1980

The Federal Bribery Statute: An Argument for Cautious Revision

Susan Daunhauer Phillips

*University of Kentucky*

Follow this and additional works at: [https://uknowledge.uky.edu/klj](https://uknowledge.uky.edu/klj)

Part of the Legislation Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

**Recommended Citation**


Available at: [https://uknowledge.uky.edu/klj/vol68/iss4/8](https://uknowledge.uky.edu/klj/vol68/iss4/8)

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsvaky.edu.
Comment

THE FEDERAL BRIBERY STATUTE: AN ARGUMENT FOR CAUTIOUS REVISION

INTRODUCTION

The federal bribery statute serves as a powerful tool for

---


Subsections (b) and (c) of the statute govern the giving and receiving of bribes:

(b) Whoever, 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:

(1) to influence any official act; or
(2) 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
(3) 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 his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or
(2) 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
(3) being induced to do or omit to do any act in violation of his official duty . . . .

. . . .

shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Subsections (f) and (g) of the statute govern the giving and receiving of illegal gratuities:

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, 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
the prosecution of offenses violating the public trust. A strong and broad bribery statute is necessary as both “an im-

to be a public official; or 

(g) Whoever, 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 asks, demands, ex-

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.


2 Offenses “violating the public trust” encompass both outright bribery and “situations in which corruption can easily develop through favorites and the misuse of discretionary authority on the part of the administrative officials, induced by such activities on the part of the corruptor as campaign contributions, gifts and the like.” C. Friedrich, The Pathology of Politics 155 (1972).
mediate deterrent to misbehavior and a long-term method of inculcating ethical standards. Since its enactment in 1962, the present statute has withstood numerous attacks upon its constitutionality and the scope of its application. While it is clear that the statute is not a paradigm of clarity and is in need of minor revision, it is equally apparent that any revised statute must be as broad and as comprehensive as the existing statute to effectuate the underlying congressional policies.

This comment will examine the federal bribery statute with a view toward future legislative revision. The first section of the comment explores the policy underlying the bribery and gratuity provisions of the statute and the second section examines the judicial interpretation of the meaning and constitutionality of the statute. The final section examin-
FEDERAL 

BRIBERY 

STATUTE 

inates the problems engendered by the application of the statute to members of Congress in light of protections afforded by the speech or debate clause of the United States Constitution. As the following discussion will indicate, revision of the existing federal bribery statute should be approached with caution. Despite some minor problems, the statute provides sufficient notice of the type of conduct it prohibits, is susceptible to consistent judicial interpretation, and generally serves its purpose well. Although it is possible to theorize about the dangers inherent in the abusive application of the statute and to conjure up “hypothetical problems which may yet arise in the peripheral areas of the law’s coverage,” one should be careful to consider these imaginary scenarios in light of judicial interpretation of the statute, the practical limitation on prosecutorial discretion and, perhaps above all else, common sense. Any legislation designed to revise the statute should be examined with considerable scrutiny to prevent the statute from being narrowed into inadequacy.

I. POLICY UNDERLYING THE FEDERAL BRIBERY STATUTE

It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased interpretation of the federal bribery statute.

12 See notes 111-126 infra and accompanying text for a discussion of the effect of the speech or debate clause on the applicability of the federal bribery statute to members of Congress.


14 The words of Justice Holmes in International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) are particularly relevant here. In discussing a claim that the antitrust provisions of the constitution and statutes of Kentucky were void for indefiniteness Justice Holmes stated that:

[A] criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree . . . . That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe.

Id. at 223.
judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official as the controlling factor in official decision.\textsuperscript{15}

The purpose of the federal bribery statute is to put public officials on notice that society demands complete honesty and will prosecute any misuse of the public trust.\textsuperscript{16} Both the legislative history of the federal bribery statute and the case law interpreting the statute reflect this strong public policy.

The legislative history, while not particularly enlightening as to the interpretation of various provisions of the statute,\textsuperscript{17} is nevertheless explicit regarding the underlying policy.\textsuperscript{18} On April 27, 1961, President Kennedy, acting on the basis of the report of his specially appointed Advisory Panel on Ethics and Conflict of Interest in Government, sent a strong message to Congress calling for a revision of the laws governing conflicts of interest among public officials and submitting proposed legislation toward that end.\textsuperscript{19} The President's message was clear: effective government and public confidence demand absolute impartiality on the part of public officials.\textsuperscript{20} Congress

\textsuperscript{10} United States v. Labovitz, 251 F.2d 393, 394 (3rd Cir. 1958).
\textsuperscript{16} See generally Winckler, Drafting an Effective Bribery Statute, 1 AM. J. CRIM. L. 210 (1972).
\textsuperscript{17} United States v. Irwin, 354 F.2d 192, 195 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).
\textsuperscript{19} Immediately upon assuming office, President Kennedy appointed this special three-man Advisory Panel, consisting of retired Judge Calvert Magruder of the United States Court of Appeals for the 1st Circuit, Dean Jefferson B. Fordham of the University of Pennsylvania Law School, and Professor Bayless Manning of the Yale Law School. The Panel submitted its report in March of 1961. On the basis of this report, the recommendations of the Association of the Bar of the City of New York, the work of Subcommittee Number Five of the House Committee on the Judiciary, the President's message, and other sources, Congress drafted and enacted 18 U.S.C. § 201. For an excellent work detailing the report of the Advisory Panel and providing background to the statute, see B. MANNING, FEDERAL CONFLICT OF INTEREST LAW (1964).
\textsuperscript{20} 1 PUB. PAPERS 326 (1961)(President John F. Kennedy), reprinted in 107 CONG. REC. 6835 (1961). The opening paragraph of the President's message is indicative of
responded to the President’s concern and consolidated the “scraps and rag tags” making up federal bribery law into the revised federal bribery statute, 18 U.S.C. section 201. The stated objective of the legislation was to bring uniformity into

the general tone of the report:

No responsibility of government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwaivering integrity, absolute impartiality and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

Id.

