No.

IN THE

Supreme Court of the United States

WILLIAM J. JEFFERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal bribery statute prohibits public officials from seeking or accepting something of value "in return for . . . being influenced in the performance of any *official act*." 18 U.S.C. § 201(b)(2)(A) (emphasis added). An "official act" is "any decision or action on" a "question, matter, cause, suit, proceeding or controversy" that is or may be "pending" (or that "may by law be brought before") a public official in his or her "official capacity." *Id.* § 201(a)(3).

The question presented is whether the court of appeals, in conflict with this Court's decision in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and the D.C. Circuit's en banc decision in *Valdes* v. *United States*, 475 F.3d 1319 (2007), correctly affirmed petitioner's convictions, which rested on a jury instruction defining "official acts" as any and all activities that are "part [of] a public official's position" based on "settled practice."

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App., *infra*, 1a-78a) is reported at 674 F.3d 332. The district court's decisions denying the motion to dismiss the bribery counts (App., *infra*, 100a-114a) and denying reconsideration of that ruling (App., *infra*, 79a-99a) are reported, respectively, at 562 F. Supp. 2d 687 and 634 F. Supp. 2d 595.

JURISDICTION

The Court of Appeals issued its decision on March 26, 2012. On June 8, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari until July 25, 2012 (No. 11A1166). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal bribery statute, 18 U.S.C. § 201, are reproduced at App., *infra*, 120a-124a.

STATEMENT

This case raises an important and recurring question concerning the reach of the federal bribery statute, 18 U.S.C. § 201(b)(2), and the meaning of this Court's decisions in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and *United States* v. *Birdsall*, 233 U.S. 223 (1914). In the decision below, the Fourth Circuit expressly

disagreed with an en banc decision of the D.C. Circuit over the meaning of both *Sun-Diamond* and *Birdsall*. Relegating key language in *Sun-Diamond* to dicta, and treating as dispositive passing observations in *Birdsall*, the court below held that any action taken by a Congressman – even if not part of his legislative duties – constitutes an "official act" so long as it is the "settled practice" of a Congressman (a standard whose meaning is hopelessly unclear). In so holding, the court of appeals deepened a conflict between the D.C. and Eleventh Circuits over the meaning of "official acts" covered by the bribery statute. To resolve these conflicts, clarify the scope of this important federal crime, and correct the Fourth Circuit's "settled practice" construction of "official act," further review is needed.

A. The Federal Bribery Statute And This Court's Decision In *Sun-Diamond*

The current version of the federal bribery statute, 18 U.S.C. § 201(b)(2), was enacted in 1962. See Act of Oct. 23, 1962, ch. 11, § 201, 76 Stat. 1119, 1119. Before then, bribery offenses pertaining to different categories of federal officials were housed in different sections of the U.S. Code. See, *e.g.*, 18 U.S.C. §§ 201-210, 215-216 (1958) (covering, *inter alia*, judges, legislators, and U.S. officers). The provisions covering Members of Congress prohibited payments relating to matters "pending *in either House of Congress, or before any committee thereof*." *Id.* §§ 204, 205 (emphasis added). Similar or identical language – likewise limiting the scope of

the covered conduct to formal, legislative duties – was used in statutes dating back to 1875.[1]

In consolidating many office-specific provisions into a "single comprehensive" bribery provision in 1962, Congress sought to "make no significant changes of substance" to prior law. S. Rep. No. 87-2213, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853. The bribery statute prohibits federal "public officials" from soliciting or accepting anything of value "in return for . . . being influenced in the performance of any *official act*." 18 U.S.C. § 201(b)(2)(A) (emphasis added). The statute defines "official act" as:

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

Id. § 201(a)(3) (emphasis added). Bribery is punishable by up to 15 years in prison, a fine of up to three times the value of the bribe, and permanent disqualification from holding federal office.

The same definition of "official act" is incorporated into the closely related but less serious

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

crime of offering an illegal gratuity, which prohibits giving anything of value to a public official "for or because of any *official act*." 18 U.S.C. § 201(c)(1)(A) (emphasis added). In *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), this Court explained that the "carefully defined" term "official act" does not reach every action taken by a public official acting in an official capacity. While "the official acts of [the President in] receiving [a] sports team[] at the White House, [the Secretary of Education in] visiting a high school, and [the Secretary of Agriculture in] speaking to farmers about USDA policy" are "assuredly 'official acts' in *some* sense," they "are *not* 'official acts' within the meaning of the statute." *Id.* at 406-07 (emphasis added). Section 201, the Court added, must be understood as a "scalpel" targeting a thin slice of conduct rather than a "meat axe." *Id.* at 406, 409, 412.

B. Petitioner's Indictment

Petitioner William Jefferson is a former Member of Congress who represented the 2nd Congressional District of Louisiana from 1991 through 2008. In a sixteen-count indictment, the government alleged that, between August 2000 and August 2005, in return for things of value benefiting him or his family, Jefferson provided assistance to several companies seeking to do business in West Africa. See C.A. Jt. App. ("JA") 68-161; App., *infra*, 3a-4a.[2]

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[2] These companies included iGate, Incorporated, a Kentucky-based telecommunications firm; Netlink Digital Television, a Nigerian telecommunications company; certain businesses owned by Lori Mody, a Virginia-based businesswoman; and

The indictment did not allege (nor has the government ever claimed) that Jefferson agreed to help these businesses by performing any legislative duties, such as introducing legislation, voting for or against a bill, conducting committee investigations or hearings, or creating earmarks. Instead, the government charged that Jefferson had agreed to perform such "official acts" as sending letters on official letterhead; traveling to foreign countries; meeting abroad with private parties and foreign government officials to promote particular U.S. businesses; using his congressional staff to accompany him on and to provide logistical assistance with this foreign travel; and scheduling and participating in meetings with federal agencies to help secure financing for the business ventures sought by the companies. JA82-83, 104-105, 116-120, 127.

The indictment charged a series of counts constituting, or fundamentally resting on, either bribery or honest-services wire fraud. Two were substantive bribery counts (Counts 3 and 4). Others were wire fraud counts (Counts 5-10), each resting on two honest-services theories: bribery as honest-services fraud, and the theory of "self-dealing" honest-services fraud recently rejected in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). The balance were compound offenses that rested on either or both

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several other businesses promoting such projects as a sugar plant, fertilizer plant, and oil and gas wells. None of these businesses (or their principals) was based (or resided) in Louisiana's 2d Congressional District, the district Jefferson represented.

bribery or honest-services fraud: (1) two conspiracy charges (Counts 1-2), alleging bribery and self-dealing as their objects; (2) three money laundering charges (Counts 12-14), alleging that Jefferson laundered the proceeds of "bribery"; and (3) one RICO charge (Count 16), whose predicate acts were bribery, honest-services fraud, and the laundering of bribery proceeds.[3]

C. The Pretrial Litigation Over The Meaning Of "Official Act"

Petitioner moved to dismiss the bribery-related counts (including all of the honest-services wire fraud counts) on the ground that they did not allege an "official act," as that term is defined in the bribery statute. He contended that, consistent with a long-settled understanding (see pages 2-3 and note 1, *supra*), an "official act" performed by a Member of Congress encompasses only those decisions or actions (such as voting on bills or conducting committee work) that involve questions that are "pending" or brought "by law" before him in his official capacity as a Member of Congress. By contrast, Jefferson argued, the activities specified in the indictment were not "official acts" because they did not involve such questions. Nor, Jefferson argued, was it an "official act" to influence a question pending before some *other* public official (particularly any *foreign* official, since the statutory definition of "public

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[3] Two remaining counts – a Foreign Corrupt Practice Act ("FCPA") charge (Count 11) and obstruction of justice (Count 15) – were not similarly tied to the government's bribery and honest-services fraud theories. Petitioner was acquitted on both of those charges.

official" does not include *any* officials of foreign governments). Seeking to influence some other public official's decision, Jefferson contended, would not involve any question that was "pending" or "brought by law" before *him*, as the bribery statute requires. For its part, the government insisted that *any* activity constitutes an "official act" so long as it is a "settled practice" for some Members of Congress to perform the activity in connection with their job.

1. *The District Court's First Opinion*. The court denied Jefferson's motion to dismiss the bribery-related counts. App., *infra*, 100a-114a. It adopted a two-part definition of "official act": "First, the act must be among the official duties or among the *settled customary* duties or *practices* of the official charged with bribery. And second, performance of the act must involve or affect a government decision or action," either by Jefferson *or by another public official*. *Id.* at 106a & nn.2-3 (emphasis added). Applying this two-part definition, the district court concluded that the activities identified in the indictment could qualify as "official acts," assuming the government could prove at trial that the actions in question in fact were "settled *customary* duties or *practices*" of Members of Congress. *Id.* at 110a-111a, 113a (emphasis added).

2. *The District Court's Second Opinion*. Following both sides' requests for reconsideration, the court issued an opinion that "vacated and superseded" parts of its first decision. App., *infra*, 79a-99a. The court held – as both Jefferson and the government had urged – that to perform an "official act," Jefferson must act "on an issue pending before *him*, not . . . on an issue pending before *another*

public official." *Id.* at 91a (emphasis in original). Over Jefferson's objection, however, the court adhered to its "settled practice" and "customary activities" standard for "official acts." *Id.* at 93a-94a, 98a. It also expressly disagreed with *Valdes* v. *United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc), which held that the term "official act" was limited to decisions or actions on "a class of questions or matters whose answer or disposition is determined by the government" (*id.* at 1324). See App., *infra*, 94a n.14.

D. The Trial, Jury Instructions, And Verdict

At trial, the government sought to show that Jefferson tried to help various companies (none of which was a constituent in the 2d Congressional District of Louisiana) garner business, principally in West Africa. Jefferson's efforts chiefly amounted to praising these companies, and proposing business deals, to foreign officials in letters and in meetings held during trips to Africa that Jefferson took with company personnel.[4] To facilitate these foreign deals, Jefferson met with private investors in America, as well as with officials at the Export-Import Bank and the United States Trade and Development Agency. He also met, on behalf of one of the companies, with officers of the United States Army. The uncontradicted evidence showed that during these meetings, Jefferson inquired into the process by which these domestic organizations grant

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

funds, or into the status of a particular company's application for funds or contracts, but did not ask the organizations for any special treatment.[5]

The government's case reflected its expansive view of "official act." The government argued that Jefferson's "official acts" included *any* help of *any* kind that Jefferson gave *anywhere* in the world to *any* person or business in America upon their request, so long as he did so in his capacity as a Congressman. See, *e.g.*, JA1018, 1020-1024, 1161-1162, 1164-1168, 2409. In support of that far-reaching theory, the government put on evidence, including through an expert, to show that such help could be characterized as "constituent service" and that "constituent service" was a "settled practice" among Members of Congress. See, *e.g.*, JA1125-1127, 1429-1432, 1654-1655, 3812-3906, 5913-5914. In addition, the government's witnesses testified that "constituents" include *anyone in America*, not just residents of a Member's district. See, *e.g.*, JA3830-3832, 4240-4241, 4293-4294, 5791. The government also argued that logistical assistance Jefferson received from his staff and other government employees in connection with his meetings with foreign officials and others was itself an "official act." See, *e.g.*, JA4960-4961, 5094-5095. In its summation, the government reiterated its sweeping view of "official acts." See JA4906 (describing "settled

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[5] The government also offered the "freezer" incident – that Jefferson had concealed nearly $100,000 in cash in his home freezer. See JA122-123, 180. This cash was allegedly intended to bribe the former Vice President of Nigeria, an FCPA violation on which Jefferson was ultimately acquitted.

practice" as the "touchstone" for what qualifies as an "official act"), 4960-4961, 5095.

Instructing the jury on "official act," the court first recited the statutory definition. See App., *infra*, 117a. But at the government's urging and over Jefferson's objection, the court added a gloss:

> An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. *Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.*

Ibid. (emphasis added).

The jury convicted Jefferson on Counts 1-2, 3-4 (the substantive bribery charges), 6-7, 10, 12-14, and 16. App., *infra*, 9a-10a & n.6. It acquitted him on three honest-services wire fraud counts (Counts 5 and 8-9) and on the only two counts that were not predicated in whole or in part on bribery or self-dealing honest-services wire fraud – Counts 11 (FCPA) and 15 (obstruction of justice). *Ibid.*; see also note 3, *supra*.

E. The Court Of Appeals' Decision

The Fourth Circuit affirmed, except for vacating the conviction on one wire fraud count (Count 10) for lack of proper venue. App., *infra*, 1a-78a. The court rejected Jefferson's contention that *Sun-Diamond*'s discussion of "official act" – and its identification of three well-settled practices that nevertheless do not constitute "official acts" – foreclosed the district court's "settled practice" instruction. App., *infra*, 42a-44a, 47a-48a. In the Fourth Circuit's view, this

aspect of *Sun-Diamond* simply was not binding. *Id.* at 45a n.35, 49a; accord *id.* at 113a-114a (district court referred to "the *Sun-Diamond* dicta"). Instead, the court of appeals grounded the "settled practice" instruction in this Court's 1914 decision in *United States* v. *Birdsall*, 233 U.S. 223, 231, which held that an earlier version of the bribery statute was not limited to a federal official's discharge of duties that are expressly *mandated* by a federal *statute*. App., *infra*, 39a-42a, 44a-45a & n.35, 48a-49a, 51a.[6]

By dismissing *Sun-Diamond*'s discussion of "official act," and adopting *Birdsall*'s reference to "settled practice" as controlling, the Fourth Circuit expressly disagreed with the en banc D.C. Circuit's decision in *Valdes* (and adopted the views of the *Valdes* dissenters). See, *e.g.*, App., *infra*, 45a ("we are unwilling to accept" *Valdes*'s reading of *Sun-Diamond*). In *Valdes*, the D.C. Circuit rejected as inconsistent with the text of Section 201(a)(3) and with a proper understanding of *Birdsall* a jury instruction similarly defining "official act" by reference to "settled practice." By contrast, the court below concluded that a "settled practice" instruction

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[6] *Birdsall* involved two defendants who were "special officers, duly appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians." 233 U.S. at 228. Their "duty," pursuant to "regulations and established requirements of the Department of the Interior," was to "inform[] and advis[e] the Commissioner of Indian Affairs" concerning whether clemency was warranted for persons convicted of violating the Indian liquor laws. *Ibid.* A third defendant was a lawyer who had paid the special officers to discharge this duty by recommending leniency for his clients. *Id.* at 229-230.

was required by *Birdsall* and consistent with the statutory definition of "official act." App., *infra*, 51a.

REASONS FOR GRANTING THE PETITION

In conflict with the D.C. Circuit and *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), the Fourth Circuit has erroneously ruled that "official act" includes any conduct that is part of a public official's "settled practice." Under that vague and far-reaching view, a federal judge who, in exchange for a small honorarium (or a gourmet meal), conducts legal research using his government Westlaw account in order to prepare and present a paper at a law school or serve as a moot court judge, commits a felony in violation of 18 U.S.C. § 201. So, too, does a Senator who accepts a pair of Nationals tickets as a thank you for honoring a "constituent request" by giving up her weekend to travel home to cut the ribbon at the opening of a new shopping mall (which would qualify as an illegal gratuity under the decision below). And a Congressman whose "settled practice" includes kissing babies and posing for photographs on the campaign trail commits the crime of bribery by accepting a small cash payment for doing those "official acts." As if that were not enough, each of the three examples given by this Court in *Sun-Diamond* of conduct that is *not* an "official act" would plainly also qualify as such, since it surely is "settled practice" for Presidents to receive championship sports teams at the White House, for Secretaries of Education to visit schools, and for Secretaries of Agriculture to give speeches to farmers concerning USDA policy.

The absurdity of these results – and their incompatibility with *Sun-Diamond* – alone should

suffice to set aside the Fourth Circuit's "settled practice" standard. But there is more. The "settled practice" standard bears no relationship to the definition of "official act" provided by Congress. Nor does that impenetrable phrase provide federal officeholders and employees with even remotely meaningful notice of the line they commit a felony by crossing. "Settled practice" as a legal standard effectively invites the crime to be defined, on a case-by-case basis and after the fact, by federal juries relying (as here) on unpredictable choices about how generally a "practice" should be defined, as well as on "expert" testimony (including, as here, by a former officeholder) concerning whether a "practice" so defined is "settled."

Further review is needed to bring the Fourth Circuit into line with *Sun-Diamond*, dispel the confusion in the lower courts over the meaning and relationship of *Sun-Diamond* and *United States* v. *Birdsall*, 233 U.S. 223 (1914), and resolve a clear circuit conflict over an important and recurring question of federal criminal law: the scope of "official acts" covered by the bribery and illegal gratuity statute.

I. The Decision Below Deepens A Circuit Conflict Over The Meaning Of "Official Acts" And This Court's Decisions In *Sun-Diamond* And *Birdsall*

A. *The Circuit Conflict Over "Official Acts."* The Fourth Circuit's decision exacerbates an existing conflict between the D.C. and Eleventh Circuits over the meaning of "official acts" under 18 U.S.C. § 201(b)(2). The defendant in *Valdes* v. *United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc), a

D.C. police officer, was prosecuted for accepting money for searching police databases. There, as here, the district court instructed the jury that "official act" included job-related activities that were established by "settled practice." *Id.* at 1325. The defendant challenged the instruction as inconsistent with the text of the statute.

The D.C. Circuit set aside the conviction, holding that the defendant did not commit an "official act" and that the jury instruction was wrong. 475 F.3d at 1321, 1325. An "official act," the court held, includes only "a class of questions or matters whose answer or disposition is determined by the government." *Id.* at 1324. Relying on the text of the statute, the court explained that "[q]uestions not subject to resolution by the government are not ordinarily the kind that people would describe as 'pending' or capable of being 'by law . . . brought' before a public official, especially if the law imposes no mandate on the official (or perhaps any official) to answer." *Ibid.* And the court rejected the government's argument, based on *Birdsall*, that "official acts" encompass any decision or action within the scope of an official's authority. *Id.* at 1322. That argument, the court observed, not only "misinterprets" *Birdsall* and "ignore[s] the plain text of the statute," but is also at odds with *Sun-Diamond*, which relied on the definition of "official act" in reversing a conviction under the closely related illegal gratuities offense. *Id.* at 1322-23.[7]

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[7] In an earlier decision, the D.C. Circuit had similarly rejected an argument by the government that "official act" should be read broadly. See *United States* v. *Muntain*, 610 F.2d 964, 969

In *United States* v. *Moore,* 525 F.3d 1033 (2008), the Eleventh Circuit expressly rejected *Valdes*'s construction of "official act." *Moore* involved a gratuities prosecution of prison guards who had accepted sexual favors in return for such "official acts" as permitting a prisoner to make a phone call (requesting contraband) to another guard, switching guards' unit assignments, giving another guard a key to staff offices, and making a phone call to an inmate on another inmate's behalf. *Id.* at 1041. The Eleventh Circuit acknowledged that *Valdes* had interpreted "official acts" as not reaching "officials' moonlighting, or their misuse of government resources, or the two in combination," but rather encompassing only "significant 'pending' Government issues that may be brought 'by law' before a public official." *Ibid.* In the Eleventh Circuit's view, however, *Valdes* was inconsistent with *Birdsall*, which it regarded as "the controlling precedent," specifically agreeing with Judge Henderson's dissenting opinion in *Valdes* on this point. *Ibid.* The Eleventh Circuit accordingly affirmed the convictions based on "the broad definition of 'official act' set forth in *Birdsall*," under which "[e]very action that is within the range of official duty" qualifies as an "official act." *Ibid.*

In the decision below, the Fourth Circuit deepened this conflict between the D.C. and

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(D.C. Cir. 1979) (efforts to sell group automobile insurance to labor unions as a negotiated benefit of labor contracts not an "official act" of the Assistant to the Secretary of Labor Relations at HUD because it did not involve any matter or issue that could be brought by law before him).

Eleventh Circuits. In an opinion that is largely a reprise of Judge Henderson's *Valdes* dissent, the Fourth Circuit treated as binding authority certain language in *Birdsall* that *Valdes* held was dicta, treated as dicta certain language in *Sun-Diamond* (discussing "official acts") that *Valdes* held was binding authority, and expressly disagreed with *Valdes*' view that *Sun-Diamond* rested in part on the definition of "official act" in Section 201(c). See App., *infra*, 45a ("we are unwilling to accept" *Valdes*'s reading of *Sun-Diamond*). Compare also *id.* at 39a-49a with 475 F.3d at 460-63 (dissenting opinion of Henderson, J.), and *United States* v. *Valdes*, 437 F.3d 1276, 1282-88 (D.C. Cir. 2006) (Henderson, J., dissenting from vacated 3-judge panel opinion). In short, the Fourth Circuit unequivocally rejected the analysis on which *Valdes* based its holding.[8]

B. *Additional Conflicts And Confusion Arising From The Fourth Circuit's Efforts To Reconcile Its Decision With* Valdes. Although the Fourth Circuit sought to paper over its disagreement with *Valdes*, those efforts actually exacerbate the circuit conflict. First, the Fourth Circuit purported to agree with *Valdes* that "the bribery statute does not encompass *every* action taken in one's official capacity." App., *infra*, 48a (emphasis added). The Fourth Circuit did

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[8] Commentators have recognized the confusion in the lower courts over the meaning of "official act" covered by the federal bribery statute. See, *e.g.*, Stuart P. Green and Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury & Fraud*, 75 LAW & CONTEMP. PROBS. 33, 39 & nn.23-24 (2012) ("courts have disagreed about what constitutes an 'official act'") (citing *Valdes* and the district court's first opinion in this case).

not identify any "official capacity" conduct that would not also constitute an "official act" under its analysis (nor do we believe it could). But assuming the court's exceedingly broad construction of "official act" *does* admit of such exceptions, the Fourth Circuit's decision would run headlong into the Eleventh Circuit's contrary conclusion in *Moore*. In the Eleventh Circuit's view, *Birdsall* includes all manner of low-level on-the-job discretionary actions taken by prison guards. See *Moore*, 525 F.3d at 1040-41. If the wholly discretionary action of making a phone call for an inmate to another inmate qualifies as "perform[ing]" an "official act," it is difficult to see how the bribery statute would not reach "every action taken in one's official capacity" – a position the Fourth Circuit purported (unconvincingly) to foreswear.

Second, the Fourth Circuit emphasized that *Valdes* had approved the result in *United States* v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988). There, the Second Circuit upheld the conviction of a Congressman who had used his office to steer a Navy contract to a particular repair company. App., *infra*, 50a (quoting *Valdes*, 475 F.3d at 1325). In the Fourth Circuit's view, the Congressman's conduct was no different from the "constituent requests," "African trade issues," and "promotion of trade in Africa," that Jefferson had engaged in. *Id*. at 52a-53a.

But this effort to cozy up to *Valdes* is flawed as well. Indeed, the Fourth Circuit's equation of a particular Navy procurement decision with any "constituent request" illustrates just how untethered from the statutory text the court of appeals'

construction of "official acts" really is. Whereas the *Valdes* en banc majority refused to construe a "pending" "matter" (there, a police investigation) by "generaliz[ing]" the concept so that it would include any "question asked and answered" by the police (475 F.3d at 1326), the Fourth Circuit effectively held that anything a Congressman does in response to a constituent's inquiry is an "official act." (And a "constituent," by the Fourth Circuit's lights, is any resident of the United States). The Fourth Circuit's position would be a non-starter in the D.C. Circuit.

Finally, the Fourth Circuit suggested that *Valdes* is distinguishable because petitioner's jury, in addition to receiving the "settled practice" gloss, was *also* read the statutory definition of "official act." App., *infra*, 51a. But that purported distinction is foreclosed by *Sun-Diamond* itself. In *Sun-Diamond*, the district court "read [the gratuity statute] to the jury *twice* (along with the definition of 'official act' from § 201(a)(3)), but then placed an expansive gloss on that statutory language," all of which led this Court to reverse the conviction and order a retrial. 526 U.S. at 403 (emphasis added). *Sun-Diamond* requires the same result here.

C. *The Circuit Conflict Over The Meaning of* Sun-Diamond *And* Birdsall. The Fourth Circuit's decision also warrants review because it deepens the confusion in the lower courts over the meaning of, and relationship between, two of this Court's decisions. In *Valdes*, the D.C. Circuit specifically relied on *Sun-Diamond* and its discussion of "official act" in holding that the bribery statute does not reach every "action taken in an official capacity," but instead covers only "a class of questions or matters

whose answer or disposition is determined by the government." 475 F.3d at 1323-24. In the D.C. Circuit's view, it was "[i]mportant[] for our purposes" that the Court in *Sun-Diamond* "reached its conclusion 'through the definition of [the] term ['official act.']'" *Id.* at 1323. In contrast, the Fourth Circuit, echoing the views of the *Valdes* dissenters, treated *Sun-Diamond*'s discussion of "official act" as non-binding dicta. See App., *infra*, 44a-45a & n.35 (Fourth Circuit was "unwilling to accept" the "proposition' that *Sun-Diamond* reached its conclusion by relying on the definition of "official act"); accord *Valdes*, 475 F.3d at 1332-33 (dissent of Henderson, J.) (describing *Sun-Diamond* as "a spectacular red-herring in this case" and as involving only "dicta"); App., *infra*, 113a (district court referring to "the *Sun-Diamond* dicta"). Thus, the decision below creates a circuit conflict over whether this Court's conclusion, in its unanimous *Sun-Diamond* opinion, concerning the types of activities that fall outside of "official acts" must be given binding force by lower courts seeking to apply the statutory definition.

