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When Does Unethical Become Criminal?: Interpreting the Gratuity Provision of 18 U.S.C. Sec. 201. United States v. Sun-Diamond Growers of California

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CASENOTE

WHEN DOES UNETHICAL BECOME CRIMINAL? INTERPRETING THE GRATUITY PROVISION OF 18 U.S.C. § 201

United States v. Sun-Diamond Growers of California[1]

I. INTRODUCTION

As another season of political campaigning begins, so does renewed public discussion of campaign reform and political honesty. This Supreme Court decision provides considerable guidance for the interpretation of 18 U.S.C. § 201(c)(1)(A), a criminal statute concerning gift giving to public officials.

The importance of the gratuity statute cannot be underestimated because "political corruption investigations that initially appear to involve bribery often conclude with gratuities convictions, if they are prosecuted at all."[2] The gratuity statute is an important tool to combat political corruption and in *U.S. v. Sun-Diamond*, the Supreme Court took an important step in clarifying the requirements necessary for a conviction.

II. FACTS AND HOLDING

On September 9, 1994, the United States Court of Appeals for the District of Columbia Circuit appointed Donald C. Smaltz to the position of Independent Counsel.[3] His job was to investigate whether Secretary of Agriculture Alphonse Michael Espy violated federal law by accepting improper gifts from organizations or individuals with business matters pending before the Department of Agriculture.[4] In December 1994, the United States Court of Appeals for the District of Columbia Circuit convened a grand jury.[5] The grand jury returned an indictment against Sun-Diamond Growers of California, an agricultural cooperative, alleging that the defendant had unlawfully provided $9,000 worth of gifts[6] directly or indirectly, to Secretary Espy, in violation of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A).[7] The indictment further alleged that Sun-Diamond devised and executed a scheme to make an unlawful corporate contribution, in the name of another, in the amount of $4,000 to a federal candidate for office, in violation of 2 U.S.C. §§ 441b(a) and 441(f).[8]

These indictments both alleged that there were two matters of significant economic interest to Sun-Diamond pending before the Department of Agriculture and Secretary Espy.[9] In 1992, the EPA announced plans to promulgate a rule that would phase out and ultimately ban the use of methyl bromide.[10] Methyl bromide was a pesticide used by certain Sun-Diamond cooperative members. Because they lacked a viable alternative, these members were concerned about the

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[1] 526 U.S. 398 (1999).

[2] George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEORGETOWN L.J. 2045, 2049 (1998).

[3] United States v. Sun-Diamond Growers of California, 941 F. Supp. 1262 (D.D.C. 1996).

[4] *Id.*

[5] *Id.*

[6] *Id.* Count I alleged that Sun-Diamond expended, over a fourteen-month period, $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, approximately $2,427 for luggage, approximately $665 for meals, and approximately $524 for a framed print, packing for the print, and a crystal bowl. Count II alleged that Sun-Diamond also expended $3,100 to Secretary Espy's girlfriend, Patricia Dempsey, to pay for the cost of an airplane ticket that enabled her to accompany him to a trade association conference in Greece.

[7] 18 U.S.C. § 201(c)(1)(A) (1994) provides:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned not more than two years, or both.

[8] *Sun-Diamond Growers*, 941 F. Supp. at 1265. This charge was contained in Counts III through IX and the alleged beneficiary of this unlawful scheme was Henry Espy, Secretary Espy's brother, during his unsuccessful campaign for the congressional seat Secretary Espy vacated when he became Secretary of Agriculture.

[9] *Id.* at 1265.

