

Bribery - 18 U.S.C. § 201(b)

- Bribery is the bedrock federal corruption charge: Prosecutors, judges, and juries understand it.
- Federal employees may not demand, seek, receive, accept or agree to accept anything of value “in return for being influenced in the performance of any official act.”
- Bribery requires corrupt intent and a quid pro quo. “[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.” *U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999).

Bribery – Who Is Covered?

- “Public official” is defined broadly. (*See* § 201(a); *Dixson v. U.S.*, 465 U.S. 482 (1984)).
- Covers federal public officials and those who have been selected to be Federal public officials (§ 201(b)(2)).
- Covers those who bribe Federal public officials (§ 201(b)(1)).
- It may cover independent contractors or consultants if acting on behalf of the U.S (fact specific inquiry, however).
- Proper inquiry is whether the person occupies a position of public trust with official federal responsibilities, not limited to formal employment or agency relationship.

Bribery – What Type of Transactions Are Covered?

- Covers not only bribe transactions that are consummated, but also solicitations and agreements – *i.e.*, even if no money is paid or no official action is taken.
- Although § 201 does not expressly include the word “attempt,” at least one circuit has held that the statute covers attempts.
- “Anything of value” is defined broadly. Includes intangibles and monetary worth is not the sole measure of value.
- The bribe can be paid to the public official or to some other individual or entity.

Bribery – What Type of Acts Are Covered?

- Official act element is broad: “[A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which at any time may be pending, or which by law could be brought before any public official. . . .” (§ 201(a)(3); *see also U.S. v. Birdsall*, 233 U.S. 223 (1914) (Includes “[e]very action that is within the range of official duty. . . .”; *U.S. v. Jefferson*, 674 F.3d 332 (4th Cir. 2012) (Includes “settled official practice[s]” as well as “‘matters’ or ‘causes’ that were pending before [the defendant]”).
- Section 201 is not limited to acts that are within the formal statutory authority of a public official, and instead includes any acts taken consistent with established practice or settled official practices
- Statute does not require that the bribee be acting within his actual official duties to accomplish the bribe’s purpose.

Bribery – What Type of Acts Are Covered?

- *U.S. v. Valdes*: D.C. Circuit limited the scope of official acts to “a class of questions or matters whose answer or disposition is determined by the government.” 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc) (holding it was not official action when a local law enforcement officer entered into database to search for information on fictitious subjects in exchange for money).
- *Valdes* has been criticized in other recent cases as being inconsistent with text of 201 and in conflict with *Birdsall* and other leading cases.

Bribery – Invalid Legal Defenses for Bribee

- Official acts were good for the community.
 - Public official would have or should have taken the acts without the bribe.
 - Public official was just playacting and was never going to follow through.
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- It is sufficient if the official represents that he or she has the power to act.
 - It is unnecessary to show that the public official actually meant to do what he or she accepted a bribe to do.
 - Playacting is irrelevant. What matters is whether the public official conveyed to the briber that the money would influence the public official.

Bribery – Invalid Legal Defenses for Bribe Payor

- Public official lacked power to act.
 - Public official did not know about or receive payment.
 - Payment was made primarily out of friendship or for business reasons.
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- It is sufficient if bribe payor believes the official had the power to act.
 - If the money is offered or provided with corrupt intent (*i.e.*, intent to influence), the official does not necessarily need to be aware of the bribe.
 - Does not matter that payment has several motivations so long as one of the motives of the payment is to influence the public official.
 - Even if official lacked authority, paying an official to defraud the U.S. or violate his/her duties is sufficient (§ 201(b)(1)(C)).

Bribery – Course of Conduct Bribery

- There is strong support for a bribery charge when there is a series of gifts and a series of official actions, rather than just one gift and one official act.
- Each payment need not be correlated with a specific official act. It can be “this for that,” “this for these,” or “these for these.”
- It is sufficient if the public official understands that he/she is expected as a result of the payment to exercise particular kinds of influence – *i.e.*, on behalf of the payor – as specific opportunities arise.
- Stream of benefits or course of conduct bribery theory is consistent with the general notion of charging multiple criminal acts in one count where they can be characterized as part of a single continuing scheme.
- However, course of conduct bribes do not toll the statute of limitations under the continuing offense doctrine.

Bribery – Venue and Penalties

- Venue: The district in which the agreement was made, or in which the official received or deposited the bribe (or even in the district in which the check was cleared) is generally an appropriate venue.
- D.C. Circuit has held that venue for bribery is not appropriate in the district in which the public official takes official action.
- Bribery is a 15-year felony, governed by U.S.S.G. § 2C1.1.