It should be mentioned that the President’s message did not include an explicit request for a revision of the then-existing bribery laws, and although his proposed bill did contain a section entitled “Compensation From Private Sources,” 107 Cong. Rec. 6835, 6839 (1961), the bill did not use the word “bribery.” However, it is possible that Congress took its cue from some language in the President’s message. Commenting on the scope of his proposed bill, the President stated that:

[T]he bill deals only with employees involved in executive, administrative and regulatory functions. It does not apply to either the judicial or legislative branch of Government. Existing laws relating to the judiciary are deemed adequate. The adequacy and effectiveness of laws regulating the conduct of Members of Congress and congressional employees should be left to strictly congressional determination.

107 Cong. Rec. at 6837 (emphasis added). The President also expressed concern over influence-buying payments and indicated that he intended to deal with that problem “directly by Presidential order, memorandum, or other form of action.” Id. The President indicated that he intended to:

Prohibit gifts to Government personnel whenever (a) the employee has reason to believe that the gift would not have been made except for his official position; or (b) whenever a regular Government employee has reason to believe that the donor’s private interests are likely to be affected by actions of the employee or his agency. When it is impossible or inappropriate to refuse the gift it will be turned over to an appropriate public or charitable institution.

Such an order will embody the general principle that any gift which is, or appears to be, designed to influence official conduct is objectionable. Government employees are constantly bothered by offers of favors or gratuities and have been without any general regulation to guide their conduct. This order will attempt to supply such guidelines, while leaving special problems, including problems created by gifts from foreign governments, to agency regulation.

Id. at 6837-38.

the law and, more particularly, not to "restrict the broad scope of the [prior] bribery statutes as construed by the courts."23

This broad interpretation, expounded by Congress and undoubtedly necessary to the continued effectiveness of the statute, has been afforded repeated judicial approval.24 In light of this policy, for example, courts have consistently held that any public official accepting a bribe with the requisite corrupt intent is guilty of bribery,25 even though the object of the bribe cannot be obtained.26 Similarly, under the gratuity subsection of the statute,27 the awarding of gifts to a public official related to his official acts has been deemed to be an evil in itself even though the donor does not have corrupt intent, because such an act tends either subtly, or otherwise, to cloud the official's judgment.28 By evincing concern about the need for a comprehensive bribery statute, the courts have rec-

---


The necessity for maintaining high ethical standards of behavior in the Government becomes greater as its activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy. The best means of assuring high standards have been a matter of increasing concern in recent years, as evidenced by the work of various committees of the Congress, the executive branch, members of the bar, and others. All of these groups have found that the present laws, while correct in principle, are confusing and inadequate and to a considerable degree are actually a hindrance to the Government. This committee has come to the same conclusion.

Id.


25 See note 1 supra for the text of the bribery provisions of the federal bribery statute.


27 See note 1 supra for the text of the gratuity subsections of the statute.

28 United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966). See also Association of the Bar of the City of New York, supra note 22, at 17. "[W]here public confidence is at issue, what people think is true may be as important as what is true." Id.
ognized that the statute represents a congressional effort to eliminate the temptation inherent in public office. Indeed, Congress in enacting the federal bribery statute, and the courts in construing it, have emphasized that only a broadly construed, all-inclusive statute will be sufficient to maintain the high ethical standards of behavior in government.

II. JUDICIAL INTERPRETATION OF 18 U.S.C. SECTION 201: CONFLICT OR CONSSENSUS?

Although both Congress and the courts have acknowledged the indispensability of a sufficiently broad bribery statute, those indicted under the law have attacked it on the grounds that it is unconstitutionally vague and overbroad. While this is understandable in view of the necessarily expansive nature of the statute, close scrutiny makes it apparent that the statute can survive these challenges. Indeed, the "language of the statute clearly and adequately expresses its purposes," and the courts have been consistent in rejecting claims of vagueness and overbreadth. The uniformity of judicial interpretation reinforces the argument that the statute is explicit enough to avoid constitutional infirmity. The statute

---


33 United States v. Alessio, 528 F.2d 1079, 1083 (9th Cir.), cert. denied, 426 U.S. 948 (1976) (citing United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966)).
is not without its problems, but inasmuch as these problems
do not reach constitutional dimensions, any statutory revision
should be approached with caution lest the statute be
divested of its effectiveness.

