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GOVERNMENT PROCUREMENT: CRIMES AND OFFENSES  
[THESIS I OF A TWO-THESIS PROJECT]

By

William Marsh Henabray

B.A., June 1968, University of New Hampshire  
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A Thesis submitted to

The Faculty of

The National Law Center

of the George Washington University in partial satisfaction  
of the requirements for the degree of Master of Laws

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## Preface

The author is a United States Air Force judge advocate, currently assigned to Air Force Systems Command Headquarters, Andrews Air Force Base, Maryland. The views and the opinions expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, Department of Defense, or any other agency of the United States Government.



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"Bru. Let me tell you, Cassius, you yourself  
Are much condemn'd to have an itching palm;  
To sell and mart your offices for gold  
To Undeservers.

Cas. I an itching palm!  
You know that you are Brutus that speak this.  
Or, by the gods, this speech were else your last.

Bru. The name of Cassius honours this corruption.  
And chastisement doth therefore hide his head.

Cas. Chastisement!

Bru. Remember March, the ides of March remember;  
Did not great Julius bleed for justice' sake?  
What villain touch'd his body, that did stab  
And not for justice? What, shall one of us,  
That struck the foremost man of all this world  
But for supporting robbers, shall we now  
Contaminate our finers with base bribes,  
And sell the mighty space of our large honours  
For so much trash as may be grasped thus?  
I had rather be a dog, and bay the moon . . ."

SHAKESPEARE, JULIUS CAESAR, act IV, scene  
iii, lines 9-27 reprinted in I THE PLAYS AND  
SONNETS OF WILLIAM SHAKESPEARE 588 (W.  
Clarke & W. Wright, eds. 1971).

"It is a sin to steal a pin/  
But guineas are fair game/  
The hound who hounds a million pounds/  
Writes 'Lord' before his name."

R. GRAVES, THEY HANGED MY SAINTLY BILLY  
57 (1957), reprinted in Gais, Criminal  
Penalties for Corporate Criminals, 8 CRIM.  
L. BULL. 377, 388 (1972).

## INTRODUCTION

↓  
The Comptroller General recently observed that crime against the Government often does pay.<sup>1</sup> This thesis is the first part of a two-thesis examination regarding the various statutory and administrative tools which the federal Government is now using to reverse this startling trend,

Although criminal law is not the natural domain of the public contracts bar, procurement law enforcement is rapidly becoming an important national priority. The Government's multi-billion dollar acquisition system is built on an elaborate series of checks and balances. However, once these safeguards are subjected to the twin ravages of fraud and corruption, the system's integrity is impaired. This paper will examine several of the federal statutory provisions which the Government uses to police the acquisition process.

This two-thesis project is intended to provide both the practicing attorney and the general contracting community with a useful primer on individual and corporate liability for various procurement-related crimes and offenses. When an agency Inspector General refers audit allegations of fraudulent misconduct (e.g., spare parts over-pricing) to the Justice Department for further action, recourse to the Defense Acquisition Regulations (DAR) or the Federal Procurement Regulations (FPR) is wholly inadequate. This type of "contracts dispute" could eventually be

Ampl

resolved by a criminal jury trial in a U.S. District Court.

This two-thesis project is an examination of the measures which the Government can, and is taking to deter procurement-related fraud and corruption. Part One will examine four broad areas: (1) improper/corrupt payments; (2) conspiracy; (3) individual and corporate criminal liability; and (4) the efficacy of existing criminal sanctions. The paper's format will follow a basic "elements approach" in order to standardize the analysis between both theses in this project. Each procurement-related crime or offense will be reduced to its its essential statutory elements, and then separately examined. After the offense has been analyzed element-by-element, the statute will then be applied to actual cases in a procurement-related context.

Part Two in this series will follow a similar format, and this thesis will analyze five related topics (1) criminal and civil false claims, (2) criminal false statements and certifications, (3) prohibited "racketeering" activities, (4) civil penalties, and (5) the increasingly important area of administrative debarments and suspensions. Part Two will also provide a brief overview of defective pricing cases. Until both of these theses are reduced to a single integrated document, several important cross-references will be required.

PART ONE

THE ANTIBRIBERY ACT AND IMPROPER  
PROCUREMENT-RELATED PAYMENTS

The general antibribery statute, 18 U.S.C. § 201, outlaws the purchase and sale of Government influence.<sup>2</sup> The law is intended to promote general confidence in the Government's decision-making process, and to prohibit improper payments in relation to public officials. The statute is also designed to deter actual, and sometimes even apparent, breaches of the public trust.<sup>3</sup> It is a serious criminal offense for a Government official either to solicit or accept anything of value in return for an official act.<sup>4</sup> It is also illegal for members of the public to offer or give anything of value to an official with the intent to influence a public act.<sup>5</sup>

The statutory crime of bribery requires both a specific criminal intent and an express quid pro quo, but an otherwise unauthorized payment to a public employee can still constitute a criminal gratuity in violation of 18 U.S.C. § 201.<sup>6</sup> The general antibribery statute also prohibits questionable "gifts" to public officials in an attempt to deter both actual and perceived conflicts-of-interest. Even the appearance of graft or corruption can compromise national confidence in the integrity of the Government's procurement system.<sup>7</sup>

The current antibribery statute was enacted in 1962 as part of an omnibus reform package designed to revise and consolidate

existing conflict-of-interest laws.<sup>8</sup> Federal conflict-of-interest statutes normally evolved on an ad hoc basis prior to the passage of this new legislation (Pub. L. 87-849).<sup>9</sup> A statute, for example, prohibiting the bribery of federal judges was enacted as early as 1790, but the first broad prohibitions against bribery did not occur until 1853.<sup>10</sup> It is not surprising that the early eighteenth century conflict-of-interest laws were generated in response to suspect procurement actions and claims against the Government.<sup>11</sup> Today, the general antibribery statute is basically the Government's first of defense against improper influence payments in relation to Government acquisition decisions or other public acts.<sup>12</sup>

## CHAPTER 1

### BRIBES AND GRATUITIES

#### A. Elements of the Crime of Bribery

The Government must prove four statutory elements beyond a reasonable doubt to establish an offense of bribery in violation of 18 U.S.C. §§ 201(b),(c):<sup>13</sup>

(1) Something of value,

(2) Knowingly and corruptly (e.g., the specific criminal intent to influence),

(3) Must be offered or promised to a public official<sup>14</sup> (the 18 U.S.C. § 201[b] offense), or must be solicited or accepted by a public official (the 18 U.S.C. § 201[c] offense),

(4) In exchange for (the quid pro quo) influencing the official's performance of any official act<sup>15</sup> or duty, or in return for influencing the official to either commit or allow fraud against the United States.

Although criminal statutes are strictly construed against the Government, several Courts of Appeals liberally interpret the antibribery statute in order to achieve the prophylactic purposes of this cornerstone conflict-of-interest law.<sup>16</sup>

#### 1. Something of Value

Bribes often consist of cash payments,<sup>17</sup> but bribes or gratuities can occur in several forms since almost anything of

value can satisfy this element. A wide range of non-monetary benefits have been held to constitute value.<sup>18</sup> These include such disparate inducements as liquor,<sup>19</sup> travel,<sup>20</sup> sexual favors,<sup>21</sup> meals and lodgings,<sup>22</sup> preferential loans,<sup>23</sup> and other gifts.<sup>24</sup>

Although the subject of gratuities will be discussed separately, infra, it is important to recognize that courts have adopted a very flexible reading of the "value" element for both bribes and gratuities.<sup>25</sup> Courts have consistently held that the words "corruptly," "value," and "influence" should be construed in accordance with their ordinary, everyday meanings.<sup>26</sup> For example, several noteworthy cases involving the judicial review of Civil Service employee discharge actions illustrate the almost de minimis amounts which courts are prepared to accept as "value" for even gratuity violations.<sup>27</sup> While these decisions may seem harsh, particularly in the context of gratuities involving only minor breaches of agency conflict-of-interest regulations, it is important to recognize that courts generally treat a gratuity violation as a lesser included offense of bribery.<sup>28</sup>

Moreover, a specific corrupt intent is not required for an illegal gratuity.<sup>29</sup> This, coupled with the fact that the gratuity subsection does not require a specific wrongful intent, makes the gratuity provisions of 18 U.S.C. § 201 a constant hazard for the unwary even if only items of limited value are involved. This does not mean that every gratuity infraction, regardless of the amount involved, will result in a formal criminal indictment. It does mean that a "technical" violation



of the gratuity subsection can occur (assuming the other statutory elements are satisfied) even if the value is relatively inconsequential.

This has important implications for contractors. A minor or "technical" gratuity infraction by a federal official might result in only an administrative admonishment for the employee involved (e.g., an oral or written reprimand). Even if only administrative measures are taken against a public contractor for his participation in the same incident, the resulting sanctions against him could be quite severe by comparison. A Department of Defense (DoD) employee might only receive an administrative reprimand for accepting an entertainment gratuity from an errant contractor, e.g., two tickets to a professional football game. However, if the responsible contractor has a Government contract that contains the standard DoD Gratuities Clause<sup>30</sup> (which is required by 10 U.S.C. § 2207 for all DoD appropriated funds contracts), he could be at considerable economic risk as a result of this provision's stringent terms and conditions.<sup>31</sup>

## 2. Corrupt Intent

The scienter element for bribery is more than just a simple mens rea.<sup>32</sup> Bribery requires a corrupt specific intent to influence, or be influenced in, some official act.<sup>33</sup> In United States v. Strand, for example, the Ninth Circuit affirmed the following instruction which defined "corruptly":

An act is "corruptly" done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.

The motive to act "corruptly" is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.<sup>34</sup>

The Court also affirmed the trial court's instruction that the Government can prove specific intent by evidence "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law."<sup>35</sup>

A bribe then must be knowingly offered, or accepted, with the corrupt specific intent to influence an official act in order to satisfy the criminal mens rea or wrongful state of mind for bribery, i.e., it must not be the product of an accident or mistake.<sup>36</sup> Bribery's tough specific intent element is typically the most difficult element for the Government to prove since the prosecution must establish beyond a reasonable doubt that the alleged bribe was offered or accepted "with the intent or design to influence official action in exchange for the donation."<sup>37</sup> It is bribery's specific criminal intent element which basically differentiates this crime from its lesser included offense of an illegal gratuity, which requires only a simple mens rea.<sup>38</sup> An 18 U.S.C. §§ 201(b),(c) charge will fail, however, unless a valuable inducement is expressly linked to a specific corrupt intent.

### 3. Public Official

The term "public official" includes a "Member of Congress . . . an officer or person acting on behalf of the United States . . . in any function, under or by authority of any . . . department, agency, or branch of the government . . ."<sup>39</sup> This definition is common to both the bribe and gratuity provisions,

and encompasses a broad spectrum of officials.<sup>40</sup> For example, the following individuals have been held to be public officials within the purview of 18 U.S.C. § 201(a): a federal prison administrator,<sup>41</sup> an Internal Revenue Service agent,<sup>42</sup> Army and Air Force Exchange Service (AAFES) personnel (even though these individuals are non-appropriated fund employees),<sup>43</sup> an administrative assistant to Senator Hiram Fong,<sup>44</sup> a congressional aide to Representative Daniel Flood,<sup>45</sup> a privately employed grain inspector licensed by the U.S. Department of Agriculture,<sup>46</sup> a quality assurance specialist for the General Services Administration (GSA),<sup>47</sup> a Small Business Administration Minority Enterprise Representative,<sup>48</sup> an Air Force sergeant,<sup>49</sup> a Department of State vice-consular officer serving at Port-au-Prince, Haiti,<sup>50</sup> a contracting officer,<sup>51</sup> a contracting officer's representative,<sup>52</sup> and a private corporate employee acting as an area management broker for the Department of Housing and Urban Development (HUD).<sup>53</sup>

Despite the rather expansive scope of the "acting on behalf" provisions of 18 U.S.C. § 201(a), it should be noted that the bribery provisions do not apply to former public officials, whereas the gratuity provisions do encompass former public officials.<sup>54</sup> In addition, a bribe may be received by a public official for himself or for any other person or entity. The gratuity provisions, however, only prohibit the official from receiving value "for himself."<sup>55</sup>

There has been considerable controversy, however, regarding the federal nexus which must exist in order to find that an

individual is "acting on behalf of" of the Government if that person is not directly employed by the United States. The Second Circuit of the Court of Appeals, in two cases involving the bribery of the same city employee, held that a Model Cities Program Administrator was not acting on behalf of the federal Government when the employee recommended that the program rent space from an individual who had offered the official a bribe.<sup>56</sup> The court held that the percentage of federal funding was not the primary factor in determining an individual's status as a "public official" but rather "the character and attributes of (the) employment relationship, if any, with the federal government."<sup>57</sup> The court noted that the defendant was a city employee (under the supervision of another city employee) and that he could not implement his recommendations without the concurrence of other city agencies.<sup>58</sup> The court adopted this position even though the federal Government paid 100% of the operating costs for the Model Cities Program.<sup>59</sup>

Several circuits have adopted a less restrictive interpretation of "public official."<sup>60</sup> For example, in United States v. Mosley, the Seventh Circuit held that persons employed by the State of Illinois to administer the Comprehensive Employment and Training Act were public officials within the meaning of 18 U.S.C. § 201.<sup>61</sup> The Seventh Circuit also decided in United States v. Griffin that a privately employed area management broker, working under a HUD contract, was acting on behalf of the federal Government.<sup>62</sup> The Ninth Circuit recently held in United States v. Hollingshead that a Federal Reserve Bank

employee was a public official for the purposes of the bribery statute.<sup>63</sup> Most courts, with the exception of the Second Circuit, seem prepared to adopt a more expansive reading of "public official" if either state or local employees are involved in administering programs supported, at least in part, by federal funding.<sup>64</sup>

A curious, but noteworthy, example of the potential scope of this element occurred in United States v. Jennings when the Second Circuit held that a defendant was guilty of bribery although he was not aware that the subjects of his intended bribe were actually FBI undercover agents (federal officials) and not local police officers.<sup>65</sup>

#### 4. In Return for an Official Act

Even if something of value is transferred to a public official with the requisite criminal intent, the transfer must still be accomplished in exchange for some identifiable public act in order to constitute bribery.<sup>66</sup> This element of the offense requires proof of a specific nexus between the offer or solicitation of something of value and an accompanying corrupt intent to influence official action.<sup>67</sup> In other words, there must be some direct link between the inducement offered to or solicited by a public official and his subsequent performance a specific public act.

In United States v. Myers,<sup>68</sup> for example, a Congressman accepted \$50,000 in one of the so-called "ABSCAM" cases.<sup>69</sup> In exchange for the payment, the Congressman agreed to introduce or

support immigration bills, inter alia, for fictitious Arab shieks. In United States v. Strand, a Customs Service employee accepted \$800 for the purpose of allowing contraband drugs to be imported into the United States.<sup>70</sup> In both of these cases there was a direct connection or linkage between the bribe and its attendant influence upon some official act.

To support a conviction for bribery, consequently, the Government must demonstrate an express relationship between the corrupt payment offered to or solicited by the public official and an accompanying intent to influence the performance of some identifiable public act.<sup>71</sup> If the Government cannot prove that an official act was done in exchange for a corrupt consideration, the transaction may still be an illegal gratuity, but it is not bribery.<sup>72</sup> The bribe must be "the prime mover or producer of the official act."<sup>73</sup>

The "exchange" or "quid pro quo" requirement has been broadly construed.<sup>74</sup> The Government does not have to prove that the official completed his illicit promise to influence some official action, or that he even attempted to perform the promised act.<sup>75</sup> An official is not required to have either the actual ability or the authority to influence the promised act, although there are a few decisions to the contrary.<sup>76</sup> A bribe may also involve the intended influence of an otherwise lawful act or duty.<sup>77</sup> For example, the Seventh Circuit held in United States v. Arroyo that a Small Business Administration (SBA) loan officer was guilty of soliciting a bribe although he had (at the time of the offense) already approved an SBA guaranteed loan

which he represented as still pending approval.<sup>78</sup>

The courts have also adopted an expansive reading of the term "official act." An "official act" is generally considered to be any matter which is pending or before a public employee in his official capacity.<sup>79</sup> For example, in United States v. Birdsall, the Supreme Court stated in relevant part:

Every action that is within the range of official duty comes within the purview of these sections [antecedents of 18 U.S.C. § 201(b),(c)] . . . To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might 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 in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery [now 18 U.S.C. § 201].<sup>80</sup>

Consequently, an official act be within the ambit of duties "customarily associated with a particular job."<sup>81</sup> For example, the solicitation of a bribe by a government contracting officer in return for the award of a contract or for approval of Engineering Change Proposals (ECPs) is an official act within the contemplation of 18 U.S.C. § 201.<sup>82</sup> In fact, as noted previously, it is immaterial whether the official is actually capable of performing the promised act.<sup>83</sup>

In sum, since the term "official act" is broadly interpreted, the demonstration of the specific quid pro quo becomes the principal focus of any inquiry with regard to this element. Bribery can only occur if a payment or gift is coupled with a specific intent to corruptly influence a public official in

exchange for an official act.<sup>84</sup>

### B. Elements of an Illegal Gratuity

Criminal gratuities are generally considered to be a lesser included offense of bribery, although occasionally this does not follow.<sup>85</sup> As noted previously, the concepts of "value" and "public official" are essentially identical for both offenses.<sup>86</sup> The gratuity provisions of 18 U.S.C. §§ 201(f),(g), however, incorporate two new elements which will be discussed seriatim.<sup>87</sup> These two requirements are the concepts of "otherwise than as provided by law" (vice bribery's corrupt intent) and "for or because of an official act" (in lieu of bribery's express quid pro quo).

The Government must prove four elements beyond a reasonable doubt in order to establish a criminal violation of 18 U.S.C. §§ 201(f),(g):<sup>88</sup>

- (1) Something of value,
- (2) Willfully, knowingly, and otherwise than provided for in the proper discharge of official duty,
- (3) Must be offered or promised to a public official (the 18 U.S.C. § 201[f] offense), or must be solicited or accepted by a public official (the 18 U.S.C. § 201[g] offense),
- (4) For or because of any official act performed or to be performed.

#### 1. Otherwise Than Provided by Law

A specific corrupt intent or purpose is not required for a



criminal gratuity.<sup>89</sup> A general mens rea suffices.<sup>90</sup> Simply stated, an official is prohibited from receiving or soliciting consideration, for or because of an official act, from any unauthorized sources. As noted in United States v. Evans, the gravamen of this offense "is not an intent to be corrupted or influenced, but simply the acceptance of unauthorized compensation."<sup>91</sup> The Government must still prove the act was committed willfully and knowingly and that it was not the result of an accident or mistake.<sup>92</sup> The existence of a specific corrupt intent or improper motive, however, is immaterial.<sup>93</sup>

## 2. For or Because of an Official Act

This pivotal requirement raises a perplexing causation issue, and it is normally the most difficult element for the Government to prove. It basically asks why the official accepted or was offered an unauthorized payment. Although it is clear that a gratuity does not require a corrupt intent or a quid pro quo,<sup>94</sup> there must still be some underlying cause and effect relationship between the value transferred and an official act.<sup>95</sup> There has been considerable confusion and conflict, however, over the purported requirement for separate proof that a gratuity was exchanged for or because of some specific official act. The issue involves whether the Government must independently show that an alleged gratuity was offered or transferred to an official with the knowledge that the inducement was "earmarked" in relation to an identifiable public act.

This question was recently addressed in United States v.

Campbell.<sup>96</sup> The case is particularly important because the District of Columbia Circuit of the Court of Appeals clarified an issue which they had inadvertently created in their earlier opinion of United States v. Brewster.<sup>97</sup> In Brewster, the court stated:

[S]ince "willfully and knowingly" could mean that Brewster knew when he accepted the money that he was receiving the contribution because of his record of performance in this field of postal legislation, and that if he continued such legislative actions in the future (particularly the near future) he would likely receive further contributions, how does this instruction distinguish the contribution found to be illegal here from a perfectly legitimate contribution? No politician who knows the identity of business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.<sup>98</sup>

In Campbell the court qualified its earlier position in Brewster by stating that a gratuity does not require a specific link between the offer or acceptance of unauthorized compensation and some specific public act, whether performed or to be performed.<sup>99</sup> A gift which is offered or solicited only to "generally influence" an official in the execution of his public office is sufficient to satisfy the "for or because of" element.<sup>100</sup> In other words, a criminal gratuity does not require a direct link or connection between the transfer of "anything of value" in relation to a covered official and the expectation of, or reward for, a specific public act.