[10] *Id.* at 1266.

economic impact of this ruling.[11] As a result, Sun-Diamond actively lobbied the Department of Agriculture to persuade the EPA to delay promulgating the rule.[12] They also sought to have the Department of Agriculture increase its funding for research investigating alternatives to methyl bromide.[13] The second matter of great interest to Sun-Diamond that was pending before Secretary of Agriculture Espy was the administration of the market promotion program ("MPP") grant fund.[14] When Congress enacted budget legislation that potentially limited, even eliminated, the MMP grants Sun-Diamond could receive, Sun-Diamond lobbied Secretary Espy to adopt regulatory definitions that would allow them to continue receiving the MMP grants.[15]

Sun-Diamond moved to dismiss the indictment, arguing the charge which alleged a violation of the gratuity statute failed to allege that 1) Sun-Diamond provided "things of value" to Secretary Espy; and 2) Sun-Diamond rewarded Secretary Espy for an act he had already performed or had committed himself to perform. They also contended that the allegations set forth did not distinguish between innocent gift giving and illegal gratuities.[16] The United States District Court for the District of Columbia denied the motion and held that the gratuity statute did not require an indictment to allege a nexus between provision of things of value and a specific official act performed or committed to be performed by the official. Rather, the statute only required that the provider of the gratuity have matters pending within purview of the official receiving gratuity.[17] The court also held that the companionship of Espy's girlfriend provided by Sun-Diamond's gift of an airplane ticket, constituted a "thing of value."[18] Subsequently, the court convicted Sun-Diamond of violating the gratuity statute, committing wire fraud, and making illegal campaign contributions.[19]

Sun-Diamond filed a post-verdict motion for acquittal and alleged that there was insufficient evidence to support the wire fraud convictions and that the corporate officer acted to further corporate interests when he made illegal campaign contributions.[20] The district court held that the evidence was sufficient and the motion for judgment of acquittal was denied.[21]

Sun-Diamond appealed their conviction arguing, among other things, that the gratuity statute required the government prove a nexus between each unauthorized gift and some specifically identified official act, performed or hoped to be performed, for which the gift was given.[22] The Court of Appeals for the District of Columbia agreed and, while it affirmed much of the trial court's decision, it reversed and remanded Count I—the violation of the gratuity statute—for a new trial.[23] The court held that the Government failed to prove this nexus in the indictment and that the trial court's charge allowed the jury to convict on a theory precluded by the statute.[24] Specifically, the court rejected the Government's interpretation of 18 U.S.C. § 201(c)(1)(A), which stated that "gifts motivated solely by the recipient's official position may be illegal gratuities."[25] The court held that case precedent and most importantly, the language of the statute required a link between the unauthorized gift and a specific, concrete official act.[26] Because the Government did not prove either that a link existed or that there was requisite intent, the trial court interpreted the statute too broadly and the jury instructions and the conviction were fatally flawed.[27] The court also disagreed with Sun-Diamond's conclusion that this error was sufficient for an acquittal, but the court agreed that the jury charge on the gratuity counts was in error and required a remand for a new trial.[28]

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[11] *Id.* at 1265-66.
[12] *Id.* at 1266.
[13] *Id.* at 1266.
[14] United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998).
[15] *Id.* at 964.
[16] United States v Sun-Diamond Growers of California, 941 F.Supp. 1262 (D.D.C. 1996).
[17] *Id.*
[18] *Id.*
[19] U.S. v Sun-Diamond Growers of California, 941 F.Supp. 1262 (D.D.C. 1996).
[20] U.S. v. Sun-Diamond Growers of California, 964 F.Supp. 486 (D.D.C. 1997).
[21] *Id.*
[22] U.S. v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998).
[23] *Id.* at 977.
[24] *Id.*
[25] *Id.* at 968.
[26] *Id.* Specifically the "for or because of any official act" clause.
[27] *Id.* at 965.
[28] *Id.*

The Supreme Court granted certiorari limited to the issues arising under 18 U.S.C. § 201, specifically: how to distinguish between the bribery and gratuity provisions; that the "link requirement" should be affirmed; and that jury instructions which did not require the link were in error should be affirmed.[29] First, the Supreme Court affirmed case precedent which distinguished a violation of the gratuity provision from that of bribery by the variation in requisite intent—namely, that bribery requires a quid pro quo, while an illegal gratuity may merely constitute a reward for some past or future official act.[30] Secondly, the Supreme Court affirmed the lower court's holding that a violation of the gratuity provision, § 201(c)(1)(A), required that the Government prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given.[31] The court rejected the Government's interpretation of the gratuity provision that stated a conviction was sufficient if it alleged that the defendant provided things of value to the public official merely because of his position.[32] Finally, the Court rejected the Government's argument that the jury instructions, which followed the Government's flawed interpretation of the statute, were harmless error.[33]

