Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 33
Number 4 *Symposium on New Directions in Federalism*

Article 16

6-1-2000

Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case

Steven M. Levin

Follow this and additional works at: https://digitalcommons.lmu.edu/llr

Part of the Law Commons

Recommended Citation

Steven M. Levin, *Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case*, 33 Loy. L.A. L. Rev. 1813 (2000).
Available at: https://digitalcommons.lmu.edu/llr/vol33/iss4/16

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

ILLEGAL GRATUITIES IN AMERICAN POLITICS: LEARNING LESSONS FROM THE *SUN-DIAMOND* CASE

The very essence of a free government consists in considering offices as public trusts, bestowed for the good of the country, and not for the benefit of an individual or a party.[1]

I. INTRODUCTION

Bribes and illegal gratuities have been pervasive features of political systems around the world since antiquity. Indeed, religious texts, classical literature and philosophy, and popular culture are replete with tales of pocket-stuffing, gift-giving, extortion, blackmail, and other acts of corruption.[2] The mere idea of bribery in American society evokes vivid images of villainous gangsters lining the pockets of fat-cat politicians with wads of cash in smoke-filled backrooms.

Bribery is defined as "an inducement improperly influencing the performance of a public function meant to be gratuitously exercised."[3] Yet bribery is a far more complicated phenomenon than this definition conveys. Bribes themselves can take on many shapes and forms.[4] At once, bribery is a political, legal, religious, ethical, and social issue.[5] To form an opinion about bribery is to reflect upon

---

1. John C. Calhoun, Speech (Feb. 13, 1885), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 393 (Justin Kaplan ed., 16th ed. 1992).

2. For a comprehensive historical and ethical discussion of bribery, see JOHN T. NOONAN, JR., BRIBES (1984).

3. *Id.* at xi.

4. The most common bribe is cash, but bribes can also include sexual favors, commodities, and appointments. *See id.* at xxi.

5. *See* Daniel Hays Lowenstein, *For God, for Country, or for Me?*, 74 CAL. L. REV. 1479, 1510 (1986) (book review) [hereinafter Lowenstein, *Review*].

one's entire conception of the political process. What may constitute a bribe in one country or state may be a totally acceptable exchange of favors elsewhere. In a tale from ancient Mesopotamia entitled "The Poor Man of Nippur," for instance, the story does not condemn a poor man who seeks to improve his lot in life by offering a goat to the mayor, but rather condemns the mayor for not keeping his end of the implied bargain.[6] While bribery of this type is not as common as it once was, bribery of various other forms persists on a wide scale today, and continues to intrigue social scientists and political academics.

The purpose of this Note is to analyze illegal gratuities in modern American politics—especially the illegal gratuities statute, 18 U.S.C. § 201—in light of the recent Supreme Court decision, *United States v. Sun-Diamond Growers*.[7] This Note will demonstrate that while a direct nexus between a gift and an official act may not be necessary to convict the giver or receiver of an illegal gratuity, a gift nonetheless will influence the public official in the official's duties, thereby tainting the legislative process. Part II examines the scope of illegal gratuities law prior to *Sun-Diamond*. Part III focuses on the *Sun-Diamond* case itself, while Part IV analyzes the consequences of the Supreme Court's opinion on illegal gratuities law. Finally, Part V suggests ways of improving the illegal gratuities laws to cover harmful gift-giving without sacrificing everyday interaction between public officials and the corporations and individuals they represent.

II. BRIBES AND ILLEGAL GRATUITIES BEFORE *SUN-DIAMOND*

To gain a better understanding of the concept of bribery and to learn how to remedy its negative effects, one must consider what makes the exchange of gifts and favors to and from public officials so morally reprehensible.

A. Why We Find Bribery Morally Reprehensible

At first glance, bribery is not as unethical as it seems. After all, "[b]ribes are [merely] a species of reciprocity,"[8] based on the theory

---

6. *See id.* at 1480-81 (reviewing JOHN T. NOONAN, JR., BRIBES 4 (1984)).
7. 119 S. Ct. 1402 (1999).
8. NOONAN, *supra* note 2, at xiii.

that one person gives a favor or gift to gain the gratitude of another. "Reciprocity is normally desirable, a cornerstone of human relationships in economic, social, political, and personal matters," writes Professor Daniel Hays Lowenstein.[9] It is common for friends or business partners to exchange gifts or treat each other to meals or special events to gain one another's gratitude.[10] Reciprocity is also present in many religions, as worshippers pray and make offerings to gain the gratitude of their gods. In fact, most societies find anomalous a relationship in which favors are not returned.[11] "Fault lies not with the giver but with the nonreciprocator."[12]

Upon closer examination, however, one can distinguish bribery from other forms of reciprocity by putting it in its proper context.[13] Most mutually beneficial exchanges take place between individuals acting in their own interests.[14] Yet, it is different when one of the parties is a public official. Through the act of voting, the public puts the public official into office as a "steward" of the people and entrusts the official to act on the public's behalf.[15] By accepting a bribe or gift, the public official is no longer acting in the interest of the general public, but rather in his own interests. "Those who, having voluntarily assumed public office, set aside the public trust for private advantage (and those who tempt public officials to do so) engage in morally reprehensible conduct by striking at the roots of fairness and democracy."[16] For that reason, "[w]e want a special crime, with a special stigma, for such conduct."[17]

Because a pluralistic society routinely subjects public officials, especially elected officials, to a wide range of pressures and deals, the question becomes which pressures are tolerable and which are

---

9. Lowenstein, *Review*, *supra* note 5, at 1481.

10. "The practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." United States v. Sawyer, 85 F.3d 713, 741 (1st Cir. 1996).

11. *See* NOONAN, *supra* note 2, at 4.

12. *Id.*

13. *See id.* at xiii.

14. *See* Lowenstein, *Review*, *supra* note 5, at 1482.

15. *See id.*

16. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 806 (1985) [hereinafter Lowenstein, *Intermediate Theory*].

17. *Id.*

improper.[18] In other words, when is a gift to a public official just a gift, and when is it more?

Bribery and illegal gratuities statutes attempt to draw the line between allowable and unethical conduct. One of the major goals of such statutes is to guard against practices that skew outcomes in favor of some groups and against others, especially if the skewing reinforces political inequalities caused by other societal conditions.[19] In so doing, these laws protect those that do not have the political or financial leverage to peddle influence. This is especially important in the modern American political system, where the gap between the "haves" and "have-nots" has widened, and the level of lobbying and influence-buying has increased.

B. *Why Individuals and Corporations Give Bribes and Illegal Gratuities and Why Public Officials Accept Them*

The causes of bribery are obvious, but worthy of discussion, nonetheless. On the giving side, bribers offer bribes to gain some degree of security and peace of mind in an ever-changing world fraught with risks and insecurities. Since "[i]nfluence is a matter of probabilities," "[t]he briber influences the official if the gift increases the probability that the official will act as the briber hopes."[20] Bribers can reduce risks, uncertainties, and market inadequacies by ensuring that public officials give them preferential treatment.[21] In some cases, corruption may also be necessary to correct bureaucratic inertia, as illustrated by the contractor who pays off a public official to expedite approval of building plans through the governmental quagmire.[22] In addition to the motives of risk reduction and profit maximization, the corporate structure itself facilitates

---

18. *See* George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2052 (1998).

19. *See* Lowenstein, *Intermediate Theory*, *supra* note 16, at 849.

20. *Id.* at 825 (footnote omitted).

21. *See* John Hogarth, *Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 562 (1995).

