No. 09-5130

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM J. JEFFERSON,

Defendant-Appellant.

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

BRIEF FOR DEFENDANT-APPELLANT WILLIAM J. JEFFERSON

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of conviction against William J. Jefferson, entered on November 13, 2009. JA245-254. The district court had jurisdiction under 18 U.S.C. § 3231. Jefferson filed a timely notice of appeal on November 23, 2009. JA242-244. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The federal bribery statute, 18 U.S.C. § 201(b)(2)(A), requires the government to prove that a public official solicited or accepted something of value "in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A). This appeal raises the following issues:

I. Whether the district court erroneously instructed that, under 18 U.S.C. § 201(a)(3), an "official act" means "activities that have been clearly established by settled practice as part [of] a public official's position." JA5149.

II. Whether the district court erroneously instructed that a *quid pro quo* under 18 U.S.C. § 201(b)(2)(A) may be proved by showing that Jefferson intended to be influenced in the performance of unspecified official acts on an "as-needed basis." JA5151.

III. Whether the district court's instructions on honest-services wire fraud, 18 U.S.C. §§ 1343 and 1346, were erroneous because they were based on (a) the

self-dealing theory that the Supreme Court repudiated in *Skilling v. United States*, 130 S. Ct. 2896 (2010), after this case was tried and (b) the flawed bribery instructions.

IV. Whether the district court's instructions on the conspiracy, money laundering, and RICO counts were erroneous because they rested on either the defective bribery instructions, the flawed honest services instructions, or both.

V. Whether the evidence was insufficient to prove venue for honest-services wire fraud in Count 10.

STATEMENT OF THE CASE

Following an eight-week trial, Jefferson was convicted on: (1) one count of conspiracy to solicit bribes, to deprive citizens of honest services by wire fraud, and to violate the Foreign Corrupt Practices Act ("FCPA"), in violation of 18 U.S.C. § 371; (2) one count of conspiracy to solicit bribes and to deprive citizens of honest services by wire fraud, in violation of 18 U.S.C. § 371; (3) two counts of solicitation of bribes, in violation of 18 U.S.C. § 201(b)(2)(A); (4) three counts of honest-services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346; (5) three counts of money laundering, in violation of 18 U.S.C. § 1957; and (6) one RICO count, in violation of 18 U.S.C. § 1962(c). The jury acquitted Jefferson on three counts of honest-services wire fraud, one count of violating the FCPA, 15 U.S.C. § 78dd-2(a), and one count of obstruction of justice, 18 U.S.C. § 1512(c)(1). The

district court (Hon. Ellis, J.) entered final judgment on November 13, 2009, imposing an imprisonment term of thirteen years. Jefferson thereafter filed this appeal.

PRELIMINARY STATEMENT

William J. Jefferson is a former Member of Congress who represented the 2nd Congressional District of Louisiana from 1991 through 2008. The government alleged that between August 2000 and August 2005, Jefferson, in return for things of value benefiting him or his family members, assisted several companies seeking to do business in West Africa, chiefly by promoting those businesses to foreign government officials in person and by letter. The government did not allege, nor has it ever claimed, that Jefferson performed any traditional legislative acts on behalf of these companies, such as introducing legislation, seeking an appropriation or earmark, conducting committee hearings, making floor speeches, and the like.

The government charged sixteen counts, all but two of which consisted of, or rested critically on, bribery, honest-services wire fraud, or both. (The only two counts that did not rest on those offenses were Counts 11 (alleging a violation of the FCPA) and 15 (alleging obstruction of justice)—on both of which Jefferson was acquitted.) Thus, as the case comes to this Court, *all* of Jefferson's

convictions hinge crucially on allegations of bribery, honest-services wire fraud, or a combination of the two.

And that's where the government has insurmountable problems. The bribery-related convictions are defective because they rest on two separately erroneous instructions. First, the district court charged that any "settled practice" of a Member of Congress constitutes an "official act" within the meaning of the bribery statute. That "settled practice" instruction contravenes Supreme Court precedent, misapprehends the text and history of the statute, and, if adopted, would render the bribery statute unconstitutionally vague.

The district court compounded that error by instructing the jury that the government could prove a *quid pro quo* without showing that Jefferson agreed to be influenced in the performance of any *specific* official act or series of acts. It was enough, the district court reasoned, that Jefferson agreed to perform unspecified acts on an "as-needed basis." That instruction cannot be reconciled with the Supreme Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999).

The honest services-related convictions run afoul of the recent decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010). The government charged the very theory—self-dealing—that the *Skilling* Court rejected as outside the ambit of 18 U.S.C. § 1346.

Thus, the bribery and wire fraud convictions should be set aside. And so should the remaining convictions—each of which rests on the erroneous bribery instructions, the erroneous honest services instructions, or both.

STATEMENT OF FACTS[1]

1. The Indictment. The government charged that between August 2000 and August 2005, Jefferson solicited things of value for himself or his family members—typically consulting fees or some ownership interest—in return for helping several companies that sought to do business predominantly in West Africa. See *United States v. Jefferson*, 546 F.3d 300, 303-304 (4th Cir. 2008); JA68-161.[2] The indictment did not allege (nor has the government ever claimed) that Jefferson agreed to help these businesses by performing any traditional legislative acts, such as introducing legislation, voting for or against a bill, conducting committee hearings, or creating earmarks. JA68-161. Instead, the government charged that Jefferson "sent letters on official letterhead, conducted official travel, and met with foreign government officials to promote" the

[1] Some of the facts are set forth in the Argument sections to which they pertain.

[2] These companies included iGate, Incorporated, a Kentucky-based telecommunications firm owned by Vernon Jackson; Netlink Digital Television, a Nigerian telecommunications company; certain businesses owned by Lori Mody, a Virginia-based businesswoman and FBI informant; and several other businesses promoting various projects (such as a sugar plant, fertilizer plant, and oil and gas wells).

businesses. *Jefferson*, 546 F.3d at 303. The indictment identified the following as among the "official acts" that Jefferson agreed to perform:

- Conducting official travel to foreign countries and meeting with foreign government officials for the purpose of influencing those officials;
- Using his congressional staff members to create trip itineraries, accompany Jefferson on travel, and otherwise provide official assistance;
- Contacting both United States and foreign embassies to schedule meetings with foreign government officials, obtaining entry and exit visas for travelers, and otherwise assisting with the official travel;
- Sending official correspondence on congressional letterhead to foreign government officials; and
- Scheduling and participating in meetings with officials of United States agencies to secure potential financing for the business ventures sought by the companies and businesspersons

See JA82-83, 104-105; see also, *e.g.*, JA116-120, 127. The government also alleged that Jefferson did not disclose his or his family's financial interest in the business ventures he promoted. See, *e.g.*, JA82, 104, 119-120, 127.

The indictment charged a series of counts constituting, or fundamentally resting on, either bribery or honest-services wire fraud. Two were substantive bribery counts (Counts 3 and 4, see JA116-118). Others were wire fraud counts (Counts 5-10, see JA119-121) resting, alternatively, on either the receipt of bribes or the theory of "self-dealing" honest-services fraud recently rejected in *Skilling v. United States*, 130 S. Ct. 2896 (2010). The balance were compound offenses that

rested on either or both bribery or self-dealing honest-services fraud: (1) two conspiracy charges (Counts 1-2, see JA79-115), alleging bribery and self-dealing as their objects; (2) three money laundering charges (Counts 12-14, see JA124), alleging that Jefferson laundered the proceeds of "bribery"; and (3) one RICO charge (Count 16, see JA126-154), whose predicate acts were bribery, self-dealing honest-services fraud, and the laundering of bribery proceeds. The jury acquitted Jefferson on the only two counts—the FCPA charge (Count 11, see JA122-123) and obstruction of justice (Count 15, see JA125)—not inextricably tied to the government's bribery and honest-services fraud theories.

2. Pretrial Litigation Over The Meaning Of "Official Act." Jefferson moved to dismiss the bribery-related counts (*i.e.* all but Counts 11 and 15) on the ground that they did not allege an "official act," as that term is defined in the bribery statute. Dkt. 23 at 1.[3] Section 201(a)(3) defines "official act" as

> 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.

18 U.S.C. § 201(a)(3). Jefferson contended that this definition encompasses activities such as voting on bills or conducting committee work, which involve questions that are "pending" or brought "by law" before him in his Congressional

[3] Docket entries refer to the trial docket below, No. 1:07-cr-00209-TSE.

capacity. Dkt. 23 at 2. By contrast, he argued, the activities specified in the indictment, such as having staff members send letters or create travel itineraries, were not "official acts" because they did not involve such questions. *Id.* at 2-4. Nor, he argued, could it be an "official act" for him to try to influence a question that was pending before some *other* public official; although such conduct might violate a different federal statute or perhaps a Congressional ethical rule, it would not involve any question that was pending or brought by law before *him*, as the *bribery* statute requires. *Id.* at 4-5. For its part, the government insisted that *any* activity constitutes an "official act" so long as it is a "settled practice" for Members of Congress to perform such activity. Dkt. 62 at 7-12.