A. Vagueness

Since its enactment, the federal bribery statute has
weathered challenges that it is unconstitutionally vague.\(^2^{34}\) In
United States v. Brewster,\(^2^{35}\) for example, the defendant, a
former United States Senator, challenged his conviction under
subsection 201(g)\(^2^{36}\) on several grounds, one being that the
subsection was unconstitutionally vague. The court reasoned
that the subsection’s standards were sufficiently explicit to
prevent any danger of arbitrary and discriminatory applica-
tion.\(^2^{37}\) A similar situation was presented and a similar conclu-
sion reached in United States v. Irwin.\(^2^{38}\) In dismissing a
vagueness challenge to subsection 201(f),\(^2^{39}\) the Second Circuit
Court of Appeals stated: “It is apparent from the language of
the subsection . . . what Congress had in mind . . . . The
statute furnished adequate warning to anyone of ordinary in-
telligence that the kind of conduct embarked upon by the ap-

\(^{34}\) See cases cited in note 31 supra; see also United States v. Alessio, 538 F.2d
1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d

\(^{35}\) 506 F.2d 62 (D.C. Cir. 1974).

\(^{36}\) See note 1 supra for the text of 18 U.S.C. § 201(g) (1976).

\(^{37}\) 506 F.2d at 77. The Second Circuit observed:
[T]he language of section 201(g) . . . “give[s] the person of ordinary intelli-
gence a reasonable opportunity to know what is prohibited, so that he may
act accordingly.” The section’s standards are sufficiently explicit to prevent
delegation of “basic policy matters to policemen, judges, and juries for reso-
lution on an ad hoc and subjective basis, with the attendant dangers of
arbitrary and discriminatory application.” Hence, section 201(g) is not im-
permissibly vague even under the standards applied to statutes governing
the conduct of average citizens. That 201(g) is directed at the conduct of
public officials, who should exercise extraordinary caution to avoid acts
potentially violative of their public trust, makes us even more reluctant to
accept the argument that the section is vague.

Id. (quoting Grayned v. Rockford, 408 U.S. 104, 108-09 (1972)) (emphasis added and
footnotes omitted).

\(^{38}\) 354 F.2d 192 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

pellant would constitute an offense.”

As the foregoing decisions indicate, the courts are in accord that the statute is not unconstitutionally vague, at least not as applied to the specific individuals before the court in a given case. The question remains, however, and must be examined in light of the possibility of future legislative revision, whether the statute is unconstitutionally vague in its general scope. The major concerns underlying the vagueness issue are: (1) the type of criminal intent necessary for a conviction under each of the subsections of the statute; (2) whether the gratuity subsections are lesser included offenses of the corresponding bribery subsections; and (3) the time element in the bribery section, particularly whether the bribe must precede the action or decision of the public officer. An inherent consideration in the analysis of whether the existing bribery statute is unconstitutionally vague is the extent to which the statute is susceptible to uniform judicial interpretation. The following discussion will indicate that while the courts have treated the intent issue with uniformity, some inconsistencies in interpretation have surfaced in the judicial reaction to the latter two issues. These inconsistencies, however, do not render the statute unconstitutionally vague, and minor revision should be sufficient to clarify those aspects of the statute.

1. The Intent Issue: Sufficient Notice as to Prohibited Conduct?

The decisional law indicates that the major dispute surrounding 18 U.S.C. section 201 involves the mental state re-

---

40 354 F.2d at 196.
41 Courts are limited in their perusal of a statute on vagueness grounds to the facts of the case before them. They rely on “the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).
42 See notes 45-91 infra and accompanying text for a discussion of the intent issue.
43 See notes 92-97 infra and accompanying text for a discussion of the lesser included offense issue.
44 See notes 98-104 infra and accompanying text for a discussion of the time element issue.
quired for a conviction under each of the subsections of the statute. The dispute, however, actually centers between those indicted under the statute and the courts, rather than among the courts themselves. The cases as a whole reflect a consistent interpretation of the intent requirements of the statute. This uniformity in judicial approach stands in direct contrast to the confusion evidenced by those indicted under the statute, who have confused the intent required for a bribery conviction with that required for a gratuity conviction.

Bribery and gratuities are dealt with in separate subsections of the statute. The bribery subsection makes it a crime when one "corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any act." The corresponding gratuity subsection of the statute provides: "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . [is guilty of a violation]. Each section prescribes different penalties, with the penalty for violation of a bribery subsection being considerably harsher. The bribery subsections of the statute specifically require a "corrupt" state of mind while the gratuity subsections require only that the gratuity be given "otherwise than as provided by law for the proper discharge of official duty . . . for or because of any official act." The statute clearly embodies two distinct offenses.

---

46 See United States v. Zacher, 586 F.2d 912, 915 (2d Cir. 1978), and the cases cited therein.
48 18 U.S.C. § 201(b). Section 201(c) is the related section directed at the public official who accepts a bribe.
49 18 U.S.C. § 201(f) (1976). Section 201(g) is the related section directed at the public official who accepts a gratuity.
50 See note 1 supra for the penalties for violation of the respective provisions.
51 In United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974), the District of Columbia Circuit noted that the bribery and gratuity provisions of the statute could be distinguished on the basis of the degree of criminal intent necessary for a conviction:
a. Intent Under the Bribery Subsections

The bribery subsections of the statute require proof of a specific corrupt intent to influence public action.\textsuperscript{52} As the Second Circuit Court of Appeals observed in \textit{United States v. Irwin},\textsuperscript{53} Congress "made a distinction between the two groups of subsections and purposely omitted from the latter [gratuity] group the description of the specific intent which was an essential element of the former."\textsuperscript{54} In \textit{United States v.}

\[\text{Id. at 71.}\]

\textsuperscript{52} "T\text{he federal judiciary has characterized the first group of offenses requiring a corrupt intent as bribery, and has referred to the lesser included offense, not requiring a corrupt intent, as the giving or receiving of an illegal gratuity." \textit{United States v. Zacher}, 586 F.2d 912, 915 (2d Cir. 1978). \textit{See also United States v. Harary}, 457 F.2d 471 (2d Cir. 1972); \textit{United States v. Umans}, 368 F.2d 725 (2d Cir. 1966), cert. denied, 389 U.S. 80 (1967).