The Fourth Circuit's decision also exacerbates a preexisting circuit conflict over the meaning of *Birdsall*. In *Valdes*, the D.C. Circuit rejected the government's submission that the bribery statute "should be construed broadly, to encompass essentially any action which implicates the duties and powers of a public official." 475 F.3d at 1322. That argument, the D.C. Circuit explained, was based on a "misinterpret[ation]" of *Birdsall* and its statement that "'[e]very action that is within the range of official duty comes within the purview of'" the predecessor to the bribery statute. *Ibid.*

"Whatever the broad language in *Birdsall* may mean," the D.C. Circuit reasoned, "it was certainly *not* the Court's holding." *Ibid.* (emphasis added). Instead, the Court in *Birdsall* was narrowly "focused on rejecting the defendants' theory on appeal – that for conduct to qualify as an 'official act' it must be one 'prescribed by statute.'" *Id.* at 1322-23.

In *Moore*, by contrast, the Eleventh Circuit rejected the *Valdes* reading of *Birdsall*, holding that *Birdsall* establishes a "broad definition" of "official act" that includes "every action that is within the range of official duty." 525 F.3d at 1041 (internal quotation marks and alterations omitted). The Eleventh Circuit went on to affirm the prison guards' convictions precisely because their various activities "f[e]ll within the broad definition of 'official act' set forth in *Birdsall*." *Ibid.* The Eleventh Circuit criticized *Valdes* for allegedly ignoring the "controlling precedent" of *Birdsall*. *Ibid.*

In the decision below, the Fourth Circuit agreed with the Eleventh Circuit – and disagreed with the D.C. Circuit – that the relevant passages in *Birdsall* represented a broad definition of the term "official act" rather than the answer to the much narrower question of the acceptable sources of duties that may constitute official acts. App., *infra*, 39a-42a, 45a-46a. "The boundaries fixed by the Supreme Court in *Birdsall*," the Fourth Circuit explained, "fall well within the bribery statute . . . and have never been altered." *Id.* at 46a.

Finally, the Fourth Circuit's decision deepens the confusion in the lower courts over the relationship between *Sun-Diamond* and *Birdsall*. The Fourth Circuit took the view that *Sun-Diamond*

did not overrule *Birdsall* because *Sun-Diamond* failed to cite the older decision. See App., *infra*, 47a ("There is simply no indication that *Sun-Diamond* sought to undermine *Birdsall*'s holding. Indeed, *Sun-Diamond* did not mention *Birdsall* at all – a curious omission if the Court intended to overturn its landmark decision on the definition of 'official act.'"). Notably, that is precisely the view taken by Judge Henderson's *dissent* in *Valdes*. See 475 F.3d at 1332-33 (dissent of Henderson, J.).

In sharp contrast, the *Valdes* majority treated *Sun-Diamond* as binding authority and the relevant discussion in *Birdsall* as dicta. And the D.C. Circuit took that position even though the government, in its en banc rehearing petition, contended that *Sun-Diamond*'s discussion of "official acts" was ill-considered. See Appellee's Pet. for Panel Reh'g or Reh'g En Banc and Addendum, at 10 n.8 in *United States* v. *Valdes*, No. 03-3066 (D.C. Cir.) (filed Apr. 10, 2006) ("U.S. *Valdes* En Banc Pet."). "[I]t is highly debatable," the government told the D.C. Circuit, "whether, upon a more detailed analysis, the Supreme Court still would conclude that the White House reception, school visit, and luncheon speech were not 'official acts,' if the hypothesized gratuities" were not of "petty value" but "instead consisted of large cash payments pocketed by the President or cabinet Secretaries for personal use." *Ibid*. The government's frontal assault on this aspect of *Sun-Diamond* all but ensures that the circuit conflicts will persist unless and until this Court intervenes.

The uncertainty created by the Fourth Circuit's decision is especially intolerable because of the large number of federal officials who work or live in that

jurisdiction. There should not be one definition of "official act" (and of the bribery and illegal gratuities crimes) that applies to the Pentagon and the CIA in Northern Virginia and to the FDA in suburban Maryland, and another definition that applies in the District of Columbia to Congress, the White House, and the Treasury Department. Nor should the government be able to circumvent *Valdes* (as it did here) merely by crossing the Potomac and initiating a prosecution in the Eastern District of Virginia. To prevent such forum-shopping and bring greater clarity to the many federal public officials who live and work in the Metropolitan D.C. area, this Court's review is needed.

II. The Question Presented Is Recurring And Important

Further review is warranted because the federal bribery statute, 18 U.S.C. § 201, is an important statute that serves as the basis for numerous federal prosecutions each year. Section 201 punishes not only the receipt or acceptance of bribes by "public officials," see *id.* § 201(b)(2)(A), but also the offering or promise of such bribes by any individual or entity, see *id.* § 201(b)(1)(A); see also 1 U.S.C. § 1. Moreover, as discussed in *Sun-Diamond*, Section 201 separately punishes both the giving and the receiving of illegal gratuities. See *id.* § 201(c)(1)(A), (B). Notably, each of these constituent offenses incorporates and thus hinges on the definition of "official act" set forth in Section 201(a)(3). The Court's resolution of the question presented here accordingly would clarify an important *set* of federal criminal proscriptions involving public corruption.

The importance of the meaning of "official act" is underscored by the broad applicability of Section 201, especially as construed by the Fourth and Eleventh Circuits. Each of the four offenses described above applies to all "public officials," which includes not only Members of Congress but also all employees and officers of the United States government (all three branches, including every department and agency) and the District of Columbia, all other persons who act "for or on behalf of the United States," and federal jurors. 18 U.S.C. § 201(a)(1); see also *Dixson* v. *United States*, 465 U.S. 482, 496-97 (1984) (adopting broad reading of "public officials"). As Judge Kavanaugh noted in his *Valdes* concurrence, decisions "in cases like this one often are relied on by hundreds of thousands of covered federal officials and those who advise them on ethics issues." 475 F.3d at 1330-31 (Kavanaugh, J., concurring); see also Brent Gurney *et al.*, *United States v. Valdes: "Officially" Defining "Official Act" Under the Federal Gratuities Statute*, THE CHAMPION, at 12, 15 (Sept./Oct. 2006) (describing issue as one "of fundamental importance to millions of federal employees whose actions are potentially subject to prosecution").[9]

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[9] Moreover, the bribery and illegal gratuity crimes are broadly triggered by the offering or receipt of "anything of value," which many courts have construed expansively to include both tangible and intangible items of little or no economic value. See, *e.g.*, *United States* v. *Williams*, 705 F.2d 603, 622-23 (2d Cir.) (worthless stock), cert. denied, 464 U.S. 1007 (1983); see also *United States* v. *Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (citing cases involving amusement and an agreement not to run in a primary election).

The government would be hard-pressed to deny that the proper interpretation of "official act" is a question of great public importance. As noted above, in *Valdes* the government requested en banc rehearing after losing before the three-judge panel on the same rationale that was later adopted by the en banc court. In its rehearing petition, the United States told the D.C. Circuit that *Valdes*'s construction of "official act" presented "a question of exceptional importance, because it draws into question the government's ability to prosecute under the bribery and gratuity statutes corrupt profit-making by public officials involving their insufficiently 'formal' government functions." U.S. *Valdes* En Banc Pet. at 4; see also *id.* at 14 (*Valdes* "has created unnecessary uncertainty in an area of the criminal law that has considerable public importance"). The government also stated that "the uncertainty about the reach of the bribery and gratuity statutes" created by the panel decision was increased because the D.C. Circuit was "the venue, historically, for many of this country's most significant public corruption investigations." *Id.* at 4. This uncertainty, of course, has only grown because of the decision below.

The importance of the issue presented is likely only to increase given the high priority assigned to enforcement (and the marked rise in federal public corruption prosecutions and investigations) in recent years. According to FBI Director Mueller, public corruption is the Administration's "top criminal priority"; as of 2008, the FBI had "more than 2,500 pending public corruption investigations," representing an increase of 50% since 2003. Robert S. Mueller III, Remarks at the A.B.A Litig. Section

Annual Conf. (April 17, 2008) (*available at* http://www.fbi.gov/news/speeches/corporate-fraud-and-public-corruption-are-we-becoming-more-crooked); see also *ibid.* ("In the past five years, the number of agents working public corruption cases also has increased by more than 50 percent. We have convicted more than 1,800 federal, state, and local officials in the past two years alone."). For that reason as well, further review is warranted.

III. The Decision Below Is Erroneous

The Fourth Circuit approved as legally correct an instruction informing the jury that "official acts" under the federal bribery statute "include" all "those *activities* that have been *clearly established by settled practice* as part [of] a public official's position." App., *infra*, 117a (emphasis added). Further review is warranted because that decision was flawed at every turn.

First, the "settled practice" instruction makes a hash of the statutory definition of "official act." The text, legislative history, and purpose of the bribery statute all strongly indicate that, with respect to Members of Congress, an "official act" is confined to the formal *legislative* process, or, at the very most, to *governmental* decision-making, as the D.C. Circuit held in *Valdes* v. *United States*, 475 F.3d 1319 (2007) (en banc). In no event does "official act" mean "settled practice."

The carefully crafted statutory definition of "official act" makes two things clear. First, to do an "official act," a public official must decide or act on a "question, matter, cause, suit, proceeding or controversy." 18 U.S.C. § 201(a)(3). Second, not just

any such "question" or "matter" will do. Instead, the statute covers only those questions or matters that may "be pending" or "by law be brought" before a public official in his official capacity – in this case, Jefferson.

By their very nature, the phrases "pending" and "by law brought" contemplate questions or matters that are resolved through the formal legislative process. After all, how are questions "brought" "by law" to Congressmen? The words plainly connote some formal process – such as the initiation of a bill in committee or the instigation of a vote on the floor. They do *not* suggest questions that happen to pop up merely as a matter of "settled practice," whatever that is. Similarly, "pending" typically modifies nouns – *e.g.*, "question," "matter," "application," "case" – that so modified denote things that are resolved through formal, institutional processes.[10]

The "settled practice" instruction departs from these long-established usages of "pending" and "by law brought." No ordinary speaker of English would suggest that a constituent who asks a Congressman

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[10] See BLACK'S LAW DICTIONARY 1169 (8th ed. 2004) ("pending, *adj.* 1. Remaining undecided; awaiting decision <a pending case>. 2. *Parliamentary law*. (Of a motion) under consideration; moved by a member and stated by the chair as a question for the meeting's consideration."). This is also how "pending" is used throughout the U.S. Code, including in Titles 2 (dealing with Congress) and 18 (dealing with crimes). See, *e.g.*, 2 U.S.C. §§ 471(d)(2) ("matters pending before the Congress"), 643(d) ("an amendment or motion . . . is pending before the Senate"); 18 U.S.C. § 1504 ("any issue or matter pending before such juror"), 1505 ("pending proceeding . . . before any department or agency of the United States").

for assistance with a government agency has "brought" that question to him "by law." Nor is it sensible to describe such constituent inquiries as "pending" questions; if anything, the question that is "pending" is the one before the *agency official*, not the Congressman. And as both the district court and government agreed below, only the latter can make out an "official act" in this case. Yet the Fourth Circuit treated constituent requests as "matters" or "questions" that were "pending." App., *infra*, 52a-53a & n.38.[11]

The legislative history and statutory purpose confirm the incorrectness of the "settled practice" instruction. As explained above (at pages 2-3 & n.1), the current version of the bribery statute, enacted in 1962, reflected Congress's efforts to consolidate a variety of office-specific bribery provisions without altering or expanding the nature of the substantive offense. Notably, the prior provisions addressed to Members of Congress covered payments relating to matters "pending *in either House of Congress, or before any committee thereof*" – that is, actions that are part of the formal legislative process. 18 U.S.C. §§ 204, 205 (1958) (emphasis added). Indeed, the very purpose of the bribery statute is to ensure that the public has "the benefit of objective evaluation and unbiased judgment *on the part of those who*

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[11] Even less do "pending" and "by law brought" make sense when applied to mundane office activities performed by Congressional staffers, which the government identified as being "official acts" themselves (see pages 9-10, *supra*). Such activities – mailing a letter or making a phone call – do not involve *any* question or matter, much less one that could be characterized as "pending" or brought "by law."

participate in the making of official decisions." *United States* v. *Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979) (emphasis added and internal quotation marks omitted). That important concern, which is reflected in the severe penalties accompanying the bribery offense, applies when a Member of Congress accepts money in return for being influenced to decide or act on a *legislative* question, but not when there is no corruption of the formal legislative decision-making process.[12]

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[12] The calculus changes, however, when a Member is paid to act on a question that is pending *not* before him or Congress, but elsewhere, such as before an executive agency. In that instance, the danger to society is reduced, inasmuch as the Member's ability to influence the question is comparatively attenuated. Notably, Congress has enacted a separate offense that specifically addresses this harm, but punishes the Member's conduct less severely (by up to five years' imprisonment). See 18 U.S.C. § 203(a)(1) (prohibiting Members of Congress from seeking or accepting compensation "for any representational services" rendered in relation "to any proceeding, application . . . or other particular matter in which the United States is a party or has a direct and substantial interest[] before any department [or] agency"); see also *id.* § 216(a). Interpreting "official act" for Congressmen as encompassing *only* legislative conduct has the added virtue of preventing the bribery statute from irrationally encroaching upon Section 203(a)(1). The "settled practice" instruction, in contrast, has a bull-in-a-china-shop effect on the "intricate web of regulations, both administrative and criminal" (including Section 203(a)(1)) that "govern[] the acceptance of gifts and other self-enriching actions by public officials." *Sun-Diamond*, 526 U.S. at 409; see also *id.* at 412 ("[T]his is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. . . . Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits.").

Second, the "settled practice" instruction is foreclosed by *Sun-Diamond*. As previously explained (at page 12), each of the activities this Court there said were *not* "official acts" would surely qualify as an "activit[y] that ha[s] been clearly established by settled practice as part [of] a public official's position." JA5149. Indeed, *Sun-Diamond* noted that the White House hosts championship sports teams "*each year*." 526 U.S at 406-407 (emphasis added). The Secretaries of Education and Agriculture, too, routinely visit schools and speak before farmers' groups, respectively.

The Fourth Circuit's reasons for declining to follow *Sun-Diamond* were all mistaken. It does not matter that *Sun-Diamond* involved a conviction under the illegal gratuities, not the bribery, provision, see App., *infra*, 44a, 47a, because both provisions incorporate the same definition of "official act." Nor was the Fourth Circuit free to ignore *Sun-Diamond* because this Court "did not rely on the official act definition *to the exclusion of the rest of the illegal gratuity statute*." *Id.* at 45a n.35 (emphasis added). It is irrelevant that the Court's construction of "official act" was not the *sole* basis for its decision, as long as it was *a* basis, which it plainly was (and the Fourth Circuit did not suggest otherwise). Finally, *Sun-Diamond*'s analysis of "official act" cannot be brushed aside because it appeared as part of a "rebuttal to the hypothetical impact of the Court's narrow reading of the illegal gratuity statute." *Id.* at 47a-48a. This Court's discussion of "official act" was unequivocal and served as the basis for rejecting the broad readings of the statute advanced by the government and independent counsel. See 526 U.S. at 405-08.

Third, the Fourth Circuit was wrong to suggest that the "settled practice" instruction was required or even supported by the "holding" of *Birdsall*. As explained above (at pages 11, 19-20), *Birdsall*'s only holding is that official acts are not limited to those actions that are expressly *mandated* by a federal *statute*. See *Valdes*, 475 F.3d at 1322-23. *Birdsall* went on to observe, in dicta, that an official's "action sought to be influenced" could be "governed by a lawful requirement" that was not "prescribed by a written rule or regulation" but rather was "found in an *established usage* which constituted the *common law of the Department* and *fixed* the [official's] *duties*." 233 U.S. at 230-231 (emphasis added); see also *id.* at 231 ("In numerous instances, *duties* not completely defined by written rules are clearly established by settled practice . . . ."") (emphasis added). Even this dicta, however, was focused on the "duties" or responsibilities required of an officeholder as part of his official position. Put differently, the *Birdsall* dicta attributed significance to "settled practice" only insofar as "settled practice" evidenced such duty. Contrary to the Fourth Circuit's suggestion, *Birdsall* did not say that every "settled practice" implicates the bribery statute just *because* it is "settled practice," even if the "settled practice" involves conduct that is purely customary or discretionary but not required as one of the duties of the office.

It is therefore hardly surprising that *Sun-Diamond* failed to cite *Birdsall* (another erroneous ground given by the Fourth Circuit for declining to apply *Sun-Diamond*). See App., *infra*, 47a. The defendants in *Birdsall* had a clear "duty" to make sentencing recommendations. That was not true of

the three examples of official activities that *Sun-Diamond* said were not "official acts" – none was truly a duty of the officeholder. In addition, the special officers in *Birdsall* clearly had "questions" that were "pending" before them: whether to recommend clemency. There was thus no need in *Sun-Diamond* for this Court to mention *Birdsall* because, properly understood, *Birdsall*'s narrow holding (and even its dicta) were in no way undermined by *Sun-Diamond*.[13]

In this case, Jefferson was not accused of being influenced in the performance of any Congressional *duty*, such as voting on legislation. No one, including the government's own expert, would regard Jefferson's conduct as anything but completely *discretionary*. (Jefferson plainly had no duty to respond favorably to a "constituent" request – whether that "constituent" was from his district, his state, or somewhere else in the United States – to accompany the "constituent" on a long trip to Africa and help the "constituent" obtain a private or public

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[13] Notably, the United States (represented by the Independent Counsel) repeatedly cited *Birdsall* in its *Sun-Diamond* merits-stage briefs. See Br. for the United States 15, 20, 21, *Sun-Diamond*, 526 U.S. 398 (1999) (No. 98-131) (filed Dec. 17, 1998) ("U.S. *Sun-Diamond* Br."); Reply Br. for the United States 4, *Sun Diamond* (filed Feb. 18, 1999). Thus, this Court could hardly have been unaware of *Birdsall*. Indeed, *Sun-Diamond* necessarily rejected the United States' argument that the *Birdsall* dicta required a "broad interpretation" of "official act." U.S. *Sun-Diamond* Br. 20-21. Tellingly, the United States Department of Justice, appearing as *amicus*, did not make this argument nor did it even cite *Birdsall*. See Br. for the U.S. Dept. of Justice as *Amicus Curiae*, *Sun-Diamond*, 526 U.S. 398 (1999) (No. 98-131) (filed Dec. 17, 1998).

contract there.) *Birdsall* had no occasion to address such discretionary conduct. The *Birdsall* Court said simply that *duties* implicate the bribery statute, and that "settled practice" can evidence a duty. The Court plainly did not say, as the critical jury instruction in this case stated, that *every* "settled practice" *itself* implicates the bribery statute, even though the practice involves no *duty* but only *discretionary* conduct. *Birdsall* thus provides no support for the district court's "settled practice" instruction.[14]

Fourth, the "settled practice" instruction suffers from another independently fatal flaw: it defines "official act" in a way that is so indeterminate that it renders the bribery statute unconstitutionally vague. See *Bouie* v. *Columbia*, 378 U.S. 347, 350 (1964) (recognizing "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime"). Indeed, it is hard to imagine a more impenetrable element than one that turns on the phrase "settled practice." *Both* words – "settled" and "practice" – are hopelessly indeterminate. What does it mean, for example, for a practice to be "settled"? That 218 Members of Congress (just more than half the body) do it? That only one or two Members do it? How often must they do it? Once a year? Once a term? Once in their careers? Can a practice that was once settled become unsettled? For example, is it sufficient that some Members engaged in the

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[14] Even if *Birdsall* could bear the broad meaning ascribed to it by the district court – and it cannot – that meaning is flatly inconsistent with the Court's much more recent decision in *Sun-Diamond*.

practice in some earlier Congress, even if none does so now? If so, how does a Member know when the practice is settled or unsettled for purposes of the bribery statute?

And, even if you could pin down the meaning of "settled," how do you know what the "practice" is? At what level of generality may, should, or must the jury define the practice? As relevant here, merely as "constituent" services writ large? Or more specifically, as helping businesses obtain foreign private and public contracts? Or more specifically still, as helping out-of-district, even out-of-state businesses obtain foreign private and public contracts? The answer is crucial because the level of generality at which the "practice" is defined directly affects whether the "practice" is "settled" – after all, what Congressman does not perform at least some activity that could be swept into the grand tent of "constituent service"? Cf. *Anderson* v. *Creighton*, 483 U.S. 635, 639-40 (1987) (similarly recognizing, in qualified immunity context, that whether a "clearly established" legal rule has been violated will "depend[] substantially on the level of generality at which the relevant 'legal rule' is to be identified").[15]

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[15] The inherent vagueness of "practice" was exacerbated in this case by the government's multiple, broad definitions of "constituent" services. According to the government's expert, Jefferson's "constituents" included not just the residents of his home district (whom he actually represented in Congress and for whom he and his staff did casework), but also *all Americans* (for whom a Member, when introducing or voting on legislation, supposedly provides "services" as a national legislator). As previously explained, however, none of the businesses or principals whom Jefferson assisted in this case were "constituents" in the

The Fourth Circuit was wrong to ignore the inherent vagueness of "settled practice" as a standard of criminal liability. See App., *infra*, 45a-46a n.36. "Settled practice" utterly fails to provide fair warning of the line between conduct that is severely punished by the statute and conduct that is not. See also *Sorich* v. *United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) ("It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail."). This Court should not tolerate a standard of liability that invites a federal crime to be defined, only after the fact and on a case-by-case basis, by federal juries relying on unpredictable, ad hoc choices about how generally a "practice" should be defined, as well as on "expert" testimony concerning whether a "practice" so defined is "settled." See *Rogers* v. *Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) ("[T]he notion of a common-law [federal] crime is utterly anathema today."). That is a recipe for indeterminacy.[16]

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first sense. And the government has never suggested that Jefferson provided "constituent services" in the second sense (*i.e.*, introduced or voted on legislation) in exchange for anything of value.

[16] The Fourth Circuit also erred in suggesting – albeit half-heartedly and in passing (App., *infra*, 52a-53a & n.39) – that any error in the "settled practice" instruction was "harmless" because the jury supposedly could have relied on a "pending question" theory of liability that was independent of the "settled practice" instruction (even though the "settled practice" instruction told the jury what "official act," including its "pending question" language, *meant*). For reasons explained above (at

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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page 18), that argument is foreclosed by *Sun-Diamond* and inconsistent with *Valdes* – both of which make clear that a gloss on a statutory definition cannot be disregarded simply because the jury is read the statutory language as well. It also ignores the government's overwhelming emphasis at trial on the "settled practice" instruction (and on evidence that had nothing whatsoever to do with any question or matter that was "pending" before Jefferson). See pages 9-10, *supra*.

APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

No. 09-5130.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM J. JEFFERSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, Senior District Judge.
(1:07-cr-00209-TSE-1)

Argued: Dec. 9, 2011.

Decided: March 26, 2012.

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge King wrote the opinion, in which Judge Niemeyer and Judge Duncan concurred.

COUNSEL

ARGUED: Lawrence Robbins, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, D.C., for Appellant. Mark D. Lytle, Office of the United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Robert P. Trout, Amy Berman Jackson, Gloria B. Solomon, Trout Cacheris, PLLC, Washington, D.C.; Mark A. Hiller, Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, D.C., for Appellant. Neil H. MacBride, United States Attorney, David B. Goodhand, Assistant United States Attorney, Rebeca H. Bellows, Assistant United States Attorney, Charles E. Duross, Special Assistant United States Attorney, Amanda Aikman, Special Assistant United States Attorney, Office of the United States Attorney, Alexandria, Virginia, for Appellee.

OPINION

KING, Circuit Judge:

In August 2009, former Louisiana congressman William J. Jefferson was convicted in the Eastern District of Virginia of eleven offenses — including conspiracy, wire fraud, bribery, money laundering, and racketeering — arising from his involvement in multiple bribery and fraud schemes. Jefferson has appealed his convictions on several grounds: (1) that an erroneous instruction was given to the jury with respect to the bribery statute's definition of an "official act"; (2) that another erroneous instruction was given with respect to the "quid pro quo" element of the bribery-related offenses; (3) that Jefferson's schemes to deprive citizens of honest services do not constitute federal crimes; and (4) that venue was

improper on one of his wire fraud offenses.[1] As explained below, we affirm all of Jefferson's convictions save one, which we vacate for improper venue.

