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Randall D. Eliason

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SURGERY WITH A MEAT AXE: USING HONEST SERVICES FRAUD TO PROSECUTE FEDERAL CORRUPTION

RANDALL D. ELIASON*

The federal criminal law prohibiting bribery and gratuities is part of an intricate web of laws and regulations governing the behavior of federal public officials. In light of this complexity, the Supreme Court has admonished that the law must be construed narrowly, to act as a "scalpel" rather than a "meat axe." In recent years, however, federal prosecutors increasingly have set aside the scalpel of the bribery and gratuities statute and have relied instead upon honest services mail and wire fraud to prosecute federal corruption. This Article analyzes the troubling implications of this trend and proposes a legislative solution.

Court decisions over the past decade have narrowly construed the bribery and gratuities law, making prosecutions under that statute more difficult and giving prosecutors of federal corruption an incentive to look for alternative legal theories. Honest services fraud, traditionally used to fight state and local corruption, has stepped into the breach and increasingly appears in federal corruption cases. But this trend threatens to upset the balance struck in the law between corrupt criminal behavior by federal officials and behavior that may be unseemly or unethical but falls short of being criminal. The vague and sweeping honest services standard fails to provide adequate notice to government officials or the public concerning what the criminal law requires. The potential penalties also vastly exceed the penalties for gratuities or other lesser misconduct that may be repackaged as honest services fraud. To remedy these problems, the Article proposes amending the federal gratuities statute and enacting a statutory definition of honest services fraud.

* Professorial Lecturer in Law, George Washington University Law School and American University, Washington College of Law, Washington, DC. J.D., Harvard Law School, 1985; B.A., University of North Dakota, 1982. The author was an Assistant United States Attorney for the District of Columbia for twelve years and was Chief of the Public Corruption/Government Fraud Section of that office from 1999-2001.

I. INTRODUCTION: PROSECUTION OF FEDERAL CORRUPTION IN THE AGE OF ABRAMOFF

The scandal involving lobbyist Jack Abramoff has been the most significant public corruption investigation to hit the nation's capital in years.[1] In more than a dozen cases to date, federal public officials and lobbyists (including Abramoff himself) have pleaded guilty to charges that they gave or accepted trips, tickets for concerts and sporting events, lavish meals, and other gifts, in connection with the performance of official acts. Robert Ney, the only Member of Congress to be convicted in the scandal thus far, pleaded guilty to accepting a series of gifts from Abramoff and his associates over several years in exchange for taking official actions that would benefit Abramoff's clients.[2]

The criminal behavior at the center of the Abramoff scandal sounds like textbook public corruption typically charged as bribery or gratuities: individuals paying off public officials either to influence them to act in a certain way or to reward them for actions already taken. It might surprise many to learn, then, that among all those convicted in the Abramoff investigation—including Congressman Ney and Jack Abramoff himself—almost no one has been charged with violating the federal bribery and gratuities law. By contrast, in each case a leading charge—and in many cases the only charge—has been honest services mail or wire fraud, or conspiracy to commit honest services fraud.[3]

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[1] For summaries of some of the major players and events in the Abramoff investigation, see, e.g., The Many Faces of the Abramoff Scandal, Posting of Derek Kravitz to Washington Post Investigations, http://voices.washingtonpost.com/washingtonpostinvestigations/2009/02/many_faces_of_abramoff.html (Feb. 4, 2009, 10:00 EST); *Unraveling Abramoff: Key Players in the Investigation of Lobbyist Jack Abramoff*, WASH. POST, June 26, 2007, http://www.washingtonpost.com/wp-dyn/content/custom/2005/12/23/CU2005122300939.html. *See also* PETER STONE, HEIST: SUPERLOBBYIST JACK ABRAMOFF, HIS REPUBLICAN ALLIES, AND THE BUYING OF WASHINGTON (2006).

[2] *See* Criminal Information, United States v. Ney, No. 1:06-cr-00272-ESH (D.D.C. filed Sept. 15, 2006); James V. Grimaldi & Susan Schmidt, *Rep. Ney Admits Selling Influence: Republican to Enter Plea in Abramoff Case*, WASH. POST, Sept. 16, 2006, at A1.

[3] Virtually all of the defendants charged in significant cases related to Abramoff's lobbying activities have been charged either with honest services mail or wire fraud or with conspiracy to commit honest services fraud, including the following (all cases are in the United States District Court for the District of Columbia): Jack Abramoff, Criminal Information, United States v. Abramoff, No. 1:06-cr-00001-ESH (D.D.C. filed Jan. 3, 2006) (honest services fraud and conspiracy to commit multiple offenses including honest services fraud); Congressman Robert Ney, Criminal Information, United States v. Ney, No. 1:06-cr-00272-ESH (D.D.C. filed Sept. 15, 2006) (conspiracy to commit multiple offenses including honest services fraud); Michael Scanlon, Abramoff's principal partner in crime and former press secretary to Rep. Tom DeLay, Criminal Information, United States v. Scanlon, No. 1:05-cr-00411-ESH (D.D.C. filed Nov. 17, 2005) (conspiracy to commit multiple offenses including honest services fraud); Tony Rudy, Abramoff's associate and former Chief of Staff

to Rep. Delay, Criminal Information, United States v. Rudy, No. 1:06-cr-00082-ESH (D.D.C. filed March 31, 2006) (conspiracy to commit multiple offenses including honest services fraud); Neil Volz, Abramoff's associate and former Chief of Staff to Rep. Ney, Criminal Information, United States v. Volz, No. 1:06-cr-00119-ESH (D.D.C. filed May 8, 2006) (conspiracy to commit multiple offenses including honest services fraud); Mark Zachares, former House of Representatives staffer, Criminal Information, United States v. Zachares, No. 1:07-cr-00106-ESH (D.D.C. filed Apr. 23, 2007) (conspiracy to commit honest services fraud); William Heaton, Abramoff's associate and former Chief of Staff to Rep. Ney, Criminal Information, United States v. Heaton, No. 1:07-cr-00042-ESH (D.D.C. filed Aug. 16, 2007) (conspiracy to commit honest services fraud); John Albaugh, former Chief of Staff to Rep. Ernest Istook, Criminal Information, United States v. Albaugh, No. 1:08-cr-00157-ESH (D.D.C. filed May 30, 2008) (conspiracy to commit honest services fraud); Kevin Ring, Abramoff's associate and former aide to Rep. John Doolittle, Indictment, United States v. Ring, No. 1:08-cr-00274-ESH (D.D.C. filed Sept. 5, 2008) (honest services fraud and conspiracy to commit multiple offenses including honest services fraud); James Hirni, former lobbyist associated with Abramoff, Criminal Information, United States v. Hirni, No. 1:08-cr-00348-ESH (D.D.C. filed Nov. 21, 2008) (conspiracy to commit honest services fraud); Todd Boulanger, Abramoff associate, Criminal Information, United States v. Boulanger, No. 1:09-cr-00025-ESH (D.D.C. filed Jan. 28, 2009) (conspiracy to commit honest services fraud); Ann Copland, former aide to Sen. Thad Cochran, Criminal Information, United States v. Copland, No. 1:09-cr-00043-ESH (D.D.C. filed Feb. 19, 2009) (conspiracy to commit honest services fraud); and Horace M. Cooper, former aide to former House Majority Leader Richard Armey, Indictment, United States v. Cooper, No. 1:09-cr-00209-ESH (D.D.C. filed Aug. 21, 2009) (conspiracy to commit honest services fraud, bribery and gratuities, false statements, and obstruction of justice).

The charging documents in the cases against Michael Scanlon and Jack Abramoff do include bribery under 18 U.S.C. § 201 as one of the objects of a conspiracy (along with honest services fraud). Neither includes any stand alone charges of bribery or gratuities. Criminal Information at 3, United States v. Abramoff, No. 1:06-cr-00001-ESH; Criminal Information at 2, United States v. Scanlon, No. 1:05-cr-00411-ESH.

Kevin Ring did not plead guilty and was indicted. His indictment does include one relatively minor charge of violating the federal gratuities statute, along with a lead charge of conspiracy to violate the gratuities statute and to commit honest services fraud and six counts of honest services wire fraud. The overwhelming majority of the allegations in the forty-six-page indictment relate to honest services fraud. *See* Indictment, United States v. Ring, No. 1:08-cr-00274-ESH (D.D.C. filed Sept. 5, 2008). As this article went to press, Ring's first trial had ended with a mistrial due to a deadlocked jury, and a new trial was being planned. *See* Del Quentin Wilber, *Abramoff Associate's Fraud Case Ends in Mistrial as Jury Deadlocks*, WASH. POST, Oct. 16, 2009, at A6.

David Safavian, former Chief of Staff for the General Services Administration, was also charged as part of the Abramoff investigation. Safavian, however, was not charged with bribery-related offenses but with false statements and obstruction of justice for lying to investigators about his dealings with Abramoff. He was convicted at trial on June 20, 2006, but that conviction was overturned. *See* United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008). Following retrial, he was convicted again. *See* Del Quentin Wilber & Derek Kravitz, *Ex-White House Aide Convicted*, WASH. POST, Dec. 20, 2008, at A2.

A handful of other individuals also have been convicted of charges such as tax evasion or obstruction of justice for matters related to or arising out of the Abramoff investigation, but these charges do not directly relate to the public corruption offenses at the heart of the investigation.

In an honest services fraud public corruption case, the defendants are charged with using the mail or wires to further a scheme to defraud citizens of their right to the fair, honest, and impartial services of their public officials.[4] Historically, honest services fraud involving public officials was primarily a vehicle for the federal prosecution of state and local corruption. The principal federal bribery and gratuities statute, 18 U.S.C. § 201, generally applies only to federal public officials.[5] Over the past four decades, as federal prosecutors increasingly focused on pursuing state and local corruption, they required other statutory tools. Honest services mail and wire fraud emerged as a leading theory of prosecution in such cases.

In recent years, however, prosecutors increasingly have employed the honest services fraud theory to prosecute not only state and local corruption but also corrupt conduct by federal public officials. This move has come in the wake of court decisions—chief among them the Supreme Court's 1999 decision in the *Sun-Diamond* case[6]—that have narrowed the scope of the federal bribery and gratuities law and made prosecutions under that statute more difficult. Faced with these restrictive court rulings, prosecutors appear to be turning with increasing frequency to honest services fraud as an alternative to traditional bribery or gratuities charges.[7]

In a typical federal corruption case, honest services fraud will now be easier to charge and prove than bribery or gratuities, will apply to a wider range of conduct, and will carry a greater potential penalty. From the prosecutor's standpoint, what's not to like? It is therefore hardly surprising that federal prosecutors are turning to the honest services theory as a ready substitute for the more finicky bribery and gratuities law. Honest services fraud is on a path to becoming the default statute of choice among

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[4] The federal mail and wire fraud statutes prohibit the use of the mail or interstate wire or radio transmissions in furtherance of a "scheme or artifice to defraud." *See* 18 U.S.C. §§ 1341, 1343 (2006). Pursuant to 18 U.S.C. § 1346 (2006), "scheme or artifice to defraud" includes a "scheme or artifice to deprive another of the intangible right of honest services." *See infra* text accompanying notes 95-130.

[5] *See* 18 U.S.C. § 201(a)(1) (2006). *See also infra* text accompanying note 22.

[6] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

[7] Other commentators have noted the increased use of honest services fraud: "[Honest services fraud] was the lead charge lodged by U.S. attorney offices against 79 suspects in fiscal year 2007, up from 63 in 2005 and 28 in 2000." Lynne Marek, *Fitzgerald and 'Honest Services'*, NAT'L L.J., June 15, 2009, at 1. The statistics maintained by the Department of Justice do not distinguish among federal officials, state and local officials, and private individuals charged with honest services fraud.

As another rough indication of the charge's increasing popularity, a Westlaw search for all federal district court and circuit court opinions containing the terms "honest services" and "18 U.S.C. 1346" from the years 1998-2001 found an average of twelve cases per year. From 2002-2005, the average was eighteen cases per year. From 2006-2009, the average was thirty-five cases per year.

prosecutors of federal public corruption cases—the new "darling of the modern prosecutor's nursery."[8]

This trend towards honest services fraud has received relatively little scrutiny; most of these cases are resolved through guilty pleas, so the legal foundations of the theory are seldom tested. But this expanding use of honest services fraud may be expanding the scope of federal public corruption prosecutions beyond the proper boundaries. Prosecutors freed of the more rigorous proof requirements of the bribery and gratuities law may, as one federal judge cautioned, use the "free swinging club of mail fraud"[9] to pursue an ever-wider range of conduct under the vague banner of honest services. This threatens to upset the delicate balances that have been struck in the law concerning the behavior of federal officials and to blur further the already less-than-clear lines between corrupt misconduct and lawful behavior.

When applied to state and local corruption, the honest services fraud theory at least had the virtue of necessity. In the absence of a federal statute directly applying to bribery or similar corrupt conduct by state and local officials, honest services mail and wire fraud stepped in to fill the void.[10] The same cannot be said of federal corruption prosecutions. In federal corruption cases, honest services fraud may be charged not because there are no other applicable corruption statutes, but because a violation of those statutes cannot be established—which may mean, in some cases, that the acts in question should not be considered criminal at all.

Conduct that may constitute federal corruption often scrapes uncomfortably close to the edge of legitimate activities such as lobbying and fundraising. There is a great deal of behavior some might consider dishonest, unethical, or sleazy that is not actually criminal. For these reasons, criminal laws in this area must contain "precisely targeted prohibitions."[11] The sweeping and ill-defined honest services standard utterly fails in this regard. Far from being precisely targeted, it potentially criminalizes any behavior that might be deemed "dishonest" while providing scant notice concerning where the line will be drawn between criminality and lesser misconduct.

In *Sun-Diamond*, the Supreme Court noted that the federal bribery and gratuities statute, with its strict proof requirements, is part of an "intricate web of regulations, both administrative and criminal, governing the

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[8] Judge Learned Hand famously referred to the conspiracy statute as the "darling of the modern prosecutor's nursery" in *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

[9] United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1981) (Winters, J., dissenting).

[10] *See infra* text accompanying notes 95-113.

[11] *Sun-Diamond*, 526 U.S. at 412.

acceptance of gifts and other self-enriching actions by [federal] public officials."[12] In light of this complexity, the Court concluded, "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[13] The concern now is that prosecutors are frequently discarding the scalpel of bribery and gratuities altogether and instead are performing surgery with the meat axe of honest services fraud. The consequences for the patient—the law of federal public corruption—have been predictably messy. It is time for Congress to step in and end the carnage by reforming the law governing federal corruption.

II. FEDERAL PUBLIC CORRUPTION AND THE *SUN-DIAMOND* LEGACY

A. THE FEDERAL BRIBERY AND GRATUITIES STATUTE

To appreciate the issues concerning the growing use of honest services fraud, it is necessary first to review the current state of the law concerning the prosecution of federal bribery and gratuities cases. The centerpiece of federal public corruption law is 18 U.S.C. § 201, entitled "Bribery of Public Officials and Witnesses."[14] The statute defines two distinct offenses: bribery and gratuities.[15]

The crime of bribery, set forth in 18 U.S.C. § 201(b), is committed when a public official (as defined in the statute) corruptly demands, seeks, receives, accepts, or agrees to receive and accept anything of value in exchange for: (1) being influenced in the performance of an official act; (2) being influenced to commit or aid in a fraud against the United States; or (3) being induced to do or omit to do an act in violation of his or her official duty.[16] The crime applies to both sides of a corrupt transaction: those who

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[12] *Id.* at 409.

[13] *Id.* at 412.

[14] 18 U.S.C. § 201 (2006). Although the title of the statute refers only to bribery, the statute defines two crimes: bribery in § 201(b), and gratuities in § 201(c).

[15] The statute also prohibits bribes and gratuities directed to witnesses and related to their testimony. *See id.* § 201(b)(3), (c)(3). Because these are not principally public corruption offenses, they will not be discussed here.

[16] *Id.* § 201(b)(2). The full section reads:

> [Whoever] being a public official or person selected to be a public official, 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;
>
> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

pay a bribe are equally as guilty as the public official who accepts it.[17] Bribery is punishable by up to fifteen years in prison, along with fines and disqualification from holding any future federal public office.[18]

The crime of gratuities, 18 U.S.C. § 201(c), is committed when a public official, otherwise than as provided by law in the exercise of his or her official duties, directly or indirectly demands, seeks, receives, accepts, or agrees to receive and accept anything of value for or because of any official act performed or to be performed.[19] Again, the crime applies to

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(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[17] *See id.* § 201(b)(1):

Whoever . . .