Moreover, the court held that Brewster should be read in the context of its special fact situation. The court also emphasized that in Brewster it was trying to define "the thin but necessary line that must be drawn between campaign contributions and

improper gratuities,"<sup>101</sup> and that any inference of a general nexus requirement in relation to gratuities, in view of the unique facts presented by Brewster, would be an "overreading" of that case.<sup>102</sup> Appellant's "specific nexus" argument in Campbell was summarily dismissed by the Court:

They make the somewhat startling claim that "if Robert Jenkins provided a move of household belongings to Judge Robert Campbell because he felt that Judge Campbell had been (or would be) generally lenient with respect to [Excavation Construction, Inc.] overweight citations, this would not be sufficient for culpable intent".<sup>103</sup>

Needless to say, the court reached a contrary conclusion.

The Campbell decision now arguably disposes of the residual issue created by the District of Columbia Circuit of the Court of Appeals in United States v. Brewster. At the same time, by qualifying their earlier apparent "nexus requirement" for gratuities to the difficult facts posed by Brewster,<sup>104</sup> the court has raised some serious doubts regarding the continued viability of the Fourth Circuit's disputed goodwill "gratuity exception" in United States v. Arthur,<sup>105</sup> a case which now was arguably an "overreading" of the earlier apparent Brewster nexus rule.

In Arthur, the court held that "goodwill" entertainment and gifts which were motivated by "some generalized hope or expectation of ultimate benefit on the part of the donor (no identifiable benefit as such)" were lawful, and did not contravene the provisions of a West Virginia antibribery statute which was similar in content to 18 U.S.C. § 201 (1976).<sup>106</sup> Yet, what difference is there between providing Judge Campbell with a free move (valued at between \$130 to \$300) of his household goods in relation to some nonspecific "lenient treatment",<sup>107</sup> and

showering public officials with free gifts and entertainment to create a favorable business "climate" in order to secure Government deposits for a private commercial bank?<sup>108</sup>

Even if the specific reason(s) for these hospitality expenses were never disclosed, value was still arguably exchanged for or because of the recipient's ability to favorably influence public acts for his benefactor. Notwithstanding the often indeterminate link between the "goodwill" provided and the expectation of, or gratitude for, unidentified public acts, value is still arguably transferred. Although the Fourth Circuit correctly held that the goodwill expenses in Arthur were not bribes (insufficient evidence of an express quid pro quo), the court (in retrospect) should have determined that these so-called "goodwill" expenses were at least illegal gratuities under the Brewster-Campbell analysis.

It could be argued that the Brewster decision, as qualified by Campbell, now establishes what might be described as a rebuttable "sine qua non" gratuity presumption. But for a public employee's position (the ability to influence the outcome of certain official acts), would the questioned official have received, or been offered, the suspect gift(s) or entertainment in issue? While this oversimplified test does not attempt to shift the burden of proof, it attempts to underscore an important point.

Judge Campbell's position of authority was evident. He was a judge assigned to a court which had original jurisdiction over the numerous traffic tickets which his benefactor received during

construction work on the Washington Metro substations. Judge Campbell, for some reason(s), suspended sentence on over 90 percent of the contractor's 1,138 traffic citations which came before him.<sup>109</sup> Even absent proof of an express quid pro quo, it seems apparent that the judge would not have received the added "perk" of a free household move but for the power of his public office. Whether the gratuity was actually conferred upon Judge Campbell as a reward, or as implicit consideration for a nonspecific future act, is basically immaterial. Judge Campbell was clearly "in a position to use his authority [whenever] in a manner which could affect the gift-giver."<sup>110</sup>

The disputed gratuity could have been motivated by the expectation of continued lenient judicial treatment (the "for" requirement), or it might have been an expression of the contractor's gratitude for past judicial indulgences (the "or because of" element). Notwithstanding the speculative focus of the contractor's intent, the contractor clearly appreciated the prerogatives of public office. Judicial power is the "goodwill" the contractor intended to cultivate. The free household move not motivated by friendship. It was a business expense. It was based upon the judge's ability to influence the disposition of the contractor's numerous traffic citations. This does not mean, however, the Brewster-Campbell analysis prohibits all gifts to public employees - even if they are motivated by friendship or purely social purposes.<sup>111</sup> It does mean that if a contractor's "gift" is challenged, as in Campbell, he might need more than a superficial explanation for his alleged "generosity" if he is to

escape the attention of the U.S. Attorney's office.

This leads to a disquieting question. If Campbell is read as qualifying the apparent specificity or "goodwill exception" of Brewster and Arthur, does this establish a per se rule against the receipt of "anything of value" (gifts or entertainment) which could "generally tend" to influence an official? Paraphrasing the words of one astute commentator, is buying a contracting officer lunch buying the contracting officer, or is there some middle ground "rule of reason"?<sup>112</sup> For example, can a "no-cost" contractor-provided meal at a remote Alaskan construction site be distinguished from an lavish luncheon provided for the same official at a fashionable K Street restaurant in Washington? A literal application of the gratuity provisions of 18 U.S.C. § 201 and the Brewster-Campbell "general tendency" rule would appear to criminally prohibit both situations, i.e., the proverbial dilemma of a "free lunch."

The vexatious problem posed by a literal reading of the statute and the Brewster-Campbell analysis cannot be avoided. Under a strict application of the 18 U.S.C. § 201 gratuity subsections, knowing receipt of anything of value, in relation to a public official, otherwise than provided by law, for or because of any official act, performed (no quid pro quo element) or to be performed, is an illegal gratuity.<sup>113</sup> Although nominal gratuity violations will seldom result in formal criminal proceedings, caution is clearly warranted. The statute as enacted, and as judicially interpreted, does not invite an ethics line-drawing exercise or semantic gymnastics.

Perhaps the best resolution of this ethical labyrinth, however, was opined by Judge Oscar Davis in Dukehart-Hughes Tractor & Equipment Co. v. United States:

I would exclude the Christmas gifts (usually costing less than five dollars); the free lunches, dinner, and cocktail parties; and the free tickets to local events. In the taxable years (1953 - 1956), our national morals, and presumably Iowa morals as well, did not bar public employees from accepting such minor and relatively inexpensive favors; they were not considered substantial enough to be characterized as a "gift" or as a "gratuity". But that cannot be said of the sponsored trips to other cities and states for fishing or sports; the golf tournament; and apparently, also, a part of the convention expense. A recipient of such largesse would know, even a decade ago, that he had been given something of real and substantial value.<sup>114</sup>

Notwithstanding Judge Davis's pragmatic approach, any time a covered official knowingly receives value (a "free lunch"), otherwise than as provided by law (perhaps from a contractor or private lobbyist), which he would not have received but for his position in Government (no direct connection or quid pro quo is necessary between the benefit conferred [lunch] and some identifiable official act [award of a contract or possibly support for certain legislation, past or pending]), the "general tendency" rule of the "for or because of" element seems arguably satisfied under 18 U.S.C. §§ 201(f),(g), as currently enacted and interpreted by relevant case law. The official is at risk.<sup>115</sup>

### C. Procurement Process Application

Bribery and criminal gratuities, in the formation and administration of Government contracts, can occur as part of an almost indeterminate variety of schemes to improperly influence acquisition decisions. The ploys which can be used to subvert

the procurement process are limited only by the misguided imagination of the individuals involved.<sup>116</sup>

Opportunities for improper payments exist in almost every phase of contract formation and performance. For example, Government officials exercise considerable discretion in relation to contract specifications, pre-award surveys, the use of Government furnished property (GFP), source selections and contract awards, inspection standards, final acceptance, contract changes and ECPs, option exercise, claim settlements, and a myriad of other ancillary functions. Improper payments tendered to influence the outcome of these events can occur anytime unscrupulous individuals detect that favorable contract-related decisions can be overtly purchased or covertly cultivated without detection or exposure.

The following analysis will focus on representative examples of procurement-related acts and functions which are often susceptible to improper influence during contract formation and performance. As noted previously, the Government must prove each of the essential statutory elements for either bribery or a criminal gratuity in order to support a criminal conviction for 18 U.S.C. § 201 misconduct.

## 1. Contract Formation

### a. Overview

K & R Engineering Co., Inc. v. United States is a leading case which illustrates the chicanery that results when a Government official is co-opted during contract formation.<sup>117</sup>



Three large contracts were let by the Army Corps of Engineers for the rehabilitation of two lock bulkheads on the Mississippi River and the repair of two barges. Allen Swenson, the Army contracts official involved, had assisted K & R on previous occasions in obtaining six to eight small purchase orders (contracts then in amounts not exceeding \$2500) in return for five percent of the face value of each contract which he procured for the firm.<sup>118</sup>

Swenson was then the Chief of the Plant Branch for the Army's St. Louis District, and he also served as the principal administrative authority over Corps contracts in that region. K & R initially offered to pay Swenson a five percent kickback on each contract the firm obtained but they later agreed to make Swenson a "silent partner" by giving him 25 percent of the profits from each Army contract the company was awarded.<sup>119</sup> Swenson performed several official acts for K & R in furtherance of this arrangement:

[W]ith respect to the bulkhead 25 contract, he gave the plaintiff advance notice of the invitation for bids so that it could prepare its bid. He informed the plaintiff of the maximum amount the Corps would pay, so that its bid would be below that figure. In drafting the specifications, he set a short time for performance, which would have necessitated overtime costs. He told the plaintiff to bid lower than others by not including the overtime costs seemingly required for timely performance.<sup>120</sup>

Swenson also provided K & R with similiar assistance on the second contract when he helped the firm secure additional work involving the rehabilitation of lock bulkhead 26.<sup>121</sup> Although Swenson's assistance in affecting award of the third contract (the repair of the two barges) involved substantially the same efforts as were required for the other two contracts, in this

instance, Swenson also recommended award of the contract to K & R "even though the plaintiff [K & R] had never before attempted a project of this scope and Swenson himself had doubts about its ability to perform adequately."<sup>122</sup> Swenson's misgivings were later confirmed when the contract was eventually terminated for convenience based in large part upon K & R's unacceptable performance.<sup>123</sup>

The two owner-contractors ultimately pled guilty to violations of 18 U.S.C. § 201(f), and a go-between also pled guilty to an 18 U.S.C. § 371 (conspiracy) offense. Swenson was later convicted of violating 18 U.S.C. § 208 (criminal conflict-of-interest).<sup>124</sup> Although Swenson's misdeeds during contract administration will also be discussed in the contract performance section,<sup>125</sup> even the pre-award aspects of the case clearly demonstrate the potential for corrupt distortions of the procurement process during contract formation.

#### b. Pre-Award Surveys

United States v. Laverick is one of the few reported cases which detail the compromise of Government pre-award surveys.<sup>126</sup> Laverick was a Government employee in charge of a department which certified the technical ability and plant capacity of firms bidding on Signal Corps contracts. His department could also authorize and approve technical changes in contract specifications.<sup>127</sup> Consad, Inc., was an electronics components manufacturer which was then competing for several Signal Corps contracts, but the firm had failed several pre-award surveys.<sup>128</sup>

One of Laverick's subordinates informed Consad they would continue to have pre-award survey problems unless certain key Signal Corps personnel received at least two percent of a pending \$2.5 million contract award.<sup>129</sup> The kickback was later reduced to \$20,000, and confidential Government documents were then shipped to Consad to help them prepare for the survey.<sup>130</sup> In the meantime, Consad had informed the FBI of the conspiracy.

Although Consad failed the Army's pre-award survey despite Laverick's efforts, Laverick later told Consad that he could help them obtain a Certificate of Competency (COC) from the Small Business Administration. Laverick claimed that the COC would negate the survey's results, and that after the contract was awarded to Consad, he would order additional spare parts to increase the firm's profit on the contract.<sup>131</sup> Laverick and his co-conspirators were convicted of bribery for their corrupt role in these activities.<sup>132</sup>

#### c. Contract Award

As noted previously, the techniques which can be used to improperly influence contract awards are seemingly limitless.<sup>133</sup> In United States v. Kenny, for example, several Navy civilian employees were involved in a series of corrupt contracting relationships with Ocean Market Consultants (OMC).<sup>134</sup> The four employees worked at the Naval Electronics Laboratory Center (NELC) at Point Loma, California, as part of the NELC's Security Systems Program Office.<sup>135</sup> One of the employees, William Parker, was also the supervisor of the NELC program

office which the Navy had internally designated as "Code 1500".<sup>136</sup>

Parker and his associates, because of their key positions in the Code 1500 program, were bribed by OMC to influence the award of several Navy contracts to their firm.<sup>137</sup> Parker, in particular, made several false representations to Navy contracting officials regarding OMC's unique qualifications to perform certain projects which were under Code 1500's supervision. OMC was subsequently awarded several of these contracts on a "sole source" basis, and OMC was thereby able to circumvent normal competitive procedures.<sup>138</sup> Parker persuaded Navy authorities to make a "sole source" award on one of these contracts by characterizing the project as an unusually time-sensitive, high priority program which OMC was uniquely qualified to perform given the contract's critical time constraints.<sup>139</sup> The group's conspiracy was eventually exposed, and OMC's proprietor, Parker and the majority of his NELC co-conspirators, were later convicted of several 18 U.S.C. § 201 offenses.<sup>140</sup>

Another improper award case occurred in United States v. Ellenbogen.<sup>141</sup> This scheme involved the abuse of an otherwise valid requirements contract and the fraudulent negotiation of over 100 small purchase orders.<sup>142</sup> A GSA buyer, whose duties included the purchase of cellophane and polyethylene products, was bribed by a contractor to order quantities greatly in excess of the Government's actual needs under the contractor's existing requirements contract.<sup>143</sup> The GSA buyer also agreed to manipulate the relatively relaxed procedures for small purchase

orders in order to make it appear as if these orders were in fact going to the lowest bidder:

Ellenbogen [the contractor] also influenced DiChellis [the GSA buyer] to award Allied Converters, Inc. over one hundred purchase orders for materials, in separate amounts of less than \$2500, which totalled \$183,342.82 by the more informal method of a standard bid form or an oral telephone bid. In these instances Ellenbogen was advised of the quotations of the other bidders taken first by DiChellis; and thereupon Allied Converters, Inc. underbid them. There was evidence that on some orders based on telephone bids, no bids by other suppliers were actually given, but DiChellis falsely listed arbitrarily selected names.<sup>144</sup>

Both the contractor and the GSA purchasing agent were later convicted of bribery, in addition to other offenses.<sup>145</sup>

In United States v. Sawyer, a Navy procurement specialist formed a consulting firm with a self-employed manufacturer's representative who worked as an advisor for small businesses which were interested in obtaining Government contracts.<sup>146</sup> The Navy contracts specialist supplied their new consulting firm with classified documents relating to prospective Government purchases. The Naval specialist was later convicted of accepting a bribe in exchange for revealing confidential inside information regarding future Navy acquisitions, and his consultant associate was found guilty of bribery and other related offenses.<sup>147</sup>

United States v. Austin involved a Navy Exchange civilian recreation officer who was responsible for obtaining 18 replacement vehicles for the Navy.<sup>148</sup> Austin advised agents of the American Motors Corporation that they could increase their initial offer in the competition for the vehicle replacement contract from \$2000 to \$2410 per car, yet still retain the lowest bid.<sup>149</sup> In exchange for his valuable inside information, Austin

received a new car. Austin was later convicted of several offenses including violations of 18 U.S.C. § 201.<sup>150</sup>

Other major buying agencies have also been embarrassed by contract award scandals.<sup>151</sup> There are several unfortunate cases, for example, involving corrupt employees of both the Army and Air Force Exchange Service (AAFES) and General Services Administration (GSA).<sup>152</sup> The AAFES, a non-appropriated fund organization, is tasked with purchasing billions of dollars of merchandise for worldwide resale to military personnel through its chain of post and base exchanges.<sup>153</sup> In re Smith details the bribery of two civilian AAFES buyers by defendant companies, but it also mentions in dicta, that the case was part of a two year investigation (by the Dallas U.S. Attorney's Office) which resulted in twenty-six convictions for bribery and graft-related offenses that involved AAFES employees, vendors, and military sales representatives.<sup>154</sup> These corrupt payments were made to AAFES purchasing agents in relation to the placement of favored AAFES merchandise orders.<sup>155</sup>

Some Government officials have subverted formal bidding competitions in exchange for various improper payments. In United States v. Hollingshead, for example, a former Federal Reserve Board (FRB) building service manager conspired with several prospective contractors to fix bids on local FRB building projects.<sup>156</sup> Hollingshead received bribes and kickbacks from a group of independent contractors as part of an elaborate fictitious bidding scheme:

[F]ictitious competitive bids [were submitted] in the name of different independent contractors. The fictitious bids

were accompanied by a lower [but inflated] bid from the particular co-conspirator. Thereafter, Hollingshead prepared and submitted purchase requisitions reflecting the non-existent competitive bids as well as the lower [inflated] bid of the particular co-conspirator. A kickback from the co-conspirator to Hollingshead would follow the contract award.<sup>157</sup>

Hollingshead was convicted of receiving a gratuity in violation of 18 U.S.C. § 201(g). The case of United States v. Winchester involved a similiar bidding scam operated by a HUD area management broker.<sup>158</sup>

Elected officials and their staffers are sometimes induced to improperly affect the award of Government contracts.<sup>159</sup> In United States v. Brasco, for example, a U.S. Congressman was convicted of conspiring to accept an improper payment in relation to the award of a Postal Department mail hauling contract.<sup>160</sup> Congressman Brasco cajoled a postal official into suggesting the appropriate low bid which a prospective bidder should make in order to obtain the award of a certain hauling contract. Brasco then assisted this same contractor in re-offering his trucks to the Post Office for the follow-on award, and he also collaborated with the contractor in bidding for the additional work under the name of a company which was ostensibly independent of the incumbent's firm.<sup>161</sup>

## 2. Contract Administration

### a. Overview

The leading case of K & R Engineering Co., Inc. v. United States, discussed previously, also provides a graphic perspective of the potential for white-collar crime during contract perfor-

mance.<sup>162</sup> After assisting K & R in securing their three tainted contracts with the Corps of Engineers, Allen Swenson continued secretly to collude with the firm notwithstanding his conflicting role as the Government's Contracting Officer's Representative (COR).

Swenson, as the Army's cognizant COR, had numerous opportunities to assist K & R since he was responsible for the supervision, inspection and acceptance of K & R's work. Swenson allowed K & R to use GFP and personnel on a "no-cost" basis, and he let K & R skim costs by corruptly authorizing deviations from contract specifications. This resulted in the incomplete painting of lock bulkhead 26 in one instance.<sup>163</sup> K & R was also permitted to use three layers of paint on the bulkhead contracts instead of the five layers which were required by contract specifications.<sup>164</sup> Swenson performed perfunctory inspections of K & R's work, and he allowed the contractor "to spray paint over wet surfaces (on the barge contract) although he knew the practice was unsatisfactory."<sup>165</sup>

Swenson also assisted K & R in submitting contract-related claims against the Government.<sup>166</sup> For example, after high waters had allegedly increased K & R's costs on the bulkhead 25 contract, Swenson informed the firm that they could file for additional compensation from the Corps.<sup>167</sup> When Swenson first discovered that rehabilitation work would also be needed on bulkhead 26, he tried unsuccessfully to persuade the Corps to award the work to K & R as an "in-scope" change under K & R's existing bulkhead 25 contract. This would have enabled K & R to



bypass competitive procedures which are required for the award of construction contracts.<sup>168</sup> When K & R's barge contract was in jeopardy of termination, Swenson prepared a formal claim against the Government for the firm's signature, alleging defective Government specifications, practical impossibility, and demanding additional compensation and extra time for performance.<sup>169</sup>

K & R's criminal association with Swenson provides a sordid illustration of the debilitating impact which graft and corruption can have on the acquisition process. Swenson's illegal activities not only deprived more deserving companies of work which they might have otherwise obtained, but his criminal chicanery also undermined the Government's efficient and economic administration of the contract.<sup>170</sup>

The Government's elaborate system of checks and balances during the contract formation process are meaningless if the otherwise responsive and responsible contractor, whose offer is most advantageous to the Government, later succeeds in corrupting the public officials who are charged with the task of administering the resultant contract. However, the general antibribery statute provides the Government with a formidable statutory weapon against any improper payments which are made to corrupt public officials during the acquisition cycle.

#### b. Inspections

The inspection process is also quite susceptible to deceptive schemes and practices, and several cases document corrupt incidents associated with this critical function.<sup>171</sup>

Government inspections are often only intended to monitor and spot check the contractor's own "in-house" quality assurance (QA) program (e.g., even the IRS does not have the manpower or resources to audit every tax return). Additional QA compliance checks are then performed by Government personnel on a random sampling basis, as opposed to a 100% screening process, in order to validate the contractor's existing QA system.<sup>172</sup> As a result, discreet payoffs and kickbacks, which are made to a small cadre of Government inspectors, can often pass relatively unnoticed until the contract specifications which are actually "shaved" become flagrant or performance-impairing.