On May 23, 2008, the district court denied Jefferson's motion to dismiss, articulating a two-part definition of "official act": "First, the act must be among the official duties or among the settled customary duties or practices of the official charged with bribery. And second, performance of the act must involve or affect a government decision or action," either by Jefferson or another public official. *United States v. Jefferson*, 562 F. Supp. 2d 687, 689, 691-694 (E.D. Va. 2008) (internal footnotes omitted). The court concluded that the activities identified in the indictment satisfied those criteria. *Id*. at 693-694.

Both sides asked the district court to revise its decision, agreeing that the "government decision or action" must belong to *Jefferson* only. Dkts. 340 at 1-2;

342 at 3-7; 358 at 1. The court then issued a second opinion that "vacated and superseded" parts of its first decision. *United States v. Jefferson*, 634 F. Supp. 2d 595, 596 (E.D. Va. 2009). The court acknowledged that its first opinion's "discussion of the bribery statute's 'official act' element was inadequately anchored in the statutory text defining that element and failed to capture accurately the universe of conduct proscribed by [the bribery statute]." *Id.* at 599-600. The court held—as both Jefferson and the government had agreed—that to do an "official act," Jefferson must act "on an issue pending before *him*, not . . . on an issue pending before *another* public official." *Id.* at 601 (emphasis in original). However, over Jefferson's objection, the court reiterated its "settled practice" standard—that the government could prove an "official act" by showing that Jefferson acted on questions or matters that came before him "as a matter of custom and settled practice." *Id.* at 604; Dkt. 342 at 3-7.

3. The Trial. The government sought to show that Jefferson tried to help iGate, the Mody ventures, and several other companies garner business, principally in West Africa. Jefferson's efforts chiefly amounted to praising these companies to foreign officials and proposing business deals to them, by letter and in meetings held during trips to Africa that Jefferson took with company

personnel.[4] To facilitate these foreign deals, Jefferson met with private investors in America, as well as with officials at the Export-Import Bank and the United States Trade and Development Agency. He also met, on behalf of iGate, with officers of the United States Army. (The evidence showed that during these meetings, Jefferson inquired into the process by which these domestic organizations grant funds, or into the status of a particular company's application for funds, but did not ask the organizations for any special treatment or for an outcome that would not otherwise have been reached.) The evidence further showed that, in his meetings and correspondence, Jefferson did not disclose that he or his family held a financial interest in the companies he promoted.[5]

The government's case reflected its expansive view of "official act." The government argued that Jefferson's "official acts" included *any* help of *any* kind that Jefferson gave to *any* person or business in America upon their request, so long as he did so in his capacity as a Congressman. See, *e.g.*, JA1018, 1020-1024, 1161-1162, 1164-1168, 2409. In support of this capacious theory, the government

[4] No trip was paid for by Congress or the federal government, and all travel took place during Congressional recesses.

[5] The government also offered the "freezer" incident—that Jefferson had concealed nearly $100,000 in cash in his home freezer. See JA122-123. This cash was allegedly intended to bribe the former Vice President of Nigeria, an FCPA violation on which Jefferson was thereafter acquitted.

put on evidence, including through an expert, to show that such help could be characterized as "constituent service" and that "constituent service" was a "settled practice" among Members of Congress. See, *e.g.*, JA1125-1127, 1131-1140, 1429-1432, 1654-1655, 3812-3906, 4205-4206, 4214-4215, 5913-5914. The government's witnesses testified that "constituents" included anyone in America, not just residents of Jefferson's congressional district, or even of Louisiana. See, *e.g.*, JA3830-3832, 4240-4241, 4293-4294, 5791.

The government also argued that logistical assistance Jefferson received in connection with his meetings with public officials was itself an "official act." See, *e.g.*, JA4961, 5094-5095. The government pointed to: travel itineraries and visa arrangements that Jefferson or his staff prepared in anticipation of travel to Africa (see, *e.g.*, JA1443-1445, 1447-1448, 3021-3025, 3086-3087, 3188-3189, 3226-3231, 3485-3488, 5368, 5513-5516, 5785-5786, 5544-5546, 5556-5593, 5848-5851); Jefferson's transportation in government vehicles while abroad (JA1327, 1631, 1639-1642, 3518-3521, 4236-4237, 4268, 4273-4274); efforts made by staff members to schedule meetings with foreign officials and arrange other travel logistics (see, *e.g.*, JA1617, 1620-1629, 3062-3063, 3211-3218, 3275-3276, 4064-4067, 5376-5377, 5488-5492, 5508-5509, 5510-5516, 5544-5546, 5594-5595, 5839-5847, 6119, 6090-6091, 6108-6110); and embassy briefings and other logistical help that Jefferson requested or received while abroad (see, *e.g.*, JA1327,

1430-1432, 1439, 1450-1453, 1456, 1463, 1482-1485, 3231, 4013-4014, 4207-4211, 4215-4216, 4236, 5782-5784, 5837-5838).

Throughout the trial, the district court struggled to define the limits of the "settled practice" definition of "official act." For example, the court thought it might stretch the definition too far to apply it to solicitations for investment that Jefferson made to private individuals, as the government urged. See JA1025-1026, 1165, 2408-2409. The court especially puzzled over whether "official acts" encompass efforts to influence *foreign* government decisions. See, *e.g.*, JA4718 ("[T]his case would not have been nearly the difficulty when I first wrote on it if what it involved was [only] the Ex-Im Bank or the Trade Administration."); *id.* at 4652 ("But I think I am correct . . . when I say there is no case that is clearly litigated and held that traveling to—going to Africa in one's official capacity to attempt to influence a foreign official is an official act."). The government itself acknowledged that extending "official acts" to foreign government decisions would be an "extreme" interpretation of that term. See JA4710-4711 (describing spectrum of "official acts" at which "the other extreme, the one I think the defendant can contest the most which is a member lobbying a foreign official on behalf of a US business to assist them.").

In its summation, the government reiterated its broad view of "official acts." The government began by stating that "[t]he touchstone[,] then, for what qualifies

as an official act, are those activities that have been clearly established by settled practice as part of the public official's position." JA4906. The government contended that "helping constituents is a matter of settled practice," and thus anything Jefferson had done to "help[] constituents"—including those outside his district and state—constituted "official acts." *Ibid.* The government also recounted the various assistance that Jefferson's staffers provided, including arranging travel and scheduling meetings, arguing that these, too, constituted "official acts." See JA4961, 5095.

4. Verdict and Post-Trial Proceedings. The jury convicted Jefferson on Counts 1-4, 6-7, 10, 12-14, and 16. JA245. It acquitted him on three honest-services wire fraud counts (Counts 5 and 8-9) and on the only two counts that were not predicated in whole or in part on bribery or honest-services wire fraud—Counts 11 (FCPA) and 15 (obstruction of justice). *Ibid.*

Jefferson sought release pending appeal on the ground that the meaning of "official act" was a "substantial question" underlying each conviction. Dkt. 603. On November 18, 2009, the district court granted Jefferson's motion. JA241.

SUMMARY OF THE ARGUMENT

Each of Jefferson's convictions depends on either erroneous bribery instructions, erroneous honest-services wire fraud instructions, or both. The judgment of conviction should be reversed.

I. Counts 3 and 4 charged violations of the federal bribery statute, 18 U.S.C. § 201(b)(2)(A). Under that section, the government must prove that Jefferson solicited or accepted something of value in return for "being influenced in the performance of any *official act*." 18 U.S.C. § 201(b)(2)(A) (emphasis added). At the government's urging, the district court added a gloss to the statutory definition of that term, instructing the jury that "official acts include those activities that have been *clearly established by settled practice as part [of] a public official's position.*" JA5149 (emphasis added).

If this were the correct definition of "official act," the bribery statute would be unconstitutionally vague. *Both* of the instruction's key terms—"settled" and "practice"—are completely indeterminate. It is scarcely surprising, therefore, that the "settled practice" instruction is foreclosed by the Supreme Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), and runs afoul of the text, history, and purpose of the bribery statute. Far from supporting the district court's "settled practice" instruction, those materials make clear that, for Congressmen, an "official act" must concern a question resolvable through the formal *legislative* process, or at most, as the D.C. Circuit held in *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc), resolvable through a *governmental* process. The convictions on Counts 3 and 4 should be reversed.

II. The convictions on Counts 3 and 4 are independently reversible because they rest on an erroneous instruction on the *quid pro quo* element of the bribery statute—the requirement that the government prove that Jefferson solicited things of value "*in return for* . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A) (emphasis added). The district court told the jury that this element may be established merely by showing that Jefferson agreed to perform *unspecified* official acts on an "as-needed basis." JA5151. This instruction contravenes *Sun-Diamond*, where the Supreme Court held that, under the neighboring gratuity statute, the government must prove that a gift was made because of "a ***specific*** 'official act.'" 526 U.S. at 414 (emphasis added). This requirement applies equally, if not more so, to the bribery statute.