I.

A.

As a nine-term congressman, Jefferson represented the Second District of Louisiana, which includes most of the City of New Orleans. Jefferson, who was first elected to the House of Representatives in 1991, maintained congressional offices both in the District of Columbia and in New Orleans. He served on several committees and subcommittees of the House, including the Ways and Means Committee and its subcommittee on trade, and the Budget Committee. During his congressional tenure, Jefferson also served as co-chair of the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria.

In about March of 2005, the FBI and the Department of Justice began a comprehensive corruption investigation of Representative Jefferson.[2] More than two years later, on June 4, 2007, the federal grand jury in Alexandria returned a sixteen-count indictment charging him as follows:

- Count 1 — Conspiracy to solicit bribes,

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[1] In this appeal, Jefferson challenges his aggregate sentence of 156 months in prison only insofar as he contests his convictions.

[2] In 2006, Jefferson was reelected to the House of Representatives, despite the ongoing and publicly exposed corruption investigation.

commit honest services wire fraud, and violate the Foreign Corrupt Practices Act, in violation of 18 U.S.C. § 371;

- Count 2 — Conspiracy to solicit bribes and commit honest services wire fraud, in contravention of 18 U.S.C. § 371;
- Counts 3 and 4 — Solicitation of bribes, in violation of 18 U.S.C. § 201(b)(2)(A);
- Counts 5 through 10 — Self-dealing and bribery-related honest services wire fraud, in contravention of 18 U.S.C. §§ 1343 and 1346;
- Count 11 — Foreign corrupt practices, in violation of 15 U.S.C. §§ 78dd–2(a), 78dd–2(g)(2)(A), and 78ff(a);
- Counts 12 through 14 — Money laundering related to bribery, in contravention of 18 U.S.C. § 1957;
- Count 15 — Obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1); and
- Count 16 — Conducting and participating in a racketeering enterprise, in contravention of 18 U.S.C. § 1962(c) (the "RICO offense").[3]

Three months later, on September 7, 2007, Jefferson sought the dismissal of Counts 2, 3, 10, 12, 13, and 14 for lack of venue, and the transfer of the balance of the indictment to the District of Columbia.

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[3] In addition to alleging sixteen criminal offenses, the indictment made criminal forfeiture allegations relating to the proceeds of the alleged offenses.

On November 30, 2007, the district court, by summary order, denied the motion. After Jefferson sought reconsideration of the venue rulings, however, the district court issued a more formal opinion on June 27, 2008, reiterating and further explaining its decision. *See United States v. Jefferson,* 562 F. Supp. 2d 695 (E.D. Va. 2008) (*"Jefferson I*"). On September 7, 2007, Jefferson also moved to dismiss the bribery-related charges of the indictment (Counts 1-10, 12-14, and 16) on the basis that none are predicated on Jefferson's receipt of things of value "in return for . . . the performance of any official act." 18 U.S.C. § 201(b)(2)(A). Jefferson contended that none of those charges sufficiently alleged an "official act" under the bribery statute, 18 U.S.C. § 201(b).[4] In his motion to dismiss the

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[4] The bribery statute, which is part of the 18 U.S.C. § 201 statutory scheme entitled "Bribery of public officials and witnesses," provides, in pertinent part:

> (b) Whoever —
>
> * * *
>
> (2) being a public official . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act;
>
> * * *
>
> shall be [guilty of an offense against the United States].

18 U.S.C. § 201(b)(2)(A). Pursuant to § 201(a)(3), the term "official act," as used in the bribery statute and the balance of § 201, is defined as

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public

bribery-related charges, Jefferson took the position that the definition of an "official act," set forth in 18 U.S.C. § 201(a)(3), is limited to those activities involving questions pending or brought before Congress, such as voting on proposed legislation or conducting committee work. Jefferson maintained that, as a result, each of the bribery-related charges is fatally flawed.

The district court rejected Jefferson's position on what constitutes an official act by its opinion of May 23, 2008, ruling that, in proving an official act, the prosecution is obligated to satisfy two criteria:

> First, the act must be among the official duties or among the settled customary duties or practices of the official charged with bribery. And second, performance of the act must involve or affect a government decision or action.

United States v. Jefferson, 562 F. Supp. 2d 687, 691 (E.D. Va. 2008) ("*Jefferson II*"). Elaborating, the court explained that an official act may include those duties of a public official that are not defined in written rules, but that are otherwise "'clearly established by settled practice.'" *Id.* (quoting *United States v. Birdsall,* 233 U.S. 223, 230-31 (1914)). The court deemed the *Birdsall* decision as controlling, and further explained that the proper definition of an "official act" under the bribery statute encompassed such matters as Jefferson's official travel to foreign

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official, in such official's official capacity, or in such official's place of trust or profit.

Id. § 201(a)(3).

countries, his official correspondence to and meetings with domestic and foreign government officials, as well as the use of his congressional staff to facilitate other activities alleged in the indictment. The court thus declined to dismiss the bribery-related charges but specified that the government was obligated to prove at trial that Jefferson's alleged acts "(i) involve[d] the performance of an official duty or settled customary duty or practice and (ii) involve[d] or affect[ed] a government decision or action." *Jefferson II,* 562 F. Supp. 2d at 693.

On March 20, 2009, Jefferson moved for reconsideration of the district court's rulings in *Jefferson II* concerning the bribery-related charges, and the government sought clarification of that decision. As a result, on May 22, 2009, the court issued a follow-up opinion. *See United States v. Jefferson,* 634 F. Supp. 2d 595 (E.D. Va. 2009) ("*Jefferson III*"). In *Jefferson III*, the court clarified two of its rulings in *Jefferson II*. First, the court emphasized that an official act must involve or affect a government decision or action. To satisfy this requirement, the bribery statute, embodied in 18 U.S.C. § 201(b)(2)(A), requires that the defendant himself, and not a third party, "be *influenced* in the *performance* of a decision or action." *Jefferson III,* 634 F. Supp. 2d at 601. That is, the "decision or action" must be made or done by the charged public official. *Id.* at 600-01. Second, the court explained that the statutory phrase "any public official" means the charged public official. *Id.* at 601. The *Jefferson III* decision further specified what could be deemed an official act under the bribery statute. Official acts are not, as *Jefferson III* explained, limited solely to legislative acts such as "voting on or introducing a

piece of legislation." *Id.* at 602. The court thus affirmed its earlier ruling that such official acts include those actions that would ordinarily involve the legitimate use of an official's office. *Id.* (citing *United States v. Biaggi,* 853 F. 2d 89, 96–99 (2d Cir. 1988)).

Jefferson's jury trial began in Alexandria on June 9, 2009, and continued for two months. It involved more than forty prosecution witnesses, plus two for the defense. Jefferson did not testify in his own defense. During the trial, the prosecution, in proving that the conduct underlying the bribery-related charges constitutes official acts, was guided by the district court's *Jefferson II* and *Jefferson III* decisions. The government thus presented evidence establishing that Jefferson's various meetings with foreign and domestic public officials on behalf of his myriad alleged bribers, coconspirators, and coschemers, as well as his use of congressional resources to correspond with such officials and coordinate foreign trips, were part of the well-settled congressional practice known as "constituent services." After the parties rested, the district court instructed the jury in a manner that was consistent with its earlier rulings. By the instructions, the court read and explained § 201(a)(3)'s statutory definition of an "official act," and charged the jury that

> [a]n act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.

J.A. 5149.[5] The verdict reflected that the jury was convinced that Jefferson's meetings and communications with domestic and foreign public officials, as alleged in the bribery-related charges in the indictment, involved official acts.

B.

By its verdict, returned on August 5, 2009, the jury convicted Jefferson on eleven of the sixteen counts of the indictment.[6] Jefferson's contentions on appeal challenge his convictions in the following respects:

(1) The district court's "official act" bribery

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[5] Jefferson objected to the instructions in a consistent and timely manner. He asserted that the proper definition of an official act is much more circumscribed than the jury instructions indicated, as he had contended in the pretrial proceedings leading to *Jefferson II* and *Jefferson III*. *See* J.A. 4826-29. (Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

[6] The jury acquitted Jefferson on Counts 5, 8, and 9 (honest services wire fraud offenses), Count 11 (the foreign corrupt practices offense), and Count 15 (the obstruction of justice offense). On August 6, 2009, by a special verdict returned on the indictment's forfeiture allegations, the jury found by a preponderance that the following property constituted proceeds derived from the offenses on which Jefferson had been convicted: $449,300 (Counts 1, 3, 4, and 16); $59,300 (Counts 6, 7, and 10); $21,353.47 (Counts 2 and 16); 30,775,000 shares of Class A stock in a business called iGate Incorporated; 1,500,000 shares of stock in an entity called W2-IBBS Limited; 1,500,000 shares of stock in a company called International Broad Band Services, LLC; and 600 shares of stock in a business called Multi-Media Broad Band Services. Jefferson does not contest the forfeiture verdict in this appeal.

> instruction, which implicates each of Jefferson's eleven convictions, was fatally erroneous;
>
> (2) The court's "quid pro quo" bribery instruction, which implicates Jefferson's convictions under Counts 3 and 4, was also fatally erroneous;
>
> (3) The Supreme Court has now repudiated the self-dealing honest services wire fraud theory on which Jefferson was prosecuted, undermining six of his convictions, that is, Counts 1, 2, 6, 7, 10, and 16; and
>
> (4) There was a lack of venue in the Eastern District of Virginia on the Count 10 wire fraud offense.

Specifically, Jefferson first contends that each of his eleven convictions must be reversed because the district court tried his case under an unduly expansive and erroneous definition of an "official act" for purposes of the bribery statute. Jefferson maintains that an official act is more circumscribed than the jury instructions indicated, and that such an act "must concern a question resolvable through the formal *legislative* process, or, at most, as the D.C. Circuit held in *Valdes v. United States,* 475 F.3d 1319 (D.C. Cir. 2007) (en banc), resolvable through a *governmental* process." Br. of Appellant 14. Jefferson asserts that his position on the definition of an "official act" is supported by the Supreme Court's decision in *United States v. Sun-Diamond Growers of California,* 526 U.S. 398 (1999), which, he insists, undercuts the district court's reliance on the *Birdsall* decision.

Jefferson next argues that, by misconstruing the bribery statute, the district court gave the jury an erroneous instruction on the "in return for" (also called the "quid pro quo") element of bribery relevant to Counts 3 and 4, instructing that the quid pro quo requirement could be satisfied by proof that Jefferson had agreed to perform unspecified official acts on an "as-needed basis."[7] Jefferson thus maintains that the court's instruction on the quid pro quo element also contravenes the Supreme Court's *Sun-Diamond* decision. *See* 526 U.S. at 414 (explaining, in illegal gratuity context, that "thing of value" must be linked to specific act for "which it was given").

Third, Jefferson contends that his convictions on Counts 1, 2, 6, 7, 10, and 16 must be reversed because they rest on the now-discredited self-dealing honest services wire fraud theory that he failed to properly disclose his (or his family's) financial interests in the businesses he was promoting. This conflict-of-interest theory, Jefferson maintains, was repudiated a year after his trial by the Supreme Court's decision in *Skilling v. United States,* 130

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[7] As the district court explained, the bribery-related charges each require proof of a quid pro quo element. The court gave the following example:

> [T]he quid pro quo is satisfied if you find that the government has established beyond a reasonable doubt that the defendant agreed to accept things of value in exchange for performing official acts on an as-needed basis, so that whatever [sic] the opportunity presented itself, he would take specific action on the payor's behalf.

J.A. 5151.

S. Ct. 2896 (2010).[8]

Finally, Jefferson asserts that his Count 10 wire fraud conviction should be reversed because there was no venue for that offense in the Eastern District of Virginia. Count 10 involved a telephone communication from Africa to Kentucky, in furtherance of one of Jefferson's bribery schemes. According to Jefferson, inasmuch as the essential criminal conduct constituting the wire fraud offense, i.e., "the act of causing a wire to be transmitted," did not occur in Virginia, the Count 10 offense should not have been prosecuted there. *See* Br. of Appellant 54.

II.

The indictment against Representative Jefferson — containing sixteen counts and spanning ninety-four pages — details the background of the various charges. The crux of the factual background consists of ten pages of "general allegations" laid out in thirty-eight numbered paragraphs, which are then realleged in each count. Those general allegations contain several that use coded terms, in lieu of proper names, such as the "CW" (for "cooperating witness"), "Nigerian Official A," and "Nigerian Company A" through "Nigerian Company G."

Focusing on the charges of conviction, Counts 1 and 2 make allegations of two criminal conspiracies involving Jefferson and others. Count 1, for

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[8] The Supreme Court determined in *Skilling* that 18 U.S.C. § 1346, which prohibits "a scheme or artifice to deprive another of the intangible right of honest services," criminalizes only those wire fraud schemes involving bribery and kickbacks, and not a defendant's failure to disclose self-dealing conflicts of interest. *Skilling,* 130 S. Ct. at 2933.

example, alleges that the objects of the conspiracy were bribery and honest services wire fraud involving iGate Incorporated, various related persons and entities in the United States and Nigeria, and several members of Jefferson's family. Count 2 alleges a separate conspiracy, with its objects being bribery and honest services wire fraud with respect to schemes that are distinct from those in Count 1, involving different businesses and companies, plus Jefferson's family members.[9]

In Counts 3 and 4 of the indictment, Jefferson is alleged to have solicited bribes in exchange for his official acts. Count 3 involves such a solicitation from iGate and its president for payments to a Jefferson family-controlled company called ANJ Group. Count

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[9] With respect to the elements of the Count 1 conspiracy offense, the district court instructed the jury, in relevant part, as follows:

> First, that the conspiracy, agreement, or understanding to commit bribery as charged in the indictment [or] honest services wire fraud as alleged in the indictment . . . was formed or reached or entered into by two or more persons[;] Second, . . . that at some time during the . . . life of the conspiracy, agreement or understanding, that the defendant knowingly and intentionally joined the conspiracy; And third, that at sometime during the existence or life of the conspiracy, agreement or understanding, . . . a member of the conspiracy did one of the overt acts described in Count 1 . . . for the purpose of advancing, furthering or helping the object or purpose of the conspiracy.

J.A. 5131–32. A nearly identical instruction was given on the Count 2 conspiracy offense. *See id.* at 5141–42. The legal sufficiency of those instructions is not challenged on appeal.

4 alleges a bribery solicitation from the CW (identified in the evidence as Virginia businesswoman Lori Mody), and her companies, International Broad Band Services, LLC ("IBBS"), and W2-IBBS Limited.[10]

Counts 6, 7, and 10 allege three honest services wire fraud offenses predicated on self-dealing and bribery that involving iGate's business ventures in Nigeria, Ghana, and elsewhere.[11] Counts 12 through

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[10] On the elements of the bribery offenses in Counts 3 and 4, the court instructed that the jury must find:

> First, that the defendant directly or indirectly demanded, sought, received or accepted, or agreed to receive or accept, anything of value, personally or for another person or entity; Two, that defendant was at the time a public official of the United States; and Three, that the defendant demanded, sought, received, accepted or agreed to receive or accept the item of value corruptly in return for being influenced in the performance of any official act.

J.A. 5147. Jefferson challenges both the "official act" and the "in return for" (i.e., "quid pro quo") aspects of that instruction on appeal.

[11] The district court instructed on the elements of the wire fraud offenses charged in Counts 6, 7 and 10 as follows:

> First, that the defendant knowingly devised or knowingly participated in a scheme to defraud the citizens of the United States and the United States House of Representatives of their intangible right to his honest services; Two, that the scheme or artifice to defraud involved a material misrepresentation or concealment of material fact; Three, that the defendant acted with intent to defraud; and Four, that in advancing or furthering or carrying out this

14 of the indictment charge Jefferson with three money laundering offenses, arising from his bribery activities, and the corresponding monetary transactions in criminally derived property.[12] Finally, Count 16, which encompasses thirty pages of allegations, charges the RICO offense and alleges twelve racketeering acts of bribery, self-dealing and bribery honest services wire fraud, and money laundering.[13]

> scheme to defraud, the defendant transmitted or caused to be transmitted any writing, signal or sound by means of a wire communication in interstate and foreign commerce.

J.A. 5154. The court went on to instruct the jury that the wire fraud counts alleged two theories of honest services referred to in the first element: (1) bribery; and (2) intentionally failing to disclose material conflicts of interest in connection with his performance of official acts (also called "self-dealing"). *See id.* at 5156-57.

[12] The trial court instructed on the elements of the money laundering offenses charged in Counts 12 through 14, in pertinent part, as follows:

> First, that the defendant knowingly engaged or attempted to engage in a monetary transaction in or affecting interstate commerce; Second, that the defendant knew the transaction involved criminally . . . derived property [;] Third, that the property had a value of greater than $10,000; Fourth, that the property was, in fact, derived from bribery; and Fifth, that the transaction occurred in the United States.

J.A. 5180-81. The legal sufficiency of that instruction is not challenged on appeal.

[13] With respect to the RICO offense charged in Count 16, the district court instructed that the elements of the RICO offense

For purposes of this appeal, we review the allegations and evidence in the context of five bribery and fraud schemes: (1) the iGate scheme; (2) the Arkel scheme; (3) the Melton scheme; (4) the Wilson-Creaghan scheme; and (5) the International Petroleum scheme.[14] Although much of the conduct underlying Jefferson's various convictions occurred during the period from 2000 through 2003, it was the

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were the following:

> First, . . . that an enterprise [Jefferson's congressional office] existed on or about the time alleged in the indictment; Second, that the enterprise engaged in or its activity affected interstate or foreign commerce; Third, that the defendant was employed by or was associated with the enterprise; Fourth, that the defendant participated, either directly or indirectly, in the conduct of the affairs of [the] enterprise; and Fifth, that the defendant knowingly participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity as described in the indictment, that is, through the commission of at [least] two of the charged racketeering acts within ten years of each other, or through causing or aiding and abetting the commission of two such racketeering acts.

J.A. 5193-94. The legal sufficiency of that instruction is also not challenged on appeal.

[14] The relevant facts are spelled out herein in the light most favorable to the government, as the prevailing party at trial. *See United States v. Madrigal-Valadez,* 561 F.3d 370, 374 (4th Cir. 2009) (observing that we review sufficiency of evidence to support conviction in light most favorable to government); *United States v. Seidman,* 156 F.3d 542, 547 (4th Cir. 1998) (recognizing that, in reviewing legal conclusions and factual findings, "[w]e construe the evidence in the light most favorable to . . . the prevailing party below").

iGate scheme, which continued from 2000 through most of 2005, that ultimately led to the comprehensive FBI investigation into Jefferson's illicit activities.

A. The iGate Scheme[15]

1.

The indictment alleges that Jefferson solicited bribes from Vernon Jackson, the President of iGate, a Louisville, Kentucky telecommunications firm, in exchange for Jefferson's assistance in the promotion of iGate's telecommunications technology in Africa.[16] In return for monetary payments and the delivery of iGate shares to ANJ, the Louisiana company controlled by Jefferson's wife, the congressman sent letters on official congressional letterhead, conducted official travel, and met with domestic and foreign government officials to promote iGate's technology. In furtherance of the iGate ventures, Jefferson solicited bribes from a Nigerian company called Netlink Digital Television ("NDTV") that was pursuing a telecommunications venture with iGate in Africa. In return for a portion of NDTV's revenue, the delivery to ANJ of shares of NDTV stock, and the payment of fees, Jefferson performed various official acts, including meetings with Nigerian government officials to promote NDTV's venture with iGate.

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[15] The iGate scheme relates primarily to Jefferson's Count 1 conspiracy conviction, his Count 3 bribery conviction, his honest services wire fraud convictions under Counts 6, 7, and 10, and his Count 16 RICO conviction.

[16] At the time of Jefferson's trial, Jackson had been in prison for more than two years as a result of his related convictions.

The indictment also alleges that Jefferson induced Lori Mody to finance a telecommunications project in Africa using iGate's technology. Jefferson solicited bribes from Mody in the form of shares in W2–IBBS, the Nigerian company created by her to pursue the iGate venture. Jefferson also solicited monetary payments from Mody to his family members. In return for those bribes, Jefferson used his congressional office to promote W2-IBBS's interests in Nigeria and elsewhere. Jefferson also solicited bribes from Mody in the form of shares in IBBS, the Ghanaian company formed by her to pursue a telecommunications project in that country. In return, Jefferson sent letters on official congressional letterhead, conducted official travel to Ghana, and met with Ghanaian government officials to promote the interests of Mody, IBBS, and W2-IBBS in Ghana and elsewhere.

Jefferson introduced Mody to officials of the Export-Import Bank of the United States (the "Ex-Im Bank"), and sought the bank's financial assistance for Mody and her businesses.[17] Jefferson and Mody discussed and planned the bribery of various Nigerian government officials to facilitate the W2-IBBS projects. Pursuant to his discussions with Mody, Jefferson met with and agreed [to] make bribe payments to Atiku Abubakar, the Vice President of Nigeria. Indeed, Jefferson received $100,000 in cash from Mody for the purpose of bribing Abubakar.

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[17] The Ex-Im Bank is a credit agency of the United States designed to assist in financing the export of U.S. goods and services to international markets.

2.

a.

The trial evidence established that, in the year 2000, Jefferson became friends with Jackson, iGate's president. As a business, iGate focused on the development of technology that enabled high speed broadband services to be delivered at low cost over existing telephonic infrastructures. iGate's goals were to market and sell its technology to the military, to targeted African telecommunications and cable companies, and to "Historically Black Institutions located throughout the United States." J.A. 5266. In "mid to late" 2000, when Jackson sought to secure military contracts for iGate's products, Jefferson used his position as a congressman to promote iGate to the United States Army. *See id.* at 350. Specifically, in his promotion of iGate's products, Jefferson arranged meetings with Army officials, with an Army congressional liaison, and with Representative Billy Tauzin of Louisiana, who served as Chair of the House Subcommittee on Telecommunications, Trade, and Consumer Protection. As part of those efforts, Jefferson secured a letter of endorsement for iGate from Representative Tauzin, which Tauzin's staff understood was to be used on behalf of one of Jefferson's constituents.

After Jackson received favorable results from Jefferson's work in promoting iGate to the Army, Jefferson asked Jackson and iGate to hire ANJ, the Jefferson family consulting firm, to market iGate's products. Jackson testified that Jefferson

> approached me and he said to me, that he

> had been helpful to me but he could no longer spend the time with me or work with me on this product and services, and that I needed a company now to get with me and market these products to high-end decision makers in the corporate sector as well as government people. . . . He said, "Well, I know of a company," and he told me about the company. And he told me the company was ANJ. . . . And he said, "My wife and daughters own this company."

J.A. 364. On the basis of Jefferson's request, Jackson and iGate agreed to hire ANJ, and Jefferson provided Jackson with a draft contract for ANJ's services. The contract proposed a term of five years, and provided that iGate would pay ANJ with shares of iGate stock, plus $90,000 per year in twelve $7500 monthly payments, plus bonuses based on a percentage of iGate's profits. That contract was executed by Jackson (for iGate) and by ANJ president Andrea Jefferson (Jefferson's wife) on January 15, 2001.[18] Jefferson then proceeded to promote iGate's technology to his fellow congressmen. At trial, Jackson asserted that he was "paying [Jefferson] to help." J.A. 469. On January 22, 2002, Jackson transferred 100,000 shares of iGate stock to ANJ and, by September 2002, had transferred 550,000 iGate shares to ANJ.

In 2003, Jefferson began to promote iGate's technology abroad, travelling to West Africa to meet

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[18] Interestingly, ANJ was not actually formed as a legal entity until January 19, 2001, four days after the contract had been signed.

with high-ranking foreign officials. In Nigeria, Jefferson promoted iGate to Dumebi Kachikwu and Ahmed Vanderpuije, the founders of NDTV. Jefferson then facilitated an agreement between iGate and NDTV under which NDTV would use iGate's technology to establish satellite service in Nigeria. Without iGate's knowledge, Jefferson solicited from NDTV a portion of its profits from the iGate-NDTV venture, plus an ownership interest in NDTV. Vanderpuije and Kachikwu agreed to pay Jefferson a commission of five dollars on each "set top box" (a required component for a cable service subscription) because, as Vanderpuije explained, he was "excited about the fact that he could have a U.S. Congressman in his pocket." J.A. 1227, 1240. NDTV also agreed to pay iGate approximately $44,000,000, with a $6,500,000 down payment, for the right to use iGate's technology in Nigeria. After that agreement was consummated, Jefferson successfully sought to have iGate increase its payments to ANJ from five to thirty-five percent of iGate's profits.