United States v. Hartley is an important recent case which involved the prosecution of a Florida contractor engaged in fraudulent sale of frozen breaded shrimp to the DoD.<sup>173</sup> The contractor, Treasure Isle, Inc., used a variety of fraudulent testing and inspection schemes, in addition to a series of false reports, to conceal the fact that production lots of contractor processed shrimp did not meet contract specifications. This elaborate conspiracy combined a variety of different ruses and ploys to defraud the Government. Liquor, money, and boxes of shrimp were used to bribe some of the plant's small cadre of military inspectors to falsify key reports.<sup>174</sup> The contractor also devised special techniques for secretly substituting presorted samples of shrimp, which conformed to Government specifications, in lieu of randomly selected Government samples (usually non-conforming) which the plant's Government inspectors had identified and segregated for subsequent compliance

testing.<sup>175</sup>

The net result of these deceptive and fraudulent vendor practices was predictable:

Smaller shrimp, less careful cleaning and deveining, extra breading, and sloppy freezing became the order of the day . . . [C]hemicals were added to large batches of shrimp which had developed a foul odor to enable the shrimp to be processed and frozen undetected. Rejected shrimp would be secretly added to other production lots. Shrimp received from abroad were also processed in the lots sold to the government. Once again, false counts were given to inspectors to enable Treasure Isle to include uninspected shrimp in government orders. And the company developed signals to alert employees of an inspector's approach.<sup>176</sup>

The corrupt scheme was eventually detected by an alert military inspector, and a follow-up investigation disclosed the true magnitude of the fraud which had been perpetrated by Treasure Isle.<sup>177</sup>

A somewhat analagous situation occurred in United States v. Romano, a case which involved the unsuccessful appeal by the general manager of a meat processing plant who was convicted of 27 counts of conspiracy relating to the supply of inferior grades of beef to the DoD.<sup>178</sup> By simultaneously bribing the plant's Government inspectors and substituting ungraded and inferior cuts of beef, the defendant's company was able to over-charge the Government in excess of \$895,000.<sup>179</sup>

United States v. Fenster also involved a similiar appeal by the part owner of a meat processing plant who was guilty of bribing a U.S. Department of Agriculture (USDA) Veterinarian-Inspector.<sup>180</sup> A USDA examination of the owner's plant in 1976 resulted in the company's receipt of the USDA's worst possible rating.<sup>181</sup> The owner attempted to bribe the plant's USDA

Veterinarian-Inspector afterwards in order to reduce the number of stoppages on his plant's production line and to lower the facility's condemnation rate.<sup>182</sup> The mechanics of the actual inspection process are worth briefly considering:

Utica Packing was engaged in the slaughter and processing of hogs. The production process -- killing, cleaning, eviscerating, sectioning, storing, and shipping -- was controlled to a large extent by the federal inspectors, who could slow the process by requiring the correction of particular problems in individual units found to be unsatisfactory or who could stop the entire process until correction of a more pervasive unsatisfactory condition was made. For example, an inspector might tag a carcass for having hair on the skin. In that instance, the carcass would be laid aside until the condition was remedied and thereafter returned to the production line. On the other hand, if the inspector discerned a repetition of certain unsatisfactory conditions that might, for example, be attributed to a defect in the cleaning equipment, the entire line would be shut down until the defect was found and remedied. It is appropriate at this point to note that a particularly important part of the inspection process is the examination of the hogs for evidence of tuberculosis because of the particular susceptibility of that animal to that disease. Depending on the type of tuberculosis involved, and on the location and extent of the involvement, a carcass may require sectioning with loss of some parts, or it may be rejected altogether or approved altogether. It is readily apparent that the shut-down of the lines, in a plant that employed approximately 100 persons, and the rejection of carcasses as diseased affect directly the efficiency and profitability of the operation.<sup>183</sup>

This quote vividly illustrates how the corruption of Government inspectors can jeopardize the basic integrity of the procurement process and even create possible health hazards for an unsuspecting public.

#### c. Contract Changes

There are only a few reported cases which actually detail improper payments incident to Government change orders in existing contracts, but bribes and gratuities which induce

unnecessary and fraudulent "get well" changes pose an obvious threat to efficient and economic contract administration.<sup>184</sup> In the context of either fraudulent constructive or ordered changes, for example, the Government is arguably paying more than necessary to meet its minimum needs. The net result is similar to that previously encountered with corrupt inspections. The Government is unwittingly defrauded. Real dollar costs are inflated because the Government has received less than what it bargained for, or in the alternative, the Government has been forced to spend more than necessary to meet the its minimum needs. The public fisc is impaired regardless.

The Third Circuit, United States v. Heffler, affirmed the bribery conviction of an Army engineering technician who made unlawful representations regarding his willingness to make improper contract changes.<sup>185</sup> The court held that even though the technician lacked actual authority (he could only make recommendations regarding implementation), the evidence was still sufficient, in part, to sustain his conviction.<sup>186</sup> Likewise, in United States v. Lev, the Second Circuit affirmed the convictions of several defendants for conspiracy to defraud the United States, and it also sustained the bribery conviction involving one of the defendant contractor's employees.<sup>187</sup> As a part of the Contracting Officer's (CO) criminal quid pro quo, the CO "granted valuable contractual deviations whenever they were required."<sup>188</sup>

#### d. Claims

Improper influence payments, which are incident to the

submission of false, fictitious or fraudulent contract claims, can also involve additional criminal acts which are specifically outlawed by other statutes.<sup>189</sup> The false claims rule structure contains elements which are quite different from those required for a violation of 18 U.S.C. § 201.<sup>190</sup> This is not to suggest that bribes or gratuities are completely alien to unlawful contract claims.<sup>191</sup> Unprincipled officials are corruptly influenced in relation to false or fraudulent claims schemes,<sup>192</sup> but 18 U.S.C. § 201 misconduct is not required per se to trigger separate criminal liability under the relevant false claims statutes.<sup>193</sup>

These important, but complex, false claims provisions (both criminal and civil) will be analyzed in detail in separate chapters.<sup>194</sup> For purposes of this brief sectional analysis, however, only note that improper influence payments can occur in conjunction with the presentment of false or fraudulent claims, statements, and certifications. Also recognize that the false claims rule structure is functionally independent of the elements of the antibribery statute.

## PART TWO

### OTHER STATUTES WHICH PROHIBIT IMPROPER PROCUREMENT-RELATED PAYMENTS

Although there are a number of antibribery statutes which are more narrowly focused than 18 U.S.C. § 201,<sup>195</sup> there are also several broad federal statutes which are available to prosecute procurement-related graft and corruption.<sup>196</sup> Some of these tough white-collar crime laws even prohibit commercial bribery in violation of either state or federal law, i.e., improper payments which are made to corrupt private employees or agents in relation to commercial enterprises.<sup>197</sup> Likewise, the most recent antibribery statute, the Foreign Corrupt Practices Act of 1977 (FCPA), was specifically enacted to cover suspect payments to foreign officials, and the law is expressly extraterritorial in scope.<sup>198</sup> The Government's available inventory of "antibribery" weapons, as a result, includes a wide battery of other statutory vehicles, in addition to 18 U.S.C. § 201, which can severely impact errant contractors during the procurement process.

The concept of an unlawful payment, in relation to a Government contract, is the common theme for Part Two's statutory survey. Although 18 U.S.C. § 201 focuses primarily on corrupt activities of public officials, several of these versatile white-collar crime laws address the question of liability (criminal and civil) for bribes, kickbacks and other improper payments or fees in a much broader context.<sup>199</sup> Notwithstanding their often

controversial application to misconduct in the contracting community,<sup>200</sup> the de facto antibribery statutes, surveyed in Part Two, are now playing an expanding role in the prosecution and deterrence of procurement-related fraud and corruption.<sup>201</sup>



CHAPTER II  
MAIL AND WIRE FRAUD

A. Elements

The mail<sup>202</sup> and wire fraud<sup>203</sup> statutes seem almost tailored for the prosecution of corrupt payment offenses incident to the procurement process.<sup>204</sup> The Government is only required to prove three elements to establish a violation of these statutes:<sup>205</sup>

- (1) Knowing participation in a scheme to defraud,<sup>206</sup> plus,
- (2) Use of the mails or wires in interstate or foreign commerce (the federal jurisdictional nexus) caused by someone associated with the scheme, and,
- (3) Use of the mails or wires<sup>207</sup> for the purpose of executing the scheme.

Although penal statutes are normally construed against the Government, several courts have adopted a rather expansive interpretation of fraud within the context of these statutes.<sup>208</sup>

1. Scheme to Defraud

There are no precise definitions for the term "scheme to defraud."<sup>209</sup> Courts have stated that the statute's fraudulent scheme or artifice is not limited to traditional common law concepts of fraud,<sup>210</sup> and that the fraudulent nature of any illegal misconduct is not measured by technical or mechanistic standards.<sup>211</sup> This flexible interpretation of "a scheme to

defraud" prompted one commentator to observe that:

[T]he mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the "first line of defense" against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery. In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.<sup>212</sup>

In view of this broad and expansive reading of the activities outlawed by the mail fraud statute, any procurement-related misconduct involving activities such as bribes, collusive bidding, follow-the-leader pricing, rotated low bids, uniform estimating systems, identical bids, kickbacks, or even false and fraudulent claims or statements,<sup>213</sup> is potentially subject to a grand jury probe under the aegis of the mail fraud statute.<sup>214</sup> The scope of this seemingly open-ended statute is arguably broad enough to police the entire spectrum of procurement fraud.<sup>215</sup> The Government, however, must still prove a reasonably foreseeable use of the mails (the jurisdictional linchpin) in furtherance of the scheme.<sup>216</sup>

A "scheme to defraud" implies at least some premeditation in the execution of the scheme,<sup>217</sup> and it is well settled that the mail fraud statute requires a specific intent to defraud.<sup>218</sup> Although the scheme to defraud has sometimes been labeled as the "gravamen of the offense,"<sup>219</sup> the critical element has often been identified as the scheme's fraudulent intent.<sup>220</sup> A scheme's specific intent may be inferred from the facts and circumstances

surrounding the questioned activities.<sup>221</sup>

Mail fraud schemes include the breach of fiduciary duties as well as deprivations of both tangible property interests,<sup>222</sup> and intangible rights (e.g., the loss of an agent's faithful and honest services) in relation to either public officials<sup>223</sup> or even private business employees (commercial bribery).<sup>224</sup> No pecuniary loss is required by the statute,<sup>225</sup> and the scheme does not have to be successful.<sup>226</sup> There is also no requirement for the public to suffer any actual harm,<sup>227</sup> but some tangible injury or harm must be contemplated by the underlying scheme.<sup>228</sup>

Not every breach of a fiduciary duty which causes the intangible loss of an agent's honest and loyal performance, however, falls within the confines of the mail fraud statute.<sup>229</sup> A fiduciary breach will constitute an illegal mail fraud scheme only if the employee also has a duty to reveal material information which could or does result in injury to his employer,<sup>230</sup> or if the breach of duty is part of a "recognizable scheme formed with specific intent to defraud."<sup>231</sup> One court distilled the factors generally considered to trigger criminal liability under the mail fraud statute as follows:

In recent years in this Circuit and across the country it has become well established that the mail fraud statute is violated when some or all of the following factors are present: a duty to disclose an interest with a concomitant failure to do so; an attempt to cover-up through false pretenses; a taking of money or property or rights of another through the use of kickbacks, extortion, bribery, tax evasion, perjury, or a violation of some state or federal statute; a use of the United States mails.<sup>232</sup>

As a general principle, consequently, the first element of a mail fraud violation is satisfied when a scheme to defraud is combined

with the requisite specific intent to defraud. The scheme can include both the deprivation of tangible or intangible rights from either the public or private sector. It can also involve fraudulent breaches of fiduciary obligations when the agent has a duty to reveal material information under circumstances where nondisclosure could or does result in harm.

## 2. Use of the Mails

The second element of a mail fraud violation requires an actual use of the mails or "causing" a use of the mails.<sup>233</sup> In Pereira v. United States,<sup>234</sup> the Supreme Court held that a defendant need not use or intend to use the mails as part of a deceptive scheme.<sup>235</sup> In order to "cause" a mailing for purposes of 18 U.S.C. § 1341 liability, the statute only requires that the mailing (even if this is done by another person without the defendant's knowledge) be a reasonably foreseeable part of the scheme's execution.<sup>236</sup> The Court described the "reasonably foreseeable" causation test as follows: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."<sup>237</sup> Each use of the mails in furtherance of the deceptive scheme is a separate violation of the statute.<sup>238</sup>

## 3. Purpose of the Mailings

The third element requires that the use of the mails must be for the purpose of executing the scheme to defraud.<sup>239</sup> The

mailings must be "incidental to an essential part of the scheme,"<sup>240</sup> and they must also be sufficiently related to the furtherance of the fraudulent activities to satisfy the statute's nexus requirement.<sup>241</sup>

United States v. Maze illustrates the inherent difficulties in determining the scope of the "in furtherance" test.<sup>242</sup> The Supreme Court held in Maze that a series of credit card sales invoices which were mailed by several out-of-state motel owners to the card's issuing bank for payment were not mailings which were sufficiently related to a defendant's interstate use of a stolen credit card. The defendant's actions, therefore, were not within the purview of the mail fraud statute.<sup>243</sup> The fraudulent scheme in Maze had reached fruition prior to the invoice mailings, i.e., when the defendant used the stolen credit card to pay the victimized motels.<sup>244</sup> The Court also added that the success of the defendant's fraudulent activities did not depend upon the mailings to "lull" his victims in order to avoid or delay detection or even to accomplish his scheme's ultimate objective.<sup>245</sup> Since the scheme's execution was not sufficiently related to or dependent upon the mailings,<sup>246</sup> the invoice billings by the merchants were not in furtherance of the defendant's fraudulent scheme but were merely collateral or incidental to it.<sup>247</sup>

The Third Circuit recently synopsisized the elusive "in furtherance" test as follows:

The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud. Whether a mailing is "for the purpose of executing a scheme" within the meaning of section 1341 depends upon whether it is "suffic-

iently closely related to the respondent's scheme to bring his conduct within the statute." The completion of the scheme must depend in some way on the mailings charged. However, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." Rather, it is sufficient if the mailing is "incident to an essential part of the scheme".<sup>248</sup>

The perplexing nexus issue which was raised in Maze (was there a sufficient use of the mails for a particular mailing to be actually in furtherance of the scheme to defraud?) basically questions whether the requisite mailings were an integral or necessary part of the scheme or merely events which occurred after the scheme was already executed.<sup>249</sup>

#### B. Procurement Process Application

The expansive judicial construction of the mail fraud statute has made the act an important vehicle for the prosecution of several forms of procurement-related misconduct. Any deceptive schemes involving bribes, kickbacks, bid-rigging, and other improper payments in relation to Government contracts are potentially subject to mail fraud prosecution if the use of the mails is reasonably foreseeable. In fact, the mail fraud statute can reach misconduct incident to both Government (state and local as well as federal) and commercial contracts.<sup>250</sup>

United States v. Hartley is a leading case which illustrates the application of the mail fraud statute to a fraudulent scheme on a DoD procurement involving, inter alia, illegal gratuities tendered to federal inspectors.<sup>251</sup> Treasure Isle's use of the mails was ultimately deemed by the court to be sufficiently closely related to the illicit scheme to sustain several mail

fraud charges.<sup>252</sup> A mail fraud prosecution is arguably available whenever a fraudulent procurement scheme involves improper contractor payments to a public official, and the use of the mails as an integral part of the scheme is reasonably foreseeable.

Several private sector cases involving kickbacks on standard commercial contracts illustrate, by way of analogy, the potential application of the mail fraud statute to procurement-related misconduct.<sup>253</sup> These cases are grounded primarily on the breach of the employee's fiduciary duties to his employer, i.e., loyalty and full disclosure. In United States v. George, for example, a purchasing agent for Zenith Radio Corporation was convicted of mail fraud for accepting undisclosed kickbacks from a cabinet supplier in connection with the award of cabinet contracts by Zenith to the vendor.<sup>254</sup> Similarly, in United States v. Bryza, the Seventh Circuit of the Court of Appeals sustained the mail fraud convictions of an International Harvester (IH) Corporation purchasing agent who accepted undivulged kickbacks in relation to IH contracts with various outside salesmen and suppliers.<sup>255</sup> Likewise, in United States v. Lea, a meat buyer for Saway Stores, Inc., was convicted of mail fraud based upon his receipt of several kickbacks from a meat brokerage firm in contravention of several explicit company policies.<sup>256</sup>

Collusive-bidding schemes are also subject to mail fraud prosecution. In United States v. Rodgers, for example, several construction contractors were convicted of mail fraud charges for their involvement in a bid-rigging scheme for the allocation of

river bank stabilization contracts on the Mississippi River which were awarded by the Corps of Engineers.<sup>257</sup> The mailings of various "notices to proceed" and progress payment checks were considered sufficient mailings to bring their conduct within the statute.<sup>258</sup> In United States v. Azzarelli Construction Co., the corporation and its vice-president were convicted of 12 counts of mail fraud, inter alia, for bid-rigging on three Illinois highway contracts.<sup>259</sup>

The following commentary's comparison of the several parallels between the general conspiracy statute and the mail fraud provisions vividly illustrates the sweeping scope of potential mail fraud applications in relation to the procurement process:

The mail fraud statute . . . has the same prosecutorial advantages, both tactical and strategic, that conspiracy has -- and more. You can manipulate venue with the mail fraud statute by simply collating your mailing, by the place that the mailing was made, or taken from, or where it was delivered.

You can also create a scheme of extraordinary duration, just as you can with a conspiracy count. And, what is more important, a mail fraud count is a substantive offense, while conspiracy is inchoate. And as I said earlier, you can pyramid the offenses based on the number of mailings the prosecutor deigns to choose.

The striking resemblance between mail fraud and conspiracy has been pointed out time and time again by the courts. And indeed the Supreme Court in a very famous case, with Justice Douglas writing the opinion, in Pinkerton, noted that when two or more persons engage in a scheme to defraud under the mail fraud statute it becomes by operation of law a conspiracy, and all the rules of evidence applicable to conspiracy apply to the scheme.<sup>260</sup>

Even this brief survey of the mail fraud statute should clearly evidence its sweeping application to almost any activities involving improper payments in relation to the procurement process.



CHAPTER III  
THE TRAVEL ACT

This tough anti-racketeering statute prohibits interstate or foreign travel with the intent to aid defined unlawful activities in violation of state or federal law.<sup>261</sup> Although the Travel Act was aimed primarily at organized crime,<sup>262</sup> the broad reach of this statute clearly applies to any individual who crosses state lines (public officials<sup>263</sup> or contractors<sup>264</sup>) or who uses interstate facilities to promote or facilitate unlawful activities such as bribery<sup>265</sup> and extortion.<sup>266</sup> This statute outlaws even a single act of bribery or extortion.<sup>267</sup>

The Supreme Court has noted the Travel Act's disquieting potential for transforming a relatively minor state violation into a federal felony.<sup>268</sup> For example, after federal jurisdiction is established, breaches of relevant state commercial bribery statutes are subject to federal prosecution as defined "unlawful activities" under the Travel Act's umbrella prohibitions.<sup>269</sup> Therefore, once the requisite jurisdictional element attaches (use of the mails, telephones or interstate travel), the statute essentially federalizes the corpus of relevant state commercial bribery statutes -- notwithstanding the conspicuous absence of an express federal statute prohibiting commercial bribery.<sup>270</sup> This is an important point since commercial bribery is only a criminal misdemeanor in many states, yet a Travel Act

prosecution for the seemingly indential offense could result in a felony conviction.<sup>271</sup>

#### A. Elements

The Government is required to prove three statutory elements to establish a violation of the Travel Act:<sup>272</sup>

- (1) Interstate travel or use of an interstate facility,
- (2) With the specific intent to aid a defined "unlawful activity" (e.g., bribery or extortion),
- (3) Followed by an overt act thereafter in furtherance of the unlawful activity.

As noted previously, the defined unlawful activity can be a violation of either state or federal law.<sup>273</sup>

##### 1. Sufficiency of Interstate Activities

This is currently the most controversial Travel Act element.<sup>274</sup> A sufficient nexus which must exist between a defendant's predicate criminal activity and the interstate element (travel, use of interstate facilities, or the causation of such events).<sup>275</sup> Some circuits demand only a minimal interstate connection,<sup>276</sup> while others require the interstate activity to be significantly related to the unlawful activity, but this nexus does not have to be essential to the scheme's operation.<sup>277</sup> Note, however, that in Perrin v. United States, the Supreme Court held that a single interstate telephone call was a sufficient use of interstate facilities to support a Travel Act violation.<sup>278</sup>

## 2. Intent to Commit "Unlawful Activity"

The defendant need not cause, or even anticipate, the interstate element since there is no express scienter requirement for the jurisdictional nexus.<sup>279</sup> The Travel Act's scienter requirement focuses on the specific criminal intent which is necessary to facilitate or promote the unlawful Travel Act predicate activity.<sup>280</sup> The criminal mens rea is connected to the defined unlawful activity and not the interstate jurisdictional element.