III. Counts 6, 7, and 10 charged honest-services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. The convictions on these counts rest on two alternative—and legally infirm—theories. The first was that Jefferson solicited bribes. The district court's instructions on this theory incorporated its erroneous instructions on "official act" and *quid pro quo*. The second theory was that Jefferson did not disclose his or his family's financial interest in the companies he promoted. This is the so-called "self-dealing" theory of wire fraud that the Supreme Court repudiated in *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010), subsequent to Jefferson's trial.

IV. The convictions on the remaining counts—Counts 1–2, 12–14, and 16—should be reversed because they depend either on the erroneous bribery instructions, the erroneous wire fraud instructions, or both. The conspiracy counts (Counts 1–2) allege as their objects bribery and honest-services wire fraud. The money laundering counts (Counts 12–14) allege that Jefferson laundered bribery proceeds. And the RICO count (Count 16) alleges as its predicates bribery, honest-services wire fraud, and laundering of bribery proceeds.

V. Count 10 alleged an act of wire fraud based on a phone call that Jefferson made while in Ghana to an alleged co-conspirator in Kentucky. The phone call neither originated in, traveled through, nor terminated in the Eastern District of Virginia, nor was it orchestrated from there. Thus, the evidence was insufficient to prove venue.

ARGUMENT

STANDARD OF REVIEW

The Court reviews "*de novo* the claim that jury instructions fail to correctly state the law." *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) (internal quotation marks omitted). The Court reviews "the district court's determination of venue *de novo*." *United States v. Wilson*, 262 F.3d 305, 320 (4th Cir. 2001).

I. THE CONVICTIONS ON COUNTS 3 AND 4 SHOULD BE REVERSED BECAUSE THE DISTRICT COURT GAVE AN ERRONEOUS "OFFICIAL ACT" INSTRUCTION

A. Because "Settled Practice" Is A Hopelessly Vague Interpretation Of "Official Act," This Court Should Be Loath, Under The Doctrine Of Constitutional Avoidance, To Adopt It

Counts 3 and 4 charged Jefferson with violations of the federal bribery statute, 18 U.S.C. § 201(b)(2)(A), which punishes public officials who seek or accept anything of value in return for "being influenced in the performance of any *official act*." 18 U.S.C. § 201(b)(2)(A) (emphasis added). "Official act" has a specific statutory definition: It "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." 18 U.S.C. § 201(a)(3).

The district court began the "official act" instruction by reciting the statutory definition. JA5148. But at the government's urging (Dkt. 340 at 14-15), and over Jefferson's vehement objection (Dkt. 358 at 4-9; see also JA4826), the court added a gloss. It told the jury that "official acts include those activities that have been *clearly established by settled practice as part [of] a public official's position.*" JA5149 (emphasis added).

1. This construction, if adopted, would render the bribery statute unconstitutionally vague. It is hard to imagine a more impenetrable element than one that turns on the phrase "settled practice." *Both* words—"settled" and "practice"—are hopelessly indeterminate. What does it mean, for example, for a practice to be "settled"? That 218 Members of Congress (just more than half the body) do it? That only one or two Members do it? How often must they do it? Once a year? Once a term? Once in their careers? Can a practice that was once settled become unsettled? For example, is it sufficient that some Members engaged in the practice in some earlier Congress, even if none do so now? If so, how does a Member know when the practice is settled or unsettled for purposes of the bribery statute?

And, even if you could pin down the meaning of "settled," how do you know what the "practice" is? At what level of generality may, should, or must the jury define the practice? As relevant here, merely as constituent services writ large? Or more specifically, as helping businesses obtain foreign private and public contracts? Or more specifically still, as helping out-of-state businesses obtain foreign private and public contracts? The answer is crucial because the level of generality at which the "practice" is defined directly affects whether the "practice" is "settled"—after all, what Congressman does not perform at least some activity that could be swept into the grand tent of "constituent service"?

2. This case is a stark and disturbing illustration of what can go wrong when words like "settled" and "practice" mark the distance between guilt and innocence. The government naturally defined "practice" at the highest conceivable level of generality: constituent services writ large. See JA1023 (arguing to court that "it's a very broad, wide range of things that [M]embers do. They . . . don't all do the same things. They all have their own inclinations. But they all do constituent services."); JA4906 (arguing in summation that "*helping constituents* is a matter of settled practice" (emphasis added)). The government then produced an "expert"—Matthew McHugh, a former Congressman—to "testify as to his opinion that constituent services are routinely performed by Members." Dkt. 299 at 2. Asked, "When members provide assistance to citizens and businesses, is that something that is customarily associated with the job of a congressman?", McHugh responded, "Yes"—as if expert testimony were needed to establish that Members of Congress customarily "provide assistance to citizens and businesses." JA3827.

But even before McHugh left the stand, the government became ensnared in the ambiguities of its own "settled practice" language. When the government finished asking McHugh about the "practice" of performing "constituent services" *generally*, and began asking him about the more particular "practice" of performing "constituent services" through advancing domestic business interests abroad, McHugh testified:

Q: Do you know whether some American businesses and entities request that [M]embers of Congress travel to foreign countries to promote American business interests to foreign government officials?

A: Yes.

Q: Do you have an opinion as to whether such requests are matters properly and customarily brought before the [M]ember of Congress in his official capacity?

A: Yes.

Q: And what is that?

A: *I would say that that would be within the ambit of a [M]ember's customary practice, if that's something the [M]ember chooses to do. Some [M]embers would choose to do it, and some [M]embers might not choose [to] do it. But if they did, it would be part of their official responsibilities as a [M]ember of Congress to establish that kind of meeting or facilitate a meeting.*

Q: Do you know whether some [M]embers of Congress travel to foreign countries in efforts to promote American business interests abroad?

A: Yes, they do.

Q: Now, did you specifically take any trips to promote American businesses abroad?

A: *I don't recall making any trips myself which would directly relate to promoting the particular business interests of constituents or others, but I know other [M]embers of Congress did.*

JA3853-3854 (emphasis added). Defense counsel pressed the issue in cross examination:

Q: Is it a matter of settled custom and practice for a [M]ember of Congress to introduce individual businesspeople to heads of state?

A: *It's not done by every [M]ember of Congress, and so—but [M]embers of Congress who do it would be acting within their responsibility—or in their role as a [M]ember of Congress. And I can't quantify it beyond that.*

Q: And is it a matter of settled custom and practice to pitch a private company's product to a foreign government entity?

A: *Some [M]embers of Congress might do that. I never did. But if a [M]ember of Congress goes with a business group and advocates with the business group a business activity, such as selling goods and services, then he or she is acting within the ambit of [C]ongressional—the [C]ongressional role, even though some [M]embers of Congress would not want to do it.*

Q: And is it a [matter] of settled custom and practice to pitch a private company's product to another private company?

A: *It's not something often done.*

Q: And is it a matter of settled custom and practice to introduce a start-up company to new sources of private capital?

A: *It's something that some [M]embers of Congress would do, but many [C]ongressmen would not do.*

Id. at 3902-3903 (emphasis added).

This testimony—from an expert, no less—brings into sharp relief just how opaque the term "settled practice" is. Is the "practice" introducing American businesses to foreign politicians? To foreign sources of investment? Doing anything to promote the business? Domestically or abroad? And what makes the practice "settled"? Merely if "[it]'s something the [M]ember chooses to do"? Or if "[s]ome [M]embers of Congress" do it? Or if Jefferson happened to "know other [M]embers of Congress" who do it? How many must he know? Here, not

even the district court could answer these questions prior to trial. See, *e.g.*, JA1167 ("[Constituent services] can be an official act if the expert testimony establishes it. We don't know yet. . . . It's what's customary. We haven't heard the evidence on that yet."); JA2409 ("It's the government's view . . . that all constituent services, constituent services generally, is an official act or are official acts because . . . it's an established practice that's what they do. Well, that sounds right and plausible, but I don't know what's meant by constituent services. . . . I don't know yet.").

The federal bribery statute should not be interpreted to require defendants to have a crystal ball in order to comply with it. Nor may it have a meaning so shifting and vague that to enforce it, the government must redefine its key terms ("settled" and "practice") in each case, and in a manner that will inevitably favor conviction. If "official act" really *does* encompass any "settled practice," then the bribery statute is unconstitutionally vague. See *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (internal quotation marks omitted)).