In promoting iGate, Jefferson also arranged for meetings between iGate, NDTV, and representatives of the Ex–Im Bank. Jefferson personally participated in those meetings and encouraged the Ex–Im Bank to fund the iGate-NDTV venture. Additionally, Jefferson arranged a meeting in 2003 with Jackson, Vanderpuije, Otumba Fashawe (another NDTV representative), plus Nigerian Vice President Abubakar, at which Jefferson urged Nigeria's support for the iGate-NDTV venture. As the venture fell into place in late 2003 and early 2004, ANJ collected more than $230,000 in fees from iGate to compensate Jefferson for his efforts in promoting iGate. When iGate was occasionally past

due on payments to ANJ, Jefferson reminded Jackson of such delinquencies and sent ANJ invoices to iGate.[19]

During 2003 and 2004, Jefferson made multiple trips to Africa to meet with foreign officials and promote the iGate-NDTV venture. On one occasion in February 2004, Jefferson met with Nigerian President Olusegun Obasanjo to discuss the improvement of telecommunication infrastructure in that country "in a low cost way." J.A. 4270.[20] During his travels, Jefferson consistently used his congressional passport, had his congressional staff accompany him, and used staff assistance to create trip itineraries and coordinate with the Department of State to schedule meetings with government officials. Jefferson also corresponded with foreign officials using his congressional letterhead, and he scheduled meetings with officials of domestic

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[19] For example, Jefferson advised Jackson by letter of December 27, 2004:

> When the money comes in a few days for the African project, I trust, that . . . iGate's debt to ANJ will be brought fully current. It now stands at $262,500, per the attachment. As you know, ANJ has a specific profit share agreement with iGate on the NDTV business, but this can wait for a better time.

J.A. 5369. The attachment being referred to was an ANJ invoice to iGate for $262,500, designated as "a request for payment of amounts currently due." *Id.* at 5370.

[20] While meeting with President Obasanjo in February 2004, Jefferson expressed an interest in exploring oil and gas opportunities in Nigeria — a venture that is the subject of another Jefferson scheme.

agencies to secure financing for the iGate-NDTV venture. Indeed, Mr. Kachikwu of NDTV described Jefferson's arrivals for meetings in Nigeria as being "in his full apparatus as a US congressman, with embassy security, embassy vehicles, introduc[ing] himself as a US congressman in charge of overseeing affairs of Nigeria or Africa." *Id.* at 1313.

b.

The trial evidence reflected that the iGate-NDTV venture foundered in approximately 2004, and iGate agreed that it would refund to NDTV the sum of $3,500,000, a major portion of the $6,500,000 down payment NDTV had already paid iGate. As the iGate-NDTV venture faltered, however, Jefferson managed to secure a replacement for NDTV's role in the iGate scheme, that is, Lori Mody, who then represented a company called W2 Limited. Mody was first introduced to Jefferson by one of his former legislative aides, Brett Pfeffer.[21] On behalf of W2 Limited, Mody entered into an investment agreement with Jackson and iGate after Jefferson assured her that he could secure financing for iGate's African ventures through the Ex-Im Bank. He also assured her that he could secure the necessary cooperation of the Nigerian government.

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[21] Pfeffer worked as Jefferson's legislative assistant for approximately three years before leaving in 1998 to become a consultant. He was eventually hired by Mody as president of W2-IBBS to solicit investment and development opportunities in start-up companies. As president of W2-IBBS, Pfeffer was paid $700,000 per year, plus fifty percent of the profits made in any opportunity he "brought to the table." J.A. 1925. For his involvement in the iGate scheme, Pfeffer was convicted and sentenced to ninety-six months in prison.

Mody and W2 Limited's contract with iGate, effective July 21, 2004, provided that W2 Limited would own the distribution rights for iGate's technology in Nigeria in exchange for a payment to iGate of $44,934,400. The parties to the contract expected that Mody would fund $3,500,000 of this amount and that the Ex-Im Bank would finance the balance. As a result, Mody created W2-IBBS to be used exclusively for the iGate-Mody aspect of the iGate scheme. Jefferson assisted Mody and Jackson in negotiating and drafting the terms of that contract, and the congressman requested compensation from Mody for his efforts. Such compensation was to include payments to ANJ, ownership interests in Mody's businesses, and payments to other businesses owned by Jefferson's family. In return, Jefferson continued to correspond and meet with African government officials to promote the iGate-Mody venture.

Mody and W2-IBBS made an initial payment of $1,500,000 to iGate in July 2004, and a day later Jackson remitted to ANJ the sum of $50,000. In September 2004, Mody and W2-IBBS made their second payment to iGate, in the sum of $2,000,000. Jackson promptly paid another $50,000 to ANJ. Notably, ANJ never performed any work for iGate.

In late 2004 and early 2005, despite Jefferson's efforts, the iGate-Mody venture began to unravel. Mody grew concerned with the propriety of Jefferson's conduct and, in March 2005, acted on her suspicions and contacted the FBI. She then turned against Jefferson and began to cooperate with the FBI and the Department of Justice.

With the FBI monitoring their relationship,

Jefferson and Mody renewed their efforts to pursue the iGate-Mody venture in Nigeria. Jefferson assured Mody that he was committed to the success of iGate's ventures in Nigeria and other West African countries, but continued to demand payments from Mody, including an ownership interest in W2-IBBS for Global Energy and Environmental Services, an entity owned by Jefferson's daughters. Acting on Mody's behalf, Jefferson made further efforts to assist the iGate-Mody venture, including visiting Ghana in July 2005 to — at least in part — promote the iGate scheme to Ghanaian government officials. After Jefferson's return from Ghana, his office completed an official travel disclosure form confirming that one of Mody's companies had sponsored his trip, and affirming that his travel to Africa was "in connection with [Jefferson's] official duties and would not create the appearance that [he] is using public office for private gain." J.A. 6175.[22]

In his negotiations with Mody, Jefferson constantly sought additional compensation for himself and his interests. Those negotiations were conducted mostly in a clandestine manner, through cryptic notes and coded messages. Nevertheless, Jefferson made a comment to Mody that revealed his apprehension concerning the propriety of their dealings. During a monitored meeting with Mody on May 12, 2005, Jefferson remarked, "All these damn notes we're writing to each other, as if we thought. . .

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[22] Jefferson's congressional office submitted similar travel disclosure forms for other trips relating to his bribery and fraud schemes, including a February 2003 trip to Nigeria and a February 2004 trip to Nigeria, Cameroon, Equatorial Guinea, and Sao Tome and Principe.

[the] FBI's watching us." J.A. 2321.[23] At a July 30, 2005 meeting with Jefferson, Mody received from him a document entitled "Cash Requirements," which reflected so-called "project costs" for the iGate-Mody venture in Nigeria and Ghana. *Id.* at 5631. This document provides for four disbursements: (1) $8,389,000 to a bank account under the name of Multi-Media Broad Band Services; (2) $145,000 to ANJ; (3) $1,000,000 to the "Global Energy Account"; and (4) $500,000 to an otherwise unexplained account called "Valenti Firm Escrow Account." *Id.* at 5631-32. Multi-Media Broad Band Services was a business entity created by Jefferson, with Mody on its board. Having reached suitable compensation arrangements with Mody, Jefferson pressed on, seeking cooperation from the governments of Nigeria and other West African countries for the iGate scheme, and specifically the iGate-Mody venture.

During the iGate scheme, Nigeria Telecommunications Limited ("NITEL"), the country's primary telephone carrier, was controlled by the Nigerian government. In order for the iGate scheme to succeed in Nigeria, iGate needed access to NITEL's telephone lines. To secure NITEL's cooperation, Jefferson met with Nigerian Vice President Abubakar on July 18, 2005, and offered him a percentage of the profits from the iGate-Mody venture. In addition to such "back-end

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[23] During an FBI-monitored telephone conversation with Jefferson in mid-2005, Jackson suggested replacing Mody with a new investor. Jefferson responded, "We've got to do this shit right, though. I mean, otherwise, we're going to all be in the goddamn pokey somewhere, fooling with . . . shit like this." J.A. 783–84.

compensation," Jefferson sought to have Mody pay Abubakar $500,000 in cash on the "front end," that is, immediately, in order to ensure his cooperation. *See* J.A. 2752-60; 6289-91. In furtherance of that plan, Mody obtained $100,000 in marked cash from the FBI and placed it in a briefcase. On July 30, 2005, outside a hotel in Arlington, Virginia, Mody delivered the briefcase containing the money to Jefferson, who was to deliver it to Abubakar. The conversations between Jefferson and Mody concerning this illicit payment were monitored and recorded by the FBI. Despite indicating to Mody on August 1, 2005, that he had already delivered the $100,000 cash payment to Abubakar, Jefferson was still in possession of at least $90,000 of the bribe money.

Two days later, FBI agents visited Jefferson's New Orleans home. Jefferson admitted the agents into his residence at about 7:00 that morning, and agreed to speak with them. During the FBI interview, Jefferson concealed his activities involving iGate and Mody and falsely responded to the inquiries. Later that day, the FBI executed six search warrants with respect to the Jefferson investigation: (1) Jefferson's District of Columbia residence; (2) his vehicle in the District of Columbia; (3) his New Orleans residence; (4) the New Orleans office of the Jefferson family accountant; (5) Vice President Abubakar's Potomac, Maryland residence; and (6) iGate president Vernon Jackson's home in Kentucky. During their search of Jefferson's D.C. home, the FBI agents found and seized $90,000 of the marked Abubakar cash, which was concealed in frozen food boxes in the freezer.

B. The Arkel Scheme[24]

1.

Contemporaneously with the early part of his involvement in the iGate scheme, Representative Jefferson engaged in a separate scheme that involved soliciting and receiving bribe payments from businessman George Knost and his business entities, Arkel International, Arkel Sugar, and Arkel Oil and Gas (collectively, "Arkel"). As spelled out in the Count 2 conspiracy charge, Jefferson, in return for such payments, performed various official acts, including endorsing an Arkel venture to officials of the Ex-Im Bank and promoting Arkel's interests to Nigerian government officials.

2.

The trial evidence confirmed that Jefferson solicited bribes from several American businesses, in addition to iGate, that aspired to do business in West Africa. Jefferson spoke favorably to his African government contacts on behalf of such businesses, including Arkel, but demanded that, in exchange, they pay members of Jefferson's family so-called "consulting" fees. Jefferson's consulting fee demands amounted to millions of dollars.

One such arrangement between Jefferson and Arkel concerned a sugar factory feasibility study and construction contract in Nigeria. Knost, Arkel's President, first met Jefferson in August of 2000 when Knost wanted to travel with a government delegation to Africa. Knost and Arkel were interested

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[24] The Arkel scheme relates primarily to Jefferson's Count 2 conspiracy conviction and his Count 16 RICO conviction.

in developing sugar factory projects in Nigeria and, as a result, contacted Jefferson's office seeking assistance with respect to the delegation. Knost informed Jefferson that the sugar projects were worth as much as $300,000,000 each.

About a year later, in the fall of 2001, Knost met with Jefferson at Arkel's offices in Baton Rouge, Louisiana. Those in attendance included Ibrahim Turaki, the Governor of Jigawa State, Nigeria, and the congressman's brother, Mose Jefferson. At that meeting, Representative Jefferson promoted Arkel's proposed sugar projects to Governor Turaki. Knost and Jefferson then had a private conversation where, according to Knost, Jefferson said, "'You need to hire my brother, Mose, as a consultant, you know, to handle this deal.'" J.A. 2995-96. During dinner with Jefferson and Mose, Knost discussed with Jefferson the assistance that the congressman could provide Arkel in terms of general promotion, facilitating the sugar projects' feasibility study, and securing an Arkel contract to construct the Nigerian sugar factories. As Knost understood it, Arkel's hiring of Mose was a "prerequisite" to obtaining Jefferson's assistance on its sugar factory endeavors in Nigeria, even though Knost did not expect Mose to perform any work on Arkel's behalf.

Arkel thereafter agreed with Representative Jefferson that Mose Jefferson would be paid four to five percent of Arkel's profits on the sugar contracts, in the event Arkel was selected to construct the Nigerian factories. Arkel and Governor Turaki then agreed to proceed with the factories' feasibility study in Jigawa, with Arkel to be paid $500,000 for its work. For his part, Jefferson assisted Arkel

representatives in obtaining visas for travel to Nigeria, scheduled meetings for Arkel with Nigerian government officials, and sought to resolve payment issues that arose between Arkel and Jigawa State. On July 27, 2001, Jigawa paid $187,230 to Arkel, after Arkel Sugar had been created to develop the Nigerian sugar projects. On August 15, 2001, a Mose Jefferson shell entity, Providence International, invoiced Arkel for $7489, which was paid one week later.[25] Jigawa thereafter made further payments to Arkel, including $85,000 in December 2001 and $260,000 in April 2002. Arkel then paid four percent of each of those payments to Providence International.

In August 2001, Knost also sought the assistance of Jefferson and his brother Mose for a potential business venture in Nigeria to develop so-called "marginal oil fields."[26] Knost agreed to pay another of Mose's shell entities, BEP Consulting Services, to secure Jefferson's assistance in obtaining Nigerian government cooperation with Arkel's interests in the marginal oil field venture. Jefferson then assisted Arkel's efforts, meeting with and seeking aid from foreign and domestic government officials and helping to gain financing for the venture from the Ex-Im Bank.

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[25] The sum of $7489 paid to Providence International by Arkel in August 2001 was four percent of the $187,230 that Jigawa had paid Arkel one month earlier.

[26] At trial, Knost described a "marginal oil field" as "an oil field that had been either discovered and not produced, or discovered and produced some period of time and became uneconomic." J.A. 3046.

C. The Melton-TDC Scheme[27]

1.

The conspiracy charged in Count 2 of the indictment includes allegations concerning a scheme in which Representative Jefferson solicited and received bribes from businessman John Melton and a company called TDC Energy Overseas, Inc.[28] In return for bribe payments from TDC, Jefferson performed various official acts, including the promotion of TDC's interests in the development of the Nigerian marginal oil fields with Nigerian government officials and with officials of the United States Trade and Development Agency (the "USTDA").[29] In particular, Jefferson sought to have the USTDA provide financial assistance to TDC for its marginal oil field ventures.

2.

Knost realized in approximately September 2001 that he would be unable to successfully pursue Arkel's marginal oil field venture in Nigeria. As a result, he offered John Melton, an ex-Arkel employee, the opportunity to take over. Melton created TDC for that purpose, but after assessing a

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[27] The Melton-TDC scheme relates primarily to Jefferson's Count 2 conspiracy conviction and his Count 16 RICO conviction.

[28] In the indictment, Melton and TDC are identified only as "Businessperson G" and "Company G."

[29] The USTDA is an agency established to promote United States private sector participation in development projects in developing and middle-income countries, with special emphasis on economic sectors with significant U.S. export potential.

proposed agreement between Arkel and Mose Jefferson's firm BEP concerning the marginal oil field venture, TDC declined to be involved, primarily because BEP's requested fees were thought to be excessive. Melton later decided to further pursue the oil field venture, however, with two partners, Ramon Jarrell and Jim Creaghan. Creaghan, who was a lobbyist from Louisiana, was to act as liaison between TDC and Representative Jefferson.

In approximately December 2001, four of the TDC schemers — Melton, Jarrell, Creaghan, and Jefferson — met in Louisiana to discuss the marginal oil field venture, as well as other potential projects in West Africa. Jefferson proposed a trip to Nigeria in January 2002 to meet with Nigerian government officials. Jefferson informed the TDC partners, however, that before he could arrange such a trip they would have to agree to hire and pay his brother Mose for consulting services. That request was agreed to, and the TDC group prepared for the trip to Nigeria.

Melton, on behalf of TDC, prepared a proposed agreement with respect to the venture and other West Africa projects, to be executed between TDC and BEP. TDC's proposal, dated January 10, 2002, identified several projects, including an oil field project, a pharmaceutical project, and a fertilizer plant project. The proposal promised that BEP would receive three percent of the net profit on all such projects. When Melton presented the proposal to Jefferson, however, the congressman rejected it, simply stating that "this won't do." J.A. 3497. After Melton promised that Mose's interests in the projects would be assured to Jefferson's satisfaction,

Jefferson agreed to move forward.

In January 2002, Melton and his TDC partners accompanied Representative Jefferson and Mose to Nigeria. That was Mose's first trip to Nigeria, and TDC paid the travel expenses. During the trip, Jefferson arranged meetings between TDC and the Governor of the Nigerian State of Akwa Ibom. As a result, Melton secured a letter of intent from the Governor to move forward with TDC on the fertilizer plant project.

Afterward, in April 2002, Melton, Jarrell, and Creaghan applied for a USTDA grant to fund a TDC feasibility study for a Nigerian fertilizer plant. Jefferson was instrumental in the success of that grant application, having also secured the support of the Governor of Akwa Ibom. As a result, TDC received a $450,000 grant from the USTDA. At trial, the USTDA Director's Chief of Staff described Jefferson's involvement with TDC's fertilizer plant grant application as "not typical." J.A. 3929.

D. The Wilson-Creaghan Scheme[30]

1.

Count 2 of the indictment also alleges that Jefferson, through "Lobbyist A" (the coded identification for Creaghan), solicited bribe payments from "Businessperson BC" (Noreen Wilson), in return for Jefferson's assistance in resolving a dispute over oil exploration rights in the waters off Sao Tome and

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[30] The Wilson-Creaghan scheme primarily relates to Jefferson's Count 2 conspiracy conviction and his Count 16 RICO conviction.

Principe.[31] For that assistance, Jefferson was promised bribe payments by Wilson and Creaghan, either directly or through a nominee company.

The indictment also alleges that Jefferson solicited and received bribes from "Company C," an entity called Life Energy Technology Holdings, in which Creaghan and Wilson were involved. Life Energy was engaged in manufacturing and distributing energy-related technology. In return for bribe payments from Life Energy, Jefferson travelled to Nigeria, Equatorial Guinea, Cameroon, and Sao Tome and Principe. He met with several government officials of those countries to promote Life Energy's technology.

2.

The trial evidence was that Creaghan first met Wilson, a Florida businesswoman, in 2001. In December of that year, Creaghan discussed with Wilson the acquisition and development of oil exploration rights near Sao Tome and Principe. Wilson was involved in a South African business called Procura Financial ("Company B") that dealt with oil drilling off the coast of West Africa. In pursuing the Sao Tome and Principe oil exploration venture, Creaghan and Wilson approached Jefferson in late 2001, on behalf of Procura Financial, and sought his assistance in overcoming barriers that were holding up their oil contracts. These barriers included ownership disputes among various oil companies and problems among the governments of

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[31] Sao Tome and Principe is a small island republic off the coast of the West African nation of Gabon.

several African nations. Jefferson sought to assist in resolving these disputes, but informed Creaghan and Wilson that, in exchange for his help, it was necessary for them to assign an ownership interest in the ventures to members of Jefferson's family. Subsequently, Creaghan, Wilson, and Jefferson arranged for Mose Jefferson to receive an ownership interest in the Sao Tome and Principe venture.

Notwithstanding Jefferson's efforts, the barriers and disputes were never resolved, and the Sao Tome and Principe oil exploration venture failed. Creaghan and Wilson continued to work together, however, and in 2003 became involved with Life Energy, which manufactured a product called "Biosphere," a waste treatment plant that produced electricity and potable water from waste. When Creaghan and Wilson sought to market Biosphere in West Africa, they contacted Jefferson for assistance. Jefferson was interested in their request, but again demanded that Mose be involved. Life Energy agreed to pay Mose — through Providence International — ten percent of each Biosphere project that was sold (a Biosphere project was priced at $6,500,000). Mose was also to receive an ownership interest in the Biosphere business in West Africa. As a result, Jefferson agreed to assist Life Energy in selling its products to West African countries. Creaghan, Jefferson, and Mose travelled again to Nigeria in February 2003 to promote the marketing of Biosphere. During their meetings with officials of several Nigerian states, Jefferson encouraged those governments to invest in Life Energy's Biosphere units.

E. The International Petroleum Scheme[32]

1.

The indictment specifies that, in 2002, Jefferson solicited bribes from "Businessperson A" (Noah Samara) and a company called International Petroleum (which Jefferson caused to be formed), in exchange for Jefferson advancing Samara's efforts to obtain oil concessions from the government of Equatorial Guinea. In furtherance of that bribery and fraud scheme, Jefferson flew to Equatorial Guinea and met with high-ranking government officials.

2.

The trial evidence revealed that Samara, who founded a satellite radio business called WorldSpace, Inc., first met Jefferson in the late 1990s. The two men became friends, and Samara was a contributor to Jefferson's political campaigns. In the fall of 2001, Samara agreed to lend Jefferson $50,000 after the congressman falsely promised he would properly disclose the loan. Jefferson also promised to repay the loan by September 2004, though he never did.

In May 2002, Samara visited several countries in Africa to pursue a project by which WorldSpace would deliver satellite-based educational services to African countries. Samara expected WorldSpace's revenue from the project to be approximately $3,000,000. Jefferson accompanied Samara on portions of this trip, including visits to Equatorial Guinea, the Democratic Republic of the Congo, and

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[32] The International Petroleum scheme relates primarily to Jefferson's Count 16 RICO conviction.

Botswana. In preparing for his trip to Africa, Samara did not intend to visit Equatorial Guinea, the Congo, or Botswana, and only agreed to do so at Jefferson's suggestion. Their visits to those additional African countries required the charter of an aircraft, which cost WorldSpace more than $70,000. During the side trip, Jefferson proposed that Samara get involved in an oil drilling project in Equatorial Guinea, even though Samara had no experience in the oil business. After visiting Equatorial Guinea, Jefferson made a proposal to Samara under which Equatorial Guinea would grant Samara an oil concession. Notwithstanding Samara's discomfort with the proposal, Jefferson recommended that Samara form International Petroleum and pursue the Equatorial Guinea oil venture. Jefferson also suggested that Samara hire one of Jefferson's daughters, an attorney, to assist with International Petroleum's legal work, and that Samara give Jefferson's daughter an ownership interest in the business. Jefferson abandoned the oil concession venture, however, because Samara refused to give Jefferson's daughter an interest in it. Samara also never accepted the oil concession from Equatorial Guinea.

In July 2002, after their trip to Africa, Samara met with Jefferson and his wife to discuss the WorldSpace educational initiative. That meeting primarily involved conversations between Samara and Representative Jefferson, and resulted in Samara agreeing to hire ANJ. During the meeting, Jefferson prepared a proposed consulting contract between WorldSpace and ANJ, under which WorldSpace, "[i]n the event that ANJ makes a material contribution to the procurement of an

agreement between WorldSpace and any developing country to provide educational offerings through the satellite receiver technology," would compensate ANJ with four percent of the gross amount paid under any such agreement. J.A. 3422. Samara understood that the agreement would obligate ANJ to assist WorldSpace in procuring contracts in Botswana, Equatorial Guinea, and the Democratic Republic of the Congo, but that ANJ would not provide consulting services for the educational content of any project. Notably, Samara understood that only Representative Jefferson—and neither his wife nor ANJ—would be assisting with those contracts. Consistent with Samara's understanding, Jefferson wrote several letters to the President of the Democratic Republic of the Congo, using his congressional letterhead, urging consideration of the World–Space satellite education proposal. According to Samara, the WorldSpace venture "slowed down" after the summer of 2002, and he did not further pursue any educational initiatives in Africa with Jefferson. *Id.* at 3434.

III.

A.

Turning to Jefferson's first contention of error, we must assess whether the district court improperly and erroneously instructed the jury on what constitutes an "official act" under the federal bribery statute. We review de novo the claim that a jury instruction failed to correctly state the applicable law. *See Al-Abood ex rel. Al-Abood v. El-Shamari,* 217 F.3d 225, 235 (4th Cir. 2000). In conducting such a review, "we do not view a single instruction in isolation; rather we consider whether taken as a

whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Rahman,* 83 F.3d 89, 92 (4th Cir. 1996).

1.

As background for our assessment, we identify and discuss the relevant legal principles underlying the parties' conflicting contentions regarding the proper definition of an "official act." The official act issue requires our assessment of the viability and applicability of the Supreme Court's century-old decision in *United States v. Birdsall,* 233 U.S. 223 (1914). There, the Court recognized, under a predecessor bribery statute, that for a public officer's action to be "official,"

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

Id. at 230-31 (emphasis added) (citations omitted).[33]

In the *Birdsall* case, Thomas Brents and Everett Van Wert were "special officers, duly appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians." 233 U.S. at 228. The two men were indicted in Iowa for accepting bribes, in violation of § 117 of the Criminal Code. *Id.* at 227. Another defendant, attorney Willis Birdsall, was indicted separately for giving bribes to Brents and Van Wert, in violation of § 39 of the Criminal Code, in exchange for their actions as Indian Affairs special officers, in advising the Commissioner of Indian Affairs (contrary to the truth) that leniency should be applied to individuals convicted for liquor trafficking with Indians. *Id.* at 229-30. Brents and Van Wert were charged with receiving bribes from Birdsall with the intent that their official actions be influenced, in contravention of the applicable statute. *Id.*

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[33] When *Birdsall* was decided, the pertinent bribery statute provided, in relevant part, that

> "whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof," accepts money, etc., "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby," shall be punished as stated.

