

Bribery of Public Officials and Witnesses (18 U.S.C. § 201)

- 6.18.201B1 Bribery of a Public Official (18 U.S.C. § 201(b)(1))
- 6.18.201B1-1 Bribery of a Public Official – “Public Official” Defined
- 6.18.201B1-2 Bribery of a Public Official – “Official Act” Defined (revised 2/2022)
- 6.18.201B1-3 Bribery of a Public Official – “Corruptly” Defined
- 6.18.201B2 Receiving Bribe by Public Official (18 U.S.C. §201(b)(2))
- 6.18.201B2-1 Receiving Bribe by Public Official – “Corruptly” Defined
- 6.18.201B3 Bribery of a Witness (18 U.S.C. §201(b)(3))
- 6.18.201B4 Soliciting Bribe by Witness (18 U.S.C. §201(b)(4))
- 6.18.201C1A Illegal Gratuity to a Public Official (18 U.S.C. § 201(c)(1)(A))
- 6.18.201C1B Receiving Illegal Gratuity by a Public Official (18 U.S.C. § 201(c)(1)(B))

6.18.201B1 Bribery of a Public Official (18 U.S.C. § 201(b)(1))

Count (*No.*) **of the indictment charges the defendant** (*name*) **with bribery of a public official, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That (*name*) **gave, offered, or promised something of value, that is** (*specify thing of value*) **to** (*name of official*);

Second: That (*name of official*) **was, at that time, a public official;**
and

Third: That (*name*) **did so corruptly with the intent to influence an official act, that is, (name) intended to give** (*specify thing of value*) **in exchange for an official act.**

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions [hereinafter O'Malley et al., supra] § 27.03.

18 U.S.C. § 201(b)(1) provides that anyone who

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.

commits a federal offense. In some cases, the court may want to modify the instruction to inform the jury that the bribe may be direct or indirect, that the defendant may be convicted of the offense based on an offer or promise to bribe, or that the conviction may be based on the intent defined in § 201(b)(1)(B) or (C). In addition to the elements instruction, the court should give Instruction 6.18.201B1-1 (Bribery of a Public Official – “Public Official” Defined), Instruction 6.18.201B1-3 (Bribery of a Public Official – “Corruptly” Defined), and Instruction 6.18.201B1-2 (Bribery of a Public Official – “Official Act” Defined). Giving an illegal gratuity to a public official in violation of 18 U.S.C. § 201(c)(1)(A) may be a lesser included offense. *See* Instruction 6.18.201C1A (Illegal Gratuity to a Public Official (18 U.S.C. § 201(c)(1)(A))).

The statute requires proof that the defendant intended to influence an official act. “In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.” *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999). *See also United States v. Kemp*, 500 F.3d 257, 284 (3d Cir. 2007).

A quid pro quo may be implicit as well as explicit. *Evans v. United States*, 504 U.S. 255, 268 (1992). The improper benefit may consist of money, property, services, or any other act which advances the official's personal or business interests, including a loan. *See United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

In addition, a conviction under this section may be based on a stream of benefits to the public official or to a third party whom the official favors, and the government does not need to establish that any specific benefit was given in exchange for a specific official act. Payments in violation of the statute may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. *See Kemp*, 500 F.3d at 282. *See also United States v. Davis*, 841 F. App'x. 375 (3d Cir. 2021).

To violate the statute, the defendant's act of bribery need not be calculated to induce unlawful conduct by the public official. In *United States v. Labovitz*, 251 F.2d 393 (3d Cir. 1958), the Third Circuit stated:

[E]ither an intention to influence official behavior or an intention to induce unlawful action will supply the culpability which the statute requires. * * * “The

statute is violated when a bribe is given or an offer to bribe is made regardless of the occasion therefor, provided it is done with the requisite intent and provided the acceptor or the offeree of the bribe is a person of the sort described in the statute.”

251 F.2d at 394 (citations omitted).

(Revised 2/2022)

6.18.201B1-1 Bribery of a Public Official – “Public Official” Defined

The term “public official” means (*a Member of Congress, or*) an officer or employee or person acting (*for*) (*on behalf of*) the United States, or any department, agency or branch of the United States Government, in any official function, under or by authority of any such department, agency, or branch of government.

The term “public official” includes any employee of the United States government as well as any person who is performing work for or acting on behalf of the United States government.

Comment

O’Malley et al., *supra*, § 27.07.

18 U.S.C. § 201 (a)(1) provides:

the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or 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.

