "Congress did not intend § 205 to act as a general gag order on federal employees."[59] To determine

Schaltenbrand is consistent with the analysis of "agent" under § 205, it is unnecessary for a § 207 case if the government charges the offense properly in the indictment.

55. 12 Cl.Ct. 56, 61 (Cl. Ct. 1987).

56. 498 F.2d 677, 679 (D.C. Cir. 1974) (The law students came "within the definition of 'subagents' appointed by agents with the consent of the principal. As such, they are clearly within the scope of the ban contained in 18 U.S.C. § 205.").

57. United States v. Sweig, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1970).

58. 202 F.3d 296, 302 (D.C. Cir. 2000).

59. *Id.*

when the circumstances come within the scope of the statutory prohibition, the D.C. Circuit stated that

> the limiting principle guiding Congress with respect to § 205 is that it is to apply only to matters in which the governmental decision at stake is focused on conferring a benefit, imposing a sanction, or otherwise having a discernable effect on the financial or similarly concrete interests of discrete and identifiable persons or entities. These are situations in which a federal employee, acting as a private party's agent or attorney, could be perceived as having divided loyalty and as using his or her office or inside information to corrupt the government's decisionmaking process.[60]

Thus, § 205 applies in those matters in which there is a danger that the federal employee acting as an agent or attorney entails a direct conflict of interest with the person's current duties to the federal government, the potential misuse of confidential government information, or an actual or perceived abuse of authority to garner a favorable outcome based on the employee's status.

By focusing on the potential for corruption in the decision-making process, the D.C. Circuit found that whether there is a "particular matter" involved "is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties are the concerns animating § 205 implicated."[61]

The hearings at issue in *Van Ee* were invitations for public comment on federal land management issues, and the employee's representation of the nonprofit groups did not involve any threat of corruption through the misuse of information or distortion of the decision-making process. Therefore, federal employees retain the right to appear before the government to advocate positions, and "§ 205 is properly understood to apply to those matters in which a federal employee's representational assistance could potentially distort the government's process for making a decision to confer a benefit, impose a sanction, or otherwise to directly affect the interests of discrete and identifiable persons or parties."[62]

C. Exceptions

Section 205's prohibition on any representational activity as an agent or attorney impinges on the ability of federal employees to engage in a range of professional and work-related activity on their own time. In recognition of the need to allow employees some measure of freedom to act for the benefit of other federal employees, § 205(d) allows *pro bono* representation in two instances: (1) in "any disciplinary, loyalty, or other personnel administration proceedings" involving another employee; and (2) for "any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or group's

60. *Id.* at 302–03.

61. *Id.* at 309.

62. *Id.* at 310.

members are current officers or employees of the United States or of the District of Columbia, or their spouses or dependent children." The former exception does not apply to any subsequent judicial proceeding in the federal courts, only to administrative proceedings.[63] The latter exception does not allow *pro bono* representation if the representation involves an administrative or judicial proceeding in which the organization is a party, or if the matter involves the disbursement of federal funds to the organization.[64]

Section 205(g) provides that the prohibition on representation as an agent or attorney does not prevent an employee "from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt." Two district courts have found the language clear in authorizing a federal employee to testify on behalf of a party in a case involving the United States, rejecting the argument that part-time government employees who were to be called as expert witnesses by a party opposing the United States could not testify.[65]

III. RESTRICTIONS ON FORMER OFFICERS, EMPLOYEES, AND ELECTED OFFICIALS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES (18 U.S.C. § 207)

Section 207 is the primary statute restricting postemployment activities of former federal officers and employees, dealing with the so-called "revolving door." The statute has been amended several times since its enactment in 1962, and is now a complex provision dealing with a range of contacts and representations in a number of matters by former officials ranging from members of Congress to lower-level federal employees.

The basic precepts of the common law prohibit an agent from harming the principal during the period of one's agency, while postemployment restrictions are minimal, relating primarily to restrictions on the use of confidential business information to compete with the principal. Businesses are rarely concerned about contacts a former employee might have with the company, and often welcome such interactions because they could generate additional business or referrals.

When the government is the former employer, however, there is a legitimate concern that departed officials will use their influence to sway the award of contracts and other benefits for

63. Bachman v. Pertschuk, 437 F. Supp. 973, 976 (D. D.C. 1977) ("[T]he exclusion need only apply to administrative proceedings where these types of matters are generally handled.").

64. 18 U.S.C. § 205(d)(2).

65. *See* United States v. Lecco, 495 F. Supp. 2d 581, 589 (S.D.W.Va. 2007) ("In view of the safe-harbor provisions found in section 203 and 205, the plain-meaning interpretation accorded them by existing case law, and the absence of explicit expert witness restrictions in sections 203 and 205, the court has difficulty envisioning circumstances under which Dr. Beckson would be subject to prosecution under the statutes identified by the government."); DeMarrias v. United States, 713 F. Supp. 346, 347 (D.S.D. 1989) ("Certainly, § 205 is somewhat cryptic and there is virtually no authority to guide this Court in applying § 205 to this case. Nonetheless, it is clear that the purposes of § 205 are not disserved by permitting Dr. Easton to testify about her observations and findings concerning the examination of the plaintiff that Dr. Easton conducted as part of her private practice.").

private interests who hire these officials in the hope of acquiring their access and contacts to their former offices. At the same time, working for the government should not be a straightjacket from which there is no escape, and it can be beneficial to attract highly skilled employees who will work for a limited period for the federal government before leaving for private business pursuits. The Seventh Circuit explained the benefits and burdens of placing restrictions on postemployment interaction with the federal government:

> The "revolving door"—the movement from private employment to the government and back—has benefits for the government as well as drawbacks. On the one hand it creates a risk of conflict of interest, a risk that people who hope to move to the private sector will favor while in public employment those firms they think may offer rewards later, and after these employees switch to the private side they may exercise undue influence on those they leave behind (who may seek to follow the same path, or may just need some of the information the departing employee took with him). On the other hand offering the opportunity to move from private to public employment and back again may enable the government to secure the services of skilled people who are unwilling to devote their careers to public service at current rates of pay. The government can hire people for less, and attract specially skilled agents, if it allows them to put their skills to use later for private employers.[66]

The statutory prohibitions in § 207 do not restrict or bar a federal employee from accepting employment with particular private (or public) employers after leaving the federal government. Instead, the focus is on interactions with the former agency on behalf of the new employer that raises questions about improper influence over the government's activities or operations. The basic prohibition is contained in § 207(a), and then additional restrictions in the statute are based on the level of the former employee's position and the types of activities in which the person was involved.

In addition to the statutory prohibition, there are a set of detailed regulations designed to provide guidance to federal employees who leave the government.[67] This section will focus primarily on the basic criminal prohibition in § 207(a), which covers communications or representations related to work the former employee was personally and substantially involved with, or matters that came within the former employee's supervisorial authority.

A. The Basic Prohibition (18 U.S.C. § 207(a))

Section 207(a) contains both a permanent prohibition on contacts by a former employee for certain matters, and a two-year ban on contacts for a wider range of issues that arose during the person's tenure, depending on the degree of involvement in the underlying matter that is the subject of the communication or representation. Section 207(a)(1) imposes a permanent ban on any officer or employee of the executive branch of the federal government (or of the District

66. United States v. Medico Industries, Inc., 784 F.2d 840, 843 (7th Cir. 1986).

67. 5 C.F.R. Part 2641.

of Columbia) from knowingly making, with the intent to influence, any communication to or appearance before any department, agency, or court in connection with a particular matter "(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation. . . ." The two-year ban in § 207(a)(2) has the same coverage as § 207(a)(1) except that it applies to a particular matter which the former executive branch (or District of Columbia) employee "knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia. . . ."

1. Participated Personally and Substantially

The distinction between the two provisions is that the lifetime ban involves matters in which the former employee "participated personally and substantially," while the two-year ban relates to matters that came within the former employee's official responsibility during the last year of the person's government service, even though it did not rise to the level of direct and substantial involvement in the particular matter. Section 202(b) defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." Section 207(i)(2) defines "participated" as "an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action." The issue of participation is broad, and the question in cases usually revolves around whether the official's involvement rose to the level of a personal and substantial participation.

In *United States v. Dorfman*, the district court held that a former U.S. Attorney's recusal from a matter did not remove him from the prohibition in § 207(a)(2) prohibiting involvement in a matter for two years when the person had official responsibility for it.[68] OGE regulations define "personally and substantially" as follows:

> To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially" means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort.

68. 542 F. Supp. 402, 408–09 (N.D. Ill. 1982) ("[R]ecusal does not permit avoidance of the two year prohibition of § 207(b) in respect to those matters which were actually pending under the official responsibility of the particular officer during his or her last year in office.").

> While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.[69]

In *United States v. Medico Industries, Inc.*, the Seventh Circuit noted that a former employee would not be personally involved "if the matter was just within his job description, but he did not work on it himself, [so] the officer would be free to represent a private party after leaving the government."[70]

On the issue of whether involvement in a particular matter is "substantial," in *United States v. Clark*, the district court found that a former Assistant U.S. Attorney could not represent a defendant in a complex criminal case in which he had previously supervised the overall investigation, received investigative reports, and discussed the matter with the prosecutor assigned to the case. The district court noted that while the former employee had little or no recollection of the matter, having left the U.S. Attorney's Office a few years earlier, but "under the statute and implementing regulation this is irrelevant. Disqualification does not depend on whether the former government lawyer has actual knowledge or acted with intent to violate his ethical duty."[71] The prohibition in § 207(a) "is concerned with the appearance of impropriety as with actual impropriety" that is not dissipated just by the passage of time or a lapse of memory.[72]

In *United States v. Martin*, the district court found that a former Assistant U.S. Attorney's role as a supervisor on the case in which he later sought to represent the defendant was "substantial" under § 207(a) because his "involvement in a supervisory capacity, taken as a whole, creates the 'reasonable appearance' of significance, especially when viewed in combination with the 'single act of approving or participation in' the 'critical step' of issuing the subpoenas for the checks."[73] Not all conduct by an attorney in a case, however, rises to the level of substantial participation in a matter. In *Kelly v. Brown,* the Court of Veterans Appeals found that there was not a violation when a former Department of Veterans Affairs attorney "was limited to reviewing (which only required him to verify the appellant's name, address, VA file number, and docket number), signing, and filing two minor pleadings" in a case in which he subsequently sought to represent the claimant.[74]

2. Particular Matter

The prohibition reaches circumstances involving a "particular matter," which is defined as "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy,

69. 5 C.F.R. § 2637.201(d). The OGE regulation provides the following example of personal and substantial involvement: "A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter." *Id*.

70. 784 F.2d 840, 843 (7th Cir. 1986).

71. 333 F. Supp. 2d 789, 795 (E.D. Wis. 2004).

72. *Id*. at 796.

73. 39 F. Supp. 2d 1333, 1334 (D. Utah 1999).

74. 9 Vet. App. 47, 39 (Ct. Vet. App. 1996).

claim, charge, accusation, arrest, or judicial or other proceeding."[75] The statute prohibits postemployment communications or appearances on a particular matter when it is one

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
(C) which involved a specific party or specific parties at the time it was so pending.

In *United States v. Medico Industries, Inc.*, the Seventh Circuit stated that "[t]he parties, facts, and subject matter must coincide to trigger the prohibition of § 207(a)."[76] Thus, according to the court, an official who drafted the specifications for a weapon could later represent a party submitting a bid for a contract to build it because "specifications (or regulations) do not have 'specific parties.'"[77] In *E.E.O.C. v. Exxon Corp.*, Fifth Circuit considered whether two former government attorneys could be experts on a case after they worked on the settlement of a matter involving the Valdez oil spill. In a subsequent case filed by the Equal Employment Opportunity Commission, a party to the settlement agreement sought to use the former employees as experts to testify about the scope of the agreement to defend against a charge that the company's substance abuse policy violated the Americans with Disabilities Act. The circuit court found that the attorneys' testimony comes within § 207(a)'s prohibition, explaining that "[t]he settlement is a 'contract,' a term included in the statutory definition [of particular matter]. Both matters involve the federal government and Exxon, and each deals with Exxon's substance abuse policy."[78]

In C.*A.C.I. Inc.-Federal v. United States*, the Federal Circuit considered whether a former Department of Justice official who was involved in a previous contract for services was disqualified from advising a bidder on a similar contract after he left the government. The circuit court found that they were not the same particular matter because "[t]he baseline service contract which the proposal covers is broader in scope, different in concept, and incorporates different features than the prior contracts."[79]

75. 18 U.S.C. § 207(i)(3).

76. 784 F.2d 840, 843 (7th Cir. 1986).

77. *Id.*

78. 202 F.3d 755, 757 (5th Cir. 2000). While the exception for testimony in § 207(j)(6) did not apply, the Fifth Circuit held that the testimony was permissible because it was based on the lawyers' knowledge of the settlement, and the fact that they received payment did not mean they were in violation of § 207(a). It based the decision on an OGE regulation, which provided, "To the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise. . . . 5 C.F.R. § 2637.209(b)(1) (1992)." *Id.* at 758.

79. 719 F.2d 1567, 1576 (Fed. Cir. 1983).

3. Scope of Conduct

The original language of § 207(a) restricted the provision to appearances by the former employee as an "agent or attorney" for an employer or principal. That limited approach was dropped when the Ethics in Government Act of 1989 amended the provision by adopting broader language that reaches "any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia."[80] The statute does not reach appearances before Congress or contacts with members of its legislative staff.

4. Intent

The statute requires that the defendant act "knowingly" in making the communication or appearance. In *United States v. Nofzinger*, the District of Columbia Circuit held that "knowingly" applies to all the elements of the offense and not just that the person had knowledge of the communication or appearance in the matter.[81] *Nofzinger* involved a prosecution under §207(c), which is no longer part of the statute, but its interpretation of the intent element applies to § 207(a)(1), which has a similar grammatical structure to the since-repealed provision at issue in that case.[82] Thus, a prosecution under § 207(a)(1) would require the government to prove the defendant's knowledge of the interest of the United States (or District of Columbia) in the matter, that the person was personally and substantially involved in the matter, and that it involved the specific parties at the time of the participation.

The same intent analysis should apply to a violation of the two-year ban in § 207(a)(2), except that one element has a different intent level. Section 207(a)(2)(B) provides that a former federal employee violates the provision if for the particular matter the person "knows *or reasonably should know* was actually pending under his or her official responsibility as such officer or employee. . . ." (italics added). For this element of the offense, an objective standard applies to the intent determination rather than just proof of the defendant's subjective knowledge. Thus, a former employee's denial of actual knowledge that the matter came within the person's responsibility, even if true, would not

80. Pub. L. No. 101-194, Title I, § 101(a), 103 Stat. 1716 (1989).

81. 878 F.2d 442, 454 (D.C. Cir. 1989).

82. The section provided:

> Whoever, [being a covered government employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to–
>
> (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
> (2) in connection with any. . . particular matter, and
> (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest–
> shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

be a defense to a charge if a person in a similar situation would reasonably know that the particular matter came within his or her responsibility.

Section 207(a) contains a second intent element, that the communication or appearance be made "with the intent to influence" the outcome of the particular matter. While a request for factual information from the former employee's office would not violate the provision, a communication or appearance related to the exercise of discretionary government authority would come within the statutory prohibition.

5. Specific Party

The requirement that a matter involve the specific party or parties involved at the time of the former employee's participation or supervisory authority over it further limits the scope of the provision. For example, involvement in a rulemaking proceeding or other general policy review would not involve specific parties, and therefore contact with the agency or department after leaving its employ on that matter would not run afoul of § 207(a), regardless of the nature or extent of the former employee's involvement. On the other hand, a government contract or even the solicitation of bids would involve specific parties, and so any communication or representation after leaving the government about that matter comes within the statute.

6. Scope of Restriction

Section 207(a)(3) provides a "clarification of restriction" contained in § 207(a)(1) and (2), emphasizing that those prohibitions apply "only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest. . . ."

A second subsection declares the same position regarding matters involving the District of Columbia. Congress added these provisions in 1990 in the Ethics Reform Act of 1989: Technical Amendments, but it is unclear how the provision adds to the understanding of the prohibitions of § 207(a)(1) and (2). The clarification largely restates the elements of § 207(a)(1) and (2), and makes it plain that it is only a communication to or appearance before a federal agency or court, or a District of Columbia agency, that triggers the postemployment restriction, and not a communication with any other level of government.[83]

The scope of § 207(a), as clarified by § 207(c), does not restrict a former employee from providing advice to a new employer about matters on which the person worked or had supervisory

83. A report prepared by the House and Senate Legislative Counsel states, "The amendment clarifies that the postemployment restrictions apply, in the case of an Executive Branch employee, only to communications to agencies of the United States, and in the case of a District of Columbia employee, only to communications to agencies of the District of Columbia." *P.L. 101-280, Ethics Reform Act of 1989: Technical Amendments, Detailed Explanation Prepared by House and Senate Legislative Counsel*, April 24, 1990, 1990 U.S.C.C.A.N. 169.

authority over, so long as the person does not communicate with an official or enter an appearance in the particular matter. Behind-the-scenes counsel about a matter on which the person worked can be a significant benefit to the new employer, yet clearly falls outside the scope of § 207(a).

In *United States v. Coleman*, the Third Circuit upheld the conviction of a former IRS revenue agent who appeared at meetings along with taxpayers whose cases he had been involved with before he left the agency. Although his involvement during the meetings was minimal, the circuit court found that he impermissibly represented the taxpayers in the cases. The court, applying a predecessor provision to § 207(a)(1), stated, "Thus, although section 207(b)(i) does not bar private consultation by a former official on matters that had been within his or her official responsibility, Coleman's appearance before [the IRS] transformed permissible private consultation into impermissible 'representation' barred by section 207(b)(i)."[84] Simply having contact with the former government office does not automatically violate § 207(a), however, and the defendant must appear in a professional capacity that seeks to influence the agency through the communication or appearance.[85]

B. Additional Restrictions (18 U.S.C. § 207(b)–(l))

Congress has enacted a number of specific provisions designed to restrict contacts involving former senior government officials, former members of Congress and their staff, and those who participated in trade negotiations who are no longer in the government. These former officials are, of course, also covered by § 207(a), but this subsection highlights how the law targets special situations beyond the basic prohibition on contacts and appearances.

1. Trade or Treaty Negotiations (18 U.S.C. § 207(b))

Section 207(b) imposes a one-year ban on a former employee knowingly representing, aiding, or advising any other person about ongoing trade or treaty negotiations that the person participated in personally and substantially during the last year of government service. A trade negotiation takes place when the president determines to undertake to enter into a trade agreement pursuant to § 1102 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2903(a)(1)(A)). A treaty negotiation occurs when the president undertakes discussions with a foreign government or international body that will result in an agreement requiring the advice and consent of the Senate.

The provision is more limited in scope than § 207(a) because it only applies to a former employee "who had access to information concerning such trade or treaty negotiation which is

84. United States v. Coleman, 805 F.2d 474, 480 (3rd Cir. 1986).

85. *See* Robert E. Derecktor of Rhode Island, Inc. v. United States, 762 F. Supp. 1019, 1027 (D. R.I. 1991) ("A defendant must appear in a professional capacity in order to violate 18 U.S.C. § 207(b). Since Onesty only appeared as a messenger, he did not violate the Ethics in Government Act.").

exempt from disclosure under [the Freedom of Information Act], which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated." At the same time, it is broader than the basic prohibition because it reaches behind-the-scenes advice by prohibiting aiding or advising another person on the trade or treaty negotiations. A former employee can provide assistance to the federal government in connection with the trade or treaty negotiation.

2. Senior Executive and Agency Personnel (18 U.S.C § 207(c))

Section 207(c) imposes a one-year ban on a current or former employee who was in a "senior" position from communicating on behalf of or representing any other person in relation to the agency or department in which the person served "in connection with any matter on which such person seeks official action by any officer or employee of such department or agency. . . ."

This provision does not require that the person have any involvement in the matter that is the subject of the communication or representation, so there is no need to inquire into whether the person participated in the matter, who were specific parties to it, or whether it came within the supervisorial authority of the senior official. The goal of the provision is to limit the appearance that a decision by the agency in which the person served might be influenced based on the contacts of a former high-level official. Like § 207(a), the prohibition does not reach behind-the-scenes consultation. In addition, the person can have contact on behalf of another agency or department of the federal government.

Section 207(c) applies to "senior" employees, but not to "very senior" employees, who are covered by the restrictions in § 207(d). Moreover, the person need not have left the federal government, only that the person is no longer at the level of a "senior" employee. Section 207(c)(2)(A) defines a "senior" employee based on their pay grade or appointment in the Senior Executive Service.[86]

86. The prohibition reaches the following federal officials:

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,
(ii) employed in a position which is not referred to in clause (i) and for which that person is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, or, for a period of 2 years following the enactment of the National Defense Authorization Act for Fiscal Year 2004, a person who, on the day prior to the enactment of that Act, was employed in a position which is not referred to in clause (i) and for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5304 or section 5304a of title 5, was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service on the day prior to the enactment of that Act,
(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3,
(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above; or

3. Very Senior Executive and Agency Personnel (18 U.S.C. § 207(d))

Section 207(d) imposes a two-year ban on a current or former employee who was in a "very senior" position from communicating on behalf of or representing any other person in relation to the agency or department in which the person served, or with "any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5," in relation to "any matter on which such person seeks official action by any officer or employee of such department or agency. . . ." The longer period barring contact was expanded by Congress from a one-year prohibition in 2007 as part of the Honest Leadership and Open Government Act of 2007.[87] The definition of "very senior" personnel is any person who

> (A) serves in the position of Vice President of the United States,
> (B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or
> (C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3.

The provision is broader than § 207(c)'s application to "senior" officials because it reaches contacts with high-level government officials in *any* agency or department regardless of where the former very senior official worked. Section 207(d) imposes a much greater limitation than § 207(c), which has a shorter duration and is limited to contact with the person's former agency or department.

4. Congress and Its Staff (18 U.S.C. § 207(e))

The Honest Leadership and Open Government Act of 2007 expanded the prohibition on former members of Congress and certain members of their staff, or the staff of congressional committees, from making "with intent to influence" any communication to or appearance before any current member of Congress or staff member "in connection with any matter on which such former Senator seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity."[88] The statute is limited to lobbying on Capitol Hill and does not otherwise restrict activities by these officials in connection with matters before the executive branch, the courts, or

(v) assigned from a private sector organization to an agency under chapter 37 of title 5.
The prohibition in § 207(c) does not apply "to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates." 18 U.S.C. § 207(c)(2)(b).

87. Pub. L. No. 110-81, Title I, § 101, 121 Stat. 736 (2007).

88. *Id.*

an administrative agency. The law imposes a two-year ban on senators, but only a one-year ban on the House of Representatives and congressional staff from either body.

5. Foreign Entities (18 U.S.C. § 207(f))

For those former officials who come within the prohibitions in § 207(c), (d), and (e), there is an additional one-year ban on representing, aiding, or advising a foreign entity before any department of agency. The statute defines a "foreign entity" as the government of a foreign country or a foreign political party, as those terms are defined in turn by the Foreign Agents Registration Act of 1938.[89]

C. Exemptions

There are seven exemptions from the various prohibitions in § 207:

- A former federal employee can continue to carry out official duties on behalf of the United States, as an elected official of a state or local government, or any act "authorized by section 104(j) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450i(j))" (§ 207(j)(1));
- For senior or very senior officials, and those working for Congress, acts on behalf of a state or local government, an institution of higher education, or a nonprofit hospital or medical research organization (§ 207(j)(2));
- A former employee representing or assisting an international organization in which the United States participates, if the secretary of state certifies in advance that the activity is in the interest of the United States (§ 207(j)(3));
- Senior or very senior officials, and those working for Congress, may make or provide "a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received" (§ 207 (j)(4));
- A former employee can make a communication "solely for the purpose of furnishing scientific or technological information" so long as the communication is made pursuant to procedures of the department or agency concerned, or if there is a certification published in the Federal Register "that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee" (§ 207(j)(5));

89. 22 U.S.C. § 611(e) defines "government of a foreign country," and § 611(f) defines "foreign political party."

- The prohibition does not apply to a former employee giving "testimony under oath, or from making statements required to be made under penalty of perjury," so that they could appear as an expert witness, except that this exemption does not apply if the person comes under § 207(a)(1) because of personal and substantial involvement in a particular matter (§ 207(j)(6)); and
- For senior or very senior officials, they can, within certain limitations, appear with or communicate on behalf of "a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party" (§ 207(j)(7)).

IV. ACTS AFFECTING A PERSONAL FINANCIAL INTEREST (18 U.S.C. § 208)

Section 208 addresses the issue of conflicts of interest arising from a current federal employee's personal financial interests, and accounts for the majority of federal conflict of interest prosecutions. Working for the federal government does not mean that a person must abjure all outside financial or remunerative activities, but the temptation to favor one's own pecuniary interests, or those of one's family, is ever-present and can work a subtle influence on the exercise of authority.

While the most basic method of favoring oneself is already covered by § 201's proscription on bribes and unlawful gratuities, § 208 reaches a broader form of potential self-aggrandizement by prohibiting participation in a wide range of government activities in which a federal employee, his or her "spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. . . ." The statute covers a broader range of interests than just the federal employee's direct pecuniary investments and ownership interests by including situations in which the person is negotiating future employment and exercises governmental authority that could favor that organization.

In *United States v. Mississippi Valley Generating Co.*, the Supreme Court explained the goal of 18 U.S.C. § 434, the predecessor to § 208: "The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[90] As the Court noted, a violation does not require proof of actual corruption, or that the government suffer any loss from the employee's act, so that "[t]he statute is thus directed not only at dishonor, but also at conduct that tempts dishonor."[91]

90. 364 U.S. 520, 562 (1961).

91. *Id.* at 549.

Section 208 traces its roots to an 1863 statute that prohibited a federal employee with a financial interest in a corporation or other type of organization from acting on behalf of the government in the "transaction of business with such business entity."[92] Congress viewed the limitation to the "transaction of business" as overly narrow, so it substantially expanded the scope of the prohibition on conflicts of interest when it enacted § 208. The House Report on the new provision states, "Section 208 supplants 18 U.S.C. § 434 which disqualifies government officials who are pecuniarily interested in business entities from transacting business with such entity on behalf of the Government. Section 208(a) would prohibit not merely 'transacting business' with a business entity in which the government employee is interested but would bar any significant participation in government action in the consequences of which to his knowledge the employee has a financial interest."[93] Similarly, the Senate Report states that § 208 "improves upon the present law (§ 434) by abandoning the limiting concept of the 'transaction of business.' The disqualification of the subsection embraces any participation on behalf of the Government in a matter in which the employee has an outside financial interest, even though his participation does not involve the transaction of business."[94]

The focus of § 208 is not just on a particular exercise of government authority, such as the award of a contract or ruling on a disputed issue, but also includes preparatory activity well in advance of any final decision. As the Seventh Circuit explained in *United States v. Irons*, "[T]he legislative history could not be more persuasive in suggesting that, while the former § 434 covered the 'transaction of business' including acts performed by way of execution of a contract involving a conflict of interest, the new Section 208 was explicit in addressing prior or more remote acts of advice or investigation."[95]

Section 208(a) prohibits federal (and District of Columbia) employees from "personally and substantially" participating in any "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" in which the person has a financial interest. This broader scope means that a much wider range of conduct could subject a federal employee to prosecution under the statute.

A. Officer or Employee

As with the other conflict of interest statutes, § 208(a) covers "an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States," along with SGEs and those employed by the District of Columbia. In addition, the statute applies

92. Act of March 2, 1863, ch. 67, § 8, 12 Stat. 696 (1863). In *Mississippi Valley Generating Co.*, the Court noted Congress adopted the statute "following the disclosure by a House Committee of scandalous corruption on the part of government agents whose job it was to procure was materials for the Union armies during the Civil War." 364 U.S. at 548.

93. H.R.Rep. No. 748 (1961).

94. S. Rep. No. 2213 (1961).

95. 640 F.2d 872, 878 (7th Cir. 1981).

to "a Federal Reserve bank director, officer, or employee," which was added to the statute in 1977.[96]

While the issue of whether a person is a federal employee is usually noncontroversial, in *United States v. Smith*, the District of Columbia Circuit rejected a defendant's argument that the prohibition only applies to employees at higher pay grades. The circuit court stated that there is no implicit limitation in the statutory language, and that "§ 208(a) was intended, and generally has been interpreted to have a broad reach, to cover all that a commonsense reading of its language would suggest."[97] In *United States v. Haynes*, a district court dismissed a § 208 charge because the defendant was an employee of a production credit association, which was federally chartered under the Farm Credit Act of 1933 but was not a federal agency, so the defendant did not come within the statutory proscription.[98]

B. Exercise of Authority

The statute contains two catch-all terms in defining the scope of the federal employee's conduct that can come within the prohibition. First, it reaches any "decision, approval, disapproval, recommendation, the rendering of advice, investigation, *or otherwise*. . . ." In explaining the scope of the provision, the Seventh Circuit stated in *United States v. Irons* that "the 'or otherwise' language of Section 208 includes acts which execute or carry to completion a contract or matter as to which the acts of rendering advice or making recommendations are specifically proscribed."[99] The defendant argued that his acts of supplying equipment under a contract that had already been entered into in exchange for payments did not violate § 208(a) because they did not involve any decision regarding entering into the agreement. In upholding the conviction, the circuit court noted that "[t]he legislative history of Section 208 demonstrates an intention to proscribe rather broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions. . . ."[100]

In *United States v. Lund*, the Fourth Circuit also read § 208(a) broadly in upholding the conviction of a federal employee who recommended his wife for pay increases and a promotion when their marriage was disclosed to the agency and regulations prohibited him from any involvement with her supervision or promotion. Rejecting the argument that the terms "contract" and "arrangement" only apply to government interactions with third parties and not internal employee issues, the circuit court held that the statute was "not restricted to conflicts of interest in matters involving outside entities, and nothing in the legislative history reveals a congressional intent to limit that

96. Pub. L. No. 95-188, Title II, § 205, 91 Stat. 1388 (1977).

97. 267 F.3d 1154, 1159 (D.C. Cir. 2001).

98. 620 F. Supp. 474, 476 (M.D. Tenn. 1985).

99. 640 F.2d 872, 878 (7th Cir. 1981).

100. *Id.* at 876.

broad language to less than its normal span. To the contrary, the legislative history indicates that Congress was fully aware of the potential breadth of the new statute."[101]

The Ninth Circuit rejected a similarly narrow interpretation of "contract" advanced by the defendant in *United States v. Selby*, reiterating that Congress chose broad language in formulating the conflict of interest prohibition. The defendant had participated in internal agency deliberations regarding expanding the scope of the work to be performed under a contract with a company that employed her husband, and urged co-workers to recommend expansion of the contract that would result in additional sales commissions for him. The circuit court held "where, as here, an employee suffers from a conflict of interest, liability may lie for actions taken after the initial procurement is authorized."[102] The Ninth Circuit determined that the defendant "did have a significant discretionary role in the [] contract, and that she was involved in the deal while there was still opportunity to change the financial outcome. Selby's involvement was not, as she characterizes it, merely ministerial or purely 'post-contractual.'"[103] *Selby* makes it clear that it is the measure of the federal employee's involvement in the exercise of authority, and not the technical legal status of the contract, that is determinative of the scope of liability.

Each specific act by the federal employee that constitutes a conflict of interest is not a separate violation of the statute, however. In *United States v. Jewell*, the Ninth Circuit determined that a "matter may form a separate basis for liability under section 208 only if it is a discrete transaction. It cannot be part of a larger transaction, and cannot be continuous or overlapping with another matter."[104] Thus, a single count alleging a violation of § 208(a) is proper even if there are separate instances reflecting the same core conflict of interest.

Even if the employee was connected to the government act, the defendant's conduct must rise to the level of participating "personally and substantially" in the action. In *United States v. Ponnapula*, the Sixth Circuit noted that "[a] statute aimed at preserving the integrity of the decisionmaking process does not need to extend to employees who have no discretion to affect that process."[105] Where the employee only reviewed a memorandum of sale with the purchaser to ensure he understood the terms, that was not sufficiently "substantial" involvement in the transaction to violate § 208(a).

C. Negotiating or Arranging for Prospective Employment

One of the significant innovations of § 208(a) was adding to the usual array of potential conflicts of interest the prohibition on any involvement in a government action while a federal employee "is negotiating or has any arrangement concerning prospective employment" with the person or

101. 853 F.2d 242, 246 (4th Cir. 1988).

102. 557 F.3d 968, 973 (9th Cir. 2009).

103. *Id.* at 973–74.

104. 827 F.2d 586, 588 (9th Cir. 1987).

105. 246 F.3d 576, 583 (6th Cir. 2001). The case involved the enforceability of a contract and was not a criminal prosecution.

organization that would be affected by the act. The District of Columbia Circuit rejected a vagueness challenge to this portion of the prohibition in *United States v. Conlon*, holding that "the terms 'negotiating' and 'arrangement' are not exotic or abstruse words, requiring etymological study or judicial analysis. They are common words of universal usage."[106] Reiterating the point about broadly construing the statutory prohibition, the circuit court overturned the trial court's dismissal of the charge because the government failed to allege specific acts of negotiating or particular bilateral arrangements by the defendant. The circuit court stated that "we must conclude that Congress meant the words 'negotiating' and 'arrangement' in § 208(a) to be given a broad reading, rather than the narrow reading accorded them by the district court."[107]

D. Financial Interest

The conflict of interest prohibition does not require that the federal employee realize an actual gain or benefit from the action taken. In *United States v. Gorman*, the Sixth Circuit held, "A financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply."[108] This is consistent with the Supreme Court's analysis of the predecessor to § 208 in *Mississippi Valley Generating Co.*, when it stated that "the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest."[109]

E. Intent

The only intent identified in the statutory language is that the defendant's act on behalf of the government "to his knowledge" involve his financial interest, or those of the others identified in the statute. Importantly, this phrase is cordoned off by commas, and so it is clear that knowledge is only required for this portion of § 208(a) and not all the other elements of the offense. In *United States v. Hedges*, the Eleventh Circuit rejected the defendant's argument that "knowledge" applies to each element of the crime, holding that "the statute specifically places the mental state requirement of knowledge in the last element and thus requires that the government official have knowledge of the conflicting financial interest."[110]

106. 628 F.2d 150, 154 (D.C. Cir. 1980).

107. *Id.* at 155. The Sixth Circuit cited to *Conlon* in stating that "negotiation" should "be given its common, everyday meaning for purposes of Section 208(a)." *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1987).

108. *Id.*

109. 364 U.S. 520, 549 (1961).

110. 912 F.2d 1297, 1401 (11th Cir. 1990). The circuit court found the defendant's citation to *United States v. Nofzinger* inapposite because that case dealt with § 207, where "knowingly" comes before the elements of the offense.

Unfortunately, the district court in *Hedges* stated that the statute is a strict liability provision, an assertion the Eleventh Circuit did not explicitly reject in upholding the conviction. Section 208(a) clearly is not a strict liability statute because it does require proof of knowledge regarding the defendant's financial interest, although the government need not show the same level of intent for the other elements of the crime. A defendant's status as a government employee, along with personal and substantial involvement in the government action, would not require proof of a separate intent because they would clearly come within the defendant's general awareness—one could hardly deny knowledge of being a federal employee if one in fact held that position. Nor does the statute require proof that the defendant violated a known legal duty because the prohibition on conflicts of interest does not require proof of any actual or intended harm or personal benefit.[111]

F. Exemptions

Congress enacted a set of exemptions to the proscription on financial conflicts of interest in the Ethics Reform Act of 1989.[112] As set forth in § 208(b), the statute provides the following exceptions to the statutory prohibition:

- When the employee makes full disclosure of the conflict of interest to the official responsible for the appointment, and "receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee";
- Regulations issued by the Office of Government Ethics that are applicable to the relevant employees determining that the financial interest is "too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies";
- For an SGE serving on an advisory panel pursuant to the Federal Advisory Committee Act who filed the requisite financial disclosure form, and the appointing official "certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved"; and
- When the financial interest results solely from birthrights related to Indian tribes, nations, or bands, an Indian allotment of title, or an Indian claim fund.

Any exemption granted by an official responsible for an appointment shall be made available to the public upon request pursuant to § 208(d)(1).

111. *See* United States v. Gorman, 807 F.2d at 1304 ("Section 208 sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct that tempts dishonor.").

112. Pub. L. No. 101-194, Title IV, § 405, 103 Stat. 1751 (1989).

V. SALARY OF GOVERNMENT OFFICIALS AND EMPLOYEES PAYABLE ONLY BY UNITED STATES (18 U.S.C. § 209)

Section 209 deals with the supplementation of the salaries paid to federal employees by outside parties. Unlike the payment of a bribe or an unlawful gratuity that is tied to a particular exercise of government authority, either as a *quid pro quo* or "for or because of" official action, § 209(a) prohibits any payment to "an officer or employee" of the executive branch, an independent agency, or the District of Columbia, regardless of whether the federal official could favor the payor or the benefit affected the performance of official duty. As with the other conflict of interest provisions, the statute is aimed at the potential for corruption rather than particular instances of the misuse of office for personal gain that are prohibited by § 201.

The predecessor to § 209 was 18 U.S.C. § 1914, which prohibited payments to a federal employee "in connection with his services as such an official or employee." Congress adopted the original prohibition in 1917 because of the then-Bureau of Education's practice of permitting private charitable organizations, such as the Rockefeller and Carnegie foundations, to pay the salaries of employees of the bureau while the government only paid them one dollar. These employees, along with business executives recruited to assist the government during World War I, were referred to as "dollar-a-year men," and the perception in Congress was that the institutions paying the salaries could wield inordinate power over government policy.[113]

Section 209 reenacted the prohibition of § 1914 without substantial change, except that the prohibition is on receiving any salary supplementation "as compensation for his services as an officer or employee" rather than "in connection with" those positions. It addresses three primary concerns regarding the integrity of federal employees:

> The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government.[114]

The statute reaches both the federal employee receiving the payment and the individual or organization that makes the payment. Importantly, the statute does not require proof of a corrupt

113. *See* Crandon v. United States, 494 U.S. 152, 160 n.12 (1990).

114. Association of the Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960).

intent, nor must the payor have any interest in the work of the department or agency in which the employee works. The Supreme Court pointed out that "[n]either good faith, nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment."[115] Thus, unlike other conflict of interest provisions that incorporate as an element of the offense the employee's personal and substantial participation in a matter, § 209(a) focuses solely on whether the salary supplementation was provided (and received) as compensation for the employee's services on behalf of the government, without regard to whether there is a misuse of public authority.

A. Crandon v. United States: *Timing of the Payment*

In *Crandon v. United States*, the Supreme Court reviewed lump sum severance payments made by the Boeing Company to five of its former employees who left the company to work for the federal government. The payments were expressly made to mitigate the financial losses the former employees would incur by leaving for government service, including reduced salaries and retirement benefits. In a civil suit to recover the payments, the government argued that they violated § 209(a) because they were for the employee's service on behalf of the federal government.

Importantly, none of the five were employees of the federal government at the time of the severance payments. In reviewing the statutory language, the Court held that a "literal reading of the second paragraph [of § 209(a)]—particularly the use of the term 'any such officer or employee'—supports the conclusion that the payee must be a Government employee at the time the payment is made."[116] The Court noted that the predecessor to § 209 applied to current employees only, and that other subsections of the statute allowing certain types of payments to employees while they are working for the government supported the interpretation of § 209(a) as applying only to those payments made when the person is currently working for the federal government.[117]

115. *Crandon*, 494 U.S. at 165.

116. *Id.* at 159.

117. The Court also analyzed the three policies supporting the prohibition on salary supplementation, and stated:

> At least two of the three policy justifications for the rule—the concern that the private paymaster will have an economic hold over the employee and the concern about bitterness among fellow employees—apply to ongoing payments but have little or no application to an unconditional preemployment severance payment. Of course, the concern that the employee might tend to favor his former employer would be enhanced by a generous payment, but the absence of any ongoing relationship may mitigate that concern, particularly if other rules disqualify the employee from participating in any matter involving a former employer. Thus, although the policy justifications for § 209(a) are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements.

Id. at 166. Professor Nolan criticized the Court's analysis of the policy rationale for the statute:

> [*Crandon*] did not explain why the third justification—the fear of a "generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers"—would not be risked by payments made before the commencement of government service. There is no apparent reason that fellow employees should be "suspicious" and "bitter" about payments only if they are made during government

While *Crandon* addressed only preemployment payments, the Court's requirement that the timing of the salary supplementation occur while the person is in the employ of the federal government would seem to preclude a charge for violating § 209(a) for payments made after the person leaves the federal government. Of course, if the payments were made "for or because of" an identified official act, then that would be a violation of § 201(c)'s prohibition on gratuities. If that link could not be established, however, then it appears a postemployment payment is immune from prosecution.[118]

Justice Antonin Scalia, in an opinion joined by Justices Sandra Day O'Connor and Anthony Kennedy concurring in the judgment in *Crandon*, offered a different analysis of the scope of § 209(a)'s prohibition. Rather than look to the timing of the payment, he asserted that the statute only prohibits periodic payments, rather than a single lump sum payment, because the term "salary" is different from "compensation" and requires that the payments be made at regular intervals.[119] The district court in *United States v. Project on Government Oversight* rejected an argument asserting that position. The court found that the government made a compelling argument that Justice Scalia's interpretation "tortures the meaning of 'contribution' and 'supplement,'" and that exceptions in the statute for one-time payments, such as for relocation expenses and contributions to charities, would be rendered meaningless if the statute only prohibited periodic payments rather than lump sum transfers.[120]

B. For Services as a Government Employee

Section 209(a) prohibits payment of compensation to a federal employee "for his services as an officer or employee." In *United States v. Muntain*, the District of Columbia Circuit found that the reimbursement of travel expenses to a government employee and his wife were not related to his work on behalf of the government. The circuit court stated, "[T]he payment to Muntain was for services having nothing to do with HUD business or with any responsibilities Muntain may have had to the Government as an employee of the United States. Indeed, at the time of the trip, Muntain was on leave from his Government position."[121] Thus, while the prosecution need not show that an exercise of federal authority was in any way influenced by the salary supplementation, it must show a nexus between the compensation and the federal employee's work for the government.

> service . . . A large lump-sum payment is not some delicate fish that smells sweet if it is offered the day before one goes to work for the government, but suddenly smells rotten the very next day.

Nolan, *supra* note 4, at 98–99.

118. Professor Nolan rather harshly criticized *Crandon*'s analysis that yields such an outcome, stating that the "distinction between compensation accepted before or after the commencement of employment distorts the intended effect of section 209, by permitting payors to compensate for government services merely by paying attention to the calendar." *Id.* at 102.

119. 494 U.S. at 170–72 (Scalia, J., concurring).

120. 525 F. Supp. 2d 161, 172 (D.C. D.C. 2007).

121. 610 F.2d 964, 970 (D.C. Cir. 1979).

The statutory language does not indicate that the government needs to prove the defendant acted with any particular intent, and the statement in *Crandon* that "[n]either good faith nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment" shows that § 209(a) is not a specific intent offense. If it were otherwise, then good faith or a lack of knowledge regarding the purpose of the payment would be viable defenses to the charge, which *Crandon* clearly precluded.

Even though intent is not an element of the crime, the purpose of the payment can be relevant in ascertaining whether it was "for his services" or done for a reason unrelated to the federal employment. In *United States v. Project on Government Oversight*, the district court considered the role of intent in a case in which a nonprofit organization gave a monetary award to a Department of the Interior employee for his role in exposing underpayment of royalties to the government. The organization claimed that the money was for his work as a whistleblower, and therefore unrelated to his official duties, while the government claimed that the compensation was for work he did in writing an internal memorandum that turned out to be important in exposing the underpayment. The trial judge noted that "'subjective intent' is not a relevant issue in this case. That is not to say, however, that 'intent' may never be a factor in the § 209(a) analysis."[122] The district court stated that the parties' intent in making and receiving the payment "would be helpful to establish what 'services' the award was 'as compensation for' under § 209(a)."[123]

The First Circuit reiterated this analysis of whether a payment was compensation for services in *United States v. Alfonzo-Reyes*. It stated that there were two parts to the issue: "(1) what the disputed payment is for, i.e., what activity prompted the compensation; and (2) the subjective intent of the parties to determine what the payment was actually for, especially where there are various activities that could have motivated the payment."[124] The circuit court rejected the defendant's argument that the money and other benefit he received was a gift and so did not constitute compensation for work as a federal employee, finding that the payers' reason to provide them to put themselves in a better position to obtain future benefits and in appreciation of his past help and to get on his "good side" furnished "sufficient evidence that non-government parties improperly supplemented Alfonzo's income in exchange for the services he rendered as a [Farm Service Agency] employee."[125] Thus, a transfer can be compensation even if the payment comes after the exercise of authority or is not tied to a specific official act.

The OGE made a similar point when it stated that "[i]ntent to compensate for performance of Government duties is highly probative in reviewing for a potential violation of 18 U.S.C. § 209."[126]

122. 531 F. Supp. 2d 59, 61 (D.C. D.C. 2008).

123. *Id.* The district court concluded that the evidence of subjective intent was not relevant in the case because the only issue it was directed at was whether the employee's work constituted "government services," not whether the payment was "for" those services. It stated, "In short, while subjective intent may sometimes be a part of the § 209(a) inquiry in determining what the payment was 'for'—an issue this Court does not reach—it is not a relevant inquiry in determining whether what the payment was for constitutes government services." *Id.* at 64.

124. 590 F.3d 280, 292 (1st Cir. 2010).

125. *Id.* The defendant received $10,000 in cash and free repairs for his wife automobile.

126. OGE Informal Advisory Letter 88x12 (July 27, 1988). The OGE Informal Advisory Letter goes on to state that "[t]he express intent of the payor, if any, is a factor that must be considered."

For example, a program that fulfilled the wishes of terminally ill children of a federal law enforcement agency would show an intent to compensate the employee because of their position in the government, but the purpose was not related to their official services but instead out of sympathy for their plight.[127] Therefore, while intent is not an element of the crime, it is relevant in determining whether there is proof of the nexus between the payment and the employee's services for the government.

C. Exemptions

There are six statutory exemptions from the prohibition on salary supplementation for federal employees. They are:

- Payments from states, counties, and municipalities (§ 209(a));
- Participation in a "bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer" (§ 209(b));
- SGEs and volunteer employees are exempt from the prohibition (§ 209(c));
- Payments in accord with the Government Employees Training Act (5 U.S.C. § 4111), which permits contributions and awards incident to training at nongovernment facilities, including related expenses (§ 209(d));
- Payment of relocation expenses in connection with participation "in an executive exchange or fellowship program in an executive agency" that meets certain requirements (§ 209(e)); and
- Payments from a tax-exempt organization to federal employees injured during an assassination or attempted assassination, or other criminal acts, involving senior government officials (§ 209(f)).[128]

VI. PENALTIES AND INJUNCTIONS

Section 216(a) provides for two levels of punishment upon conviction for violating one of the conflict of interest statutes. For a defendant who "engages in the conduct constituting the offense," § 216(a)(1) provides for a maximum prison term of one year. If a defendant "*willfully* engages in the conduct constituting the offense," then under § 216(a)(2) the maximum prison term is five years. The higher punishment is based on proof of a greater intent—willfully—by the defendant.

127. *See* Office of Government Ethics, *Summary of the Restriction on Supplementation of Salary (18 U.S.C. § 209)*, *available at* http://www.usoge.gov/laws_regs/other_ethics_guidance/othr_gdnc/og_sum209_02.pdf.

128. The exemption for federal employees injured during an assassination attempt was enacted in response to the injuries suffered by a secret service agent and the press secretary during the attempted assassination of President Ronald Reagan in 1981. *See* 128 Cong. Rec. 6322–6323, 6381–6382 (1981).

Even if the particular statute does not require proof of a specific intent, the willfulness element means that the government must prove that the defendant intentionally violated a known legal duty.

This is consistent with the Supreme Court's interpretation of "willfully" in the areas of tax evasion in *Cheek v. United States* and structuring currency transactions in *Ratzlaf v. United States*. In *Cheek*, the Court stated that "the standard for the statutory willfulness requirement is the voluntary, intentional violation of a known legal duty."[129] In *Ratzlaf*, the Court reviewed a provision similar to § 216(a)(2) making it a crime for a defendant who "willfully" structured currency transactions to avoid filing the requisite reports, and so to convict the defendant "the jury must find he knew the structuring in which he engages was unlawful."[130]

Section 216(b) authorizes the attorney general to pursue a civil proceeding for each violation of the conflict of interest statutes, and the remedy is a civil penalty up to the amount of the compensation received or $50,000, whichever is greater. The burden of proof is by a preponderance of the evidence, so this approach is more favorable to the government and more likely to be pursued in less egregious cases, such as the litigation about possible salary supplementation at issue in *United States v. Project on Government Oversight*. Section 216(c) authorizes the attorney general to seek injunctive relief to prevent a violation of the conflict of interest statutes.

129. 498 U.S. 192, 201 (1991).

130. 510 U.S. 135, 149 (1994).

This page intentionally left blank

| 10 |

ELECTION-RELATED CRIMES

Protecting the integrity of elections has been an issue for the federal government since Reconstruction, when the first laws were passed to ensure that the franchise was protected for former slaves. Today, there are a range of criminal statutes addressing different aspects of elections, from provisions outlawing intimidation of voters and discrimination preventing exercise of the franchise to prohibitions on stuffing ballot boxes and paying voters to cast their ballots. Andrew Lack once said that "[b]ad officials are elected by good citizens who do not vote." The right to vote is a cornerstone of democracy, and the possibility that the outcome of an election may be affected by bribery or corruption strikes at the heart of the legitimacy of government.

The focus of this chapter is on provisions addressing corruption of the voting process. While protecting an individual's right to vote free from intimidation is important, this work analyzes public corruption, and how officials and others can be prosecuted for misuse of authority that can undermine the decision-making process. Unlike other chapters dealing with the exercise of official power, the analysis here is limited to election-related offenses that affect the process of selecting our representatives through corruption and not threats or violence, and those criminal laws designed to ensure the integrity of the citizenry's right to choose its representatives in a fair election. Thus, conduct that might taint an election, such as publishing false or inaccurate information about a candidate, or that constitute a violation of state election laws, such as residency requirements, will not be considered in this chapter. The focus is on those crimes that affect the integrity of the electoral process, regardless of the particular candidates or individual issues.

I. HISTORY OF ELECTION-RELATED STATUTES

As part of the original Civil Rights Act adopted during the early years of Reconstruction right after the Civil War, Congress enacted a provision to protect the former slaves by making it a crime for a

state official to interfere with any right protected by the law, including the right to vote.[1] Beginning in 1870, Congress adopted a series of laws, known as the Enforcement Acts, designed specifically to protect the voting rights of the former slaves. The laws changed the approach taken to federal elections that left the process to the states and instead substituted federal supervision of congressional elections, including oversight of voter registration and ballot counting. One provision outlawed "force, bribery, threats, intimidation, or other unlawful means" to keep voters from going to the polls.[2]

The first Enforcement Act maintained the broad prohibition on interference with rights, in addition to prohibiting disguised groups, namely the Ku Klux Klan, from traveling on a "public highway, or upon the premises of another" with the intent to interfere with the "free exercise and enjoyment of any right or privilege granted . . . by the Constitution or laws of the United States."[3] The second Enforcement Act extended federal control by authorizing placement of federal supervisors of elections "in cities where election irregularities were considered likely" and "to stand guard over and scrutinize registration and voting procedures and []certify returns."[4] The third Enforcement Act, known as the Ku Klux Act, made it a federal crime "to conspire to prevent persons from holding offices, serving on juries, enjoying equal protection of the laws, or voting," or to conspire to "overthrow . . . or destroy by force the government of the United States."[5]

1. Act of April 9, 1866, 14 Stat. 27 (1866). The provision provided:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

2. An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, 16 Stat. 140 (1870).

3. Section 6 of the first Enforcement Act provided:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, – the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years, – and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

4. An Act to Amend an Act Approved May Thirty-One, Eighteen Hundred and Seventy, Entitled "An Act to enforce the Rights of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes," 16 Stat. 433 (1871).

5. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13, 13–14 (1871). *See generally* W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. Rev. 859 (2006).

This provision was not directed solely at voting as much as efforts to intimidate citizens, particularly newly enfranchised African Americans, from exercising their rights.[6]

In *United States v. Price*, the Supreme Court summarized the development of the law during Reconstruction from the passage of the Civil Rights Act in 1866 to enactment of the first Enforcement Act in 1870:

> The purpose and scope of the 1866 and 1870 enactments must be viewed against the events and passions of the time. The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 "unreconstructed" States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.
>
> For a few years 'radical' Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man.
>
> Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866, which, as we have described, included § 242 in its originally narrow form. On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.[7]

Two Supreme Court decisions in the 1870s, however, *United States v. Reese* and *United States v. Cruikshank*, limited the scope of the voting provisions of the Enforcement Acts by holding that congressional power with respect to the regulation of state elections was limited to preventing only intentional discrimination based on race or color.[8]

6. *See* James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 Temp. Pol. & Civ. Rts. L. Rev. 453 (2004) ("The Enforcement Acts therefore targeted not just voting violence but any conspiracy to violate the basic rights of citizens, the most important of which was basic physical protection. Repeatedly throughout this period we see a concern for the failure of state and local governments to supply the most basic of governmental obligations, that of protecting citizens against organized violence and the threat of violence, especially when African Americans gathered for public social and political meetings.").

7. 383 U.S. 787, 804–05 (1966).

8. 92 U.S. 214 (1875); 92 U.S. 542 (1876). *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 Mich. L. Rev. 2341 (2003) ("*Reese* and

Congress later repealed most of the voting-related provisions of the Enforcement Acts in 1894,[9] although it left in place two broad criminal statutes protecting rights: (1) a prohibition on conspiracies to injure or intimidate a person to prevent the exercise of a constitutional or statutory right, which is now 18 U.S.C. § 241; and (2) a prohibition on actions taken "under color of any law, statute, ordinance, regulation, or custom" to deprive a person of any constitutional or statutory right, which is now 18 U.S.C. § 242.[10]

These provisions have been used to prosecute conspiracies to intimidate voters, and to interfere in the right to a fair election through ballot-stuffing and other acts that affect the integrity of the vote.[11] At one time, the Supreme Court viewed these statutes as applying only to voting in a general election, but in *United States v. Classic* the Court reversed its position and held that the laws also apply to primary elections.[12] The Court has held, however, that a conspiracy to bribe voters in an election in which federal offices were on the ballot did not come within these provisions because the right to vote is a personal one and the language of the provision does not clearly allow for the exercise of federal authority to ensure the integrity of a state election.[13]

The Voting Rights Act of 1965 marked a key turning point in ensuring the right to vote for all citizens regardless of their race or color by providing that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[14] The Voting Rights Act includes criminal penalties in 42 U.S.C. §§ 1973i and 1973j that, *inter alia*, makes it a crime to deprive (or conspire to deprive) a person of voting rights and to offer or accept a payment in exchange for voting.

Cruikshank indisputably hindered ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments.").

9. Act of February 8, 1894, 28 Stat. 36 (1894).

10. The statutes were §§ 5508 and 5510 until the revision of federal law in 1909, when they became §§ 19 and 20. A 1926 revision of the United States Code renumbered the provisions again as §§ 51 and 52, and the current citations were adopted in 1948 as part of yet another revision of federal laws. Cases interpreting earlier versions of the law retain their precedential value because the statutes have maintained the same basic prohibition on interference with rights since their enactment as part of the Enforcement Acts.

11. The civil counterpart to §§ 241 and 242 is 42 U.S.C. § 1983, which authorizes suits for damages for violation of a person's constitutional or statutory rights by state and local officials acting under color of law. This is among the most heavily litigated provisions of the federal code.

12. 313 U.S. 299 (1941). The Court overturned its earlier decision in *Newberry v. United States*, 256 U.S. 232 (1918).

13. United States v. Bathgate, 246 U.S. 220 (1918) ("Bribery, expressly denounced in another section of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election. This conclusion is strengthened by express repeal of the section applicable in terms to bribery and we think is rendered entirely clear by considering the nature of the rights or privileges fairly within intendment of original § 6. The right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, which is here relied on. The right to vote is personal and we have held it is shielded by the section in question.").

14. Pub. L. No. 89-110, 79 Stat. 443 (1965), codified at 42 U.S.C. § 1973(a). The statute was amended to its current form by the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (1982).

Congress sought to regulate campaign contributions, especially those from corporations and other organizations, through disclosure laws and limits on the amount that can be contributed to a political campaign. The Federal Corrupt Practices Act was adopted in 1925, and while the law's primary focus was on campaign finance, it included a provision, now 18 U.S.C. § 597, that prohibits making any expenditure to a person to vote, or to vote for (or against) a particular candidate. While the Federal Corrupt Practices Act was largely repealed when Congress adopted the Federal Election Campaign Act, § 597 remains on the books.

II. ENFORCEMENT ACTS (18 U.S.C. §§ 241 AND 242)

The two criminal provisions that can be traced to the Reconstruction-era Enforcement Acts are § 241, prohibiting conspiracies to deprive citizens of their rights, and § 242, which reaches those acting under color of law who interfere in the exercise of rights.[15] These two provisions are broadly written and cover a wide range of constitutional and statutory rights, not just the right to vote. Because each involves a violation of federal rights, they cover the same ground regarding voting rights, except that the government must prove the additional element of the involvement of a state or local official to establish a violation of § 242. A § 242 prosecution can involve private parties, but they must be acting in concert with a public official.[16]

The conspiracy charge under § 241 is brought in a wide range of cases because it allows for the inclusion of private parties in the prosecution, regardless of whether there is any governmental involvement in the deprivation of rights. Such a charge allows for the introduction of a wide range of evidence to establish the agreement, such as co-conspirator statements in furtherance of the criminal agreement. Section 241 is targeted at conspiracies to hinder or prevent citizens from exercising constitutional and statutory rights. The provision provides for imprisonment and, in cases involving a criminal agreement that results in death, capital punishment, for the following:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured. . .

15. The Supreme Court traced the development of the statutory language of these to provisions since their enactment during Reconstruction in *United States v. Williams*, 341 U.S. 70, 83 (1951), in an appendix to the opinion entitled "Criminal Civil Rights Legislation: Comparative Table of Successive Phraseology."

16. *See* United States v. Price, 383 U.S. 787, 794 (1966) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.").

Section 242 reaches violations of federal rights that are undertaken by state or local officials. The provision, which also includes heightened punishments if the violation involves the use of a firearm or the death of a victim, provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens. . . .

In Ex parte *Yarborough*, the Supreme Court upheld an indictment charging the defendants with conspiracy to prevent a former slave from voting in a federal election by beating him, holding that the right to vote is one guaranteed by the Constitution and not merely a creature of state law.[17] In explaining the necessity for a federal law to prevent interference with such a fundamental right, the Court stated,

> If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.[18]

The Court reiterated its view of the importance of voting as a constitutional right nearly sixty years later in *United States v. Classic* when it stated, "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."[19]

17. 110 U.S. 651, 665 (1884) ("The principle, however, that the protection of the exercise of this right is within the power of congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guarantied by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary."). The case is also known as the *Ku Klux Cases* in which seven members of the Ku Klux Klan were convicted of conspiracy to violate the rights of Berry Sanders to prevent from voting in a congressional election.