Ultimately, the Supreme Court held that when attempting to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between the unlawful gratuity and a specific official act to sustain a conviction.[34]

III. LEGAL BACKGROUND

A. Legal Origins of the Gratuity Provision Embodied in 18 U.S.C. § 201

After a "handful of well-publicized instances of questionable conduct or demonstrated misconduct of high officials in two administrations" that resulted in "obtrusive" Congressional investigations, conflicts of interest and political corruption became a topic of great political and public concern in the early 1960s.[35] Following up on a campaign promise, President John F. Kennedy appointed a three-person Advisory Panel to study conflict-of-interest reform and to recommend a legislative course of action.[36] On October 23, 1962, he signed into law the bill that encompassed those recommendations.[37]

The Act was an important step in improving a body of law that had been criticized as being disorganized, ambiguous, and inadequate.[38] The Act consolidated "scattered and uncoordinated statutes" into a united act, lauded for its clarity and consistency.[39] In adding the new § 201 to Title 18 of the United States Code, the act consolidated a "plethora of piecemeal bribery statutes."[40] However, while it clarified many conflict of interest provisions, it failed to adequately delineate the differences in the bribery and gratuity proscriptions of 18 U.S.C. § 201.[41] In fact, it is possible to interpret 18 U.S.C. § 201(c)(1)(A) as merely being a "form of second-degree bribery" instead of an independent and distinct gratuity offense.[42] Nevertheless, while a violation of 18 U.S.C. § 201(c)(1)(A) has been treated as a lesser included offense of bribery,[43] courts have consistently treated § 201 as creating two separate offenses: bribery and illegal gratuity.[44]

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[29] U.S. v. Sun-Diamond Growers of California, 119 S. Ct. 1402

[30] *Id.* at 1406.

[31] *Id.* at 1402.

[32] *Id.* at 1403.

[33] *Id.* at 1404.

[34] *See generally* U.S. v. Sun-Diamond Growers of California, 119 S. Ct. 1402.

[35] Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARVARD L. REV. 1113-15 (1963).

[36] *Id.* at 1117.

[37] *Id.* This legislation, H.R. 8140, went into effect January 21, 1963 (90 days later). Pub. L. 87-849, 76 Stat. 1119 (codified as amended in scattered sections of 18 U.S.C. including §§ 201-09, 18) [herinafter The Act].

[38] Perkins, *supra* note 33, at 1113, 1117.

[39] Perkins, *supra* note 33, at 1163.

[40] Perkins, *supra* note 33, at 1119.

[41] George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEORGETOWN L.J. 2045, 2060-01 (1998).

[42] *Id.* at 2061. It is important to note that when the Act was initially passed the gratuity provision was originally embodied in § 201(g).

[43] United States v. Crutchfield, 547 F.2d 496, 500 (9th Cir. 1977). However, illegal gratuity need not always be a lesser included offense of bribery. See United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982).

[44] Brown, *supra* note 40, at 2061-62.

B. 18 U.S.C. § 201: Drawing the Line Between Gratuity and Bribery

While the courts have clearly established that bribery and gratuity are two separate offenses, they have struggled to clearly delineate the difference between the two. Because both offenses share much of the same analytical framework, it is nearly impossible to define what a violation of the gratuity provision entails without comparing it to the bribery offense. Frequently, the elements of the gratuity offense have been defined in the negative—what is *not* required, in contrast to the bribery proscription.

One difference between the bribery and gratuity provisions is the requisite intent. To sustain a bribery conviction, the prosecution must establish that the bribe was given or received "corruptly."[45] The intent required to sustain a gratuity conviction has been considerably more nebulous.[46] *United States v. Campbell* held that the prosecution must prove that "the alleged gratuities be given and received 'knowingly and willingly,' and 'for or because of an official act.'"[47] In *United States v. Standefer*, the court held that the gratuity provision did not obligate the Government to prove a specific intent.[48]

Explaining that "the giving of a gratuity is an offense much different than bribery," United States v. Secord held that one key distinction is that the gratuity provision does not require proof of a "quid pro quo," while the bribery charge clearly does.[49] Knowing what has not been required for a violation of the gratuity offense is helpful but it doesn't address what all is required. A survey of case law has shown that there has been little consistency on this point.