(1) directly or indirectly, corruptly gives, offers, or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent –

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a 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 . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

The culpability of the bribe payor as well as the bribe recipient is a key distinction between bribery and the crime of extortion under statutes such as the Hobbs Act, 18 U.S.C. § 1951 (2006). In an extortion case, only the public official is guilty of an offense; the person paying the extortion is considered to be a victim and unwilling participant. In a bribery case, both sides to the transaction are willing participants and both may be charged.

[18] *Id.* § 201(b).

[19] *Id.* § 201(c)(1)(B). The full section reads:

[Whoever] being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person

. . . .

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

both sides of the transaction, and those who pay the gratuity are equally guilty.[20] An illegal gratuity is punished much less severely than a bribe; the maximum prison term is only two years.[21]

The crimes of bribery and gratuities have several elements in common:

Public officials: Both crimes apply only to federal public officials. "Public official" is defined in the statute to include all officers and employees of any department, agency, or branch of the United States, as well as private individuals who are acting for or on behalf of the United States.[22] The statute does not criminalize private commercial bribery (such as an executive at IBM paying an employee at Dell to provide corporate secrets) or other corrupt transactions between private parties. Most significantly, 18 U.S.C. § 201 does not apply to state or local officials who are engaged in purely state or local activities.

Thing of value: Bribery and gratuities both apply to agreements to give or receive "anything of value."[23] This term is interpreted very broadly to include virtually anything of subjective worth to the intended recipient. The most obvious and common examples are money, property, and other tangible goods, but the term also includes more intangible items such as

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18 U.S.C. § 201(c)(1)(B).

The statute requires that a public official receive a gratuity "personally." *Id.* A bribe, however, may be accepted "personally or for any other person or entity." *Id.* § 201(b)(2).

[20] *See id.* § 201(c)(1)(A):

> Whoever . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

[21] *Id.* § 201(c).

[22] *See id.* § 201(a)(1). In *Dixson v. United States*, 465 U.S. 482 (1984), the Supreme Court discussed the applicability of the statute to those acting "for or on behalf of the United States." The defendants in *Dixson* were officers of a private nonprofit corporation who controlled and distributed federal funds through a community development grant program. The Court found that the defendants were "public officials" within the meaning of the statute, which the Court held applies to any individuals who "occup[y] a position of public trust with official federal responsibilities." *Id.* at 496. It is not enough merely to be an employee of an organization that receives some federal assistance or federal funding; the individual must "possess some degree of official responsibility for carrying out a federal program or policy." *Id.* at 500; *see also* United States v. Thomas, 240 F.3d 445 (5th Cir. 2001) (holding that a guard at a private prison facility that contracted with the United States to house and guard federal inmates is a public official under § 201); United States v. Hang, 75 F.3d 1275 (8th Cir. 1996) (holding that a city public housing agency employee is public official for purposes of § 201); United States v. Velazquez, 847 F.2d 140 (4th Cir. 1988) (holding that a county deputy sheriff responsible for supervising federal inmates is a public official under § 201).

[23] 18 U.S.C. § 201(b)(1)-(2), (c)(1)(A)-(B).

promises of future employment,[24] loans given on unusually favorable terms,[25] sexual favors,[26] and companionship.[27] Even if a gift is actually worthless, it will constitute a thing of value if the public official believed it to be valuable.[28]

Official act: Gratuities are things of value given or received for or because of "any official act" performed or to be performed by the public official.[29] In addition, one of the three prohibitions in the bribery section forbids an agreement to give or receive anything of value in exchange for influence over "any official act" by a public official.[30] The term "official act" is defined 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."[31] As discussed in more detail below,[32] a recent controversial decision by the en banc United States Court of Appeals for the District of Columbia Circuit[33] gave a restrictive reading to the term "official act," opening up a possible new line of defense in these cases and giving prosecutors a reason to look for alternative theories of liability.

B. IS IT A BRIBE OR A GRATUITY?

The key distinction between a bribe and a gratuity is the element of intent.[34] To be guilty of bribery, a defendant must act with corrupt intent. This means that the defendant must act with the intent to *influence* the actions of the public official or, on the public official's side of the transaction, that the official has the intent to *be influenced* in the performance of official acts or duties. The agreement in a bribery case is often referred to as a quid pro quo—you give me this, and in exchange I

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[24] *See* United States v. Biaggi, 909 F.2d 662, 684-85 (2d Cir. 1990); United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986).

[25] *See Gorman*, 807 F.2d at 1304-05.

[26] *See* United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008).

[27] *See* United States v. Sun-Diamond Growers of Cal., 941 F. Supp. 1262, 1269 (D.D.C. 1996).

[28] *See* United States v. Williams, 705 F.2d 603 (2d Cir. 1983) (ABSCAM case; holding that worthless stock offered to Congressman as part of an undercover sting operation was a thing of value because he believed it to be valuable).

[29] 18 U.S.C. § 201(c)(1)(A)-(B) (2006).

[30] *Id.* § 201(b)(1)(A), (2)(A).

[31] *Id.* § 201(a)(3).

[32] *See infra* text accompanying notes 71-94.

[33] Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

[34] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999) (discussing bribery-gratuities distinction).

will do that for you. Rather than acting in the best interests of the public, the official is acting to line his or her own pockets by doing the bidding of the briber. Bribery is thus the true corruption offense because official decision-making is itself corrupted.

A gratuity, on the other hand, does not require corrupt intent. The gratuities statute requires only that a thing of value be given or accepted "for or because of any official act performed or to be performed" by the public official.[35] Violating the gratuities statute does not require that official actions were actually affected or influenced in any way; indeed, a gratuity may be paid after official action was already taken, when influencing the action is no longer possible. In their simplest forms, therefore, a bribe says "please," and a gratuity says "thank you."

Although the two crimes are aimed at a similar danger, the harm from a gratuity is much more diffuse than the harm from a bribe.[36] Rather than having a particular official action corrupted, the fear is that, over time, an official who receives gratuities from certain individuals may be influenced in some future, unspecified actions to favor those individuals. Essentially, a gratuity allows the donor to curry favor with the public official in an improper way, hoping that the official might look kindly upon the donor's interests sometime down the road. One court described the purpose of the ban on gratuities this way:

> The purpose of these statutes is to reach any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position .... Even if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee ....[37]

Even if such a hope for future favorable action is absent, the law forbidding gratuities reflects a judgment that public officials work equally for all, and even a perception that certain groups will be favored because they are showering an official with gifts is a harm to be avoided.

The distinction between the two offenses is reflected in their respective penalties. Bribery is considered far more serious because the actions of the public official are actually corrupted. That seriousness is reflected in the potential maximum prison sentence of fifteen years, along with fines and possible disqualification from future office.[38] By contrast, a gratuity is

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[35] 18 U.S.C. § 201(c)(1)(A).

[36] *Cf.* George Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?*, 52 WAYNE L. REV. 1371, 1377 (2006) (noting that "the gratuities offense is broader than bribery, but it is aimed at the same evil").

[37] United States v. Evans, 572 F.2d 455, 480 (5th Cir. 1978).

[38] *See* 18 U.S.C. § 201(b).

punishable by a maximum of only two years in prison, along with fines.[39] In a gratuities case, the conduct of the people's business has not been directly affected; thus the harm is considered much less serious.

To highlight the distinction between the two offenses, consider the following hypothetical scenarios:

> *(1) A lobbyist for the National Organization of Large Industrial Polluters visits the office of Congressman X, and says, "Congressman, we here at NOLIP want to thank you for all your support in the past. As I'm sure you know, there is a vote coming up next week to repeal the Clean Air Act. Our members are very interested in seeing that bill pass. We think the air is pretty clean already, and believe we can rely on the free market to handle these problems without government regulation. We hope we can count on you to vote 'yes' on the bill. And because this is so important to us, we'd like to encourage you to vote our way by giving you this plain brown envelope with $50,000 in it."*
>
> *(2) The same lobbyist meets with Congressman X and says, "Congressman, my clients, the members of NOLIP, really appreciate all you have done for them over the years. In particular, we want to thank you for your vote last week to repeal the Clean Air Act. Heaven knows we have enough government regulation already, and we're grateful you recognized that. As an expression of our appreciation, here's a plain brown envelope with $50,000 in it."*

The first scenario is an example of a bribe. The lobbyist is seeking to influence a future official act by the Congressman and provides the thing of value with the intent to cause the Congressman to act a certain way. The second scenario is a gratuity. The official act in question—the vote—has already taken place and can no longer be influenced. The payment is clearly "for or because of" that official act, and thus constitutes a gratuity.

When considering whether an offense is a bribe or a gratuity, the sequence of events is important, although not always determinative. In a case where the official act precedes any agreement to pay or receive a thing of value (as in scenario number two above), the question is easy. No influence of the official act is possible because the act has already occurred. This is a "pure" gratuity: an after-the-fact thank you that, given the sequence of events, could not possibly be a bribe.[40]

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[39] *See* 18 U.S.C. § 201(c).

[40] It is the timing of the agreement or deal, not the timing of any actual payment, that is the key. The crime is in the agreement itself, and a bribe or gratuity can take place even if the promised thing of value never actually changes hands. So, for example, in our NOLIP hypothetical, if the Congressman agreed to vote against the Clean Air Act in exchange for a cash payment, cast the promised vote, and then collected the payment later, that would still be a bribe. That the actual payment took place after the official act would not alter the fact

When an agreement to pay or receive a thing of value is made *before* the official act in question, things may get murkier. Because the official action has yet to be taken, one can argue there is necessarily intent to influence that action and bribery would be the appropriate charge. But suppose the Congressman has been traveling around his district for weeks making speeches about the need to repeal the Clean Air Act, and is even a sponsor of the bill. It is crystal clear how he intends to vote. If our NOLIP lobbyist gives him the payoff before the actual vote takes place, is that still a bribe? Because the Congressman's position is so clear, there would seem to be little need or incentive to influence him. Such a case may constitute a "forward-looking gratuity"—a payment to thank the Congressman for or because of an official act "to be performed," as provided in the statute,[41] but without the corrupt intent to influence an action that already seems a foregone conclusion.

The line between such a forward-looking gratuity and a bribe often will be a blurry one. In the example just cited above, one could argue that the intent to influence on the part of our lobbyist is still present, because the Congressman could always change his mind or get cold feet. Even though the Congressman has repeatedly expressed support for the bill, the payment is insurance to influence him to go through with the vote. The parties to the transaction, however, would argue that the intent to influence was absent because the vote was never in doubt. The outcome in such a case will depend upon the nature and strength of the government's evidence. Indeed, many gratuities cases and gratuities guilty pleas are simply weak bribery cases, where the evidence of corrupt intent may be less than compelling.[42]

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that the public official still *agreed* to be influenced in the performance of an official act in exchange for something of value. The same would be true even if, for some reason, the promised payment never was made at all.

[41] *See* 18 U.S.C. § 201(c)(1)(A)-(B); *see also* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408 (1999) (discussing an example of a forward-looking gratuity).

[42] Courts occasionally muddy the waters themselves when discussing the distinction between a bribe and a gratuity. For example, discussing the distinction in *United States v. Schaffer*, 183 F.3d 833, 841-42 (D.C. Cir. 1999), the D.C. Circuit summarized the law as follows:

> [W]hereas bribery involves the present giving, promise, or demand of something in return for some action in the future, an unlawful gratuity can take one of three forms. 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 summary is incorrect. The second and third forms of gratuity discussed by the court both involve intent by the giver to *influence* some future actions by the official, and thus properly would be considered bribery. Difficulties of proof may result in such cases being charged as mere gratuities, but the conduct described by the court makes out the elements of

C. THE STATUS GRATUITY AND THE *SUN-DIAMOND* CASE

Consider now a third variation on our NOLIP hypothetical:

> *(3) The lobbyist for NOLIP has an ongoing relationship with Congressman X. Over a period of several years, the lobbyist gives things of value to the Congressman worth thousands of dollars, including fancy dinners out, skybox seats to various sporting events, all-expenses paid golf trips to exotic locations, and the like. Over that same time period, Congressman X takes a number of official actions that favor clients of the NOLIP lobbyist, such as making speeches in support of NOLIP members, contacting various executive branch agencies on their behalf, and supporting legislation favored by NOLIP. However, the timing of the gifts and the official acts does not always match up, and it is not easy to link any one specific gift with any one official act.*

Does this scenario describe a bribe, a gratuity, or something else? Most would probably agree that this appears to be a corrupt relationship. The lobbyist is providing a stream of things of value to the Congressman to curry favor with him and encourage him to advance NOLIP's interests. At the same time, the Congressman is taking various official acts that benefit NOLIP. The Congressman appears to be "on retainer" or in the lobbyist's "back pocket." But there is no direct evidence linking any specific official act to any specific thing of value that was given.

At a minimum, this scenario describes what prosecutors used to call a "status gratuity," "goodwill gratuity," or "currying-favor gratuity." Such cases were charged under the theory that the things of value provided to the public official constituted improper gratuities given because of the official's status and ability to act to benefit the donor. Over time, the donor was hoping to build up goodwill with the official so that, when issues arose of interest to the donor, the official might look kindly on the donor and act in accordance with his interests. This is precisely the type of harm at which the gratuities statute is aimed. Therefore, according to this theory of prosecution, a gratuities charge was proper, even though no firm link could be established between any specific payment and any specific official act. Prosecutions charging such status gratuities were upheld by a number of courts.[43]

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bribery. *See also* Charles B. Klein, *What Exactly Is an Unlawful Gratuity After* United States v. Sun-Diamond Growers?, 68 GEO. WASH. L. REV. 116 (1999) (discussing forward-looking gratuities and criticizing the D.C. Circuit's approach in *Schaffer* and *Sun-Diamond*).

[43] *See, e.g.*, United States v. Bustamante, 45 F.3d 933, 940 (5th Cir. 1995) (holding that a gratuities charge is sufficient if the thing of value was given simply because the defendant held public office; there is no need to link gratuity to any specific official act); United States v. Standefer, 610 F.2d 1076, 1080 (3d Cir. 1979) (same); United States v. Evans, 572 F.2d 455, 481 (5th Cir. 1978) (same); United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.

The status gratuity theory of prosecution met its demise in the 1999 Supreme Court case of *United States v. Sun-Diamond Growers of California*.[44] The case was an offshoot of the investigation of Clinton administration Secretary of Agriculture Michael Espy by Independent Counsel Donald Smaltz. Sun-Diamond is a trade association of producers of various agricultural products. It was charged with providing illegal gratuities to Secretary Espy under 18 U.S.C. § 201(c)(1)(A).[45] The indictment alleged that Sun-Diamond had given Espy gratuities valued at about $5,900, including tickets to the U.S. Open tennis tournament, luggage, meals, a framed print, and a crystal bowl.[46]

The indictment also described two matters of interest to Sun-Diamond's members that were pending before the Department of Agriculture at the time the gifts were given. The first was a grant program administered by the Department to promote the sale of U.S. farm commodities overseas, and the second was the government's proposed regulation of methyl bromide, a low-cost pesticide used by many of Sun-Diamond's members.[47] Although the indictment described these as matters pending before the Secretary in which Sun-Diamond had an interest, it did not allege any direct connection between those matters and any of the gratuities that were given.[48] Instead, the government proceeded on the "status gratuity" or "currying favor gratuity" theory discussed above. In rejecting a defense motion to dismiss, the district court upheld the status gratuity theory, holding that:

> [T]o sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position.[49]

The jury was instructed along the same lines, and Sun-Diamond was convicted on the gratuities charge.[50]

1976) (same). *But see* United States v. Jennings, 160 F.3d 1006, 1020 n.5 (4th Cir. 1998) (rejecting status gratuity theory and requiring a gratuity to be linked to a specific official act).

[44] 526 U.S. 398 (1999).

[45] *Id.* at 401.

[46] *Id.*

[47] *Id.* at 402.

[48] *Id.*

[49] *Id.* at 402-03 (quoting United States v. Sun-Diamond Growers of Cal., 941 F. Supp. 1262, 1265 (D.D.C. 1996)).

[50] *Id.* at 403. The jury instructions fully adopted the traditional status or goodwill gratuity theory:

The United States Court of Appeals for the District of Columbia Circuit reversed.[51] The court held that because the gratuities statute requires a thing of value to be given "for or because of any official act," a defendant may not be convicted based on gifts that were given purely because of a public official's status or position.[52] The court of appeals held, however, that although there had to be some identifiable official acts to which the gratuities were related, the government was not required to show that any *particular* gift was directly linked to any *particular* official act. An official might have a number of matters on his plate of interest to the defendant, and gifts not directly linked to any one particular matter could still violate the gratuity statute "as long as the jury was required to find the requisite intent to reward past favorable acts or to make future ones more likely."[53]

A unanimous Supreme Court upheld the reversal of the conviction, but went one step further. The Court acknowledged that the conviction rested on the theory that the gratuities statute could be satisfied by a string of gifts to Secretary Espy "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future."[54] The Independent Counsel's argument before the Court was textbook status gratuity: "[S]ection 201(c)(1)(A) reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be *in a position to act* favorably to the giver's interests."[55] Supporting the Independent Counsel, the Solicitor General argued that the gratuity statute required only that the gifts be motivated by the recipient's capacity to exercise some government influence or power on the donor's behalf. Gifts would fail to violate the gratuities statute only if the donor was completely indifferent to the recipient's exercise of official power—for example, if a gift were given simply because the donor admired the official and the donor was hoping for

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> [T]o prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*

United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 965 (D.C. Cir. 1998) (quoting trial court jury instructions).