18. 110 U.S. 651, 657–58 (1884).

19. 313 U.S. 299, 314 (1941). The defendants, Commissioners of Elections in Louisiana, were charged with falsifying the outcome of a primary election for a congressional seat, and the Court held that § 241 applies to primary elections along with general elections. It stated,

> We cannot regard it as any the less the constitutional purpose or its words as any the less guarantying the integrity of that choice when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Id. at 316–17.

The elements of the § 241 offense are (1) an agreement between two or more persons (2) to injure, oppress, threaten, or intimidate a person in the exercise of a constitutional or statutory right (3) with the intent to interfere with the identified right.[20] The elements of the § 242 offense are (1) a deprivation of constitutional or statutory rights, (2) committed under color of law, and (3) the defendant must have acted willfully.[21] In *Classic*, the Supreme Court explained what it means to act under color of law: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[22]

The general federal conspiracy statute—18 U.S.C. § 371—requires proof of an agreement to commit a criminal act involving at least two or more persons, and the same requirement applies to a conspiracy charge under § 241, so cases under the broader conspiracy provision are relevant to ascertaining the existence of a conspiracy.[23] In *Braverman v. United States*, the Supreme Court explained that "[t]he gist of the crime of conspiracy as defined by [§ 371] is the agreement or confederation of the conspirators to commit one or more unlawful acts where one or more of such parties do any act to effect the object of the conspiracy."[24]

The government need not show an express agreement among the conspirators, and the crime may be proven by circumstantial evidence.[25] The agreement must be targeted at a violation of rights, and not just that the conduct has an incidental impact on the rights of citizens. In *United States v. Morado*, the Fifth Circuit explained that "[t]he first step requires the showing of an agreement. It is not enough in this case that votes were stolen, or that state election laws were violated. Some persons must be shown to have been actual confederates in a plan to accomplish the illegal dilution of votes."[26] Section 241 further specifies the *mens rea* for the crime as an intent to violate the rights of a person.

A § 371 conspiracy charge requires proof of an overt act in furtherance of the criminal objective. The lower courts that have specifically considered the overt act requirement in § 241 prosecutions

20. *See* United States v. Guidry, 456 F.3d 493, 507 (5th Cir. 2005).

21. *See* United States v. LaVallee, 439 F.3d 670, 686 (10th Cir. 2006); United States v. Brugman, 364 F.3d 613, 616 (5th Cir. 2004).

22. 313 U.S. 299, 326 (1941).

23. The general conspiracy statute provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

24. 317 U.S. 49, 53 (1942).

25. *See* United States v. Avila, 557 F.3d 809, 815–16 (7th Cir. 2009) ("As we have often noted, '[a]n agreement need not be explicit; a tacit agreement may support a conspiracy conviction.' Furthermore, the government need not present any direct evidence of the agreement; circumstantial evidence alone will suffice."); United States v. Rodriguez-Mendez, 336 F.3d 692, 695 (8th Cir. 2003) ("An agreement to join a conspiracy need not be explicit but may be inferred from the facts and circumstances of the case."); United States v. Murphy, 957 F.2d 550, 552 (8th Cir. 1992) ("[T]he agreement need not be express, but rather can be an informal tacit understanding between the coconspirators. Moreover, a conspiracy can be proved entirely by circumstantial evidence.").

26. 454 F.2d 167, 174 (5th Cir. 1972).

reject it as an element of the offense because the statute does not contain language referencing it, unlike § 371's requirement that a conspirator "do any act to effect the object of the conspiracy."[27] A few lower court decisions, however, suggest that the government must allege and prove an overt act for a § 241 conspiracy, although that position is usually contained in a general recitation of the elements of the offense so the absence of an overt act allegation is not presented to the court.[28]

A. The Right to Vote

Section 241 applies to conspiracies to interfere with the rights and privileges granted by the Constitution or federal law. As the Supreme Court stated in *United States v. Cruikshank*, one of its earliest decisions interpreting the Enforcement Acts: "To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress."[29] The Court reiterated that point in 1966 in *United States v. Guest* when it stated that "§ 241 protects only against interference with rights secured by other federal laws or by the Constitution itself."[30]

The origins of § 241 in the Enforcement Acts, which were designed to protect the rights of the former slaves, led the Supreme Court to recognize consistently that the right to vote is one granted

27. *See* United States v. Whitney, 229 F.3d 1296, 1301 (10th Cir. 2000) ("Section 241 does not require proof of an overt act in furtherance of the conspiracy."); United States v. Skillman, 922 F.2d 1370, 1375 (9th Cir. 1990) ("Unlike the general conspiracy statute, 18 U.S.C. § 371, which expressly requires proof of an overt act, section 241 makes no mention of such a requirement."); United States v. Morado, 454 F.2d 167, 169 (5th Cir. 1972) ("In fact, 18 U.S.C.A. § 241 does not require that any overt act at all be shown."); Williams v. United States, 179 F.2d 644, 649 (5th Cir. 1950) ("No overt act is even required to complete a conspiracy under [§ 241], but the crime is completed by the agreement."); Smith v. United States, 157 F. 721, 725 (8th Cir. 1907) ("The indictment for conspiracy under section 5508 [now § 241] is different from one under section 5440. In the latter an overt act must be pleaded, while in the former none is required.").

28. In *United States v. Greer*, 129 F.3d 1076, 1099 (5th Cir. 1991), *United States v. McKenzie*, 768 F.2d 602, 606 (5th Cir.1985), and *United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983), the Fifth Circuit appeared to reverse its course from *Morado* and *Williams* when it stated that proof of a § 241 conspiracy required proof of an overt act. None of the cases, however, directly involved a claim that the absence of an overt act allegation, or a failure to prove its existence, undermined the conviction for violating § 241. The reference to an overt act appeared in a general recitation of the elements of the offense, and the overt act element played no further role in the decision, which means that the courts were not focused on the language of § 241, which is similar to 21 U.S.C. § 846, the drug conspiracy statute, which also does not contain an overt act element that the Supreme Court found dispositive in concluding that the government need not allege or prove one for a violation of that provision. *United States v. Shabani*, 513 U.S. 10 (1994). It does not appear that the Fifth Circuit opinions in *Greer*, *McKenzie*, and *Kimble* considered in detail the language of § 241, which does not make reference to an overt act as an element of the crime, unlike § 371. *See United States v. Crochiere*, 129 F.3d 233, 237 (1st Cir. 1997) ("In none of the Fifth Circuit cases, however, was the question a central issue in the case."). The reference to this "element" of the offense seems to have been made in passing in describing the offense, so it is doubtful that these offhanded statements establish that an overt act must be alleged and proven in light of other circuit court opinions directly addressing the question that reject the overt act element as inconsistent with the language of § 241.

29. 92 U.S. 542, 549 (1875).

30. 383 U.S. 745, 759 n.17 (1966).

by the Constitution and therefore came within the purview of the criminal statute. In Ex parte *Yarborough*, the Court stated that "it is not correct to say that the right to vote for a member of congress does not depend on the constitution of the United States."[31] In *United States v. Classic*, the Court explained that "included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution."[32] More recently, in *Bush v. Gore*, the Court noted that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[33]

In *United States v. Mosley*, the Court considered a prosecution of county election officials who failed to count all the ballots from eleven precincts in reporting the election results. In overturning the lower court's dismissal of the indictment, the Court explained the scope of the voting right: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box."[34] *Mosley* took the position that the right to vote extends beyond just a citizen's actual exercise of the franchise by incorporating the right to have the votes properly counted in determining the true winner of an election.

While the franchise can only be exercised by individuals, there is no requirement that the prosecution identify a particular individual whose right to vote was to be interfered with through the conspiracy. In *United States v. Pleva*, the Second Circuit noted that "it is therefore of no moment to allege which voters, among those who voted, were deprived of the right to have their votes counted and returned as cast" and that if such a requirement were imposed then "this statute would in every practical way be a nullity. . . ."[35] In *United States v. Liddy*, the District of Columbia Circuit rejected the defendant's argument that to be injured, oppressed, threatened, or intimidated, the victim of the offense must be aware of the potential deprivation of a protected right. In the voting cases, the circuit court noted that § 241 applied "even though they typically involve an injury to innocent voters who had no knowledge of the secretive tampering at the time it occurred, only after the fraud was discovered did the injured persons become cognizant of the violation of their rights."[36]

The states adopt the rules and eligibility requirements for registration of voters and the conduct of elections, and all states have a unitary system in which voting for federal and state offices is conducted in a single election with the same procedures. The Constitution specifically

31. 110 U.S. 651, 663 (1884).

32. 313 U.S. 299, 315 (1942).

33. 531 U.S. 98, 104 (2000).

34. 238 U.S. 383, 386 (1915).

35. 66 F.2d 529, 531 (2nd Cir. 1933).

36. 542 F.2d 76, 81 (D.C. Cir. 1976). The conspiracy in *Liddy* involved a violation of the Fourth Amendment rights of the psychiatrist for Daniel Ellsberg, who leaked the Pentagon Papers, when White House operatives illegally searched his office to find embarrassing information about his patient.

relies on the states for conducting elections, providing that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations. . . ."[37]

The Supreme Court held in *Newberry v. United States* that the right to vote did not extend to partisan primaries to select candidates for the general election, noting that such elections were unknown to the Framers of the Constitution and "they are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."[38] *Newberry* ignored the reality that in many instances winning the primary is tantamount to election to the office.

That loophole was closed in *United States v. Classic* in 1941 when the Court recognized that fraud in a primary election in Louisiana did violate the rights of voters because the winner would be virtually unopposed in the general election. The Court upheld the indictment of election officials for violating § 241 and § 242, stating that

> [w]e cannot regard it as any the less the constitutional purpose or its words as any the less guarantying the integrity of that choice when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.[39]

The right to vote granted by the Constitution clearly applies to any election that involves federal offices, and the Eighth Circuit also found that the statute applies to Indian tribal elections because those voting rights are granted by statute.[40]

The Supreme Court has not specifically extended recognition of the constitutional right to vote in a § 241 prosecution to an election involving only state or local positions on the ballot and no federal office. In *Anderson v. United States*, the Court upheld a conspiracy conviction involving a scheme to stuff the ballot box in a primary election in which the principal candidate to be aided by the illegal votes was running for local office but votes were also cast for federal offices. So long

37. U.S. Const. art. I, § 4. The Constitution provides that for elections to both houses of Congress "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature," U.S. Const. art. I, § 2 (House of Representatives); U.S. Const. amend. XVII (Senate). For the election of the president, the Constitution also relies on the states: "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." U.S. Const, art. II, § 1, ¶ 2.

38. 256 U.S. 232, 250 (1921).

39. 313 U.S. 299, 316–17 (1941). The Court distinguished *Newberry* as not controlling because only four Justices supported the proposition that a primary election fell outside the constitutional right, and the fifth Justice (McKenna) concurred in the result because the primary election at issue involved a vote for the Senate that occurred before the adoption of the Seventeenth Amendment requiring the direct election of senators, so the vote had no effect on the ultimate choice for the office. *Id*. at 317.

40. United States v. Wadena, 152 F.3d 831, 846 (8th Cir. 1998) (right to an election free from fraud guaranteed to Indian tribe members under the Indian Civil Rights Act).

as at least one aspect of the criminal plan was to cast ballots for a federal office, then the conspiracy came within the prohibition of § 241:

> Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes. And, whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of § 241.[41]

In *United States v. Bradberry*, decided shortly after *Anderson*, the Seventh Circuit struck down the conviction of an election judge when the evidence only showed that the ballot box stuffing affected voting for state and local offices. The circuit court, in an opinion by then-Judge John Paul Stevens shortly before his elevation to the Supreme Court, found that "[t]here is no direct evidence that any fraudulent votes were cast for the federal offices, and no testimony describing any intention to cast false votes in the federal election or suggesting any motive to do so."[42] While the Seventh Circuit cast its decision as only concluding that the evidence was insufficient to establish the crime charged, and abjured deciding the issue left open by *Anderson* regarding whether § 241 applies to purely local elections, the analysis strongly implies that failure to prove *some* federal connection would be fatal to a conspiracy charge under the statute.

One way prosecutors can avoid the issue of whether § 241 applies to purely state or local elections is to focus on a violation of due process and equal protection rights related to voting that may be interfered with by misconduct in an election. In *United States v. Price*, the Court stated that the statute "includes rights or privileges protected by the Fourteenth Amendment."[43] In *United States v. Guest*, issued the same day as *Price*, the Court announced that "§ 241 by its clear language incorporates no more than the Equal Protection Clause itself. . . ."[44]

Discrimination that denigrates the right of individuals to have their votes counted in an election may violate the Equal Protection Clause if state actors are involved. In *Bush v. Gore*, the Court explained that equal protection applies not just to granting the right to vote, but in addition "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[45] If action by the state makes

41. 417 U.S. 211, 226 (1974).

42. 517 F.2d 498, 500 (7th Cir. 1975).

43. 383 U.S. 787, 798 (1966). In *United States v.* Price, The Court rejected the notion that only certain rights granted by the Constitution or federal statutes come within § 241. The Court stated,

> The language of § 241 is plain and unlimited. . . [I]ts language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or "flow from" the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution.

Id. at 800.

44. 383 U.S. at 754.

45. 531 U.S. at 104.

some votes more (or less) valuable than others, then that could be the basis for a § 241 prosecution if two or more agree to engage in the conduct constituting the equal protection violation.

In *United States v. Anderson*, the Fourth Circuit took just that approach in relying on the equal protection rights of voters in upholding a § 241 conviction for ballot-box stuffing. The circuit court stated that "it is clear that, where states provide for the election of officers, that right . . . is protected against dilution involving 'state action' under the Equal Protection Clause of the Fourteenth Amendment."[46] The Supreme Court upheld the convictions in *Anderson* on other grounds and did not address the equal protection analysis. The Court's application of that constitutional right in *Bush v. Gore*, however, supports the Fourth Circuit's position that unequal treatment of votes in any election, including one with only state or local candidates on the ballot, can provide the requisite constitutional violation for a § 241 charge if there is proof of a conspiracy involving state actors.

While § 241 does not require any state actors to be involved in the conspiracy, unlike § 242, the rights of due process and equal protection are afforded only against interference by the states, not private individuals. Therefore, a claimed conspiracy to violate an individual's Fourteenth Amendment rights would require proof that a governmental official was involved in the agreement, otherwise absent state action there would not be an agreement to violate the victim's constitutional rights.[47] In *Guest*, the Court acknowledged that "[i]t is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority."[48]

B. Voting Rights Conspiracies

1. Altering the Election Tally

Although § 241 is not limited to voting rights, prosecutions related to election frauds have been reviewed a number of times by the Supreme Court. The first case to consider conduct that affected the vote as coming within the conspiracy statute was *United States v. Mosley*. In an opinion by Justice Oliver Wendell Holmes, the Court upheld the indictment of two members of a county

46. 481 F.2d 685, 699 (1973), *aff'd on other grounds*, Anderson v. United States, 417 U.S. 211 (1974).

47. 383 U.S. at 799. *Price* involved the prosecution of eighteen men for the murder of three civil rights workers in Mississippi in August 1964. In finding the indictments sufficiently alleged a conspiracy to violate the victims' due process rights, the Court stated,

> This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

Id.

48. 383 U.S. at 755.

election board for conspiring to not report the votes in eleven precincts. Noting that Ex parte *Yarborough* had rejected a challenge to the constitutionality of the provision, the Court stated that "it is as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."[49] *Mosley* rejected the defendant's argument that a provision of the repealed Enforcement Acts that made it a federal crime to hinder a citizen from voting in an election meant that the broad conspiracy provision did not apply to violations of the right to vote. The Court noted that the repealed provision had been found unconstitutional because it was not limited to violations based on the race or color of the voter, in contrast to the broader conspiracy provisions designed to protect all federal rights, including the right to vote.[50]

After *Mosley*, the Court upheld the application of § 241 to prosecutions in which votes were improperly added to the total, known as ballot box stuffing, or otherwise proper votes were invalidated or undercounted. In *United States v. Classic*, in which the Court extended the provision to primary elections, the defendants were accused of altering ballots to increase the tally in favor of a candidate for the House of Representatives. The Court explained that "included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections."[51] In *United States v. Saylor*, the Court applied *Mosley* in holding that a conspiracy to cast unused blank ballots came within the statute because "[f]or election officers knowingly to prepare false ballots, place them in the box, and return them, is certainly to prevent an honest count by the return board of the votes lawfully cast."[52]

In *Anderson v. United States*, the Court upheld the conviction of defendants for casting fictitious ballots in a primary election. The Court took a broad view of the type of conduct that infringes the right to vote coming within § 241's prohibition:

> Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes. And, whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of § 241.[53]

49. 238 U.S. 383, 386 (1915).

50. *Id.* at 387–88. In *United States v. Reese*, the Court found that the provision of the Enforcement Act making it a crime to hinder or bribe a voter in any election exceeded Congress's power under the Fifteenth Amendment if the statute was not limited to violations of the right to vote based on race. 92 U.S. 214, 221 (1875). It stated:

> Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

Id.

51. 313 U.S. 299, 315 (1941).

52. 322 U.S. 385, 389 (1944).

53. 417 U.S. 211, 227 (1974). Among the defendants convicted in *Anderson* was an attorney subsequently disbarred by the West Virginia Supreme Court, which found that the crime constituted "moral turpitude." *In re Smith*, 206 S.E.2d 920 (W.Va. 1974).

Anderson quoted from the Sixth Circuit's opinion in *Prichard v. United States* on the protection afforded by § 241 on the right to a fair count of the ballots:

> The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest court is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.[54]

The *Prichard* defendants were two law partners in Kentucky charged with conspiracy to stuff ballot boxes during the 1948 general election. Only Prichard, a prominent operative in the Democratic Party after serving as a law clerk to Justice Felix Frankfurter and an aide to two Cabinet secretaries, was convicted.[55]

In *United States v. Olinger*, the Seventh Circuit upheld the conviction of an election judge for participating in a scheme to fill out the ballots of elderly and mentally handicapped voters who resided in a residential care facility. The circuit court noted that "[i]t has long been settled that § 241 embraces a conspiracy to stuff the ballot box at an election for federal officers, and thereby to dilute the value of votes of qualified voters."[56] The lower courts have fairly consistently upheld convictions for ballot box stuffing over challenges to the sufficiency of the evidence or the application of § 241 to such conduct.[57]

54. 417 U.S. at 227 (quoting 181 F.2d 326, 331 (6th Cir. 1950)).

55. Edward F. Prichard, Jr. was also prominent in the post–World War II civil rights movement after his clerkship with Justice Felix Frankfurter and service as an assistant to both Attorney General Robert Jackson and Treasury Secretary Fred Vinson, both of whom were later appointed to the Supreme Court. President Harry S. Truman became suspicious of him because of his strong liberal bent, and he returned to Kentucky in 1945, where he organized a scheme to stuff 254 ballots during the 1948 election, a minuscule number of votes out of the nearly 100,000 cast in the general election. The Supreme Court did not review the Sixth Circuit's decision upholding Prichard's conviction because of the absence of a quorum when four Justices (Chief Justice Vinson, and Justices Reed, Frankfurter, and Clark) recused themselves. Under 28 U.S.C. § 1, six Justices must be able to hear a case for a quorum, and when the remaining Justices determine that the case cannot be heard at the next session of the Court, it is affirmed as it would be by an equally divided Court.

Joseph Rauh, another leader in the civil right movement, was quoted as saying, "Prich was a brilliant strategist until he put those goddamn crooked ballots in the box in November 1948, one of the dumbest things that ever was done." *Oral History Interview with Joseph L. Rauh, Jr.*, Harry S. Truman Library and Museum, *available at* http://trumanlibrary.org/oralhist/rauh.htm. Prichard received a two-year prison sentence for the offense, although he only served approximately six months before President Truman commuted his sentence to time served in December 1950. After his conviction, he returned to prominence in Kentucky as a leader in areas as diverse as civil rights, strip mine regulation, and education reform. For a thorough review of the case and the life of Prichard, see Tracy Campbell, Short of the Glory: The Fall and Redemption of Edward F. Prichard Jr. (University of Kentucky Press 1998).

56. 759 F.2d 1293, 1298 (7th Cir. 1985). The Seventh Circuit compared the case to the well-known novel *The Last Hurrah*, a fictionalized recounting of former Boston mayor and Massachusetts governor James Michael Curley, who was sentenced to prison while serving his fourth term as mayor: "This appeal tells a story which would greatly resemble Edwin O'Connor's *The Last Hurrah*—except the scene is Chicago, not Boston; the date is 1982, not the first half of this century; and unlike O'Connor's humor, there is nothing funny about stealing the votes of the elderly." *Id.* at 1295.

57. *See* United States v. Weston, 417 F.2d 181 (4th Cir. 1969) (improper absentee ballots); Fields v. United States, 228 F.2d 544 (4th Cir. 1955) (completing absentee ballots for illiterate voters); Crolich v. United States, 196 F.2d 879 (5th Cir. 1952) (impersonating qualified voters). A number of defendants connected to the Pendergast political machine in Kansas City were convicted after the 1936 election for violating § 241 for conduct described in one case as follows: "The situation,

2. The Limits of the Right to Vote

While the Supreme Court's language describing the scope of the right to vote seems to include almost any act that undermines the integrity of an election, in fact the Court has not gone that far. In a decision issued shortly after *Mosley*, the Court held in *United States v. Bathgate* that § 241 did not apply to an agreement to bribe voters to cast their ballots for certain candidates in the 1916 general election. Noting that a provision of the repealed Enforcement Acts made it a crime to bribe voters, the Court held that the conspiracy statute could not be applied to the same conduct that Congress had specifically removed from the federal criminal code in 1894. The Court explained that "[t]he right or privilege to be guarded . . . was a definite, personal one, capable of enforcement by a court, and not the political, non-justiciable one common to all that the public shall be protected against harmful acts, which is relied on here."[58]

It is difficult to reconcile the broad reading of the statute in Justice Holmes's opinion in *Mosley* with *Bathgate*'s narrower view of the right to vote as only protected insofar as an individual is prevented from voting or having the vote improperly denigrated. In *United States v. Saylor*, the Court noted that the defendant argued "that any attempted distinction between the conduct described in *Bathgate* and that referred to in the *Mosley* case is illogical and insubstantial," and conceded that "[m]uch is to be said for this view."[59] *Bathgate* was a unanimous decision that included Justice Holmes, so it is difficult to view it as aberrational. The Court's decision in *Bathgate* signaled its concern with extending the criminal prohibition to *any* conduct that might call into question the perceived fairness of an election. The opinion stated that "the reasoning relied on to extend [the statute to bribery] would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, or supposed injuriously to affect freedom, honest, or integrity of an election."[60]

The proper understanding of *Bathgate*, which has never been overruled, is that § 241 applies to conduct that directly impacts the counting of votes, such as ballot box stuffing or refusing to count votes from a certain precinct because they will likely favor one candidate over another. The actual number of votes recorded was incorrect in *Mosley*, *Classic*, *Saylor*, and *Anderson*, because ballots were counted—or ignored—to skew the final tally, thereby impacting all voters who legitimately cast ballots. A vote affected by bribery, on the other hand, is not cast illegitimately by a person not entitled to vote. In that situation, there is no way of knowing whether the voter would have gone to the polls regardless of the payment or which candidates would have received the person's vote. It is much more difficult in the bribery situation to measure conclusively the impact on the outcome of the election that rises to the requisite interference with the right to vote for a § 241 conspiracy or § 242 interference. Filling out blank ballots, creating false absentee ballot applications,

then, as disclosed by the evidence of the Government, was this: In the Second Precinct of the Twelfth Ward the registration list was padded, the ballot box was stuffed with false and fictitious ballots, the ballots cast were not counted nor returned as cast by the voters either for the Congressional candidates or for the other candidates. . . ." *Devoe v. United States*, 103 F.2d 584, 587 (8th Cir. 1939); *see* Walker v. United States, 93 F.2d 383 (8th Cir. 1937); Luteran v. United States, 93 F.2d 395 (8th Cir. 1937); Little v. United States, 93 F.2d 401 (8th Cir. 1937); Ditsch v. United States, 93 F.2d 409 (8th Cir. 1937).

58. 246 U.S. 220, 226–27 (1918).

59. 322 U.S. at 389.

60. *Id*. at 226.

or altering the votes of senior citizens clearly alters the vote tally, even if the ultimate outcome might be unaffected.

Is bribery different from stuffing a ballot box? It can plausibly be argued that each affects the vote, but in the former case the voter is qualified to vote, while in the latter the votes are wholly illegitimate. To find the requisite interference with the right to vote, the jury must be presented with sufficient evidence showing the count was altered, and payment of a bribe does not demonstrate the requisite impact to the same degree as falsified ballots or ignored votes do. While the distinction is fine, the Court's reference in *Bathgate* to conduct "supposedly injuriously to affect freedom, honesty, or integrity of an election" shows that there is a legitimate need to limit the type of conduct that can be prosecuted under § 241 and § 242 as a violation of the right to vote.

For example, is providing a ride to the polls to a person who will support a favored candidate, or furnishing a completed sample ballot suggesting votes for one party's nominees, appreciably different from paying a citizen a small amount to encourage him to vote in a particular way? If bribery comes within the statutory prohibition on interfering with the *right* to vote, then false statements by a candidate that influence voters to cast their ballots for him and against his opponent also may be viewed as affecting the fairness of the election that constitutes interference with the right to vote. It is difficult to believe that § 241 and § 242 can be a means to police the veracity of campaign promises.

A reasonable limitation on the scope of the right to vote is to require proof that the election tally was directly altered or affected by the conspiracy or intimidation, but not where the prosecution requires an inquiry into how legitimate voters decided to cast their ballots. That does not mean voter bribery is permissible because 42 U.S.C. § 1973i(c) makes it a crime to offer money to a person to have them vote, so the conduct charged in *Bathgate* could be successfully prosecuted today. In addition, 18 U.S.C. § 597 prohibits making any expenditure to a person to vote, withhold their vote, or vote for a particular candidate.[61] These provisions do not require a jury to find that there was a conspiracy to "injure, oppress, threaten, or intimidate" persons in the exercise of their right to vote, and so are better equipped to deal with voter bribery than § 241 and § 242.

So long as the voter is entitled to cast a ballot, then *Bathgate* should be read to prevent a criminal prosecution based on any consideration about the reasons why the voter cast the ballot or potential influences on the decision to vote and whom to vote for. In *United States v. McLean*, the Fourth Circuit applied this analysis of *Bathgate* to a § 241 charge for offering money to voters to cast their ballots for specified candidates. The circuit court rejected the government's argument that the conspiracy was to deprive voters of a fair election but not one to bribe. The Fourth Circuit found that the case was beyond the statute's reach because bribery is distinct from conduct that directly alters the number of votes in the election:

> In the present case, there were no fictitious ballots, no fraudulent applications, no voting of deceased persons, no improper use of blank ballots, no manipulation of elderly or mentally

61. These two statutes are discussed later in this chapter.

handicapped persons, and no voter was allowed to vote more than once. There is no claim that there was an improper count or a failure to properly certify the vote in the precinct. *McLean* is purely and simply a bribery case. The voters were qualified to vote, they voted only once, but their votes were purchased.[62]

3. Targeting Individual Voters

If illegitimate ballots are introduced into the system, or there is an agreement not to count legitimate ballots, the impact on the rights of the voters is direct and immediate, with no need to determine whether the ultimate outcome was influenced. Drawing the line at conduct that changes the number of legitimate votes that may be counted does not preclude prosecutions when specific voters are targeted, as was the case in *United States v. Tobin*. The defendants sought to jam the telephone lines of the local Democratic party and a firefighters union that would provide rides to the polls for voters who needed assistance. The specific goal was to suppress the number of Democratic voters in the 2004 general election by making it more difficult for voters who needed assistance to cast their ballots.

The District Court rejected the defendant's challenge to the § 241 charge, holding that "the superseding indictment unambiguously seeks to impose § 241 liability for conduct amounting to an unlawful agreement to willfully 'injure' or 'oppress' citizens in the free exercise or enjoyment of the specific constitutionally protected right to vote, an offense about which defendant had fair warning."[63] Unlike cases such as *Mosley* and *Bathgate* that focus on the impact on an undifferentiated group of voters, *Tobin* is a more traditional § 241 prosecution in which specific voters are the target of the conspiracy.

Of course, not every political dirty trick that impacts an election comes within the conspiracy statute even if the goal is to make it more difficult for voters to exercise the franchise. Reversing or taking down a sign pointing to the polling place or distributing flyers telling voters for one party that they should vote on a different day in the hope that it will fool some voters into missing the election day have a diffuse impact on the election because it is not clear whether any specified voters are the target. Charges under the *Mosley* analysis would likewise not be possible because the count would not be affected by improper votes or undercounting of legitimate ballots. In *Tobin*, on the other hand, the particular voters who would seek assistance in voting were the object of the conspiracy, and the goal was not simply to make it potentially more difficult but instead to actually impede the ability to exercise the franchise. While a more diffuse plan to make it more difficult to vote would fall outside the scope of § 241, a plan that targets specific voters is more likely to be a violation of the statute.

62. 808 F.2d 1044, 1049 (4th Cir. 1987).

63. 2005 WL 3199672 at *3 (D. N.H. 2005). The defendant was ultimately acquitted of the § 241 charge. 545 F. Supp. 2d 189 (D. N.H. 2008).

C. Intent

Section 242 requires proof that the defendant acted "willfully" in violating the rights of the victim. A charge of conspiracy usually entails proof of specific intent, requiring the government to show that the defendant intended to enter into the agreement to further its purpose and with knowledge of its criminal object.[64] In the typical prosecution under the general conspiracy provision—18 U.S.C. § 371—the Supreme Court explained that "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."[65] Section 241 is different from § 371 because the statute sets forth expressly the object of the conspiracy as interference in the exercise or enjoyment of a constitutional or statutory right, so there is no need to show a separate intent related to an underlying offense.

The Supreme Court explained what constitutes the specific intent for a violation of an individual's rights in *Screws v. United States*. The case involved the beating of an arrestee by officers that resulted in his death, and the charge was for a violation of § 242 for willful interference with the due process rights of the victim under color of law. The Supreme Court has applied *Screws*'s specific intent analysis of "willfully" to § 241, noting that there is "no basis for distinction" between the specific intent requirement in the two statutes, so the intent analysis is identical under both provisions.[66]

The Court explained that "the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."[67] While at one point *Screws* stated that it was necessary to show the defendants "had the purpose to deprive the prisoner of a constitutional right," the Court did not mean that the defendants must understand the parameters of the right involved or undertake the conduct with the conscious goal of violating a person's rights.[68] Instead, the Court found that "[w]hen [defendants] act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."[69]

The Court's reference to acting in "reckless disregard" of constitutional rights shows that the proof of specific intent need not establish that a defendant intended to violate a known legal duty, but only that the person intended to engage in the conduct (or enter into an agreement to do so) with the knowledge that it was likely to violate a constitutional or statutory right. The Court did impose that higher level of intent in *Ratzlaff v. United States* and *Cheek v. United States*, requiring proof of the defendant's knowledge of the legal obligation and intent to violate it to establish

64. United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995); *see* United States v. Haldeman, 559 F.2d 31, 112 (D.C. Cir. 1976) ("[T]he specific intent required for the crime of conspiracy is in fact the intent to advance or further the unlawful object of the conspiracy.").

65. United States v. Feola, 420 U.S. 671, 686 (1975).

66. United States v. Price, 383 U.S. 787, 806 n.20 (1966).

67. 325 U.S. 91, 104 (1945).

68. *Id.* at 107.

69. *Id.* at 105.

a willful violation of a currency structuring statute and for tax evasion. The Court explained that the statutes at issue were complex, and a violation should not be based on a lower threshold of intent that could ensnare an unwary person who did not seek to violate the law.[70] Section 241's intent requirement, however, need not reach that level, otherwise it would be almost impossible to show that a defendant understood the nature and scope of the constitutional right involved, something many judges and lawyers struggle with, and then sought to interfere with the exercise of that right. In *United States v. Reese*, the Ninth Circuit explained how reckless disregard can be established to prove a defendant's intent under § 241: "Such intentionally wrongful conduct, because it contravenes a right definitely established in law, evidences a reckless disregard for that right; such reckless disregard, in turn, is the legal equivalent of willfulness."[71]

In fleshing out the specific intent requirement after *Screws*, the Supreme Court's discussions have not been a model of clarity. In *United States v. Guest*, a § 241 prosecution involving racial discrimination, the Court considered a conspiracy to interfere with the right to interstate travel without interference. In describing the scope of the statute, the Court stated:

> This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U.S.C. § 241. A specific intent to interfere with the Federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. *Screws v. United States*, 325 U.S. 91 (1945). Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the *predominant purpose* of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.[72]

The Court was not specifically considering the issue of the sufficiency of the proof of intent or the proper instruction to be given to a jury, and the issue was only whether the indictment was properly dismissed. Intent was not an issue in the case, so the reference to the "predominant purpose" of the conspiracy as connoting what must be proven to establish the requisite specific intent for the crime should be taken in that light. Nevertheless, *Guest* expresses the position that an agreement in violation of § 241 requires proof that the interference in the rights of the victims was more than tangential to the agreement, as would be the case in a robbery of a person who happened to be traveling between two states at the time of the offense. Whether "predominant" means that the interference was the primary goal of the agreement, or at least a significant aspect of it, was left unresolved by *Guest*.

In *Anderson v. United States*, the Court squarely addressed the intent issue in a voting fraud case in which the defendants cast fictitious votes on voting machines in a primary election to secure the

70. In *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Court held that for a tax evasion charge "the standard for the statutory willfulness requirement is the voluntary, intentional violation of a known legal duty." In *Ratzlaf v. United States*, 510 U.S. 135, 149 (1995), involving a currency reporting violation, the Court stated that "the jury had to find he knew the structuring in which he engaged was unlawful."

71. 2 F.3d 870, 881 (9th Cir. 1993).

72. 383 U.S. 745, 760 (1966) (italics added).

nomination of their favored candidate to the county commission, a local office. Also on the ballot were candidates for the Senate and House of Representatives, and the Court rejected the defendant's argument that they did not have the requisite specific intent because they only sought to alter the outcome of the local race, not the federal offices. The Court began by noting that "[a] single conspiracy may have several purposes, but if one of them—whether primary or secondary—be the violation of a federal law, the conspiracy is unlawful under federal law."[73] In explaining what the government must prove to establish specific intent, the Court held:

> That petitioners may have had no purpose to change the outcome of the federal election is irrelevant. The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots.[74]

Thus, while the defendants' primary objective was to influence a local election, and "there was little discussion among the conspirators of the federal votes per se," the jury was entitled to infer that the scheme included entering votes for federal candidates. So long as the conspirators contemplated at least some potential impact on the federal election from the ballot stuffing agreement, then the conspiracy came within § 241.[75]

After *Anderson*, the government need not prove that the defendants intended to change the outcome of a federal election by interfering with the rights of voters, or even that they considered the federal offices an important part of the scheme. So long as the conspiracy involved some actual or potentially measurable impact on the federal election, even as one aspect of a broader criminal plan, then there would be sufficient evidence of specific intent, regardless of whether the government can prove that federal offices were within the particular contemplation of the conspirators.[76] The language in *Guest* about a "predominant purpose" does not mean that the violation of a federal right be a featured part of the agreement, but more that the agreement include as one of its potential outcomes interference with a federal right.

Guest's illustration of an agreement to rob an interstate traveler as not coming within § 241 remains applicable even after *Anderson* because that same robbery of a person on the way to vote which prevents him from casting a ballot would no more violate § 241 than interfering with the

73. 417 U.S. 211, 227 (1974).

74. *Id.*

75. *Id.* at 226.

76. In *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976), involving the prosecution of one of the members of the so-called White House Plumbers Unit for the break-in of the office of the psychiatrist to Daniel Ellsberg related to the leak of the Pentagon Papers, the District of Columbia Circuit held,

> It is settled law that a conviction under this section requires proof that the offender acted with a 'specific intent' to interfere with the federal rights in question. This does not mean that he must have acted with the subjective awareness that his action was unlawful. It is enough that he intentionally performed acts which, under the circumstances of the case, would have been clearly in violation of federal law, absent any other defense.

Id. at 945.

right to travel. Incidental impact on a federal right cannot establish the requisite specific intent, while an agreement to engage in conduct that clearly includes some measure of interference with the exercise of a federal right would be a violation even if that is not the primary or even contemplated goal of the conspirators.[77] The reference in *Screws* to a "reckless disregard" for the consequences of an agreement can be established by showing that the likely outcome of the agreement, such as stuffing the ballot box or preventing votes from being counted, would be to affect the election to a federal office, and that is enough to infer the specific intent to violate § 241.[78]

While the government need not show that the conspirators gave particular consideration to affecting the votes for a federal office, if there is no evidence of any discussion of the federal offices, it is necessary to show some effect on the vote tally for federal offices to allow the jury to infer the specific intent to interfere with constitutional or statutory rights. In *Anderson*, the Court noted that it was "equally clear" that about one hundred votes were cast for the two federal offices on the ballot as one piece of evidence that "amply supported the jury's conclusion that each of the [defendants] knowingly participated in a conspiracy which contemplated the casting of false votes for all offices at issue in the election."[79]

In *United States v. Bradberry*, the Seventh Circuit—in an opinion by Justice Stevens before his appointment to the Supreme Court—overturned a conviction for voting fraud under § 241 because the evidence did not show any impact on the federal race, only state and local elections. The circuit court stated, "There is no direct evidence that any fraudulent votes were cast for the federal offices, and no testimony describing any intention to cast false votes in the federal election or suggesting any motive to do so."[80] In another Seventh Circuit case decided by the same panel, *United States v. Bryant*, the circuit court found sufficient evidence to infer specific intent to interfere with federal voting rights based on a careful analysis of the votes cast for federal offices:

> The evidence shows, however, that in the twentieth precinct of the twenty-seventh ward there were 215 Democratic ballot applications resulting in 195 votes cast in the race for the Democratic

77. *See* United States v. McLean, 528 F.2d 1250, 1255 (2nd Cir. 1976) ("The *Guest* Court did not suggest, as do appellants here, that a conspirator must think in federal constitutional terms, i.e., be aware that the freedom to travel is federally guaranteed, in order to produce a § 241 violation. Rather the Court required evidence of a specific intent to interfere with traveling because it faced an intrinsically ambiguous situation in which a robber might engage in criminal conduct occasioning at most an incidental interruption of the victim's traveling activities, an interruption that the robber did not seek or intend for its own sake.").

78. *See* United States v. Barker, 514 F.2d 1077, 1080 (7th Cir. 1975) ("Once it was established that some of the Barker-Reed votes were cast in the Senate race it was a permissible inference that such votes were at least contemplated by both of these men when they agreed to tamper with the election results.").

79. 417 U.S. at 215 n.3 & 225.

80. 517 F.2d 498, 500 (7th Cir. 1975). The Seventh Circuit explained,

> Accordingly, although the existence of 29 fraudulent ballot applications may justify an inference that a like number of fraudulent votes were cast, they do not warrant the further inference that those votes were cast for federal candidates particularly when the statistical evidence demonstrates that some of the false votes were cast for local candidates and that evidence is consistent with the hypothesis that none of those votes was cast for any federal candidate.

Id.

> Congressional nomination, and 190 votes cast in the race for the Democratic nomination to the United States Senate. Since at least fifty of the Democratic ballots were admittedly fraudulent, there could have been at most 165 legitimate votes cast for each federal office. Consequently, at least thirty fraudulent votes were cast in the Congressional race, and at least twenty-five fraudulent votes were cast in the Senatorial contest. This is sufficient evidence from which it can be inferred beyond a reasonable doubt that the conspiracy of which the defendant was a member contemplated the casting of fraudulent votes for federal offices.[81]

Bradberry and *Bryant* emphasize the importance of showing some impact on the federal election from false ballots or undercounting in the absence of any direct evidence that the co-conspirators considered any federal office. Defense counsel in voting rights cases under § 241 and § 242 that involve interference on the broad right to vote of citizens should be particularly vigilant regarding the government's evidence demonstrating what effect, if any, questionable votes had on the *federal* offices on the ballot. Negating evidence of that effect can undermine the requisite proof of a defendant's specific intent to interfere with the federal voting right.

III. VOTING RIGHTS ACT (42 U.S.C. §§ 1973i)

The Voting Rights Act of 1965 is among the most important civil rights laws adopted since Reconstruction.[82] In *South Carolina v. Katzenbach*, which upheld the constitutionality of the statute, the Supreme Court described its rationale: "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country."[83] Among other things, the Voting Rights Act outlawed literacy tests, authorized federal monitors of elections, and required pre-clearance by the Department of Justice in certain states for any changes in their voting laws or redistricting.

Among some of the lesser-known provisions of the Voting Rights Act were § 11 and § 12, which provide criminal penalties for a range of conduct that interferes with voting. Now codified at 18 U.S.C. § 1973i and 1973j, these laws, *inter alia*, restored a crime that had been part of the original Enforcement Acts by outlawing payments to voters in exchange for casting their ballots. It added new offenses prohibiting making false statements in connection with registering and voting,

81. 516 F.2d 307, 310 (7th Cir. 1975). The same panel of Seventh Circuit judges who decided *Bradberry* also decided *Bryant*, although Justice Stevens did not author the opinion in *Bryant*.

82. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 et seq.). For a general history of voting rights, *see* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (Basic Books 2000).

83. 383 U.S. 301, 308 (1966).

and voting more than once in an election. The Voting Rights Act also prohibits intimidation of voters[84] and conspiracies to interfere in the exercise of the voting rights granted by the statute.[85]

The two provisions that deal directly with election frauds are § 1973i(c), which covers payments for votes and giving false information in connection with registering or voting, and § 1973i(e), which prohibits voting more than once. These provisions provide:

> **(c) False information in registering or voting; penalties**
>
> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.
>
> **(e) Voting more than once**
>
> (1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

A. § 1973i(c)

This provision actually covers two different offenses: providing false information to register or vote, and payments made to a person to register or vote. The elements of the crime are: (1) knowingly or willfully; (2) engage in either (a) providing false information as to a person's name, address or period of resident to establish eligibility to register or vote, or conspire to encourage

84. 42 U.S.C. § 1973i(b):

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

85. 42 U.S.C. § 1973j(b): "Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 1973, 1973a, 1973b, 1973c, 1973h, or 1973i(a) of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both."

false registration or illegal voting, or (b) pay, offer to pay, or accept payment to register to vote or to vote; (3) in an election held solely or in part to elect a candidate for a federal office. The false information portion of the provision includes a conspiracy to encourage "false registration to vote or illegal voting" as a means of committing the offense. This is not a distinct conspiracy provision, which would allow for a separate charge apart from the substantive violation, but one manner by which defendants can commit the crime.

The term "illegal voting" is not defined in the statute, and its inclusion as part of the false information portion of § 1973i(c) implies that the illegal vote would be one in which the person had provided false information in order to register or vote so that it is not a vote that was legitimately cast in the election. An "illegal vote" could conceivably include a situation in which the person voted a second time, which would also be a violation of law. That prohibition, however, is in a separate section of the statute, and the better interpretation of illegal voting is to limit it to situations in which the voter provided false information to establish eligibility to register or vote. If a separate conspiracy charge is sought for double voting under § 1973i(e), then it can be brought under the general conspiracy statute, 18 U.S.C. § 371, while an alleged conspiracy to vote illegally can be charged as one means of violating § 1973i(c).

1. Federal Jurisdiction

Section 1973i(c) was added to the Voting Rights Act in the Senate as a floor amendment, but without the proviso limiting it to elections that include a federal office. According to the amendment's sponsor, Senator Harrison Williams, the broad reach of the provision was intentional:

> We believe that section 14(d) of the pending voting rights bill is deficient. First it limits its coverage to registration and voting under this act. There is no reason for limiting such coverage. Registration under this act or under any other act should be covered. There should be no loopholes. We should have clean elections period; not clean elections under one act and unclean elections under some other act. The bill prohibits fraudulent registration. This is more difficult to prosecute than false registration, which is what our amendment prohibits. What cancels out the registration of an honest citizen is a false registration fraudulent or otherwise . . .[86]

Out of concern that the provision might exceed Congress's constitutional authority to regulate elections, the criminal prohibition was limited to those elections "held solely or in part for the purpose of selecting or electing any candidate" to a federal office.[87]

86. 111 Cong. Rec. S8813 (April 26, 1965).

87. Senator Hart, among others, expressed concern about the constitutionality of the proposal:

> [W]e do not attempt to reach State or local elections with a criminal sanction on payment for fraudulent registration in voting. Why? Because we had very grave doubt that on that basis we could. It is that point to which I reply. It is not a piece of redtape or flimflam. It is a very serious problem.

Unlike § 241 and § 242, which require proof that the interference with voting rights affected the vote count, § 1973i only requires that the election involve a designated federal office, not that there is any direct effect on the federal election. The lower courts have been clear that the statute reaches corruption of any election in which a federal office is involved, regardless of whether the false information to register or vote or the payments were intended to affect a state or local election.

In *United States v. Howard*, the Seventh Circuit rejected the defendant's argument that his false statement to register to vote had no impact on the federal election because he sought to vote for a local office when he provided the incorrect address, and that had he provided his correct address he could have voted for the same federal candidates as he did at the incorrect address. While acknowledging the argument's superficial appeal, the circuit court held that "the language of section 1973i(c) does not require the government to prove that the prohibited conduct had an actual or potential impact on the *result* of the federal contest."[88] In *United States v. Cole*, the same circuit held that payments to voters violated the statute even though the federal offices on the ballot had candidates who were unopposed for the nomination, so any improper voting could not have affected the election's outcome. The Seventh Circuit stated, "We hold that § 1973i(c) is designed to protect the integrity of the federal election process and that the integrity of a mixed election can be marred regardless of whether federal candidates are opposed."[89]

Registration to vote can occur at any time, and need not be done in relation to a particular election. In *United States v. Cianciulli*, a district court upheld the conviction of defendants for falsely registering voters even though the registration took place during a year in which there was no federal election and so the improperly registered voters could not have voted in an election that met the jurisdictional requirement. The court held, "[A]ny false registration can be the basis of a violation of § 1973i(c), because it creates an Eligibility to vote in a federal election. This is true whether or not that registration occurs in the same year as a federal election."[90] Thus, while the vote-buying portion of the offense must be tied to a federal election, the false registration prong of § 1973i(c) only requires that the person be eligible to vote in a federal election at some point in time, not that it be related specifically to an impending election in which federal offices are on the ballot.

By making the integrity of the election the focal point of the crime, the particular offices that are the object of the defendant's scheme and the intent—or lack thereof—are irrelevant. In *United States v. Mason*, the Fourth Circuit rejected a defendant's argument that his vote buying only

111 Cong. Rec. S8433 (April 26, 1965). Senator Ervin proposed the limiting amendment adopted by the Senate and later enacted by the House of Representatives.

88. 774 F.2d 838, 843 (7th Cir. 1985).

89. 41 F.3d 303, 306 (7th Cir. 1994); *see* United States v. McCranie, 169 F.3d 723, 727 (11th Cir. 1999) ("[W]hether the federal candidate is opposed or unopposed is of little consequence because the integrity of a mixed federal-state election is marred by fraudulent voting activities, even if these activities are only directed toward the stat elections."); United States v. Mason, 673 F.2d 737, 740 (4th Cir. 1982) ("Mason's activities, while intended to influence only the local election, had an effect which reached beyond the local races to taint the federal election process.").

90. 482 F. Supp. 585, 617 (E.D. Pa. 1979). Under the state voter registration system in place, the registration was good for two years, which would have included the federal election in the following year.

related to a race for sheriff and not the federal offices on the ballot. The circuit court held, "There is no requirement that the payment or offer of payment be made specifically on behalf of a federal candidate or that a special intent to influence a federal race exist."[91] In *United States v. Malmay*, the Fifth Circuit upheld the defendant's conviction despite the absence of any evidence of an intent to influence the federal election, finding that payments to voters "distorts the total, leaves to chance the federal candidates who might—or might not—receive their vote, distorts the results, and is, therefore, repugnant to the integrity of the elective process."[92]

While § 1973i(c) requires proof that the defendant acted knowingly or willfully, the structure of the statute supports the conclusion that the intent element only applies to the conduct of making a false statement or paying voters, not the jurisdictional limitation to elections with federal offices on the ballot. The proviso in the statute is separated out from the operative terms of the statute by a colon, so it is not linked directly to the introductory intent language. Congress enacted the jurisdictional limitation to avoid potential constitutional problems, not to add an additional element to the crime.[93]

Challenges to the constitutionality of the statute based on its broad scope covering any election in which a federal office is on the ballot have been rejected consistently. In *United States v. Carmichael*, the Fourth Circuit rejected the defendants' argument that Congress can only enact legislation to reach conduct with a direct effect on the federal election, holding that "[t]he power of Congress to proscribe conduct that potentially corrupts a federal contest in addition to conduct that actually corrupts a federal context has been previously upheld."[94] The Fifth Circuit took the same approach in *United States v. Bowman* in explaining the scope of congressional authority to regulate elections:

> [U]nder the Constitution, Congress may regulate "pure" federal elections, but not "pure" state or local elections; when federal and state candidates are together on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption.[95]

The scope of Congress's authority to regulate conduct related to elections in which a federal office is on the ballot is clear, and so challenges seeking to invalidate § 1973i(c) on the ground that it reaches conduct reserved to state regulation have been unsuccessful.

91. 673 F.2d 737, 739 (4th Cir. 1982).

92. 671 F.2d 869, 875 (5th Cir. 1982).

93. The Supreme Court has generally acknowledged that the intent element of an offense does not apply to the jurisdictional requirements for the crime. *See Feola v. United States*, 420 U.S. 671, 696 (1975) ("[W]ith the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.").

94. 685 F.2d 903, 908–09 (4th Cir. 1982).

95. 636 F.2d 1003, 1011 (5th Cir. 1981).

2. Payment for Votes

The prohibition on paying for votes, and accepting a payment to vote, does not require proof of a *quid pro quo* or even that the voter was influenced by the payment. The mere payment establishes the offense, so long as it is related to voting in an election involving a federal office. The statute does not define what can constitute a payment for a vote, and the lower courts have taken a practical approach that looks to whether something of value has been conveyed for the exercise of the franchise. Money is obviously the most common form of payment, and the sums involved are usually quite small, ranging anywhere from $3 to $40 per vote. In *United States v. McCranie*, the Eleventh Circuit reviewed a conviction in a case in which each side in an election for county commissioner set up competing tables in the local courthouse to bid for absentee votes.[96]

In *United States v. Garcia*, the defendants, including a county welfare director, provided food vouchers in exchange for absentee votes in a party primary election, and the circuit court rejected the argument that § 1973i(c) was limited to monetary transactions. The Fifth Circuit stated, "[W]e cannot find that a 'payment' in the form of a welfare food voucher exceeds the ordinary meaning of the word or renders the intended scope of the statute unconstitutionally vague or indefinite."[97] The circuit court cited as support for its interpretation the statement of Senator Williams, who sponsored the amendment that added this provision to the Voting Rights Act, that it "would provide a penalty for anyone offering or accepting money or something of value in exchange for registering or voting."[98] In giving a broader reading to "payment" than just cash, the Fifth Circuit held:

> Congress did not intend to restrict the term "payment" in § 1973i(c) to offers of money, and that the term was intended to include items of pecuniary value offered or given directly to an individual voter in exchange for his individual vote, such as the welfare food vouchers present here. While a food voucher may not be valuable to the person who issues it, it has the same significance as cash to the person receiving it. And since the intent of Congress was to prohibit the direct offer or giving to an individual voter of an item of pecuniary value in order to obtain his or her vote, an assessment of the monetary worth of an item from the perspective of the voter receiving the item, and not the person offering it, accords with the legislative intent of the statute.[99]

Not everything that might be considered as having some value constitutes a "payment" when provided in connection with voting. In *United States v. Lewin*, the first reported § 1973i(c) case, the

96. 169 F.3d 723, 726 (11th Cir. 1999). The circuit court recounted, "At trial, a Dodge County magistrate described the rowdy courthouse atmosphere during the absentee voting period as 'a successful flea market.' One of the vote buyers in the Mullis camp also testified that the open bidding for votes was '[l]ike an auction.' " *Id.*

97. 719 F.2d 99, 101 (5th Cir. 1983).

98. 111 Cong. Rec. S8423 (April 26, 1965). In a later exchange about the amendment, Senator Williams explained that the provision "is intended solely to prohibit the practice of offering or accepting money or a fifth of liquor—some payment of some kind—for voting or registering." 111 Cong. Rec. S8986 (April 29, 1965).

99. 719 F.2d at 102. In *United States v. Saenz*, 747 F.2d 930 (5th Cir. 1984), the defendants provided payments in the form of welfare vouchers in same primary election as in *Garcia*. In *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994), the defendants gave voters beer or cigarettes to entice them to vote.

Seventh Circuit rejected a vagueness challenge to the statute on the ground that it would also reach groups that provide transportation to the polls for voters or employers who pay their employees while providing time off to vote, conduct that is clearly legitimate. The circuit court stated, "The statute uses the word 'pay.' It in no way prohibits *assistance* rendered by civic groups to prospective voters; nor would we deem a fringe benefit continuance of an employee's wages to be proscribed by the statutory direct prohibition against payment *for* registration."[100] The distinction between providing assistance and making a payment is the link between the transfer of a benefit or thing of value and the voting or registration—there must be some type of exchange of value for the vote to violate § 1973i(c)—and not just assistance that makes it easier for voters to reach the polls and cast a ballot.

Whether the voter actually engages in the voting or allows the payer to complete the ballot is irrelevant. In *United States v. Campbell*, the Eighth Circuit rejected the defendant's argument that the payment of $50 for a person's blank absentee ballot did not constitute payment for the vote because "section 1973i(c) plainly prohibits an individual from paying a voter and then filling out or helping the voter fill out an absentee ballot."[101]

3. False Information

The false information prong of § 1973i(c) is limited to the voter's name, address, or "period of residence in the voting district." This aspect of the offense adds an additional intent element beyond the "knowingly or willfully" requirement because the false information must be given "for the purpose of establishing his eligibility to register or vote." This second intent requires proof that the false information was provided to allow the person to vote in a jurisdiction or location that the person was not otherwise eligible to vote in. Therefore, a defense of mistake or that the person was merely negligent in providing false information would negate the intent requirement for a false information prosecution under § 1973i(c).

The government bears the burden of establishing the falsity of the information, so that even if it were questionable whether the name, address, or period of residency was correct, that alone would not establish that it was in fact false. In *United States v. Smith*, the Eleventh Circuit overturned a conviction because "there is insufficient evidence to support a finding that any of the information Tyree wrote on to the application that is the subject of Count 12 was false. . . ."[102] The circuit court noted that there is no defense to the charge that the voter authorized or directed the use of false information, and the government need not show that the registration was completed without the voter's permission.[103]

100. 467 F.2d 1132, 1136 (7th Cir. 1972).

101. 845 F.2d 782, 787 (8th Cir. 1988). The circuit court explained, "Campbell's actions were equivalent to paying Cross for marking her ballot in accordance with his directions, and the statute gave Campbell fair warning that his conduct was unlawful." *Id.*

102. 231 F.3d 800, 814–15 (11th Cir. 2000).

103. *Id.* at 814 ("[N]othing in § 1973i(c) requires that the information be given without the voter's permission.").

The false statement prohibition applies to both registering and voting. In *United States v. Boards*, the Eighth Circuit held that providing a false address on an application for an absentee ballot violated § 1973i(c) because the application is a step in the process of voting. The circuit court stated, "An absentee ballot application is a 'vote' under the Voting Rights Act's broad definition because an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.' Thus, § 1973i(c)'s prohibitions include absentee ballot applications."[104] The Eighth Circuit also found that the use of the names of real voters by the defendants to obtain absentee ballots that they would take and vote also constituted providing false information because they "could not get the absentee ballots of other real voters by using their own names on the applications."[105]

B. Voting More than Once

Section 1973i(e) prohibits a person from voting more than once in an election, although the statute does not prohibit a second vote if a prior ballot was invalidated or the person votes in two different jurisdictions so long as candidates for the same office are not involved in the election.[106] The prohibition applies to elections in which there is a federal office on the ballot, the same limitation applied to § 1973i(c).

The Voting Rights Act defines voting as "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."[107] In order to vote more than once, the government must prove that the person cast one ballot in the election, regardless of whether it was done lawfully, and then cast at least one additional ballot in the same election.

The provision does not contain an intent element for the offense, unlike § 1973i(c) that requires proof of knowledge or willfulness. The absence of terms such as "knowledge" or "willful" in this subsection, which appear in other provisions in § 1973i, counsels against finding that a specific intent must be proven. On the other hand, while it could be argued that this is a strict liability offense, the punishment for a violation is a $10,000 fine and up to five years of imprisonment, which are substantial penalties that undermine the argument that Congress sought to hold a person accountable regardless of their culpable state of mind for voting more than once.[108]

104. 10 F.3d 587, 589 (8th Cir. 1994).

105. *Id.*

106. 42 U.S.C. § 1973i(e)(3) provides: "As used in this subsection, the term 'votes more than once' does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office."

107. 42 U.S.C. § 1973l(c)(1).

108. *See* Morrissette v. United States, 342 U.S. 246, 263 (1952) ("[M]ere omission from [a statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced.").

The better analysis is that the government must prove a general intent to violate the law, meaning that a defendant acted with at least a general awareness of the wrongfulness of the conduct.

Section 1973i(e) can be used most effectively in voting fraud cases in which there is no evidence that the defendant paid others for their vote, or intimidated them to vote. For example, in *United States v. Smith*, the defendants were charged under § 1973i(e) when they voted absentee ballots without the knowledge or consent of the voters. [109] Similarly, in *United States v. Lewis*, the defendants were charged with submitting bogus absentee ballots in a primary election in which federal offices were on the ballot.[110] The conduct in *Smith* and *Lewis* would not come within § 1973i(c) because false information was not provided to obtain the ballots, nor were voters compensated or coerced into turning over their ballots.[111] In this situation, the submission of ballots obtained without the voters' consent or using fake ballots meant the defendants voted more than once, and because the provision requires multiple voting, the government must prove that the defendants submitted (or aided and abetted the submission of) at least two ballots. Other types of cases in which § 1973i(e) is most useful involve theft or fraud in obtaining blank ballots that are completed and submitted, or deceiving a voter into completing a ballot that only expresses the preferences of another person and not the voter.