Indeed, even if the constitutionality of the "settled practice" instruction were merely in doubt—and it isn't—that doubt must be resolved in Jefferson's favor under the well-settled doctrine of constitutional avoidance. See *Mary Helen Coal*

Corp. v. Hudson, 235 F.3d 207, 214 (4th Cir. 2000) ("As is our duty, we decline to interpret the statute in a manner that gratuitously raises grave constitutional questions."); *United States v. Perez*, 488 F.2d 1057, 1059 (4th Cir. 1974) ("It is axiomatic that statutes are to be interpreted to avoid constitutional issues unless their plain and explicit meaning requires that constitutional issues be met and decided."); *Blasecki v. City of Durham*, 456 F.2d 87, 93 (4th Cir. 1972) (same); *United States v. Cassiagnol*, 420 F.2d 868, 873 (4th Cir. 1970) (same); *Link v. Receivers of Seaboard Air Line Ry.*, 73 F.2d 149, 153 (4th Cir. 1934) (same); see also *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle . . . has for so long been applied by this Court that it is beyond debate." (internal citation omitted)).

In light of the vagueness of "settled practice," this Court should be loath to interpret the bribery statute in a way that, at a minimum, would force the Court to wrestle with a grave constitutional question. Here there is especially no reason to do so. As we show below, the case law, text, legislative history, and purpose of the bribery statute foreclose the district court's sweeping and implausible construction of "official act."

B. The "Settled Practice" Instruction Is Foreclosed By *Sun-Diamond*

The first wall the district court's instruction runs into is *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999). *Sun-Diamond* involved the federal gratuity statute, 18 U.S.C. § 201(c). Like its bribery counterpart, the gratuity statute is predicated on "official act" as defined by Section 201(a)(3). In *Sun-Diamond*, the Court held that, to establish a gratuity, "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." 526 U.S. at 414. Were the law otherwise, the Court explained, the gratuity statute would extend to acts that, although "'official['] . . . in some sense" (*id.* at 407), are plainly *not* "official acts" within the meaning of section 201(a)(3):

> [The government's view] would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits, see, *e.g.*, Gibson, Masters of the Game, Lexington Herald-Leader, Nov. 10, 1998, p. A1. Similarly, it would criminalize a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school. That these examples are not fanciful is demonstrated by the fact that counsel for the United States maintained at oral argument that a group of farmers would violate [the gratuity statute] by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers.

Id. at 406–407. The Court concluded that "those actions—while they are assuredly 'official acts' in some sense—*are not 'official acts' within the meaning of the statute*." *Id.* at 407. (emphasis added).

The district court's "settled practice" instruction simply cannot be squared with *Sun-Diamond*. The activities the Supreme Court identified—"receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy," *id.* at 407—are all "activities that have been clearly established by settled practice as part [of] a public official's position," JA5149; indeed, the Court observed that the White House hosts championship sports teams "*each year*." 526 U.S at 406-407 (emphasis added); see also Ken Belson, *At the White House, It Is Often Good Politics to Play Ball*, N.Y. Times, Apr. 24, 2010, p. SP3 (recounting the "tradition, stretching back a century and a half, of baseball players mixing with commanders in chief").[6] Under the "settled practice"

[6] The Secretaries of Education and Agriculture, too, routinely visit schools and speak before farmers groups, respectively. See, *e.g.*, ED.gov, Events, Media Advisories, *available at* http://www2.ed.gov/news/events/advisory.html#052710a (last visited Nov. 14, 2010) (showing that, in May 2010 alone, Secretary of Education Arne Duncan visited more than 15 schools or student groups); Tr. Oral Argument, *Sun-Diamond*, 526 U.S. 398, *available at* 1999 WL 135163 (U.S.), at *27 (Mar. 2, 1999) (Justice Breyer; "I would have thought [it] was fairly common" for the Secretary of Agriculture to speak to farmers about Agriculture Department policies).

instruction, these activities would necessarily constitute "official acts." But the Supreme Court definitively has said otherwise.

C. The "Settled Practice" Instruction Contravenes The Text, History, and Purpose Of The Bribery Statute

The "settled practice" instruction also runs headlong into the text, history, and purpose of the bribery statute. These interpretive sources show that, with respect to Members of Congress, an "official act" is confined to the formal *legislative* process, or, at the very most, to *governmental* decision-making, as the D.C. Circuit held in *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). In no event—especially in light of the principle of constitutional avoidance noted in I.A—does "official act" mean "settled practice."

1.a. The statutory definition of "official act" makes two things clear. First, to do an "official act," a public official must decide or act on a "question, matter, cause, suit, proceeding or controversy." 18 U.S.C. § 201(a)(3). (For ease of reading, we abbreviate this string of words as a "question or matter".) Second, not just any question or matter will do. Instead, the statute covers only those questions or matters that may "be pending" or "by law be brought" before a public official in his official capacity—in this case, Jefferson.

By their very nature, the phrases "pending" and "by law brought" contemplate questions or matters that are resolved through the formal legislative

process. After all, how are questions "brought" "by law" to Congressmen? The words connote some formal process—such as the initiation of a bill in committee or the instigation of a vote on the floor. They do *not* suggest questions that happen to pop up merely as a matter of "settled practice," whatever that is.

"Pending" has the same connotation, especially given its proximity to "by law brought" in the statute. "Pending" typically modifies nouns—*e.g.*, "question," "matter," "application," "case"—that so modified denote things that are resolved through formal, institutional processes.[7] This is also how "pending" is used throughout the expanses of the United States Code,[8] including Titles 2 (dealing

[7] See Black's Law Dictionary (8th ed. 2004) ("pending, adj. 1. Remaining undecided; awaiting decision <a pending case>. 2. Parliamentary law. (Of a motion) under consideration; moved by a member and stated by the chair as a question for the meeting's consideration.").

[8] See, *e.g.*, 5 U.S.C. § 1306 ("matters pending before the Office [of Personnel Management]"); 12 U.S.C. § 1761b(15) ("a list of approved or pending applications for membership [of a credit union]"); 16 U.S.C. § 3164(e) ("in conjunction with such other Federal agencies before which the application is pending"); 29 U.S.C. § 172(d) ("proceedings pending before the United States Conciliation Service"); 39 U.S.C. § 3210(a)(3)(B) ("discussions of proposed or pending legislation or governmental actions").

with Congress)[9] and 18 (dealing with crimes).[10] The same is true of its use in the federal rules[11] and regulations,[12] and even in this Court's local rules.[13]

The district court's "settled practice" gloss distorts these long-established usages of "pending" and "by law brought." No one would suggest that a constituent who asks a Congressman for assistance with a government agency has

[9] See, *e.g.*, 2 U.S.C. §§ 190l ("Private claims pending before Congress"), 288c(a)(1) ("any civil action pending in any court of the United States or of a State or political subdivision thereof"), 455 ("any proceeding pending in any court"), 471(d)(2) ("matters pending before the Congress"), 643(d) ("an amendment or motion . . . is pending before the Senate").

[10] See, *e.g.*, 18 U.S.C. §§ 985(b)(1)(B) ("the subject of a pending forfeiture action"), 1033(d) ("any proceeding . . . pending before any insurance regulatory official or agency or any agent or examiner"), 1504 ("any issue or matter pending before such juror"), 1505 ("under which any pending proceeding is being had before any department or agency of the United States"), 3006A(d)(5) ("while the case was pending before the United States magistrate judge and the court").

[11] See, *e.g.*, Fed. R. Bankr. P. 1014(b) ("by the court in the district in which the petition filed first is pending"); Fed. R. Civ. P. 13(a)(2)(A) ("the subject of another pending action"); Fed. R. Crim. P. 20(a)(1) ("the district where the indictment, information, or complaint is pending"); Sup. Ct. R. 3 ("all cases pending on the docket"); Tax Court Rule 81 ("a case pending in the Court").

[12] 1 C.F.R. § 456.4(k)(2) ("a pending request" before an agency); 14 C.F.R. § 302.420 ("any pending enforcement proceeding"); 28 C.F.R. § 24.104 ("an adversary adjudication pending before the Department [of Justice]"); 47 C.F.R. § 73.3521 ("When there is a pending application for a new low power television").

[13] See, *e.g.*, Local Rules 22(b)(1) ("cases filed by petitioner pending in any other court"), 22(b)(3) ("any pending application for a certificate of appealability"), 34(a) ("the final disposition of pending cases"), 46(b) ("a case pending before this Court"), 46(g)(1)(b) ("while an investigation into allegations of misconduct is pending").

"brought" that question to him "by law." Nor is it sensible to describe such constituent inquiries as "pending" questions; if anything, the question that is "pending" is the one before the *agency official*, not the Congressman. And as both the district court and government agreed below (see *supra* at 8-9), only the latter can make out an "official act" in this case.

Even less do "pending" and "by law brought" make sense when applied to mundane office activities performed by Congressional staffers, which the government identified as being "official acts" themselves (see *supra* at 11-12). Such activities—mailing a letter or making a phone call—do not involve *any* question or matter, much less one that could be "pending" or brought "by law."

