No. 09-5130

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM J. JEFFERSON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION
1:07-cr-00209-TSE

REPLY BRIEF FOR DEFENDANT-APPELLANT WILLIAM J. JEFFERSON

Robert P. Trout
Gloria B. Solomon
TROUT CACHERIS, PLLC
1350 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20036
Phone: (202) 464-3300

Lawrence S. Robbins
Mark A. Hiller
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411L
Washington, D.C. 20006
(202) 775-4500

Counsel for Defendant-Appellant William J. Jefferson

TABLE OF CONTENTS

Page

TABLE OF CONTENTS–cont'd

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES–cont'd

Page(s)

TABLE OF AUTHORITIES–cont'd

Page(s)

TABLE OF AUTHORITIES–cont'd

Page(s)

Statutes

TABLE OF AUTHORITIES–cont'd

Page(s)

Other Authorities

INTRODUCTION

The government opens its brief with a lengthy and partisan factual statement—as if we were challenging the sufficiency of the evidence and not a series of fundamental instructional errors. The subtext seems clear enough: The government hopes that the Court will conclude that Jefferson simply deserves to be punished, and will not carefully examine the "settled practice" instruction on which that punishment rests.

The government has good reason to shift the Court's focus—because, as the government well knows, this is not your garden-variety bribery case. The overwhelming core of Jefferson's conduct was introducing United States businessmen to foreign public officials and private persons. As Judge Ellis recognized, no court has ever extended the bribery statute to such conduct (JA4652), and even the prosecutors admitted that doing so would constitute an "extreme" application of the law (JA4710-11).

Faced with these obstacles, the government needed the "settled practice" instruction. Only a definition of "official act" so elastic and amorphous could encompass Jefferson's conduct. Only "settled practice" could transform into "official acts" *any* use a Member of Congress makes of staff members or other resources, or *any* conduct of *any* nature the Member performs at the request of *any* person or business in America.

Yet, to read the government's brief, one would not know just how hard the government fought to obtain the "settled practice" instruction. One would think that the instruction was a footnote to the district court's reading of the statutory definition of "official act." (Never mind that it was Jefferson who beseeched the district court to charge the statutory text only (Dkt. 358 at 4-9; JA4826), and that it was the government that argued relentlessly that the "settled practice" language be added as a gloss on the statutory definition (*e.g.*, Dkt. 62 at 7-12; Dkt. 100 at 1-2; Dkt. 340 at 14-17).) One would think that the "settled practice" instruction played only a marginal role at trial. (Never mind that the government's entire case rested on the instruction—through expert testimony on the "settled practices" of Congressmen, exhortation to the jury that "settled practice" is the "touchstone" of "official act" (JA4906), and countless other examples.)

Now, having ridden the back of this instruction to conviction, the government all but hides it in the barn. Nowhere in its 100-page brief does the government explain why the "settled practice" instruction is actually *correct*. Instead, the government principally argues that our legislative-acts construction is *incorrect*, reserving a few pages to claim that our alternative construction (the one the D.C. Circuit adopted en banc in *Valdes*) does not require retrial. We explain below why these arguments are wrong. Even if they were right, however, Jefferson would still need to be retried because "official act" clearly does not

encompass foreign government decisions—an issue on which the government offers only the thinnest response.

The government's other arguments also fail. The government cannot reconcile the district court's *quid pro quo* instruction with *Sun-Diamond*: The latter unambiguously requires the government to link purported bribe payments to *particular* official acts, while the former does not—and the government does not claim otherwise. Proof of such link is essential, lest the *quid pro quo* element be diluted and lawful goodwill payments be transformed into illicit bribes.

The government acknowledges that, in light of *Skilling*, the district court erred by instructing the "self-dealing" theory of honest-services wire fraud. That error is not harmless beyond a reasonable doubt. The fact that the jury convicted Jefferson on substantive bribery counts does not establish that the jury followed the alternative bribery path on any other counts, which all involved different elements than substantive bribery. Moreover, the government makes *no mention* of the tremendous emphasis it placed on the invalid self-dealing theory throughout the trial.

Finally, venue is improper on Count 10. The government's only argument is that "scheme or artifice to defraud" is a conduct element of honest-services wire fraud. But this argument has been squarely rejected, including by the Second and Ninth Circuits.

ARGUMENT

I. THE DISTRICT COURT MIS-DEFINED "OFFICIAL ACT"

The central issue in this case is whether the "settled practice" instruction is erroneous. As we show in section A below, the government has essentially punted on that question. Instead, the government labors to explain why our competing interpretations are wrong; we respond to those contentions in section B. Finally, section C rebuts the government's claim that the instructional error was harmless.

A. The "Settled Practice" Instruction Is Erroneous

i. The "Settled Practice" Instruction Has No Basis In The Statutory Text

We contended in our opening brief that the "settled practice" instruction contravenes the text of section 201(a)(3), which defines "official act." See Jefferson Br. 26-29. The government offers no rebuttal. It makes no effort to reconcile the statutory language—especially the words "pending" and "by law brought"—with the "settled practice" instruction. Instead, the government argues only that the text does not support *our* legislative-acts construction of "official act." See Gov't Br. 41-52. (We refute this argument *infra* at I.B.i.) But claiming that our definition is wrong does not make the government's "settled practice" instruction right.

ii. Birdsall *Does Not Support The "Settled Practice" Instruction*

The only justification the government offers for its "settled practice" instruction is that the instruction is authorized by *United States v. Birdsall*, 233 U.S. 223 (1914). See Gov't Br. 45-46, 54. It isn't.

To the contrary, as we have argued (Jefferson Br. 37-40), *Birdsall* said simply that official acts are not limited to conduct mandated by statute, but can also encompass conduct "within the range of *official duty*." 233 U.S. at 230 (emphasis added). The Supreme Court attributed significance to "settled practice" only insofar as "settled practice" evidenced such duty. See *id.* at 231 ("In numerous instances, *duties* not completely defined by written rules are clearly established by settled practice . . . ." (emphasis added)). The Court clearly did not say that every "settled practice" implicates the bribery statute just *because* it is "settled practice," even if the "settled practice" involves purely discretionary conduct. In any event, as *Valdes* recognized, *Birdsall*'s entire discussion of "settled practice" was dicta. See *Valdes v. United States*, 475 F.3d 1319, 1322-23 (D.C. Cir. 2007) (en banc); see also Jefferson Br. 39.[1]

[1] Moreover, *Birdsall* is consistent with the statutory text it construed. The defendants there clearly had "questions" that were "pending" before them: whether to recommend clemency. By contrast, the "settled practice" instruction does not even feign to be anchored in the statutory text.

The government ignores these arguments. It simply does not explain how *Birdsall* supports its "settled practice" instruction. Instead, the government's discussion of that case is confined to rejecting our construction of "official act." Thus the government claims that on our "counterintuitive" reading of *Birdsall*, "a congressman could not be prosecuted for voting on a piece of legislation as a bribe-derived *quid pro quo* because such a vote is not a 'duty.'" Gov't Br. 46 n.20. This is mistaken. Under *Birdsall*, a congressman's efforts to "draft legislation, designate earmarks or, even, vote on legislation" (*ibid.*) would easily be "official acts"—not because they happen to be "settled practice," but because, as the government's own expert testified, they amount to congressional duties. See JA3861 ("propos[ing] and consider[ing] and vot[ing] on legislation" are "duties of a US congressman").

But the district court never instructed the jury to determine whether Jefferson's conduct constituted an "official duty." Instead, the court said that it was enough to find that the conduct is "settled practice"—even though, as McHugh made clear, congressional activity can often be a "settled practice" without amounting to an "official duty." Compare, *e.g.*, JA3894 (no congressional duty to introduce businesspersons to foreign heads of state) and JA3894-95 (no congressional duty to accompany businesspersons abroad to facilitate foreign

business deals) with JA3902-03 (such activities may be "settled custom and practice").

The government asserts that "*Birdsall*'s 'settled practice' interpretation has been consistently applied in all manner of contexts." Gov't Br. 54. This is very misleading. The cases the government cites construed *Birdsall* as we do above, to mean that conduct amounting to an official duty falls within the bribery statute.[2] None of those cases, though, equated "settled practice" with "official act" without regard to official duty, as the government would do. And, though the government

[2] See *United States v. Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008) ("The Court held in *Birdsall* that '[e]very action that is within the range of official duty comes within the purview of these sections.'"); *United States v. Parker*, 133 F.3d 322, 326 (5th Cir. 1998) ("Official acts that violate an official's official duty are not limited to those proscribed by statutes and written rules and regulations . . . ."); *United States v. Biaggi*, 853 F.2d 89, 97 (2d Cir. 1988) ("In determining whether recommendations by the federal employees were part of their official duties, the [*Birdsall*] Court noted . . . ."); *United States v. Muntain*, 610 F.2d 964, 967-68 n.3 (D.C. Cir. 1979) (same); *United States v. Carson*, 464 F.2d 424, 432 (2d Cir. 1972) (same).

Congress reads *Birdsall* the same way. See Public Corruption Prosecution Improvements Act of 2011, S. 401, 112th Cong. § 13 (2011) (amending the definition of "official act" to include "any action within the range of official duty"). As the bill's co-sponsor Senator Leahy explained, "[t]his section explicitly adopts the language from . . . *Birdsall*, defining 'official act,' and in so doing makes clear that '[e]very action that is within the range of official duty comes within the purview of the bribery statute.'" Patrick Leahy, *Leahy, Cornyn Bring Back Proposal To Root Out Public Corruption*, available at http://leahy.senate.gov/press/press_releases/release/?id=69342C70-A1CE-4424-B0CB-5830A87257F0 (last visited April 15, 2011).

does not mention it, *Valdes* (rightly) concluded that *Birdsall*'s entire discussion of "settled practice" was dicta. See 475 F.3d at 1322-23.

In sum, *Birdsall* does not support the district court's "settled practice" instruction, and the government offers no explanation why it does.

iii. Sun-Diamond *Precludes The "Settled Practice" Instruction*

In *Sun-Diamond*, the Supreme Court unanimously stated that the following activities are not "official acts" under section 201(a)(3) (which applies equally to the bribery and gratuity statutes): (i) the President's "receiving [championship] sports teams at the White House"; (ii) the Secretary of Education's "visiting [a] high school"; and (iii) the Secretary of Agriculture's "speaking to the farmers about USDA policy." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999). We contended that the "settled practice" instruction cannot be reconciled with *Sun-Diamond* because, under that instruction, each of the foregoing activities would clearly be an "official act." See Jefferson Br. 24-26.

Again, the government simply does not confront this argument. Nowhere does the government deny that the *Sun-Diamond* activities would be "official acts" under its "settled practice" instruction. Instead, the government offers red herrings. First, the government imputes to us an argument we never made: that *Sun-Diamond* "renders *Birdsall* a dead letter." Gov't Br. 58. To be clear: We did not argue, and do not argue, that *Sun-Diamond* overruled *Birdsall*. To the

contrary, our reading of *Birdsall* is completely consistent with *Sun-Diamond*. As discussed above, *Birdsall* said that the bribery statute can encompass official duties. The activities discussed in *Sun-Diamond* are obviously not official duties, but purely discretionary acts. Therefore, consistent with *Sun-Diamond*, *Birdsall* would not treat them as official acts. The only interpretation of *Birdsall* that conflicts with *Sun-Diamond* is the government's.

The government's next argument—that "the concerns of *Sun-Diamond* are not implicated here" (Gov't Br. 58)—is also beside the point. Whether the *Sun-Diamond* Court had in mind a single concern or many concerns is irrelevant. What matters is that the Court unambiguously stated that the activities discussed above, "while they are assuredly 'official acts' in some sense[,] are not 'official acts' within the meaning of the statute [*i.e.*, section 201(a)(3)]." 526 U.S. at 407.[3]

[3] The government's selective recitation from the six-thousand page record, designed to show that Jefferson's "conduct comfortably fits within [the "official act"] definition's heartland" (Gov't Br. 59-60), is also irrelevant. The scope of "official act" is the very question on appeal, so the government's assertion that Jefferson's conduct falls within its "heartland" simply begs the question what the heartland is.

iv. The "Settled Practice" Instruction Is Unconstitutionally Vague, And In Any Event The Court Should Reject The Instruction Under The Canon Of Constitutional Avoidance

We contended that the "settled practice" instruction is unconstitutionally vague because its key terms—"settled" and "practice"—are each indeterminate. Jefferson Br. 17-23. We further maintained that even if the constitutionality of the instruction were merely in doubt, then, under the doctrine of constitutional avoidance, the Court should reject the "settled practice" instruction in favor of an equally plausible and constitutionally valid construction of "official act" (of which we offer two). *Id.* at 22-23. The government makes various arguments in response. None has merit.[4]

[4] Jefferson clearly has standing to challenge the "settled practice" instruction on vagueness grounds. In selectively quoting the record, the government ignores testimony that Jefferson believed it was lawful for him to do overseas business deals in areas where he did not legislate. Trial Tr., July 13, 2009, at 69. Moreover, the government points to no evidence showing that Jefferson "knew he was one to whom" the particular statute in this case—18 U.S.C. § 201(b)(2)(A)—"clearly applied." Gov't Br. 64. Our very argument is that, properly construed, the statute does not apply. Further, there are numerous reasons why Jefferson might have wanted the consulting contracts not to be in his name—for example, concern that the agreements could violate a criminal statute other than section 201(b)(2)(A); concern that they violated House ethics restrictions; or simply concern that the agreements would show that Jefferson acted in a manner unbecoming of his office, even if not in violation of any criminal law or other rule. Finally, the government quotes the record out of context. For example, Jefferson's reference to the "pokey" clearly alludes to his concern that Jackson would unlawfully defraud Mody if, as Jackson proposed, he falsely declared Mody to have breached their contract. JA777-85.