The analysis gets much more difficult when the provision is applied to voter assistance in which one person ostensibly aids another in completing the ballot, but in fact effectively directs the person to vote for certain candidates, apparently overbearing the will of the voter. If a threat or other form of intimidation is used, then the defendant can be prosecuted under 42 U.S.C. § 1973i(b),[112] so conduct that goes beyond persuasion and into coercion would be prosecuted under that provision. Where the persuasion does not cross that line, then the issue is whether the person can be said to have exercised such control that the actual voter had not expressed his or her own preference in the election.

In *United States v. Salisbury*, the Sixth Circuit confronted this scenario in overturning the conviction of a party operative who was particularly aggressive in visiting the homes of absentee voters to help them complete their ballots. The defendant would read aloud to the voters, many of whom were elderly, the identification numbers of the candidates she supported, and the voter would then punch the hole next to that number without being asked who they wanted to vote for or being given an alternate candidate. She would also disparage candidates if a voter expressed an

109. 231 F.3d 800, 818 (11th Cir. 2000).

110. 514 F. Supp. 169 (M.D. Pa. 1981).

111. The defendants in *Smith* were also charged with violations of § 1973i(c) related to providing false information on absentee ballot applications, but those were separate charges involving different voters than the § 1973i(e) charges.

112. The statute provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

interest in one the defendant did not support. When the voter completed the ballot, the defendant would have them sign it and then take it for submission.[113]

In overturning the conviction, the Sixth Circuit held that § 1973i(e) was unconstitutionally vague as applied because it did not contain a definition of "voting" and it was unclear "whether a person can illegally vote on behalf of another without physically marking the ballot or, whether a person can vote on behalf of another without consent where that other person signed the absentee ballot form."[114] The circuit court's analysis is flawed, however, because the Voting Rights Act does define "voting" in another provision, so § 1973i(e)'s reference to voting is not vague in any constitutional sense. The more important question was whether the conduct in *Salisbury* came within the statutory definition when the defendant did not personally take control of the ballot or direct the choice of candidates without the consent of the voter.

"Voting" means selecting a candidate for an office, or taking a position on a proposition, and then submitting the ballot to be counted, a process by which the person exercises *control* over completing the ballot. In order to vote twice in violation of § 1973i(e), the government must prove the defendant exercised the requisite degree of control over two (or more) ballots submitted for counting in the election that express the will of the person submitting them. That control can be established as either physically taking the ballot and voting it, or deceiving the voter into completing the ballot so that it is not an expression of the voter's own choices. The dictionary definition of "vote" is an "expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication,"[115] so determining whether a person has voted requires finding that the person exercised sufficient control over the ballot to express his or her own choice. For example, helping a blind or mentally impaired person by directing their hand to vote for the candidates preferred by the person aiding them means that control over the ballot has been taken from the voter. Whether there is an actual taking—like a larceny—or deception regarding the choice—like a fraud—the deprivation of control shows that the voter did not actually vote but instead another person exercised the franchise by expressing his or her own preference on the ballot.

Viewed in that light, the defendant's conduct in *Salisbury* did not constitute "voting," and therefore the government failed to prove an element of the crime by establishing that she voted twice (or more). While certainly pernicious, the defendant did not exercise the requisite control over the ballots when she visited the absentee voters and effectively got them to vote for the candidates she supported. Her methods of persuasion resulted in a vote that reflected her preference, but the government did not prove that the ultimate decision regarding who to vote for was made by her and not the individual voters she visited. To extend § 1973i(e) to her conduct would call into question other types of voter assistance as potentially rising to the level of voting twice, such as voter guides or providing false (or slanted) information about candidates.

To prove a violation of § 1973i(e), the government must prove that the conduct rises to the level of an actual expression of the defendant's preferences by casting the ballot and not just that

113. 983 F.2d 1369, 1372 (6th Cir. 1993).

114. *Id.* at 1378.

115. Black's Law Dictionary (8th ed. 2004).

the defendant took advantage of the voters to sway them to vote for the preferred candidates. While there is a thin line between persuasion and control, the burden is on the government to prove beyond a reasonable doubt that the line has been crossed, and the evidence in *Salisbury* did not reach that level.

The Seventh Circuit applied this analysis in *United States v. Cole*, a case in which the defendant had absentee voters sign their ballots but otherwise left them blank, after which Cole or one of his associates voted for the favored candidates. Unlike *Salisbury*, the defendant took control of the ballots so that "the absentee voters were not expressing their wills or preferences, i.e., Cole was using the absentee voters' ballots to vote his will and preferences."[116] The circuit court rejected *Salisbury*'s void-for-vagueness analysis, finding that the statutory definition was sufficient to overcome any constitutional problems in the statute.[117] However, *Cole* and *Salisbury* are easily reconciled because there was no question in *Cole* that the defendant voted the ballots himself, while in *Salisbury* the government's evidence was at best equivocal regarding whether the defendant ever actually controlled the ballot or simply got the voters to support the candidates she preferred by unseemly measures. By making the offense "voting more than once" and not simply conduct in which a voter is deceived, § 1973i(e) requires conduct that constitutes the act of voting, and not just underhanded tactics that lead voters to select a candidate they might not support otherwise.

IV. NATIONAL VOTER REGISTRATION ACT (42 U.S.C. § 1973gg-10)

Congress enacted the National Voter Registration Act (NVRA) in 1993 to create national standards by which voters could register to vote in order to increase the number of participants in elections while also adopting measures to "protect the integrity of the electoral process[] and to ensure that accurate and current voter registration rolls are maintained."[118] Among other things, the NVRA requires states to allow individuals to register to vote when they apply for or renew a driver's license[119] and registration by mail.[120] While the statute only applies to federal elections, each state uses a unitary voter registration system, so the statute effectively governs all voter registration.

116. 41 F.3d 303, 308 (7th Cir. 1994).

117. *Id.* The Seventh Circuit reviewed *Salisbury*'s constitutional analysis, but concluded that "we will not follow it."

118. Pub. L. No. 103-31, 107 Stat. 77 (1993).

119. 42 U.S.C. § 1973gg-3 provides: "Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application."

120. 42 U.S.C. § 1973gg-4 provides: "Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office."

In addition to the prescribed registration procedures, the NVRA added new criminal provisions in 42 U.S.C. § 1973gg-10 related to intimidation of votes and conduct that would "deprive or defraud the residents of a State of a fair and impartially conducted election process." One of the concerns expressed in Congress regarding the expanded methods of registering to vote was the potential for fraud, although it is not clear to what degree voters, acting alone, engage in any illegal activity.[121] In addition to the new criminal provisions, the statute also allowed the states to adopt reasonable programs designed to remove the names of those considered to be ineligible to vote.[122]

The criminal provision prohibits two types of acts that undermine the integrity of an election: intimidation, threats, or coercion related to registering to vote or voting (§ 1973gg-10(1)), and fraud in an election as a result of the submission of false, fictitious, or fraudulent voter registration materials or ballots (§ 1973gg-10(2)). The statute authorizes a prison term up to five years for each violation. In order to prove a violation under the election fraud prong, the government must establish the following elements: (1) knowing and willful (2) (a) procurement or submission of voter registration applications or (b) procurement, casting, or tabulation of ballots (3) that are known by the person to be materially false, fictitious, or fraudulent under the laws of the state in which the election is held.

The statute contains two intent elements. The first, "knowingly and willfully," applies to the voter registration materials or ballots as being improper. The second intent is knowledge that these items are "false, fictitious, or fraudulent" under state law. The reference to particular state laws appears to require proof that the defendant be aware of the relevant state laws related to voter registration or ballots. Proof that the documents or ballots were somehow incorrect without linking that to a particular state law requirement would not be sufficient to establish this second intent. A knowledge requirement does not require proof of an intent to violate a known legal duty, which is sometimes applied when a statute requires proof of willfulness, but by specifically referencing state law, Congress clearly intended to require the government at least prove the defendant's subjective appreciation that the registration material or ballots did not comply with the relevant state election law. While intent can be shown by circumstantial evidence, this more particularized intent requirement may allow for an ignorance defense, i.e., the defendant was not cognizant of state law and therefore did not have the requisite intent to commit the crime.

While § 1973gg-10(2) is similar to the false registration prong of § 1973i(c), the latter provision is limited to false statements regarding the registrant's name, address, and period of residence in the district. The NRVA prohibition covers *any* false statement on registration materials,

121. *See* Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 Harv. C.R.–C.L. L. Rev. 1, 10–11 (2009) ("But the new policy also engendered fears that easing registration requirements might encourage voter-initiated fraud. These fears were not driven by a response to data. Scholars and election administrators cautioned Congress that incidents of voters acting fraudulently were 'extremely rare,' and noted that the vast majority of election fraud incidents were committed by election officials, candidates, and campaigns, rather than voters themselves.").

122. 42 U.S.C. § 1973gg-6(a)(4). A subsequent law, the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1714 (2002) (codified at 42 U.S.C. § 15483), also has provisions aimed at preventing fraudulent votes. However, the statute does not contain any criminal provisions.

and also covers a fraudulent statement, which means that even if the statement is not technically false, it may be sufficiently misleading to constitute a fraud.

In addition, § 1973gg-10(2) covers false or fraudulent ballots, which may allow prosecution for submitting a ballot that the person obtained by fraud because the ballot would not reflect the true intentions of the actual voter. This provision is broader than § 1973i(e)'s prohibition on voting more than once because the government does not have to prove that the person voted a second time, only that a fraudulent ballot was submitted. The statute's emphasis on protecting a "fair and impartially conducted election process" supports a broad reading of what constitutes a fraudulent ballot, so that schemes to obtain ballots by deceiving voters about who to vote for or tricking them into turning over ballots to allow another to vote them would violate § 1973gg-10(2).

There has only been one reported decision on a prosecution for violating § 1973gg-10. In *United States v. Prude*, the defendant had been convicted of forgery, a felony which deprived her of the right to vote and she had not had her civil rights restored. Although her probation officer informed her that she was not eligible to vote, and she signed a form indicating that fact, she nevertheless registered and voted by absentee ballot. The Seventh Circuit did not review the statute in any detail, and the issues in the case concern the admission of evidence to establish her knowledge of the prohibition on voting as a felon who did not have her civil rights restored, the procedures for withdrawing a previously cast ballot, and the proper jury instructions.[123] The case came about as a result of a federal investigation of voting fraud in Milwaukee, Wisconsin, and the defendant was the only person charged based on casting just a single improper ballot.[124]

V. FEDERAL CORRUPT PRACTICES ACT (18 U.S.C. § 597)

The means by which campaigns for federal office are financed has been a concern since the end of the eighteenth century, when large business organizations sought to influence elections by contributing significant amounts to candidates favorable to their positions. In response to President Teddy Roosevelt's call to stop corruption in elections, Congress adopted the Tillman Act in 1907 to prohibit national banks and corporations from making campaign contributions to candidates for federal offices.[125] Congress strengthened the disclosure requirements in 1910 by adopting the Federal Corrupt Practices Act, and then in 1925, in response to the Teapot Dome scandals, attempted to tighten the campaign finance disclosure requirements further, although the law still contained many loopholes.[126] Included in the revised Act was § 311, now codified at 18 U.S.C. § 597, which

123. 489 F.3d 873 (7th Cir. 2007).

124. *Id.* at 876. The U.S. Attorney's Office for the Eastern District of Wisconsin brought approximately fourteen voter fraud cases after the 2004 election, and five resulted in convictions. Those cases represented approximately 10 percent of the voter fraud cases brought from 2002 through 2006. The defendant cast her first ballot in the election. *See* Bill Glauber, *Her First Vote Put Her in Prison*, Milwaukee Journal-Sentinel (May 21, 2007).

125. Pub. L. No. 59-36, 34 Stat. 864 (1907).

126. 1925 Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925).

prohibits making an "expenditure" to a person to vote. The statute is a bit of an orphan in the federal code because most of the provisions surrounding it were repealed in 1971 by the Federal Election Campaign Act. The statute provides:

> Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and
>
> Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote–
>
> Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.[127]

The elements of the offense are (1) making or offering to make, or a voter soliciting, accepting, or receiving (2) an expenditure (3) to vote, withhold the vote, or vote for or against a particular candidate. By reaching both offers and solicitations, § 597 reaches conduct that is preliminary to any actual vote, so there is a violation even if there is no actual payment or agreement to provide a benefit. A provision of the Federal Corrupt Practices Act, previously codified at 18 U.S.C. § 591, defined "expenditure" to include "a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable." The provision has since been repealed, but its definition remains useful for determining what constitutes an "expenditure."[128]

The statute does not specify a particular intent level, but the punishment portion of § 597 makes it a felony offense for a "willful" violation that can result in imprisonment up to two years, and a misdemeanor punishable by up to one year in prison if there is no proof of that intent. By providing different punishments based on the defendant's intent, it is reasonable to conclude that proof of the basic violation requires a general intent, that is an awareness of wrongdoing in engaging in the prohibited conduct. A willful violation would require a specific intent, and the Supreme Court's analysis in *Screws v. United States*, discussed above, of willfully is the appropriate analysis for § 597. In *Screws*, the Court stated regarding a § 242 violation, "One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him for he either knows or acts in reckless disregard of its prohibition. . . ."[129] There are no lower court decisions discussing the meaning of "willful" in this provision, and the approach taken in other voting cases in which the Court has required proof of a specific intent are persuasive authority.

127. In the1948 revision of the federal code, Congress combined 2 U.S.C. § 250, which set for the conduct elements of the offense, and § 252, which provided the punishment for a violation, into a single provision. The statute remained even after the repeal of the Federal Corrupt Practices Act by the Federal Election Campaign Act in 1972.

128. Congress repealed § 591 in 1980 and replaced it with 2 U.S.C. § 431(9), which has essentially the same definition of expenditure except that it adds "for the purpose of influencing any election for Federal office." The definitions in § 431 apply to the Federal Election Campaign Act, and so this provision is not directly applicable to § 597, which was part of the Federal Corrupt Practices Act but not incorporated into the later statute. While § 431(9) definition of "expenditure" does not apply directly to § 597, it certainly provides guidance on the meaning of "expenditure" because it uses almost identical language and replaced the prior definitional statute without a replacement provision having been adopted.

129. 325 U.S. 91, 104 (1945).

Section 597 has been used rarely, and since the adoption of § 1973i(c) as part of the Voting Rights Act of 1965 there are no reported decisions on prosecutions related to expenditures in connection with encouraging or discouraging the exercise of the franchise. That provision is broader because it applies to any payment made in connection with voting, while § 597 only applies to expenditures that entice a person to vote or refrain from voting, or to vote for (or against) a particular candidate. The few older cases reviewing prosecutions for violating the statute provide some guidance on its scope.

The expenditure must be made in connection with voting, so the timing of the payment, or its offer or solicitation, must occur before the election. In *United States v. Bruno*, the district court noted that a promise to make an expenditure to entice a person to vote would constitute a violation, but the government's indictment failed to allege that the payments made after the election were connected to an offer to the voters before it took place.[130] The expenditure need not actually affect voting, however, because § 597 criminalizes both the offer and solicitation of the payment.

Section 597 does not specify the type of election to which it applies, stating only that the expenditure must be made in relation to voting or withholding a vote. The breadth of the statutory language appears to apply to any election, not just one involving federal candidates. The approach taken by Congress in adopting the criminal provisions of the Voting Rights Act and the NRVA that limited those provisions to elections with federal candidates on the ballot, and the constitutional concerns expressed in the Senate in relation to § 1973i, support reading the statute as requiring that the election not be one solely involving state or local offices, and that there be a federal aspect to it.

A remaining uncertainty is whether the expenditure to vote must be specifically related to exercising the franchise for a federal office, or if the presence of a federal candidate alone is sufficient to allow for prosecution under § 597. Two district court decisions on the issue are split. In *Bruno*, the district court dismissed the indictment because the government did not allege that the votes cast affected any federal races on the ballot. The district judge relied on the Supreme Court's decision in *Blitz v. United States*, which overturned a conviction for voting more than once in violation of one of the Enforcement Acts because the charge "should clearly show that the accused actually voted for a representative in congress, and not simply that in voting he falsely personated another at a general election at which such representative was or could have been chosen."[131] Under this reading of the statute, the government must prove that the person enticed to vote actually voted for the federal office.

A decision by another district court in *United States v. Blanton* adopted the broader approach of looking to whether there is a federal candidate on the ballot, holding that the statute

> makes it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a General Election, where the official ballot contains the names of candidates for Congress

130. 144 F. Supp. 593, 594 (N.D. Ill. 1955).

131. 153 U.S. 308, 315 (1894).

> and the person receiving the expenditure proscribed votes the official ballot, and that such legislation is within the powers of Congress.[132]

The district judge relied on another Supreme Court decision, Ex parte *Coy*, which upheld the application of an Enforcement Act provision to tampering with ballots in a federal election even though the indictment did not allege any particular effect on the federal offices up for election. The Court stated:

> The manifest purpose of both systems of legislation is to remove the ballot-box as well as the certificates of the return of votes cast from all possible opportunity of falsification, forgery, or destruction; and to say that the mere careless omission, or the want of an intention on the part of persons who are alleged to have acted feloniously in the violation of those laws, excuses them because they did not intend to violate their provisions as to all the persons voted for at such an election, although they might have intended to affect the result as regards some of them, is manifestly contrary to common sense, and is not supported by any sound authority.[133]

The Supreme Court's decisions in *Blitz* and Ex parte *Coy* are difficult to reconcile, and reflect the schizophrenic approach in the late eighteenth century regarding the scope of congressional authority to regulate elections that involved both federal and state offices. Each opinion can be read to support the position taken by the district courts in *Bruno* and *Blanton*, which are plainly inconsistent regarding what the government must prove regarding the effect on the federal portion of the election.

The better approach is the one taken in *Blanton* that limits prosecutions under § 597 to elections with federal offices on the ballot, but not requiring proof of an actual impact on the vote for federal candidates. There are three reasons for taking this approach. First, § 241 and § 242 are similarly vague about the scope of the right to vote, and the Supreme Court's view at least allows for prosecution under those statutes so long as there is a federal candidate on the ballot without requiring that those who conspire or violate the rights of others actually intend to affect the outcome of the election to a particular federal office. It would be inconsistent with the Court's approach to protecting the right to vote in § 241 and § 242 to adopt a narrower interpretation of "vote" to mean that the government must show proof of an actual effect on certain offices on a ballot.

Second, Congress enacted the Federal Corrupt Practices Act to ensure the integrity of elections. Taking the approach of *Bruno* (and *Blitz*) would undermine that legislative purpose in adopting a statute that prohibits expenditures that will alter the outcome of an election by requiring even greater proof of corruption than is otherwise necessary to protect the right to vote.

Third, as a practical matter, the proof requirement of *Bruno* makes it virtually impossible to prove a violation because—absent an admission by the voter or payer that the goal was to affect

132. 77 F. Supp. 812, 815 (E.D. Mo. 1948).

133. 127 U.S. 731, 755 (1888).

the federal election—it cannot be shown that the federal count was affected when ballots do not contain any identifying information showing which one is traceable to the improper payment. Moreover, § 597 also prohibits expenditures to have a person withhold their vote, and proof of an impact on federal offices would be impossible absent an admission that those offices were the motivation for the payment. The government would not be able to prove either the casting of a tainted ballot for a federal candidate, or how the nonevent of failing to vote affected a federal office, and therefore this aspect of the offense would be effectively read out of the statute.

VI. REGISTRATION AND VOTING BY NONCITIZENS (18 U.S.C. §§ 611 AND 1015(f))

Neither the Constitution nor federal law prescribe who is permitted to vote in federal elections. Congress relies on the states to determine the eligibility of their residents to vote in an election. Because voter registration is unitary and not divided between federal and state elections, a state could, if it so wished, allow noncitizens to vote. No state, however, does so today, and every one now requires that a person registering to vote be a citizen of the United States. That was not always the case, as Professor Jamin Raskin pointed out:

> Until it was finally undone by the xenophobic nationalism attending World War I, alien suffrage figured importantly in America's nation-building process and in its struggle to define the dimensions and scope of democratic membership. Where alien suffrage was adopted, the practice was seen as conducive to a desired immigration (and assimilation) of foreigners and consistent with basic principles of democratic government. Moreover, the enactment of noncitizen voting laws was widely recognized as permissible within the constitutional regime of electoral federalism. The class of aliens—or, more precisely, white male aliens—exercised the right to vote in at least twenty-two states or territories during the nineteenth century. After a surge in anti-immigrant emotion at the turn of the century, there was a steady decline in alien suffrage and Arkansas became the last state to abandon noncitizen suffrage in 1926.[134]

Although Congress has not prescribed voter eligibility requirements beyond prohibiting discrimination, the NVRA imposed standards on what must be included on the voter registration forms, including a requirement to affirm that the person is a U.S. citizen. For example, 42 U.S.C. § 1973gg-3(c)(2)(C) provides that the form for driver's license registration must include a section that "states each eligibility requirement (including citizenship)." The mail voter registration form prescribed in § 1973gg-7 includes the same requirement, while the Help America Vote Act requires each state to include on voter registration forms the following question: "Are you a citizen

134. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Sufferage*, 141 U. Pa. L. Rev. 1391, 1397 (1993).

of the United States of America?"[135] The National Mail Voter Registration Form created by the U.S. Election Assistance Commission (EAC) states in its first instruction that a U.S. citizen can register to vote, and like the state forms the first entry asks, "Are you a citizen of the United States?"[136]

In addition to § 1973gg-10 that prohibits material false statements in voter registration applications, Congress added two provisions in 1996 to address voting by aliens. First, 18 U.S.C. § 611 specifically prohibits any alien from voting in an election in which a federal office is on the ballot, punishable by up to one-year imprisonment. The statute contains an exception to the offense that allows an alien to vote in an election held for a purpose other than voting for federal offices so long as the alien does not have an opportunity to vote for a federal candidate and "aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance." To date, no state provides for such voting, so the exception to § 611 has not arisen.[137] The statute also provides what is in effect a mistake defense in carefully defined circumstances in which the person could reasonably believe he or she was a citizen with the right to vote:

> **Subsection (a) does not apply to an alien if –**
> (1) each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization);
> (2) the alien permanently resided in the United States prior to attaining the age of 16; and
> (3) the alien reasonably believed at the time of voting in violation of such subsection that he or she was a citizen of the United States.[138]

Section 611 does not specify any particular intent for the crime, similar to the prohibition on voting more than twice in 42 U.S.C. § 1973i(e). While it could be argued that it is a strict liability offense, as noted above federal courts generally avoid finding a statute does not require proof of any *mens rea*.[139] In *United States v. Knight*, the Eleventh Circuit rejected a defendant's argument that § 611 was unconstitutionally vague because it does not incorporate an intent element. Instead, the circuit court held that "[w]hile Knight maintains that we must read a specific intent mens rea into

135. 42 U.S.C. § 15483(b)(4)(A)(i).

136. The form is *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx. The second question asks whether the registrant is eighteen years of age, which is prescribed by 42 U.S.C. § 15483(b)(4)(A)(ii). The Help America Vote Act then requires that immediately below these questions appear the statement "If you checked "no" in response to either of these questions, do not complete this form." The EAC form puts this admonition in bold red print. Next to the signature block on the form, it states that the information provided is made under penalty of perjury, and the first item listed is "I am a United States citizen." It would be difficult to argue that the voter registration information did not clearly inform the person that U.S. citizenship is a prerequisite to voting.

137. Some local jurisdictions, such as Cambridge, Massachusetts, and Takoma Park, Maryland, do allow aliens to vote, but those involve only municipal elections in which there are no federal offices on the ballot.

138. 18 U.S.C. § 611(c). Congress added this limitation on the statute as part of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1635 (2000). While this subsection focuses on the alien voter's reasonable belief, it is not a typical criminal defense because the burden is not on the alien to establish the elements of the provision. Instead, it is a limitation on the application of the statute, so the government would be required to prove that § 611(c) does not apply.

139. *See* United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor.").

§ 611 in order to properly separate wrongful conduct from innocent conduct, a general intent requirement satisfies this goal. As a general intent crime, the government must still prove that the defendant knowingly engaged in the conduct prohibited by § 611."[140]

The second criminal provision added in 1996 was 18 U.S.C. § 1015(f), which provides that "[w]hoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum)" may be imprisoned up to five years.[141] The provision contains the same mistake defense to application of the statute as § 611(c). The intent element of the offense requires proof of knowledge of the false statement regarding citizenship, and unlike § 611 this violation focuses on the falsity of any claim to citizenship in registering or voting.

Section 1015(f) differs from the other voting provisions reviewed in this chapter because it is not limited to federal elections. Instead, it applies to *any* election in addition to registering to vote, so that the presence of federal candidates need not be established to successfully prosecute a defendant. The authority to enact this provision is the Naturalization Clause of the Constitution, which vests Congress with exclusive power over aliens.[142] The other voting provisions are based on congressional authority over elections, which the Supreme Court has interpreted to be limited to elections in which federal offices are on the ballot or state registration that affects voting in a federal election.[143]

140. 490 F.3d 1268, 1271 (11th Cir. 2007).

141. Congress also added § 1015(e) to the statute at the same time, which makes it a crime for any person who "knowingly makes any false statement or claim that he is, or at any time has been, a citizen or national of the United States, with the intent to obtain on behalf of himself, or any other person, any Federal or State benefit or service, or to engage unlawfully in employment in the United States."

142. U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have power. . . To establish a uniform Rule of Naturalization. . . .").

143. Another criminal provision that could be used to prosecute an alien who makes a false statement about citizenship in connection with registering to vote or voting is 18 U.S.C. § 911, relating to a false claim to citizenship. In *United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951), the Seventh Circuit upheld a conviction for false representing U.S. citizenship when the defendant signed a voter registration form that specifically asked if he was a citizen. In *United States v. Anzalone*, 197 F.2d 714 (3rd Cir. 1952), on the other hand, the Third Circuit overturned a defendant's conviction because the voter registration form never asked whether the person was a citizen of the United States, so there was no false statement. The current voter registration form used by the states and the Election Assistance Commission features this as the very first question asked a prospective registrant, so it would be easy to establish a false assertion by an alien who misrepresented that he or she was a U.S. citizen.

| 11 |

PATRONAGE AND RELATED FEDERAL POLITICAL EMPLOYMENT OFFENSES

Appointing the victorious political party's supporters to office after an election has long been a facet of American governance. The Constitution provides no express protection from being dismissed for those appointed to office. During the early years of the Republic, it was common for senior government officials to control the appointment of all who worked in a department or office, but turnover was not significant. Interestingly, the seminal decision in *Marbury v. Madison* that established the Supreme Court's power of judicial review was essentially a patronage case involving the appointment of a justice of the peace in Washington, D.C., by outgoing President John Adams the night before he was to leave office.

The election of Andrew Jackson in 1828 saw the development of the "spoils system" by which the president, or his surrogates, largely cleared out the federal bureaucracy appointed by his predecessor and installed those loyal to him. This use of political power to reward the winning side's supporters became an accepted part of the American system, reflected in the observation that "to the victors belong the spoils of the enemy"—in this case, governmental jobs.[1]

Things have changed substantially since the "spoils system" reached its height in the nineteenth century. The Supreme Court has held that state and local government employees who do not hold senior policymaking positions cannot be fired solely because of their political beliefs or associations. The Court stated in *Elrod v. Burns* that

> if conditioning the retention of public employment in the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least

1. The phrase is attributed to Senator William Marcy, who was at one time an ally of Vice President Martin Van Buren, and later secretary of war under President James Polk.

> restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.[2]

A few years later in *Branti v. Finkel,* the Court held:

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate "an overriding interest of vital importance," requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.[3]

Congress has periodically sought to insulate federal workers from political considerations in hiring and service by enacting laws to protect them from pressure to engage in partisan political activities and to contribute to campaigns. In 1883, the first major effort to depoliticize the bureaucracy came about in the adoption of the Civil Service Act, more commonly known as the Pendleton Act.[4] This law marks the beginning of the modern civil service by requiring federal job applicants to pass a written examination along with a prohibition on certain types of political activities by federal employees. At the same time, First Amendment concerns have been raised about laws that prevent those who work for the government from participating in campaigns and other partisan political activity that other citizens are free to undertake.

The focus on curtailing patronage and restricting the role of politics in the federal bureaucracy involves both civil regulation and enforcement along with criminal provisions for more egregious violations. Most of the cases in this area are handled in civil and administrative proceedings, and there are few prosecutions pursuant to the criminal statutes that govern in this area.

I. HISTORY OF THE STATUTES

The institution of political patronage to reward supporters that flourished in the Jacksonian period led to a system by which those who received government jobs would pay a portion of their salary to the political party responsible for their appointment, which came to be known as the "lug." This helped fill the coffers of the party in power, and made winning elections to governorships and the presidency all the more important for the continuing operation of the parties. Congress first took action against this type of financial extortion in 1867 when it prohibited an officer or employee of the government from requiring or requesting from a worker in a navy yard a payment or contribution for

2. 427 U.S. 347, 363 (1976).
3. 445 U.S. 507, 515–16 (1980).
4. An Act to Regulate and Improve the Civil Service of the United States, 22 Stat. 403 (1883).

political purposes, punishable by dismissal from government service.[5] Congress expanded the prohibition in 1876 by outlawing the practice completely by making it a crime for an officer or employee of the United States, in a position other than one nominated by the president and approved by the Senate, to request, give to, or receive from "any other officer or employee of the government any money or property or other thing of value for political purposes."[6] The prohibition remains in place in 18 U.S.C. § 602.

The Supreme Court upheld the constitutionality of the statute in Ex parte *Curtis*, in which the defendant was convicted of accepting a political contribution from a fellow employee and was imprisoned when he could not pay the fine. In reviewing his petition for a writ of habeas corpus that challenged the constitutionality of the statute, the Court held:

> The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.[7]

After the assassination of President James A. Garfield in 1881 by a disgruntled office-seeker, Congress undertook a serious effort to reform the federal bureaucracy by adopting the Pendleton Act in 1883.[8] By that time, there were over 1 million federal workers, and basing a large number of such appointments on political considerations created a system rife with corruption. The Pendleton Act created the Civil Service Commission and instituted competitive exams for some federal positions. Over time, the federal bureaucracy became professionalized, and the effects of the "spoils system" diminished as an increasing number of jobs were held by careerists rather than political appointees, reaching the point where the vast majority of federal workers today are nonpolitical.

While the primary enforcement mechanism for violations was through administrative proceedings before the Civil Service Commission, the Pendleton Act also contained four criminal provisions that remain in the federal code: 18 U.S.C. § 602 (prohibiting solicitation of campaign contributions by federal officers and employees from other federal employees);[9] § 603 (prohibiting federal employees from making campaign contributions to their employer's campaign); § 606 (prohibiting changing or threatening to change the employment status of a federal employee for not making a campaign contribution); § 607 (prohibiting solicitation of campaign contributions while in a federal office building). President Teddy Roosevelt expanded on the Pendleton Act's prohibitions in 1907 when he issued an Executive Order barring federal employees from using

5. 14 Stat. 489 (1867).

6. Act of Aug. 15, 1876, ch. 287, 19 Stat. 143 (1876).

7. 106 U.S. 371, 373 (1882). For a comprehensive discussion of *Curtis* and the political funding system Congress sought to combat, *see* Kurt Hohenstein, Coining Corruption: The Making of the American Campaign Finance System (N. Ill. Univ. Press 2007).

8. An Act to Regulate and Improve the Civil Service of the United States, 22 Stat. 403 (1883).

9. This provision updated the earlier statute upheld by the Supreme Court in Ex parte *Curtis*.

their position to interfere in an election, and prohibited federal workers from taking an "active part in political management or political campaigns."[10]

Congress combined the prohibitions of the Pendleton Act and Roosevelt's Executive Order when it adopted the Hatch Act in 1939.[11] Among other things, the new statute provided that "no officer or employee in the executive branch of the Federal government, or in any agency or department thereof, shall take any active part in political management or in political campaigns." One of the concerns in Congress was that the expanding federal bureaucracy created by the New Deal increased the likelihood of election abuses involving federal employees, including concerns about the coercion of political donations for the 1936 and 1938 elections. Congress expanded the scope of the Hatch Act in 1940 by applying its prohibition on partisan political activity to state and local government workers whose positions were funded by the federal government.[12]

Restricting the right of a citizen to engage in political activity certainly appeared to strike at the core of the First Amendment's right to free expression, but the Supreme Court twice rejected challenges to the Hatch Act's restrictions on federal and state employees. In *United Public Workers of America (C.I.O.) v. Mitchell*, the Supreme Court upheld the constitutionality of the Hatch Act from a challenge that the ban on political activities even during a federal worker's own time, away from the workplace, violated the First Amendment. The Court held:

> We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours. The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours.[13]

In *Civil Service Commission v. National Association of Letter Carriers*, the Court rejected a claim that the Hatch Act prohibition was unconstitutionally vague and overbroad, reaffirming its position in *Mitchell*: "We agree with the basic holding of *Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited."[14]

The primary means of enforcing the Hatch Act's restrictions on political work was through the administrative process, but, like the Pendleton Act, the new law also contained criminal prohibitions that remain in force today. These include: 18 U.S.C. § 246 (prohibiting deprivation of employment or other benefits from federal relief funds); § 595 (prohibiting government workers from using official authority to interfere with election to a federal office); § 598 (prohibiting use

10. Exec. Order No. 642 (1907), *reprinted in* 1 Presidential Executive Orders 61 (1944).

11. An Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147 (1939).

12. Act of July 19, 1940, Pub. L. No. 76-753, 54 Stat. 767 (1940). Congress avoided any federalism concerns that would arise by an effort to directly regulate the hiring decisions of the state by threatening to withhold federal funds to any state that did not comply with the restrictions on campaign activities applicable to federal workers in the Hatch Act.

13. 330 U.S. 75, 95 (1947).

14. 413 U.S. 548, 567 (1973).

of any federal funds for work-relief and public works to interfere with voting); § 600 (prohibiting promises of federal employment as a reward for political activity); § 604 (prohibiting solicitation of political contributions from persons receiving work relief); § 605 (prohibiting disclosure of names of persons receiving relief to political workers).

In 1976, Congress adopted another criminal provision, 18 U.S.C. § 601, that prohibits causing a person to contribute a thing of value to a candidate based on the threat or actual denial or deprivation of employment with the government in a federally funded position or loss of a benefit or payment from a federal program. The statutes cover both sides of the patronage coin: offering a position or benefit in exchange for political activity, or threatening the loss of such a position if a contribution is not made. The statute was adopted to eliminate the "lug," which was the percentage of a public employee's salary the person was expected to contribute to the political party in control of the state's government.[15] A predecessor statute only prohibited such denials or threats to those with positions or benefits funded as part of a federal relief program. Congress expanded the statute to a wider range of circumstances in which any governmental worker whose position is traceable to the federal government was coerced into giving money for political purposes, including those at the local level where such practices were once common.[16]

In 1993, Congress amended the Hatch Act to allow most federal employees to engage in political work, including managing campaigns and other partisan political activities during their off-duty hours, although they still may not run for partisan elective office.[17] Among the federal employees who remain subject to the more stringent restrictions on political activity found in the original Hatch Act are those who work for the Central Intelligence Agency, Department of Justice Criminal Division, FBI, National Security Agency, and Secret Service.[18] Congress also added a

15. The Senate Report on the legislation explained the effect of the "lug":

> The evidence received by the Subcommittee on Criminal Justice of the House Committee on the Judiciary indicated that in Indiana the employees are expected to contribute 2 percent of their gross salary to the political party in control at any given time. In some areas of Indiana, the local party organization may collect a 1 percent lug in addition to the State party's 2 percent. The Office of Federal Elections of the General Accounting Office made an audit and a field investigation of one State Central Committee covering the period from April 8 to December 31, 1972, and found that, during 1972, patronage contributions to this Committee aggregated approximately $375,000, or 46 percent of the total contributions received. The employees who are subjected to this form of political patronage harassments are threatened with termination if they do not make their 2 percent payments. If the threats fail, the employee may actually be fired.

S. Rep. No. 94-1245, *reprinted at* 1976 U.S.C.C.A.N. 2883. The earliest attempt to eliminate assessments on government workers to pay a portion of their salary to the political party responsible for their appointment was in 1837. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* Corrado et al., The New Campaign Finance Sourcebook 8 (Brookings 2005).

16. The Senate Report stated, "The 'work relief and relief purposes' limitation makes section 601 much narrower than section 600. For example, if A goes to B, who is already employed by the Federally-funded highways construction program, and threatens to fire him if he does not contribute to A's party, the Justice Department cannot prosecute A. The reason is that section 601 is inapplicable because the Federal funds are not being used for 'work relief and relief purposes.' Section 601 must be expanded to include more than 'work relief and relief purposes' situations, if it is to provide adequate criminal sanctions." S. Rep. No. 94-1245.

17. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993).

18. *See* 5 U.S.C. § 7323(b)(2)(B).

new criminal provision, 18 U.S.C. § 610, prohibiting coercion of a federal employee to engage in political activity.

While there are a number of criminal statutes addressing patronage and politics in the federal workplace or involving federal expenditures, there have been few prosecutions, and the vast majority of cases are dealt with administratively through the Merit Systems Protection Board. The following two sections review the criminal provisions adopted by Congress in the Pendleton Act, Hatch Act, and Hatch Act Amendments by dividing them into patronage-related crimes and those involving governmental workers and federally funded or authorized benefits.

II. PATRONAGE CRIMES

The Hatch Act includes two provisions addressing appointment to a position or denial or deprivation of employment related to political activities. Section 600 provides:

> Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party. . . .

Section 601 provides:

> (a) Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of—
>
> (1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or
>
> (2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State;
>
> if such employment, position, work, compensation, payment, or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined under this title, or imprisoned not more than one year, or both.

Two other provisions, which have not been the basis of prosecutions discussed in any reported decisions, also reach patronage activity. Section 599 prohibits congressional candidates from promising or pledging support for an appointment to a public or private position in exchange for support of the candidate. Section 246 prohibits deprivations or threats to deprive a person of a position or benefit created by an Act of Congress appropriating funds for work relief or other relief because of the person's political affiliation, race, color, sex, religion, or national origin.

A. Promise of Employment or Benefits (18 U.S.C. § 600)

The elements of a violation of § 600 are: (1) directly or indirectly promised (2)(a) any employment, position, compensation, contract, appointment, or other benefit, or (b) special consideration in obtaining these (3) that are made possible in whole or in part by an Act of Congress (4) as consideration, favor, or reward (5) for political activity, including support of or opposition to a candidate or political party (6) in connection with any election, political convention, or caucus. A violation is punishable by a fine and up to one year in prison.

The statute covers both federal and state elections, and the position or benefits must be linked to an Act of Congress. There is no minimum federal funding level to come within the statute, nor is there a requirement that the promise be related to any misuse of federal funds or authority in the offer. There are no cases construing what is meant by a position or benefit being "made possible in whole or in part by any Act of Congress" when it is one that comes through a state or local government, or even through a private provider. Direct federal funding for a position or benefit would be the easiest to prove, but the statute could apply to federal programs that mandate certain programs that are administered by the states, such as Medicare and Medicaid, but the funding does not go directly to the governmental unit.

Unlike § 666 (see Chapter 4), which has a minimum federal funding element for bribery and embezzlement from a program, § 600 takes a much broader approach that allows a prosecution when the position or benefit is traceable to an Act of Congress. In a prosecution involving a promise or benefit that is not clearly provided by the federal government, defense counsel should focus in particular on the strength of the connection between the benefit and the Act of Congress that the government must prove as an element of the offense. The more tenuous that link is, the greater the possibility that the prosecution cannot establish the federal interest in the promise in exchange for political activity or support.

Section 600 appears to cover the offer of an appointment for any position, from the lowest-level worker to cabinet secretaries and other senior appointments in the executive branch, along with the personal staff for members of Congress, because all those positions are created (or funded) by an Act of Congress. While political considerations should be irrelevant for most positions in the federal bureaucracy, certain posts implicitly demand that the person appointed be willing to adhere to the political positions of the presidential administration or congressional office—politics certainly plays a central role in selecting cabinet secretaries or a senator's aides. The Department of Justice takes the position that "consideration of political factors in the hiring or termination of the small category of senior public employees who perform policymaking or confidential duties for elected officials of federal, state, or local governments" are not covered by § 600.[19] Nevertheless,

19. U.S. Department of Justice, Federal Prosecution of Election Offenses 117 (7th ed. 2007). The Supreme Court has found that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). *See Branti v. Finkel*, 445 U.S. 507, 515–16 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court explained how pernicious political pressure on public employees can be:

> Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces

the statute does not make this distinction, so it is more a matter of prosecutors choosing not to pursue cases that explains why it has not been used in situations involving the offer of senior positions in the federal government.

Federal jurisdiction is premised on the position or benefit offered having been made possible by an Act of Congress. The statute is not strictly limited to proof of federal funding, so that congressional authorization of a program that may be administered by a state or local government, or even a private organization, could come within the prohibition. While the provision reached conduct that links a future position or benefit to current political activity, § 600 does not require proof of a *quid pro quo* because it reaches both the offer of the position or benefit ("consideration") and conferring it as a gift for the political activity ("favor" or "reward").

There is only one reported decision discussing a prosecution under § 600. In *United States v. Pintar*, the Eighth Circuit upheld the conviction of the defendants, a husband and wife, who hired a secretary to work at a federally funded program based on her support for a political party and willingness to work on behalf of the party while she was ostensibly engaged in activities for the program. The circuit court concluded, "We are satisfied there exists sufficient evidence for a jury to find that both Barbara and Michael Pintar promised employment as consideration for [the secretary's] performance of political work."[20]

Section 600 is not limited to federal elections, unlike offenses that involve conduct affecting the integrity of an election through interference with the right to vote, such as 18 U.S.C. § 241 or 42 U.S.C. § 1973i(c). The provision incorporates the different ways in which candidates are selected in different states by including conventions and caucuses within the proscription. The statute does not define "political activity," but administrative regulations adopted pursuant to the Hatch Act state the term "means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."[21] Because § 600 was part of the original Hatch Act, it is fair to look to the administrative definition of the term as a guide.

B. Deprivation of Employment or Benefits (18 U.S.C. § 601)

The elements of a violation of § 601 are: (1) directly or indirectly cause or attempt to cause (2) a contribution of a thing of value (including services) (3) for the benefit of a candidate or political party (4) by the denial or deprivation, or threat of denial or deprivation (5) of employment or benefit from a federal, state, or local government (6) that is provided for or made possible by an

reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

Id. at 73. None of the cases on protection of government employees from political pressure were criminal prosecutions, but instead involved administrative or civil claims.

20. 630 F.2d 1270, 1283 (8th Cir. 1980).

21. 5 C.F.R. § 734.101.

Act of Congress. Like § 600, this provision reaches positions and benefits linked to an Act of Congress without regard to whether there is direct federal funding for the program.

The original legislative proposal would have required proof that the threat or deprivation was "on account of such person's refusing to make a contribution." The Department of Justice objected to that language because it appeared to limit the statute to those cases in which the victim resisted the coercive conduct, but not when such conduct was successful. The Senate amended it to its current form, and the statute now reaches actual and *attempted* threats or deprivations to coerce a contribution, so that the crime is complete without regard to any actual harm that befell the victim.[22]

The statute is not limited to elections, like § 600, and takes a broader approach that reaches coercion of contributions that benefits any candidate or political party regardless of when the conduct occurs in relation to the election cycle. Funding mechanisms for political parties through assessments imposed on government employees are thus effectively outlawed by the provision. The statute defines "election" as including conventions, caucuses, and even voting for delegates to a state constitutional convention, something not mentioned in other criminal voting statutes. Similarly, a "candidate" includes those seeking federal, state, or local offices, so long as the person has taken the steps necessary to qualify for election, or has received contributions or made expenditures for the purpose of bringing about nomination to office. The broad definition of "candidate" means that Section 601 covers even the exploratory phase of a campaign before a formal announcement of the person's candidacy.

The timing of the deprivation or threat is crucial to proving a § 601 violation, according to the Third Circuit in *United States v. Cicco*. The defendants in *Cicco* were local officials who informed two "special" police officers that there would be no further employment for them because they had not worked on behalf of the victorious political party in the most recent election. In overturning their convictions, the circuit court explained that "an employer's mere expectation or desire that the employee contribute services for the political benefit of the employer is not sufficient" to establish a violation.[23] Instead, it interpreted § 601 to require "evidence of actual campaign contributions or services 'caused' by threats of terminating employment, or evidence of an employer's 'attempt to cause' a contribution of future campaign contributions or services corroborated by an objective fact, such as evidence of employment offered or obtained."[24] The Third Circuit found

22. The Senate Report on § 600 quotes a letter from the Department of Justice about the legislation:

> While we generally favor the enactment of H.R. 11722, we do note that the legislation is somewhat awkwardly drafted and is subject, through the use of the phrase 'on account of such person's refusing to make a contribution', to the unfortunate construction that the criminal penalty is applicable only in the case where the victim is courageous enough to 'refuse' to make the demanded contribution. Clearly, the conduct of the defendant in threatening the victim with loss of employment or a benefit, or in depriving the victim of such employment or benefit, if he does not make a political contribution merits punishment irrespective of whether the victim surrenders to the extortion.

S. Rep. No. 94-1245.

23. 10 F.3d 980, 985 (3rd Cir. 1994).

24. *Id.*

that while "the facts of this case present a close call," there was no evidence of "any request, direct or indirect, that future political services be contributed by them."[25]

Cicco's focus on proof of an actual deprivation or threat connected to future contributions or work on behalf of the party may have resulted from the circuit court's narrow reading of the statute to require that the defendant's conduct be *expressly* linked to a demand for a contribution. This approach ignores the statutory language that covers any person who "indirectly" causes or attempts to cause a contribution, and § 601 does not require the type of proof the Third Circuit seemed to demand for a successful prosecution. The special police officers appear to have lost their positions because of their failure to work on the party's behalf, and the message to them and others was clear: working for the party in upcoming elections was a condition of continued employment. Even if evidence of an explicit link between continued employment and a contribution of a thing of value was not present, indirectly attempting to cause such a contribution could be inferred from the course of conduct.[26] *Cicco* is an important precedent, however, as the only published decision on the statute by apparently limiting § 601 to cases in which there is evidence of an actual threat or deprivation, or substantial steps toward an attempted deprivation, and not just an indirect message sent to workers that they are expected to contribute.

Section 601 only reaches contributions or providing services, not demands that the person vote for the favored candidate at the risk of losing a position or benefit. By not specifically including election-related conduct, the statute does not apply to coercion to vote, although such conduct could be prosecuted under 18 U.S.C § 242 (if the defendant were a state actor) or 42 U.S.C. § 1973i(b).[27]

Including "services" within the "thing of value" element shows Congress sought to prohibit demands that the employee work on behalf of a campaign as a condition of retaining a position or benefit, without regard to whether the victim made a direct monetary donation. Stuffing envelopes and compiling voter lists is just as valuable as a campaign contribution, and more likely to be sought from a government employee because the conduct is less likely to be uncovered, unlike

25. *Id*. In an earlier opinion, the Third Circuit overturned the defendants' convictions under 18 U.S.C. § 666 for bribery, holding that "[i]f solicitation of what the government characterizes as 'party loyalty' is covered" then the statute could be unconstitutionally vague. *United States v. Cicco*, 938 F.2d 441, 444 (3rd Cir. 1991). It is not clear whether the circuit court's restrictive definition of § 666 still applies. *See* Chapter 4.

26. *See* Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 Rutgers L. Rev. 507, 531 (1998) ("The irony is that when patronage is most oppressive, political bosses need to be the least explicit. As the prosecution pointed out at trial, today's politicians would rarely, if ever, come out and say, 'if you come out and support us in the future, you have a chance for redemption.' Moreover, even if staff were to ask their bosses whether they could redeem themselves by campaigning in the future, bosses are unlikely to say anything more explicit than 'we'll see what we can do.' Although such a statement would be intended to let the other person know that campaigning would improve his or her chances, § 601 could not reach it as interpreted in *Cicco* II because it would constitute neither a promise of employment nor an explicit demand for political work in return for employment.").

27. 18 U.S.C. § 1973i(b) provides: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote. . . ."

a reportable campaign contribution. Section 601 protects against a wide range of coercive acts by employing a broad approach to what constitutes a thing of value.[28]

C. Promise of Employment by Candidate (18 U.S.C. § 599)

One provision of the Federal Corrupt Practices Act, now codified at 18 U.S.C. § 599, specifically addressed patronage acts by a candidate for office. The statute provides:

> Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

The provision only applies to candidates seeking support in an upcoming election and not offers of employment made for other purposes.

Section 599 covers an offer of appointment to any public or private employment, and is not limited to positions created or funded by the federal government. Moreover, it reaches the offer to employ any person, so an offer of employment to a family member or friend in exchange for securing support for the candidacy would be a violation. The constitutional basis for the provision would have to be the Commerce Clause and not the Elections Clause of the Constitution because it is not directly related to voting or the conduct of a federal election. Employment would clearly affect interstate commerce, so this provision comes within Congress's regulatory authority.

The statute requires proof of a specific intent to procure the person's support in the election because the offer for an appointment must be made for that "purpose." If there is additional proof that the defendant was "willful," then the potential term of imprisonment is increased from one year to two. Because § 599 requires proof that the defendant acted for the purpose of garnering electoral support, the additional proof of willfulness would likely require the government to establish the defendant's knowledge of the legal obligation not to make such an offer in exchange for support.

The statutory language appears to be quite broad by applying to any candidate for election to federal, state, or local office. Section 302 of the Federal Corrupt Practices Act, which was repealed by the Federal Election Campaign Act, defined a "candidate" as a person seeking election to Congress, but not the presidency, and further limited the statute to general or special elections,

28. *See* Cicco, 10 F.3d at 984 ("While the specific problem that Congress was addressing was financial demands on public servants, neither the language of section 601 nor the legislative history suggests that the court should distinguish between demands for money and demands for services that have no identifiable market value, or which have value only to the person(s) seeking the contribution. Section 601's parenthetical language '(including services)' clearly indicates to us that Congress intended to reach non-monetary contributions.").

but not primaries or political nominating conventions.[29] Although the definition did not apply specifically to § 599, this provision was part of the same legislation enacted by Congress. The limitations imposed by Congress on other provisions of the Federal Corrupt Practices Act are instructive of how a court should interpret the scope of the provision. There are no reported decisions under this statute.

The statute could be applied if a candidate sought both the withdrawal of an opponent and that person's support in exchange for employment of any person in the public or private sector.[30] While § 599 does not apply to primary elections, the requested withdrawal of the opponent from the primary and support in the general election would come within the terms of the statute if it were coupled with the former opponent's appointment to a position. The statute requires proof that the offer was made for support in the upcoming election, and not just to provide a benefit to the former opponent as an inducement to leave the race. While such political trading might be difficult to prove without the cooperation of witnesses to the agreement, this is the type of backroom deal that the statute is designed to punish.

D. Deprivation of Relief Benefits (18 U.S.C. § 246)

The original Hatch Act contained a provision prohibiting deprivations or threats to deprive a person of a position or benefit funded by a congressional work relief or other relief appropriation "on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election." After the adoption of the current § 601 in 1976, this provision was shifted to the same chapter as other civil rights provisions and away from the statutes dealing directly with elections. The provision was also broadened by eliminating any reference to elections, and now provides:

> Whoever directly or indirectly deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible in whole or in part by any Act of Congress appropriating funds for work relief or relief purposes, on account of political affiliation, race, color, sex, religion, or national origin, shall be fined under this title, or imprisoned not more than one year, or both.

The elements of a violation of § 246 are: (1) directly or indirectly (a) deprives, (b) attempts to deprive, or (c) threatens to deprive (2) a person of employment or other benefit (3) provided

29. 2 U.S.C. § 1964, *repealed by* 2 U.S.C. § 431. The statute provided:

    (a) The term "election" includes a general or special election, but does not include a primary election or convention of a political party;
    (b) The term "candidate" means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected. . . .

30. *See* U.S. Department of Justice, *Federal Prosecution of Election Offenses* 119 (7th ed. 2007).

for in whole or in part by a congressional appropriation (4) for work relief or other relief purposes (5) because of the person's political affiliation, race, color, sex, religion, or national origin. A key requirement is that the federal government, as part of a work relief or other relief statute, fund the position or benefit. The statute does not define what constitutes a relief statute, although the benefit must result from an exercise of Congress's constitutional authority to appropriate funds and not one of its other powers.[31] There are no reported decisions under this statute.

III. FEDERAL POLITICAL EMPLOYMENT CRIMES

As discussed above, the Hatch Act is enforced primarily through administrative proceedings, and the main federal agency charged with oversight of the federal workplace is the Merit Systems Protection Board (MSPB). The MSPB is a successor to the original Civil Service Commission created by the Pendleton Act. Hatch Act violations are investigated and prosecuted by the Office of Special Counsel (OSC), which also works to protect whistleblowers. The OSC promotes compliance with the Hatch Act's restrictions on political activity by providing advisory opinions in addition to pursuing investigations and prosecutions of potential violations. The OSC has issued over a thousand advisory opinions to those subject to the Hatch Act's prohibitions, which allow it to determine whether contemplated political activity is permissible.

While the administrative component of the Hatch Act is of primary importance, the statute also contains a number of criminal provisions, although prosecutions are quite rare. This subsection provides a brief overview of the criminal statutes.

A. Interference with Elections by Officials (18 U.S.C. § 595)

Part of the original Hatch Act, the statute provides:

> Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, shall be fined under this title or imprisoned not more than one year, or both.

31. U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .").

Unlike other provisions of the Hatch Act that apply only to federal employees, § 595 applies to government officials at any level who use their authority to interfere with or affect a federal election.

The statute does not define what constitutes interference with or affecting an election, and those terms could be subject to very broad interpretations. There are no reported cases under this statute, although it could be used to prosecute government officials who direct the expenditure of federal funds to a particular location or program for the purpose of affecting an upcoming election.

B. Using Relief Appropriation to Interfere with Any Election (18 U.S.C. § 598)

Part of the original Hatch Act, the statute provides:

> Whoever uses any part of any appropriation made by Congress for work relief, relief, or for increasing employment by providing loans and grants for public-works projects, or exercises or administers any authority conferred by any Appropriation Act for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election, shall be fined under this title or imprisoned not more than one year, or both.

This provision requires proof that funds were used from a congressional appropriation for work relief, relief, or, more generally, for "increasing employment by providing loans or grants for public-works projects."

It has been a common feature in recent years for the federal government to engage in economic stimulus activities by funding work programs for projects such as highway and infrastructure repair, so this statute applies to any misuse of such funds related to encouraging or discouraging voting. Unlike many of the election-related offenses, such as § 595, this statue applies to conduct involving any election and not just a federal election. It is limited to conduct affecting voting and not broader political activities. There are no reported cases under this statute.

C. Solicitation of Campaign Contributions (18 U.S.C. § 602)

As discussed above, one of the oldest criminal statutes limiting solicitation of campaign contributions from federal employees was adopted in 1876. Although amended over time, the statute retains the core prohibition on federal employees soliciting contributions from their fellow workers. The statute provides:

> It shall be unlawful for—
> (1) a candidate for the Congress;
> (2) an individual elected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(3) an officer or employee of the United States or any department or agency thereof; or
(4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States; to knowingly solicit any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined under this title or imprisoned not more than 3 years, or both.

The statute was part of the effort to restrict political shakedowns of federal employees for campaign contributions from their superiors and co-workers. In Ex parte *Curtis*, the Supreme Court explained the rationale for the prohibition:

> If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor—to avoid a discharge from service, not to exercise a political privilege.[32]

Much like it did in Ex parte *Curtis*, nearly fifty years after that decision the Supreme Court, in *United States v. Wurzbach*, held that the statute was a proper exercise of Congress's inherent power to oversee the conduct of its representatives and employees: "It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment."[33]

The elements of the offense are: (1) a federal employee, person receiving a salary or compensation derived from the U.S. Treasury, member of Congress, candidate for election to Congress (2) who knowingly solicits (3) a campaign contribution (as provided by 2 U.S.C. § 431(8)) (4) from another federal employee.

While it is easy to identify a federal employee, the statute also covers those receiving a salary or other compensation derived from the U.S. Treasury, which is very imprecise wording. In *United States v. Burleson*, the district court dismissed § 602 charges for soliciting campaign contributions from the employees of a subcontractor working on a federal project. The district court explained:

> Had defendants received compensation for their services in the form of Treasury checks, or if they had been Government employees receiving compensation from a paymaster set up with Government funds to be administered by the paymaster, there would have been some basis for construing section

32. 106 U.S. 371, 384–85 (1882).

33. 280 U.S. 396, 398 (1930). The defendant was Representative Harry M. Wurzbach, the first Republican elected to Congress from Texas since Reconstruction. He successfully challenged the election of his opponent in 1930, the same year in which the Supreme Court upheld his indictment for improper solicitation of campaign contributions. He died in 1931, and his official congressional biography does not reference the charge against him.

> 602 as applicable to them. But neither of those situations existed. They worked for a subcontractor and received as compensation for services checks drawn on an account which had become money of the prime contractor and allocated to the subcontractor.[34]

While the source of the funds is crucial, the amount received is not, as the district court pointed out in *United States v. Cason*: "Neither would it matter how much or how little of such compensation came from the national treasury, or how it was paid."[35]

The description of what constitutes a contribution under the Federal Election Campaign Act (FECA) provides a variety of categories of what does and does not come within that term. A contribution includes

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.[36]

This provision focuses on monetary transactions and not the contribution of services, except where there is compensation from another person. Importantly, FECA contains an extensive and complex list of disbursements and provision of benefits that do not come within the meaning of a contribution, including volunteer services, unreimbursed travel expenses, professional services, and the cost of campaign materials.[37] It is critical to identify the type of transfer involved to determine whether it comes within FECA's definition, and if it does not, there is no criminal (or civil) violation.

The intent element of the offense requires proof that the defendant knowingly solicited the contribution from a federal employee, so the defendant must be aware that the person solicited works for the federal government. In a prosecution under a prior version of the statute, the District of Columbia Circuit held that it was the recipient's intent to solicit a campaign contribution that was important, not the understanding of the person solicited about the nature of the request. The circuit court stated, "So long as the Representative received the contribution for a political purpose, it is immaterial whether the giver understood that purpose."[38]

Because proof of knowledge about the solicited party's employment status is required, a defendant can offer an ignorance defense on this element. In response, the government may be able to obtain a deliberate ignorance instruction to establish the defendant's intent, that the defendant had reasonable notice the person solicited was a federal employee but chose to deliberately avoid obtaining that knowledge. Proof of intent in this way is based on showing the defendant's

34. 127 F. Supp. 400, 403 (E.D. Tenn. 1954).

35. 39 F. Supp. 730, 730 (W.D. La. 1940).

36. 2 U.S.C. § 431(8)(A).

37. 2 U.S.C. § 431(8)(B). The definition has fourteen different subsections describing transactions or benefits that are excluded from the statute.

38. Brehm v. United States, 196 F.2d 769, 771 (D.C. Cir. 1952).

lack of knowledge was the result of a choice not to seek out information despite indications that the person could not be solicited due to being a federal employee.