Birdsall, 233 U.S. at 230 (quoting Crim.Code § 117, 35 Stat. at L. p. 1109, chap. 321, U.S. Comp. Stat. Supp. 1911, p. 1623).

The district court in Iowa ruled that each of the indictments was defective and sustained the defendants' demurrers to them, agreeing that no offenses were charged. In the trial court's view, there was no act of Congress that conferred a duty on the Department of the Interior or its Bureau of Indian Affairs to make recommendations of leniency to the executive or judicial branches. As a result, the court concluded, Brents's and Van Wert's recommendations could not constitute official acts under the bribery statute.

The Supreme Court reversed the district court's judgment, explaining that acts reached by the bribery statute extend beyond those acts that are "prescribed by a written rule." *Birdsall,* 233 U.S. at 231. The *Birdsall* Court thus held that "[e]very action that is within the range of official duty comes within the purview of these sections." *Id.* at 230.

The federal bribery statute was revised in 1962, nearly fifty years after the *Birdsall* decision, to its current provision in 18 U.S.C. § 201(b). The only notable distinction between the bribery statute as it existed in 1914 and the present version is that the predecessor version, instead of using the term "official act," employed the phrase "decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit." *See Birdsall,* 233 U.S. at 230. Although § 201(b)(1)(A) replaces that phrase with the two words "official act," the bribery statute now uses the substance of the predecessor's phrase to define an "official act" under § 201. That is, the present definition of an official act, spelled out in

§ 201(a)(3), draws specific definitional language from its 1914 predecessor. Put succinctly, there is simply no distinction in substance between an official act as defined by *Birdsall*, and an official act under Jefferson's indictment. *See United States v. Carson,* 464 F.2d 424, 433 (2d Cir. 1972) (recognizing that "[t]he terms of the written definition of official act have not been altered to any substantial extent since their origin in the Act of July 13, 1866, ch. 184, § 62, 14 Stat. 168").

In light of the foregoing, the government relied on the *Birdsall* decision to support its position on the "official act" issue raised in this case. And the district court agreed with the government's position, as explained in the court's *Jefferson III* opinion. Accordingly, the court instructed the jury as follows:

> An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.

J.A. 5149.

2.

On the other hand, Jefferson contended in the district court, and continues to maintain on appeal, that the Supreme Court's more recent decision in *United States v. Sun-Diamond Growers,* 526 U.S. 398 (1999), forecloses the use of a "settled practice" instruction on official acts under the bribery statute. In *Sun-Diamond,* rather than examining the bribery statute, the Court examined the requirements for a violation of the illegal gratuity statute, found in 18

U.S.C. § 201(c) — the bribery statute's lesser included offense and close cousin.[34]

The defendant in *Sun-Diamond* was a trade association that gave thousands of dollars worth of gifts (i.e., tickets to sporting events, luggage, and meals) to the Secretary of Agriculture when his Department had matters pending that would affect the trade association and its members. The *Sun-Diamond* decision began its discussion by distinguishing the illegal gratuity statute from the bribery statute. As the Court recognized, although they are subsections of the same statutory scheme — and subject to the same definitions — an act of bribery requires the giving of something of value in exchange for an official act. *See Sun-Diamond,* 526 U.S. at 404. On the other hand, an illegal gratuity "may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id.* at 405.

The *Sun-Diamond* Court declined, therefore, to read the illegal gratuity statute so broadly as to prohibit "gifts given by reason of the donee's office." 526 U.S. at 408. To do so, the Court reasoned, "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

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[34] The illegal gratuity statute provides, in relevant part, as follows: "Whoever . . . directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official [shall be guilty of a crime against the United States]." 18 U.S.C. § 201(c)(1)(A).

year during ceremonial White House visits[.]" *Id.* at 406-07. Warning against an expansion of the illegal gratuity statute to prohibit such gifts, the Court advised that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412. Thus, the Court ruled that gifts by a trade group of farmers to the Secretary of Agriculture, at a time when matters affecting the farmers were pending in the Department, were not barred by the illegal gratuity statute, because such offerings were not directly connected to any specific official act or acts taken or to be taken on the matters of interest to the farmers. *Id.* at 414.

3.

Jefferson claims to find support for his reading of *Sun-Diamond* in *Valdes v. United States*, a 2007 en banc decision of the District of Columbia Circuit. *See* 475 F.3d 1319 (D.C. Cir. 2007). Valdes, a police officer, was charged with contravening the bribery statute by accepting money from an undercover informant in exchange for accessing the police database for information such as license plate numbers, addresses, and outstanding warrants. Although Valdes was indicted on bribery charges, a jury convicted him on three counts of the lesser included offense of receipt of an illegal gratuity. *Id.* at 1322.

The D.C. Circuit reversed Valdes's convictions because his actions amounted to "moonlighting," or misusing government resources, and did not fit into the statutorily required "question, matter, cause, suit, proceeding or controversy." *Valdes,* 475 F.3d at 1323–24. The *Valdes* court relied on the *Sun-*

Diamond decision, seizing on the Supreme Court's discussion of the customary activities of a public official that do not constitute official acts, and asserting that the *Sun-Diamond* Court "reached its conclusion 'through the definition of' [official act,]" *Valdes,* 475 F.3d at 1323 — a proposition we are unwilling to accept.[35] The D.C. Circuit recognized *Birdsall*'s ruling that an "official act" need not be prescribed by statute, but concluded that *Birdsall* did not "stand for the proposition that every action within the range of official duties *automatically* satisfies § 201's definition; it merely made clear the coverage of activities performed as a matter of custom." *Valdes,* 475 F.3d at 1323.

4.

At bottom, Jefferson contends that the definition of an official act used by the trial court, particularly its inclusion of the "settled practices" of a public official, is "hopelessly indeterminate" and overly general, rendering the bribery statute "unconstitutionally vague." *See* Br. of Appellant 18.[36] As a result, he maintains that each of his

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[35] As we discuss further below, *see infra* Part III.A.5, our reading of *Sun-Diamond* reveals that the Court did not rely on the official act definition to the exclusion of the rest of the illegal gratuity statute. Rather, the Court merely referenced that definition to defeat any potential argument that *Sun-Diamond's* narrowing of an illegal gratuity would be misconstrued as overly inclusive. *See Sun-Diamond,* 526 U.S. at 408 (recognizing that any overly inclusive or "absurd" results of narrowing ambit of illegal gratuity may be eliminated "*through the definition of [official act]*").

[36] Though Jefferson suggests that the district court's construction of the bribery statute renders the statute

convictions is fatally flawed.

The boundaries fixed by the Supreme Court in *Birdsall* fall well within the bribery statute, however, and have never been altered. *See United States v. Moore,* 525 F.3d 1033, 1041 (11th Cir. 2008) (deeming *Birdsall* "relevant Supreme Court precedent" on definition of official act); *United States v. Parker,* 133 F.3d 322, 326 (5th Cir. 1998) (citing *Birdsall* for proposition that official act may be found in "established usage"); *United States v. Biaggi,* 853 F.2d 89, 97 (2d Cir. 1988) (relying on *Birdsall* to rule that official acts in the bribery statute "encompass[ed] all of the acts normally thought to constitute a congressman's legitimate use of his office"); *United States v. Morlang,* 531 F.2d 183, 192 (4th Cir. 1975) (recognizing *Birdsall's* holding that, under the bribery statute, "the official action sought to be influenced need not be prescribed by statute but may be governed by a lawful requirement of the executive department under whose authority the official is acting"). We must, as explained below, reject Jefferson's challenge to the district court's official act instruction because it squares with the

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"unconstitutionally vague," he does not provide any argument regarding the elements of an impermissibly vague statute, but instead poses a series of sixteen rhetorical questions. *See Giovani Carandola, Ltd. v. Fox,* 470 F.3d 1074, 1079 (4th Cir. 2006) (recognizing that "[a] statute is impermissibly vague if it either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or (2) authorizes or even encourages arbitrary and discriminatory enforcement" (internal quotation marks omitted)); Br. of Appellant 18. We therefore deem it unnecessary to conduct a vagueness analysis with respect to the bribery statute.

Birdsall precedent. The *Sun-Diamond* decision does not require us to rule otherwise, and Jefferson's acts are encompassed in both the *Birdsall* "settled practices" and the statutory definitions of an official act.

5.

Jefferson argues that the link between a specific official act and a thing of value, required by *Sun-Diamond,* cannot be squared with the "settled practices" instruction used in this case. He asserts that the bribery statute, if read to encompass a public official's settled practices, would criminalize such customary activities as the President receiving sports teams at the White House, and "the Supreme Court definitively has said otherwise." Br. of Appellant 26. Jefferson's contention, however, misses the mark. There is simply no indication that *Sun-Diamond* sought to undermine *Birdsall's* holding. Indeed, *Sun-Diamond* did not mention *Birdsall* at all — a curious omission if the Court intended to overturn its landmark decision on the definition of "official act." In *Sun-Diamond,* the Court was concerned with an unwarranted extension of the illegal gratuity statute to prohibit any gifts to public officials. Rather than ruling on what constitutes an official act, the Court simply embraced a narrow reading of the illegal gratuity statute, deciding that a connection between the payment or gift and a specific official act was required, as opposed to those gratuities given simply because of status or in order to "create a reservoir of goodwill." *See Sun-Diamond,* 526 U.S. at 405.

The only analysis by *Sun-Diamond* of the definition of an official act comes as a rebuttal to the

hypothetical impact of the Court's narrow reading of the illegal gratuity statute. *See* 526 U.S. at 407. The Court addressed the possibility that its narrow interpretation could lead to "absurd" results, in that gifts could be regarded as having been given to the President or the Secretary of Agriculture "for or because of" the official acts of "receiving the sports teams at the White House . . . and speaking to the farmers about USDA policy, respectively." *Id.*

The Court responded that such an absurd result would be "eliminated *through the definition of [official act.]"* 526 U.S. at 408. The Court explained, "[T]he answer to this objection is that those actions — while they are assuredly 'official acts' in some sense — are not 'official acts' within the meaning of the statute. . . ." *Id.* at 407. Bolstering this conclusion, *Sun-Diamond* explained that, when a gratuity is not linked to a specific official act "and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing example[ ] [of the sports jerseys] from being prosecuted." *Id.* at 408. Without a more explicit directive, we are unwilling to translate *Sun-Diamond's* brief discussion of the "official act" definition into an unqualified exclusion of all settled practices by a public official from the bribery statute's definition of an official act. And we have no authority to nullify *Birdsall's* time-tested ruling that an official act need not be specifically prescribed by law.

Put simply, we agree with *Sun-Diamond* and *Valdes* that the bribery statute does not encompass every action taken in one's official capacity, and we

also agree with *Valdes* that *Birdsall* did not so hold. Although *Birdsall* recognized that every act within the range of official duty comes within the purview of an "official act," the inquiry does not end there, and such an act must yet adhere to the definition confining an official act to a pending "question, matter, cause, suit, proceeding or controversy." § 201(a)(3). We thus part company with Jefferson's broad assertion that *Sun-Diamond* supersedes *Birdsall*.

The trial evidence showed that Jefferson, as a congressman, had long-standing relationships with businesspersons and investors, and it was his practice to request and receive favors, gifts, and beneficial business deals in exchange for his actions in promoting such businesses, both abroad and domestically, and in ensuring the success of specific business ventures. The acts performed by Jefferson in exchange for the various bribe payments included, inter alia:

- Granting requests for assistance to business ventures by corresponding and visiting with foreign officials;
- Attempting to facilitate and promote ventures between foreign governments and the businesses who were paying him and his family;
- Scheduling and conducting meetings with Army officials and representatives, at which he promoted iGate;
- Travelling to Nigeria and Ghana, and meeting with representatives of the Ex–Im Bank to endorse, assist, and promote

the iGate scheme; and

- Vouching for Arkel in Nigeria and seeking to secure construction contracts for the Arkel entities.[37]

Importantly, the various individuals and businesses that were paying Jefferson — by delivering money and things of value to enterprises owned by his family members — were doing so *with the specific understanding* that he would assist in their business ventures. Notably, the *Valdes* court qualified its decision, in a manner that is material here, by emphasizing that

> today's decision is in no way at odds with numerous other cases finding liability under § 201. By focusing on those questions, matters, causes, suits, proceedings, and controversies that are decided by the government, our interpretation of the statute easily covers [inter alia] *a congressman's use of his office to secure Navy contracts for a ship repair firm,* as in *United States v. Biaggi* [853 F.2d 89, 96-99 (2d Cir. 1988)].

Valdes, 475 F.3d at 1325 (emphasis added). To be sure, the D.C. Circuit explained that the contested act in *Biaggi* — a decision substantially identical to this case — was "clearly covered by the statute

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[37] Under the evidence, Jefferson's bribery schemes resulted in him and his family receiving, inter alia, at least $449,300 through ANJ; approximately $21,000 though BEP; 30.7 million shares of iGate stock issued to ANJ; 1.5 million shares of W2-IBBS stock issued to Global; and 1.5 million shares of IBBS stock issued to Global.

because [it] concern[ed] inappropriate influence on decisions that the government actually makes." *Id.*

6.

Here, after reading the § 201(a)(3) "official act" definition to Jefferson's jury, the trial court instructed that

> [a]n act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.

J.A. 5149. This instruction was entirely consistent with the *Birdsall* principle, which has never been overruled or called into question by the Supreme Court. And the instruction did not in any way supplant the statutory definition of what constitutes an official act; it simply explained to the jury that an official act need not be prescribed by statute, but rather may include acts that a congressman customarily performs, even if the act falls outside the formal legislative process.

Inasmuch as the trial court gave its "settled practice" instruction in tandem with the statutory definition of "official act," the jury was not authorized to ignore the directive that Jefferson's official acts must pertain to a pending question, matter, or cause that was before him. In other words, the jury could not rely exclusively on Jefferson's settled practices.

Finally, it is notable that the prosecution tried Jefferson's case under both "settled practice" and "pending question" theories. For example, the

government presented expert testimony on the nature of congressional duties, utilizing the experience and knowledge of former multi-term Representative John McHugh, the current Secretary of the Army. Secretary McHugh confirmed that Jefferson's obligations as a congressman included constituent services, which "involves people who live in your own congressional district coming to you or to your staff, asking for assistance on matters which relate to the Federal Government." J.A. 3825. McHugh also testified that the duties of a congressman include addressing various concerns that relate to committee assignments, and that such actions are performed in a congressman's official capacity pursuant to the settled practices and customs of Congress. The government presented additional evidence that Jefferson was largely responsible for promoting trade in Africa and reaching out to African government officials to foster commercial relationships between those countries and the United States. Thus, the jury was free to find, first of all, that performing constituent services was a settled official practice of Jefferson's congressional office and, second, that African trade issues were "matters" or "causes" that were pending before him.[38] The jury was then entitled to conclude

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[38] Although Jefferson's primary defense theory at trial and on appeal is that what he did in connection with the multiple bribe payments did not constitute criminal acts under the bribery statute, that was certainly not his view of those actions while the bribery schemes were ongoing. As he advised Mody in 2005, "these damn notes we're writing to each other, as if we thought . . . [the] FBI's watching us." J.A. 2321. More damning, his criminal mindset was established beyond peradventure by his statement to Jackson that same year that

that Jefferson's actions in connection with both constituent requests and the promotion of trade in Africa fall under the umbrella of his "official acts."[39]

Viewed in context, the "settled practice" instruction did not impermissibly expand the term "official act." *See Cupp v. Naughten,* 414 U.S. 141, 146-47 (1973) (recognizing proposition that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). Therefore, we reject Jefferson's contention that the trial court improperly instructed the jury on the definition of an official act.

B.

Jefferson next contends, with respect to the bribery charges in Counts 3 and 4, that the district court erred when it instructed the jury that the prosecution was obliged to prove that, in exchange for bribe payments, Jefferson performed unidentified official acts "on an as-needed basis." Again, we review de novo the claim that a jury instruction

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"We've got to do this shit right, though. I mean, otherwise, we're going to all be in the goddamn pokey somewhere, fooling with . . . shit like this." J.A. 783-84. Finally, the jury was entitled to conclude — as it did — that the concealment of $90,000 of a cash bribe provided further confirmation of Jefferson's view that he was involved in criminal activity.

[39] Though we discern no error in the official act instruction, it bears noting that, even if the "settled practice" instruction was erroneously given, it was harmless because the prosecution presented ample evidence to the jury that Jefferson's acts related to the bribe payments were acts on "matters" or "causes" that were pending before him — such as acts in furtherance of his congressional duties to promote trade with Africa.

failed to correctly state the applicable law. *See El-Shamari,* 217 F.3d at 235. The instruction at the center of this challenge relates to the "quid pro quo" element of the bribery offense, and the court advised the jury that

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

J.A. 5151. Again relying primarily on the *Sun-Diamond* decision, Jefferson asserts that this instruction contravenes the bribery statute's requirement that there be "a specific intent to give or receive something of value *in exchange* for an official act." Br. of Appellant 43 (citing *Sun-Diamond,* 526 U.S. at 404-05). Although we have already discussed the Court's *Birdsall* decision (which arose in the bribery context), as well as its *Sun-Diamond* opinion (in an illegal gratuity case), we again emphasize the material distinction between a bribery offense and an illegal gratuity offense.

Although both the bribery and illegal gratuity statutes relate to giving a thing of value to a public official, or a public official accepting a thing of value, the illegal gratuity statute, on its face, is one-sided. That is, an illegal gratuity does not require an intent to influence or be influenced. The gratuity is a reward for an action that a public official has already taken, or for an action that the public official has

committed to take in the future. The bribery statute, however, requires proof of a quid pro quo, that is, an intent on the part of the public official to perform acts on his payor's behalf. In other words, the public official's intent to perform acts for the payor — required for a bribery offense — is the exchange, or quid pro quo, missing from the illegal gratuity scenario.

In this situation, Jefferson intended to promote, for example, iGate, Mody, and Arkel, in his official capacity as a congressman, in exchange for money and things of value paid through his family's businesses. The fact that he promised to promote certain business ventures on an as-needed basis (and then followed through) does not take this case beyond the ambit of the bribery statute. As we held in *United States v. Quinn*, the government need not

> prove "that the defendant intended for his payments to be tied to specific official acts (or omissions). . . . Rather, it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action." . . . In other words, "[t]he quid pro quo requirement is satisfied so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor."

359 F.3d 666, 673 (4th Cir. 2004) (quoting *United States v. Jennings,* 160 F.3d 1006, 1014 (4th Cir. 1998)). Here, the congressman was soliciting ongoing bribe payments — from iGate, NDTV, Mody, Arkel, and others — to his family's businesses, in exchange for promoting and facilitating lucrative

deals between, for example, iGate and the Army, or between iGate, Mody, or Arkel and various African governments. In that context, it would be impossible — and it is unnecessary — to link every dollar paid to one of the Jefferson family companies to a specific meeting, letter, trip, or other action by Jefferson to fulfill his end of a corrupt bargain. We have not and do not read the bribery statute or *Sun-Diamond* to compel any such link.

The trial court's quid pro quo instruction is strongly supported by the Second Circuit's decision in *United States v. Ganim,* 510 F.3d 134 (2d Cir. 2007). We agree with that court's explanation that, "in order to establish the quid pro quo essential to proving bribery, the government need not show that the defendant intended for his payments to be tied to specific official acts (or omissions)." *Id.* at 148 (internal quotation marks omitted). Rather, "bribery can be accomplished through an ongoing course of conduct." *Id.* at 149 (citing *Jennings,* 160 F.3d at 1014); *see also United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012) (explaining that "[t]he bribery theory does not require that each *quid,* or item of value, be linked to a specific *quo,* or official act. Rather, a bribe may come in the form of a stream of benefits" (internal quotation marks omitted)).

There was, in this case, an ongoing course of illicit and repugnant conduct by Jefferson — conduct for which he was compensated considerably by those on whose behalf he was acting. An absurd result would occur if we were to deem Jefferson's illicit actions as outside the purview of the bribery statute, simply because he was rewarded by periodic payments to his family's businesses. Given the

choice between a "meat axe or a scalpel" when interpreting a statute, we, like the Supreme Court, favor the scalpel. *See Sun-Diamond,* 526 U.S. at 412. We will not, however, carve from the bribery statute a criterion that depends on the public official's preferred method of payment.

C.

In his third appellate contention, Jefferson maintains that his honest services wire fraud convictions must be vacated because of an erroneous jury instruction on the self-dealing theory of honest services wire fraud that was repudiated by the Supreme Court in *Skilling v. United States,* 130 S. Ct. 2896 (2010).[40] In response, the government concedes that an instructional error occurred, but maintains that the error was harmless beyond a reasonable doubt. Jury instructions are reviewed holistically for abuse of discretion on claims of adequacy, but, as explained above, Jefferson's contention that the instruction failed to correctly state the applicable law is reviewed de novo. *See United States v. Jeffers,* 570 F.3d 557, 566 (4th Cir. 2009); *El-Shamari,* 217 F.3d at 235. Where the jury has been instructed on two theories of guilt, and one of those theories is erroneous, we further apply a harmless error standard of review. *See Hedgpeth v. Pulido,* 555 U.S. 57, 60–61 (2008) (per curiam); *United States v. Hornsby,* 666 F.3d 296, 305 (4th Cir.

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[40] Jefferson's contention on the *Skilling* decision is that the erroneous instructions fatally infect six of his convictions, that is, his conspiracy convictions under Counts 1 and 2, his honest services wire fraud convictions under Counts 6, 7, and 10, and his Count 16 RICO conviction.

2012).

1.

Importantly, the honest services wire fraud allegations rested on alternative theories: (1) that Jefferson solicited bribes in exchange for his official acts in the iGate scheme; and (2) that Jefferson had failed to disclose his conflicts of interest and self-dealing in the iGate scheme. On appeal, Jefferson initially maintains that the first alternative theory is fatally defective because it relied on the erroneous "official act" bribery instruction — a contention we today reject. *See supra* Part IV.A. Jefferson then contends that the government's reliance on the second alternative — his undisclosed conflicts of interest and self-dealing in the iGate scheme — is foreclosed by the Court's decision in *Skilling*.

The *Skilling* decision limited the scope of the honest services wire fraud statute, found in 18 U.S.C. § 1346, by confining its application to bribes and kickbacks only.[41] The Supreme Court thereby declined to construe the scope of § 1346 to include "undisclosed self-dealing by a public official or private employee — i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Skilling,* 130 S. Ct. at 2932.

Inasmuch as Jefferson's convictions rest on

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[41] Section 1346 of Title 18, which was enacted in 1988, responded to the Supreme Court's 1987 decision in *McNally v. United States,* 483 U.S. 350. Section 1346 specifies that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

multiple theories of guilt, only one of which is flawed, we must assess whether the honest services wire fraud instruction given to the jury in Jefferson's trial was "harmless beyond a reasonable doubt, such that it is clear that a rational fact finder would have found [the defendant] guilty absent the error." *United States v. Poole,* 640 F.3d 114, 120 (4th Cir. 2011). As explained below, we are satisfied that the error was necessarily harmless.

2.

Counts 1 and 2 each charged a conspiracy with multiple objects, in violation of 18 U.S.C. § 371, and the jury was instructed that it only had to find that Jefferson had conspired to commit one of the substantive offenses identified. Count 1 charged Jefferson with conspiring to commit bribery, to commit honest services wire fraud, and to violate the Foreign Corrupt Practices Act, and Count 2 charged him with conspiring to commit bribery and honest services wire fraud. Counts 6, 7, and 10 charged Jefferson with honest services wire fraud, in contravention of 18 U.S.C. §§ 1343 and 1346, under the alternative theories identified above. Finally, in the 18 U.S.C. § 1962(c) RICO charge of Count 16, eleven of the twelve racketeering acts specified in the indictment fell under two alternative theories: bribery and honest services wire fraud. The trial court properly instructed the jury that, in order to convict on Count 16, it had to find that Jefferson had committed two or more of those racketeering acts.

Jefferson therefore relies on the *Skilling* decision as a basis for reversal of his convictions on the conspiracy, honest services wire fraud, and RICO

offenses.[42] In *Skilling,* however, the Supreme Court simply limited the ambit of § 1346 to those fraud schemes involving bribes or kickbacks, excluding undisclosed conflicts of interest and self-dealing. *See* 130 S. Ct. at 2931 (explaining that "we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law"). Importantly, the trial court properly instructed the jury on both of the alternative honest services wire fraud theories alleged in the indictment: bribery and self-dealing. And, only one of those theories is erroneous.