The fact that the travel or use of interstate facilities occurred as a result of mixed motives (purposes which are both related and unrelated to the unlawful activity) does not preclude a Travel Act conviction.<sup>281</sup> In addition, each incidence of the interstate element, in furtherance of a defined unlawful activity, forms the basis for a separate Travel Act offense.<sup>282</sup>

## 3. Overt Act Thereafter

The illegal acts must occur after the commission of the interstate element.<sup>283</sup> Failure to demonstrate a subsequent act in furtherance of the unlawful activity, after satisfying the interstate element, is a complete defense to the charge.<sup>284</sup>

### B. Procurement Process Application

Although the jurisdictional nexus for a Travel Act case is often more difficult to establish than for a comparable mail fraud prosecution, the Travel Act is still a formidable weapon in the hands of a skilled prosecutor. The statute is capable of

reaching commercial or public bribery schemes in violation of either state or federal law.<sup>285</sup> The Travel Act is also useful in cases where there is sufficient evidence of interstate travel to facilitate an improper procurement-related payment, but insufficient proof regarding the direct use of any interstate facilities such as the mail or telephones.<sup>286</sup>

The Travel Act's scope also includes extortionate payments, but a separate Hobbs Act extortion prosecution (18 U.S.C. § 1951) is sometimes easier for the Government to pursue because the Hobbs Act only requires a de minimis effect on interstate commerce to satisfy that statute's federal jurisdictional element.<sup>287</sup> In United States v. Addonizio, for example, several Newark city officials demanded payoffs and kickbacks from local Newark contractors, suppliers and engineers who were engaged in municipal construction contracts.<sup>288</sup> Prosecutors used a "minimal impact on inter-state commerce" theory to meet their Hobbs Act jurisdictional burden.<sup>289</sup> Improper payment cases involving extortionate conduct should normally be charged under either the Travel Act or the Hobbs Act, in lieu of an alternative mail fraud theory, since extortion implies force or coercion -- not fraud or deceit.<sup>290</sup> Violations of the Foreign Corrupt Practices Act and the "Subcontractor" Anti-Kickback Act can also be assimilated as unlawful predicate Travel Act activities.<sup>291</sup>

One commentator made the following observation on the application of the Travel Act and the Hobbs Act to non-traditional racketeering activities:

By looking at the precise language of the statutes, the courts have not been the least reluctant to hold that these

statutes, both apparently designed to curb racketeering in the classic sense, can properly be used to counter governmental corruption reaching down to the lowest governmental level of our society. There now can no longer be any question of the proper construction of these statutes. They have both been too long upheld to be subject to such challenge, although these challenges were routinely made in the early days. It is now clear that the precise language of the statutes control and it is that language to which the practitioner must look.<sup>292</sup>

Although the theoretical limits of a Travel Act prosecution are certainly more restricted than for a comparable mail fraud case, the broad application of the Travel Act (and even the Hobbs Act) to improper procurement-related payments is readily apparent.

CHAPTER IV  
THE ANTI-KICKBACK ACT

The "Subcontractor" Anti-Kickback Act prohibits subcontractors from making direct or indirect payments to any employee or agent of a federal prime contractor or higher-tier subcontractor under a negotiated contract for the purpose of acknowledging (i.e., rewarding) or inducing a subcontract award.<sup>293</sup> The act initially applied to only cost-plus-fixed-fee or other cost reimbursement contracts, but the statute was amended in 1960 to make it applicable to all negotiated (not formally advertised) contracts.<sup>294</sup> The statute essentially outlaws a species of subcontractor commercial bribery in relation to federal contracts.<sup>295</sup> The act's purpose is to prevent the Government from subsidizing the cost of any kickbacks or other illicit fees incident to corrupt award of subcontracts or purchase orders.<sup>296</sup>

The Anti-Kickback Act provides for both criminal penalties<sup>297</sup> and direct civil remedies<sup>298</sup> such as the recovery of kickbacks from the payor or the recipient,<sup>299</sup> as well as the cancellation of any tainted contracts without liability.<sup>300</sup>

A. Elements

There are three statutory elements required for a criminal violation of the Subcontractor Anti-Kickback Act.<sup>301</sup> The Government must prove:

(1) The existence of a subcontractor relationship with an employee or agent of a covered prime contractor or a higher tier subcontractor,<sup>302</sup>

(2) Under a negotiated contract with the United States,<sup>303</sup> and

(3) The transfer of a prohibited payment (kickback), made or received, with the specific knowledge of its nature and purpose (to influence or acknowledge the award of a subcontract or purchase order).

The statute conclusively presumes, at least for purposes of civil liability, that any kickback "was included in the price of the subcontract or [purchase] order and ultimately borne by the United States."<sup>304</sup>

In Howard v. United States, the First Circuit of the Court of Appeals stated that the act's purpose "is basically the same as that of the bribery statute, 18 U.S.C. § 201, and should be construed according to the same principles."<sup>305</sup> A brief comparative analysis, however, of the four indispensable elements of 18 U.S.C. § 201 -- something of value, specific corrupt intent, public official and the quid pro quo -- reveals several contrasts between the two statutes, as well as parallels.

A variety of non-monetary items have been held to constitute value for purposes of the Subcontractor Anti-Kickback Act, just as they have for the bribery statute,<sup>306</sup> and both statutes are specific intent offenses.<sup>307</sup> At the same time, although criminal scienter is required by the Anti-Kickback Act, the Anti-Kickback defendant (unlike the bribery defendant) does not have to know

that the kickback was made in relation to a covered Government contract.<sup>308</sup> If the payor knowingly made the kickback, it is irrelevant that he was unaware of the existence of the underlying federal contract. In further contrast, the Anti-Kickback Act substitutes certain private commercial contractors for the antibribery statute's "public officials,"<sup>309</sup> and no express quid pro quo is necessary for a Kickback Act violation,<sup>310</sup> i.e., no direct connection as such is required between the making or receiving of a prohibited payment and the award of a specific subcontract or purchase order.<sup>311</sup> The Government, however, must still establish that the prohibited payment was knowingly and voluntarily made<sup>312</sup> to generally induce or acknowledge a subcontract award or purchase order. The non-specific "quid pro quo" necessary for a kickback violation is basically analogous to the elastic "for or because" element of a criminal gratuity.<sup>313</sup>

#### B. Procurement Process Application

The protracted AlSCO-Harvard Fraud Litigation provides a practical illustration of the complexities which can occur in the application of Anti-Kickback Act's parallel criminal and civil remedies in a major procurement fraud prosecution.<sup>314</sup> This case involved Navy purchases of 2.75-inch rocket launchers from 1962 through 1968.<sup>315</sup> There were several different phases of the fraudulent scheme's numerous deceptions, but the so-called "Western Molded Stage" is the segment which involved the use of illegal kickbacks to obtain an undue preference in the award of the prime's subcontracts.<sup>316</sup> The Government alleged that a



subcontractor had concealed certain cost increases in the firm's prices for rocket fairings (the nose cone and fins) in order to pay illegal kickbacks to the prime.<sup>317</sup> The Government also asserted that the Navy was ultimately forced to finance these illegal payments through fraudulent and fictitious billings.<sup>318</sup>

The defendants countered that the alleged kickbacks paid by the subcontractor were billed in return for the increased production costs related to the manufacture of the new fairings, and that the payments were also made as a partial reimbursement for the prime's development costs.<sup>319</sup> False invoices for non-existent materials were exchanged between the firms because the prime felt his company could not justify the recoupment of these additional developmental expenditures in company's R&D budget!<sup>320</sup> The Court denied the Government's request for summary judgment in relation to the illegal kickbacks allegedly paid by Western Molded (the sub) to Chomocraft (the prime), but this proved to be a Pyrrhic victory for the defendant subcontractor who inadvertently "backed into" a false claims conviction:

In establishing a valid summary judgment defense for the alleged kickbacks under the Anti-Kickback Act, however, defendants also have made admissions that require the Court to grant summary judgment in favor of plaintiff under the False Claims Act. Specifically, defendants have admitted that they caused fictitious invoices to be sent by certain foreign companies to Western Molded, requesting payment for certain raw materials that never were delivered nor intended to be delivered to Western Molded. Admission of this fact demonstrates that defendants had "actual knowledge" of the fictitiousness of certain claims made against the Government. Accordingly, summary judgment lies in plaintiff's favor under the False Claims Act for those claims.<sup>321</sup>

## CHAPTER V

### THE COVENANT AGAINST CONTINGENT FEES

The Government has a long-standing policy against the payment of contingent fees to "influence peddlers,"<sup>322</sup> whenever such compensation is conditioned upon an agent's or employee's success in obtaining Government contracts.<sup>323</sup> Parallel DAR and FPR clauses, entitled "Covenant Against Contingent Fees Clause," are the administrative vehicles which are used to implement this policy.<sup>324</sup> The clause is required by statute for all negotiated contracts, and procurement regulations make its inclusion mandatory for advertised procurements as well.<sup>325</sup> The Covenant reflects the Government's concern that such incentive agreements have a "tendency to corrupt," and are void as against public policy.<sup>326</sup> Although a contingent fee violation does not necessarily involve a criminal offense,<sup>327</sup> severe civil sanctions may accompany any breach.<sup>328</sup>

The warranty does not preclude all contingent payments in relation to Government contracts<sup>329</sup> - - only unauthorized fees and commissions.<sup>330</sup> The parallel DAR and FPR clauses specifically exempt both bona fide employees<sup>331</sup> and bona fide established commercial or selling agencies.<sup>332</sup> These two exceptions have generally ameliorated the impact of the Covenant's otherwise harsh strictures.<sup>333</sup>

## A. Elements

The current DAR and FPR clause has four elements which prohibit contractors from:

1. Retaining any employee or commercial/selling agency,
2. For a contingent fee (payment conditioned upon success),
3. In order to solicit or secure a federal contract,
4. Unless such contingent fee or commission is paid to:
  - a. A bona fide employee, or,
  - b. A bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

The first and third elements are straightforward, and the second element is defined in DAR § 1-505.1 and FPR § 1-1.504-2.<sup>334</sup> The two express exceptions provided in the fourth element, however, merit further comment.

### 1. Bona Fide Employee

A bona fide employee is defined by DAR § 1-505.3 and FPR § 1-1.504-4 as:

[A]n individual (including a corporate officer) employed by a concern in good faith to devote his full time to such concern and no other concern and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work. It is recognized that a concern, especially a small-business concern, may employ an individual who represents other concerns.

DAR § 1-504 and FPR § 1-1.502 also provide a definition of "improper influence," which is described as any "influence, direct or indirect, which induces or tends to induce consideration or action by any employee or officer of the United

States with respect to any Government contract on any basis other than the merits of the matter." Assuming, then, that an otherwise bona fide employee has not exercised improper influence upon public officials to secure a Government contract, a fee which is conditioned upon successful award may be permissible under the DAR and FPR, subject to further qualification.<sup>335</sup>

The bona fide employee exception will ultimately depend upon the nature of the business arrangement between the agent and the contractor.<sup>336</sup> DAR § 1-505.3 and FPR § 1-1.504-5 list several important factors, but the most critical elements are the continuity of the agent's employment relationship with the contractor and whether the employee has authority to solicit a wide range of contracts.<sup>337</sup> If a contractor can demonstrate an ongoing business relationship with an experienced employee, and if the employee's duties involve a general agency to solicit both commercial and Government work (in lieu of a special agency to solicit only certain contracts), the employee's contingent fee arrangements are arguably permissible,<sup>338</sup> absent improper influence<sup>339</sup> or exorbitant fees.<sup>340</sup>

## 2. Bona Fide Commercial or Selling Agency

The principles which are applicable in determining the bona fide employee exception are also relevant in applying the bona fide commercial or selling agency exemption.<sup>341</sup> The nature of the agency's employment relationship with the contractor will once again become the central focus of the inquiry,<sup>342</sup> but the agency exception has two additional requirements. The firm must

be an "established agency,"<sup>343</sup> and the Covenant also requires that the agency must be "maintained by the contractor for the purpose of securing business."<sup>344</sup>

#### B. Procurement Process Application

The Government's contingent fee policy is administratively implemented by DAR § 1-506 and FPR § 1-1.505. All prospective Government offerors, absent a few narrow exceptions,<sup>345</sup> must make written representations and agreements in their offers concerning the use of specified contingent fee arrangements in relation to the award of the proposed contract.<sup>346</sup> Prospective contractors must indicate whether they have employed or retained anyone on a contingent fee basis other than a full-time, bona fide employee who works solely for that offeror.<sup>347</sup> The narrow contingent fee exception provided in the contractor's representation appears overly restrictive, at first, in view of the exceptions provided by the DAR and FPR clause.<sup>348</sup> An affirmative representation by the contractor, however, does not necessarily foreclose any exemptions provided by the Covenant. It only triggers additional informational submissions to the contracting officer.<sup>349</sup>

If a prospective contractor has a contingent arrangement with someone who is not a full-time, bona fide employee who works only for that contractor, a Standard Form (SF) 119 will normally be provided to that offeror (or a previous submission may be updated) in order to clarify the nature of the contingent employment.<sup>350</sup> An offeror's failure to provide a required contingent fee representation and agreement is considered a minor

informality, at least initially, and the prospective contractor will be afforded another opportunity to furnish the documentation prior to award.<sup>351</sup> Although SF 119's are normally only tendered to successful offerors,<sup>352</sup> a refusal to furnish this information may ultimately result in rejection of the offeror's bid.<sup>353</sup>

Quinn v. Gulf & Western Corp., which was recently decided by the Second Circuit, is an example of an improper contingent fee arrangement.<sup>354</sup> A turbine blade manufacturer agreed to pay a ten percent sales commission to the owner of a consulting firm which was contingent upon the receipt of a supply contract with the Tennessee Valley Authority (TVA).<sup>355</sup> The situation was aggravated by the fact that the consultant was also serving as a special Government employee for the TVA at the time of sale.<sup>356</sup> The court held that the employment relationship did not meet the bona fide employee test prescribed by procurement regulations, and that the contract was unenforceable.<sup>357</sup> The opinion also dismissed the possibility of unjust enrichment by citing 41 C.F.R. § 1-1.503, which provides that the Government can recover the full amount of the contingent fee which the contractor had agreed to pay in violation of his express warranty.<sup>358</sup>

Eglin Manor, Inc. v. United States is an example of another compensation agreement which violated the warranty.<sup>359</sup> The facts involved a contingent fee arrangement for obtaining a military housing certificate of need and an Air Force letter of acceptability, in connection with a proposed Wherry Housing project at Eglin Air Force Base, Florida.<sup>360</sup> The agent, a former Florida State Senator, was hired because of his political influence in

Washington.<sup>361</sup> In addition to his salary and expenses, the agent was promised a special stock commission in the plaintiff's company if his efforts proved successful.<sup>362</sup>

Some contingent free arrangements are permissible. In Wickes Industries, Inc., the Armed Services Board of Contract Appeals approved an employee's commission for obtaining a Government contract which involved the design, manufacture, and delivery of an air traffic control system.<sup>363</sup> The Board held that the employee's contingency arrangement was bona fide,<sup>364</sup> and recited some of the following facts in support of its decision:

Mr. Taylor was first employed by Wickes Industries in about 1967 as a marketing representative working exclusively for the Aircomb Division. He had previously sold radio frequency interference equipment, filters and "screen-rooms." Such equipment has a wide range of military and industrial applications . . .

\* \* \*

Mr. Taylor's duties were not confined simply to the sale of a product, but rather included a broad range of marketing functions and services. He would consult with a customer, attempt to ascertain the customer's general requirements, and then come up with solutions, recommended approaches to the problem . . . Mr. Taylor's responsibilities extended to both commercial and military sales. He conducted market surveys; he called on the aircraft manufacturers on the West Coast, and on the various commercial airlines, in an effort to establish their requirements . . .

\* \* \*

During the period of the Sales Representative Agreement, Mr. Taylor's duties were the same as they had been previously when he was on salary . . . Wickes had three other commissioned representatives at the time, in other geographic areas, and had employed commissioned representatives in the past. Affidavits incorporated into the record by the Stipulations of the parties support a finding that such arrangements are normal in the shelter industry, and that the rates of the commission set forth in the agreement with Mr. Taylor are typical in amount, both at Wickes and in the industry generally.<sup>365</sup>

The Board held that the Government could not terminate the

contract in question because the contingent fee arrangement was within the Covenant's bona fide employee exception.<sup>366</sup>

The Court of Claims likewise upheld a bona fide employee arrangement in Companhia Atlantica De Desen., Etc. v. United States.<sup>367</sup> The case involved a new Portuguese firm which made an agency agreement with two U.S. industrial consultants for the sale of specified metals, including tungsten, in the United States, Germany, and Switzerland.<sup>368</sup> No undue influence was established, and the Court found that both consultants, who were hired for a period of five years, were highly experienced, and that the Government had notice of the agency agreement for over a year before officials decided to cancel the contract for an alleged breach of the warranty.<sup>369</sup>

The legitimacy of any contingent fee arrangement will ultimately depend upon the nature of the employment relationship between the employee/agent and the contractor.<sup>370</sup> If an agent, therefore, is only paid on the basis of consummated Government sales, as in Le John Manufacturing Co. v. Webb, the warranty is clearly breached.<sup>371</sup> Similarly, if there is no ongoing business relationship, as in Wietzel v. Brown-Neil Corp., the arrangement will also fail.<sup>372</sup> Given the Government's long-standing policy against contingent fees, exceptions must comply with the relevant elements listed in either DAR §§ 1-505.3 or 1-505.4, or alternatively, FPR §§ 1-1.504-4 or 1-1.504-5, to survive review.<sup>373</sup>



## CHAPTER VI

### THE FOREIGN CORRUPT PRACTICES ACT

Although the FCPA<sup>374</sup> is not a triumph of legislative draftsmanship,<sup>375</sup> any contractor engaged in international commerce or multinational procurements must be generally aware of the act's ambiguous and often chilling criminal provisions.<sup>376</sup> The FCPA is a recent amendment to the Securities Exchange Act of 1934, and it was enacted unanimously by an alarmed Congress in 1977.<sup>377</sup> The statute was a predictable Congressional response to a rash of embarrassing disclosures that hundreds of America's most prestigious corporations had made substantial unreported payoffs to foreign sources for "questionable" commercial purposes.<sup>378</sup> These suspect corporate disbursements, which involved both foreign and domestic beneficiaries, totaled over \$300 million and public reactions against these payments caused severe political repercussions in capitals around the world.<sup>379</sup>

The FCPA can be divided into two sections: (1) the general criminal provisions outlawing corrupt payments to certain foreign officials, and (2) the accounting and record requirements for U.S. public companies.<sup>380</sup> The FCPA's antibribery provisions prohibit (in relation to covered foreign officials) any payments or alleged gifts which are made to induce or influence public acts for commercial purposes, i.e., to obtain, retain or direct business. This analysis will focus on the FCPA's antibribery

sections, but information on the Security and Exchange Commission's (SEC) accounting and reporting requirements for regulated issuers is documented in other FCPA literature.<sup>381</sup>

Although the FCPA's express criminalization of suspect foreign payments and its extensive books and records provisions are still quite controversial,<sup>382</sup> the regrettable vagaries of the current statute should not be allowed to obfuscate the corrupt nature of the misconduct which the FCPA is intended to deter:

It is undisputed that United States companies doing business abroad have frequently made payments to foreign government officials for the purpose of obtaining or retaining business in a given country. It is also certain that if such practices had been carried out with United States government officials, prosecutions for bribery would abound.<sup>383</sup>

The FCPA, as currently enacted, however, leaves much to be desired, yet in terms of United States foreign relations, the need for at least some controls over suspect payments to the Government officials of other sovereign nations cannot be summarily dismissed.<sup>384</sup>

#### A. Elements

There are six statutory elements<sup>385</sup> currently required for a substantive violation of the FCPA's criminal antibribery sections. The act prohibits any U.S. public company or domestic concern,<sup>386</sup> which includes any officer, director, employee, or agent, or any stockholder acting on behalf of a U.S. public company or domestic concern, from engaging in any:

(1) Use of the mails or means of interstate commerce (the jurisdictional nexus),

(2) Corruptly in furtherance of,

(3) A payment, offer or promise to pay, or authorization of a payment of anything of value,

(4) In relation to:

(a) any foreign official, or

(b) foreign political party or official or candidate thereof, or

(c) any other person (e.g., a foreign sales agent, consultant, or business affiliate) while knowing or having reason to know that all or a portion of the payment will be offered, or promised, to the foreign parties referenced above in 4(a) & (b),

(5) For the purpose of influencing or affecting any official act or decision,

(6) In order to assist a U.S. public corporation (the 15 U.S.C. § 78dd-1 offense) or domestic concern (the 15 U.S.C. § 78dd-2 offense) to obtain, retain, or direct business.