While § 602(a) prohibits *any* solicitation of a campaign contribution from one federal employee by another, the 1993 revisions to the Hatch Act added a new subsection, § 602(b), that provides an exemption from the prohibition for the solicitation of contributions by federal employees in certain prescribed circumstances.[39] For example, under 5 U.S.C. § 7323, a federal employee is permitted to receive, solicit, or accept a campaign contribution from another federal employee unless that federal employees is a subordinate.[40] This exemption is incorporated into § 602, so a federal employee does not commit a crime by requesting campaign contributions from employees at the same level or from superiors, but soliciting a subordinate violates the law because the circumstances may be coercive.

D. Making Campaign Contributions (18 U.S.C. § 603)

Section 603 is traceable to the Pendleton Act, and is a counterpart to § 602 by prohibiting federal employees from making campaign contributions to their employer. The statute provides:

> It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The provision is narrower than the campaign contribution solicitation statute because it only prohibits giving the contribution to the donor's employer and not other elected federal officials. It applies the same definition of contribution as provided in FECA. There are no reported cases under the statute.

The greatest impact of the statute is on congressional staff, who are prohibited from contributing to the campaign of the member of Congress for whom they work. The exemptions provided by the Hatch Act for executive branch employees that allow solicitation of nonsubordinates also allows contributions to employees who are at the same level and above, so long as they are not coerced.

39. 18 U.S.C. § 602(b) provides:

> The prohibition in subsection (a) shall not apply to any activity of an employee (as defined in section 7322(1) of title 5) or any individual employed in or under the United States Postal Service or the Postal Regulatory Commission, unless that activity is prohibited by section 7323 or 7324 of such title.

40. The statute is phrased as a double negative, that a federal employee may not "knowingly solicit, accept, or receive a political contribution from any person, unless such person is. . . not a subordinate employee." 5 U.S.C. § 7323(a)(2)(B).

An opinion by the Office of Legal Counsel of the Department of Justice considered whether an employee of the executive branch could contribute to the president's campaign committee, and found that there was no prohibition under the Hatch Act or § 603. The opinion concluded:

> [B]ecause an executive branch employee or officer would not violate [5 U.S.C.] § 7323 or § 7324 simply by making a contribution to a President's re-election campaign committee, it follows that, pursuant to 18 U.S.C. § 603(c), such an executive branch employee or officer (other than a member of the uniformed services) would not violate the criminal prohibition found in § 603(a) simply by making such a contribution.[41]

E. Solicitation from Persons on Relief (18 U.S.C. § 604)

Part of the original Hatch Act, the statute provides:

> Whoever solicits or receives or is in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose from any person known by him to be entitled to, or receiving compensation, employment, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, shall be fined under this title or imprisoned not more than one year, or both.

The statute does not define "political purpose," and it is not confined to campaign contributions. It reaches a broader range of political activities than other provisions that reference contributions for electoral purposes, although it only applies to those receiving benefits from work relief or other relief legislation. There are no reported cases under the statute.

F. Disclosure of Names of Persons on Relief (18 U.S.C. § 605)

Part of the original Hatch Act, the statute provides:

> Whoever, for political purposes, furnishes or discloses any list or names of persons receiving compensation, employment or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager; and
>
> Whoever receives any such list or names for political purposes—
>
> Shall be fined under this title or imprisoned not more than one year, or both.

41. Office of Legal Counsel, U.S. Department of Justice, *Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee*, May 5, 1995, *available at* http://www.justice.gov/olc/603.htm.

The provision punishes both the person disclosing the list of names and the recipient of the information. The statute does not define "political purposes." The list of recipients who would trigger liability makes it clear it is related to elections and the solicitation of campaign contributions. There are no reported cases under the statute.

G. Intimidation to Secure Political Contributions (18 U.S.C. § 606)

A companion to § 602 that is traceable to the original prohibition on forced campaign contributions, the statute provides:

> Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined under this title or imprisoned not more than three years, or both.

This provision punishes changes in a federal employee's responsibilities or compensation made in connection with the employee giving, withholding, or neglecting to make a contribution. Like § 602, it applies to employees of all three branches of the federal government along with those whose compensation is derived from the U.S. Treasury.

The statute covers not only monetary contributions but also providing any "other valuable thing," which can include services or intangible benefits. The prohibition is not limited to contributions for federal elections, but applies to coercion for a contribution "for any political purpose," which includes state and local elections, along with those for federal offices. Section 602 incorporates the limitation of the Hatch Act in 2 U.S.C. § 431(8)(a) that only covers monetary contributions made for election to a federal office, so § 606 can be used in coercion cases which might not come within § 602 because the contribution was not for a federal office or involved something other than money. There are no reported cases under the statute.

H. Place of Solicitation (18 U.S.C. § 607)

Traceable to the Pendleton Act, the statute provides:

> It shall be unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or

> building occupied in the discharge of official duties by an officer or employee of the United States, from any person.

The statute contains two prohibitions: first, the solicitation or reception of campaign contributions from someone who is in a federal office or building, and is not limited to those who are federal employees; and second, solicitation or receipt of campaign contributions by a federal employee, including the president, vice president, and members of Congress, while in a federal office or building. The statute covers any election and not just those with federal candidates who are on the ballot.

The elements of the first offense under § 607 are: (1) solicitation or receipt (2) of a donation of money or other thing of value (3) in connection with any election (4) from a person who is located in a room or building occupied by federal employees for the discharge of official duties. This prong of the offense covers solicitations by any person and not just federal employees, unlike § 602's narrower prohibition.

The elements of the second offense under § 607 are: (1) solicitation or receipt (2) by any federal employee, including elected federal officials, (3) of a donation of money or other thing of value (4) in connection with any election (5) while located in a room or building occupied by federal employees for the discharge of official duties.

There was a significant controversy in 1997 regarding the application of the statute to the solicitation of campaign contributions by Vice President Al Gore from his office in the White House. Under the then-prevailing language of the statute, it was not clear that § 607 applied to the president and vice president, and the statute was ambiguous regarding whether the recipient of the solicitation also had to be a federal employee.[42] No charges were filed against the vice president, and Congress amended the statute in 2002 to make clear it applies to *any* elected federal official, and the prohibited solicitation or receipt involves any other person regardless of their affiliation with the federal government.[43]

In *United States v. Thayer*, the Supreme Court held that a violation did not require the personal presence of the defendant at the time of the solicitation or receipt, so a mailed solicitation came within the statute when the recipient was in a post office.[44] The delivery of a solicitation letter or campaign contribution to a post office box, however, does not violate the statute, nor does the statute apply when the General Services Administration leases office space to a candidate for a campaign operation.[45] When a large-scale direct mail solicitation is received in a federal office, the

42. Prior to its amendment in 2002, the statute provided:

> It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal.

43. The amendment was part of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 96 (2002). For a thorough review of the controversy over Vice President Gore's campaign contribution solicitations, *see* Scott D. Slater, Comment, *Where the Bucks Stop: An Analysis of Presidential Telephone Solicitations Under 18 U.S.C. § 607*, 59 U. Pitt. L. Rev. 851 (1998).

44. 209 U.S. 39, 44 (1908) ("[T]he defendant solicited money for campaign purposes; he did not solicit until his letter actually was received in the building; he did solicit when it was received and read there; and the solicitation was in the place where the letter was received.").

45. *See* U.S. Department of Justice, *Federal Prosecution of Election Offenses* 115 (7th ed. 2007).

Department of Justice's policy is to request that the federal office be removed from the mailing list and not to pursue criminal charges if the solicitor cooperates with the request.[46] The determination of what constitutes an office or building is based on the employment status of the occupants of the location, who must be discharging official federal duties, and not who the intended recipients of the solicitation are.

The statute does not contain an explicit intent level for this part of the offense and while it could be interpreted as a strict liability statute, that does not appear to be a fair reading of a provision that is punishable by up to three years of imprisonment.[47] It is not always clear that a location is a federal office or building, especially in light of the fact that the government frequently leases space, and so the address may not denote its federal character. Therefore, it is consistent with the policy underlying the statute to interpret it as requiring at least knowledge that the location was a federal office or building. Intent can be inferred from circumstantial evidence, so an address that referenced a federal agency or building name, such as a "United States Courthouse," can be sufficient to establish the defendant's knowledge of its federal character. This intent level would allow prosecutors to seek a deliberate ignorance instruction if the defendant ignored information which would lead to the conclusion that the location was one at which official federal duties were discharged.

It is not uncommon for a contributor to mistakenly send a donation directly to a congressional office or the White House, and § 607 provides an exemption for such situations. When a contribution is received in an elected official's office, the statute does not apply so long as there was no solicitation that directed delivery to the federal location, and the contributions must be transferred to a political committee within seven days of receipt.[48] There are no reported cases under the statute.

I. Coercion of Political Activity (18 U.S.C. § 610)

The revision of the Hatch Act in 1993 included a new provision, 18 U.S.C. § 610, prohibiting coercion of executive branch officials to engage or not to engage in political activity. The statute provides:

> It shall be unlawful for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government as defined in section 7322(1) of title 5, United States Code, to engage in, or not to engage in, any political activity,

46. *Id*.

47. *See id*. at 114 ("Violations of Section 607 require proof that the defendant was actively aware of the federal character of the place where the solicitation took place or was directed.").

48. 18 U.S.C. § 607(b) provides:

> The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress or Executive Office of the President, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971.

> including, but not limited to, voting or refusing to vote for any candidate or measure in any election, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

The elements of the offense are: (1) intimidate, threaten, command or coerce, or attempt to do so, (2) an executive branch employee[49] (3) to engage or not to engage in political activity.

The prohibition applies to any election and not just those in which a federal candidate is on the ballot. The statute also covers coercion of contributions to any political cause, even if it is not related to an election to office, such as a ballot initiative. The provision complements the prohibition in § 606, which makes it a crime to change the status or position of a federal employee for making or refusing to make a campaign contribution, by covering a broader range of threats that are not directly related to the victim's responsibilities as a federal official or that do not involve campaign contributions.[50]

While the statute does not define "political activity," it does list what is included within the term: (1) voting, (2) making contributions, and (3) engaging in campaign-related work. Section 610 could be applied to coercive tactics used on federal employees for other types of political conduct, such as pressuring the employee to take steps to have a candidate to drop out of a race or working to discourage voters from going to the polls. There are no reported cases under the statute.

49. The statute refers to the definition of "employee" contained in 5 U.S.C. § 7322(1), which provides:

> (1) "employee" means any individual, other than the President and the Vice President, employed or holding office in—
> (A) an Executive agency other than the Government Accountability Office;
> (B) a position within the competitive service which is not in an Executive agency; or
> (C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds;
>
> but does not include a member of the uniformed services. . . .

50. Section 610 is narrower than § 606, however, because the latter provision applies to an employee of any of the three branches of the federal government, while the former only applies to those in the executive branch.

| 12 |

CAMPAIGN FINANCE AND LOBBYING

Will Rogers once said, "Politics has become so expensive that it takes a lot of money even to be defeated." During the 2008 campaign, Senator John McCain raised over $350 million in a losing effort, while President Barack Obama raised nearly $750 million.[1] The total amount donated to all federal candidates, as reported by the Federal Election Commission, was $1.686 billion.[2] Needless to say, the observation of former California State Assembly Speaker Jesse Unruh that "money is the mother's milk of politics" is as true today as it ever has been.

Fundraising by candidates at all levels, particularly those in office seeking reelection, has become a year-round pursuit. The constant need for money has enhanced the role of lobbyists who seek to shape legislation by, among other things, making campaign contributions to ensure access to committee chairs and leaders in both houses of Congress. Over fifty years ago, Senator Paul Douglas noted the pernicious effect of contributions and favors provided by lobbyists to elected officials:

> Today the corruption of public officials by private interests takes a more subtle form. The enticer does not generally pay money directly to the public representative. He tries instead by a series of favors to put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that his first loyalties are to his private benefactors and patrons. What happens is a gradual shifting of a man's loyalties from the community

1. For a review of presidential fundraising in the 2008 election, *see* http://www.fec.gov/press/bkgnd/pres_cf/PresidentialJointfundraising.shtml.

2. *Id.*

> to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process, the official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes.[3]

Once elected to office, the legislative process involves dealing with representatives of a variety of interests, and lobbying elected officials is common in every capitol. In addition to providing information and support for legislation, lobbyists have been known to ply elected officials with gifts and other benefits, ranging from free tickets to sporting events to invitations to speak at corporate meetings invariably held in exotic locations. The First Amendment prohibits Congress from inhibiting the right "to petition the Government for a redress of grievances," giving lobbying a measure of protection from regulation.

The interplay of lobbyists and campaigns is nothing new, and Congress has sought to limit the potential for corruption by regulating both spheres. Regulation of campaign contributions involves four interrelated approaches: contribution limits, prohibition on contributions from certain organizations or persons, campaign finance disclosure requirements, and public funding of presidential campaigns. Similarly, regulation of lobbying concentrates primarily on four areas: disclosure of advocacy activities and sources of funding, restrictions on the use of organizational funds for lobbying, limitations on the types of benefits that can be provided to elected officials, and restrictions on hiring former members of Congress and their staff (discussed in Chapter 9).

The federal regulatory structure for campaign contributions and lobbying is largely administrative, and disclosure of required information is handled by the Federal Election Commission (FEC) for campaign finance, and the Office of the Clerk of the House of Representatives and Secretary of the Senate for lobbying. Criminal prosecutions play a much smaller role in these areas because the regulations tend to be complex and government relies on civil enforcement as a more efficient means of ensuring compliance. This chapter focuses on the main criminal provisions but will not review in detail the rules for campaign contributions and lobbying that are primarily subject to civil enforcement.

A recent concern in the area of campaign contributions is so-called "pay to play" contributions, in which businesses contribute to elected officials and local referenda campaigns in order to be considered for lucrative contracts underwriting bonds and pension investments. This practice has come under increased scrutiny, and special rules and codes of conduct have been adopted to deal with this situation.

3. Paul H. Douglas, Ethics in Government 44 (Harvard University Press 1952); *see* Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 Stan. L. & Pol'y Rev. 10, 15 (2008) ("Enter the two wild cards that threaten to—and some would say inevitably will—pervert the governmental process: reciprocity and private financing of political campaigns. The first is hard-wired into human nature; the second is certainly deeply imbedded in our political system.").

I. HISTORY OF FEDERAL CAMPAIGN FINANCE STATUTES

Congress enacted the first federal legislation restricting campaign contributions in 1867, which prohibited solicitations from naval yard workers.[4] The Civil Service Reform Act, commonly known as the Pendleton Act, was adopted in 1883 in the wake of the assassination of President James A. Garfield by a frustrated office-seeker.[5] The law sought to break party control over government jobs by instituting merit selection and prohibiting assessments of workers.

At the urging of President Teddy Roosevelt, Congress adopted the Tillman Act in 1907 that prohibited national banks and corporations from making campaign contributions to candidates for federal offices.[6] Congress strengthened the disclosure requirements in 1910 by adopting the Federal Corrupt Practices Act. In 1925, in response to the Teapot Dome scandals, it further tightened the campaign finance disclosure requirements, but many loopholes remained.[7] Congress outlawed campaign contributions by unions in 1943, and then made the ban permanent in the Taft-Hartley Act in 1947.[8]

In 1971, Congress adopted the Federal Election Campaign Act (FECA) that repealed the Federal Corrupt Practices Act and substituted a comprehensive structure to regulate campaign financing for primary and general elections that, *inter alia*, required disclosure of contributors and allowed the collection of money from employees of corporations and labor unions through political action committees (PACs). After the Watergate scandal came to light, Congress further strengthened FECA by imposing limits on the total amount individuals and PACs could contribute to a candidate in an election cycle, capped the amount individuals could contribute to their own campaign, and created the FEC to monitor and enforce the campaign laws. The Supreme Court upheld FECA's contribution limits in *Buckley v. Valeo*, but struck down the structure of the FEC because it was not an independent agency under separation of powers principles, and further restricted regulation of the amounts individual candidates could spend on their own behalf as a violation of the First Amendment.[9]

In response to the Supreme Court's decision, Congress amended FECA in 1976 to meet *Buckley v. Valeo*'s constitutional concerns by restructuring the FEC. The legislation transferred and updated a number of provisions, which the Federal Corrupt Practices Act had placed in the criminal code to the election code. It also created a new misdemeanor offense, punishable by up to one year in prison, for violations of FECA done "knowingly and willfully" when the total amount of the violation(s) involved an aggregate amount of $2,000 or more.[10] The criminal provision was

4. 14 Stat. 489 (1867).

5. An Act to Regulate and Improve the Civil Service of the United States, 22 Stat. 403 (1883).

6. Pub. L. No. 59-36, 34 Stat. 864 (1907).

7. 1925 Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925).

8. War Labor Disputes (Smith-Connolly) Act, 57 Stat. 163 (1943); Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947).

9. 424 U.S. 1 (1976).

10. 2 U.S.C. § 455 (repealed by the Bipartisan Campaign Reform Act in 2002).

limited by a three-year statute of limitations, which is shorter than the standard five-year limitations period for most federal crimes. Because of the relatively light penalty for a violation and the shortened limitations period, prosecutors generally used the false statement statute, 18 U.S.C. § 1001, to prosecute campaign finance violations that involved disguised contributions and failure to properly report the true source of a contribution.

Congress undertook another major reform of the campaign finance laws when it adopted the Bipartisan Campaign Reform Act (BCRA) in 2002 to prohibit "soft money" expenditures by national and state parties, regulate "electioneering communications," and deal with coordinated expenditures.[11] In the area of criminal prosecutions, the BCRA repealed the three-year statute of limitations for campaign finance prosecutions, applying instead the five-year limitations period applicable to most federal offenses. In addition, it created a two-tier structure for prosecuting violations based on the aggregate amount of contributions involved, with a maximum five-year term of imprisonment for violations involving $25,000 in a calendar year, and up to one year in prison for violations involving $2,000 in a calendar year.[12]

FECA imposes extensive disclosure obligations on campaign committees that require them to list the name and address of contributors and file periodic reports with the FEC. As discussed in Chapter 8, many of the campaign finance cases are brought under the false statement statute, 18 U.S.C. § 1001, for filing false information about campaign contributions. These prosecutions have included contributors who sought to disguise their identity or the source of the funds, using an aiding and abetting theory of liability.

II. CRIMINAL PROSECUTION OF FEDERAL CAMPAIGN FINANCE VIOLATIONS

The basic provision authorizing criminal prosecution of campaign finance violations is 2 U.S.C. § 437g(d)(1)(A), which provides:

> Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—
> (i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or
> (ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

The elements of the offense are: (1) knowing and willful violation of a FECA provision (2) involving the making, receiving, or reporting of (3) any contribution, donation, or expenditure

11. Pub. L. No. 107-155, 116 Stat. 81 (2002).
12. 2 U.S.C. § 437g(d)(1)(A).

(4) (a) aggregating more than $25,000 in a calendar year or (b) aggregating more than $2,000 in a calendar year.

Section 437g(d)(1)(A) requires proof of two intents: knowingly and willfully. The complexity of the federal election laws, and the fact that donations are an accepted means of financing electoral campaigns, is a strong basis for interpreting "willfully" as requiring proof that the defendant intended to violate a known legal duty. The Supreme Court's decision in *Ratzlaf v. United States* imposed a stringent intent threshold for a violation of the currency reporting requirement, noting that "currency structuring is not inevitably nefarious," and so the Court was "unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring."[13] Making a campaign contribution is even less nefarious than structuring a cash transaction, so imposing a higher proof requirement to establish the requisite intent comports with the Court's interpretation of willfulness in a similar context in *Ratzlaf*.

FECA does not expressly define "contribution" and "expenditure," instead providing detailed descriptions of what is and is not included within the meaning of those terms.[14] There is no legislative definition of "donation," but FECA only directly regulates contributions to federal campaigns, so a donation can be understood as a contribution to a state or local campaign.[15] An important distinction between a contribution and expenditure is the former is a gift to another person to engage in political activities, while the latter is a disbursement made by the owner of the money or property for the purpose of that person engaging in political speech. In *Buckley v. Valeo*, the Supreme Court allowed for greater regulation of contributions than expenditures because the latter involve direct political speech by the person spending the money.[16]

13. 510 U.S. 135, 146 (1994).

14. 2 U.S.C. § 431(8)(A) describes a contribution as including "(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." The description of what is not within the term involves thirteen subsections covering, *inter alia*, the sale of food at campaign events, loans, provision of professional services, and payments for volunteer activities. Similarly, § 431(9)(A) describes an expenditure as including "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure." The description of what is not included covers ten subsections. Needless to say, any case alleging a violation of § 437g(d) requires careful scrutiny of the type of transaction at issue to determine whether it comes within the meaning of "contribution" or "expenditure" to make it subject to prosecution.

15. *See* U.S. Department of Justice, Federal Prosecution of Election Offenses 165 n. 64 (7th ed. 2007).

16. 424 U.S. 1 (1976). The Court held:

> In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, § 608(b)(1), a $5,000 limitation on contributions by a political committee to a single candidate, § 608(b)(2), and a $25,000 limitation on total contributions by an individual during any calendar year, § 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, § 608(e)(1), its limitation on a candidate's

FECA has a number of substantive provisions dealing with making and reporting campaign contributions to federal candidates and national political parties that can be the basis for a criminal prosecution.[17] The principle provisions are:

- *2 U.S.C. § 441a*: Campaign contribution limits for individuals and organizations donating to individual candidates and campaign committees, including aggregate limits;[18]
- *2 U.S.C. § 441b*: A ban on contributions and solicitations by corporations, national banks, and labor unions;[19]
- *2 U.S.C. § 441c*: A ban on contributions and solicitations by government contractors;
- *2 U.S.C. § 441e*: A ban on foreign nationals from contributing to a campaign for any federal, state, or local election;[20]
- *2 U.S.C. § 441f*: A ban on contributions in the name of another person;
- *2 U.S.C. § 441g*: Prohibition on cash contributions greater than $100;
- *2 U.S.C. § 441i*: A ban on national parties and congressional campaign committees from soliciting "soft money" contributions.[21]

Section 437g(d)(1)(B) makes a knowing and willful violation of § 441b(b)(3)'s prohibition on contributions or solicitations by corporations, national banks, and labor unions, punishable if

> expenditures from his own personal funds, § 608(a), and its ceilings on overall campaign expenditures, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.

Id. at 58–59.

17. For a thorough review of the campaign finance laws, *see* Corrado et al., The New Campaign Finance Sourcebook (Brookings 2005).

18. 2 U.S.C. § 441a-1 increases the limit if the opposing candidate in an election to the House of Representatives spends more than $350,000 of personal funds.

19. This provision also prohibited direct expenditures by corporations, national banks, and labor unions for candidates. In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court invalidated the prohibition on expenditures, but did not disturb the other restrictions in the statute.

20. Congress amended this section in the BCRA to make it clear that the ban on campaign contributions by foreigners applied to *any* election and not just federal elections.

21. The Supreme Court explained the meaning of "soft money" in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), when it upheld the constitutionality of this provision:

> Under FECA, "contributions" must be made with funds that are subject to the Act's disclosure requirements and source and amount limitations. Such funds are known as "federal" or "hard" money. FECA defines the term "contribution," however, to include only the gift or advance of anything of value "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (emphasis added). Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions. As a result, prior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute "nonfederal money"—also known as "soft money"—to political parties for activities intended to influence state or local elections.

Id. at 122–23.

the aggregate amount is $250 during a calendar year, considerably less than the monetary thresholds for other offenses.

FECA contains two additional criminal prohibitions. First, § 437g(d)(1)(C) makes it a crime to violate § 441h "without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved." Section 441h prohibits two types of fraudulent misrepresentations related to federal election campaigns. Section 441h(a)(1) makes it a crime for a federal candidate, or an agent or employee of that person, to

> fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof.

Section 441h(b)(1) prohibits any person to "fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations." The statute also reaches any person who "willfully and knowingly participate[s] in or conspire[s] to participate in any plan, scheme, or design" to make the fraudulent misrepresentation. Unlike other contribution or expenditure violations that are conditioned on a threshold amount before a criminal prosecution can proceed, this provision applies regardless of the amount involved.[22]

A fraudulent misrepresentation requires proof of a specific intent to defraud, so negligent or mistaken statements that may be misleading would not constitute a violation of § 441h. For those who do not directly engage in the fraudulent misrepresentation, a prosecution based on being an accomplice or conspirator requires proof of the additional intents of knowledge and willfulness. The use of identical intent language as found in § 437g(d)(1)(A), means the government must show the defendant engaged in a violation of a known legal duty to establish liability for being complicit in the crime or conspiring to violate the law.

Section 441f prohibits disguising campaign contributions by putting them in the name of another person.[23] In *United States v. O'Donnell*, the Ninth Circuit held that the prohibition covers both false name contributions, in which the donor provides an incorrect name for the contributor, and "straw donor" contributions, in which a person makes the contribution in his own name and

22. The reference to a $1,000 contribution or expenditure in § 437g(d)(1)(C) was in FECA as adopted in 1971, when the limit on individual campaign contributions was $1,000. Congress added the two-tier gradation of the offense in the BCRA, but it did not modify the provision to conform to the current campaign contribution limitations or the triggering amounts for a criminal prosecution. The statutory language makes it clear that contribution and expenditure limits in other provisions of FECA are irrelevant to a violation involving a fraudulent misrepresentation.

23. 2 U.S.C. § 441f provides: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." The constitutionality of this provision was upheld in *Mariani v. United States*, 212 F.3d 761, 775 (3rd Cir. 2000).

is then reimbursed by another person.[24] The circuit court rejected the defendant's argument that § 441f only covers false name contributions because it is the actual individual who made the gift, holding:

> In ordinary usage, when Friend B delivers a gift that was provided by Friend A, we say that it was Friend A who gave that gift. In the context of gifts, the word "giving" connotes the idea of providing from one's own resources rather than simply conveying, and thus we refer to the original source rather than the intermediary as the one who gave. Section 441f must be understood on this same common sense level.[25]

The statutory prohibition reaches both the intermediary who gave the contribution and the ultimate source of the funds, at least when the source advances the contribution before it is made or agrees to reimburse the intermediary prior to the contribution.[26]

Section 437g(d)(1)(D) makes it a crime for a person to knowingly and willfully violate § 441f if the aggregate amount of the contributions is greater than $10,000 in a calendar year. The provision provides for two-tiered punishment, with a maximum prison sentence of two years if the amount involved was less than $25,000, and up to five years if the amount was greater than that.

24. 608 F.3d 546 (9th Cir. 2010). The circuit court explained the two types of contributions:

> A false name contribution is a *direct* contribution from A to a campaign, where A represents that the contribution is from another person who may be real or fictional, with or without obtaining that person's consent. A straw donor contribution is an *indirect* contribution from A, through B, to the campaign. It occurs when A solicits B to transmit funds to a campaign in B's name, subject to A's promise to advance or reimburse the funds to B.

Id. at 549. The defendant acknowledged making $26,000 in campaign contributions to a presidential campaign in 2003 by agreeing to reimburse thirteen donors, most of whom were employees of his law firm and relatives, after they made the gift. *Id*.

25. *Id*. at 550. The Ninth Circuit explained that "the statutory language applies when a defendant's funds go to a campaign either directly from him or through an intermediary. In either case, for purposes of § 441f, the defendant has made that contribution—and he has violated the statute if his own name was not provided as the source." *Id*. In *United States v. Boender*, 691 F. Supp. 2d 833 (N.D. Ill. 2010), the district court reached the same conclusion by finding that the word "make" in § 441f applies to both direct and indirect contributions:

> [T]he dictionary definition of "make" supports the conclusion that one makes a contribution either by giving money to a nominal donor (the Government's theory of its case) or by directly giving money to a donee (Boender's interpretation of Section 441f). Likewise, both definitions are regularly employed in common usage: When people make something happen, they either do so directly or use instruments of one sort or another. A person may make a pie with their own hands, consistent with Boender's definition of the word. But a person also may make a payment to a creditor by writing a check, consistent with the Government's definition—the person "makes" the payment, but a drawor bank and drawee bank actually move the money, after a postal employee delivers the check to the recipient. Likewise, a head of state "makes war" through soldiers.

Id. at 839.

26. The Ninth Circuit declined to reach the hypothetical situation in which the reimbursement was not agreed to in advance and not made until after an otherwise lawful contribution was made. The circuit court stated, "With regard to reimbursed gifts, we acknowledge that the timing objection would be troubling (perhaps even decisive) when, for example, a defendant reimburses the contributions made by others without any prior arrangements or understandings. We therefore express no view on whether § 441f would apply to that hypothetical defendant." 608 F.3d at 551.

Section 437g(d)(2) provides a defense based on a lack of knowledge or intent if the defendant entered into a conciliation agreement with the FEC "which specifically deals with the act or failure to act constituting such violation and which is still in effect." Under § 437g(a)(4)(A)(i), if the FEC determines, by a vote of four members, that there is probable cause to believe a violation of the law has occurred, then the Commission "shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved."

A conciliation agreement means the FEC case is concluded and there are no further administrative proceedings on the subject, providing a complete defense to a criminal charge. In *United States v. International Union of Operating Engineers, Local 701*, however, the Ninth Circuit determined that the statute does not *compel* the FEC to determine whether there is probable cause that a violation occurred as a prerequisite to a criminal prosecution, so a defendant does not have a right to enter into a conciliation agreement as a means to limit or preclude criminal liability.[27]

Section 437g(d)(3) allows the district court to take into consideration a conciliation agreement regarding the particular conduct that underlies a criminal conviction in determining the appropriate punishment, even if the jury convicts despite the defense afforded by the agreement.[28]

While FECA focuses on the solicitation and receipt of campaign contributions, the BCRA, for the first time, added a new provision regulating expenditures of campaign contributions. Section 439a prescribes the permitted uses of campaign contributions, which include "ordinary and necessary expenses" incurred in a campaign and those "in connection with duties of the individual as a holder of Federal office," along with transferring the funds to other campaign committees of individual candidates and political parties, or for any other lawful purpose.[29] The statute then provides

27. 638 F.2d 1161, 1163 (9th Cir. 1979) ("Nothing in these provisions suggests, much less clearly and ambiguously states, that action by the Department of Justice to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC. Indeed, it would strain the language to imply such a condition.").

28. 2 U.S.C. § 437g(d)(3) provides:

> In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—
>
> (A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);
> (B) the conciliation agreement is in effect; and
> (C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

29. 2 U.S.C. § 439a(a) provides:

> A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual—
>
> (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;
> (2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;
> (3) for contributions to an organization described in section 170(c) of Title 26;
> (4) for transfers, without limitation, to a national, State, or local committee of a political party;

that "[a] contribution or donation. . . shall not be converted by any person to personal use," and goes on to define conversion as use of the campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office."

Section 439a(b)(2) lists various payments that would be for personal purposes, although the description is only illustrative:

(A) a home mortgage, rent, or utility payment;
(B) a clothing purchase;
(C) a noncampaign-related automobile expense;
(D) a country club membership;
(E) a vacation or other noncampaign-related trip;
(F) a household food item;
(G) a tuition payment;
(H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and
(I) dues, fees, and other payments to a health club or recreational facility.[30]

Similar to other violations of FECA, the government must prove the defendant acted knowingly and willfully.

In *United States v. Taff*, a district court rejected a defendant's argument that using campaign funds to assist in obtaining a mortgage did not violate § 439(b). The defendant, who was running for Congress, presented a $300,000 bank check to a mortgage company to show he had sufficient funds to make a down payment for a house when in fact the funds were from his congressional campaign committee. The district court found that the use of campaign funds to assist in obtaining a personal loan could be the basis for a violation, holding that when he exercised dominion over the campaign funds there was a personal conversion of them, even though there was no actual transfer of money from the campaign's account.[31]

III. PAY-TO-PLAY REGULATION

Federal law clearly outlaws payments made to a public official to obtain a government contract, while providing a gift to the official as a reward for receiving a contract is an unlawful gratuity. There are a number of statutes used to prosecute such activities, such as 18 U.S.C. § 201 for federal officials, 18 U.S.C. § 666 for state and local officials, and the Hobbs Act and mail and wire fraud

(5) for donations to State and local candidates subject to the provisions of State law; or
(6) for any other lawful purpose unless prohibited by subsection (b) of this section.

30. Section 439a(c) has a separate and detailed provision dealing with payments with campaign funds for flights on commercial and private aircraft.

31. 400 F. Supp. 2d 1270 (D. Kan. 2005).

statutes for public officials at any level of government. The campaign finance laws seek to limit how much donors can give to a candidate to mitigate the potential for corruption, as the Supreme Court explained in *Buckley v. Valeo* when it sustained the constitutionality of FECA:

> It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.[32]

Linking campaign contributions to a particular exercise of official authority is often difficult, and the potential for favoritism in the award of government contracts and other benefits may be hard to trace to a specific donation. In recent years, the practice of making contributions to elected officials to gain favor with them for the future award of contracts has come to be known as "pay-to-play," by which those who contribute are the only ones likely to be considered for future contracts and awards.

Pay-to-play practices are rarely explicit, otherwise they could be charged as bribery or an unlawful gratuity if there was a clear link between the donation and an exercise of official authority. Instead, the donors and recipients do not typically let it become known by the general public that contributions have been made (and accepted) to influence the exercise of governmental authority. As the District of Columbia Circuit pointed out in *Blount v. S.E.C.*, "While the risk of corruption is obvious and substantial, actors in this field are presumably shrewd enough to structure their relations rather indirectly—indeed, the phrase 'pay to play' suggests that a contribution brings the donor merely a chance to be seriously considered, not the assurance of a contract."[33] Pay-to-play restrictions target the perception that contributions must be made if a company wants to participate—play, as it were—in future contract awards and not just instances of actual corruption, which likely could be prosecuted as bribery.

The federal and state governments have struggled to deal with pay-to-play practices which appear to be rampant but are difficult to charge under traditional bribery and unlawful gratuity statutes. Moreover, the contributions often come within the limitations imposed on campaign contributions because a company or firm often contributes the maximum amount permissible, and then its members or officers also do, providing significant financial benefits to the candidate while complying with all the requirements of the law. Rather than focus on limiting or eliminating campaign contributions per se, the pay-to-play laws and rules restrict the ability of a firm to win

32. 424 U.S. 1, 26 (1976).

33. 61 F.3d 938, 944 (D.C. Cir. 1995).

future business from a governmental unit when donations have been made to an elected official with the authority to make or influence the award of a contract or grant of other benefits. Thus, while there is no interference in the right to make campaign contributions, this approach prevents any gains from accruing to the contributor (or his employer) from the donations.

Pay-to-play laws and rules have been imposed primarily on two groups: government contractors and investment advisers. While anyone making a campaign contribution could reap a benefit from the government, these two groups are seen as having the most to gain from engaging in pay-to-play practices, and so the restrictions have been imposed primarily on them.

A. Federal Contractor Donations

FECA prohibits in § 441c federal contractors and those selling a building or land to the federal government from making "any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use." The statute is much narrower than other pay-to-play restrictions because it is limited to the actual entity that enters into the contract and does not include its employees or owners, who remain free to contribute to campaigns so long as they are not a direct signatory or beneficiary of the government contract. The FEC interpreted the prohibition in § 441c as applying only to campaigns for federal office and not state and local elections.[34] In addition, the prohibition on campaign contributions applies from the start of negotiations to enter into a contract "and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings." Many of the pay-to-play abuses involve contributions in advance of any negotiations for a particular contract, and these would be unaffected by § 441c.

B. Municipal Securities Rulemaking Board Rule G-37

The federal government issues enormous amounts of debt, controlling the process of selling its securities through the Treasury Department because the market is so large and it offers a wide range of securities, some on a weekly basis. While state and local governments are among the largest issuers of bonds in the United States, with between $400 and $500 billion sold annually since 2000, the market is much more fragmented than the market for federal debt securities. Especially for smaller governmental units such as water districts, school boards, and the like, they may issue bonds once or twice a year, if even that often. The bodies rely on investment firms to assist in issuing and marketing the securities to investors, and the fees paid to investment advisers from underwriting and selling the bonds can be quite significant. The decision on which firm to retain as the investment adviser is often made by elected officials, such as members of a city council

34. 11 C.F.R. § 115.2(a) provides that the "prohibition does not apply to contributions or expenditures in connection with State or local elections."

or school board, who may receive campaign contributions from financial firms in the hope of being selected to advise on bond issuance.

In response to potential abuses through pay-to-play campaign contributions, the Municipal Securities Rulemaking Board (MSRB), a self-regulatory organization overseen by the Securities & Exchange Commission (SEC), adopted Rule G-37 to limit donations from municipal bond firms. Rule G-37 prohibits a broker-dealer firm which helps to underwrite and sell securities from participating in any municipal securities business of a state or local government for two years after making a political contribution to an elected official of the issuing government who can influence the selection of the adviser on the transaction.[35] The elected official need not have personal decision-making authority to come within the Rule because it also covers officials with the power to appoint others who will make the decision on issuing municipal bonds.[36]

Rule G-37 further prohibits a broker-dealer from seeking to provide underwriting services to a government if the firm or any of its "municipal finance professionals"[37] solicits contributions on behalf of a candidate of that government, or if they solicit payments to political parties where the firm is providing or seeking to provide services to a government client.[38] The Rule allows an

35. M.S.R.B. Rule G-37(b) provides:

> No broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (A) the broker, dealer or municipal securities dealer; (B) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (C) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional. . . .

36. MRSB Rule G-37(g)(vi) provides:

> The term "official of such issuer" or "official of an issuer means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate: (A) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (B) for any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

The SEC explained the scope of Rule G-37(g)(vi) regarding the appointment authority of an elected official, finding that "an official covered by this part of the Rule must have the identified appointing authority, that is, the power to appoint a person who has responsibility for or influence over the selection of a municipal securities dealer." *In the Matter of Sisung Securities Corp.*, Admin. Proc. File No. 3-12443 (Nov. 5, 2007).

37. A "'municipal finance professional'" is a person associated with a broker-dealer firm who is "'primarily engaged'" in municipal securities activities, who solicits municipal securities business on behalf of a broker-dealer, who supervises others primarily engaged in municipal securities activities "'up through and including'" the chief executive officer of the firm, or who is a member of the firm's executive or management committee. M.S.R.B. Rule G–37(g)(iv).

38. Rule G-37(c) provides:

> (i) No broker, dealer or municipal securities dealer or any municipal finance professional of the broker, dealer or municipal securities dealer shall solicit any person, including but not limited to any affiliated entity of the broker, dealer or municipal securities dealer, or political action committee to make any contribution, or shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.
>
> (ii) No broker, dealer or municipal securities dealer or any individual designated as a municipal finance professional of the broker, dealer or municipal securities dealer pursuant to subparagraphs (A), (B), or (C)

individual at a firm to make a contribution up to $250 to a candidate for whom the person can vote in the upcoming election, thus allowing donations to candidates who will represent the person.

Firms that engage in municipal securities business must file a quarterly disclosure form with the MSRB listing all non–*de minimus* contributions to candidates and political parties. The MSRB expanded the disclosure obligations of municipal securities firms in 2010 by requiring disclosure of contributions by the firm and any of its municipal securities professionals to bond ballot measures voters are asked to approve. The MSRB stated the additional disclosure was necessary because "[s]ome industry participants have expressed concerns about the opportunity for abuses associated with the awarding of municipal securities business as a result of dealer contributions to bond ballot campaigns."[39]

The District of Columbia Circuit upheld the constitutionality of Rule G-37 over a First Amendment challenge in *Blount v. S.E.C.* The circuit court noted that "the link between eliminating pay-to-play practices and the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade' is self-evident," so the restrictions on the free speech rights of municipal securities firms and their employees were permissible.[40]

Although Rule G-37 could be the basis for a criminal prosecution under Section 32 of the Securities Exchange Act of 1934, 15 U.S.C. § 77x, there have been no reported cases involving the use of this Rule in a criminal proceeding. The SEC has imposed civil sanctions for violations, including monetary penalties.[41]

C. Investment Advisers

Concern about pay-to-play practices in the investment field moved beyond just the municipal securities area to the investment advisers for public pension funds and state and local governments seeking to invest funds. Elected officials oversee many of these funds created to pay the pensions of retired state and local workers. For example, the New York State and Local Retirement System (NYSLRS) has over $120 billion in assets and is overseen by the New York State Comptroller, who is elected to office. A number of individuals have been charged in connection with pay-to-play contributions to the former Comptroller in order to serve as an investment adviser to NYSLRS,

> of paragraph (g)(iv) of this rule shall solicit any person, including but not limited to any affiliated entity of the broker, dealer or municipal securities dealer, or political action committee to make any payment, or shall coordinate any payments, to a political party of a state or locality where the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

39. M.S.R.B. Notice 2009-62, *Amendments Filed to Rule G-37 Regarding Contributions to Bond Ballot Campaigns*, Dec. 4, 2009, *available at* http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2009/2009-62.aspx?n=1.

40. 61 F.3d 938, 944 (D.C. Cir. 1995).

41. *See, e.g.*, *In the Matter of Pryor, McClendon, Counts & Co., Inc.*, Admin. Proc. File No. 3-9884 (Feb. 6, 2002) (imposing $40,000 penalty for, *inter alia*, violations of Rule G-37).

or acted as placement agents to obtain access to pension funds that would be invested on behalf of NYSLRS.[42]

In response to these widespread pay-to-play practices involving public pension funds, New York State Attorney General Andrew Cuomo issued a Public Pension Fund Reform Code of Conduct in 2009 to curb abuses among investment advisers seeking access through campaign contributions to officials with oversight responsibility for pension investments.[43] The Code of Conduct bans the use of placement agents and lobbyists and applies the prohibition in Rule G-37 on campaign contributions to elected officials who oversee public pension funds, requiring disclosure of campaign contributions to such officials.

In 2010, the SEC adopted a final rule to prohibit pay-to-play by investment advisers who are registered with the Commission, as well as many who work on behalf of private investment companies that are otherwise exempt from registration.[44] The rule is modeled on Rule G-37 by not prohibiting campaign contributions but instead imposing a two-year "time out" period for the investment firm after a contribution to an official with responsibility for investments. In describing the rationale for the rule, the SEC stated, "Pay to play practices are rarely explicit: participants do not typically let it be publicly known that contributions or payments are made or accepted for the purpose of influencing the selection of an adviser."[45]

D. State Pay-to-Play Statutes

Eighteen states have enacted some form of pay-to-play restrictions, and Attorney General Cuomo has proposed that New York adopt the Code of Conduct his office issued. Unlike Rule G-37's focus on disqualifying the contributor from future contracts for a period of time after the contribution, the states have tended to adopt outright bans on contributions by certain contractors. This area continues to develop as pay-to-play issues received increased attention in the media and the state legislatures, and the approach of the MSRB and SEC may become more the norm. The following are three examples of state statutes in the field:

- *Colorado*: Voters narrowly approved a ballot initiative to amend the state Constitution in 2008 to prohibit contractors who receive sole-source contracts from making campaign

42. *See Cuomo Secures Agreement with Private Equity Firm Riverstone to Sign Code of Conduct and Eliminate Pay-to-Play in Pension Funds Nationwide* (June 11, 2009), *available at* http://www.ag.ny.gov/media_center/2009/june/june11a_09.html. The SEC filed a companion civil complaint against the same defendants. *S.E.C. v. Morris* et al., No. 09-CIV. 2518 (CM) (third amended complaint), *available at* http://www.sec.gov/litigation/complaints/2009/comp21036.pdf.

43. *Available at* http://www.ag.ny.gov/media_center/2009/june/pdfs/Riverstone%20AOD%20FINAL%20EXECUTED.pdf. The Code of Conduct would allow contributions up to $300 by candidates the person was entitled to vote for in the election, $50 more than permitted by M.S.R.B. Rule G-37.

44. S.E.C. Rule 206[4]-5, *Political Contributions by Certain Investment Advisers*, 17 C.F.R. 275.206(4)-5.

45. *Id.*

contributions during the term of the contract or for two years after that.[46] The amendment provides for a ban on contractors who make illegal contributions from receiving government contracts for three years, and officeholders who accept such contributions can be removed from office.

- *Illinois*: A statute that went into effect in 2009 prohibits any contractor and its affiliates that received state contracts totaling over $50,000 from making campaign contributions to any official or candidate for office who is responsible for awarding the contract.[47] A contractor violating the law can have a contract voided for a single violation, and a three-year ban on business if three or more violations occur within a thirty-six month period.
- *New Jersey*: A state statute adopted in 2004 bans a company from negotiating or entering into a contract worth more than $17,500 for eighteen months with the state, or any county or municipality, if the company or its owner makes a contribution to a candidate or a party campaign committee if a member of that party is elected to a position involved in the award of the contract.[48] An Executive Order issued by the governor in 2008 expands the law by including in its prohibition contributions by an officer of a company, a partner or other owner of an organization, their spouse or civil union partner, and any child residing with the person. [49]

IV. LOBBYING

The First Amendment prohibits Congress from "abridging the right of the people. . . to petition the Government for a redress of grievances." This means there is some measure of protection for lobbying members of Congress and the executive branch in the process for drafting legislation and formulating policy. Despite such lofty protection, contacting legislators and executive officers has gained a much more pejorative meaning, as exemplified by the term "lobbyist." Often portrayed as purveyors of campaign contributions and other more questionable favors to legislators, lobbyists have often been the target of legislative wrath that reeks of an attitude of "protect us from our own failings."

The term "lobbyist" has been around since at least the mid-eighteenth century. Its origin is obscure, and it is often attributed to President Ulysses S. Grant, who would spend time most evenings in the lobby of the Willard Hotel, a short walk from the White House, smoking a cigar and having a drink, and it was well known that the best place to seek a favor from him was there.

46. Colo. Const. art. 28, § 15 provides:

> Because of a presumption of impropriety between contributions to any campaign and sole source government contracts, contract holders shall contractually agree, for the duration of the contract and for two years thereafter, to cease making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit of any political party or for the benefit of any candidate for any elected office of the state or any of its political subdivisions.

47. 10 Ill Comp. Stat. 5/9-35.

48. N.J. Stat. Ann. § 19:44A-20.4.

49. State of New Jersey Executive Order No. 117, Sept. 24, 2008.

Today, large firms specialize in lobbying, many occupying space along K Street in Washington, a premier office location in the city. In state capitols, there is usually an area known for hosting large numbers of lobbyists, and local bars and restaurants come in and out of favor with lobbyists in each administration. Whether the caricature of lobbyists is true or not, the practice is often seen as involving backroom meetings and secret deals, although virtually every organization engages in lobbying in some way, such as having its members send letters to their representatives and senators, and perhaps even visiting Capitol Hill offices to seek support for the group's position.

Congress regulated lobbyists by requiring disclosure of their clients, the source of their funding, and the issues on which they have acted. To insulate themselves from many of the more pernicious practices of interest groups, the legislative branch imposed restrictions on the types and amount of gifts that can be received, and imposed self-reporting obligations. In 2008, President Barack Obama announced his intention to prohibit lobbyists from participating in his campaign and restrict their eligibility for positions in his administration. As one author noted, "[T]hese acts by lobbyists and government officials work to appease American citizens and avert the appearance of impropriety."[50]

Most lobbyist regulations involve disclosure requirements that are subject to administrative enforcement rather than criminal prosecution. As with campaign finance disclosures, the few criminal cases tend to be brought under the false statement statute, 18 U.S.C. § 1001, rather than for a direct violation of the lobbying law.

A. History of the Statutes

The first comprehensive federal lobbying statute was the Federal Regulation of Lobbying Act of 1946 (FRLA).[51] The statute required the registration of any person engaged for pay for the "principal purpose" of attempting to influence the passage or defeat of legislation in the Congress. Among the information that must be disclosed was the lobbyist's name and address, information about the person or organization who employed the lobbyist, how much pay the lobbyist received, reports of any expenditures for lobbying purposes, and the particular legislation the lobbyist was hired to support or oppose. The FRLA was heavily criticized, and a Senate Report in 1993 pointed out that the statute "was a hastily considered law, which was subject to no hearings, little committee consideration, and almost no floor debate."[52]

In *United States v. Harriss*, the Supreme Court interpreted the FRLA narrowly in a criminal prosecution for failure to file required information. The Court limited the meaning of "principal purpose" to the following three circumstances:

> (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influ-

50. Angela Lynne Davis, *Genuine Reform or Just Another Meager Attempt to Regulate Lobbyists: A Critique of the Honest Leadership and Open Government Act of 2007*, 18 Kan. J.L. & Pub. Pol'y 340, 341 (2009).

51. Pub. L. No. 79-601, 60 Stat. 812 (1946).

52. S. Rep. No. 103–37 (1993).

> ence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.[53]

By limiting the statute to "direct communications," a significant loophole was opened in the law because those who avoided such communications fell completely outside the reporting requirements. After *Harriss*, there were no other criminal prosecutions for violation of the FRLA.

Congress first regulated foreign lobbyists in 1938 when it adopted the Foreign Agents Registration Act to require public reporting to the secretary of state about the work of publicity agents, specifically Nazi propagandists.[54] In 1966, Congress expanded the law to move away from registration of potentially subversive foreign propagandists to regulation of lobbyists acting on behalf of foreign business interests. The statute covers any person who engages in political activities on behalf of a foreign government or foreign political party, or any "partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[55] A separate statute, 18 U.S.C. § 219, prohibits any federal official from acting as an agent of a foreign principal (see Chapter 11).

The Ethics Reform Act of 1989 limited gifts which members of Congress and their staff, along with other federal officials, could receive.[56] Among other things, the law prohibited members from receiving honoraria and limited the amount of any gift to fairly nominal amounts. But the statute did not regulate meals, travel, or other types of benefits.

In 1995, after Republicans took back control of the Congress based on a platform of reform, came the Lobbying Disclosure Act. [57] The new law expanded the definition of a lobbyist but created a loophole that allowed the person to avoid disclosure if their work on behalf of a client constituted less than 20 percent of their total activities on that client's behalf. Thus, lobbyists who engaged in a wide range of activities on behalf of a client could avoid the disclosure requirements.

In 2007, much like the 1995 legislation, Congress adopted the Honest Leadership and Open Government Act (HLOGA) after Democrats regained control of Congress after vowing to "clean up" from various scandals, most prominently the various prosecutions involving well-known lobbyist Jack Abramoff.[58] Among other changes, the law required quarterly lobbyist disclosures, reporting of the specific federal agency or house of Congress lobbied, and greater description of the issue or legislation that was the subject of the contact. The law also tightened the definition of which lobbyists are subject to the disclosure requirements and what information about their clients must be revealed, including coalitions and associations whose members contribute more

53. 347 U.S. 612, 623 (1954).

54. Act of June 8, 1938, 52 Stat. 631 (1938). In *Viereck v. United States*, 318 U.S. 236 (1943), the Supreme Court explained the purpose of the law: "The Act of 1938 requiring registration of agents for foreign principals was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment." *Id*. at 241.

55. 22 U.S.C. § 611(b).

56. Pub. L. No. 101-194, 103 Stat 1716 (1989).

57. Pub. L. No. 104-65, 109 Stat. 691 (1995).

58. Pub. L. No. 110-81, 121 Stat. 735 (2007).

than $5,000 for lobbying activities and who actively participated in the planning, supervision, or control of the lobbyist's activities.[59]

In *National Association of Manufacturers v. Taylor*, the District of Columbia Circuit rejected a First Amendment challenge to the expanded disclosure requirement. The circuit court held that "there is more than a 'substantial' relation between the governmental interest in greater transparency and the information that amended § 1603(b)(3) requires to be disclosed; in fact, the section's disclosure requirements are narrowly tailored and effectively advance that interest."[60]

B. Criminal Prosecution

While the FRLA had both criminal and civil enforcement provisions, the criminal statute was repealed in 1995 by the Lobbying Disclosure Act and not restored until the adoption of the HLOGA in 2007. That act amended 2 U.S.C. § 606 by adding a criminal provision in addition to the civil enforcement mechanism, and the potential civil penalty was increased from $50,000 to $200,000 for each violation. Section 606(b) provides that "[w]hoever knowingly and corruptly fails to comply with any provision of this chapter shall be imprisoned for not more than 5 years or fined under Title 18, or both," while a civil violation only requires proof of knowledge. In *Arthur Andersen v. United States*, the Supreme Court interpreted an obstruction of justice statute that similarly required proof that conduct was undertaken "knowingly and corruptly" and explained that "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly'" commit a crime.[61] Proof of intent for a criminal prosecution of the lobbying provisions requires the government to demonstrate consciousness of wrongdoing and not merely knowledge of the applicable disclosure provisions.

Another means of regulating lobbying in criminal statutes is in the federal conflict of interest provisions, discussed in Chapter 9, prohibiting, *inter alia*, actions on behalf of those with whom the federal official has a personal or business connection and seeking or accepting employment for specified periods after leaving the federal government.

59. 2 U.S.C. § 1603(b)(3).

60. 582 F.3d 1, 20 (D.C.Cir. 2009).

61. 544 U.S. 696, 706 (2005).

This page intentionally left blank

| 13 |

RICO AND PUBLIC CORRUPTION

I. HISTORY AND SCOPE OF THE STATUTE

The Racketeer-Influenced and Corrupt Organizations Act, commonly known as RICO, is a broad statute that has been used to prosecute mobsters, street gangs, and drug dealers for their extensive criminal activities.[1] The statute targets "enterprises," which can be either legitimate businesses or entities that are used to engage in criminal conduct, or illegal associations in which individuals band together to commit crimes. RICO took a significantly new approach to crime by making proof of the offense be the commission of a series of other criminal acts that, when taken together, show that there was a "pattern of racketeering activity" committed by the defendants through the enterprise.

To establish the pattern of racketeering activity, RICO requires the government to prove that the defendants engaged in two or more criminal acts, which the statute defines very broadly as including both state law crimes and a long list of federal crimes. It is not a prerequisite for a RICO conviction that the defendant be convicted separately of the predicate offenses, only that the government prove the acts show beyond a reasonable doubt that the defendants engaged in the pattern of racketeering activity.[2] RICO also provides private parties with a civil cause of action for a violation, a rarity in the federal criminal law.[3]

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970), *codified at* 18 U.S.C. §§ 1961–1968.

2. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985) ("[A] prior conviction-requirement cannot be found in the definition of "racketeering activity." Nor can it be found in § 1962, which sets out the statute's substantive provisions. Indeed, if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the Government to enjoin violations that had not yet occurred.").

3. 18 U.S.C.A. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct

One congressional goal in adopting RICO was to give federal prosecutors a vehicle to combat the infiltration of legitimate businesses by organized crime. A "Statement of Findings and Purpose" adopted as a preamble to RICO states:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

RICO is not limited to cases involving criminal gangs or organized crime. The Supreme Court stated in *H.J. Inc. v. Northwestern Bell*, "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."[4] This led the Court to reject a narrow reading of RICO that focuses on only criminal conduct associated with organized crime, explaining that "[i]t would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus."[5]

While a law targeting organized crime would seem an unlikely basis for a public corruption prosecution, the expansive definition of racketeering activity in RICO, and the concern that criminals would seek to influence government officials, made the statute a staple in prosecutions of public officials. As the Seventh Circuit noted, "It is generally well-known that one of the primary tools in the hands of organized crime is the corruption of public officials and the subversion and undermining of public agencies."[6]

RICO prohibits three different types of conduct that involve the use of an enterprise. Section 1962(a) prohibits "any person who has received any income derived. . . from a pattern of racketeering activity" from using those funds to acquire an interest in or control of another enterprise. Section 1962(b) prohibits any person from acquiring or maintaining an interest in an enterprise "through a pattern of racketeering activity." These two provisions seek to protect legitimate operations from organized crime by making it a crime to engage in a series of criminal acts, or use the proceeds of criminal activity, to gain control of a business. These two provisions are most directly applicable to criminal organizations that seek to expand their power through control of ostensibly legitimate enterprises that can then be used as a cover for continuing criminal acts.

Section 1962(c) is the most commonly used provision of RICO because its expansive language prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. Unlike subsections (a) and (b), this crime focuses on the pattern of racketeering activity itself

that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.").

4. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989).

5. *Id*. at 249.

6. United States v. Lee Stoller Enterprises, Inc., 652 F.2d 1313, 1317 (7th Cir. 1981).

and not the consequences of the criminal conduct that results in gaining control of an enterprise. Section 1962(d) is a separate RICO conspiracy provision that makes it a crime for defendants to agree to commit the crimes that constitute the pattern of racketeering activity.

RICO is a complex statute that requires the government to show not just the underlying criminal acts that form the pattern of racketeering activity, but also an overarching organization that committed those crimes as part of continuing criminal activity. As such, RICO prosecutions, including those involving public corruption, involve long-term conduct and a variety of violations rather than single or isolated instances of criminal activity. In assessing any criminal prosecution under RICO, it is important to focus on the elements of the offense that include both the organizational aspect of the crime and the underlying criminal acts that must be linked together into the requisite pattern.

II. RICO DEFINITIONS

RICO includes a number of definitions for the particular terms of art it employs to define an offense based on other predicate crimes. These terms give the statute its broad scope because Congress used expansive language and encouraged a liberal interpretation of its provisions.[7]

A. Racketeering Activity

The core of RICO is the racketeering activity undertaken by the defendants. The statute divides the crimes into two categories in § 1961(1), one involving state law offenses and the other a list of federal crimes. The state offenses that can be a racketeering activity are "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical. . . which is chargeable under State law and punishable by imprisonment for more than one year." Like the Travel Act, the inclusion of bribery on the list makes public corruption prosecutions amenable to RICO charges.

The state law bribery provision that is the basis for a RICO charge must be identified specifically because the prosecution must show the offense is punishable for more than one year, unlike the Travel Act's generic approach to bribery under state law (see Chapter 7). If the state statute does not constitute bribery, then a RICO conviction based on it cannot stand. In *United States v. Genova*, the Seventh Circuit found a RICO conviction could not be based on claimed bribery for using government employees to engage in political work that violated a subsection of an Illinois statute prohibiting a public official from obtaining a personal advantage when the official performed

7. Congress included a statement in the Organized Crime Control Act of 1970, of which RICO is a part, that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, Title IX, § 904(a), 84 Stat. 922, 947, codified at note following 18 U.S.C. § 1961.

an act in excess of his lawful authority. The circuit court found that the provision "did not read like a definition of bribery and therefore may not be used as a predicate offense under RICO."[8]

The list of federal offenses that can be a racketeering activity for a RICO violation is extensive and for public corruption cases, the important ones included in the definition are: 18 U.S.C. § 201 (bribery and unlawful gratuities), 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud), 18 U.S.C. § 1951 (the Hobbs Act), and 18 U.S.C. § 1952 (the Travel Act). The statute does not include § 666 as a racketeering act, but the inclusion of state law bribery and the mail and wire fraud provisions means RICO can be used comfortably for bribery and kickbacks at the state and local level.

B. Enterprise

The enterprise is the vehicle through which the RICO violation occurs because it is operated by the defendants through the racketeering activity. The definition in § 1961(4) provides that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Unlike a typical statutory definition, the list of what can constitute an enterprise is not exclusive because it only "includes" the described types of organizations or entities but is not limited to these examples.