C. Interpreting the Gratuity Provision

Conceptually, it is helpful to view the differing case law approaches as different points along a spectrum.[50] On one side of the spectrum are strict requirements akin to those necessary for a bribery offense, such as requiring a direct relationship between the "gift" and the "official act." On the other end of the spectrum are cases which have characterized gratuity offenses as "status offenses," that a gift given to an "official" who is in a position to potentially benefit the giver was sufficient enough grounds for a violation of the gratuity offense.[51]

1. The Gratuity Provision as a Status Offense

The United States District Court in the District of Columbia, the trial court that eventually was the first to hear *Sun-Diamond*,[52] articulated the gratuity proscription as a status offense in *United States v. Richard Secord*.[53] Richard Secord, of Iran-Contra fame, was charged with, among other things, giving an illegal gratuity to a government official, Lieutenant Colonel Oliver North "for or because of any official act performed or to be performed."[54] The court, in distinguishing the gratuity offense from bribery, held that the Government need not prove that the "gratuity was given in exchange for any specific official act," rather "that the defendant acted simply because of North's official position, in appreciation for their relationship, or in anticipation of its continuation."[55]

This court was not alone when it held that giving a gift solely in recognition of an official's "status," without any link to a specific "official act," was sufficient to uphold a § 201 gratuity conviction. In *United States v. Standefer*,[56] the defendant, a Gulf Oil vice president, was convicted of providing illegal gratuities to Cyril J. Niederberger, an Internal

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[45] United States v. Campbell, 684 F.2d 141, 149 (D.C.Cir. 1982).
[46] *Id.*
[47] *Id.*
[48] United States v. F.W. Standefer, 610 F.2d 1076, 1080 (3d Cir. 1979).
[49] United States v. Richard Secord, 726 F. Supp. 845, 847 (D.D.C. 1989).
[50] Brown, *supra* note 40, at 2062.
[51] Brown, *supra* note 40, at 2062.
[52] United States v. Sun-Diamond Growers of California, 941 F.Supp. 1262 (D.D.C. 1996).
[53] *Secord*, 726 F. Supp. at 847.
[54] *Id.* at 846, citing language from 18 U.S.C. § 201(c)(1)(A) (Supp. 1989).
[55] *Secord*, 726 F.Supp. at 847 (citing United States v. Evans, 572 F.2d 455, 479 (5th Cir. 1978) and United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977)).
[56] 610 F.2d 1076 (3d Cir. 1979).

Revenue Service agent in charge of auditing Gulf Oil's federal income tax returns.[57] The Third Circuit denied any requirement of specific intent, did not consider or mention a link requirement, and held that "all that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purpose."[58]

The Fifth Circuit, in *United States v. Evans*,[59] also supported a broad construction of § 201(c)(1)(A). The court said that it was necessary to accomplish the statute's purpose of reaching "any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position 'otherwise than as provided by law for the proper discharge of official duty.'"[60] *Evans* was a complex case, which involved six defendants and a sixteen-count indictment.[61] The indictment charged, among other things, that defendant Cecil Evans, a public official at the Office of Education (United States Department of Health, Education and Welfare) accepted illegal gratuities from the Collegiate Recovery and Credit Assistance Programs, ostensibly to ignore the company's misappropriation of funds.[62] Like many courts before them, the court held that there was no requirement of specific intent, that the prosecutor must merely establish the "defendant accepted things of value knowingly and purposefully" and not by mistake.[63] The court even held that a gratuity conviction could be upheld even if the official "actually lacks authority to perform an act to benefit donor."[64]

These cases offered a general prohibition against gift giving to public officials and established a bright-line rule about the requisite elements of a gratuity offense. If a defendant gave a gift to a public official whom the defendant thought was in a position to benefit him in that official capacity, he or she was guilty of the offense unless he or she could prove they gave the gift out of social purpose or mistake. This broad interpretation served prosecutors well but later courts have rejected it.