\textsuperscript{53} 354 F.2d 192 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

\textsuperscript{54} \textit{Id. at 197.} Although the language used by the Second Circuit in \textit{Irwin} tends to suggest that Congress made a conscious decision to include the word "corruptly" as descriptive of the specific intent necessary for a conviction under the bribery provisions of the statute, the legislative history indicates that there is some uncertainty as to how the word found its way into the statute. As indicated earlier in notes 17-23 \textit{supra} and accompanying text, the bill that eventually became 18 U.S.C. § 201, H.R. 8140, 87th Cong., 1st Sess. (1961), was the product of a growing concern about federal conflict of interest. The legislative history prior to the enactment of H.R. 8140 is illustrative. Pursuant to its objective of strengthening federal criminal laws relating to conflicts of interest, Congress considered at least four bills: H.R. 139, 87th Cong., 1st Sess. (1961); H.R. 3411, 87th Cong., 1st Sess. (1961); H.R. 3412, 87th Cong., 1st Sess. (1961); and H.R. 3050, 87th Cong., 1st Sess. (1961). H.R. 139 was the Kennedy administration's bill, and H.R. 3050 was proposed by the Association of the Bar of the City of New York by Representative John Lindsay. H.R. 3411 and H.R. 3412 were identical bills and will be referred to in this discussion as H.R. 3411. H.R. 3411 was the only proposal that directly addressed the bribery issue; it contained a revision of the existing bribery statutes. However, H.R. 3411 did not include the word "corruptly." Exactly how the term "corruptly" came to be included in the final compromise bill, H.R. 8140, is unclear, but some clues do exist. Mr. Nicholas deB. Katzenbach, Assistant Attorney General, testified in the hearings before the House.
Strand the Ninth Circuit described the intent element necessary for a conviction under the bribery subsection 201(c) as, "the defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with the specific intent to violate the law." In reference to the same subsection, the Second Circuit in United States v. Polansky

subcommittee that was responsible for recommendations concerning the proposed legislation. See generally Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. of the House Comm on the Judiciary, 87th Cong., 1st Sess. 30 (1961) [hereinafter cited as Hearings]. As part of his testimony, Katzenbach placed several prepared documents in the record, including an analysis of H.R. 3411; only one section of that analysis is relevant to this topic. That section included the following statement:

The danger that innocent conduct may fall within the provisions of the proposed sections 201 and 202 may be avoided by the inclusion of a term such as "willfully" or "corruptly" in subsection (b) (p.3, line 18). "Corruptly" is employed in title 18, United States Code section 1503 and has never presented any serious obstacle to conviction.

Id. at 36. It is likely that this suggestion carried a great deal of weight in the formulation of the section of H.R. 8140 that was to become 18 U.S.C. § 201. It should be noted, however, that Katzenbach made his suggestion in reference to H.R. 3411, not H.R. 8140. In fact, it is possible to argue that the inclusion of the word "corruptly" in H.R. 8140 was contrary to Congress' intention to consolidate but not to limit the existing law. Indeed, in its report on H.R. 8140, the House Judiciary Committee stated:

This section substitutes for the principal sections dealing with bribery now contained in sections 201 to 213 of chapter 11 of title 18, one comprehensive statute applicable to all persons performing activities for or on behalf of the United States. Varying terminology is used in the different statutes presently in force. Although in many instances the courts have construed these differing terms as having the same meaning, uniformity will be assured by enacting one statute using the same terms for all bribery situations. The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application.

H.R. REP. No. 748, 87th Cong., 1st Sess. 15 (1961)(emphasis added). It is clear from the last sentence of the Judiciary Committee's report that Congress was satisfied with the breadth of the existing bribery statute; the inclusion of the word "corruptly" restricted the breadth that Congress was trying to preserve. This analysis of legislative history suggests that the word "corruptly" was included in one piece of legislation — H.R. 8140 — where it was neither needed nor wanted, when, in fact, it had been suggested for inclusion in a different bill — H.R. 3411. Any language in the case law suggesting that Congress made a conscious decision to include the word "corruptly" in the existing bribery statute should be considered in light of this legislative history.

55 574 F.2d 993 (9th Cir. 1978).
56 Id. at 996 (emphasis in original).
57 418 F.2d 444 (2d Cir. 1969).
stated that the intent required "proof beyond a reasonable doubt that the accused had corruptly agreed to receive the money with the specific intent that, in return therefore, it would influence his performance of an official act." While the courts have utilized different language, their interpretations of the intent necessary for a conviction under the bribery subsections are consistent in substance. The case law indicates that the bribery subsection "prohibits the giving of a thing of value with the specific intent of influencing an official action."