Enterprises fall into two categories: first, those that are legal entities, such as corporations, limited liability companies (which did not exist when RICO was enacted), and labor unions, and second, more loosely organized groups that the statute describes as a group that is "associated in fact." The first category is quite easy to prove because these organizations frequently have documents establishing their existence, such as a corporate filing with a state office, or engage in a variety of activities that can establish their existence as a distinct entity, such as entering into contracts or participating in litigation.[9]

The second category of enterprises gives RICO a wide application because any group of individuals who engage in criminal conduct may be sufficiently coordinated to constitute an enterprise for a RICO prosecution. Applying the liberal construction to the statutory terms that Congress prescribed, the Supreme Court takes a broad view of the proof necessary to establish that individuals operated as an association-in-fact to be a RICO enterprise.

In *United States v. Turkette*, the Court rejected the argument that an enterprise must somehow have legitimate aims so that a purely illegal confederation did not violate RICO. The Court held that "[t]here is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate

8. 333 F.3d 750, 758. The Seventh Circuit noted that the government conceded "no Illinois decision supports its view that using public funds to pay municipal employees for political labor is bribery" under the cited provision. *Id.* at 759. In *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), the Ninth Circuit looked to state court decisions interpreting its bribery provision to determine whether the defendant's conduct constituted a violation of the law to support a RICO conviction. The circuit court found that "California courts have rejected 'lack of official capacity' as a defense to the crime of bribery under section 68," and therefore the same claim could not be made in attacking a RICO conviction based on bribery in violation of state law. *Id.* at 595.

9. *See* Michael Morrissey, Note, *Structural Strength: Resolving a Circuit Split in* Boyle v. United States *with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 Fordham L. Rev. 1939, 1940 (2009) ("If an enterprise is a legal structure, person, or corporation, the process of meeting the evidentiary requirement is simple. . . .").

and illegitimate enterprises."[10] The Court explained that an association-in-fact enterprise is distinct from the pattern of racketeering activity because they are separate elements of the offense, and the enterprise could be "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[11] But it noted that that proof of the enterprise and pattern element "may in particular cases coalesce," so that each element need not be shown by wholly separate evidence.[12]

The enterprise element came before the Court again in *United States v. Boyle*, which resolved a split among the circuits as to what must be shown to establish an association-in-fact enterprise. The defendant sought a jury instruction which would require a finding that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts."[13] Rejecting the claim, the Court explained that proving the existence of an association-in-fact enterprise requires consideration of three issues:

- *Structure*. The Court stated that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[14] For a § 1962(c) prosecution, the association-in-fact enterprise "must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.' "[15]
- *Ascertainable*. "Whenever a jury is told that it must find the existence of an element beyond a reasonable doubt, that element must be 'ascertainable' or else the jury could not find that it was proved. Therefore, telling the members of the jury that they had to ascertain the existence of an 'ascertainable structure' would have been redundant and potentially misleading."[16]
- *"Beyond that inherent in the pattern of racketeering activity."* The Court explained that proof of the pattern is a separate element of the RICO offense, but that "if the phrase is used to mean that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect," citing to *Turkette*'s statement that the proof may "coalesce" on the enterprise and pattern elements.[17]

10. 452 U.S. 576, 584 (1981).

11. *Id*. at 583.

12. *Id*. The Court emphasized that the enterprise "is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id*.

13. 129 S. Ct. 2237, 2242 (2009).

14. *Id*. at 2244.

15. *Id*. The Court noted that the jury instructions need not include the word "structure" in them, although after *Boyle* a careful district judge will use the terms supplied to avoid any potential appellate issue.

16. *Id*. at 2244–45.

17. *Id*. at 2245.

In describing what constitutes an association-in-fact enterprise, *Boyle* rejected the argument that the government must prove additional structural attributes. The Court stated that an enterprise

> need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.[18]

The breadth of § 1961(4) means that RICO covers the gamut of organizations, both formal and informal, and does not impose any requirements on the government to show particular indicia of the existence of an enterprise, such as a name, hierarchy of roles, or membership criteria, although all of those could be proof to establish the element. The Court explained that

> nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.[19]

C. Pattern of Racketeering Activity

RICO's greatest innovation was creating a new offense based on proof that the defendant(s) engaged in a series of other crimes that are related to one another. A well-known article described RICO as "the crime of being a criminal" because the statute makes it a distinct crime to engage in criminal activity without requiring proof that anyone was convicted of the racketeering acts.[20] Indeed, double jeopardy does not prevent using conduct that was the subject of a previous prosecution, even if it resulted in an acquittal, as a racketeering act because the crime involves separate elements from the underlying offenses.[21]

In *United States v. Coonan*, the Second Circuit held that the "chargeable" and "punishable" language of §1961 does not mean that if an offense was precluded from being tried at the state level it was precluded from serving as part of a RICO conviction.[22] The court described the statutory

18. *Id*.

19. *Id* at 2245–46.

20. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661 (1987).

21. *See* United States v. Coonan, 938 F.2d 1553, 1563 (2nd Cir. 1991) ("Kelly is simply in error when he asserts that principles of double jeopardy bar the use of conduct that was the subject of a prior prosecution as a predicate act in a subsequent RICO prosecution. In this Circuit, the permissibility of such subsequent RICO prosecutions, at least in cases involving racketeering activity occurring after the initial prosecution, is well established."); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1977) (instructing the jury to not account for the evidence as it pertained to the substantive state charge, which the defendant was acquitted on, and only look at it as part of the conspiracy charge in federal court).

22. 938 F.2d 1553, 1563–65 (2nd Cir 1991).

language as merely descriptive of "the type of generic conduct which will serve as a RICO predicate and satisfy RICO's pattern requirement."[23] The district court in *United States v. Levasseur* held that it is not a violation of double jeopardy as long as the elements of the state crime are proven at the federal trial.[24] But if the predicate act has been tried and acquitted at the federal level, it is a violation of double jeopardy to submit that act as part of the predicate acts showing a pattern for a RICO charge.[25]

Alternatively, in *United States v. Louie*, the district court took the position that a prior acquittal is enough to bar the act from being used to support a RICO conviction.[26] The court dismissed the racketeering charges due to the special interplay between RICO charges being based on state laws and the dual sovereignty principal.[27] Because a RICO violation incorporates what another sovereign deems illegal, in recognizing an acquittal "a federal court will accord due respect to the state court processes which resulted in acquittal."[28] *Louie* also gave more deference to the statutory language of § 1961 than *Coonan* by acknowledging acquittals as precluding an offense from being "chargeable" and "punishable" under state law.[29]

Section 1961(5) provides that the pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." While two different racketeering acts is the minimum, that is usually not enough to prove a RICO violation because the statute states there must be "at least" that number, and perhaps more.

In *H.J. Inc. v. Northwestern Bell*, the Supreme Court interpreted the term "pattern" to require proof of the continuity of the racketeering acts and their relationship to one another. The plaintiff in the civil RICO case alleged that the Minnesota Public Utilities Commission was operated through a pattern of racketeering activity involving a violation of the state bribery statute by a telephone company and its employees giving benefits to the commissioners in exchange for increasing the rates charged to customers. The lower court dismissed the complaint because it only alleged a single scheme, finding that RICO requires multiple illegal schemes to satisfy the pattern element. The Supreme Court rejected the multiple scheme analysis, but did impose minimum criteria that must be established to show the requisite pattern.

23. *Id.* at 1564.

24. 699 F. Supp. 965, 976 (D. Mass. 1988)

25. *Id.*

26. 625 F. Supp. 1327, 1337 (S.D.N.Y. 1985) (holding that prior acts, which have been acquitted at the state level, cannot support a RICO charge because 1) there is no legislative history supporting the notion that RICO was to be used to retry state court acquittals, and 2) that the language of 18 U.S.C. 1961(1)(a) calls for the predicate act to be chargeable and punishable under state law; neither of which are possible due to double jeopardy after an acquittal); s*ee also* United States v. Carrillo, 229 F.3d 177, 186 (2nd Cir. 2000) ("[T]he text of RICO. . . demand[s] that predicate acts constitute state law crimes.").

27. *Louie,* 625 F. Supp. at 1337.

28. *Id.*

29. *Id.* The Second Circuit's decision *Coonan* cited *Louie* in a different part of the opinion while interpreting the statute more broadly than the district court. Although *Coonan* can be read as overruling *Louie*'s interpretation of RICO, it did not expressly overrule that case even though the circuit court was clearly aware of the district court's position.

The Court held that Congress's use of the word "pattern" showed that it intended "a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity."[30] Using "pattern" meant that "[i]t is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'"[31] Therefore, the Court held that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity," i.e., continuity plus relationship produces the pattern.[32]

In explaining the relationship aspect, the Court quoted another provision of the 1970 statute that included RICO, which stated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[33] This statement is quite broad because it includes acts that "otherwise are interrelated" but "are not isolated events," which provides little real guidance. Under this standard, the government (or private plaintiff) must show more than just that two or more acts occurred during the relevant time period, but that they also have some connection among them so that a jury can infer they are part of a pattern.[34]

The continuity requirement is not limited to multiple schemes, although evidence of them would be "highly relevant" to showing the pattern. The Court stated that continuity is a temporal concept, and it involves both closed-ended and open-ended periods, "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[35] As the Court recognized, it was dealing with very nebulous terminology, and gave some guidance as to how much time should be involved, at least for a closed-ended period:

> [A party] may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months

30. 492 U.S. 229, 237 (1989).

31. *Id.* at 238.

32. *Id.* at 239.

33. *Id.* (quoting Title X of the Crime Control Act of 1970, the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575 et seq. (partially repealed)).

34. Religious Technology Center v. Wollersheim, 971 F.2d 364, 366 (9th Cir. 1992) ("An allegation of two isolated criminal acts is insufficient to satisfy the relatedness requirements; the predicate offenses are related if they have 'the same or similar purposes, results, participants, victims or methods of commission.'"); Procter & Gamble Co. v. Riverview Prod., Inc., 879 F.2d 10, 20 (2nd Cir. 1989) ("'[R]elatedness' means—given that different acts of racketeering activity have occurred—that there is a way in which the acts may be viewed as having a common purpose. . . . Ordinarily, proof of these concepts of continuity and relatedness in the pattern will vary in each case."); United States v. Indelicato, 865 F.2d 1370, 1383 (2nd Cir. 1989) ("In some cases both the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.").

35. *Id.* at 241.

> and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.[36]

The Court also provided two examples of how the continuity aspect can be shown even when the period of time involved may be limited. First, "[a] RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit," citing to a hoodlum's protection racket that may involve only a few instances of demanding payments but that contains the threat of future criminal acts. Second, "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," such as how an organized criminal group might operate, and "is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.' "[37]

Although the Supreme Court refused to impose any strict requirements on how much time must elapse, in cases involving a closed-ended period, the lower courts have generally found that racketeering acts occurring over a period of only months is insufficient to establish this prong of the pattern element, and the Second Circuit requires at least two years.[38] The enterprise need not have a long-term existence, and in public corruption cases, the fact that an elected official may end his term at any time does not prevent that public office from having sufficient continuity to serve as the enterprise.[39]

The fact that a defendant no longer holds office does not prevent a finding that there was a closed-ended period. In *United States v. Bustamante*, a former congressman was convicted of

36. *Id*.

37. *Id*. at 242–43. The Court noted the limits of its analysis, pointing out that "[t]he limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope." *Id*. at 243. Congress never accepted the invitation to furnish any greater clarity on what constitutes a pattern.

38. *See* Spool v. World Child Intern. Adoption Agency, 520 F.3d 178, 184 (2nd Cir. 2008) ("Although we have not viewed two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity. . . ."); First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159, 181 (2nd Cir. 2004) ("[W]hile two years may be the minimum duration necessary to find closed-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern."); Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229, 244 (2nd Cir. 1999) ("[T]he predicate acts that the Windsor Defendants committed spanned less than one year—a period of insufficient length to demonstrate closed-ended continuity under our precedents.").

39. In *United States v. McDade*, 827 F. Supp. 1153 (E.D. Pa. 1993), the district court rejected a congressman's challenge to a RICO charge alleging that his congressional office was the enterprise through which bribes and gratuities were solicited because it was separate from him and would exist as long as he served. The district court stated, "The work of the office, legitimate and allegedly otherwise, went on despite the comings and goings of employees. For the period of time in question, Mr. McDade's offices functioned as a continuous organization in which various replaceable members performed particular acts." *Id*. at 1182.

a RICO violation based on accepting gratuities over a four-year period before he left office, and the court concluded that "Bustamante's criminal behavior threatened to continue, at least during the closed-end four year period of activity."[40] In *United States v. Freeman*, the Ninth Circuit noted that identifying bribery as the racketeering activity for a RICO charge suggests "the existence of a distinct threat of long-term racketeering activity."[41]

III. CONDUCTING AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY (18 U.S.C. § 1962(c))

Public corruption prosecutions that involve RICO charges use § 1962(c) as the basis for the charges, and often include a conspiracy charge under § 1962(d) based on the pattern of racketeering activity. Section 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Congress designed this provision as a catch-all, and the language is a bit difficult to decipher because the word "conduct" is used twice, once as a verb and once as a noun.

The elements of the § 1962(c) offense are: (1) any person (2) employed by or associated with (3) any enterprise affecting interstate commerce (4) who conducts or participates in the conduct of the enterprise's affairs (5) through a pattern of racketeering activity.

For prosecutions (and civil cases) brought under this provision, the Supreme Court recognized the "person-enterprise" rule: the defendant—the person—must be distinct from the enterprise. In *Cedric Kushner Promotions, Ltd. v. King*, the Court stated that "[w]e do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[42]

The employment or association element will be largely a function of the form of enterprise that is identified as being operated through the pattern of racketeering activity. If a legitimate entity is the enterprise, then the person's relationship with that entity can be established by showing their employment position or other contractual or legal relation to it. If it is an association-in-fact enterprise, then proof of its existence entails showing the relationship of the defendants as being associated with it.

40. 45 F.3d 933, 942 (5th Cir. 1995).

41. 6 F.3d 586, 596 (9th Cir. 1993). In rejecting a challenge to RICO on the ground that it is unconstitutionally vague, the Ninth Circuit pointed out "[i]t is obvious that receiving bribes and kickbacks on public contracts is criminally culpable, and that repeated over time, such activities feed on themselves so as to become a pattern." *United States v. Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992).

42. 533 U.S. 158, 161 (2001). The person-enterprise rule is primarily important in civil RICO cases because a named defendant, such as a corporation or other organization, cannot also be identified as the enterprise that was operated through the pattern of racketeering activity.

The interstate commerce element requires proof that the enterprise was involved in interstate commerce, such as purchasing or selling goods that cross state lines,[43] or the enterprise affected interstate commerce in some way. Courts interpret the affecting commerce aspect as requiring only a slight effect on interstate commerce, similar to the broad commerce element for a Hobbs Act conviction.[44]

A. The Operation or Management Test

Proof that the defendant conducted or participated in the conduct of the enterprise's affairs requires showing that the person had some measure of control or direction over the enterprise, under the "operation or management" test adopted by the Supreme Court in *Reves v. Ernst & Young*. In *Reves*, a civil RICO case, the defendant was an accounting firm that allegedly failed to properly conduct an audit of a cooperative bank that resulted in false financial statements being issued in relation to the sale of notes to the public.

The court rejected aiding and abetting liability as a basis to hold a person liable for a RICO violation, interpreting the statute to require some greater degree of involvement in the enterprise. The Court held:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs.[45]

Because such a wide range of entities or groups can be an enterprise, the Court focused on the person's particular role in it and not just a particular title, explaining that "RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. The 'operation or management' test expresses this requirement in a formulation that is easy to apply."

In response to the argument that this test would only apply to those who run an organization, whether it be legal or illegal, the Court stated that "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management."[46] Regarding whether an outsider can direct an enterprise despite not having any formal authority in the entity, *Reves* noted that "[a]n enterprise also might be 'operated'

43. *See* United States v. Robertson, 514 U.S. 669, 671–72 (1995) (holding that a gold mine identified as the RICO enterprise that purchased equipment from another state met the interstate commerce element; "Whether or not these activities met (and whether or not, to bring the gold mine within the 'affecting commerce' provision of RICO, they would have to meet) the requirement of substantially affecting interstate commerce, they assuredly brought the gold mine within § 1962(a)'s alternative criterion of 'any enterprise. . . engaged in. . . interstate or foreign commerce.' ").

44. *See* United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996).

45. 507 U.S. 170, 179 (1993).

46. *Id*. at 184.

or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery."[47] This analysis is particularly important in public corruption cases because it can allow for the prosecution of an individual who does not hold a public office or official authority for using bribery to control how an office operates.

B. Public Office as the RICO Enterprise

In public corruption cases, federal prosecutors frequently include the governmental office that the official occupied as part of the RICO enterprise. Whether charged as an association-in-fact enterprise or with the public office as the enterprise, the lower courts have been nearly unanimous that the statutory definition of an enterprise is broad enough to incorporate governmental bodies, regardless of their legal status.[48] As the Seventh Circuit explained in *United States v. Lee Stoller Enterprises, Inc.*, "[C]onsideration of the purpose of Organized Crime Control Act, the plain words of the RICO statute, and the volume of past precedent leads us to conclude here again that a public entity may constitute an 'enterprise' within the meaning of RICO."[49]

In *United States v. Angelilli*, the Second Circuit described the breadth of the definition of an enterprise under § 1961(5) as clearly encompassing government offices. The circuit court pointed out that the definition "includes" the list of entities, and does not state those are the only forms of organization that can constitute an enterprise. Further, "the use of the word 'any' indicates an intent to make the list all-inclusive," while "the word 'entity' itself is hardly restrictive. It denotes anything that exists. As modified by the word 'legal,' it suggests that any being whose existence is recognized by law is within the term 'enterprise.'"[50] Thus, the circuit court rejected the defense claim that the New York City Civil Court was not an enterprise.

The First Circuit explained in *United States v. Cianci* how the government office can be part of an enterprise. The defendants were accused of operating the City of Providence, Rhode Island, through bribery, and the city was alleged to be part of the association-in-fact enterprise. Rejecting the defendant's argument that a municipality cannot have an unlawful purpose, the circuit court stated that "[a] RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members when the latter exploits the former to carry out that purpose."[51] While the city could not be charged as a defendant, it could participate

47. *Id.*

48. In *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), the district court ruled that the State of Maryland could not be the RICO enterprise because the statute did not authorize a government to be the enterprise. The Fourth Circuit has subsequently rejected the holding in *Mandel* and upheld RICO convictions in which government offices were identified as the enterprise. *See* United States v. Long, 651 F.2d 239, 241 (4th Cir. 1981) (specifically rejecting defendant's argument based on *Mandel* that the office of a South Carolina state senator could not be a RICO enterprise); United States v. Altomare, 625 F.2d 5 (4th Cir. 1980) (state prosecutor's office as the RICO enterprise); United States v. Baker, 617 F.2d 1060 (4th Cir. 1980) (sheriff's department as the RICO enterprise).

49. 652 F.2d 1313, 1319 (7th Cir. 1981).

50. 660 F.2d 23, 31 (2nd Cir. 1981).

51. 378 F.3d 71, 83 (1st Cir. 2004).

in the illegal conduct through the acts of its authorized agents, and, in this case, its mayor and the director of administration.[52]

The Sixth Circuit cautioned prosecutors in *United States v. Thompson* about identifying a public office as the RICO enterprise because the language of the indictment "may also needlessly cast unfair reflection upon innocent individuals."[53] The case involved three defendants who solicited bribes for pardons from the governor, and the indictment stated that "The Office of Governor of Tennessee" was the enterprise. An enterprise is not necessarily corrupt when a public official is charged with a violation for misuse of authority, only that the office may be used corruptly by that official. In that light, the Sixth Circuit, sitting en banc, urged prosecutors to use great care when identifying a state or local office as the enterprise, suggesting the following:

> [T]he language which could and we believe preferably should have been employed, would have alleged that the three defendants constituted a "group of individuals associated in fact although not a legal entity which made use of the Office of Governor of the State of Tennessee" for the particular racketeering activities alleged in the indictment.[54]

The Seventh Circuit endorsed *Thompson*'s caution to prosecutors about identifying a government office as the RICO enterprise, although the circuit court noted that doing so was not forbidden by the statute. In *United States v. Warner*, the circuit court reviewed the convictions of former Illinois Governor George Ryan and one of his long-time supporters for soliciting bribes while he was the Illinois secretary of state. Rejecting the claim that identifying the State of Illinois as the RICO enterprise was impermissible, the Seventh Circuit found that this was an "exceptional" case supporting prosecutors using the state itself as the enterprise because "there was no single entity or office that it could have identified, short of the state as a whole, that would have encompassed the enterprise that was used by the defendants."[55] Echoing *Thompson*'s concern about the taint on the government office charged as the enterprise, the circuit court noted that "[t]his of course does not mean that the state itself has violated any federal law; it may instead be a victim of the overall scheme, as are many RICO enterprises."[56]

The enterprise need not have a separate legal existence as a government office or agency, and it is sufficient so long as it has an organizational structure through which public authority was exercised in relation to the state law bribery or federal racketeering offenses alleged as part of the pattern. The following are examples of the types of government offices that have been identified as the RICO enterprise in federal prosecutions:

52. *Id.* at 85 ("Insofar as Cianci's and the other defendants' criminal schemes were or would be carried out by themselves and others acting in their municipal roles, the City—if only to that extent—did share in the same common criminal purpose.").

53. 685 F.2d 993, 1000 (6th Cir. 1982).

54. *Id.*

55. 498 F.3d 666, 696 (7th Cir. 2007).

56. *Id.*

- *Offices of Elected Representatives*: Members of Congress who have been charged with RICO violations in which their office was part of the enterprise include Mario Biaggi,[57] Albert Bustamante,[58] Nicholas Mavroules,[59] Joseph McDade,[60] and James Traficant,[61] and state elected officials include a South Carolina state senator[62] and an aide to a California state representative.[63]
- *State Courts*: Among the courts identified as enterprises are the 18th Michigan District Court,[64] the Municipal Court of the City of El Paso,[65] the New York City Civil Court,[66] the Cook County Courts,[67] Office of the County Judge of Craighead County, Arkansas,[68] the Philadelphia Traffic Court,[69] and the Florida Third Judicial Circuit.[70]
- *State and Local Government Offices*: Among the state and local governmental offices alleged as the RICO enterprise are the Mahoning County (Ohio) Sheriff's Office,[71] the Philadelphia (Pennsylvania) Construction Services Department,[72] the Macon (Georgia) Police Department,[73] the Prosecuting Attorney of Hancock County (West Virginia),[74] the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes,[75] the Office of Governor of Tennessee,[76] and the State of Illinois.[77]

57. United States v. Biaggi, 909 F.2d 662 (2nd Cir. 1990) (RICO conviction reversed).
58. United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) (RICO conviction affirmed).
59. United States v. Mavroules, 819 F. Supp. 1109 (D. Mass. 1993) (RICO charge upheld, defendant eventually pleaded guilty to other charges).
60. United States v. McDade, 827 F. Supp. 1153 (RICO charge upheld, defendant acquitted at trial).
61. United States v. Traficant, 368 F.3d 646 (6th Cir. 2004) (RICO conviction affirmed).
62. United States v. Long, 651 F.2d 239 (4th Cir. 1981).
63. United States v. Freeman, 6 F.3d 586 (9th Cir. 1993).
64. United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985).
65. United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981).
66. United States v. Angelilli, 660 F.2d 23 (2nd Cir. 1981).
67. United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985).
68. United States v. Clark, 646 F.2d 1259 (8th Cir. 1981).
69. United States v. Bacheler, 611 F.2d 443 (3rd Cir. 1979).
70. United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981).
71. United States v. Davis, 707 F.2d 880 (6th Cir. 1983).
72. United States v. Urban, 404 F.3d 754 (3rd Cir. 2005).
73. United States v. Brown, 555 F.2d 407 (5th Cir. 1977).
74. United States v. Altomare, 625 F.2d 5 (4th Cir. 1980).
75. United States v. Frumento, 563 F.2d 1083 (3rd Cir. 1977).
76. United States v. Thompson, 685 F.2d 993 (6th Cir. 1982).
77. United States v. Warner, 498 F.3d 666, 696 (7th Cir. 2007).

| 14 |

VENUE IN FEDERAL CORRUPTION PROSECUTIONS

Venue in federal criminal cases involves the intersection of constitutional provisions, statutes, and rules. During the colonial period, the right to a trial by jurors of the place where the offense had been committed was considered vital. In 1769, Parliament, over strong objections in the colonies, proposed taking Americans to England or to another colony for trial in treason cases. The colonial legislatures quickly denounced this move, and the Declaration of Independence included a denouncement of the King "for transporting us beyond Seas to be tried for pretended offences."

The Constitution contains explicit protections for the defendant's right to trial where the crime occurred. Article III, Section 2 provides that the trial of all federal crimes "shall be held in the State where the said Crimes shall have been committed." While that provision also provides for a right to a jury trial, the Constitution does not specify the location from which the jurors will be drawn, called the "vicinage." The Sixth Amendment requires that the jury be "of the State and district" where the crime was committed. The term "district" does not have any clearly defined constitutional meaning. As one commentator noted, "By using the term 'district,' the Sixth Amendment left it to Congress (which defined the bounds of federal judicial districts) to decide how local to make federal juries."[1] Congress has, by statute, divided many of the states into different districts, and large single-district states, such as Montana, New Mexico, and Minnesota, along with some larger districts, have different divisions within them to limit the pool of potential jurors.

This technical distinction between venue and vicinage is of no real importance at the federal level.

1. Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 Wash. L. Rev. 271, 303 (2005).

> Although in theory both constitutional provisions could be satisfied by trying a defendant in one district of a state though the offense was committed in another district, so long as the jurors were selected from the district of the crime, no such procedure has ever been attempted, and it has been considered that trial in the district of the offense is required. [2]

Federal Rule of Criminal Procedure 18 restates the basic constitutional requirement by providing that "the prosecution shall be had in a district in which the offense was committed." Venue must be proper for each count of an indictment and for each defendant (if there are multiple defendants charged).[3] There is no statutory definition of what it means to "commit" a crime, so the Supreme Court and lower courts have been left to develop tests for ascertaining where the proper location of a criminal case should be.

A defendant may waive the right to be tried in the place where the crime was committed either by expressly seeking a change of venue or by failing to object to the government's choice of venue when it is clear that the case could not be brought where it was. Under Rule 18, a defendant—but not the prosecutor—can move for a change of venue due to prejudicial pretrial publicity, or because it will be more convenient for the parties and witnesses and is in the interest of justice.[4] A court may not order a change of venue even if prejudicial pretrial publicity would have supported such a decision if the defendant does not agree to the change.[5]

If venue is improper, a defendant must call it to the court's attention when the problem becomes apparent; otherwise, the objection to venue is waived. The Fifth Circuit explained in *United States v. Stratton* that "[t]he essential factors in determining whether a defendant has waived his constitutional venue right are knowledge of the right, the free exercise of an uncoerced will, and conduct or action known to the accused which evidences an intent to waive."[6] A defendant's silence on the issue can constitute a waiver of the right, which is quite different from the treatment of waiver of other constitutional protections, which usually requires the government to show that the waiver was knowing, intelligent, and voluntary.[7]

2. Wright & Henning, Federal Practice & Procedure: Criminal § 301 (4th ed. 2009).

3. United States v. Root, 585 F.3d 145, 155 (3rd Cir. 2009) ("[V]enue must be proper for each count of the indictment."); United States v. Giovanelli, 747 F. Supp. 875, 885 (S.D.N.Y. 1990) ("[V]enue would be proper as to each defendant in any district in which the criminal conduct began, continued or concluded.").

4. The operative provisions of Rule 21 begin by stating that "Upon the defendant's motion" the transfer of the case for trial can be ordered, so that the government cannot seek a change of venue. The prosecutor selects the venue when deciding to seek an indictment, and so cannot later seek a change of venue to alter that decision.

5. United States v. Stratton, 649 F.2d 1066, 1077 (5th Cir. 1981) ("The court does not have the option of waiving the option of waiving this right on behalf of the defendant and transferring venue, even if the trial judge sincerely believes that such action would be for defendant's own good.").

6. *Id.*

7. *See* United States v. White, 590 F.3d 1210, 1214 (11th Cir. 2009) ("This issue is not whether White was aware of Rule 21, but whether he knowingly and voluntary waived his constitutional right to be tried in the district in which his offense occurred. There is simply no evidence White or his lawyer was unaware of his constitutional right. Not only did he acknowledge his right to be tried in the district in which the offense was committed in his motion for a change of division by citing directly to Rule 18, but he also failed to object when the court transferred the case to another district. He also did not object before or during the trial. Instead, he waited until after he was convicted to complain that the district

In addition to being a constitutional right, venue is considered to be an element of every offense that the government must prove. Unlike other elements of a crime, however, the government need only prove venue by a preponderance of the evidence, not beyond a reasonable doubt.[8] A court will not instruct the jury to determine whether venue was proper in the district unless the defendant offers some evidence showing that there is a reasonable factual dispute over the issue.[9]

Jurisdiction over an offense must be distinguished from venue. A federal court has jurisdiction to adjudicate a case if a federal statute or the Constitution grants it authority over the subject matter of the proceeding, while venue denotes the location of the proceeding. The federal venue provisions allocate the authority to pursue prosecutions among the different federal districts. Unlike subject-matter jurisdiction, venue does not involve the power of the court to adjudicate a case, but it is a constitutional requirement that the case be tried where the crime was committed. While a court cannot hear a case over which it does not have jurisdiction, venue can be waived by a defendant because it is a protection available to the individual that does not involve judicial authority to decide the case. A prosecution that is not within the federal court's jurisdiction or when the defendant properly objected to it being in an unauthorized venue has the same result because the case must be terminated. Thus, the terms "jurisdiction" and "venue" are sometimes used interchangeably, but, in fact, they apply to different aspects of a criminal prosecution.

I. THE PROCESS OF DETERMINING VENUE

The constitutional requirement of prosecution where the crime was committed is easily understood in cases involving most common law offenses, such as murder or robbery, which usually occur in a single location. Even many corruption prosecutions involve conduct in a particular locale, especially cases involving local officials, and so venue in those cases is often easy to determine. For more complex schemes involving conduct over an extended period and a number of different participants, determining where the crime was committed may not be an easy task.

If a federal statute prescribes the appropriate venue for its prosecution, then that provision controls where the case can be filed. There is no requirement that a crime be prosecuted in only one location if the venue provision authorizes prosecution in different ones, in which case it is a matter of prosecutorial discretion about where the case should be pursued. Federal Rule of

court had transferred the case, *sua sponte*. Because there is no evidence he was unaware of his right, we construe his silence as an implied waiver.").

8. *See* United States v. Rommy, 506 F.3d 108, 119 (2nd Cir. 2007) ("[T]he venue requirement, despite its constitutional pedigree, is not an element of a crime so as to require proof beyond a reasonable doubt; rather, venue need be proved only by a preponderance of the evidence."); United States v. Stickle, 454 F.3d 1265, 1271 (11th Cir. 2006) ("It has long been settled that when the government is proving a non-essential element of a crime, like venue, the prosecution is not required to meet the reasonable doubt standard.").

9. United States v. Perez, 280 F.3d 318, 334 (3rd Cir. 2002) ("[W]here the indictment alleges venue without a facially obvious defect, if (1) the defendant objects to venue prior to or at the close of the prosecution's case-in-chief, (2) there is a genuine issue of material fact with regard to proper venue, and (3) the defendant timely requests a jury instruction, venue becomes a jury question and the court must specifically instruct the jury on venue.").

Criminal Procedure 21(b) permits a district court to transfer a case to another jurisdiction "for the convenience of the parties and witnesses and in the interest of justice." This Rule only authorizes a defendant to seek a transfer, not the government, which must live with its venue choice absent a request by the defendant to move the trial to a different district. If a court grants a defendant's Rule 21(b) motion, the case can be transferred to any district regardless of whether venue would have been proper there, because the defendant's motion operates as a waiver of the constitutional venue requirement.[10]

The vast majority of federal crimes, including most public corruption offenses, do not have a specific venue provision, so the general federal venue statute, 18 U.S.C. § 3237, controls the location of the prosecution. The statute is particularly important for "continuing" offenses that occur in multiple locations by permitting prosecution in different districts. The statute provides:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

A court must ascertain whether the venue chosen by the government is proper by analyzing the conduct that constitutes the offense. The initial question in a prosecution involving a statute that does not contain a specific venue provision is whether the crime can be committed in only a single location, which is then the sole proper venue for the case, or whether it can be committed in multiple locations because it is a continuing offense. If it is a continuing offense, then it comes within § 3237(a), which allows charges to be filed in any district where the crime "was begun, continued, or completed."

At one time, a number of courts analyzed statutes by looking at the verb(s) used to describe the offense. The so-called "verb test" focused on the essential act described in the statute that made it a crime, which would then provide the appropriate venue for the prosecution. If the verb entailed continuing conduct, then under § 3237(a), it could be charged in any place where the relevant act occurred. For example, a statute making it a crime to "knowingly deposit" obscene materials in the mail was held to limit venue to the place where the item entered into the mails and not the location of its receipt.[11] In response, Congress amended the statute to proscribe the mailing or delivery of

10. United States v. Roberts, 618 F.2d 530, 537 (9th Cir. 1980); Jones v. Gasch, 404 F.2d 1231, 1234–35 (D.C. Cir. 1967).
11. United States v. Ross, 205 F.2d 619, 620–21 (10th Cir. 1953).

obscene matter, thus expanding the potential site of a criminal prosecution to where the item entered the mails or where it reached the intended recipient.[12]

The Supreme Court changed the focus from the verb(s) in statutes to a broader consideration of the nature of the crime charged in the indictment to ascertain the proper venue for prosecution. In *United States v. Cabrales*, the Court held that a money-laundering prosecution could not be maintained in Missouri when the financial transactions occurred entirely in Florida, even though the money came from drug sales in Missouri. The Court held that "the *locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it."[13] The Court noted that a charge of money laundering might be a continuing offense if it involved transporting money from one locale to another, but, in this case, the offense involved transactions only in Florida, so any prior criminal activity in Missouri was of "no moment."[14]

A year after *Cabrales*, in *United States v. Rodriguez-Moreno*, the Court limited the verb test as a means of determining the appropriate venue:

> We have never before held, and decline to do so here, that verbs are the sole consideration in identifying the conduct that constitutes an offense. While the "verb test" certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed.[15]

The defendant was charged with kidnapping and using a weapon during the commission of a crime of violence in a case that involved forcibly moving the victim from Texas to New Jersey and then to Maryland as part of a drug deal. The government charged the defendant in New Jersey, even though the only place the defendant had possession of the gun was in Maryland, and the Court held that venue was proper in any district in which the underlying crime of violence occurred.

Rodriguez-Moreno's broader focus requires a more nuanced review of the statute's scope to determine where proper venue lies. The Court adopted an expansive, although imprecise, description of the statutory analysis required: "[A] court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts."[16]

12. 18 U.S.C. § 1461, as amended by Act of Aug. 28, 1958, Pub. L. No. 85-796, 72 Stat. 962 (1958).

13. 524 U.S. 1, 7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

14. *Id.* at 8. The Court explained that "Cabrales, however, dispatched no missive from one State into another. The counts before us portray her and the money she deposited and withdrew as moving inside Florida only." *Id.* at 9. Congress amended the money-laundering statute after *Cabrales* to expand venue under the statute to any location where the underlying specified unlawful activity, such as drug dealing or bribery, could also be prosecuted so long as the defendant participated in the transfer of proceeds from that district. 18 U.S.C. § 1956(i)(B), as amended by USA Patriot Act, Pub. L. No. 107-56, § 1004, 115 Stat. 272 (2001).

15. 526 U.S. 275, 279 (1999).

16. *Id.*

Even before *Rodriguez-Moreno* rejected a strict application of the verb test as the sole means of determining venue, there was significant authority in the lower courts rejecting the view that the Constitution commands a single exclusive venue. Courts have moved toward a "substantial contacts" analysis for determining the proper venue that can result in multiple jurisdictions as the proper venue for trying the case, as described by the Second Circuit in *United States v. Reed*:

> [A] review of relevant authorities demonstrates that there is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding. . . .[17]

Courts tend to apply the substantial contacts test to determine whether venue is proper in a particular district in cases in which the defendant's acts did not take place there, but the effects of the criminal conduct are felt there.[18]

Cabrales and *Rodriguez-Moreno* take a flexible, highly fact-specific approach to determining venue based on the nature of the crime set forth in the statute and the type of conduct charged in the indictment. The starting point in each case is the statutory language, to determine whether the provision incorporates a description of the appropriate venue and whether it is a continuing offense, and then a consideration of what the government charged to determine where in particular the crime was committed.

Corruption statutes often involve a range of different means to commit the offense, which can result in a number of locations being suitable as the venue for a prosecution. In the following sections, the venue analysis for the primary corruption statutes is reviewed.

II. VENUE FOR BRIBES AND UNLAWFUL GRATUITIES

There are a number of different federal statutes that address the solicitation and offer of bribes and gratuities. The provisions often cover a range of conduct from the initial contact in seeking or offering a benefit to the actual transfer of value to the public official, so venue may be limited to a single jurisdiction or a case could be filed in a number of different districts because of the variety of acts involved in the process. Because the statutes do not specify a particular venue for the

17. 773 F.2d 477, 481 (2nd Cir. 1985). In *Reed*, the circuit court held that a perjury prosecution based on false testimony given by the defendant in a deposition taken in California for use in a civil action in New York could properly be brought in the Southern District of New York and that a prosecution for obstruction of justice was proper in the district in which the proceeding sought to be obstructed was pending.

18. *See* United States v. Saavedra, 223 F.3d 85, 93 (2nd Cir. 2000) ("The substantial contacts rule offers guidance on how to determine whether the location of venue is constitutional, especially in those cases where the defendant's acts did not take place within the district selected as the venue for trial.").

prosecution, the starting point for the analysis is the statutory language to determine the conduct constituting the offense.

A. 18 U.S.C. § 201

Section 201(b) reaches any person who "gives, offers or promises" anything of value to an official, and any official who "demands, seeks, receives, accepts, or agrees to receive or accept" the benefit, either as a bribe or as a reward. The statute can be violated in multiple ways, and there is no single act that constitutes the offense. Therefore, venue can be appropriate in a number of districts depending on the course of conduct alleged in the indictment.

What § 201(b) does not incorporate is an element related to the actual exercise of authority by the official or a benefit received by the offeror. While that is often powerful evidence of the *quid pro quo*, such conduct, if it occurred, would not be relevant to the determination of the proper venue for the prosecution. In *United States v. O'Donnell*, the Sixth Circuit explained that

> [t]he critical event in the commission of the crime is the actual giving or the offer to give or transfer money or other thing of value, absent which no offense is committed under the statute. In view of the focus of the statute upon these physical aspects, it is not unreasonable to conclude that venue must be laid in the district in which the[se] events occurred.[19]

The District of Columbia Circuit reached the same conclusion in *United States v. White*, holding that "venue for bribery lies only in a district in which the defendant committed unlawful acts and is not proper in a district where only the effects of the crime occur."[20]

Under § 3237(a), bribery can be a continuing offense, so venue may be proper in any place where the conduct "was begun, continued, or completed." In *Palliser v. United States*, the Supreme Court held that venue was proper in Connecticut when the defendant sent through the mails an item from New York to Connecticut soliciting the local postmaster to violate a provision of federal law requiring that postage stamps only be dispensed for cash. This was, in effect, an attempt to

19. 510 F.2d 1190, 1194 (6th Cir. 1975). *O'Donnell* involved an obstruction of justice charge, and the Sixth Circuit discussed venue under §201(b) to contrast the potential venue for that charge as opposed to the obstruction charge. The circuit court held that venue for an obstruction charge can include the district in which the proceeding occurred along with where the actual obstructive conduct took place because the crime takes into account the impact on the proceeding. In contrast, bribery does not involve any actual exercise of governmental authority so the location of an actual decision or implementation of public authority, such as where a bribed legislator voted on a bill, could not be the venue for the criminal prosecution absent additional conduct in that district. It stated, "The place of the intended result is irrelevant and the statute does not focus on it." *Id.*

20. 887 F.2d 267, 272 (D.C. Cir. 1989). The government official, Finotti, worked in the District of Columbia for the General Services Administration, and took payments from a co-defendant, White, to favor his company's interests. Although Finotti engaged in a number of acts benefiting the company while performing his job, the discussions about the payments were held in North Carolina and Virginia, and payments were mailed from North Carolina to Finotti's home in Maryland, so venue was not proper in the District of Columbia when no act that was part of the agreement to influence took place there.

bribe the postmaster to transfer the stamps for different consideration, and the Court upheld the prosecution in Connecticut, finding that "there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut. . . ."[21] The Court applied *Palliser* in *Benson v. Henkel* to reject a challenge to a bribery prosecution in the District of Columbia based on the payment being mailed from California to Washington, D.C.[22]

A similar view of what constitutes a continuing bribery offense arose in *United States v. Stephenson*, when the Second Circuit found that telephone calls by the defendant from Washington, D.C., to New York City were sufficient to establish venue in the Southern District of New York, even though the defendant never entered the district. The defendant was a federal export licensing officer working in the District of Columbia and he called the victims, who were in New York City, to inform them that their application for an export license was likely to be denied unless they gave him 5 percent of the contract. The circuit court found that the defendant's corrupt demand could not have been accomplished "without entering, by telephone, the Southern District of New York, where his briber targets conducted business."[23] The approach in *Stephenson* is similar to the analysis in *Palliser* and *Benson* that involved mailings, and so an electronic transmission is similar to a mailing in that it is part of the bribery process and so venue is proper in any location where the call was made or received.

At one time, courts were concerned about the proper venue for a prosecution when the payment was made by a check. In *Burton v. United States*, a U.S. Senator was convicted in Missouri for accepting compensation for representation before a department of the United States, a prohibition now contained in 18 U.S.C. § 203. Senator Joseph Burton deposited the checks he received from a company in Missouri in a bank in Washington, D.C., and did not do anything in his home state to represent the company in seeking a contract from the post office department. Applying the commercial law of that time, the Court overturned the conviction because the Washington bank took ownership of the check before it was presented to the Missouri bank for payment, so venue was improper in Missouri because the senator did not engage in any prohibited conduct in that state.[24]

If the commercial law in a state is different regarding ownership of the check, then the location of the bank whose account furnished the bribe or unlawful gratuity can be a proper venue for a prosecution. In *United States v. Baxter*, the Third Circuit upheld a § 201 conviction of an official who received unlawful gratuities in Virginia that were provided by check from a company whose bank was in Pennsylvania. The circuit court explained that the defendant's bank, "acting as his agent, went to the Eastern District of Pennsylvania to receive payment of the gratuities. Baxter is

21. 136 U.S. 257, 267 (1890).

22. 198 U.S. 1, 15 (1905).

23. 895 F.2d 867, 874 (2nd Cir. 1990).

24. 196 U.S. 283, 304 (2005). The Court stated, "The payment of the money was in Washington, and there was no commencement of that offense when the office of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri." *Id.*

thus deemed to have received the illegal gratuities in the Eastern District of Pennsylvania. Since the crimes were committed in that district, venue was proper there."[25]

While *Burton* focused on the narrower issue of ownership of a check, the prosecution involved improper compensation, which the Court did not view as a continuing offense that would have allowed a prosecution in Missouri because that is where the check was sent from. In bribery and unlawful gratuities cases, the transfer of funds from one district to another can be the basis for providing venue in more than one location, depending on how the payment was made. In *United States v. Ellenbogen*, the Second Circuit upheld a § 201(b) bribery conviction for giving a government official $3,000 toward the down payment on a house in New Jersey. The case was prosecuted in the Southern District of New York and, although the conversations with the official occurred in New Jersey, venue was proper because "[t]here was no bribery until Ellenbogen made the payment by mailing the check from New York."[26] The circuit court noted that under § 3237 the process of making the bribe made this a continuing offense.

Courts take a commonsense view of the acts that can be part of the bribe or unlawful gratuity to provide a basis for finding venue in a district. In *United States v. Niederberger*, the defendant was an IRS employee who took golfing trips that were paid for by a corporation whose tax audits he was responsible for supervising. Each of the trips originated in Pittsburgh, but the actual benefits he received—the golf junkets—took place in other states. The Third Circuit rejected the argument that the Western District of Pennsylvania was not a proper venue because the crime was a continuing offense, so "the acts which began in Pittsburgh, even though it may be argued that the acts were completed elsewhere, are sufficient to establish venue in the Western District of Pennsylvania for those activities charged in the indictment which took place in other locations."[27] Similarly, the Seventh Circuit rejected a challenge to venue in the Northern District of Illinois when part of the bribery transaction took place in an office in Chicago.[28]

B. 18 U.S.C. § 666

The bribery and unlawful gratuities portion of § 666 describes the offense as corruptly "solicits or demands for the benefit of any person, or accepts or agrees to accept" for the official, and "gives, offers, or agrees to give" for the offeror. This language is similar to § 201, and courts have interpreted them identically in identifying the elements of the corruption offense. While § 666 includes, as an additional element, the receipt by a state or local government, or a government-funded program, of $10,000 in federal benefits in a twelve-month period, that is not part of the conduct element of the offense and has no effect on venue. As a practical matter, the vast majority of § 666 prosecutions occur where the governmental or federally funded program is, perhaps because the

25. 884 F.2d 734, 737 (3rd Cir. 1989).

26. 365 F.2d 982, 989 (2nd Cir. 1966).

27. 580 F.2d 63, 70 (3rd Cir. 1978).

28. 222 F.2d 144, 158 (7th Cir. 1955). The circuit court took judicial notice that Chicago is in the Northern District of Illinois. *Id.*

proof of the federal benefits element will be easier with the availability of local witnesses who can testify about the receipt of funding.

The issue of venue in a § 666 prosecution has not been the subject of any published judicial decisions. The similarity in the conduct prohibited in § 666 and § 201 means that cases analyzing the proper venue for bribery and unlawful gratuities involving federal officials should be relevant for a prosecution of state and local officials. The history of § 666 as a means to supplement the scope of § 201 further supports the conclusion that the venue analysis should be identical for both provisions.

III. THE HOBBS ACT (18 U.S.C. § 1951)

In the context of a corruption prosecution, the Hobbs Act prohibits extortion under color of official right that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." The broad jurisdictional basis for a Hobbs Act prosecution has an equally significant impact on the proper venue for the trial. Courts have uniformly held that any location in which the extortionate act affects commerce is a proper venue for the case because the conduct that makes this a federal offense is affecting interstate commerce.[29] In *United States v. Craig*, one of the earliest Hobbs Act prosecutions for bribery, the Seventh Circuit upheld the prosecution of two state legislators, who were from Southern Illinois, in the Northern District of Illinois because the money used to pay the bribes came from a company's petty cash fund located in Chicago, and, therefore, commerce was affected in that district.[30] Therefore, unlike a bribery prosecution under § 201 and § 666, under which venue would not be permissible in the district based solely on an official act performed there, a Hobbs Act charge may allow for a broader choice of venue because conduct can affect commerce in the district in which the extortion's impact was felt.

The extortionate acts can also serve as the basis for venue, which means the process of entering into the *quid pro quo* necessary for a bribery prosecution can occur in a number of locations. Courts are clear that a Hobbs Act violation can be a continuing offense under § 3237(a), so any step in the process of extortion under color of official right, such as multiple payments, will suffice

29. *See* United States v. Bowens, 224 F.3d 302, 313 (4th Cir. 2000) ("Thus, in a prosecution under the Hobbs Act, venue is proper in any district where commerce is affected because the terms of the statute itself forbid *affecting commerce* in particular ways.") (italics in original); United States v. Stephenson, 895 F.2d 867, 875 (2nd Cir. 1990) ("Venue under the Hobbs Act is proper in any district where interstate commerce is affected or wherever the alleged acts took place."); United States v. Lewis, 797 F.2d 358, 367 (7th Cir. 1986) ("[T]he effect on commerce needed to support venue in a Hobbs Act case goes to the very limits of the power of the federal authorities to regulate such activities. This court, therefore, has long held that venue for a Hobbs Act prosecution lies in any district where the requisite effect on commerce is present, even if the acts of extortion occur outside the jurisdiction."); United States v. Floyd, 228 F.2d 913, 918 (7th Cir. 1956) ("While no case is called to our attention and we find none on the point, we think it plain that it was the intention and purpose of congress to authorize the laying of venue in any District wherein commerce is affected, and this irrespective both of defendant's residence and the place where the coercive threats are made.").

30. 573 F.2d 513, 517 (7th Cir. 1978) ("Because the extortion affected commerce in Chicago, the District Court for the Northern District of Illinois was empowered to entertain that charge, regardless of the fact that defendants may have been prosecuted in another district under venue principles pertaining to conspiracy.").

to furnish the necessary connection for venue in every district in which they occur.[31] In *United States v. Royer*, the Second Circuit upheld venue in the Eastern District of New York, even though none of the defendants engaged in any conduct there, because the extortionate acts included conduct by a subscriber to a website living in that district who offered to investigate the victim, thereby putting pressure on him to make the extorted payment to the defendants.[32]

IV. THE TRAVEL ACT (18 U.S.C. § 1952)

The Travel Act reaches any person who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce" with the intent to engage in unlawful activity, and thereafter engages or attempts to engage in conduct that includes bribery in violation of federal or state law. The key conduct element of the offense is the interstate travel, use of the mails, or a facility of interstate commerce, so the potential venue for a prosecution can be quite broad depending on the method used to engage in the unlawful act.

One aspect of the Travel Act is the timing aspect: the performance or attempted performance of the unlawful act must occur after the travel or use of the mails or facility of interstate commerce. This would seem to limit venue to those locations involved *after* the defendant begins the process of engaging in the unlawful activity, effectively ruling out the starting point for the travel or transmission. This interpretation would distinguish venue under the Travel Act from other bribery-related offenses that include the location where the mailing or wire was sent as part of the offer or solicitation of a bribe.

One circuit seemed to endorse this approach, although its analysis is cryptic at best and arguably did not view the Travel Act as only applying once the travel begins. In *Spinelli v. United States*, the Eighth Circuit briefly discussed venue for a Travel Act charged, stating:

> The substantive violation of this statute took place when appellant crossed into Missouri with the requisite intent and thereafter attempted or committed an illegal act in Missouri. The crime was, therefore, committed in Missouri. Appellant was tried in the United States District Court for the Eastern District of Missouri. Appellant's allegation of a violation of his Sixth Amendment right to be tried in the district in which the crime was committed, has obviously not been violated.[33]

The circuit court did not find a violation of the defendant's venue right, and its assertion that the crime occurred when the defendant crossed into Missouri does not preclude venue in the location from which the travel began, instead only asserting that venue is unassailable where the government filed the case. Nevertheless, *Spinelli* can plausibly be read to limit venue to those

31. *See* United States v. Smith, 198 F.3d 377, 384 (2nd Cir. 1999) (because multiple payments makes extortion a continuing offense for statute of limitations purposes, the same analysis must apply to venue).

32. 549 F.3d 886, 896 (2nd Cir. 2008).

33. 382 F.2d 871, 890 (8th Cir. 1967).

locations through which a defendant traveled *after* interstate travel has commenced, although it is doubtful that is what the Eighth Circuit meant when it made a brief reference to the issue.

Subsequent lower court decisions have uniformly rejected *Spinelli*'s purportedly limited reading of venue under the Travel Act, relying on § 3237(a) to authorize venue where the travel (or mailing or transmission in interstate commerce) began. In *United States v. Polizzi*, the Ninth Circuit found that a Travel Act violation is a continuing offense, and, therefore, "[A] defendant can be prosecuted for traveling in violation of section 1952, or for aiding and abetting such travel, in any district in which the travel occurred."[34] In *United States v. Blitstein*, the Tenth Circuit specifically rejected *Spinelli*'s arguably narrow reading of the Travel Act, holding that venue was proper in Colorado for a defendant who traveled from there to California to extort a victim.[35]

V. MAIL AND WIRE FRAUD

A. Mail Fraud (18 U.S.C. § 1341)

Congress enacted the first version of the mail fraud statute in 1868 to outlaw use of the mails for sending letters or circulars for lotteries. Over the years, the statute has been broadened considerably, so it now reaches any scheme or artifice to defraud, as part of its execution, a person who

> places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing. . . .

A 1994 amendment added the use of a private or commercial interstate carrier to the statute to cover frauds involving the use of expedited delivery services, such as UPS or FedEx, which are not part of the postal system but operate in much the same way.[36]

In *Salinger v. Loisel*, the Supreme Court rejected the argument that the defendant's presence in the district was required for a prosecution because the statute covers both the place where the item was deposited and where it was delivered.[37] While the target of the criminal prohibition is fraud,

34. 500 F.2d 856, 899 (9th Cir. 1974).

35. 626 F.2d 774, 782–83 (10th Cir. 1980). Other courts recognizing the starting point of the defendant's travel as a proper venue for a Travel Act prosecution are the Fourth, Fifth, and Eleventh Circuits. *See* United States v. Burns, 990 F.2d 1426, 1437 (4th Cir. 1993); United States v. Pepe, 747 F.2d 632, 660 n. 44 (11th Cir. 1984); United States v. Guinn, 454 F.2d 29, 33 (5th Cir. 1972).

36. For a history of the mail fraud statute, *see* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435 (1995).

37. 265 U.S. 224, 234 (1924) ("[W]here the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit.").

for venue purposes, the lower courts have disagreed on whether the proper location for a prosecution is tied to just the use of the mails or an interstate carrier as set forth in § 1341, or whether a district through which the item traveled can also be a proper venue. The issue concerns whether the second paragraph of § 3237(a) applies to mail fraud, so venue is proper in any district "from, through, or into which" the mailing or transportation of an item in interstate commerce moved.

Although there is a disagreement among the circuit courts regarding the applicability of § 3237(a) to the mail fraud statute, all agree that conduct related to conceiving or implementing the scheme to defraud cannot provide venue for a prosecution if no use of the mails is made there. In *United States v. Ramirez*, the Second Circuit rejected the argument that acts related to devising a fraudulent scheme, unrelated to any mailing or use of an interstate carrier, supported venue in the district in which they occurred. The circuit court explained that while conceiving and engaging in conduct related to the scheme is "an essential element" of the crime, it "is not an essential *conduct* element for purposes of establishing venue."[38] The Second Circuit explained that "[u]nless this limitation were respected, a defendant who devised a scheme to defraud while driving across the country could be prosecuted in virtually any venue through which he passed."[39]

The key to the analysis is the second paragraph of § 3237(a), which provides that "[a]ny offense involving the use of the mails,. . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such * * * mail matter * * * moves." The mail fraud statute certainly involves the "use of the mails," but the language of § 1341 can be read to expressly provide the appropriate venue for a prosecution, that being where the item was deposited, delivered, or caused to be such by the mail or an interstate carrier, which would take it out of the continuing offense category created by § 3237(a).

The second paragraph of § 3237(a) was added to the venue statute in 1948 in response to the Supreme Court's decision in *United States v. Johnson*, holding that an offense under the Federal Denture Act was complete when the goods are deposited in the mail, and so venue was not proper at the place of delivery. The statute prohibited mailing of dentures not cast by dentists licensed by the state and the Court found it significant that the statute did not specifically provide for venue at the place of receipt, only prohibiting the "sending or bringing into" a state the dentures. The Court stated that

> it is inadmissible to suggest either oversight on the part of Congress in failing to make provision for choice of venue or to make the cavalier assumption that that which is specifically provided for in other enactments—i.e., trial in more than one district—was authorized but through parsimony of language left unexpressed in the Federal Denture Act.[40]

38. 420 F.3d 134, 145 (2nd Cir. 2005) (italics in original). The prosecution involved a scheme involving an immigration lawyer and a doctor to falsely state that the lawyer's clients would have jobs in order to fraudulently obtain visas for them. The mail fraud charge against the doctor involved a mailing from New Jersey to Vermont, and the case was tried in the Southern District of New York, where certain acts were performed but the mailing was neither deposited nor delivered there.

39. *Id.*

40. 323 U.S. 273, 277 (1944).

In the 1948 revision of the federal criminal code, the reviser added the second paragraph to § 3237(a) to effectively overturn *Johnson*, an odd turn of events considering that the revision was not supposed to change the law in any substantive way. The Revision Notes to the provision state:

> The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in United States v. Johnson, 1944, 65 S. Ct. 249, 89 L.Ed. 236, which turned on the absence of a special venue provision in the Denture Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in section 1073 of this revision.[41]

The Federal Denture Act involved a use of the mail, so it could now be prosecuted in the location where the dentures were delivered.

The key issue was whether this provision also expanded the scope of the mail fraud statute by designating it a "continuing offense" so that the first paragraph of § 3237(a) applied. In *United States v. Brennan*, the Second Circuit rejected the proposition that the second paragraph expanded the potential venue for a mail fraud prosecution to include those places through which the mail actually traveled. The circuit court referred to the Supreme Court's concern in *Johnson* that an expansive view of venue would allow for a defendant to be charged in a place "remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution."[42] The Second Circuit held that "§ 3237(a) is best read as not applying to statutes, like the mail fraud statute, that specify that a crime is committed by particular acts of depositing or receiving mail, or cause it to be delivered, rather than by the more general and ongoing act of 'us[ing] the mails.'"[43]

The U.S. Department of Justice takes the same view of the mail fraud statute, so a prosecution in a district in which an item passed through or where the criminal scheme was formulated would not be sufficient alone for venue. The *Criminal Resource Manual* states:

> [V]enue must be charged in either (1) the district in which the letter was placed in the mail by the defendant; (2) the district in which the defendant took or received the letter from the mails; or (3) the district in which the defendant knowingly caused a letter to be delivered according to the direction thereon.[44]

41. 18 U.S.S § 3237.
42. 323 U.S. at 275.
43. 183 F.3d 139, 147 (2nd Cir. 1999).
44. U.S. Department of Justice, *Criminal Resource Manual* 966.

In *United States v. Turley*, a Third Circuit case, federal prosecutors conceded that venue would not be proper in a district through which the mail passed, and "that cases applying the general venue statute were wrongly decided."[45]

The Sixth Circuit took a different approach to the potential scope of venue in *United States v. Wood*, finding that the second paragraph of § 3237(a) applies to the mail fraud statute. The circuit court noted that "[i]f the plain meaning of language is to be given any efficacy at all, how can the offense of *mail* fraud *not be* an 'offense involving the use of the mails. . . .'?"[46] It rejected the Second Circuit's analysis of § 1341 in *Brennan*, holding that "venue in a mail fraud case is limited to districts where the mail is deposited, received, or moves through, even if the fraud's core is elsewhere."[47] The Fifth and Tenth Circuits also refer to mail fraud as coming within § 3237(a), but neither analyzed the issue beyond just a brief reference to the nature of the crime being one that involved a continuing offense, so they provide little support to the proposition advanced by the Sixth Circuit.[48]

The primary difference between the competing views of whether the second paragraph of § 3237(a) applies to mail fraud is that finding the crime to be a continuing offense means it could be prosecuted in a district in which the mailing or item transported in interstate commerce traveled, and not just in the districts in which it was sent or delivered. This is not a significant expansion of the potential venue for prosecutions. Applying the second paragraph of § 3237(a) would not allow for a case to be charged in a district without a connection to the actual mailing or interstate transport of the item alleged in the indictment. The government, therefore, could not prosecute a defendant in the location where the scheme was conceived or perpetrated if there were no mailing or interstate shipment into or out of the district, except perhaps in the rare situation

45. 891 F.2d 57, 60 n.2 (3rd Cir. 1990). The government argued that venue was proper in a district in which the defendant knowingly caused a mailing to be sent, not just where it was caused to be delivered. The Third Circuit did not rule on this issue because it found the defendant waived a venue claim by failing to raise the issue in the trial court. *Id*. at 61.