22. *See id.* Hogarth writes: "Survival in the current environment requires more than keeping a company in the black. In the struggle for market domination, staying still is not an option." *Id.*

bribery through the division of labor, thereby making "each individual employee's role in corrupt schemes appear innocuous."[23]

On the receiving side, big government has numerous characteristics which make it especially vulnerable to bribery and corruption. These features include

> poor salaries in comparison to similar jobs in the private sector; ill-defined tasks and roles; absence of a clear mandate or purpose; few, if any, performance measures for the organization as a whole, or for individual staff; promotion based on seniority rather than performance; communication blocks that isolate management from line staff; lack of supervision over, or even visibility to, tasks performed; excessive delegation of authority; rules that are contradictory, unworkable, or not enforced; and top-heavy management structures involving several layers of officials.[24]

Public officials also are susceptible to bribes because, like the rest of society, they are motivated by self-interest and often are able to enhance their prospects for re-election and advancement by accepting bribes and gifts.[25] In describing the relationship between lobbyists and public officials, one insider noted: "[I]t's a two-way street. A lot of times the [public officials] are shaking down the lobbyists."[26]

Bribery is also facilitated by the fact that it is hard to detect. There are enormous costs and complexities to investigating allegations of bribery and corruption, and the results of such investigations are often fruitless. "Very few corporate or government officials are prosecuted, fewer still are convicted, and even fewer are imprisoned."[27] In the end, because the motivation to offer and accept bribes is strong, and few offenders pay the consequences, it is not

---

23. *Id.* at 563.

24. *Id.* at 563-64.

25. *See* Lowenstein, *Intermediate Theory*, *supra* note 16, at 836. By one estimate, "[s]ome congressmen must raise as much as $25,000 a week just to stay competitive, and the lobbyists hold the ATM card." *60 Minutes: The Lobbyist* (CBS television broadcast, Aug. 22, 1999) (transcript produced by Burrelle's Information Services) [hereinafter *60 Minutes*].

26. *60 Minutes*, *supra* note 25.

27. Hogarth, *supra* note 21, at 566.

the least bit surprising that people give bribes and public officials accept them for their mutual benefit and advancement.

C. Buying Influence in the United States

Bribery is not a new concept to Americans. The United States Constitution mentions both treason and bribery by name.[28] In the past, outright bribery was the preferred mode of corruption in America, leaving behind a lengthy line of scandals such as Credit Mobilier, Teapot Dome, Abscam, and numerous embarrassing revelations of official corruption in New Jersey, Louisiana, West Virginia, and sister states.[29] So pervasive have been bribery and corruption in American politics through the years that they are the subject of countless works of art and literature, including Thomas Nast's caricatures of William "Boss" Tweed in *Harper's Weekly* during the 1870s,[30] and Robert Penn Warren's truth-based fictional tale of Louisiana politician Willie Stark in "All the King's Men."

Although blatant corruption is not as pervasive in the United States as it once was, more subtle and guileful forms remain. Some commentators have suggested that the complete eradication of corruption from the American political system is somewhat "utopian."[31] Even as corruption in government has leveled out over the years, the public still perceives most politicians as corrupt. In response to a poll question asking if Americans can trust the government in Washington to do what is right most of the time, seventy-six percent of Americans answered yes in 1964, while only nineteen percent answered yes in 1996.[32] This cynicism likely can be traced to the

---

28. *See* NOONAN, *supra* note 2, at xvi.

29. *See* LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 21-22 (1996).

30. Tweed's "ugly features, small beady eyes, huge banana-like nose, vulturish expression and bloated body are the personification of big-city corruption." LEO HERSHKOWITZ, TWEED'S NEW YORK: ANOTHER LOOK xiii (1977).

31. NEIL H. JACOBY ET AL., BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD 42-43 (1977); *see also* SABATO & SIMPSON, *supra* note 29, at 23 ("Any crusade to eradicate corruption is naive and doomed to failure . . . .").

32. *See* Alan Murray, *Foreword* to SABATO & SIMPSON, *supra* note 29, at ix.

Watergate affair and the more recent scandals of the 1980s and 1990s administrations.

Today, the buying of influence in the United States is as widespread as ever, but in many ways it is cloaked by the legitimacy of lobbying and campaign contributions. The rise of lobbying activities in Washington has increased dramatically in the past few years. In 1998 alone, lobbyists in Washington spent approximately $1.5 billion—more than $100 million a month—to influence legislators.[33] From 1961 to 1982, the number of corporate headquarters in Washington increased tenfold,[34] and since President Bill Clinton took office, registered lobbyists skyrocketed from 7500 to over 15,000.[35]

Most of these lobbying activities are both legitimate and legal, though it is debatable whether they are truly democratic.[36] Yet, outright bribery persists: "It is a significant and politically relevant fact that under our present system of campaign finance, politicians and interest groups engage routinely . . . in felonious bribery that goes unprosecuted primarily because the crime is so pervasive."[37]

D. Codification of Bribery and Illegal Gratuities Statutes

Usually at the public's behest, American politicians have made efforts over the decades to eliminate, or at the very least control, bribery and corruption in politics. Initially, bribery was a common law offense applicable only to judicial actions, but statutes gradually expanded the offense to all official actions.[38] Today, bribery is a statutory offense, codified by Congress in 1962 in 18 U.S.C. § 201. Section 201 is divided into three parts: subsection (a) contains definitions, subsection (b) prohibits both giving and accepting a bribe, and subsection (c) prohibits both giving and accepting an illegal gratuity.

---

33. *See 60 Minutes*, *supra* note 25.

34. *See* Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 567 (1998).

35. *See 60 Minutes*, *supra* note 25.

36. Many groups and individuals simply lack the resources to afford lobbyists or provide gratuities to a public official that would put them in the public official's favor. *See* Brown, *supra* note 18, at 2054.

37. Lowenstein, *Intermediate Theory*, *supra* note 16, at 848.

38. *See* DANIEL HAYS LOWENSTEIN, ELECTION LAW 425 (1995).

To many, the concepts of giving bribes and of giving illegal gratuities are synonymous, and at least one court has characterized the difference between the two as "slight."[39] Yet Congress has distinguished them by creating separate crimes with separate punishments. Like state bribery statutes, § 201(b) creates the following five elements for bribery:

(1) There must be a public official involved.
(2) The defendant must have a corrupt intent.
(3) A benefit, anything of value, must accrue to the public official.
(4) There must be a relationship between the thing of value and some official act.
(5) The relationship must involve an intent to influence the public official (or to be influenced if the defendant is the official) in the carrying out of the official act.[40]

The common law elements of giving and accepting an illegal gratuity, by contrast, are included in § 201(c):

(1) There must be a current or former public official involved. A transaction involving a former official, however, can be an unlawful gratuity, but not a bribe.
(2) There is no requirement of corrupt intent.
(3) A benefit, or something of value, must accrue to the public official.
(4) There must be a relationship between the thing of value and some official act.
(5) There must be an intent that the benefit pass to the public official "for or because of" the official act. Unlike bribery, however, there need be no intent that the official act be influenced by the benefit.[41]

39. United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974). "The lines between conduct constituting . . . bribery [and] payment of an illegal gratuity . . . to a public official are poorly defined and often turn on minor differences in the parties' intent." Elkan Abramowitz, *Navigating the Shoals of Political Gift-Giving*, N.Y. L.J., July 6, 1999, at 1.

40. *See* LOWENSTEIN, *supra* note 38, at 435; Lowenstein, *Intermediate Theory*, *supra* note 16, at 796.

41. *See* Lowenstein, *Intermediate Theory*, *supra* note 16, at 797.

"The primary difference between bribery and illegal gratuities is that bribery requires a corrupt intent, while an illegal gratuity does not."[42] The quid pro quo requirement means that, for behavior involving bribery to be actionable, a public official must allow the receipt of the gift to influence his decision on an identifiable matter.[43] Usually, illegal gratuities are "merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."[44]

Illegal gratuities are not as severe as bribes, as indicated by the levels of punishment for each.[45] Yet prosecutors are more likely to bring cases under the illegal gratuities statute than under the bribery statute because the elements of bribery are harder to prove.[46] Violation of the bribery statute may be punished by up to fifteen years' imprisonment, a fine of $250,000 ($500,000 for organizations), or triple the value of the bribe, whichever is greater, and disqualification from holding government office.[47] By contrast, violation of § 201(c)(1)(A), the illegal gratuities statute may be punished by up to two years' imprisonment and a fine of $250,000 ($500,000 for organizations).[48]

Recently, the U.S. Supreme Court had the opportunity to examine § 201(c), the illegal gratuities statute, in *United States v. Sun-Diamond Growers*,[49] a high-profile case involving gifts to former Secretary of Agriculture Michael Espy from a California agricultural

42. Suzette Richards & Robert Warren Topp, *Federal Criminal Conflict of Interest*, 36 AM. CRIM. L. REV. 629, 631 (1999); *see* LOWENSTEIN, *supra* note 38, at 436.