Some courts, in addition to the requirement of specific criminal intent, or as a substitution therefor, require proof of a quid pro quo for a bribery conviction. Some courts do not speak to the intent element per se but instead describe a specific quid pro quo as the distinguishing factor between bribery and illegal gratuities. Other courts use the two terms interchangeably throughout their opinions, while courts in a fourth group base their decisions solely on the "intent element" without discussing a quid pro quo. Although these courts might appear to be expounding discordant interpretations, their approaches are in fact harmonious. A "corrupt ac-

---

68 Id. at 446.
See United States v. Neiderberger, 580 F.2d 63, 68 (3rd Cir. 1978).

Not every gift, favor, or contribution to a government or political official constitutes bribery. It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent . . . . "Bribery" imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted.

Id. at 734.
ceptance in return for being influenced” evidences a specific criminal intent and a quid pro quo. As explained in one Senate Committee Report, a corrupt intent to influence implies an offer or agreement contemplating the violation of the public official’s duty. Therefore, while the nomenclature varies, the basic interpretation is consistent.

b. Intent Under the Gratuity Subsections

In examining the judicial interpretations of the type of mental state necessary to maintain a conviction under the gratuity subsections of the federal bribery statute, it is necessary to employ a two-pronged analysis. A discussion of the language used by the courts in paraphrasing the degree of intent required by the gratuity subsections will reveal that the courts are consistent in their general description of that intent. Similarly, consideration of the courts’ application of the intent requirement will illustrate that while it is at least arguable that the intent issue is susceptible to divergent treatment, the judicial interpretation has been uniform.

It is well-settled that the gratuity subsections require a significantly lesser degree of intent. To prevail, the govern-

---


65 [T]he gravamen of the bribery offense under current law is that a thing of value is given or offered “corruptly” with the intent to influence or induce the prohibited action . . . . It implies an offer or agreement contemplating the violation of the public servant’s duty. However, it also serves to denote the state of mind of either the bribe offeror or the recipient, or both, and is thus a word designating the culpability.


66 See notes 68-76 infra and accompanying text for a discussion of the language employed by the courts in describing the type of intent necessary for a conviction under the illegal gratuity provisions of the statute.

67 See notes 77-91 infra and accompanying text for a discussion of the court’s application of the intent requirement.

ment must prove that the prohibited act was committed “knowingly and purposefully and not through accident, misunderstanding, inadvertance or other innocent reasons.” In *United States v. Raborn* the Ninth Circuit stated that the gratuity offenses “require proof of a knowing intent to violate the law.” Similarly, the court in *United States v. Passman* noted that the required intent for a conviction under subsection 201(g) does not require a specific intent: “[It] does, however, require a mens rea. It is necessary that the Government prove that the defendant committed the act prohibited knowingly and not through accident or mistake.” When these judicial pronouncements are read in light of the statutory language requiring the giving or receiving of “anything of value to any public official . . . for or because of any official act performed or to be performed,” it is clear that while the gratuity subsections of the statute “do not require specific criminal intent or a corrupt purpose,” they “do require some provable relationship between the giving of a gratuity and official action.”

The application of this rather general formulation of the intent necessary for a conviction is a considerably more difficult task. As one commentator has suggested, the issue inherent in any such application is whether this language requires that “a payment be given because of some specific act of an official in order to constitute an offense,” or whether “the

---


575 F.2d 688 (9th Cir. 1978).

*Id.* at 691.


*Id.* at 915. As the court stated in United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974): “However ill-defined it may be in the exact words of the statute, there is and must be a general criminal intent on the part of the defendant to support a conviction under the gratuity section (g).” *Id.* at 82.

See note 1 *supra* for the complete text of the gratuity subsections of the statute.


*Id.*

*Id.* at 27 (emphasis added). Perry refers to this as the “restrictive” interpretation of the gratuity subsections.
payment only need to be related to an official’s actions in general.”

Although it is at least arguable that this distinction between intent to influence a specific act and intent to “generally influence” could be a source for discord among the courts, the existing case law indicates that the courts are consistent in their consideration of the issue. In *United States v.*
Niederberger the defendant, an employee of the Internal Revenue Service, challenged his conviction under the gratuity subsection of the statute claiming that it was necessary for the government to allege that he received the gratuities "in return for some specific, identifiable act which he performed or was to perform in the future." The Third Circuit rejected this argument by holding that:

A quid pro quo is simply foreign to the elements of a subsection (g) offense. 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.

would be unlawful. . . . They argue that this case is inapposite to payments made to a non-elected official who should not be receiving any payments relating to his official duties other than his salary. Perry, supra, at 27. In light of the consistency evinced by the Niederberger, Evans, Alessio and Standefer cases — all decisions since Brewster — it is reasonable to suggest that the language employed by the court in Brewster resulted more from an effort to distinguish illegal gratuities and legal campaign contributions than from an effort to define the scope of illegal gratuities. It must be emphasized that the Brewster court did not hold that payments made to "generally influence" were excluded from the range of conduct prohibited by the gratuity provisions of the statute; in fact, the court never even considered the issue.