[51] *Sun-Diamond*, 138 F.3d 961.

[52] *Id.* at 968.

[53] *Id.* at 969.

[54] *Sun-Diamond*, 526 U.S. at 405.

[55] *Id.* (quotation marks omitted) (quoting Brief of the United States at 22, *Sun-Diamond*, 526 U.S. 398 (1999) (No. 98-131), 1998 WL 886774).

nothing in return.[56] According to the government, no particular official act need be identified, so long as the donor was motivated by a hoped-for exercise of official power.

The Supreme Court, however, found that the government's status gratuity theory did "not fit comfortably within the statutory text."[57] The statute prohibits only gratuities given "for or because of any official act," which, the Court reasoned, suggests that some *particular* official act must be linked to a given gratuity.[58] This means, the Court concluded, that a pure "status" gratuity—a gift given to a public official simply because of his official position and ability to exercise official power—does not violate the statute. The Court also rejected the middle ground adopted by the court of appeals, which had ruled that it was sufficient if some official acts were identified in connection with the gratuity but that no direct link was required. The Supreme Court held this also was inconsistent with the statutory language, concluding that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved" in connection with a particular gift.[59]

The Supreme Court noted that this interpretation also avoided some peculiar results that would follow from the government's status gratuity theory. For example, the Court reasoned, suppose the President received a sports jersey from a championship team visiting the White House, or the Secretary of Agriculture received a free lunch from a farmer's group in connection with a speech given on USDA policy. The Secretary would always have some matters pending before him or her of interest to farmers, just as the President would always have power over some matters relevant to college or professional sports. If a gratuity could be based solely on an official's ability to exercise power on the donor's behalf, with no requirement that it be linked to a particular official act, then the receipt of such token gifts would potentially violate the statute.[60] The Court concluded that its narrower reading of the statute was appropriate in part to avoid such "absurdities."[61]

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[56] *Id.* at 405-06 (summarizing the Solicitor General's argument); *see also* Brief for U.S. Department of Justice as Amicus Curiae Supporting Petitioner, *Sun-Diamond*, 526 U.S. 398 (No. 98-131), 1998 WL 898906.

[57] *Sun-Diamond*, 526 U.S. at 406.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 406-07.

[61] *Id.* at 408. The Court recognized the possible argument that, even in the hypotheticals it described, one could claim that the jersey or meal were given "for or because of" the official acts of receiving the sports team or giving the speech:

> The answer to this objection is that those actions—while they are assuredly "official acts" in some sense—are not "official acts" within the meaning of the statute, which, as we have noted,

Finally, the Court concluded that a narrow interpretation of the gratuities statute was more compatible with the fact that there also exists a wide range of government regulations spelling out conditions under which it is permissible for government employees to accept certain gifts—gifts that, although allowed under the regulations, might be deemed potentially criminal under the government's status gratuity theory.[62] The existence of this regulatory regime, the Court reasoned, suggests that the rules concerning public officials and the acceptance of things of value are much more complex than the government's interpretation of the gratuities statute would suggest, and "[g]iven that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[63] Accordingly, the Court held, to establish a violation of the gratuities statute, "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."[64]

Sun-Diamond cleanly killed the status gratuity theory of prosecution. In light of that decision, then, what remains of the distinction between a bribe and a gratuity? Some have suggested that there no longer is any real distinction,[65] but this is not the case. It's true that a gratuity, like a bribe, must now be linked to a specific official act. Unlike a bribe, however, a gratuity still does not require corrupt intent. A "thank you" gift after an official act has already been performed—NOLIP scenario number two above—is still a gratuity, and could never be a bribe. Similarly, in cases in

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defines "official act" to mean "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." 18 U.S.C. § 201(a)(3).

Id. at 407.

This discussion of the definition of "official acts" was critical in another recent decision that further limited the scope of the federal gratuities statute, *Valdes v. United States*, 475 F.3d 1319, 1329 (D.C. Cir. 2007) (en banc). *See infra* text accompanying notes 82-84.

[62] *Sun-Diamond*, 526 U.S. 409-12. In particular, the Court discussed the ban on federal employees accepting gifts from individuals who may be affected by the exercise of their official duties, contained in a civil statute, 5 U.S.C. § 7353 (2006). The Office of Government Ethics has issued detailed regulations concerning the acceptance of any gifts from so-called "prohibited sources," and providing exceptions that allow such gifts in certain circumstances. *See* 5 CFR §§ 2635.201–205 (2009).

[63] *Sun-Diamond*, 526 U.S. at 412.

[64] *Id.* at 414.

[65] *See* George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond, *and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 774 (2000) ("If [the gratuities statute as interpreted in *Sun-Diamond*] sounds like the crime of bribery, that is because it is. The Court has essentially eliminated the separate crime of unlawful gratuity and turned it into a lesser included offense of bribery.").

which a link to a specific official act can be established, there will still be times when it is unclear whether a thing of value given prior to that official act is a bribe or simply a forward-looking gratuity without the necessary evidence of corrupt intent to influence official action.

What is clear, though, is that even for the relatively minor charge of gratuities, a direct connection between a particular thing of value and a particular official act now must be established beyond a reasonable doubt. This can pose a serious evidentiary hurdle for prosecutors of public corruption cases. It is not uncommon to find NOLIP scenario number three: a series of gifts given over time to a public official, and a series of official acts that favor the gift giver. This is, for example, the basic fact pattern of most of the Abramoff-related cases. But it may be extremely difficult to pick out a particular gift and prove beyond a reasonable doubt that it was "for or because of" a particular official act. If, over a five-year period, there are dozens of gifts and a number of official acts, how do you prove the direct one-to-one link that *Sun-Diamond* requires?

Indeed, an irony of *Sun-Diamond* is that it may make the most corrupt relationships some of the most difficult to prosecute. If there is a "one-time deal," where a payment is made to an official for a single, identifiable official act, the required link between gift and action may be relatively easy to establish. If a private party and a corrupt official have a long-term relationship, however, the parties may not even think in such "one-to-one" terms. Over a long period of time there may be a series of gifts to the official and a number of acts taken by that official to benefit the gift giver, but linking any particular gift to any particular official act may be extremely difficult, if not impossible. After *Sun-Diamond*, such a long-term corrupt relationship may be more difficult to prosecute than an isolated corrupt transaction.

In status gratuity situations, prosecutors faced a dilemma after *Sun-Diamond*. An ongoing pattern of personal gifts and official acts may signify a relationship that appears clearly unlawful, yet *Sun-Diamond*'s requirement of linking particular gratuities to particular official acts could prove to be an insurmountable obstacle to bringing charges under 18 U.S.C. § 201. Faced with such cases, prosecutors in the aftermath of *Sun-Diamond* had to consider alternative approaches.

D. LIMITING THE SCOPE OF "OFFICIAL ACTS": THE *VALDES* CASE

The gratuities statute requires that a thing of value be given or received for or because of "any official act" performed or to be performed.[66] Similarly, one of the three theories of bribery under § 201(b) requires the

[66] 18 U.S.C. § 201(c)(1)(A)-(B) (2006).

government to prove that a thing of value was given or received to influence "any official act" of a public official.[67] The term "official act" is defined identically for both offenses: "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."[68]

A leading case concerning the scope of "official acts" is *United States v. Muntain*.[69] The defendant was an Assistant to the Secretary for Labor Relations at the U.S. Department of Housing and Urban Development. In that capacity, he developed contacts with representatives of many different labor unions. An insurance company sought his assistance in marketing group auto insurance to unions, and he agreed to do so in exchange for commissions. He was convicted of receiving illegal gratuities, but the D.C. Circuit reversed on the grounds that the commissions he received were not in connection with an "official act" as defined in the statute. There was no evidence that Muntain's regular duties had anything to do with insurance, and the payments were therefore not in connection with any question, matter, case, or controversy that might come before him in his official capacity.[70] Muntain's moonlighting—using contacts he developed on his government job—might have been reprehensible, but it was not a violation of the gratuities statute.

Recently, the D.C. Circuit—the same court that decided *Muntain*—issued a significant en banc decision interpreting the "official act" requirement: *Valdes v. United States*.[71] Nelson Valdes was a Washington, D.C. police officer. One evening he met up at a nightclub with William Blake who, unknown to Valdes, was working as an undercover informant for the FBI. Blake told Valdes that he was a judge. Over the course of a few weeks the two met several times at the club; at one point Valdes gave Blake his business card "just in case [Blake] ever needed a favor."[72] At the FBI's direction, Blake asked Valdes to use a police database to look up some license plate numbers, ostensibly to find contact information for people who owed Blake money.[73] On several occasions, Valdes looked up license plate information for Blake. He also agreed to check a name and address provided by Blake to see whether the individual had an outstanding

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[67] *Id.* § 201(b)(1)(A)-(2)(A).

[68] *Id.* § 201(a)(3).

[69] 610 F.2d 964 (D.C. Cir. 1979).

[70] *Id.* at 967-69.

[71] 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

[72] Valdes v. United States, 475 F.3d 1319, 1321 (D.C. Cir. 2007).

[73] *Id.*

warrant issued against him. In exchange for these favors, Blake paid Valdes a few hundred dollars.[74]

Valdes was indicted on three counts of bribery under 18 U.S.C. § 201(b)(2)(A) and (C)—agreeing to accept a thing of value in exchange for being influenced in the performance of an official act and for doing an act in violation of his official duty.[75] The jury, however, convicted him only of the lesser-included offense of receiving an illegal gratuity under 18 U.S.C. § 201(c)(1)(B).[76] On appeal, he argued that his acts of looking up the requested information on police databases were not "official acts" within the meaning of the statute. A panel of the D. C. Circuit agreed.[77] The case was taken en banc, and the entire court, over vigorous dissents, affirmed the panel and ruled that Valdes's convictions could not stand.[78]

The court in *Valdes* focused on the specific statutory language defining official act: "[1] any decision or action [2] on any question, matter, cause, suit, proceeding, or controversy, [3] which may at any time be pending, or which may by law be brought [4] before any public official in such official's capacity."[79] The government argued that this language should encompass essentially any action taken in an official capacity, and this was how the jury had been instructed. The court concluded, however, that the language was more restrictive. In particular, the requirement that the act relate to a specific "question, matter, cause, suit, proceeding, or controversy," the court noted, suggests that the statute is focused primarily on discretionary actions of officials resolving matters and answering questions that typically are brought before them in the course of their duties.[80] The more sweeping interpretation sought by the government would improperly bring within the statute "a broad range of moonlighting activities that in *any way* paralleled an officer's regular work," and seems belied by the statute's careful definition of "official act."[81]

The majority in *Valdes* also relied heavily upon the Supreme Court's decision in *Sun-Diamond.* As discussed above, the Supreme Court in that case held that interpreting the gratuities statute to require a direct link to a

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[74] *Id.* at 1321-22.

[75] *Id.* at 1322. The definition of "public official" in 18 U.S.C. § 201(a)(1) includes not only federal employees but also employees of the District of Columbia. Thus D.C. police officers and other local government employees—unlike state or local employees in any other jurisdiction—are subject to federal criminal prosecution under § 201, even when engaged in purely local activities.

[76] *Id.*

[77] United States v. Valdes, 437 F.3d 1276 (D.C. Cir. 2006).

[78] *Valdes*, 475 F.3d at 1319.

[79] *Id.* at 1322 (quoting 18 U.S.C. § 201(a)(3)).

[80] *Id.* at 1323-24.

[81] *Id.* at 1326.

particular official act avoided such "absurdities" as criminalizing the President's receipt of a jersey from a sports team visiting the White House, or the Secretary of Agriculture's receipt of a meal when making a speech to a farmers' organization.[82] Anticipating the possible argument that such gifts were "for or because of" the official acts of receiving the team or making the speech, the Supreme Court noted that "[t]he answer to this objection is that those actions— while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute," because they do not involve a decision or action on a question, matter, or controversy brought before the public official.[83] Thus there may be many things done within the range of official duty that do not fall within the narrower class of "official acts." The *Valdes* majority concluded that this discussion of the term "official act" in *Sun-Diamond* was directly on point when it came to analyzing whether the actions of Officer Valdes fell within the statute.[84]

In looking up the license plate information requested by Blake, Valdes was certainly acting in an official capacity in some respects, and was using the resources of his official position. Nevertheless, the court concluded, these did not constitute "official acts" within the meaning of the statute. Looking up the records as a favor to Blake did not involve any question, matter, cause, or controversy that might actually come before Valdes in his official capacity. There was no risk of corrupting Valdes's resolution of matters entrusted to his discretion, the harm at which the gratuities statute is primarily aimed.[85] These actions were unrelated to any real duties being carried out by Valdes, and instead were a type of moonlighting, similar to that carried out by the defendant in *Muntain*. Accordingly, the court held, Valdes's conviction for illegal gratuities could not stand.[86]

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[82] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 406-07 (1999).

[83] *Id.* at 407.

[84] *Valdes*, 475 F.3d at 1329.

[85] *Id.* at 1324 (citing United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979)).

[86] The irony of the *Valdes* case is that although Valdes could not be convicted of gratuities, he likely could have been convicted of the more serious crime of bribery. In fact, he was originally indicted for bribery under § 201(b)(1)(A)—to agree to be influenced in an official act—and (C)—to agree to do or omit to do an act in violation of his official duty. Although a conviction under subsection (A) would also fail for lack of an official act, Valdes could still have been convicted for violating his official duty under subsection (C) by using the police databases for an improper purpose. The gratuities statute, however, does not have a similar "violating official duty" provision. By acquitting Valdes of bribery and convicting him only of the lesser-included offense of illegal gratuities, the jury in effect created the legal issue that resulted in Valdes's successful appeal, because the gratuities conviction—unlike a bribery conviction—depended on the finding that there was an "official act" within the meaning of the statute. *See Valdes*, 475 F.3d at 1330 (Kavanaugh, J., concurring) ("The

Valdes caused quite a stir when it was decided, with commentators suggesting the case had dealt a serious blow to corruption prosecutions.[87] But as a matter of statutory construction, the majority's decision was sound. It would have been a simple matter for Congress to draft the gratuities statute so as to apply to any action taken within the scope of an official's authority or within the range of official duty. The more limited language — focused on a "decision" or "action" in a "matter" or "proceeding"—does suggest that Congress had a narrower category of official acts in mind.[88] The prohibition on gratuities is not a mere "gift statute" like those in force in a number of states.[89] Not everything done by a public official and related in some way to his or her official position will qualify as an "official act." This interpretation is also consistent with *Sun-Diamond*'s admonition that the bribery and gratuities statute must act with scalpel-like precision in this complex area of the law.

Valdes represents another significant and high-profile limitation of the bribery and gratuities statute.[90] The decision has already made its presence

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amount of ink spilled on this case is largely a result of the jury's divided verdict, as well as small but key differences in the textual scope of the bribery and illegal gratuities statutes.").

[87] *See, e.g.*, Jeffrey H. Birnbaum, *Jefferson's Reprieve?*, WASH. POST, Feb. 20, 2007, at A11; Meredith McGehee, *Don't Let Officials Take Gifts and Money Without Fear of Prosecution*, LEGAL TIMES, Sept. 25, 2006, at 69; Dorothy Samuels, *What, No Tipping the People's Servants?*, N.Y. TIMES, Nov. 27, 2006, at A22.

[88] The harsh reaction to the *Valdes* decision stems in part from an understandable sense that such conduct should be punished. The flaw in such a reaction is the assumption that the only way to punish such misconduct would be through a federal gratuities prosecution. Although the dissent argued that the majority had concluded the conduct of Officer Valdes "does not constitute a crime," *Valdes*, 475 F.3d at 1333 (Garland, J., dissenting), that is not the case. The decision means only that the terms of the gratuities statute do not apply to Valdes's conduct. There are a number of other criminal statutes the government could use to prosecute such a case. As already noted, Valdes could have been convicted of bribery under § 201(b)(1)(C) for agreeing to violate his official duty in exchange for the money. He also likely could have been charged with violating 18 U.S.C. § 209, which prohibits government employees from receiving any supplementation of salary. Finally, particularly given the relatively small scale of the misconduct involved, a case could have been brought in the District of Columbia local courts under D.C. criminal law, which includes a more broadly-worded gratuities statute. *See* D.C. Code § 22-704(a) (LexisNexis 2001 & Supp. 2009) (prohibiting gratuities that cause an "official to execute any of the powers in such official vested . . . otherwise than is required by law"); *see also Valdes*, 475 F.3d at 1324-25 (listing other provisions under which Valdes could have been prosecuted).