43. *See* Medrith Lee Hager, *The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift*, 83 KY. L.J. 197, 200 (1995). "Proof of a quid pro quo does not necessarily require proof of an express agreement. Such a standard would unduly hamper prosecution while encouraging more subtle forms of illegal activity." *Id.* (footnotes omitted).

44. United States v. Sun-Diamond Growers, 119 S. Ct. 1402, 1406 (1999) (*Sun-Diamond I*).

45. *See id.*

46. *See* Robert S. Greenberger, *Top Court Rules for Sun-Diamond Over Smaltz*, WALL ST. J., Apr. 28, 1999, at B12. Prosecutors also frequently prefer the illegal gratuities statute because those who deal in bribes are less willing to cooperate in the investigation and prosecution. *See id.*

47. *See* 18 U.S.C. § 201(b) (1994); *Sun-Diamond I*, 119 S. Ct. at 1406.

48. *See* 18 U.S.C. § 201(c); *Sun-Diamond I*, 119 S. Ct. at 1406.

49. 119 S. Ct. 1402 (1999) (*Sun-Diamond I*).

cooperative. Writing for a unanimous Court, Justice Antonin Scalia stated the issue in the case as "whether conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position."[50] The United States, represented by Independent Counsel Donald Smaltz, urged that the indictment did not have to allege a direct nexus between the things of value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Espy. Under Smaltz's proposed standard, all that was needed to convict Sun-Diamond was to show that it provided things of value to Espy because of his official position.[51]

The Supreme Court rejected that argument, instead stating the following: "[I]n order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[52] As Justice Scalia put it, "[a] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[53] At least part of the reason that the Court arrived at its decision is that a broad interpretation of § 201(c) would have criminalized benign token gifts to public officials based on their official positions and not linked to any identifiable act.[54]

The effects of the *Sun-Diamond I* decision are numerous and far-reaching. Lobbyists praised the ruling, saying that Smaltz's proposed standard "would [have] broadly criminalize[d] a range of harmless gift-giving and undercut an individual's legitimate right to curry general goodwill, keep doors open and try to influence government."[55] Critics, on the other hand, believed that the

---

50. *Id.* at 1404.
51. *See id.* at 1405-06.
52. *Id.* at 1411.
53. *Id.* at 1410.
54. *See id.* at 1407. Some of the examples raised include giving token sports jerseys to the president at White House ceremonies, and providing the secretary of agriculture a complimentary lunch in conjunction with a speech to farmers. *See id.*
55. Joan Biskupic, *Court Shows Reluctance on Strict Gifts Law*, WASH. POST, Mar. 3, 1999, at A2 [hereinafter Biskupic, *Reluctance*].

"Supreme Court ha[d] just opened the door to an era of graft and corruption that would make Tammany blush."[56]

However one views this particular decision, one thing is clear: the Court's interpretation of § 201(c) offers "ample latitude to lobbyists trying to secure access in the nation's capital and makes it harder to prosecute someone under the statute by requiring prosecutors to prove the gift was connected to a specific official action."[57] Some have even gone so far as to say that "[t]hanks to [the] . . . Supreme Court ruling, every day is Christmas for many high-ranking federal officials."[58]

The fact that, under current law, corporations and individuals can bestow extravagant gifts and money upon public officials, as long as the latter do not perform official acts in exchange, is indeed troubling. In the *Sun-Diamond I* case, "[t]his flies in the face of common sense. Even if Espy did not perform an obvious service for raisin and nut producers, the gifts were meant to curry favor and buy influence."[59] Likewise, in almost every other case, "there are, have been, or are likely to be matters of interest to the donor pending before the donee."[60] Not even the most honest politician, "who knows the identity and business interests of his . . . contributors[,] is ever completely devoid of knowledge as to the inspiration behind the donation."[61]

At bottom, therefore, "the government should be able to set limits on gift-giving even in the absence of a tit-for-tat deal."[62] As written and interpreted, the illegal gratuities statute is simply too ambiguous to prevent influence-peddling effectively. Both the Supreme Court in the *Sun-Diamond I* decision and Independent Counsel Smaltz, who unsuccessfully employed the gratuities statute to prosecute Espy and Sun-Diamond, intimated that the gratuities

---

56. Ellen Weintraub, *Reports of Gratuities Law's Demise Are Greatly Exaggerated*, ROLL CALL, May 6, 1999, at A1.

57. Joan Biskupic, *High Court Narrows Law on Gratuities in Espy Case*, WASH. POST, Apr. 28, 1999, at A1 [hereinafter Biskupic, *High Court*].

58. Opinion, *Court Decision Puzzling*, HERALD, May 12, 1999, at 11A.

59. *Id.*

60. Brown, *supra* note 18, at 2065.

61. United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974).

62. Opinion, *supra* note 58, at 11A.

laws should be refined by Congress or the Office of Government Ethics to cover more subtle but harmful forms of gift-giving.[63]

E. The Need for Stronger Gratuities Laws

Corruption of public officials is always a timely topic because such corruption wreaks enormous long-term economic and social costs. "Among the direct consequences ultimately borne by the taxpayer are increases in the cost of government due to noncompetitive bidding on government contracts, nonproductive use of money for bribes, loss of tax revenues, erosion of the free market . . . , and enforcement and prosecution costs to investigate and convict wrongdoers."[64] More importantly, however, corruption and influence-buying in government have the intangible effect of decreasing the public's trust in government and increasing apathy among voters. As one commentator noted,

> [t]he problem with this system is not that there are too many lobbyists, but that the skilled lobbyists are linked only to the large and powerful business and social issue groups that can afford them. Thus the voices of individual citizens, minorities, and under-funded causes are shut out of political discourse because they cannot be heard without the intermediary of a professional lobbyist.[65]

Once we understand the importance of fixing the gift-giving system, we can begin to address its problems. But we must also appreciate our limitations. "Any crusade to eradicate corruption," write Larry J. Sabato and Glenn R. Simpson, "is naive and doomed to failure, but corruption can be controlled and limited."[66] Bribery laws should encourage elected officials to pursue their interests in a manner that also serves the public interest. A set of laws that forbids much of what a politician needs to do on a daily basis cannot serve this purpose because it cannot be obeyed or enforced.[67]

---

63. *See Sun-Diamond I*, 119 S. Ct. at 1408; Biskupic, *High Court*, *supra* note 57, at A1.
64. Hogarth, *supra* note 21, at 559.
65. Fatka & Levien, *supra* note 34, at 567-68.
66. SABATO & SIMPSON, *supra* note 29, at 23.
67. *See* Lowenstein, *Intermediate Theory*, *supra* note 16, at 836.

It is therefore important to strike a balance between what is ideal and what is realistic. Professor Lowenstein calls this balance the "intermediate theory of politics."[68] On the one hand, we want to encourage public discourse between all constituents and organizations with their public officials since such communication leads to wiser and more effective legislation. Cutting off the public from its officials would only increase apathy and distrust of government.

It is sometimes considered appropriate at these interactions to exchange gratuitious favors, such as when the secretary of education visits and brings notoriety to a local high school and receives a school baseball cap in return.[69] Obviously, these are not the kind of exchanges that we want to investigate and prosecute because they are relatively harmless.[70] Furthermore, as already mentioned, such investigations are both expensive and time consuming. Indeed, the investigation and prosecution by Independent Counsel Smaltz of Secretary Espy and the agricultural companies that gave him roughly $33,000 in gifts took four years and cost around seventeen million dollars.[71] In the end, the jury acquitted Espy on all charges, and the Supreme Court reversed Sun-Diamond's conviction.[72]

Yet, while it is important for the public and governmental entities to interact, we want to limit such interaction so that more ideas than money are exchanged. It is one thing to influence legislation, but it is a far different matter to buy favorable legislation. Apparently the jury and the Supreme Court in the Espy matter considered it acceptable, under current law, for Sun-Diamond to bestow large gifts upon Espy as long as he did not perform an official act for

---

68. *Id.* at 784.