The jurisdictional nexus between the improper payments and interstate commerce has been addressed previously,<sup>387</sup> but several of the other material FCPA elements merit further analysis.

#### 1. Prohibited Payments

The improper payments element involves determining which transactions are in fact prohibited by the FCPA. The FCPA does not outlaw all payments or gifts to foreign officials. Gifts to foreign officials in their "private capacity" are arguably permitted by the Act.<sup>388</sup> The statute only prohibits those transactions which are made to corruptly influence covered

foreign officials in relation to public acts or decisions for commercial purposes.<sup>389</sup> In addition, "facilitating" or so-called "grease" payments,<sup>390</sup> which are made to officials whose positions are "essentially ministerial or clerical" in nature, are not prohibited by the FCPA.<sup>391</sup> However, these routine facilitating payments must be made to exempted foreign officials, and bona fide facilitating payments are not intended to obtain, retain, or direct business.

The facilitating or grease payment exception, however, does present an anomalous and somewhat contradictory situation:<sup>392</sup>

[B]ribes in any amount, for any purpose, are apparently permissible under the antibribery law if they are paid to clerical or ministerial employees and there is nothing to stop a clerk from passing a payment along to his cabinet-level boss.

All of which leaves that company doing business in the Middle East in legal limbo, because there is no answer to the obvious question: How does an American businessman determine which of the civil servants in a government agency have essentially clerical duties . . . [?]

\* \* \*

Given these uncertainties, cautious companies may try to abstain from all foreign payments, including grease. But others will try to accomplish with grease what they used to accomplish with bribes. One business lawyer predicts: "With the grease-payment loophole, foreign bribery will continue as usual. This law just pushes it down to the lowest level."<sup>393</sup>

Another commentator suggests that "the greater the amount of the grease payment, the greater the chance that the enforcement authorities would believe it was intended to influence official action improperly."<sup>394</sup> Any firm, consequently, with export markets or operating locations overseas should not make even "routine" expediting payments, which might be otherwise allowable

under the FCPA, without first exercising certain Argus-eyed precautions. Advance investigations should be made whenever possible to determine if the foreign officials to benefit have duties which are essentially non-discretionary, and whether the proposed facilitating payments might be perceived as excessive, under the circumstances, at some later date.<sup>395</sup>

Although bribes, kickbacks, and political contributions to certain foreign sources are prohibited by the FCPA,<sup>396</sup> bona fide facilitating payments, which are made to exempt officials, and extortionate payments,<sup>397</sup> which are paid under duress to retain business, are both generally permissible under the Act. It would be difficult to infer a corrupt purpose for an extortionate payment which was made to a foreign official in order to prevent the destruction of a concerned company's offshore oil platform.<sup>398</sup>

## 2. Corrupt Purpose

This is perhaps the key element of the FCPA.<sup>399</sup> The FCPA's criminal mens rea arguably contemplates that a corrupt quid pro quo will invariably involve some misuse of a foreign public office for commercial purposes.<sup>400</sup> The word "corruptly" implies a wrongful purpose, and the FCPA House Report noted that the requisite intent for a FCPA violation was analagous to "that [intent] required under 18 U.S.C. § 201(b) which prohibits domestic bribery."<sup>401</sup> Since domestic bribery in violation of 18 U.S.C. § 201(b) is a specific intent offense,<sup>402</sup> the FCPA must also, by inference, require that the alleged use of any

interstate facility, in furtherance of a transfer of anything of value,<sup>403</sup> must also be made with the specific intent to improperly influence a public act or decision for business purposes.<sup>404</sup>

An assessment of the specific criminal mens rea required for a FCPA violation will normally involve an analysis of a complex set of factual variables and other relevant considerations.<sup>405</sup> One commentator offered the following circumstantial test for inferring the specific corrupt intent necessary to support an FCPA violation:

Whether or not a payment is corrupt is dependent upon the reasonableness of the payment in the circumstances in which it was made. If payments are found to be unreasonable, this will support the inference that the intent of the payor was corrupt. Among factors to be considered in a determination of reasonableness are: (1) the amount of money involved; (2) the occasion; (3) the custom in the country in question; (4) the conduct of competitors; and (5) the amount of money previously spent on the same or similar officials.<sup>406</sup>

The factors noted above are not all-inclusive, but they do indicate the practical and subtle evidentiary problems which may be involved whenever the Government alleges that suspect payments were made with the specific intent to corrupt certain foreign officials.<sup>407</sup>

In view, however, of several conflicting viewpoints regarding the metes and bounds of a corrupt payment under the FCPA, a meaningful rule structure cannot yet be articulated to differentiate between otherwise allowable entertainment expenses and illegal payments.<sup>408</sup> Perhaps the only practical, but somewhat nonresponsive, advice is to exercise appropriate organizational safeguards and avoid "perception" problems.

### 3. Reason to Know Standard

The imputed liability provisions of 15 U.S.C. §§ 78dd-1(a)(3) and 78dd-2(a)(3) are perhaps the most alarming sections of the FCPA for management.<sup>409</sup> The act states that it is a criminal offense to give anything of value to any person, while knowing or having reason to know, that all or a portion of the thing of value will be offered, given, or promised, directly or indirectly, to defined foreign sources for corrupt purposes.<sup>410</sup>

Precise standards do not exist for determining when a firm has "reason to know" that they are violating the act as a result of the actions of their agents or intermediaries abroad.<sup>411</sup> One insightful commentor, however, has offered some guidance:

[T]he relationship in the Act between the word "corruptly" and the phrase "having reason to know" is conjunctive, not disjunctive. A United States company does not violate the FCPA merely by transferring something of value with constructive knowledge that the recipient will use it to make a prohibited payment; the company must also act with a corrupt intent.

A longer but equally telling refutation derives from the authorities holding the phrase "reason to know" cannot constitutionally be construed to impose criminal sanctions for mere negligence . . . Moreover, under accepted tenets of statutory construction, absent a clear legislative expression to the contrary, scienter is a requisite element of a malum in se crime such as bribery.

Regrettably, the legislative history of the Act provides no definitive guide to the meaning of "reason to know".<sup>412</sup>

Notwithstanding this interpretation, the "reason to know" standard still leaves management with several important unanswered questions. What legal criteria will be used to determine corporate and individual criminal responsibility for the actions of ostensibly independent sales agents and intermediaries,

operating relatively unsupervised, overseas?<sup>413</sup>

The purpose of the "reason to know" provision is to prevent business concerns from doing indirectly what they are prohibited from doing directly.<sup>414</sup> At the same time, however, one commentator has persuasively questioned the need for the FCPA's chilling "reason to know" standard since the U.S. domestic general antibribery statute lacks a similar provision.<sup>415</sup> In addition, even U.S. law has a limited exception for foreign gifts, since certain U.S. officials are permitted to receive items of less than \$100 in value from foreign governments under the authority of 5 U.S.C. § 7342.<sup>416</sup> In addition to the dubious value of the FCPA's vicarious liability provisions, the following passage highlights the practical hazards of the act's sweeping "reason to know" criminal umbrella:

The real problem with the provisions, however, lies in the lack of guidelines defining "reason to know." By definition, such guidelines are based on hindsight: whether the company should have known of a particular result had it exercised "reasonable" control procedures, even if the company could not reasonably control the agent's actions . . . For example, if an agent who gathers more business than others has bribed to obtain business, while receiving a slightly larger commission, should the company have realized he was using his extra commission to bribe government officials? In such cases, companies might not employ an agent, even if a thorough examination of his background revealed no history of bribery, simply for the uncertainty of the "reason to know" standard. This standard especially burdens smaller businesses, since they often rely exclusively on foreign agents to obtain foreign business.<sup>417</sup>

The FCPA's third party liability provisions are broad enough to impute liability for the conduct of foreign sales agents and consultants,<sup>418</sup> and even foreign subsidiaries in some circumstances.<sup>419</sup>



## B. Procurement Process Application

The specific criminal applications of the FCPA are unclear since the statute has yet to be decisively interpreted by the courts.<sup>420</sup> This task is also complicated by the reluctance of enforcement agencies to promulgate anything beyond disclosure guidelines,<sup>421</sup> thus leaving the most ambiguous sections of the FCPA subject to considerable speculation.<sup>422</sup> Practical enforcement regulations have yet to issue on the most problematic FCPA issues, such as the "reason to know" standard, permissible routine "ministerial" payments, non-corrupt entertainment expenses for foreign officials, etc.<sup>423</sup>

The lack of FCPA criminal precedents is probably rooted in problems associated with the enforcement of any extraterritorial statute.<sup>424</sup> One commentator, who urges an alternative FCPA private right of action,<sup>425</sup> made the following observations on the Act's somewhat lackluster enforcement:

Several reasons explain why the two agencies [SEC & DoJ] have brought so few actions, and why agency enforcement is unlikely ever to be effective. First, it is difficult to discover violations by transnational corporations, because the violations occur outside the United States and both parties to the bribe try to conceal it. With their limited staffs, agencies are simply unable to detect most illegal payments. Second, the burden of detection weighs all the more heavily on the agencies since political corruption is taken for granted in some countries . . . And agency enforcement may offend officials in foreign countries, harming other United States interests. Third, vigorous enforcement against American corporations may cause those corporations to lose business. If American corporations are competing for business against foreign corporations whose governments have not passed antibribery statutes, in markets where corruption is an expected part of the political system, detection and prosecution of American bribery probably would result in foreign corporations dominating the market. Finally, the two agencies charged with enforcing the FCPA have assigned few attorneys to this area. In 1978, the SEC had 25 attorneys

assigned to the foreign payments problem, while the Justice Department had a 16-lawyer task force. Thus only 41 people were available to enforce the Act.<sup>426</sup>

Although there are several other additional factors which have contributed to the modest number of cases which have been brought by the DoJ,<sup>427</sup> this does not mean that the act's antibribery sections can be safely ignored. The SEC has initiated several civil enforcement actions against regulated issuers for accounting and reporting irregularities based upon improper payments abroad,<sup>428</sup> and these compliance actions have now arguably become the indirect cutting edge of FCPA's antibribery measures.<sup>429</sup>

The DoJ's prosecution in United States v. Kenny International Corp.<sup>430</sup> is still the leading criminal FCPA case, but the trial ended in a guilty plea (no reported judicial decision or issues for appeal).<sup>431</sup> The facts involved a corrupt payment of \$337,000, which was made by Kenny International, to certain foreign officials in the Cook Islands to protect the corporation's exclusive marketing rights for the island's postage stamps.<sup>432</sup> The corporation's political payoff was later used as a voter subsidy to help re-elect the incumbent premier.<sup>433</sup> Certain aspects of the plea bargain were highly irregular.

Although the trial court only fined Kenny International \$50,000 for their FCPA violation, the company's chief executive officer also agreed (as part of the plea bargain) to return to the Cook Islands, whenever required, to testify concerning the payoffs to island officials.<sup>434</sup> In addition, he also agreed to plead guilty to foreign criminal charges which were then pending

in the Cook Islands and to restore \$337,000 to the Cook Islands Government which willingly cooperated with U.S. authorities.<sup>435</sup> Several politically motivated and country-unique considerations were involved in the case's resolution, and Kenny International is, regrettably, of limited value as a criminal FCPA precedent.<sup>436</sup>

Notwithstanding the lack of both judicial and regulatory interpretive guidance, the FCPA is not a dead letter, and the extraterritorial criminal provisions of this statute must still be considered in the course any international business transaction.<sup>437</sup> United States v. McDonnell Douglas illustrates how the FCPA can compel plea bargaining.<sup>438</sup> The McDonnell Douglas corporation and several senior company executives were criminally indicted in 1979 for certain foreign payoffs allegedly involving \$1.6 million in secret commissions, inter alia, for the sale of DC 10 jetliners to Pakistan.<sup>439</sup> The following synopsis of the McDonnell Douglas case illustrates the potential evidentiary problems which are often involved in the proof and pleading of any major FCPA enforcement action:<sup>440</sup>

It was not until 1979, however, that any individual executive of a corporation was charged in a major foreign bribery case. In this case, a grand jury indicted four top executives of McDonnell Douglas, charging that they and the corporation had defrauded Pakistan International Airlines by concealing more than \$1 million in payoffs to four Pakistani sales agents. The indictment also cited payments to officials in South Korea, the Phillipines, Venezuela, and Zaire. The defendants were alleged to have added \$500,000 to the price of each plane to cover these payments, at the same time stating to the airline that the sales commissions were only \$100,000 a plane. The grand jury further charged that when the government owned airline and the finance minister of Pakistan protested the \$100,000 commissions, they were allegedly withdrawn by the defendants, the remaining \$400,000 per plane payment being still con-

cealed, however. It was charged, in additional counts, that the company had made false statements to the [U.S.] Export-Import Bank in order to conceal other payoffs in selling aircraft abroad, between 1972 and 1976.<sup>441</sup>

The DoJ eventually dropped the criminal charges against the four high-level McDonnell executives after the major aerospace firm agreed to pay \$1.2 million in a related civil action.<sup>442</sup>

Although the McDonnell Douglas case did not produce any seminal judicial decisions, it does underscore the need for senior management to recognize the potential criminal implications of the FCPA's antibribery provisions in the international business environment.<sup>443</sup>

A large number of major Government contractors are also engaged, directly or indirectly, in security assistance arms transfers to eligible foreign Governments, frequently under the aegis of the U.S. Foreign Military Sales (FMS) Program.<sup>444</sup> The FMS Program is big business. In 1982 new FMS cases totaled over \$21.5 billion.<sup>445</sup> Although FMS transactions are normally conducted on a Government-to-Government basis,<sup>446</sup> U.S. contractors frequently employ international sales agents or marketing consultants to represent their firms overseas, and adequate corporate safeguards are necessary to insure that these commercial agents do not corruptly influence a potential foreign buyer's procurement decisions.<sup>447</sup> Although reasonable foreign agents' fees (not to exceed \$50,000) are allowable costs if they comply with the provisions of DAR §§ 6-1305.4 & 15-205.37(c), contractors are still required to verify and disclose all such payments to help preclude the reoccurrence of past abuses.<sup>448</sup>

### C. Postscript

Strong bipartisan support for a clarification of the FCPA resulted in the reintroduction on Feb. 4, 1983, of The Business Accounting and Foreign Trade Simplification Act (S. 414).<sup>449</sup> This bill would amend several ambiguous sections of the FCPA, and it is the legislation which passed the Senate in November 1981 (S. 708 -- the "Chaffee Bill"), only to die in the House.<sup>450</sup> In the words of the bill's current sponsor, Sen. John Heinz (R-Pa.), S. 414 is basically intended to eliminate "doubt as to what constitutes a corrupt payment and when a corporation is liable,"<sup>451</sup> i.e., its purpose is not to reopen the floodgates for corrupt payments overseas again.

The FCPA's adverse impact on American exports has been widely disputed,<sup>452</sup> but the recent 1982 U.S. international trade deficit of \$8.1 billion appears likely to stimulate support for at least some compromise FCPA reform package in 98th Congress.<sup>453</sup> The following passage summarizes several of the unfortunate deficiencies of the FCPA as currently enacted:

After almost five years, it is clear that the Foreign Corrupt Practices Act is the source of considerable confusion as well as controversy. The law itself admits of multiple interpretations, no one of which is conclusive. The government enforcing agencies have been at odds on how to enforce the law, and the Carter administration, which helped enact the law, did little if anything to contribute to its subsequent clarification. The business community, having failed in the first instance to oppose the legislation, now responds to its requirements more by reaction than by action. Traditional corporate advisers such as lawyers and accountants agree only on their unwillingness to shoulder responsibility for giving advice under the act, and the majority of advice that is given tends to be precautionary, rather than activating: both the lawyers and accountants are much more willing to tell business what it cannot do than what it can. Even those who would amend the FCPA, so as to moderate its worst excesses

and render comprehensible its most inscrutable strictures, have not been able to prepare amendatory legislation that will do the job.<sup>454</sup>

The fate of S. 414 is highly speculative.<sup>455</sup> However, it is evident that the FCPA must eventually be clarified in some form or manner.

S. 414 does purport to resolve several major uncertainties regarding criminal liability under the current Act, such as facilitating payments, the "reason to know" standard, various accounting and reporting requirements, and other collateral matters.<sup>456</sup> Strong Administration and agency support for S. 414 has been forthcoming in the early days of the 98th Congress, and S. 414 was recently approved and reported out of the Senate Banking Committee on May 25, 1983 by a vote of 18-1.<sup>457</sup> In the meantime, attempts by the United States to gain support for a multinational accord outlawing corrupt foreign practices (to supplement the current U.S. "unilateral approach") have continued to meet with little success.<sup>458</sup>

### PART THREE

#### CONSPIRACY AND PROCUREMENT-RELATED OFFENSES

Conspiracy has been defined as a "confederation of two or more persons to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means."<sup>459</sup> Professor Perkins, a noted criminal law authority, offers a simpler alternative formulation: "A conspiracy is a combination for an unlawful purpose."<sup>460</sup> It is this agreement to combine for an unlawful purpose, without regard to the actual object(s) or purpose(s) of the conspiracy itself (i.e., to commit bribery or mail fraud), which constitutes the separate criminal activity outlawed by the crime of conspiracy.<sup>461</sup>

Part Three will focus on the general conspiracy section of the Criminal Code, 18 U.S.C. § 371,<sup>462</sup> which condemns two different types of conspiracies. The first type involves a conspiracy to commit any offense against the United States which is prohibited by other federal statutes.<sup>463</sup> The second offense includes any conspiracy to defraud the United States.<sup>464</sup> The latter conspiracy is itself a substantive crime, and an indictment drawn under it need only reference 18 U.S.C. § 371.<sup>465</sup> Unless the object of the conspiracy is only a misdemeanor, violation of 18 U.S.C. § 371 is a felony offense.<sup>466</sup>

A conspiracy to commit a substantive crime is a completely different offense from the substantive crime which is actually

the unlawful purpose of the conspiracy.<sup>467</sup> These two separate and distinct offenses are both based upon different statutory violations. A defendant can therefore be indicted for both a substantive criminal offense (such as mail fraud) and an 18 U.S.C. § 371 conspiracy to commit the same crime.<sup>468</sup>

There are two main reasons for the separate criminalization of conspiracy.<sup>469</sup> The first purpose is to criminalize preliminary conduct which is directed toward the commission of a crime but which occurs prior to the crime's completion, i.e., the inchoate offense.<sup>470</sup> The second reason is to punish conspirators separately for the increased danger which group crime poses to society.<sup>471</sup>

Conspiracy is an ancient legacy of the common law<sup>472</sup> and its use and abuse has been the subject of several critical Supreme Court decisions<sup>473</sup> and a perennial topic for commentators.<sup>474</sup> The conspiracy charge, however, continues to be a lethal weapon in the hands of a skilled prosecutor,<sup>475</sup> and the offense is now increasingly alleged in White-Collar Crimes involving multiple defendants.<sup>476</sup> There are several practical reasons why a seasoned prosecutor will generally allege a conspiracy whenever possible:<sup>477</sup>

Conspiracy prosecutions are attractive for a variety of reasons. First, the crime of conspiracy permits the intervention of criminal law at a time prior to the commission of a substantive offense . . .

\* \* \*

Second, a conspirator is not allowed to shield himself from prosecution because of a lack of knowledge of the details of the conspiracy, or its intended victims, or the identity of his co-conspirators and their contributions; conspiracy is designed to prevent the opportunity for escaping punishment by



someone claiming anonymity within a group . . .