46. 364 F.3d 704, 713 (6th Cir. 2004) (italics in original).

47. *Id*. A dissenting judge argued that jurisdiction should be permissible in the district "where the fraudulent conduct is centered," even if no mailings were sent to or from it, or caused to be delivered there because the fraud, and not just the mailing, is the important conduct that must be considered in determining the proper venue for a prosecution. *Id*. at 727.

48. In *United States v. Reitmeyer*, 356 F.3d 1313, 1323 (10th Cir. 2004), the Tenth Circuit noted that mail fraud is considered a continuing offense for venue purposes, but that comment was made in the context of contrasting the venue analysis with application of the statute of limitations to a continuing offense, so the scope of venue under § 1341 was not truly before the court. In *United States v. Loe*, 248 F.3d 449, 465 (5th Cir. 2001), the Fifth Circuit stated, "As a 'continuing offense,' mail fraud may be prosecuted in 'any district in which such offense was begun, continued, or completed.'" The circuit court upheld the conviction because three mailings were made from the district in which the case was prosecuted, so there was no need to consider whether mail fraud is a continuing offense. Moreover, the circuit court applied the first paragraph of § 3237(a), which no other court has held applies to mail fraud. Neither decision provides any relevant support for the proposition that mail fraud is a continuing offense. In addition, a district court, in *United States v. Carpenter*, 405 F. Supp. 2d 85, 91 (D. Mass. 2005), also concluded that mail fraud is a continuing offense under § 3237(a). The court appeared a bit confused on the potential scope of venue because it quoted from both the first and second paragraphs of the statute, failing to notice that the second paragraph is a more limited grant of venue in a prosecution involving the use of the mails than the broader allowance for any district in which the crime "was begun, continued, or completed." Like the Fifth and Tenth Circuit decisions, the reference to mail fraud being a continuing offense was irrelevant to the court's analysis because it found that the mailings were sent from the district, so that "[t]here was no question that venue was proper as to these counts." *Id*.

when it could be shown that the item traveled through the district but its transport neither originated nor terminated there.

B. Wire Fraud (18 U.S.C. § 1343)

Unlike the mail fraud statute, the wire fraud provision does not contain any language regarding the location of the wire transmission that can provide a basis for finding that the statute has an express venue requirement. Section 1343 provides that any person devising or intending to devise a scheme or artifice to defraud who "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice" is guilty of a violation. The conduct element of the offense is the wire transmission in interstate or foreign commerce, which requires the government to show that the item actually crossed state lines (see Chapter 6).

Courts have found that the second paragraph of § 3237(a) applies because the offense involves movement in interstate commerce, so the proper venue is any district from, through, or into which the wire traveled. In *United States v. Ebersole*, the Fourth Circuit specifically rejected the defendant's argument that § 3237(a) did not apply to § 1343, holding that "the court correctly identified wire fraud as a 'continuing offense,' as defined in § 3237(a), properly tried in any district where a payment-related wire communication was transmitted in furtherance of Ebersole's fraud scheme."[49] In *United States v. Kim*, the Second Circuit held that the defendant need not personally send or receive the wire transmissions, so long as the person caused them to be transmitted from, through, or into the district in which the charges were filed.[50]

There is a split in the circuits regarding whether the district in which the fraud was conducted or where its impact was felt can be appropriate even without any connection to the wire. In *United States v. Pearson*, the Seventh Circuit upheld venue in the Southern District of Illinois even though the wire transmission only moved from the Eastern District of Pennsylvania to the Northern District of Illinois because the defendants' crime "focuses on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois."[51] The circuit court relied on the first paragraph of § 3237(a) that permits charging where the crime was begun, continued, or completed to find that defrauding the customers was part of the crime, even without the wire transmission in the district.

In *United States v. Pace*, however, the Ninth Circuit held that the defendants must at least cause the wires to be sent from the district of the prosecution if the transmission was not sent or received there. Although the circuit court found that the first paragraph of § 3237(a) applied to the case, its

49. 411 F.3d 517, 527 (4th Cir. 2005).

50. 246 F.3d 186, 192 (2nd Cir. 2001). The defendant worked for a United Nations mission in Bosnia-Herzegovina, and submitted inflated vouchers to the United Nations in New York. He was never physically present in the Southern District of New York at the time of the fraud, but the circuit court found that "[t]he fact that he was not in Manhattan when he caused the wire transmissions does not eliminate the connection between Kim's acts and the Southern District for the purposes of venue." *Id.*

51. 340 F.3d 459, 466–67 (7th Cir. 2003).

analysis of the evidence was that the conduct must involve the wire and not just the underlying fraud, so the causation requirement was necessary to show that the offense was begun, continued, or completed in the district.[52] The Third Circuit in *United States v. Goldberg* took a similar view that causative acts leading to the wire transmissions can be sufficient, relying on the fact that the defendant was charged as an accomplice to the wire fraud to find that his conduct in the district was sufficient when it resulted in the wires being transmitted between two other districts.[53]

The district court in *United States v. Jefferson* tried to reconcile *Pearson* and *Pace* by explaining that acts related to devising the scheme are insufficient to establish venue, but "orchestrating a wire transmission or performing other acts directly or causally connected to the wire transmission does give rise to venue in the district where such acts are performed, even if the wire transmission does not originate, pass through, or terminate in that district."[54] The defendant in *Jefferson* was a member of Congress charged with, among other counts, wire fraud under the "right of honest services" theory related to a kickback scheme involving help for a company to obtain contracts in Africa. The wire transmission that formed the basis for the count was a telephone call from Ghana to a company official in Louisville, Kentucky, and the case was prosecuted in the Eastern District of Virginia. Rejecting the venue challenge, the district court held that

> venue cannot be based on the purely mental element of devising a scheme, for it is impossible to ascertain or prove where a scheme was hatched. But in order for a wire fraud to be criminally actionable, steps must be taken to actuate the scheme or bring it to fruition. It is these acts on which venue must be based.[55]

Jefferson is an important case because it involves a public corruption prosecution, and takes an expansive view of what can constitute conduct causing a wire transmission that allows for venue in a district untouched by the actual wire transmission. The district court explained the defendant's role in promoting the transaction was the basis for the right of honest services charge, and linked

52. 313 F.3d 344, 350 (9th Cir. 2002).

53. 830 F.2d 459, 465 (3rd Cir. 1987). The circuit court held:

> [I]n joining the § 1343 and § 2314 charges with § 2(b), it would not violate the provisions of § 3237 to permit venue to lie where the § 2(b) principal performed all causative acts. Section 2(b), in making Goldberg the principal, recognizes the common law rule that the acts, which Goldberg caused to be performed by innocent persons, are legally his acts. If the act of beginning the transmission or the transportation is legally the act of the principal, Goldberg, then it follows that venue lies in the district in which he was located when he caused that act to be performed.

Id. at 466.

54. 562 F. Supp. 2d 695, 703–04 (E.D. Va. 2008).

55. *Id.* at 704. The district court provided a second description of the appropriate test when the wire transmission does not occur in the district: "Put differently, although venue for a wire fraud or mail fraud scheme cannot be based on where the scheme was hatched, it is also not limited to those places where the wire or mail was transmitted, passed through, or arrived; other acts in furtherance of the scheme may also support venue." *Id.* The reference to the mail fraud statute is incorrect, because that provision has an express venue requirement and, if it applies, the second paragraph of § 3237(a) limits the available districts for trial. The district court referred to mail fraud because one of the cases it analyzed, *United States v. Ramirez*, dealt with that provision, and so the court may have felt compelled to include § 1341 in its analysis, even though the charge at issue was for wire fraud only.

the transaction to the actual telephone call in which the congressman was not a party nor did it occur in the Eastern District of Virginia. *Jefferson* signals that a wide range of venue can be appropriate so long as the wire transmission is linked to some aspect of the conduct involved in the deprivation of the right of honest services, a flexible concept in itself.

This broader approach to venue under the wire fraud statute may not be an appropriate interpretation of the second paragraph of § 3237(a), which refers to the locations where the interstate commerce was sent, passed through, or received. Section 1343 is based on Congress's commerce power, and the conduct that makes this a federal offense is not the fraud but the use of an interstate or foreign wire transmission, so that transmission is the appropriate conduct for the venue analysis. Looking to the location of fraudulent activity unrelated to the wire transmission goes beyond § 3237(a). The Department of Justice takes the more limited approach that ties venue to the wire transmission, stating in its *Criminal Resource Manual* that "prosecutions may be instituted in any district in which an interstate or foreign transmission was issued or terminated."[56] Defense counsel should pay particular attention to the asserted basis for venue in a wire fraud case when the transmission did not touch upon the district of prosecution.

VI. FALSE STATEMENTS (18 U.S.C. § 1001) AND CAMPAIGN FINANCE

The federal false statement statute is used in a number of areas when information or reports must be filed with a department or agency of the United States, or when the government gathers information from individuals and companies in the course of exercising its authority. The statute prohibits making "any materially false, fictitious, or fraudulent statement or representation" in relation to any matter "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." The statute does not contain a specific venue provision.

One of the leading Supreme Court cases related to filing false information with the government is *Travis v. United States*, a decision often relied on by defendants seeking to limit venue for § 1001 prosecutions, but it is also one that has been largely limited to its particular facts. In *Travis*, the Court reversed the conviction of the defendant, a union official tried in his home jurisdiction of Colorado, for mailing a false affidavit to the National Labor Relations Board (NLRB) in Washington, D.C., stating he had no affiliation with the Communist Party. The Court held that venue would only lie in the District of Columbia, where the affidavit was required to be submitted, because the statute provided that the NLRB could not initiate an investigation or issue a complaint in a labor relations matter unless the affidavit was on file. Because the NLRB had to receive the form *before* it could take any further action in a case, the Court found that the prosecution under § 1001 could not be brought outside of the District of Columbia because there was no offense *until* the defendant completed the filing there.[57]

56. U.S. Department of Justice, *Criminal Resource Manual* 967.

57. 364 U.S. 631, 635 (1961). Section 9(h) of the National Labor Relations Act, provided that the NLRB could not conduct an investigation or issue a complaint "unless there is on file with the Board an affidavit executed

The Court noted that a trial in Colorado "might offer conveniences and advantages to him which a trial in the District of Columbia might lack," but held that "[v]enue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the locus of the crime."[58] Therefore, the Court found that the "locus of the offense has been carefully specified, and only the single act of having a false statement on file at a specified place is penalized."[59] As with many cases during this period that involved the prosecution of those with ties to the Communist Party, the decision may reflect unease with these cases, and, therefore, the Court used the venue provision as a means to overturn a conviction that it viewed as noxious.

Travis did not limit all § 1001 prosecutions to the place where the statement was filed or delivered to a particular government office. The lower courts have noted that the statute proscribes the *making* of a false statement, which means the actual filing of the false statement is not the sole conduct required for prosecution. Therefore, § 1001 is a continuing offense, and can be prosecuted in the district where the document or statement was prepared in addition to the location where the governmental office received it.[60]

In *United States v. Wiles*, the Tenth Circuit upheld venue in Colorado for a §1001 charge for filing false financial documents with the Securities and Exchange Commission in Washington, D.C., rejecting the defendant's argument that venue was limited to the place of receipt. The company was located in Colorado, and the circuit court found that the entire process of preparing the document was part of the filing of it, which took place in Colorado, so that venue was also proper in that district.[61] The Second Circuit took the same approach related to false filings with the Securities and Exchange Commission in *United States v. Bilzerian*. The defendant filed forms disclosing his stock ownership in a company as required by law, and the circuit court held that "[t]he documents were prepared and signed—i.e., 'made'—within the Southern District of New York, and thus venue was properly laid there."[62]

The Fifth Circuit applied the *Bilzerian* analysis in *United States v. Herberman*, finding that the preparation of Medicare claim forms in one district and filed in another could be prosecuted in the place of preparation because "there was set in motion the events which allegedly culminated in

contemporaneously or within the preceding twelve-month period by each officer of such labor organization. . . that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." *Id*. at 633 n.2.

58. *Id*. at 636.

59. *Id*. at 637.

60. *See* United States v. Mendel, 746 F.2d 155, 165 (2nd Cir. 1984) (applying § 3237(a), "[v]enue under 18 U.S.C. § 1001 lies where a false statement is prepared and signed, though it may have been filed elsewhere."); De Rosier v. United States, 218 F.2d 420, 422 (5th Cir. 1955) (applying § 3237(a), "[w]hen the letter containing the false statements and the fabricated document was prepared and forwarded to the Loyalty Board, there was set in motion the events which culminated in the commission of the offenses charged. It would be an excess of literalism to say that the appellant was only preparing to commit the offense, and that the actual commission thereof had not in fact begun at the time and place from which the letter was sent, mailed, or forwarded, to the Board.").

61. 102 F.3d 1043, 1064–65 (10th Cir. 1996).

62. 926 F.2d 1285, 1301 (2nd Cir. 1991).

the commission of the offenses charged."[63] On the other hand, if an item must be filed in a particular location and the defendant is charged with making a false statement based on the failure to file, then under *Travis* "a prosecution for failure to file lies only at that place."[64]

As discussed in Chapter 8, the filing of false campaign finance reports with the Federal Election Commission (FEC) is often prosecuted under an aiding and abetting theory for violation of § 1001. The defendant is accused of providing false information to a campaign official, such as the treasurer, about the source or amount of the contribution, and the official at the campaign, in turn, includes the false information in the reports required to be filed with the FEC in Washington, D.C. In *United States v. Rosen*, the district court rejected the defendant's argument that venue in the Central District of California, where the fundraising event occurred, was improper for filing false information with the FEC about the costs and expenditures for the event. The court found that "[b]ecause Rosen's alleged conduct in causing the false statements to be made occurred, at least in large part, in Los Angeles, it does not matter that the report was ultimately filed in Washington, D.C., as required by the FECA."[65] Venue is proper in the location where the defendant engages in conduct that leads to the filing of the false report because that act constitutes the aiding and abetting that leads to liability as an accomplice to the offense.

In prosecutions for receiving improper campaign contributions, venue is proper where the checks are deposited. In *United States v. Chestnut*, the Second Circuit held that "venue in the Southern District was constitutionally proper because the deposit of the checks in New York, where the principal offices and officers of L & N were located, constituted the ultimate essential element of the offense of accepting and receiving an unlawful contribution."[66] On the other hand, when the offense is making an illegal contribution, venue is proper where the contribution is made, not where it is ultimately delivered. In *United States v. Hankin*, the Third Circuit held that campaign contributions are made when and where the check is first delivered, not where it is received. The prosecution involved reimbursed contributions to the presidential campaign of former Pennsylvania governor Milton Shapp given for the purpose of qualifying for federal matching funds.[67] Venue could not be centralized in one district, but individual cases would need to be brought in each of the districts where the checks were first delivered or mailed.

63. 583 F.2d 222, 227 (5th Cir. 1978).

64. 364 U.S. at 636.

65. 365 F. Supp. 2d 1126, 1133 (C.D. Calif. 2005). Another district court upheld venue in the location where the defendant's acts caused the false information to be included in the campaign finance report, relying on § 3237(a) as governing the analysis. The district court stated, "We believe that § 3237(a) is likewise applicable here. It is undisputed that the scheme to cause false reports to be filed and all of the causative acts were carried out in the Eastern District of Pennsylvania. Accordingly, we find that the venue under § 3237(a) is proper here." *United States v. Curran*, 1993 WL 137459 *22 (E.D. Pa. 1993). The Third Circuit reversed the decision on other grounds without reaching the venue issue. 20 F.3d 560 (3rd Cir. 1994).

66. 533 F.2d 40, 47 (2nd Cir. 1977).

67. 607 F.2d 611, 613 (3rd Cir. 1979). The issue concerned when the three-year statute of limitations then in effect for campaign finance violations expired, and the circuit court rejected the venue analysis in *Chestnut* as applicable to when the offense occurred in *Hankin*, distinguishing between contribution cases and receipt cases.

VII. CONSPIRACY (18 U.S.C. § 371)

A conspiracy is an agreement among two or more persons to engage in criminal conduct, and under 18 U.S.C. § 371, the government must prove one overt act toward completion of the object offense. Venue for a conspiracy prosecution can be in the district where the agreement is reached, or in any district in which a coconspirator engaged in an overt act. In *Hyde v. Shine*, the Supreme Court stated that "if the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there, though the overt act is shown to have been committed in another jurisdiction, or even in a foreign country."[68] In *Whitfield v. United States*, it noted that "this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense."[69] A defendant need not ever be present in the district for venue to be proper, so long as either the agreement was reached there or one overt act occurred in the location.

A voting rights conspiracy prosecuted under 18 U.S.C. § 241 does not require proof of an overt act, and under *Whitfield* the proper venue is where the conspirators reached their agreement or where any one of them engaged in an overt act in furtherance of the criminal object. Thus, while proof of an overt act is not an element of the offense, it can be a basis for establishing venue.

68. 199 U.S. 62, 76–77 (1905).

69. 543 U.S. 209, 218 (2005). *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252 (1940) ("But since there was no evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there.").

This page intentionally left blank

| 15 |

INVESTIGATIVE AND TRIAL ISSUES

The investigation of public corruption involves many of the same considerations that arise in any federal criminal investigation, and the tactics used are similar to those employed in most white collar crime cases. There are essentially two types of investigations: historical and proactive. They are not mutually exclusive and both types can arise in a case. A historical investigation involves the gathering of information from all available sources, primarily documents and witness interviews, in an effort to prove a crime that has already occurred. Corruption is an economic crime, so the old adage to "follow the money" particularly applies, which means bank, brokerage, and credit card records are important to understanding the case along with campaign contribution reports if an elected official is involved. On the other hand, a proactive investigation is one that seeks to catch the corrupt official or those who would corrupt an official in the act. This method primarily involves undercover techniques or cooperating witnesses, and usually includes audio or visual recordings. Often, a proactive investigation will incorporate the use of some historical investigative methods before a case is brought.

I. INITIATING AN INVESTIGATION

The FBI is the primary investigative agency for federal criminal law violations, especially in public corruption cases. In October 2008, the Department of Justice issued "The Attorney General's Guidelines for Domestic FBI Operations" (Domestic Operations Guidelines) that provides a set of uniform procedures for all investigations. The Domestic Operations Guidelines state that "it is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of

law-abiding people. The purpose of these Guidelines, therefore, is to establish consistent policy in such matters."[1]

The first level of inquiry is an "assessment," which includes "seeking information, proactively or in response to investigative leads" that involves violations of federal criminal law or national security threats, "identifying and obtaining information about potential targets of or vulnerabilities to criminal activities," and identification of potential human sources of information.[2] The investigative methods that may be used in an assessment are limited to reviewing publicly available information, accessing information already held by the FBI or other governmental agency, interviews, observation or surveillance that does not require a court order, and issuing "[g]rand jury subpoenas for telephone or electronic mail subscriber information."[3]

A "predicated investigation" is a higher level inquiry that requires supervisory level approval before proceeding, depending on the methods used to gather information. Among the circumstances that can warrant such an investigation is the finding that an activity constituting a federal crime "has or may have occurred, is or may be occurring, or will or may occur, and the investigation may obtain information relating to the activity or involvement of an individual, group or organization in such activity."[4] There are two types of predicated investigations: "preliminary" and "full." A preliminary investigation must be completed within six months, although it may be extended another six months by the Special Agent in Charge (SAC) for the particular office.[5] A full investigation may be conducted "if there is an articulable factual basis for the investigation that reasonably indicates" a federal crime has occurred or may occur.[6]

This concept of predication, while somewhat elusive, is important. Unless there is a basis that can be clearly articulated for conducting the investigation, which basis is similar to "suspicion," the FBI cannot record conversations or engage in certain other intrusive techniques. Consider that the inability to make consensual recordings without predication means that in many cases the first conversation between a cooperating witness (or undercover agent) and a target will not be recorded, and the only evidence will be the memories of those present and any subsequent written reports. This can cause serious problems for the prosecution, and provide substantial fodder for the defense.

II. SPECIAL CONSIDERATIONS IN PUBLIC CORRUPTION INVESTIGATIONS

The Domestic Operations Guidelines describe a number of investigative methods that may be used in a predicated investigation. FBI agents can employ the following methods in addition to

1. U.S. Dept. of Justice, *The Attorney General's Guidelines for Domestic FBI Operations*, at 5 (Oct. 3, 2008) (Domestic Operations Guidelines), *available at* http://www.justice.gov/ag/readingroom/guidelines.pdf. The Domestic Operations Guidelines address national security and terrorism issues in addition to general federal criminal law, and investigative issues specific to those types of investigations will not be reviewed.

2. *Id*. at 19.

3. *Id*. at 20.

4. *Id*. at 21.

5. *Id*.

6. *Id*. at 22.

those available in an assessment: consensual monitoring, subject to legal review by FBI counsel, polygraph examinations, subpoenas, and undercover operations. If the investigation is only preliminary rather than full, then electronic surveillance pursuant to the Wiretap Act, 18 U.S.C. §§ 2510 et seq., and searches conducted pursuant to a judicially authorized warrant may not be used.

A. Authorizing an Investigation

When the investigation involves certain public officials, then special steps must be taken in authorizing the inquiry and employing certain investigative techniques. The Guidelines define a "sensitive investigative matter" as one that includes "the activities of a domestic public official or political candidate (including corruption or a threat to national security). . . ."[7] The initiation of a predicated investigation involving a sensitive investigative matter requires notification to FBI headquarters and the relevant U.S. Attorney or the Department of Justice in Washington, D.C.

When an investigation involves consensual monitoring of communications, such as an undercover or cooperating agent recording a conversation or computer surveillance, the agents must receive approval from the Criminal Division of the Department of Justice if it involves a "sensitive monitoring circumstance." The Guidelines define that term to include two groups who may be involved in public corruption:

1. investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;
2. investigation of the Governor, Lieutenant Governor, or Attorney General of any state or territory, or a judge or justice of the highest court of any state or territory, concerning an offense involving bribery, conflict of interest, or extortion related to the performance of official duties. . . .[8]

B. Approving an Undercover Operation

The FBI has been involved in organizing and implementing complex undercover investigations of public corruption, such as Abscam, which targeted members of Congress, and Operation Greylord that focused on corrupt judges in Chicago. The Guidelines allow for the use of undercover investigations in public corruption cases so long as they conform to the requirements set forth in the "Attorney General's Guidelines on FBI Undercover Operations" (Undercover Guidelines). Other law enforcement agencies have similar guidelines.

7. *Id.* at 44.
8. *Id.*

The Undercover Guidelines define "undercover activities" as "any investigative activity involving the use of an assumed name or cover identity by an employee of the FBI or another Federal, state, or local law enforcement organization working with the FBI."[9] Note that this definition does not include the most common type of proactive investigation—the use of a cooperating witness to actively engage the target in illegal activity or conversations relating to corruption. While most undercover operations can be approved by the local SAC of the FBI field office, those involving "sensitive circumstances" must undergo a more rigorous review.

The Undercover Guidelines provide that sensitive circumstances arise when there is a reasonable expectation that the inquiry involves, *inter alia*:

> (a) an investigation of possible criminal conduct by any elected or appointed official, or political candidate, for a judicial, legislative, management, or executive-level position of trust in a Federal, state, or local governmental entity or political subdivision thereof;
> (b) an investigation of any public official at the Federal, state, or local level in any matter involving systemic corruption of any governmental function;
> (c) an investigation of possible criminal conduct by any foreign official or government, religious organization, political organization, or the news media;
> (d) [e]ngaging in activity having a significant effect on or constituting a significant intrusion into the legitimate operation of a Federal, state, or local governmental entity. . . .[10]

If the sensitive circumstances are present, then the SAC must file an application with FBI headquarters that includes a "statement of which circumstances are reasonably expected to occur, what the facts are likely to be, and why the undercover operation merits approval in light of the circumstances. . . ."[11]

Once the application is recommended for approval by "appropriate supervisory personnel" at the headquarters, then it is forwarded to the Undercover Review Committee for its consideration.[12] The Committee considers the risks from engaging in an undercover operation, and, for cases involving sensitive circumstances, must "examine the application to determine whether adequate measures have been taken to minimize the incidence of sensitive circumstances and reduce

9. U.S. Dept. of Justice, *Attorney General's Guidelines on FBI Undercover Operations* II.A (rev. Nov. 13, 1992) (Undercover Guidelines), *available at* http://www.justice.gov/ag/readingroom/undercover.htm. Interestingly, the FBI conducted undercover operations for decades without any specific authorization, other than appropriations, to engage in this technique. It was only in the wake of congressional criticism of the Abscam operation that the Department of Justice saw a need for these guidelines to both authorize and regulate the use of undercover operations.

10. *Id.* IV.C(2). The Undercover Guidelines also note that there may be circumstances in which the involvement of public officials "may logically be considered nonsensitive," and the Section Chief for the FBI's White-Collar Crimes Section in the headquarters should be consulted to determine whether the undercover operation should comply with all the procedures for approval.

11. *Id.* IV.F.

12. *Id.* IV.C(2). The Undercover Guidelines provide that the Committee be comprised of "appropriate employees of the FBI designated by the Director and Criminal Division attorneys designated by the Assistant Attorney General in charge of the Criminal Division, DOJ, to be chaired by a designee of the Director." *Id.* IV.D(1).

the risks of harm and intrusion that are created by such circumstances."[13] If the Committee recommends approval of the undercover operation, then it must provide a brief written statement "explaining why the operation merits approval in light of the anticipated occurrence of sensitive circumstances."[14] The final decision to authorize the undercover operation must be made by the director or a designated assistant director of the FBI.

C. Conducting an Undercover Operation

Once an undercover operation is approved, those engaged in the inquiry must be careful to remain within the confines of the law to the greatest extent possible. There is also concern with possible entrapment of an individual in criminal conduct, which can be raised as a defense in a federal prosecution. The Undercover Guidelines state that "[e]ntrapment must be scrupulously avoided," and provide that no inducement to an individual to engage in criminal conduct is permissible unless:

> (1) The illegal nature of the activity is reasonably clear to potential subjects; and
> (2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
> (3) There is a reasonable expectation that offering the inducement will reveal illegal activities; and
> (4) One of the two following limitations is met:
> (i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or,
> (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.[15]

It is (4)(i) and (ii) that define predication for an undercover operation in the corruption context. Section (i) sets out the general concept of predication, while section (ii) allows for predication to exist before the target is known in a "sting" operation. If there is no preexisting reason to investigate an individual who is targeted in an undercover operation, the operation itself must be designed so that innocent people will not be drawn in, or will be given all opportunity to withdraw upon learning of the illegality of the undercover operation.

Courts have regularly upheld the payment of bribes to public officials in undercover operations, finding that the government's conduct did not cross the line by constituting an

13. *Id.* IV.D(3).

14. *Id.* The Undercover Guidelines require that the Committee recommend approval "only upon reaching a consensus," and provides a means for further consideration if a member from the Department of Justice disagrees with a recommendation to approve.

15. *Id.* V.B.

improper inducement.[16] Regarding Abscam, one of the most famous undercover operations in a public corruption case, the District of Columbia Circuit explained that "Abscam was not significantly different from an undercover drug or fencing operation offering to buy from all who appear at its door. Instead of buying stolen goods or contraband drugs, Abscam bought corrupt official influence in Congress. Such government involvement in crime does not violate principles of due process."[17] While the payment of a bribe is illegal, the Domestic Operations Guidelines specifically allow the SAC to authorize "the payment of bribes" as part of an authorized undercover operation.[18]

A final note about undercover or other proactive investigative techniques involves the nature of investigative targets and their conversations. Public officials, and those who seek to corrupt them, are usually a wary lot. As such, they often act and speak in an indirect manner, often declaring that the payments are not bribes, are not illegal, are not in return for anything, are campaign contributions, or even not a payment at all. Very often cooperating witnesses, and sometimes undercover agents, perhaps in an effort to allay suspicion, allow such remarks to go unchallenged. This can be the death of an otherwise productive undercover operation for the government and can be a solid basis for a successful defense.

III. DANGERS IN PUBLIC CORRUPTION PROSECUTIONS[19]

Then-Attorney General Michael Mukasey said in 2008 that "[t]he investigation and prosecution of public corruption is among the highest obligations of law enforcement, and it should come as no surprise that I consider it to be one of the top priorities of the Department of Justice."[20] These cases are significant not only because the defendants are usually leading public figures in cities and states and sometimes on the national scene, but even more so because they involve a core value of our democratic form of government, that public authority should not be used for private gain.

16. *See, e.g.*, United States v. Blassingame, 197 F.3d 271, 283 (7th Cir. 1999) ("Fuller fully understood that there was an expectation that he would use his influence as president of the Water Reclamation District to assist Christopher. Nor are we persuaded by Defendant Fuller's argument that the $4,000 and $5,000 bribe payments were 'extraordinary' because he received the money for nothing in return. As president of the Water Reclamation District, Fuller had substantial influence over its bureaucracy. With full knowledge of Christopher's intentions, Fuller, at a minimum, discussed Water Reclamation District business, provided advance information, exerted influence, held meetings, and made inquiries on Christopher's behalf. Accordingly, because of Fuller's actual assistance and Christopher's expectation of assistance which Fuller was well aware of, we do not find bribes of $4,000 and $5,000 'extraordinary.' ").

17. United States v. Kelly, 707 F.2d 1460, 1469–70 (D.C. Cir. 1983).

18. Domestic Operations Guidelines, *supra* note 1, at 33.

19. This portion of the chapter is based in part on Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 Geo. J.L. Ethics 351 (2010). Reprinted with permission of the publisher, Georgetown Journal of Legal Ethics © 2010.

20. U.S. Dep't of Justice, *Fact Sheet: The Department of Justice Public Corruption Efforts*, (Mar. 27, 2008), http://www.justice.gov/opa/pr/2008/March/08_ag_246.html.

The importance of public corruption cases often is matched by the difficulty that prosecutors face in bringing them successfully because the government frequently relies on cooperating witnesses who were involved in highly questionable dealings. A number of recent prosecutions highlight the crucial role of the cooperating witness for the government's case and how that witness can bring a case down if the government is not careful.[21] The prosecution of former Alaska Senator Ted Stevens on charges of filing false statements presented graphically the dangers a cooperating witness can pose if prosecutors are not careful.

Bill Allen, the former chairman of an Alaskan company provided the critical testimony about gifts given to the senator that the senator failed to report to the Senate.[22] As often happens in corruption cases, Allen's story changed over time; however, prosecutors failed to disclose to the defense the star witness's exculpatory statements made during trial preparation, a due process violation under *Brady v. Maryland*.[23] Months after a jury convicted the senator—instrumental in his narrow defeat at the polls shortly after the verdict—Attorney General Eric Holder announced that the government asked the district court to drop the case due to the failure to disclose information about its key witness.[24] A short time later, the Department of Justice asked that the convictions of two former Alaska state legislators also be reversed because of disclosure issues related to similar statements made by Allen in those cases.[25]

21. For example, the bribery investigation of former Congressman Randy "Duke" Cunningham, which resulted in his guilty plea and a 96-month sentence, was made in large part through the cooperation of lobbyist Mitchell Wade. *See* Greg Moran, *Contractor in Scandal to Learn Fate Soon: Wade Cooperated in Cunningham Probe*, San Diego Union-Trib., Dec. 14, 2008, at B1.

The prosecution of former Illinois governor Rod Blagojevich may be the rare corruption case that does not need witness testimony to show a defendant's corrupt intent, although even here it would likely help the Department of Justice if it could put on testimony showing Blagojevich acting similarly in other situations.

22. *See* Richard Mauer & Erika Bolstad, *Close Friendship: Former Veco Boss Tells of Admiration for Senator*, Anchorage Daily News, Oct. 1, 2008, at A1.

23. *See* Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. Times, Apr. 8, 2009, at A1 (discussing decision to dismiss charges against Senator Stevens because notes of an earlier conversation between a prosecutor and Allen were discovered that contradicted his trial testimony). In *Brady v. Maryland*, the Supreme Court held, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The prosecution's *Brady* obligations are among the most fundamental requirements for a fair trial, and are frequently litigated, particularly in cases involving cooperating witnesses.

24. Attorney General Holder issued the following statement:

> In connection with the post-trial litigation in *United States v. Theodore F. Stevens*, the Department of Justice has conducted a review of the case, including an examination of the extent of the disclosures provided to the defendant. After careful review, I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in consideration of the totality of the circumstances of this particular case, I have determined that it is in the interest of justice to dismiss the indictment and not proceed with a new trial.

Press Release, U.S. Dep't of Justice, *Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens* (Apr. 1, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html. The district court granted the government's motion to dismiss, and the prosecutors assigned to the case were investigated by the Office of Professional Responsibility in the Department of Justice.

25. In a statement reminiscent of what he said about the *Stevens* case, Attorney General Holder stated, "After a careful review of these cases, I have determined that it appears that the Department did not provide information that should have

For prosecutors in public corruption cases, having a witness who was "in the room" when the transaction occurred, which will often involve multiple meetings, is crucial to establish the reason for offer or solicitation of a corrupt benefit. Such transactions involve a process which likely includes a number of interactions that may have taken place over weeks or even months. Government officials, particularly those in elective office, have numerous meetings and deal with a variety of constituencies, including lobbyists and campaign contributors. Separating out the ordinary intercourse of political life from the illicit transfer of benefits or money in exchange for the exercise of government authority is almost impossible without a witness who was present. At the same time, a cooperating witness presents dangers because of the possibility of fabrication.[26]

All trial lawyers know the importance of witness preparation. As Professor John S. Applegate pointed out, "American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy."[27] How far can a lawyer go, however, in preparing, or perhaps even "coaching," a witness by supplying information or suggesting responses that can shape the person's testimony so that it comes across well to the jury? The professional responsibility rules are largely silent on the issue of witness preparation, and there are few judicial opinions on what is and is not acceptable in preparing a witness to testify.[28]

IV. THE IMPORTANCE OF WITNESSES

Showing an improper motive or desire to obtain an unlawful advantage in a public corruption prosecution is difficult to establish by way of documentary evidence. Perhaps more than any other area of white collar crime, a public corruption case requires the testimony of witnesses who can provide some insight into the defendant's knowledge of the impropriety of the transaction. Even where there are recorded transactions or conversations, they must be put into context. Rarely will a document clearly establish that the offer of a benefit was given to obtain official action or that an official's statement was indeed the solicitation of a bribe and not simply a request for support or a campaign contribution. Especially in cases involving elected officials, the testimony of those who make the payments or facilitate the transfer—the intermediaries who surround every politician

been disclosed to the defense." Press Release, U.S. Dep't of Justice, *Department Asks Alaska Corruption Cases Be Remanded to District Court, Former State Representatives Be Released* (June 4, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/June/09-ag-550.html. Unlike in the *Stevens* case, however, the government did not request that the court dismiss the charges, but instead sought to have the case remanded to the district court to determine whether to allow a retrial of the charges. *See id.*

26. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 847 (2002) ("The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers.").

27. John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 278–79 (1989).

28. *See id*. at 279 ("The line between preparing and prompting (or 'coaching,' the usual term of opprobrium) is rarely clear even for the most scrupulous."). Professor Applegate describes witness preparation as "one of the dark secrets of the legal profession." *Id*.

and the donors who appear with regularity—are usually the linchpin of the prosecution.[29] The prosecutor's goal at trial will be to corroborate the government's witnesses in each and every way possible, which is why even proactive investigations are usually followed by historical ones, to provide the evidence needed to support the testimony of cooperating witnesses.

The importance of testimony to the government's case is often matched by the need for the defense to call witnesses to explain that no intent to corrupt the exercise of government authority existed. An important feature of the defense case will be to call into question those individuals who provided information to the government, showing that they misunderstood the interaction or, perhaps worse, fabricated their testimony to avoid responsibility. Frequently, the best witness is the defendant, but putting him on the witness stand is always a risky proposition even if it is almost a necessity in a public corruption prosecution. Especially when the defendant is an elected official, there is enormous pressure for the person to testify and explain how there was no corrupt motive, even where the transaction has the aura of impropriety. A failure to take the witness stand by a person whose political career involves taking—and explaining—public positions could be viewed as tantamount to an admission of the crime. Moreover, most politicians believe that if given the chance to explain themselves, they can convince a jury of their innocence. Under the professional responsibility rules, the client, not the lawyer, decides whether to testify,[30] and the lure of the witness stand (and perhaps one last performance) can be overwhelming.

The central role of witnesses in the assessment of the meaning of "corruptly" means that the lawyers preparing them to testify play a particularly important role in the case. While the documents can provide crucial support for testimony, records are often ambiguous and rarely yield much insight into a defendant's state of mind. For the defense, the decision whether to put the defendant on the witness stand is frequently the most important issue in the trial because the defendant's testimony is often paramount in the jury's mind when it decides the case. Ensuring that the cooperating witness and the defendant are prepared for the onslaught of cross-examination can make the difference in a close case.

V. THE ETHICS OF WITNESS PREPARATION

The rules of professional conduct say surprisingly little about the topic of witness preparation, even though they are designed to regulate significant aspects of the legal process.[31] Courts recognize that witness preparation is common in all forms of litigation. As one district court noted:

29. For example, in the successful prosecution of former Louisiana Representative William Jefferson, a key witness was a cooperating witness who was videotaped paying the congressman $100,000, of which $90,000 was later found hidden in a freezer in his home. *See* Jonathan Tilove, *Guilty on 11 Counts*, New Orleans Times-Picayune, Aug. 6, 2009.

30. Model Rules of Prof'l Conduct R. 1.2(a) (2007) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

31. *See* Joseph D. Piorkowski, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 Geo. J. Legal Ethics 389, 389 (1987) ("There remains, however, a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness' testimony. Within this area, there are very few guideposts to assist the attorney in maximizing his effectiveness as advocate while still remaining within the recognized limits of professional responsibility.").

> [I]t could scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial.[32]

Judges expect counsel for each side to have their witnesses ready to testify and to present the evidence in an orderly fashion. As the North Carolina Supreme Court stated:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves court time.[33]

A lawyer is required to represent his or her client competently, and it likely would be viewed as malpractice for trial counsel to call an unprepared witness if there was a chance to meet and interview the person in advance, even if only for a few minutes.[34] The District of Columbia Bar once stated in an ethics opinion, "a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly."[35]

At the other end of the spectrum, Model Rule 3.3(a)(3) states that a lawyer shall not "offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[36] The prohibition on introducing perjured testimony is clear, but whether a lawyer has allowed, or perhaps even led, a witness—including a client—to present false evidence is fairly uncommon, and the secrecy of witness preparation means it will rarely become known that a lawyer violated the rule by suggesting how a witness should testify in a way that is untruthful.

The issue of witness preparation sliding into falsity is rarely one of outright falsehood by the witness, when the person simply fabricates a story. Instead, it is more likely the witness will present his or her recall more clearly than before the lawyer suggested how to respond to questions; perhaps the opposite may happen as well, that the witness will respond "I don't recall" when, in fact, the person does remember what occurred. Telling a witness what will play well before a jury could be benign, or it could be a means of changing the evidence to support one side's position.

32. Hamdi & Ibrahim Mango, Co. v. Fire Ass'n of Philadelphia, 20 F.R.D. 181, 182 (S.D.N.Y. 1957).

33. State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979).

34. Model Rules of Prof'l Conduct R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *see also* Applegate, *supra* note 27, at 289 ("The obligation to prepare, in sum, is clear from the duties of competence and zealousness, however, the extent of that obligation is not clear.").

35. District of Columbia Ethics Op. No. 79 (Dec. 18, 1979).

36. Model Rules of Prof'l Conduct R. 3.3(a)(3).

The American Law Institute's *Restatement (Third) of the Law Governing Lawyers* addresses witness preparation explicitly and gives its imprimatur to a wide range of conduct that shapes a witness's testimony. Section 116(1) provides that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify."[37] This section appears to condone only a lawyer listening to what a witness has to say in an "interview," largely a passive exercise. Comment (b) to this section, however, goes on to provide a list of permissible steps the lawyer can take in preparing the witness that go far beyond merely interviewing the person about their testimony:

> [D]iscussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; *revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue*; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and *discussing probable lines of hostile cross-examination that the witness should be prepared to meet*.[38]

The Comment then states that "[w]itness preparation may include *rehearsal of testimony*" and a "lawyer may suggest choice of words that might be employed to make the witness's meaning clear."[39] Again, these steps are hardly the passive acts of interviewing a witness. Perhaps to assuage any fear that the Restatement is encouraging false testimony, the Comment ends with the careful admonition that "a lawyer may not assist the witness to testify falsely as to a material fact," but makes no effort to describe what the limits are on proper witness preparation. [40]

Under the Restatement's analysis, almost anything short of showing the witness how to commit perjury appears to be acceptable. Can the rules of the profession really take an "anything goes" approach, so long as the lawyer does not assist the witness in presenting patently false testimony? It would be hard to find any type of preparation short of the lawyer instructing the witness to fabricate a story that would not be defensible under the Comment to section 116.

Consider a session in which a lawyer and witness rehearse the testimony that will occur the next day. Professor Applegate raises the issue of whether this type of preparation undermines the truth-seeking function of a trial:

> Rehearsal is in a sense the ultimate witness-preparation technique. It treats the trial precisely as a play scripted by the lawyers. Rehearsal goes beyond providing factual information or documents to familiarize the witness with the subject matter of the upcoming testimony. It is more intensive than simply providing demeanor suggestions. Most important, it comes uncomfortably close to the line

37. Restatement (Third) of the Law Governing Lawyers § 116(1) (2000).

38. Restatement (Third) of the Law Governing Lawyers § 116(b) cmt. ¶ (b) (2000) (italics added).

39. *Id.* (italics added).

40. *Id.*

> between the lawyer's knowing what would help the case and the lawyer's advising the client how to help the case.[41]

As is typical in this and many other areas of legal ethics, the line between proper and improper conduct is almost imperceptible. Professor Richard Wydick noted that rehearsing testimony may be ethical or unethical, depending on the lawyer's (and the witness's) motivation:

> Witness preparation sessions often end with role playing by the lawyer and witness. Typically, the lawyer questions the witness on several topics using the style she will use during direct examination. Then she, or one of her colleagues, cross-examines using the style the adversary lawyer is likely to use. If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it is ethically unobjectionable. If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.[42]

There is no clear external or objective indicator about when a particular form of witness preparation is unethical and when it is perfectly consistent with the lawyer's responsibility to competently represent a client and seek a lawful objective. Thus, lawyers are left on their own to determine whether their preparation of a witness is taking them close to the line of Model Rule 3.3's prohibition on false evidence.

VI. PREPARING WITNESSES AND CLIENTS TO TESTIFY

A 1979 District of Columbia Bar ethics opinion issued, interpreting the now largely defunct Disciplinary Rules, highlights that the lawyer is responsible for determining when the line between permissible preparation and impermissible creation of false evidence has been crossed.[43] The Opinion states that "it is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it."[44] Would that life were so easy for lawyers that they could always discern the lines.[45]

Public corruption cases are most often about the intent of the offeror and recipient, and a jury must decide whether the reason for the transaction entailed the intentional misuse of government

41. Applegate, *supra* note 27, at 323.

42. Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 16 (1995).

43. District of Columbia Ethics Op. No. 79.

44. *Id.*

45. *See* W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 Tex. Tech L. Rev. 1343, 1349 (1999) ("But how do we know when the result of a session in the horse shed [with a witness] is refreshing recollection, and when it is prompting perjury?"); Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 Tex. Tech L. Rev. 1383, 1383 (1999) ("Everyone knows that it is wrong to ask a witness to lie. What is not known is how far a lawyer can properly push a witness short of that.").

authority for personal gain. Whether the case involves gifts or other benefits to an official, or payments that may be campaign contributions, the determination of what was in the minds of the parties—whether the conduct was "corrupt"—will usually determine whether a guilty verdict is returned. For the prosecution, its key witness on this issue will likely be a person who has agreed to cooperate in the case, often in exchange for a reduced sentence or, less frequently, a grant of immunity. For the defense, the public official's testimony will be crucial to the case because he is usually the only person who can explain what was understood about the relationship that is alleged to be corrupt.

Among the many temptations an attorney may face in trying a case, two in the public corruption case should be highlighted: (a) for the government, how much the prosecutor can shape the testimony of a cooperating witness to make it effective yet fulfill the obligation to ensure that the truth be ascertained and the due process rights of the defendant be respected; and (b) for either side, what to do when the witness testifying at trial suddenly adds facts or strengthens the recall of events beyond what was discussed during preparation; in other words, determining when testimony becomes false under Model Rule 3.3.

A. Preparing the Cooperating Witness and the Brady *Disclosure Obligation*

Preparing a witness, especially the one who will directly accuse the defendant of engaging in criminal conduct, is of the utmost importance in a criminal case. Unlike the typical eyewitness, however, the cooperating witness in a public corruption case is not going to describe the crime like the victim of a robbery or observer of a drug deal testifies about a sequence of observable events and the identity of the perpetrators. In bribery and kickback cases, like most white collar criminal prosecutions, there is usually no real dispute regarding the facts of the underlying transaction. It is often conceded that the payment was made or the benefit conferred, and then that a governmental decision was implemented (or deferred).

The recall about the details of the events or physical characteristics of the perpetrator is not what is important; the intent of the participants in the process is key. While there may be some dispute about what was said between the parties, the issue is really one of what each side understood, and whether the public official misused the authority conferred by public office. The decision at issue need not be shown to be incorrect, and it is not a defense to a public corruption prosecution to argue that the act was outside the public official's authority or would have occurred regardless of the personal benefit.[46]

A cooperating witness has likely gone through two rounds of intense preparation before testifying at trial. First, the defense lawyer for the witness will have to prepare him or her for sessions

46. *See* United States v. Gjieli, 717 F.2d 968, 976 (6th Cir. 1983):

> The deterrent value of punishing the bad intent of bribers is the same regardless of whether or not the acts to be accomplished are within the scope of the actual lawful duties of the bribed public official and regardless of whether the briber has correctly perceived the precise scope of the official's lawful duties.

with the prosecutors before the final decision is made to enter into the plea agreement, called "woodshedding" or "horseshedding" the witness.[47] Prosecutors are fond of saying they will not buy "a pig in a poke," so they need to preview the person to ascertain whether he or she will be a good witness and can provide the type of information that will advance the case.[48] Second, after the deal is made, the prosecutor has to prepare the witness for trial and determine how best to present a witness who made a deal and, thus, will be subject to a strong cross-examination attempting to show that the testimony is a fabrication to mitigate the witness's potential prison sentence—the "deal with the devil" problem.

In all of these rounds of preparation, the witness's testimony will be shaped by defense lawyers and prosecutors who will want the person to say certain things and describe the process in a way that will be favorable to showing the defendant's corrupt intent. The meaning of phrases and the types of gestures made by the recipient of a bribe or the public official seeking a kickback on a contract will be crucial. The case is not only a matter of "who said what when?" but also "what did you understand that to mean?" and "was the person hostile or friendly, cajoling or demanding?" Over time, the cooperating witness may adopt the viewpoint of the prosecutors, perhaps seeing more in the transaction than really occurred at the time.[49] Frequently, public corruption cases get to trial years after the transactions at issue, and so memories may be tainted by the unintended bias of a witness who wants to be accommodating to the prosecution, perhaps reflecting the desire to have your side win the case.

For the prosecutor, there are competing pressures in pursuing the case. Convinced by evidence purportedly showing a legal violation that can be proven beyond a reasonable doubt, the prosecutor's focus becomes winning the case. Public corruption cases involve the core values of a democratic society: fair and equal treatment of all, and the punishment of abuse of government power so that our political institutions can function properly.[50] Thus, achieving a conviction takes on even greater importance because of the political and social implications of corruption. At the

47. *See* Bruce H. White & William L. Medford, *The Pitfalls of Preparing a Lay Witness for Trial*, 23 Am. Bankr. Inst. J. 22, 52 (June 2004) ("The best method of finding out how a witness will testify, and exactly what he/she will say, is a good, old-fashioned woodshed session—essentially, talking to the witness alone so that the witness's attention is focused on trial preparation."); Hodes, *supra* note 45, at 1366 ("Arming the client with pertinent legal information and trusting the client to make good and legitimate use of it demonstrates loyalty and zealousness. Recognizing that at some point a loyal servant can be manipulated into becoming an accomplice in crime is honoring the bounds of law. And knowing how to flirt with that boundary line but not cross over it is true professionalism.").

48. *See* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797, 1833 (2001) ("In the American system, witness preparation is an art form. American prosecutors are among its most practiced and capable artists. Cooperating accomplices receive much of their artistic attention.").

49. *See* United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980) ("We think it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case."); Douglass, *supra* note 48, at 1833 ("In sum, when we assess reliability, there is no reason to favor the live testimony of a cooperating accomplice over a blame-shifting jailhouse confession on the basis of the incentives which may shape, and shade, the accomplice's story. If anything, the incentive to favor the government is stronger by the time the accomplice finds his way to the witness stand.").

50. *See* Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* Corruption and the Global Economy 31, 45 (Kimberly Ann Elliott ed., 1997) (bribery "undermines the legitimacy of governments, especially democracies. . . . Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that government is substituting democratic values for decisions based on ability to pay. It can lead to coups by undemocratic leaders.").

same time, the admonition of the Supreme Court in *Berger v. United States* to prosecutors remains particularly relevant, cautioning that "while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[51]

Among the most important obligations of a prosecutor is to furnish exculpatory evidence to a defendant. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[52] In *Giglio v. United States*, the Court included, within the *Brady* disclosure requirement, impeachment information if the reliability of the witness may be determinative of the defendant's guilt. [53]

The disclosure obligation imposed by *Brady* and *Giglio* is familiar to all prosecutors. When getting a witness ready for trial, however, the line between permissible preparation and impermissible influence that may lead to false testimony is difficult to discern. A prosecutor would be unlikely to ask the witness to commit perjury, and the prohibition on such conduct is clear under both the professional responsibility rules and Supreme Court precedent.[54] But the shaping of a witness's testimony may raise questions about the scope of the witness's recollection and provide a basis to impeach the witness. Under *Brady*, this evidence would have to be disclosed to the defense. The prosecutor who comes close to the line of suggesting how a cooperating witness should testify or correcting perceived errors so that the testimony is consistent with other aspects of the government's evidence may not violate Model Rule 3.3 prohibition on presenting false testimony, but the information could come within the due process requirement for the government to disclose material exculpatory evidence to the defense.[55]

The interplay between the cooperating witness and the prosecutor often occurs outside the presence of a third party, such as counsel for the witness or case agents who may write a report of the preparation session.[56] A witness interview during an investigation usually results in a report of some kind that can be turned over to the defense under *Brady* or as a statement subject to disclosure pursuant to the Jencks Act, while pretrial preparation often involves just the witness and government attorney. The prosecutor has discretion to keep the sessions with the witness within

51. Berger v. United States, 295 U.S. 78, 88 (1935).

52. Brady v. Maryland, 373 U.S. 83, 87 (1963).

53. Giglio v. United States, 405 U.S. 150, 154 (1972).

54. *See* Napue v. Illinois, 360 U.S. 264, 271 (1959) (explaining that a new trial is required whenever false testimony could "in any reasonable likelihood have affected the judgment of the jury").

55. The Department of Justice issued a memorandum on January 4, 2010, that states:

> Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session.

Memorandum from David W. Ogden, Deputy Attorney General, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) (Discovery Guidance), *available at* http://www.justice.gov/dag/discovery-guidance.html.

56. There are prosecutors who will only meet with a potential witness in the presence of a third party, such as a case agent, to limit possible claims of improper conduct in the meeting.

the bounds of propriety and to disclose any exculpatory information that might come out of the preparation process.[57] *Brady* is not limited to written materials, so an oral statement of a cooperating witness must be disclosed if it is exculpatory. Is that being done by prosecutors?[58]

B. The Witness Who Does Better than Expected

The issue of witness perjury is not a new one, and the professional responsibility rules make it clear that a lawyer cannot allow a witness, including a client, to present false testimony and must take steps to remedy the situation if it does occur.[59] The much harder issue of what the defense lawyer must do when the client-defendant intends to testify falsely has been the subject of significant debate in both the courts and the academic literature.[60] As the Supreme Court noted in the leading case of *Nix v. Whiteside*, "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."[61]

It should be clear to anyone who reads *Nix* that the case was easy to decide because the Court essentially adopted the viewpoint of the defense lawyer, Gary L. Robinson, who had concluded that his client planned to commit perjury in his trial testimony to support a self-defense claim to a murder charge. As summarized in *Nix*:

> Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded: "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."[62]

Mr. Robinson's determination that his client intended to commit perjury occurred in the course of preparing him to testify at his murder trial, and the effort to dissuade Nix from committing perjury complied fully with the rules of the profession. As the Court noted:

> Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose

57. *See Id.*

58. *See* Gershman, *supra* note 26, at 834 ("[T]he absence of any contemporaneous record of the prosecutor's preparation of witnesses encourages improper coaching by hiding the process from meaningful oversight by courts or defense counsel.").

59. Model Rules of Prof'l Conduct R. 3.3(a)(3).

60. The classic article on this issue is Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). The California Court of Appeals reviewed the various approaches to client perjury in *People v. Johnson*. 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998).

61. Nix v. Whiteside, 475 U.S. 157, 173 (1986) (emphasis in original).

62. *Id.* at 160–61. As happens with criminal defendants, the suggestion of a fellow prisoner—perhaps Mr. Cook himself—is taken as the requisite for a successful defense.

> the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland* [*v. Washington*].[63]

Nix presents a stark example of potential client perjury when the defendant wanted to add a critical fact to his eyewitness testimony that would add significant weight to the self-defense argument for acquittal. In public corruption cases, the focus on intent, which is usually inferred from an array of evidence, means any false testimony is unlikely to be as clearly probative as Nix's potential perjury. For example, the meetings between a public official and a lobbyist and any transfer of money or other benefits are likely to be established by records, so the likelihood that a witness would fabricate testimony to create a meeting or bribe that did not occur is unlikely. The greater possibility for false testimony is more a matter of the nuances of the interactions, such as whether an official demanded a payment or merely made a vague suggestion, a distinction that may reflect as much tone or inflection as the words themselves. Moreover, the strength of the witness's recall of the details of the meeting that support the recollection can strengthen (or diminish) the veracity of the testimony.

For the prosecutor and the defense lawyer in the public corruption prosecution, the case that is far harder than *Nix* is when the witness or defendant adds new information during the testimony that may strengthen his or her credibility.[64] It could be testimony about a statement made by the official that had not been mentioned before, or a disclaimer of knowledge regarding a transaction

63. *Id.* at 171. The issue in *Nix* was whether Robinson provided ineffective assistance of counsel in stating that he would withdraw and inform the court should the defendant testify falsely. The Court's statement that he came "well within accepted standards of professional conduct" is about as high a compliment as can be paid to an attorney in this context. *Id.*

64. The defense lawyer for the person who is trying to make a deal with the government by cooperating in its investigation can face a similar issue if the client adds details to strengthen the case against another target of the investigation. Unlike the client or witness testifying at trial, there is no public exposure of the statements, only the presence of the defense lawyer to ensure that it is correct. The attorney is in a difficult position when the client is proffering information to the government in the hope of receiving a plea bargain with reduced charges and a lower punishment because the better the information, the greater the government's incentive to make a deal. The lawyer must be particularly attuned to any "enhancement" of the information being provided by the client because false statements could in fact scuttle a plea agreement and lead the government to prosecute the witness. This can create a sufficient counterbalance to reduce the cooperating witness's incentive to lie.

The danger of a cooperating witness committing perjury was shown in *United States v. Wallach*, when the Second Circuit overturned the convictions of the defendants because a witness (Guariglia), described as the "centerpiece" of the prosecution, lied about his continuing gambling after denying on the witness stand that he had done so. 935 F.2d 445, 457 (2nd Cir. 1991). The circuit court found that the government did not know the witness was committing perjury during the trial, but the witness's improbable explanations about taking cash advances from casinos were sufficiently suspicious to undermine his credibility and required prosecutors to investigate his possible gambling further. *Id.* The court explained:

> Guariglia was the centerpiece of the government's case. Had it been brought to the attention of the jury that Guariglia was lying after he had purportedly undergone a moral transformation and decided to change his ways, his entire testimony may have been rejected by the jury. It was one thing for the jury to learn that Guariglia had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie. While the jury was instructed that Moreno was an acknowledged perjurer whose testimony should be weighed carefully, no such instruction was given relative to Guariglia's testimony. Accordingly, because we are convinced that the government should have known that Guariglia was committing perjury, all the convictions must be reversed.

that was discussed during preparatory sessions. Unlike the "something 'metallic'" in *Nix*, the testimony may not be clearly false, or it may be just one piece of a much larger mosaic presented through the witness. What does a lawyer do when the witness—and perhaps even the client—starts adding details that had not come up during trial preparation to make the testimony potentially more persuasive?[65] When is the line between inevitable minor errors of recall and perjury crossed?

Cross-examination is one potential safeguard that can give an attorney some comfort if the client testifies untruthfully. Dean Wigmore's famous phrase about cross-examination is that it is "the greatest legal engine ever invented for the discovery of truth."[66] A wary opponent should be able to expose the inconsistencies in the testimony through a clever examination of the falsifying witness, thus strengthening that side's case by undermining the credibility of the opponent. For the cooperating witness, one or more reports of earlier interviews likely exist and those can be used in cross-examination to expose inconsistencies, although these reports may not be very thorough or may not address all the points that a witness testified about. The report is written by an agent, not the witness, and so its utility in cross-examination may be limited.[67] For the testifying defendant, a report recounting a prior meeting is less likely to be available, although if the person agreed to be interviewed early on in the investigation, then there may be recorded statements that can be used.

Cross-examination may not be the great legal engine espoused by Wigmore, especially in a federal criminal prosecution which does not include open discovery and in which the preparation sessions between a witness and the lawyer are not necessarily subject to any outside scrutiny. Although some prosecutors use the "open file" discovery method,[68] not all do, and, from the government's perspective, it has no access to the defendant once charges are filed.[69] Putting the

Id. at 457. The importance of cooperating witnesses makes it imperative for prosecutors to ensure that they are telling the truth to avoid having a conviction overturned because of negligence on their part.

65. *See* Gershman, *supra* note 26, at 835 ("A major incentive for prosecutors to use cooperating witnesses is to support an uncertain but consistent version of the facts, rather than to confirm an inconsistent version of the facts that may represent more of the truth.").