1. The government first downplays the significance of the "settled practice" instruction. It asserts that all the instruction did was "admonish[] the jury not to *exclude* an act from the 'official' category simply because that act was not prescribed by statute or a written rule or regulation." Gov't Br. 39 (emphasis added). But that dodge will not do. The statutory "official act" definition—which was all the defense wanted the jury to receive—would not have invited a rational jury to convict only on the basis of acts "prescribed by statute or a written rule or regulation." Accordingly, no gloss was needed to avoid any such confusion. Instead, the district court's gloss directed Jefferson's jury to *include* as "official acts" anything it found to be a "settled practice." There is simply no avoiding the significance—and intolerable vagueness—of that instruction.

Nor is it true that the "settled practice" instruction "simply clarified" the meaning of "official act." Gov't Br. 65-66. Rather, the "settled practice" instruction purported to *define* "official act." Indeed, that is exactly what the government told the jury in summation: "The touchstone[,] then, for what qualifies as an official act, are those activities that have been clearly established by settled practice as part of the public official's position." JA4906.

And it simply does not matter that the district court read the statutory definition of "official act" twice. The district court in *Sun-Diamond* likewise "read [the gratuity statute] to the jury twice (along with the definition of 'official act'

from § 201(a)(3)), but then placed an expansive gloss on that statutory language," which led the Supreme Court to order a retrial. 526 U.S. at 403; see also, *e.g.*, *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977) (erroneous instruction not harmless even though "the court defined obscenity correctly" twice).

2. When the government at last confronts our vagueness challenge on the merits, its arguments fall flat. Our opening brief posed some basic questions regarding the meaning of the phrase "settled practice"—*e.g.*, At what level of generality does one define "practice"? How does one know when the practice is "settled"? Jefferson Br. 18. These were not trick questions. They were fair inquiries regarding the minimum information a reasonable congressperson must know to understand whether his or her conduct is "settled practice" and thus punishable under section 201(b)(2)(A) by fifteen years' imprisonment. If the "settled practice" instruction were as comprehensible as the government claims, then the government could simply have answered these questions, even in part.

It has not. Instead, it punts to the dictionary. See Gov't Br. 66. Sometimes, of course, dictionary definitions are clear enough to satisfy the Due Process clause. But not here, where the definitions are themselves ambiguous. Is there any doubt, for example, that a criminal law would be void for vagueness if, as the government suggests, it turned on whether one's "habitual way or mode of acting" was of a

character "about which there is considered to be no room for doubt or question" that it is part of his official position? *Ibid.*[5]

The closest the government comes to explaining what "settled practice" means is its statement that "[a] public official such as defendant thus could easily understand that his actions would be deemed 'official' . . . *if there was no question those actions constituted* ***his*** *customary way of doing* ***his*** *job.*" Gov't Br. 66 (emphasis added). In other words, according to the government, whether conduct is "settled practice" must be determined by reference to the idiosyncrasies of the specific defendant-public official—here, Jefferson.

If this is what "settled practice" means, then the Court should vacate Jefferson's convictions on this ground alone. To start with, if all that matters in defining "settled practice" is *Jefferson's* conduct, then why did the government call an expert witness who did not even *know* Jefferson (see JA3835 ("I think I know [Jefferson] only by sight. . . . I don't think we knew each other well at all.")) to testify about the practices of other congresspersons, but *not* Jefferson? The government's construction also has no basis in the statutory text; it bears no relation to the requirement that an "official act" involve a "question or matter" that

[5] It hardly needs stating that the mere fact that a term is defined in the dictionary does not, by itself, mean that the term is not unduly vague. If that were true, then there could be no such thing as a vagueness challenge. After all, what statute uses words that have *no definition*?

could be "pending" or "by law brought" before the charged public official; and it bears no resemblance to *Birdsall*'s focus on "official dut[ies]." 233 U.S. at 230. It is also no less vague than the "settled practice" language itself. How does one measure whether there is "no question" that Jefferson's conduct "constituted his customary way of doing his job"?

Moreover, the government's construction would cause the bribery statute to constantly shift in scope, as the practices of Members—or even just *one* Member, in the government's view—evolve. This would effectively endow courts with the power to define the bribery offense as they go along. *E.g.*, JA1167 (district court: "[Constituent services] can be an official act if the expert testimony establishes it. We don't know yet. . . . It's what's customary."). While such common-law-making authority is permissible in the civil sphere, it is of course verboten in the criminal arena. *United States v. Bass*, 404 U.S. 336, 348 (1971).

Imaginary Images, Inc. and *Giovani Carandola* are clearly inapt. See Gov't Br. 66. Neither had anything to do with "settled practice." The former was a civil suit brought by stripclubs to challenge a liquor regulation that prevented them from serving mixed drinks. *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 741 (4th Cir. 2010). The only terms the Court construed were "striptease," "partially nude," and "clad both above and below the waist." *Id.* at 750. *Giovani Carandola* was similar. See *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079-81 (4th Cir.

2006) (construing "simulate" and "fondling"). Nor does it matter that the phrase "settled practice" may be "common usage." Gov't Br. 66. Many phrases and slang are "'matter[s] of everyday speech'" (*ibid.*), but that does not make them definite enough to be the basis of federal criminal laws. It is likewise irrelevant that the Supreme Court has happened to use the phrase "settled practice" in some of its opinions. Gov't Br. 67. Certainly, the government identifies no case in which the Supreme Court used "settled practice" to *construe* a criminal statute.[6]

3. Finally, the government caricatures our discussion of McHugh's testimony as a "dress[ed] up" sufficiency-of-the-evidence challenge. Gov't Br. 70. It is not. We do not claim that the evidence was insufficient to meet the "settled practice" test, whatever that is. Instead, we challenge the validity of that instruction—here, because it is unconstitutionally vague. We recount McHugh's testimony because it exemplifies just how slippery, shifting, and sinuous the phrase "settled practice" is. McHugh's testimony alone discloses no fewer than four different "practices" that could constitute an "official act"—constituent services generally; introducing domestic businesses to foreign officials; pitching their business to foreign government entities; and connecting them with foreign private sources of capital—and a like number of standards to measure whether the

[6] Other than *Birdsall*. On that, see *supra* at I.A.ii.

"practice" (whatever it is) is "settled." See Jefferson Br. 19-21. A criminal statute cannot constitutionally turn on a phrase so obtuse that an expert witness must elucidate it, especially when the testimony only underscores its vagueness.

4. Even if the "settled practice" instruction were not vague beyond doubt, its constitutionality is surely *in* doubt. Fourth Circuit law requires the Court to adopt an equally plausible and constitutionally valid construction of "official act." See Jefferson Br. 22-23 (citing cases). We have offered two such constructions, and defend them below.

B. "Official Act" Must Involve A Legislative Act, Or At Most A Government Decision, But In All Events Excludes Foreign Government Decisions

i. The Text, History, And Purpose Of The Bribery Statute Show That "Official Act" Means Legislative Act When The Public Official Is A Congressman

1. It is undisputed that section 201(a)(3) restricts "official acts" to questions or matters that could be "pending" or "by law be brought" before the defendant-public official. 18 U.S.C. § 201(a)(3). We contended that the most natural reading of these terms—in light of their juxtaposition and their entrenched use throughout the United States Code (among myriad other rules and regulations)—is that they connote formal processes, which for Congressmen mean conduct that is part of the formal legislative process. By contrast, questions decided outside the legislative branch, such as by an executive agency, are

"pending" or "by law brought" before the public officials *in that agency*, but not before the defendant-Congressman. The government resists this interpretation. But its arguments either offer no plausible construction of "pending" and "by law brought" or simply read those terms out of the statute.

The government claims that Congress did not "confine 'pending' to formal causes, suits, or proceedings" because section 201(a)(3) additionally refers to "question[s]" or "matter[s]"—terms which the government views as informal. Gov't Br. 46-47. But this just begs the question what "pending" and "by law brought" mean, and hence *which* "question[s]" and "matter[s]" count under section 201(a)(3). Not even the government claims that a "question" or "matter" could come within section 201(a)(3) if it were not of a class that could be "pending" or "by law brought." Further, the terms "question" and "matter" are not informal. To the contrary, "relying on the canon of *noscitur a sociis*, . . . the words 'question' and 'matter' are known by the company that they keep." *Valdes*, 475 F.3d at 1323. As even the government acknowledges (at 46-47), that company—"cause, suit, proceeding or controversy"—consists of formal proceedings.

The government next challenges our contention that the United States Code routinely uses "pending" to connote formal proceedings. It claims that it is just as easy to find "instances where Congress has deployed 'pending' in its conventional—informal—sense." Gov't Br. 47 & n.21. If so, the government

does not identify any. Three of the four statutes it cites use "pending" as a different part of speech (preposition) than how section 201(a)(3) uses it (adjective).[7] The lone exception—2 U.S.C. § 2006, limiting Congressmen to one "pending" request "for the assignment of a vacant room"—cuts clearly in our favor. Requests for office assignments are not informal, but require Members to "file with the Architect of the Capitol a request in writing," which is resolved through specific criteria based on length of tenure, as prescribed in 2 U.S.C. § 2005.

Unable to explain why "pending" should not be construed in its traditional, formal sense (the government does not try to argue that "by law brought" could have an informal construction), the government shifts gears and claims that constituent requests *themselves* are "pending" before Congressmen in the formal sense, pointing to Jefferson's old congressional website. Gov't Br. 43-44, 47-48. But if this were true, then any act would be "official" merely because a constituent requests it, regardless what the act is. Suppose for example that a Member attends a birthday party or barbeque (or, similar to *Sun-Diamond*, speaks at a high school).

[7] See 5 U.S.C. § 5534a ("member of a uniformed service . . . who is on terminal leave pending separation from, or release from active duty in, that service"); 10 U.S.C. § 702(b)(1)(A) ("pending separation from the Academy") and (B) ("pending return to the Academy"); 12 U.S.C. § 1747k ("pending the restoration of dwelling or nondwelling facilities damaged by fire").

These are clearly not "official acts," even if attendees perceive the Member in his official capacity. Yet, in the government's view, they would become "official" if the Member happened to attend at a constituent's behest. This makes no sense. The contingency of a constituent request should not transform an unofficial act into an official one—or, put differently, transform a question that is not "pending" into one that is.

These hypotheticals are not speculation. To the contrary, the government has embraced situations like this from the start. The government has been quite clear that in its view: (1) Because "official act" means "settled practice," and (2) because it is "settled practice" for Congressmen to perform constituent services, therefore (3) *any* action performed by Congressmen at the behest of constituents—which the government defines as *any* person or business in America—is *per se* an "official act," no matter what the action is. *E.g.*, Dkt. 62 at 14 n.9; Dkt. 140 at 4 n.2; JA1018, 1020-24, 1161-62, 1164-68, 2409. Thus, in the government's view, it is just as much an "official act" for a Congressman to introduce a bill as it would be for him to ask a purely private citizen to invest in a purely private company at the company's behest—a radical implication that even Judge Ellis found hard to swallow. See JA1020 ("Raising money from a private constituent is not an official act, is it?").

The more sensible view is to focus on the character of the Member's act, not the happenstance whether a constituent requested it. Thus, under the legislative acts construction, it would be an official act for a Member to introduce a bill at the behest of a constituent—not because the constituent asked for it, but because introducing legislation is an official act. And, under *Valdes* (discussed *infra*), it would be an official act for a Member to influence an executive agency decision at a constituent's behest—not because the constituent asked for it, but because exerting such influence is an official act. By contrast, it would not be an official act for a Member to attend a barbeque—*regardless* whether a constituent asked him to attend. Our construction not only captures acts that are sensibly described as "official," but also avoids unnatural contortions in the text that the government's construction requires. *E.g.*, JA1168 (Government: "Vernon Jackson is a matter or decision pending before this [M]ember of Congress.").[8]

2. The government next claims that *Birdsall* forecloses our legislative-acts construction. Gov't Br. 45-46. *Birdsall* does not. It could not. *Birdsall* did not involve officials in the legislative branch, much less address whether the

[8] Even if "constituent services" categorically were "official acts," that still does the government no good. The district court did not charge the jury that "official act" means "constituent services," but rather "settled practice." And that vague term swallows swaths of conduct the government relied on but which involve no "pending" questions, such as ministerial tasks performed by staffers. See Jefferson Br. 11-12; see also *infra* at I.C.

bribery statute should be confined to legislative acts when the defendant is a Congressman. It addressed only whether the bribery laws cover conduct that is not mandated by statute. The government claims (at 46) that "*Birdsall* makes clear [that] there is no necessary formality attendant to those questions or matters which may by law be brought before a public official." But this is doubly wrong. Where a question is brought *"by law"* before a public official, it is necessarily brought formally—how else is such a question brought? Further, *Birdsall did* involve a formal question: the question whether the bribe-receiving defendants should recommend clemency, which it was manifestly their duty to decide.

The government also claims that our legislative-acts construction of "official act" has been "rejected by the federal courts"—meaning two Second Circuit decisions. Gov't Br. 48. We acknowledge that our construction is at odds with *Biaggi* and *Carson*. But this should not deter the Court. There is no indication that either court was presented with the arguments we have made, including the significance of the terms "pending" and "by law brought," the legislative history of the bribery statute, the relationship of that statute to other ethics offenses, and the limited import of *Birdsall*. And, while *Biaggi* stated that the language of section 201(a)(3) "does not mention legislative acts," the Court did not ground its broader interpretation of "official act" within the statutory text. See 853 F.2d at 97. *Biaggi* and *Carson* also predated *Sun-Diamond*, in which the Supreme Court instructed

that, when construing bribery and conflict-of-interest statutes, courts should use a "scalpel" and not a "meat axe." 526 U.S. at 412. Finally, former-Congressman Biaggi would still have been guilty under a legislative-acts construction of "official act" because he promised, among other things, "to introduce a bill in Congress" to benefit the bribe payor's company. 853 F.2d at 98.[9]

3. The government's effort to avoid the grip of the legislative history is unavailing. The government acknowledges that the terms of section 201(a)(3) "have not been altered to any substantial extent since" 1866. Gov't Br. 52 (quotation marks omitted). The government further acknowledges that, during this time, the bribery statute covering Congressmen used "pending" specifically to refer to questions or matters pending in "either House of Congress, or before any committee thereof." 18 U.S.C. §§ 204, 205 (1958); see Gov't Br. 55. And, the government acknowledges that the 1962 Congress made "no significant changes of substance" to then-existing law. Gov't Br. 53 (quotation marks omitted). The natural inference from these propositions—each of which the government admits—is that "official act" continues to refer to legislative acts when the defendant-public official is a Congressman.