\* \* \*

Third, and most importantly, there are valuable evidentiary and tactical advantages available to a prosecutor in conspiracy cases. Under the co-conspirator exception to the hearsay rule, an act or declaration by one co-conspirator is admissible against each co-conspirator. A conspiracy trial may take place in any jurisdiction where any overt act is committed by any of the conspirators. The statute of limitations is tolled with each additional overt act. Under the theory of complicity, a conspirator is liable for the substantive crimes of his co-conspirators and can be punished for both the conspiracy and the completed substantive offense. Even late joiners to an ongoing conspiracy can be liable for prior acts of co-conspirators if the agreement by the late-comer is made with full knowledge of the conspiracy's objective. Finally, increased judicial convenience and economy are attractive features in conspiracy prosecutions. As a result, judges are generally reluctant to sever defendants for separate trials.<sup>478</sup>

In view of the favorable evidentiary rules and other procedural considerations noted above, it is readily apparent why Judge Learned Hand once referred to the dreaded conspiracy charge as "that darling of the modern prosecutor's nursery."<sup>479</sup>

## CHAPTER VII

### CONSPIRACY

#### A. Elements of the General Conspiracy Statute

The Government must establish the following four elements beyond a reasonable doubt in order to prove an 18 U.S.C. § 371 conspiracy: <sup>480</sup>

- (1) The existence of an agreement between two or more persons, <sup>481</sup>
- (2) For either of the following unlawful objects:
  - (a) To commit an offense against the United States, <sup>482</sup>
  - or
  - (b) To defraud the United States, <sup>483</sup> and
- (3) That each alleged conspirator entered into the unlawful agreement (i.e., conspiracy) knowingly and with the intent to advance its unlawful object(s), <sup>484</sup> and
- (4) That at least one overt act was committed by a co-conspirator in furtherance of the conspiracy during its existence. <sup>485</sup>

##### 1. The Agreement

An agreement for a common unlawful purpose is the gist of the crime of conspiracy. <sup>486</sup> It does not have to be a formal or express arrangement, <sup>487</sup> since the hallmarks of a successful conspiracy are secrecy and concealment. <sup>488</sup> The agreement can be

a tacit understanding between or among the parties,<sup>489</sup> and the plan's existence can be inferred from circumstantial evidence.<sup>490</sup> As noted in Jones v. United States: "Generally, convictions will be sustained if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists."<sup>491</sup>

The object of the conspiracy statute is to punish unlawful agreements<sup>492</sup> regardless of their formality.<sup>493</sup> The existence of an unlawful agreement can be inferred from acts showing a unity of purpose or a common understanding,<sup>494</sup> and the agreement's success, or lack thereof, is of no import.<sup>495</sup>

#### a. Requisite Plurality

Since a conspiracy is an agreement between or among conspirators,<sup>496</sup> at least two or more persons are required to form the plan.<sup>497</sup> This is in contrast to a scheme to commit mail fraud which may be committed by one person acting alone.<sup>498</sup> A conspiracy, however, requires a "meeting of minds."<sup>499</sup> As a result, "unless at least two people commit [the act of agreeing], no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone."<sup>500</sup> Moreover, a defendant can be convicted of committing an 18 U.S.C. § 371 conspiracy with a person or persons unknown.<sup>501</sup> If there is sufficient evidence to prove that the defendant conspired with just one unindicted co-conspirator, the defendant can still be convicted even if the

remaining indicted co-conspirators are all acquitted, i.e., a "partnership in crime" still technically exists.<sup>502</sup>

#### b. Intracorporate Conspiracy

It is well settled that a corporation can be indicted as a conspirator.<sup>503</sup> Whether a corporation can conspire with its own employees and agents, however, is currently generating some provocative controversy.<sup>504</sup> Intracorporate conspiracy cases are essentially a legacy of Sherman Act antitrust litigation.<sup>505</sup> The traditional rule is stated in Nelson Radio & Supply v. Motorola: "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."<sup>506</sup> At the same time, even in other antitrust cases such as Greenville Publishing Co. v. Daily Reflector, Inc.,<sup>507</sup> courts have generally fashioned an exception "when the officer has an independent stake in achieving the corporation's illegal objective."<sup>508</sup>

The Eleventh Circuit of the Court of Appeals recently launched a frontal assault on the Nelson Radio agency fiction<sup>509</sup> in United States v. Hartley,<sup>510</sup> which was recently quoted with approval by the Sixth Circuit in United States v. S & Vee Co., Inc.:

The difficulty in accepting the theory of intracorporate conspiracy is conceptual. Under elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents become the acts of the corporation as a single entity. The conceptual difference is easily overcome, however, by acknowledging the underlying purpose of this fiction -- to expand corporate responsibility.

By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial

responsibility for them. See Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 608 (5th Cir. 1981). The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identify [sic] of the other. We decline to expand the fiction only to limit corporate responsibility in the criminal conspiracy now before us.<sup>511</sup>

Consequently, while judicial precedents still support the traditional "corporate entity" rule, there is a serious challenge to this seemingly embedded hornbook doctrine.<sup>512</sup>

## 2. The Unlawful Object

As noted by previously, 18 U.S.C. § 371 outlaws two broad criminal purposes: (1) a conspiracy to commit any substantive offense against the United States which is prohibited by other statutes, and (2) conspiracy to defraud the United States.<sup>513</sup>

### a. Conspiracy to Commit Any Offense

This straightforward prohibition encompasses any substantive offense, whether criminal or civil, against the United States.<sup>514</sup> This section is clearly consistent with the gravamen of the crime of conspiracy, since any agreement by two or more persons to violate a civil or criminal Act of Congress is a combination for an unlawful purpose almost by definition.<sup>515</sup>

### b. Conspiracy to Defraud the United States

A conspiracy to defraud the United States in any manner or for any purpose is the second criminal object condemned by 18 U.S.C. § 371.<sup>516</sup> The Supreme Court held in Hammerschmidt v. United States that this provision is not restricted to acts which

wrongfully deprive the Government of either money or property:

To conspire to defraud the United States . . . also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.<sup>517</sup>

Moreover, the Supreme Court recently reiterated in Dennis v. United States that 18 U.S.C. § 371 "reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.'"<sup>518</sup> Almost any deceitful or dishonest scheme (kickbacks, bid-rigging) which could impair or obstruct a lawful Government function can arguably serve as a criminal object for purposes of 18 U.S.C. § 371 liability.<sup>519</sup>

### 3. Criminal Knowledge and Intent

Once the existence of a conspiracy (agreement and unlawful object) is established, the third element for an 18 U.S.C. § 371 violation involves determining which of the defendants knowingly and voluntarily became members of that conspiracy.<sup>520</sup>

It is well settled that each conspirator must specifically intend to agree and knowingly join in the "essential nature of the plan,"<sup>521</sup> and that each conspirator must also be a willing participant in the conspiracy with the intent to further some unlawful object or purpose of the agreement.<sup>522</sup> Considerable confusion, however, has surrounded the separate mental elements required for these two different intents:

It has been observed that there are really two intents required for the crime of conspiracy: an intent to agree and an intent to achieve the object of the agreement. As applied to the former, the statement that a conspiracy requires a specific intent is clearly correct, for the intent to agree is indispensable to, and characteristic of, this species of crime. But if the statement is meant to apply to the second element, as appears to be the case, it seems inaccurate. It is difficult, in fact, to conceive of any crime in which the intent is less specific. This intent may be to commit almost any crime, some civil offenses, and some acts which do not even give rise to civil liability.<sup>523</sup>

Conspiracy, therefore, has a bifurcated mental element which requires a specific intent to join in the underlying unlawful agreement and also an unspecified criminal intent to effect the unlawful purpose(s) of the conspiracy itself.<sup>524</sup>

The Supreme Court has held that the criminal intent required for a conspiracy conviction must be at least the same as the mens rea which is necessary for commission of the intended substantive crime.<sup>525</sup> This principle is not as perplexing as it first seems, as illustrated by United States v. Vilhotti:

The fact that . . . specific intent is not required for a conviction of the substantive crime as it is for the conspiracy, is not at all unique in criminal law and is supported by reason. In United States v. Crimmins, supra, 123 F.2d at 273, Judge Learned Hand pointed out: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a red light, for one cannot agree to run past a light unless one supposes that there is a light to run past."<sup>526</sup>

Judge Hand recognized that although specific intent was an essential element in the formation of the conspiracy's unlawful agreement, a specific intent was not always required for commission of the agreement's unlawful object since the substantive offense might only require a general mens rea.

Likewise, a conspirator is not required to know each

objective or every detail of the agreement,<sup>527</sup> or the identity of all the members of the conspiracy.<sup>528</sup> At the same time, even if the Government can establish that the defendant specifically intended to enter into an unlawful agreement, the Government must still prove (beyond a reasonable doubt) that he knowingly promoted the conspiracy.<sup>529</sup> Mere knowledge of the conspiracy alone, or guilt by association, is insufficient proof of an individual's participation in a conspiracy.<sup>530</sup> The conspirator must in some way affirmatively cooperate, or at least agree to cooperate, in the unlawful object(s) of the conspiracy.<sup>531</sup> In the oft-quoted words of Judge Learned Hand: "[H]e must in some sense promote their venture himself, make it his own, have a stake in its outcome."<sup>532</sup> There is no requirement, however, to prove a conspirator's involvement by direct evidence, since a conspiracy's common purpose can be inferred from a "development and a collection of circumstances."<sup>533</sup>

Each conspirator must knowingly join the agreement with the concurrent intent to actively promote at least some criminal object(s) of the conspiracy.<sup>534</sup> The Supreme Court once aptly described, but later qualified, the marriage between the "actual knowledge" and "willing participation" factors as follows:

The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy . . . Those having no knowledge of the conspiracy are not conspirators . . . and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a part but of which the supplier had no knowledge.<sup>535</sup>

Conspiracy is a crime of intent, and intent depends upon a



defendant's knowledge of the underlying agreement.<sup>536</sup> If an defendant has no knowledge of the conspiracy's unlawful agreement, he cannot form a specific intent to join it. Even if his efforts contribute in some measure to the conspiracy's unlawful object(s), the defendant was never a knowing member of the agreement.<sup>537</sup>

Once a defendant is knowingly and actively connected to membership in a conspiracy, he becomes subject to the co-conspirator's exception to the hearsay rule,<sup>538</sup> which has three basic preconditions:<sup>539</sup>

- (1) The existence of a conspiracy,
- (2) Both the declarant and the defendant must be members of the conspiracy, and
- (3) The statement must be made in furtherance of the conspiracy.

This rule of evidence is extremely important because once these three elements are satisfied, any such hearsay statements (which are in furtherance of the conspiracy) are then admissible in evidence against any member of that conspiracy.<sup>540</sup>

#### 4. Overt Act

After both the existence of a conspiracy<sup>541</sup> and the defendant's membership<sup>542</sup> in that conspiracy have been established,<sup>543</sup> any overt act committed by a co-conspirator in furtherance of that conspiracy will complete the offense.<sup>544</sup> The overt act does not have to be criminal in nature.<sup>545</sup> It can be only a phone call.<sup>546</sup> As noted in United States v. Root: "Title

18 U.S.C. § 371 does not require 'mission accomplished', only 'mission attempted'. An overt act by the conspirators in an effort to accomplish the mission satisfies the requirement of the statute."<sup>547</sup> This contrasts sharply with some federal conspiracy statutes, such as a 21 U.S.C. § 846 narcotics conspiracy and a Sherman Act antitrust conspiracy,<sup>548</sup> which do not require proof of an overt act.<sup>549</sup>

Once a conspiracy exists, each co-conspirator is liable for all the acts of his co-conspirators which are committed in furtherance of the conspiracy, even if the conspirator is not aware of either the acts or the actors.<sup>550</sup> A conspiracy, once formed, is presumed to continue until the contrary is shown.<sup>551</sup>

#### B. Conspiracy To Defraud The Government With Respect To Claims

18 U.S.C. § 286 outlaws any conspiracy to defraud the United States in relation to false, fictitious, or fraudulent claims.<sup>552</sup> Although 18 U.S.C. § 371 can be used to prosecute a conspiracy to commit any offense (civil or criminal) against the United States,<sup>553</sup> 18 U.S.C. § 286 only prohibits a conspiracies to defraud the Government with respect to false, fictitious or fraudulent claims.<sup>554</sup>

The conspiracy elements of 18 U.S.C. § 286 are substantially identical<sup>555</sup> to the statutory conspiracy elements analyzed previously for 18 U.S.C. § 371.<sup>556</sup> These essential requirements include an agreement between the conspirators,<sup>557</sup> for a definite unlawful object,<sup>558</sup> specific intent and knowledge,<sup>559</sup> and an overt act by any co-conspirator in furtherance of the conspiracy.

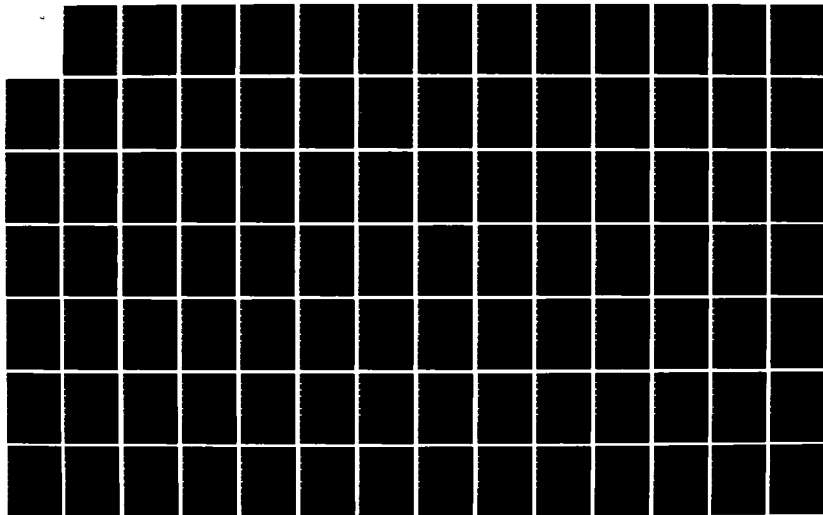
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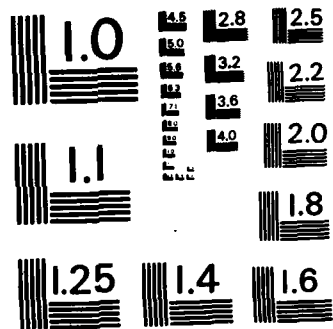
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conspiracy.<sup>560</sup> 18 U.S.C. § 286 and 18 U.S.C. § 371, however, have two very different criminal objects.<sup>561</sup>

The illegal object of an 18 U.S.C. § 286 offense involves any conspiracy for the purpose of defrauding the United States by "obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim."<sup>562</sup> However, the dual criminal objects of the general conspiracy statute prohibit two broad unlawful purposes.<sup>563</sup> The first general object involves a conspiracy to commit any offense against the United States (civil or criminal), and the second sweeping criminal purpose prohibits a conspiracy to defraud the United States "in any manner or for any purpose."<sup>564</sup>

A "claim" is not defined in 18 U.S.C. § 286, but in United States v. Niefert-White Co., the Supreme Court held that a claim can include "all fraudulent attempts to cause the Government to pay out sums of money."<sup>565</sup> The Court of Claims recently adopted the following ambitious definition of a claim in O'Brien & Machine Co. v. United States:

[T]he rule which emerges from decisions is rather that "claim" is a word of many meanings, to be determined in the context of the purpose of the statute in which it is found. In the False Claims Act, which was remedially aimed at all types of financial frauds, on the Government, the "claim" against the Government is held to be conduct which after some intermediate steps has the effect of bringing about a payment of money or other financial loss by the Government. Under other statutes, in the light of their statutory purpose the objective of the claim need not be money.<sup>566</sup>

The Niefert-White holding indicates that a claim, for purposes of an 18 U.S.C. § 286 conspiracy, will include at least false, fictitious, or fraudulent claims for money or property which are presented to the United States.<sup>567</sup> If an alleged 18 U.S.C. § 286

conspiracy involves a disputed claim which is also arguably in violation of the criminal False Claims statute,<sup>568</sup> relevant 18 U.S.C. § 287 precedents are clearly persuasive in divining the limits of an 18 U.S.C. § 286 "claim" under the holding of O'Brien & Machine Co.<sup>569</sup> An indictment, therefore, which charges a substantive violation of 18 U.S.C. § 287, as well as a collateral 18 U.S.C. § 286 conspiracy to obtain payment of the same claim, would be a proper charge as a matter of law.<sup>570</sup>

In stark contrast to the somewhat elusive notion of a "claim"<sup>571</sup> in the context of an 18 U.S.C. § 286 offense, a general 18 U.S.C. § 371 conspiracy to defraud the United States can incorporate almost any imaginable scheme to impair, obstruct, or otherwise defeat a lawful Governmental function.<sup>572</sup> As a result, if a dispute arises regarding whether an alleged conspiracy actually involves a "claim" against the United States, the Government can effectively sidestep the issue by charging an 18 U.S.C. § 371 conspiracy to defraud since this offense does not require the loss of any Government money or property.<sup>573</sup>

#### C. Procurement Process Application

The general conspiracy statute may be the Government's most versatile weapon against procurement crime. The sweeping umbrella coverage of 18 U.S.C. § 371 can be used to prosecute almost the entire spectrum of Government contract fraud.<sup>574</sup> Whenever any allegedly fraudulent contracting activity (false claims or statements, price-fixing, improper payments) involves more than one person, the Government can raise the clarion call

of a criminal conspiracy.<sup>575</sup>

### 1. Conspiracy to Commit Any Offense

Although some criminal statutes incorporate their own separate and distinct conspiracy offense,<sup>576</sup> 18 U.S.C. § 371 can be used to prosecute a conspiracy to violate almost any procurement-related substantive offense.<sup>577</sup> This includes conspiracies to commit criminal false claims<sup>578</sup> and statements,<sup>579</sup> mail fraud,<sup>580</sup> bribery,<sup>581</sup> kickbacks<sup>582</sup> and Travel Act violations,<sup>583</sup> assuming, of course, the participation of two or more persons in the alleged offense.<sup>584</sup> The actual completion<sup>585</sup> or success<sup>586</sup> of the substantive crime itself is irrelevant.<sup>587</sup>

In United States v. Tyminski, a New York electronics contractor was convicted of twenty-five separate criminal false claims counts, and an 18 U.S.C. § 371 conspiracy to present false claims, in connection with an Air Force fixed price contract for APN/59 radar units.<sup>588</sup> The defendant, who was also the corporation's president, schemed with other company officials in fraudulently billing costs, which were properly allocable to the fixed price radar contract, to other Government contracts when it became apparent that the firm would incur a substantial loss on the APN/59 radar contract.<sup>589</sup> Some of the improperly charged Government work involved cost-plus contracts.<sup>590</sup>

United States v. Richmond<sup>591</sup> and Maxwell v. United States<sup>592</sup> are two cases which both involve criminal conspiracies to submit false statements in violation of 18 U.S.C. § 1001. Although the

Government failed to prove either of the conspiracy charges,<sup>593</sup> the fact patterns provide practical baselines for assessing potential 18 U.S.C. § 371 liability.