Pursuant to the Supreme Court's decision in *Yates v. United States*, when a general verdict on a single criminal charge rests on alternative theories, one valid and the other invalid, the verdict must be set aside if it is "impossible to tell which ground the jury selected." 354 U.S. 298, 312 (1957); *see also United States v. Ellyson*, 326 F.3d 522, 531 (4th Cir. 2003). Jefferson asserts that, under *Yates*, a new trial on the conspiracy, honest services wire fraud, and RICO counts is mandated, because "there is no doubt that the jury could easily have taken the legally invalid path to conviction (i.e., self-dealing honest services wire fraud)." Br. of Appellant 49-50. Unfortunately for Jefferson, however, that is not the applicable standard for our evaluation of the *Skilling* error. Rather, as the Court recognized in *Hedgpeth v. Pulido*, a *Yates* alternative-theory error is subject to ordinary harmlessness review, and the relevant appellate inquiry is whether the error was harmless

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[42] Jefferson does not claim any spillover prejudice by contending that the *Skilling* error on the conspiracy, honest services wire fraud, or RICO counts tainted his separate convictions for money laundering and bribery offenses.

beyond a reasonable doubt. *See Hedgpeth,* 555 U.S. at 61; *see also Skilling,* 130 S. Ct. at 2934 & n. 46 (recognizing that harmless error analysis applies to alternative-theory error cases on direct appeal); *Black v. United States,* 130 S. Ct. 2963, 2970 (2010) (same). Accordingly, a reviewing court is not entitled to reverse a conviction that could rest on either a valid or invalid legal theory if the court can conclude "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States,* 527 U.S. 1, 18 (1999). Put another way, the *Yates* error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 15 (internal quotation marks omitted). By way of example, if the evidence that the jury "necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground, the conviction may be affirmed." *United States v. Hastings,* 134 F.3d 235, 242 (4th Cir. 1998).

In several recent decisions, the federal courts have applied the harmless error test to uphold convictions that were challenged under *Skilling*. In *United States v. Black*, for example, the Seventh Circuit affirmed fraud convictions where the jury had been instructed on a valid pecuniary fraud theory as well as an invalid "intangible right of honest services" fraud theory. *See* 625 F.3d 386, 388 (7th Cir. 2010). Relying on *Hedgpeth*, the *Black* court explained that, "if it is not open to reasonable doubt that a reasonable jury would have convicted [defendants] of pecuniary fraud, the convictions on

the fraud counts will stand." *Id.* After closely examining the underlying facts, the court affirmed, finding that "[n]o reasonable jury could have acquitted the defendants of pecuniary fraud on this count but convicted them of honest-services fraud." *Id.* at 393. In so ruling, the Seventh Circuit also relied on the fact that the evidence and closing arguments had focused on the pecuniary fraud theory. *Id.*

Similarly, in *Ryan v. United States*, an Illinois district court upheld several convictions, including racketeering and mail fraud, in the face of a *Skilling* challenge, finding that the facts underlying the invalid conflict-of-interest honest services wire fraud theory would nevertheless have supported convictions under a bribery honest services wire fraud theory. *See* 759 F. Supp. 2d 975, 991-93 (N.D. Ill. 2010); *see also United States v. Wilkes,* 662 F.3d 524, 544 (9th Cir. 2011) (affirming honest services wire fraud conviction where jury was instructed on both bribery and self-dealing theories, and conviction of substantive bribery offense "confirm[ed] beyond any reasonable doubt that the jury would have convicted [defendant] of honest services fraud if the court's definition had been limited to the bribery basis that *Skilling* expressly approved"); *United States v. Cantrell,* 617 F.3d 919, 921 (7th Cir. 2010) (ruling that *Skilling* did not disturb honest services wire fraud conviction that rested on kickback scheme). *But see United States v. Wright,* 665 F.3d 560, 570-72 (3d Cir. 2012) (vacating honest services wire fraud conviction where verdict encompassed both bribery theory and defective conflict-of-interest theory).

3.

Turning specifically to this case, the jury's guilty verdict on Counts 3 and 4 — the two substantive bribery offenses — demonstrates beyond a reasonable doubt that Jefferson was guilty under the valid bribery theory underlying Counts 1, 6, 7, 10, and 16, and that the *Skilling* error in the jury instructions was necessarily harmless. *See Neder,* 527 U.S. at 15, 18. By convicting Jefferson of those bribery offenses (Counts 3 and 4), the jury necessarily found that Jefferson had committed the bribery object of the Count 1 conspiracy charge, since — as described in both the indictment and the instructions — the bribery object was co-extensive with the bribery conduct charged in Counts 3 and 4.

The foregoing analysis also applies to the Count 16 RICO conviction, in that two of the racketeering acts that the jury found proven were identical to the bribery acts underlying Counts 3 and 4. In this regard, the jury was provided with a verdict form that required it to specify the alleged racketeering acts it found Jefferson had committed. The jury was also provided with Court Exhibit 5, which identified the twelve alleged racketeering acts, eleven of which identified the two alternative theories of liability: bribery of a public official (prong "a") and deprivation of honest services by wire fraud (prong "b"). Two of the racketeering acts that the verdict found as proven were identical to the bribery offenses in Counts 3 and 4. Finally, racketeering act 12, which the jury also found as proven, described monetary transactions in nine separate racketeering acts, including three that corresponded to the money laundering counts (Counts 12–14) on which Jefferson

was also convicted. Notably, the verdict on racketeering act 12 is not challenged on appeal.

Nor does *Skilling* provide Jefferson with any basis for relief as to Counts 6, 7, and 10, the honest services wire fraud counts. Although the trial court, on those counts, instructed the jury on both the bribery theory and the erroneous self-dealing theory, Jefferson's convictions on Counts 3 and 4 render the *Skilling* error harmless beyond a reasonable doubt, because, in finding Jefferson guilty of the substantive bribery violations, the jury necessarily found facts that would have supported his convictions under the bribery honest services theory of Counts 6, 7, and 10. Those charges allege wire communications in furtherance of the iGate scheme, the very bribery scheme outlined in Counts 3 and 4 as well as Count 1 — where Jefferson solicited and received bribes from Jackson, Mody, and iGate. Put another way, the bribery theory underlying the honest services wire fraud counts was that Jefferson had deprived American citizens and the House of Representatives of his honest services by soliciting bribe payments from Jackson, Mody, and iGate — conduct the jury found he had committed when it convicted him on Counts 3 and 4.

4.

We turn finally to Count 2, which charges a § 371 conspiracy offense with two statutory objects: bribery and honest services wire fraud. Although the bribery schemes alleged as objects in Count 2 were not charged as substantive bribery offenses, the record establishes beyond a reasonable doubt that the alternative-theory error resulting from the inclusion of the self-dealing wire fraud instruction "did not

contribute to the verdict obtained." *See Neder,* 527 U.S. at 15 (internal quotation marks omitted). First, the primary focus of the prosecution's evidence and argument — overall and with respect to Count 2 specifically — concerned the conspiracy's bribery object, not self-dealing honest services wire fraud. And the evidence presented in support of Jefferson's systemic bribery schemes was overwhelming. Second, any reasonable jury that found Jefferson guilty of self-dealing honest services wire fraud would also have found that he conspired to commit either bribery or bribery-related honest services wire fraud.

The prosecution's evidence on Count 2 conclusively established that Jefferson and his brother Mose entered into a bribery scheme whereby Jefferson would solicit bribes from various business persons and entities in exchange for his official acts on behalf of such persons and entities, including, inter alia, George Knost and Arkel; John Melton and TDC; and James Creaghan and Noreen Wilson. On the evidence, we are readily satisfied, beyond a reasonable doubt, that the guilty verdict on the Count 2 conspiracy rests on a finding that Jefferson conspired with others to commit the bribery object of the conspiracy, as well as the bribery component of honest services wire fraud.

At its core, this prosecution was about bribery. In denying Jefferson's motion to dismiss the honest services wire fraud charges, the district court observed that "the honest services fraud allegations contained in Counts 5-10, and referenced in Counts 1, 2, and 16, explicitly frame the alleged deprivation of honest services as a consequence of defendant's

alleged solicitation and receipt of bribes." *United States v. Jefferson,* 562 F. Supp. 2d 719, 723 (E.D. Va. 2008). Furthermore, the primary thrust of the prosecution's evidence, as well as its jury arguments, concerned Jefferson's involvement in bribery schemes.

In sum, the prosecution's evidence on Count 2 readily proved the conspiracy between Jefferson, his brother Mose, and others, in which Jefferson would perform official acts to benefit bribe payors in exchange for their payments to entities controlled by Mose. Moreover, Jefferson's self-dealing was primarily used as a means to conceal the multiple bribe payments. Even if the jury believed that Jefferson had engaged in a conspiracy to conceal his self-dealing on behalf of the entities and persons involved in the Count 2 conspiracy, it necessarily found that he had conspired to commit bribery and bribery honest services wire fraud, because those alternative theories of liability were co-extensive.

As the prosecution emphasized in its trial argument, the "interests" that Jefferson failed to disclose were the bribe payments he had received in exchange for his actions as a congressman.[43] Indeed,

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[43] By way of example, see J.A. 258 ("[Jefferson] concealed [his] bribe payments from public view by funneling those payments, shares of stock, and other beneficial interests through bogus companies nominally owned and operated by his family members through companies that were set up for the sole purpose of receiving the bribe payments."); *id.* ("The evidence will show these sham agreements for what they really were: A means to conceal bribes."); *id.* at 4903 ("Again and again, you have seen evidence of the shell companies set up by Congressman Jefferson at his direction, frequently by the taxpayer paid staff, for the sole purpose of hiding the fact that

there could be no legitimate purpose or valid explanation for those payments. Central to the prosecution's evidence and argument on Count 2 was the notion that the entities and agreements that Representative Jefferson caused to be created were at the core of his bribery schemes with Mose, and that they were created as vehicles for the bribe payments Jefferson had solicited. In these circumstances, the *Skilling* instructional error on the Count 2 conspiracy offense was harmless, as it is clear that any rational fact finder would have found Jefferson guilty of that offense absent the error.

D.

Finally, Jefferson contends that there was a lack of venue in the Eastern District of Virginia for Count 10 of the indictment, which alleges an honest services wire fraud offense, in violation of 18 U.S.C. §§ 1343 and 1346. The wire transmission underlying Count 10 is a simple event: a July 6, 2005 telephone call made by Jefferson "in Accra, Ghana, to Vernon Jackson in Louisville, Kentucky, discussing, among other things, the progress of meetings taking place in Ghana and a letter sent by Defendant Jefferson to Nigerian Official A." J.A. 121. That phone call related to the aspect of the iGate scheme in which Mody was also involved. We review de novo the contention that a district court lacked venue over a

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the congressman was trading his official influence for cash payments and percentages and profits."); *id.* at 5083 ("To the casual observer, these agreements looked legitimate. And that, ladies and gentlemen was the entire purpose."); *id.* at 5088 ("No matter what shell company or what agreement or what nominee, the purpose was always the same: covering up bribes, period.").

criminal charge. *United States v. Newsom,* 9 F.3d 337, 338 (4th Cir. 1993).

1.

Article III of the Constitution provides for the venue of a criminal prosecution, directing that trial "shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3.[44] Rule 18 of the Federal Rules of Criminal Procedure mandates that "the government must prosecute an offense in a district where the offense was committed." And, under § 3237(a) of Title 18, "any offense against the United States begun in one district and completed in another or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

It is settled that, in a criminal case, venue must be narrowly construed, *see United States v. Johnson,* 323 U.S. 273, 276 (1944), *abrogated by statute on other grounds,* and venue must be proper for each separate count of a multi-count indictment, *see United States v. Ebersole,* 411 F.3d 517, 524 (4th Cir. 2005). Moreover, we have recognized that where — as here — Congress has not specifically provided for venue in the statute defining an offense, venue lies only where the essential conduct elements of the offense took place:

When a criminal offense does not include a

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[44] The Sixth Amendment also alludes to venue, specifying that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district *wherein the crime shall have been committed.*" U.S. Const. amend. VI (emphasis added).

> specific venue provision, venue must be determined from the nature of the crime alleged and the location of the act or acts constituting it. This inquiry is twofold. We must initially identify the conduct constituting the offense, because venue on a count is proper only in a district in which an essential conduct element of the offense took place. We must then determine where the criminal conduct was committed.

Smith, 452 F.3d at 334-35 (internal quotation marks omitted); *see also Ebersole,* 411 F.3d at 524 (same). The foregoing decisions serve to implement the clear directive of the Supreme Court for resolution of a venue issue — to first ascertain "the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno,* 526 U.S. 275, 279 (1999).

2.

The parties agree that venue for the prosecution of a federal criminal offense is proper only in a district where an "essential conduct element" of the offense took place. The disagreement on Count 10 arises from the application of the foregoing principle to the charged wire fraud offense. Jefferson contends that the use of a wire communication is the offense's sole essential conduct element, and there was thus no venue in the Eastern District of Virginia, because the phone call underlying Count 10 was neither begun nor completed in that district. For its part, the government maintains that the "devisal and participation in a scheme to defraud" is also an essential conduct element of the wire fraud offense,

and that the "Count 10 evidence was sufficient to prove venue as it showed [Jefferson] participat[ed] in the fraudulent scheme to deprive citizens of honest services [i.e., the iGate scheme] in the Eastern District of Virginia." Br. of Appellee 38, 95. The district court endorsed the government's position, ruling that venue was appropriate in the district because Jefferson had there performed "acts directly or causally connected to the wire transmission." *Jefferson I*, 562 F. Supp. 2d at 703-04.

In maintaining that venue is proper on Count 10 in the Eastern District of Virginia, the government relies primarily on the Supreme Court's decision in *United States v. Rodriguez-Moreno,* 526 U.S. 275 (1999), and the Seventh Circuit's opinion in *United States v. Pearson,* 340 F.3d 459 (7th Cir. 2003), *vacated on other grounds by Hawkins v. United States,* 543 U.S. 1097 (2005). In *Rodriguez-Moreno*, the Supreme Court ruled that venue for a charge of carrying a firearm in relation to a kidnapping, in violation of 18 U.S.C. § 924(c), was proper in New Jersey. Although the underlying kidnapping offense occurred partly in that state, the defendant had used and carried the firearm only in Maryland. The Court explained that "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *Rodriguez-Moreno*, 526 U.S. at 281 (internal quotation marks omitted). In Pearson, the Seventh Circuit deemed venue to be proper in a wire fraud prosecution in the district where the defendants performed acts manifesting their intent to defraud, but where the wire communication neither originated nor terminated. *Pearson,* 340 F.3d at 466-67. The government thus argues that, because the

iGate scheme underlying Count 10 was devised and partially carried out in the Eastern District of Virginia, venue for wire fraud was proper there.

3.

The wire fraud statute provides for the punishment of whoever "transmits or causes to be transmitted" a wire communication to execute a scheme or artifice to defraud. 18 U.S.C. § 1343. The essential elements of a wire fraud offense are "(1) the existence of a scheme to defraud and (2) the use of . . . a wire communication in furtherance of the scheme." *United States v. Curry,* 461 F.3d 452, 457 (4th Cir. 2006).[45]

The scheme to defraud is clearly an essential element, but not an essential *conduct* element, of wire (or mail) fraud. *See United States v. Ramirez,* 420 F.3d 134, 144-145 (2d Cir. 2005); *see also United States v. Pasquantino,* 336 F.3d 321, 332 n. 5 (4th

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[45] The district court instructed the jury in rather more detail, however, directing that it could convict on Count 10 only if it found: (1) that Jefferson knowingly devised or participated in a scheme to defraud; (2) that the scheme to defraud involved a material misrepresentation or concealment of material fact; (3) that Jefferson acted with intent to defraud; and (4) that in carrying out the scheme to defraud, Jefferson transmitted or caused to be transmitted a wire communication. Although the court charged the jury in four elements rather than two, its instruction probably favored Jefferson, and certainly covered the essential aspects of a wire fraud offense. In any event, neither Jefferson nor the government has contested the propriety of the wire fraud instruction. *See United States v. Hornsby,* 666 F.3d 296, 310 (4th Cir. 2012) (reciting circuit precedent that no error committed where, "taken as a whole, the instruction fairly states the controlling law" (citation omitted)).

Cir. 2003) (recognizing that, "[b]ecause the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses"). Rather, "the essential conduct prohibited by § 1343[is] the misuse of wires as well as any acts that cause such misuse." *United States v. Pace,* 314 F.3d 344, 349 (9th Cir. 2002); *see also Ebersole,* 411 F.3d at 527 ("Here, the nature of the offense alleged was the act of causing a wire to be transmitted in furtherance of a fraud." (internal quotation marks omitted)); *United States v. Condolon,* 600 F.2d 7, 8 (4th Cir. 1979) ("The gravamen of the [wire fraud] offense is simply the misuse of interstate communication facilities to execute 'any scheme or artifice to defraud.'"). Similarly, the essential conduct element in mail fraud is "the misuse of the mails." *See Ramirez,* 420 F.3d at 144 (holding that the essential conduct element of mail fraud "encompasses the overt act of putting a letter into the postoffice" (internal quotation marks omitted)).

In a mail or wire fraud prosecution, the mailing or wire transmission itself — i.e., misuse of the mail or wire—has consistently been viewed as the *actus reus* that is punishable by federal law.[46] In such prosecutions, it is settled that each mailing or wire transmission in furtherance of the fraud scheme constitutes a separate offense, and it may be

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[46] The *actus reus* is the "guilty act" required for the imposition of criminal sanctions, and is distinguishable from the *mens rea, i.e.,* the guilty mind. *See United States v. Muzii,* 676 F.2d 919, 920, 923 (2d Cir. 1982) (recognizing that the "guilty act ... must be contemporaneous with the guilty mind" and "an attempt to punish evil thoughts alone would cast the net of the criminal law too widely").

separately punished. *See Badders v. United States,* 240 U.S. 391, 394 (1916) (recognizing that "there is no doubt that the law may make each putting of a letter into the postoffice a separate offence" when multiple mailings relate to the same scheme); *United States v. Williams,* 527 F.3d 1235, 1241 (11th Cir. 2008) (determining that, "[w]here one scheme or artifice to defraud involves multiple wire transmissions, each wire transmission may form the basis for a separate count" because "Section 1343 targets not the defendant's creation of a scheme to defraud, but the defendant's *execution* of a scheme to defraud"); *United States v. Allen,* 491 F.3d 178, 181-84 (4th Cir. 2007) (affirming convictions on multiple counts of wire fraud arising from single scheme).

The treatment of multiple transmissions as separate offenses is linked inexorably to the legal principles applicable to issues of double jeopardy. As the Supreme Court explained long ago, in *Blockburger v. United States*, the separate punishment test implicates the question of "whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty." 284 U.S. 299, 302 (1932) (internal quotation marks omitted). As the Eighth Circuit recognized in *United States v. Gardner*, an indictment that charges multiple mail fraud offenses based on a single fraud scheme does not contravene the Double Jeopardy Clause under *Blockburger*, because "it is not the plan or scheme that is punished." 65 F.3d 82, 85 (8th Cir. 1995). The *Gardner* court emphasized that the criminal acts being punished are, as here, each separate mailing (or wire transmission). *Id.*; *see also Badders,* 240

U.S. at 394.

Applying these principles, the multiple wire fraud charges in Jefferson's indictment do not pose a double jeopardy issue — and none is raised — because § 1343 criminalizes each wire transmission in furtherance of a single fraud scheme. It is the physical act of transmitting the wire communication for the purpose of executing the fraud scheme that creates a punishable offense, not merely "the existence of a scheme to defraud." As the Second Circuit explained in *Ramirez*, a conduct element is one of action, such as the act of putting a letter in the mailbox or making a telephone call. *See* 420 F.3d at 144-45. On the other hand, the element of devisal of the scheme "connotes contemplation, not action." *Id.* at 144.

The government's argument for venue on the basis of Jefferson's "devisal and participation in a scheme to defraud," if accepted, would constrict the application of the wire fraud statute, which requires only that the subject scheme be devised, not that it be participated in. As the *Ramirez* court pointed out with respect to the identical element of the analogous mail fraud statute, "devising a scheme to defraud [ ] is not itself conduct at all (although it may be made manifest by conduct), but is simply a plan, intention or state of mind, insufficient in itself to give rise to any kind of criminal sanctions." 420 F.3d at 145. Requiring an additional showing of participation in the scheme impermissibly engrafts a conduct component onto a pure intent element, confusing the issue before us. The district court therefore erred in relying on Jefferson's "acts directly or causally connected to the wire transmission" as providing

venue, because aside from the transmission itself, there are no acts necessary to establish the crime of wire fraud.

That the devisal of a scheme relates only to establishing the *mens rea* element of the wire fraud offense provides a critical distinction between Jefferson's situation and the one addressed by the Court in *Rodriguez–Moreno.* In the latter case, both of the essential elements — using or carrying a firearm and committing a crime of violence — were conduct elements requiring physical acts. It was therefore of no moment that the defendant, prosecuted in one state where he engaged in the predicate kidnapping, used or carried a firearm only in another state, after he took the victim there:

> Since one of the essential conduct elements of the offense had occurred in New Jersey, venue was proper there . . . even though the other essential conduct element had occurred elsewhere. The government would have us conclude that "having devised or intending to devise a scheme or artifice to defraud" . . . is comparable to "during a crime of violence" under § 924(c)(1). But whereas a crime of violence such as kidnaping is an act, and thus may qualify as an essential *conduct* element, . . . "having devised or intending to devise a scheme or artifice to defraud" is not.

Ramirez, 420 F.3d at 146 (citation omitted).

The government's position on venue ignores that the crime charged in Count 10 was not the bribery

scheme, but the offense of wire fraud occasioned by a single telephone call. Its distinct parts — the making and completion — occurred in two different localities, neither of which was within the Eastern District of Virginia.[47]

4.

In determining that venue was proper on Count 10, the district court relied on the Seventh Circuit's *Pearson* decision, which concluded that, under the wire fraud statute, venue is proper in any district where the defendant's acts "provided critical evidence of the 'intent to defraud,' an element of the crime of wire fraud." 340 F.3d at 466; *see Jefferson I*, 562 F. Supp. 2d at 702-04. That position runs contrary to the decisions of at least two of our sister circuits. *See Ramirez*, 420 F.3d at 144 (mail fraud; rejecting government's argument that "venue is proper . . . in any district where any aspect of the

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[47] The government's argument for venue on Count 10 would invite the dismissal of the indictment's wire fraud charges for multiplicity — a constitutional doctrine implicating both the Double Jeopardy Clause and Fifth Amendment due process. *See United States v. Colton,* 231 F.3d 890, 909-10 (4th Cir. 2000) (deeming bank fraud charges to be multiplicious); *United States v. Mancuso,* 42 F.3d 836, 847 n. 11 (4th Cir. 1994) (explaining that "[m]ultiplicity is charging a single offense in more than one count in an indictment" (internal quotation marks omitted)). If, as the government contends on appeal, Jefferson's scheme to defraud was itself an essential conduct element, and thus sufficient to establish venue for a wire fraud charge in every district touched by the scheme, the Jefferson indictment could be deemed multiplicious. That is, if the crime of wire fraud were defined by the single underlying scheme and not by the individual acts of wire transmission, the indictment could be said to charge the same offense in each of Counts 6 though 10.

scheme or artifice to defraud was practiced"); *Pace*, 314 F.3d at 349 (wire fraud; "Although a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct. Therefore, venue is established in those locations where the wire transmission at issue originated . . . or was received. . . ." (internal quotation marks omitted)).[48] In sum, we agree with the Second and Ninth Circuits, and we are satisfied to adhere to the venue principles enunciated and applied in their *Ramirez* and *Pace* decisions.

Representative Jefferson could have been — and perhaps yet could be — prosecuted on Count 10 in the district in Kentucky where his phone call was received. If the call had originated domestically (rather than in Africa), he might also have been prosecuted in the district from which the phone call

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[48] The district court incorrectly perceived that the Seventh Circuit's *Pearson* decision could somehow be reconciled with the *Pace* and *Ramirez* principles. *See Jefferson I*, 562 F. Supp. 2d at 703-04. Notably, the *Pearson* court itself did not think so. *See Pearson,* 340 F.3d at 467 n. 3 ("declin[ing] to adopt the analysis" in *Pace*). Nor does the government so believe, as it argues that *Pace* and *Ramirez* were wrongly decided. *See* Br. of Appellee 97 n.34 ("[T]he narrow view of venue espoused in [*Pace* and *Ramirez*] is contrary to *Rodriguez-Moreno*."). Contrary to the government's position, however, neither *Pace* nor *Ramirez* is in any way adverse to *Rodriguez-Moreno*. To adopt the government's venue theory, we would be called upon to approve a type of "pendent venue" for wire fraud offenses, or otherwise agree that a "substantial contacts" test could be applied. Because both those propositions run counter to the Constitution and Rule 18, we are unwilling to adopt either of them.

had been made. *See Ebersole,* 411 F.3d at 527 (explaining that wire fraud is continuing offense under § 3237(a) and thus may be prosecuted in any district where offense was begun, continued, or completed). But Jefferson could not, on these facts, be properly prosecuted on Count 10 in the Eastern District of Virginia. As a result, we are obliged to vacate Jefferson's conviction and sentence on that charge.

IV.

Pursuant to the foregoing, we affirm each of Jefferson's convictions in this case except his Count 10 wire fraud conviction and sentence, which we vacate and remand for such further proceedings as may be appropriate.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

APPENDIX B

United States District Court,
E.D. Virginia,
Alexandria Division.

