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# Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law

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**PUBLIC CORRUPTION:  
A COMPARATIVE ANALYSIS OF INTERNATIONAL CORRUPTION  
CONVENTIONS AND UNITED STATES LAW**

Peter J. Henning\*

**I. INTRODUCTION**

Corrupt acts by public officials are not countenanced in any political regime, at least not publicly, if that government wishes to retain its authority to enforce the law. Yet, what exactly is "corruption"? There is no single definition of corruption,<sup>1</sup> and the term has described everything from blatant acts of bribery to the use of political power to advance one party or faction's agenda. While every nation has criminal proscriptions on bribing government officials,<sup>2</sup> bribery is only one manifestation of public corruption. The criminal law is not the only means to inhibit corruption, and many nations have adopted ethical guidelines for public administration and regulations on campaign finance to limit the opportunity to misuse, or improperly influence, public authority.

Individual officials can abuse their authority in an almost limitless number of ways. For example, the expansion of the internet and electronic mail means that a governmental employee can easily conduct personal business during work hours, often with little threat of being detected or disciplined. Is this use of government resources a corrupt act, and, if so, should the law treat it as a criminal violation? While there is pressure to expand the criminal law to address public corruption, others criticize the adoption of increasingly intricate guidelines on government employee conduct because they *detract* from the effort to enhance ethical standards.<sup>3</sup> Legislators must strike a delicate balance between drafting

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\*Associate Professor, Wayne State University Law School. © Peter J. Henning. I appreciate the constructive comments and suggestions of Professors Ellen Podgor, Chris Blakesley, Bill Burnham, and Gennady Danilenko, and the excellent research assistance of Brittany Schultz, Esq.. My friend and colleague, Edward Wise, inspired me to think about this topic from a comparative point of view, and I miss his counsel and encouragement.

1. See, e.g., John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory*, 72 AM. POL. SCI. REV. 974, 976 (1978).

2. See FRITZ HEIMANN, SHOULD FOREIGN BRIBERY BE A CRIME? 7 (1994) ("There is no country in the world where bribery is either legally or morally acceptable."); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C<sup>2</sup> Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 595 (2000) ("Scholars studying the corruption phenomenon have noted a unique paradox: corruption is universally disapproved yet universally prevalent."); Claire Moore Dickerson, *Political Corruption: Free-Flowing Opportunism*, 14 CONN. J. INT'L L. 393, 395 (1999) ("scholars have asserted that every country has laws against bribery of its own officials").

3. See FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* xii (1996) ("It should not be assumed, as it often has been, that all corruption controls further

effective laws to prohibit corruption and adopting guidelines which are little more than an exercise in micromanagement that makes following the rules an end in itself rather than a means to serve the public interest.<sup>4</sup>

At a fundamental level, the term "corruption" does not denote any particular transgression, and need not even be conduct that would constitute a crime. Despite the problems with identifying and rooting out official corruption, there is unanimous agreement that it is wrongful and cannot be tolerated in civilized society.<sup>5</sup> The harm wrought by corrupt public officials on both their own nation and the global economy is significant.<sup>6</sup> Indeed, opposing corruption is a

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or even coincide with government efficiency and effectiveness, or that such measures actually reduce corruption."); Kathleen Clark, *Do We Have Enough Ethics in Government?: An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 62 (1996) ("Adding more ethics regulation actually may be counterproductive. It distracts both government officials and the public from the more general goal of protecting the public trust.").

4. See ANECHIARICO & JACOBS, *supra* note 3, at xv ("The irony of corruption control is that the more anticorruption machinery we create, the more we create bureaucratic pathology and red tape."); ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 290 (1993) ("The more zealous the effort to identify and legislate against wrongful conduct, the more elusive the goal of achieving ethical behavior has become. Each reform has added another layer of regulation. The result is a complex and formidable rule structure, whose rationale is increasingly obscure and whose operation is increasingly arcane.").

5. See Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 LAW & POL'Y INT'L BUS. 47, 49 (1999) ("While the commentators naturally have posed a variety of policy solutions to the problem, virtually all now agree that transnational bribery is a major economic and ethical concern."); Andrea D. Bontrager Unzicker, Note, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 659 (2000) ("Bribery is universally shameful, but despite the host of negative effects tied to international corruption and the fact that virtually every country in the world has laws against domestic bribery, many nations have been unwilling, until recently, to address the problem.").

Rejection of corruption does not mean that all agree that international efforts to combat corruption are acceptable. Professor Salbu has criticized efforts to define certain practices as corrupt as a form of cultural imperialism. See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999), although others argue that anti-corruption laws do not undermine cultural norms; Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 645 (2000) ("The characterization of anti-bribery laws as dangerously intrusive errs in two important ways."); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 705-06 (2000) ("This criminalization does not constitute moral imperialism. Indeed, to allow such conduct is morally questionable.").

6. See SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978) [hereinafter ROSE-ACKERMAN, *CORRUPTION*]; Beverly Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the*

cliché, akin to supporting “mom and apple pie.”<sup>7</sup> Recently, many nations have worked at the international level to enhance the fight against public corruption through the adoption of multilateral agreements requiring the signatory countries to adopt tougher domestic criminal laws to punish abuses of public authority.

In 1996, the Organization of American States (OAS) adopted the Inter-American Convention Against Corruption (IACAC), whose purpose is “[t]o promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption . . . .”<sup>8</sup> The United States ratified the IACAC on September 15, 2000, joining 20 other OAS nations that ratified the Convention.<sup>9</sup> In 1997, the Organization for Economic Co-operation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention) to address a problem that “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”<sup>10</sup> There are two European initiatives to address the problem of public corruption. In 1997, the European Union promulgated the Convention on the Fight Against Corruption in order to improve judicial cooperation in criminal matters among the member states.<sup>11</sup> Building on that Convention, the Council of Europe adopted a much broader approach in the Criminal Law Convention on Corruption (Council Convention) in 1999 that calls on all of the member states of the European Union to implement “a common criminal policy aimed at the protection of society against corruption . . . .”<sup>12</sup>

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*Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L.J. 483, 484-85 (2000) (“Bribery and corruption threaten the ability of [Eastern European] countries to complete their work toward privatization by distorting the development process and discouraging private investment.”).

7. See David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 455 (1999) (“However difficult it might be to define ‘corruption,’ in polite society one must be opposed to it.”).

8. Inter-American Convention Against Corruption, March 29, 1996, 35 I.L.M. 724, 728, art. II, § 1 [hereinafter *IACAC*].

9. 146 CONG. REC. S7809 (2000). For a list of OAS members that have adopted the IACAC, see <http://www.oas.org>.

10. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, art. I, ¶ 5 [hereinafter *OECD Convention*]. The United States signed the Convention and adopted implementing legislation entitled the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998). The Convention entered into force on February 15, 1999. See OECD Home Page <http://www.oecd.org/daf/nocorruption/>.

11. Council Act No. 97/C 195/01, 1997 O.J. 195, 2-11.

12. Criminal Law Convention on Corruption, January 27, 1999, Preamble, ETS No. 173 [hereinafter Council Convention]. In 1998, the Council created the Group of States Against Corruption, known by the acronym GRECO, to coordinate the fight against corruption. Committee of Ministers, Council of Europe, Multidisciplinary Group on Corruption: Draft Agreement Establishing the Group of States Against Corruption (Apr. 2,

While easily assailed, corruption is not a term susceptible to facile definition.<sup>13</sup> The Conventions rely on the traditional offense of bribery as the paradigm of corruption, defining the crime as the offer of any "advantage" in connection with the discharge of public duties. They then address obliquely a few broader instances of corruption, such as influence-peddling or the misuse of office for personal gain. The IACAC has the broadest provision, defining corruption to include "[a]ny act or omission in the discharge of his duties by a government official . . . for the purpose of illicitly obtaining benefits for himself or for a third person."<sup>14</sup> Although the Conventions seek to promote uniformity, they do not follow a single approach, and there is no overarching paradigm of corruption to determine what forms of official misconduct should be designated as crimes.<sup>15</sup> They limit the forms of corruption largely to two-party exchanges in which the governmental official receives a benefit provided by a party with an interest in the outcome of a decision or other exercise of authority. Corruption, however, is not confined solely to bribery-type situations, and criminal definitions of corruption relying on the bribery paradigm leave out activities by officials that result in personal enrichment through the misuse of authority that are as improper as the receipt of a bribe.<sup>16</sup>

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1998), available at <http://www.coe.fr/cm/cmdocs/1998/98cm54.htm>.

The United Nations adopted an International Code of Conduct for Public Officials in 1996 as a means to assist member nations in fighting corruption, but it does not call upon UN members to adopt new legislation. See United Nations: General Assembly Res. 51/59 on Action Against Corruption, Dec. 12, 1996, 36 I.L.M. 1039 (1996).

13. See Kennedy, *supra* note 7, at 456 ("Although the term 'corruption' is open to all sorts of interpretations, once something has been at least plausibly swept into the corruption category, the discursive balance of forces changes. Efforts to eliminate the practice are harder to oppose.").

14. IACAC, *supra* note 8, at 729, art. VI(1)(c).

15. The Conventions have been criticized for being too narrowly drawn because the principle crime is bribery and not a broader offense of corruption. See Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW. 149, 157 (2000). There is no question that bribery is the quintessential form of public corruption, but the issue is how far the criminal law can be extended to other instances of misuse of official authority for personal gain.

16. Miguel Schloss, the Executive Director of Transparency International, offered a broad interpretation of bribery that covers a variety of forms of corruption and governmental misconduct that fall outside the traditional definition of a bribe:

[I]t should be understood that bribery encompasses payoffs for a wide variety of illicit activities: (i) getting around licenses, permits, and signatures; (ii) acquiring monopolistic power through entry barriers to competitors; (iii) access to public goods, including legal or uneconomic awards of public procurement contracts; (iv) access to the use of public physical assets or their outright stripping and appropriation; (v) access to preferential financial assets, such as

The focus at the international level on encouraging countries to adopt broad criminal statutes to deter and punish corrupt activities by public officials raises the question of how the law in the United States addresses corruption. The United States has been among the leaders in seeking international and regional agreements supporting the adoption of stronger anti-corruption laws. The Foreign Corrupt Practices Act (FCPA),<sup>17</sup> enacted by Congress in 1977 to address the problem of transnational bribery of public officials by American corporations seeking overseas business, provided the framework for the OECD Convention.<sup>18</sup> The FCPA expanded the jurisdiction of federal prosecutors to include corrupt acts

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credit; (vi) illegal trade in goods banned for security or health considerations, such as drugs and nuclear materials; (vii) illicit financial transactions, such as money laundering and insider trading; (viii) influencing administrative or legislative actions; and (ix) influencing judicial decisions.

Miguel Schloss, *Symposium Fighting International Corruption and Bribery in the 21st Century, Luncheon Address*, 33 CORNELL INT'L L.J. 469, 471 (2000).

Professor Salbu criticizes the effort to adopt domestic and international prohibitions on corruption because they appear to be largely ineffectual. He states, "If both the FCPA and domestic laws in foreign countries have failed to have any serious impact on bribery, is there any reason to assume that additional legislation would have a greater effect?" Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 681 (2000). He argues that criminal laws "serve[] a very limited role" in the fight against corruption. *Id.* The point is a good one, but one should not infer that the criminal law must be ineffective because it has not stopped corruption. While the criminal law alone cannot end corruption, it provides the core method of attacking past instances of corruption. Policies designed to eliminate the institutional structures that encourage corruption may ultimately have a greater impact than individual prosecutions, but criminal prohibitions will always be a necessary aspect of every effort to eradicate and punish corruption. This article argues in favor of broader laws to reach forms of corruption that fall outside the paradigm of bribery, understanding the limitations of any criminal provision as a limited, but necessary, tool.

17. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, and 78ff (2000)). Congress has amended the FCPA twice, in 1988 as part of the Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, 102 Stat. 1107, 1415-25 (1988), and again in 1998 to conform to the OECD Convention in the International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

18. See Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 18 (1999) ("It is certain that the FCPA has provided a relevant legislative model for other multilateral organizations and nations because it remains the sole statutory prohibition of bribery of foreign officials by business for the purpose of obtaining contracts."). For a thorough review of the history and structure of the FCPA, see Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249 (1999).

committed outside the United States, and established a standard for extending the criminal law beyond a nation's borders. In 1999, Vice-President Gore hosted the Global Forum on Fighting Corruption in Washington, D.C., in which 90 nations sent representatives to discuss a broad array of topics related to public corruption.<sup>19</sup> The United States is a key participant in the international effort to enhance the investigation and prosecution of corruption, and views its laws as an important guide for other nations seeking to adopt broader prohibitions in this area.<sup>20</sup> For example, the United States Senate ratified the IACAC with an explicit understanding that it did not need to adopt any new laws to meet the Convention's requirements because "[t]here is an extensive network of laws already in place . . . that criminalize a wide range of corrupt acts."<sup>21</sup>

Although it holds itself out as an example for other nations to follow, the United States does not have a coherent set of domestic anti-corruption laws. Instead, one can best describe the federal law as a hodgepodge.<sup>22</sup> One provision of federal law targets bribery and unlawful gratuities to federal officials,<sup>23</sup> while a different one addresses corruption connected to state and local programs that receive federal funds.<sup>24</sup> In addition to these narrower criminal provisions, judicial interpretation expanded the Mail Fraud statute<sup>25</sup> and the Hobbs Act<sup>26</sup> to reach official misconduct even though Congress did not adopt the provisions expressly to address corruption. Determining what types of conduct by public officials violate federal criminal provisions, and how broadly or narrowly those statutes

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19. Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, Feb. 23-25, 1999, available at <http://usinfo.state.gov/topical/econ/integrity/documents/gore.html>.

20. See Letter of Transmittal from Department of State to President Clinton (March 24, 1998), reprinted in INT'L ECON. L. DOC. IEL-I-B21 (available on WESTLAW) [hereinafter *Letter of Transmittal*] ("[O]ne of the objectives of the [IACAC] is to have the rest of the nations of the hemisphere develop a body of laws on corruption comparable to that which exists in the United States."); *Hearing on the Inter-American Convention Against Corruption*, 106th Cong. (May 2, 2000) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs) [hereinafter *Under Secretary Larson Statement*] (discussing the "strong position the United States has historically taken in opposition to corruption, and the fact that our laws and policies on this issue are at the forefront internationally . . .").

21. 146 CONG. REC. S7809 (2000).

22. The United States is not alone in having a disjointed approach to corruption. The English law of corruption has been described as "an area of law riddled by logical inconsistency and historical hangovers." Peter Alldridge, *Reforming the Criminal Law of Corruption*, 11 CRIM. L.F. 287, 287 (2000).

23. 18 U.S.C. § 201 (2000).

24. 18 U.S.C. § 666 (2000). A violation of this provision requires that the program receive over \$10,000 of federal funds in a 12-month period. *Id.*

25. 18 U.S.C. § 1341 (2000). The Wire Fraud statute reaches the same corrupt conduct as the Mail Fraud statute. 18 U.S.C. § 1343 (2000).

26. 18 U.S.C. § 1951 (2000).

should be interpreted, has been the subject of continuing controversy. Congress has not defined a crime of public corruption,<sup>27</sup> nor established the extent to which the federal power should be applied to the corrupt acts of state and local officials. Judicial interpretations of statutes employed in corruption cases leave the scope of the law unclear because the provisions are viewed in isolation, without reference to any overarching statutory structure for combating public corruption. The fault lies not so much with the courts as with Congress, which has not undertaken the task of enacting a clear set of provisions to deal with corruption at the various levels of government. Lacking a coherent system of anti-corruption laws at the federal level, it is unclear what limits, if any, there are to applying criminal provisions to regulate public affairs, or whether certain types of conduct should be left to the civil and administrative apparatus. Nations seeking unambiguous laws prohibiting corruption may find that the United States does not provide a model of clarity in this area.

Despite the lack of a coherent set of laws at the federal level, the United States can offer guidance on addressing misconduct that falls outside the bribery paradigm involving the misuse of official authority for personal gain. The Mail Fraud statute is a good example of a powerful anti-corruption statute that reaches conduct by both public officials and employees of private enterprises that does not necessarily involve the typical two-party exchange found in bribery situations.<sup>28</sup> Instead, the provision focuses on the personal enrichment of the defendant through dishonesty in the exercise of authority rather than the payment and receipt of a bribe. International efforts to address corruption should consider adoption of a provision like the Mail Fraud statute's prohibition on officials acting to deprive the citizenry of the right of honest services as a means to punish the misuse of public office for personal enrichment even in the absence of a two-party transaction, such as a bribe.

This Article analyzes the International Conventions that address public corruption and compare their approaches with the structure of United States laws applied to prosecute corruption. The focus is on the federal government rather than the states because the international agreements on corruption apply to the national governments in the first instance, and it is the federal law that will provide guidance to, and be influenced by, the development at the international level of a coherent body of law on the subject.<sup>29</sup> Part II reviews briefly some

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27. See Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 700 (2000) ("[F]ederal jurisdiction over political corruption at the state and local level is gradually expanding to fulfill the same functions as the statutes punishing corruption within the federal system.").

28. 18 U.S.C. § 1341 (2000).

29. One of the understandings of the United States Senate in ratifying the IACAC was that, due to the federal system of government in the United States, the Convention "does not impose obligations with respect to the conduct of officials other than federal officials." 146 CONG. REC. S7809 (2000). The United States took that position in



formulations of a definition of corruption that encompass a broad array of conduct, from the clearly illegal to the outer limits of ethical conduct and fair administration of the law. Part III describes the approaches to public corruption in the IACAC, OECD Convention, and Council Convention. The OECD and Council Conventions focus exclusively on bribery as the sole form of corruption subject to prosecution, although the Council Convention tries to reach an additional form of corruption it terms trading in influence that largely resembles bribery. The IACAC begins with bribery, and then suggests additional forms of corruption that focus on the personal enrichment of the public official as the linchpin for criminal liability. The IACAC is closer to the broader anti-corruption provisions found in United States law. None of the Conventions address gratuities given to officials that are designed to seek future benefits unrelated to a specific exercise of authority, a form of corruption that involves influence buying. A related issue not addressed in the Conventions is the topic of political campaign contributions, and how corruption law should treat these payments that are designed to influence the exercise of official authority.

Part IV analyzes the scope of the United States laws on corruption in light of the position asserted in ratifying the IACAC that no additional provisions were needed to comply with that Convention's obligations, and how the law in the United States can shape further development of a uniform approach to corruption. The first section considers the interrelated crimes of bribery and unlawful gratuities. While bribery is the most commonly identified form of public corruption, the offer and receipt of a gratuity is also a criminal offense that raises a difficult interpretive issue regarding the distinction between a bribe and a gift, and what types of gifts should rise to the level of a violation of the criminal law. The second section analyzes the relationship of political campaign contributions to prosecutions for corruption. The global effort to combat corruption must consider how the process of financing political campaigns can be accommodated to the effort to eliminate corruption. The third section reviews the broadest anti-corruption statute in the federal law—the Mail Fraud statute—that reaches any “scheme to defraud” that deprives the government and citizenry of the right of honest services owed by public officials. The analysis of this provision is important to understanding how broadly the criminal law can sweep to address forms of corruption that do not fit the bribery paradigm when officials misuse public authority for personal benefit. The Article discusses how anti-corruption law should be expanded along the lines sketched out in the Mail Fraud statute to prohibit schemes by which officials enrich themselves and others improperly

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negotiating the Convention when the leader of the delegation stated that “countries with federal systems of government may not be able to bind their states and municipalities to the obligations under the Convention.” Letter of Transmittal, *supra* note 20; see Under Secretary Larson Statement, *supra* note 20 (“At the conclusion of the negotiations [for the IACAC], the United States delegate read a statement into the record, asserting that we understood the Convention did not impose obligations with respect to officials other than federal officials for countries with a federal system of government.”).

through influence-peddling, skimming, nepotism, and other types of misuse of public authority.

## II. EFFORTS TO DEFINE PUBLIC CORRUPTION

In the criminal law, the fundamental form of corruption is bribery.<sup>30</sup> In his widely-acclaimed book *Bribes*, Judge Noonan described it as follows: "The core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised."<sup>31</sup> Every definition of corruption incorporates bribery as the principal form of misconduct, and then usually seeks to expand the concept to cover a broader array of conduct. Professor Lowenstein cogently described the problem with crafting laws to prosecute corruption beyond bribery:

[T]he crime of bribery is the black core of a series of concentric circles representing the degrees of impropriety in official behavior. In this conception, a series of gray circles surround the bribery core, growing progressively lighter as they become more distant from the center, until they blend into the surrounding white area that represents perfectly proper and innocent conduct.<sup>32</sup>

Judge Noonan pointed out that bribery is one form of reciprocity, and that "[a] bribe is not distinguished from other ways of eliciting a benevolent response."<sup>33</sup> Moreover, even within the crime of bribery, there is uncertainty regarding the linkage required between the payment and the official act, and what intent the offeror and public official must have for the transaction to come within the criminal prohibition.