[9] The government's citation to *Brewster* (at 51) is inapt. That case said nothing about the meaning of "official act" in the bribery statute, but addressed only the scope of the Speech or Debate Clause.

The government responds that the enacting Congress meant to incorporate the broad construction that pre-1962 judicial decisions had accorded the bribery statute. Gov't Br. 52-54. We agree—but the government identifies no pre-1962 decision that is contrary to our construction (and none at all, other than *Biaggi* and *Carson*). Nor is our construction "narrow." It may be narrow*er* than the government's preferred (and seemingly limitless) "settled practice" instruction, but it still covers a panoply of activity, including the initiation of legislation, committee work, investigations, fact-finding expeditions, and voting, among countless other congressional activities.

The only specific attack the government offers against our construction is that it renders section 201(a)(3) non-uniform, contrary to Congress's intent. Gov't Br. 55. But there is nothing non-uniform about construing "pending" as we propose. In each context, "pending" (and "by law brought") mean those types of "question[s], matter[s], cause[s], suit[s], proceeding[s] or controvers[ies]" that involve formal proceedings before the relevant official. For Congressmen, "pending" means the formal legislative process; for executive branch officials, it means the formal executive process; and so on. In a misguided effort to avoid a false non-uniformity, the government reads "pending" and "by law brought" out of the statute entirely.

The government also claims that our legislative-acts construction is somehow diminished by the fact that the pre-1962 bribery statutes applicable to Congressmen defined official acts to include questions or matters that could be brought before a Congressman "'by law or under the Constitution.'" Gov't Br. 55. We do not see how this argument favors the government. To the contrary, the language "by *law* or under the *Constitution*" further underscores the formality of the questions and matters these statutes covered. Moreover, we can think of no question that could be brought before a Member "by law or under the Constitution" that would *not* be part of the legislative process. Certainly the government identifies none.[10]

4. We also contended that the purpose of the bribery statute and its relationship to numerous other corruption-related statutes support our legislative-acts construction. Jefferson Br. 31-33. The government responds that our construction would somehow subvert the purpose of section 201(b)(2)(A) because, "'[w]hen a bribe is exchanged, the parties have, in effect, conspired to deprive the

[10] Quoting the 1962 Senate Report, the government states (at 53) that "official act" was "'defined to include any decision or action taken by a public official in his capacity as such.'" No court has ever accorded this language its literal meaning, under which *every* action a public official performs in his official capacity, no matter how menial or infrequent, and no matter the nature of the question involved, is automatically an "official act." Accordingly, nowhere below or in its brief does the government advocate this construction.

United States of the honest services of its official.'" Gov't Br. 60 (quoting H.R. Rep. No. 87-748, at 6). This quotation, though, merely assumes the truth of the government's argument—that a "bribe" *has been* "exchanged"—and sheds no light on *whether* a bribe has been exchanged, which is the only pertinent question.

The government's remaining arguments rest on two related and fundamental misunderstandings: first, that conduct like Jefferson's will go unpunished unless it falls within section 201(b)(2)(A); and second, that the numerous other statutes and regulations pertaining to public corruption exert no interpretative influence on the scope of section 201(b)(2)(A).

Both premises are greatly mistaken. As *Sun-Diamond* emphasized, public ethics is among the most highly regulated areas of law. See 526 U.S. at 409-12. Section 201(b)(2)(A) is just "one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *Id.* at 409. If "official act" were construed to mean legislative acts, then a Member's paid efforts to influence an executive branch decision, such as the government's hypothesized award of an Air Force contract (Gov't Br. 61), would scarcely escape punishment. Such efforts would not only presumably violate numerous regulations (*e.g.*, House of Representatives Rule XXIII (Code of Official Conduct); House of Representatives Rule XXV (Limitations on Outside Earned Income and Acceptance of Gifts)) but would

almost surely lead to imprisonment under an offense other than section 201(b)(2)(A), such as nearby section 203(a) (discussed further *infra*).

Sun-Diamond also underscored that courts, when interpreting section 201 and other ethics provisions, should construe such laws to be in harmony, rather than conflict, with one another:

> [T]his is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should be reasonably taken to be the latter.

526 U.S. at 412. This admonition exists on top of the "fundamental rule of criminal statutory construction that statutes are to be strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has 'plainly and unmistakably' proscribed." *United States v. Sheek*, 990 F.2d 150, 153 (4th Cir. 1993).

Yet, reading section 201(b)(2)(A) as the government would—essentially, as a catch-all provision encompassing any conduct that a Congressman performs in his official capacity in return for payment—would cause that section to encroach irrationally on nearby section 203(a). As we have explained (Jefferson Br. 31-32), section 203(a), which was enacted simultaneously with section 201, targets the precise harm the government hypothesizes: Members who accept payment in return for trying to influence decisions in other branches. See, *e.g.*, *United States*

v. Myers, 692 F.2d 823, 855 (2d Cir. 1982) (section 203 is "primarily concerned with government officials' being paid to bring their influence to bear on federal agencies"); *United States v. Johnson*, 383 U.S. 169, 188 (1966) (Warren, C.J., concurring in part and dissenting in part) (Congressman's effort to influence Justice Department prosecution is "the classic example of a violation" of section 203's predecessor).[11] It would make no sense for Congress to have wanted to punish such conduct by only five years' imprisonment under section 203(a), but (under the government's construction) to punish the very same conduct under section 201(b)(2)(A) by up to fifteen years' imprisonment.

The government tries to dismiss the significance of section 203(a), but its arguments are all mistaken. The government claims that the scope of section 203(a) is irrelevant to ascertaining the scope of section 201(b)(2)(A). Gov't Br. 62-63. But *Sun-Diamond* says just the opposite when it comes to construing the "intricate web" (526 U.S. at 409) of ethics offenses. The government claims that section 203(a) "does not require a corrupt intent" (Gov't Br. 62), but this Court has squarely held that it does. See *United States v. Johnson*, 419 F.2d 56, 60 (4th Cir.

[11] Section 203(a) punishes any Member of Congress who seeks or accepts compensation "for any representational services" rendered in relation "to any proceeding, application . . . or other particular matter in which the United States is a party or has a direct and substantial interest[] before any department [or] agency." 18 U.S.C. § 203(a)(1).

1969) (construing statutory predecessor to section 203; "We hold, therefore, that the statute implicitly requires scienter."). And the government claims that section 203(a) is a poor fit for the charged conduct in this case, even though the Justice Department's own opinions say the opposite (see *Conflict-Of-Interest Statutes; Intermittent Consultants Or Advisers*, 42 Op. Att'y Gen. 111, 119-20 (1962) (construing predecessor statute; "[The statute] was designed to prohibit a Member of Congress . . . from using whatever influence or purported influence he might have anywhere in the Government departments or agencies as a means of obtaining income from outside sources"); *id.* at 120 ("primary objective is to prevent the corrupt selling of influence"); *18 U.S.C. § 203 And Contingent Interests In Expenses Recoverable In Litigation Against The United States*, 22 Op. O.L.C. 1, 4 (1998) (same)), and the government has used this statute to prosecute virtually identical conduct in other cases, including in this very Court. See, *e.g.*, *Johnson*, 419 F.2d at 57 (upholding conviction of Congressman under precursor to section 203 for "receiv[ing] payment for attempting to have the Justice Department dismiss a mail fraud indictment"); *Burton v. United States*, 196 U.S. 283, 285-86 (1905) (construing precursor to section 203 to encompass a Senator's paid-for efforts to "induc[e] the Postmaster General, the chief inspector, and other officers to decide the question then pending before the Post-office Department in a way favorable to the Rialto Company").

We do not mean to suggest that section 203(a) is dispositive of the scope of section 201(b)(2)(A). But when you consider all the evidence—that the text of section 201(a)(3) ("pending" and "by law brought") connotes formal proceedings; that since the nineteenth century "pending" has referred to matters pending in Congress or its committees when it comes to Congressmen; that the 1962 Congress made no substantive changes to such law; that *Sun-Diamond* commands courts to construe ethics offenses narrowly to avoid unnecessary overlap; and that section 203(a) punishes the very conduct the government now claims section 201(b)(2)(A) should be construed to punish, but through *one-third* the length of imprisonment—then maybe it is not our construction that is "cramped" (Gov't Br. 40), but the government's that is bloated.

ii. If The Court Declines To Adopt The Legislative-Acts Construction Of "Official Act," It Should Adopt The Construction Articulated By The D.C. Circuit In Valdes

For the reasons above, we think the indicia of congressional intent show that, for Congressmen, "official act" means legislative acts, and that paid efforts to influence questions "pending" or "by law brought" outside of the legislative branch are punishable by other rules and statutes, such as section 203(a). If the Court nevertheless declines to construe "official act" this way, it should adopt the slightly broader construction articulated by the en banc D.C. Circuit in *Valdes*. As we explained (Jefferson Br. 34-35), *Valdes* defined "official act" to mean action on

questions that are pending before any branch of government. See *Valdes* 475 F.3d at 1324 ("official act" means action on "questions or matters whose answer or disposition is determined by the government").

The government does not offer much opposition to this construction.[12] Instead, it asserts that *Valdes* "does not conflict with [its] definition of 'official act'" and, in any event, does not necessitate retrial. Gov't Br. 72-74. Both assertions are incorrect. We address the latter *infra* (at I.C) and the former here.

The government claims that *Valdes* is consistent with its definition of "official act" because both *Valdes* and the government agree with "*Biaggi*'s 'official act' holding." Gov't Br. 72. This much is accurate. Under *Valdes*, former-Congressman Biaggi performed an "official act" when he tried to influence the award of a Navy contract, because the award was a question pending before a branch of government (the executive branch). See *Valdes*, 475 F.3d at 1325 ("our

[12] The government says (at 73) that "*Valdes* is an out-of-Circuit decision that this Court is not bound by," citing *Moore*. *Moore* concluded that *Valdes*'s construction of "official act" was precluded by the "controlling precedent" of *Birdsall*. *United States v. Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008). But *Valdes* itself considered and rejected this argument (475 F.3d at 1323), and the government does not make it here. Nor can the government dismiss *Valdes* as being "concerned" only with public officials' moonlighting or "misuse of government resources." Gov't Br. 73-74. *Valdes*'s construction is based on the statutory text. See 475 F.3d at 1323-24.

interpretation of ["official act"] easily covers . . . a congressman's use of his office to secure Navy contracts" (citing *Biaggi*)).

But this is where the similarity ends. Whereas *Valdes* requires a question or matter resolvable by the government, the cavernous "settled practice" instruction does not. Instead, as noted, it encompasses "constituent services": *any* act a Member performs at *anyone's* behest. Indeed, it goes farther still. As the prosecution argued below, it would be an "official act" *anytime* a Congressman asks staff members to do *anything*, because it is "settled practice" for Congressmen to make use of staffers and other congressional resources. See, *e.g.*, JA82-83, 104-05, 4961, 5094-95; Dkt. 62 at 5 n.3.

Valdes is not just inconsistent with these constructions of "official act," but outright repudiated them. There, as here, the "government maintain[ed] that the bribery . . . statute should be construed broadly, to encompass essentially any action which implicates the duties and powers of a public official." 475 F.3d at 1322; see also *ibid.* (government's position, citing *Birdsall*, was that "the specific requirements of [section] 201(a)(3) are 'equivalent' to a statute that would simply prohibit 'any decision or action within the scope of the official's authority'"). But the en banc court rejected this argument: "The government's position, however, both misinterprets the Supreme Court and ignores the plain text of the statute." *Ibid*. Likewise, citing its decision in *United States v. Muntain*, 610 F.2d 964 (D.C.

Cir. 1979), the en banc court rejected the proposition that the misuse of government resources could alone be an "official act." See *Valdes*, 475 F.3d at 1324 (refusing to construe "official act" to mean "the misuse of public office and contacts gained through that office to promote private ends" (internal quotation marks omitted)).[13]

iii. Regardless, "Official Act" Does Not Encompass Foreign Government Decisions

We contended in our opening brief that regardless how the Court construes "official act," that term does not encompass questions that only foreign governments can resolve. Jefferson Br. 36-37. To be clear, the legislative-acts and *Valdes* constructions each cover a significant amount of conduct pertaining to foreign matters. For example, the legislative-acts construction would encompass a Member's vote on whether to grant foreign aid, a hearing on whether to approve a treaty, and action on any other foreign-related question that is subject to resolution

[13] *Muntain* involved an official in the Department of Housing and Urban Development who was convicted under the gratuity statute for participating in a "private scheme to sell group automobile insurance to labor unions." 610 F.2d at 966. The D.C. Circuit reversed on the ground that there was no "official act" because the Department lacked authority over the sale of insurance to labor unions. *Id.* at 967-68 ("[Muntain's] conduct [was] reprehensible, but it is not criminal within the strictures of [the statute]."). Nor did it matter that Muntain had "directed his subordinates to assist . . . in promoting the insurance scheme," because "[t]he crucial question . . . is whether in directing his subordinates to act, Muntain himself engaged in an 'official act,'" which the court concluded he did not. *Id.* at 969.

by the legislative branch. (It bears repeating that the government has never alleged Jefferson performed any legislative acts in return for payment—that is why the government needs the "settled practice" instruction.) And, under *Valdes*, a Congressman's efforts to influence questions pending or brought by law in another branch of government, such as the State Department or Export-Import Bank, would also be "official acts." But what is *sui generis*, and is not the basis of an "official act," is a question that is resolvable only by a foreign government, such as whether to contract with a private business.