Such contortions are possible only because the "settled practice" instruction is so far divorced from the statutory definition. Whereas the statute restricts an "official act" to a class of questions or matters bearing a particular formality—those that can sensibly be described as "pending" or brought "by law" before the Member—the "settled practice" instruction looks broadly (and vaguely) to a public official's "activities," asking merely whether they are "settled practice." JA5149. Thus untethered from the statute, the "settled practice" instruction can transform *any* activity, however menial, into an "official act"—including, as the government argued below, the mere use of Congressional office staff to draft *travel itineraries*.

b. The legislative history reinforces these points. Congress enacted the current version of section 201 in 1962. See Act of Oct. 23, 1962, § 201, 76 Stat. 1119, 1119. Before then, bribery offenses were housed in different sections of the United States Code pertaining to different categories of public officials. See, *e.g.*, 18 U.S.C. §§ 201-210 (1958) (covering, *inter alia*, United States officers, district attorneys, Members of Congress, and judges).

The provisions addressed to Members of Congress covered payments relating to matters "pending *in either House of Congress, or before any committee thereof.*" 18 U.S.C. §§ 204, 205 (1958) (emphasis added). Similar or identical language was used in prior statutes dating back to 1875.[14]

The legislative history thus confirms the lesson of the text: Bribery of Congressmen covers questions or matters "pending" or "by law brought" to a Member as part of the legislative process. That has been the object of the statute

[14] See Act of Mar. 4, 1909, ch. 321, § 110, 35 Stat. 1104, 1108 ("*pending in either House of Congress or before any committee thereof*, or which by law or under the Constitution may be brought before him in his official capacity, or in his place as such Member" (emphasis added)); *id.* § 111, 35 Stat. 1104, 1108 ("*pending in either House of Congress, or before any committee thereof*, or which by law or under the Constitution may be brought before him in his official capacity or in his place as such Member" (emphasis added)); Act of June 22, 1874, ch. 5, § 5450, 1 Rev. Stat. 1054, 1062 (1875) ("*pending in either House of Congress, or before any committee thereof*" (emphasis added)); *id.* ch. 6, § 5500, 1 Rev. Stat. 1069, 1072 (1875) ("*pending in either house, or before any committee thereof*, influenced thereby" (emphasis added)).

for more than a century. And, as the district court itself recognized, see *Jefferson*, 634 F. Supp. 2d at 601, the most recent revision of section 201 was a recodification effort designed to "make no significant changes of substance" to prior law. S. Rep. No. 87-2213, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853.

c. The *Sun-Diamond* Court emphasized that because the rules governing bribery and conflicts-of-interest each constitute "merely one strand of an intricate web of regulations," they must be construed narrowly so as not to overlap one another:

> [T]his is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits.

526 U.S. at 412. But that is exactly what would happen here if "official acts" encompassed non-legislative questions, such as questions pending before an executive department or agency. Then, the bribery statute (section 201(b)) would unnecessarily overlap neighboring section 203(a). That section, which Congress also enacted in 1962, specifically prohibits a Member of Congress from seeking or accepting

> any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another . . . in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or

> other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission.

18 U.S.C. § 203(a)(1).

This statute thus punishes, by up to five years' imprisonment (see *ibid.;* 18 U.S.C. § 216(a)), Members of Congress who accept payment in return for trying to influence questions or matters pending before non-legislative federal entities, including executive departments and agencies. With respect to Congressional defendants, section 203 would thereby overlap with the bribery statute if the latter extended to non-legislative questions. And whereas section 203 prescribes a maximum of only five years' imprisonment, section 201(b) authorizes *fifteen years'* imprisonment. Such disparity of punishment for identical conduct would flout *Sun-Diamond*'s proscription of broad and disruptive constructions of bribery statutes.

d. The purpose of the bribery statute also strengthens the conclusion that, for Congressmen, "official act" covers only legislative conduct. "The foundation of the Federal bribery statute has been described in the following terms:"

> It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased 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. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government.

United States v. Muntain, 610 F.2d 964, 968 (D.C. Cir. 1979) (emphasis added and internal quotation marks omitted); *United States v. Carson*, 464 F.2d 424, 434 (2d Cir. 1972) (same). This concern applies when a Member of Congress accepts money in return for being influenced to decide or act on a *legislative* question; then, the Member is clearly "participat[ing] in the making of official decisions," and the need is great for "objective evaluation and unbiased judgment." *Muntain*, 610 F.2d at 968. The bribery statute's fifteen-year maximum punishment is appropriately severe.

The calculus changes, however, when the Member is paid to act on a question that is pending *not* before him or Congress, but elsewhere, such as an executive agency. In that instance, the danger to society is reduced, inasmuch as the Member's ability to influence the question is comparatively attenuated. Accordingly, section 203, which specifically addresses this harm, punishes the Member's conduct less severely.

e. Finally, even if our "legislative acts" reading were not the only plausible reading of "official act" in this context, the rule of lenity strongly favors its adoption. "It is a fundamental rule of criminal statutory construction that statutes are to be strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has 'plainly and unmistakably' proscribed." *United States v. Sheek*, 990 F.2d 150, 153 (4th Cir. 1993). "Under a long line of

[Supreme Court] decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J.) (plurality); see also *Skilling*, 130 S. Ct. at 2932 (endorsing the "familiar principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (internal quotation marks omitted)).

2. We believe that the bribery statute covers only legislative conduct when the public official is a Congressman. But Jefferson's convictions are infirm even under the broader definition articulated by the en banc D.C. Circuit in *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007), which the district court expressly declined to follow. See *Jefferson*, 634 F. Supp. 2d at 602 n.14. Under *Valdes*, "official act" encompasses questions that are pending before *any* Branch of the federal government, but excludes questions and matters not subject to resolution by the government.

a. *Valdes* involved a detective who accepted cash payments from an FBI informant in return for providing confidential information, including certain names and addresses. 475 F.3d at 1320-1321. The government charged the detective with accepting a bribe, and he was convicted of the lesser-included offense of receiving a gratuity. *Id.* at 1322; see 18 U.S.C. §§ 201(b)(2)(A) & (C), 201(c)(1)(B).

The en banc court reversed, holding that the evidence did not show any "official act" under section 201(a)(3). 475 F.3d at 1321. Guided by *Sun-Diamond*'s injunction to interpret bribery-related statutes narrowly, and "relying on the canon of *noscitur a sociis*" (*i.e.*, the principle that the meaning of a word or phrase should be construed according to its surrounding words), the en banc court concluded

> that the words "question" and "matter" are known by the company that they keep. Seen in that light, the six-term series refers to a class of questions or matters whose answer or disposition is determined by the government. That class includes such questions as "Should the Congress enact new legislation regulating corporate directors?," "Should this person be prosecuted?," and "What firm should supply submarines for the Navy?" But it would not include questions like "What is your name?," an issue that the government does not normally resolve.

Id. at 1323-1324 (internal citations omitted). The court further reasoned that

> [o]ur reading of the statute is buttressed by the elements immediately preceding and following the six-term series. It would be linguistically odd, at a minimum, to treat an answer to a question as a "decision or action on" a question unless the answer were one that the government had authority to decide. The same holds true of the clause requiring that such questions or matters be of a class which "may at any time be pending, or which may by law be brought before any public official." Questions not subject to resolution by the government are not ordinarily the kind that people would describe as "pending" or capable of being "by law . . . brought" before a public official, especially if the law imposes no mandate on the official (or perhaps any official) to answer.

Id. at 1324. Thus, under *Valdes*, only questions answerable by the government can be the basis of "official acts."

b. *Valdes* had no occasion to address the further question whether "official acts" extend to matters that are determined only by *foreign* governments, such as the question whether a foreign government will award a contract to an American business at the behest of a Member of Congress. But the answer is surely no. Section 201(a)(3) by its terms applies to questions or matters that are "before any *public official*." 18 U.S.C. § 201(a)(3) (emphasis added). And section 201(a)(1) states clearly: "the term 'public official' means . . . an officer or employee or person acting *for or on behalf of the United States* . . . ." 18 U.S.C. § 201(a)(1). A question that is before a *foreign* government is by definition not one that is before someone acting "for or on behalf of the United States."

Moreover, extending section 201(a)(3) to foreign government decisions would lead to highly incongruous results. If the bribery statute encompassed a Congressman who accepted payment in return for lobbying a foreign government entity, then the Member could be punished by up to fifteen years' imprisonment. See 18 U.S.C. § 201(b). This result makes no sense in light of section 203(a),[15] which: (1) specifically addresses the particular harm caused by Members of

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

Congress who lobby government entities in return for payment, (2) would impose *no* punishment on a Member of Congress who lobbied a *foreign* government entity, see, *e.g.*, *United States v. Biaggi*, 853 F.2d 89, 98-99 (2d Cir. 1988) (section 203 applies only to "specific federal forums"), and (3) would impose at most *five years'* imprisonment if the conduct were committed against a *United States* entity—merely one-third of what a Member would suffer under section 201(b) if he had done the same conduct before a *foreign* entity.