In some cases, the court may want to define “public official” for the jury.

In *Dixson v. United States*, 465 U.S. 482 (1984), the Supreme Court concluded that “[t]he term public official is not limited to persons in a formal employment or agency relationship with the Government.” 465 U.S. at 494. The Court identified the appropriate inquiry as "whether the person occupies a position of public trust with official federal responsibilities." 465 U.S. at 496. To clarify, the Court explained, "[t]o be a public official under section 201(a), an individual must

possess some degree of official responsibility for carrying out a federal program or policy." 465 U.S. at 499.

6.18.201B1-2 Bribery of a Public Official – “Official Act” Defined

The term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust. The government must prove that *(name)* intended to influence a specific act or acts.

The term “official act” includes the decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically described in any law, rule, or job description to be considered to be an “official act.” *However, not every action taken by a public official qualifies as an “official act.”*

[The court may want to identify relevant actions that are not official acts: For example, merely (arranging or hosting meetings) (arranging or hosting events) (contacting, calling, or speaking with other government officials) (making introductions)(expressing support for a particular action), without more, are not official acts.]

In order to find the defendant guilty of this offense, you must identify one or more specific questions, matters, causes, suits, proceedings, or controversies that involve the formal exercise of governmental power. A

question, matter, cause, suit, proceeding or controversy must be something specific and focused that either was pending or might by law have been brought before *(name of the public official)*. **In this case,** *(the indictment)* *(the government)* **alleges the following questions, matters, causes, suits, proceedings, or controversies:** *(list alleged questions, matters, causes, suits, proceedings, or controversies)*.

In order to find the defendant guilty of this offense, you must also find that *(name of the public official)* **made a decision, took an action, or agreed to make a decision or take an action on one or more of the identified questions, matters, causes, suits, proceedings, or controversies.** *[That decision or action may include using (his)(her) official position to exert pressure on another official to perform an “official act,” or to advise another official, knowing or intending that such advice will form the basis for an “official act” by another official.]*

Comment

O’Malley et al., supra, § 27.08; *McDonnell v. United States*, 579 U.S. 550 (2016); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-06 (1999).

18 U.S.C. § 201 (a)(3) provides:

the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

In some cases, the court may want to define “official act” for the jury. In *McDonnell v. United States*, 579 U.S. 550 (2016), the Supreme Court clarified the meaning of “official act” and held that the trial court committed reversible error when it failed properly to instruct the jury on the meaning of the term, allowing the government to rely on an overly-broad definition. *McDonnell* was an honest services fraud and extortion case in which “[t]he parties agreed that they would define honest services fraud with reference to [section 201].” In *McDonnell*, the government based its case on evidence that the defendant-governor and his wife arranged meetings, hosted events, “contact[ed] other government officials” and recommended that state officials meet with the company in question, “promot[ed] the company’s products and facilitat[ed] relationships” with state officials, all of which the government argued constituted “official acts.” The government further argued that “these activities constituted ‘official action’ because they related to Virginia business development.” *McDonnell*, 579 U.S. at 564-65. The trial court’s instructions to the jury comported with the government’s view of what constituted an official act.

The Court rejected the government’s broad reading of the statutory language, holding instead:

[A]n “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy.” The “question, matter, cause, suit, proceeding or controversy” must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is “pending” or “may by law be brought” before a public official. To qualify as an “official act,” the public official must make a decision or take an action on that “question, matter, cause, suit, proceeding or controversy,” or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an “official act,” or to advise another official, knowing or intending that such advice will form the basis for an “official act” by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of “official act.”

McDonnell, 579 U.S. at 574.

The Court also discussed three points that the instructions should have covered:

[T]he District Court should have instructed the jury that it must identify a “question, matter, cause, suit, proceeding or controversy” involving the formal exercise of governmental power.

McDonnell, 579 U.S. at 578. Further,

[T]he District Court should have instructed the jury that the pertinent “question, matter, cause, suit, proceeding or controversy” must be something specific and focused that is “pending” or “may by law be brought before any public official.”

McDonnell, 579 U.S. at 579. Finally,

[T]he District Court did not instruct the jury that to convict [the defendant], it had to find that he made a decision or took an action—or agreed to do so—on the identified “question, matter, cause, suit, proceeding or controversy.”