[89] *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 727-29 (1st Cir. 1996) (discussing Massachusetts gift statute). A broader prohibition against federal employees receiving gifts from those doing business with the government or regulated by the government—the so-called ban on gifts from "prohibited sources"—is contained in a *civil* statute, 5 U.S.C. § 7353(a)-(b)(1) (2006).

[90] Other courts have not necessarily followed the D.C. Circuit's lead in the wake of *Valdes*. *See, e.g.*, United States v. Moore, 525 F.3d 1033 (11th Cir. 2008) (declining to follow *Valdes* on the meaning of official act and suggesting that the majority decision in

felt in at least one major federal case, that involving former Louisiana Congressman William Jefferson. In 2007, Jefferson was indicted on multiple charges related to bribes he allegedly received in exchange for using his influence to promote business ventures in Africa for various entities and individuals.[91] As part of his defense, Congressman Jefferson, citing *Valdes*, argued that his conduct did not involve "official acts" and that he was acting merely as a businessman, not a member of Congress.[92] In other words, as in *Valdes* and *Muntain*, he claimed that he was moonlighting and accepting outside compensation, but that compensation did not constitute a bribe or a gratuity because it was not linked to any decisions, controversies, or matters that would come before him in his capacity as a Member of Congress. The district court judge denied Jefferson's motion to dismiss on these grounds, ruling that the jury should decide whether official acts within the meaning of the statute were involved.[93] Jefferson was convicted on August 5, 2009, of eleven of sixteen counts, including the bribery counts.[94] The issues concerning "official acts" undoubtedly will be a substantial part of his arguments on appeal.

Taken together, *Sun-Diamond* and *Valdes* substantially narrow the scope of the federal bribery and gratuities statute. It is not uncommon for prosecutors to be faced with a situation where a private individual and a public official seem to have a corrupt, "you scratch my back and I'll scratch yours" relationship. But as an evidentiary matter, it may be very difficult to prove a direct quid pro quo for a bribery charge or to link a particular gift to a particular official act, as *Sun-Diamond* requires for a gratuity. What's more, if the actions of the official in question do not directly relate to the core of her job duties, there may be a *Valdes* issue over whether a connection to an "official act" can be established. Such cases may "feel" like bribery or gratuities cases, and yet meeting the legal requirements of the bribery and gratuities statute beyond a reasonable doubt may be quite

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Valdes is inconsistent with Supreme Court precedent). Nevertheless, given the obvious importance of District of Columbia precedent in federal corruption prosecutions, the *Valdes* case is particularly significant.

[91] *See* David Johnston & Jeff Zeleny, *Congressman Sought Bribes, Indictment Says*, N.Y. TIMES, June 5, 2007, at A1; Jerry Markon & Allan Lengel, *Lawmaker Indicted on Corruption Charges*, WASH. POST, June 5, 2007, at A1.

[92] *See* Defendant's Motion to Dismiss Bribery Counts (Counts 3 and 4) and Conspiracy, Wire Fraud, Money Laundering, and Racketeering Counts Based on Bribery and Memorandum in Support, United States v. Jefferson, No. 1:07CR209 (E.D. Va. Sept. 7, 2007); *see also* Birnbaum, *supra* note 87; Joe Palazzolo, *Senate Bill Shores Up Bribery Law*, LEGAL TIMES, Nov. 12, 2007, at 1.

[93] *See* United States v. Jefferson, 562 F. Supp. 2d 687, 695 (E.D. Va. 2008).

[94] *See* Jerry Markon & Brigid Schulte, *Jefferson Convicted in Bribery Scheme*, WASH. POST, Aug. 6, 2009, at A1.

difficult. *Sun-Diamond* and *Valdes* therefore provide great incentive for prosecutors in federal corruption cases to look for alternative theories of criminal punishment.

III. HONEST SERVICES MAIL AND WIRE FRAUD

A. THE DEVELOPMENT OF HONEST SERVICES FRAUD

As noted above, the principal federal criminal statute concerning public corruption, 18 U.S.C. § 201, applies only to federal public officials.[95] Of course, public corruption occurs on the state and local level as well. State prosecutors may lack the time and resources to pursue such cases, which often are complex and time-consuming. They may sometimes lack the will to pursue them, particularly if the targets are powerful state officials who may be the state prosecutor's political cronies or who could retaliate and harm the prosecutor's career. In some cases, state laws or criminal procedures may make the successful investigation or prosecution of such cases more difficult. For these and other reasons, in the post-Watergate era federal prosecutors increasingly focused on prosecuting state and local corruption cases as federal crimes.[96] In order to bring such cases against those who were not federal public officials under 18 U.S.C. § 201, however, a different legal foothold was needed. A leading theory of prosecution that emerged was to charge state and local corruption as a scheme to defraud citizens and taxpayers of their intangible right to the fair and honest services of their government officials, using the federal mail and wire fraud statutes.[97]

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[95] *See* 18 U.S.C. § 201(a)(1) (2006); *supra* text accompanying note 22.

[96] *See* Thomas H. Henderson, Jr., *The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption*, 8 CUMB. L. REV. 385 (1977) (discussing increasing federal prosecution of state and local corruption in the 1970s in an article by the Chief of the Public Integrity Section at the U.S. Department of Justice); *see also* Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1983); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989); Ralph E. Loomis, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 85 (1978).

[97] Other federal statutes that may be used to prosecute state and local corruption include the Hobbs Act, 18 U.S.C. §1951 (2006), the federal programs bribery statute, 18 U.S.C. § 666 (2006), the Travel Act, 18 U.S.C. § 1952 (2006), and RICO, 18 U.S.C. § 1961-68 (2006). *See* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 704-10 (2000); Henderson, *supra* note 96; Kurland, *supra* note 96, at 383-406.

Mail fraud[98] and wire fraud[99] are bread-and-butter statutes for federal prosecutors of white-collar crime.[100] Along with conspiracy,[101] they are probably the most commonly charged offenses in the white-collar arsenal. First enacted in 1872, the mail fraud statute originally was designed to prevent the use of the mails to further "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 in the country."[102] Mail fraud has evolved over time to become a virtual catch-all federal fraud statute.[103] The requirement of a mailing in furtherance of the fraud has been interpreted so broadly that finding a mailing on which to base federal jurisdiction is rarely a problem in any significant white-collar matter.[104]

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[98] 18 U.S.C. § 1341 (2006).

[99] 18 U.S.C. § 1343 (2006).

[100] In a frequently-quoted passage, federal judge and former prosecutor Jed Rakoff described the mail fraud statute as follows:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. §1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (citations omitted).

[101] 18 U.S.C. § 371 (2000).

[102] CONG. GLOBE, 41st Cong., 3d Sess. 35 (1871) (remarks of Rep. Farnsworth, discussing an early version of the legislation ultimately passed in 1872). For a detailed history of the mail fraud statute, see Rakoff, *supra* note 100.

[103] *See, e.g.*, 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).

[104] In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court held that a mailing in furtherance of a scheme to defraud under the mail fraud statute need not be central or critical to the scheme, but need only be incident to an essential part of the scheme. In *Schmuck*, the defendant, a used-car distributor, repeatedly sold cars with rolled-back odometers to various retail auto dealers in Wisconsin. The dealers would then sell the cars and mail a title application form to the Wisconsin Department of Transportation on behalf of the retail customer. The Court held that these mailings were sufficiently linked to Schmuck's fraud to satisfy the mail fraud statute, based on a theory that Schmuck's fraud scheme was ongoing and the successful mailings by the dealers were essential to ensure that they would continue to purchase cars from Schmuck. This was true even though Mr. Schmuck did not send the mailings personally, the mailings themselves were perfectly innocent and routine, and the mailings took place after Schmuck had already delivered the cars and gotten the money from the dealers.

In dissent, Justice Scalia argued that "it is mail fraud, not mail and fraud, that incurs liability" and that these mailings were too far removed from the scheme to provide federal jurisdiction. *Id.* at 723 (Scalia, J., dissenting).

Enacted in 1952, the wire fraud statute is similarly sweeping in scope. It applies to schemes to defraud involving use of an interstate wire or radio transmission—which today includes not only traditional land-line telephone calls, but cell phone calls, faxes, e-mails, text messages, and Internet transmissions (wired or wireless). Again, in most white-collar cases today there will be an abundance of such transmissions, each providing a potential jurisdictional hook for a federal criminal prosecution.[105]

The popularity of mail and wire fraud stems in part from their breadth and adaptability. Both statutes hinge on the presence of a "scheme or artifice to defraud." If a person acting with fraudulent intent executes or attempts to execute such a scheme, the prosecution need only find a letter, e-mail, phone call, or fax in furtherance of that scheme to establish federal criminal jurisdiction.[106] "Scheme to defraud" is a remarkably broad term that has allowed prosecutors to apply the mail and wire fraud statutes to an enormous range of criminal activities. Securities fraud, investment scams, real estate fraud, credit card fraud, phony billing or contracting schemes, identity theft, Internet scams, health care fraud—all of these crimes and countless others may readily be cast as mail or wire fraud, with the object of the fraud being the money or personal property of the victims. In fact, one of the virtues of mail and wire fraud over the years has been the ability of prosecutors to use those malleable statutes to pursue criminal conduct that

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[105] Because jurisdiction under the wire fraud statute is based on the Commerce Clause, the government must prove that the wire or radio transmission crossed state lines. *See* United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985). For mail fraud, however, federal jurisdiction is based on the postal power granted to Congress in Article I, § 8 of the Constitution. A mailing, therefore, need not cross state lines, and a purely intrastate mailing will satisfy the requirements of the mail fraud statute without regard to any effects on interstate commerce. *See* United States v. Elliott, 89 F.3d 1360, 1363-64 (8th Cir. 1996).

In 1994, Congress amended the mail fraud statute to apply its prohibitions to private commercial carriers such as Federal Express and United Parcel Service. There is some debate over whether a purely intrastate delivery by one of these carriers will suffice to provide federal jurisdiction, or whether a greater effect on interstate commerce must be shown once the U.S. Postal Service is out of the picture. *See* United States v. Photogrammetric Data Servs. Inc., 259 F.3d 229, 247-49 (4th Cir. 2001) (finding that intrastate delivery by a private courier was sufficient to establish jurisdiction because the courier itself was an instrumentality of interstate commerce).

[106] Some courts describe mail or wire fraud as having three elements: the defendant knowingly participated in the scheme to defraud, the defendant acted with fraudulent intent, and the defendant caused the mail or wires to be used in furtherance of the fraud. *See, e.g*, United States v. Sorich, 523 F.3d 702, 708 (7th Cir. 2008); United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001). Others describe the offenses as having only two elements, because the requirement of a scheme to defraud necessarily includes acting with specific intent to defraud and "there is no fraudulent scheme without specific intent." United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir. 1980).

may implicate federal interests but may not clearly be covered by more targeted federal legislation.[107]

One example of the use of mail and wire fraud to fill such a legislative gap is the prosecution of state and local corruption. When federal prosecution of such cases began to accelerate, an alternative theory concerning what constituted a "scheme or artifice to defraud" began to emerge. This theory held that defendants could be prosecuted under the mail or wire fraud statutes for a scheme to defraud citizens of their intangible right to the honest services of their government officials.[108] Some such cases involved typical bribery or kickback schemes that could not be reached by 18 U.S.C. § 201 because they did not involve federal officials. Other cases involved self-dealing schemes, where government officials used their public positions secretly to enrich themselves. These cases often did not involve an identifiable loss of money or property that would support a traditional mail fraud charge, even though the conduct clearly was corrupt.

The plausibility of the honest services theory stemmed from the wording of the mail and wire fraud statutes. The statutes prohibit the use of the mail or wires for purposes of executing "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[109] Because the clauses set forth alternative theories of liability, it appears that a "scheme or artifice to defraud" is potentially distinct from a scheme "for obtaining money or property." This led prosecutors to argue, and courts to agree, that a "scheme or artifice to defraud" was not limited to schemes involving money or property, but could also apply to schemes to deprive victims of certain intangible rights, including the right to honest services.[110]

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[107] *See* United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

[108] *See* Baxter, *supra* note 96, at 321-22 (noting that use of honest services fraud increased dramatically in the post-Watergate era as prosecutors focused on state and local corruption); Beale, *supra* note 97, at 717 (arguing that federal prosecutors developed the honest services fraud theory in order to reach state and local corruption); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 661 (2006) (noting that prosecutors first began to expand the use of honest services fraud because there was no generally applicable federal statute that applied to state and local corruption).

[109] 18 U.S.C. §§ 1341, 1343 (2006) (emphasis added).

[110] In addition to honest services fraud by governmental officials, other intangible rights prosecutions under the mail and wire fraud statutes included cases charging officials with defrauding citizens of their right to an honest election, charging private individuals with defrauding employers or unions of their honest services by accepting kickbacks or selling confidential information, and charging defendants with depriving victims of their right to privacy and other nonmonetary rights. *See* McNally v. United States, 483 U.S. 350, 362-64 nn.2-4 (1987) (Stevens, J., dissenting).

Honest services fraud was charged in a variety of cases involving both public officials and private actors,[111] but the most common use of the theory

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[111] A detailed analysis of honest services fraud as applied to the private sector is beyond the scope of this Article. Honest services fraud is perhaps most controversial when applied to private sector relationships, such as those between employer and employee or corporate officer and shareholders. Government officials who abuse the public trust for personal gain may more naturally be thought of as violating a duty of "honest services" to the public. Private sector relationships, on the other hand, generally are not bound by such duties of loyalty or honest services:

> When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible "rights" have been violated.

United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996); *see* United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999).

A leading case in the private sector area is the Second Circuit's decision in *United States v. Rybicki,* 354 F.3d 124 (2d Cir. 2003) (en banc). The defendants were personal injury lawyers in New York. Over a period of several years, they repeatedly arranged for secret payments to be made to claims adjusters employed by insurance companies that had insured against injuries sustained by the lawyers' clients. The purpose of the payments was to induce the adjusters to expedite the resolution of the clients' claims. *See id.* at 127. Acceptance of such payments by the adjusters was a violation of insurance company policy. The government introduced no evidence that any of the claims paid in connection with the scheme were in higher amounts than they otherwise would have been—in other words, the government did not allege any monetary loss to the insurance companies. Instead, it charged the defendants with honest services mail and wire fraud, alleging that the scheme deprived the insurance companies of their right to the honest services of their claims adjuster employees. *See id.* at 127-28.

The majority rejected the defendant's argument that 18 U.S.C. § 1346 was unconstitutionally vague. After reviewing the pre-*McNally* cases, the court concluded:

> [T]he term "scheme or artifice to deprive another of the intangible right to honest services" in section 1346, when applied to private actors, means a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Id. at 141-42.

Because the defense attorneys' scheme to bribe the insurance company employees fell squarely within this standard, the court concluded that the defendants were on notice that their conduct was prohibited by § 1346 and that their vagueness challenge must fail.

Four judges dissented, arguing that the statute is impermissibly vague and leaves federal prosecutors unrestrained: "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *Id.* at 160 (Jacobs, J., dissenting).

The Supreme Court recently granted certiorari in two cases that may clarify the parameters of honest services fraud in the private sector. *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *cert. granted,* 2009 WL 1321026 (2009); United States v. Black,

was to prosecute public corruption at the state and local level. Armed with the honest services fraud theory, federal prosecutors aggressively pursued corruption cases against officials not covered by the federal bribery and gratuities statute.[112] During the 1970s and 1980s, those convicted of honest services fraud included state governors, legislators, judges, and many other state and local officials.[113]

B. *MCNALLY* AND THE "MCNALLY FIX"

The Supreme Court brought honest services prosecutions to a temporary halt in 1987 in *McNally v. United States*.[114] Charles McNally was a private citizen; his co-defendant James Gray was a former public official of the Commonwealth of Kentucky. Along with a third individual, Howard Hunt, they were active in Democratic politics in Kentucky.[115] As chairman of the state Democratic party, Hunt was given de facto control over selecting the insurance companies from which Kentucky would purchase insurance. He entered into an agreement with the Wombwell Insurance Company whereby Kentucky would purchase insurance from Wombwell and Wombwell would split any commissions in excess of $50,000 with other insurance agencies designated by Hunt.[116] Hunt directed that those shared commissions be funneled to a number of different agencies, many of which were owned and run by Hunt, Gray, and McNally, and some of which were established solely for the purpose of sharing these commissions. From 1975 to 1979, Wombwell paid $851,000 in commissions to the insurance companies designated by Hunt pursuant to this arrangement.[117]

McNally was a classic political self-dealing scheme: the defendants used their positions of power and influence to line their own pockets while concealing their activities from the public. There was no evidence,

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530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009); *infra* text accompanying notes 200-04.