We argued that this conclusion is compelled by the plain terms of section 201. Jefferson Br. 36. In particular, section 201(a)(3) restricts "official acts" to questions or matters that are "before any *public official*." 18 U.S.C. § 201(a)(3) (emphasis added). And section 201(a)(1) states that "the term 'public official' means . . . an officer or employee or person acting for or on behalf of the United States." 18 U.S.C. § 201(a)(1). We contended that a question that is before a *foreign* government cannot be one that is before a United States employee or someone acting "for or on behalf of the United States." We further posited (at 36-37) that construing "official act" to reach foreign government decisions would lead to bizarre results in light of section 203, which specifically targets the harm caused by Members who lobby government entities in return for payment, yet imposes no punishment on Members who lobby foreign governments, and only five years'

imprisonment (not fifteen, as in the bribery statute) on Members who lobby United States entities.

The government does not respond to these points. Instead, the entirety of its argument is nestled in three sentences on page 72. The government claims that because *Biaggi* held that "official act" includes a Congressman's attempt to influence a New York City government decision, therefore "official act" equally extends to any question pending before any foreign government, whether a Nigerian national decision, a municipal election in Fiji, or anything in between.

The government pushes *Biaggi* far beyond its limits. *Biaggi*, of course, involved no foreign government decision and so did not address this issue. Nor can its reasoning be applied by analogy. The government identifies no evidence that Congress meant to punish efforts to influence purely foreign-government decisions. Courts follow the "'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Small v. United States*, 544 U.S. 385, 387-88 (2005) (holding that the phrase "convicted in any court" "encompasses only domestic, not foreign, convictions"). When Congress wishes to target harm caused to foreign governments by unethical acts, it has done so expressly. See, *e.g.*, 15 U.S.C. § 78dd-2(a) (Foreign Corrupt Practices Act; punishing payment to "any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity").

Thus, the Court should exclude foreign government questions as predicates of "official acts." This follows not just from the reasons above, but from basic principles of fairness and lenity. As Judge Ellis noted (JA4652), no court has ever held that "official act" extends this far. The government itself admitted that applying the statute in this way is "extreme." JA4710-11 (describing spectrum of "official acts" at which "the other extreme, the one I think the defendant can contest the most which is a member lobbying a foreign official on behalf of a US business to assist them"). And, while we think the plain terms of the statute show that "official act" does *not* encompass efforts to influence foreign government decisions, surely the statute is at most ambiguous as to whether it *does*—the government, at least, identifies no text or history supporting its construction. "Under a long line of [Supreme Court] decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008); see Jefferson Br. 33-34 (citing cases).

C. The Erroneous "Settled Practice" Instruction Was Highly Prejudicial

The government acknowledges that the convictions on Counts 3 and 4 must be reversed if "official act" means a legislative act in the case of Congressmen. Gov't Br. 71. This is because the government has never alleged or sought to prove

that Jefferson was influenced to perform a legislative act in return for receiving a thing of value.

The government is clearly wrong, however, when it asserts (at 71) that retrial on those Counts is not needed if the Court construes "official act" according to *Valdes*. In that event, Jefferson's conviction may be affirmed only if the government can prove "beyond a reasonable doubt that the jury verdict would have been the same absent" the erroneous "settled practice" instruction. *United States v. Davis*, 270 F. App'x 236, 252 (4th Cir. 2008) (internal quotation marks omitted); see also *United States v. Hastings*, 134 F.3d 235, 241 (4th Cir. 1998).

The government cannot nearly satisfy this "exacting test." *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977). Absent from the government's brief is any mention of the wealth of evidence it put to the jury that would show an "official act" under the erroneous "settled practice" instruction but not under

Valdes.[14] See Jefferson Br. 41-43. The bulk of the government's case has always concerned Jefferson's interactions with foreign officials and private entities while abroad—none of which is cognizable under *Valdes*. The government previewed such evidence in its opening statement,[15] presented it at length during trial—

[14] Instead, the government focuses on only the fraction of evidence concerning Jefferson's contact with domestic government entities. Gov't Br. 73. The government presents this evidence in a misleading and greatly overstated light. For example, the government claims that Jefferson "issued a congressional inquiry" (Gov't Br. 6) to the Army to discuss the iGate product—but does not say that the Army officer in question testified that he "did not" understand Jefferson to be acting on the iGate owner's behalf (JA1604), that Jefferson never asked the officer to "overlook any . . . problems" with the iGate product (Trial Tr., June 26, 2009, at 177), that the Army had planned to test the iGate product before the officer ever spoke to Jefferson (*id.* at 178), that Jefferson "didn't attempt to order [the officer] to do more tests" (*id.* at 179), and that the officer "didn't feel like [Jefferson] was pressuring [him] to take some action [he] didn't intend to take" (*ibid.*). The government's account of Jefferson's other alleged "intercessions" is similarly incomplete. *E.g.*, *id.* at 109-13.

[15] *E.g.*, JA271 ("The congressman flew first to Nigeria with Vernon Jackson and others, where he met with a variety of high-ranking officials and ministers regarding the iGate deal"); JA279 ("[Jefferson] had access to the president and vice-president of Nigeria"); JA280 ("[Jefferson] had a series of meetings with high level Ghanian officials, including the vice-president and the minister of communications.").

through no fewer than eight witnesses,[16] and then recounted it in summation.[17] Indeed, of the 23 pages of the government's brief discussing the Count 3 and 4 conduct, 16 refer to Jefferson's foreign interactions.

The instructional error would still not be harmless—much less harmless beyond a reasonable doubt—if "official act" encompassed efforts to influence government decisions of any kind, foreign or domestic. The government amassed hoards of evidence of purported "official acts" that involved merely logistical assistance provided by Jefferson's staff members and others. This included travel itineraries, official transportation, official greetings while abroad, *etc.*—virtually

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[16] For just a sampling, see JA435-36, 453-57, 471-73, 501-15, 541-60, 665-72, 1083-85, 1096, 1192-1202, 1311-23, 1326-28, 1333-59, 1387-88, 1449-53, 1456-70, 1617-66, 1667-68, 1697-1702, 2027-54, 2283-85, 2289-91, 2335-37, 2560-69, 2610-19, 2632-34, 2647-62, 2703-15, 3207-37, 3275-77, 3301-11.

[17] *E.g.*, JA4938 ("The Congressman also told both Dumebi and Jackson that he could help the venture by influencing foreign government officials. The Congressman told them that he had a close relationship with the president of Nigeria, the vice-president of Nigeria, and the Nigerian Communications [C]ommission. At that time, the vice-president of Nigeria was in charge of telecommunications and he oversaw the Ministry of Communications and NITEL. These contacts were critically important because numerous Nigerian government approvals were absolutely necessary to the success of the iGate/NDTV venture."); JA4940 ("[H]e expected Jefferson to arrange meetings with heads of state and heads of government agencies in Nigeria to secure all necessary approvals to permit iGate/NDTV ventures to proceed."); JA4945-46 ("In Nigeria, Jefferson met with high ranking government officials including the president of Nigeria, the vice-president of Nigeria, and the chairman of the Nigeria Communications [C]omission."); see also, *e.g.*, JA4947-49, 4960-64, 5073-75.

any trapping of office short of the congressional sink. The government charged that these trappings were *themselves* "official acts." See JA116 (indictment; alleging as "official acts" the "use of congressional staff members"); JA118 (same). The government lost no chance to emphasize these trappings at trial—in its opening statement,[18] expert testimony that it was "settled practice" for Congressmen to use official resources,[19] testimony of staffers and others of official assistance provided,[20] and summation.[21] Further, the government argued that Jefferson performed "official acts" any time he solicited private investors for capital, reasoning that such entreaties amounted to "constituent service" and hence

[18] *E.g.*, JA271 ("The congressman had his congressional staff help coordinate this trip through the US State Department. He traveled there on his official passport, and he was met by US Embassy personnel at these destinations."); JA279-80 ("He traveled there on his official passport, was met at the airport by US embassy personnel, and also had a briefing at the US embassy in Ghana.").

[19] See JA3827 (McHugh agrees that "[M]embers routinely utilize staff resources to provide the services and assistance requested" when helping constituents).

[20] This included testimony by Jefferson's former chief of staff (Lionel Collins), acting chief of staff (Roberta Hopkins), legislative assistant (Angelle Kwemo), and senior policy advisor (Melvin Spence), among others. For a sampling of the copious testimony concerning official logistical assistance Jefferson received, see Jefferson Br. 11-12.

[21] *E.g.*, JA4961 ("Jefferson also had the staff arrange the travel, prepare an itinerary for the trip, secure visas for the trip participants, and make arrangements with the State Department in Ghana."); JA5095 ("And it wasn't just [Chevy] Suburbans. Expeditors, country debriefings, logistics, assistance with setting up meetings with high-ranking officials in all of these countries.").

"settled practice," even though they involved no government decision of any kind.[22] Guided by the elastic "settled practice" instruction, the jury could easily have based its findings of "official acts" on this evidence, even if it discredited *all* the evidence concerning meetings with foreign and domestic government entities.

Finally, the government's harmless error argument has even less merit when considered in light of the fact that Judge Ellis *sua sponte* proposed submitting interrogatories to allow the jurors to identify which specific acts they concluded were "official acts." See JA4651-52. Judge Ellis reasoned that, should this Court disagree with the "settled practice" definition, such interrogatories might avoid rendering "the verdict unsustainable." JA4654. The government twice opposed the offer (JA4654-55, 4709-12), and the idea was eventually dropped (JA4712).

II. THE "AS-NEEDED BASIS" *QUID PRO QUO* INSTRUCTION WAS ERRONEOUS

Our opening brief contended that Jefferson's convictions on Counts 3 and 4 should be reversed for the independent reason that the district court gave an erroneous *quid pro quo* instruction. Jefferson Br. 43-47. Our argument rested on two propositions: first, that *Sun-Diamond* requires proof of a "specific 'official

[22] *E.g.*, JA4937 (summation: "In April 2001, for instance, at Jefferson's recommendation and urging, Horace Bynum, an elderly pharmacist and James Smith who you heard from, each paid $100,000 for 80,000 shares of iGate stock."); JA983-1009 (testimony of James Smith); JA1178-89 (testimony of Lynn Bynum).

act'" (526 U.S. at 414) to establish an offense under section 201 (whether gratuity or bribery); and second, that the district court's "as-needed basis" instruction did not require such proof, but instead allowed the government to show only that Jefferson agreed to be influenced in the performance of unspecified future acts.[23] The government contests neither proposition, yet claims the instruction is valid nonetheless. The government is mistaken.

1. An accurate definition of *quid pro quo* is crucial because, as the government recognizes, it is all that separates an unlawful bribe from a lawful goodwill gift. Gov't Br. 75. This is because there is nothing inherently illegal in paying a public official with the intent to influence his conduct in one's favor. So long as the payor's hope is "generalized," the payment is merely a lawful goodwill gift. *United States v. Jennings*, 160 F.3d 1006, 1020-21 & n.5 (4th Cir. 1998). What transforms such a gift into an unlawful bribe is if the gift is designed "to induce a *specific* act" (*id.* at 1021 (emphasis added))—or, from the perspective of the payee, to be influenced in the performance of a specific act. This was Fourth Circuit law prior to *Sun-Diamond*, and is also what *Sun-Diamond* unmistakably

[23] The relevant part of the instruction stated that the "quid pro quo requirement *is satisfied* if you find . . . that the defendant agreed to accept things of value in exchange for performing official acts *on an as-needed basis, so that [whenever] the opportunity presented itself, he would take specific action on the payor's behalf*." JA5151 (emphasis added).

said: "that some ***particular*** official act be ***identified*** and ***proved***." 526 U.S. at 406 (emphasis added); see also *id.* at 409 (language of gratuity statute pertains to "*particular* official acts" (emphasis in original)); *id.* at 414 ("the Government must prove . . . a specific 'official act'").

The fundamental defect of the "as-needed basis" instruction is that it does not require the jury to connect a payment to *any* particular official act. Instead, the instruction requires proof only that the payee abstractly agreed to perform *unspecified* future acts. The difference has profound consequences. In most cases, the government will be able to point to a series of payments and a series of acts benefitting the payor. These payments may be bribes. But they may just as well be goodwill gifts. The only safeguard in distinguishing the two is by requiring the jury to *tie* the acts to the payments—not necessarily one-for-one, but at least *some* for *some*. Otherwise acts that happen to benefit the payor, but which in fact were not influenced by the payments, could wrongfully be swept into the bribery statute. Yet, that is exactly what the "as-needed basis" instruction invites by not requiring the jury to find *any* connection between the particular acts that Jefferson did and

the payments that allegedly induced those acts. Indeed, the government does not claim otherwise.[24]

The error was especially prejudicial here. As discussed above (at I.C), the government used the capacious "settled practice" instruction to amass a huge array of purported official acts. It also pointed to various payments from Jackson's and Mody's companies to Jefferson's family. Under the "as-needed basis" instruction, which the trial court presented as dispositive of the *quid pro quo* requirement (JA5151 ("quid pro quo requirement *is satisfied if*" (emphasis added))), the jury could simply have looked at the government's list of purported official acts, as well as its list of payments to Jefferson's family, and concluded that they were bribes, *even if the jury did not think that any of those particular acts were performed in return for the payments*. By contrast, had the jury been required to tie the acts to the payments, it certainly could have acquitted. For example, there was abundant evidence that neither Jefferson, Jackson, nor Brett Pfeffer (Mody's associate) viewed the financial interests as bribes, but rather as legitimate compensation in return for Jefferson's helping iGate procure capital.[25]

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[24] The government notes (at 77) that the district court's "as-needed basis" instruction refers to "specific action." But that vague reference will not do. Whatever this phrase means, it clearly does not require that "some particular official act be identified and proved." *Sun-Diamond*, 526 U.S. at 406.

[25] See, *e.g.*, JA896-900, 916-19, 968-69, 975-77, 2162-66.