McDonnell, 579 U.S. at 579. *See also Cordaro v. United States*, 933 F.3d 232 (3d Cir. 2019) (concluding that the evidence established “matters” because “[e]ntering into contracts is ‘a formal exercise of governmental power’ that falls ‘within the specific duties of an official’s position’” and that the evidence further established that the defendant agreed to or actually took action on the matters); *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019). *Cf. United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017) (discussing *McDonnell* at length and rejecting defendant’s argument that *McDonnell* applied to construction of state bribery statute in RICO prosecution).

In *Fattah*, the Third Circuit considered bribery convictions in a case tried before *McDonnell* was decided and held that the instructions were erroneous under *McDonnell*. The court identified the analytical path established in *McDonnell*:

First, the Government must “identify a ‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official.” This first step is divided into two sub-components. In Step 1(A), the Government must “identify a ‘question, matter, cause, suit, proceeding or controversy.’” Step 1(B) then clarifies that the identified “question, matter, cause, suit, proceeding or controversy” be one that “‘may at any time be pending’ or ‘may by law be brought’ before a public official.”

Under Step 1(A), a “question, matter, cause, suit, proceeding or controversy” must be “a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.” Importantly, “a typical meeting, telephone call, or event arranged by a public official” does not qualify as such a formal exercise of governmental power.

Step 1(B) then requires us to ask whether the qualifying “question, matter, cause, suit, proceeding or controversy” was one that “‘may at any time be pending’ or ‘may by law be brought’ before a public official.” * * *

Step 2 requires the Government to prove that the public official made a “decision” or took “an action” on the identified “question, matter, cause, suit, proceeding or controversy.” The *McDonnell* Court explained:

Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information ... does not qualify as a decision or action on the pending question of whether to initiate the study. Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an “official act.”

Fattah, 914 F.3d at 152-53. The model instruction has been revised to meet the requirements set forth in *McDonnell* and *Fattah*.

In *United States v. Repak*, 852 F.3d 230 (3d Cir. 2017), the defendant was convicted under §§ 666 and 1951 of Title 18 and challenged his convictions, arguing that the government failed to establish “official acts” under *McDonnell*. The Third Circuit held that the requirements of *McDonnell* were met by evidence demonstrating that the defendant, who was the Executive Director of the Johnstown Redevelopment Authority, facilitated the award of Redevelopment Authority contracts. In *Repak*, the court concluded that the defendant’s facilitation of the award was sufficient to establish his guilt. *Repak*, 852 F.3d at 237. The court also held that action relating to existing contracts could violate the statute because the contractors “acquiesced in Repak’s solicitations because they felt that they would lose work if they did not.” *Repak*, 852 F.3d at 237. Further, the court rejected the defendant’s argument that the instructions permitted the jury to convict him for any official act; the court noted that the evidence and government theory in the case focused only on one particular set of official acts. *Repak*, 852 F.3d at 256.

In *United States v. Davis*, 841 F. App’x. 375 (3d Cir. 2021) (non-precedential), the court cautioned:

In a political system based upon private campaign contributions, care must be taken to ensure that a donor is not prosecuted based on only “proof of a campaign donation followed by an act favorable to the donor.” Rather, a campaign contribution becomes an illegal bribe “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”

Davis, 841 F. App’x. at 379 (citations omitted).

A public official-defendant may be guilty of violating § 666 even if the official actually lacks the authority to perform the acts agreed to. *Cordaro v. United States*, 933 F.3d 232 (3d Cir. 2019).

(Revised 2/2022)

6.18.201B1-3 Bribery of a Public Official – “Corruptly” Defined

A person offers a thing of value to a public official “corruptly” if the person acts knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the offer of the thing of value to the public official.

Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.

[It is not necessary for the government to prove that the public official was actually influenced, or actually performed an official act, or was even aware of the bribe. What the government must prove beyond a reasonable doubt is that the defendant acted with corrupt intent to bribe a public official, regardless whether the act was successful.]

Comment

O’Malley et al., *supra*, § 27.09.

In *United States v. Traitz*, 871 F.2d 368 (3d Cir. 1989), the Third Circuit explained:

This statute has been said to require that the alleged briber offer the bribe with a “corrupt intent” to influence official conduct. This requires the government to show that the “money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would

be influenced.” Provided that the money is offered with corrupt intent, “the official does not necessarily even need to be aware of the bribe . . . so long as a bribe is offered or promised with the required intent to influence any official act the crime is committed.”