United States v. Richmond involved ten separate false statement counts, and an 18 U.S.C. § 371 conspiracy to commit these offenses.<sup>594</sup> The defendants were the principal owners, managers, and employees of a construction engineering consulting firm in Grand Forks, North Dakota.<sup>595</sup> The charges grew out of fraudulent time card billings which were invoiced to local repair projects funded under the Federal-Aid Highways Act.<sup>596</sup> Although the defendants were convicted on several of the substantive 18 U.S.C. § 1001 counts, the Government failed to prove that the fraudulent invoices were submitted as the result of an unlawful conspiracy among the participants.<sup>597</sup>

Likewise, in Maxwell v. United States, the Government also failed to prove a conspiracy to present false and fraudulent statements in relation to a complex claim which resulted from the Government's convenience termination of fixed price contracts.<sup>598</sup> The convictions were reversed on appeal because the verdict was not supported by the Government's evidence.<sup>599</sup>

An 18 U.S.C. § 371 conspiracy to commit mail fraud and several mail fraud violations were charged in United States v. Allen.<sup>600</sup> This case involved an indictment in connection with an allegedly fraudulent kickback scheme at Hughes Aircraft Company in El Segundo, California.<sup>601</sup> The Government charged that a buyer for the company's Radar Systems Group, in violation of company policy, purchased materials from certain favored vendors



at inflated prices in exchange for kickbacks.<sup>602</sup> The District Court dismissed the Government's indictment with prejudice on former jeopardy grounds, however, based on a prior not guilty finding in relation to same facts.<sup>603</sup>

United States v. Williams is perhaps the most "celebrated" procurement-related conspiracy to commit bribery.<sup>604</sup> This highly-publicized ABSCAM case involved Senator Harrison Williams of New Jersey who was convicted of a broad 18 U.S.C. § 371 conspiracy to commit bribery, illegal gratuity, and conflict-of-interest offenses, in addition to other substantive charges.<sup>605</sup> In exchange for stock certificates and other valuable consideration, Williams promised to use his influence to secure prospective Government titanium contracts for a mining venture in which he held an interest.<sup>606</sup> Similarly, in United States v. Brasco, a New York Congressman was convicted of an 18 U.S.C. § 371 conspiracy to commit bribery in relation to his role in the award of certain mail-hauling contracts.<sup>607</sup>

Although a conspiracy to commit bribery appears to violate Wharton's Rule (an agreement between two or more persons does not constitute a conspiracy if the crime requires at least two persons to commit the offense, i.e., bigamy),<sup>608</sup> it does not apply to a conspiracy to commit bribery.<sup>609</sup> Neither bribery nor an unlawful gratuity include the requirement for proof of a "conspiratorial agreement",<sup>610</sup> i.e., no concerted action is required between the bribe giver and the bribe taker.<sup>611</sup> As a result, conspiracy and bribery are two separate and distinct offenses, and a covered official can violate 18 U.S.C. § 201 without the

participation of any other party.<sup>612</sup> In United States v. Previte, the First Circuit articulated several reasons which support a narrow reading of Wharton's Rule in relation to a conspiracy to commit bribery:

Bribery offenses implicate broad social concerns, and have an impact far beyond that of the consensual, victimless offenses that lie at the heart of Wharton's Rule. Similarly, conspiracy to commit bribery might well be thought to raise the dangers of criminal agreement in a way that "conspiracy" to engage in such traditional Wharton's Rule offenses as duelling and incest cannot. Thus, the legislative intent might well be thought presumptively to include rather than exclude parallel conspiracy liability, a presumption which would become conclusive here in the absence of any affirmative indication of legislative intent to the contrary.<sup>613</sup>

Therefore, an indictment which charges both an 18 U.S.C. § 371 conspiracy to commit bribery, and a separate substantive violation of 18 U.S.C. § 201, is correct as a matter of law.<sup>614</sup>

In United States v. Hanis, a buyer for Westinghouse Electric Corporation (WEC) was convicted for conspiring to receive kick-backs in violation of 41 U.S.C. §§ 51, 52 & 54.<sup>615</sup> The buyer assisted favored suppliers in obtaining purchase orders and sub-contracts from WEC for Government fixed-price-reimbursable contracts with price-redetermination clauses.<sup>616</sup>

## 2. Conspiracy to Defraud

This charge is the Government's most effective weapon against multiple defendant, procurement-related offenses. Unlike more narrowly focused statutes which only prohibit specific offenses (i.e., 18 U.S.C. § 286), this sweeping provision of 18 U.S.C. § 371 is aimed at fraud "in any manner or for any purpose."<sup>617</sup> If a suspected contracting "irregularity" involves

more than one person and there are allegations of fraudulent misconduct, liability under 18 U.S.C. § 371 could attach.<sup>618</sup> The objects of a general conspiracy to defraud can include such widely disparate activities as bid-rigging,<sup>619</sup> false, fictitious, or fraudulent claims<sup>620</sup> and statements,<sup>621</sup> assorted improper payments,<sup>622</sup> and other sundry schemes to defraud the United States.<sup>623</sup>

United States v. Walker involves an 18 U.S.C. § 371 conspiracy to defraud, in addition to a separate Sherman Act restraint of trade conspiracy, in relation to the bid-rigging of certain Forest Service timber sales.<sup>624</sup> The Government proved that the defendant had conspired with several other contractors to fix bids on two Oregon land tract timber contracts.<sup>625</sup> However, in United States v. Kates a defendant's conviction was reversed in relation to a complex bid-rigging conspiracy surrounding several urban renewal contracts for the Philadelphia Redevelopment Authority.<sup>626</sup> The court found insufficient evidence of a common plan or agreement.<sup>627</sup>

In United States v. Bass, a General Dynamics (GD) subcontractor was convicted for conspiracy to defraud the United States in connection with several false statements which the sub generated in the process of supplying GD with blatantly defective F-111 aircraft components.<sup>628</sup> The defendant also corruptly dispensed gratuities to GD employees to influence acceptance of his substandard parts.<sup>629</sup> In United States v. Ebeling, the contractors were also convicted for an 18 U.S.C. § 371 conspiracy based upon the submission of several false statements.<sup>630</sup> Both

defendants were found guilty of collusively charging the Government for subcontract work which they had not performed.<sup>631</sup> Likewise, in United States v. Balk, the defendants were guilty of defrauding the United States in connection with the falsification of important welder certifications which were used by the Navy in ship repair work to assess important metallurgical welding standards.<sup>632</sup>

A general conspiracy to defraud can also involve the submission of false claims. The First Circuit, in United States v. Cincotta, affirmed the defendant's conspiracy conviction for submitting several false claims to Army officials.<sup>633</sup> The defendants invoiced the Army for undelivered fuel oil, and the company then sold the undelivered oil (which the Government had never received) to their other customers.<sup>634</sup> United States v. Minnisohn also involved a conspiracy to obtain payment for false and fraudulent claims.<sup>635</sup> The defendants feloniously conspired to defraud the United States by delivering underweight bags of cement to Government construction project, and the Government's loss only amounted to approximately twenty-seven dollars.<sup>636</sup>

Several cases document 18 U.S.C. § 371 conspiracies involving improper payments in relation to Government procurement officials.<sup>637</sup> In United States v. Hartley, one aspect of the contractor's complex conspiracy, which was discussed previously,<sup>638</sup> involved a series of corrupt payments to military inspectors.<sup>639</sup> The Sixth Circuit, in United States v. Razette, affirmed a contractor's conviction for conspiracy to defraud which was incident to the bribery of an Air Force contracting

officer assigned to Wright-Patterson Air Force Base, Ohio.<sup>640</sup> Members of the County Council of McMinn County, Tennessee were also guilty of an 18 U.S.C. § 371 conspiracy in United States v. Thompson.<sup>641</sup> The conspiracy included the solicitation and receipt of a \$6000 kickback from an architect's firm which was hired to work on a county hospital project that was funded, in part, under the Hill-Burton federal assistance program.<sup>642</sup>

Although any conspiracy to defraud allegations must be carefully scrutinized, it is evident that this formidable "dragnet" charge can be used to prosecute almost any procurement-related fraud or corruption which involves multiple defendants.

PART FOUR

CRIMINAL LIABILITY AND SANCTIONS

"They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege that care and vigilance, with a very common understanding, may preserve a man's goods from thieves, but honesty has no defense against superior cunning."

J. SWIFT, GULLIVER'S TRAVELS, Pt. 1,  
Ch. 6 (1726), reprinted in Gais,  
Criminal Penalties for Corporate  
Criminals, 8 CRIM. L. BULL. 377,  
381 (1972).

"Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"<sup>643</sup>

Edward, First Barron Thurlow 1731-1806

"If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."

BISHOP, NEW CRIMINAL LAW §17, quoted in  
New York C & H. R. R. Co. v. United  
States, 212 U.S. 481, 492 (1909).

"[I]n any large organization . . . there will always be individuals who will find the rewards of corruption greater than the satisfactions of legitimate behavior . . . If this is correct, then the relevant question becomes one of finding ways to reduce, not eliminate, the frequency of corruption . . ."

J. GARDINER, THE POLITICS OF CORRUPTION  
93-94 (1970).

## CHAPTER VIII

### CRIMINAL LIABILITY AND SANCTIONS

#### A. Corporate Liability

The Supreme Court, in New York C. & H. R. R. Co. v. United States,<sup>644</sup> ended the early common law legal fiction that a corporation was not subject to criminal liability:

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities." The modern authority, universally, so far as we know, is the other way.

\* \* \*

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act . . . While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject-matter and correcting the abuses aimed at.<sup>645</sup>

In this seminal decision of Feb. 23, 1909, the Supreme Court served notice to the corporate world that henceforth it would no longer be insulated from criminal liability for the unlawful acts

of corporate directors, officers, employees, and other authorized agents.<sup>646</sup>

### 1. Respondeat Superior

A corporation is generally liable for the criminal acts and omissions of its employees (even specific intent crimes)<sup>647</sup> if the culpable individual is acting within the scope of his employment and authority.<sup>648</sup> This "respondeat superior"<sup>649</sup> theory of corporate criminal liability is based upon traditional civil tort law and agency principles.<sup>650</sup> If an employee is acting in his corporate capacity, this theory imputes the criminal intent and acts of the living agent to the inanimate corporation.<sup>651</sup>

Although the acts of senior executives are clearly attributable to the corporation,<sup>652</sup> there are differing views on whether the acts of non-managerial/lower-level employees should also bind a corporation.<sup>653</sup> Federal precedents indicate that illegal acts of subordinate, and even menial, employees can be imputed to the corporate employer.<sup>654</sup> Corporations are even criminally accountable for some employees' actions which violate company policy or regulations.<sup>655</sup>

### 2. Ultra Vires

In Standard Oil Co. v. United States, the Fifth Circuit of the Court of Appeals held that an employee's conduct must be intended to advance the interests of his corporate employer in order to place the employee's actions within the scope of his



employment.<sup>656</sup> The illegal acts in Standard were not imputed to the corporation because the unfaithful employees had been bribed by a third party to act on his behalf and against the interests of Standard Oil.<sup>657</sup> This narrow "ultra vires" exception does not mean that the corporation must derive a tangible benefit from the employee's activities before it incurs criminal liability.<sup>658</sup> It simply restricts imputed corporate criminal responsibility to those situations where an employee is acting within the scope of his employment (not on a frolic of his own), primarily for the intended benefit his corporate employer.<sup>659</sup>

#### B. Individual Liability

The common law recognized four categories of criminally responsible parties in felony cases: (1) an accessory before the fact, (2) a principal in the first degree, (3) a principal in the second degree, and (4) an accessory after the fact.<sup>660</sup> This ancient responsibility doctrine holds that persons who were not direct participants in the overt commission of a crime can still incur liability for a criminal act under certain conditions:

A man may be principal in an offense in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding and abetting the fact to be done. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may also be a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance . . .

\* \* \*

An accessory is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed . . .

\* \* \*

As to . . . who may be accessory before the fact, Sir Matthew Hale defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like be present, he is guilty of the crime as principal . . .

\* \* \*

An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon . . .<sup>661</sup>

The traditional law of principals and accessories is still relevant in attributing personal criminal responsibility to corporate officers, employees, and agents.<sup>662</sup> Although the individual liability of direct corporate actors remains relatively straightforward,<sup>663</sup> the process of attributing criminal responsibility to indirect actors (particularly for specific intent offenses) poses a far more perplexing task for the Government.<sup>664</sup>

#### 1. Direct Actors

18 U.S.C. § 2 provides the rule structure for liability as a principal in federal sector offenses:

##### § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

This statutory definition, therefore, makes any person who directly participates in the overt commission of a crime a

"principal of the first degree" for purposes of 18 U.S.C. § 2 liability and punishment.<sup>665</sup> As a result, each direct corporate actor or principal is personally liable for any acts which he performs or causes to be performed in his corporate capacity.<sup>666</sup>

The District of Columbia Circuit of the Court of Appeals, in United States v. Sherpix,<sup>667</sup> adopted the following rule from United States v. North American Van Lines, Inc.,<sup>668</sup> which summarizes the individual accountability of a corporate officer: "The accepted rule is that officers, directors, and agents of a corporation may be held criminally liable for their acts although performed in their official capacity but where they have neither actively participated in nor directed nor authorized a violation of law by their corporation they are not liable." A direct corporate actor, therefore, is criminally responsible as a principal (in the first degree) if he knowingly participates in an illegal act, even if he does so in a representative capacity.<sup>669</sup>

## 2. Indirect Actors

Indirect corporate actors (generally principals in the second degree or accessories before the fact) are also principals for purposes of 18 U.S.C. § 2 if the requisite conditions of the statute are satisfied.<sup>670</sup> Highly placed corporate officials, therefore, who knowingly direct or authorize a crime, but who are careful not to overtly participate in its commission, can still incur liability as a 18 U.S.C. § 2 principal.<sup>671</sup>

The individual liability of indirect actors is determined by

the scienter standard of the statute allegedly violated.<sup>672</sup> In United States v. Park, the Supreme Court considered the broad criminal scope of the strict liability provisions of the 1938 Food and Drug Act in relation to indirect corporate actors.<sup>673</sup> In Park, the Court affirmed a corporate president's conviction for failing to correct unsanitary conditions (rodent infestation) in one of his company's warehouses.<sup>674</sup> Although the Court indicated that the Food and Drug Act did not impose vicarious liability on indirect corporate actors merely because of their corporate position or title, the Court did highlight the almost absolute liability of "responsible" officials in the context of a strict liability statute:

The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link.<sup>675</sup>

Congress, therefore, has the authority to impose a rigid "extraordinary care" criminal standard upon responsible indirect corporate actors for defined criminal offenses.<sup>676</sup>

Whenever a statute prescribes a specific intent requirement for direct actors, the same mental element will apply to any indirect actors.<sup>677</sup> As a result, if a specific intent offense contains a "knowing and willful" mental element, the indirect corporate actor (and alleged principal) is subject to the same standard.<sup>678</sup> The Government must prove that any indirect corporate actor had actual knowledge of the crime before he can

be convicted of a specific intent offense (e.g., bribery, conspiracy, fraudulent claims).<sup>679</sup> As a result, the Government must show that the responsible official (with power to influence the actions of subordinates) in some way intentionally directed, approved, authorized, or perhaps acquiesced, in the illegal act before he is individually liable as a principal.<sup>680</sup> The task of proving and pinpointing indirect individual criminal responsibility in today's increasingly complex corporate infrastructures is often a very difficult evidentiary burden in comparison with the Government's relatively de minimis showing in strict liability offenses.<sup>681</sup>

In sum, the criminal liability of indirect corporate actors is basically a function of the scienter requirement of the statute allegedly violated.<sup>682</sup> In strict liability cases, such as United States v. Park, a responsible corporate official is almost vicariously liable.<sup>683</sup> However, if a specific intent crime such as conspiracy is involved, actual knowledge and some form of willful complicity will be required before the responsible official is criminally liable in an individual capacity.<sup>684</sup>

### C. Criminal Sanctions

The subject of criminal sanctions is one of today's most controversial white-collar crime issues.<sup>685</sup> Are existing criminal sanctions actually effective deterrents in controlling private and public sector economic crime? Several excellent law review articles have agonized over this issue,<sup>686</sup> and their

conclusions are basically negative.<sup>687</sup>

There are basic reasons for punishment in American jurisprudence (in addition to simple incapacitation): deterrence, retribution or "just deserts", and rehabilitation.<sup>688</sup> Deterrence should be the primary purpose for procurement-related sanctions since the Government's first priority should be to prevent economic crime -- not to punish, incapacitate, or rehabilitate offenders after the fact.<sup>689</sup> Retribution should, therefore, play an important but collateral role.<sup>690</sup> If deterrence is in fact the primary purpose for white-collar criminal sanctions, then general deterrence should be the benchmark for examining the adequacy of existing criminal sanctions.<sup>691</sup>

An insightful commentator developed the following model for "deterrence utility" in relation to corporate commercial crime over two decades ago:

The rate of acquisitive corporate crime engaged in on behalf of any endocratic corporation [a "large publically held corporation, whose stock is scattered in small fractions among thousands of stockholders"] will a) vary directly with the expectation of net gain to that corporation from the crime, and will b) vary inversely with the certainty and severity of the impact with which the criminal sanction personally falls upon those who formulate corporate policy.<sup>692</sup>

If this model is used to evaluate the actual performance of the two principal white-collar criminal sanctions (imprisonment and fines), the deterrent role of existing criminal sanctions would receive a mixed review at best.<sup>693</sup> Without the selective access to collateral civil and administrative remedies (i.e., suspension, debarment, civil recoveries, public employee discharges for cause), the following analysis will suggest that current sanctions are more retributive than deterrent in nature.<sup>694</sup>

## 1. Imprisonment

Although it is evident that that an inanimate corporation cannot be incarcerated, its human agents can be -- but the process requires far more than just an administrative "show cause" hearing and the right to be heard.<sup>695</sup> This is perhaps the principal reason why criminal sanctions cannot be the Government's first line of defense against procurement-related fraud and corruption.<sup>696</sup> The criminal justice system is an extremely rigorous, exacting and adversarial process (and so it should be), and this poses inherent deterrent limitations.<sup>697</sup> One commentator (then an Assistant United States Attorney) assessed the problem as follows:

A serious impediment to use of the criminal sanction in white-collar crime cases is the ponderous character of the criminal process. Few white-collar crime cases are simple; their prosecution entails an enormous expenditure of the resources of the criminal justice system in relation to the number of cases prosecuted. As a result, comparatively few commercial cases are prosecuted, and those which are proceed at a snail's pace. The infrequency of prosecution means that most offenders who have been prosecuted are treated as first offenders even though their lives may have been spent in serious crime. To compound matters, the system's limited resources have not been deployed effectively. Ultimately, if the criminal justice system is to fashion a credible deterrent to commercial and economic crime, the prosecution of white-collar crime must become more than an empty gesture or a sporadic act of vengeance.<sup>698</sup>

This writer also underscored the systemic limitations of criminal deterrence:

[A] number of factors relevant to the functioning of deterrence . . . pose major problems for white-collar enforcement efforts: (1) instead of a credible threat of harsh punishment, there is in fact a pattern of light sentences and a limited number of prosecutions; (2) although any fraud or bribery offense should be threatened by swift and certain detection and prosecution, there is no such threat; and (3) although deterrence theory assumes that the potential offender

will function predictably, many potential and actual white-collar criminals are not ideal psychological models, either because they function irrationally or because they are motivated by considerations which make the possibility of punishment or detection an acceptable risk.<sup>699</sup>

Although the alleged sentencing disparities between white-collar crimes and traditional street crimes have arguably abated during the post-Watergate years,<sup>700</sup> the existing criminal justice system lacks the optimum responsiveness, necessary resources, and predictive certainty envisioned by the deterrence model in relation to procurement crime.<sup>701</sup>

In addition, it is often difficult to pinpoint the responsible corporate officials (indirect actors) for specific intent crimes:

It is very difficult to obtain the conviction of the true policy formulators in large, complex corporations. The top executives do not ordinarily carry out the overt criminal acts -- it is the lower or middle management officials who, for example, attend price-fixing meetings. Under traditional doctrines of complicity, to hold a superior responsible he must be shown actually to have participated in his subordinate's criminal activities, as by ordering the conduct or encouraging or aiding in its performance. It is very difficult to obtain evidence of such participation. Difficulties of proof have prevented the prosecution of top management in many Sherman Act cases.<sup>702</sup>

In sum, while the threat of imprisonment is probably the major deterrent and retributive criminal sanction,<sup>703</sup> the natural limitations of the criminal justice system restrict its utility as a truly effective white-collar crime deterrent.<sup>704</sup>

## 2. Criminal Fines

The deterrence model also incorporates an important cost-benefit notion.<sup>705</sup> Even a cursory survey of several of the major



procurement-related crimes (with the exception of the FCPA, Sherman Act, or the chilling divestiture provisions of the Racketeer Influenced and Corrupt Organization Act [RICO])<sup>706</sup> indicate the general disparity between the statutory "per offense" ceilings on criminal fines and the Government's potential monetary loss in relation to major procurement frauds: (1) 18 U.S.C. § 201 (\$10,000); (2) 18 U.S.C. § 287 (\$10,000) (3) 18 U.S.C. § 371 (\$10,000); (4) 18 U.S.C. § 1001 (\$10,000); and (5) 18 U.S.C. § 1341 (\$1,000). Quere whether the threat of a criminal fine would deter an aggressive multinational firm from conspiring to defraud the United States (\$10,000 per offense) by offering a public official a \$50,000 bribe (\$10,000 per offense) to influence the award of a \$50 million dollar contract to that corporation?<sup>707</sup>

One commentator put the problem in the following thought-provoking perspective:

An increase in the present level of criminal fines would directly reduce the expectation of net gain to the corporation . . . But the criminal fine is inherently unsuited to the role of forcing an endocratic corporation convicted of acquisitive crime to disgorge its illegal profits. The fine has traditionally been employed to inflict economic punishment, and not to extract illegal profits. When a thief, for example, is convicted, the criminal fine is not employed to deprive him of his bounty. Rather, after the state has summarily taken away the thief's bounty, the fine (or jail sentence or execution) is imposed as a punishment, to place the thief in a worse position than the one he occupied before the theft. As presently administered against the endocratic corporation, the criminal fine -- like a sales tax -- deprives the criminal corporation of a small portion of its bounty, but permits it to retain the "lion's share".<sup>708</sup>

Criminal fines must pose a serious cost-benefit issue for potential offenders before they become a credible deterrent.<sup>709</sup>

This critique is not intended to suggest that criminal fines are inherently ineffective. In relation to the deterrence utility model, existing criminal remedies (both fines and imprisonment) simply appear to have a more significant retributive than deterrent effect. The timely and flexible use of collateral administrative and civil remedies is necessary to supplement the natural limitations of the criminal justice system if the Government intends to deter and police procurement fraud and corruption more effectively.<sup>710</sup>

#### D. Enforcement Postscript

What the system requires should be obvious: a massive infusion of investigative and prosecutive resources proportionate to the problem of white-collar crime itself; a geometric increase in the volume of white-collar offenders prosecuted; a revision of fraud and corruption statutes to provide for the possibility of substantially increased fines and prison sentences in the serious and aggravated cases; and a major education effort directed at judges, prosecutors, investigators, and legislators to make clear to them how vital the role each plays in the entire process.<sup>711</sup>

The Government has a formidable arsenal of statutory weapons (e.g., 18 U.S.C. §§ 201, 287, 371, 1001, 1341, 1951, 1952, 1961-68) which it can marshal whenever necessary in the current offensive against Fraud, Waste & Abuse (FW&A). Although these statutory vehicles are readily available, recourse to the ponderous criminal justice system as the Government's first line of defense against FW&A is somewhat dysfunctional.<sup>712</sup> At the same time, the sheer magnitude of the public sector white-collar crime problem is forcing the Government to become more serious about deterrence vis-a-vis retribution. The potential impact of

criminal fraud in the DoD is significant:

Joseph Sherick, the Pentagon's top expert on fraud and waste, estimates that criminal activity costs the military \$1 billion a year, enough to buy the Navy a new cruiser. Mr. Sherick adds, "The opportunity is there to steal 1% to 3% of the procurement budget," which is \$90 billion this year and projected to be \$101 billion next year. By that reckoning, crooks could be pillaging the equivalent of three new cruisers each year.<sup>713</sup>

The Government's response to the FW&A challenge, however, has been unprecedented.<sup>714</sup>

The new Agency Inspectors General (IG's) have been extremely tenacious and successful in fereting out FW&A. Since 1981, the IG's have reported savings to the Government of over \$16.9 billion, and they have referred over 4,000 cases to the Department of Justice for prosecution.<sup>715</sup> In the first six months of 1982, over 200 suspensions and debarments resulted from IG investigations.<sup>716</sup>

The DoD and Department of Justice have recently formed a joint DoD Procurement Fraud Unit with a broad charter to investigate fraud in defense contracts.<sup>717</sup> The new task force will target FW&A in three principal areas: labor-mischarging, bid-rigging, and any cases in which the Government doesn't receive the benefit of its bargain, i.e., substandard and defective items.<sup>718</sup>

The Office of Management and Budget is now in the process of implementing administrative regulations to activate the long dormant provisions of 18 U.S.C. § 218. This statute provides for the rescission of contracts in which there has been a final conviction for bribery, graft, or conflicts-of-interest.<sup>719</sup> Once implemented, the Government could recover all sums previously

paid to the contractor in relation to a tainted contract without additional judicial proceedings.<sup>720</sup>

These are but a few of the Government's continuing initiatives against procurement fraud and corruption, but the multi-faceted campaign against FW&A is still in its formative stages. However, even now, the Government's "Deterrence Renaissance" has at least two important implications for the private sector.