69. *See* United States v. Sun-Diamond Growers, 119 S. Ct. 1402, 1407-08 (1999) (*Sun-Diamond I*).

70. "The ability of lobbyists to develop and maintain legitimate relationships with government officials—which effectuate the citizen's right to petition, facilitate the flow of information, and inform decisionmaking—would be severely and unnecessarily hindered by the fear of criminal prosecution." Brief of American League of Lobbyists as *Amicus Curiae* in Support of Respondent at 4-5, United States v. Sun-Diamond Growers, 119 S. Ct. 1402 (1999) (No. 98-131).

71. *See* Lyle Denniston, *Not All Gifts Are Payoffs, High Court Rules*, BALTIMORE SUN, Apr. 28, 1999, at 3A.

72. *See Sun-Diamond I*, 119 S. Ct. at 1411; Matt Bai, *The Trials of Mike Espy*, NEWSWEEK, Dec. 14, 1998, at 34.

Sun-Diamond. Yet, one can just as easily argue that these gifts were meant to create a reservoir of good favor with Secretary Espy which he would eventually take into account in the course of his official duties. In other words, what first appeared to be a legal gratuity could become a bribe or illegal gratuity, "the facts of which cannot be proved or have not come to light."[73] Even if the gifts do not influence the public official at some point, they nevertheless represent a classic "appearance" problem. "Although perhaps to a lesser degree than [outright] bribes, gratuities present risks of preferential treatment, divided loyalty, and inefficient government."[74]

At present, the illegal gratuities statute does not cover situations where influence is cheaply bought with fancy dinners, tickets to sporting events, or free vacations.[75] That is not to say that these activities are not regulated by other statutes.[76] Yet, with stronger and less ambiguous gratuities laws on the books, it will be easier to prosecute public officials and bribers for conduct that adversely affects the public at large without disrupting the everyday function of pluralist politics.

---

73. Brown, *supra* note 18, at 2054.

74. *Id.*

75. *See* Opinion, *supra* note 58, at 11A.

76. *See, e.g.*, 18 U.S.C. § 203 (1994) (making illegal the acts of giving to or receiving from a federal employee compensation in consideration of the employee's representational assistance to anyone involved in a proceeding in which the United States has a direct and substantial interest); *id.* § 205(a)(1) (making it illegal for federal employees to act as "agent or attorney" for anyone prosecuting a claim against the United States); *id.* § 205(a)(2) (making it illegal for a federal employee to act as "agent or attorney" for anyone appearing before virtually any government tribunal in connection with a matter in which the United States has a direct and substantial interest); *id.* § 207 (making it illegal for various types of federal employees to engage in assorted activities after completion of their federal service); *id.* § 208 (making it illegal for an executive branch employee to participate in any decision or proceeding relating to a matter in which he has a financial interest); *id.* § 209 (making it illegal for an officer or employee of any independent agency of the United States to receive "any contribution to or supplementation of salary . . . from any source other than the Government of the United States"); *id.* 217 (making it illegal for a federal employee to accept a gift in connection with the "compromise, adjustment, or cancellation of any farm indebtedness . . . .").

F. Court Interpretation of the Bribery and Illegal Gratuities Statutes Leading Up to Sun-Diamond

In 1962, Congress consolidated and codified statutes relating to bribery and illegal gratuities into 18 U.S.C. § 201.[77] Subsection (a) contains definitions, while subsections (b)(1) and (2) define, respectively, bribery and acceptance of a bribe:

> (b) Whoever—
>
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (A) to influence any official act; or
>
> (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;
>
> (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act;
>
> (B) being influenced to commit or aid in

77. *See* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. § 201 (1994)).

committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

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

. . . .

shall be fined . . . or imprisoned for not more than fifteen years . . . or both, and may be disqualified from holding any office . . . under the United States.[78]

In § 201(c), Congress defined the lesser offense of giving and receiving an illegal gratuity:

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

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

. . . .

78. 18 U.S.C. § 201(b).

> shall be fined . . . or imprisoned for not more than two years, or both.[79]

The congressional purpose in enacting gratuity legislation was to eliminate the "tendency . . . to provide conscious or unconscious preferential treatment of the donor by the donee."[80] According to Congress, as the government's activities became greater and more complex—bringing the government into closer contact with the private sector—the necessity for maintaining high ethical standards of behavior amongst public officials increased.[81] In *United States v. Evans*, the Supreme Court stated the following about the illegal gratuities statute:

> Congress proceeded evidently in recognition of the principle that "No man can serve two masters," and that it was not right that an officer should agree to accept fees for doing services in matters where the United States is interested, before any officer of the government. The performance of duty by an officer is compensated by the salary or fees regularly allowed by law. To permit agreements for other compensation for services, to be paid by those interested in matters before government officers, would be to countenance the rendering of services oftentimes inconsistent with fidelity to the best interests of the government, to which the employé owes his first and highest obligation.[82]

While there is almost universal agreement that giving and receiving gratuities and favors is morally reprehensible, unfortunately "[t]he federal cases interpreting § 201 are not consistent."[83] In particular, courts are split in their interpretation of the "for or because of" language in the statute.

---

79. *Id.* § 201(c).

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

81. *See* S. REP. NO. 87-2213 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853.

82. *Evans*, 572 F.2d at 480 (quoting United States v. Booth, 148 F. 112, 116 (D. Or. 1906)).

83. Brown, *supra* note 18, at 2062.

1. Direct nexus approach

Some courts have interpreted those words to require a direct nexus between the gratuity given and a specifically identified official act to convict the people who gave or received the gratuity. This approach is best called the "direct nexus" approach, and is represented by the U.S. Court of Appeals for the District of Columbia Circuit's decision in *United States v. Brewster*.[84] According to the court, "[t]here must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence."[85]

Brewster dealt with a senator who received gratuities from a mail order company that had an interest in defeating the enactment of pending legislation that would increase postal rates.[86] The *Brewster* court was "plainly concerned with the chilling effect that an expansive reading of . . . gratuities statutes could have on well-established political practices."[87] The court, therefore, took pains to raise the standard for convicting a party under the illegal gratuities statute, essentially construing the gratuity provisions of § 201 as similar to the bribery provisions.[88] The decision in *Brewster* also emphasized that the senator was an elected official, as opposed to an appointed official, requiring more of a direct nexus for campaign contributions in an effort to protect the campaign finance system.[89] Many courts have used this distinction to interpret the illegal gratuities statute in a completely opposite manner.[90]

2. Status approach

While *Brewster* required a direct nexus between the gratuity and an official act, other courts have taken a decidedly different approach, requiring only that the gift be given because the public

---

84. 506 F.2d 62 (D.C. Cir. 1974).
85. *Id.* at 81; *see also* United States v. Campbell, 684 F.2d 141, 150 (D.C. Cir. 1982) (approving of a jury charge requiring "that the alleged gratuities be given and received 'knowingly and willingly,' and "'for or because of an official act'").
86. *See Brewster*, 506 F.2d at 64-65.
87. Brown, *supra* note 18, at 2062.
88. *See id.*
89. *See id.* at 2064.
90. *See id.*

official held a certain position or status.[91] This "status" approach is best represented in *Evans*, where the Fifth Circuit stated the following:

> [U]nder the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value "otherwise than as provided by law for the proper discharge of official duty." Thus, [the illegal gratuities statute] makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee.[92]

Evans involved a defendant convicted of accepting an illegal gratuity in his official capacity at the United States Department of Health, Education and Welfare, in connection with collection of delinquent student loans.[93] In contrast to *Brewster*, the *Evans* decision effectively made it easier to prosecute the public official by requiring the government to prove only that a gift was given because of the official's position instead of for a particular act.[94] As will be discussed, much of the criticism concerning *Evans* and the status approach is that it gives prosecutors *too much* power to convict givers and receivers of illegal gratuities.