871 F.2d at 396 (citations omitted).

6.18.201B2 Receiving Bribe by Public Official (18 U.S.C. §201(b)(2))

Count (*No.*) **of the indictment charges the defendant** (*name*) **with demanding, seeking, or receiving a bribe while a public official, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That (*name*) **demanded, sought, or received something of value, that is,** (*specify item described in the indictment*);

Second: That (*name*) **was, at that time, a public official of the United States** (*or was acting on behalf of the United States*); **and**

Third: That (*name*) **did so corruptly in return for being influenced in the performance of an official act, that is,** (*name*) **intended to perform an official act in exchange for** (*specify thing of value*).

Comment

O'Malley et al., *supra*, § 27.06.

18 U.S.C. § 201(b)(2) provides that whoever

being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

- (A) being influenced in the performance of any official act;
- (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
- (C) being induced to do or omit to do any act in violation of the official duty of such official or person

commits a federal offense. In some cases, the court may want to modify the instruction to inform the jury that the bribe may be direct or indirect, that the defendant may be convicted of the offense based on an agreement to accept a bribe, or that the conviction may be based on the intent defined in § 201(b)(1)(B) or (C). In addition to the elements instruction, the court should also give Instruction 6.18.201B1-1 (Bribery of a Public Official – “Public Official” Defined), Instruction 6.18.201B1-3 (Bribery of a Public Official – “Corruptly” Defined), and, if appropriate, Instruction 6.18.201B1-2 (Bribery of a Public Official – “Official Act” Defined).

In *United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), the Third Circuit stated that violation of this section has three elements:

- (1) defendant must be a public official, (2) who directly or indirectly demanded, sought, received, accepted, or agreed to receive or accept anything of value personally or for any other person or entity, and (3) did so specifically for one of the three corrupt purposes set forth in subsections (A) through (C).

Ozcelik, 527 F.3d at 93. In *Ozcelik*, the evidence showed that the defendant, who worked for the Department of Homeland Security, asked others within DHS to take official action on behalf of the person from whom the defendant solicited a bribe. The Third Circuit noted that the government’s “theories blend together into one theory of aiding and abetting other unidentified Immigration officials to take official action to alter [the briber’s] records.” *Ozcelik*, 527 F.3d at 94. The government’s case did not fail merely because the government could not identify those who were to take the official action.

(Revised 12/2009)

6.18.201B2-1 Receiving Bribe by Public Official – “Corruptly” Defined

A public official demands, seeks, or receives a thing of value corruptly if the official accepts the item knowingly and intentionally with the purpose either of accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result influenced by the receipt of the thing of value.

Corrupt acts are ordinarily motivated by a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another.

Comment

O'Malley et al., *supra*, § 27.09.

In *United States v. Traitz*, 871 F.2d 368 (3d Cir. 1989), the Third Circuit explained:

This statute has been said to require that the alleged briber offer the bribe with a “corrupt intent” to influence official conduct. This requires the government to show that the “money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced.” Provided that the money is offered with corrupt intent, “the official does not necessarily even need to be aware of the bribe . . . so long as a bribe is offered or promised with the required intent to influence any official act the crime is committed.”

871 F.2d at 396 (citations omitted).

6.18.201B3 Bribery of a Witness (18 U.S.C. §201(b)(3))

Count (*No.*) **of the indictment charges the defendant** (*name*) **with** (*briefly describe charged offense; e.g., with offering a bribe to a witness*), **which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That (*name of witness*) **was to be a witness under oath or affirmation at** (*describe proceeding, e.g., a trial before the United States District Court for the Eastern District of Pennsylvania*);

Second: That (*name*) [*(gave) (offered) (promised)*] **something of value to** (*name of witness*); **and**

Third: That (*name*) **did this act corruptly, that is, with the intent to influence** [*(name of witness's) testimony*] [*(name of witness) to be absent from the proceeding described*].

Comment

Eighth Circuit § 6.18.201C.

18 U.S.C. §201(b)(3) provides that whoever

directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom

commits a federal offense. The court should also modify and give Instruction 6.18.201B1-3 (Bribery of a Public Official – “Corruptly” Defined). In some cases, the court may want to modify this instruction to inform the jury that the bribe may be direct or indirect or that the defendant may be convicted of the offense based on an offer or promise to bribe.

Section 201(d) provides:

Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C.A. § 201(d).

6.18.201B4 Soliciting Bribe by Witness (18 U.S.C. §201(b)(4))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with**
(briefly describe charged offense; soliciting a bribe while a witness), which is
a violation of federal law.