Scholars outside the law advance various definitions of what constitutes corruption involving public officials, and there is no single description of the phenomenon embraced by all disciplines.<sup>34</sup> Professor Nye's analysis of the effect

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30. See George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2051 (1998) ("Bribes are an example, perhaps the quintessential example, of political corruption.").

31. JOHN T. NOONAN, JR., *BIBES* xi (1984).

32. Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985).

33. NOONAN, *supra* note 31, at 4.

34. See Tevfik F. Nas et al., *A Policy-Oriented Theory of Corruption*, 80 AM. POL. SCI. REV. 107 (1986) ("There remains a need for an internally consistent theoretical model and an analytical definition [of corruption] which would lead to important policy considerations.").

of corruption in developing nations contains one of the best-known and most detailed descriptions of the phenomenon:

Corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).<sup>35</sup>

Professor Key's exhaustive study of graft in American history described both bribery and what he labeled "auto-corruption," which occurred when a public official "secures for himself the administrative privilege which would be secured by an outsider by bribery. He awards contracts to himself, perhaps using dummy corporations, which would go to reward a contractor in the organization."<sup>36</sup> Professors Peters and Welch focused on the four components "involved in every political act or exchange. We believe this process can meaningfully be partitioned into the 'public official' involved, the actual 'favor' provided by the public official, the 'payoff' gained by the public official, and the 'donor' of the payoff and/or 'recipient' of the 'favor' act."<sup>37</sup>

Professor Rose-Ackerman's extensive economic analysis of corruption approached the issue in this way: "Private individuals and firms who want favorable treatment may be willing to pay to obtain it. Payments are corrupt if they are illegally made to public agents with the goal of obtaining a benefit or avoiding a cost."<sup>38</sup> Professor Kennedy noted that "[c]orruption has become a code word for 'rent-seeking'—using power to extract a higher price than that which would be possible in an arms-length or freely competitive bargain—and for practices which privilege locals."<sup>39</sup> Professor Gronbeck, a linguist, gave a straightforward definition, that "the term 'political corruption' encompasses those acts whereby private gain is made at public expense."<sup>40</sup> Professor Eisenstadt, a

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35. J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967); EDWARD C. BANFIELD, *POLITICAL INFLUENCE* 315 (Glencoe, IL Free Press 1961).

36. V. O. Key, Jr., *Techniques of Political Graft*, in *POLITICAL CORRUPTION* 46, 48 (Arnold J. Heidenheimer ed. 1970).

37. Peters & Welch, *supra* note 1.

38. ROSE-ACKERMAN, *CORRUPTION*, *supra* note 6, at 9.

39. Kennedy, *supra* note 7, at 460.

40. Bruce E. Gronbeck, *The Rhetoric of Political Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK* 173, 173 (Arnold J. Heidenheimer, Michael Johnston, Victor T. Le Vine eds., 1999). The World Bank has a similarly straightforward definition

historian, offered a similar description, that “[p]olitical corruption means that a public official has perverted the office entrusted to his care, that he has broken a public trust for private gain.”<sup>41</sup>

The definitions offered by scholars in other disciplines take a broad view of what constitutes corruption, beginning with bribery as the paradigm of a corrupt transaction. The definitions assume—at least implicitly—a core form of conduct that is obviously illegal, and therefore corrupt *per se*. The academic analyses then move to a more expansive description, beyond the narrower confines of the criminal law, that incorporate broader social manifestations of corruption.<sup>42</sup> While these definitions include much conduct that is clearly illegal, the goal is not to offer a description of what a criminal law should incorporate. Indeed, the definitions of corruption often combine notions of ethical conduct and fair governance with crimes like bribery, extortion and influence-peddling.<sup>43</sup>

Adding to the difficulty in defining corruption is the absence of reliable measures of its pervasiveness beyond general perceptions that a government or ministry is corrupt.<sup>44</sup> Relying solely on conduct that constitutes a criminal violation would not demonstrate whether corruption is rampant because the misconduct is so difficult to detect that conviction rates provide little insight into the scope of the problem.<sup>45</sup> Moreover, corruption in most instances occurs without a victim, at least in the common sense of that term as a person not a party

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of corruption as “the use of public office for private gain.” Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, FIN. AND DEV., Mar. 1998, at 7, available at <http://www.worldbank.org/fandd/english/0398/articles/020398.htm>.

41. Abraham S. Eisenstadt, *Political Corruption in American History*, in POLITICAL CORRUPTION: A HANDBOOK, *supra* note 40, at 537-38.

42. For example, Professor Rose-Ackerman’s definition states that the payments must be “illegally made” to be corrupt. ROSE-ACKERMAN CORRUPTION, *supra* note 6, at 9.

43. See PETER DELEON, THINKING ABOUT POLITICAL CORRUPTION 22 (1993) (“Legality would seemingly be the key component, but that would imply that only illegal acts are corrupt, an implication we will later see to be shortsighted.”).

44. See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT’L L.J. 731, 750 (2000) (“Empirical data concerning the incidence and consequences of these various segments of bribery and corruption are notoriously difficult to collect and validate. Generally speaking, only poor and typically impressionistic information is available.”). Transparency International publishes a Corruption Perception Index based on a composite index drawing on a number of polls and surveys carried out among business people, the general public and country analysts that ranks countries according to the perception of corruption in their government. The organization also publishes a Bribe Payers Survey rating the frequency with which businesses from a country pay bribes to secure contracts. See <http://www.transparency.de> (last visited Oct. 24, 2001); cf. Schloss, *supra* note 16, at 475-79 (discussing goals of Transparency International).

45. ANECHARICO & JACOBS, *supra* note 3, at xiv (“The student of corruption and corruption control is bedeviled by the absence of data or indicators of the corruption rate. No one knows for sure whether official corruption has diminished over time.”).

to the violation who suffers the effects of a crime, and who may report it to the authorities. The hallmarks of corruption are stealth and obfuscation between ostensibly cooperating parties, and the pursuit of criminal cases can be hampered by the involvement of offenders who possess a good reputation and high social standing. Public corruption is certainly among the most difficult crimes to investigate and prosecute successfully.<sup>46</sup>

The imprecision regarding what constitutes a corrupt act arises in part because of the term's rhetorical potency. Politicians invoke the specter of corruption to denigrate opponents and call into question the motives underlying decisions they oppose, sometimes merely to further their own political interests.<sup>47</sup> In American political history, the deadlock after the 1824 presidential election was broken by what opponents termed the "Corrupt Bargain" that resulted in the House of Representatives choosing John Quincy Adams as President over Andrew Jackson, the winner of the popular vote and recipient of the most electoral votes.<sup>48</sup> One side's accusation of corruption can, of course, mean that the opponent is compromising to achieve a consensus to further the good of the polity. Political rhetoric does not always correspond to what might be designated as illegal, or even unethical. Yet, the definition of what is corrupt continues to expand in response to public pressure—often fueled by media accounts of official transgressions—on the executive and legislative branches of governments to adopt

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46. See *United States v. Schaffer*, 183 F.3d 833, 843 (D.C. Cir. 1999), *vacated on other grounds* by 240 F.3d 35 (D.C. Cir. 2001) ("When faced with competing explanations for some specific misconduct, conduct which could be either innocuous or illicit depending upon the particular motivation involved, the inquiry will rarely be clear or neat."); Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 551 (2000) ("Bribery assumes many forms and, due to its characteristically clandestine nature, it is often difficult to detect.").

47. See NOONAN, *supra* note 31, at xiii ("[A]ccusations of bribery are often politically motivated or are made in order to satisfy certain social or psychic needs; one cannot judge from the accusations alone whether acts of bribery have actually occurred"). Political scientists note that there is a "negative relation between information about corruption and electoral support for the party in control of the presidency." See Tim Fackler & Tse-min Lin, *Political Corruption and Presidential Elections, 1929-1992*, 57 J. POL. 971, 989 (1995).

48. See Marc W. Kruman, *The Second American Party System and the Transformation of Revolutionary Republicanism*, 12 J. EARLY REPUBLIC 509, 521 (1992) ("Fear turned to outrage when John Quincy Adams, after winning the presidency with Henry Clay's aid, appointed Clay as his secretary of state. Dubbed the 'corrupt bargain' by Jackson's men, whose candidate had gained a plurality of the popular and electoral college votes, the apparent pact convinced Jacksonians that Adams had purchased the presidency and anointed his own successor."). See also NOONAN, *supra* note 31, at 449 (describing the agreement between Adams and Clay that provided the votes for Adams' election as a reciprocity similar to a bribe).

progressively stricter laws to demonstrate that society will not countenance any abuse of the public trust.<sup>49</sup> On a global scale, commentators are advocates of recognizing the basic right of individuals to live in a society free from corruption, arguing that nations should consider corrupt acts by public officials a crime under international law.<sup>50</sup>

The definitions demonstrate that corruption is an expanding—and quite malleable—concept. Efforts to adopt new criminal laws to address broader concerns about official misconduct, therefore, should move beyond the bribery paradigm as the predominant form of corruption. The question that arises is how the law should define corruption as a criminal offense, one that often carries a substantial penalty for those convicted. A law, unlike a scholarly definition, must state the elements of the offense with sufficient precision to inform those subject to its strictures of what is criminal conduct and what penalties they may incur for a violation. The broader the scope of the law, the greater the possibility that arguably acceptable conduct will come within the criminal provision and result in punishment for acts that are not morally blameworthy.

### III. THE INTERNATIONAL APPROACH TO PUBLIC CORRUPTION

The debilitating effect of official corruption on transnational commerce provided a strong impetus for the adoption of the International Conventions. High profile bribery and corruption cases involving leaders of various nations, including South Korea, Italy, Brazil and Peru, spurred international organizations to address corruption.<sup>51</sup> The United States had long been the only nation to adopt

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49. See ANECHARICO & JACOBS, *supra* note 3, at 6 (“Over the course of some fifty years, there has been a big change. Much conduct that was legal a generation ago is now corrupt; yesterday’s ‘honest graft’ is today’s illegal conflict of interest.”).

50. See Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT’L L.J. 159, 189 (2000) (“If one sees indigenous spoliation as a violation of human rights much like torture or slavery, then it becomes an international crime that circumvents state sovereignty.”); see also Kofele-Kale, *supra* note 15, at 152. Professor Kofele-Kale argues that the right of economic self-determination supports the basic human right to live in a corruption-free society, and this right “is inherently a basic human right because life, dignity, and other important human values depend on this right.” *Id.* at 163. As a universal human right, contravention of it by corrupt officials would not only violate domestic law but also would be a crime under international law. *Id.* at 166. But see Claire M. Dickerson, *Political Corruption as an International Offense* (Summary of Remarks), 94 AM. SOC’Y INT’L L. PROC. 56, 56 (2000) (“The elimination of corruption, too, can be a violation of human rights, in particular the cultural rights of indigenous populations. For example, the OECD antibribery convention may be viewed as a conspiracy by the developed countries to protect multinational corporations by reducing bribe payments, but without considering the cultural norms of the payee’s country’s population.”).

51. See Hess and Dunfee, *supra* note 2, at 601 (discussing convictions of two former

criminal sanctions for bribery of foreign officials in international business transactions; much of the world resisted American efforts to have countries employ their criminal law to prohibit bribery by domestic enterprises of officials outside their borders.<sup>52</sup> The growth of the global economy in the 1990s saw a dramatic change in attitude about the need to outlaw bribery and other forms of corruption in transnational business. Bribery creates significant barriers to global trade and, while it may reward some entities with increased revenues, ultimately corruption makes international business more costly for all.<sup>53</sup> Changes in the global economy have made it possible for a concerted push at the international level to enact broad anti-corruption legislation that translates the broad sentiment against corruption into concrete criminal prohibitions.

The starting point for the International Conventions is defining the crime of corruption so that member and signatory states can enact or strengthen their domestic law. Once the fundamental crime is established, nations can enact additional provisions prohibiting particular forms of corruption involving the misuse of government authority that is of sufficient harm to call for criminal sanctions.

### **A. The OAS Inter-American Convention Against Corruption**

The OAS is comprised of 34 nations in the Western Hemisphere.<sup>54</sup> In December 1994, at the First Summit of the Americas, the heads of state of the OAS member nations issued a Plan of Action that called for, *inter alia*, the development

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Presidents of South Korea, former Italian Prime Minister, and impeachment of President of Brazil); Nichols, *supra* note 5, at 639 ("The corruption-related turmoil faced by the United States twenty-five years ago, however, pales in comparison to that experienced by many European and Latin American countries, as well as Japan in the last ten years.").

52. See George & Lacey, *supra* note 46, at 556 (FCPA "signified the U.S. government's unilateral stance against business corruption and resulted in prolonged, vehement objection by the U.S. business community."); see also Salbu, *supra* note 5, at 54 ("In the 1980s and early 1990s, writers voiced concern that the United States' unilateral hard line on bribery was paternalistic, expensive, and subjected the country to a global competitive disadvantage in bidding for international contracts. . .").

53. See Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 (Supp.) L. & POL'Y INT'L BUS. 95, 96 (1999) ("Even though in the short run corruption can have a positive economic effect, in the long run the results are likely to be costly in terms of economic efficiency, political legitimacy, and basic fairness.").

54. The OAS is a regional agency authorized under Article 52 of the United Nations Charter. See U.N. CHARTER art. 52. A list of the 34 members of the OAS is available at <http://www.oas.org/EN/MSTATES/bckgrdme.htm> (last visited Oct. 24, 2001).

within the OAS, with due regard to applicable treaties and national legislation, [of] a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged, through negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international cooperation.<sup>55</sup>

One of the primary goals of the United States in the drafting process for the IACAC was inclusion of a provision covering transnational bribery similar to the FCPA.<sup>56</sup> In March 1996, at the Specialized Conference on the Draft Inter-American Convention Against Corruption, the delegates adopted the IACAC and sent it to each member nation for signature and ratification.<sup>57</sup> The Convention requires nations to change their current laws and adopt new provisions covering both domestic acts of corruption and bribery in transnational business transactions. The United States is one of 21 nations to ratify the IACAC, and the Convention is considered the most far-reaching international accord in the field because it reaches both transnational bribery and domestic corruption by promoting a uniform approach through the criminal law.<sup>58</sup>

The IACAC takes a broad view of corruption that includes both bribery and other misuses of office for personal enrichment. Article VI(1) defines three principal "acts of corruption":

- a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

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55. Summit of the Americas: Declaration of Principles and Plan of Action, 34 I.L.M. 808, 818-19 (1995).

56. See *Letter of Transmittal*, *supra* note 20 ("Especially noteworthy is the obligation to criminalize the bribery of foreign government officials. This provision was included in the Convention at the behest of the United States negotiating delegation.").

57. See Luis F. Jimenez, *The Inter-American Convention Against Corruption*, 92 AM. SOC'Y INT'L L. PROC. 157, 157 (1998) (describing the Convention drafting process in the OAS).

58. See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of an International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 478 (1998) (The IACAC "went much further than any other actual or proposed international agreement in seeking not only to make bribery of foreign officials a crime in the country of the exporting firm or individuals, but also in encouraging local governments to deal more effectively with the problem of domestic corruption.").



b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; [and]

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party . . .<sup>59</sup>

The first two acts of corruption entail a violation by the public official receiving the benefit and the offeror of the benefit, so that each step in the transaction constitutes a separate criminal offense. The item that may constitute the corruption is defined broadly as "any article of monetary value, or other benefit."<sup>60</sup> The expansive subject matter of the illicit exchange that includes any "other benefit" means that the underlying transaction should not be limited solely to economic exchanges, and the transfer may involve an intangible gain and not just money or property. For example, a "benefit" conferred on a government official may include hiring or promoting a relative, purchasing goods from an entity in which the official has a vested interest, and perhaps even the offeror's willingness to protect an official's interests at a later time, *i.e.* an exchange of favors.

The first two acts of corruption in the IACAC reflect the traditional crime of bribery. The classic example of corruption is a payment involving a *quid pro quo* between the offeror and public official in which each party acts with the intent that the transfer influence the exercise of governmental authority. The receipt of the item alone would not constitute bribery absent proof of the participants' intent and the relationship of the transaction to the official action.

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59. *IACAC*, *supra* note 8, art. VI, § 1. There are two other acts of corruption described that are not in themselves corrupt, but relate to an underlying act of corruption. The IACAC states that corruption incorporates:

- d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and
- e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

*Id.* These provisions broaden the scope of corruption but do not change the basic definition of the crime.

60. See *IACAC*, *supra* note 8, art. VI § 1(a) & (b).

Consistent with this common understanding of bribery, Article VI(1)(a)-(b) incorporate the requirement of an “exchange” of the benefit “for any act or omission in the performance of his public functions.”<sup>61</sup> The language of this prohibition does not alter or expand the concept of bribery, and the IACAC makes this provision the core form of corruption.<sup>62</sup>

It is questionable whether the elements of the bribery offense also reach a gratuity, which differs from a bribe because it is a reward to an official that does not entail a *quid pro quo* exchange. A gift may be given either before or *after* the decision, while a bribe must take place before the governmental action because the offer is the precondition for the corrupt outcome of the process. The IACAC refers to the receipt of a “gift, favor, promise or advantage for himself” in the definition of the crime, but these terms only relate to the type of benefit that can qualify as the consideration for a corrupt exchange. The IACAC requires that whatever benefit the official receive be “in exchange for” the governmental act, which means that a gift bestowed after the decision would not meet the *quid pro quo* requirement of Article VI(1)(a)-(b), absent a prior agreement.<sup>63</sup>

The IACAC took a more expansive approach in the third form of corruption, making it a crime when the government official acts or fails to act “for the purpose of illicitly obtaining benefits for himself or for a third party.” Unlike the bribery transaction, this provision does not require a *quid pro quo* linking the receipt of the benefit to the official’s conduct. There need not be another party providing the benefit, and it appears that the official’s conduct need not be otherwise tainted by the acceptance or realization of the benefit. Article VI(1)(c) focuses primarily on the official’s intent for acting or failing to act, asking whether the receipt of some identifiable benefit was related to the official’s performance of his duties. The act of corruption is the *illicit* receipt or appropriation of a benefit that occurs through the performance of official duties.<sup>64</sup>

On the one hand, a government official receives a salary for discharging his duties, so there is no improper gain from the exercise of authority in that case because the person is entitled to receive the benefit; *i.e.*, there is nothing “illicit” about the payment. On the other hand, even an apparently proper exercise of authority that provides an additional benefit to the official or another person on whose behalf the official seeks to confer the benefit would violate this provision if the official made the decision, at least in part, to produce a gain for himself or another to which the person was not entitled. It is not the exercise of governmental authority that is corrupt, as in a bribery situation, but the official’s realization of a gain derived from the decision. There must be a link between the decision and the benefit to demonstrate the corrupt character of the conduct, but

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61. *Id.*

62. *Id.*

63. See Jimenez, *supra* note 57, at 159 (“The expression ‘in exchange for’ used in Article 6 introduces the delicate element of proof that an act was the direct result of the request or offer of benefits to the public official.”).

64. See IACAC, *supra* note 8, art. VI § 1(c).

the IACAC does not require that the connection be as close as that required for a bribe, which calls for an "exchange."<sup>65</sup> The corruption can involve a legitimate exercise of authority—or at least one that does not cause any harm to the government—generating a gain to the official who is not otherwise entitled to receive the benefit traceable to the decision.

Article VI(1)(c) marks an important step—apparently overlooked or misunderstood by the United States—that expanded the definition of corruption by making the misuse of authority for personal gain a separate offense even though it does not involve a two-party transaction. The United States, however, viewed Article VI(1)(c) as only a form of an attempt crime that is a precursor to the bribery-type transactions described in Article VI(1)(a)-(b), and not as a separate form of corruption. The State Department's analysis of the conduct described in Article VI(1)(c) stated that the provision "would embrace a situation in which an individual took some preparatory action unknown to anyone, with the purpose of profiting illicitly at some future point."<sup>66</sup> Similarly, the United States Senate's Understanding in ratifying the Convention asserted that there is no general attempt statute in federal law and that "Article VI(1)(c) . . . by its literal terms would embrace a single preparatory act done with the requisite 'purpose' of profiting illicitly at some future time, even though the course of conduct is neither pursued, nor in any sense consummated. The United States will not criminalize such conduct per se . . . ."<sup>67</sup> The view of Article VI(1)(c) as only a type of attempt provision, and perhaps an extension of the criminal law unacceptable under the principles of United States criminal law, ignored the clear language in Article VI(1)(c) that defines a different form of corruption beyond bribery, and not simply conduct that may be an attempt to commit the bribery outlawed in Article VI(1)(a)-(b).