2. *The Other End of the Spectrum: Reinterpreting the Official Act Requirement*

The interpretation of the gratuity proscription as a status offense was rejected in a case markedly similar to *Sun-Diamond* and presided over by the same court. In *United States v. Espy*,[65] Secretary of Agriculture Espy was charged with accepting illegal gratuities—this time, from Tyson Foods.[66] The *Espy* court held that "a gratuity motivated solely by the official's position is not unlawful" and to find otherwise would read the "for or because of any official act" clause out of the statute.[67] While the court declined to hold that "concrete official acts must now be specified in the indictment" it required a showing of "intent to reward an official for an act taken in the past or to be taken in the future."[68]

The case was decided shortly after the court decided the appeal of *Sun-Diamond* and demonstrated that courts have taken a marked turn in the way they read the statutory language "giving, offering or promising anything of value . . . for or because of any official act performed or to be performed . . .."[69] While the status offense approach virtually read the "official act" clause out of the statute, the newest wave of cases have read the language to require a particular official act, which should be named specifically in the indictment.

One such case is *U.S. v Jennings*,[70] where contractor Larry Jennings, Sr. was found guilty of providing illegal gratuities to Charles Morris, an employee of the United States Department of Housing and Urban Development who was in charge of deciding what jobs were awarded to contractors.[71] The *Jennings* court defined a gratuity as "a payment made

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[57] *F.W. Standefer*, 610 F.2d at 1078. Gratuities included five free golfing vacations for Mr. Niederberger and his family. *Id.*
[58] *Id.* at 1080.
[59] 572 F.2d 455 (5th Cir. 1978).
[60] *Evans*, 572 F.2d at 480.
[61] *Id.* at 461.
[62] *Id.* at 462-63.
[63] *Id.* at 480-81.
[64] *Id.* at 481.
[65] 23 F. Supp.2d 1 (D.D.C. 1998).
[66] *Id.* at 3.
[67] *Id.* at 5.
[68] *Id.*
[69] 18 U.S.C. § 201(c)(1)(A) (1994).
[70] 160 F.3d 1006 (4th Cir. 1998).
[71] *Jennings*, 160 F.3d at 1010.

to an official concerning a specific official act."[72] Jennings was found guilty because the Government established a specific official act Morris was to be rewarded for.[73]

IV. INSTANT DECISION

In the instant decision, the Court first addressed the statutory scheme of 18 U.S.C. § 201, distinguishing between the crimes of bribery and illegal gratuity.[74] Holding that intent was the "distinguishing feature," the Court described bribery as requiring a quid pro quo or specific intent to "corruptly" give or receive something of value "for or because of" an official act.[75] The Court held that a gratuity conviction, which imposed lesser punishment, required a lesser showing of intent and no quid pro quo.[76] It held that a gratuity could simply be a reward for a public official's past or future act.[77]

The Court conducted extensive analysis to determine whether the gratuity statute required a connection between the respondent's intent and a specific official act.[78] The Court rejected the earlier interpretation that giving a gratuity to a public official merely because of their official position was a violation of the gratuity statute.[79] It held that buying generalized goodwill without the intent to influence a specific official act is not a violation of the gratuity statute and to find otherwise would be counter to the language of the statutory text.[80] The Court read the "for or because of any official act performed or to be performed" clause as being "pregnant with the requirement that some particular official act be identified and proved."[81] The Court found this was the most natural reading of the language and argued that if the legislature had wanted a broad prohibition against gifts to officials it would have used more appropriate language.[82]

The Court further contended that the trial court's interpretation of the gratuity provision would create the odd and unanticipated result of criminalizing token gifts.[83] If Joe Torre, manager of the World Series-winning Yankees, gave a Yankees jersey to President Clinton, under the trial court's interpretation he would be in violation of the statute.[84] By accepting the gift, President Clinton would be guilty as well.[85] This absurd result is cured by the requirement that the gift be tied to an official act as it is defined in the statute.[86]