80 580 F.2d 63 (3rd Cir. 1978).
81 Gulf Oil Corporation provided the defendant with five all-expense paid golfing trips, including trips to Pompano Beach Florida, Absecon, New Jersey, and Pebble Beach, California. Id. at 65 n.1.
82 Id. at 68.
83 Id. at 69. In United States v. Standefer, 452 F. Supp. 1178 (W.D. Pa. 1978), the court relied on Niederberger to find the defendant guilty of violating a gratuity subsection even though the payment was not made for a specific act. Id. at 1182-84. It should be noted that Niederberger and Standefer emanated from the same transaction. F.W. Standefer, as the corporate officer of Gulf Oil Corporation, extended gratuities to Cyril J. Niederberger, "a supervisory internal revenue agent who was case manager for the audit of the Gulf Oil Corporation income tax returns for the years 1959 to 1964 . . . ." Id. at 1179. U.S. v. Niederberger, 580 F.2d 63 (3rd Cir. 1978), involved the prosecution of Niederberger under section 201(g) for receiving illegal gratuities. The Standefer case involved the prosecution of Standefer under section 201(f) for giving the illegal gratuities. Both defendants claimed that the gratuities were not violative of the act as they were not made in return for a specific act done by Niederberger, but rather just "to create a better working atmosphere by providing these expensive junkets for the case supervisor . . . ." 452 F. Supp. at 1183. The
In *United States v. Evans*, the Fifth Circuit rebuffed a similar claim by holding that a conviction under the gratuity subsection does not require "that the official actually engage in identifiable conduct or misconduct nor that any specific quid pro quo be contemplated by the parties nor even that the official actually be capable of providing some official act as quid pro quo at the time."

The interpretation espoused by the *Niederberger* and *Evans* courts portends a very broad reading of the gratuity subsection of the statute. An expansive interpretation of the gratuity provisions, however, is consistent with both the congressional objective underlying the federal bribery statute and the judicial belief that a broad reading is necessary in order to effectuate the purposes of the statute. Admittedly, the statute's failure to delineate the elements of an illegal gratuity with exact precision, and the courts' tendency to read the gratuity provisions broadly could, if carried to the extreme, render the statute unconstitutionally vague. But, in light of the possibility that greater specificity could create loopholes and subvert the basic purpose underlying the statute, and because the statute "is directed at the conduct of
public officials who should exercise extraordinary caution to avoid acts potentially violative of their public trust," it is both undesirable and unnecessary to revise the gratuity subsections of the statute with an eye toward greater specificity. If the statute is to realize the congressional objective of promoting the integrity, fairness and impartiality of public officials, it is imperative that the language of the gratuity subsections remain sufficiently expansive.  

2. The Lesser Included Offense Issue

The great majority of courts unequivocally have held that the gratuity subsections are lesser included offenses of the corresponding bribery subsections. In the recent case of United States v. Passman, a federal district court examined this majority position in depth and reached a different conclusion. The court held that the subsection 201(g) gratuity count is not necessarily a lesser included offense of the corresponding bribery count, subsection 201(c)(1). The court based this

is defined as "anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or any other property or service that has a value in excess of $100; . . . ." Subcommittee on Criminal Justice of the House Judiciary Committee, 96th Cong., 2d Sess., Criminal Code Revision Act of 1980, 64, 68 (Comm. Print 1980). Under this specific wording a $75 bottle of wine, a "night on the town," or weekend use of the donor's beach condominium would not constitute a violation under the statute. If gifts even tending to influence are to be discouraged, all-encompassing language is required.


Although it is entirely possible to construct imaginary examples of abusive application of the gratuity subsections of the statute, these fears should be allayed by the fact that the Justice Department likely will not consider it worth its time and energy to prosecute de minimis violations:

At the present time the government prosecutes goodwill gratuity cases only in situations that involve costly gifts and entertainment. . . . In the real world of private industry-government relations there is a general awareness that an official's integrity is not compromised by the purchase of a lunch, but the same may or may not hold true of an all-expense-paid vacation to the Caribbean.

Perry, supra note 59, at 30.

See, e.g., United States v. Raborn, 575 F.2d 688, 691 (9th Cir. 1978); United States v. Crutchfield, 547 F.2d 496, 500 (9th Cir. 1977); United States v. Masiello, 445 F.2d 1324, 1325 (2d Cir. 1971), cert. denied, 404 U.S. 1060 (1972); United States v. Polansky, 418 F.2d 444, 446-47 (2d Cir. 1969).
decision on an examination of the two sections and its determination “that there are some situations where proof of (c) (1) would not support a conviction under (g).”94 Specifically, the court pointed to the requirement in subsection (g) that the official must receive value for himself, as opposed to subsection (c) (1) under which a violation occurs if the official receives value “for himself or for any other person or entity.”95 The court reasoned that a conviction under subsection (c)(1) where the public official received “anything of value” for someone else would not support a conviction under subsection (g), therefore, violation of subsection (g) was not necessarily a lesser included offense of subsection (c) (1).96 Although situations could arise in which the lesser included offense issue could precipitate a problem,97 it is clear that a solid majority of the courts have been consistent in holding that the gratuity provisions are lesser included offenses of the corresponding bribery subsections. Inasmuch as this issue has not resulted in a major interpretive conflict, statutory revision to clarify the issue is really unnecessary.