D. The "Settled Practice" Instruction Is Not Supported By *Birdsall*

The district court based its "settled practice" instruction on *United States v. Birdsall*, 233 U.S. 223 (1914). See *Jefferson*, 562 F. Supp. 2d at 691 n.2; *Jefferson*, 634 F. Supp. 2d at 602. *Birdsall* does not even *support* the "settled practice" instruction, much less *require* it.

Birdsall was a consolidated appeal of three cases involving the same bribery scheme. 233 U.S. at 227. Defendants Brents and Van Wert were "special officers, duly appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians." *Id.* at 228. Their "duty," pursuant to "regulations and established requirements of the Department of the Interior," was to "inform[] and advis[e] the Commissioner of Indian Affairs" concerning whether clemency was warranted for persons convicted of violating the Indian liquor laws. *Ibid.* Defendant Birdsall

was a lawyer who paid Brents and Van Wert to recommend leniency for his clients. *Id.* at 229-230. The government charged the defendants with violating the bribery statutes then applicable to United States officers and persons acting on behalf of the United States. *Id.* at 230.

The same district judge dismissed all three indictments. *Id.* at 227. The judge reasoned that because there was no federal statute *requiring* Brents and Van Wert to make sentencing recommendations to their superior, the "indictments charged no offense." *Id.* at 231.

The Supreme Court reversed. *Id.* at 236. The Court held that "[i]t is not enough to say that there is no mandatory requirement imposing the obligation to give the [sentencing] recommendation." *Id.* at 235. Instead, the Court reasoned that "[e]very action that is within the range of official duty comes within the purview of [the bribery laws at issue]." *Id.* at 230. The Court then considered what it meant for an action to fit that criterion:

> To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the [applicable] statutes against bribery.

Id. at 230-231 (internal citations omitted). Concluding that the indictments sufficiently alleged that Brents and Van Wert acted within the scope of their "duty," the Court reversed. *Id.* at 231.

Judge Ellis apparently read *Birdsall* to mean that *any* "activit[y]" is an "official act" so long as it is "clearly established by settled practice as part [of] a public official's position." JA5149. This is not what *Birdsall* held or even said.

First, the determinative issue in *Birdsall* was whether the defendants could be guilty, even though no federal statute expressly required Brents and Van Wert to make sentencing recommendations in the first place. The Supreme Court said they could be. 233 U.S. at 235. That conclusion—that the bribery statutes are not confined to conduct that is expressly prescribed by federal law—required that the judgments of the district court be reversed, and is the only holding of the case. The rest is dicta. See, *e.g.*, *Valdes*, 475 F.3d at 1322-1323 ("Whatever the broad language in *Birdsall* may mean, it was certainly not the Court's holding. In *Birdsall*, the Court was focused on rejecting the defendants' theory on appeal—that for conduct to qualify as an 'official act' it must be one 'prescribed by statute' . . . .").

Regardless, the Supreme Court's other statements do not support the district court's instruction. *Birdsall* was focused on the concept of *duty*. The defendants in that case had a clear "*duty*" to make sentencing recommendations, and the Court

concluded that conduct amounting to an "*official duty*" comes within the ambit of the bribery statute. 233 U.S. at 228, 230 (emphasis added). The Court invoked "settled practice" as a shorthand for custom giving rise to binding duties. Put another way, the *Birdsall* Court referred to "settled practice" not because the phrase has any significance *of itself*, but only because it may shed light on whether particular conduct rises to the level of an "*official duty*." *Id.* at 230 (emphasis added).

But Jefferson has not been accused of being influenced in the performance of any Congressional *duty*, such as passing on legislation. No one, including the government's own expert (see *supra* I.A.2), would regard his conduct as anything but completely *discretionary*. *Birdsall* had no occasion to address such conduct. The Court said simply that *duties* implicate the bribery statute, and that "settled practice" can evidence a duty. The Court plainly did not say, as the district court did, that *every* "settled practice" *itself* implicates the bribery statute, even though the practice involves no *duty* but only *discretionary* conduct. *Birdsall* thus provides no support for the district court's "settled practice" instruction.[16]

[16] Even if *Birdsall* could bear the broad meaning ascribed to it by the district court—and it cannot—that meaning is flatly inconsistent with the Supreme Court's much more recent decision in *Sun-Diamond* (see *supra* I.B).

E. The Erroneous Instruction On "Official Act" Was Highly Prejudicial

The district court's erroneous "settled practice" instruction devastated Jefferson's defense. It invited the jury to convict based on evidence that did not constitute an "official act," properly construed. The appropriate disposition of the bribery convictions depends on which construction of section 201(a)(3) this Court adopts.

1. If the Court agrees with us that "official act" is confined (for Congressmen) to legislative matters, then the convictions on Counts 3 and 4 must be reversed and those counts dismissed. Neither count alleged that Jefferson was influenced in regard to any question or matter answerable by Congress. See JA116 (Count 3) and JA117-118 (Count 4). Nor did the government produce any evidence of such questions or matters at trial.

2. If, on the other hand, the Court interprets "official act" as the D.C. Circuit did in *Valdes*—to include questions answerable by domestic government entities, including but not limited to Congress—then the convictions on Counts 3 and 4 must be vacated and the case remanded for a new trial. Below, the government relied on evidence that would not meet the *Valdes* definition of "official act" but that could satisfy the "settled practice" instruction. Indeed, the government began its summation by telling the jury that "[t]he touchstone[,] then, for what qualifies as an official act, are those activities that have been clearly

established by settled practice as part of the public official's position." JA4906. The government then emphasized that its expert and other witnesses "testified [that] helping constituents is a matter of settled practice," *ibid.*, and recounted the evidence tending to show that Jefferson performed constituent services for the iGate and Mody ventures (the subjects of Counts 3 and 4), see generally JA4930-4969, 5074-5075, 5080-5082, 5092-5093.

The vast majority of this evidence does not make out any "official act" under *Valdes*. Nearly all of it concerned Jefferson's alleged conduct vis-à-vis foreign governments and entities.[17] And even if foreign government decisions could form the predicate of "official acts" under *Valdes*, the government also relied on large amounts of evidence that indisputably do not meet *Valdes* because they do not involve government decisions at all. This includes vague testimony that Jefferson "open[ed] up the gate to relationships" by making "business introductions" on behalf of the allegedly bribe-paying companies. JA3002, 3060-3062; see also JA3050-3051, 3078, 3085. It also includes a wealth of evidence of mundane

[17] See, *e.g.*, JA4938 (government summation; "The Congressman told them that he had a close relationship with the president of Nigeria, the [V]ice-[P]resident of Nigeria, and the Nigerian Communications [C]ommission."); JA4940 ("In exchange, [the owner of iGate] expected Jefferson to arrange meetings with heads of state and heads of government agencies in Nigeria to secure all necessary approvals to permit iGate/NDTV ventures to proceed."); see also, *e.g.*, JA4937-4969, 5074-5075.

logistical help from Jefferson's staff and embassy officials; the government regaled the jury with this evidence as proof of "settled practice" and thus of "official acts." See, *e.g.*, JA3827 (affirmative answer by government expert to question whether "[M]embers routinely utilize staff resources to provide the services and assistance requested" when helping constituents); JA4961 (arguing in summation that "Jefferson also had the staff arrange the travel, prepare an itinerary for the trip, secure visas for the trip participants, and make arrangements with the State Department in Ghana."); JA5095 ("And it wasn't just [Chevy] Suburbans. Expeditors, country debriefings, logistics, assistance with setting up meetings with high-ranking officials in all of these countries."); see also *supra* at 11-12.

II. THE CONVICTIONS ON COUNTS 3 AND 4 SHOULD BE REVERSED BECAUSE THE DISTRICT COURT GAVE AN ERRONEOUS *QUID PRO QUO* INSTRUCTION

In addition to requiring proof of an "official act," the bribery statute also requires proof that the public official received a thing of value "*in return for . . . being influenced* in the performance of any official act." 18 U.S.C. § 201(b)(2)(A) (emphasis added). The highlighted language states the crucial *quid pro quo* requirement: "'a specific intent to give or receive something of value *in exchange* for an official act.'" *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (quoting *Sun-Diamond*, 526 U.S. at 404-405) (emphasis in *Sun-Diamond*). The district court instructed the jury that

> the quid pro quo requirement is satisfied if you find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing official acts *on an as-needed basis, so that [whenever] the opportunity presented itself, he would take specific action on the payor's behalf.*

JA5151 (emphasis added). This instruction contravenes *Sun-Diamond* and independently requires reversal of the convictions on Counts 3 and 4.