66. 5 John Henry Wigmore, Evidence in Trials at Common Law § 1367 (J. Chadbourn rev. 1974).

67. Under Federal Rule of Criminal Procedure 26.2, the government must produce a "statement" made by any of its witnesses, which is defined to include "a written statement that the witness makes and signs, or otherwise adopts or approves" or "a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording." Fed. R. Crim. P. 26.2(f)(1)–(2). If the interview notes are those of an agent that do not purport to be a verbatim recital of the witness's statement or is not adopted by the witness, then it need not be produced to the defense. *See United States v. Bobadilla-Lopez*, 954 F.2d 519, 522 (9th Cir. 1992) ("Both the history of the statute and the decisions interpreting it have stressed that for production to be required, the materials should not only reflect the witness' own words, but should also be in the nature of a complete recital that eliminates the possibility of portions being selected out of context.").

68. As the name implies, open-file discovery is when the prosecutor supplies all information related to a case, except for privileged communications and work product, to the defendant in advance of trial. One advantage of this approach is that it avoids having the prosecutor determine what evidence constitutes *Brady* material because all documents are provided, regardless of whether they are inculpatory or exculpatory. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. 257, 310 (2008) ("The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment. It does not require a prosecutor to make difficult discretionary decisions.").

69. The Fifth Amendment privilege against self-incrimination prevents the government from calling a defendant to testify at trial, and the prosecution cannot comment on a defendant's decision not to testify. *See* Griffin v. California, 380

onus on the opponent to ferret out any falsity in a witness's testimony may not be the best method of preventing a violation of Model Rule 3.3, which does not prohibit the introduction of false testimony "unless you can get away with it."

The lack of access to information about witness preparation is exacerbated for the defense lawyer because it is in the client's interest to allow the testimony to go forward in the hope that the jury will return a not guilty verdict. As one lawyer put it very aptly, "a trial may be a search for truth, but I—as a defense attorney—am not part of the search party."[70] If the testimony does not reach the level of falsity outlined in *Nix*, and perhaps even if it does, then there is a question of whether defense counsel has an obligation under the professional conduct rules to intervene or even disclose it to the court.[71]

When the lawyer does not know what the truth actually is, then what should the person do about a client or witness who is a very good liar? If someone is able to testify convincingly, even if the lawyer questions the testimony's truth, it may be permissible to have the witness testify. Model Rule 3.3 prohibits a lawyer from *"knowingly"* offering false evidence, which means the attorney must have actual knowledge and not just a suspicion.[72] The age-old issue is, when does a lawyer really know the witness or client is not testifying truthfully? Even the strict prohibition on using false evidence is mitigated in the *Model Rules* if the lawyer does not reach the level of actual knowledge, and the Comment to Rule 3.3 states that "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[73] The drafters try to mitigate this by further stating that "although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." The distinction appears to be one between a "mere" falsehood—something a teenager might call a "kinda lie"—and one that is clearly false.

U.S. 609, 615 (1965) ("[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). Prior to trial, a person cannot be forced to testify against himself in a police interrogation, before a grand jury, or even in a civil proceeding if the answer may be incriminating. *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 266 n.1 (1983) ("A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness's answer will be introduced in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial.").

70. Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 Fordham L. Rev. 1263, 1267 (2007).

71. Model Rule 3.3(a)(3) prohibits offering evidence the lawyer "knows to be false." Model Rules of Prof'l Conduct R. 3.3(a)(3). If the lawyer does not know it is false because it is not clear that the testimony is in fact incorrect, then the obligation not to introduce the evidence is not triggered.

72. Model Rule 1.0(f) provides that "'[k]nowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question." Model Rules of Prof'l Conduct R. 1.0(f). The actual knowledge standard means that even a reasonable suspicion would not constitute the requisite knowledge to trigger the prohibition of Model Rule 3.3(a)(3).

73. Model Rules of Prof'l Conduct R. 3.3 cmt. ¶ [8].

This page intentionally left blank

| 16 |

THE SPEECH OR DEBATE CLAUSE

The Constitution provides a special protection for members of Congress that prohibits their arrest while attending a session of the national legislature, or in traveling to or from the session. More importantly, it provides a shield from being "questioned in any other place" about a speech or debate in Congress. This provision grew out of the conflict between the monarchy and Parliament in seventeenth-century England when the monarch would bring criminal charges against members of the House of Commons who opposed the ruler.

The protection was placed in the English Bill of Rights for members of Parliament, which provides "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[1] The Articles of Confederation provided a similar protection for members of Congress:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace. [2]

The Constitution carried over this protection with slight modifications in the language, so that the provision protects any "speech *or* debate," and prohibits questioning in "any other place" without reference to a court. The Clause provides:

> They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning

1. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689, 1 W.& M. Sess. 2, cl. 2.

2. Arts. of Confederation art. V, ¶ 5.

> from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. [3]

There is no evidence of any discussion of the meaning or scope of the protection, as a leading history of the provision noted:

> The speech or debate clause in article I, section 6, is the product of a lineage of free speech or debate guarantees from the English Bill of Rights of 1689 to the first state constitutions and the Articles of Confederation. Presumably because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention and virtually none at all in the ratification debates.[4]

It is clear the protection afforded members of Congress ensures that the other co-equal branches of government do not interfere with the legislative process, but the scope of the constitutional provision and its effect on public corruption cases involving federal elected officials has been the subject of a number of judicial decisions. Corruption on Capitol Hill is not completely uncommon. According to one study, between 1970 and 2000, a total of sixty-one congressmen and senators have been indicted on a range of crimes, many of which involve public corruption.[5] Since 2000, additional members and staff were caught up in the lobbying scandal surrounding Jack Abramoff, and in separate cases two representatives, Randy "Duke" Cunningham and William Jefferson, were convicted of bribery-related crimes.

The following sections discuss the leading Supreme Court decisions on the scope of the Speech or Debate Clause, and what effect it has on investigations and prosecutions of members of Congress and their staff.

3. U.S. Const. art. I, sec. 6, cl. 1. The constitutional protection only applies to members of Congress, not to those serving in state or local legislatures. In addition, if a state constitution provides a similar protection to members of its legislature, that does not bind the federal government, which can use evidence that would come within the federal constitutional provision against a state legislator. In *United States v. Gillock*, involving a bribery prosecution of a Tennessee state senator, the Court held:

> The Federal Speech or Debate Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators. The Tennessee Speech or Debate Clause is in terms a limit only on the prosecutorial powers of that State. Congress might have provided that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress. Alternatively, Congress could have imported the "spirit" of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), into federal criminal law and directed federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the courts of the state. But Congress has chosen neither of these courses.

445 U.S. 360, 374 (1980).

4. Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1135–36 (1973).

5. Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. Ill. L. Rev. 599, 623.

I. ARREST

The Supreme Court, in *Williamson v. United States* in 1908, gave a narrow reading to the arrest privilege provided to members of Congress. The defendant was a member of the House of Representatives who was convicted of conspiracy to suborn perjury. Before sentencing, he challenged the district court's authority to impose any sentence of imprisonment because it would interfere with the right not to be arrested during attendance at a session of Congress. The privilege does not apply to "Treason, Felony, and Breach of the Peace," and the Court held that reference to those offenses had "the very purpose of excluding all crimes from the operation of the parliamentary privilege, and therefore to leave that privilege to apply only to prosecutions of a civil nature."[6]

In *Long v. Ansell*, the Court rejected a senator's claim that he could not be served with a summons in a civil case during a session of Congress because the constitutional protection only applies to arrests, not service of process. The Court stated, "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies."[7] Thus, a member can only avoid arrest for civil infractions or in connection with civil suits, which are virtually unknown in the modern era.

II. SCOPE OF THE SPEECH OR DEBATE PROTECTION

The Supreme Court first considered the scope of the Speech or Debate Clause in 1880 in *Kilbourn v. Thompson*, a civil false imprisonment suit against members of a committee of the House of Representatives and the sergeant-at-arms from an investigation of misuse of government funds. The suit arose from Kilbourn's arrest and imprisonment for contempt related to his refusal to respond to a subpoena *duces tecum* issued by the committee. The representatives asserted the protection of the Speech or Debate Clause because the committee's contempt recommendation related to their role as members of the House, and, therefore, they could not be held liable for recommending that the House hold Kilbourn in contempt. The Court rejected a narrow reading of the provision that limited it to words spoken in an actual debate. Instead, it adopted a broader test that applied the protection "to things generally done in a session of the House by one of its members in relation to the business before it."[8] The sergeant-at-arms, however, did not receive any

6. 207 U.S. 425, 438 (1908). The Court explained that "the terms 'treason, felony, and breach of the peace,' as used in our constitutions, embrace all criminal cases and proceedings whatsoever." *Id*. at 445–46. The Court's historical analysis of the scope of the Arrest Clause has been criticized as erroneous, leading Professor Thomas Davies to state, "The weight of the evidence is crushingly contrary to [Justice] White's analysis of the original meaning of the Arrest Clause in *Williamson*. The evidence indicates that the Framers meant to adopt the common-law understanding of legislative privilege, which set the boundary of the privilege at an actual breach of the peace offense." Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study in the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 299 (2002).

7. 293 U.S. 76, 83 (1934).

8. 103 U.S. 168, 204 (1880).

protection from the Speech or Debate Clause because it did not extend to his actions in carrying out an illegal arrest.[9]

Kilbourn's legislative business test gives a broader reading to the provision than the words of the Clause actually provide, and that case has been the source of significant judicial analysis in determining the contours of the protection afforded members of Congress. Elected officials engage in a range of conduct that extends far beyond the floor of either house of Congress, and the courts have had to focus on a number of issues about what falls within the core of the constitutional immunity granted to them.

A. Modern Supreme Court Interpretations

1. Tenney v. Brandhove

In *Tenney v. Brandhove*, the Court expounded on what comes within a legislature's business in a § 1983 civil rights suit against members of a committee of a state legislature. Although the issue concerned whether Congress meant to abrogate the common law immunity of state legislators for conduct related to their legislative role, the Court addressed the scope of the Speech or Debate Clause as evidence of the scope of the protection. It rejected the claim that the constitutional (or common law) protection did not apply to acts for which there was an improper purpose, stating that "[t]he privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to their motives."[10]

The Court found that a committee acting pursuant to authority granted by the legislature is "an established part of representative government" and, therefore, its members came within the scope of the protection. Even though the committee might have been used for "dishonest or vindictive motives" that harm individuals, the opinion explained that "[t]he courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."[11] Once it is established that a legislator is acting in a manner that involved the exercise of legislative authority, then the Speech or Debate Clause precludes further judicial action related to the conduct.

2. United States v. Johnson

United States v. Johnson was the first criminal case involving a Speech or Debate Clause issue to reach the Supreme Court. It involved the prosecution of two representatives convicted of helping

9. *Id.* at 205.

10. 341 U.S. 367, 377 (1951). The case involved a committee of the California legislature investigating un-American activities involving Communists, and the plaintiff claimed it sought to intimidate him when he refused to answer its questions.

11. *Id.* at 377–78.

two officers of a savings and loan company who were being prosecuted by the Department of Justice. Representatives Thomas F. Johnson and Frank Boykin were convicted of accepting campaign contributions in exchange for approaching the attorney general and other officials urging that they "review" the indictment of the two officers. Among the evidence introduced to establish the conflict of interest and conspiracy charges was a statement made by Representative Johnson on the floor of the House, and the trial involved extensive questioning of the congressman by the prosecutor about who drafted the speech.

As an initial matter, the Court made it clear that a congressman's contacts with the executive branch to influence its decision on the indictment fell outside the scope of the Speech or Debate Clause protection. It stated, "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process."[12] Contact with federal officials and agencies is a common undertaking in a congressional office, so it would certainly qualify as an "official act" under 18 U.S.C. § 201, which specifically includes members of Congress within the bribery and unlawful gratuity prohibitions. Thus, *Johnson* makes it clear that the Speech or Debate Clause protects a much narrower range of conduct than official acts of a member of Congress.

With regard to questioning about Representative Johnson's speech, the Court explained that "[h]owever reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress. . . ."[13] The Court reviewed the long history of the Clause, noting that "[i]t was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchy."[14]

The rationale for the Speech or Debate Clause was "not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[15] The focus was on the potential interference in legislative activity and not only possibly being found liable outside of Congress for statements. Under this approach, the constitutional protection is broader than just immunity from criminal or civil actions because intimidation can come in a number of guises beyond just being named as a party in a judicial proceeding.

The Court emphasized this point when it explained that the Speech or Debate Clause serves the "prophylactic purpose" of protecting members of Congress from being called to account for their legislative acts outside of the Congress, and the protection does not depend on whether the content of the statement or conduct was at issue in the matter. In the prosecution of Representative Johnson, the government focused on the motives for giving the speech and its contents, which

12. 383 U.S. 169, 172 (1966).

13. *Id.* at 180.

14. *Id.* at 181.

15. *Id.* The Court stated, "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominant thrust of the Speech or Debate Clause." *Id.* at 182.

came within the express protection afforded by the Constitution even if the accuracy of the statement was not at issue.

The Court allowed the prosecution to be returned to the district court for a new trial in which the evidence related to the speech would not be introduced. Interestingly, it did not address the proper remedy for a Speech or Debate Clause violation. The question had not been presented by the government during oral argument, so the Court found the issue had been waived and the decision of the Fourth Circuit to remand for a new trial simply affirmed.[16]

3. United States v. Brewster

The key decision interpreting the scope of the Speech or Debate Clause is *United States v. Brewster*, which involved the first Court's extended consideration of what comes within the constitutional protection and the authority of the executive branch to investigate and prosecute corruption involving aspects of the legislative process. While the Court had said—and would later reiterate—the proposition that the Clause should be interpreted beyond the literal meaning of "speech or debate," *Brewster* is important because of its narrower reading of the extent of the constitutional protection, especially in criminal prosecutions of a member of Congress.

Daniel Brewster was a senator charged with accepting a bribe or unlawful gratuity in connection with votes on postal rate legislation related to his service on the Committee on Post Office and Civil Service. He moved to dismiss the indictment because references were made in the indictment to his reviewing and voting on legislation.

The Court began by explaining the scope of the constitutional protection for members of Congress: "[T]he Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."[17] The Court distinguished others types of activities performed by elected officials in the normal course that fall outside the scope of the Speech or Debate Clause, such as "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress."[18] It described these as "political in nature rather than legislative" so that there would be no protection for a member engaged in such conduct.[19] Thus, the "Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process."[20]

16. The former congressman was convicted after the retrial. *See* United States v. Johnson, 419 F.2d 56 (4th Cir. 1969).

17. 408 U.S. 501, 512 (1972).

18. *Id.*

19. The Court explained the meaning of its statement in *Johnson* that the Speech or Debate Clause covered conduct "related to the due functioning of the legislative process" as a limited expression of the constitutional protection because "the Court did not in any sense imply as a corollary that everything that 'related' to the office of a Member was shielded by the Clause." *Id.* at 513–14.

20. *Id.* at 515–16.

The Court expressed concern that a broader reading of the Clause to include anything that might "relate" to the legislative process would provide a license to members to engage in criminal conduct. It stated, "Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make members of Congress super-citizens, immune from criminal responsibility."[21] This concern animated the Court's subsequent discussion of the constitutional protection that led to a narrower reading of the provision. The Court's unease with an expansive constitutional protection was clear when it stated that the Clause "has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers."[22]

Brewster noted that the need to protect members of Congress from interference in the legislative process is not coextensive with the historical interests of members of Parliament operating under a monarchical form of government. The Constitution provides for three co-equal branches of government, and the system has built-in protections for Congress that were not present in England under the Stuart kings. The Court pointed out that the "Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members."[23] It rejected the claim that Congress alone should be responsible for policing its members, at least for conduct that is part of the legislative process, in finding that a prosecution for taking a bribe to vote on legislation did not give the executive branch any more power to interfere with the legislative branch than the prosecution in *Johnson* involving bribery of a member to influence the Department of Justice. Therefore, the Court held that "[d]epriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of members of Congress is unlikely to enhance legislative independence."[24]

The core issue in *Brewster* was whether taking a bribe to vote on legislation came within the protection of the Speech or Debate Clause, and, to answer this question, the Court focused on what the government must prove for the crime of bribery. The Court explained that "[t]aking a bribe is, obviously no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as part of or even incidental to the role of a legislator." The crime is complete upon the agreement to accept the bribe, not the performance of the agreed upon act.[25] The Court held, "When a bribe is taken, it does not matter whether the

21. *Id.* at 516.

22. *Id.* The Court further noted that "[i]n order to preserve other values, [the Framers] wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process." *Id.* at 517.

23. *Id.* at 522 n.16.

24. *Id.* at 524–25. The Court did point out one way in which Congress could protect itself from interference by the other branches: "If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century." *Id.* at 524. It is unlikely the political environment would ever allow Congress to effectively allow bribery of its members as a means of protecting congressional authority over the legislative process.

25. This approach was consistent with the Court's later analysis of the *quid pro quo* element of a Hobbs Act violation in *Evans v. United States* (*see* Chapter 5).

promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch."

Proof of the crime requires some reference to the *quid pro quo* agreement that related to the legislative act promised by the defendant, such as Brewster's agreement to vote on legislation, which came close to the legislative acts protected by the Speech or Debate Clause. The Court explained that the Clause did "not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions," nor did it "prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself."[26] While the government is prohibited from introducing evidence of the legislative acts themselves, such as a member voting in favor of legislation or making a speech on the floor, the fact that the *quid pro quo* involves engaging in such activity did not preclude a prosecution of the member of Congress who would engage in such activity.[27]

Brewster has important implications for the types of evidence that can be used to prosecute a member of Congress for conduct related to their legislative acts. The prosecutor must be careful not to introduce evidence or raise questions about the actual legislative conduct engaged in by the member in relation to the alleged criminal conduct, but may discuss, in an indirect way, what the member agreed to do. Because bribery is not part of the legislative process, the solicitation or acceptance of a bribe can be prosecuted so long as the proof of the offense does not delve into legislative acts, i.e., how a member "acted, voted, or decided."[28]

While evidence of legislative acts is off-limits in a prosecution of a member of Congress, the Court was clear that the Speech or Debate Clause did not preclude a prosecution that indirectly referenced involvement in the legislative process so long as there was no direct questioning of the member regarding any acts or their motivation. Defining the contours of the protection would be left to later cases and the lower courts in dealing with the details of particular investigations and prosecutions.

4. Gravel v. United States

On the same day it issued its decision in *Brewster*, the Court decided a second case on the scope of the Speech or Debate Clause protection. Unlike the criminal prosecution in *Brewster*, *Gravel v. United States* concerned a grand jury investigation related to the disclosure of the so-called Pentagon Papers about the government's Vietnam War policies that was classified at the time as "Top Secret–Sensitive." After receiving a copy, Senator Mike Gravel convened a meeting of a subcommittee he chaired and proceeded to read extensively from them, and then placed the entire forty-seven volumes in the subcommittee's public record. A short time later, Senator Gravel

26. *Id.* at 528.

27. The Court noted that the Speech or Debate Clause makes the government's case more difficult because the protection for legislative acts operates as an evidentiary preclusion on proving the crime: "Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the Clause is inadmissible." *Id.*

28. *Id.* at 527.

arranged for the publication of the Pentagon Papers by a private publisher. The senator worked with an aide he appointed the day of the subcommittee hearing to assist in the preparations for it.

The grand jury subpoenaed Senator Gravel's aide as part of its investigation to determine whether the disclosure of the documents violated federal criminal laws, including conversion of government property, transmitting national defense information, removing public documents, and conspiracy. The senator's aide filed a motion to quash the subpoena as violating the protection of the Speech or Debate Clause, and the senator intervened to assert the same position.

The Court found that the constitutional protection from being "questioned in any other place" was more than just immunity from criminal prosecution, it also precluded inquiry into the legislative acts of a member of Congress during an investigation. It stated, "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch."[29] The Court went on to explain that the senator "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting."[30] Importantly, the Court identified the scope of the Speech or Debate Clause as prohibiting examination of a member of Congress, even if there was no pending judicial proceeding, so that a grand jury investigation like the one in *Gravel* is also subject to the protection. This was consistent with the Constitution's wording that prohibits questioning and not just from having to defend in court as a party to a case.

The Court then extended the protection to the senator's aide because the modern Congress requires that its members perform so many different tasks that it would be impossible for the institution to function without assistance. It held:

> We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.[31]

The protection for a legislative assistant is coterminous with that afforded a member of Congress for whom the aide works, so that "the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator."[32]

While the Speech or Debate Clause provides a privilege to members of Congress and their aides to resist testifying about legislative acts, the Court noted that the Clause did not prevent them from being called as witnesses about conduct that fell outside the scope of the protection. It stated that the Constitution "does not immunize a Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about

29. 408 U.S. 606, 616 (1972).
30. *Id.*
31. *Id.* at 618.
32. *Id.* at 622.

or impugn a legislative act."[33] This was consistent with *Brewster*'s holding that a member of Congress is not immune from prosecution for conduct that falls outside the legislative process.

The Court also rejected the lower court's conclusion that there was a nonconstitutional testimonial privilege, similar to Executive Privilege afforded the president and his aides, that protects against disclosure of communications between a member of Congress and an assistant beyond the prohibition of the Speech or Debate Clause for inquiries into legislative acts. The Court stated:

> But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime. . . .[34]

Gravel then addressed the issue of the scope of the Speech or Debate Clause for the conduct of the senator and his aide, which involved both a subcommittee hearing and making arrangements to publish the Pentagon Papers. The Court found that "a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'"[35] To come within the constitutional protection, the Court stated that the conduct "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[36]

The Court distinguished between reading the Pentagon Papers during the subcommittee hearing and then placing them in the official record, which constituted protected legislative activity, from arrangements made with a private publisher to put the documents into a book available to the general public, which fell outside the protection. *Gravel* rejected reading the Speech or Debate Clause as providing immunity from investigation or prosecution for conduct only tangentially related to a legislative act but not within the direct scope of the protection, explaining that the Clause "does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true."[37] Thus, neither Senator Gravel nor his aide were privileged "to violate an otherwise valid criminal law in preparing for or implementing legislative acts."[38] The Court noted that the grand jury could inquire about how the classified documents came to the senator "as long as no legislative act is implicated by the questions."[39]

33. *Id*.
34. *Id*. at 627.
35. *Id*. at 624 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).
36. *Id*. at 625.
37. *Id*. at 626.
38. *Id*.
39. *Id*. at 628.

Taken together, *Gravel* and *Brewster* give a fairly narrow reading to the protection of the Speech or Debate Clause because both allowed for questioning of a member of Congress that came relatively close to protected legislative acts, but both cases did not specifically address such conduct directly. So long as a prosecutor was careful to avoid questioning about the legislative acts explicitly, the investigation or prosecution could, in all likelihood, proceed. Both also made clear that the Clause did not confer a general immunity on a member or staff to avoid all inquiry into their conduct, and appeared to put the burden on the member to show that the investigation or prosecution impinged on the constitutional protection, at least when the conduct at issue did not involve fairly traditional legislative activity, such as holding hearings, voting, and making speeches.

5. United States v. Helstoski

The Court returned to the issue of the evidentiary use of legislative acts in *United States v. Helstoski*, which involved the prosecution of a representative for allegedly accepting bribes to introduce private bills that would allow aliens to remain in the country. Prosecutors challenged the trial court's ruling that precluded the introduction of evidence that Representative Henry Helstoski actually introduced the private bills in Congress in fulfillment of the *quid pro quo*.

Relying on *Johnson* and *Brewster*, the Court stated that there was "no doubt that evidence of a legislative act of a member may not be introduced by the Government in a prosecution under § 201."[40] The Court rejected the argument that prohibiting use of the legislative act would create a significant roadblock to proving the representative's corrupt intent for accepting the money, acknowledging that "without doubt the exclusion of such evidence will make prosecutions more difficult."[41] Nevertheless, the Speech or Debate Clause only provides a "shield" from prosecution for purely legislative acts, even those tinged by corruption.

The Court reiterated its holding in *Brewster* that a member of Congress can be prosecuted for promising to perform a future legislative act, and stated that "[n]othing in our opinion, by any conceivable reading, prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible."[42] It also rejected the position advanced by Justice John Paul Stevens, in dissent, that evidence of a legislative act should be admissible if it is not offered for the purpose of proving the act took place.[43] The Court stated, "Revealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause."[44]

40. 442 U.S. 477, 487 (1979).

41. *Id.* at 488.

42. *Id.* at 488 n.7.

43. *Id.* at 494 (Stevens, J., dissenting) ("I do not believe, however, that they require rejection of evidence that merely refers to legislative acts when that evidence is not offered for the purpose of proving the legislative act itself.").

44. *Id.* at 490.

Helstoski shows that the Court viewed the constitutional protection as operating in a manner similar to the exclusionary rule applied to Fourth Amendment violations, although it provides an even broader protection. Evidence of legislative acts cannot be used for any purpose by the government, not even for impeachment of a member of Congress, unlike the evidence subject to the exclusionary rule that can be used in certain circumstances. At the same time, *Brewster* and *Johnson* do allow for at least tangential references to legislative acts, such as explaining that the *quid pro quo* agreement involved engaging in legislative conduct, but whether the agreement was actually fulfilled cannot be introduced. Although evidence of completion of the *quid pro quo* can be quite compelling, the Court found that the government's desire to use such evidence—even though it is obtained from a public source—did not override the immunity conferred on members of Congress by the Constitution. It explained that the Clause "was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government."[45]

6. Other Decisions on the Scope of the Clause

The Supreme Court has considered the Speech or Debate Clause in other cases that did not involve criminal investigations or prosecutions that shed light on the scope of the protection afforded to members of Congress. In *Powell v. McCormack*, involving the authority of the House of Representatives to deny a member his seat, the Court stated that "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[46]

The Court expressed a similar view of the rationale of the Clause in *Eastland v. United States Servicemen's Fund*, involving a suit to quash a subpoena issued by a House subcommittee to a bank for an organization's financial records. It stated:

> Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function.[47]

The Court explained that once a member of Congress or an aide was found to have operated within the "legitimate legislative sphere," then the Clause "is an absolute bar to interference."[48]

45. *Id.* at 491. In a companion case, *Helstoski v. Meanor*, 442 U.S. 500 (1979), the Court held that a denial of a Speech or Debate Clause claim of immunity from being questioned about legislative acts can be appealed immediately rather than having to wait until the case is concluded. *Id.* at 506–07. For example, denial of a motion to dismiss an indictment can be appealed even though most such motions must await an appeal after a conviction under the Collateral Order Doctrine.

46. 395 U.S. 486, 505 (1969).

47. 421 U.S. 491, 503 (1975).

48. *Id.*

In *United States Servicemen's Fund*, a member of Congress was not being questioned directly through the subpoena, but the motion to quash the subpoena interfered with the committee's exercise of authority and, therefore, its propriety could not be questioned by a motion to quash. The Court found that issuing the subpoena was a legislative act, so "in determining the legitimacy of the congressional act we do not look to the motives alleged to have prompted it."[49] In deciding what comes within the protection of the Speech or Debate Clause, the Court in *United States Servicemen's Fund* held that "[t]he issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking."[50]

In *Doe v. McMillan*, the Court found that including material in a House committee report and then distributing it within the Congress came within the constitutional protection.[51] On the other hand, in *Hutchinson v. Proxmire*, the Court concluded that republication of material outside of either House, even when it was initially contained in a speech made in Congress, was not protected by the Clause because subsequent republication to the media, constituents, and federal agencies was not a part of the legislative process. In rejecting a Speech or Debate Clause challenge to a defamation action filed against a senator for statements he made in a newsletter and correspondence with a federal agency, the Court stated, "Indeed, the precedents abundantly support the conclusion that a Member may be held liable for republishing defamatory statements originally made in either House. We perceive no basis for departing from that long-established rule."[52]

49. *Id.* at 508. The organization claimed that the subcommittee was trying to harass it by investigating the sources of its funding.

50. *Id.* at 505.

51. 412 U.S. 306, 312 (1973). *McMillan* involved a lawsuit by parents of schoolchildren in the District of Columbia who were identified in a report issued by the House District of Columbia Committee about the state of the schools in Washington, D.C., who claimed that the report violated their right to privacy. The Court held:

> Without belaboring the matter further, it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries.

Id.

52. 443 U.S. 111, 127–28 (1979). The defendant, Senator William Proxmire, issued a "Golden Fleece of the Month Award" for what he considered to be wasteful government spending. The plaintiff was a research scientist who received government funding for studying emotional behavior in monkeys. The statement was placed in the Congressional Record, and while Senator Proxmire could not recall whether he actually spoke the words in the Senate, the Court assumed "that a speech printed in the Congressional Record carries immunity under the Speech or Debate Clause as though delivered on the floor." *Id.* at 116 n.3. *See* Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987) (a congressman's "statements to the public, via press release and press conference, do not constitute legislative activity and therefore do not fall within the scope of the Speech or Debate Clause.").

III. THE MEANING OF LEGISLATIVE ACTS

The availability of the Speech or Debate Clause protection does not depend on there being a particular type of legal proceeding, such as a member of Congress or their staff being named as a party. In *MINPECO, S.A. v. Conticommodity Services*, the District of Columbia Circuit upheld quashing a subpoena in a civil suit that sought information and documents from a House subcommittee. Whether the case or investigations is civil or criminal, and regardless of whether an individual member or one of its committees or subcommittees is the object of the legal proceeding, the Speech or Debate Clause can be invoked to prevent having to turn over documents or respond to questioning so long as the inquiry relates to legislative acts. The circuit court stated, "A litigant does not have to name members or their staff as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive."[53]

In *Fields v. Office of Eddie Bernice Johnson*, the District of Columbia Circuit summarized the Supreme Court decisions about what constitutes a legislative act protected by the Speech or Debate Clause, "The legislative process at the least includes 'delivering an opinion, uttering a speech, or haranguing in debate'; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and 'introducing material at Committee hearings.'"[54] *Fields* involved a claim of employment discrimination brought by an employee in a representative's office, and the issue was whether an employment decision by a member of Congress is protected by the Speech or Debate Clause. The circuit court held that the decision could come within the constitutional protection if "the challenge personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause."[55]

The lower courts look at other types of conduct by members of Congress to determine whether they are legislative acts within the Speech or Debate Clause. In *United States v. Biaggi*, the Second Circuit held that travel by a congressman ostensibly to conduct a committee hearing did not fall within the constitutional protection in a prosecution for violating the Travel Act for accepting an unlawful gratuity. The circuit court noted that "legislative factfinding activity conducted by Biaggi during his Florida trip was protected," but "the Speech or Debate Clause does not immunize a congressman from prosecution for interstate travel in furtherance of receipt of an unlawful gratuity, any more that it would immunize him from a charge of theft of services if he traveled as a stowaway."[56]

53. 844 F.2d 856, 859 (D.C. Cir. 1988).

54. 459 F.3d 1, 10–11 (D.C. Cir. 2006).

55. *Id*. at 16. The D.C. Circuit, sitting en banc, modified the position it took in *Browning v. Clerk, U.S. House of Representatives* that "[w]here the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee." 789 F.2d 923, 928 (D.C. Cir. 1986). *Fields* narrowed the protection by requiring that the personnel decision be specifically related to legislative acts, and not just that the employee engaged in conduct that could come within the constitutional protection. This is not an issue that is likely to arise in a criminal case.

56. 853 F.2d 89, 104 (2nd Cir. 1988). The circuit court explained the scope of the constitutional protection related to official congressional travel:

> Travel may well be related to the legislative process if its purpose is, for example, to attend a debate or to conduct on-site collection of information for consideration of contemplated legislation. Nonetheless, unless the focus of

The District of Columbia Circuit reached conflicting decisions on whether a submission by a member of Congress to a Committee comes within the Speech or Debate Clause. In *United States v. Rose*, the circuit court refused to dismiss a civil suit brought by the Department of Justice against a representative for filing a false financial report with the House Committee on Standards of Official Conduct—more commonly known as the Ethics Committee—as required by the Ethics in Government Act. The congressman claimed the suit was based on his testimony before the committee when it investigated his disclosure, which he claimed was a legislative act. The circuit court rejected that position, holding that his "testimony was not addressed to a pending bill or to any other legislative matter; it was, instead, the Congressman's defense of his handling of various personal financial transactions."[57] It also rejected the proposition that a member appearing before a congressional committee came within the Speech or Debate Clause because the statement occurred within the halls of Congress because "his testimony was given in a personal capacity rather than 'in the performance of [his] official duties'; we focus on what Congressman Rose said, not where he said it."[58]

In *In re Grand Jury Subpoenas*, on the other hand, the District of Columbia Circuit found that a congressman's submission to the House Ethics Committee about whether he accepted private funding for a golf trip that was not listed on his financial disclosure form came within the Speech or Debate Clause because he maintained the trip was primarily for the purpose of legislative fact-finding. Prosecutors issued a grand jury subpoena to the representative's lawyers for documents submitted to the committee related to its investigation. According to the circuit court, "The Committee's inquiry. . . was directed to whether the trip was an exercise of the congressman's official powers or an abuse of those powers, i.e., a privately-sponsored vacation."[59] The possibility that the trip could be viewed as legislative activity meant that the statement was arguably a legislative act, and therefore protected by the Speech or Debate Clause from further inquiry.

Rose involved transactions that were clearly personal in nature, while the trip involved in *Grand Jury Subpoenas* could have been legislative, although it is not clear what the House Ethics Committee ultimately decided about whether the trip involved legislative fact-finding. Simply asserting that the subject matter of the congressional inquiry could be legislative seemed to be sufficient in *In re Grand Jury Subpoenas* to invoke the protection of the Speech or Debate Clause, but it is difficult to distinguish the questioning in *Rose* as different just because it involved only personal transactions. The nature and subject matter of the Ethics Committee's inquiry is the same, but one member's generalized reference to legislative activity changed the outcome. The statements of the members of Congress in both cases involved personal conduct, and under *Brewster* the mere fact that a legislative act was referred to was not, standing alone, sufficient to invoke the constitutional protection.

the legislation itself is transportation, the mere transport of oneself from one place to another is simply not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."

Id. (quoting *Gravel v. United States*, 408 U.S. at 625).

57. 28 F.3d 181, 188 (D.C. Cir. 1994).

58. *Id*

59. 571 F.3d 1200, 1203 (D.C. Cir. 2009).

IV. TESTIMONIAL PRIVILEGE AND IMMUNITY

The Speech or Debate Clause operates in two ways: it provides absolute immunity from a civil suit or criminal prosecution for legislative acts within the constitutional protection, and it provides a type of testimonial privilege to preclude questioning or demands for documents in connection with third-party litigation and criminal investigations. When a member of Congress is named in a suit or charged with a crime, then the Supreme Court's decisions in *Johnson* and *Brewster* make it clear that the immunity protects against evidence related to legislative acts being introduced directly to prove the claim or offense, although the legislative role may be referred to as a means of providing context. In *Gravel*, the Court went a step further by prohibiting questioning of a senator (or his aide) before a grand jury regarding legislative acts related to a third-party's conduct, extending the privilege beyond just direct claims against the member. How far to apply the Speech or Debate Clause in other contexts has led to some division in the lower courts.

A. Subpoenas

The lower courts have recognized that the testimonial privilege provided by the Speech or Debate Clause extends to subpoenas for records related to legislative acts, but whether it goes beyond that to protect other information in the same material has been the subject of some dispute. In *In re Grand Jury Investigation*, the Third Circuit read the constitutional protection narrowly to allow a grand jury subpoena for records related to personal acts of a representative when legislative acts were also referenced in the documents. The investigation concerned possible bribery and obstruction of justice, and the prosecutor issued a grand jury subpoena to the Clerk of the House for the representative's office telephone records.

The telephone records showed calls that likely involved legislative acts along with some personal calls that would not be protected. The circuit court rejected the argument that when a document contains both protected and unprotected material, then the entire document comes within the Speech or Debate Clause. The Third Circuit stated, "While there is much to be said for such a rule, we think it foreclosed by *Gravel v. United States*, which authorizes rather wholesale rummaging in the interest of discovering and prosecuting third-party crimes."[60]

The circuit court distinguished the privilege granted to members of Congress from that provided for attorney-client and physician-patient communications, which are designed to prevent disclosure of information to protect (and encourage) a socially valuable relationship. The Speech or Debate Clause privilege, on the other hand, "clothes the legislator with a use immunity, analogous in many ways to the use immunity conferred upon witnesses."[61] The court explained:

> But to the extent that the Speech or Debate Clause creates a Testimonial privilege as well as a Use immunity, it does so only for the purpose of protecting the legislator and those intimately associated

60. 587 F.2d 589, 596 (3rd Cir. 1978).

61. *Id.*

> with him in the legislative process from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy . . . . [T]he privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure.[62]

Thus, the claim that the entire document should be protected because it contained privileged information misconstrued the effect of the Speech or Debate Clause, which the circuit court concluded was not designed to prevent disclosure of communications but only against questioning of a member of Congress about them.

The Third Circuit put the burden of establishing what information related to legislative acts on the representative, not on the prosecution. It stated, "Since the Congressman is asserting a use privilege personal to him, and since the information as to which calls were legislative acts is in his possession alone, the burden of going forward and of persuasion by a preponderance of the evidence falls on him."[63] In that sense, the privilege is similar to other types of testimonial privileges in which the burden is on the party seeking to prevent the questioning from establishing the basis for the claim.

The Ninth Circuit analyzed the scope of the Speech or Debate Clause privilege in *Miller v. Transamerican Press, Inc*., which concerned whether a former representative could be questioned about how he came to receive an article he subsequently inserted in the Congressional Record that the plaintiff claimed was defamatory. The circuit court rejected the argument that the constitutional protection did not apply to past acts of a former representative because the inquiry would not affect the legislative process. It found that the case came squarely within the constitutional protection that prohibits questioning about any legislative act, and the "present status with regard to public office or to the lawsuit is irrelevant."[64]

It was unclear whether passive receipt of an article constituted a legislative act, while insertion of the material in the Congressional Record did fall within the constitutional protection. The Ninth Circuit took a broader view than the Third Circuit on the scope of the protection, holding that any questioning about how the article came into the congressional office would touch upon legislative acts, and therefore was precluded by the Speech or Debate Clause privilege. The circuit court explained the rationale for prohibiting inquiry on the subject:

> The possibility of public exposure could constrain these sources. It could deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information. Even more to the point, it would chill speech and debate on the floor. The Congressman might censor his remarks or forgo them entirely to protect the privacy of his sources, if he contemplated that he could be forced to reveal their identity in a lawsuit.[65]

62. *Id*. at 597.
63. *Id*.
64. 709 F.2d 524, 529 (9th Cir. 1983).
65. *Id*. at 530–31.

The Ninth Circuit's analysis appeared to view the constitutional protection as a means of keeping information confidential rather than providing a use immunity for the member of Congress. The Clause, however, was not adopted to encourage constituent communications, but instead a protection afforded one branch to prevent interference by another. The fact that the former representative would be questioned about a legislative act should be sufficient to invoke the constitutional protection without regard to whether it might impact interaction with constituents unless that was part of the legislative process.[66]

The District of Columbia Circuit took a similar approach to a subpoena for records in a civil suit in *Brown & Williamson Tobacco Corp. v. Williams*, which involved a subpoena to a House committee for documents the plaintiff claimed were stolen and subsequently provided to the committee. The circuit court equated a subpoena for records as equivalent to questioning of a member of Congress at a deposition, and, therefore, the Speech or Debate Clause was clearly applicable. It noted that, unlike the grand jury inquiry in *Gravel*, this case involved a private third-party tort suit, so that "the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest, but is 'absolute' in all other contexts."[67] Explaining the scope of the Speech or Debate Clause, it stated, "A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen. We do not perceive a difference in the vigor with which the privilege protects against compelling a congressman's testimony as opposed to the protection it provides against suit."[68]

The District of Columbia Circuit offered another rationale for precluding inquiry by means of a subpoena for documents that reflects the view of the Speech or Debate Clause privilege as one that protects the confidentiality of communications rather than primarily a use immunity. The circuit court found that a subpoena was an indirect means of questioning a member of Congress, and "indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do—and this is true whether or not the documents are sought for the purpose of inquiring into (or frustrating) legislative conduct or to advance some other goals. . . ."[69] The circuit court disagreed with the Third Circuit's statement in *In re Grand*

66. The Ninth Circuit's reading of the Speech or Debate Clause to include a confidentiality component conflicts with the Supreme Court's analysis in *Gravel*, which permitted inquiry into issues related to the receipt of the Pentagon Papers by a senator and his aide. Although the circuit court cited to *Gravel* in its opinion for different propositions about the Clause, it never analyzed how its confidentiality analysis fit with the Supreme Court's conclusion that receipt of materials could be inquired about in the grand jury. It seems unlikely that the distinguishing characteristic in *Transamerican Press* is the fact that the source of the information is purported to be a constituent of the representative. The Speech or Debate Clause protects the member of Congress, not the person speaking with the member, and the relationship between them is irrelevant so far as the constitutional protection applies.

67. 62 F.3d 408, 419–20 (D.C. Cir. 1995). The circuit court rejected the argument that an inquiry into the source of documents was consistent with the Supreme Court's analysis in *Gravel* that conduct unrelated to the subcommittee hearing could be inquired into in the grand jury investigation, so the Speech or Debate Clause was not an absolute bar to questioning of a member or aide. It found that permitting an inquiry into the source of documents in any situation "would 'chill' any congressional inquiry; indeed, it would cripple it." *Id.* at 419.

68. *Id.* at 421.

69. *Id.* at 420.

Jury Investigation that the Clause was "not designed to encourage confidences by maintaining secrecy," asserting that this would be "inconsistent with an interpretation of the Speech or Debate Clause that would permit Congress to insist on the confidentiality of investigative files."[70]

It is not clear how a claim of confidentiality relates to the protection afforded by the Speech or Debate Clause. As the Supreme Court made clear in *Johnson*, *Brewster*, and *Gravel*, the constitutional issue was whether the questioning involves legislative acts, not whether there is a need to keep the information confidential to allow the legislative process to move forward. The Court made it clear that the Constitution does not protect acts that fall outside the legislative process, such as accepting a bribe. There is no mention of any need to encourage confidentiality in Congress or with congressional staff.

While members of Congress may wish to maintain the confidentiality of their communications with staff, the Clause does not provide that all questioning is prohibited to further that particular goal. The Constitution allows questioning of members of Congress within the body itself, so there would be no basis to assert a confidentiality claim in response to a congressional inquiry. Instead, the entire focus of the Clause is on protecting the public conduct of the Congress—speeches or debates in the body and those acts attendant to the legislative process—from outside inquiry. Congressional action is publicly available, and involves the official conduct of members of Congress that is not, as the Third Circuit pointed out, to be shrouded in secrecy. The thrust of the Speech or Debate Clause is to protect the public affairs of Congress, not to operate as a shield for private communications. While there may be a basis to assert a legislative privilege for confidential communications similar to that afforded the executive branch, that is an issue quite apart from the Speech or Debate Clause.

B. Searches

While most criminal investigations of corruption involve grand jury subpoenas for evidence, there are cases in which a search warrant is executed to obtain documents and other items related to bribery, kickbacks, and other forms of corruption. Most searches involving a member of Congress do not raise Speech or Debate Clause issues because the items seized do not involve legislative acts.[71] In one instance, however, a search occurred in the Capitol Hill office of a sitting member of Congress, and the District of Columbia Circuit took up the issue of how the Speech or Debate

70. *Id.* (quoting *In re Grand Jury Investigation*, 587 F.2d at 597). The Third Circuit took the same position in *United States v. Helstoski*, when it stated, "The privilege is not one of nondisclosure but of nonevidentiary use." 635 F.2d 200, 203 (3rd Cir. 1980).

71. For example, in *United States v. Jefferson*, 562 F. Supp. 2d 695 (E.D. Va. 2008). FBI agents recovered $90,000 from a freezer in the home of a congressman that had been delivered to him earlier by an undercover operative.

Clause affects the power of the executive branch to obtain records pursuant to a lawfully issued warrant in *United States v. Rayburn House Office Building, Room 2113*.

The search came as part of an investigation of Representative William Jefferson for bribery. The warrant application specifically authorized the seizure of only nonlegislative materials from the congressman's office, but it was clear that, during the course of the search, government agents would have to review materials related to the legislative process to determine what was subject to seizure pursuant to the warrant. To minimize any violation of the constitutional protection afforded members of Congress, the Department of Justice created a "filter" team to review items that were arguably related to legislative acts in order to assess whether they should be retained or returned to Representative Jefferson.[72] In challenging the search, the congressman claimed that reviewing any legislative materials was a violation of the Speech or Debate Clause and, therefore, everything seized must be suppressed.

The District of Columbia Circuit began with the proposition, based on its earlier decision in *Brown & Williamson*, that a "key purpose" of the privilege afforded by the Speech or Debate Clause "is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put."[73] This is an application of the circuit court's view that the privilege is more than just a use immunity, but also designed to protect the confidentiality of legislative communications. Although the Supreme Court has never reached that issue, the circuit court held that it was bound by *Brown & Williamson* to find that inquiry into legislative communications was prohibited by the Speech or Debate Clause. Thus, the circuit court found:

> This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.[74]

By viewing the Speech or Debate Clause as protecting the confidentiality of legislative materials, the District of Columbia Circuit concluded that "a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause."[75] To protect the executive's right to use lawful means to enforce the law, the member of Congress whose office is searched must be allowed to object prior to any seizure of evidence to ensure that materials protected by the Clause are not viewed in the course of the search.[76] The circuit court rejected

72. 497 F.3d 654, 656–57 (D.C. Cir. 2007).

73. *Id.* at 660.

74. *Id.* at 661.

75. *Id.* at 663.

76. The circuit court stated, "The Executive's search of the Congressman's paper files therefore violated the Clause, but its copying of computer hard drives and other electronic media is constitutionally permissible because the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive. . . ." *Id.*

Representative Jefferson's proposed remedy that all materials, including nonlegislative documents, be returned because that would exceed the protection afforded by the Speech or Debate Clause, which does not prohibit searches of congressional offices per se.[77]

Rayburn House Office Building assumed that a search should be treated identically to a subpoena, which involves questioning of a member of Congress or at least some communicative response to a demand for documents. It is arguable that there is no questioning involved in a search in the same sense that a deposition or subpoena requires a response, and the Fifth Amendment privilege against self-incrimination does not apply to the seizure of evidence pursuant to a warrant. Rather than focus on whether a search involves questioning, the anti-interference rationale the Supreme Court has relied on to interpret the scope of the Speech or Debate Clause points toward finding a search to be the type of intrusion into the legislative process that the Constitution sought to preclude. Thus, the District of Columbia Circuit was on firm ground in analyzing the applicability of the Clause with the power of the executive branch to conduct a search, even though a search does not directly involve questioning of a member of Congress. Understood as a form of questioning, a search interferes with the legislative process in a way that a subpoena does not because the decision on whether and when to respond is up to the member of Congress, who can object in advance.

If the circuit court only relied on the anti-interference analysis, then its decision to limit the authority of the executive branch to conduct a search of a member's legislative office would be a reasonable extension of the constitutional protection. Rather than take that approach, however, the District of Columbia Circuit instead focused on the confidentiality rationale to support its conclusion that some materials could not be viewed at all during a search.

A potential flaw in the confidentiality approach is that if the constitutional protection were designed to ensure that no confidential information of a member of Congress ever be revealed, then any search of a congressional office would pose a danger of disclosing that information. Moreover, the protection for communications would not be limited to just those that involve legislative acts because members of Congress communicate on a range of issues, and confidentiality could not be limited to just those communications involving legislative acts. Reliance on a confidentiality rationale to limit the scope of a search would be overinclusive because the Speech or Debate Clause would appear to cover all communications in a legislative office, even those that might not otherwise qualify for protection under the Speech or Debate Clause.

A better approach to take to a search is to focus on its intrusiveness of the search into the legislative process, which can allow the executive branch to seize a wide range of materials without regard to whether they are protected by the Speech or Debate Clause. A search warrant is issued ex parte and the party searched can only challenge its execution after the fact, as occurred in *Rayburn House Office Building*. The District of Columbia Circuit's focus on allowing the member of Congress to assert the Speech or Debate Clause protection before execution of the warrant is particularly important to avoid the substantial interference and chilling effect a search can have on the legislative process. The rationale for such protection should not be to protect confidentiality within a legislative office, which has never been part of the Clause, but to prevent intrusion by the executive

77. *Id.* at 665.

branch in the legislative process. The better focus is on preventing questioning that would be attendant with a search, which is effectively an inquiry into the operation of a congressional office.

Emphasizing confidentiality confuses the core issue of preserving the integrity of Congress. Regardless of whether communications involving a member of Congress is present in the materials to be searched, the Speech or Debate Clause was designed to limit the possibility of a representative or senator being called to account for their conduct in the legislative process while not granting a complete immunity from all questioning or liability.

C. Wiretaps and Consensual Recordings

Unlike a search, wiretaps and consensual recordings of conversations do not involve any direct interference with the legislative process, although they are quite invasive by recording statements of a member of Congress. If the privilege granted by the Speech or Debate Clause also encompasses protection of the confidentiality of congressional communications, as the District of Columbia Circuit held in *Rayburn House Office Building* and *Brown & Williamson*, then that would call into question whether the law enforcement tactic of listening in on conversations could be used to investigate corruption involving representatives and senators.

In *United States v. Renzi*, the district court rejected a representative's claim that wiretaps of conversations that included discussions of legislative acts should be suppressed as a violation of the Speech or Debate Clause. The argument was that the entire wiretap was improper because it allowed agents to overhear telephone calls that were protected by the Clause from disclosure in connection with an investigation concerning a possible land swap in which the representative would sponsor legislation in exchange for a bribe. The district court refused to follow the analysis in *Rayburn House Office Building*, finding that decision "erred by broadly defining the testimonial privilege to include a non-disclosure privilege."[78] It explained that the Supreme Court's decisions have never held that the Speech or Debate Clause is based on the need for confidentiality, and "the very opposite is implied from the nature of the protections bestowed by the Clause, protections designed to encourage candor and openness in speech or debate 'in either House.'"[79]

In *United States v. Dowdy*, the Fourth Circuit rejected the argument of a congressman that a conversation he had in his Capitol Hill office with a cooperating defendant to discuss a bribe should be excluded because it was obtained in violation of the protection afforded Congress under the principle of separation of powers. It does not appear that the representative asserted the Speech or Debate Clause privilege, perhaps because the tenor of the recorded conversation made it clear that the discussion concerned a bribe.[80] The Clause is based on the need to protect against encroachment on the legislative process by the other two branches, so the reference to separation of powers has many of the hallmarks of the constitutional protection afforded members of

78. 692 F. Supp. 2d 1136, 1145 (D. Ariz. 2010). The district court affirmed the recommendation of the magistrate judge to deny the motions, whose opinion is incorporated into the district court's decision.

79. *Id.*

80. 479 F.2d 213, 220 (4th Cir. 1973).

Congress. The circuit court stated, "Defendant cites no authority, and we are aware of none, indicating that the recording and transcription of a Congressman's conversations violate the constitutional principle of the separation of powers."[81]

The use of an undercover sting operation in the Abscam investigation, which involved audio and video recording of conversations with congressmen, was also challenged in *United States v. Myers* as a violation of the separation of powers principle. The Second Circuit found that the government's investigative tactics, which included seeking the assistance of members of Congress in introducing legislation and other conduct that could otherwise constitute legislative acts, was not impermissible. The circuit court stated, "With the policy choice thus fully within the control of Congress, we cannot conclude that the separation of powers doctrine creates a constitutional barrier to the law enforcement technique selected by the Executive Branch."[82]

Renzi, *Dowdy*, and *Myers* involved the use of undercover tactics to record conversations that could have involved references to legislative conduct by the member of Congress, but the courts did not find a violation of the Speech or Debate Clause from the fact that congressmen were recorded discussing matters that could pertain to legislative business. The act of intercepting or recording a conversation would not involve any direct questioning of a representative or senator or any interference in the legislative process, so the use of this investigative tool is quite different from a subpoena for records or a search warrant, which bring the legislator directly into the judicial process and, therefore, can be understood as rising to the level of questioning about a legislative act.

If the confidentiality analysis of *Rayburn House Office Building* and *Brown & Williamson* is a proper interpretation of the Clause, then recording conversations, and perhaps even having an undercover agent engage a member of Congress in conversations that touch upon the legislative process as part of a sting operation, could be precluded from the arsenal for corruption investigations. The use of an undercover operative, such as in the Abscam investigation, was never found to violate the Speech or Debate Clause because the object of the encounters with representatives and senators was to lure them into accepting bribes, the type of conduct the Supreme Court expressly found in *Brewster* to fall well beyond the constitutional protection. The confidentiality analysis, however, could significantly reorient the way in which corruption on Capitol Hill can be investigated if it were to be widely adopted.

81. *Id*. at 229. The Fourth Circuit issued its opinion a few months before the Supreme Court issued its decisions in *Brewster* and *Gravel* discussing the scope of the Speech or Debate Clause. In *Brewster*, the Court made it clear that a discussion of a bribe in exchange for a legislative act, such as sponsoring a bill, does not come within the scope of the constitutional protection afforded members of Congress. The discussion in *Dowdy* would fall within that exclusion from the Clause, and so it could not be argued successfully that the recorded conversation was protected by the Speech or Debate Clause as related to a legislative act.

82. 635 F.2d 932, 939 (2nd Cir. 1980); *see also* United States v. Murphy, 642 F.2d 699, 700 (2nd Cir. 1980) ("Here, as in *Myers*, there is no claim that the grand jury did not hear significant and sufficient evidence unprotected by the Speech or Debate Clause, since the appellants have viewed videotapes of alleged acceptances of bribes.").

V. REMEDIES

The protection afforded by the Speech or Debate Clause depends on the context in which the constitutional protection arises. Under *Gravel*, a member of Congress or an aide can invoke the privilege to prevent questioning on topics related to legislative conduct, although they may be asked about other acts that fall outside the scope of the privilege. If there is a subpoena for documents that relate to a legislative act, then the Clause permits a court to quash it.

A member of Congress charged with a crime can invoke the immunity afforded by the Speech or Debate Clause to preclude being tried on a charge that would require proof of a legislative act. In *Dombrowski v. Eastland*, the Supreme Court explained:

> It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, that legislators engaged "in the sphere of legitimate legislative activity," should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.[83]

In *Helstoski v. Meanor*, the Supreme Court held that a district court's denial of a motion to dismiss a charge because its prosecution would violate the constitutional protection is immediately appealable, similar to a claim under the Double Jeopardy Clause of the Fifth Amendment.[84] The privilege afforded by the Clause also prevents the government from using any evidence of a legislative act to prove the charge, as the Court explained in *United States v. Johnson* when it held that a prosecution involving any reference to a speech on the floor of the House was precluded.[85] Similarly, in *United States v. Brewster*, the Court stated, "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."[86] Thus, the Clause operates primarily as a type of exclusionary rule, at least when a member of Congress is a party to the case.

In *Johnson*, the Court remanded the case for retrial in which the prosecution would be precluded from introducing or even referring to the legislative acts, but allowed the government to seek a conviction based on other evidence. Courts have also dismissed charges both before trial and after a conviction because they were based on acts protected by the Speech or Debate Clause. For pretrial dismissal of charges, the usual rule in federal criminal cases is that a court cannot consider the evidence on which the grand jury based its decision to indict. In *United States v. Costello*, the Supreme Court held, "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits."[87] Unlike a post-trial

83. 387 U.S. 82, 84–85 (1967) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

84. 442 U.S. 500, 507 (1979).

85. 383 U.S. 169, 184–85 (1966) ("We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause.").

86. 408 U.S. 501, 525 (1972).

87. 350 U.S. 359, 363 (1956).

review of the evidence, pretrial dismissal requires the court to scrutinize whether conduct protected by the Speech or Debate Clause is likely to be implicated in the government's evidence.

In *United States v. Helstoski*, the Third Circuit upheld the dismissal of the indictment—after the Supreme Court remanded the case—because "evidence violating the speech or debate clause was so extensive that it completely infected" the grand jury proceedings.[88] The circuit court noted that the congressman testified ten times before eight different grand juries about legislative acts, leading the district court to conclude that "[t]he entire proceeding was tainted by such evidence."[89] The Third Circuit held that it was authorized to look beyond the face of the indictment to scrutinize the evidence supporting the charges because "[i]nvocation of the constitutional protection at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning."

The Third Circuit explained the rationale for allowing the dismissal of charges before a trial rather than waiting until after a jury verdict, as happens in most cases challenging the propriety of an indictment:

> We must recognize that the mere issuance of an indictment has a profound impact on the accused, whether he be in public life or not. Particularly for a member of Congress, however, publicity will be widespread and devastating. Should an election intervene before a trial at which he is found innocent, the damage will have been done, and in all likelihood the seat lost. Even if the matter is resolved before an election, the stigma lingers and may well spell the end to a political career.[90]

In *United States v. Swindall*, the Eleventh Circuit found that perjury charges should have been dismissed before trial because prosecutors introduced, both in the grand jury and at trial, evidence of a congressman's membership on a committee that considered legislation on currency structuring that was the basis for the charges. Representative Patrick Swindall denied knowing that certain transactions were in violation of the money-laundering laws, which were adopted when he was a member of a House committee that reviewed and approved the legislation containing the provisions. The circuit court found that use of his membership on the committee as circumstantial evidence of his knowledge of the law violated the Speech or Debate Clause for two reasons, "First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative acts. Second, here the government's inquiry into Swindall's committee memberships actually amounted to an inquiry into legislative acts."[91] The Eleventh Circuit explained that "[i]t seems obvious that levying criminal or civil liability on members of Congress for their

88. 635 F.2d 200, 202 (3rd Cir. 1980).

89. *Id.*

90. *Id.* at 205.