2. None of the government's responses reckons with the basic argument above. The government tries to brush *Sun-Diamond* aside by limiting it to the gratuity statute. Gov't Br. 76-78. But the Supreme Court grounded its reasoning in statutory text—"any official act"—that is identical in both the gratuity and bribery statutes. See 18 U.S.C. §§ 201(b)(2)(A), 201(c)(1)(B). The Supreme Court concluded that it would make no sense for Congress to draft the statute as such, and then expressly define "official act" in section 201(a)(3), if Congress did not intend section 201 to require proof of a *specific* official act: "The insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." 526 U.S. at 406. Moreover, for the reasons described above, the Supreme Court's concern with not punishing lawful goodwill payments is just as germane here as it was in *Sun-Diamond*.

The government also claims that this Court's precedents authorize the "as-needed basis" instruction. Gov't Br. 75-76, 78-79. Even if that were true,[26] it is irrelevant. The "as-needed basis" instruction derives from cases decided before *Sun-Diamond*, and our argument is that *Sun-Diamond* abrogated the instruction. While *Quinn* and *Harvey* were decided after *Sun-Diamond*, *Quinn* did not discuss the instruction (see 359 F.3d 666, 674-76 (4th Cir. 2004)), and *Harvey* did not

[26] The government does not dispute our contention (Jefferson Br. 46) that this Court's discussions of the "as-needed basis" instruction have been dicta.

address whether the instruction can stand after *Sun-Diamond* (see 532 F.3d 326, 334-35 (4th Cir. 2008)). The validity of the instruction is thus an open question.

Moreover, with the narrow exception of the "as-needed basis" instruction, our view agrees with this Court's law, including that a *quid pro quo* exists where a stream of payments is tied to a stream of official acts. But the "as-needed basis" instruction differs markedly from this rule by not requiring the jury to find *any* link between the payments and the particular official acts the defendant did. In that regard, it bears emphasis that *Jennings* itself—from which the "as-needed basis" instruction derives—repeatedly underscored that a *quid pro quo* requires proof of specific acts. *E.g.*, 160 F.3d at 1019 ("[payor] must have intended for the official to engage in some specific act (or omission) or course of action (or inaction) in return for the charged payment"); *ibid.* ("[A court] can adequately convey [the *quid pro quo*] concept to the jury by describing the exact quid pro quo that the defendant is charged with intending to accomplish."); *ibid.* (giving model instruction which identifies "'the specific official act or omission that defendant is charged with intending to induce'" (emphasis omitted)).

Finally, for the reasons discussed above, the government clearly cannot satisfy its burden of proving that the erroneous "as-needed basis" instruction was harmless beyond a reasonable doubt. See Gov't Br. 81 n.30.[27]

III. EVEN IF THE BRIBERY INSTRUCTIONS WERE VALID, *SKILLING* REQUIRES RETRIAL ON COUNTS 1−2, 6−7, 10, AND 16

The government does not dispute that the instructions on the conspiracy counts (Counts 1 and 2), honest-services wire fraud counts (Counts 6, 7 and 10), and RICO count (Count 16) were erroneous because they charged offenses consisting of, or based on, the self-dealing theory of honest-services wire fraud that *Skilling* repudiated. The government claims, however, that those errors are harmless. Gov't Br. 81-92. That is incorrect, especially in light of the government's vehement advocacy of the self-dealing theory to the jury and the mounds of evidence it adduced to support that impermissible theory—none of which the government mentions in its brief.[28]

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[27] The government's reliance on out-of-circuit decisions (at 79-80) is unavailing. Neither *Ganim*, *Whitfield*, nor *Kemp* involved section 201. Indeed, one of the main reasons the Second Circuit upheld the "as-needed basis" instruction in *Ganim* was that the bribery statutes at issue in that case, unlike section 201, did not refer to "official act." See *United States v. Ganim*, 510 F.3d 134, 146 (2d Cir. 2007) ("[T]here is good reason to limit *Sun-Diamond*'s holding to the statute at issue in that case, as it was the very text of the illegal gratuity statute—'for or because of *any official act*'—that led the Court to its conclusion . . . ." (emphasis in original)).

[28] We assume in this section that the bribery instructions were valid and thus that the Court has rejected our arguments regarding "official act" and *quid pro quo*.

1. We agree with the government on the applicable standard: The government must prove that the instructional error on each count was "harmless beyond a reasonable doubt." Gov't Br. 84. As post-*Skilling* courts have made clear, that is a very heavy burden. It is not enough for the government to show that it is "unlikely" (*United States v. Black*, 625 F.3d 386, 392 (7th Cir. 2010)) or "[im]probable" (*United States v. Coniglio*, No. 09-3701, 2011 WL 791347, at *2 (3d Cir. Mar. 8, 2011)) that the self-dealing theory infected the verdict on each challenged count. Instead, the Court may affirm "only if it is clear beyond a reasonable doubt that a rational jury would have found [Jefferson] guilty on the valid theory absent the invalid theory." *Coniglio*, 2011 WL 791347, at *2 (vacating convictions in light of *Skilling*).

2. The government cannot prove this for any count. To determine whether the erroneous self-dealing instruction tainted the verdict, the Court "looks to the charges in the indictment, the evidence and the arguments made at trial." *United States v. Rezko*, No. 05 CR 691, 2011 WL 830459, at *7 (N.D. Ill. Mar. 3, 2011) (reviewing for harmlessness in light of *Skilling*). Yet, except for Count 2, the government makes no attempt at an "in-depth examination of the facts and evidence" (Gov't Br. 88), nor discusses *at all* the tremendous emphasis it placed on the invalid self-dealing theory (see *infra*). Instead, the government relies entirely on the proposition that "the jury's guilty verdict on Counts Three and Four, the

bribery counts, shows beyond a reasonable doubt that [Jefferson] was found guilty under a valid legal theory as to Counts One, Six, Seven, Ten, and Sixteen." Gov't Br. 86.

This assertion, made without reference to any legal authority, is demonstrably false. It fails for the simple reason that the *substantive* bribery offense underlying Counts 3 and 4 is a different offense, with different elements, from either *conspiracy* to commit bribery (Count 1), *honest-services* bribery (Counts 6−7 and 10), or *RICO* with bribery predicates (Count 16). It is black letter law that "'conspiracy is a distinct offense from the completed object of the conspiracy.'" *United States v. Ferguson*, 245 F. App'x 233, 241 (4th Cir. 2007). The "essence" of conspiracy is "an agreement to commit an unlawful act," *Iannelli v. United States*, 420 U.S. 770, 777 (1975), while substantive bribery requires no such agreement. Nor did Counts 3 and 4 require the jury to find that Jefferson "knowingly devised or knowingly participated in a scheme to defraud" (JA5154) and had the "specific intent" to "deceive or cheat" (JA5161), which are the "gravamen" of honest services wire fraud. *United States v. Condolon*, 600 F.2d 7, 8 (4th Cir. 1979); see also *United States v. Strothman*, 892 F.2d 1042 (4th Cir. 1989). Likewise, substantive bribery says nothing about the relationship of a bribee's solicitations, while the RICO charge required the government to prove that the predicate acts had "a nexus to the enterprise," were "related," and "either

extend[ed] over a substantial period of time, or . . . pose[d] a threat of continued criminal activity." JA5203-04; see also *United States v. Grubb*, 11 F.3d 426, 440 (4th Cir. 1993).

Because Counts 3 and 4 thus rest on distinct elements from the other counts, the government is simply wrong that the verdict on Counts 3 and 4 "necessarily" shows that the jury followed a "valid legal theory" on Counts 1, 6−7, 10, and 16. Gov't Br. 86. To the contrary, on this record, it is exceedingly likely that on these counts the jury relied on the invalid self-dealing theory. Completely absent from the government's brief is any mention of the ubiquitous role the self-dealing theory played throughout the trial, occupying just as much time and focus as the bribery theory did. The government argued, and the trial court agreed, that the indictment expressly charged the self-dealing theory.[29] The government argued the theory in its opening statement as an alternative to the bribery theory. *E.g.*, JA258 ("Jefferson tried to conceal not only the bribes, but his clear conflicts of interest, his self-dealing, and his self-enrichment. In doing so, [Jefferson] deprived the citizens of the United States to their right to his honest services."). It adduced copious evidence to support the theory, eliciting from virtually every one of its

[29] *E.g.*, JA83 ¶ 50 (Count 1; "JEFFERSON failed to disclose his and his family's financial interests in these business ventures"); JA120 ¶ 211 (Counts 6−7 and 10; same); JA127 ¶ 222 (Count 16; same).

witnesses that (1) Jefferson acted in his official capacity, (2) did not disclose his or his family's financial interest, and (3) such disclosure would have been material to the witness.[30] It repeatedly emphasized the theory in its summation,[31] telling the jury that the theory was an independent ground on which to convict. *E.g.*, JA4908 ("the government has proven that the defendant repeatedly deprived others of his honest services, both by receiving bribes, as well as, concealing material facts in conflict of interest"). And, Judge Ellis explicitly instructed the same. *E.g.*, JA5156-57 ("Counts 5 through 10 . . . . allege two theories of honest services wire fraud. . . . [T]he second theory the government has charged is that the defendant

[30] To appreciate the sheer breadth of evidence the government adduced on the self-dealing theory, consider just some of the questions the government put to just one of its witnesses, Vernon Jackson. See, *e.g.*, JA405 ("Did [Jefferson] disclose at all that his wife's company had a stake in iGate?"); *ibid.* ("Did [Jefferson] disclose that [his] wife's company had shares of iGate?"); JA440-41 ("[D]id [Jefferson] disclose his or his family's financial interest in iGate or in the project itself?"); JA441 ("Did [Jefferson] at any time disclose that his wife's company was entitled to 35 percent of the gross profits of iGate's project in Africa?"); *ibid.* ("Did [Jefferson] disclose that his wife's company owned a significant number of iGate shares?"); *ibid.* ("Did [Jefferson] say or do anything to suggest that his family had a financial stake in iGate or the NDTV venture?"); JA508 (same); *ibid.* (same); JA545 (same); JA579 (same); JA580 (same); *ibid.* (same); JA581 (same).

[31] *E.g.*, JA4934 ("Jefferson never disclosed to him, that . . . Jefferson or his wife had a financial interest in iGate"); JA4941 ("the Congressman never once disclosed his family's interest in iGate"); JA4946 ("in none of these meetings with foreign government officials did Jefferson ever disclose his or his family's financial interest"); see also JA4935 (same); JA4948 (same); JA4948-49 (same); JA4949 (same); JA4964 (same); JA4968 (same).

committed honest services wire fraud by intentionally failing to disclose material conflicts of interest in connection with his performance of official acts.").[32]

The jury could have relied on just a fraction of this evidence to convict Jefferson on Counts 1, 6−7, 10, and 16 under the invalid self-dealing theory. At the same time, the jury could easily have concluded that the government did not prove the bribery theory on these counts beyond a reasonable doubt. For example, on Count 1, there was ample reason to doubt that Jefferson *conspired* with anyone to solicit bribes, even if he did solicit them and was therefore guilty on Counts 3 and 4. As Judge Ellis instructed, Lori Mody—the bribor in Count 4 (JA5146)—was a government agent and therefore as a matter of law could not be a conspirator. JA5136. And, as noted, the cross-examination of Vernon Jackson—the Count 3 bribor (JA5146)—elicited abundant testimony that he never viewed the consulting agreements as bribes, but rather as legitimate compensation in return for helping iGate procure capital.[33]

In light of the above, a reasonable jury could have convicted Jefferson on the invalid self-dealing theory while rejecting the bribery theory on Counts 1, 6−7, 10,

[32] See also JA5158-59 (instructing that jury need credit only one theory—bribery or self-dealing—to convict on honest-services counts); JA5132 (incorporating wire-fraud instructions into instructions on Count 1); JA5203 (same, regarding Count 16).

[33] See *supra* note 25 and accompanying text.

and 16. Indeed, even if that were "unlikely," retrial is still warranted. *Black*, 625 F.3d at 392.

3. Retrial is also necessary on the Count 2 conspiracy charge, for which the government alleged no corresponding substantive count. The government claims that the erroneous self-dealing instruction was harmless as to Count 2 because the "core" of the government's case was bribery, not self-dealing. Gov't Br. 89-90. But as the discussion above makes clear, this is simply untrue. As with the other counts, the government's evidence on Count 2 focused just as much on the self-dealing theory as it did on the bribery theory,[34] and Judge Ellis presented the theories as independently sufficient to establish guilt under Count 2.[35]

Nor is there merit to the government's claim that, if the jury credited the self-dealing theory of honest services fraud on Count 2, it must also have credited the bribery theory. Gov't Br. 90-92. In the first place, nothing in the jury instructions required this result; the instructions on the self-dealing theory did not even *mention* bribe payments, much less equate them with the interests the government had to prove that Jefferson concealed. See JA5156-58.

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[34] *E.g.*, JA3170, 3234, 3332, 3558, 3567, 3644-45, 3965, 4054-55, 4073, 4233-36, 4243-44, 4249-50.

[35] See *supra* note 32 and accompanying text (quoting jury instruction on Counts 5−10); see also JA5142 (incorporating instructions into Count 2).

The government's argument is also question-begging: The government casually assumes that the financial interests Jefferson concealed were "bribe payments" (Gov't Br. 91) and not legitimate compensation, when that was the very question put to the jury. One of Jefferson's basic defenses on Count 2 (as on the other counts) was that these payments were not given *in return for* the performance of official acts—and hence could not be bribes—but instead were legitimate remuneration for Jefferson's introducing businesspersons to sources of capital. See, *e.g.*, JA1026; Dkt. 498 at 2. There was significant evidence to support this theory—for example, that virtually all the government's key witnesses on Count 2 testified pursuant to prosecution agreements;[36] that many of them initially told federal agents the consulting agreements were not bribes, or otherwise admitted to lying during their interrogations;[37] that it was out-of-character for these witnesses—reputable businesspersons in their communities—to agree to pay bribes;[38] and that it was customary in business to pay legitimate "finder's fees" to

[36] *E.g.*, JA3171-72, 3989-90, 4094, 4113-15, 4454-55.