Given the different circuits' lack of uniformity in interpreting the illegal gratuities statute, the time was ripe for the Supreme

91. *See, e.g.*, United States v. Bustamante, 45 F.3d 933, 940 (5th Cir. 1995) ("[I]t is sufficient for the government to show that the defendant was given the gratuity simply because he held public office."); United States v. Standefer, 610 F.2d 1076, 1080 (3d Cir. 1979) (en banc) ("All that was required in order to convict [the defendant] was that the jury conclude that the gifts were given by him for or because of [the public official's] official position, and not solely for reasons of friendship or social purposes."); United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966) ("[The illegal gratuities statute] makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment."); United States v. Secord, 726 F. Supp. 845, 847 (D.D.C. 1989) ("The Government need not prove that the gratuity was given in exchange for any specific official act; there need be no 'quid pro quo' . . . . [T]he Government must [only] show that Defendant acted simply *because of* [the individual's] official position.").

92. United States v. Evans, 572 F.2d 455, 480 (5th Cir. 1978) (citation omitted).

93. *See id.* at 475.

94. *See id.* at 480.

Court to settle the issue authoritatively. This opportunity presented itself in the *Sun-Diamond* case.

III. THE *SUN-DIAMOND* CASE

A. Facts of Sun-Diamond

In August of 1997, Independent Counsel Donald C. Smaltz charged Sun-Diamond Growers, a large agricultural cooperative owned by individual cooperatives including Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, Valley Fig Growers, and Hazelnut Growers of Oregon, with, among other violations, making illegal gifts to former Secretary of Agriculture Michael Espy.[95] Specifically, count one of the indictment charged

95. *See* United States v. Sun-Diamond Growers, 138 F.3d 961, 963 (D.C. Cir. 1998) (*Sun-Diamond II*). One should note that the illegal gratuities statute permits prosecutors to go after both those giving gratuities as well as those receiving gratuities. *See* 18 U.S.C. § 201(b)(1)-(2) (1994). Therefore, Independent Counsel Smaltz prosecuted not only Sun-Diamond (the gift giver), but also Secretary Espy (the gift receiver) in a separate trial. *See* United States v. Espy, 23 F. Supp. 2d 1 (D.D.C. 1998). The indictment in the *Espy* case charged the Secretary himself with over 30 counts of accepting over $33,000 in illegal gratuities from Sun-Diamond and other agricultural organizations, such as Arkansas-based Tyson Foods. *See id.* at 2. In that trial, Smaltz called over 70 witnesses in seven weeks of testimony. *See* Bill Miller, *As Espy Trial Ends, Its Insight into Gifts and Favors Is Murky*, WASH. POST, Nov. 23, 1998, at A21. And despite the fact that criminal defense attorney Ted Wells did not call a single witness, it took the jury just nine hours to acquit Espy on all counts of wrongdoing. *See* Bai, *supra* note 72, at 34. After the prolonged investigation and trial, Wells said, "'The jury could see that the Mickey Mouse stuff they were trying to accuse Mike of didn't even occur .... It was absurd. This was a heavy-handed and unfair prosecution and the jury knew it.'" Charles Whitaker, *Mike Espy: Bruised But Unbowed*, EBONY, Apr. 1999, at 146. Indeed, at the unveiling ceremony of his portrait at the U.S. Department of Agriculture, President Bill Clinton announced, "'Mike, the jury redeemed you, and you belong to the American people, and we are very proud of you.'" Terry M. Neal, *At USDA Event, Espy is Portrait of Triumph*, WASH. POST, Dec. 11, 1998, at A29.

For a look at other cases involving gratuities given to and accepted by Secretary Espy, see *United States v. Schaffer*, 183 F.3d 833 (D.C. Cir. 1999); *In re Espy*, 145 F.3d 1365 (D.C. Cir. 1998); *United States v. Williams*, 29 F. Supp. 2d 1 (D.D.C. 1998). Interestingly, while Espy and Sun-Diamond ultimately prevailed in their legal battles against the independent counsel, companies such as Tyson Foods simply agreed to pay fines of six million dollars to

Sun-Diamond with giving Espy approximately $5900 in illegal gratuities, including tickets to the U.S. Open Tennis Tournament worth $2295, luggage worth $2427, meals worth $665, and a framed print and crystal bowl worth $524.[96] Sun-Diamond also gave Patricia Dempsey, Espy's then-girlfriend, $3200 in cash so that she could pay for airfare to accompany Espy on a business trip to Greece.[97] Sun-Diamond transferred the gifts to Espy through Richard Douglas, the vice president for corporate affairs whose chief responsibility included representing the interests of the corporation and its members in Washington.[98] Espy and Douglas had been long-time friends since the two attended college together at Howard University.[99] Espy claimed that he thought Douglas gave Espy the gifts personally, but it was later revealed that Sun-Diamond reimbursed Douglas for his expenditures on the gifts.[100] At a separate trial, Douglas testified that he never asked Espy for any favors for the company and that Espy never provided any.[101]

Still, the indictment detailed two specific issues on which Sun-Diamond had a clear interest in favorable action by Secretary Espy. The first involved Espy adopting a regulatory definition of "small-sized entities" to include cooperatives such as Sun-Diamond's members, thereby entitling them to grant funds under a market promotion program (MPP) administered by the U.S. Department of Agriculture

---

avoid a more costly legal battle. *See* Bai, *supra* note 72, at 34.

96. *See* United States v. Sun-Diamond Growers, 119 S. Ct. 1402, 1405 (1999) (*Sun-Diamond I*). The indictment also charged a separate criminal scheme involving illegal campaign contributions by Sun-Diamond to Espy's brother, Henry, who unsuccessfully ran for Michael Espy's congressional seat when Michael Espy was appointed the secretary of agriculture. *See* Audrey Strauss, *The Legal Story Behind the Espy Acquittal*, N.Y. L.J., Jan. 7, 1999, at 5 n.2 [hereinafter Strauss, *Legal Story*]. Sun-Diamond was convicted on those counts and the convictions were affirmed. *See id.*

97. *See* Bai, *supra* note 72, at 34.

98. *See Sun-Diamond II*, 138 F.3d at 963-64.

99. *See id.* at 964. So close were Espy and Douglas that the latter had a spare key to Espy's Maryland home, where Espy sometimes cooked for Douglas and Douglas's girlfriend. *See* Bai, *supra* note 72, at 34.

100. *See* Bai, *supra* note 72, at 34. Furthermore, Sun-Diamond increased Douglas's compensation as a result of his success in advancing Sun-Diamond's interests with Secretary Espy. *See* United States v. Sun-Diamond Growers, 964 F. Supp. 486, 491 (D.D.C. 1996) (*Sun-Diamond III*).

101. *See* Miller, *supra* note 95, at A21.

(USDA).[102] Second, Sun-Diamond had an interest in an Environmental Protection Agency plan to phase out the use of methyl bromide, a pesticide used by some of the growers who belonged to the member cooperatives.[103] The indictment did not, however, allege a direct nexus between the issues before Secretary Espy and the gratuities conferred.[104]

B. Deciding the Case

The evolution of the *Sun-Diamond* case from the district court to the Supreme Court reflects the difficulty courts encountered in construing the illegal gratuities issue. Only after the Supreme Court decision did the meaning of § 201(c) become evident.

1. The district court decision, trial, and verdict

Initially, the *Sun-Diamond* case was heard by Judge Ricardo Urbina in the United States District Court for the District of Columbia. Sun-Diamond moved to dismiss the indictment using the direct nexus approach.[105] In other words, Sun-Diamond claimed that it was innocent absent a showing of a direct nexus between the gifts it gave Secretary Espy and an official act that he performed for Sun-Diamond.[106] Judge Urbina rejected this argument, stating the following:

> [T]he definition of "official act" denotes that the official need not have undertaken or committed himself to undertake a specific act. An official act is one which involves "any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at the time be *pending*. Presently, the indictment alleges that there were two matters pending before Secretary Espy in which Sun-Diamond had a significant interest. There is no indication

102. The appellate court notes that while Sun-Diamond and its members "were hardly mom-and-pop organizations—they reported net sales of $648 million for fiscal year 1993— . . . many of their constituent growers were quite modest in size." *Sun-Diamond II*, 138 F.3d at 964.