Under the common law in the United States, an attempt to commit a crime is viewed generally as a violation once conduct "has passed the stage of preparation, and has moved to the point of perpetration, of the offense."<sup>68</sup> The conduct must be sufficient to establish the defendant's requisite specific intent to continue forward to complete the crime, despite the failure to complete the

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65. A gratuity given after the fact would not come within this third form of corruption in the Article VI because the government action would not be made to obtain the benefit. As with a bribe, this form of corruption has a temporal requirement, that the benefit be a component of the decision and not a happenstance arising from it. *See infra*, text at notes 129-139 (discussing the difference between a bribe and an unlawful gratuity under United States law).

66. *Letter of Transmittal, supra* note 20.

67. 146 CONG. REC. S7809 (2000).

68. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (3d ed.), § 27.02[B] at 374 (2001); *See* MODEL PENAL CODE § 5.01(1)(C) (Proposed Official Draft 1962) (defining one form of an attempt to commit a crime as "an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the offense.")

offense. Article VI(1)(c)'s language does not comprise attempted bribery, which requires a two-party exchange, nor is it limited to a "single preparatory act." Instead, the provision targets one or more acts of an official designed to illicitly obtain benefits in a manner distinct from receipt of an advantage. The corrupt conduct may be one act, or a series of acts, and the provision requires proof linking the exercise of authority to the "purpose" of obtaining the improper benefit, the highest level of intent in the criminal law. The concern expressed in the United States Senate's Understanding of Article VI(1)(c) that the provision would reach preparatory acts is true of any attempt crime, that the conduct must pass from preparation to perpetration before it is a violation of the criminal law.<sup>69</sup> The language of Article VI(1)(c) does not alter the law of attempt or impermissibly expand the meaning of corrupt acts because the conduct must establish the criminal purpose of the official. Viewing Article VI(1)(c) solely as an attempt provision also overlooks Article VI(1)(e), which defines the scope of potential liability for perpetrators to include those who participate in an act of corruption "as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner . . ."<sup>70</sup> Unlike the corruption in Article VI(1)(a)-(b), which involves an improper payment and receipt, Article VI(1)(c) defines a different offense based on personal enrichment obtained through an exercise of government authority undertaken with the intent to benefit the official. This offense is similar to the Mail Fraud statute's prohibition on fraudulent schemes that involve a deprivation of the right of honest services. Under both approaches, it is the link between the decision and the self-enrichment that forms the act of corruption, not limited solely to a third-party payment to an official.<sup>71</sup>

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69. See *Commonwealth v. Peaslee*, 59 N.E. 55 (Mass. 1901) (Classic description by Chief Justice Holmes of the distinction between preparation and perpetration, that "preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree.").

70. IACAC, *supra* note 8, art. VI § (1)(e).

71. The apparent confusion of the United States regarding the type of misconduct described in Article VI(1)(c) was further reflected in its response to an OAS questionnaire seeking information from nations that ratified the IACAC regarding implementation of the Convention. The response to the question whether the United States prohibits the acts described in the provision was "Yes," and identified 18 U.S.C. § 201 as the specific provision reaching the act of corruption. Section 201, however, only reaches bribery and unlawful gratuities provided to a federal official, not the broader form of corruption involving the exercise of authority to gain personal benefits. See Working Group on Probity and Public Ethics, Committee on Juridical and Political Affairs Permanent Council, *United States Response to Questionnaire on Ratification and Implementation of the Inter-American Convention on Corruption*, Organization of American States at 14 (March 2000), available at <http://www.oas.org> [hereinafter *U.S. Questionnaire Response*]. The response did not reiterate the view that Article VI(1)(c) only reaches attempted corruption, although the citation to § 201 may mean that the United States views the provision as prohibiting attempted bribery despite the absence of any language in Article VI(1)(c) indicating that was the scope of that act of corruption. The response also does not refer to the Mail Fraud

The IACAC contains additional provisions for OAS members to consider "to foster the development and harmonization of their domestic law and the attainment of the purposes of this Convention." Article XI, entitled "Progressive Development," suggests prohibiting the following specific forms of corruption:

- a. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of classified or confidential information which that official or person who performs public functions has obtained because of, or in the performance of, his functions;
- b. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;
- c. Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain; whether or not such act or omission harms State property; and
- d. The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.<sup>72</sup>

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statute, 18 U.S.C. § 1341 (2000), which covers both bribery and broader forms of corruption.

<sup>72</sup> IACAC, *supra* note 8, art. XI.

These provisions are more specific applications of Article VI(1)(c)'s prohibition on the misuse of one's office for personal enrichment. Article XI(a), (b), and (d) deal with the misuse of authority regarding property—including intangible property such as information—that falls outside the more traditional form of corruption based on a bribery paradigm. For example, misuse of confidential information in Article XI(a) is similar to insider trading involving the theft of confidential information to trade securities when the market is ignorant of the information. This form of misconduct is becoming more widely recognized as illegal, even though there is often no tangible loss to particular victims, because the harm is the damage to the credibility of the market and the unfairness of the personal enrichment through exploitation of one's position providing access to confidential information.<sup>73</sup>

Article XI(c) is different from the other provisions in the Article by reaching efforts to tamper with the government's decision-making process through influence peddling, by which an official sells his ability to affect another office's exercise of authority. There is no *quid pro quo* exchange of the decision for the payment, but a broader form of corruption in which influence derived from public office is sold.<sup>74</sup> The provision also makes harm to the government irrelevant to the crime, so that the propriety of the decision is irrelevant, and the official need not be successful in affecting the outcome to be guilty of the offense. Similar to the corruption defined in Article VI(1)(c), Article XI(c) focuses on the personal benefit derived from office as the foundation for designating the conduct as corrupt. These provisions expand the definition of corruption by identifying more subtle forms of misconduct that, while resulting in the personal enrichment of the official, fall outside the traditional two-party exchange of a bribe.

Article IX of the IACAC advances another means of proving corruption that takes a very different, and potentially more troublesome, approach to the issue. The provision, entitled "Illicit Enrichment," states:

[s]ubject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions. Among those States Parties that have established illicit

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73. See MARC I. STEINBERG, *INTERNATIONAL SECURITIES LAW: A CONTEMPORARY AND COMPARATIVE ANALYSIS* 49 (1999).

74. This prohibition fills a gap in Article VI(1)(c) because the misconduct does not involve the discharge of the official's duties but the use of the governmental position to gain a benefit for himself and secure a decision in favor of the third party.

enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.<sup>75</sup>

Unlike the other acts of corruption in Articles VI(1) and XI that focuses on improper transfers or gains derived from the exercise of governmental authority, Illicit Enrichment makes a government official's accumulation of significant wealth a form of corruption. To prove Illicit Enrichment, a State Party need not establish a link between a particular decision, or any exercise of governmental authority, and the receipt of particular benefits.<sup>76</sup> The governmental official must explain the fact of wealth alone, and a failure to provide an adequate explanation would mean that the official must have traded on the governmental authority vested in him for personal gain.<sup>77</sup> Article IX is, in effect, corruption without proof of either a *quid pro quo* or intent to gain illicit benefits from official action. The circumstantial evidence of unexplained wealth leads—perhaps inexorably—to the conclusion of some improper exchange or misuse of authority to benefit the decision maker. Ownership of significant wealth, which is susceptible to proof through records maintained by third parties, such as banks and brokerages, becomes an element proving corruption in place of proving the improper exercise of authority that can be difficult to establish absent cooperating witnesses or incriminating documents. The IACAC promoted Article IX to make proof of corruption much easier by removing any requirement to demonstrate a nexus between a benefit gained by an official and a particular governmental action.<sup>78</sup>

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75. IACAC, *supra* note 8 art. IX.

76. *Id.*

77. *Id.*

78. The United States noted in its Understanding of the Convention that there are provisions in United States law that achieve the same outcome as Article IX, including punishment for failure to make proper financial disclosures and tax evasion. 146 CONG. REC. S7809 (2000); *see Gantz, supra* note 58, at 479. A criminal tax prosecution that would reach the same end as the Illicit Enrichment provision would likely involve a technique used in the United States to prove tax evasion called the "net worth" method. Professor Bucy described a net worth case as involving the following:

With an indirect method of proof, the amount of income a defendant allegedly received is shown circumstantially by adding the amounts of money deposited by the defendant over a period of time ("bank deposits" method); calculating the increase in a defendant's visible wealth, such as new homes, investments, automobiles, boats, etc. ("net worth" method); or simply documenting cash expenditures by a defendant ("cash expenditure" method). When these indirect methods of proof reveal an amount of income in excess of the defendant's income as reported to the IRS, a presumption arises that the defendant has not reported all of her income. The defendant bears the burden of rebutting this presumption. Government agents have a duty to investigate leads provided by a taxpayer regarding nontaxable

The criminal law in Latin America was the source for Article IX, and Illicit Enrichment is a crime in ten nations.<sup>79</sup> This provision, added to the IACAC during the final round of negotiations in 1996 at the insistence of Latin American nations,<sup>80</sup> would be problematic if adopted in its current form in the United States and other jurisdictions that have not already accepted Illicit Enrichment as an offense. The language of Article IX appears to place the burden of proof on the government official to explain the fact of significant wealth, which clearly violates the fundamental principal of due process in the United States that the government bears the burden of proving all elements of a crime beyond a reasonable doubt.<sup>81</sup> The introductory language of Article IX reflects that concern by making the requirement to adopt the provision subject to constitutional limitations of individual nations. The United States Senate ratified the Convention subject to the Understanding that it would not adopt the Illicit Enrichment provision outlined in Article IX because such a law would be "inconsistent with the United States Constitution and fundamental principles of the United States legal system."<sup>82</sup>

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sources of income. In indirect method cases, the government is not required to disprove every possible source of nontaxable income, or document the defendant's finances "to a mathematical certainty."

Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 ARIZ. ST. L.J. 639, 664-65 (1997).

79. See Jimenez, *supra* note 57, at n.8 ("Illicit enrichment is defined as a crime, in varying degrees of detail, in the laws of Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Peru, and Venezuela."); see also Gantz, *supra* note 58, at 479 (Illicit Enrichment "is important to many Latin American jurisdictions where investigatory institutions are not always capable of complex investigations."); Working Group on Probity and Public Ethics, Committee on Juridical and Political Affairs Permanent Council, *Replies to the Questionnaire on Ratification and Implementation of the Inter-American Convention Against Corruption*, Organization of American States, at 25 (Sept. 2000), available at <http://www.oas.org> (The nations that have ratified the IACAC that have criminal prohibitions on Illicit Enrichment are: Argentina, Ecuador, Honduras, Mexico, Panama, and Venezuela.).

80. See *Letter of Transmittal*, *supra* note 20 (Article IX "was included at the instance of a number of Latin American nations."); see also Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 57 & n.15 (describing problems on the part of the United States with the late insertion of the provision).

81. *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional statute of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

82. 146 CONG. REC. S7809 (2000).



### **B. The OECD Convention on Combating Bribery of Officials in International Business Transactions**

The OECD is comprised of 29 member nations that are the leading exporters in the global economy. The organization is devoted to fostering global economic development, and it is perhaps the leading international organization promoting anti-corruption efforts related to cross-border trade. The United States has long sought an agreement, similar to the FCPA, in which other nations would prohibit individuals and organizations in their country from engaging in cross-border bribery to obtain or protect international commercial transactions.<sup>83</sup> In the early 1990s, with the increased globalization of business, the OECD responded to the call of the United States and began work on a convention that would require nations to make it a criminal offense to pay a bribe to an official of another nation to secure business contracts.<sup>84</sup> In December 1997, the 29 members of the OECD and five other nations<sup>85</sup> signed the OECD Convention that calls on the signatory states to amend their domestic law to criminalize bribery of foreign officials and to foster cooperation among nations in pursuing prosecutions. The United States amended the FCPA in 1998 to conform to the Convention's requirements.<sup>86</sup>

The OECD Convention is concerned with the payment of bribes by business enterprises and not a broader program to combat all forms of official corruption. The bribery proscription only reaches the conduct of the offeror, "active bribery," and not the foreign public official's receipt, "passive bribery."<sup>87</sup> The Convention defines bribery at the outset, in paragraph 1 of Article 1:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue

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83. George et al., *supra* note 18, at 35.

84. *See id.* at 34-39 (One of the most serious impediments to the negotiations was the tax treatment of payments to foreign officials to obtain business. Germany and France permitted businesses to deduct such payments, and it took years before those nations and others finally agreed to prohibit the tax deductability of bribes paid to foreigners.)

85. The five non-members of the OECD to sign the Convention are Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic.

86. International Anti-Bribery and Fair Competition Act of 1988, Pub. L. No. 105-366 (codified at 15 U.S.C. §§ 78dd-1, 78dd-3, 78ff (2000)) (The amendments entailed an expansion of the scope of the FCPA to cover "any person" who engages in transnational bribery and other minor changes.); *see also* H.R. REP. 105-802, at 21 (1998). The OECD Convention incorporates the core definition of bribery in the FCPA, and did not require any substantial changes in United States law. *See* George & Lacey, *supra* note 46, at 571 ("Congress easily set about the task of making a few necessary additions to the 1988 FCPA Act" to conform United States law to the requirements of the OECD Convention.).

87. *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions*, OECD Negotiating Conf. ¶ 1, available at <http://www.oecd.org/daf/nocorruption/> [hereinafter *OECD Convention Commentaries*].

pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>88</sup>

Similar to the IACAC, the definition of bribery requires a link—"in order that"—between the payment and the performance or omission of the official act. The definition of "act or refrain from acting in relation to the performance of official duties" goes a step beyond the standard approach to describing the crime of bribery that paragraph 1 appears to adopt. Paragraph 4.c states that the crime includes "*any use of the public official's position*, whether or not within the official's authorised competence."<sup>89</sup> Although described as a form of bribery, this offense is closer to the crime of influence-peddling in Article XI(c) of the IACAC. The Commentaries to the Convention state:

One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office—though acting outside his competence—to make another official award a contract to that company.<sup>90</sup>

In every nation, leading governmental officials have considerable influence with, or at least access to, other offices over which they have no direct supervisory authority. A payment to an official to intervene in another office's exercise of authority on behalf of the payer is structurally similar to a bribe, except that the benefit does not flow directly to the official making the decision.<sup>91</sup> Because the person receiving the benefit appears corrupt for taking something to which he is not entitled, and the payer receives the same result that would take place if he paid a bribe to the official with authority, it is certainly symmetrical to view this conduct as another form of bribery. Yet, it is not a bribe *per se* absent the direct exchange—*quid pro quo*—between the payer and the receiving official that results in an exercise of governmental authority. It is something more akin to

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88. *OECD Convention*, *supra* note 10, art. 1, ¶ 1.

89. *Id.*, art. 1, ¶ 4.c.

90. *OECD Convention Commentaries*, *supra* note 87, ¶ 19.

91. If the intervening official served as a conduit, then this would be a traditional bribe using a third party as the go-between in the transaction. The OECD Convention makes those who aid in the completion of the bribe guilty of the crime, so the scenario envisioned in Paragraph 4.c must be when the official actually making the decision does not receive or share in the benefit paid by the enterprise seeking the business.

the misuse of influence that is derived, at least in part, from the nature of the political system and the status of the recipient of the payment.

Requesting the intercession of a government official with another office or branch is not necessarily corrupt, and in some cases is an acceptable aspect of the political system. Not every public official, especially one holding an elected position, is a full-time government employee, and some may be permitted to maintain outside businesses or professional practices. Even among those officials whose sole responsibility is government service, the use of influence to affect another office's decision is not necessarily improper. In the United States, is it common practice for a Senator or Representative to intercede on behalf of an individual constituent or a company with a significant economic presence in the state or district.

This broader interpretation of the crime of bribery brings the OECD Convention closer to Article VI(1)(c) of the IACAC on the misuse of public office for an illicit personal gain. The payment received by the interceding official, *i.e.* the improper gain, makes this use of authority corrupt. While the conduct may not constitute a bribe in the traditional sense, it has all the hallmarks of a corrupt transaction that involves an illicit transfer resulting in a questionable exercise of governmental power. The OECD Convention, therefore, is not confined solely to bribery involving a *quid pro quo* between the offeror and the government's decision-maker. The Convention takes corruption a small step further by incorporating the notion of misuse by an intermediary of the accouterments of office; that is, the employment of one's influence and access to other parts of government to realize a personal benefit. Even this expansion of the law in the OECD Convention beyond the narrower confines of bribery is not completely effective because it only reaches "foreign public officials," not influential members of the private sector or political party officers who may hold considerable sway over public officials.<sup>92</sup>

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92. The Commentaries to the Convention advance one circumstance in which a political party official may be the recipient of a bribe that would trigger liability for the enterprise making the offer. Paragraph 16 states:

In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

*OECD Convention Commentaries*, *supra* note 87, ¶ 16. This circumstance is relatively narrow, however, because it is limited to single party states in which the distinction between the government and party are non-existent.

The FCPA explicitly incorporates foreign political party officials in its bribery prohibition. It provides:

The Convention drafters expressed one potentially significant limitation on the definition of bribery in the OECD Convention, the reservation that the criminal prohibitions should not apply to "small facilitation payments."<sup>93</sup> While any payment apparently comes within the parameters of Article I's broad proscription against providing "any undue pecuniary or other advantage" to an official, the Commentaries state that "small facilitation payments" are not made "to obtain or retain business or other improper advantage."<sup>94</sup> The Commentaries do not describe what constitutes a small facilitation payment, and there is no explanation why these payments are not bribes. The OECD justified its position exempting such payments on the ground that "[o]ther countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action."

The OECD's statement removing small facilitation payments from the coverage of the Convention appears to be at least a tacit acknowledgment that adhering to a strict definition of bribery creates problems in getting some countries to ratify the agreement if it meant eliminating all payments to public officials, especially those at the lower levels of a bureaucracy. The FCPA contains a detailed provision that excludes payments for "routine governmental action," defined as a limited range of ministerial acts unrelated to obtaining

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It shall be unlawful for any issuer which has a class of securities registered . . . or which is required to file reports . . . , or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

15 U.S.C. § 78dd-1(a)(2) (2000).

93. OECD Convention Commentaries, *supra* note 87, ¶ 9.

94. *Id.*

business or a contract.<sup>95</sup> Unlike the FCPA's more particularized treatment of the issue, however, the OECD Convention takes a backhanded approach to these payments by burying the limitation in the Commentaries, rather than placing it in the substantive provisions of the Convention.

The OECD's approach creates a potentially significant gap in the coverage of domestic laws adopted pursuant to the Convention because it provides neither a definition of "facilitation payment" nor an explanation of when a payment is small enough to avoid the criminal proscription. For example, it is not clear whether the size of the transaction determines whether a payment is small or not, or if the focus is solely on the value of the benefit. Moreover, it is not clear whether the authority or rank of the official determines whether the payment is given to "facilitate" the transaction when it would otherwise constitute an impermissible bribe.

The OECD made no effort to explain why petty corruption is acceptable, a position that can hardly be squared with the lofty rhetoric of the Convention's Preamble that decries the distortion of international competitive conditions caused by bribery.<sup>96</sup> Moreover, toleration of "small" facilitation payments contradicts another statement in the Commentaries that bribery is an offence "irrespective of . . . perceptions of local custom, the tolerance of such payments by local authorities,

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95. 15 U.S.C. § 78dd-1(b) (2000). The FCPA defines routine governmental actions as:

- (3)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
  - (ii) processing governmental papers, such as visas and work orders;
  - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
  - (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
  - (v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

15 U.S.C. § 78dd-1(f)(A)-(B) (2000). The IACAC does not provide a similar exemption for either form of payment in its provision prohibiting transnational bribery. *IACAC*, *supra* note 8, art. VIII.

96. *OECD Convention*, *supra* note 10, Preamble.

or the alleged necessity of the payment in order to obtain or retain business or other improper advantage."<sup>97</sup> Exempting certain types of payments makes the scope of the law unclear and may afford corrupt officials a sizeable loophole to avoid criminal liability.

