

KEEPING THEM HONEST



**How Federal Anti-Corruption Law
Ensures Public Service is for the Public Good**

Policing Public Corruption

- “[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.” *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961).
- Emoluments Clause: “[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Constitution, Article I, Section 9, Clause 8.

Bribery – 18 U.S.C. § 201(B)

- Bribery is the bedrock federal corruption charge.
- Bribery requires corrupt intent and a *quid pro quo*—“a specific intent to give or receive something of value in exchange for an official act.” *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999).
- Intent is even more important than conduct: the law prohibits solicitations and agreements, even if no money is paid or no official action is taken. *See United States v. Muhammad*, 120 F.3d 688, 693-94 (7th Cir. 1997).

Bribery

- Section 201 covers Federal public officials, as well as those who bribe them.
- **“Public official”** is defined broadly. *Dixson v. United States*, 465 U.S. 482 (1984). It includes “an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.” 18 U.S.C. § 201(a).
 - So it doesn’t include everyone . . .



Bribery

- The **official act** element is also broad: it is not limited to acts that are within the formal statutory authority of a public official, and instead includes any acts taken consistent with established practice. See *United States v. Birdsall*, 233 U.S. 223 (1914).
- In other words: “Job description is not a complete measure of clout.” What matters is what the defendant really did. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005)

Bribery

- What is an “official act” under Section 201?
- In *McDonnell v. United States*, 136 S.Ct. 2355 (2016), the Court held that the definition contains two requirements:
 - 1) the question/matter at issue must be specific and focused and involve a formal exercise of government power—something like “a lawsuit before a court, a determination before an agency, or a hearing before a committee.” *Id.* at 2369;
 - 2) The official involved in the bribery scheme need not have control over the outcome of the question or matter—the official can be an active link in the decision chain.
- The following, standing alone, do not constitute action on a question/matter: (1) setting up a meeting, (2) talking to another official, or (3) organizing an event.

Bribery

- Even if the official does not have the necessary authority, paying an official to defraud the United States or violate his or her duties is sufficient to constitute bribery. See 18 U.S.C. § 201(b)(1)(C); *United States v. Parker*, 133 F.3d 322, 326 (5th Cir. 1998). Again, **intent** is key.



Gratuities – 18 U.S.C. § 201(c)

- A gratuity is a thing of value given “for or because of an official act performed or to be performed” by a public official.
- A gratuity is a lesser included offense of bribery. A gratuity does not require a *quid pro quo* or an agreement that the official will be influenced. *United States v. Ring*, 706 F.3d 460, 467 (D.C. Cir. 2013).
- The penalties are usually much lower than for bribery.



Gratuities

- Distinguishing between a bribe and a gratuity
 - A payment as a **thank you** for a past act is a gratuity, not a bribe.
 - If there was no prior agreement, and no quid pro quo, it's a gratuity.
 - A payment for a past official act can be a bribe, however, so long as the agreement was reached prior to the official act. *See United States v. Gatling*, 96 F.3d 1511, 1522-23 (D.C. Cir. 1996).

Extortion – 18 U.S.C. § 1951

- Similar to bribery: "The Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).
- If the public official is particularly heavy-handed, and/or the payor is a witness for the government, extortion may be an appropriate additional charge beyond bribery.



"I prefer the term 'influencer' to extortionist."

FEDERAL PROGRAM FRAUD AND BRIBERY

18 U.S.C § 666

- Section 666 is the core statute for charging bribery against **state and local officials**.
- Like Section 201, it prohibits bribery, fraud, and embezzlement by agents and employees of organizations and government entities. The basic elements and concepts of bribery under section 666 and section 201 are the same.
- Gratuities: Section 666 covers payments designed to influence or reward a public official, and therefore it contains language analogous to federal gratuities, under section 201(c). But 666 also requires that the defendant act "corruptly," as required for federal bribery under section 201(b). As a result of this confusing combination, the extent to which section 666 covers gratuities is not clear.

FEDERAL PROGRAM FRAUD AND BRIBERY

- Playacting defense: Some courts have held that, under Section 666, the public official must actually intend to be influenced or rewarded. *See United States v. Ford*, 435 F.3d 204 (2d Cir. 2006).
- Bona Fide Fee Defense: 18 U.S.C. § 666(c) exempts “bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business” from the reach of the statute.



*“Then we carefully disguise the bribes as legal fees
by changing the word ‘bribes’ to ‘legal fees.’”*

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COLLECTION

HONEST SERVICES FRAUD – 18 U.S.C. § 1346

- Section 1346 enables use of the mail and wire fraud statutes to reach schemes to deprive the government of the honest services of a public official.
- In *Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010), the Supreme Court limited Section 1346 to honest services fraud schemes that involve bribery or kickbacks. *Skilling* eliminated the use of section 1346 to prosecute undisclosed conflicts of interest or self-dealing.
 - The payment or thing of value must be supplied by a third party who is not deceived, i.e., a third party who seeks favorable action from the public official in return for a thing of value. That is, the corrupting influence must come from a source other than the public official's own financial interests. *Id.* at 2928.

HONEST SERVICES FRAUD

- After *Skilling*, the core elements of honest services fraud are the following:
 - The scheme involved bribes or kickbacks.
 - The scheme involved some misrepresentation or omission of material facts. In a typical bribery case, looking for a material false statement or omission seems to be beside the point. See, e.g., *United States v. Frega*, 179 F.3d 793, 804 (9th Cir. 1999) (“[B]ribery and concealing bribery are part and parcel of the same scheme.”).
 - The defendant acted with the intent to defraud, that is, with the intent to deceive for the purpose of depriving the citizens of the public official’s honest services.



CAMPAIGN CONTRIBUTIONS AS BRIBERY/EXTORTION PAYMENTS

- Campaign contributions constitute a thing of value for purposes of the various bribery statutes (Sections 201, 666, 1346), and they constitute property for purposes of Hobbs Act extortion under color of official right (Section 1951).
- The link between a campaign contribution and the official action must be very clear for a prosecution to be likely.

Conflicts of Interest

- Conflict of interest charges are rarely indicted standing alone, although a standalone conflict charge may be appropriate in some cases.
- Conflicts fall under a detailed set of statutory prohibitions. 18 U.S.C. §§ 203, 205, 207, 208, 209. In general, these provisions contain misdemeanors and felonies aiming to prevent undue financial or other influences.
- All of these crimes are low on the culpability scale and carry relatively low penalties, but all provide an important ethical framework for government employees and contractors.



Grab Bag



- Federal law has many other tools to protect the public from crimes or conflicts on the part of federal officials. Such tools include:
 - THE ANTI-KICKBACK ACT, 41 U.S.C §§ 8701-07 (used for government contracts)
 - PROCUREMENT INTEGRITY ACT, 41 U.S.C. § 1202, 1205 (similarly used for contracts and contractors)
 - FALSE STATEMENTS, 18 U.S.C. § 1001
 - THEFT OF GOVERNMENT PROPERTY, 18 U.S.C. § 641
 - THEFT BY GOVERNMENT OFFICIALS, 18 U.S.C. § 654

Any Questions?