The Court disputed the government's argument that its interpretation was the only way to give effect to the forward-looking prohibition on gratuities to people who have been selected for public office but have yet to assume their responsibilities.[87] The Court was relatively unconcerned, arguing that this possibility was no more difficult to prosecute then the prosecution of a public official with respect to some future official act.[88]

The Court next noted that if Congress wanted to adopt such a sweeping prohibition against gift giving to officials, it would have "done so in a more precise and more administrable fashion."[89] The Court supported this analysis by giving examples of other laws that clearly prohibit giving gifts and receiving gifts.[90]

The Court asserted that its interpretation, as opposed to the broad one adopted by the trial court, is more compatible with the "intricate web of regulations . . . governing the acceptance of gifts and other self-enriching actions by public officials."[91] The decision then detailed numerous criminal and civil regulations relevant to public officials and the

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[72] *Id.* at 1013.
[73] *Id.*
[74] United States v. Sun-Diamond Growers of California, 526 U.S. 398, 403 (1999).
[75] *Id.* at 403-404.
[76] *Id.* at 404.
[77] *Id.* at 405.
[78] *Id.* at 406-08.
[79] *Id.* at 406.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 408.
[83] *Id.* at 407-08.
[84] *Id.* at 407.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 408.
[88] *Id.*
[89] *Id.* at 409.
[90] *Id.*
[91] *Id.*

giving of gratuities, noting their specifically targeted prohibitions.[92] The Court concluded this argument by stating that "a statute in this field that could linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[93]

The Court next addressed the related issue of whether jury instructions that indicated there was no need to prove a link between the gift and the specific official act constituted harmless error.[94] In reviewing the jury instructions, the Court found them as flawed as the interpretation the trial court prosecution originally promulgated and held that they were not harmless error.[95]

The Supreme Court, affirming the Court of Appeals for the District of Columbia Circuit, unanimously held that, to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government "must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[96]

V. COMMENT

In U.S. v. Sun-Diamond, the Supreme Court took an important step by affirming the "link requirement." Unfortunately, it established the "link" as a requirement in all § 201(c)(1)(A) prosecutions without addressing what quality and quantity of evidence is sufficient to prove a link. In his article, "The Federal Gratuity Statute: How Breaking Bread Can Be Breaking the Law," Stanley Brand bemoaned the fact that the pre-*Sun-Diamond* interpretation of 18 U.S.C. § 201(c)(1)(A) too broad of an overreaching prohibition on gifts.[97] He wrote that a government employee who has simply accepted a free lunch from a contractor could fall within its wide net, and, therefore, be subject to severe sanctions.[98] However, in Sun-Diamond, the Supreme Court decisively affirmed the "link" requirement—that the gratuity proscription was more then a mere status offense but required a link between the "official act" and the "thing of value."[99] While this decision helped to clarify a murky area of the law and reassured federal employees they could eat their free lunches in peace, the Court chose to limit its opinion to the narrow question of the link's requirement. It affirmed the necessity of the link without defining what is sufficient evidence of a link. The courts clearly need more guidance.

The problems present in post-*Sun-Diamond* courts was demonstrated in *United States v. Schaffer*, a case decided shortly after *Sun-Diamond*, and, incidentally, springing from the same independent counsel investigation that led to the charges against Sun-Diamond.[100] On January 15, 1998, a federal grand jury in the District of Columbia indicted Archibald Schaffer, III, on seven separate counts of a 15-count indictment, including two counts of violating 18 U.S.C. § 201(c)(1)(A), the gratuity provision.[101] The indictment alleged that Schaffer, working for Tyson Foods, provided Secretary of Agriculture Espy with a variety of gifts during a time which USDA officials "were at various stages in the process of developing and implementing initiatives that would seriously impact the business of Tyson Foods."[102] The defendant was convicted by a jury of violating the gratuity statute, but the United States District Court for the District of Columbia granted defendant's motion for judgment of acquittal.[103] The United States Court of Appeals for the District of Columbia Circuit upheld the acquittal as it related to the gratuity provision and found that "no rational trier of fact could have concluded that Schaffer had acted with the requisite intent to influence . . . ."[104] Citing *Sun-Diamond,* the court upheld the link requirement and examined the nexus between the gifts given to Espy and the policies they may have been