103. *See Sun-Diamond I*, 119 S. Ct. at 1405.

104. *See id.*

105. *See* United States v. Sun-Diamond Growers, 941 F. Supp. 1262, 1265 (D.D.C. 1996) (*Sun-Diamond IV*).

106. *See id.*

> that the gratuity statute or the definition of the term "official act" require the indictment to allege that Sun-Diamond intended to *reward* Secretary Espy for an act that he had done or committed himself to do.[107]

In denying the motion to dismiss, Judge Urbina appeared to endorse the status approach espoused by the *Evans* line of cases. Specifically, he wrote that "it is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture."[108]

Subsequently, the case went to trial in September of 1996. In accordance with the status approach, the district court charged the jury with instructions that made "it a crime for a person or company to knowingly and willingly give a public official a thing of value *because of his official position* whether or not the giver or receiver intended that a particular official's acts be influenced."[109] Indeed, "time and again the jury instructions hammered home [the] theme" that it was sufficient if the motivating factor for the payment was to keep the official happy or to create a better relationship with the official because of his status.[110]

With these instructions, the jury convicted Sun-Diamond of violating the illegal gratuities statute.[111] Following the conviction, Sun-Diamond renewed its motion for judgment of acquittal on the indictment but was again rejected by Judge Urbina.[112]

The district court's adherence to the status approach is a well-intended, but flawed approach to controlling influence-peddling. By denying Sun-Diamond's repeated attempts to dismiss the indictment and by instructing the jury as it did, the court seemed intent on both following precedent and making it easier for prosecutors to convict companies such as Sun-Diamond. But while the court's use of the status approach may be popular with a public frustrated with corruption, it is not entirely practical.

---

107. *Id.* at 1267 (citations omitted).

108. *Id.* at 1268 (footnote omitted).

109. United States v. Sun-Diamond Growers, 138 F.3d 961, 965 (D.C. Cir. 1998) (*Sun-Diamond II*).

110. *Id.*

111. *See Sun-Diamond IV*, 964 F. Supp. at 488.

112. *See id.* at 494.

The status approach is overbroad in that it criminalizes harmless gift-giving (baking brownies) as well as harmful, yet subtle, gift-giving (crystal bowls, meals, tickets to sporting events). By punishing just about everyone involved, it does not even attempt to draw a line between allowable and non-allowable conduct. One is left to wonder when a gift is simply too lavish to be considered just a gift. The circuit court was quick to recognize these shortcomings and cast them aside.

2. The circuit court decision

On appeal, the District of Columbia Circuit reversed Sun-Diamond's conviction.[113] In an opinion written by Judge Stephen F. Williams, the appellate court rejected the status approach and held erroneous the district court's jury instructions.[114] Wrote Judge Williams:

> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position . . . . [T]he terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.[115]

At oral argument, the independent counsel's broad reading of the gratuities statute appeared to have startled the court. When asked whether an instance in which an old friend of some newly-appointed officeholder took the latter to a meal or sports event while his firm had matters pending before the officeholder was an illegal gratuity, the independent counsel answered that "[i]t may well be."[116]

---

113. *See Sun-Diamond II*, 138 F.3d at 977.

114. *See id.* at 968.

115. *Id.* According to counsel for Sun-Diamond, the jury instructions effectively stripped the factfinder of determining whether in fact Sun-Diamond's gifts were for or because of any official act. *See* Eric Bloom, Oral Argument Before the United States Supreme Court in *Sun-Diamond I* at 32, United States v. Sun-Diamond Growers, 119 S. Ct. 1402 (1999) (No. 98-131).

116. *Sun-Diamond II*, 138 F.3d at 967 n.4.

The court responded by asking the independent counsel if he was serious.[117]

In a "somewhat contradictory"[118] opinion, however, the appellate court also purported to reject the direct nexus approach, instead trying to find an intermediate ground between the two approaches.[119] According to the court, Sun-Diamond's efforts to win "generalized sympathy" with Espy would not be actionable as an illegal gratuity, but a jury could convict the defendant if it found intent to reward past favorable acts or to make future ones more likely.[120]

By failing to endorse either the status approach or the direct nexus approach, the circuit court decision swung the pendulum toward the middle. Yet the "tenuous distinctions"[121] in the appellate court opinion left ambiguous the status of the illegal gratuities statute in the District of Columbia. While the appellate court opinion may have been legally viable, it, too, was confusing in its practical application. The court seemingly failed to realize that, intentionally or unintentionally, Sun-Diamond's attempts to win generalized sympathy by conferring gifts upon Secretary Espy (legal) would almost undoubtedly make future acts more likely (illegal). Again, the case was appealed to clarify the continuing confusion with the illegal gratuities statute.

3. The Supreme Court decision

In 1998, the Supreme Court granted certiorari limited to the issue arising under the illegal gratuities statute, even though there were several other issues in the case.[122] "In reviewing the scope of the gratuities statute, the Supreme Court [would] have to consider where to land on the continuum of this potentially elastic statute."[123]

Once again, Sun-Diamond argued before the Court, through its counsel, Eric Bloom, that the statute called for a link between a gift

117. *See id.*
118. Brown, *supra* note 18, at 2064.
119. *See Sun-Diamond II*, 138 F.3d at 969.
120. *See* Brown, *supra* note 18, at 2064.
121. *Id.*
122. *See* United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir.), *cert. granted*, 525 U.S. 961 (1998).
123. Strauss, *Legal Story*, *supra* note 96, at 7.

on the one hand and some specific official act on the other hand.[124] The government, through Deputy Independent Counsel Robert W. Ray, argued in response that all that was needed to convict Sun-Diamond was a showing that Sun-Diamond intended to give gratuities to Secretary Espy because of his official position.[125]

The Court immediately took issue with a reading of the statute that would have criminalized innocent gratuities. Several justices "battered" the deputy independent counsel with hypotheticals involving different scenarios of trivial gift-giving to public officials.[126] One commentator noted that "Smaltz [seemed] doomed from the moment in oral argument when his deputy refused to dismiss the possibility that baking brownies for a Senator could be subject to criminal liability under his interpretation of the statute."[127]

In the opinion, the Court appears to have construed the illegal gratuities statute narrowly for several reasons. First and foremost, it was concerned with the practical effects—or what the Court called "peculiar results"—that the government's interpretation would have produced.[128] A broad reading of the gratuities statute would have criminalized seemingly innocuous gift-giving, including the actions of a group of farmers who provided a complimentary lunch for the secretary of agriculture in conjunction with his speech to the farmers concerning USDA policy.[129] This, in turn, would give aggressive prosecutors the go-ahead to investigate and prosecute all instances of gift-giving, without affording lobbyists, gift-givers, and public officials any protection. Both during oral argument and in the opinion, the Court expressed concern about interpreting the statute broadly with "nothing but the Government's discretion" to protect against unwarranted prosecutions.[130]

---

124. *See* Eric Bloom, Oral Argument Before the United States Supreme Court in *Sun-Diamond I* at 32 (No. 98-131).

125. *See* Robert A. Ray, Oral Argument Before the United States Supreme Court in *Sun-Diamond I* at 3-4 (No. 98-131).

126. *See* Audrey Strauss, *The Sun-Diamond Gratuities Ruling by the High Court*, N.Y. L.J., May 6, 1999, at 5 [hereinafter Strauss, *High Court*].

127. Weintraub, *supra* note 56, at 1.

128. *Sun-Diamond I*, 119 S. Ct. at 1407.

129. *See id.*

130. *Id.* at 1408.