[112] *See* Beale, *supra* note 97, at 699 (arguing that in the post-Watergate era, "new theories [including honest services fraud] were developed to prosecute corrupt state and local officials under existing federal statutes. The courts and Congress acquiesced, and the number of federal prosecutions of state and local corruption increased enormously.").

[113] *See, e.g.*, United States v. Holzer, 816 F.2d 304 (7th Cir. 1987) (county judge); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (governor of Maryland); United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (city alderman); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (former governor of Illinois); *see also McNally*, 483 U.S. at 362 n.1 (Stevens, J., dissenting).

[114] 483 U.S. 350.

[115] *See id.* at 352.

[116] *See id.* at 352-53.

[117] *See id.* at 353.

however, that Kentucky suffered any monetary loss as a result of this scheme by, for example, paying higher insurance premiums than it otherwise might have paid.[118] The commissions themselves were paid by the insurance companies, not by the Commonwealth. The indictment therefore charged the defendants with a mail fraud scheme to deprive the citizens and government of Kentucky not of money or property, but of their intangible right to have the government's affairs conducted "honestly, impartially, [and] free from corruption, bias, dishonesty, deceit, official misconduct, and fraud."[119] The fraud charged was the failure of the defendants to disclose their private gain resulting from the use of their public office, in violation of the fiduciary duties that they owed the public. This was a typical honest services mail fraud theory, the type that had been accepted by every court of appeals to consider the issue.[120] The defendants were convicted in the trial court, and their convictions were affirmed by the United States Court of Appeals for the Sixth Circuit.[121]

The Supreme Court reversed. Tracing the history of the mail fraud statute and the cases interpreting that statute, the Court concluded that the term "to defraud" historically meant to deprive the victim of his or her property rights.[122] The history of the statute, according to the Court, demonstrated that Congress intended to punish only such schemes.[123] To find that it applied to the intangible right to honest services, the Court held, would be to "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."[124] The Court concluded that if Congress wanted the mail fraud

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[118] *See id.* at 360.

[119] *See id.* at 353-54, n.4.

[120] *See id.* at 362 (Stevens, J., dissenting).

[121] McNally v. United States, 790 F.2d 1290 (6th Cir. 1986).

[122] *McNally,* 483 U.S. at 358.

[123] Concerning the disjunctive clauses in the statute, scheme or artifice "to defraud" *or* "for obtaining money or property by means of false or fraudulent pretenses, representation, or promises," the Court acknowledged that it was "arguable" that they were to be construed independently. *Id.* In light of the history of the term "defraud," however, the Court concluded that the second clause merely made it plain that the statute reaches false promises and misrepresentations as to the future, as well as other frauds involving money or property. *Id.* at 359.

[124] *Id.* at 360. In this regard, the Court noted there was no evidence presented that the patronage scheme in question violated any Kentucky law. *Id.* at 360 n.9. The Court was clearly troubled by the prospect that conduct not even prohibited by the state could potentially result in a federal felony prosecution.

statute to reach schemes to deprive people of such intangible rights, "it must speak more clearly than it has."[125]

Congress wasted little time in responding. The year after *McNally* was decided, Congress enacted 18 U.S.C. § 1346, known to prosecutors as the "McNally fix." The statute provides simply that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[126] The limited legislative history of this provision makes it clear that Congress was motivated specifically by a desire to overturn the decision in *McNally*.[127] Courts interpreting § 1346 have generally concluded that Congress intended to overturn *McNally* and to restore the law of honest services fraud to its pre-*McNally* state.[128] Congress failed, however, to provide any further explanation of what it meant by the term "honest services" when it passed § 1346.[129] In response to the Supreme Court's admonition, therefore, Congress did speak more clearly—but only slightly.[130]

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[125] *Id.* Justice Stevens wrote a stinging dissent in *McNally*. *Id.* at 361 (Stevens, J., dissenting). He took issue with the majority's rejection of the reasoning of every lower court to consider the honest services issue. He argued there was no basis to conclude that the term "to defraud" was limited to cases involving money or property, and that numerous schemes to deprive victims of intangible rights should be cognizable as mail fraud. Finally, he noted his "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision." *Id.* at 377.

[126] 18 U.S.C. § 1346 (2006).

[127] *See* 134 CONG. REC. S17,360-02 (daily ed. Nov. 10, 1988) (remarks of Sen. Biden) ("[Section 1346] overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights."); 134 CONG. REC. H1,1108-01 (daily ed. Oct. 21, 1988) (remarks of Rep. Conyers) ("This amendment [adding § 1346] is intended merely to overturn the *McNally* decision. No other change in the law is intended.").

[128] *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 134 (2d Cir. 2003) (en banc); United States v. Brumley, 116 F.3d 728, 732 (5th Cir. 1997) (en banc); *see also* United States v. Frost, 125 F.3d 346, 364 (6th Cir. 1997) (noting that every circuit to have addressed the question has held that § 1346 overturned *McNally*).

[129] The Supreme Court has indicated that passage of § 1346 reinstated only the honest services fraud theory and not the other intangible rights theories of mail and wire fraud that had been adopted by courts prior to *McNally*. *See* Cleveland v. United States, 531 U.S. 12, 19-20 (2000).

[130] The text of § 1346 was part of the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988). Courts and commentators have noted that the language was inserted at the eleventh hour on the day that the bill was passed, and was never reported on by any committee or debated on the floor of either the House or the Senate. *See Brumley*, 116 F.3d at 739 (Jolly, J. & DeMoss, J., dissenting); O'Sullivan, *supra* note 108, at 662-63 (noting the lack of any congressional debate or legislative history, and criticizing Congress's enactment of § 1346 as "swift and thoughtless").

C. PUBLIC SECTOR HONEST SERVICES FRAUD AFTER § 1346

In the more than twenty years since the passage of § 1346, the federal courts have wrestled with the proper scope and interpretation of the honest services fraud theory.[131] It is probably safe to say that no area of federal criminal law has led to greater confusion and turmoil. Even prior to *McNally*, the law on honest services fraud was inconsistent across the country.[132] The passage of § 1346 evinced Congress's desire that the honest services theory of prosecution survive, but shed no additional light on its proper scope and meaning. Two decades of judicial interpretation have failed to reach a clear consensus regarding the statute's parameters, leaving the law in what Justice Scalia recently described as a state of "chaos."[133] As prosecutors have charged an ever-widening range of conduct as honest services fraud, courts have pushed back against the "incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases."[134]

In public sector cases, the concept of honest services fraud stems from the generally accepted notion that public service is a trust, and that public employees "inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest."[135] Officials who act in their own self-interest, rather than for the public good, violate that duty. In cases involving public employees who are engaged in core corrupt conduct such as bribery, kickbacks, or self-dealing, therefore, application of the honest services fraud theory is relatively uncontroversial.

Honest services prosecutions in the public sector tread on shakier ground, however, when the allegations begin to stray from the heartland corruption offenses of bribery or self-dealing.[136] Courts have struggled to define the boundaries between honest services fraud and lesser forms of official misconduct, "given the amorphous and open-ended nature of

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[131] For a collection of cases interpreting § 1346, see James Lockhart, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 1346, Providing that, for Purposes of Some Federal Criminal Statutes, Term 'Scheme or Artifice to Defraud' Includes Scheme or Artifice to Deprive Another of Intangible Right to Honest Services,* 172 A.L.R. FED. 109 (2001).

[132] *See, e.g.*, *Brumley*, 116 F.3d at 733 (noting that prior to *McNally* the meaning of "honest services" was "uneven").

[133] Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari).

[134] United States v. Brown, 459 F.3d 509, 523 (5th Cir. 2006).

[135] United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999).

[136] *See, e.g.*, United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008) (noting that when the honest services fraud theory moves beyond "core misconduct" such as bribery, "difficult questions arise in giving coherent content to the phrase through judicial glosses").

§ 1346."[137] As the First Circuit has noted, "[t]o allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced."[138] A violation of "honest services" clearly means something more than simply behaving dishonestly or violating some state ethical rule; the question is where and how to draw the boundary.

One rule adopted by some courts is that, in order to constitute honest services fraud, the defendant's scheme must violate some existing state law.[139] Most courts have rejected this "state law limiting principle," holding that the interpretation of federal criminal law should not be allowed to vary on a state-by-state basis.[140] The Seventh Circuit has held that a misuse of public office for private gain is what separates honest services fraud from breaches of lesser duties,[141] but other courts have criticized this requirement.[142] Courts continue to struggle to find ways to rein in the honest services theory, and standards continue to vary across the country.[143] It is not possible to distill a single, unified theory out of all of these cases and draw order from the chaos. It is possible, however, to extract a few core principles.

A leading post-*McNally* case in the First Circuit, *United States v. Sawyer*,[144] involved facts remarkably similar to those in the Jack Abramoff investigation, albeit on the state level. The defendant F. William Sawyer worked for the John Hancock Mutual Insurance Company (Hancock) lobbying the Massachusetts state legislature on insurance issues. Over a number of years, he provided many members of the legislature with gifts

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[137] United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008) (citation omitted).

[138] United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996).

[139] *See* United States v. Brumley, 116 F.3d 728, 734-35 (5th Cir. 1997) (en banc); *see also* United States v. Carbo, 572 F.3d 112, 115 (3d Cir. 2009) (noting that the Third Circuit has "suggested, without unequivocally deciding, that a public official is guilty of honest services fraud only if his failure to disclose a conflict of interest violated state law").

[140] *See* United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009); United States v. Urciuoli, 513 F.3d 290, 298-99 (1st Cir. 2008); United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007); United States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999); United States v. Bryan, 58 F.3d 933, 940-41 (4th Cir. 1995).

[141] *See Sorich*, 523 F.3d at 708; United States v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007); United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998); *see also* United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (holding that the crux of honest services fraud involves a political official using his office for personal gain).

[142] *See* United States v. Inzunza, 580 F.3d 894, 904-05 (9th Cir. 2009); United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003); United States v. Panarella, 277 F.3d 678, 691-92 (3d Cir. 2002).

[143] *See Sorich*, 523 F.3d at 707-08 (discussing different "limiting principles" adopted by courts to narrow the potential scope of honest services fraud).

[144] 85 F.3d 713 (1st Cir. 1996).

including meals, rounds of golf, and other entertainment. At one point Sawyer took a number of legislators on a trip to Puerto Rico, where he paid for their lodging, meals, transportation, and golf.[145] Many of these legislators served on a committee that routinely considered issues important to Hancock. Sawyer was convicted of honest services fraud, on the theory that his pattern of gifts to these legislators deprived the citizens of Massachusetts of their right to the fair, unbiased, and honest services of the lawmakers.

Sawyer had been charged on the theory that his conduct caused the legislators to violate both a Massachusetts gift statute, which prohibited legislators from receiving any gifts in excess of $100, and the Massachusetts gratuity statute, which was similar in wording to the federal gratuities statute.[146] Concerning the gift statute, the court noted that a violation of that statute "does not necessarily entail an improper motive to influence, or otherwise affect, the official *duties* of the recipient."[147] Because there was no requirement of influence or effect on the services actually provided by the public official, a mere allegation of a violation of the gift ban could not constitute a deprivation of honest services. To find such a violation, the court held, the jury would have to find that "Sawyer *intended to influence or otherwise improperly affect the official's performance of duties*," not merely that he intended to give the legislators gifts.[148]

Turning to the Massachusetts gratuities statute, the court reached a similar conclusion: "[a]s with the gift statute . . . not every violation of the gratuity statute automatically encompasses an intent to induce the public official to alter or deviate from the performance of honest and impartial services."[149] As with the federal law, the state gratuity statute did not require a finding of intent to influence official actions. Only if such corrupt intent were shown, the court concluded, could a violation of honest services be found. A simple "thank you" gratuity would not constitute a deprivation of honest services. On the other hand, a "person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official

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[145] *See id.* at 721. One of the more infamous incidents in the Abramoff investigation involved an all-expenses paid golf trip to Scotland on a private jet that was organized by Abramoff and attended by Congressman Robert Ney and other public officials. *See* STONE, *supra* note 1, at 16-17.

[146] *Sawyer*, 85 F.3d at 725-26.

[147] *Id.* at 728.

[148] *Id.* at 729.

[149] *Id.*

action in derogation of the public's right to impartial official services."[150] Only if this bribe-like, corrupt intent was found could a violation of the gratuities statute also constitute a deprivation of honest services. Because the jury had not been properly instructed on the level of intent required, the court reversed Sawyer's convictions for honest services fraud.[151]

The First Circuit expanded on *Sawyer* the following year in another leading case, *United States v. Czubinski*.[152] The defendant, Richard Czubinski, was employed as a Contact Representative for the Internal Revenue Service. His job involved answering taxpayer inquiries about their tax returns. To perform his duties, he was given access to an IRS database that contained income tax information about virtually every taxpayer in the country.[153] IRS rules forbade employees such as Czubinski from using that access for any purpose other than the performance of their official duties.[154] In violation of those rules, Czubinski carried out a number of unauthorized searches and examined confidential tax information concerning various people, including the tax returns of a district attorney who had been prosecuting Czubinski's father, an individual who had run against Czubinski in a local election, a woman Czubinski had dated a few times, and other social and professional acquaintances.[155]

There was no proof that Czubinski did anything more than look at the tax returns. There was no evidence that he disclosed the information to any third parties, or made any other use of the information.[156] Nor was there any financial or other direct harm to the IRS. In short, his offense consisted essentially of unauthorized browsing of the IRS files, in violation of IRS rules. The government indicted him for, among other things, honest services wire fraud, alleging that by his conduct he had defrauded the IRS and the public of their right to his honest services as an IRS employee. He was convicted at trial, but his conviction was reversed by the First Circuit.[157]

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[150] *Id.* at 730.

[151] *Id.* at 734.

[152] 106 F.3d 1069 (1st Cir. 1997).

[153] *See id.* at 1071.

[154] *See id.*

[155] *See id.* at 1071-72.

[156] *See id.* at 1072. There was evidence presented at trial that Czubinski was a member of the Ku Klux Klan and that he told another individual at a social event that he intended to use some of the information he gathered to build dossiers on people involved in the white supremacist movement. No evidence was produced, however, that he actually did produce such dossiers or took any steps to produce them after that isolated comment. *See id.*

[157] *See id.* at 1073. Czubinski was also charged with wire fraud for depriving the IRS of intangible property—the confidential tax information—and with computer fraud. The First Circuit reversed his convictions on these charges as well. *See id.* at 1072-73.

Concerning honest services fraud for public officials, the court noted first that honest services fraud does not encompass every instance of official misconduct and that honest services convictions of public officials "typically involve serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision-makers to disclose certain conflicts of interest."[158] As it did in *Sawyer*, the court held that an honest services case must involve not only wrongdoing by the public official, but wrongdoing that "is intended to prevent or call into question the proper or impartial performance of that public servant's official duties."[159]

Although Czubinski violated IRS workplace rules, that was not enough to constitute honest services fraud: "the threat [of such a prosecution] is one of transforming governmental workplace violations into felonies. We find no evidence that Congress intended to create what amounts to a draconian personnel regulation."[160] The conclusive factor, according to the court, was that there was no evidence that Czubinski had ever failed to carry out his official tasks in the proper manner. Although he clearly committed wrongdoing by browsing the files, this was unrelated to his official duties, which involved responding to taxpayer inquiries about their returns. Because there was no effect on the services to the public that he was paid to perform, Czubinski could not be said to have defrauded the public of its right to his honest services.[161]

The Fifth Circuit, sitting en banc, employed a similar analysis in *United States v. Brumley*.[162] Brumley was an employee and then the

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[158] *Id.*

[159] *Id.*

[160] *Id.* at 1077.

[161] *See id.* Admittedly, this standard is open to some manipulation. For example, Czubinski's job duties could easily be defined to include not merely answering taxpayer inquiries on the phone, but generally safeguarding confidential taxpayer information. If his duties are so defined, then he arguably was not providing the services of an honest public employee when he improperly browsed through the tax returns. The difficulty with this argument is that any employee's duties could be defined broadly to include the duty to follow all workplace rules, thus rendering any violation of workplace rules a potential honest services violation. But this would once again allow any violation of workplace rules, no matter how trivial, to be transformed into honest services fraud—the kind of sweeping result that the courts have consistently rejected. Therefore, for purposes of analyzing whether the employee carried out his or her duties as an honest employee would, the focus must be on a narrower category of discretionary duties entrusted to the employee by the public. This narrower interpretation would be analogous to the "official act" definition in § 201, where not every thing done by a public employee will constitute an "official act" within the meaning of the statute. *See* 18 U.S.C. § 201(a)(3) (2006); *supra* text accompanying notes 66-94.