[37] *E.g.*, JA3118-20, 3129, 3693-94, 3780-81, 3987-89, 4090-93, 4453, 4488-91; see also Trial Tr., July 16, 2009, at 133-34; Trial Tr., July 20, 2009, at 7-12.

[38] *E.g.*, JA3608-09, 4116-23, 4491-99; see also Trial Tr., July 15, 2009, at 126; Trial Tr., July 21, 2009, at 237-39.

persons who identified sources of capital.[39] Based on this, the jury could have concluded that the consulting agreements were not bribes, yet were concealed,[40] and thus have convicted on Count 2 under the erroneous self-dealing theory. The most the government shows is that the evidence was sufficient for the jury to reach the opposite conclusion. But by definition that does not prove harmlessness beyond a reasonable doubt.

4. Finally, even if the Court were to conclude that the self-dealing instructional errors on Counts 1−2, 6−7, 10, and 16 are all harmless, Jefferson should still be resentenced. A jury that convicted him on these counts under the bribery theory may have additionally convicted under the invalid self-dealing theory. In that event, Jefferson would have been "incorrectly sentenc[ed] . . . for two crimes rather than one." *Black*, 625 F.3d at 389. Resentencing is warranted because the district court might have imposed a lesser sentence had it known that the self-dealing theory does not state an offense. See *ibid.* (resentencing required regardless whether *Skilling* error was harmless).

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[39] *E.g.*, JA3123-24, 3783-85, 4074-75.

[40] The government asserts (at 91) that there could be no "legitimate purpose or valid explanation" for concealing the consulting agreements unless they were bribes. This is clearly not true. There are numerous unrelated reasons why Jefferson might not have wanted to publicize these agreements. See *supra* note 4.

IV. VENUE WAS IMPROPER ON COUNT 10

The government agrees that venue in criminal cases lies only in districts where a conduct element of the offense occurred. Gov't Br. 94 ("courts must look at the essential conduct elements"). And the government does not deny that the wire underlying Count 10—a telephone call from Jefferson in Ghana to Vernon Jackson in Kentucky—did not originate, pass through, or terminate in the Eastern District of Virginia, nor did Jefferson orchestrate the phone call from there. Gov't Br. 92. The government nonetheless claims that Jefferson committed wire fraud conduct in that district because he took actions from there in furtherance of the alleged Count 10 scheme. The government reasons that the "scheme or artifice to defraud" element of the wire fraud statute is not just an essential element, but a *conduct* element. It is not.

Circuit courts have squarely rejected the government's argument. The Second Circuit's reasoning in *United States v. Ramirez*, 420 F.3d 134 (2d Cir. 2005), is compelling. There, the government claimed that venue under the mail fraud statute was proper not only in districts where the mail was sent, but also "'in any district where any aspect of the 'scheme or artifice to defraud' was practiced.'" *Id.* at 144. The court rejected the argument, concluding that "'having devised or intending to devise a scheme or artifice to defraud,' while an essential element, is not an essential *conduct* element for purposes of establishing venue." *Id.* at 145

(emphasis in original). The court offered several, independently dispositive reasons. First, "the plain meaning of the word 'devise' . . . . connotes contemplation, not action." *Id.* at 144. Second, the "view that a fraudulent scheme is not itself proscribed conduct finds further support in the law of double jeopardy. . . . That an indictment may charge multiple counts of mail fraud based on the same scheme to defraud without running afoul of double jeopardy demonstrates that the mailing represents the individual act prohibited, not the fraudulent scheme." *Id.* at 145 (internal quotation marks and alteration omitted). Third, a contrary interpretation would lead to absurd results. *Ibid.* ("Unless this limitation were respected, a defendant who devised a scheme to defraud while driving across the country could be prosecuted in virtually any venue through which he passed."). Fourth, the court's "conclusion is consistent with the Supreme Court's admonition that provisions implicating venue are to be narrowly construed." *Id.* at 146. The Ninth Circuit followed similar reasoning to reach the same conclusion regarding the wire fraud statute. See *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) ("The government, however, urges a broader reading of § 1343, and argues that venue is appropriate wherever Pace concocted his 'scheme to defraud' . . . . Although a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme

that constitutes the prohibited conduct."); see also *United States v. Mikell*, 163 F. Supp. 2d 720, 735 (E.D. Mich. 2001).

The government presents no reason why this Court should split from the Second and Ninth Circuits.[41] Indeed, the government's only response to *Ramirez* and *Pace* (at 97 n.34) is that "the narrow view of venue espoused in these decisions is contrary to *Rodriguez-Moreno*." But the government does not say why this is true, and the Second Circuit correctly explained why it is not. *Rodriguez-Moreno* held that 18 U.S.C. § 924(c)(1)—which punishes whoever uses or carries a firearm "during and in relation to any crime of violence"—contains two conduct elements: "the 'using and carrying' of a gun and the commission of a [crime of violence]." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). "But whereas a crime of violence such as kidnaping is an act, and thus may qualify as an essential *conduct* element, . . . 'having devised or intending to devise [any] scheme or artifice to defraud' is not." *Ramirez*, 420 F.3d at 146; see also *Pace*, 314 F.3d at 349-50 (considering *Rodriguez-Moreno*). And, in fact, the government's own prosecution manual says that venue for wire fraud exists where the "interstate or

[41] *Ramirez* and *Pace* are not distinguishable, as the government claims (at 97 n.34). Those cases squarely rejected the argument the government makes here: that venue exists "'in any district where any aspect of the 'scheme or artifice to defraud' was practiced.'" *Ramirez*, 420 F.3d at 144-45.

foreign transmission *was issued or terminated*." Criminal Resource Manual 967 (cited in USAM 9-43.000) (emphasis added).[42]

The conviction on Count 10 should thus be reversed for lack of venue.

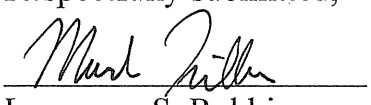
CONCLUSION

For the reasons stated above, all of Jefferson's convictions should be reversed.

[42] The government implies that it is significant that the district court's wire-fraud instruction contained the language "'*participated in* a scheme to defraud.'" Gov't Br. 94 (emphasis added). But the jury charge is irrelevant; the validity of a venue challenge turns solely on the elements of the wire fraud *statute*—which refers only to "having devised or intending to devise any scheme or artifice to defraud." 18 U.S.C. § 1343.

Moreover, because "scheme or artifice to defraud" is not a conduct element of section 1343, the government's recitation of evidence relating to this element (at 95-96) is irrelevant.

Respectfully submitted,



Lawrence S. Robbins
Mark A. Hiller
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
1801 K Street N.W., Suite 411L
Washington, D.C. 20006
(202) 775-4500

Robert P. Trout
Gloria B. Solomon
TROUT CACHERIS, PLLC
1350 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20036
Phone: (202) 464-3300

Counsel for Defendant-Appellant William J. Jefferson.

April 18, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as modified by the Court's February 25, 2011 Order (Dkt. 92): It is written in Times New Roman, a proportionally spaced font, has a typeface of 14 points, and contains 13,991 words (as counted by Microsoft Word 2003 word processing software), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Date: April 18, 2011

Mark A. Hiller

APPENDIX

TABLE OF CONTENTS

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 11. Bribery, Graft, and Conflicts of Interest (Refs & Annos)
§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly- -

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another--

(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or

(B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner Elect, Federal judge, officer, or employee;

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly- -

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another, at a time when such person is an officer or employee of the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the District of Columbia is a party or has a direct and substantial interest, before any department, agency, court, officer, or commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was an officer or employee of the District of Columbia;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a particular matter involving a specific party or parties--

(1) in which such employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise; or

(2) which is pending in the department or agency of the Government in which such employee is serving except that paragraph (2) of this subsection shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(d) Nothing in this section prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for or otherwise representing his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except--

(1) in those matters in which he has participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) in those matters that are the subject of his official responsibility,

subject to approval by the Government official responsible for appointment to his position.

(e) Nothing in this section prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if

the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(f) Nothing in this section prevents an individual from giving testimony under oath or from making statements required to be made under penalty of perjury.

CREDIT(S)

(Added Pub.L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1121, and amended Pub.L. 91-405, Title II, § 204(d) (2), (3), Sept. 22, 1970, 84 Stat. 853; Pub.L. 99-646, § 47(a), Nov. 10, 1986, 100 Stat. 3604; Pub.L. 101-194, Title IV, § 402, Nov. 30, 1989, 103 Stat. 1748; Pub.L. 101-280, § 5(b), May 4, 1990, 104 Stat. 159.)

Current through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, and 111-350) approved 2-25-11

END OF DOCUMENT

Effective: November 10, 1998

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)
§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this

section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, by made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the pre-

ceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term “domestic concern” means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a

foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.";

CREDIT(S)

(Pub.L. 95-213, Title I, § 104, Dec. 19, 1977, 91 Stat. 1496; Pub.L. 100-418, Title V, § 5003(c), Aug. 23, 1988, 102 Stat. 1419; Pub.L. 103-322, Title XXXIII, § 330005, Sept. 13, 1994, 108 Stat. 2142; Pub.L. 105-366, § 3, Nov. 10, 1998, 112 Stat. 3304.)

Current through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, and 111-350) approved 2-25-11

END OF DOCUMENT

RULES

of the

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

PREPARED BY

Karen L. Haas

Clerk of the House of Representatives

JANUARY 5, 2011

(Rev. 1–05–11)

Joint Committee on Internal Revenue Taxation in accordance with section 4022(b) of the Internal Revenue Service Restructuring and Reform Act of 1998; or

(b) the chair of the Committee on Ways and Means causes such a tax complexity analysis to be printed in the Congressional Record before consideration of the conference report.

12. (a)(1) Subject to subparagraph (2), a meeting of each conference committee shall be open to the public.

(2) In open session of the House, a motion that managers on the part of the House be permitted to close to the public a meeting or meetings of their conference committee shall be privileged, shall be decided without debate, and shall be decided by the yeas and nays.

(3) In conducting conferences with the Senate, managers on the part of the House should endeavor to ensure—

(A) that meetings for the resolution of differences between the two Houses occur only under circumstances in which every manager on the part of the House has notice of the meeting and a reasonable opportunity to attend;

(B) that all provisions on which the two Houses disagree are considered as open to discussion at any meeting of a conference committee; and

(C) that papers reflecting a conference agreement are held inviolate to change without renewal of the opportunity of all managers on the part of the House to reconsider their decisions to sign or not to sign the agreement.

(4) Managers on the part of the House shall be provided a unitary time and place with access to at least one complete copy of the final conference agreement for the purpose of recording their approval (or not) of the final conference agreement by placing their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

(b) A point of order that a conference committee failed to comply with paragraph (a) may be raised immediately after the conference report is read or considered as read. If such a point of order is sustained, the conference report shall be considered as rejected, the House shall be considered to have insisted on its amendments or on disagreement to the Senate amendments, as the case may be, and to have requested a further conference with the Senate, and the Speaker may appoint new conferees without intervening motion.

13. It shall not be in order to consider a conference report the text of which differs in any way, other than clerical, from the text that reflects the action of the conferees on all of the differences between the two Houses, as recorded by their placement of their signatures (or not) on the sheets prepared to accompany the conference report and joint explanatory statement of the managers.

RULE XXIII

CODE OF OFFICIAL CONDUCT

There is hereby established by and for the House the following code of conduct, to be known as the ''Code of Official Conduct'':

1. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof.

3. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to the beneficial interest of such individual from any source, the receipt of which would occur by virtue of influence improperly exerted from the position of such individual in Congress.

4. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept gifts except as provided by clause 5 of rule XXV.

5. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept an honorarium for a speech, a writing for publication, or other similar activity, except as otherwise provided under rule XXV.

6. A Member, Delegate, or Resident Commissioner—

(a) shall keep the campaign funds of such individual separate from the personal funds of such individual;

(b) may not convert campaign funds to personal use in excess of an amount representing reimbursement for legitimate and verifiable campaign expenditures; and

(c) except as provided in clause 1(b) of rule XXIV, may not expend funds from a campaign account of such individual that are not attributable to bona fide campaign or political purposes.

7. A Member, Delegate, or Resident Commissioner shall treat as campaign contributions all proceeds from testimonial dinners or other fundraising events.

8. (a) A Member, Delegate, Resident Commissioner, or officer of the House may not retain an employee who does not perform duties for the offices of the employing authority commensurate with the compensation such employee receives.

(b) In the case of a committee employee who works under the direct supervision of a member of the committee other than a chair, the chair may require that such member affirm in writing that the employee has complied with clause 8(a) (subject to clause 9 of rule X) as evidence of compliance by the chair with this clause and with clause 9 of rule X.

(c)(1) Except as specified in subparagraph (2)—

(A) a Member, Delegate, or Resident Commissioner may not retain the spouse of such individual in a paid position; and

(B) an employee of the House may not accept compensation for work for a committee on which the spouse of such employee serves as a member.

(2) Subparagraph (1) shall not apply in the case of a spouse whose pertinent employment predates the One Hundred Seventh Congress.

9. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not discharge and may not refuse to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, religion, sex (including marital or parental status), disability, age, or national origin of such individual, but may take into consideration the domicile or political affiliation of such individual.

10. A Member, Delegate, or Resident Commissioner who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which such individual is a member, and a Member should refrain from voting on any question at a meeting of the House or of the Committee of the Whole House on the state of the Union, unless or until judicial or executive proceedings result in reinstatement of the presumption of the innocence of such Member or until the Member is reelected to the House after the date of such conviction.

11. A Member, Delegate, or Resident Commissioner may not authorize or otherwise allow an individual, group, or organization not under the direction and control of the House to use the words ''Congress of the United States,'' ''House of Representatives,'' or ''Official Business,'' or any combination of words thereof, on any letterhead or envelope.

12. (a) Except as provided in paragraph (b), an employee of the House who is required to file a report under rule XXVI may not participate personally and substantially as an employee of the House in a contact with an agency of the executive or judicial branches of Government with respect to nonlegislative matters affecting any nongovernmental person in which the employee has a significant financial interest.