### C. The Council of Europe Criminal Law Convention on Corruption

European Union members have undertaken two related efforts to address corruption.<sup>98</sup> In 1997, the European Union adopted the Convention on the Fight Against Corruption that required the member states to adopt laws punishing bribery that involved officials of both the national governments and the European Union, including its related bodies. Two years later, in 1999, the Council of Europe, which is comprised of 41 nations, adopted the broader Criminal Law Convention on Corruption, calling upon the members of the European Union to adopt domestic legislation reaching all forms of corruption.<sup>99</sup> Thirty-six members of the European Union and three non-members, including the United States, have signed the Convention, and ten have ratified it.<sup>100</sup> The Council Convention reaches payments to domestic and foreign officials, members of international organizations and parliamentary bodies, and employees of private enterprises.<sup>101</sup>

The Council Convention prohibits both active and passive bribery,<sup>102</sup> *i.e.* the offeror and recipient of the payment may be prosecuted. It defines active bribery of public officials as "the promising, offering or giving by any person, directly or indirectly, of any undue advantage" for an official "to act or refrain from acting in the exercise of his or her functions."<sup>103</sup> Passive bribery is "the

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97. *OECD Convention Commentaries*, *supra* note 87, ¶ 7.

98. The Council of Europe adopted the Convention on the Protection of the European Communities' Financial Interests on July 26, 1995, that required members of the European Union to adopt legislation addressing fraud in relation to the expenditure of funds or the receipt of revenue by the European Community itself rather than by the government of the member states. While the criminal conduct involved, at least in most instances, misappropriation by public officials, the Convention did not address broader anti-corruption issues. In a Protocol to the Convention adopted in September 1996, the Council adopted provisions addressing bribery, which formed the basis for the later Conventions addressing corruption. Protocol to the Convention, 1996 O.J. (C 313) 2.

99. For a history of the development of the Council Convention, see *Explanatory Report, Criminal Law Convention on Corruption* ¶ 39 (1998) [hereinafter *Council Convention Explanatory Report*], available at <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>.

100. See *Council Convention*, *supra* note 12, art. 32(3) (The Convention requires fourteen nations to ratify it to enter into force.).

101. *Id.* art. 2.

102. *Id.* arts. 2, 3.

103. *Id.* The Council Convention has slightly different language on what constitutes a the payment for a bribe, using the term "advantages" rather than "undue advantage" to

request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or for anyone else, or the acceptance of an offer or promise of such an advantage . . . ."<sup>104</sup>

The Council Convention begins with the core crime of bribery, defining it in terms of a *quid pro quo* that requires proof of an exchange of value for the official's exercise of authority entrusted to him. The Convention inserts the term "undue" before advantage because it is "something the recipient is not lawfully entitled to accept or receive."<sup>105</sup> The criminal provision focuses on the validity of the payment and not just whether the official received a benefit in the transaction. An innovative aspect of the Council Convention is the variety of individuals subject to the criminal prohibition, covering not only government officials at the international and national levels but also extending to bribery in private transactions, without regard to any misuse of public authority.

The Council Convention took a step beyond bribery by incorporating explicitly the crime of "Trading in Influence," which it defined as:

[Intentionally] promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that

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describe the illicit transaction. More importantly, the Council Convention requires that the bribe be paid to have the official act "in breach of his official duties." The Council Convention deliberately avoided requiring proof of a breach of official duty as an element of the crime. See *Council Convention Explanatory Report*, *supra* note 99 ("Such an extra element of 'breach of duty' was, however, not considered to be necessary for the purposes of this Convention.").

104. *Council Convention*, *supra* note 12, art. 3. Article 7 deals with bribery in the private sector, and contains an additional element for the offense that requires proof that the bribe induce the employee to breach a duty owed to the employer. The Article provides:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach their duties.

The bribery provisions dealing with public officials do not require proof of a breach of duty, only the offer and receipt of an undue advantage related to official conduct.

105. *Council Convention Explanatory Report*, *supra* note 99, ¶ 38.

influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.<sup>105</sup>

The crime is committed upon receipt of the payment, and is not contingent on the success of the intervention. This provision is similar to Article XI(c) of the IACAC and the OECD Convention's interpretation of the scope of its bribery provision to include payments to a government official to secure the official's intervention with another office or branch of government in connection with a decision.<sup>107</sup>

The goal of the Trading in Influence prohibition is laudable for trying to reach misconduct by those "who are in the neighbourhood of power" to address a type of "background corruption."<sup>108</sup> The provision follows the bribery model by requiring that the offer and receipt of the undue advantage be "in consideration of

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106. *Council Convention*, *supra* note 12, art. 12. Professor Kofele-Kale criticized the Council Convention because it takes an almost exclusively anti-bribery approach and does not reach broader issues of corruption, especially by those at the highest levels of government. See Kofele-Kale, *supra* note 15, at 155. The Trading in Influence provision of the Council Convention, while structurally similar to the bribery provisions, is broader because it reaches beyond the narrower *quid pro quo* relationship. It remains tied to a direct exchange, however, and does not reach gratuities or other forms of misuse of power for personal gain.

107. The FCPA also contains a provision prohibiting payments to foreign public officials to use their influence on behalf of the offeror:

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality . . . .

15 U.S.C. § 78dd-1(a)(3) (2000).

108. *Council Convention Explanatory Report*, *supra* note 99, ¶ 64. (The Council justified the provision on the ground that some of the members of the European Union did not address this type of corruption.)



that influence." While the miscreant official need not be successful in wielding influence, the illicit transaction between the offeror and the corrupt official must take place before the exercise of influence. The Council Convention did not take into account gratuities paid after the fact, even though such benefits may be at least as corrupt when an official accepts a reward for past conduct, especially when the payment may indirectly result in future uses of influence on the payer's behalf. Absent proof of a promise to provide the undue advantage in exchange for the use of influence, *i.e.* a *quid pro quo*, the Council Convention only reached the most blatant misuse of influence, when an official sells himself to help secure a particular outcome.

Like the OECD Convention, the Trading in Influence prohibition treads a very thin line between corruption and acceptable interaction in public administration. The Council Convention's Explanatory Report acknowledges that "Improper influence' must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion."<sup>109</sup> While the Convention focuses on the official's "corrupt intent" as the key to distinguishing between legal and illegal participation in a decision, that term is not discussed in either the Convention or its Explanatory Report, and there are no examples provided as guidance for the application of this criminal prohibition.

As with any type of corruption offense, the proof of influence peddling will be largely circumstantial, so that it will often be difficult to determine *ex ante* when an official's use of influence to affect a decision is "improper" and when it constitutes an acceptable form of lobbying. Different offices within one branch of government are not sealed off from one another, and many political systems incorporate, or at least accept, a degree of interaction between different branches of government. For example, nations with a parliamentary system have elected members of the legislative branch to serve as heads of departments, ostensibly overseeing the actions of the bureaucrats working at the operational level.<sup>110</sup> A member may serve in different ministries during a legislative career and would likely have a measure of influence in those departments. Similarly, in the United States, the committee system in Congress gives individual members influence with departments that they deal with regularly, and interceding with an executive department on behalf of a constituent is not only acceptable but an expected function of legislative office.<sup>111</sup>

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109. *Id.* ¶ 65.

110. See, e.g., Colin Turpin, *Ministerial Responsibility: Myth or Reality?*, in THE CHANGING CONSTITUTION 53, 62 (Jeffrey Jowell & Dawn Oliver eds., 1989) ("In the British parliamentary democracy . . . [t]he accepted constitutional position is that the minister at the head of a department . . . has entire responsibility to Parliament for the department's functions, including any parts of its work for which the immediate, 'day-to-day' responsibility is entrusted to subordinate ministers.").

111. See Lowenstein, *supra* note 32, at 813 ("Now it is well known that American legislators at all levels see it as one of their primary functions to intercede [on] behalf of constituents in their dealings with executive agencies of the government.").

The Trading in Influence provision makes it a crime only when the influence exerted or offered is “improper,” a very imprecise term to define criminal conduct. Determining what is improper under the provision could bog down in an effort to prove what constitutes a common practice in the use of influence to affect decisions. It may be impossible to distinguish acceptable interaction between governmental officials from an impermissible use of influence, especially for those at the highest levels of government who are likely to have the type of influence that the Council Convention envisions. Instead, proof of the crime will depend on the propriety and circumstances surrounding the *benefit* conferred on the official. The corruption is not so much the official’s offer to influence another part of the government, which may not be clearly improper, but the receipt of the benefit in relation to the official’s use of influence on another office or branch of government.

The transfer involved in influence-peddling is similar to the payment of a bribe because the payer seeks to alter the exercise of authority through a secret payment to a public official. There is no *quid pro quo*, however, because the corrupt official does not have the authority to make the decision but only offers his services to intervene in the decision-making process and may not be able to secure the result sought. Compared to a bribery prosecution, the chance of proving this type of corruption may be lower because the influence-peddler is removed from the actual decision, so it will be difficult to link an improper payment to a particular governmental action. The lack of a direct connection means that the offeror and the influential official may more plausibly deny their corrupt intent, and the possibility of detection, absent a cooperating witness, is even less when the official’s involvement is outside his own area of authority. The operating assumption for this crime is that offerors will approach those with the appearance of influence, and the only way an official can “sell” influence is to have otherwise legitimate connections to the locus of authority. The stronger the official’s connection to another department, the easier it may be to deny any impropriety. Indeed, the official may assert that he was looking out for—perhaps even promoting—the interests of the affected office and the citizenry, not that he sought to corrupt the process. The ability of the official to explain the use of influence will require that any personal benefits received be subject to an innocent explanation.

#### **D. The Definition of Corruption in the International Conventions**

The International Conventions use bribery as the core act of corruption. Each requires proof of a relationship between the payment or transfer of the benefit to the public official and the governmental action, phrasing the element as an “exchange” in the IACAC, “in order to obtain or retain business” in the OECD Convention, and for the official “to act or refrain from acting” in the Council Convention. The Conventions all use the term “advantage” to describe the

currency of the corrupt transaction, adopting a broad approach to the types of benefits that one can offer an official to induce an improper exercise of power. The OECD Convention is the only one to acknowledge explicitly a limitation on what can constitute a bribe by exempting "small facilitation payments" from the offense.<sup>112</sup>

The bribery proscriptions in the IACAC and Council Convention reach both the offer of the benefit—active bribery—and the receipt or solicitation of the benefit—passive bribery. The focus of the OECD Convention is on the payment of bribes by a domestic enterprise and not on the prosecution of the foreign corrupt official, who presumably is subject to laws in his own nation prohibiting receipt of the payment. The language of all three provisions requires that a *quid pro quo* arrangement be concluded *before* the official action would occur, although the bribe need not be actually paid or the exercise of authority completed to violate the proscription. The Conventions do not address directly whether a gratuity paid to reward an official for action already taken is a crime, even when that exchange is intended as an illicit benefit to an official for a prior exercise of authority.

The Conventions then identify conduct outside the traditional crime of bribery that will be subject to criminal prosecution as a form of corruption. The IACAC identifies these additional layers of corruption in Articles VI(1)(c) and XI by making it a crime for an official to misuse his position to benefit himself or others. Further, the IACAC recommends the crime of Illicit Enrichment as a form of a catch-all provision that places the burden on the official to explain an aggregation of wealth beyond that which would be expected of a public officer, creating an inference of corruption.<sup>113</sup> These broader forms of corruption focus on an official's misappropriation of a benefit to which the person was not otherwise entitled. There need not be another participant in the illegal act, as is the case with a bribe, and the decision or governmental action is not necessarily questionable or tainted, although it often will be. This approach is similar to what Professor Key called "auto-corruption" through the misuse of power to benefit a particular person or group without the administrative process necessarily being degraded.<sup>114</sup> The OECD and Council Conventions also expand the definition of corruption, although not as broadly as the IACAC, to incorporate influence-peddling. Unlike the IACAC's broader types of corruption, influence-peddling is structurally similar to bribery because it involves an outsider seeking to affect the exercise of government authority through an exchange with a public official to intercede in the decision-making process.

While each treats the sale of influence, none of the Conventions deals with the issue of gratuities, which are payments designed to gain access to an official and perhaps a favorable hearing when an issue arises at a future date.

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112. See *OECD Convention Commentaries*, *supra* note 87, ¶ 9.

113. See *supra*, text at notes 76-77.

114. See Key, *supra* note 36, at 48.

Influence buying can be just as corrupt because it creates the appearance—and often the reality—that the decision-making process is affected by the receipt of gifts. It is not clear why the Conventions do not explicitly treat the *purchase* of influence outside the *quid pro quo* exchange as a form of corruption.

The creation of crimes beyond bribery raises a number of interesting questions about the potential scope of the laws. Influence-peddling resembles the bribery paradigm of corruption, but the structural similarity alone cannot make it corrupt because lobbying legislatures and executive branch offices is often an accepted, if sometimes unseemly, practice in most political systems.<sup>115</sup> An official's receipt of money or other benefits from private sources that do business with the government is often disturbing, yet when the transaction occurs in the context of political fundraising, there is a substantial question whether the payment is something that the criminal law should punish.<sup>116</sup> When the crime focuses primarily on the receipt of personal benefits, apparently through the exercise of governmental authority or personal influence, there are questions regarding what constitutes a misuse of office and who is harmed by the official's conduct if the decision is not necessarily inappropriate or improper.

The International Conventions encourage the adoption of new or broader criminal provisions to reach corruption beyond bribery, but at this stage there are a number of unresolved issues. In the next section, the Article reviews how the law of public corruption in the United States developed, and discusses how it may be relevant to understanding the international effort to develop a system of criminal laws addressing corruption. One of the reasons for adopting the International Conventions was to harmonize the law of corruption and develop a unified approach to the issue.<sup>117</sup> The statutes and theories for prosecuting corruption adopted by the United States can be useful for other nations as they develop programs to investigate and prosecute official misconduct.

#### IV. CORRUPTION UNDER FEDERAL LAW

Like other forms of economic or social authority, public office is susceptible to abuse in ways ranging from trifling to substantial. Examples of public corruption at the highest levels of the U. S. government executive branch include everything from seemingly inconsequential tokens—items worth approximately \$5,900 provided by an agricultural organization to an incoming

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115. See Lowenstein, *supra* note 32, at 845 ("Political pressure, then, is not always wrongful in itself.").

116. See *id.* at 850 (distinguishing transactions involving personal benefits for the official from political benefits); see *infra*, text at notes 152-160 (discussing relationship of bribery to campaign contributions).

117. See, e.g., *IACAC*, *supra* note 8, Preamble ¶ 6 ("RECOGNIZING that, in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively[.]").

Secretary of Agriculture<sup>118</sup>—to systematic abuses of power, such as the conduct of President Nixon and his aides in the Watergate scandal. There is an omnipresent potential for misconduct resulting in personal gain or misuse of resources by those holding public power that cuts across all levels of government authority, from the highest federal and state executives to the customs agent at the border or the cop on the beat.

Public corruption can be a form of larceny in the sense that the official is enriched by the misconduct. But unlike common thievery, corruption is more than simply the personal enrichment of the wrongdoer who takes something of value from an identifiable victim. There is another, perhaps greater harm from corruption: the violation of the public trust that results in a denigration of society.<sup>119</sup> Not all abuses of office, however, are necessarily criminal offenses, and even many acts that might fit within a broad anti-corruption statute may be so trivial that they are not prosecuted with any degree of regularity.

In the drafting and ratification of the IACAC, the United States maintained that it did not need to change or add provisions concerning corruption because “the kinds of official corruption which are intended under the Convention to be criminalized would in fact be criminal offenses under U.S. law.”<sup>120</sup> The principle bribery provision applicable to federal employees is 18 U.S.C. Section 201, although a second statute reaches corruption at the state and local levels.<sup>121</sup> These two provisions target the types of two-party transactions reached in the International Conventions. In addition to these explicit anti-corruption provisions, federal law prohibits extortion “under color of official right” in the Hobbs Act, which permits prosecution of public officials who accept payments in relation to the exercise of their official duties.<sup>122</sup> The Mail Fraud statute makes it an offense to engage in “any scheme or artifice to defraud” that includes the deprivation of the right of honest services, thereby making it a crime for a public official or private employee to misuse authority for personal gain.<sup>123</sup> This amalgam of statutes uses different terminology than the International Conventions to define

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118. See *United States v. Sun Diamond Growers*, 526 U.S. 398, 401 (1999) (trade association charged with providing former Secretary of Agriculture Espy with gratuities of “tickets to the 1993 U.S. Open Tennis Tournament (worth \$2,295), luggage (\$2,427), meals (\$665), and a framed print and crystal bowl (\$524).”).

119. See Daniel Hays Lowenstein, *For God, For Country, or For Me?*, 74 CALIF. L. REV. 1479, 1483 (1986) (arguing for a “stewardship” analysis of the harm caused by bribes, that “the prohibition of bribery serves the purpose of protecting persons who are affected by but are not parties to the reciprocal arrangements declared corrupt. The stewardship paradigm thus focuses attention on what the interests of the beneficiaries are and what set of ethical or legal obligations imposed on the stewards will best serve those interests in the long run.”).

120. 146 CONG. REC. S7809 (2000).

121. 18 U.S.C. § 666 (2000). (The statute applies to officials working in programs that receive over \$10,000 of federal funds in a 12-month period.)

122. 18 U.S.C. § 1951(b)(2) (2000).

123. 18 U.S.C. §§ 1341, 1343 (wire fraud), and 1346 (2000).

the crime of corruption, and the application of the laws to specific types of misconduct is not always clear. To the extent United States law can serve as a guide for other countries developing domestic legislation to prohibit corruption, a review of the scope and application of the federal law can be informative.

## A. Bribery and Gratuities

### 1. The Development of the Federal Law

Bribery of customs officers and judges was among the first federal criminal statutes Congress enacted after the ratification of the Constitution. The customs provision required that the official "connive at a false entry of" a ship or goods,<sup>124</sup> while the judicial bribery law prohibited payments "to obtain or procure" a decision from the court.<sup>125</sup> The judicial bribery provision clearly required a *quid pro quo* between the offeror and the judge. The customs statute used the term "connive" to describe the relationship between the offeror and the officer in relation to the misuse of authority. Conniving incorporates the notion of a surreptitious arrangement, so that the exchange is similar to the *quid pro quo* requirement for a bribe.

Congress adopted a broader bribery statute in 1853, making it a crime to offer or give a thing of value to any federal officer "with intent to influence his vote or decision" on an official action.<sup>126</sup> This provision made proof of the *quid pro quo* an explicit element of the crime. In 1863, Congress expanded the criminal law of corruption by passing the first statute prohibiting gratuities to customs officers from any person "engaged in the importation of goods, wares or merchandise" into the United States.<sup>127</sup> Unlike the earlier bribery provisions, this crime did not require that the payment be in exchange for the avoidance of customs duties but instead criminalized the payment because of its potential impact on the future conduct of customs officers.<sup>128</sup>

Congress streamlined and reorganized the federal bribery and conflict of interest laws in 1962<sup>129</sup> into "a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery."<sup>130</sup> The bribery provision is Section 201(b), and it reaches both active bribery (the offeror of the

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124. Act of July 30, 1789, ch. 5, § 35, 1 Stat. 46 (1789).

125. Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117 (1790).

126. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171 (1853). The provision was part of the Act to Prevent Frauds on the Treasury. See *Dixon v. United States*, 465 U.S. 482, 491 n.8 (1984) (discussing history of the federal bribery laws).

127. Act of Mar. 3, 1863, ch. 76, § 6, 12 Stat. 740 (1863).

128. *Id.*

129. Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. § 201 (2000)).

130. S. REP. NO. 87-2213, at 1 (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3853.

bribe) and passive bribery (the official receiving "any thing of value").<sup>131</sup> The federal bribery provision is almost identical to the core bribery offense defined in the International Conventions that obliges the government to establish a *quid pro quo* arrangement for a conviction.<sup>132</sup> Section 201(b) requires the government to prove that the offeror transmitted the payment with the intent to "influence any official act" and that the public official "corruptly demands, seeks, receives, or agrees to receive or accept anything of value personally or for any other person or entity in return for . . . being influenced" in the exercise of authority.<sup>133</sup> Section 201 broadly defines "official act" as any issue currently before the official for a decision or action, or "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."<sup>134</sup> Those subject to the criminal prohibition include every federal employee, members of Congress, and those who have been

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131. 18 U.S.C. § 201(b) (2000).

132. See *United States v. Sun Diamond Growers*, 526 U.S. 398, 404-405 (1999) ("for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act."); Brown, *supra* note 30, at 2060 ("Subsection (b) is a classic bribery statute.").