[162] 116 F.3d 728 (5th Cir. 1997) (en banc).

Associate Director of the Texas Workers' Compensation Commission. In that position, he cultivated relationships with a number of lawyers who represented clients before that Commission. Over the years, he solicited "loans" totaling more than $100,000 from a number of those lawyers; none of these "loans" was ever repaid. He developed a particularly close relationship with a lawyer named John Cely, and the evidence established that Brumley had used his position at the Commission to aid Cely in his dealings with the Commission.[163] Brumley was convicted of depriving the citizens of Texas of their intangible right to his honest services.

After surveying the pre-*McNally* case law, the Fifth Circuit noted that in enacting § 1346, Congress had left to the courts the definition of honest services:

> Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that if the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. . . .
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> Stated another way, "honest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer—or that he consciously contemplated or intended such actions. *For example, something close to bribery.* If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services that would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services. *Thus the mere violation of a gratuity statute, even one closer to bribery than the Texas statute, will not suffice.*[164]

The court concluded that, under this standard, the evidence that Brumley used his official position to help Cely in exchange for things of value—essentially an allegation of bribery—was sufficient to sustain his conviction for honest services fraud.[165]

The Eighth Circuit reached a similar result in the pre-*McNally* case of *United States v. McNeive*.[166] McNeive was a city plumbing inspector who repeatedly accepted unsolicited gratuities in connection with his non-discretionary duty to issue plumbing permits. His conviction for violating his duty of honest services to the citizens of the city was overturned. The

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[163] *See id.* at 730-31.

[164] *Id.* at 734 (emphasis added) (citations omitted).

[165] *See id.* at 735-36. Three judges issued a sharp dissent from what they termed "an issue-evasive and jurisprudentially flawed majority opinion." *Id.* at 736 (Jolly, J. & DeMoss, J., dissenting). The dissent argued that the term "honest services" was unconstitutionally vague, and accused the majority of legislating to define the terms of the statute. *See id.*

[166] 536 F.2d 1245 (8th Cir. 1976).

court found that although McNeive may have violated a city ordinance forbidding such gratuities, there was no evidence that he failed to perform his duties conscientiously or that his services were affected or corrupted in any way. As such, there could be no violation of his duty of honest services.[167]

In *United States v. Lopez-Lukis,*[168] the Eleventh Circuit also focused on whether the public official's actions were influenced in an honest services fraud case:

> The crux of this theory is that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest .... When a government officer decides how to proceed in an official endeavor—as when a legislator decides how to vote on an issue—his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services.[169]

Under this standard, the court held, a member of a board of county commissioners who accepted bribes in exchange for selling her own vote and trying to influence the votes of other commissioners, and the lobbyist who bribed her, were properly charged with honest services fraud.

From these and other decisions it is possible to glean a workable standard concerning honest services fraud for public officials: it requires some evidence that the official's performance of his or her public duties was altered or corrupted. The analysis focuses on the word "services": for there to be a violation of a duty of honest services, the rendering of those services must in some way be affected. As discussed above, conduct that causes a public employee's services to be influenced or affected is conduct typically associated with the crime of bribery. As part of the quid pro quo, the public official agrees to act in the way desired by the bribe payor, and thus the official is not performing his duties to the public in a fair, honest, and impartial way. Under this approach, honest services fraud by public officials is best understood as applying to conduct that would be akin to bribery.

Receipt of gratuities, on the other hand, typically would not be an honest services violation. The gratuity may simply be a reward for official actions already taken, and the services provided by the public official may not be affected at all. What distinguishes a bribe from a gratuity or other

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[167] *See id.* at 1251.

[168] 102 F.3d 1164 (11th Cir. 1997).

[169] *Id.* at 1169; *see also* United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007) (concluding that even if public official engages in reprehensible conduct, it is not honest services fraud unless the public is actually deprived of the honest services of the official).

lesser misconduct is whether the official's actions were intended to be corrupted. The same analysis should be applied to distinguish honest services fraud from lesser forms of misconduct. If the evidence establishes that, because of payment of past gratuities, an official is altering his behavior in order to favor the donor, an honest services violation may be established because the actual services provided by the official are being affected.[170] Just as in a bribery and gratuities case, whether there is sufficient evidence of a quid pro quo and an effect on the public official's actions will be a question of fact.

In addition to cases involving conduct akin to bribery, the most common types of honest services fraud cases against public officials have been those alleging an undisclosed conflict of interest.[171] This area has given the courts more difficulty, because some potential conflicts of interest are relatively trivial and should not be the subject of a federal criminal prosecution. The most serious conflicts cases are those that may be characterized as self-dealing, where the public official not only has a conflict of interest but exercises official power so as to benefit his or her own interests.[172] Conflict of interest cases therefore also may be analyzed by focusing on whether the services provided by the public official are affected by the conflict. If the official is concealing conflicts and acting to benefit those concealed interests, then she is depriving the public of its right to her honest services.[173] On the opposite end of the spectrum, if a public

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[170] *See* United States v. Sawyer, 85 F.3d 713, 730 (1st Cir. 1996) (holding that if a person engaged "in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action" by a public official, honest services fraud could be established).

[171] *See* United States v. Kincaid-Chauncey, 556 F.3d 923, 942 (9th Cir. 2009) ("The courts have recognized two principal theories of honest services fraud in cases involving public officials: fraud based on a public official's acceptance of a bribe and fraud based on a public official's failure to disclose a material conflict of interest.") (listing cases).

[172] *See, e.g.*, United States v. Kemp, 500 F.3d 257, 279 (3d Cir. 2007) (noting that honest services cases typically involve either bribery or failure to disclose a conflict of interest that resulted in personal gain); United States v. Woodward, 149 F.3d 46, 57 (1st Cir. 1998) (same); *Lopez-Lukis*, 102 F.3d at 1169 (same).

[173] *See, e.g.*, United States v. Jennings, 487 F.3d 564 (8th Cir. 2007) (state representative violated honest services by concealing his interest in a company and taking actions in the legislature to benefit that company); United States v. Panarella, 277 F.3d 678 (3d Cir. 2002) (same); United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (undisclosed conflict of interest violates honest services when public official personally benefits from that conflict); United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (city alderman violated honest services by concealing his ties to a construction company for which he sought a city contract); United States v. Mittelstaedt, 31 F.3d 1208 (2d Cir. 1994) (community consulting engineer violated honest services by concealing financial interest in projects he sought to promote); *cf.* United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) (finding no violation of honest services where state representative introduced friend to public officials responsible for awarding city contracts, when representative played no role in awarding the contracts,

official is not influenced at all in the performance of her duties and provides all of the services of a good and honest employee, the mere existence of an apparent conflict of interest will not rise to the level of honest services fraud, even if it violates some state disclosure law or ethical obligation. Even if a conflict exists, an official cannot be said to be acting with intent to defraud the public of her honest services if she does not exercise her powers to benefit in some way from that conflict.

The heartland of public sector honest services fraud therefore involves cases where the wrongful conduct at issue amounts to bribery or self-dealing: the official's performance of his or her official duties is influenced in exchange for some personal gain. In order for the public to be deprived of an official's honest services, there must be some evidence that performance of those services was affected by the misconduct. If an official continued to perform her duties as required and expected, then whatever other misdeeds may have occurred—including violations of other federal or state laws—it is not honest services fraud. The official may indeed be engaged in dishonest conduct, but the *services* provided by that official, and rightly expected by the public, are not affected and thus the public cannot be said to have been defrauded of those services.[174] The key to an honest services violation in the public sector is a public employee exercising official power not in the best interests of the public but in order to obtain some personal advantage or benefit, in a way that deprives the public of the services it has a right to expect from one in that position.

IV. THE PERILS OF PROSECUTING FEDERAL PUBLIC CORRUPTION AS HONEST SERVICES FRAUD

As discussed above, historically public sector honest services fraud was primarily used by federal prosecutors to pursue state and local

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did not otherwise fail to fulfill his duties, and where there was no identified rule requiring him to disclose his interest in the contracts).

[174] Professor Coffee has criticized a proposed standard that focuses on the word "services" and on whether the employee has performed the same services that a totally honest employee would have performed. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 451-52 (1998). He suggests that a public official's decision-making calculus is too complex to allow a ready determination of whether his services have actually been affected. There is, however, no reason to believe that this determination would be any more difficult than determining whether an official had been influenced in the performance of his duties in a typical bribery case. Professor Coffee also argues that this standard would have the effect of requiring proof of a loss of money or property, which would defeat the primary rationale of the honest services doctrine. *See id.* This is not the case—if an official is bribed by an outside third party, and his services are thereby affected, then the public is deprived of his honest services even when there has been no deprivation of money or property from the public that would support a traditional mail fraud charge.

corruption.[175] The theory was less frequently applied to federal officials.[176] Court decisions discussing honest services fraud routinely refer to it as a vehicle for prosecuting state and local corruption.[177] In *McNally* itself, a key reason for the Court's holding was its concern that honest services prosecutions would involve "the Federal Government in setting standards of disclosure and good government for local and state officials."[178] The sparse legislative history surrounding the passage of § 1346 also indicates that overturning *McNally* in order to allow the prosecution of state and local corruption was Congress's primary concern.[179] There is no indication that

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[175] *See supra* text accompanying notes 95-113. The recent charges against Illinois governor Rod Blagojevich provide a good example. The allegations in that case clearly involve bribery—the influencing of official acts in exchange for things of value. As a state governor, Blagojevich could not be charged under the federal bribery statute. Federal prosecutors instead charged him with, among other things, honest services mail and wire fraud, for depriving the citizens of Illinois of their right to his honest services—by conduct that amounts to bribery. *See* Carrie Johnson, *FBI Says Illinois Governor Tried to Sell Senate Seat*, WASH. POST, Dec. 10, 2008, at A1.

Similarly, the former state Senate Majority Leader in New York, Joseph L. Bruno, was recently indicted on federal charges that he accepted more than $3 million from companies seeking business with the state, and had undisclosed interests in businesses with contracts with the state. He was charged with honest services fraud. *See* Mike McIntire & Jeremy W. Peters, *U.S. Says Bruno Got Millions in Albany Corruption Scandal*, N.Y. TIMES, Jan. 24, 2009, at A1.

[176] For example, in his dissent in *McNally*, Justice Stevens included lengthy footnotes listing cases where the honest services theory had been applied. His footnote describing the use of the theory to prosecute public officials for corruption listed eighteen cases; only one—United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979)—involved a federal public official. *See* McNally v. United States, 483 U.S. 350, 362 n.1 (1987) (Stevens, J., dissenting).

[177] The dissenting judges in the *Rybicki* case, who would have held that § 1346 is unconstitutionally vague, noted their concern that the broad statute "invites federal prosecutors to police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of 'honest services' fraud." United States v. Rybicki, 354 F.3d 124, 164 (2d Cir. 2003) (Jacobs, J., dissenting); *see also* United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997) (expressing concern that honest services fraud prosecutions would unduly interfere with state politics); United States v. Sawyer, 85 F.3d 713, 722-23 (1st Cir. 1996) (noting that Congress has the power to use the mail fraud statute to prohibit "schemes to defraud *a state and its citizens*" through § 1346) (emphasis added).

[178] *McNally*, 483 U.S. at 360. In his recent dissent from a denial of certiorari in an honest services fraud case, Justice Scalia also argued that the doctrine raises federalism concerns about whether federal prosecutors should be "creating ethics codes and setting disclosure requirements for local and state officials," and that honest services fraud "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." Sorich v. United States, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). He made no mention of prosecutions of federal officials.

[179] *See* 134 CONG. REC. H11,108-01 (daily ed. Oct. 21, 1988) (remarks of Rep. Conyers) (arguing that the guarantee clause of the Constitution provides "a constitutional basis for Congress to pass criminal legislation relating to corruption in local government"); *see also*

Congress had any thought about giving federal prosecutors an additional tool for building cases against *federal* officials.[180]

This legal landscape has changed over the past decade, in the wake of the *Sun-Diamond*[181] case and the decision of the D.C. Circuit in *Valdes.*[182] Faced with these restrictive interpretations of the federal bribery and gratuities statute, prosecutors increasingly have turned to the honest services theory to pursue federal public officials. Charging honest services fraud allows prosecutors to avoid *Sun-Diamond*'s requirement of a link to a particular official act, which is based strictly on the wording of § 201. Honest services fraud may therefore become a vehicle through which federal prosecutors resurrect the status-gratuity theory rejected by *Sun-Diamond.* Charging honest services fraud also avoids the need to establish that the conduct in question meets the specific definition of an "official act" in § 201—the downfall of the *Valdes* prosecution.

In the Abramoff investigation, the most prominent federal corruption case in recent years, honest services fraud has been the clear statute of choice. A common phrase found in many of the Abramoff-related charging documents is that the defendants provided a "stream of things of value" to various public officials in exchange for a series of official acts.[183] The language is that of a status gratuity or potentially bribery, but the charge is honest services fraud, which avoids the strict requirements of the bribery statute. There is no need to prove a direct link between a particular official act and a particular thing of value, as would be required for either a bribery or gratuity charge. This theory of a "stream of benefits" to a public official

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Kurland, *supra* note 96 (discussing federal constitutional basis for criminalizing state and local corruption).

[180] *See* Beale, *supra* note 97, at 717.

[181] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

[182] Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

[183] *See, e.g.*, Criminal Information at 6 , United States v. Ney, No. 1:06-cr-00272-ESH (D.D.C. filed Sept. 15, 2006) ("Ney and his staff accepted . . . a stream of things of value intending to be influenced . . . ."); Criminal Information at 4, United States v. Rudy, No. 1:06-cr-00082-ESH (D.D.C. filed Mar. 31, 2006) ("The purpose of the conspiracy was for defendant RUDY and his coconspirators to unjustly enrich themselves by corruptly accepting and providing a stream of things of value with intent to influence and reward official acts . . . ."); Criminal Information, United States v. Abramoff, No. 1:06-cr-00001-ESH (D.D.C. filed Jan. 3, 2006) ("[D]efendant Abramoff, Scanlon, and others, together and separately, provided a stream of things of value to a Member of the United States House of Representatives . . . . "); Criminal Information at 7 , United States v. Scanlon, No. 1:05-cr-00411 (D.D.C. filed Nov 17, 2005) ("Scanlon and Lobbyist A . . . provided a stream of things of value to Representative #1 and members of his staff . . . .").

for official acts as a violation of honest services has been accepted by a number of courts in the aftermath of *Sun-Diamond*.[184]

Given the state of the law, it is entirely understandable and predictable that federal prosecutors would gravitate towards honest services fraud and the advantages that it offers them. But the growing use of honest services fraud in federal corruption cases raises a number of concerns. The first stems from the vagueness of the "honest services" standard itself. This concern is of course not unique to cases involving federal corruption, as courts have long lamented this lack of clarity.[185] A number of federal judges have argued that the standard is so vague as to be unconstitutional.[186] This raises due process and fairness concerns over the ability of public officials and others to know where the line is drawn between legal and illegal behavior.[187] The term "honest services," standing alone, provides little guidance once the allegations move beyond core corruption such as bribery.

In the area of federal corruption, however, the vagueness and breadth of the honest services fraud standard raises unique concerns. The Supreme Court noted in *Sun-Diamond* that the federal gratuities statute "is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by [federal] public officials."[188] The law governing the receipt of gifts and

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[184] *See* United States v. Kincaid-Chauncey, 556 F.3d 923, 945 (9th Cir. 2009) (approving jury instructions in honest services fraud case that said the government was not required to link any particular payment to any specific official act); United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) (holding that in an honest services fraud case, the government "need not prove that each gift was provided with the intent to prompt a specific official act"); *see also* United States v. Woodward, 149 F.3d 46, 60 (1st Cir. 1998) (pre-*Sun-Diamond* case) ("It is not necessary for the government to link a particular gratuity with a specific act in order to obtain a conviction [for honest services fraud].").

[185] *See, e.g.*, United States v. Urciuoli, 513 F.3d 290, 300 (1st Cir. 2008); United States v. Thompson, 484 F.3d 877, 884 (7th Cir. 2007); United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996).

[186] *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 155 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting); United States v. Brumley, 116 F.3d 728, 736 (5th Cir. 1997) (en banc) (Jolly, J. & DeMoss, J., dissenting); *see also* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 187-99 (1994) (arguing that the honest services fraud standard is unconstitutionally vague).