(b) Paragraph (a) does not apply if an employee first advises the employing authority of such employee of a significant financial interest described in paragraph (a) and obtains

from such employing authority a written waiver stating that the participation of the employee in the activity described in paragraph (a) is necessary. A copy of each such waiver shall be filed with the Committee on Ethics.

13. Before a Member, Delegate, Resident Commissioner, officer, or employee of the House may have access to classified information, the following oath (or affirmation) shall be executed:

''I do solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorized by the House of Representatives or in accordance with its Rules.''

Copies of the executed oath (or affirmation) shall be retained by the Clerk as part of the records of the House. The Clerk shall make the signatories a matter of public record, causing the names of each Member, Delegate, or Resident Commissioner who has signed the oath during a week (if any) to be published in a portion of the Congressional Record designated for that purpose on the last legislative day of the week and making cumulative lists of such names available each day for public inspection in an appropriate office of the House.

14. A Member, Delegate, or Resident Commissioner may not, with the intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity—

(a) take or withhold, or offer or threaten to take or withhold, an official act; or

(b) influence, or offer or threaten to influence, the official act of another.

15. (a) Except as provided in paragraph (b), a Member, Delegate, or Resident Commissioner may not use personal funds, official funds, or campaign funds for a flight on an aircraft.

(b) Paragraph (a) does not apply if—

(1) the aircraft is operated by an air carrier or commercial operator certificated by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules, or, in the case of travel which is abroad, by an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules;

(2) the aircraft is owned or leased by a Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner (including an aircraft owned by an entity that is not a public corporation in which the Member, Delegate, Resident Commissioner or a family member of a Member, Delegate, or Resident Commissioner has an ownership interest, provided that such Member, Delegate, or Resident Commissioner does not use the aircraft any more than the Member, Delegate, Resident Commissioner, or family member's proportionate share of ownership allows);

(3) the flight consists of the personal use of an aircraft by a Member, Delegate, or Resident Commissioner that is supplied by an individual on the basis of personal friendship; or

(4) the aircraft is operated by an entity of the Federal government or an entity of the government of any State.

(c) In this clause—

(1) the term ''campaign funds'' includes funds of any political committee under the Federal Election Campaign Act of 1971, without regard to whether the committee is an authorized committee of the Member, Delegate, or Resident Commissioner involved under such Act;

(2) the term ''family member'' means an individual who is related to the Member, Delegate, or Resident Commissioner, as father, mother, son, daughter, brother, sister, husband, wife, father-in-law, or mother-in-law; and

(3) the term ''on the basis of personal friendship'' has the same meaning as in clause 5 of rule XXV and shall be determined as under clause 5(a)(3)(D)(ii) of rule XXV.

16. A Member, Delegate, or Resident Commissioner may not condition the inclusion of language to provide funding for a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (including an accompanying joint explanatory statement of managers) on any vote cast by another Member, Delegate, or Resident Commissioner. For purposes of this clause and clause 17, the terms ''congressional earmark,'' ''limited tax benefit,'' and ''limited tariff benefit'' shall have the meanings given them in clause 9 of rule XXI.

17. (a) A Member, Delegate, or Resident Commissioner who requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or an accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers) shall provide a written statement to the chair and ranking minority member of the committee of jurisdiction, including—

(1) the name of the Member, Delegate, or Resident Commissioner;

(2) in the case of a congressional earmark, the name and address of the intended recipient or, if there is no specifically intended recipient, the intended location of the activity;

(3) in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Member, Delegate, or Resident Commissioner;

(4) the purpose of such congressional earmark or limited tax or tariff benefit; and

(5) a certification that the Member, Delegate, or Resident Commissioner or spouse has no financial interest in such congressional earmark or limited tax or tariff benefit.

(b) Each committee shall maintain the information transmitted under paragraph (a), and the written disclosures for any congressional earmarks, limited tax benefits, or limited tariff benefits included in any measure reported by the committee or conference report filed by the chair of the committee or any subcommittee thereof shall be open for public inspection.

18. (a) In this Code of Official Conduct, the term ''officer or employee of the House'' means an individual whose compensation is disbursed by the Chief Administrative Officer.

(b) An individual whose services are compensated by the House pursuant to a consultant contract shall be considered an employee of the House for purposes of clauses 1, 2, 3, 4, 8, 9, and 13 of this rule. An individual whose services are compensated by the House pursuant to a consultant contract may not lobby the contracting committee or the members or staff of the contracting committee on any matter. Such an individual may lobby other Members, Delegates, or the Resident Commissioner or staff of the House on matters outside the jurisdiction of the contracting committee. In the case of such an individual who is a member or employee of a firm, partnership, or other business organization, the other members and employees of the firm, partnership, or other business organization shall be subject to the same restrictions on lobbying that apply to the individual under this paragraph.

RULE XXIV

Limitations on Use of Official Funds

Limitations on use of official and unofficial accounts

1. (a) Except as provided in paragraph (b), a Member, Delegate, or Resident Commissioner may not maintain, or have maintained for the use of such individual, an unofficial office account. Funds may not be paid into an unofficial office account.

(b)(1) Except as provided in subparagraph (2), a Member, Delegate, or Resident Commissioner may defray official

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expenses with funds of the principal campaign committee of such individual under the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

(2) The funds specified in subparagraph (1) may not be used to defray official expenses for mail or other communications, compensation for services, office space, office furniture, office equipment, or any associated information technology services (excluding handheld communications devices).

2. Notwithstanding any other provision of this rule, if an amount from the Official Expenses Allowance of a Member, Delegate, or Resident Commissioner is paid into the House Recording Studio revolving fund for telecommunications satellite services, the Member, Delegate, or Resident Commissioner may accept reimbursement from nonpolitical entities in that amount for transmission to the Clerk for credit to the Official Expenses Allowance.

3. In this rule the term ''unofficial office account'' means an account or repository in which funds are received for the purpose of defraying otherwise unreimbursed expenses allowable under section 162(a) of the Internal Revenue Code of 1986 as ordinary and necessary in the operation of a congressional office, and includes a newsletter fund referred to in section 527(g) of the Internal Revenue Code of 1986.

Limitations on use of the frank

4. A Member, Delegate, or Resident Commissioner shall mail franked mail under section 3210(d) of title 39, United States Code at the most economical rate of postage practicable.

5. Before making a mass mailing, a Member, Delegate, or Resident Commissioner shall submit a sample or description of the mail matter involved to the House Commission on Congressional Mailing Standards for an advisory opinion as to whether the proposed mailing is in compliance with applicable provisions of law, rule, or regulation.

6. A mass mailing that is otherwise frankable by a Member, Delegate, or Resident Commissioner under the provisions of section 3210(e) of title 39, United States Code, is not frankable unless the cost of preparing and printing it is defrayed exclusively from funds made available in an appropriation Act.

7. A Member, Delegate, or Resident Commissioner may not send a mass mailing outside the congressional district from which elected.

8. In the case of a Member, Delegate, or Resident Commissioner, a mass mailing is not frankable under section 3210 of title 39, United States Code, when it is postmarked less than 90 days before the date of a primary or general election (whether regular, special, or runoff) in which such individual is a candidate for public office. If the mail matter is of a type that is not customarily postmarked, the date on which it would have been postmarked, if it were of a type customarily postmarked, applies.

9. In this rule the term ''mass mailing'' means, with respect to a session of Congress, a mailing of newsletters or other pieces of mail with substantially identical content (whether such pieces of mail are deposited singly or in bulk, or at the same time or different times), totaling more than 500 pieces of mail in that session, except that such term does not include a mailing—

(a) of matter in direct response to a communication from a person to whom the matter is mailed;

(b) from a Member, Delegate, or Resident Commissioner to other Members, Delegates, the Resident Commissioner, or Senators, or to Federal, State, or local government officials; or

(c) of a news release to the communications media.

Prohibition on use of funds by Members not elected to succeeding Congress

10. Funds from the applicable accounts described in clause 1(k)(1) of rule X, including funds from committee expense resolutions, and funds in any local currencies owned by the United States may not be made available for travel by a Member, Delegate, Resident Commissioner, or Senator after the date of a general election in which such individual was not elected to the succeeding Congress or, in the case of a Member, Delegate, or Resident Commissioner who is not a candidate in a general election, after the earlier of the date of such general election or the adjournment sine die of the last regular session of the Congress.

RULE XXV

Limitations on Outside Earned Income and Acceptance of Gifts

Outside earned income; honoraria

1. (a) Except as provided by paragraph (b), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(1) have outside earned income attributable to a calendar year that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year; or

(2) receive any honorarium, except that an officer or employee of the House who is paid at a rate less than 120 percent of the minimum rate of basic pay for GS–15 of the General Schedule may receive an honorarium unless the subject matter is directly related to the official duties of the individual, the payment is made because of the status of the individual with the House, or the person offering the honorarium has interests that may be substantially affected by the performance or nonperformance of the official duties of the individual.

(b) In the case of an individual who becomes a Member, Delegate, Resident Commissioner, officer, or employee of the House, such individual may not have outside earned income attributable to the portion of a calendar year that occurs after such individual becomes a Member, Delegate, Resident Commissioner, officer, or employee that exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of that calendar year multiplied by a fraction, the numerator of which is the number of days the individual is a Member, Delegate, Resident Commissioner, officer, or employee during that calendar year and the denominator of which is 365.

(c) A payment in lieu of an honorarium that is made to a charitable organization on behalf of a Member, Delegate, Resident Commissioner, officer, or employee of the House may not be received by that Member, Delegate, Resident Commissioner, officer, or employee. Such a payment may not exceed $2,000 or be made to a charitable organization from which the Member, Delegate, Resident Commissioner, officer, or employee or a parent, sibling, spouse, child, or dependent relative of the Member, Delegate, Resident Commissioner, officer, or employee, derives a financial benefit.

2. A Member, Delegate, Resident Commissioner, officer, or employee of the House may not—

(a) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship except for the practice of medicine;

(b) permit the name of such individual to be used by such a firm, partnership, association, corporation, or other entity;

(c) receive compensation for practicing a profession that involves a fiduciary relationship except for the practice of medicine;

(d) serve for compensation as an officer or member of the board of an association, corporation, or other entity; or

(e) receive compensation for teaching, without the prior notification and approval of the Committee on Ethics.

Copyright royalties

3. (a) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive an advance payment on copyright royalties. This paragraph does not prohibit a literary agent, researcher, or other individual (other than an individual employed by the House or a relative of a Member, Delegate, Resident Commissioner, officer, or employee) working on behalf of a Member, Delegate, Resident Commissioner, officer, or employee with respect to a publication from receiving an advance payment of a copyright royalty directly from a publisher and

solely for the benefit of that literary agent, researcher, or other individual.

(b) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive copyright royalties under a contract entered into on or after January 1, 1996, unless that contract is first approved by the Committee on Ethics as complying with the requirement of clause 4(d)(1)(E) (that royalties are received from an established publisher under usual and customary contractual terms).

Definitions

4. (a)(1) In this rule, except as provided in subparagraph (2), the term ''officer or employee of the House'' means an individual (other than a Member, Delegate, or Resident Commissioner) whose pay is disbursed by the Chief Administrative Officer, who is paid at a rate equal to or greater than 120 percent of the minimum rate of basic pay for GS–15 of the General Schedule, and who is so employed for more than 90 days in a calendar year.

(2)(A) When used with respect to an honorarium, the term ''officer or employee of the House'' means an individual (other than a Member, Delegate, or Resident Commissioner) whose salary is disbursed by the Chief Administrative Officer.

(B) When used in clause 5 of this rule, the terms ''officer'' and ''employee'' have the same meanings as in rule XXIII.

(b) In this rule the term ''honorarium'' means a payment of money or a thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles) by a Member, Delegate, Resident Commissioner, officer, or employee of the House, excluding any actual and necessary travel expenses incurred by that Member, Delegate, Resident Commissioner, officer, or employee (and one relative) to the extent that such expenses are paid or reimbursed by any other person. The amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not so paid or reimbursed.

(c) In this rule the term ''travel expenses'' means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a relative of such Member, Delegate, Resident Commissioner, officer, or employee, the cost of transportation, and the cost of lodging and meals while away from the residence or principal place of employment of such individual.

(d)(1) In this rule the term ''outside earned income'' means, with respect to a Member, Delegate, Resident Commissioner, officer, or employee of the House, wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered, but does not include —

(A) the salary of a Member, Delegate, Resident Commissioner, officer, or employee;

(B) any compensation derived by a Member, Delegate, Resident Commissioner, officer, or employee of the House for personal services actually rendered before the adoption of this rule or before such individual became a Member, Delegate, Resident Commissioner, officer, or employee;

(C) any amount paid by, or on behalf of, a Member, Delegate, Resident Commissioner, officer, or employee of the House to a tax-qualified pension, profit-sharing, or stock bonus plan and received by such individual from such a plan;

(D) in the case of a Member, Delegate, Resident Commissioner, officer, or employee of the House engaged in a trade or business in which such individual or the family of such individual holds a controlling interest and in which both personal services and capital are income-producing factors, any amount received by the Member, Delegate, Resident Commissioner, officer, or employee, so long as the personal services actually rendered by such individual in the trade or business do not generate a significant amount of income; or

(E) copyright royalties received from established publishers under usual and customary contractual terms; and

(2) outside earned income shall be determined without regard to community property law.

(e) In this rule the term ''charitable organization'' means an organization described in section 170(c) of the Internal Revenue Code of 1986.

Gifts

5. (a)(1)(A)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift except as provided in this clause.

(ii) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift from a registered lobbyist or agent of a foreign principal or from a private entity that retains or employs registered lobbyists or agents of a foreign principal except as provided in subparagraph (3) of this paragraph.