In 1984, Congress extended the federal bribery prohibition to state and local officials when the program employing the official receives at least \$10,000 of federal money in a twelve-month period. 18 U.S.C. § 666 (2000). The statute reaches any person who "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent" of the governmental organization in connection with any business or transactions having a value of \$5,000 or more. *Id.* at § 666(a)(2). The language tracks § 201(b)'s requirement that the payment be to influence a decision, although § 666(a)(2) includes "reward," a term not in § 201(b). Although it is not entirely clear whether use of the term "reward" means that § 666(a)(2) also prohibits gratuities, the better interpretation is that the provision only reaches bribes. The original language of § 666 covered transfers "for or because of" governmental business, which parallels the gratuities provision in § 201(c). In 1986, Congress amended § 666 by, *inter alia*, changing the language to § 201(b)'s "influence" requirement. Pub. L. No. 99-646. In *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), the Fourth Circuit analyzed § 666(a)(2) and the legislative history, finding that the better position is that it parallels the bribery prohibition of § 201(b) but does not encompass gratuities. *Id.* at 1015 n.4; but see *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995) (§ 666 prohibits both bribes and gratuities); see also George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 310 (1998) ("The change from 'for' [sic] or 'because of' to 'corruptly influencing' is a change from a gratuities to a bribery statute.").

133. 18 U.S.C. § 201(b) (2000).

134. *Id.* § 201(a)(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").

"selected to be a public official" even though they have not yet assumed public authority.<sup>135</sup>

In addition to the bribery provision, the federal statute prohibits the offer and receipt of any thing of value that is provided "for or because of any official act performed or to be performed" by a public official.<sup>136</sup> The gratuity provision, Section 201(c), is part of the bribery statute, but it expands the scope of the anti-corruption law.<sup>137</sup> Section 201(c) reaches a broader form of public corruption by prohibiting the offer and receipt of an item related to the performance of a public duty even though the official act is not conditioned on the payment. Unlike a bribe, which can only occur before an official act, because the crime is the *quid pro quo* arrangement to influence the outcome, a gratuity can be either before or after the official act because the crime is providing the reward regardless of when the act occurred. One cannot bribe an official for a decision already reached, but one can certainly reward an official for previous conduct.<sup>138</sup>

While a gratuity is structurally similar to a bribe (a transfer to a public official related to the exercise of governmental authority) the criminal prohibition reaches payments that are not as closely connected to the outcome of the governmental process. While the bribe involves a *quid pro quo* arrangement, the purpose of a gratuity is to gain favor from an official because that official has the authority to take action affecting the offeror at some future time. The government

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135. *Id.* § 201(a)(1)-(2):

(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.

136. *Id.* § 201(c).

137. In addition to the bribery and gratuities prohibition in § 201, Congress adopted other prohibitions on federal employees related to receipt of salary supplements, 18 U.S.C. § 209 (2000), and restrictions on representing parties in claims against the government. 18 U.S.C. § 205 (2000). These narrower provisions target particular abuses that would not come within the prohibition of § 201.

138. See *United States v. Schaffer*, 183 F.3d 833, 841 (D.C. Cir. 1999), *vacated on other grounds by* 240 F.3d 35 (D.C. Cir. 2001) (Sections 201(b) and 201(c) "differ in their temporal focus. Bribery is entirely future-oriented, while gratuities can be either forward or backward looking.").



is in a constant process of making policy and regulating industries, and a gratuity can help the offeror gain access to the official at a later time when an important issue moves to the forefront. A decision tainted by bribery is questionable in almost every circumstance, but a reward to an official, even if it were judged improper, does not mean any particular decision was wrong or otherwise affected by the official's self-enrichment.

An issue that has arisen in the interpretation of the gratuity prohibition in Section 201(c) is how closely linked the governmental act and the transfer to the official must be to establish a criminal violation. In other words, how is a gratuity different from a bribe? The bribery provision requires a payment to "influence any official act," so the government must prove that the offeror sought a particular result through the payment, and that the government official accepted the payment to reach the requested outcome. The illegal gratuity provision requires that the gift be "for or because of" the official's exercise of authority, but the transfer need not affect that decision. If the payment is a reward for a previous decision, then the distinction between a bribe and a gratuity is clear. While one cannot offer a bribe after the fact, the gift to an official who made a decision favorable to the offeror is rewarded "for or because of" the decision. This is structurally similar to the *quid pro quo* of the bribe, but in a different temporal situation that removes the activity from the crime of bribery.<sup>139</sup> The criminal prohibition on after the fact gratuities addresses payments that are improper because the public official realizes a personal gain from the exercise of authority, while the offeror builds goodwill that may provide access to the official when a decision that may affect the offeror arises in the future.

Making after-the-fact gratuities illegal under Section 201(c) means that the payments are not viewed as isolated events. An after-the-fact gift may in reality be the precursor to bribery because the first payment is unlikely to be the last contact between the offeror and the official.<sup>140</sup> Once rewarded, an official may be likely to accommodate the offeror's subsequent requests for meetings and support for a position favorable to the offeror. Proof of the link between the gratuity and the previously made decision is sufficient to label the transfer as corrupt and therefore worthy of the criminal prohibition because it may be a precursor to future payments that would constitute bribes. The problem in a

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139. The timing of the actual payment of a bribe is irrelevant because it is the *quid pro quo* arrangement that constitutes the offense. There is no requirement that either the payment be made before the decision or that the official exercise the authority consistent with the arrangement. See *United States v. Myers*, 692 F.2d 823, 850 (1982) ("[I]t is no defense that the promise could not have been carried out either because the official act to be taken was beyond the defendant's authority (citations omitted), or had already been taken . . . Neither is it a defense that the public official will not be called upon to take official action because of the fictitious nature of the person alleged to be seeking assistance.").

140. See *Windsor & Getz*, *supra* note 44, at 750 ("Gifts and gratuities are different in principle from full-blown corruption; however, their customary practice and expectation could become the basis for corruption.").

prosecution for this type of Section 201(c) violation will be establishing the relationship between the gift and the official conduct; that the item conferred was “for or because of” an exercise of authority. A gift may be given for different reasons, some altruistic and others corrupt, so proving that the motivation for giving and taking the gift was related specifically to the official’s prior decision may be impossible, absent an admission of culpability by one of the parties to the transaction.<sup>141</sup>

Section 201(c) also prohibits gifts given for official acts “to be performed,” which raises a thornier issue of distinguishing a gratuity from a bribe when the sequence of payment and official act are the same for both crimes. One could view the gratuity provision as a less culpable subset of bribery, that absent proof of the *quid pro quo* arrangement the government need only show some general connection between the transfer of the item and the official act. Section 201(c) provides for a lower penalty for an illegal gratuity (up to two years imprisonment) while a bribery conviction under Section 201(b) may be punished by up to fifteen years imprisonment.<sup>142</sup> Yet, the gratuity provision may reach farther than bribery by prohibiting gifts made to curry favor with an official for a later, as yet unidentified decision. Unlike a bribe, which is an exchange for a particular result, the gratuity can be a form of *influence buying* by the offeror, designed to gain access to an official and perhaps a favorable disposition in future exercises of authority. The proffer of meals, travel and other benefits by lobbyists to legislators are examples of gifts that, while not necessarily linked to a specific piece of legislation, are designed to affect—perhaps even to influence—decisions on proposals that may not exist at the time of the gratuity, but that the lobbyist knows may arise one day and affect the lobbyist’s clients.

## 2. *Sun Diamond*: Distinguishing Bribes from Before the Fact Gratuities

In *United States v. Sun Diamond Growers*,<sup>143</sup> the Supreme Court dealt with the question of whether gifts designed to curry favor well before any specific issue is in front of the official receiving the benefits constitute illegal gratuities. The defendant was an agricultural trade group that provided a number of gifts, with a total value of approximately \$5,900, to Mike Espy after his nomination to

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141. The bribery and gratuity provisions in § 201 actually incorporate two separate crimes each, one by the offeror and one by the recipient. It may be that the government will only have sufficient proof of one party’s intent while the other party may be found not guilty. See *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974) (“The payment and the receipt of a bribe are not interdependent offenses, for obviously the donor’s intent may differ completely from the donee’s. Thus the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.”).

142. 18 U.S.C. § 201 (2000).

143. 526 U.S. 398 (1999).

be the Secretary of Agriculture. The case arose as part of an Independent Counsel investigation of Espy, and the indictment alleged that there were two agricultural matters of interest to the defendant that motivated the gifts as a means to gain favor with the Secretary.<sup>144</sup> The government did not, however, assert that the gifts were specifically related to these matters; instead, the government's theory was that the gifts were provided because of Espy's position as Secretary of Agriculture, *i.e.* to curry favor with an official wielding substantial authority over the defendant's business.<sup>145</sup> The Independent Counsel's approach to Section 201(c) was that the defendant engaged in influence buying through the gifts provided to Espy—to build a reservoir of goodwill<sup>146</sup>—but did not seek a decision on a particular matter pending before the Secretary.

The Court rejected the government's theory that Section 201(c) prohibits gifts designed solely to gain favor with the recipient, without proof of a nexus between the gift and a particular future decision of the official. The opinion began by distinguishing a bribe from a gratuity, at least where the gift occurs prior to any particular decision, by noting that a bribe requires proof of a *quid pro quo* while a gratuity "may constitute merely a reward for some future act that the public official will take . . . ."<sup>147</sup> The Court held that Section 201(c)'s language that the gift be "for or because of any official act" required the government to prove the defendant gave the gift in connection with a specific issue that would come before the official at some point in time for a decision.<sup>148</sup> Otherwise, the broad reading proposed by the government "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 . . . ."<sup>149</sup>

*Sun Diamond* was not a wholesale rejection of the criminalization of gratuities, but the Court spurned what it called the government's "meat axe"

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144. *Id.* at 402. (The first matter related to regulatory changes in a grant program to defray foreign marketing expenses that might result in lower payments unless the Secretary of Agriculture adopted a definition favorable to the defendant, and the second involved regulation of a pesticide that the Secretary could affect by interceding with the Environmental Protection Agency.).

145. *Id.*

146. *Id.* at 404 (The government sought to convict under the "illegal gratuity" theory.).

147. *Id.* at 405.

148. *Id.* at 406. The Court analogized the "for or because of" element of the gratuity offense to asking the question, "Do you like any composer?" According to the Court, that question "normally means 'Do you like some particular composer?'," so that the reference to an official act in the gratuity provision, broadly defined in § 201(a)(3), means that Congress must have meant that the gift be linked to a specific act just as the question is really asking about a particular composer. *Id.* The Court's analysis would apply to an official charged under § 201(c) with receipt of a gratuity, requiring that the defendant know that it was a reward "for or because of" a pending official act and not simply a generalized benefit conferred on the official.

149. *Sun Diamond*, 526 U.S. at 406-407.

approach to before the fact gifts because such treatment would undermine the extensive administrative regulation of gifts to federal officials.<sup>150</sup> These regulations, which are quite detailed, were adopted to ensure a high level of ethics when officials interact with private parties, especially those subject to the official's authority.<sup>151</sup> The criminal statutes "are merely the tip of the regulatory iceberg," and a broad analysis of Section 201(c) that would reach every gift from a person with any potential interest in the future exercise of governmental authority would make the administrative scheme superfluous.<sup>152</sup> Perhaps worse, according to the Court, this approach could subject anyone giving and receiving an item of value that could be connected to any potential official act subject to the unreviewable prosecutorial discretion about who to charge with a criminal offense.<sup>153</sup>

While the Court's analysis of the criminal prohibition on gratuities given before an official act reflects a plausible reading of the statutory language, there is a troubling aspect to the opinion's narrow approach that acquiesces in before-the-fact gifts made to curry favor with officials. By requiring the government to establish a clear link between the gift and a pending decision, the Court essentially eliminated the criminal prohibition on gratuities when the transfer takes place *before* an official act.<sup>154</sup> If the government can establish that the gift is related to a specific matter, then it most likely has proven a bribe because the transfer would be designed to affect the official action, demonstrating a *quid pro quo*. It is difficult to see how providing any thing of value would be "for or because of any

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150. *Id.* at 412.

151. For example, regulations permit federal officials to accept gifts worth \$20 or less, so long as the total amount of gifts from that source is less than \$50 per year. 5 C.F.R. § 2635.204(a) (2001). The Court noted that there were numerous similar regulations "littering this field" and that the broad interpretation of § 201(c) could "expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits." *Sun Diamond*, 526 U.S. at 412.

152. *Sun Diamond*, 526 U.S. at 410.

153. The Court was troubled by the government's statement at the oral argument of the case that a free lunch provided to the Secretary of Agriculture in conjunction with a speech to a farm organization would be a criminal violation because the Secretary could have a matter affecting farmers at some point in time. *Id.* at 407. The Court expressed concern with interpreting the statute in a way that would make even the most innocuous gift a potential crime, regardless of whether it may be corrupt, and refused to rely on the reasonable exercise of prosecutorial discretion as the sole protection for what appeared to be innocent conduct. *Id.* at 408.

154. See George D. Brown, *Putting Watergate Behind Us - Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 774 (2000) ("The Court [in *Sun Diamond*] has essentially eliminated the separate crime of unlawful gratuity and turned it into a lesser included offense of bribery."). Although Professor Brown asserts that *Sun Diamond* is a "decriminalization of the gratuities offense," that is only true insofar as a before the fact gratuity is concerned. *Id.* A reward "for or because of" a decision already made remains a violation of § 201(c), while that payment could not be a bribe. *Id.*

official act," a Section 201(c) gratuities violation, if the transfer was not also intended to "influence" the decision, a Section 201(b) bribery violation.<sup>155</sup> Gifts to public officials are given for a reason, and when the motive is related to the authority vested in the official rather than a personal relationship, then the gift is designed either to affect the outcome of a particular decision-making process or more generally to gain access and curry favor to affect a future decision. If there is no evidence of a pending official act to which the payment relates, then the government cannot establish either an illegal gratuity—there is no link to prove the gift is "for or because of" the exercise of authority—or a bribe.<sup>156</sup>

As an anti-corruption measure, Section 201 reaches the core form of corruption: bribery. The statute expands the criminal law to prohibit gifts designed to reward an official, which could not be prosecuted as bribes because of the absence of a *quid pro quo*. *Sun Diamond*, however, curtails the statute by removing the possibility of criminal prosecution for before the fact influence buying if no link exists between the transfer and a specific pending decision. The decision creates a distinction between pre- and post-official action gratuities that ignores the corrupting effect of any transmission of a benefit to a public official motivated primarily by the authority conferred on that official. In either instance, the primary reason for giving a gift is to establish conditions under which the

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155. The Court mentions one possibility of an illegal gratuity concerning a pending decision that can still be prosecuted after narrow interpretation of § 201(c). If a person nominated for an office announced a position on a pending issue, the gratuity may be given "for or because of" the nominee's anticipated decision. *Sun Diamond*, 526 U.S. at 408. The Court's example is chimerical, for two reasons. First, as a practical matter, nominees do not announce how they will decide a particular matter prior to their official appointment to an office, and it may be improper—"arbitrary and capricious" in the language of administrative law—to announce a decision before the person has reviewed the facts and legal arguments. Indeed, the nominee is unlikely to have access to the relevant materials on which to base a decision until the person assumes office. Second, the gratuity, if linked to an announced position, is also designed to assure the nominee will maintain that position, *i.e.* to influence the outcome of the decision-making process, which is a bribe in violation of § 201(b).

A § 201(c) charge in a case involving a pending decision, as opposed to an after the fact gift, remains viable as a lesser-included offense of bribery. If the jury found that the evidence of a *quid pro quo* were not sufficiently clear to establish that element beyond a reasonable doubt, it is possible to return a verdict on the gratuity charge because the gift need not be intended to influence, only that it was linked to a specific official act. A number of courts have held that § 201(c) is a lesser-included offense of § 201(b). *See, e.g.*, *United States v. Patel*, 32 F.3d 340, 343 (8th Cir. 1994); *United States v. Wilson*, 26 F.3d 142, 161 (D.C. Cir. 1994); *United States v. Lasanta*, 978 F.2d 1300, 1309 (2nd Cir. 1992), but it is unlikely that a prosecutor would not charge bribery after *Sun Diamond*'s analysis for the nexus requirement for a gratuity violation.

156. *See* Charles B. Klein, *What Exactly Is an Unlawful Gratuity After United States v. Sun Diamond Growers?*, 68 GEO. WASH. L. REV. 116, 123 (1999) ("it is difficult, if not impossible, to explain how a gift-giver who actually intends to influence a particular official act can violate the unlawful gratuity statute, but not the bribery statute.").

official will be favorably disposed to the offeror in future cases. The timing of the gratuity is irrelevant when the offeror seeks future benefits from the transmission of the gift. *Sun Diamond's* interpretation of the statute, however, insulates a gift given sufficiently early in the decision-making process such that it cannot be linked directly to a specific issue before the recipient. While the bribery provision prohibits payments made to influence a particular decision, a gratuity may purchase something akin to that influence with a similar corrupting effect on the exercise of official authority.<sup>157</sup>

The problem with an expansive view of Section 201(c)'s prohibition on gratuities is determining how to measure the effect of a gift in order to ascertain whether it was corrupt. The gratuity provision does not require proof of the "corrupt" intent required for bribery, and Section 201(b)'s more narrowly drawn elements mean that only egregious conduct will be punished. Once the criminal law moves beyond the clearer bribery arrangement to the more amorphous crime of illegal gratuities, the law may be used to punish any gift, including the types of trivial items that concerned the Supreme Court in *Sun Diamond*. Given the political nature of corruption charges, a criminal prohibition on gifts could be a means to attack political foes. The criminal law employs broad terms to define a violation, so fine distinctions between tokens of appreciation—the championship jersey or free lunch—and improper efforts to buy influence will be difficult to incorporate into even the most carefully drafted statute. The OECD encountered the same problem in asserting an exemption for "small facilitation payments" that would not be a violation of the OECD Convention's anti-bribery provisions. In each instance, the difficulty is defining where the line can be drawn between a trivial violation that should not be prosecuted, and one serious enough to invoke the powerful force of the criminal law.

The Supreme Court's reference to the large body of administrative regulations governing gifts to federal officials is instructive on how other nations can approach the issue. It may be that the subtle ethical distinctions between acceptable and questionable gifts should be left to a non-criminal or administrative forum. Unlike broad criminal statutes, administrative guidelines can address issues regarding the size of permissible gifts, what sources of gifts would be objectionable, and the required reporting provisions to ensure transparency in the exercise of authority. The non-criminal alternative, however, assumes that there is a well-developed administrative structure for drafting and enforcing such a code of conduct. To the extent that nations cannot rely on such a mechanism to ensure that gifts are regulated, the criminal law may be the only means available to regulate and prohibit gratuities designed to buy influence.

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157. See Lowenstein, *supra* note 32, at 825 ("[S]tudents of power and influence have observed that the most effective pressure may be that which evokes an anticipatory response on the part of the pressured individual without even an explicit request on the part of the person exercising the pressure, much less an explicit agreement.").

### 3. Incorporating Gratuities Into an Anti-Corruption Statute

None of the International Conventions specifically address the issue of unlawful gratuities, although it is possible that the bribery provisions' *quid pro quo* requirement can be read broadly to include any transfer related to an official act, perhaps reaching some before-the-fact gifts to officials. The bribery statute, however, would not reach after-the-fact gifts, and the influence-peddling sections of the IACAC and Council Convention incorporate the same *quid pro quo* element of bribery so they would not cover gifts unrelated to a specific decision.

A criminal prohibition on gratuities has much to recommend it to nations seeking to eliminate corruption because it creates a broader anti-corruption offense targeting gifts to officials designed to affect the exercise of governmental authority.<sup>158</sup> First, the prohibition fills a gap in the bribery statute by reaching after the fact gratuities so that arrangements that might avoid the *quid pro quo* element are still subject to prosecution. Second, the practice of providing gifts to government officials because of their position has the same potential as the offer of a bribe to corrupt the governmental process, and certainly presents an appearance of unfairness if access to an official is in any way dependent on providing personal benefits. Third, prohibiting gifts provided because an official

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158. In addition to the statutory prohibition on bribery and gratuities, federal law also prohibits supplementation of the salaries of federal employees by private parties. 18 U.S.C. § 209 (2000). Section 209 provides:

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality;

or Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.