1. *Sun-Diamond* explicitly held that the gratuity statute requires proof of "a *specific* 'official act' for or because of which [a gratuity] was given." 526 U.S. at 414 (emphasis added). The Court rejected the government's argument that it was sufficient to prove that the gratuity was given because of the official's position (and thus his ability to do favors as needed). The Court reasoned that the gratuity statute "prohibits only gratuities given or received 'for or because of *any official act* performed or to be performed.'" *Id.* at 406 (emphasis in original). The Court explained:

> It seems to us that this means "for or because of *some particular official act* . . . . Why go through the trouble of requiring that the gift be made "for or because of any official act performed or to be performed by such public official," and then defining "official act" (in § 201(a)(3)) . . . when, if the Government's interpretation were correct, it would have sufficed to say "for or because of such official's ability to favor the donor in executing the functions of his office"? The insistence upon an "official act," carefully defined, seems pregnant with the requirement that *some particular official act be identified and proved.*

Ibid. (emphasis added).

The Court's reasoning applies squarely here. Like the gratuity statute, the bribery statute uses the identical language—"any official act"—that the Court interpreted in *Sun-Diamond*. See 18 U.S.C. § 201(b)(2)(A) ("in the performance of *any official act*" (emphasis added)). And even more so than the gratuity statute, the bribery statute contemplates proof of a specific official act because the *sine qua non* of bribery is "'a specific intent to give or receive something of value *in exchange* for an official act.'" *Quinn*, 359 F.3d at 673 (quoting *Sun-Diamond*, 526 U.S. at 404-405) (emphasis in *Sun-Diamond*). Hence, the bribery statute requires proof that a public official agreed to "*perform*[]" an official act. 18 U.S.C. § 201(b)(2)(A). The natural inference is the performance of an *identifiable* official act.

The district court's instruction flouts this requirement by requiring that the government prove only that Jefferson agreed to perform unidentified official acts "on an as-needed basis." JA5151. Whatever that ambiguous phrase means, it clearly does not require proof of a "*specific* 'official act,'" as *Sun-Diamond* does. 526 U.S. at 414 (emphasis added). We do not suggest that to comply with *Sun-Diamond*, the government must prove a specific link between each payment and each alleged "official act"; rather, it would be enough to show a stream of payments in return for a stream of "official acts." See, *e.g.*, *United States v. Harvey*, 532 F.3d 326, 335 (4th Cir. 2008).

But it is another thing entirely to relieve the government of any obligation to tie the payments to *any* "official act," and permit it instead to prove merely that Jefferson agreed to perform *unspecified* "official acts" at some point in the future "on an as-needed basis." JA5151. If that were the case, then, as *Sun-Diamond* said, Congress would not have needed to define "official act" in the first place, much less to have done so with such precision. *Sun-Diamond* squarely rejected such a construction.

2. The district court thought that Fourth Circuit law authorizes the "as-needed basis" instruction. See JA4832-4833. This is not so. First, in the handful of cases that referred to the "as-needed" instruction or one like it, the discussion was dictum either because the evidence overwhelmingly proved bribery under a narrower *quid pro quo* instruction, because the court was not interpreting section 201(b), or both. See *Harvey*, 532 F.3d at 335 ("Thus, there is no question that a rational trier of fact could have found that the evidence at trial established a course of conduct in which Harvey, a public official, engaged in a series of official acts in exchange for a series of payments that Kronstein made through third parties for Harvey's benefit . . . ."); *United States v. Jennings*, 160 F.3d 1006, 1010, 1022-1023 (4th Cir. 1998) (defendant convicted of violating 18 U.S.C. § 666); *United States v. Arthur*, 544 F.2d 730, 732, 735-736 (4th Cir. 1976) (construing 18 U.S.C.

§ 656 and West Va. Code Ann. § 61-5A-3 (Supp. 1975) and concluding that the district court's instruction was erroneous).

Even if the "as-needed basis" language in these cases were not dictum, *Sun-Diamond* has abrogated it. The *Jennings* decision, from which the district court's "as-needed basis" instruction originally derives, see 160 F.3d at 1014, was decided before *Sun-Diamond*. Although one Fourth Circuit decision has mentioned the "as-needed" language after *Sun-Diamond*, see *Harvey*, 532 F.3d at 335, the Court did not address whether the language survived the Supreme Court's decision. Nor did the court below, which simply relied on Circuit precedent. See JA4833 ("But it's the Fourth Circuit, and I'm bound by that. You know, you could say it was a lousy decision, but that is not a privilege I have.").

III. THE CONVICTIONS ON COUNTS 6, 7, AND 10 SHOULD BE REVERSED BOTH BECAUSE THEY REST ON THE ERRONEOUS BRIBERY INSTRUCTIONS AND BECAUSE THEY CHARGED THE VERY THEORY OF "HONEST SERVICES" REJECTED IN *SKILLING*

Counts 6, 7 and 10 charged Jefferson with committing honest-services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. The convictions rest on two alternative theories: first, that Jefferson solicited bribes in exchange for performing official acts for the iGate and Mody ventures, and second, that Jefferson had an undisclosed conflict of interest in the iGate and Mody transactions. See JA119-

121; *United States v. Jefferson*, 562 F. Supp. 2d 719 (E.D. Va. 2008); JA5156-5157. Neither theory is legally tenable.

1. The court's instruction on the bribery theory incorporated its erroneous instructions on *quid pro quo* and the "settled practice" definition of "official act." JA5157 ("[Y]ou must consider the bribery instructions that I have previously provided to you with respect to Counts 3 and 4, including the instructions regarding the meaning of the term 'official act,' . . . and the quid pro quo requirement."). Thus, the bribery-theory instruction, too, was erroneous.

2. The alternative, conflict-of-interest theory is foreclosed by *Skilling v. United States*, 130 S. Ct. 2896 (2010), decided subsequent to Jefferson's trial. In *Skilling*, the Supreme Court held that section 1346, the so-called "honest-services" statute, "covers only bribery and kickback schemes," *id.* at 2907. The Court explicitly rejected, as outside the scope of section 1346, the theory charged in this case: "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 2932.

The conflict-of-interest theory is infirm here for another reason. The district court instructed that Jefferson's undisclosed interest must relate to an "official act," which the court defined according to its erroneous "settled practice" instruction.

JA5158 ("[Y]ou must consider the instructions I have given you regarding the meaning of 'official acts.'"); *Jefferson*, 562 F. Supp. 2d at 724 & n.6 (concluding, prior to trial, that the conflict-of-interest theory requires proof of an "official act").

3. Because the conflict-of-interest theory is invalid under *Skilling*, the only possible route to conviction would be through the bribery theory. The proper disposition of these counts therefore depends on how this Court construes "official act." If the Court interprets that term to require legislative acts, then these counts must be dismissed for the same reasons discussed above in reference to Counts 3 and 4. See *supra* I.E. If the Court adopts the broader *Valdes* definition of "official act," then these counts must be retried. See *ibid.*

Finally, even if the Court sustains the bribery convictions—and rejects *both* our "official act" and *quid pro quo* challenges—retrial of Counts 6, 7, and 10 is *still* necessary. In that event, the wire fraud charges would rest on one valid theory (bribery) and one indisputably invalid theory (self-dealing honest-services fraud). Under the rule in *Yates v. United States*, 354 U.S. 298 (1957), a new trial on those counts would be required. See *Black v. United States*, 130 S. Ct. 2963, 2968 (2010) ("Under the rule declared by this Court in [*Yates*], a general verdict may be set aside 'where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.'"). Here, there is no doubt that the jury could easily have taken the legally invalid path to conviction (*i.e.*, self-

dealing honest-services wire fraud). The government elicited testimony from virtually all of its witnesses that they would have wanted to know of Jefferson's undisclosed interest in the ventures he allegedly promoted. For just a sampling, see JA440-441, 996-997, 1494-1495, 1523, 1665-1666, 1696, 1699-1700, 3567, 4235.

IV. THE CONVICTIONS ON COUNTS 1–2, 12–14, AND 16 SHOULD BE REVERSED BECAUSE THEY REST ON THE ERRONEOUS BRIBERY INSTRUCTIONS, THE REPUDIATED "HONEST SERVICES" THEORY, OR BOTH

Each of the remaining convictions—on Counts 1-2, 12-14, and 16—rests on the erroneous bribery instructions, the "honest-services" theory of wire fraud repudiated by *Skilling*, or both.

1. The money laundering counts (Counts 12-14) alleged that Jefferson laundered bribe proceeds and thus required proof that the money "was, in fact, derived from bribery." JA5181; see also JA124. The erroneous bribery instructions thereby tainted the convictions on these counts.

2. The conspiracy counts (Counts 1-2) alleged bribery and honest-services wire fraud as their objects, and incorporated the district court's erroneous instructions on those offenses. See JA5129-5132, 5139-5140, 5145-5146; see also JA79-80, 102.

3. The same is true of the RICO count (Count 16), which alleged bribery, honest-services wire fraud, and money laundering of bribe proceeds as predicates. See JA5203, 5206; see also JA126-154.