[187] Due process requires that the criminal law contain clear rules delineating permissible and impermissible conduct, and laws that fail to do so may be void for vagueness. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also* Bouie v. City of Columbia, 378 U.S. 347 (1964).

[188] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 409 (1999).

other behavior by federal officials is, the Court observed, an area full of "precisely targeted prohibitions."[189] It was partly in order to avoid conflicts with this intricate web of laws and regulations that the Court interpreted the gratuities statute narrowly.[190] But now, as prosecutors increasingly employ the sweeping honest services fraud standard in federal corruption cases, that intricate web identified by the *Sun-Diamond* Court is at risk of being completely shredded.[191]

Actions that may not amount to a federal bribery or gratuities violation under § 201, and that may even appear permissible under other statutes or regulations, easily may be repackaged as honest services fraud. The term is broad enough to encompass almost any conduct that appears sleazy or dishonest in the eyes of a prosecutor. To cite just one cautionary example, prosecutors in the Abramoff case listed campaign contributions—which were fully disclosed and within legal limits—as part of a pattern of corrupt gifts to public officials.[192] Although it is not impossible for a campaign contribution to constitute an illegal bribe or gratuity, such cases are unusual. Within our system of privately financed campaigns, it is generally considered legitimate for politicians to accept contributions from interested individuals who are hoping that the politician will act in a certain way.[193] Including campaign contributions as part of an overall pattern of gifts to a public official and labeling the entire package a violation of "honest services" highlights the risk that honest services charges will further blur

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[189] *Id.* at 412.

[190] *See id.*

[191] Writing shortly after *Sun-Diamond* was decided, Professor Beale foresaw this potential danger. *See* Beale, *supra* note 97, at 718-19 (observing that "allowing a federal prosecutor to bring honest services charges against federal officials for conduct that falls outside of the carefully drawn limitations of the federal bribery and gratuity statute would fly in the face of the Supreme Court's recent decision in *Sun-Diamond*"). This is, of course, precisely what has happened. *See also id.* at 701 (arguing that courts should construe honest services fraud narrowly in order to "eliminate the incentive for federal prosecutors to prosecute federal officials under the mail and wire fraud statute, using the undefined and elastic phrase 'honest services' to evade the carefully drawn limitations in the statutes that regulate the conduct of federal officials").

[192] *See* Criminal Information paras. 8(F), 22, United States v. Abramoff, No. 1:06-cr-00001-ESH (D.D.C. filed Jan 3, 2006).

[193] *Cf.* McCormick v. United States, 500 U.S. 257, 272 (1991) (rejecting a Hobbs Act prosecution based on the receipt of campaign contributions from parties interested in actions taken by the legislator: "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions and expenditures . . . .").

the already less-than-bright line between legitimate political activities and illegal corrupt behavior.[194]

This Article has argued that honest services fraud against public officials is best understood as limited to cases involving serious corrupt conduct similar to bribery or use of public office for a private gain—cases where the services of the public official are actually affected or influenced.[195] If this is the standard, then the reason for concern about the increase in honest services prosecutions in federal cases becomes clear. Honest services fraud may be alleged in some cases where, in light of *Sun-Diamond* and *Valdes*, prosecutors may have had difficulty proving even a *gratuities* charge, much less a bribery charge. Charging a series of official acts and a corresponding "stream of benefits" as honest services fraud fails to distinguish among: 1) payments or gifts that *influence* official acts and would justify the more severe penalties associated with bribery; 2) those that may be only *for or because of* official acts and would constitute gratuities; and 3) those that may not be criminal at all. Freed from the precise requirements of the bribery and gratuities statute, prosecutors alleging honest services fraud may obscure these critically-important distinctions while drawing an ever-wider range of conduct under the honest services umbrella.

Another reason for concern over this trend toward honest services fraud is the disparate criminal penalties at stake. Receipt or payment of illegal gratuities is a relatively minor felony, punishable by a maximum penalty of only two years in prison.[196] Indeed, in some cases conduct that violates the criminal gratuities statute may be difficult to distinguish from conduct that will constitute a mere administrative offense or violation of a gift statute bearing only civil penalties.[197] Honest services mail or wire fraud, on the other hand, is punishable by up to twenty years in federal

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[194] *See* Jeffrey Birnbaum, *The End of Legal Bribery: How the Abramoff Case Could Change Washington*, WASH. MONTHLY, June 2006, at 21; *see also* Randall D. Eliason, *It's Just Bribery as Usual*, LEGAL TIMES, Mar. 6, 2006, at 62, 62 (discussing difficulties of distinguishing campaign contributions from potentially corrupt misconduct).

[195] *See, e.g.*, United States v. Kincaid-Chauncey, 556 F.3d 923, 942 (9th Cir. 2009) ("The courts have recognized two principal theories of honest services fraud in cases involving public officials: fraud based on a public official's acceptance of a bribe and fraud based on a public official's failure to disclose a material conflict of interest."); *see supra* text accompanying notes 131-174; *see also* United States v. Urciuoli, 513 F.3d 290, 295 n.3 (1st Cir. 2008); United States v. Kemp, 500 F.3d 257, 279 (3d Cir. 2007); United States v. Brown, 459 F.3d 509, 521 (5th Cir. 2006).

[196] 18 U.S.C. § 201(c) (2006).

[197] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 389, 409-12 (1999) (discussing the relationship between the gratuities statute and various civil and administrative gift regulations).

prison.[198] By taking what is only arguably a gratuities violation and charging it as honest services fraud, prosecutors are able not only to avoid the strictures of the gratuities statute but also to increase the potential penalty tenfold. Honest services fraud is not merely the gratuities statute reborn: it is gratuities on steroids. There is no evidence that Congress ever intended such severe potential penalties to apply to conduct that may be, at best, a mere gratuities violation.[199]

An unknown ingredient added to this already volatile mix is the impending action by the U.S. Supreme Court. More than twenty years after *McNally,* the Court is finally about to enter the honest services fray once again. As this Article goes to press, the Court has granted certiorari in three honest services fraud cases, which will be heard during the 2009-2010 Term. One case, *United States v. Weyhrauch,*[200] involves honest services fraud charged against a member of the Alaska state legislature. The other two, *United States v. Skilling*[201] and *United States v. Black,*[202] are private sector cases where corporate officers were charged with violating their duty of honest services to the corporation and its shareholders. These cases may simply add to the large body of judge-made law in this area, with the Supreme Court deciding whether to adopt various limitations on the scope of § 1346 imposed by the lower courts.[203] The *Skilling* case also challenges

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[198] 18 U.S.C. §§ 1341, 1343 (2006). Mail and wire fraud previously carried a maximum penalty of only five years in prison. In 2002, as part of the Sarbanes-Oxley legislative reforms, the maximum penalty for each crime was increased to twenty years. *See* Pub. L. No. 107-204, 108 Stat. 2087, 2147 (2002). This legislative change, of course, greatly compounded the problem of the disparity of possible punishment for honest services fraud as compared to gratuities.

[199] A similar concern with disparity of punishment also arises in many cases involving state and local officials. Honest services fraud prosecutions, with their potential twenty-year penalty, may be based on conduct that, under state law, would be a far less serious felony offense, a misdemeanor, or not even criminal at all. *See, e.g.*, United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009) (honest services prosecution of Alaskan official based on a conflict of interest that did not violate state law); United States v. Panarella, 277 F.3d 678, 694 (3d Cir. 2002) (honest services prosecution based on a violation that was only a misdemeanor under state law); United States v. Sawyer, 85 F.3d 713, 727-30 (1st Cir. 1996) (honest services prosecution of Massachusetts official for conduct that under state law would be a civil violation or two year felony).

[200] 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009).

[201] 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 2009 WL 1321026 (2009).

[202] 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009).

[203] The honest services issue presented in *Skilling* is whether § 1346 requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance his employer's interests, and, if not, whether § 1346 is unconstitutionally vague. *See* Petition for a Writ of Certiorari, Skilling v. United States, No. 08-1394 (May 11, 2009), 2009 WL 1339243. The issue presented in *Black* is whether, as some courts have held, a private sector scheme to defraud another of honest services requires that the defendant contemplated some economic or other property harm to the

the constitutionality of § 1346, and it is possible the Court will declare § 1346 unconstitutionally vague, either in private sector cases alone or in all cases.[204] Such a ruling would, of course, reinforce the need to adopt a specific statutory definition of honest services fraud, as proposed herein. And regardless of how the three cases are resolved, they will do nothing to remedy the weaknesses in the current bribery and gratuities law.

As honest services fraud supplants the bribery and gratuities statute, the danger the Supreme Court sought to avoid in *Sun-Diamond* has come to pass in another form. The sweeping and ill-defined honest services standard completely fails to provide the type of "precisely targeted prohibitions"[205] necessary in the area of federal public corruption. Honest services fraud allows prosecutors to circumvent the narrowly crafted bribery and gratuities statute and potentially to criminalize an ever-broader range of conduct, while public officials and private citizens alike are left to wonder what the boundaries are between lawful and unlawful behavior.[206]

The law of honest services fraud in its present form cannot be the lodestar for federal corruption cases. At the same time, it must be recognized that the federal bribery and gratuities statute has been crippled by the court decisions discussed in this Article. The best solution is for Congress to restore the proper balance in the law concerning federal corruption by amending the bribery and gratuities statute and providing a precise definition of honest services fraud. The current situation leaves the standards concerning public corruption impossibly vague and subject to constant judicial or prosecutorial revision. It is past time for Congress to act.

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private party to whom honest services were owed. *See* Petition for a Writ of Certiorari, Black v. United States, No. 08-876 (Jan. 9, 2009), 2009 WL 75563. The issue presented in *Weyhrauch* is whether an honest services prosecution of a state official for non-disclosure of material information requires the government to prove that the non-disclosure violated state law. *See* Petition for a Writ of Certiorari, Weyhrauch v. United States, No. 08-1196 (Mar. 25, 2009), 2009 WL 797581.

[204] *See* Petition for a Writ of Certiorari, Skilling v. United States, No. 08-1394 (May 11, 2009), 2009 WL 1339243.

[205] United States v. Sun-Diamond Growers of Cal., 526 U.S. 389, 412 (1999).

[206] Early on in the development of the honest services doctrine, Professor Coffee foresaw some of the dangers of the expansive use of that doctrine: as the honest services fraud doctrine is expanded, "[s]tatutory defenses in other more limited statutes would thereby be circumvented, and the power of the prosecutor over the defendant would be measurably enhanced." John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 3 (1983).

V. A PROPOSED LEGISLATIVE SOLUTION

A. DEFINITION OF HONEST SERVICES FRAUD

To resolve the ongoing controversies surrounding the scope of honest services fraud, Congress should enact legislation along the following lines:

Add to 18 U.S.C. § 1346:

> A person deprives another of the intangible right of honest services if, being a public official or a person selected to be a public official, that person carries out his or her official duties not honestly, impartially, and in the best interests of the public, but in order to obtain, directly or indirectly, some private benefit or advantage through bribery, kickbacks, self-dealing, or similar corrupt misconduct.

As courts in *Czubinski, Brumley,* and other cases have noted, the concept of denial of honest services by public officials should be akin to bribery: the actual services of the official are affected because the official is acting in his own self-interest rather than in the interests of the public. When a public official deliberately uses the power of her office for personal gain rather than for the public's benefit, she can truly be said to have defrauded the public of her honest services.[207] The proposed definition would ensure that honest services fraud cases involving public officials would be limited to the proper class of cases: those involving truly corrupt misconduct.[208]

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[207] Although the language of this definition refers only to public officials, private individuals—such as those who bribe public officials—may of course also be held liable for public sector honest services fraud. In such a case, the private individuals are guilty of participating in a scheme or artifice to defraud the public of the honest services of the public official. As participants in the mail fraud scheme, the private individuals who pay the bribes are equally as guilty as the public officials who accept them. In other words, although only the public officials have the duty of honest services, private individuals may also be guilty of participating in schemes to defraud the public of those honest services.

[208] Under this proposed standard, honest services fraud would be limited to cases involving corruption by public officials. The theory as applied to duties between private actors would be eliminated. The core focus of honest services fraud traditionally has been public corruption. Application of the theory to private relationships has always been problematic, resulting in fractured court decisions and convoluted holdings. The demise of this theory of prosecution would not be much lamented. It would be a mercy killing.

Honest services fraud is rarely brought as a stand-alone charge in a case involving private relationships. Most frequently, the charge is thrown in as one of a number of different theories of prosecution. The removal of that theory, therefore, does not mean that large numbers of cases that otherwise would have been prosecuted will now go uncharged. It is more likely that those prosecutions that are brought will be cleaner and tighter, and that much less ink will be spilled in the appellate courts trying to define the parameters of honest services fraud in private relationships. As long as the theory remains viable, however, prosecutors will feel compelled to include it in their indictments for fear of missing

The proposed standard is analogous to that adopted by the Seventh Circuit, which holds that the misuse of public office for private gain is the line that separates honest services fraud from lesser legal or fiduciary duty violations.[209] However, using public office for private gain alone is not sufficient; the official's performance of his or her public duties must also be affected. This is the requirement of influence over an official act, or quid pro quo, which is at the heart of corrupt misconduct such as bribery. For example, in a case such as *Muntain,*[210] an official may be able to use

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something, and cases will continue to founder over the issue of defining the duty of honest services in private relationships.

To take just one recent example, in the so-called Enron barges case, *United States v. Brown,* 459 F.3d 509 (5th Cir. 2006), the defendants were charged with a conspiracy with three objects: honest services wire fraud, wire fraud to deprive Enron of money or property, and securities fraud. *See id.* at 518. The conspiracy count failed on appeal because the court found the honest services theory inapplicable, and the jury had not been asked to specify which object or objects of the conspiracy they found to be proven. *See id.* at 518, 523. Absent the honest services fraud theory, the government's prosecution could have proceeded, and may in fact have been sustained on appeal. This is not an uncommon situation. *See, e.g., United States v. Black,* 530 F.3d 596 (7th Cir. 2008), *cert. granted,* 129 S. Ct. 2379 (2009).

Finally, if there are cases involving private relationships that could be federally prosecuted *only* as honest services fraud, it is worth asking what federal interest justifies such prosecutions. If there truly is no other fraud—in terms of loss of money or property—or other misconduct that falls within the reach of the numerous federal criminal statutes available, the case most likely involves conduct between two private parties that may be dishonest or unseemly but does not rise to a level justifying a federal criminal prosecution. Other remedies are available, either through private litigation, employer discipline, or, if appropriate, state prosecution. Not every breach of a duty or case of employee misconduct in the private sector justifies a federal criminal prosecution and a possible twenty-year sentence. Confining the honest services fraud theory to cases of serious public corruption properly limits that theory to the area that should be of the greatest concern to the federal government and federal prosecutors.

If, however, Congress chose to preserve the honest services fraud theory for private sector relationships, it could enact a separate definition of honest services fraud for such relationships. *See supra* note 111 (discussing the Second Circuit's decision in *Rybicki* and that court's definition of honest services fraud in private sector relationships).

[209] *See* United States v. Thompson, 484 F.3d 877, 882 (7th Cir. 2007); United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998). As the Seventh Circuit has noted, this "private gain" standard finds some support in the language of *McNally,* where the Supreme Court used similar language to summarize the caselaw that existed at the time of that decision. *See* McNally v. United States, 483 U.S. 350, 355 (1987) (describing court of appeals decisions as holding that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud"); *see also id.* at 362-63 (Stevens, J., dissenting) (noting that in public sector honest services cases, "the officials have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests"); United States v. Sorich, 523 F.3d 702, 708 (7th Cir. 2008) (noting that the Seventh Circuit's "private gain" test stems from the language of *McNally*).

[210] United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979); *see supra* text accompanying notes 69-70.

connections established through his public office to his advantage in some outside work or "moonlighting." This would arguably involve a use of his public office for private gain, but unless his performance of his official duties was somehow affected by corrupt behavior, this would not be a violation of honest services.