This provision has been described by Professor Nolan as "the third tier in a hierarchy of impermissible payments, which begins with bribes, then moves to illegal gratuities, and ends with supplementation of salary." Beth Nolan, *Public Interest, Private Income: Conflict and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 90 (1992).

occupies an important government post diminishes the effect of wealth on the exercise of official authority.<sup>159</sup>

The problem with a broad criminal prohibition on gifts is that there are legitimate forms of lobbying or personal reciprocity that involve providing gifts or other benefits to government officials.<sup>160</sup> Interaction between government officials and those subject to their authority can be quite beneficial by providing an avenue for information to flow from the constituencies affected by government decisions. Moreover, the ceremonial aspects of executive authority are powerful symbolic tools, and gifts to an official from organizations can be a positive expression of the relationship between a country's leaders and its citizens. There is nothing corrupt about the tokens the Supreme Court described in *Sun Diamond* as the types of gifts that could trigger criminal liability under a broad definition of an unlawful gratuity. A blanket criminal prohibition on gifts may curtail unnecessarily some beneficial interaction between government officials and those interested in the policies administered because of fear of prosecution for any minor transgression. The criminal law should not seek to make government more remote from those governed.

The argument against a broad criminal prohibition on gifts may overstate the case, however, because permitting gifts allows a pernicious form of corruption to persist, giving the appearance that access to and influence with officials is conditioned on the offer of favors and benefits. While there may be instances of insignificant tokens of appreciation that should not be prohibited, counterexamples exist that demonstrate the strong potential for corruption from gratuities. For example, *United States v. Sawyer*<sup>161</sup> catalogued a number of benefits provided by lobbyists to Massachusetts state legislators, including golf outings, lavish dinners, and a stay at a resort while attending a legislative conference, as part of an effort to gain favor from elected representatives who would consider legislation affecting the lobbyists' clients.<sup>162</sup> The purchase of

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159. Cf. Brown, *supra* note 30, at 2057 ("I think that society should continue to condemn the transfer of something of value to an official who is likely to perform official acts that could benefit the giver, or who has performed such an act in the past.").

160. See Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 720 (1999) (Describing the Chinese tradition of *guanxi* that involve "special connections and privileged relationships for the purpose of gaining an advantage or accomplishing results" that is an acceptable practice even though, "[a]t its worst, *guanxi* is akin to corruption and can amount to not following the rules."); Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 561 (1997) (Describing the Korean tradition of providing *ttokkapp*, which "literally means rice-cake expenses and traces its origins to payments that were offered to cover for the expenses for buying rice-cakes, a precious food source in earlier times.").

161. 85 F.3d 713 (1st Cir. 1996).

162. *Id.* at 720-21. The defendant, a lobbyist for an insurance company, provided these benefits to the chairpersons of the Insurance Committee of the Massachusetts House of Representatives, and once the representatives left the committee they received



access and influence on future decisions through gifts should not be constrained solely by reliance on an official's moral fortitude to resist temptation.

The problem with gratuities is not that an individual or group offers a gift as a means to gain access to government officials, but that the official receives a benefit because of the authority the government confers on him. This is similar to the definitions of corruption discussed earlier, that any misuse of office for personal gain is corrupt. Crafting a criminal prohibition on gifts is difficult because the law should not punish every benefit and there are advantages to adopting rules that do not unnecessarily curtail interaction between officials and those who they are charged with governing.<sup>163</sup> One approach is to narrow the definition of the offices subject to a strict prohibition on receiving gifts, while requiring a higher degree of proof to convict a lower-level official. Section 201 applies equally to career federal employees, appointed officers, and members of Congress, and a better approach to prohibiting gratuities may be to calibrate the prohibition to the recipient's office to avoid overcriminalization while also preventing improper influence buying through gifts.<sup>164</sup> While the *Sun Diamond* Court justified its interpretation of the statute by pointing to trivial gifts as potentially triggering criminal liability, a provision drafted more carefully than Section 201(c) that created different prohibitions based on the recipient's level of authority and the type of gift received would redress much of the concern with overcriminalization.

For most federal employees, the stricter "for or because of any official act" element contained in Section 201(c) works well because they are unlikely to ever receive a gift, or at least not one of any particular value, related to their work. Moreover, it is unlikely that anyone would try to curry favor with the vast majority of government workers because they do not have the authority to set policy or establish regulations outside of a very narrow area. In other words, there is no need to buy influence with most workers because there is nothing much to

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"practically nothing" from the defendant for entertainment. *Id.* at 721. *Sawyer* involved a federal prosecution under, *inter alia*, the mail and wire fraud statute, not § 201, because the officials were state representatives not covered by that provision, which only applies to those at the federal level. The mail and wire fraud convictions were premised on the fact that the defendant provided unlawful gratuities under state law, and the case is a good example of the kinds of benefits that can be provided officials because of the governmental authority vested in them.

163. There are detailed regulations, discussed in *Sun Diamond*, governing the source and amount of permissible gifts for federal employees. For example, employees are permitted to accept gifts of \$20 or less "provided that the aggregate market value of individual gifts received from any one person . . . shall not exceed \$50 in a calendar year." 5 C.F.R. § 2635.204(a) (2001).

164. For example, all federal employees who leave the government are prohibited from seeking to influence a decision on a matter in which the employee "participated personally and substantially," 18 U.S.C. § 207(a)(1) (2000), and there is a one-year restriction on certain high level executive and legislative branch employees from appearing before the agency or office that employed them. 18 U.S.C. §§ 209(c)-(e) (2000).

purchase. In the few instances in which a gift is given, it is likely to be a token benefit for which it would be difficult to demonstrate a link between the gift and the official act. The transfer of any valuable item to a lower-level employee is arguably a bribe because that person likely exercises authority over a matter of particular interest to the offeror. Therefore, the stricter prohibition on gratuities serves as a lesser-included offense of bribery. For most government officials, it is unlikely that a small gift would have any corrupting effect, so a narrower criminal prohibition will not permit a substantial amount of corruption to go unpunished.<sup>165</sup>

Officials at the highest levels of government should be subject to a stricter prohibition because there is a benefit to purchasing access to and influence with those exercising significant authority.<sup>166</sup> For these officials, the statute should make any gift subject to criminal prosecution. *Sun Diamond* is a prime example of an organization seeking to build ties to an incoming cabinet officer who would have significant authority to affect the organization's interests. It is difficult not to view the gratuities provided as anything but corrupt, regardless of whether they constituted a criminal violation under Section 201(c). To the argument advanced in *Sun Diamond* that a broad prohibition would reach even trivial gifts, the better approach would be to bar even the modest token of appreciation to ensure that the corrupting effect of valuable gifts is proscribed. A team can donate a championship jersey to the government and it would not be a gift to the President personally. The senior officials can politely refuse a meal or offer to pay for it. An effective prohibition on gifts used as a means of buying influence with officials should distinguish between the levels of authority possessed.<sup>167</sup>

There is another important distinction between types of officials for establishing a clear law of public corruption involving gifts – whether the official is elected or appointed. Most gratuity cases, such as *Sun Diamond*, have involved

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165. Professor Nolan noted that lower-level federal employees are unlikely to receive the types of benefits accorded higher officials:

[B]ecause senior officials are more powerful and more closely identified with their public positions, they may have a greater opportunity for improper private gain from their public offices. A GS-11 staff member at the Internal Revenue Service is unlikely to be offered paid speaking engagements on her favorite topic, auto racing, as a pretext for supplementing her salary or merely to purchase general access to her. On the other hand, the Commissioner of Internal Revenue might be an attractive target for such offers.

Nolan, *supra* note 158, at 141.

166. Section 207(d) restricts senior executive branch personnel from having any contact with their former departments for one year while imposing lesser restrictions on mid-level and low-level employees. 18 U.S.C. § 207(a)-(d) (2000).

167. See Brown, *supra* note 30, at 2057 (“It is crucial to distinguish between acceptable and unacceptable forms of influence.”).

appointed officials in the government's executive branch. Because of the enormous authority they wield, the receipt of any gift by those high level officials raises legitimate questions regarding the propriety of the transfer. Elected representatives, however, depend on gifts to conduct their election campaigns. Any effort to adopt a criminal prohibition on gratuities must address the question of how political campaign contributions fit within the anti-corruption regime.<sup>168</sup>

## **B. Corruption and Campaign Contributions**

In the United States, and some western-style democracies, campaigns for public elective office are financed largely through private donations. Political contributions usually are given in cash—or its equivalents—and many national campaigns operate year-round and raise millions of dollars. Elected officials wielding enormous power solicit these funds, and serious questions have been raised regarding the propriety of large campaign contributions given to persuade the recipient to view the contributor's position positively after the election, or at least be willing to listen to the contributor's point of view. A decision by a representative that favors donors or groups who provided campaign funds in the past triggers questions regarding the propriety of the decision and its relation to the campaign contributions. A recent example is the controversy regarding pardons issued on the last day of President Clinton's term and whether there was any connection to political contributions.<sup>169</sup>

Whenever large amounts of money reach a public official, there is the temptation to divert the funds to personal use. Moreover, because solicitation of contributions by candidates and monetary donations to political campaigns is permissible, bribes and gratuities can be designated as campaign contributions to camouflage the true nature of the payment. The recent allegations about a secret political fund maintained by former Chancellor Kohl of Germany is an example of the potential for serious corruption in a political system dependant, at least in part, on private monetary contributions to fund campaigns for office.<sup>170</sup> Yet, even if

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168. See Lowenstein, *supra* note 32, at 809 ("It is therefore evident that a campaign contribution is a 'thing of value' for bribery purposes, but the result is that the potential sweep of the bribery statutes is enormous.").

169. See John Harwood, *Clinton Pardon Firestorm Raises Questions About Nearly Everyone Involved in Process*, WALL ST. J., Mar. 7, 2001, at A24 (Noting that questions have been raised about connection between fundraising and pardon grants by the President); James V. Grimaldi, *Denise Rich Gave Clinton Library \$450,000*, WASH. POST, Feb. 10, 2001, at E1 (Describing donations to Clinton presidential library by former wife of fugitive financier Marc Rich who received a pardon).

170. See Cecilie Rohwedder, *Kohl Agrees to Pay Fine to End Criminal Investigation*, WALL ST. J. (EUROPE), Feb. 9, 2001 at 1 (Former Chancellor Kohl agreed to pay a fine of €153,390 to settle a criminal investigation "in the biggest political scandal in German's postwar history" involving a secret campaign contribution fund).

donations are not diverted to personal use but instead finance a political campaign, a contribution given to purchase an elected official's support or vote on legislation is equally corrupt. As the Supreme Court noted, "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."<sup>171</sup>

The United States sought to limit some of the pernicious effects of campaign contributions by requiring disclosure of donors and imposing limitations on the total amount that individuals may contribute directly to a candidate.<sup>172</sup> The rationale for such restrictions was that transparency has a curative effect on the process of raising money, and contribution limits diminish the possibility of corruption. The system of campaign contribution regulation in the United States is complex, however, and riddled with loopholes.<sup>173</sup> The most problematic aspect is the failure to regulate what are known as "soft money" contributions to third-party organizations and the political parties that use the funds to support a candidate or position. The Supreme Court struck down spending limitations imposed on organizations that were not directly under the candidate's control.<sup>174</sup> Significant amounts of money have been funneled through

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171. *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985). Professor Strauss argues that payments to elected officials are only corrupt when the official uses the money for personal gain, not when the funds are employed in support of an election campaign. See David A. Strauss, *What is the Goal of Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 141, 144 ("the central distinction between campaign contributions and bribes—that the former, unlike the latter, do not (in principle) enrich the candidate—may indeed be decisive."); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1373 (1994) (same). Professor Lowenstein disagrees, arguing that "[t]he law, the simplest and most unmistakable elements of our political culture, and, for most of us, our sense of what is right and wrong in politics, all tell us that acceptance of a campaign contribution in exchange for official decisions favorable to the contributor is a corrupt practice." Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. L.F. 163, 173; see also Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. Q. 127, 131 (1997) ("it is corrupt for an officeholder to take money in exchange for some action. The money may be a bribe for personal use or a campaign contribution.").

172. 2 U.S.C. § 434(b) (2000).

173. At the federal level, the campaign finance laws are administered and enforced by the Federal Election Commission. Any person making aggregate contributions of more than \$200 to a candidate must be disclosed, including the date and amount of the contributions, *Id.*, and cannot contribute more than \$1,000 per election to an individual candidate, \$5,000 annually to a political committee, and no more than \$25,000 total per year for all types of campaign contributions. 2 U.S.C. § 441a(a) (2000). There are complex administrative regulations defining, among other things, "earmarked" contributions and contribution "conduits" that may be used to avoid the contribution limits. 11 C.F.R. § 110.6 (2000).

174. *Fed. Election Comm'n v. Colo. Republic Fed. Campaign Comm.*, 121 S. Ct. 2351, 2358 (2001) (Noting that the Court has distinguished regulations on campaign contributions and expenditures because "a reason for the distinction is that limits on

organizations that are clearly designed to support a particular candidate, yet there is little regulation of the use of the funds and no limit on contributions. Recent calls for campaign finance reform in the United States focus on the problem of soft money donations and the potentially corrupting effect they have on elections for national office. Aside from administrative regulations, there have been occasional criminal prosecutions in the United States related to campaign contributions. The cases generally involve violations related to false statements in disclosure documents required by the campaign reporting provisions, usually with no accusation that the candidate engaged in a corrupt arrangement in exchange for the donation.<sup>175</sup>

Many contributors expect a candidate to support certain positions, and may express their sentiment in favor of those positions by making a donation. Not every contribution is specifically linked to a particular issue, and "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."<sup>176</sup> There is an expectation that the candidate will maintain previously announced stands on the issues and can expect future contributions for supporting particular positions. The mutuality of expectation between contributors and candidates is not necessarily corrupt, although there is no doubt that each side understands the relationship of the donation to the exercise of authority, that it is "for or because of" certain future decisions. Campaign contributions may purchase access to an official at some future point when an issue of importance to the donor arises.<sup>177</sup> Similarly,

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contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as *quid pro quo* agreements, but also an undue influence on an officeholder's judgment, and the appearance of such influence . . . "); Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 498 (1985) ("[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

175. See, e.g., *United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999) (charges for filing false statements with the Federal Election Commission [FEC] related to contributions to the Democratic Party through "straw contributors" that did not disclose the identity of the true donors); *United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998) (charges for filing false statements with the FEC by using straw donors to conceal the identity of foreign contributors to the Democratic Party).

176. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

177. See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 840 (1998) ("[T]he suspicion that 'access' leads to corruption persists."); David Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 571-72 (1980) ("Contributors may give because they like a candidate or his positions, for reasons of personal friendship, from a sense of civic duty, to support the two-party system, or even to facilitate nonpolitical relationships with friends or business associates. But many contributors intend to purchase access—the opportunity to plead a case with public

legislators in leadership positions or who head important committees often receive large campaign contributions—even though many have little need for the money because they face no real opposition in elections—through “rent extraction” by gathering funds from donors with an interest in legislation before the body or their committee.<sup>178</sup> The motive for donating to a candidate who does not need the contribution is clearly one of gaining access or protecting a position, and powerful legislators can extract the contributions on the perceived threat that failure to pay will result in the denial of entree to the decision-making process or at least a less sympathetic hearing on an issue.

### 1. The *Quid Pro Quo* Requirement

The difficult issue for the criminal law is the relationship of an anti-corruption statute to campaign contributions. Voters expect candidates to state their positions publicly, and legislators are all-too-happy to proclaim their support or opposition to those sympathetic with their position. If a contributor voices to the candidate that the contribution is designed to persuade the official to take or maintain a particular position upon election to office, then that statement apparently shows the donor provided the funds with the intent to “influence”—or “for or because of”—an official action; acceptance of the contribution with knowledge of the donor’s intent may establish that the candidate acted corruptly. Although the transaction could meet the technical requirements for a bribe or illegal gratuity under Section 201, no one suggests that all donors who support a position through a donation and all candidates for federal office who seek donations by asserting a position are guilty of a criminal violation. The potential breadth of anti-corruption statutes presents a special problem in dealing with campaign contributions. The Supreme Court addressed the problem of reconciling the prohibition on bribery with the system of campaign contributions in two cases that reflect the difficulties in applying federal anti-corruption law to an area in which it is permissible to solicit and donate money in order to influence a position.<sup>179</sup> Section 201, the principle federal statute targeting bribery, reaches only misconduct by federal officers and employees, not state or local government officials.<sup>180</sup> Corruption at these lower levels is probably greater than

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officials.”).

178. Ayers & Bulow, *supra* note 177, at 846 (“Politicians engage in ‘rent extraction’ when they threaten potential donors with unfavorable treatment unless a sufficiently large contribution is made. Rent extraction almost surely explains some of the anomalous patterns of giving—particularly, the ‘everybody loves a winner’ phenomenon. The high level of contributions made to incumbents with safe seats is consistent with rent extraction because incumbents have the greatest ability to extort donations.”).

179. See *McCormick v. United States*, 500 U.S. 257 (1991); see also *Evans v. United States*, 504 U.S. 255 (1992).

180. See 1 SARAH WELLING ET AL., *FEDERAL CRIMINAL LAW AND RELATED*

at the federal level because there are more officials in local and state governments than in the federal government and their authority touches virtually every business and individual, from police protection to garbage collection to zoning laws. The federal effort to prosecute corruption at lower levels has come through a statute—the Hobbs Act<sup>181</sup>—that specifically prohibits extortion, not bribery. Beginning in the early 1970s, federal prosecutors sought to expand the reach of the Hobbs Act to encompass corruption in state and local government.<sup>182</sup> The endeavor has been largely successful as courts made the Hobbs Act a principle anti-corruption provision to punish the receipt of bribes—passive corruption—by a wide variety of state and local officials.<sup>183</sup> The expansion of the Hobbs Act into an anti-corruption statute forced the Supreme Court to confront the question of how broadly to apply the provision to campaign contributions. The Court's analysis is instructive on the difficulties in applying the criminal law to donations to elected officials.

Congress adopted the Hobbs Act as a successor to an earlier law, the Anti-Racketeering Act of 1934,<sup>184</sup> which was designed to combat extortion and violence perpetrated by criminal organizations against private individuals.<sup>185</sup> Like the Anti-Racketeering Act, the Hobbs Act prohibits robbery and extortion to obtain property, and it defines two types of extortion: physical coercion ("wrongful use of actual or threatened force, violence, or fear") and the use of public office ("under color of official right").<sup>186</sup> The meaning of this second type

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ACTIONS § 15.15 at 591-92 (1998) ("Federal prosecutors employ the color-of-official-right prong of the Hobbs Act to prosecute state and local officials for bribery and corruption because the federal bribery and gratuities statutes only apply to federal officials and employees.").

181. 18 U.S.C. § 1951 (2000).

182. See *McCormick*, 500 U.S. at 266 n.5 (1991).

183. 18 U.S.C. § 1951, n.9, 41 (2000).

184. Act of June 18, 1934, ch. 569, 48 Stat. 979 (superseded by the Hobbs Act in 1946).

185. Congress enacted the Hobbs Act in response to the Supreme Court's decision in *United States v. Teamsters Local 807*, 315 U.S. 521 (1942), which held that the Anti-Racketeering Act did not apply to extortion committed by unionized truckers who demanded payments from out-of-town drivers before permitting them to enter the state. *Id.* at 530; see Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1174-75 (1977) (discussing history of Hobbs Act).

186. 18 U.S.C. § 1951 (2000). The statute provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this

of extortion—"under color of official right"—was unclear because the common law development of bribery and extortion did not distinguish clearly between the two crimes.<sup>187</sup> Federal prosecutors first applied the Hobbs Act successfully to reach corruption by local officials in 1972 in a prosecution of the political "boss" of a county in New Jersey who required that a percentage of all government contracts be paid to him for the privilege of doing business with local governments.<sup>188</sup> Although there was no overt threat to those who paid off the local boss, the court of appeals upheld the conviction because the simple fact of public office established that those who paid were victims of the extortion.<sup>189</sup>

Broadly interpreted, the Hobbs Act became a powerful tool for federal prosecutors intent on combating corruption at the local level. There was no need to establish that the official in any way threatened the payer of the money, or indeed that there was any overt discussion of the reason for the payment. Courts found the "under color of official right" element satisfied upon proof that the official had the authority to affect the outcome of an exercise of governmental authority. This type of extortion is effectively a form of bribery, and courts recognized explicitly that a public official charged with violating the Hobbs Act was in reality alleged to have taken a bribe.<sup>190</sup> The weakness of the Hobbs Act was that the statute only prohibits extortion, and not specifically bribery, which means that it reaches the official extorting the property but not the person paying it. Unlike Section 201(b), which covers both the offeror and the recipient, only passive corruption comes within the prohibition of the Hobbs Act. This created the anomalous situation that a person giving a bribe to a federal official could be charged with a violation of Section 201, but another person making the same payment to a state or local official would be the "victim" of extortion and not subject to criminal prosecution under the Hobbs Act.<sup>191</sup>

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section shall be fined under this title or imprisoned not more than twenty years, or both.