UNITED STATES OF AMERICA
v.
WILLIAM J. JEFFERSON.

No. 1:07cr209.
May 22, 2009.

MEMORANDUM OPINION

In this multi-count prosecution of William J. Jefferson, a former congressman,[1] defendant's threshold attempt to dismiss various bribery-related counts on the ground that the acts alleged fell outside the scope of the federal bribery statute was denied by Memorandum Opinion issued on May 23, 2008.[2] Specifically, the May 2008 Opinion rejected

[1] Defendant represented Louisiana's 2nd Congressional District from 1991 until he left office following his defeat in a 2008 bid for reelection.

[2] *See United States v. Jefferson,* 562 F. Supp. 2d 687 (E.D. Va. 2008) (hereinafter the "May 2008 Opinion").

defendant's argument that the bribery allegations were legally insufficient with respect to the "official act" element of 18 U.S.C. § 201(b)(2)(A), which prohibits public officials from soliciting things of value in exchange for being influenced in the performance of "official acts." Ten months later, both parties filed motions—the government, a motion for clarification, and defendant, a motion for reconsideration and, in the alternative, to exclude evidence—focusing sharply on the "official act" element of the bribery statute. In essence, the parties argue that the May 2008 Opinion's discussion of that element is open to misinterpretation and must be clarified prior to trial. Defendant additionally argues that evidence of certain acts should be excluded at trial because those acts do not fall within the scope of the "official act" element.

The parties' motions were fully briefed and argued, and in the end, for the reasons stated from the Bench, an Order issued granting the government's motion in part and denying defendant's motion. *See United States v. Jefferson,* 615 F. Supp. 2d 448 (E.D. Va. 2009) (Order) (Docket No. 388). This Memorandum Opinion further explains the reasons stated from the Bench. More specifically, although the result reached in the May 2008 Opinion—namely, that the bribery-related counts' allegations fall within the ambit of the bribery statute—is reaffirmed here, the May 2008 Opinion's discussion of the "official act" element is vacated and superseded to the extent it conflicts with this Memorandum Opinion.

I.

A. The Indictment and Alleged "Official Acts"

On June 4, 2007, a federal grand jury sitting in the Eastern District of Virginia returned a sixteen-count indictment (the "Indictment") charging defendant, then a sitting congressman, with a variety of crimes including conspiracy, bribery, wire fraud, foreign corrupt practices, money laundering, obstruction of justice, and racketeering. The Indictment is lengthy and detailed; it spans some ninety-four pages. Pertinent here are the bribery allegations, namely that beginning in or about January 2001, defendant used his office and status as a Member of the U.S. House of Representatives to advance the business interests of various individuals and corporations in return for money and other things of value. More specifically, the Indictment sets forth eleven bribery-related counts that allege defendant conspired to solicit or solicited money and other things of value in exchange for being influenced in the performance of various "official acts," all in violation of § 201(b)(2)(A).[3] This

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[3] Those eleven bribery-related counts can be summarized as follows:

(i) Counts 1 and 2 (the "Conspiracy Counts") allege conspiracies between defendant and others to violate, *inter alia,* § 201(b)(2)(A);

(ii) Counts 3 and 4 (the "Bribery Counts") allege independent violations of § 201(b)(2)(A);

(iii) Counts 5 through 10 (the "Wire Fraud Counts") allege wire fraud predicated on, *inter alia,* § 201(b)(2)(A) violations; and

(iv) Count 16 (the "Racketeering Count"), which

Memorandum Opinion focuses solely on § 201(b)(2)(A)'s "official act" element, and hence the factual recitations set forth here are limited to the Indictment's "official act" allegations.[4]

The Indictment's bribery-related counts set forth several broad descriptions of acts defendant allegedly undertook, or agreed to undertake, in exchange for things of value from individuals seeking to advance various business ventures in Africa and elsewhere. Those acts generally involved defendant's efforts to obtain financial and other business development assistance for those business ventures by exerting his influence as a Member of Congress on various U.S. and African government officials and agencies, including, *inter alia,* the Nigerian government, the Export-Import Bank of the United States, and the United States Trade Development Agency. More specifically, defendant, acting either directly or through his congressional staff, allegedly exerted his influence by engaging in a pattern of meetings and correspondence that included, *inter alia,* (i) "official travel" overseas to meet with foreign government officials; (ii) meetings with U.S. and foreign government officials in the United States; and (iii) correspondence, in some instances on congressional

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> charges defendant with racketeering in violation of 18 U.S.C. § 1962(c), alleges approximately twelve racketeering acts predicated in part on § 201(b)(2)(A) violations.

[4] The Indictment's bribery-related allegations are set forth in greater detail in *Jefferson,* 562 F. Supp. 2d at 689-90, and *United States v. Jefferson,* 534 F. Supp. 2d 645, 646-48 (E.D. Va.), *aff'd,* 546 F.3d 300 (4th Cir. 2008), *cert. denied,* No. 08-1059, 2009 WL 434823 (U.S. May 18, 2009).

letterhead, with U.S. and foreign government officials and agencies. In connection with the overseas travel, defendant, again acting either directly or through his congressional staff, also allegedly lobbied various U.S. and foreign embassies to expedite visa requests and otherwise assist with travel arrangements.

The Indictment alleges that during the course of the alleged bribery schemes, defendant's conduct suggested that he considered himself to be acting—and indeed, hoped those he dealt with would consider him to be acting—in his official capacity as a congressman. For example, the Indictment alleges that when defendant solicited the alleged bribes from the individuals seeking his assistance, he did so as both a congressman and as a member of certain congressional committees and caucuses relating to international—and more specifically, African—trade matters. Defendant's positions in that regard allegedly included (i) membership on the Subcommittee on Trade of the House Committee on Ways and Means, (ii) membership on the House Committee on the Budget, (iii) co-chairmanship of the Africa Trade and Investment Caucus, and (iv) co-chairmanship of the Congressional Caucus on Nigeria. Further, defendant allegedly used official congressional letterhead and represented himself as a congressman when he wrote to U.S. and foreign government officials seeking to gain financial and other business development assistance on behalf of those who had made or promised payments to him. Moreover, defendant allegedly filed several travel forms with the Clerk of the U.S. House of Representatives on which he stated that his travel to Africa was "in connection with [his] duties as a

Member or Officer of the U.S. House of Representatives."[5]

B. The Prior Opinion and the Parties' Motions

In the May 2008 Opinion, the sufficiency of the Indictment's "official act" allegations was squarely addressed. *See United States v. Jefferson,* 562 F. Supp. 2d 687 (E.D. Va. 2008). Specifically, defendant's motion to dismiss the Bribery Counts—and derivatively, the Conspiracy, Wire Fraud, and Racketeering Counts—for failure to allege facts establishing the "official act" element of a § 201(b)(2)(A) violation was denied. *Id.*[6] In denying defendant's motion, the May 2008 Opinion essentially relied upon a two-pronged analysis of the statutory definition of "official act":

> First, the act must be among the official duties or among the settled customary duties or practices of the official charged with bribery. And second, performance of the act must involve or affect a government decision or action.

Id. at 691 (citing *United States v. Birdsall,* 233 U.S.

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[5] *See, e.g.,* Indictment ¶ 75 (allegation with respect to travel form filed regarding a February 2004 trip to Nigeria).

[6] In addition, defendant's subsequent, similar arguments with respect to the Wire Fraud and Racketeering Counts, insofar as those counts are predicated in part on § 201(b)(2)(A) violations, were also rejected for the reasons stated in the May 2008 Opinion. *See United States v. Jefferson,* 562 F. Supp. 2d 719, 722-23 (E.D. Va. 2008) (denying motion to dismiss Wire Fraud Counts); *United States v. Jefferson,* 571 F. Supp. 2d 696 (E.D. Va. 2008) (Order) (denying motion to dismiss Racketeering Count).

223, 230 (1914); *Valdes v. United States,* 475 F.3d 1319, 1324 (D.C. Cir. 2007)). Applying that two-pronged test, the May 2008 Opinion held that the Indictment's "official act" allegations were legally sufficient. Yet, the May 2008 Opinion also cautioned that "[w]hether . . . the government is able to prove each of the[ ] [required] elements with regard to each of the alleged acts . . . is a question properly addressed at trial, not on a motion to dismiss the Indictment." *Id.* at 693.

Nearly ten months later, on March 20, 2009, both parties filed motions addressing the import of the May 2008 Opinion's two-pronged test. Specifically, the government filed a motion to clarify the May 2008 Opinion and to permit use of a proposed jury instruction on the "official act" element, while defendant filed a motion for reconsideration of the denial of his motion to dismiss or, in the alternative, to exclude evidence of conduct that defendant argues does not fall within the statutory definition of "official act." The parties' positions with respect to those motions merit brief discussion here.

First, the government argues that although the result reached in the May 2008 Opinion was correct, clarification is nonetheless necessary because the "official act" discussion therein "could be mis-construed [sic] to require that a government decision, separate and apart from the decision or action of the charged public official, is necessary for the 'official act' element . . . to be satisfied." Gov't Mot. Clarify (Docket No. 340), at 1. With respect to defendant's motion to exclude evidence, the government contends that proof of all alleged "official acts" should be admitted at trial because all such alleged actions

constitute "actions on matters that were pending before [defendant] in his official capacity[.]" Gov't Mem. in Opp'n (Docket No. 359), at 5.[7] Moreover, the government argues that the jury instructions, in addition to containing the statutory definition of "official act," should include, *inter alia,* the following elaboration:

> The term "official act" includes the decisions or actions generally expected of the public official. These decisions or actions do not need to be specifically prescribed by any law, rule, or job description to be considered an "official act." Thus, "official acts" include those duties and activities customarily associated with a particular position.

Gov't Mot. Clarify, at 14 (citations omitted).

By contrast, defendant contends that the bribery-related counts must be dismissed because, he argues, the May 2008 Opinion's "official act" discussion "improperly expands the definition of official act beyond the plain language of the statute." Def. Mot. Reconsideration (Docket No. 342), at 1. Thus, defendant objects to "to any [jury] instruction that amends or elaborates upon the definition [of 'official act'] set forth in . . . § 201(a)(3)." Def. Mem. in Opp'n

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[7] *See, e.g.,* Gov't Mem. in Opp'n, at 6 n. 2 ("[I]n performing constituent services, the actual *matter* pending before a congressman is the request by his constituent for his intervention. And where, as here, a congressman takes action on such a request in exchange for things of value, he has performed a corrupt 'official act' in violation of the bribery statute." (emphasis in original)).

(Docket No. 358), at 2. In this respect, defendant argues (i) that "[u]nder the government's theory, anything that is not an official act could become one because the public official 'decides' to do it"; and (ii) that "the government's interpretation completely ignores the phrase 'on any question, matter, cause suit, proceeding or controversy.'" *Id.* at 3 (quoting § 201(a)(3)). Moreover, defendant argues that the "government decision or action" involved or affected under the May 2008 Opinion's second prong must be a *U.S.* government decision or action;[8] thus, defendant argues that evidence of acts directed to foreign government officials and entities must be excluded.

II.

As the parties' motions reflect, clarification of the May 2008 Opinion is warranted. More specifically, the May 2008 Opinion's discussion of the bribery statute's "official act" element was inadequately anchored in the statutory text defining that element and failed to capture accurately the universe of conduct proscribed by § 201(b)(2)(A). Thus, the government's motion for clarification must be granted in part, and to the extent the discussion of the "official act" element herein conflicts with the May 2008 Opinion, this Memorandum Opinion controls.[9] By contrast, defendant's motion to

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[8] In support of this argument, defendant relies on the statutory definition of "public official," which is limited to U.S. government officials. *See* 18 U.S.C. § 201(a)(1).

[9] Although the government's motion is granted in part, its request for a particular jury instruction and defendant's objection thereto are premature and will be addressed at trial.

reconsider the *result* reached in the May 2008 Opinion must be denied, as it is clear that the Indictment's "official act" allegations fit well within the statutory definition of "official act" explained here. Similarly, defendant's motion to exclude evidence must also be denied, as the question of whether the government will prove that the conduct alleged falls within the scope of conduct proscribed by § 201(b)(2)(A) is an issue properly addressed in the context of the evidence adduced at trial.

First, analysis of what constitutes an "official act" must begin with—and indeed, must be anchored in—the plain language of the statute defining that term.[10] In this respect, 18 U.S.C. § 201(a)(3) defines an "official act" as

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

Importantly, § 201(a)(3) supplies the abstract definition of "official act" to be used in various provisions of § 201, including the bribery provision at

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[10] Focus on the plain language of the statute is, of course, consistent with *United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 406, 412 (1999), in which the Supreme Court observed in *dicta* (i) that the term "official act" has been "carefully defined" by § 201(a)(3), and (ii) that statutes governing public officials' alleged self-enriching conduct "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."

issue here, § 201(b)(2)(A). That provision provides, in pertinent part, as follows:

> Whoever . . . being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act . . . [shall be guilty of an offense].

§ 201(b)(2)(A). Thus, the plain language of § 201(b)(2)(A) and § 201(a)(3), taken together and applied to a specific case like this one, requires the government to adduce proof with respect to the "official act" element[11] that defendant solicited a thing of value in exchange for being influenced in his performance of (i) a decision or action (ii) on a question, matter, cause, suit, proceeding or controversy (iii) which could at any time have been pending, or which could by law have been brought before him, in his official capacity, or in his place of trust or profit.

The parties' briefs demonstrate that two points of clarification are warranted. First, the second prong of the May 2008 Opinion's test—that the "official act" must "involve or affect a government decision or action"—could be misinterpreted as suggesting that

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[11] As observed in the May 2008 Opinion, defendant concedes the Indictment's legal sufficiency on the other elements required by the bribery statute, and the parties instant motions do not require elucidation of those elements or terms at this stage. *See Jefferson,* 562 F. Supp. 2d at 690.

the "decision or action" required by the statute may be, or is required to be, a decision or action by someone *other* than the charged public official. This is neither correct, nor what was intended by the May 2008 Opinion. Rather, the statute clearly requires that in exchange for the alleged bribe, defendant—and not some third party, government or otherwise—be *influenced* in the *performance* of a decision or action.

Second, it is important to clarify the meaning of the phrase "any public official" in § 201(a)(3). Specifically, the May 2008 Opinion cited that phrase in a manner that may have led the parties to believe that the "question, matter," *etc.,* at issue could be one that may at any time be pending, or could by law be brought before "*any* public official," even if that public official is not the charged public official. *See Jefferson,* 562 F. Supp. 2d at 693 n. 14. This is incorrect; in context, the reference to "any public official" means the charged official. Any contrary implication is inconsistent with the plain language, context, and legislative history of the bribery statute. Although it is true that § 201(a)(3) uses the word "any" immediately before the term "public official," a plain reading of the phrase "any public official" in the context of the bribery statute clearly means "any [charged] public official," and not "any public official, [whether charged or not]." This is so because § 201(a)(3) defines "official act" in the *abstract,* as evidenced by its use of the word "any" before "decision or action" and the word "any" before "question, matter, cause, suit, proceeding or controversy." Thus, when the abstract definition of § 201(a)(3) is applied to a particular case via a specific provision—here, § 201(b)(2)(A)—a plain

reading of that definition makes clear that the phrase "any public official" must reasonably be read to refer to the charged public official, not any public official, whether charged or not. In other words, the statute's use of "any" before "public official" signifies that any public official can engage in an "official act" by acting on an issue pending before *him,* not that the charged public official can engage in an "official act" by acting on an issue pending before *another* public official.

This plain reading of the phrase "any public official" is also consistent with the legislative history of § 201. More specifically, the predecessor statute to § 201(b)(2)(A) and § 201(a)(3) prohibited, *inter alia,* a U.S. government official from accepting things of value in return for being influenced in "*his* decision or action on any question, matter, cause, or thing which may then be pending, or may by law be brought before *him* in *his* official capacity, or in *his* place of trust or profit[.]" Act of July 13, 1866, ch. 184, § 62, 14 Stat. 98, 168 (emphasis added).[12] Congress amended this provision in 1962, "consolidat[ing] the various prior criminal statutes dealing with bribery into [§] 201, with the stated purpose of making, in the words of the Senate Report, 'no significant changes of substance[.]' " *United States v. Carson,* 464 F.2d 424, 433 (2d Cir. 1972) (quoting S. Rep. 87-2213 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3853). Indeed, the Senate

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[12] *See also Birdsall,* 233 U.S. at 230 (also quoting predecessor bribery statute containing "before him in his official capacity" language); *Wilson v. United States,* 230 F.2d 521, 524 (4th Cir. 1956) (quoting predecessor statute, then codified at 18 U.S.C. § 202, using "before him in his official capacity" language).

Report acknowledged that

> [t]he current bribery laws in [T]itle 18, United States Code, sections 201-213 consist of separate sections applicable to various categories of persons—Government employees, Members of Congress, judges, and others. Section 201 would bring all these categories within the purview of one section and make uniform the proscribed acts of bribery, as well as the intent or purpose making them unlawful.

S. Rep. 87-2213, *as reprinted in* 1962 U.S.C.C.A.N. at 3856. Thus, Congress's amendment of the phrase "before him" to "before any public official" was not a substantive change or expansion of the bribery laws; rather, it was the product of a *consolidation* of statutes that used that phrase in various specific contexts—as applied to a particular type of public official—to a single section that provides an *abstract* definition of "official act" to be used in a number of specific provisions.[13] Accordingly, both the plain language and the legislative history of § 201(a)(3) make clear that the phrase "any public official" should be read to mean "any [charged] public official," and not "any public official, [whether charged or not]." In sum, then, the "decision or action" required by § 201(a)(3) must be the charged public official's decision or action, and the phrase "any public official" in § 201(a)(3) applies to the

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[13] *See also United States v. Biaggi,* 853 F.2d 89, 98 (2d Cir. 1988) (observing in *dicta* that § 201 "refers to . . . action[s] taken on a matter brought before the public official in his official capacity").

charged public official.

Next, it is important to address what constitutes a "question, matter, cause, suit, proceeding or controversy," and what must be shown for that "question, matter," *etc.,* to be one "which may at any time be pending, or which may by law be brought before any public official [*i.e.,* the charged official], in such official's official capacity, or in such official's place of trust or profit." § 201(a)(3). In this respect, it has long been settled that these phrases do not require proof that the alleged "official act" was taken pursuant to responsibilities explicitly assigned by law; rather, as the Supreme Court held long ago, these phrases are intended to describe those activities that have been "clearly established by settled practice" as part of a public official's position. *Birdsall,* 233 U.S. at 231. Courts since *Birdsall* have consistently applied this principle. *See, e.g., Carson,* 464 F.2d at 431-34; *United States v. Biaggi,* 853 F.2d 89, 96-99 (2d Cir. 1988). Thus, where, as here, the charged public official is a congressman, the universe of "official acts" described by § 201(a)(3) is not limited to so-called "legislative acts" such as voting on or introducing a piece of legislation; rather, § 201(a)(3) has been read "sufficiently broadly to encompass all of the acts normally thought to constitute a congressman's legitimate use of his office." *Biaggi,* 853 F.2d at 97 (relying on *Birdsall* as the "earliest pertinent interpretation"). Moreover, it is also settled that the charged public official need not have authority to make a final decision or take binding action on the "question, matter," *etc.,* at issue. Rather, § 201(a)(3) "cover[s] any situation in which the advice or recommendation of a [public official] would be influential, irrespective of the

[official]'s specific authority (or lack of same) to make a binding decision." *United States v. Carson,* 464 F.2d at 433 (citations omitted).[14]

These principles, applied here, compel the conclusion that the Indictment's "official act" allegations in this case are sufficient to withstand defendant's attempts to dismiss the bribery-related charges at this stage of the prosecution. Yet, the Indictment's legal sufficiency on the "official act" element does not relieve the government of its burden to prove at trial that the alleged "official acts" meet the statutory definition of that term. Accordingly, to satisfy its burden with respect to the "official act" element, the government must adduce proof at trial that each alleged "official act" at issue was, at the time of the relevant offense, (i) a decision or action by defendant (ii) on a question, matter,

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[14] *But see Valdes v. United States,* 475 F.3d 1319, 1324 (D.C. Cir. 2007). Specifically, in *Valdes,* the D.C. Circuit observed that § 201(a)(3)'s scope is limited to "a class of questions or matters whose answer or disposition is determined by the government." *Id., quoted in Jefferson,* 562 F. Supp. 2d at 691 n.3, 692. Yet, as explained here, no such limitation appears on the face of § 201(a)(3), nor does such a limitation square with the broad reading of § 201(a)(3) and its predecessor statutes in *Birdsall, Carson*, and *Biaggi,* where various "questions, matters," *etc.,* were pending before those defendants, as a matter of clearly established settled practice, for their advice or recommendation—notwithstanding those defendants' lack of authority to resolve the "questions, matters," *etc.* Moreover, *Valdes* is factually distinguishable, as that case involved a D.C. police officer's use of a computer database, not a congressman's exertion of influence on U.S. and foreign government officials. Insofar as language in *Valdes* addressing those vastly different circumstances is inconsistent with the result reached here, *Valdes* is unpersuasive.

cause, suit, proceeding or controversy (iii) which could at any time have been pending, or which could by law have been brought before defendant in his official capacity, or in his place of trust or profit. Importantly, consistent with the principles of *Birdsall, Biaggi,* and *Carson,* the government, in adducing such proof, need not show that the "question, matter," *etc.,* at issue was or could have been pending before defendant pursuant to any responsibilities explicitly assigned by law, nor is the government required to prove that defendant had the authority to resolve the question, matter, cause, suit, proceeding or controversy at issue. Rather, it is sufficient for the government to adduce proof, including expert testimony or evidence of defendant's admissions and conduct, that it was customary, as a matter of clearly established settled practice, for members of Congress in defendant's position to exert influence—by advice, recommendation, or otherwise—on the issues in question.

Instructive in demonstrating how the government might meet this burden are *Carson* and *Biaggi,* two Second Circuit cases addressing exertion of influence by a congressman or his staff on resolution of questions, matters, causes, suits, proceedings or controversies not by law within a congressman's purview to resolve. First, in *Carson,* the Second Circuit rejected a senatorial administrative assistant's argument on appeal that his attempts to persuade a deputy attorney general to quash a federal criminal prosecution could not support a jury verdict for solicitation of bribes in exchange for "official acts." 464 F.2d at 431-35. As the Second Circuit put it, "[t]hat administrative assistants as part of their 'duties' exert the influence

inherent in their employment relationship with members of Congress appears 'clearly established by settled practice.'" *Id.* at 434 (quoting *Birdsall,* 233 U.S. at 231). Moreover, it was immaterial in *Carson* that the congressional aide did not have the actual authority to halt the criminal prosecution at issue; indeed, the Second Circuit observed that

> [a]pparently [the assistant], and those bribing him, thought he had access to the Justice Department through his position that would enable him to alleviate, if not altogether quash, pending Justice Department action or bring about lenient post- conviction treatment.

Id.[15] Similarly, in *Biaggi* the Second Circuit rejected a congressman's arguments that his actions in lobbying various municipal and federal entities on behalf individuals who made payments "were not 'official act[s]' within the meaning of § 201 because they were not legislative acts and because they were directed principally toward municipal, not federal, agencies." 853 F.2d at 97 (alteration in original).[16] Rather, the Second Circuit held that "[a] congressman's own invocation of his position and of congressional interest in his intercession with others

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[15] Notably, the assistant in *Carson* worked for a member of the Senate Judiciary Committee, which the Second Circuit observed is "the one most powerful congressional committee affecting [the Justice] Department's operations." 464 F.2d at 434.

[16] Although *Biaggi* addressed § 201's "official act" definition in the context of § 201's gratuities provision, that distinction is immaterial here.

on behalf of a constituent" constituted an official act. *Id.* at 98. Accordingly, the congressman's conviction in *Biaggi* was affirmed, as "[t]he evidence was ample to permit the jury to conclude beyond a reasonable doubt that the acts performed . . . were among those customarily associated with a congressman's job." *Id.* at 99.[17]

Thus, the government might meet its burden on the "official act" element in this case by showing that defendant's action (of exerting his influence in person or by written correspondence) was on a question, matter, cause, suit, proceeding or controversy (such as the question of how various federal agencies allocate funds, the question of how embassies handle visa requests, or the matter of how the Nigerian government pursues business development in Nigeria) that may at any time be pending before a member of Congress for advice or recommendation as a matter of custom and settled practice. Direct evidence in this respect may include, for example, defendant's underlying representations and actions during the alleged course of conduct, including representations that he was acting in his official capacity, as such representations may tend to show that his exertions of influence on the "questions, matters," *etc.,* at issue were—the

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[17] Similarly, in *Birdsall,* the Supreme Court found an indictment to be legally sufficient under a predecessor bribery statute where two subordinate executive branch officials were alleged to have accepted things of value in exchange for recommending sentence commutations where providing such recommendations was not prescribed by written rule and the defendant officials did not have actual authority to commute the sentences in question. 233 U.S. at 227-30.

payment of an alleged bribe aside—a customary use of a congressman's office, as clearly established by settled practice.[18] Similarly, relevant expert testimony might include, as the government has forecasted will be the case, testimony by a former congressman that a congressman's customary use of his office, as clearly established by settled practice, includes exertion of influence on U.S. and foreign government officials on behalf of individuals seeking to advance business interests in the United States and abroad.[19]

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[18] *See, e.g.,* Indictment ¶ 75 (allegation that defendant represented on one travel form that a trip to Nigeria was "in connection with [his] duties as a Member or Officer of the U.S. House of Representatives."). *Biaggi* is instructive in this regard, as the Second Circuit looked in part to "the manner in which [the congressman] went about" exerting influence—which included, *inter alia,* use of congressional letterhead, opening of an office file, and directing his administrative assistant to handle various tasks—as "suggest[ing] that his conduct was to be considered official." 853 F.2d at 98.