94 Id. at 917.
95 See note 1 supra for the complete text of the statute.
96 460 F. Supp. at 917-18. The same issue was presented in Brewster, but the circuit court, refusing to “theorize,” held that on the facts of that case the gratuity count was a lesser included offense of the bribery count. 506 F.2d at 69. In dictum the court stated:

It is always true that the greater offense contains an element which the lesser included offense does not; this is one of the reasons for the use of the terms “greater” and “lesser” to describe the two offenses, and why the lesser is thought to be included in the greater.

Id. at 75.
97 Fed. R. Crim. P. 31(c) permits an instruction to the jury and conviction on a lesser included offense, even though not specifically charged in the indictment. The defense of a congressman indicted for taking a bribe in the form of a campaign contribution could differ radically depending on whether he was being charged solely under the bribery section, or whether he was also on notice of the gratuity offense. Proof that a lawful re-election committee had received the funds would be essential to his defense under the gratuity section which requires that value be given to the official himself, but would be irrelevant evidence as a defense to a charge under the bribery section. Depending on the jurisdiction, the congressman could be considered to be on notice that he must defend against a gratuity charge without it being charged specifically in the indictment, despite the fact that it has not been uniformly held to be a lesser included offense. Cf. United States v. Brewster, 506 F.2d 62, 75 (D.C. Cir. 1974)(the court recognized that this could possibly be a problem but did not address it further as it was not a problem under the facts of that case).
3. The Time Element Issue

A fundamental question arising out of application of the bribery provision of the federal bribery statute is whether the bribe must precede the action or decision of the public officer. In both United States v. Passman and United States v. Cohen, the courts took the position that the statute required that the bribe precede the public official's action. In Cohen the court noted that "[f]rom a time standpoint alone bribery requires that money be given or promised with the intent to influence an official's decision before that decision is reached." In United States v. Arroyo the Seventh Circuit pronounced an interpretation directly contrary to the position adopted by the Passman and Cohen courts. In Arroyo the court affirmed the defendant's conviction under the statute and held that the statute is not limited in every case to bribery solicitations occurring before actual performance of an official act. The court studied both the face of the statute and its legislative history and concluded that "[since] Congress used broad language in these provisions we find no intent to limit their coverage to future acts."

While the inconsistency revealed by these three decisions is not significant enough to render the statute unconstitutionally vague, minor statutory revision could rectify the conflict. The statute should be reworded to make it clear that bribery can encompass prior acts as well as acts to be performed in the future. As the Seventh Circuit indicated in Arroyo, this conclusion is mandated by the congressional purpose reflected by the statutory definition of "official act" as "any . . . action . . . which may at any time be pending . . . before any public official, in his official capacity." "The broad language of the statute, and the purpose it was designed to accomplish, pre-

---

100 Id. at 805-06.
102 Id. at 654.
clude [a narrower] construction.”

B. Overbreadth

In addition to claims that the federal bribery statute is unconstitutionally vague, some commentators and several of those indicted under the law have argued that the statute is overbroad. The courts that have considered this issue have been consistent in holding that the statute is constitutionally acceptable. The primary contention of those challenging the breadth of the statute is that the law could be construed to outlaw legitimate campaign contributions “which arguably can be characterized as the sort of political, associational activity protected by the First Amendment.” In rejecting this argument, the courts have relied on the unequivocal language of the statute. Inasmuch as the bribery provisions require that the act be done corruptly, those making innocent campaign contributions are not made susceptible to criminal liability by virtue of making such payments; the necessary specific intent is conspicuously absent in such cases. The gratuity subsections of the statute require that a payment be made to the official himself and be knowingly and purposefully received by the official in consideration of an official act. In light of these requirements it is unlikely that inno-

104 581 F.2d at 655. In Arroyo, the Seventh Circuit reasoned as follows: Congress having used broad language in these provisions, we find no intent to limit their coverage to future acts. Congress did not intend for a public official, who had solicited and encouraged a bribe with a false representation that the official act was in futuro, to escape liability for bribe-solicitation by proving that he had successfully hidden the truth of past performance from the bribe-payer. Id. at 654 (footnote omitted).

105 See generally Note, Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451 (1978); Note, The Bribed Congressman’s Immunity from Prosecution, 75 Yale L.J. 335 (1965) [hereinafter cited as Bribed Congressman].


109 The Federal Election Campaign Act specifically states that each individual who is a candidate for federal office is required to set up a separate re-election cam-
cent campaign contributions fall within the purview of the gratuity subsections of the statute. Furthermore, as the Second Circuit stated in United States v. Brewster: "Congress has an indisputable interest in proscribing [the conduct prohibited by the statute] as a means for preserving the integrity of governmental operations. This interest supersedes any conceivable First Amendment value related to such conduct."110

III. THE FEDERAL BRIBERY STATUTE AND THE SPEECH OR DEBATE CLAUSE

A. Brewster and Helstoski: The Inadmissibility of "Legislative Acts"

The federal bribery statute specifically applies to members of Congress,111 and several have been convicted under the statute.112 A prime contention of those indicted has been that their indictment violates the speech or debate clause of the United States Constitution.113 The Supreme Court's decision
in *United States v. Brewster*, however, essentially eliminated this claim as a possible ground of contention. In that case, a former United States Senator had been charged under 18 U.S.C. section 201 with accepting bribes and gratuities in return for the performance of legislative acts. In holding that Brewster's indictment did not violate the speech or debate clause, the Court made it clear that proof of legislative acts is not essential to a charge of bribery under subsection 201(c). Thus, while the Court ruled that the government cannot introduce evidence of a legislative act in a prosecution under the bribery statute, the Court did hold that proof of legislative acts is not *necessary* to a conviction under the bribery statute.