In order to find the defendant guilty of this offense, you must find that
the government proved each of the following three elements beyond a
reasonable doubt:

First: That *(name)* **was to be a witness under oath or affirmation at**
(specify proceeding, e.g., a trial before the United States District Court for
the Eastern District of Pennsylvania);

Second: That *(name)* *[(asked for) (demanded) (accepted) (agreed to*
receive)] **something of value** *(personally) (for (specify person or entity));*

and

Third: That *(name)* **did so corruptly, that is, in return for** *[(being*
influenced in (his)(her) testimony at) (absenting (himself) (herself) from)]
(specify proceeding).

Comment

Eighth Circuit § 6.18.201D.

18 U.S.C. §201(b)(4) provides that whoever

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 being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom

commits a federal offense. The court should also modify and give Instruction 6.18.201B2-1 (Receiving Bribe by Public Official – “Corruptly” Defined).

Section 201(d) provides:

Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

18 U.S.C.A. § 201(d).

6.18.201C1A Illegal Gratuity to a Public Official (18 U.S.C. § 201(c)(1)(A))

Count *(No.)* of the indictment charges the defendant *(name)* with giving an illegal gratuity to a public official, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name of official)* was a public official or a former public official;

Second: That *(name)* knowingly directly or indirectly *(gave)* *(offered)* *(promised)* something of value to *(name of official)*, and that this was not provided by law for the proper discharge of *(name of official)*'s official duty; and

Third: That *(name)* did so *(for)* *(because of)* an official act *(performed)* *(that was going to be performed)* by *(name of official)*. To establish this element, the government must prove that there was a link between the offer or giving of the thing of value and a specific official act for or because of which it was offered or given. It is not

sufficient that the gratuity was offered or given because (*name of public official*) had authority over matters in which (*name*) had an interest, or that the gratuity was offered or given solely for social reasons or friendship. The government, however, does not need to show that the gratuity influenced or was intended to influence the official act; it is sufficient if the gratuity was a reward for some future act that the public official would later take (*and may already have determined to take*), or for a past act that (*he*)(*she*) had already taken.

Comment

Fifth Circuit § 2.14.

18 U.S.C. § 201(c)(1) provides that whoever, 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

commits a federal offense. The court should also give Instruction 6.18.201B1-1 (Bribery of a Public Official – “Public Official” Defined), Instruction 6.18.201B1-2 (Bribery of a Public Official – “Official Act” Defined), and Instruction 5.02 (Knowingly). Giving an illegal gratuity to a public official in violation of 18 U.S.C. § 201(c)(1)(A) may be a lesser included offense of the crime of bribing a public official in violation of 18 U.S.C. § 201(b)(1). *See* Instruction 6.18.201B1 (Bribery of a Public Official (18 U.S.C. § 201(b)(1))).

In *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit described the requirements of the statute:

What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 69.

This provision of § 201 “requires a showing that something of value was given, offered, or promised to a public official . . . ‘for or because of any official act performed or to be performed by such public official.’” *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999). In *Sun-Diamond*, the Court explained the difference between bribery and giving an illegal gratuity:

The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

526 U.S. at 404-05.

Merely giving a gratuity to an official to foster good will does not violate the statute. The government must prove that the defendant gave the gratuity to the official “for or because of” the official’s position, and “not solely for reasons of friendship or social purposes.” *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979). Furthermore, the gratuity must be linked to a specific official act or acts. *See Sun-Diamond*, 526 U.S. at 407-08. “[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.” *Sun-Diamond*, 526 U.S. at 414.

In *United States v. Holck*, 398 F. Supp.2d 338 (E.D. Pa. 2005), *aff’d sub nom. United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), the district court discussed whether *Sun-Growers* requires a specific temporal relationship between the gratuity and the official act. The district court focused on the decision of the D.C. Circuit in *United States v. Schaffer*, 183 F.3d 833 (D.C. Cir. 1999), which the defendants cited as requiring proof of such a relationship:

On the surface, it might appear that *Schaffer* provides some persuasive authority for [the defendants'] temporal attenuation argument. However, there are two main reasons why this Court does not take it as such.

First, as the D.C. Circuit recognized, the U.S. Supreme Court has clearly left the magnitude of the necessary link "in doubt." *Schaffer* is a D.C. Circuit opinion, which is obviously not binding in the courts of the Third Circuit. Moreover, research indicates that no other courts (including the Third Circuit) have cited to *Schaffer* for a specific principle related to "temporal attenuation;" nor have any courts generally opined on an appropriate temporal benchmark. As such, *Schaffer* is not only inapposite on the facts, it stands on its own in the legal landscape, and is far from "established" law that would control here.