This proposed standard does not require that the misconduct in question violate an independent state law, a requirement that some courts have adopted but most have rejected.[211] The need for such a judicially crafted limitation largely vanishes once the crime of honest services fraud is actually defined in federal law. Practically speaking, of course, corrupt misconduct that violates the proposed standard will in almost all cases violate some state criminal statute as well. On the other hand, conduct that may violate some state law—such as a financial disclosure requirement or state ethical obligation, or a state law gift ban as in *Sawyer*[212]—but does not rise to the level of corrupt misconduct provided in this standard will not amount to honest services fraud, regardless of what potential state violations may exist. This avoids the potential danger, noted by a number of courts, of allowing honest services fraud to turn every state ethical violation or breach of fiduciary duty into a federal felony.[213]

The private gain required by this standard usually will accrue to the corrupt public official herself, but this will not always be the case. The crime of bribery is committed when a corrupt public official, in exchange for agreeing to be influenced in the performance of her duties, accepts a thing of value either for herself or on behalf of another person or entity.[214] A politician who agrees to vote a certain way in exchange for a $50,000 a year job for a relative is just as guilty as one who pockets the money personally. Accordingly, under this proposed standard, as under the law of bribery generally, the private gain may be received directly or indirectly, either personally or by another.[215]

This proposed standard does not purport to encompass every case where an honest services charge against a public official has been upheld; it is unlikely that any such universal unifying principle could be found. This standard is, however, largely faithful to the rough consensus concerning

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[211] *See supra* text accompanying notes 139-40.

[212] *See* United States v. Sawyer, 85 F.3d 713, 728-29 (1st Cir. 1996).

[213] *See, e.g., Sawyer,* 85 F.3d at 728 ("To allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced.").

[214] *See* 18 U.S.C. §§ 201(b)(1), (b)(2) (2006).

[215] *See* United States v. Sorich, 523 F.3d 702, 709 (7th Cir. 2008) (holding that private gain in an honest services case need not go to the defendant: "By 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not.").

honest services fraud for public officials that has developed in the circuit courts. Through its focus on core corrupt misconduct, it targets actions that are similar in nature to bribery, where the services expected by the public are not provided because the official is acting in his or her own self-interest instead. By enacting such a definition, Congress would finally clarify the scope of honest services fraud and would put to rest a source of great confusion and controversy in the courts.

B. AMENDMENTS TO THE GRATUITIES STATUTE

Amendments to the federal gratuities statute should be aimed at remedying the issue created by *Sun-Diamond,* where a course of improper conduct cannot be charged due to an inability to link a particular thing of value to a particular official act. The amendments should also address the problem highlighted by the *Valdes* case, by providing that a gratuity may be linked not only to an "official act" but also to an act in violation of official duty.

The gratuities statute, 18 U.S.C. § 201(c), should be amended as follows (new language in bold italics):

> Whoever –
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> (1) otherwise than as provided by law for the proper discharge of official duty—
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> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of ***(i) any act or series of acts in violation of the official duty of such official or person; or (ii)*** any official act ***or series of official acts*** performed or to be performed by such ~~public~~ official~~, former public official,~~ or person ~~selected to be a public official~~;[216] or
>
> (B) being a public official, former public official, or person selected to be a public official, ~~otherwise than as provided by law for the proper discharge of official duty~~,[217] directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of ***(i) any act or series of acts in violation of the official duty of such official or person; or (ii)*** any official act ***or series of official acts*** performed or to be performed by such official or person;
>
> . . .

[216] The stricken language in subsection (ii) is to make the wording consistent with the rest of the statute.

[217] This language is proposed to be deleted because it is redundant of the lead-in language to the section.

Add following new section 201(f):

(f) In a prosecution for an offense under subsection (c)(1), it is not necessary that any particular thing of value be directly linked to any particular official act or violation of official duty. It is sufficient if the thing(s) of value are for or because of any identifiable violation(s) of official duty or any identifiable official act(s) performed, to be performed, or hoped for.

This statutory change addresses the difficulties raised by *Sun-Diamond*'s requirement of a link between a particular gratuity and a particular official act. Such a link would still be required in a bribery case, due to the need to establish a direct quid pro quo. In a gratuities prosecution, however, the proposed section (f) makes it clear that prosecutors may charge an ongoing pattern of conduct—a series of gifts, and a series of official acts over a period of time—without the need to establish a direct one-to-one link between any particular gift and any particular act. This would allow for prosecution of the "politician on retainer" situation, similar to many of the Abramoff cases. This standard is similar to the "middle ground" holding of the D.C. Circuit in *Sun-Diamond*: there must be a connection between the gratuities and some identifiable official act or acts, but it is not necessary to show that any particular thing of value is directly for or because of any particular act.[218]

What would still be barred by this language is a case where a thing of value is given when the donor does not have any exercise of official power in mind. This is in keeping with the fact that the gratuities statute is not meant to be a general ban on all outside gifts to public officials. As the Court noted in *Sun-Diamond*, many such gifts are legal, and there is a wide array of statutes and government regulations related to such gifts. If, however, the donor is seeking to curry favor or get in the official's good graces by rewarding past or future official acts, a gratuities violation could be established—so long as the particular acts can be identified and proved. By continuing to require a link to some identifiable official act or acts, the proposed amendment retains the core nature of the ban on gratuities while correcting the overly restrictive language of that statute as interpreted by the Court in *Sun-Diamond*.[219]

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[218] *See* United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 968-69 (D.C. Cir. 1998).

[219] Once again, the distinction between such a forward-looking gratuity and a bribe is not a bright line. If one is giving gratuities with the hope of encouraging future acts, then arguably one is engaged in bribery—giving a thing of value in exchange for influencing official action. In most cases the difference will be one of degree and will hinge upon the strength of the evidence of a quid pro quo. If there is strong evidence of a desire to influence particular official acts, bribery may be the appropriate charge. If the evidence of a link is weaker—future official acts can be identified, but there is more of a generalized hope of

The proposed amendment would also address the problem highlighted in the *Valdes*[220] case, by clarifying that a gratuity may be paid for a violation of official duty as well as for an "official act" as defined in the statute. Officer Valdes almost certainly violated his official duties when he agreed to use police databases for an improper purpose in exchange for money.[221] Under the proposed amendment, his actions would be chargeable as receipt of a gratuity, just as under the bribery statute an official may be charged for accepting a thing of value in exchange for an agreement to do an act in violation of official duty.[222]

C. IMPLICATIONS FOR REPRESENTATIVE CASES

To evaluate the impact of the proposed legislative changes, it is useful to examine how various cases would have been affected had the proposed statutory language been in place at the time those cases arose.

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affecting them rather than a strong link between the gifts and those acts—then gratuities would be the appropriate charge.

[220] Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

[221] *See id.* at 1327.

[222] *See* 18 U.SC. § 201(b)(2)(C) (2006). One proposed alternative would be to amend the definition of official act to include "any action within the range of official duty." Legislation currently pending in Congress proposes this change. *See* Public Corruption Prosecution Improvements Act, S. 49, 111th Cong. § 13 (2009). This is based on language from a Supreme Court case, *United States v. Birdsall*, 233 U.S. 223 (1914), which construed the predecessor to 18 U.S.C. § 201 and which the dissent in *Valdes* argued should have controlled that case. *See Valdes,* 475 F.3d at 1331 (Henderson, J., dissenting). Although such an amendment would reverse the result in *Valdes*, the language is potentially problematic. A gratuities statute that prohibits any gift given for "any action within the range of official duty," creates the potential "absurdities" discussed by the Supreme Court in *Sun-Diamond.* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408 (1999). The championship sports team giving the President a jersey when visiting the White House would violate such a gratuities statute, because meeting with the team would presumably be an act "within the range of official duty." As the *Sun-Diamond* Court observed, under the existing definition of "official act," this conduct is not criminal, because these types of activities do not involve official acts as currently defined. *Id.* at 407-08. The language proposed in this Article continues to avoid these "absurdities" by leaving the definition of "official act" intact, while bringing the conduct of those such as Officer Valdes back within the scope of the statute through amendments to the definition of a gratuity itself.

The legislation currently pending in Congress also recommends amending the gratuities statute to apply to things of value given or promised not only for or because of official acts but also "for or because of the official's or person's official position." Public Corruption Prosecution Improvements Act, S. 49, 111th Cong., 1st Sess., § 12. This too would raise the issue of criminalizing the examples listed as "absurdities" in *Sun-Diamond*, and would transform the gratuities law into a general gift ban. This would also bring the gratuities law into conflict with the wide array of others laws and regulations governing gifts to federal employees. The language proposed in this Article would avoid these problems.

Jack Abramoff and Robert Ney: Abramoff was charged with a wide variety of crimes, including defrauding his Indian tribe clients of millions of dollars. These were charges of conspiracy to commit mail or wire fraud involving a scheme to defraud the victims of money, not honest services.[223] None of those traditional fraud charges would be affected by the amendments proposed in this article.[224]

Concerning the corrupt relationship with Congressman Ney, those charges could be framed as bribery or gratuities charges, rather than as honest services fraud. If the government believed it had evidence of specific legislative acts that were influenced by Abramoff's gifts, then bribery would be the appropriate charge. More likely, prosecutors could charge the ongoing course of conduct between Abramoff, his associates, and Ney as a series of gratuities, where the things of value were provided for or because of official acts taken or promised by Ney. Under the amended statute, prosecutors would be relieved of the *Sun-Diamond* requirement that they link a particular gift to a particular official act. They would need to demonstrate, however, that there were particular official acts performed or hoped for that motivated the gifts.

Alternatively, if prosecutors did have evidence of a quid pro quo sufficient to establish bribery, they could also charge a scheme to defraud the citizenry of the right to the honest services of Representative Ney. Under the proposed statutory definition, conduct amounting to bribery—as opposed to mere gratuities—would constitute honest services fraud. There would be no barrier to bringing such a charge in a case involving federal officials, although presumably the theory would continue to be used most

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[223] *See* Criminal Information at 3, United States v.. Abramoff, No. 1:06-cr-0001-ESH (D.D.C. filed Jan 1, 2006). The Information filed in Abramoff's case included three counts: conspiracy, honest services mail fraud, and tax evasion. *See id.* The conspiracy count alleged that Abramoff conspired with others to commit five different crimes: depriving Abramoff's clients of their right to his honest services, defrauding Abramoff's clients of money, depriving Abramoff's employer of its right to his honest services, causing Congressional staff members to violate conflict of interest laws, and bribing federal officials. There is no stand-alone charge of bribery or gratuities. It is also interesting to note that the Information charges bribery as an object of the conspiracy, but then cites not only the bribery statute but also the honest services mail and wire fraud statute—as if to acknowledge the bribery allegations might not stand on their own under § 201. *See id.* para. 6(D).

[224] Another theory of liability in the Abramoff case was that Abramoff deprived his Indian tribe clients and his own employer of their right to his honest services. Under the proposed amendments, this theory of liability would not be available because honest services fraud would be limited to cases involving public officials. Removing this theory would have no impact on the overall outcome of the case, because the same conduct could be (and was) charged under other theories, particularly mail and wire fraud to deprive the victims of money. The honest services fraud theory as applied to Abramoff's services to private parties was largely redundant, as it is in most such cases.

frequently in cases involving state and local corruption. If used in the case involving Ney and Abramoff, the charge would simply be an alternative theory of prosecution for conduct already covered by the bribery statute.

It may be that the prosecutors in the Abramoff and Ney cases could have proven a direct quid-pro-quo to sustain a bribery charge. Or it may be that the evidence of corrupt intent would have fallen short, resulting in gratuities charges. The reason we don't know for certain is that the honest services charge obscures such distinctions and thus obscures the true nature of any misconduct. It seems likely that prosecutors could at least have met the burden of establishing gratuities violations under the proposed amendment for the conduct of Abramoff and his associates related to Representative Ney, other Members of Congress, and various Congressional staffers. Accordingly, the prosecutions would largely remain intact. Gone would be the hazy, catch-all honest services fraud theory that charged the defendants with being corrupt without requiring the government to pin down the specifics. The much larger heart of the case—Abramoff's multi-million dollar fraud against his Indian tribe clients—would be unaffected.

The charges against Representative Ney himself presumably also would be reframed as violations of the gratuities statute rather than honest services fraud.[225] The allegations in that case involved a stream of things of value provided to Ney by Abramoff and his staff, and a series of official acts taken by Ney to benefit Abramoff's clients. Relieved of the *Sun-Diamond* obligation to prove a direct link between a particular gift and a particular act, prosecutors using the revised statute could charge the ongoing course of conduct as a gratuities violation. This would be a more appropriate charge, with a more appropriate potential penalty, given the nature of Ney's misconduct. Again, however, if a direct quid pro quo could be established, then bribery would be the appropriate charge (or, alternatively, honest services fraud under the statute proposed here).

Officer Valdes: As already noted, under the proposed amendment a conviction of Officer Valdes for gratuities could be sustained. Even if the actions of Officer Valdes in looking up the driver's license information were not "official acts" under the statute, doing so in exchange for cash constituted accepting a thing of value for a violation of his official duty to use those databases only for proper police purposes. Under the revised statute, this would constitute an illegal gratuity.

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[225] *See* Criminal Information, United States v. Ney, No. 1:06-cr-00272-ESH (D.D.C. filed Sept. 15, 2006). Ney was charged with two counts: conspiracy and false statements. The objects of the conspiracy were listed as committing honest services fraud, making false statements, and causing staffers to violate conflict of interest rules. There was no bribery allegation.

Congressman William Jefferson: As discussed above, the case involving former U.S. Representative William Jefferson has raised the *Valdes* issue.[226] Jefferson argues that he was moonlighting, and that the work for which he was paid had nothing to do with any acts or decisions that he made or was likely to make in the course of his official duties. As such, he claims, his actions fall outside the parameters of 18 U.S.C. § 201 because they did not involve "official acts," and he cannot be found guilty of bribery.[227]

Under the proposed amendment, this would remain a viable defense. If Representative Jefferson was strictly moonlighting and the money he received had absolutely no link to anything he was doing in Congress, then he should prevail on that defense. His conduct may be reprehensible and may violate any number of other statutes or regulations, but it is not a bribe or gratuity—and should not be, if the bribery and gratuities statute is to retain its primary focus and not become a general gift ban.

As was the case with Officer Valdes, there are other ways to reach any misconduct by Representative Jefferson. In fact, Jefferson was convicted of a number of other crimes, including conspiracy, money laundering, and racketeering.[228] Even if his "official acts" defense ultimately prevails, his misconduct will not necessarily go unpunished. There is no need to broaden the definition of "official acts" to address such a case, given the many other remedies that are available and the unintended consequences that may result from any such amendment.

Conflict of Interest Cases: As the First Circuit observed in *Sawyer*, honest services fraud has been found in cases where an official failed to disclose a conflict of interest that resulted in personal gain, even if there was no bribery.[229] This would hold true under the proposed amendment. For example, if a public official failed to disclose certain real estate investments on required financial disclosure forms and then took legislative acts to benefit those personal interests, there would be an honest services violation. The official would be using his public position to act not in the best interest of the public, but to obtain a personal benefit through self-dealing. These actions would demonstrate the corrupt intent necessary to establish honest services fraud.

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[226] *See supra* text accompanying notes 90-94.

[227] *See* United States v. Jefferson, 562 F. Supp. 2d 687 (E.D. Va. 2008).

[228] *See* Indictment, United States v. Jefferson, No. 1:07CR209 (E.D. Va. filed June 4, 2007). Jefferson was found guilty on eleven of sixteen counts on August 5, 2009, and intends to appeal. *See* Markon & Schulte, *supra* note 94.

[229] *See* United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996); *see also supra* text accompanying notes 171-73.

On the other hand, if an official failed to disclose financial information that could pose a conflict of interest for some other reason—for example, he thought the holdings might be politically embarrassing, or he was trying to conceal them from an ex-spouse, or he objected on privacy grounds to the disclosure requirements—that standing alone would not be honest services fraud. Such conduct is dishonest, to be sure, and may well violate state statutes or ethics rules related to the required filing of the forms. But if the official is not using the power of his office to obtain some personal benefit related to the concealed holdings, there is no honest services fraud.[230]

VI. CONCLUSION

Over the past decade, court decisions have restricted the scope of the federal bribery and gratuities law, and prosecutors have responded by expanding the use of honest services fraud. The growing use of honest services fraud in federal corruption cases has highlighted the confusion and uncertainty surrounding this theory of prosecution. In cases involving federal officials, there is the added danger that the increasing use of honest services fraud is further blurring the lines between acceptable and corrupt behavior and upsetting the delicate balance struck in federal law concerning federal public corruption.

Amending the criminal code as suggested here will bring some much-needed clarity to this area of federal criminal law. It will reinvigorate the federal bribery and gratuities statute by responding to the judicial narrowing of that statute. It will also put to rest the ongoing judicial struggles to define the parameters of honest services fraud and restore that theory to its core concern: serious cases of political corruption, particularly in state and local government.

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[230] In a case where disclosure of financial interests was required by state law, one could argue that any employee who failed to make the proper disclosures was not providing the services of a good and honest employee and therefore could be charged with honest services fraud. But this would mean that any violation of any state ethical or legal requirement, regardless of the reason, would be sufficient to establish mail fraud – something the courts have clearly rejected. It is more appropriate to limit application of the doctrine to cases that involve true self-dealing that goes along with the failures to disclose, as provided by the proposed amendment. *See supra* note 161.