The Supreme Court recently reaffirmed the *Brewster* decision in *United States v. Helstoski*. After relying on *Brewster* for the proposition that evidence of or reference to a legislative act is inadmissible in the bribery prosecution of a member of Congress, the Court reasoned that “[r]evealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being ‘questioned’ in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.” However, the Court proceeded to limit the scope of its holding by circumscribing the meaning of “legislative act.” The Court observed that: “it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not ‘speech or debate.’ Likewise, a *promise* to introduce a bill is not a legislative act.” In light


115 In *Brewster*, the Supreme Court noted that a “legislative act has consistently been defined as an act generally done in Congress in relation to the business before it.” *Id.* at 512.


118 *Id.* at 490.

119 *Id.* (emphasis in original). In *Helstoski* the government made a rather unique waiver argument. The prosecution proposed that, by enacting 18 U.S.C. § 201, Congress institutionally waived the speech or debate clause protection — that section 201 “represents a collective decision to enlist the aid of the Executive Branch and the courts in the exercise of Congress’ powers under Art. I, § 5, to discipline its mem-
of the Brewster and Helstoski decisions the only determination necessary is whether the government has enough information to indict the member of Congress without inquiring into legislative acts as that term is defined in Brewster and Helstoski.

B. Should the Federal Bribery Statute Apply to Members of Congress?

Although Brewster and Helstoski clearly stand for the proposition that the speech or debate clause does not prohibit the prosecution of a member of Congress under the federal bribery statute, the eventuality of future revision of the statute raises at least one important question: should members of Congress be included under the statute at all? Indeed, some commentators have suggested that the legislature is the proper forum for the trial and punishment of its members.\footnote{See generally, Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 SUFFOLK U. L. REV. 1 (1968); Comment, Texas Public Ethics Legislation: A Proposed Statute, 50 TAX. L. REV. 931 (1972).}

For several reasons, the courts appear to be a more appropriate forum for dealing with the bribery of Congressmen than the legislature itself. First, the judiciary has the expertise to ensure a fair trial, while in the legislature, political considerations could prevail.\footnote{See United States v. Brewster, 408 U.S. 501, 519-20 & n.14 (1972); Cranston, supra note 3, at 222 & n.14.} Second, “[h]istory demonstrates that when left to act upon their own initiative legislatures are unlikely to pursue charges of corruption of members.”\footnote{Cranston, supra note 3, at 222 & n.39.} The ar-
argument in favor of the legislature as a more appropriate place for trial is based upon the fear of harassment by members of the executive branch. However, this contention is nothing more than conjecture inasmuch as the prosecutions that have been brought under the statute do not reflect this type of abuse. Indeed, the Supreme Court expressly considered and dismissed this argument in Brewster. The Court reasoned that while a strategically timed indictment could possibly harm a congressman's reelection chances, the barriers to any vindictive indictment under the statute are significant and, in addition, are counterbalanced by the fact that the legislative branch has weapons of its own. Therefore, prosecution via the federal bribery statute of cases involving the bribery of legislators offers clear advantages to the retention of that authority by the legislature itself.

**CONCLUSION**

The foregoing discussion indicates that while the federal bribery statute, 18 U.S.C. section 201 is not a panacea, it is not unconstitutionally vague. The statute does provide sufficient notice of the conduct prohibited and has been susceptible to consistent interpretation by the courts. Indeed, any lack of specificity on the face of the statute is a function of the underlying congressional purpose to guarantee the integrity, fairness and impartiality of public officials. Similarly, while the statute is expansive, it is not unconstitutionally overbroad. Concern about potential abuse in the application of the statute and "problems which may yet arise in the peripheral areas of the law's coverage" should be abated by con-

seldom unethical conduct which has no institutional effects.

Comment, supra note 120, at 957 & n.79.

123 Cranston, supra note 3, at 223.

124 See United States v. Brewster, 408 U.S. 501, 523-24 (1972). The Supreme Court stated: "We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years, have been abused by the Executive Branch." Id.

125 Id.


sideration of the manner in which the law actually has been applied, and by a common sense realization of the limits of this application. Finally, it is suggested that it is desirable to apply the federal bribery statute to members of Congress and that the enforcement of the statute against congressmen does not contravene the speech or debate clause of the United States Constitution.

The federal bribery statute is an effective weapon in the battle against the most flagrant violation of public trust — the bribery of a public official. Although it may be true that the existing statute is not a "model of clarity and nicely drawn distinctions," the statute serves its purposes well, and any contemplated revision should be considered in light of the efficacy of the present law. It is indeed axiomatic that anemic, loophole-ridden statutes are ineffective, and in the area of federal bribery law, where concern for the public interest is paramount, an ineffective statute would be disastrous.

Susan Daunhauer Phillips

\[\text{Id. at 78.}\]