*Id.* § 1951(a).

187. See James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 834 (1988) ("The text of the Hobbs Act is not clear, and those who pretend that it is are merely making the analysis of its meaning more difficult").

188. *United States v. Kenny*, 462 F.2d 1205, 1210 (3d Cir. 1972); see Ruff, *supra* note 185, at 1177.

189. *Kenny*, 462 F.2d at 1229. The defendants argued that the government had to prove that they used force or the threat to obtain the money, but the court held that extortion could be proved by either evidence of a threat or that the defendants' obtained the money because of their position of official authority.

190. See *Evans v. United States*, 504 U.S. 255, 266 (1992) (defendant's acceptance of a "bribe" met the requirements for conviction for extortion under color of official right); 1 WELLING ET AL., *supra* note 180, § 15.15 at 591 ("[V]irtually all modern 'color of official right' prosecutions have alleged bribery or similar forms of corrupt conduct.").

191. See *United States v. Tomblin*, 46 F.3d 1369, 1383 (5th Cir. 1995) ("[A] private



The interpretation of extortion under color of official right as a form of bribery triggered the issue of what constitutes a violation when the payment appears to be a campaign contribution. The Supreme Court first considered the problem in *McCormick v. United States*.<sup>192</sup> The defendant, a state legislator, had sponsored legislation permitting doctors who received a medical degree from a foreign school to practice medicine with a state-issued temporary permit while studying for a permanent license.<sup>193</sup> During a reelection campaign, McCormick contacted the lobbyist for the doctors and said that "his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything from the foreign doctors."<sup>194</sup> The lobbyist gave McCormick five cash gifts on the doctors' behalf, and the defendant did not list any of the payments on his campaign disclosure forms as required by state law.<sup>195</sup> The defendant argued that the payments were campaign contributions and therefore were not extorted under color of official right.<sup>196</sup>

The Court began its analysis by noting the central role donations play in the American electoral system and the problem with a broad criminal prohibition on extortion under color of official right:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain

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person cannot be convicted of extortion under color of official right."); *United States v. McClain*, 934 F.2d 822, 830 (7th Cir. 1991) (government cannot charge a private person with extortion under color of official right).

192. 500 U.S. 257 (1991).

193. *Id.* at 259.

194. *Id.* at 260.

195. *Id.* The state prohibited cash contributions in excess of \$50, W. VA. CODE § 3-8-5d (1990), and the doctors' organizations did not list the payments as campaign contributions in its record of expenditures.

196. *Id.* at 268.

property from another, with his consent, "under color of official right."<sup>197</sup>

The Court held that a Hobbs Act violation involving the payment of funds that are ostensibly campaign contributions requires proof that "the payments were made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act."<sup>198</sup> The Court noted that this was a special case because the defendant was an elected official, and that "if the payments to McCormick were campaign contributions, proof of a *quid pro quo* would be essential for an extortion conviction."<sup>199</sup>

*McCormick's* imposition of a *quid pro quo* element under the Hobbs Act is consistent with the requirements for proving a bribe. If extortion under color of official right is a form of bribery—it has the same structure as a bribe because the official conditions future action on the receipt of a payment—then the Court's imposition of a *quid pro quo* requirement is proper, even though the statute itself makes no reference to bribery or the elements of that crime. The Court sowed confusion, however, by noting that it was only deciding a campaign contribution case and not whether the *quid pro quo* element applied "in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value."<sup>200</sup>

The similarity between the Hobbs Act's extortion under color of official right provision and the bribery statute was illuminated by the Supreme Court's decision in *Evans v. United States*,<sup>201</sup> decided a year after *McCormick*. The defendant was an elected local official who took \$8,000 from an undercover agent who purported to seek assistance to rezone a tract of land, an issue that would come before the defendant for a vote.<sup>202</sup> Evans asserted that the funds were campaign contributions, and \$1,000 of the proceeds was in the form of a check payable to his campaign committee.<sup>203</sup> The Court rejected the argument that the Hobbs Act requires that an official make an affirmative inducement to qualify as extortion under color of official right.<sup>204</sup> In analyzing the statute, the Court viewed the wrongdoing as bribery, stating that "the wrongful acceptance of a *bribe* establishes all the inducement that the statute requires."<sup>205</sup> The Court's analysis in *Evans* makes it clear that the Hobbs Act parallels the crime of bribery by requiring proof that the parties reach an agreement, although that agreement need be neither express nor fulfilled for criminal liability.

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197. *Id.* at 272.

198. *McCormick*, 500 U.S. at 272 (emphasis added).

199. *Id.*

200. *Id.* at 274 n.10.

201. 504 U.S. 255 (1992).

202. *Id.* at 257.

203. *Id.*

204. *Id.* at 265-66

205. *Id.* at 266 (emphasis added).

For a Hobbs Act prosecution for public corruption, the question is what level of proof the government must introduce to establish the *quid pro quo* element when the payment may be a campaign contribution. In *McCormick*, the Court stated that the illegal exchange must involve "an explicit promise or undertaking" by the elected official to take action.<sup>206</sup> If by "explicit" the Court meant "express," then it imposed a significant, and perhaps insurmountable, evidentiary burden on the prosecutor. The dissenting opinion in the case pointed out that "[s]ubtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require."<sup>207</sup> In *Evans*, the Court found that the government met the *quid pro quo* requirement set forth in *McCormick* because there was proof that the payment was in exchange for the defendant's agreement to perform an official act, and "fulfillment of the *quid pro quo* is not an element of the offense."<sup>208</sup> In a concurring opinion, Justice Kennedy asserted that "[t]he official and the payer need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."<sup>209</sup>

Taken together, *McCormick* and *Evans* show that the Court incorporated the core element of bribery—the *quid pro quo*—as the key for corruption prosecutions of elected officials without going into detail whether bribery and extortion under color of official right were coterminous. The possibility that payments might be campaign contributions necessitated a limited application of the Hobbs Act, leading the Court to import the *quid pro quo* element from bribery to extortion prosecutions involving public officials. *McCormick*'s requirement that the official make "an explicit promise or undertaking" largely reiterates the *quid pro quo* element of a bribery prohibition, that there be an exchange in which each party understands that the payment is designed to influence a particular decision. *Evans* did not create a different standard but only emphasized that bribery does not require consummation of the exchange or proof that the parties entered into a binding agreement.<sup>210</sup>

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206. *McCormick*, 500 U.S. at 273.

207. *Evans*, 504 U.S. at 282 (Stevens, J., dissenting).

208. *Id.* at 268. (The Court stated, "We hold today that the Government need only show that a public official has obtained a payment to which he is not entitled, knowing that the payment was made in return for official acts.").

209. *Id.* at 274 (Kennedy, J., concurring).

210. See *United States v. Hairston*, 46 F.3d 361, 372 (4th Cir. 1995) ("Court wrote broadly enough to require proof of a *quid pro quo* in all cases charging extortion under color of official right."); *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* provided a gloss on the *McCormick* Court's use of the word 'explicit' to qualify its *quid pro quo* requirement."). The lower courts have not been unanimous in reading *McCormick* and *Evans* together, with some regarding *Evans* as governing cases in which there is no campaign contribution while viewing *McCormick* as imposing a higher standard in campaign contribution cases. See *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993). Although the Hobbs Act does not specifically proscribe bribery, the Court's decisions in *McCormick* and *Evans*

## 2. The Uneasy Coexistence of Anti-Corruption Law and Campaign Contributions

The Supreme Court's statement in *McCormick* that the government must prove an "explicit" agreement when the payment may be a campaign contribution does not appear to mean that the parties to the transfer have an express agreement, akin to a contract. Instead, the Court sent a signal that cases involving campaign contributions require special care, involving unequivocal corroboration of the corrupt nature of the exchange. Without unmistakable proof of an agreement, the criminal law impinges on the campaign finance system and creates serious doubt about the legality of contributions for candidates and contributors. The Court in *McCormick* was reluctant to extend a statute that, by its terms, did not expressly reach bribery of public officials to encompass "not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation."<sup>211</sup> The decision did not impose a greater evidentiary burden than the *quid pro quo* requirement of a bribery statute, but the thrust of the analysis made it clear that prosecutors and judges must tread carefully when the payments may be campaign contributions. The Court's reticence about extending the Hobbs Act should be equally applicable to a pure bribery prohibition, such as Section 201(b).

Donations are an important, even crucial, part of the election system in countries that rely on private funding of campaigns. The signal in *McCormick* to tread carefully reflects the concern that the inevitable clash of an anti-corruption statute with a core facet of the democratic system implicates significant constitutional issues. The Court took a similarly cautious approach to campaign finance legislation, finding that the likelihood that contributions will be corrupt, or appear corrupt, permitted legislatures to impose restrictions on contributions to candidates that would otherwise be protected by the First Amendment's right to political expression.<sup>212</sup> In *Buckley v. Valeo*, the Court stated that "[t]o the extent that large contributions are given to secure political quid pro quos from current and potential office holders, the integrity of our system of representative democracy is undermined."<sup>213</sup> The Court upheld limits on the amount individuals can contribute to campaigns, despite the First Amendment, on the ground that Congress could rightly conclude that in addition to bribery laws the "contribution ceilings were a necessary legislative concomitant to deal with the reality or

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incorporate bribery into extortion, so it is logical that the *quid pro quo* element, which is the key to proving bribery, would be the primary issue. The cases do not have different *quid pro quo* elements, but rather the Court emphasized that campaign contributions present a qualitatively different problem that requires a greater showing to demonstrate that the payment was not an acceptable donation but an illegal exchange.

211. *McCormick*, 500 U.S. at 272.

212. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

213. *Id.* at 26.

appearance of corruption inherent in a system permitting unlimited campaign contributions . . . .<sup>214</sup> Yet, the Court also invalidated certain limitations on campaign expenditures to support a candidate made by organizations operating independently of the campaign because there did not appear to be as great a possibility of corruption as with direct contributions.<sup>215</sup> Subsequent decisions reiterate the focus on corruption as the key to balancing the permissibility of limitations on campaign contributions and expenditures with First Amendment rights.<sup>216</sup>

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214. *Id.* at 28.

215. *Id.* at 46. The Court stated,

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

*Id.* at 47. The Court found that the government did not have a sufficiently strong interest in regulating the expenditures to overcome the First Amendment right to free speech of those subject to the limitation. The Court held that donating money to political campaigns is a form of speech protected by the First Amendment, *id.* at 14-15, so that any infringement on the constitutional right must be based on a significant governmental interest. The need to prohibit corruption was sufficient to uphold the contribution limits, but the lesser possibility of corruption for independent expenditures meant that the restriction was unconstitutional. The Court's acceptance of the possibility of corruption from campaign contributions has been criticized as unsupportable. Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 63 (1997) ("Money's alleged corrupting effects are far from proven . . . . The anticorruption rationale fails to justify additional regulation of campaign speech and contributions.").

216. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 616 (1996) (independent expenditures by state political party cannot be restricted because the Court was "not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction."); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding state restriction on expenditures of corporate funds on behalf of candidates because the regulation "aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."); *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 259 (1986) (enforcement action against non-profit advocacy organization for violating federal limitation on expenditures by corporations was unconstitutional because such organizations "do not pose that danger of corruption."); *Fed. Election Comm'n v. Nat'l Conservative Action Comm.*, 470 U.S. 480, 501 (1985) (independent expenditures by political action committee is unconstitutional because "the effort to link either corruption or the appearance of corruption to independent expenditures by PACs, whether large or small, simply does

The Court's reliance on corruption as the foundation for permissible campaign finance regulation is based on its generalized belief about the political system, that large cash contributions may lead to *quid pro quo* arrangements that are unlikely to be exposed, thereby allowing prophylactic rules to limit contributions because of the appearance of corruption. The most serious form of corruption is bribery, and the Court adopted the language of that prohibition by focusing on the possibility of a *quid pro quo* between donor and candidate as the core form of misconduct justifying limited restrictions on political donations.<sup>217</sup> Nevertheless, the Court accepted the fact that contributions can buy influence with an elected official because political discourse—and the money necessary to publicize a position—is fundamental to democracy. The possibility that a donor might gain access to a candidate alone is insufficiently corrupt to override the importance of people's rights to make campaign contributions as an expression of their position.

The notion of corruption advanced in the campaign finance area is quite similar to the message in *McCormick*, an approach that is more a pragmatic accommodation of campaign contributions than a principled analysis of what is and is not corrupt.<sup>218</sup> For criminal prosecutions involving payments that are even arguably campaign contributions, the government must establish the *quid pro quo* so clearly that there is no possible doubt that the transaction was corrupt. Yet, unlike the explicit focus on corruption as the guiding principle in the campaign finance regulation cases, the Court took only an indirect approach in *McCormick* and *Evans* to describe the requirements for criminal liability. After those decisions, it is difficult to explain precisely what must be proven for a bribery prosecution of an elected official when the payment may be a campaign contribution. The Hobbs Act does not even mention bribery, therefore it is not surprising that the leading cases on what constitutes a violation are unclear on exactly how campaign contributions should be accommodated to the criminal prohibition. Although the Supreme Court acknowledged the role of the Hobbs Act as an anti-corruption statute, its analysis reflects the broader struggle to reconcile the needs of the election system with an anti-corruption regime.

Much like United States law, international efforts to combat corruption do not expressly deal with campaign contributions, despite the importance of the subject for nations that rely on private financing of political campaigns. While a bribe may be disguised as a campaign contribution, democracies whose election

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not pass this standard of review.”).

217. See Brown, *supra* note 154, at 803. “The corruption that bothered the Court [in *Buckley v. Valeo*] was *quid pro quo* corruption. It is true that the opinion depicted campaign contributions as less ‘blatant’ than bribery, but the very use of the term *quid pro quo* reinforces the similarity” between corruption and bribery. *Id.*

218. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1709 (1993). “As to *McCormick*’s explicit *quid pro quo* requirement where campaign contributions are involved, Justice White’s argument is neither textual nor historical. Rather, it’s a pragmatic and logical argument . . .” *Id.*

systems depend on private, voluntary donations to finance campaigns cannot prohibit or even unduly restrict such payments. Campaign finance can be subject primarily to administrative regulation, as in the United States, but even there the criminal prohibition remains as an important means to deter and police abuses of the system. Where anti-corruption law fails, in both the United States and in the International Conventions, it is the absence of any acknowledgment of the need to find a balance between the criminal law and acceptable campaign finance practices that permit donors to purchase access to and influence with a candidate.

Campaign contributions are, by their nature, given to influence or reward the candidate. The Supreme Court's hesitancy in applying the Hobbs Act to purported campaign contributions without proof of an "explicit" agreement indicates that, at a minimum, the criminal law should only be applied when there is strong proof of a bribe and not just a gratuity. It may be that the criminal law cannot—or should not—reach campaign contributions that effectively buy access to an elected official because that is the price for having elections financed by voluntary contributions. In other words, while *quid pro quo* arrangements should be prosecuted, the criminal law is not equipped to ensure equality among donors or the overall fairness of the campaign finance system. Although wealth may give a certain class of donors greater access to officials, that fact alone does not make a contribution corrupt unless the law clearly limits the amount or source of donations. Those types of prohibitions, however, are ill-suited to a broad criminal provision that cannot be written to distinguish liability based on the size or source of contributions. Instead, more detailed campaign contribution limitations should be embodied in a system designed by the legislature to regulate administratively the methods of financing political campaigns.

Unlike more common examples of bribery, the *quid pro quo* involving campaign contributions need not personally enrich the official because the subversion of the political process is the harm from the exchange. Corruption in the context of campaign contributions is qualitatively different from payments to non-elected officials because the cost to the system is not the official's personal gain—beyond election or retention of office—but the perversion of the representative's responsibility to advance the common good. Absent substantial changes in the campaign finance system, a broad anti-corruption law should only reach those instances of a clear *quid pro quo* arrangement involving a trade of the elected official's vote or support for the donation.

One facet of campaign finance regulation should include some demarcation between criminal acts and administrative violations. The accommodation of the political reality of campaign contributions with an anti-corruption law should be explicit and not left to guesswork about whether a criminal provision applies to a purported donation. Although elected officials should not be permitted to label every payment a campaign contribution, and thereby exempt themselves from criminal prosecution, broadly written bribery and gratuity provisions that do not incorporate some consideration of political donations create uncertainty about an important facet of the political system. It is

a delicate balance, but at a minimum anti-corruption law should require clear proof of a *quid pro quo* and not simply that a donation was given to provide the donor access to the official.

### C. Fraud as an Anti-Corruption Device

Bribery is the core form of corruption, but a *quid pro quo* exchange is not the sole method by which officials misuse public authority. The types of corruption reviewed to this point largely involve a two-party exchange, whether it is bribery or illegal gratuities. The Hobbs Act model of extortion as a form of bribery involves the same structure because there are two parties to the transaction, although only the public official acting under color of official right is liable for criminal prosecution and the payer is the victim. Yet, corruption is never as simple, or necessarily as brazen, as the offer and receipt of a payment in exchange for official action. Public authority can be misused in a variety of ways, and limiting an anti-corruption regime to just bribery and similar exchanges would miss a broad array of conduct that results in personal enrichment through the exercise of that authority. In the United States, the method of choice for attacking public corruption in a wide array of situations—including bribery and gratuities—is the Mail Fraud statute,<sup>219</sup> a provision celebrated and assailed as one of the most malleable provisions in all of federal criminal law.<sup>220</sup>

The Mail Fraud statute was first adopted in 1872 to prevent individuals from using the post office to perpetrate frauds on unsuspecting victims.<sup>221</sup> The

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219. 18 U.S.C. § 1341 (2000). A companion provision, the Wire Fraud statute, 18 U.S.C. § 1343 (2000), applies the same analysis to fraudulent schemes involving the use of interstate wire, radio, or television transmissions. See *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

220. See Alex Hortis, Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. REV. 1099, 1113-14 (1999) ("[T]he aspect of the mail fraud statute that has received the most criticism, its broad malleability, has also been cited as its greatest value.").

New Zealand has a statute that is strikingly similar to the mail fraud statute, imposing liability on any person acting with "intent to defraud" who uses "any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration . . ." Crimes Act 1961 § 229A(b) (N.Z.). The requirement that a document be used has been described as "colourless," much like the mailing element of the Mail Fraud statute, and the provision has been extended "into an uncharacteristically broad crime of fraud." James Mullineux, *A Comprehensive Crime of Fraud*, 10 CRIM. L.F. 281, 283-84 (1999).

221. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323; see Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 442 (1995) ("The language of the original mail fraud statute, however, appears designed to protect the post office from being abused as part of a fraudulent scheme."). The sponsor of the legislation in the House of Representatives stated



statute prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" by which the defendant uses the post office or an commercial delivery service as a means to execute the fraudulent scheme.<sup>222</sup> There is no definition in the statute of what constitutes a "scheme or artifice to defraud," although fraud is a form of larceny, a common law crime requiring proof that the defendant took possession of property with an intent to steal.<sup>223</sup> Unlike common thefts in which the defendant takes property from the victim, fraud involves a deceit that causes the victim to part with the property voluntarily.<sup>224</sup> The Mail Fraud statute is broader than the common law offenses involving deception—larceny by trick, embezzlement, and false pretenses—because the statute reaches any *scheme* to defraud, not just false statements of past or present facts that result in a loss.<sup>225</sup> As

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that the law was targeted at "thieves, forgers, and rapsallions generally, for the purposes of deceiving and fleecing the innocent people of the country." CONG. GLOBE, 41st Cong., 3rd Sess. 35 (1870) (statement of Rep. Farnsworth).

222. 18 U.S.C. § 1341 (2000):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

223. See DRESSLER, *supra* note 58, § 32.02[A] at 546 ("Common law larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.").

224. See Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 737 (1999) ("The 'classic definition' of fraud in English law focuses on 'deceit' or 'secrecy.' In United States federal criminal law the term is often synonymously used with the term 'deceit.'").

225. Common law crimes involving fraud required proof of a misstatement or omission regarding a past or present fact, and not a matter of opinion ("mere puffery") or a

the Supreme Court stated, "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"<sup>226</sup> Yet, like any larceny, fraud involves a gain to the defendant and a loss to the victim.