[19] *Compare, e.g., Biaggi,* 853 F.2d at 98 ("Consistent with the judicial recognition of the realities of the scope of a congressman's job, defendants' attorneys, in cross-examining [a][s]enator . . . at trial, brought out the fact that the duties of senators and representatives routinely include interceding with various agencies on behalf of their constituents.") *and Carson,* 464 F.2d at 434 ("[Defendant] testified that as part of his job and under the applicable 'procedure that goes on at Capitol Hill,' he as an administrative assistant to [a][s]enator . . . would exert influence on various agencies and branches of the [g]overnment 'without any strings attached.' ") *with United States v. Muntain,* 610 F.2d 964, 968 (D.C. Cir. 1979) ("In the instant case there was no evidence that [defendant's] meetings with labor officials to discuss and promote group automobile insurance involved a subject which could be brought before [him] or, for that matter, anyone else at [defendant's federal

In sum, although the result reached by the May 2008 Opinion is reaffirmed for the reasons stated, the May 2008 Opinion's explanation of the "official act" element is superseded by the analysis contained herein. Further, the issue of an appropriate jury instruction on the "official act" element will be addressed after evidence is presented at trial.

An appropriate Order has issued.

Alexandria, Virginia
May 22, 2009

/s/
T.S. Ellis, III
United States District Judge

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agency] in an official capacity.").

APPENDIX C

United States District Court,
E.D. Virginia,
Alexandria Division.

UNITED STATES OF AMERICA
v.
WILLIAM J. JEFFERSON,
Defendant.

No. 1:07cr209.
May 23, 2008.

MEMORANDUM OPINION

The government, in a sixteen-count indictment (the "Indictment"), charges defendant William J. Jefferson, a sitting member of the United States House of Representatives, with a variety of crimes including conspiracy, wire fraud, violating the Foreign Corrupt Practices Act, money laundering, obstructing justice, racketeering, and soliciting bribes. Defendant has moved to dismiss the Indictment's bribery counts, Counts 3 and 4, on the ground that these counts fail to allege facts establishing a necessary element of bribery in violation of 18 U.S.C. § 201 (1994). Specifically, defendant argues that the Indictment does not

identify any "official act" performed by defendant in return for any thing of value. Defendant also seeks dismissal, derivatively, of Counts 1 and 2 (conspiracy), 5-10 (wire fraud), 12-14 (money laundering), and 16 (racketeering), to the extent that those counts are predicated on the bribery violations alleged in Counts 3 and 4.

For the reasons that follow, the Indictment's bribery allegations are sufficient, and defendant's motion must be denied.

I.

Defendant is the currently sitting member of the United States House of Representatives representing Louisiana's 2nd Congressional District, an office he has held since 1991. The Indictment alleges that beginning in or about January 2001, defendant used his office to advance the business interests of various individuals and corporations in return for money and other things of value paid either directly to defendant or via 'nominee companies,' i.e., companies ostensibly controlled by one of defendant's family members, but in fact controlled by defendant himself. The specific schemes alleged in the Indictment are described in greater detail in an earlier Memorandum Opinion. *United States v. Jefferson*, 534 F. Supp. 2d 645 (E.D. Va. 2008). At issue here are the two bribery schemes alleged in Counts 3 and 4.

Count 3 alleges that defendant solicited bribes from Vernon Jackson, president of iGate, Incorporated (iGate), a Louisville, Kentucky-based telecommunications firm, to promote iGate's telecommunications technology in certain African

countries. Specifically, the Indictment alleges that in or about January 2001, defendant informed Jackson that defendant would use his congressional office to promote iGate's business interests only if Jackson agreed to make payments to ANJ Group, L.L.C. (ANJ), a Louisiana company controlled and managed by defendant's spouse, Andrea Jefferson. Defendant allegedly prepared a "professional services agreement" that provided for payments from iGate to ANJ in the form of (i) monthly $7,500.00 payments, (ii) a percentage of iGate's income, and (iii) stock options. In return for these payments, defendant allegedly advanced iGate's business interests by, *inter alia,* corresponding and meeting with Nigerian, Ghanian, and American government officials (including an unnamed Member of Congress who at the time sat on the House Subcommittee on Telecommunications, Trade, and Consumer Protection) all for the purpose of persuading these persons to take steps to support iGate's business ventures in Africa.

Count 4 alleges that defendant solicited bribes from Lori Mody, an Alexandria, Virginia-based businesswoman, to promote the business interests in Africa of Mody's African companies IBBS and W2-IBBS. Specifically, the Indictment alleges that defendant introduced Mody to Jackson as a potential investor in iGate's telecommunications technology. After Mody and Jackson entered into an investment agreement, defendant allegedly requested payments from Mody in the form of (i) fees, (ii) shares in W2-IBBS, and (iii) monthly payments to defendant's family members. In return for these payments, defendant allegedly advanced Mody's business interests by, *inter alia,* corresponding and meeting

with Nigerian, Ghanian, and American government officials to persuade them to take steps in support of Mody's business ventures.

At issue here is the legal sufficiency of these bribery counts. Defendant contends that the counts must be dismissed because they fail to allege any "official acts," an essential element of a bribery charge. The government contends that the counts are sufficient. The matter has been fully briefed and argued and is now ripe for disposition.

II.

An indictment is legally sufficient if (i) it contains the elements of the offense charged and informs the defendant of the charges he must meet, and (ii) it identifies the offense conduct with sufficient specificity to allow the defendant to plead double jeopardy should there be a later prosecution based on the same facts. *Russell v. United States,* 369 U.S. 749, 763-64 (1962). The second prong of this sufficiency inquiry is not in issue here; there is no dispute that the Indictment is "a plain, concise, and definite written statement of the essential facts constituting the offense charged" as required by Rule 7(c)(1), Fed. R. Crim. P. Nor is there any dispute that the Indictment identifies the offense conduct with ample specificity. What is sharply disputed is the first prong of the legal sufficiency inquiry, namely whether the facts alleged satisfy each of the requisite statutory elements of a bribery offense.

Analysis of this question properly begins with an examination of the statutory language that defines the charged violation. Counts 3 and 4 charge defendant with bribery, in violation of 18 U.S.C.

§ 201(b)(2)(A), which states, in pertinent part:

> "Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for being influenced in the performance of any official act [shall be guilty of an offense]."

An indictment charging bribery must therefore allege each of the following elements: (i) that the defendant is a public official, and (ii) that defendant corruptly demanded, sought, received, accepted, or agreed to receive or accept (iii) anything of value (iv) in return for being influenced in the performance of (v) an official act.

The parties do not dispute that the Indictment's allegations are legally sufficient as to the first four offense elements. Thus, the Indictment alleges that defendant (i) is a public official — a Member of Congress — (ii) who corruptly demanded, sought, received, accepted, or agreed to receive or accept (iii) things of value — money and company stock — (iv) in return for being influenced in the performance of certain acts to promote or advance the business of iGate (Count 3) and of IBBS and W2-IBBS (Count 4) in Nigeria and Ghana. The focus of the parties' dispute over the Indictment's legal sufficiency is whether the acts defendant allegedly performed in return for things of value constitute "official acts" under the statute. More precisely, the question presented is whether (i) official travel to Nigeria and Ghana, (ii) correspondence and meetings with foreign government officials, (iii) correspondence and

meetings with American government officials, and (iv) use of congressional staff, all to advance iGate's, IBBS's, and W2-IBBS's business ventures in Africa, are "official acts" under § 201. In defendant's view, none of these acts is an "official act" within the meaning of the bribery statute. Instead, defendant argues that they are merely routine, legal uses of defendant's influence to promote private business ventures. At issue, therefore, is the scope of the statutory definition of "official act." For the reasons that follow, the Indictment's allegations of the "official act" element of a bribery offense are adequate at this stage of the prosecution.

III.

The bribery statute defines an "official act" as

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

18 U.S.C. § 201(a)(3). Judicial elucidation of the bribery statute has established the following principles. First, the Supreme Court has cautioned that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[1] The meaning of this caution is plain: Courts are not authorized to construe the bribery statute to sweep

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[1] *United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 412 (1999).

within its ambit all manner of seemingly venal or corrupt conduct by public officials. Rather, courts must confine the scope or reach of the statute as required by the reasonable meaning of the statutory language. In other words, where the statutory language is capable of either broad or narrow application, courts must apply that language with the precision of the scalpel, not the blunt force of the meat axe.

This cautionary rule is particularly important with regard to "official acts," for without it the definition of "official acts" might be extended to apply to any action taken by a public official acting in his official capacity. To avoid such a broad interpretation, courts have held that an act must satisfy two criteria to qualify as an "official act" under § 201. First, the act must be among the official duties or among the settled customary duties or practices of the official charged with bribery.[2] And second, performance of the act must involve or affect a government decision or action.[3] These two criteria merit further elaboration.

With regard to the first criterion, it is settled that the category of official acts is not limited to acts performed pursuant to responsibilities explicitly assigned by law. Instead, the Supreme Court has made clear that "[i]n numerous instances, duties not

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[2] *United States v. Birdsall,* 233 U.S. 223, 230 (1914) ("Every action that is within the range of official duty comes within the purview of these sections.").

[3] *Valdes v. United States,* 475 F.3d 1319, 1324 (D.C. Cir. 2007) (bribery statute applies to "questions or matters whose answer or disposition is determined by the government").

completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery."[4] In other words, an official may violate § 201 even if the acts he performs in return for things of value are not among his statutorily prescribed duties, but are instead among those duties of the office established by settled practice.

The Second Circuit addressed this point in *United States v. Biaggi,* 853 F.2d 89 (2d Cir. 1988). There, Biaggi, a congressman from New York, was convicted of receiving gratuities[5] in return for various official acts — namely, lobbying municipal and federal officials, including a senator and the Secretary of the Navy, in person, over the phone, and by written correspondence on official letterhead. Biaggi argued that these acts were not "official acts" within the meaning of the statute. The Second Circuit rejected Biaggi's argument, concluding that § 201 "encompass[ed] all of the acts *normally thought to constitute a congressman's legitimate use of his office*." *Biaggi,* 853 F.2d at 97 (emphasis added).[6] It

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[4] *Birdsall,* 233 U.S. at 230-31.

[5] The bribery statute, 18 U.S.C. § 201(b), and the gratuity statute, 18 U.S.C. § 201(c), both incorporate the definition of "official acts" contained in § 201(a)(3).

[6] *Cf. United States v. Brewster,* 408 U.S. 501, 524 (1972) (rejecting a Speech or Debate Clause challenge to the prosecution of a congressman for bribery and noting that "[w]e would be closing our eyes to the realities of the American political system if we failed to acknowledge that many non-

follows that an indictment under § 201 is sufficient if the acts alleged to have been undertaken in return for the bribe are among the defendant's official duties or among the settled customary duties or practices of his office.

The second criterion — that the alleged official act must involve or affect a government decision or action — further limits the applicability of § 201. Instructive in this regard is the D.C. Circuit's decision in *Valdes v. United States,* 475 F.3d 1319 (D.C. Cir. 2007). There, the court reversed the conviction of a police officer charged with taking bribes in return for providing information that he retrieved from several police databases.[7] Noting that § 201 defines "official acts" as acts involving "question[s], matter[s], cause[s], suit[s], proceeding[s] or controvers[ies], which may at any time be pending, or which may by law be brought before any public official," the D.C. Circuit explained that this "six-term series refers to a class of questions or matters whose answer or disposition is determined by the government."[8] The court concluded that Valdes's searches of police databases would only constitute official acts if they were related to or resulted in a formal police investigation.[9] The *Valdes* court also explicitly

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legislative activities are an established and accepted part of the role of a Member, and are indeed 'related' to the legislative process").

[7] *Valdes,* 475 F.3d at 1320-22.

[8] *Id.* at 1324.

[9] *Id.* at 1326.

recognized that its holding was consistent with the *Biaggi* decision, which — unlike *Valdes* — involved "inappropriate influence [by the defendant] on decisions that the government actually makes."[10]

Together, *Biaggi* and *Valdes* elucidate the second criterion of a § 201 "official act": it must involve or affect a government decision or action. Importantly, § 201 does not require proof that such a government decision or action was actually taken, for "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way[;] acceptance of the bribe is the violation of the statute, not performance of the illegal promise."[11] In other words, an official violates § 201 when he receives things of value in return for being influenced in the performance of duties involving government decisions, *whether or not* his performance of those duties actually achieves the desired effect on those government decisions.

In summary, an "official act" under § 201 is an act performed by an official in his or her official capacity that (i) involves the performance of an official duty or settled customary duty or practice and (ii) involves or affects a government decision or action. These principles, applied here, compel the conclusion that the Indictment has sufficiently alleged the elements of a § 201 offense. Counts 3 and 4 allege four specific types of activity conducted by defendant that, the government alleges, constitute official acts under § 201: (i) official travel to Nigeria,

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[10] *Id.* at 1325.

[11] *Brewster,* 408 U.S. at 526.

Ghana, and elsewhere; (ii) official correspondence and meetings with Nigerian and Ghanian government officials; (iii) official correspondence and meetings with United States government officials; and (iv) use of congressional staff to facilitate the other alleged activities. The government will bear the burden of proving at trial that each of these acts (i) involves the performance of a member of Congress's official duty or settled customary duty or practice and (ii) involves or affects a government decision or action.

Whether or not the government is able to prove each of these elements with regard to each of the alleged acts in Counts 3 and 4 is a question properly addressed at trial, not on a motion to dismiss the Indictment.[12] But if the government is able to prove, for instance, that (i) lobbying government agencies such as the Export-Import Bank of the United States (Ex-Im Bank)[13] on behalf of constituents is among

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[12] *See Costello v. United States,* 350 U.S. 359, 363-64 (1956) (defendant may not challenge indictment on the ground that it is not supported by sufficient evidence); *United States v. DeLaurentis,* 230 F.3d 659, 660-61 (3d Cir. 2000) (dismissal of indictment "may not be predicated upon the insufficiency of the evidence to prove the indictment's charges"); *United States v. Alfonso,* 143 F.3d 772, 776-77 (2d Cir. 1998) ("Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial to satisfy the jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.").

[13] The Export-Import Bank of the United States is an agency established by Congress "to assist in financing the export of U.S. goods and services to international markets." *About Ex-*

the settled customary duties or practices of a Member of Congress, and that (ii) the Ex-Im Bank's decision to award financial support to American companies is a government decision, then the government will have proved the necessary elements of an official act under § 201.

IV.

Defendant raises a number of arguments in support of his motion to dismiss the Indictment. He first argues that none of the acts alleged in Counts 3 and 4 are "official acts" because none involved a decision that defendant himself was empowered to make. But § 201 applies when an official may influence *any* government decision through the performance of his duties; the official charged under § 201 need not be the official empowered to make the decision at issue.[14] As long as the government is able to prove that the acts alleged in Counts 3 and 4

Im, http://www.exim.gov/about/mission.cfm (last visited January 23, 2008).

[14] *See* 18 U.S.C. § 201(a)(3) (defining "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before *any* public official, in such official's official capacity, or in such official's place of trust or profit") (emphasis added); *see also Valdes,* 475 F.3d at 1325 (concluding that § 201 applies to "those questions, matters, causes, suits, proceedings, and controversies that are decided by *the government* ") (emphasis added). The *Valdes* court specifically noted that its conclusion was consistent with the Second Circuit's decision in *Biaggi*, which applied § 201 to a congressman's use of his office "to secure Navy contracts for a ship repair firm" — a decision squarely within the decision-making authority of the Navy, not the congressman. *Id.*; *see also Biaggi,* 853 F.2d at 92-94.

involved the performance of defendant's official duties or his settled customary duties or practices and involved or affected a government decision, those acts will satisfy the statutory definition of "official act" under § 201 even though defendant may not have had authority to make the ultimate decision himself.[15]

Defendant next argues that the conclusion reached here is foreclosed by the Supreme Court's decision in *United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 412 (1999). That case stands primarily for the proposition that the bribery statute is not implicated by all actions taken in an official capacity, but instead requires a *quid pro quo* — "a specific intent to give or receive something of value *in exchange* for an official act."[16] The conclusion reached here is consistent with *Sun-Diamond:* § 201 does not apply to all actions taken in an official capacity, but rather only those actions

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[15] The issue is well illustrated by the following hypothetical: a member of Congress accepts money to contact the Department of Homeland Security on behalf of a constituent and attempts to influence the Department to expedite the immigration application of the constituent's family-member. Under defendant's theory, this would not violate § 201 because the member of Congress lacks actual authority to grant or deny the immigration application. This is incorrect, for "[i]t is the corruption of official decisions through the misuse of influence in governmental decision-making which the bribery statute makes criminal." *United States v. Muntain,* 610 F.2d 964, 968 (D.C. Cir. 1979) (reversing Department of Housing and Urban Development official's § 201 conviction insofar as it was based on the appearance of impropriety created by the official's purely private actions).

[16] *Sun-Diamond,* 526 U.S. at 404-06 (emphasis in original).

whereby an official performs an official duty or a settled customary duty or practice in a manner involving or affecting a government decision or action. Under *Sun-Diamond*, the bribe is the *quid,* and the performance of the duty or practice in a manner involving or affecting a government decision or action is the *quo.*

Next, defendant argues that the actions alleged in Counts 3 and 4 are similar to those acts identified in *Sun-Diamond* that "while . . . assuredly 'official acts' in some sense [ ] are not 'official acts' within the meaning of the statute."[17] For example, the *Sun-Diamond* Court cited the presidential tradition of welcoming champion sports teams to the White House-an event that invariably involves the presentation of a sports jersey to the president. Defendant suggests that the use of influence gained by virtue of his office is essentially similar in that it relates to his office, but is not an official act under § 201. This argument fails for three reasons. First, the acts identified in the *Sun-Diamond* dicta lack the necessary *quid pro quo;* the president does not welcome a sports team to the White House *in return for* a sports jersey. By contrast, the indictment alleges that defendant performed various acts in return for significant bribes. Second, the allegations in the Indictment go far beyond the *de minimis* actions discussed in *Sun-Diamond.* Defendant is alleged to have received millions of dollars in cash and corporate shares, not baseball caps and sports jerseys, in return for various acts. And third, the acts recited in Counts 3 and 4 are alleged to involve

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[17] *Id.* at 407.

the performance of official duties or settled customary duties or practices, not the performance of acts merely incidentally related to defendant's office. Whether or not the alleged acts in fact involved the performance of official duties or settled customary duties or practices is a question to be resolved at trial on the basis of the evidence presented.

In sum, the Indictment alleges that in return for bribes defendant (i) traveled to foreign countries; (ii) corresponded with and met with foreign government officials to promote the interests of iGate, IBBS, and W2-IBBS; (iii) corresponded with and met with United States government officials to promote the interests of iGate, IBBS, and W2-IBBS; and (iv) used his congressional staff to advance the interests of iGate, IBBS, and W2-IBBS. The government will bear the burden of proving at trial that these acts are "official acts" under § 201, i.e., that they are among defendant's official or settled customary duties or practices and that they involve or affect a government decision. Dismissal of the Indictment is premature, as the Indictment satisfies the requirements of Rule 7, Fed. R. Crim. P., and accordingly defendant's motion to dismiss must be denied.

An appropriate order will issue.

/s/

Alexandria, Virginia
May 23, 2008

T.S. Ellis, III
United States District Judge

APPENDIX D

EXCERPT OF JURY INSTRUCTIONS

Counts 3 and 4 charged substantive violations of Counts – I beg your pardon – of that code section. In other words, Counts 1 and 2 charge a conspiracy to do that, and I have instructed you on that. Now Counts 3 and 4 charge substantive violations of the Bribery Statute.

Count 3 of the indictment charges that:

Beginning in or about January 2001, through in or about August 2005, within the Eastern District of Virginia and elsewhere, the defendant, then a public official, corruptly demanded, sought or received things of value from Vernon Jackson and iGate for ANJ, a Jefferson family-controlled company, in return for being influenced in the performance of official acts, to advance iGate's business ventures.

Count 4 of the indictment charges that:

Beginning in or about June 2004 through in or about August 2005, within the Eastern District of Virginia and elsewhere, the defendant, then a public official, corruptly demanded, sought or received things of value from Lori Mody and Lori Mody's companies, W2-IBBS and IBBS, in return for being influenced in the performance of official acts to advance Lori Mody's business ventures.

Now, Section 201 of Title 18 provides, in pertinent part, that: Whoever, being a public official, directly are indirectly, corruptly demands, seeks,

receives, accepts or agrees to receive or accept anything of value personally or for any other person or entity, in return for being influenced in the performance of any official act, shall be guilty of an offense against the United States.

So in other words to sustain its burden of proof for the crimes of demanding, seeking or receiving a bribe by a public official as charged in Counts 3 and 4, the government must prove the following three essential elements beyond a reasonable doubt:

First, that the defendant directly or indirectly demanded, sought, received or accepted, or agreed to receive or accept, anything of value, personally or for another person or entity;

Two, that defendant was at that time a public official of the United States; and

Three, that the defendant demanded, sought, received, accepted or agreed to receive or accept the item of value corruptly in return for being influenced in the performance of any official act.

If the government fails to prove any of these essential elements beyond a reasonable doubt for either Count 3 or Count 4, or both, then you must find the defendant not guilty of that count or counts.

Now, with respect to the first essential element, the phrase "anything of value" means any item, whether tangible or intangible, that a person – that the person giving or offering or the person demanding or receiving considers to be worth something.

The phrase "anything of value" includes a sum of money, shares of shock, percentage of revenue,

commissions, favorable treatment, a job, or special consideration.

Now, with regard to the second essential element, the term "public official" includes a member of Congress.

With respect to the third element, 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 such official's place of trust or profit.

In order to violate to Bribery Statute, the defendant must have corruptly sought, received or agreed to receive a thing of value in return for being influenced in his own performance of an official act; that is, a decision or action on any question, matter, cause, suit, proceeding or controversy that may at any time be pending or which may by law be brought before the defendant in his official capacity.

An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part a public official's position.

Moreover, an act on a particular question or matter may still be official even if the public official did not have authority to make a final decision or take binding action on the issue.

It is not a defense that the offer or promise or demand or receipt of anything of value concerned an official act that was actually lawful, desirable, or even beneficial to the public.

The third essential element also requires that the government prove beyond a reasonable doubt that the defendant corruptly sought, received, or agreed to receive an item of value in return for being influenced in the performance of an official act.

And as I had have previously instructed you, to act corruptly means to act knowingly and dishonestly for a wrongful purpose.

The offense – the offense of bribery requires the intent to be influenced in the performance of an official act. In other words, for bribery there must be a quid pro quo, a specific intent to receive something of value in exchange for being influenced in the performance of an official act.

Yet each individual payment need not be correlated with a specific official act. Rather, it is sufficient to show that the defendant intended for each payment to induce him to adopt a specific course of official action. In other words, the intended exchange in bribery can be this for these, or these for these; not just this for that.

Further, it is necessary for the government to prove that the defendant intended to perform a set number of official – I'm sorry.

Further, it is not necessary for the government to prove that the defendant intended to perform a set number of official acts in return for payments. The quid pro quo requirement is satisfied if you find the evidence shows a course of conduct of things of value flowing to the defendant in exchange for a pattern of official actions favorable to the donor.

What must be shown is that the defendant sought, received or agreed to receive payments with

the intention of providing a specific type of official action in return.

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

Thus, you may convict defendant only if you find that the govern- – that he solicited or accepted something of value in exchange for some specific official act or course of action.

The government is not required to prove an express intention or agreement to engage in a quid pro quo; rather, such an intent may be established by circumstantial evidence.

Now, in order for you to return a verdict of guilty on the bribery charges in Counts 3 and 4, the government must prove – must convince you that the offense, or any part of it, took place in the Eastern District of Virginia.

APPENDIX E

18 U.S.C. § 201

Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

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

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

(b) Whoever–

(1) directly or indirectly, corruptly gives,

offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent–

(A) to influence any official act; or

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

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

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

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

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

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

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

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

(c) Whoever–

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

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

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks,

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

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

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