GRATUITIES - 18 U.S.C. § 201(c)

- Gratuities are things of value given “for or because of an official act performed or to be performed” by a public official.
- Gratuities are a lesser included offense of bribery.
- A gratuity requires knowing and willing conduct, but not corrupt conduct.
- The payment must be “for or because of official act(s),” but a gratuity does not require a *quid pro quo* or an agreement that the official will be influenced. The proof need not show that the payor intended to exact action by the recipient.
- Gratuity provision applies to former public officials.
- Unlike a bribe, which can be paid to the public official or to another person or entity, the gratuity must be paid to the public official personally. This distinguishes gratuities from campaign contributions.

Gratuities – Status Gratuities Are Not Covered

- Status gratuity is a thing of value given to a public official because of the public official's position, but not necessarily tied to a specific official act.
- The pure status gratuity is not a crime under § 201(c). In *Sun-Diamond*, 526 U.S. at 405-14, the Supreme Court held that it is not a violation of 201(c) to make a payment for or because of the recipient's official position, or in an effort to win generalized sympathy from a public official. Instead, "the Government must prove a link between a thing of value conferred upon a federal official and a specific 'official act' for or because of which it was given."
- *Sun-Diamond* overruled earlier circuit opinions that viewed the status gratuity theory favorably.

Gratuities - Penalties

- Gratuity is a two-year felony, and the guidelines, U.S.S.G. § 2C1.2, can be substantially lower than for bribery.
- For example, the offense level is increased only for the amount of the gratuity, and not for the amount of benefit to be received by the payor, or the resulting loss to the government.
- This reflects the theory that a gratuity, unlike a bribe, does not actually purchase an official act.

Is it a Bribe or a Gratuity? (Past Official Acts)

- The “distinguishing feature” between bribery and illegal gratuities is found in the intent element.
- A payment as a thank you for a past act is a gratuity, not a bribe.
- If there was no prior agreement, and no *quid pro quo*, it is a gratuity.
- A payment for a past official act can be a bribe, but only if the agreement was reached prior to the official act.

Is it a Bribe or a Gratuity? (Future Official Acts)

- The distinction between a bribe and a gratuity in connection with future official acts is much more difficult to see, and depends heavily on the facts.
- Payments to a public official for acts that would have been performed in any event – whether before or after those acts have occurred – are probably illegal gratuities rather than bribes. But the evidence may belie the official's defense that he/she would have performed the act anyway.
- If the connection between the payment and the official act is weak or purely circumstantial, it is safer to charge a gratuity. In this sense, a gratuity case is simply a weak bribery case.
- If the payment is made with the intent to influence an official act, the payor is guilty of bribery. But if the public official did not agree to be influenced, the official has not committed bribery. In this sense, a gratuity may be an unsuccessful bribe.
- When there is a real meeting of the minds between the payor and the official as to which official act is being purchased, that is a bribe.

Is it a Bribe or a Gratuity? (Future Official Acts)

- Without a viable status gratuity theory, it is even more difficult to see the difference between a bribe and a gratuity for future official acts. If you have evidence that a thing of value was given “for or because of” a future official act (gratuity), you also have at least circumstantial evidence that it was given with the intent to influence that official act (bribery).
- Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act.
- In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

Is it a Bribe or a Gratuity? (Verrusio Decision)

- A gratuity must be due to a particular official act and not merely “to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts.”
- In *U.S. v. Verrusio*, 2014 WL 3906296 (D.C. Cir. Aug. 12, 2014), a Congressional policy director received a World Series ticket and other entertainment as gratuities. Verrusio argued an indictment alleging that the gratuities were received for or because of official assistance in “securing favorable amendments” to the federal highway bill by “influencing [its] language” was not specific enough. The court ruled that “[n]othing more (and perhaps less)” is sufficient under pertinent case law.
- “The indictment certainly need not allege precisely how Verrusio contemplated influencing that language. Would he do it by himself or ask someone else to do it? Would that someone else be Colonel Mustard or Professor Plum? With a candlestick or a rope, in the library or the study? Answering those questions is not required at the indictment stage. Alleging that Verrusio received gratuities for his official assistance in ‘securing favorable amendments’ to the federal highway bill by ‘influencing [its] language’ is sufficiently specific.”

Referral Process – What if you suspect bribery or illegal gratuities?

- Inspector General (IG) of the department or agency involved investigates alleged misconduct. A list of agency IG's can be found at the Council of the Inspectors General on Integrity and Efficiency (www.ignet.gov/index.html).
- FBI will also investigate alleged criminal misconduct of federal employees.
- DOJ's Office of Professional Responsibility: Has jurisdiction to investigate misconduct allegations involving DOJ attorneys and law enforcement personnel relating to administrative performance of duties.
- DOJ's IG: Has jurisdiction to investigate certain allegations of employee misconduct.
- Federal prison wardens or other BOP employees: Office of Internal Affairs, Bureau of Prisons.

Supplementation of Salary – 18 U.S.C. § 209

- Under § 209, executive branch employees may not receive any salary or supplementation of salary from any person other than the Government, as compensation for services as a Government employee.
- Sometimes used to plead out weak bribery or gratuities cases.

Contact Information and Questions

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