The Mail Fraud statute remained largely confined to con artists and other types of chicanery<sup>227</sup> until the early 1970s. At approximately the same time that the Hobbs Act became a tool for fighting corruption, federal prosecutors applied the Mail Fraud statute to reach abuses of authority that went beyond the types of confidence games and scams that were previously the target of prosecution.<sup>228</sup> The provision does not specifically mention corruption, but prosecutors argued that a scheme to defraud includes misuse of authority—constituting a breach of fiduciary duty—for personal gain. For public officials, the government asserted that the failure to disclose misconduct deprived the citizenry of its right to honest and faithful service from those who exercise government authority. Unlike the classic fraud in which a defendant's statements trick the victim out of money or property, the fraud by a public official results in the loss of the intangible right to the fair exercise of authority that violates the official's duty to put the public interest before his own personal interest.<sup>229</sup>

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statement of future conduct, such as a promise to pay at a later date that is ultimately not fulfilled. See DRESSLER, *supra* note 58, § 32.10[B] at 564-65.

226. *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

227. See, e.g., *Schmuck v. United States*, 489 U.S. 705 (1989) (used car dealer who rolled-back odometers on cars before selling to dealers); *United States v. Sampson*, 371 U.S. 75 (1962) (fraudulent advanced-fee loan scheme); *Pereira v. United States*, 347 U.S. 1 (1954) (victim tricked into marrying one of the defendants and providing funds to husband and his partner for bogus investments).

228. See Henning, *supra* note 221, at 460-61 ("Beginning in the 1970s, federal prosecutors began using the mail fraud statute to attack political corruption at the federal, state, and local level."); Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 321-22 (1983) (reviewing history of federal effort targeting corruption of state and local officials including direction from President Ford to focus prosecutorial resources on local corruption).

229. See Henning, *supra* note 221, at 461 ("The deprivation was of an intangible right, not a property right, and the scheme involved the official's breach of a fiduciary duty by failing to disclose the corrupt activity."). One of the earliest prosecutions of a high government official under the Mail Fraud statute was the case against former Maryland Governor Marvin Mandel. In upholding the conviction, the Fourth Circuit stated that the statute reaches "any scheme that is contrary to public policy [or] conflicts with accepted standards of moral uprightness, fundamental honesty, fair play, and right dealing." *United States v. Mandel*, 591 F.2d 1347, 1360-61 (4th Cir. 1979); see also Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 8-9 (1998) ("Public officials who fail to provide honest services are said to defraud the citizens and the state of their right to receive such services from those officials. The obligation to provide honest services, and the intangible right to that service, depend on the existence of a special

The intangible rights theory provided a means to reach misconduct by public officials and even those who affected the exercise of government authority but who did not hold any public office. In *United States v. Margiotta*,<sup>230</sup> the government successfully prosecuted the head of a local political party who controlled the apportionment of government insurance contracts and received kickbacks from agencies that received the contracts. The Second Circuit upheld the conviction on the ground that the local government had the right to have its affairs "conducted honestly, free from corruption, fraud and dishonesty" and that the defendant owed a duty to act honestly even though he held no official position.<sup>231</sup> This broader approach to what constitutes a fraudulent scheme included those in the private sector who breached a fiduciary duty to act honestly and not favor their own interests over those of an employer or client. In one case, the government successfully prosecuted a state senator, not for conduct related to his elected office, but because he failed to disclose to a client of his law firm that he was working for a competitor, a violation of his fiduciary obligation as a lawyer to his client.<sup>232</sup>

There was almost no limit on the application of the intangible rights theory to prosecute misuse of authority or failure to disclose conflicts of interest, until the Supreme Court rejected the theory in *McNally v. United States*.<sup>233</sup> The scheme in *McNally* involved a state officer and a powerful local party official who directed the award of state insurance contracts to companies owned by their friends and political allies, who returned a portion of the insurance premiums paid by the state to the defendants.<sup>234</sup> The government charged the defendants under the Mail Fraud statute for engaging in a scheme to defraud the citizens of the state their right to honest services.<sup>235</sup> The government did not allege that the state lost any money from the award of the contracts, and it did not appear that the state paid any higher premiums for the insurance, or that the contracts were not completely performed.<sup>236</sup> The Court rejected the intangible rights theory, holding

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relationship between the parties.").

230. 688 F.2d 108 (2nd Cir. 1982).

231. *Id.* at 114.

232. *United States v. Bronston*, 658 F.2d 920 (2nd Cir. 1981); see John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 434 (1998) (Decision in *Bronston* "crossed a critical threshold: before it, cases in which there was only a conflict of interests, but neither a transaction between the fiduciary and the client nor any misappropriation of information or property by the fiduciary from the client, had been considered merely 'constructive fraud,' which did not amount to the type of 'actual fraud' that transgressed the federal mail and wire fraud statutes.").

233. 483 U.S. 350 (1987).

234. *Id.* at 352-55.

235. *Id.*

236. *Id.* at 360-61; see Hortis, *supra* note 220, at 1100 ("The state's losses as a result of the scheme [in *McNally*] were unclear: The legislature had already set aside a predetermined amount for insurance, the premiums charged were no higher than those of other insurance companies, and the insurance company provided full insurance coverage to

that the Mail Fraud statute requires proof that the defendant's scheme involved a deprivation of money or property.<sup>237</sup> In reaching that conclusion, the Court stated that "rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the Mail Fraud statute] as limited in scope to the protection of property rights . . . ."<sup>238</sup>

Congress quickly reversed the Court's rejection of the intangible rights theory when it adopted Section 1346, which defines a scheme to defraud as including "a scheme or artifice to deprive another of the intangible right of honest services."<sup>239</sup> Although the legislative history of this provision is sparse, it appears that Congress intended to restore the intangible rights theory to the Mail Fraud statute and permit prosecutions of government officials and private actors for abuses of a position of authority.<sup>240</sup> Section 1346 marked an important change in the Mail Fraud statute by making explicit its application as an anti-corruption measure.

The appeal of the statute, especially after the adoption of Section 1346, is that the provision does not require the government to establish a *quid pro quo* or other linkage between the misconduct and a payment. The Mail Fraud statute is not limited to bribery or its structural equivalents, gratuities and extortion, so that it covers a broader range of misconduct by public officials. The question is what must the government prove to establish a scheme to defraud. As with any larceny, common law fraud involves conduct—a deception or misrepresentation—that causes a loss to the victim and a corresponding gain to the defendant. Section 1346 works a fundamental change on the crime of fraud in two ways. First, the conduct element is an omission, *i.e.* the official's failure to disclose the corrupt conduct that constitutes a breach of fiduciary duty owed to the public or one's employer.<sup>241</sup> If an official has a personal interest in a decision or exercise of governmental authority, he has a duty to disclose that interest and refrain from participating in the process. Reaching a decision tainted by undisclosed self-interest violates the official's duty to serve the public and constitutes the requisite deception for a scheme to defraud. Second, by focusing on the right of honest

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the state.").

237. *McNally*, 483 U.S. at 360-61

238. *Id.* at 360.

239. 18 U.S.C. § 1346 (2000).

240. See 2 WELLING ET AL., *supra* note 180, § 17.19 at 34 ("[T]he lower courts have agreed that in enacting § 1346 Congress overruled *McNally* and endorsed or reinstated the pre-*McNally* cases that defined the concept of honest services."); see also Henning, *supra* note 221, at 463 ("As with other amendments to the mail fraud statute, the legislative history of this provision is sparse, although one sponsor stated that Congress intended to restore the law to its pre-*McNally* state.").

241. See Moohr, *supra* note 229, at 19 ("Deception is found in the failure to disclose the breach. It is fundamental to the offense that the actor owes and breaches fiduciary duties of loyalty and honesty.").

services as the object of the fraudulent scheme, Section 1346 means that the defendant's gain from the misconduct need not correspond to the victim's loss, and indeed there does not have to be any pecuniary or other tangible loss to support a conviction for defrauding the public of its right to honest services. Instead, the defendant's personal enrichment, traceable to the breach of fiduciary duty, is enough for a violation.<sup>242</sup>

The crime is well-suited to public corruption prosecutions because all officials have a fiduciary duty to put the interests of the public ahead of their own personal advantage. Proof of a scheme involving deceit that results in a substantial gain to the official is sufficient even without a corresponding loss attributable to any particular victim. The factual situation leading to the indictment in *McNally* provides a good example of the applicability of the Mail Fraud statute to public corruption that might otherwise escape prosecution under a bribery provision. The defendants awarded the insurance contracts to their friends and political cronies, a fact not disclosed prior to the award. Further, they were personally enriched by the payments from the insurers who received the contracts, another fact not disclosed. Taken together, the defendants' conduct would establish a scheme to defraud because the non-disclosure of control of the process and personal benefit from the transaction would breach a fiduciary duty, thus constituting a scheme to defraud. The absence of evidence that the state overpaid for the insurance or did not receive full coverage is irrelevant to the mail fraud analysis because the undisclosed misuse of office for personal gain establishes the scheme to defraud; the defendant's gain from a scheme need not correspond to the victim's loss, unlike more traditional forms of larceny.<sup>243</sup>

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242. See *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) ("No case we can find in the long history of the intangible rights prosecutions holds that a breach of fiduciary duty, without misuse of one's position for private gain, is an intangible rights fraud."); 2 WELLING ET AL., *supra* note 180, at § 17.19(a)(i) at 38 ("The enactment of § 1346 provides strong support for the view that it is the deprivation of the honest service by the government official—regardless of any financial loss—that constitutes the fraud under either the mail or wire fraud statute[s]."); see also Moohr, *supra* note 229, at 25 ("The statutory harm is the loss of honest services, but the actor's gain is likely to be some monetary award from a third party who was not deceived. Honest services fraud does not require symmetry between the victim's loss and the actor's gain."); Hortis, *supra* note 220, at 1108 ("The rise of the [intangible rights] theory can be attributed, in part, to a serious evidentiary problem in public corruption cases where a specific harm was difficult to ascertain.").

243. See Moohr, *supra* note 229, at 48 ("In these frauds, the defendant uses his or her position to realize a goal of obtaining some benefit. Using the actor's ultimate objective—to accept a bribe, to convert property to his or her own use, or exploit a conflict of interest—focuses the inquiry on the defendant's purpose, whether that objective causes a loss to the victim of the deceit or a gain or a benefit from a third party."); see also Coffee, *supra* note 232, at 451 ("[T]he 'actual harm' standard [for Mail Fraud statute prosecutions] works relatively poorly in the case of the public fiduciary . . . because we cannot meaningfully measure 'harm' in this context (at least in the same concrete way that we can

The scheme in *McNally* involved a clear abuse of public authority, but prosecution under the bribery or extortion provisions may have been difficult. The payments by the insurance companies were directed to another company indirectly controlled by the defendants, and the government may not have had proof of the *quid pro quo* arrangement that conditioned award of the contract to the payment of a portion of the premiums. Under the Hobbs Act, the fact of public office might have been sufficient to prove the extortion, but the absence of evidence of the dealings between the defendants and the insurance companies would have made it more difficult to establish that the payments were extorted under color of official right. However, the Mail Fraud statute, after the adoption of Section 1346, shifts the focus away from the offeror of the payment and asks whether the public official abused a position of trust leading to a personal profit from the transactions. Proving a bribery *quid pro quo* may be difficult, but a mail fraud prosecution can rest on the official's misconduct that resulted in the amassment of personal wealth.

By moving outside the two-party exchange paradigm of bribery, the Mail Fraud statute addresses different types of corruption that involve the abuse of official authority. Professor Kofele-Kale described a form of corruption called "indigenous spoilation where there is only a taker, a corrupted individual but no givers or corruptors."<sup>244</sup> He related a scenario in which the wife of a president of a country demands large sums of money from the central bank to fund personal shopping trips with no claim of right to the funds or intention to repay them; the bank official provides the funds out of fear of losing a job. There is no overt threat, or even direct pressure, sufficient to establish extortion, and the payment is certainly not a bribe because there is no *quid pro quo*. Yet, the wife is abusing the president's authority for personal gain.

*United States v. Rostenkowski*<sup>245</sup> presents a similar pattern of misconduct found sufficient to charge a violation of the Mail Fraud statute. The defendant was a powerful Congressman who had staff members engage in his personal business, directed employees to secretly pay him a portion of their salary, and took funds from his office postage account for personal use.<sup>246</sup> None of the acts involved bribery, but the Mail Fraud statute reached this conduct because the Congressman abused public authority for personal gain.<sup>247</sup>

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in private economic transactions where there is a gain or loss), conflicts of interest and side payments need to be disclosed or forbidden as a prophylactic matter.").

244. Kofele-Kale, *supra* note 15, at 158. He criticizes the anti-corruption conventions because the *quid pro quo* "view of corruption as involving a bribe giver and bribe taker may have symmetrical appeal but does not account for the entire range of corrupt behavior." *Id.*

245. 59 F.3d 1291 (D.C. Cir. 1995).

246. *Id.* at 1294-96.

247. *Id.* at 1294-95. The government charged Congressman Rostenkowski with four counts of mail fraud for the overall scheme, and individual charges of embezzlement and false statements involving the specific forms of misconduct.

The malleability of the provision has made it useful in a number of cases involving the misuse of the office holder's stature to manipulate the exercise of governmental authority. A public official who engages in influence-peddling by offering his authority to intervene in other offices to benefit those willing to pay breaches the duty to put the public interest before his own personal enrichment. This situation is similar to influence buying by those who provide an official with a gratuity, but the deception constitutes the criminal violation and not proof of a *quid pro quo* arrangement.<sup>248</sup> A local government may become so corrupt that it becomes common knowledge that anyone wishing to do business in the area or to provide goods and services to the government must make payments to those who control the reigns of power.<sup>249</sup> Proof of bribery or extortion may be difficult if the corruption is so pervasive that it is a routine matter, with no need for a demand or an expression of what is expected in return for the payment. In that situation, the Mail Fraud statute may be particularly effective at prosecuting the misconduct because the focus is on the official's conduct in the exercise of authority and not a particular transaction's mechanics.<sup>250</sup>

There is no exact counterpart to the Mail Fraud statute in the International Conventions, although Article VI(1)(c) of the IACAC contains a similarly broad anti-corruption provision that covers much of the same misconduct. Article VI(1)(c) prohibits an official "in the discharge of his duties" from "illicitly obtaining benefits for himself or for a third party," and Article XI prohibits personal gain through conduct involving a misuse of government property and information for the official's own advantage. These provisions reach beyond bribery to conduct that constitutes a breach of the right of honest services resulting in personal enrichment. The IACAC's focus on the misuse of office is similar to the breach of the fiduciary duty arising from the failure to disclose the misconduct that is required for mail fraud. Each makes the official's improper gain a requirement for finding criminal liability. Similar to federal law, the IACAC scattered its anti-corruption provisions in different parts of the

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248. See *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("When the prosecution can prove the other elements of the wire fraud offense, taking kickbacks or benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official's honest services because '[i]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated.'" (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996))).

249. See, e.g., *United States v. Dischner*, 960 F.2d 870, 875 (9th Cir. 1991) (defendants controlled award of all contracts for municipality in Alaska and received kickbacks from "ten percent" companies known to pay defendants 10% of gross revenues; "As one witness testified at trial, if you wanted to work on the North Slope [in Alaska], 'you had to pay Lew Dischner.'").

250. See *Hortis*, *supra* note 220, at 1112-13 ("Distinguishing illicit corrupt activities from noncorrupt legal activities can be extraordinarily difficult. Because corruption and fraud in government elude easy definition, it is often more useful to examine government officials' conduct on a case-by-case basis than to draft statutes to capture specific acts.").

Convention and did not adopt a single approach to misuse of office that falls outside the bribery paradigm. The Council Convention explicitly adopts only one provision, on Trading in Influence, aimed at the misuse of office outside the bribery context.<sup>251</sup> Even that provision follows the bribery model by focusing on the two-party arrangement where the official influences the affairs of another office. The OECD Convention is the narrowest of the three, applying only to bribery of foreign officials and not the more subtle forms of corruption. The OECD's narrow goal seeks to minimize interference with domestic law outside the context of international business transactions, so its exclusive focus on bribery is designed to address the primary harm from corruption in that area and not the broader types of misconduct that can occur in a political system.<sup>252</sup>

## V. CONCLUSION: TOWARD A UNIFIED CRIME OF CORRUPTION

The core form of corruption is bribery, and there is little dispute that the elements of the offense require a *quid pro quo* arrangement for a particular exercise of official authority. The criminal prohibition reaches both the offeror ("active corruption") and the recipient ("passive corruption"). The International Conventions do not consider the role of gratuities and how influence buying fits in under the bribery proscription. Unlike a bribe, a gratuity may be given after the official decision, which means there would be no *quid pro quo* even though the official received a personal benefit from the exercise of official authority. Moreover, before the fact gifts designed to buy access to an official may be as corrupting as an after the fact gift. After *Sun Diamond*, the law in the United States has a gap that permits gifts to an official before a decision—unless they constitute a bribe—but prohibits gifts given after a decision if the payment is "for or because of" the official act. Gratuities present a difficult problem for criminal prohibitions because gifts come in all sizes and may be given for a variety of reasons, not all of which are corrupt or suspect. Yet, buying access to officials responsible for creating and implementing policy is certainly questionable, and often may be corrupt. The development of an international approach to corruption should consider explicitly the question of whether and how to prohibit gratuities.

Additionally, the International Conventions do not address campaign finance issues, and the criminal law application to donations to candidates for elective office. A campaign contribution by its nature is designed to influence or reward the recipient, and contributors often expect that they will receive a hearing

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251. The Council of Europe adopted the Convention on the Protection of the European Communities' Financial Interests on July 26, 1995, that required the member states to adopt legislation targeting fraudulent conduct involving funds of the European Union. The Council adopted a protocol expanding the Convention to cover corruption on September 27, 1996, which served as the model for the Council Convention adopted in 1999. The Council Convention did not include the fraud provisions of the earlier Convention.

252. See *supra*, text at note 91.



from the official, and that the official will consider their interests in reaching a decision. At the same time, the campaign finance system can provide an effective cover for bribes and other illicit transactions. Simply labeling a payment as a campaign contribution should not confer a form of immunity on the payer or the recipient. Nations should consider the role of campaign contributions in defining the outer limits of anti-corruption law. The United States has taken an indirect approach to the issue, with the Supreme Court signaling to prosecutors that they should act cautiously when considering the application of the criminal law to payments that are at least arguably campaign contributions.<sup>253</sup> The Court did not find campaign contributions completely outside the criminal prohibition on bribery, but required that proof of corruption be clear from the circumstances.<sup>254</sup> As nations modify their domestic law, they should review the issue of campaign finance regulation and the role of the criminal law in order to understand the relationship between the rights of citizens to donate money to their chosen candidate and the need to prosecute corruption.

Once one looks beyond the core crime of bribery in the International Conventions, the approaches to corruption diverge. The IACAC takes an aggressive position that reaches a wide variety of conduct involving the misuse of office for personal gain. The United States seems to have missed the import of the language of Article VI(1)(c) by viewing it as a type of attempt crime and not a separate form of corruption. The Mail Fraud statute covers much of the same misconduct as Article VI(1)(c). Its focus on the official's personal gain through the exercise of authority is an important expansion in the definition of corruption beyond the bribery paradigm. The Council Convention identifies only one specific crime—Trading in Influence—that would not constitute bribery, and even there the definition is not entirely clear. The OECD Convention focuses exclusively on criminalizing bribery by domestic entities involved in business transactions outside the country, a potentially revolutionary step in addressing corruption across national borders. Unlike the Council Convention and IACAC, the OECD Convention does not seek to attack corruption across the board but only in a narrower range of economic arrangements.

United States law has developed haphazardly in addressing corruption, but through the Mail Fraud statute, particularly Section 1346, it reaches most forms of misconduct by public officials resulting in personal enrichment. The right of honest services provision focuses on identifying a breach of the official's duty that constitutes a deception, and the personal benefit gained from the breach. The Mail Fraud statute provides an effective tool for prosecuting public corruption because it builds on the public's right to have official authority exercised properly, and any failure to put the public's interest ahead of the official's own interest may result in criminal liability if the official receives a personal benefit. Unlike the two-party transaction in bribery, the Mail Fraud statute reaches the myriad of

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253. See *McCormick v. U.S.*, 500 U.S. 257 (1991).

254. *Id.* at 275-76.

ways that government authority can be used to personally enrich individuals. The international campaign should encompass added forms of corruption that are as harmful as a bribe but do not fit within the two-party paradigm of the *quid pro quo* exchange involving the offer and acceptance of a benefit. Betrayal of the public trust is not limited to just bribes, but moves through the concentric circles of gratuities, influence peddling, kickbacks, and misuse of authority for personal enrichment that undermines the authority of governments.