Second, the Court emphasized the fact that Congress intended the language of the gratuities statute to pertain to official acts and not to the office:

> Our refusal to read § 201(c)(1)(A) as a prohibition of gifts given by reason of the donee's office is supported by the fact that when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion.[131]

Because Congress had distinguished between specific and broad statutes in the past—as exemplified by the language in 18 U.S.C. § 209(a) prohibiting supplementation of executive salaries—the Court found any broad interpretation of the gratuities statute to be "implausible."[132]

Finally, the Court rejected the government's broad interpretation of the gratuities statute because it considered a narrow prohibition "more compatible with the fact that § 201(c)(1)(A) is merely one strand of an intricate web of regulations . . . governing the acceptance of gifts and other self-enriching actions by public officials."[133] The Court went on to describe a number of criminal and civil regulations that "demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions."[134] The Court concluded its analysis by observing that given the linguistic choice, the statute should be interpreted as a "scalpel" rather than a "meat axe."[135]

In the end, the independent counsel's broad interpretation of the statute was too extreme to make it tenable. The unanimity of the decision showed that this was not so much a partisan issue as it was a reflection of the fact that the Court was uncomfortable with expanding the heavily regulated area of gratuities law. While the independent counsel correctly cited a number of decisions that broadened the interpretation of the gratuities statute, ultimately, the explicit

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1410.
135. *Id.*

language of the gratuities statute requiring the gift to be "for or because of any official act" supported Sun-Diamond's position, not the independent counsel's.[136]

But while the independent counsel and the district court's use of the status approach was flawed, the Supreme Court's endorsement of the direct nexus approach is not much better. The direct nexus approach does not work because it underestimates just how influential money is in the legislative process. While the direct nexus approach prevents "peculiar results" stemming from innocent gift-giving, it also shelters not-so-innocent gift-giving that is likely to influence a public official. And like the status approach, the Court's use of the direct nexus approach as applied to the illegal gratuities statute fails to draw a line between allowable and unethical conduct, leaving those distinctions to other regulations. The Court's decision essentially treats the residents of a retirement home who bake brownies for their senator the same as a company like Sun-Diamond that spends thousands of dollars to show the public official its gratitude.

IV. RAMIFICATIONS OF *SUN-DIAMOND*

While the circuit courts had room to shape § 201(c) as they saw fit, the Supreme Court's decision in *Sun-Diamond* left unambiguous the meaning of the gratuities statute. After this decision, the government would be required to establish a direct nexus between the gift conferred and an official act performed by the public official.[137]

From this decision emerges a clearer picture of who the winners and the losers are in the battle over illegal gratuities. The decision was especially cheered by professional lobbyists, who saw increased opportunities to influence legislation through gift-giving. The decision will also serve as a helpful precedent for criminal practitioners to defend against aggressive interpretations of the gratuities

---

136. Strauss, *Legal Story*, *supra* note 96, at 5.

137. The decision

> left in place a three-pronged regulatory scheme whereby offering or accepting a gift as a quid pro quo, to induce an official act, constitutes bribery . . . ; offering or accepting a gift as a reward or thank you for an official act constitutes an illegal gratuity . . . ; and offering or accepting a gift not otherwise prohibited by the criminal laws is subject to administrative regulation . . . but will not result in a jail term.

Weintraub, *supra* note 56, at 1.

statute.[138] Yet, one commentator noted that lobbyists and criminal practitioners should perhaps be more reserved in their jubilation:

> The [*Sun-Diamond*] decision should not . . . give rise to concern . . . that it is now open season for gift-giving to federal officials. In fact, such conduct is highly regulated, as the Court's opinion pointed out, and both criminal and regulatory sanctions can be imposed on the gift-giver and recipient in a wide range of circumstances.[139]

The decision nevertheless dealt a blow to prosecutors by opening the floodgates to more money in the legislative process. While it protected innocent gift-giving such as baking brownies for public officials, the decision also provided legal shelter for corporations and individuals to wine and dine federal government officials so as to gain favor with those officials.

Sun-Diamond brings to light a major problem with the illegal gratuities statute. The statute itself forces courts to apply either the status approach or the direct nexus approach, when, in fact, neither is particularly workable. At least one commentator has expressed frustration with a statute that is "so malleable" that it can be read to establish an offense resembling bribery—as the direct nexus approach does—and a separate offense based on a different rationale—as the status approach does.[140]

The status approach, on the one hand, creates "peculiar results" and leaves too much discretion to the government in deciding whom to prosecute. Samuel J. Buffone, of the American League of Lobbyists, astutely observed that a broad reading of the illegal gratuities statute "in the hands of an aggressive or unethical prosecutor can be a dangerous weapon."[141]

The direct nexus approach, on the other hand, seemingly ignores the potential influence that a gift could have on the public official in the official's legislative duties. As one senator noted, "[A]nyone who believes that corporations and lobbyists lavish a Cabinet secretary with gifts worth tens of thousands of dollars just to be friendly is

138. *See* Strauss, *High Court*, *supra* note 126, at 5.

139. *Id.*

140. Brown, *supra* note 18, at 2065.

141. Laurie Asseo, *Supreme Court: Bribery Law Needs to Tie Gift with Act*, HARRISBURG PATRIOT, Apr. 28, 1999, at A5.

dangerously naive."[142] While they may not be tied to an official act when given, these gifts undoubtedly will influence public officials in their official duties at a later point, thereby benefiting the corporations or individuals that gave them at the public's expense. And even if, by chance, the gifts do not influence the public officials, there is still the public *perception* that the gifts have played a part in the officials' decision-making process.

Neither the status approach nor the direct nexus approach really provide any guidance as to which gifts are legal and which are not. The only guidance from federal laws on the matter is to be found in the bribery statute, which makes unlawful any gifts given or received with the intent to influence an official act,[143] or in "an intricate web of regulations, both administrative and criminal," which governs the acceptance of gifts and other self-enriching actions by public officials.[144] This raises the twin issues of how to reform § 201(c) to clarify which gratuities are illegal or whether to do away with it altogether.

V. RECOMMENDATIONS

Despite the outcome in the *Sun-Diamond* case, Independent Counsel Smaltz maintains that his office's "mandate required [it] to examine both the actions of the regulated companies who gave Espy gratuities as well as Espy's acceptance of same."[145] Justifying his investigation, Smaltz stated:

> The Espy matter is a case that supports the need for, and worth of, independent counsel. As Secretary of Agriculture, Michael Espy administered a government department with a work force of 124,000 employees (6% of the total number of federal employees), and administered an annual budget of $65.5 billion (representing 4.3% of the total federal budget). The . . . Secretary of Agriculture is ninth in line to succeed the President . . . . But for the appointment

142. Russell D. Feingold, *Sound Ethics Haven't Been Ruled Out*, L.A. TIMES, May 4, 1999, at B7.
143. *See* 18 U.S.C. § 201(b) (1995).
144. United States v. Sun-Diamond Growers, 119 S. Ct. 1402, 1408 (1999).
145. Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2376 (1998).

of an independent counsel, the illegal conduct surrounding Secretary Espy would never have been exposed, investigated, or prosecuted.[146]

Casting aspersions on the value of the independent counsel aside, one still wonders whether the Espy case was ever worth the time or expense. After Espy himself had been acquitted, some of Smaltz's own prosecutors mentioned that the case never should have been tried.[147]

Yet, the fault does not lie entirely with Smaltz. Rather, the problem is with the gratuities statute used to prosecute Espy and Sun-Diamond, which "was just too ambiguous to hang a conviction on."[148] It is clear from the Court's application of the gratuities statute in *Sun-Diamond* that, as currently written and interpreted, the statute lacks real teeth. Section 201(c) now provides wide latitude for lobbyists to lavish generous gifts upon public officials as long as they are not connected to an official act.

Rather than dwell on the *Sun-Diamond* Court's narrow interpretation of the law, many activists have seized the opportunity to promote badly-needed reform in a defective statute. In other words, "[w]hile the Espy case turned out to be a lemon, there's still a chance to make some lemonade out of the Supreme Court's ruling."[149] There are two ways to approach reform in the area of illegal gratuities: one involves changing or eliminating § 201(c) itself, and the other involves changing the entire process of gift-giving to public officials.