91. 971 F.2d 1531, 1543 (11th Cir. 1992). The investigation involved a representative who wanted to sell a note in exchange for cash, which would not be reported under the currency structuring laws. He was called to testify before a grand jury and denied knowledge of the criminality of the proposed conduct, which the government sought to overcome by showing that he was a member of the House Banking and Judiciary Committees, which were involved in reviewing money-laundering legislation that made certain types of cash transactions subject to reporting requirements and prohibited other types of monetary transactions.

knowledge of the contents of the bills considered by their committees threatens or impairs the legislative process."[92]

While Representative Swindall had moved to dismiss the charges before trial because of the Speech or Debate Clause violation, he did not appeal the district court's denial of his motion, despite having the right to pursue an interlocutory appeal under *Helstoski v. Meanor*. Even though he went to trial and was convicted, the Eleventh Circuit still found that dismissal of the charges was appropriate because the constitutional protection prevents a member of Congress from even having to defend a case. The circuit court noted that there were two violations of the Clause before the grand jury: first, his legislative status was "critical evidence leading to his indictment" because it was used to establish probable cause of his intent, and second "his privilege against being questioned in any place other than Congress was violated when he was questioned before the grand jury about Speech or Debate matters."[93]

The Eleventh Circuit rejected the government's argument that a new trial was the only permissible remedy for a violation, holding that "no new indictment can issue from an excised transcript of Swindall's grand jury testimony because the decision to indict was inextricably linked to the grand jury's impressions of Swindall's answers to improper questions."[94] It explained the remedies that are available when a violation of the Speech or Debate Clause has been established:

> If the questioning occurs at trial, a conviction cannot stand. If the questioning occurs before the grand jury, the affected counts of the indictment cannot stand. Otherwise, there would be no deterrent to prosecutors from improperly haling a member of Congress before a grand jury to ask questions about protected legislative activities as long as they had sufficient other evidence to indict.[95]

In *United States v. Dowdy*, the Fourth Circuit found that it may be necessary to look behind the language of an indictment to determine whether the allegations constituted a violation of the constitutional immunity. The circuit court stated, "[W]e think that the speech or debate clause constitutes a limitation on what may be alleged as well as what may be proved, although it may be necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations."[96] The Fourth Circuit found that three of the overt acts alleged as

92. *Id.* at 1545. The circuit court stated:

> If legislators thought that their personal knowledge of such bills could one day be used against them, they would have an incentive (1) to avoid direct knowledge of a bill and perhaps even memorialize their lack of knowledge by avoiding committee meetings or votes, or (2) to cease specializing and attempt to become familiar with as many bills as possible, at the expense of expertise in any one area. Either way, the intimidation caused by the possibility of liability would impede the legislative process. Prohibiting inquiry into committee membership thus advances the Speech or Debate Clause's "fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator."

Id. (quoting *Gravel v. United States*, 408 U.S. 606, 618 (1972)).

93. 971 F.2d at 1547.

94. *Id.* at 1549.

95. *Id.*

96. 479 F.2d 213, 223 (4th Cir. 1973).

part of a conspiracy were improper because they referenced legislative acts, but it did not find it necessary to dismiss the charge containing them because other alleged overt acts did not contravene the constitutional protection.[97]

Along the same lines, in *United States v. Rostenkowski*, the District of Columbia Circuit explained that "at least under some circumstances the Speech or Debate Clause prohibits not only reference to protected material on the face of an indictment but also the use of that material before the grand jury."[98] The circuit court limited the availability of the dismissal remedy, however, when the constitutional protection can be vindicated by excluding evidence from trial. The circuit court stated:

> Assuming that the indictment is untainted by the submission of Speech or Debate material to the grand jury, but that a preview of the evidence that the Government proposes to present at trial would reveal some Speech or Debate material, it would still not be appropriate for the district court to dismiss the indictment; rather, the court would merely prohibit the Government from presenting that evidence at trial.[99]

The Fourth Circuit had warned in *Dowdy* that artful pleading of an indictment would not avoid pretrial review of a potential Speech or Debate Clause issue in a prosecution.[100] In *United States v. McDade*, the Third Circuit found that the Speech or Debate Clause does not impose any special pleading requirements for a valid indictment, but the court could, before trial, review evidence the government planned to use to establish its case to ensure there will not be anything that runs afoul of the Speech or Debate Clause. The circuit court explained that, because the Constitution protects a member of Congress from having to defend against a charge, "in a case with potential Speech or Debate Clause issues, [the prosecutor] must provide sufficient notice of the nature of the charges so that a motion for dismissal on Speech or Debate Clause grounds can be adequately litigated and decided."[101] Although the information need not be included in the indictment, if there is insufficient information available to ascertain the potential that the charge violates the Speech or Debate Clause, then the court can hold an evidentiary hearing to address the issue.[102]

Although the use of evidence of legislative acts in the grand jury can be a basis to dismiss charges, that remedy is not automatic. In *United States v. Jefferson*, the Fourth Circuit reviewed a

97. *Dowdy* involved a post-trial challenge to a conviction, so the circuit court had the benefit of being able to review the evidence underlying the allegations in the indictment to determine whether there was a violation of the Speech or Debate Clause.

98. 59 F.3d. 1291, 1300 (D.C. Cir. 1995).

99. *Id.*

100. 479 F.2d at 223 ("[T]he validity of an indictment must be determined in the context of the proof which is offered to sustain it, or in the context of facts adduced on a motion to dismiss it. Otherwise, the validity of an indictment would depend solely on what the prosecutor elected to allege, and he would be limited only by his sense of self-restraint in alleging all facts, including those unfavorable to his case.").

101. 28 F.3d 283, 298 (3rd Cir. 1994).

102. *Id.* ("We agree with the defendant that if a district court lacks sufficient factual information to determine whether dismissal of a particular charge in an indictment is required under the Speech and Debate Clause, the court must obtain that information before trial by conducting a hearing or by some other means.").

congressman's claim that reference to his legislative status before the grand jury required dismissal of criminal charges that he accepted bribes. It rejected the argument, based on *Dowdy*, that a court must look behind the indictment to review whether any evidence will be presented that violates the constitutional protections "where, as here, there is no allegation that proof of the indictment requires the presentation at trial of Speech or Debate Clause materials."[103] The circuit court noted that the trial court's *in camera* review of the evidence presented to the grand jury to assess whether any of it came within the constitutional protection "was within its discretion and entirely appropriate," even if "controlling authority did not compel such a comprehensive review."[104]

While courts have been willing to look at the evidence prosecutors presented to a grand jury to assess a possible violation of the Speech or Debate Clause, they have been unwilling to require the government to prove that all of its evidence is untainted by information it possesses about legislative acts. Defendants have argued that the constitutional protection for members of Congress is similar to testimony compelled pursuant to a grant of immunity that overcomes the Fifth Amendment privilege against self-incrimination. In *Kastigar v. United States*, the Supreme Court held that when the government grants a person immunity from prosecution in order to compel testimony, then the Fifth Amendment requires that the testimony, and any fruits derived from the witness's statements, cannot be used against that person. In order to prosecute an immunized witness, the Court requires the government to prove that all of its evidence is derived from a source independent of the defendant's immunized testimony, which it has characterized as a "heavy burden."[105] If the government cannot establish an independent basis for its evidence, then the indictment must be dismissed.

The remedy for a *Kastigar* violation presents an inviting target for members of Congress charged with crimes, but courts have rejected the application of this approach for Speech or Debate Clause claims. In *Rostenkowski*, the District of Columbia Circuit explained that "the Government does not have to establish an independent source for the information upon which it would prosecute a Member of Congress. Rather, the burden of proof is the other way around: the Member must show that the Government has relied upon privileged material."[106] In *Renzi*, the district court noted that the Clause does not protect against disclosure of legislative acts, unlike the Fifth Amendment that allows a witness to refuse to respond to questions, concluding that "Renzi is mistaken in his argument that the privilege extends to requiring the prosecution to demonstrate, in a *Kastigar* hearing, that its case against Renzi is based upon evidence completely independent of the evidence it obtained in violation of the Speech or Debate Clause."[107]

103. 546 F.3d 300, 314 (4th Cir. 2008). The prosecution involved the congressman whose office search was reviewed by the District of Columbia Circuit in *United States v. Rayburn House Office Building, Room 2113*.

104. *Id.*

105. 406 U.S. 441, 461–62 (1972) ("One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.").

106. 59 F.3d at 1300.

107. 686 F. Supp. 2d 991, 1002 (D. Ariz. 2010).

VI. WAIVER

The Supreme Court explained in *Helstoski* that the protection afforded by the Speech or Debate Clause is "to preserve the constitutional structure of separate, coequal, and independent branches of government." It would appear that the constitutional provision is directed more toward safeguarding the institutional interest of Congress vis-à-vis the other two branches and less a benefit provided to an individual member, so waiving the protection would be a decision the entire legislative body should make. The Court in *Helstoski* avoided the issue, stating that "we perceive no reason to decide whether an individual Member may waive the Speech or Debate Clause's protection against being prosecuted for a legislative act."[108] But then it assumed an individual member could waive the privilege to be free from questioning without prior approval by Congress, holding that "waiver can be found only after explicit and unequivocal renunciation of the protection. The ordinary rules for determining the appropriate standard of waiver do not apply in this setting." This is a much higher standard than the one used for waiver of the Fifth Amendment privilege against self-incrimination, which only requires that a witness voluntarily respond to questions.

Helstoski involved a representative who answered questions in a grand jury, and the Court was unwilling to find his responses sufficient to constitute a waiver. If a member of Congress is charged with a crime, the lower courts recognize that the defendant can offer evidence at trial of legislative acts as a defense to the charge, which effectively operates as a waiver of the protection, although the issue has only arisen in the context of a pretrial motion to dismiss and not after a conviction. In *United States v. Myers*, the Second Circuit held that the Speech or Debate Clause did not prohibit a representative from introducing his legislative acts to defend against a bribery charge. While the prosecution was prohibited from using such evidence to prove the charge, the Clause "does not prevent him from offering such acts in his own defense, even though he thereby subjects himself to cross-examination."[109]

Two other circuit courts have followed *Myers* in recognizing the right of a member of Congress to introduce evidence of a legislative act in defending a charge. In *United States v. McDade*, the Third Circuit adopted the Second Circuit's reasoning, although it stated in a footnote that "a Congressman cannot be *forced* to refute charges that directly implicate legitimate legislative acts."[110] It is not clear what it meant by being "forced to refute charges" beyond the prohibition on the government from introducing evidence of legislative acts. In *United States v. Rostenkowski*, the District of Columbia Circuit cited *Myers* and *McDade* in recognizing the right of a representative to offer such evidence, rejecting a motion to dismiss because he "points to nothing on the face of the indictment . . . to show that such a defense is necessary or that his legislative acts will ever be at issue in the trial" apart from his choice to offer the evidence.[111]

108. 442 U.S. at 490. The Court also considered whether a narrowly drawn criminal statute can operate as a waiver of the Clause's protection, but did not decide that issue because the statute involved, 18 U.S.C. § 201, did not evidence an intention by Congress to abandon the constitutional protection. *Id.* at 492 ("We hold only that § 201 does not amount to a congressional waiver of the protection of the Clause for individual Members.").

109. 28 F.3d 932, 942 (2nd Cir. 1980).

110. 28 F.3d 283, 295 n.14 (3rd Cir. 1994).

111. 59 F.3d 1291, 1303 (D.C. Cir. 1995).

This page intentionally left blank

| 17 |

SENTENCING

The Federal Sentencing Guidelines provide the framework for a recommended sentence after a conviction. The Sentencing Reform Act of 1984 required the development of guidelines that would further four identified purposes of criminal sanctions: deterrence, incapacitation, just punishment, and rehabilitation. The law created the U.S. Sentencing Commission, which has the authority to adopt provisions that rationalize the federal sentencing process so that there is consistency in punishment.

The Commission adopted the first Guidelines in 1987, and until 2005 federal judges were required to give a sentence within the prescribed range unless there were adequate grounds for a departure. In *United States v. Booker*, the Supreme Court held that the Guidelines are only advisory, in order to avoid any potential violation of a defendant's Sixth Amendment right to have a jury decide the facts supporting a conviction.[1] Today, the Guidelines are the starting point for the determination of an appropriate punishment for a criminal violation, although they are no longer binding on federal district judges who have a measure of discretion to deviate from the recommended sentence.

In two decisions applying *Booker*, the Court set forth the role the Guidelines now play in the sentencing process. In *Rita v. United States*, the Court held that a sentence falling within the range recommended by the Guidelines should be accorded a presumption of reasonableness by a court of appeals reviewing a sentence, at least in what it called the "mine run of cases."[2] In *Gall v. United States*, the Court determined that a sentence outside the prescribed Guidelines

1. 543 U.S. 220, 245 (2005).
2. 551 U.S. 338, 350 (2007). The Court stated:

> An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general. . . . [T]he courts of appeals' "reasonableness" presumption, rather than having independent legal effect, simply recognizes the real-world

recommendation would not be subject to greater scrutiny as long as the district court provided a reasonable explanation for the punishment imposed.[3] Appellate review of a sentence outside the Guidelines range would be limited to whether the district court abused its discretion, a deferential standard.[4] As a result of the Court's approach to the Guidelines, district court judges have greater flexibility to fix an appropriate sentence, but the starting point remains important: "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[5]

While particular statutes establish the maximum penalty for a violation, such as fifteen years for bribery and two years for an unlawful gratuity in 18 U.S.C. § 201, the Guidelines provide the framework for the likely punishment based on a range of different factors, including the defendant's public position, role in the offense, and the value of any payment or the intended benefit from a corrupt transaction. The process involves applying the relevant Guidelines section for the conviction to determine the offense level, which includes applying any enhancement based on the characteristics of the crime or the defendant's role in the offense, and then determining the defendant's criminal history. Once those factors are calculated as the "offense level," the Sentencing Table provides the recommended sentencing range, calculated in months, that corresponds to the offense level and criminal history category for the offender.[6]

The sections applicable to most corruption offenses are in Part C of Chapter 2 of the Guidelines, covering "Offenses Involving Public Officials and Violation of Federal Election Campaign Laws." One part of the calculation of the offense level involves the amount of the bribe or intended benefit, based on the loss table in Part B, which deals with economic crimes, such as fraud, embezzlement, and theft. The loss table can have a significant impact on the recommended sentence, and the Guidelines have had a major effect on sentences in corruption cases because the recommended sentences are generally much longer than the prison terms typically imposed before the adoption of the Sentencing Reform Act.

> circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.

Id. at 350–51.

3. 552 U.S. 38, 41 (2007).

4. The Court adopted the following standard to guide district court sentencing decisions:

> Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Id. at 49–50.

5. *Id*.

6. *See* United States Sentencing Guidelines Manual § 2B1.1 (2009).

I. BRIBERY, EXTORTION, AND RIGHT OF HONEST SERVICES FRAUD (§ 2C1.1)

The most important Guidelines provision for corruption offenses is § 2C1.1, which covers bribery offenses under 18 U.S.C. § 201, 18 U.S.C. § 666, extortion "under color of official right" under the Hobbs Act, and right of honest services fraud prosecutions (18 U.S.C. § 1346),[7] along with conspiracies to violate those provisions. This provision covers most corruption prosecutions analyzed in this book, and has been the most litigated section in Part C.

A. Base Offense Level

The base offense level for bribery, extortion, and right of honest services convictions under § 2C1.1 is 14 for a public official and 12 for other defendants. The Guideline commentary states that the term "public official" "shall be construed broadly and includes the following: all officials defined in 18 U.S.C. § 201(a)(1), members of state and local legislatures, any officer or employee of a state or local government, a juror in a state or local trial, and anyone selected for one of these positions."[8] The commentary also includes a catch-all provision, applying § 2C1.1 to any defendant who:

> (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).[9]

Bribery, extortion, and right of honest services fraud do not require proof of an actual payment, so that preparatory conduct, such as solicitation or an attempt, is treated the same under the Guideline as the completed offense.[10]

The base offenses level applied to the Sentencing Table would result in a term of imprisonment of fifteen to twenty-one months for a public official, and ten to sixteen months for a defendant who

7. Fraud offenses prosecuted under a right of honest services theory are included in this Guideline rather than the economic offense provision, § 2B1.1, because "[s]uch fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses." United States Sentencing Guidelines Manual §2C1.1 cmt. background (2009).

8. United States Sentencing Guidelines Manual § 2C1.1, cmt. n.1(A)–(D) (2009).

9. United States Sentencing Guidelines Manual § 2C1.1, cmt. n.1(E) (2009).

10. United States Sentencing Guidelines Manual § 2C1.1 cmt. background (2009) ("Offenses involving attempted bribery are frequently not completed because the offense is reported to authorities or an individual involved in the offense is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.").

is not a public official. This is the recommended sentence before any enhancements are applied. For any sentence longer than one year, the defendant must serve that time in a federal correctional institution rather than participate in other types of confinement. Compare the starting point for public corruption offenses with the lower base offense level of seven for other economic crimes under § 2B1.1, such as theft, embezzlement, and frauds resulting in a loss of money or property. The starting point for offenders under the economic crimes provision is a sentence of zero to six months, and the court could order only probation or that any term of incarceration be served in a community corrections facility or home confinement.

In *United States v. Orsburn*, the Seventh Circuit encountered a significant disparity between the bribery and economic crimes provisions, and it overturned a 135-month sentence for an elected official convicted of embezzlement because the district court improperly relied on § 2C1.1 rather than § 2B1.1. The circuit court noted that the sentencing range was 121 to 151 months when the bribery Guideline was used, while the theft Guideline yielded a recommended sentencing range of 57 to 71 months. The disparity reflected, among other things, § 2C1.1's much higher starting point, with a base offense level of 14 for a public official, while § 2B1.1 starts with a base offense level of seven. The Seventh Circuit found that the 135-month sentence was "unusually high for embezzlers," and held that the bribery Guideline should not be applied to conduct that was no different from an ordinary embezzlement except for the fact that the defendant was an elected official who stole from the government he represented.[11]

B. Specific Offense Characteristics

1. Single or Multiple Bribes or Extortion

Section 2C1.1(b)(1) provides for a 2-level increase in the offense level if the crime "involved more than one bribe or extortion." The Sentencing Commission added this enhancement in 1989. The comment accompanying this provision provides some measure of guidance to determine whether the conduct involved multiple bribes or extortion by explaining that "[r]elated payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts."[12] The focus is on the relationship between the payments and the official act, which is part of the *quid pro quo* agreement to ascertain whether the transfers should be viewed as multiple iterations of a single exercise of public authority, or whether they are separate arrangements calling for distinct payments.

The leading case analyzing § 2C1.1(b)(1) is *United States v. Arshad*, in which the defendant pleaded guilty to making payments to a housing inspector. The district court found that the different

11. 525 F.3d 543, 545 (7th Cir. 2008).

12. United States Sentencing Guidelines Manual § 2C1.1, cmt. n.2 (2009). A "payment" is described as "anything of value. A payment need not be monetary." United States Sentencing Guidelines Manual § 2C1.1 cmt. n.1 (2009).

payments constituted multiple instances of bribery and applied the 2-level enhancement.[13] In determining whether the payments constituted related payments or multiple bribes, the Second Circuit focused on the following factors:

- Whether the payments were made to influence a single action or multiple exercises of official authority;[14]
- "[W]hether the pattern and amount of payments bear the hallmarks of installment payments, such as a regular schedule of payments over a finite period of time toward a fixed final sum, rather than a series of intermittent and varied bribes";[15] and
- "[W]hether the method for making each payment remains the same—whether, for example, the payments involve the same payor and payee in each instance, and whether payments are made in the same form and by the same means."[16]

Regarding the first factor, the circuit court rejected the defendant's argument that his payments were part of only one plan to obtain benefits from the housing inspector for one housing unit and so constituted a single bribe. The Second Circuit explained that "multiple payments meant to influence more than one action should not be merged together for purposes of § 2C1.1 merely because they share a single overall goal or are part of a larger conspiracy to enrich a particular defendant or enterprise."[17] The court found that "while the existence of multiple payees and payment methods may demonstrate the existence of multiple bribes, the opposite is not true: An identity of payees and payment methods does not, by itself, establish that separate payments constitute a single bribe."[18] The Ninth Circuit took the same approach in *United States v. Kahlon* in finding multiple bribes, holding that "[a]lthough the payments were part of a larger conspiracy, they were not installment payments for a single action."[19]

13. 239 F.3d 276, 278 (2nd Cir. 2001).

14. *Id.* at 280.

15. *Id.* at 281. The circuit court found that there was insufficient commonality in the transactions to render them installment payments rather than separate bribes:

> Arshad points to a certain commonality that was shared with respect to some of the payments: they were made, if not at regular intervals or in regular amounts, at least at a fixed rate of $10 per apartment. He therefore argues that they were, in effect, "installment payments." But the payments to which he refers involve only his attempt to obtain approval for deficient work. Their commonality therefore does not support a finding that all of his payments, including those for authorization for more work hours and expedited approval of payment for past work, which did not share that commonality, together with those for approval of deficient work, were part of a single bribe.

Id. at 282.

16. *Id.*

17. *Id.* at 281.

18. *Id.* at 282.

19. 38 F.3d 467, 470 (9th Cir. 1994). In *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996), the Tenth Circuit rejected the defendant's argument that the focus should be on the single conspiracy from a contract to pay for patient referrals, stating:

> The parties renewed that contract once, but it was terminable on thirty days notice. Defendant and Jackson expected three referrals per month; Garcia averaged slightly less than that over approximately fifteen months time.

Because bribery involves a *quid pro quo* arrangement, the object of the agreement provides important indications about whether separate payments should be treated as installments or distinct bribes. If the *quid pro quo* changes over time by covering new instances of an exercise of official authority, then that indicates multiple bribes were paid, even if they possess similarities regarding the methods and amounts.

For example, in *United States v. Soumano*, the Second Circuit found that the defendant's payments of $2,500 and $500 were more than one bribe to a Social Security Administration representative, even though they involved the same type of benefit sought, and were made to the same official in the identical manner only a day apart. The circuit court rejected the defendant's reading of *Arshad* as requiring that the payments be construed as a single bribe because they were intended to obtain the same governmental action in each instance, explaining that this "interpretation of *Arshad* would lead to absurd results because it would mean that, even if Soumano made hundreds of requests for false documents over many years and provided independent payments for each request, his conduct would only constitute one bribe for purposes of § 2C1.1."[20]

A defendant may be held responsible for the acts of another defendant involved in the bribery scheme, even if that person did not personally participate in the corrupt payment. Under this analysis, which is an extension of aiding and abetting liability, if one defendant receives (or pays) multiple bribes, then a codefendant can receive the 2-level increase because of those transactions. In *United States v. Bynum*, the Ninth Circuit upheld the application of the 2-level increase because the defendant was jointly involved in a kickback scheme with an elected official, and it was foreseeable that the official would solicit a payment from another person, which constituted a separate instance of bribery.[21]

A bribery conviction does not require proof that an official act was influenced, although in most cases the payment has been received. In *Evans v. United States*, the Supreme Court stated that "the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense."[22] A defendant can also be convicted of bribery for the promise to make a payment under 18 U.S.C. § 201(b), or solicitation of a bribe. Similarly, an agreement to give or receive anything of value under 18 U.S.C. § 666(a)(2) is an offense, so the government need not show an actual transfer of money or property to successfully convict a defendant.

Section 2C1.1(b)(1) requires proof of "more than one bribe or extortion," and the plain language indicates that a case involving only the offer or solicitation of a bribe would not be sufficient

> The $3000 payments occurred at approximately two- to five-week intervals. The evidence supports the district court's finding that Garcia received payments "as long as both sides wanted to perform." The district court's conclusion that these periodic payments embodied separate bribes was not clearly erroneous.

Id. at 1153–54. *See also* United States v. Harvey, 532 F.3d 326, 337 (4th Cir. 2008) ("Because the district court considered that Harvey had undertaken multiple acts for Kronstein's benefit, and that Kronstein had made multiple payments to Harvey in return, it did not clearly err in finding, by a preponderance of the evidence, that this case involved multiple bribes.").

20. 318 F.3d 135, 137.

21. 327 F.3d 986, 993 (9th Cir. 2003).

22. 504 U.S. 255, 268 (1992).

to trigger the 2-level increase. The comment to this provision states that it reaches conduct "involving more than one incident of either bribery or extortion." It is not clear whether an "incident" would include the offer or solicitation of a bribe without an actual payment being made, but the comment should not be read to expand the meaning of the Guideline.

2. Value

A key provision that can substantially increase the recommended sentence for a bribery, extortion, and right of honest services conviction is § 2C1.1(b)(2), which incorporates the loss table in § 2B1.1(b)(1). The loss table provides:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**
(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**
(O)	More than $200,000,000	add **28**
(P)	More than $400,000,000	add **30**

Determining the amount involved in the corruption involves consideration of a range of methods that measure the benefit from the transaction or the loss caused by the violation on governmental functions. Section 2C1.1(b)(2) allows the following methods for calculating the impact of the corruption: "[T]he value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest. . . ." For cases in which there is more than one incident of bribery or extortion, the amount involved for the Guideline calculation is "determined separately for each incident and then added together."[23]

23. United States Sentencing Guidelines Manual § 2C1.1 cmt. n.2 (2009).

A. LOSS

The bribery, extortion, and right of honest services Guideline incorporates the methods for calculating loss contained in § 2B1.1 Note 3 for economic crimes, which covers the following types of harm:

- *Actual Loss*: "the reasonably foreseeable pecuniary harm that resulted from the offense";
- *Intended Loss*: "means the pecuniary harm that was intended to result from the offense; and. . . includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)."[24]

The sentencing judge "need only make a reasonable estimate of the loss."[25] Section 2B1.1 contains a number of special provisions for different types of economic crimes, such as product substitution, misuse of a computer or program, and stolen or counterfeit credit cards, which would not apply to a corruption case.

B. NET VALUE

A far more common focus is on the benefit received or to be received from the corruption because bribery, extortion, and right of honest services cases usually involve a misuse of government authority to derive a personal benefit. The calculation requires the court to determine the "net value" of the benefit received or to be received from the corruption, and there are two examples in the commentary clarifying how to calculate that figure:

> (A) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (B) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000.[26]

The commentary goes on to point out that the value of any bribe should not be included in the calculation, and so, in the first example, the defendant could not argue that the benefit was only $7,500 because of the $500 cost of securing the price reduction through the bribe payment.[27]

24. United States Sentencing Guidelines Manual § 2B1.1 cmt. n.3(A) (2009). The Note goes on to describe "pecuniary harm" as "harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm," and "reasonably foreseeable pecuniary harm" as "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." *Id.*

25. United States Sentencing Guidelines Manual § 2B1.1 cmt. n.3(C) (2009).

26. United States Sentencing Guidelines Manual § 2C1.1 cmt. n.3 (2009).

27. *Id.* ("Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.").

This is consistent with the view that expenses necessary to commit a crime are not used to reduce any gain from criminal conduct, i.e., a bank robber cannot claim the cost of the gun to reduce the proceeds of the crime.

A key issue is what costs should be included to arrive at the benefit figure from a corrupt transaction. The question arises most often in cases involving bribes or extortion to obtain a government contract that is then performed by the payer of the bribe or the victim of the extortion. The total dollar value of the contract is not solely determinative of the benefit, because if the government receives some value from the contract performance, then the harm from the corruption has been mitigated.

In *United States v. Landers*, the Fifth Circuit set forth the basic structure for analyzing what constitutes the net value from the corrupt transaction, pointing out that "[t]he very use of the term 'net' before 'value' implies that some costs should be deducted."[28] The defendant in *Landers* paid $10,000 in bribes to obtain supply contracts for his employer valued at over $1 million, and the district court determined that the contract generated a gross profit of $204,071. In arriving at the profit figure, the district court deducted the "cost of goods sold" in supplying the materials pursuant to the contract but not any share of the company's gross overhead.[29]

The Fifth Circuit divided costs into two categories: direct costs and indirect costs. It held that the examples in the commentary to § 2C1.1(b)(2) "demonstrates that, at the least, direct costs are deductible."[30] It defined direct costs "as all variable costs that can be specifically identified as costs of performing a contract," such as transportation expenses for the goods involved.[31] On the other hand, "variable overhead costs that cannot easily be identified to a specific contract are not direct costs."[32] The circuit court understood that it was not applying these terms in the same sense that an accountant would, but instead used them as guides for a district court's reasonable calculation of the net value, which does not require the same degree of precision that an audited financial statement would.

Landers defined indirect costs, or "fixed costs," as those a business incurs "independently of output. For example, rent and debt obligations are costs a business incurs no matter how many contracts it receives."[33] The circuit court rejected the defendant's argument to deduct a portion of those costs from the contract to determine the "net profit," holding that "indirect costs have no impact on the harm caused by the illegal conduct."[34] The Fifth Circuit explained that "the benefit of an additional contract is measured by gross revenue minus direct costs. By definition, indirect costs do not affect that value."[35] It found that including indirect costs in the net value calculation

28. 68 F.3d 882, 884 (5th Cir. 1995).

29. *Id.*

30. *Id.* The circuit court explained, "Any benefit from a contract is reduced by the direct costs of performing the contract. This is so because direct costs have no independent value; the only benefit from direct costs is that they are necessary to secure the value of the contract over and above those costs." *Id.*

31. *Id.* at 884 n.2.

32. *Id.*

33. *Id.* at 885 n.5. The circuit court found that "[f]or the most part, overhead costs are fixed costs." *Id.*

34. *Id.* at 885.

35. *Id.*

could skew the Guideline analysis by rewarding a company with higher overhead, which would usually be a large organization with greater fixed costs, so that "[a]lthough the harm is the same, deducting indirect costs would result in disparate 'net value' calculation and different enhancements under the guidelines."

The Fifth Circuit's analysis of net value distinguishing between direct costs, which are deduced from the total value of the contract, and indirect costs, which are not included in the calculation, has been accepted by other circuit courts. In *United States v. Glick*, the Second Circuit, citing *Landers*, stated, "In calculating the amount of 'improper benefit,' only direct costs, not indirect costs, should be subtracted from the gross value received."[36] In *United States v. DeVegter*, the Eleventh Circuit held, "We agree with the Fifth Circuit's approach which subtracts direct costs, but not indirect costs, from profits to determine the net improper benefit."[37]

The Third Circuit in *United States v. Lianidis* accepted the *Landers* analysis of direct and indirect costs and applied it to salaries paid to the controlling shareholders of a closely held company that obtained government contracts through bribery.[38] The circuit court rejected the government's argument that the salaries of $445,298 paid to the defendant, and $601,525 paid to her husband, were the proper measure of the net value from the bribery. It stated, "The 'benefit received' under § 2C1.1(b)(2) is not the salary paid to Lianidis and her husband, for which she and her husband legally worked and which the government does not dispute was reasonable, but rather the 'net value' received by [the company] itself under the SMA contracts."[39] Because the salaries were legitimate and attributable to the contracts obtained, they constituted direct costs to the corporation awarded the contract and should have been deducted from the amounts paid to the company in calculating the net value of the benefit received. If the government had shown that the salaries were not legitimate, or had been inflated, then using them as a measure of the benefit received would be permissible.[40]

In addition to the crime for which a defendant was convicted, the Sentencing Guidelines allow a judge to consider "relevant conduct," which may include other violations for which the person was not charged or counts were dropped as part of a plea agreement. Under § 1B1.3, a court may

36. 142 F.3d 520, 525 (2nd Cir. 1998).

37. 439 F.3d 1299, 1304 (11th Cir. 2006).

38. 599 F.3d 273, 281 (3rd Cir. 2010). The circuit court stated, "We agree that the Fifth Circuit's reasoning is sound: indirect costs, like bribes, do not impact the harm caused by the bribery, and allowing the deduction of indirect costs would foster inconsistency in sentencing." *Id.*

39. *Id.* at 283. The Third Circuit found that the government's salary argument was "both over- and under-inclusive." It explained, "The use of salary is over-inclusive because Lianidis and her husband gave their labor, not just a bribe, in exchange for their salaries. The use of salary is under-inclusive because Lianidis and her husband, as owners of DMS, did not depend on their salaries to receive benefits under the SMA contracts." *Id.*

40. A dissent in *Lianidis* argued that using the salaries was a legitimate basis for calculating the benefit received, and would adopt a rule that

> when an employee pays bribes to win contracts for a corporation that she owns and controls, the employee herself is the beneficiary of the bribe, and the amount of the benefit is equal to the sum of (1) the portion of her salary attributable to the bribe-induced contract and (2) the profits the corporation earned from that contract (after paying her salary).

Id. at 285 (Hardiman, J., dissenting). The dissenting judge noted, "I am loathe to permit a deduction for the value of labor that one had the opportunity to perform only through bribery." *Id.* at 285 n.3.

consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and all reasonably foreseeable acts undertaken by another person acting as part of jointly undertaken criminal activity.[41] In a corruption case, other bribes by a defendant and the benefit derived from those acts can be included in the calculation of the total net value from the corruption. The benefit, however, must be traceable to the bribe and not simply part of a course of business by a defendant who paid bribes at some point in time.

For example, in *United States v. Anderson*, the Seventh Circuit rejected a sentence based on the profits from a housing development that was completed before the earliest bribes occurred because it did not constitute relevant conduct.[42] Similarly, in *United States v. Griffin*, the Fifth Circuit found that the judge should not have considered a defendant's salary and bonus in calculating the benefit received from tainted contracts because "[b]oth the salary and bonus were negotiated. . . before any bribery scheme came into being. And, Roberts would have received these amounts regardless of any bribes had the project been completed."[43]

In bribery cases involving removal or reduction of tax liabilities, the benefit is the amount of taxes that need not be paid. In *United States v. Dijan*, the Eighth Circuit held, "In a case involving bribery to cancel tax liability, the value of the benefit received from the bribe is the amount of the tax liability that the defendant sought to eliminate."[44] This analysis applies even if the Internal Revenue Service might not have been able to recover the full amount owed.[45]

In calculating the benefit derived from the bribery, the defendant need not actually realize the value of the corrupt transaction. In *United States v. Quinn*, the Fourth Circuit noted that bribery under 18 U.S.C. § 201(b) covers both solicitation and an actual bribe, and so, for sentencing purposes, there is no need to establish an actual gain to calculate the intended benefit from the transaction. Although the contracts sought through the bribe payment in *Quinn* were never awarded, "the district court should determine the value of the bribery payment and the value of the benefit to be received as if the contracts proposed to CTI and West had been executed."[46]

When a middleman facilitates a bribe, the benefit received by the payer can be the basis for valuing the transaction, even if the defendant did not directly participate in the gain. In *United States v. Kinter*, the Fourth Circuit held that for cases in which

> a middleman defendant acts on behalf of a third-party payer of the bribe, the district court may consider the payer's bribe-generated benefits when calculating the 'benefit received' under United

41. United States Sentencing Guidelines Manual § 1B1.3(a)(1) (2009).

42. 517 F.3d 953, 964 (7th Cir. 2008) ("Misty Creek was basically completed by the time of the earliest alleged bribes; the construction of homes was already well underway at that point.").

43. 324 F.3d 330. 367 (5th Cir. 2003). The circuit court also found that the expected profit on another project should not have been considered in calculating the benefit received because the public official "never voted on this project, nor was there any evidence that she intended to do so." *Id*.

44. 37 F.3d 398, 403 (8th Cir. 1994).

45. *See* United States v. Thickstun, 110 F.3d 1394, 1400 (9th Cir. 1997) ("[I]t makes no difference that the IRS might never have recovered all taxes that defendants owed. They bribed a federal official to eliminate their entire tax liability, and should be sentenced on that basis. That appellants are indigent is irrelevant; it might be taken into account in the imposition of fines and restitution, but not in computing their terms of imprisonment.").

46. 359 F.3d 666, 680 (4th Cir. 2004).

States Sentencing Guidelines Manual § 2C1.1, as long as those profits were reasonably foreseeable or the result of acts aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.[47]

When the beneficiary of the bribe is not aware of the corrupt transaction, or the effect is spread to a number of otherwise innocent persons, then the benefit received should not include what those other parties might have realized from the tainted act. In *United States v. Ellis*, the Fourth Circuit rejected the government's argument that the calculation of the benefit received from bribes paid to enact legislation should include the benefits received by race track companies aided by the new law. The circuit court explained that "calculating the total benefit received by companies who profit from improperly passed legislation is a far less certain endeavor, one that (as this case suggests) is potentially limitless in reach."[48] But to the extent a defendant is acting with others, either as an accomplice or co-conspirator, then the Guideline would allow including the net value realized by those parties in calculating the benefit received from the corruption.

As in other areas of the law, courts have not been hospitable to arguments that highlight the impossibility of any actual harm coming about because the offer or solicitation of a bribe would not have resulted in a *quid pro quo* agreement. In some cases, defendants argue there was no benefit from the bribe if the public official only feigns interest with no intention of following through on the requested act. In *United States v. Falcioni*, the Second Circuit rejected the defendant's claim that there was no benefit from the offered bribe because the official reported it to the authorities rather than go through with the proposed agreement. The circuit court found that "whenever law enforcement officials detect a fraud in progress, the possibility of success is dramatically reduced. Simply because the government's crime prevention efforts prove successful, however, does not mean that the 'intended loss' is zero."[49] In *United States v. Muhammad*, the Seventh Circuit reached the same conclusion, holding that "[t]he mere fact that Muhammad's bribe was not successful does not prevent us from using the ascertainable benefit that the bribe intended to influence in order to enhance his sentence."[50]

Along the same lines, the District of Columbia Circuit rejected an official's argument that a company making the illicit $10,000 payment was lawfully entitled to the approval provided by the defendant, thereby reducing its costs by $100,000, and so there was no improper benefit and only the lower bribe payment should be used in calculating the recommended sentence. The circuit court stated, "[N]othing explains why a contractor would pay $10,000 to receive no benefit at all . . . The fact that Edwards' bribery scheme was ultimately unsuccessful, and that Keystone was later permitted to implement a less expensive, nonfriable abatement plan without paying $10,000,

47. 235 F.3d 192, 197 (4th Cir. 2000). *See* United States v. Gillam, 167 F.3d 1273, 1279 (9th Cir. 1999) ("While frequently it will be the payer of the bribe who receives the sentence, that is not invariably so. The guideline applies equally where, as here, the recipients of the bribes are the defendants. The underlying deterrence policy, articulated in the last sentence of the Background Note, applies no less in the latter situation. It plainly envisions that the punishment should fit the crime, and the measure of the crime is the greater of the benefit to the payer or the recipient.").

48. 951 F.2d 580, 586 (4th Cir. 1990).

49. 45 F.3d 24, 27 (2nd Cir. 1995).

50. 120 F.3d 688, 701 (7th Cir. 1997).

are of no moment."[51] The benefit is based on the defendant's understanding of the transaction, not what actually transpired. In *United States v. Chmielewski*, the defendant paid two $1,000 bribes to reduce a $35,000 penalty assessed for safety violations, although his attorney had worked out a compromise with the agency to settle the case for a $6,000 payment. The Seventh Circuit upheld the finding that the amount of the benefit was $35,000:

> [I]t was not clearly erroneous for the judge to have found that when the money changed hands the "benefit" Chmielewski thought he was receiving—and that's all that is necessary for the § 2C1.1 enhancement to kick in—was worth at least $35,000. The very best that can be said is that it's possible Chmielewski unwittingly overpaid his bribe to get out of dutch with OSHA ($2,000 is a steep price to pay to get off a $6,000 hook), but that doesn't make his conduct less egregious, only more stupid.[52]

In *United States v. Váquez-Botet*, the First Circuit explained the rationale for looking at the benefit received from the perspective of the defendant at the time of the bribe or extortion. The officials in *Váquez-Botet* argued they did not ultimately affect the decision to award the contract despite being bribed, and it was awarded to a qualified company, so there was no benefit received. The circuit court rejected that position, stating that

> [t]he rationale for an *ex ante* inquiry lie in the purpose of the exercise: to set the defendant's punishment at a level commensurate with the degree of his moral culpability. For this reason, it is not determinative what loss the victim actually ended up suffering, or indeed whether the victim suffered any loss at all.[53]

C. AMOUNT OF PAYMENT

If the loss or the intended (or actual) benefit received cannot be reasonably calculated, then the amount of the payment sought or made to the public official can be used to determine the value of the transaction. The Guideline commentary explains:

> In a case in which the value of the bribe exceeds the value of the benefit, or in which the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is greater.[54]

51. 496 F.3d 677, 682 (D.C. Cir. 2007).
52. 196 F.3d 893, 895 (7th Cir. 1999).
53. 532 F.3d 37, 67 (1st Cir. 2008).
54. United States Sentencing Guidelines Manual § 2C1.1 cmt. background (2009).

3. High-Level Decision-Making or Sensitive Position

A 4-level enhancement is imposed "[i]f the offense involved an elected public official or any public official in a high-level decision-making or sensitive position. . . ."[55] Note that the defendant need not occupy that position, only that a person holding it was involved in the bribery, extortion, or right of honest services violation. In addition, if the total offense level after the enhancement is less than 18, it should be increased to that level. The Sentencing Table calls for a sentence of twenty-seven to thirty-three months for a first-time offender at that offense level.

The commentary to § 2C1.1(b)(3) describes a "high-level decision-making or sensitive position" as one "characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process." Examples of high-level decision-making officials include "a prosecuting attorney, a judge, an agency administrator, and any other public official with a similar level of authority," while a sensitive position includes "a juror, a law enforcement officer, an election official, and any other similarly situated individual."[56] Although the commentary distinguishes between the two types of positions, courts do not always view them as distinct, combining the characteristics of each in assessing whether to apply the 4-level enhancement.

One indicia of a high-level decision-making position is the exercise of substantial discretion in implementing government policies and rules. In *United States v. Lazarre*, the Eleventh Circuit reviewed the enhancement imposed on an assistant district director of the Immigration and Naturalization Service. It noted that his "discretion is similar to that given a supervisory law enforcement official or a prosecuting attorney or even a judge setting bail."[57] While officials must work within the confines of the rules and regulations applicable to a situation, "these jobs involve the exercise of substantial discretion; and each enjoys sufficient authority to implement established guidelines and make substantive decisions based on the unique circumstances of individual cases."[58] The circuit court found it was "not a close case" regarding the assistant director's position triggering the enhancement because the defendant "exercised significant discretion to set bonds, and parole or detain immigrants in Florida. The power to grant or deny parole is a significant and sensitive power."[59]

The District of Columbia Circuit reached a similar conclusion in *United States v. Gatling* regarding a defendant who was the chief of a subsidized housing division in the District of Columbia's public housing authority. The circuit court explained that the defendant supervised a twenty-three-person staff and had authority over the disbursement of substantial amounts of money in housing subsidies, so that "[w]hile regulations may have curtailed Walker's ability to issue section 8

55. United States Sentencing Guidelines Manual § 2C1.1(b)(3) (2009). The Guideline was amended in 2004 to reduce the enhancement from 8 levels to 4, while incorporating a higher initial offense level for public officials and the increase in the enhancement based on the loss table in § 2B1.1.

56. United States Sentencing Guidelines Manual § 2C1.1 cmt. n.4 (2009).

57. 14 F.3d 580, 582 (11th Cir. 1994).

58. *Id.*

59. *Id.* Note the opinion's use of the word "sensitive" in describing the position as being a high-level decision-making one, showing how the terminology can be intermingled.

subsidies as she chose, she had the power to issue subsidies without the need for further authorization or review."[60] In *United States v. Stephenson*, on the other hand, the Second Circuit upheld the district court's decision not to enhance the sentence of a defendant whose duties as an Export Licensing Officer in the Department of Commerce included reviewing applications to export high-tech equipment from the United States when he extorted money from an applicant to approve a license request. The circuit court stated that the fact that his "duties involved some degree of discretion and required him to possess a security clearance does not set him apart from a multitude of personnel in the federal service."[61]

The analysis of what constitutes a sensitive position is not significantly different from that applied to a high-level decision-making one, although this category appears to be more of a catch-all in cases in which the official did not hold a sufficiently senior position to come under the high-level designation. In *United States v. Matzkin*, the Fourth Circuit found that the district court did not abuse its discretion in finding that a supervisory engineer, working at a company which advised the Navy on the award of contracts, held a sensitive position even though he was "simply a mid-level employee with no power to award contracts on his own. . . ."[62] The circuit court noted that the engineer was on a committee that reviewed contract bids and the Navy "would not likely accept the bid without a favorable report" from it. Thus, the official's position on the committee allowed him to accept bribes in connection with the award of multi-million dollar contracts, bringing him within the scope of the enhancement.[63]

The Seventh Circuit reached a similar decision in *United States v. Reneslacis*, finding that a district adjudication officer for the Immigration and Naturalization Service (INS) may not be a high-level decision-making position, but the official did play a significant role in the immigration process to make it a sensitive position. According to the circuit court, although the defendant "did not have a particularly lofty position within the INS," his position was sensitive "[b]ecause only a handful of his decisions were ever reviewed, he had near total control over who could become a permanent resident and eventually a U.S. citizen."[64] Therefore, "possessing unreviewed power over important public decisions reflects a sensitive post—even if existing rules dictate how those decisions should be made."[65]

In *United States v. Tomblin*, the Fifth Circuit found that an aide to a senator held a sensitive position, even if he did not exercise any discretion: "A senator's top administrative aide holds a position of substantial influence, because he often serves as the senator's functional equivalent."[66] In *United States v. ReBrook*, the Fourth Circuit upheld the enhancement because of the special

60. 96 F.3d 1511, 1526 (D.C. Cir. 1996).
61. 895 F.2d 867, 878 (2nd Cir. 1990).
62. 14 F.3d 1014, 1021 (4th Cir. 1994).
63. *Id.*
64. 349 F.3d 412, 416 (7th Cir. 2003).
65. *Id.*
66. 46 F.3d 1369, 1391 (5th Cir. 1995).

relationship an attorney had in advising a state lottery board, even though he had no official governmental position.[67]

The Fifth Circuit, in *United States v. Snell*, engaged in an extensive analysis of the role of a juror as coming within the enhancement, looking at the decision-making authority of a single juror in a case and its importance to the judicial process. The circuit court pointed out that while "a juror does not alone possess final decision-making authority over the guilt or innocence of a criminal defendant, he does maintain the essentially absolute power to force a mistrial—at least in the federal system, as in this case."[68] The 2004 amendment to § 2C1.1 added to the commentary the examples of high-level decision-making and sensitive positions, which now specifically includes a juror in the list of those in a sensitive position.

The District of Columbia Circuit rejected the argument that a school police officer did not occupy a sensitive position, finding that inclusion of a "law enforcement officer" in the list of examples in the commentary did not contradict the scope of the Guideline. The circuit court held:

> [I]t seems plain to us that there is nothing inconsistent about using a law enforcement officer as an example of a public official in a "sensitive position." Whatever the precise scope of that term, whatever other positions might fall within its ambit, it certainly includes law enforcement officers, like Johnson, who are charged with the power to make arrests—a sensitive power if there ever was one.[69]

It also noted that the prior commentary regarding a sensitive position included "supervisory law enforcement officers" in the list, but "supervisory" was dropped in the 2004 amendment to the Guideline. Nevertheless, the District of Columbia Circuit pointed out that "we should not be understood to embrace the idea that any law enforcement officer, no matter his level of responsibility, can be deemed to hold a sensitive position," but because the defendant had the power to arrest, the district court properly found that he occupied a sensitive position.[70]

67. 58 F.3d 961, 970 (4th Cir. 1995). The district court summarized the reason why it rejected the defendant's objection to the enhancement, which the Fourth Circuit described as "lucid":

> I believe that the de facto situation here requires the Court to hold that the position was sensitive in relation to Mr. ReBrook's particular advice that he gave to the director, Mr. Bryan, and the influence that he had with other of the commission members, as witness the testimony of Mr. Giambrone, in the matters having to do with the committee report on the video lottery matter. Mr. ReBrook, because of his special relationship here had-was privy to particular information both as an attorney and as a friend and confidant to the high level supervisory official, Mr. Bryan, and I think that the evidence is ample here to conclude that he held a sensitive position in the facts and circumstances of this particular case, so I do overrule the objection.

Id. at 970 n.12.

68. 152 F.3d 345, 347 (5th Cir. 1998).

69. 605 F.3d 82, 83 (D.C. Cir. 2010).

70. *Id*. at 84. It is not clear why the power to arrest was crucial to the finding that being a police officer was a sensitive position, particularly when the prosecution did not involve any arrest, but bribes paid to the defendant to secure favorable parking. Moreover, the vast majority of police officers have the authority to arrest, so it would seem unlikely that any would not be included within the category of holding a sensitive position, although perhaps a civilian who worked for the police department or other law enforcement agency might be able to avoid that label.

Given the broad discretion of the district courts in assessing the circumstances supporting this enhancement, the determination of what constitutes a high-level decision-making official or one occupying a sensitive position is unlikely to be disturbed on appeal. It may well be the case that if a person is in a position to accept a bribe to affect the exercise of governmental authority, or at least is viewed as having that authority, then there is a greater likelihood that the person comes within one of the two categories in § 2C1.1(b)(3) for the enhancement.

II. OFFERING, GIVING, SOLICITING, OR RECEIVING A GRATUITY (§ 2C1.2)

The Guideline for a gratuities offense is similar to the structure of the bribery, extortion, and right of honest services provision, although it reflects the lower maximum penalty in 18 U.S.C. § 201(c) for a gratuities offense as compared to bribery.[71] The base offense level for a conviction of a public official is eleven, and nine for all others, and there is a 2-level enhancement for more than one gratuity being paid. The enhancement based on the amount of the transaction is limited to just the value of the gratuity, and not any benefit received because there would not be a *quid pro quo* agreement so the linkage to a particular benefit (or loss) is not present. The same 4-level enhancement applies if an elected official is involved, or one in a high-level decision-making or sensitive position, with the base offense level raised to 15 in that circumstance.

Because an unlawful gratuities violation starts with a lower offense level and has a maximum penalty of two years, some defendants convicted of violating § 666 argue that a payment was a gift rather than a bribe if the facts are unclear about the purpose of the payment. In *United States v. Agostino*, the Seventh Circuit summarized the analysis as follows: "If the payer's intent is to influence or affect future actions, then the payment is a bribe. If, on the other hand, the payer intends the money as a reward for actions the payee has already taken, or is already committed to take, then the payment is a gratuity."[72] The defendant was convicted for violating 18 U.S.C. § 666(a)(2) and while the evidence regarding the purpose of the payments was unclear, the circuit court upheld the application of § 2C1.1 because "[t]he district court was privy to the testimony and argument regarding Agostino's intent first hand, and it is therefore more appropriate for it to determine whether the money was offered with a corrupt purpose."[73] The First Circuit took the same approach

71. The Guideline also applies to the following offenses: (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity (18 U.S.C. §§ 212 and 213); (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank (18 U.S.C. § 214); and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or canceling a farm debt (18 U.S.C. § 217).

72. 132 F.3d 1183, 1195 (7th Cir. 1997).

73. *Id.* In *United States v. Anderson*, the Seventh Circuit upheld a sentence calculated under the bribery Guideline when "it is clear that Anderson was attempting to influence the future actions of a public official." 517 F.3d 953, 961 (7th Cir. 2008). In *United States v. Griffin*, the Eighth Circuit took the same approach, holding that "[t]he evidence of an agreement to exchange Simmons's money for Griffin's actions is sufficient to affirm the District Court's application of United States Sentencing Guidelines Manual § 2C1.1. Griffin was not merely paid after the fact for something he had already done, and would have done anyway." 154 F.3d 762, 764 (8th Cir. 1998).

in *United States v. Mariano*, stating that "the gratuity guideline presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as a reward for actions the public official has already taken or is already committed to take."[74]

In *United States v. Santoprieto*, the Second Circuit took the view that a conviction under § 666 requires that the sentence be calculated only under § 2C1.1 and not the gratuities provision. The circuit court noted that a corrupt intent was required for a violation of § 666, which is not an element of the gratuities offense, and, therefore, "sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline."[75] Section 666 covers both *quid pro quo* payments and rewards, which are closer to a gratuity, and the statutory index in the Guidelines lists both § 2C1.1 and 2C1.2 as applicable to that statute.[76] The Second Circuit focused on a statement in the commentary to § 2C1.2 that "[a] corrupt purpose is not an element of this offense," which was the basis for finding the provision could not be applied to a violation involving only a reward.

The Sentencing Commission's 2004 amendment to the commentary to § 2C1.2, however, eliminated any reference to "corrupt purpose" for the unlawful gratuities offense, apparently undermining *Santoprieto*'s rationale for precluding application of that Guideline to a § 666 conviction. Moreover, by including both § 2C1.1 and § 2C1.2 as applicable to that statute in the index indicates that a sentencing court can apply § 2C1.2 to a conviction under § 666 for a reward, so long as the facts support characterizing the payment as a gratuity and not a *quid pro quo* arrangement.

III. CONFLICT OF INTEREST; PAYMENT OR RECEIPT OF UNAUTHORIZED COMPENSATION (§ 2C1.3)

The Guideline for conflict of interest and unauthorized compensation provisions provides for a base offense level of six, which is lower than that applied to bribery and unlawful gratuities offenses.[77] There is only one enhancement in this provision—a 4-level increase "[i]f the offense

74. 983 F.2d 1150, 1159 (1st Cir. 1993). The circuit court upheld the use of § 2C1.1 for calculating the Guideline sentence, finding

> Mariano admitted that he paid large sums of money in order to forestall city officials from reassigning the work. Butterworth likewise admitted that he forked over $100,000 so that he could retain valuable contracts which Pawtucket might otherwise have redirected to a competitor. Since Mariano and Butterworth each sought to receive a quid pro quo, in the form of future (favorable) treatment, and since the offenses to which they pleaded guilty involved corrupt intent, the district court's determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous.

Id.

75. 996 F.2d 17, 21 (2nd Cir. 1993).

76. United States Sentencing Guidelines Manual App. A (2009).

77. In the statutory index, the following provisions are referenced: 7 U.S.C. § 13(c) (CFTC commodity transactions); 7 U.S.C. § 610(g) (Agricultural Adjustment Administration commodity transactions); 18 U.S.C. §§ 203 (compensation of members of Congress); 204 (practice in court by members of Congress); 205 (representation by federal employees in claims against the government); 207 (restrictions on former employee work); 208 (financial conflicts of interest); 209 (salary supplementation); 219 (agent for foreign principal); 440 (postal service conflict of interest); 442 (printing office

involved actual or planned harm to the government." There is no case law on the issue of what constitutes harm to the government.

Section 2C1.3(c) specifically cross-references § 2C1.1 and § 2C1.2, requiring that when the underlying offense involved bribery or an unlawful gratuity those Guidelines should be applied rather than § 2C1.3. Unlike those provisions, the conflict of interest Guideline does not reference the loss table in § 2B1.1 and has only one enhancement provision. Defendants in cases prosecuted under the right of honest services theory argued their conduct was more akin to a conflict of interest than a bribe or gratuity, which would trigger a much higher recommended sentence.

In *United States v. Grandmaison*, the First Circuit rejected the defendant's argument that §2C1.3 was the more appropriate Guideline because his conduct involved mainly a conflict of interest, even though his conviction involved a right of honest services charge. The circuit court found that "section 2C1.3 linguistically does not apply to defendant or his conduct; that guideline only addresses conflicts of interest by present or former federal officers and employees and, therefore, does not reach state or local officials such as defendant."[78] In *United States v. Jennings*, the Eighth Circuit found that the right of honest services Guideline was the appropriate one to apply because "the government also charged and proved that Jennings used his position to influence his colleagues and members of the utility industry for personal gain, and that he lied and fabricated documents. There was more to his scheme than a conflict of interest."

The Guideline applicable to right of honest services convictions in *Grandmaison* and *Jennings* was § 2C1.7, which was a separate provision for convictions based on that theory of fraud. The right of honest services Guideline also provided that "[i]f the offense is covered more specifically under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest), apply the offense guideline that most specifically covers the offense." The Sentencing Commission eliminated § 2C1.7 in 2004 and consolidated it with § 2C1.1. Importantly, that provision does not contain any cross-reference to § 2C1.3 in connection with right of honest services convictions, so it appears that use of the conflict of interest Guideline in sentencing for a right of honest services conviction would not be appropriate.

IV. PAYMENTS TO OBTAIN PUBLIC OFFICE (§ 2C1.5)

The Guideline for payment to obtain public office covers convictions under 18 U.S.C. §§ 210 and 211, and provides for a base offense level of 8. There are no enhancements for this provision. The maximum term of imprisonment for a violation of either statute is one year, and the prescribed

conflict of interest); 1012 (Housing and Urban Development property transactions); 1901 (collection or disbursement of revenue); 1903 (Federal Crop Insurance Administration commodity transactions); 1909 (bank examiner conflict of interest); 40 U.S.C. § 14309(a) (Appalachian Regional Commission conflict of interest).

78. 77 F.3d 555, 567 (1997).

offense level recommends a sentence of zero to six months. There is no case law interpreting this provision.

V. MAKING, RECEIVING, OR FAILING TO REPORT A CONTRIBUTION, DONATION, OR EXPENDITURE IN VIOLATION OF THE FEDERAL ELECTION CAMPAIGN ACT; FRAUDULENTLY MISREPRESENTING CAMPAIGN AUTHORITY; SOLICITING OR RECEIVING A DONATION IN CONNECTION WITH AN ELECTION WHILE ON CERTAIN FEDERAL PROPERTY (§ 2C1.8)

The Guideline for campaign contribution offenses provides for a base offense level of 8, and then a number of enhancements that can increase the recommended sentence.[79] If the value of the illegal transaction[80] exceeds $5,000, then the loss table in § 2B1.1 is used to increase the offense level based on the amount involved.[81] If the illegal transaction involves a payment made by or received from a foreign national, then there is a 2-level increase, and if a foreign government is involved, then there is a 4-level increase.[82]

Section 2C1.8(b)(3) provides for a 2-level increase in the following two situations: "(A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit." The Guideline commentary defines "governmental funds" as "money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government."[83]

79. Many campaign finance cases involving federal offices are prosecuted under 18 U.S.C. § 1001 for making a false statement to a federal agency. *See* Chapter 8. Section 2B1.1 is the applicable provision of the Guidelines applicable to that violation.

80. The Guideline defines an "illegal transaction" as

> (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section.

United States Sentencing Guidelines Manual § 2C1.8 cmt. n.1 (2009).

81. United States Sentencing Guidelines Manual § 2C1.8(b)(1) (2009).

82. United States Sentencing Guidelines Manual § 2C1.8(b)(2) (2009). The Guideline uses the definition of a foreign national contained in the Federal Election Campaign Act, 2 U.S.C. § 441e(b), and foreign government contained in the Foreign Agents Registration Act, 22 U.S.C. § 611(e).

83. United States Sentencing Guidelines Manual § 2C1.8 cmt. n.1 (2009).

The enhancement for a campaign finance violation to obtain "a specific, identifiable non-monetary Federal benefit" covers a situation "that does not rise to the level of a bribe or a gratuity."[84] The commentary distinguishes certain benefits, such as "a Presidential pardon or information proprietary to the government" that would come within this provision, from illegal transactions "in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials."[85] For contributions that do not rise to the level of a bribe or unlawful gratuity that would come within § 2C1.1 and § 2C1.2, the government may have evidence of an improper motivation related to the illegal transaction that can be used to obtain a higher recommended sentence through this enhancement. But the government should be required to identify a particular act or exercise of authority in relation to the contribution, and not simply a generalized desire by the defendant to obtain possible benefits at a future time.

Section 2C1.8 contains two other enhancements. If the defendant engages in thirty or more illegal transactions, then there is a 2-level increase.[86] If the campaign finance violation involved "intimidation, threat of pecuniary or other harm, or coercion," then a 4-level increase is applied.[87]

There is no case law interpreting this provision.

84. United States Sentencing Guidelines Manual § 2C1.8 cmt. n.2 (2009).

85. *Id.*

86. United States Sentencing Guidelines Manual § 2C1.8(b)(4) (2009).

87. United States Sentencing Guidelines Manual § 2C1.8(b)(5) (2009).

This page intentionally left blank

TABLE OF CASES

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

S

T

U

V

W

Y

Z

TABLE OF STATUTES

CODE OF FEDERAL REGULATIONS:

RULES

ACTS

INDEX