Second, and perhaps more important, a more nuanced reading of *Schaffer* than that offered by counsel for [defendants] suggests that *Schaffer* is better understood as a case about the knowledge--rather than the mere time frame--required to establish the required link. *Schaffer* was acquitted of the gratuity charges not simply because there was a long period of time between the gifts and the USDA's policy revisions, but, rather, because of a finding that there was no evidence that *Schaffer* knew or anticipated anything about those policy revisions (or any other decisions affecting Tyson within Espy's purview) at the time of the gift giving. *See Schaffer*, 183 F.3d at 833. If evidence had demonstrated that *Schaffer* had actually known about the potential USDA policy revisions, nothing in *Schaffer* says that the D.C. Circuit would have refused to affirm the jury's verdict merely because of significant temporal attenuation between the gifts and the actual policy revisions. Knowledge may or may not be a product of temporal attenuation (i.e., one could easily conceive of a situation where a lack of knowledge was due to something other than an issue of timing). The factual scenario in *Schaffer* happened to involve a question of knowledge that hinged on the timing of an outside event, but a case could just as easily turn on something else.

398 F. Supp. 2d at 353-54.

The court continued:

[T]he appropriate question under conspiracy and bribery jurisprudence is not whether the favorable loans and [the public official's] official actions were greatly attenuated in time, but, rather, whether [the defendants] knew or anticipated anything when they made the favorable loans with regard to future acts of [the public official] (e.g., the NTI line of credit), or did [the public official's] actions regarding the NTI line of credit evidence a payback as consideration for their

having made the loans. The actions of [the defendants] were not so temporally attenuated that the jury could not find their conduct with regard to both the loans and the NTI line of credit evidenced the scheme to corrupt [the public official].

398 F. Supp. 2d at 354.

6.18.201C1B Receiving Illegal Gratuity by a Public Official (18 U.S.C. § 201(c)(1)(B))

Count *(No.)* of the indictment charges the defendant *(name)* with receiving a gratuity while a public official, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* was a public official *(or a former public official)*;

Second: That *(name)* knowingly directly or indirectly *(demanded)* *(sought)* *(received)* *(accepted)* *(agreed to receive or accept)* something of value, and that this was not provided by law for the proper discharge of *(name)*'s official duty; and

Third: That *(name)* did so *(for)* *(because of)* an official act *(name)* *(had performed)* *(was going to perform)*. To establish this element, the government must prove that there was a link between the thing of value sought or received and a specific official act for or because of which it was sought or received. It is not sufficient that the gratuity was sought or received because *(name)* had authority

over matters in which (*name of donor*) **had an interest, or that the gratuity was offered or given solely for social reasons or friendship. The government, however, does not need to show that the gratuity influenced or was intended to influence the official act; it is sufficient if the gratuity was a reward for some future act that** (*name*) **would later take** (*and may already have determined to take*), **or for a past act that** (*he*)(*she*) **had already taken.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes 16-14* (Matthew Bender 2003).

18 U.S.C. § 201(c)(1)(B) provides that whoever, otherwise than as provided by law for the proper discharge of official duty,

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

commits a federal offense. The court should also instruct the jury on the meaning of knowingly. *See* Instruction 5.02 (Knowingly). In some cases, the court may also wish to give Instruction 6.18.201B1-1 (Bribery of a Public Official – “Public Official” Defined) and Instruction 6.18.201B1-2 (Bribery of a Public Official – “Official Act” Defined). Receiving an illegal gratuity while a public official in violation of 18 U.S.C. § 201(c)(1)(B) may be a lesser included offense of the crime of receiving a bribe by a public official in violation of 18 U.S.C. § 201(b)(2). *See* Instruction 6.18.201B2 (Receiving Bribe by Public Official (18 U.S.C. §201(b)(2))).

In *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit described the requirements of the statute:

What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 69.

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999), the Court explained the difference between bribery and giving an illegal gratuity:

The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

526 U.S. at 404-05. *See also Kemp*, 500 F.3d at 284. The gratuity must be linked to a specific official act or acts. *See Sun-Diamond*, 526 U.S. at 407-08. “[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.” *Sun-Diamond*, 526 U.S. at 414.

(Revised 12/2009)