A. Changing the Illegal Gratuities Statute Itself

Since the Supreme Court has interpreted the gratuities statute to require a direct nexus like the bribery statute, one wonders if the gratuities statute is necessary at all. Yet, simply because both statutes are concerned about the role of money in influencing official action, there is still a need for two separate offenses with varying degrees of punishment.[150] The gratuities offense is meant to cover

146. *Id.* at 2371-72 (footnote omitted).
147. *See* Bai, *supra* note 72, at 34.
148. Feingold, *supra* note 142, at B7.
149. *Id.*
150. *See* Brown, *supra* note 18, at 2066.

gift-giving with a more attenuated nexus between the transfer and the act, the lack of an agreement between donor and donee, and the importance of ethics laws considerations such as avoiding appearances of impropriety, adopting a prophylactic approach, and downplaying the importance of motive.[151]

Yet, while total elimination of the gratuities statute is probably unnecessary, the language of the statute could be altered to make the statute stronger. Perhaps the most important step that Congress could take to tighten up the gratuities statute is to recognize that while a strict quid pro quo is not necessary under § 201(c) to convict the giver or receiver of a gratuity, generous gifts from corporations and individuals to public officials nevertheless *appear* improper to the general public. "Congress should quickly begin work to clarify and strengthen the statute, to make sure that it covers not just blatant offers of quid pro quo, but also the appearance of impropriety that thousands of dollars in gifts to a public official inevitably creates in the public's mind."[152]

The District of Columbia Circuit Court attempted—albeit unsuccessfully—to find a middle-ground between the status and direct nexus approaches. By illegalizing conduct that "make[s] future [acts] more likely" and "reward[s] or elicit[s] favorable official action," the court at least acknowledged that gifts unattached to an official act pending before a public official could nonetheless influence that official, or appear to influence that official, at a later time.[153] Yet, the circuit court clouded its decision with other language making it legal to gain "generalized sympathy" from a public official.[154] In searching for new ways to word the statute, Congress should incorporate the circuit court decision language about making "future acts more likely" while leaving out language concerning "generalized sympathy."

151. *See id.*
152. Feingold, *supra* note 142, at B7.
153. United States v. Sun-Diamond Growers, 138 F.3d 961, 968-69 (D.C. Cir. 1998) (*Sun-Diamond II*).
154. *Id.* at 967.

B. Changing the Gift-Giving Process

In addition to retooling § 201(c), Congress should reduce the role of money in the legislative process by reforming the gift-giving process. One way to ensure that money does not find its way into this political process is to use public funds to finance a public official to attend events and interact with constituents so constituent companies will not have to pay the public official's way. This allows public officials to interact with their constituents in a manner that is fair and that appears fair to the public. Under this scheme, companies such as Sun-Diamond that bestow lavish gifts upon a public official would no longer be able to defend themselves against charges of buying influence by saying that they gave the gift to gain "access to" and "the gratitude of" the public official. Instead, the public official would appear before such constituents using public funds, thereby allowing the official to consider pending matters in an impartial manner that benefits the public rather than a particular individual or corporation. This tactic may not prove particularly popular, as it would undoubtedly increase government expenditures necessary to finance such public events. But in the long run, government funding may prove to be a better way of allowing public officials to communicate with their constituents than the current system of lobbying and influence-peddling.

Yet another potential resolution to this problem—one that is already in place—is to limit the kinds of gifts that public officials receive. There are already strict federal regulations preventing federal employees from accepting gifts from persons or parties who have an interest in their official work. And Senate gift rules have put limits on the "fancy vacation trips with lobbyists, lavish meals, and high-priced tickets to sporting or entertainment events."[155] Any version of the illegal gratuities statute must be read in conjunction with these laws to determine when gift-giving becomes excessive and therefore illegal. Furthermore, these laws should constantly be re-evaluated and expanded to close gift-giving loopholes. They should also be narrowly tailored, however, so as not to limit free speech or communication between government officials and their constituents.

---

155. Feingold, *supra* note 142, at B7.

Another step to combat influence-peddling would be to alter the federal statutes that cover bribery and gratuities to allow for civil, rather than criminal, sanctions. At least one thoughtful observer of the legislative process, attorney and former Federal Election Committee official Kenneth Gross, has suggested that there are fewer prosecutions of bribery and illegal gratuities because the relevant statutes require proof of criminal intent and provide only for criminal prosecutions with severe penalties.[156] "Putting someone in prison for doing favors in exchange for . . . contributions . . . is arguably disproportionate to the offense. Were such cases to be prosecuted in *civil* court instead, the stakes could be lowered considerably while the primary goal of such prosecutions—deterrence—would be preserved."[157]

Finally, Professor John Hogarth has suggested a number of preventative measures designed to control corruption before it happens rather than after the fact.[158] Some of these measures call for the strengthening of criminal laws to detect and catch corporate wrongdoers. For instance, Hogarth suggests holding senior managers and officers of corporations vicariously liable, both civilly and criminally, for the corrupt acts of their employees, with or without the officers' guilty knowledge.[159]

Other tactics recommended by Hogarth involve reducing the need and opportunity for corruption and bribery.[160] To reduce the causes of corruption, "[g]overnments should target those aspects of bureaucratic culture that contribute to low morale, neutralization of

---

156. *See* Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 300 (1991).

157. SABATO & SIMPSON, *supra* note 29, at 336; *see also* United States Supreme Court Official Transcript at 13, United States v. Sun-Diamond Growers, 119 S. Ct. 1402 (1999) (No. 98-131) ("[W]hy not, given the difficulties in this area, assume that Congress intended this general kind of present-giving . . . should be handled by civil regulations rather than somebody bringing the blunderbuss of the criminal law . . . into the prosecutor's arsenal, where they could prosecute trivial things?"); Brown, *supra* note 18, at 2067 ("Congress should evaluate whether the offense should be the subject of civil penalties . . . .").

158. *See* Hogarth, *supra* note 21, at 569-75.

159. *See id.* at 570-71.

160. *See id.* at 573-75.

responsibility, and vulnerability to bribes,"[161] such as low salaries, ill-defined tasks, lack of supervision, and excessive delegation of authority. In a similar vein, corporations and public officials alike should require full financial disclosure and encourage whistleblowing.[162]

The aforementioned policies are only beginning points for remedying the influence of money on public officials. As is usually the case, Congress will be reluctant to reform a system that serves its interests so well. But by both altering the gratuities statute and by implementing change in the gift-giving process, Congress could take an active role in reducing illegal gratuities and restoring public trust.

VI. CONCLUSION

While the *Sun-Diamond* decision did not seem to please people trying to keep money out of the legislative process, it did serve as a wake-up call to Congress to look once again at seemingly corrupt practices, and perhaps to reform an outdated and poorly constructed statute. Congress is now in an unprecedented position to resolve a problem that has gone unaddressed for several decades. Although skeptics doubt politicians' propensity and ability to deal with such a problem, there are indicators—albeit small ones—that politicians are willing to look at their own actions and that change is forthcoming. Campaign finance reform packages have been introduced on the floor of both houses; one has passed in the House of Representatives, and another was hampered by a Republican filibuster in the Senate.

While "[c]omplete eradication of corruption is an unrealistic goal[,] [c]ontrolling its spread and limiting its damaging effects can be achieved given sufficient public demand and political will."[163] With a clearer "conception of what we expect the political system to accomplish and how we would like government officials and others in the political process to behave if that system is to have a chance of success[,]" change is possible in the gratuities statute.[164] If Congress is able to resolve the problems with the gratuities statute, it can

161. *Id.* at 573.
162. *See id.* at 574-75.
163. *Id.* at 575.
164. Lowenstein, *Review*, *supra* note 5, at 1510.

renew the public's faith that our government's decisions are based on merits, not money.

*Steven M. Levin**

* J.D. candidate, May 2001. I would like to thank Professor Richard Hasen of Loyola Law School and Martha Cochran of the law firm Arnold & Porter for pointing me in the right direction, and the editors and staff of the *Loyola of Los Angeles Law Review* for their tireless efforts in revising and editing this piece. Thanks also to Jackie Sadker for her continued support. Last, but certainly not least, I wish to thank my sister, Laura, and my parents, Rita and Charles, for their unconditional love, support, and guidance during the harrowing law school experience.