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[92] *Id.* at 409-12.
[93] *Id.* at 412.
[94] *Id.*
[95] *Id.* at 414.
[96] *Id.*
[97] Stanley Brand, *The Federal Gratuity Statute: How Breaking Bread Can Be Breaking the Law*, 42 FEDERAL LAWYER 17 (1995).
[98] *Id.*
[99] *Sun-Diamond Growers of California*, 526 U.S. at 414.
[100] United States v. Schaffer, 183 F.3d 833 (D.C. Cir. 1999).
[101] *Id.* at 838.
[102] *Id.* at 837. The gifts to Espy included four tickets to the inaugural dinner (at $1500 per person) and a $1,200 scholarship for his girlfriend, Patricia Dempsey. *Id.* One of the initiatives at issue was the USDA's potential adoption of a "zero tolerance" pathogen control program for poultry. *Id.*
[103] *Id.* at 833.
[104] *Id.* at 835-36.

meant to influence.[105] Finding that there was no evidence that Schaffer "knew or anticipated anything about zero tolerance" or any other decisions affecting Tyson within Espy's purview at the time of the gift giving, Schaffer was acquitted of the gratuity charges.[106]

While the court based its decision on *Sun-Diamond*, it criticized the Supreme Court opinion for the "lack of specific guidance . . . on the amount and kind of evidence necessary to establish a nexus with an official act."[107] *Sun-Diamond* closed the door on the status offense interpretation without clearly articulating the requirements of the newer and more stringent standard. When the gratuity provision of 18 U.S.C. § 201 was interpreted as a status offense, as it was in *Standefer*, the line between criminal offense and unethical—but legal—conduct was comparatively easy to draw.[108] To uphold a conviction under the gratuity provision no specific intent was required, the key determination was whether the gift was given because of the official's position and not "solely for reasons for friendship or social purposes."[109] With the new standard, it is more difficult to establish a violation. Attempting to determine what is necessary for the link, the *Schaffer* opinion complained that:

> Neither elementary linguistic analysis, the structure of the gratuity statute or its place within the larger statutory and administrative fabric regulating gifts to officeholders, nor the desire to avoid trapping the unwary point towards any specific interpretation of the degree of proof necessary to satisfy the Court's 'for or because of a particular official act' language.

With that dire pronouncement, how should future courts determine the sufficiency of the link? While *Schaffer* complained about the lack of guidance, it failed to provide much instruction itself, other then to condone the use of circumstantial evidence.[110]

In the future, courts will be required to closely assess the intent of the defendant to determine whether there was a link between the thing of value conferred and the official act. Unfortunately, as courts have complained in the past, "it is no easy task to articulate the requisite intent necessary to constitute accepting or giving an illegal gratuity."[111] While bribery prosecutions have always required a showing of corrupt intent,[112] the intent requirement for gratuity prosecutions has changed over the years. In the past, courts have interpreted the gratuity offense as requiring no specific intent, merely that a thing of value was knowingly given to an official (or knowingly accepted by an official) "otherwise than as provided by the law."[113] *Sun-Diamond* moved the standard closer to the stringent requirements of the bribery statutes by requiring prosecutors to prove that the thing of value was given "to reward past favorable acts or to make future ones more likely."[114] This move has made it more challenging to clearly distinguish between the bribery and gratuity provisions, a distinction that has already been hazy in previous application.[115]

While *Sun-Diamond* may have been correct to assert that an accurate reading of the text of 18 U.S.C. § 201(c)(1)(A) requires a link between the thing of value and a specific official act, if future courts require too rigorous a showing of evidence to establish that link, they could risk establishing an impossible standard for future prosecutions. For guidance, courts should look at what is deemed sufficient proof in bribery convictions (18 U.S.C. § 201(b)). As in bribery prosecutions, prosecutions of the gratuity statute should rely heavily on circumstantial evidence to establish the requisite intent necessitated by the link requirement.[116] *Schaffer* agreed and proclaimed that, "as with most cases in which the defendant's state of mind is at issue, it may be near impossible to establish the requisite mens rea through direct evidence."[117] The court also said that "proof of an actor's subjective motivation will likely require recourse to