4. As with the other counts of conviction, the proper disposition of these counts depends on how the Court construes "official act." If the Court agrees that (for Congressmen) "official acts" are confined to legislative matters, then the Court should dismiss the money laundering allegations (Counts 12-14 and Racketeering Act 12 of Count 16), which rest solely on bribery, for the reasons given above in reference to Counts 3 and 4 (see *supra* I.E). The Court would also have to dismiss Counts 2 and 16 because they rest alternatively on bribery and honest-services wire fraud (the latter of which itself rests alternatively on bribery and the repudiated self-dealing theory). Count 1 would have to be retried because one of the alleged objects of the conspiracy (violation of the FCPA) involves neither bribery nor honest-services wire fraud.

On the other hand, if the Court adopts *Valdes*'s definition of "official act," then all of these counts would have to be retried for the reasons discussed above in relation to Counts 3 and 4 (see *supra* I.E). Still, certain allegations would have to be dismissed outright because they involve only *foreign* government decisions, which are not encompassed by *Valdes*. These include allegations concerning Noah

Samara (Racketeering Acts 4-5 (JA135-139)) and Noreen Griffen and Procurer and LETH (Count 2 (JA112-115) and Racketeering Act 6 (JA139-141)).

Finally, even if the Court affirms the bribery convictions, retrial of Counts 1-2 and 16 is *still* needed under *Yates*, for the same reasons described above in reference to the wire fraud counts (see *supra* III.3).

V. THE CONVICTION ON COUNT 10 SHOULD BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE VENUE

Count 10 charged honest-services wire fraud under 18 U.S.C. §§ 1343 and 1346. The count was based on a phone call that Jefferson made while in Ghana to Vernon Jackson in Kentucky regarding the iGate and Mody ventures. See JA121. Because the phone call did not originate, pass through, or terminate in the Eastern District of Virginia, Jefferson moved to dismiss the count for lack of venue. See Dkt. 32 at 10. The district court denied the motion, concluding that venue was appropriate not only in districts where the wire traveled, but also in any district where Jefferson performed "acts directly or causally connected to the wire transmission." *United States v. Jefferson*, 562 F. Supp. 2d 695, 703-704 (E.D. Va. 2008). Pointing to allegations in the indictment that Jefferson did acts in the Eastern District of Virginia related to the alleged iGate and Mody bribe schemes, the court held that venue was proper. *Id.* at 704; see also JA236-237. Not so.

In criminal cases, venue must be narrowly construed, *United States v. Johnson*, 323 U.S. 273, 276 (1944) (abrogated by statute on other grounds), and proper on each count, *United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). Moreover, it is black letter law in this Circuit that where, as here, Congress did not specifically provide for venue in the statute defining the offense, venue lies only where the essential *conduct* elements of the offense occurred:

> When a criminal offense does not include a specific venue provision, venue must be determined from the nature of the crime alleged and the location of the act or acts constituting it. This inquiry is twofold. We must initially identify the conduct constituting the offense, *because venue on a count is proper only in a district in which an essential conduct element of the offense took place*. *We must then determine where the criminal conduct was committed*.

United States v. Smith, 452 F.3d 323, 334-335 (4th Cir. 2006) (emphasis added and internal quotation marks and citations omitted); see also *Ebersole*, 411 F.3d at 524 (same); *United States v. Barnette*, 211 F.3d 803, 813 (4th Cir. 2000) (same). These decisions implement the clear directive of the Supreme Court: to ascertain "the *conduct* constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal *acts*." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (emphasis added).

Section 1343 punishes whoever "*transmits* or *causes* to be transmitted" wires to execute a scheme or artifice to defraud. 18 U.S.C. § 1343 (emphasis added). Hence, "the essential conduct prohibited by § 1343 [is] the misuse of

wires as well as any acts that cause such misuse." *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002); see also *United States v. Ramirez*, 420 F.3d 134, 144-145 (2d Cir. 2005) (reaching same conclusion regarding mail fraud statute); *Ebersole*, 411 F.3d at 527 ("Here, the nature of the offense alleged was 'the act of causing a wire to be transmitted in furtherance of a fraud.'"); *United States v. Condolon*, 600 F.2d 7, 8 (4th Cir. 1979) ("The gravamen of the [wire fraud] offense is simply the misuse of interstate communication facilities to execute 'any scheme or artifice to defraud.'").

Jefferson presumably could have been prosecuted in the district in Kentucky where his phone call was received, or in any district through which the call traveled. He might also have been prosecuted in any district from which he caused the call to be made. See *Ebersole*, 411 F.3d at 527 (wire fraud is a continuing offense under 18 U.S.C. § 3237(a) and thus may be tried in any district where the offense was begun, continued, or completed). But he could not have been tried in the Eastern District of Virginia. The call did not pass through there, nor did Jefferson cause it to be made from there. Instead, the only connection between that district and the call was that Jefferson allegedly performed acts there in furtherance of the alleged iGate and Mody schemes. But while that is an *element* of the wire fraud offense, it is clearly not a *conduct* element, and both this Circuit and the

Supreme Court have emphasized that venue is proper only where the essential *conduct* elements have occurred. See *Rodriguez-Moreno*, 526 U.S. at 279.

Notably, the district court did not suggest that Jefferson performed any acts in the Eastern District of Virginia that *were* essential conduct elements of the wire fraud offense. Instead, the court relied on a decision from the Seventh Circuit holding that, under the wire fraud statute, venue is proper in any district where the defendant's acts "provided critical evidence of the 'intent to defraud,' an *element* of the crime of wire fraud." *United States v. Pearson*, 340 F.3d 459, 466 (7th Cir. 2003) (emphasis added), *vacated on other grounds by Hawkins v. United States*, 543 U.S. 1097 (2005); see *Jefferson*, 562 F. Supp. 2d at 702-704. That position has been roundly rejected by other circuits. See *United States v. Ramirez*, 420 F.3d 134, 144-145 (2d Cir. 2005) (mail fraud; concluding that "'having devised or intending to devise a scheme or artifice to defraud,' while an essential element, is not an essential *conduct* element for purposes of establishing venue," and rejecting the government's argument that "venue is proper . . . in any district where any aspect of the scheme or artifice to defraud was practiced" (emphasis in original and internal quotation marks omitted)); *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) (wire fraud; "Although a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct. Therefore, venue is

established in those locations where the wire transmission at issue originated, passed through, or was received, or from which it was 'orchestrated.'" (internal citation omitted)). The court below stated that *Pearson* could be reconciled with *Pace* and *Ramirez*, see *Jefferson*, 562 F. Supp. 2d at 703-704, but neither the *Pearson* court nor even the government in this case thought so, see *Pearson*, 340 F.3d at 467 n.3 ("declin[ing] to adopt the analysis" in *Pace*); Dkt. 56 at 14 n.2 ("The government disagrees with the *Ramirez* and *Pace* decisions . . . ."). The Seventh Circuit's *Pearson* decision is the sole authority for the district court's venue holding, and that ruling simply cannot be reconciled with this Circuit's conclusion that venue lies only where essential *conduct* elements of an offense occurred.

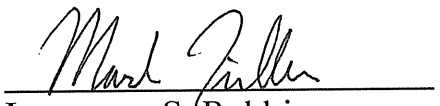
CONCLUSION

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

STATEMENT WITH RESPECT TO ORAL ARGUMENT

This case presents significant questions of law and requires analysis of the substantial trial record. Accordingly, the defendant respectfully requests that the Court permit oral argument.

Respectfully submitted,



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November 15, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B): it is written in Times New Roman, a proportionally spaced font, has a typeface of 14 points, and contains 13,518 words (as counted by Microsoft Word 2003 word processing software), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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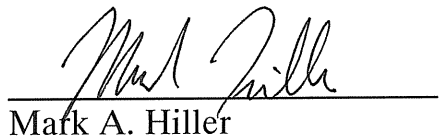

Mark A. Hiller

Statutory Appendix

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 11. Bribery, Graft, and Conflicts of Interest (Refs & Annos)
§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section--

(1) 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;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) 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.

(b) Whoever--

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit

to do any act in violation of the lawful duty of such official or person;

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

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in 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;

(3) 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;

(4) 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;

shall be fined under this title or not more than 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.

(c) Whoever--

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

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

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives,

accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such 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 for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) 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.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

CREDIT(S)

(Added Pub.L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1119, and amended Pub.L. 91-405, Title II, § 204(d) (1), Sept. 22, 1970, 84 Stat. 853; Pub.L. 99-646, § 46(a)-(l), Nov. 10, 1986, 100 Stat. 3601-3604; Pub.L. 103-322, Title XXXIII, §§ 330011(b), 330016(2)(D), Sept. 13, 1994, 108 Stat. 2144, 2148.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, and will accordingly be served on the government's counsel of record, listed below, by the CM/ECF system, on this 15th day of November, 2010. I also hereby certify that one copy of the related Joint Appendix was mailed this 15th day of November, 2010, to:

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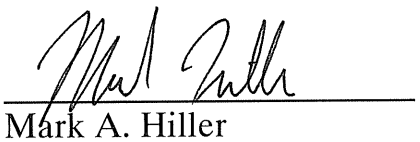

Mark A. Hiller