(B)(i) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept a gift (other than cash or cash equivalent) not prohibited by subdivision (A)(ii) that the Member, Delegate, Resident Commissioner, officer, or employee reasonably and in good faith believes to have a value of less than $50 and a cumulative value from one source during a calendar year of less than $100. A gift having a value of less than $10 does not count toward the $100 annual limit. The value of perishable food sent to an office shall be allocated among the individual recipients and not to the Member, Delegate, or Resident Commissioner. Formal recordkeeping is not required by this subdivision, but a Member, Delegate, Resident Commissioner, officer, or employee of the House shall make a good faith effort to comply with this subdivision.

(ii) A gift of a ticket to a sporting or entertainment event shall be valued at the face value of the ticket or, in the case of a ticket without a face value, at the highest cost of a ticket with a face value for the event. The price printed on a ticket to an event shall be deemed its face value only if it also is the price at which the issuer offers that ticket for sale to the public.

(2)(A) In this clause the term ''gift'' means a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(B)(i) A gift to a family member of a Member, Delegate, Resident Commissioner, officer, or employee of the House, or a gift to any other individual based on that individual's relationship with the Member, Delegate, Resident Commissioner, officer, or employee, shall be considered a gift to the Member, Delegate, Resident Commissioner, officer, or employee if it is given with the knowledge and acquiescence of the Member, Delegate, Resident Commissioner, officer, or employee and the Member, Delegate, Resident Commissioner, officer, or employee has reason to believe the gift was given because of the official position of such individual.

(ii) If food or refreshment is provided at the same time and place to both a Member, Delegate, Resident Commissioner, officer, or employee of the House and the spouse or dependent thereof, only the food or refreshment provided to the Member, Delegate, Resident Commissioner, officer, or employee shall be treated as a gift for purposes of this clause.

(3) The restrictions in subparagraph (1) do not apply to the following:

(A) Anything for which the Member, Delegate, Resident Commissioner, officer, or employee of the House pays the market value, or does not use and promptly returns to the donor.

(B) A contribution, as defined in section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) that is lawfully made under that Act, a lawful contribution for election to a State or local government office, or attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(C) A gift from a relative as described in section 109(16) of title I of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(16)).

(D)(i) Anything provided by an individual on the basis of a personal friendship unless the Member, Delegate, Resident Commissioner, officer, or employee of the House has reason to believe that, under the circumstances, the gift was provided be-

cause of the official position of such individual and not because of the personal friendship.

(ii) In determining whether a gift is provided on the basis of personal friendship, the Member, Delegate, Resident Commissioner, officer, or employee of the House shall consider the circumstances under which the gift was offered, such as:

(I) The history of the relationship of such individual with the individual giving the gift, including any previous exchange of gifts between them.

(II) Whether to the actual knowledge of such individual the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

(III) Whether to the actual knowledge of such individual the individual who gave the gift also gave the same or similar gifts to other Members, Delegates, the Resident Commissioners, officers, or employees of the House.

(E) Except as provided in paragraph (e)(3), a contribution or other payment to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Ethics.

(F) A gift from another Member, Delegate, Resident Commissioner, officer, or employee of the House or Senate.

(G) Food, refreshments, lodging, transportation, and other benefits—

(i) resulting from the outside business or employment activities of the Member, Delegate, Resident Commissioner, officer, or employee of the House (or other outside activities that are not connected to the duties of such individual as an officeholder), or of the spouse of such individual, if such benefits have not been offered or enhanced because of the official position of such individual and are customarily provided to others in similar circumstances;

(ii) customarily provided by a prospective employer in connection with bona fide employment discussions; or

(iii) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such organization.

(H) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.

(I) Informational materials that are sent to the office of the Member, Delegate, Resident Commissioner, officer, or employee of the House in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.

(J) Awards or prizes that are given to competitors in contests or events open to the public, including random drawings.

(K) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).

(L) Training (including food and refreshments furnished to all attendees as an integral part of the training) if such training is in the interest of the House.

(M) Bequests, inheritances, and other transfers at death.

(N) An item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(O) Anything that is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(P) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act) of an individual other than a registered lobbyist or agent of a foreign principal.

(Q) Free attendance at an event permitted under subparagraph (4).

(R) Opportunities and benefits that are—

(i) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(ii) offered to members of a group or class in which membership is unrelated to congressional employment;

(iii) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(iv) offered to a group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(v) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(vi) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(S) A plaque, trophy, or other item that is substantially commemorative in nature and that is intended for presentation.

(T) Anything for which, in an unusual case, a waiver is granted by the Committee on Ethics.

(U) Food or refreshments of a nominal value offered other than as a part of a meal.

(V) Donations of products from the district or State that the Member, Delegate, or Resident Commissioner represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any single recipient.

(W) An item of nominal value such as a greeting card, baseball cap, or a T-shirt.

(4)(A) A Member, Delegate, Resident Commissioner, officer, or employee of the House may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(i) the Member, Delegate, Resident Commissioner, officer, or employee of the House participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the official position of such individual; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, Delegate, Resident Commissioner, officer, or employee of the House.

(B) A Member, Delegate, Resident Commissioner, officer, or employee of the House who attends an event described in subdivision (A) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual.

(C) A Member, Delegate, Resident Commissioner, officer, or employee of the House, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with the event unless—

(i) all of the net proceeds of the event are for the benefit of an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code;

(ii) reimbursement for the transportation and lodging in connection with the event is paid by such organization; and

(iii) the offer of free attendance at the event is made by such organization.

(D) In this paragraph the term ''free attendance'' may include waiver of all

or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a gift the value of which exceeds $250 on the basis of the personal friendship exception in subparagraph (3)(D) unless the Committee on Ethics issues a written determination that such exception applies. A determination under this subparagraph is not required for gifts given on the basis of the family relationship exception in subparagraph (3)(C).

(6) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(b)(1)(A) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event in connection with the duties of such individual as an officeholder shall be considered as a reimbursement to the House and not a gift prohibited by this clause when it is from a private source other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs registered lobbyists or agents of a foreign principal (except as provided in subdivision (C)), if the Member, Delegate, Resident Commissioner, officer, or employee—

(i) in the case of an employee, receives advance authorization, from the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works, to accept reimbursement; and

(ii) discloses the expenses reimbursed or to be reimbursed and the authorization to the Clerk within 15 days after the travel is completed.

(B) For purposes of subdivision (A), events, the activities of which are substantially recreational in nature, are not considered to be in connection with the duties of a Member, Delegate, Resident Commissioner, officer, or employee of the House as an officeholder.

(C) A reimbursement (including payment in kind) to a Member, Delegate, Resident Commissioner, officer, or employee of the House for any purpose described in subdivision (A) also shall be considered as a reimbursement to the House and not a gift prohibited by this clause (without regard to whether the source retains or employs registered lobbyists or agents of a foreign principal) if it is, under regulations prescribed by the Committee on Ethics to implement this provision—

(i) directly from an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(ii) provided only for attendance at or participation in a one-day event (exclusive of travel time and an overnight stay).

Regulations prescribed to implement this provision may permit a two-night stay when determined by the committee on a case-by-case basis to be practically required to participate in the one-day event.

(2) Each advance authorization to accept reimbursement shall be signed by the Member, Delegate, Resident Commissioner, or officer of the House under whose direct supervision the employee works and shall include—

(A) the name of the employee;

(B) the name of the person who will make the reimbursement;

(C) the time, place, and purpose of the travel; and

(D) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

(3) Each disclosure made under subparagraph (1)(A) shall be signed by the Member, Delegate, Resident Commissioner, or officer (in the case of travel by that Member, Delegate, Resident Commissioner, or officer) or by the Member, Delegate, Resident Commissioner, or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include—

(A) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;

(B) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;

(C) a good faith estimate of total meal expenses reimbursed or to be reimbursed;

(D) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;

(E) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in subparagraph (4);

(F) a description of meetings and events attended; and

(G) in the case of a reimbursement to a Member, Delegate, Resident Commissioner, or officer, a determination that the travel was in connection with the duties of such individual as an officeholder and would not create the appearance that the Member, Delegate, Resident Commissioner, or officer is using public office for private gain.

(4) In this paragraph the term ''necessary transportation, lodging, and related expenses''—

(A) includes reasonable expenses that are necessary for travel for a period not exceeding four days within the United States or seven days exclusive of travel time outside of the United States unless approved in advance by the Committee on Ethics;

(B) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in subdivision (A);

(C) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this clause; and

(D) may include travel expenses incurred on behalf of a relative of the Member, Delegate, Resident Commissioner, officer, or employee.

(5) The Clerk of the House shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received.

(c)(1)(A) Except as provided in subdivision (B), a Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip on which the traveler is accompanied on any segment by a registered lobbyist or agent of a foreign principal.

(B) Subdivision (A) does not apply to a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965.

(2) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under the exception in paragraph (b)(1)(C)(ii) of this clause for a trip that is financed in whole or in part by a private entity that retains or employs registered lobbyists or agents of a foreign principal unless any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip is de minimis under rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C) of this clause.

(3) A Member, Delegate, Resident Commissioner, officer, or employee of the House may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses for a trip (other than a trip permitted under paragraph (b)(1)(C) of this clause) if such trip is in any part planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal.

(d) A Member, Delegate, Resident Commissioner, officer, or employee of the House shall, before accepting travel otherwise permissible under paragraph

(b)(1) of this clause from any private source—

(1) provide to the Committee on Ethics before such trip a written certification signed by the source or (in the case of a corporate person) by an officer of the source—

(A) that the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) that the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal; or

(ii) is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(iii) certifies that the trip meets the requirements specified in rules prescribed by the Committee on Ethics to implement paragraph (b)(1)(C)(ii) of this clause and specifically details the extent of any involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request, or arrangement of the trip considered to qualify as de minimis under such rules;

(C) that the source will not accept from another source any funds earmarked directly or indirectly for the purpose of financing any aspect of the trip;

(D) that the traveler will not be accompanied on any segment of the trip by a registered lobbyist or agent of a foreign principal (except in the case of a trip for which the source of reimbursement is an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965); and

(E) that (except as permitted in paragraph (b)(1)(C) of this clause) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal; and

(2) after the Committee on Ethics has promulgated the regulations mandated in paragraph (i)(1)(B) of this clause, obtain the prior approval of the committee for such trip.

(e) A gift prohibited by paragraph (a)(1) includes the following:

(1) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(2) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, Delegate, Resident Commissioner, officer, or employee of the House (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph (f).

(3) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, Delegate, Resident Commissioner, officer, or employee of the House.

(4) A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, Delegates, the Resident Commissioner, officers, or employees of the House.

(f)(1) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Member, Delegate, Resident Commissioner, officer, or employee of the House is not considered a gift under this clause if it is reported as provided in subparagraph (2).

(2) A Member, Delegate, Resident Commissioner, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of an honorarium described in subparagraph (1) shall report within 30 days after such designation or recommendation to the Clerk—

(A) the name and address of the registered lobbyist who is making the contribution in lieu of an honorarium;

(B) the date and amount of the contribution; and

(C) the name and address of the charitable organization designated or recommended by the Member, Delegate, or Resident Commissioner.

The Clerk shall make public information received under this subparagraph as soon as possible after it is received.

(g) In this clause—

(1) the term ''registered lobbyist'' means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute;

(2) the term ''agent of a foreign principal'' means an agent of a foreign principal registered under the Foreign Agents Registration Act; and

(3) the terms ''officer'' and ''employee'' have the same meanings as in rule XXIII.

(h) All the provisions of this clause shall be interpreted and enforced solely by the Committee on Ethics. The Committee on Ethics is authorized to issue guidance on any matter contained in this clause.

(i)(1) Not later than 45 days after the date of adoption of this paragraph and at annual intervals thereafter, the Committee on Ethics shall develop and revise, as necessary—

(A) guidelines on judging the reasonableness of an expense or expenditure for purposes of this clause, including the factors that tend to establish—

(i) a connection between a trip and official duties;

(ii) the reasonableness of an amount spent by a sponsor;

(iii) a relationship between an event and an officially connected purpose; and

(iv) a direct and immediate relationship between a source of funding and an event; and

(B) regulations describing the information it will require individuals subject to this clause to submit to the committee in order to obtain the prior approval of the committee for any travel covered by this clause, including any required certifications.

(2) In developing and revising guidelines under subparagraph (1)(A), the committee shall take into account the maximum per diem rates for official Government travel published annually by the General Services Administration, the Department of State, and the Department of Defense.

Claims against the Government

6. A person may not be an officer or employee of the House, or continue in its employment, if acting as an agent for the prosecution of a claim against the Government or if interested in such claim, except as an original claimant or in the proper discharge of official duties.

7. A Member, Delegate, or Resident Commissioner shall prohibit all staff employed by that Member, Delegate, or Resident Commissioner (including staff in personal, committee, and leadership offices) from making any lobbying contact (as defined in section 3 of the Lobbying Disclosure Act of 1995) with that individual's spouse if that spouse is a lobbyist under the Lobbying Disclosure Act of 1995 or is employed or retained by such a lobbyist for the purpose of influencing legislation.

8. During the dates on which the national political party to which a Member (including a Delegate or Resident Commissioner) belongs holds its convention to nominate a candidate for the office of President or Vice President, the Member may not participate in an event honoring that Member, other than in the capacity as a candidate for such office, if such event is directly paid for by a registered lobbyist under the Lobbying Disclosure Act of 1995 or a private entity that retains or employs such a registered lobbyist.

RULE XXVI

FINANCIAL DISCLOSURE

1. The Clerk shall send a copy of each report filed with the Clerk under title I of the Ethics in Government Act of 1978 within the seven-day period beginning on the date on which the report is filed to the Committee on Ethics. By August 1 of each year, the Clerk shall compile all such reports sent to the Clerk by Members within the period beginning on January 1 and ending on June 15 of each year and have them printed as a House document, which shall be made available to the public.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, and will accordingly be served on the government's counsel of record, listed below, by the CM/ECF system, on this 18th day of April, 2011.

David Brian Goodhand
Mark D. Lytle
United States Attorney's Office
2100 Jamieson Ave.
Alexandria, VA 22314
(703) 299-3700

Counsel for Plaintiff-Appellee United States of America

Date: April 18, 2011

Mark A. Hiller