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[105] *Id.* at 839.
[106] *Id.*
[107] *Id.* at 841.
[108] United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).
[109] *Id.* at 1080.
[110] *Schaffer*, 183 F.3d at 833. *Schaffer*, much like *Sun-Diamond*, is a case where the prosecution made no real evidentiary showing of a link. If there had been a serious effort to prove the link, this case would have been much more instructive to future cases.
[111] United States v. Campbell, 684 F.2d 141, 149 (D.C. Cir. 1982).
[112] United States v. Muldoon, 931 F.2d 282, 287 (4th Cir. 1991).
[113] United States v. Evans, 572 F.2d 455, 481 (5th Cir. 1978).
[114] United States v. Sun-Diamond Growers of California, 526 U.S. 398.
[115] United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998).
[116] *Id.*
[117] *Schaffer*, 183 F.3d at 843.

circumstantial rather than direct evidence."[118] Clearly, there will be many occasions where "the trier of fact can do no more than ascribe an intent on the basis of the circumstances surrounding the defendant's actions."[119]

The Supreme Court affirmed the judgment of the court of appeals, and remanded the case for a new trial on the gratuity charges.[120] How might the new court decide *Sun-Diamond* in light of the link requirement? The *Schaffer* prosecution failed because prosecutors could not establish that the defendant knew about the policy decisions Espy was considering which would have directly affected them.[121] Thus, the "for or because of any official act" requirement—the link between gift and the desired official act—was not met. While "any attempt to reduce the gratuity statute's nebulous 'for or because of' language into a more concrete formulation will necessarily be imperfect,"[122] the facts in *Sun-Diamond* seem to easily fit "for or because of . . .an official act" language. Looking at the facts in *Sun-Diamond,* there were "two matters in which respondent had an interest in favorable treatment from the Secretary at the time it bestowed the gratuities," and evidence established that the company "sought the Department of Agriculture's assistance in persuading EPA to abandon its proposed rule altogether, or at least to mitigate its impact."[123] Unlike *Schaffer*, there was a specific official act the company was trying to initiate and evidence that places the gifts contemporaneous with the requests for the specific official act. Should the court follow the lead of bribery convictions and allow itself to be guided by circumstantial evidence it is highly possible that a conviction will result. And this time, the conviction may withstand the Supreme Court's newer and more stringent requirements.

VI. CONCLUSION

In his dissent in *McNally v. United States*, Justice Stevens noted the difficulty in defining "just when conduct which is clearly unethical is also criminal."[124] The required elements for a violation of the gratuity provision in 18 U.S.C. 201(c)(1)(A) have historically been tough to grasp. The gratuity statute is an important tool to combat political corruption and the elements required for a conviction need to be clearly articulated.

Against a backdrop of inconsistent case law precedent, *Sun-Diamond* employed sound logic to clearly establish that the government must prove a link between the unlawful gratuity and a specific official act. While *Sun-Diamond* took a major step in interpreting the gratuity statute by establishing the link requirement, it chose not to address what quality and quantity of evidence is sufficient to prove a link. This is regrettable because it leaves many unanswered questions for future courts to address. While there is little case law to provide guidance, policy reasons suggest that future courts shouldn't establish too rigorous a showing to intent, but—as in many bribery prosecutions—rely on circumstantial evidence.

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[118] *Id.* at 848.
[119] *Id.* at 843.
[120] *Sun-Diamond Growers of California*, 526 U.S. at 414.
[121] Schaffer, 183 F.3d at 833.
[122] *Schaffer*, 183 F.3d at 843.
[123] *Sun-Diamond Growers of California*, 526 U.S. at 402.
[124] Brown, *supra* note 40, at 2052-2054 (citing McNally v. United States, 483 U.S. 350, 376 (1987)).