First of all, the contracting community should recognize that the Government has more than enough criminal statutes to vigorously prosecute almost any white-collar offense. Consider the recent case of United States v. Computer Sciences Corporation.<sup>721</sup> In 1980, the corporation and six individual defendants were charged with fraud in relation to a \$100 million computer contract with the General Services Administration.<sup>722</sup> The twenty-seven page, fifty-seven count indictment alleged mail and wire fraud, false claims, and three RICO charges, including an 18 U.S.C. § 1962(d) RICO conspiracy.<sup>723</sup> The controversial case, after almost three years of intense litigation, only recently concluded in a corporate civil settlement and one individual defendant's "nolo" plea to two false claims charges.<sup>724</sup>

The second, and perhaps most significant implication, is that the Government now appears committed to the long-term task of assembling the investigation and prosecution resources which are necessary for credible deterrence. (The DoD alone has assembled a legion of almost 18,000 investigators and auditors.)<sup>725</sup> Although there is always the possibility of potential

excess,<sup>726</sup> it appears that the Government has decided to alter the sad perception "that crime against the Government often does pay."<sup>727</sup> The long-term implications for the relationship between Government and industry are manifest.<sup>728</sup>

## CONCLUSION

The Government has several advantages in the battle against white-collar crime. Federal authorities have ample access to a formidable battery of statutory provisions (e.g., the general antibribery, conspiracy, false statement, and mail fraud statutes) which they can use to prosecute almost any procurement-related fraud or corruption. In fact, the various laws which prohibit the purchase and sale of official influence are seemingly weighted in the Government's favor. However, the complicated issues involved in determining the actual deterrent value of existing criminal sanctions, as well as the rapidly evolving implications of the Government's new initiatives against Fraud, Waste & Abuse, raise important questions which warrant additional research of an empirical nature.

In any event, individual criminal liability and incarceration are often only a remote threat to those most responsible for procurement fraud -- culpable high-level indirect corporate actors. In addition, the nominal fines for most procurement-related offenses have a little deterrent value in the context of multi-million and billion dollar acquisitions. However, even if Congress were to implement new and innovative white-collar sentencing alternatives, the natural limitations of the criminal justice system (important due process requirements and procedural considerations) suggest that the Government should place greater

reliance on the use of flexible administrative and civil remedies to police the Government's acquisition function more effectively. Although criminal prosecutions have a salutary effect on business ethics, the criminal justice process is simply too cumbersome to be the Government's first line of defense against procurement fraud and corruption.

Furthermore, while this paper is not intended to survey the intricate procedures involved in procurement enforcement, there is one particularly disturbing trend. A disparity appears to exist between the resources committed to detecting procurement irregularities as compared to the number of experienced federal prosecutors who are available to prosecute the resultant cases. For a credible deterrence posture, the Government must have both capabilities.

The Government must continue to provide the investigative and criminal justice resources which are required to effectively detect and prosecute federal white-collar crime if it is ever to dispel the notion that crime against the Government often does pay. At the same time, the Government must also implement a broad spectrum of effective criminal, civil, and administrative sanctions which are capable of deterring potential individual and corporate offenders without creating an unnecessary "adversarial" relationship between the private and public sectors.

## FOOTNOTES

1. Comp. Gen. Rep. B-201976, Fraud in Gov't Programs -- How Extensive Is It? How Can It Be Controlled?, Vol. 1, at 46 (AFMD-81-75, Nov. 6, 1981) (hereinafter cited as Gov't Procurement Fraud).
2. 18 U.S.C. § 201 (1976). This statute prohibits bribery and illegal gratuities in relation to witnesses and a broad spectrum of public officials. Although there are other more narrowly drawn laws prohibiting bribes or illegal gratuities in defined situations, these more restrictive statutes will not be addressed in any detail. See, e.g., 7 U.S.C. §§ 60, 85 (1976) (bribery of grain classifiers); 18 U.S.C. §§ 212-13 (1976) (offer/acceptance of loan or gratuity to a bank examiner); 18 U.S.C. § 215 (1976) (receipt of commissions or gifts for procuring loans); 18 U.S.C. § 224 (1976) (bribery in sporting contests); 21 U.S.C. § 622 (1976) (bribery of meat inspectors); 26 U.S.C. § 7214 (1976) (unlawful acts of revenue officers or agents); 47 U.S.C. § 509 (quiz show bribery). See also Project, White-Collar Crime: Second Annual Survey of Law, 19 AM. CRIM. L. REV. 173, 409 n.1902 (1981) (hereinafter cited as White-Collar Crime II).
3. See United States v. Arroyo, 581 F.2d 649, 655 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979); United States v. Jacobs, 431 F.2d 754, 759 (2d Cir. 1970), cert. denied, 402 U.S. 950; United States v. Passman, 460 F.Supp. 912, 918 (W.D.La. 1978); United States v. Griffin, 401 F.Supp. 1222 (S.D.Ind. 1975), aff'd, 541 F.2d 284 (7th Cir. 1976); Vaughn, The Personal Accountability of Public Employees, 25 AM. U. L. REV. 85, 124-27 (1975); R. VAUGHN, CONFLICT-OF-INTEREST REGULATION IN THE FEDERAL BRANCH 7 (1979) (hereinafter cited as VAUGHN).

Gov't employees are also subject to special administrative standard of conduct codes promulgated by Exec. Order in addition to other relevant federal criminal provisions. See Exec. Order No. 11222, 3 C.F.R. § 306 (1964-65 Comp.), as amended by Exec. Order No. 11590, 36 Fed. Reg. 7831 (1971) and Exec. Order No. 12107, 44 Fed. Reg. 1055 (1978), reprinted in 18 U.S.C. § 201, app. at 1025-27 (1976) and in 18 U.S.C. § 201, app. at 970-71 (Supp. V 1981). All major executive branch agencies have implemented detailed guidance for their employees under the procedures and delegation of authority in Exec. Order No. 11222, §§ 501-706. See, e.g., 5 C.F.R. pt. 735 (1982) (Civil Service Employee Responsibilities and Conduct); 32 C.F.R. pt. 40 (1982) (Dep't of Defense [DoD] Standards of Conduct, separately promulgated as DoD DIRECTIVE [DoDD] No. 5500.7, STANDARDS OF CONDUCT [Jan. 15,



1977]); 41 C.F.R. §§ 105-735.1-.5 (1982) (Gen. Serv. Admin. [GSA] Standards of Conduct). Public employees, therefore, are subject to a wide range of administrative sanctions, including discharge, for violations of applicable agency standard of conduct regulations. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as 5 U.S.C. § 1101, et seq. [1976 & Supp. V 1981]), details procedures for public sector administrative disciplinary proceedings. Consequently, even if an official's acceptance of an improper payment does not warrant criminal prosecution, the employee is still subject to considerable administrative jeopardy. See generally 5 U.S.C. § 7501, et seq. (1976 & Supp. V 1981). For employee removals sustained on judicial review, see infra notes 19-20, 22.

4. 18 U.S.C. § 201(c) (1976) provides:

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

(1) being influenced in his performance of any official act; or

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

(3) being induced to do or omit to do any act in violation of his official duty . . .

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

18 U.S.C. § 201 is also a defined "racketeering activity" which can be incorporated as a predicate offense under the Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. §§ 1961-68 (1976 & Supp. V 1981). See generally Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. CRIM. L. C. 1 (1978).

The Govt's legal weaponry against improper payments also includes an independent civil action for recovery of money damages as a non-exclusive remedy, in addition to criminal penalties and increasingly tough administrative sanctions (e.g., suspension and debarment). See Continental Mgmt., Inc. v. United States, 527 F.2d 613, 616-21 (Ct.Cl.

1975), which held that the Gov't has a common law right to damages from either the purveyor of the bribe or the corrupt employee. The amount of the bribe is considered a reasonable measure of the damages, even though evidence of direct or specific monetary injury to the United States cannot be established. See also Jankowitz v. United States, 533 F.2d 538, 547-49 (Ct.Cl. 1978); United States v. Pezzello, 474 F.Supp. 462, 463 (S.D.Tex. 1979). See generally Chemerinsky, Fraud and Corruption Against the Gov't: A Proposed Statute to Establish a Taxpayer Remedy, 72 J. CRIM. L. C. 1482 (1981) (hereinafter cited as Chemerinsky); Comment, Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials, 48 TENN. L. REV. 347 (1981); Wash. Post, Nov. 25, 1982, at A8, col. 1, reporting that the Justice Dep't (DoJ) had filed suit against former U.S. Rep. John W. Jenrette and a codefendant for the return of approximately \$50,000 which they allegedly accepted from undercover agents as part of the FBI's so-called "ABSCAM" sting investigation. See also, e.g., Agnew v. State, 51 Md.App. 614, 446 A.2d 425 (1982) (successful taxpayer qui tam suit against former vice-president Agnew for recovery of \$147,500 in kickbacks, plus interest, in relation to the award of state road engineering contracts during his tenure as governor of Maryland); Wash. Post, Jan. 5, 1983, at B3, col. 2, reporting that Agnew was subsequently forced to pay \$268,482 in "damages" as a result of the successful taxpayer suit noted above.

5. 18 U.S.C. § 201(b) (1976) provides:

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

(1) to influence any official act; or

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

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

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

6. 18 U.S.C. §§ 201(f),(g) (1976) provides:

(f) Whoever, otherwise than provided by law for the the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . .

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

In addition to criminal sanctions, the Gov't also has a common law right in a civil action to recover any gratuity which the employee has received. See supra note 4. See also United States v. Carter, 217 U.S. 286, 305-06 (1910); United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); United States v. Drumm, 329 F.2d 109, 113 (1st Cir. 1964); United States v. Eilberg, 507 F.Supp 267, 270-71 (E.D.Pa. 1980); United States v. Drisko, 303 F.Supp. 858, 860-61 (E.D.Va. 1969). See generally United States v. Iovenelli, 403 F.2d 468, 469 (7th Cir. 1968).

7. See United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Brewster, 506 F.2d 62, 77 (D.C. Cir. 1974); United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966). See generally ASS'N OF THE BAR OF THE CITY OF N.Y., CONFLICT OF INTEREST IN THE FEDERAL SERVICE 18-20 (1960). See also Petrowitz, Conflict of Interest in Federal Procurement, 29 LAW & CONTEMP. PROBS. 196, 196-200 (1964) (hereinafter cited as Petrowitz).

8. Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. §§ 201-18 [1976 & Supp. V 1981]). For a succinct overview of the origins of this Act, see Perkins, The New Federal Conflict of Interest Law, 76 HARV. L. REV. 1113 (1963) (hereinafter cited as Perkins). For a comprehensive legislative history abstract of Pub. L. No. 87-849, as well as the prior conflict-of-interest statutes, see B. MANNING, FEDERAL CONFLICT OF INTEREST LAW, App. E (1964) (hereinafter cited as MANNING).

9. See MANNING, supra note 8, at 7-8.
10. See Petrowitz, supra note 8, at 197 n.2.
11. VAUGHN, supra note 3, at 4, states as follows:

Not accidentally, the first conflict-of-interest statutes concerned activities in procurement and in the presentation of claims against the United States. The activities to which these provisions addressed themselves involved more blatant forms of corruption and self-dealing. These were also activities for which it was easier to devise a definition of government interest being served. In letting a contract, enforcing specifications, or paying claims, the government acts much like commercial enterprise. The need to determine the public or government interest is likewise less difficult [footnote omitted].

See also United States v. Hess, 127 F.2d 233, 235-36 (3d Cir. 1942):

"The government was cheated without conscience in its purchases of military supplies. A committee of the War Department in 1862 exposed frauds of \$17,000,000 in contracts amounting to \$50,000,000. The Michigan legislature formally charged that 'traitors in disguise of patriots have plundered our treasury', and James Russell Lowell, agreeing, asserted, 'Men have striven to make the blood of our martyrs the seed of wealth.' The term, 'shoddy aristocracy', came to signify those who reaped fortunes out of government contracts, particularly from supplying the soldiers with inferior clothing [footnotes and citation omitted]."

12. See Cranston, Regulating Conflict of Interest of Public Officials: A Comparative Analysis, 12 VAND. J. TRANSNAT'L L. 215, 219 (1979). See also notes 196-201 & 462, infra and accompanying text.
13. This elements synopsis is based upon a paraphrase of 18 U.S.C. §§ 201(b),(c), and the comparison of bribes and gratuities in United States v. Brewster, supra note 7, at 67:

Bribery Section (c)(1)

(c) Whoever, being a public official [ ] or person selected to be a public official, directly or indirectly

[A] corruptly

Gratuity Section (g)

(g) Whoever, being a public official [former public official,] or person selected to be a public official

[A] otherwise than provided by law for the

asks, demands, exacts,  
solicits, seeks, accepts,  
receives, or agrees to  
receive anything of value  
for himself

[B] or for any other person  
or entity,

[C] in return for:

(1) being influenced in  
his performance of any  
official act . . . (shall be  
guilty of . . .)

proper discharge of  
official duty, directly or  
indirectly

asks, demands, exacts,  
solicits, seeks, accepts,  
receives, or agrees to  
receive anything of  
value for himself

[C] for or because of  
any official act  
performed or to be  
performed by him . . .  
(shall be guilty  
of . . .)

The Gov't must prove every essential element of the crime charged beyond a reasonable doubt (notwithstanding the separate issue of affirmative defenses). See Mullaney v. Wilbur, 421 U.S. 684, 696-702 (1975); In re Winship, 397 U.S. 358 (1970). For a discussion of the elements of bribery, see generally II E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 34.05 (3d ed. 1977 & Supp. 1981) (hereinafter cited as DEVITT & BLACKMAR); B. EIMER & J. SWENNEN, GOV'T PROCUREMENT INVESTIGATIONS (Fed. Pubs.) 2-40 to -43 (1982) (hereinafter cited as EIMER & SWENNEN); GOV'T CONT. BRIEFING PAPERS, Ethics in Government Procurement 3-7, No. 78-3 (June 1978) (hereinafter cited as Ethics in Procurement).

14. The term "public official" is defined in 18 U.S.C. § 201(a) (1976) as a:

[M]ember of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he 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 . . .

15. The term "official act" is also defined in 18 U.S.C. § 201 (a) (1976):

"[O]fficial act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which at any time may be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

16. See United States v. Arroyo, *supra* note 3, at 655; United States v. Evans, *supra* note 7, at 480; United States v. Anderson, 509 F.2d 312, 333 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); Parks v. United States, 355 F.2d 167, 168 (5th Cir. 1965). *But cf.* United States v. Enmons, 410 U.S. 396, 411 (1973); United States v. Smith, 360 U.S. 1, 9 (1959). See generally Hall, Strict or Liberal Construction of Penal Statutes, 48 HARV. L. REV. 748 (1935).
17. See United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978) (Customs Service employee solicited \$800); United States v. Brewster, *supra* note 7, at 65-67 (gratuity convictions of U.S. Sen. for receiving improper "campaign contributions" from a mail order company, rev'd and rem'd on other grounds); United States v. Egenberg, 441 F.2d 441, 442-43 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971) (several improper cash payments made by a CPA to IRS technicians); United States v. Umans, 368 F.2d 725, 727 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967) (another case involving improper cash payments made by a CPA to IRS auditors for favorable tax treatment).
18. See generally Project, White-Collar Crime: A Survey of Law, 18 AM. CRIM. L. REV. 165, 244-45 (1980) (hereinafter cited as White-Collar Crime I); White-Collar Crime II, *supra* note 2, at 411.
19. See United States v. Hartley, 678 F.2d 961, 967 (11th Cir. 1982) *aff'g* 486 F.Supp. 1348 (M.D.Fla. 1980); United States v. Roberts, 408 F.2d 360, 361 (2d Cir. 1969). *Accord*, United v. Heffron, 405 F.2d 1307 (Ct.Cl. 1969) (discharge of a Gov't contract administrator for accepting a half case of liquor in violation of the DoD Standards of Conduct sustained, notwithstanding the employee's almost 15 years of prior satisfactory public service). See also Jones v. United States, 617 F.2d 233 (Ct.Cl. 1980) (Agriculture Dep't meat inspector discharged for accepting one bottle of whiskey from the owner of a meat plant in which the inspector worked).
20. See United States v. Niederberger, 580 F.2d 63, 65 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); United States v. Evans, *supra* note 7, at 466 (a trip from Dallas-Fort Worth to Las Vegas). *Accord*, Lowery v. Richardson, 390 F.Supp. 356, 358-59 (E.D.Okla. 1973) (Navy Constr. Rep.'s acceptance of a unofficial trip from Oklahoma to Texas in a contractor's private aircraft was sufficient, in part, to uphold the employee's removal for cause, although alternative commercial flights were not available).
21. See United States v. Crutchfield, 547 F.2d 496, 499 (9th Cir. 1977); United States v. Harary, 457 F.2d 471, 473 (2d Cir. 1972). See also 11 REP. 61 (Office of The Judge Advocate Gen. of the A.F.) (Apr. 1982), which noted that

a sexual harassment case had recently been prosecuted as an 18 U.S.C. § 201 offense:

Rumors that sexual harassment has been charged by civilian authorities in some jurisdictions as a criminal offense now have been confirmed. A federal grand jury in the middle district of Pennsylvania returned an indictment against a federal civilian employee for soliciting bribery, a violation of 18 U.S.C. § 201, by "directly and indirectly, corruptly ask[ing], demand[ing], solicit[ing] and seek[ing] things of value for himself, that is, sexual acts to be performed upon himself" by an employee under his supervision. The defendant in that criminal action reportedly has been convicted on one of two counts but sentencing reportedly has been postponed pending the ruling on defendant's motion for a new trial. It is alleged in the indictment that this sexual consideration induced the defendant to do and to omit doing official acts affecting the "emoluments, benefits, tasks, enjoyment, status and continuation of . . . employment" of the harassee.

22. See United States v. Alessio, 528 F.2d 1079, 1080 (9th Cir.), cert. denied, 426 U.S. 948 (1976) (a prison administrator accepted vacation trips to San Diego and Las Vegas which were paid by prisoners in his facility). Accord, Lane v. United States, 633 F.2d 1384 (Ct.Cl. 1980) (four former employees of the Internal Revenue Audit Division were deemed properly discharged for receiving gratuities -- meals, drinks and green fees at golf clubs -- in violation of agency standard of conduct regulations); Edwin Parker III v. United States, 28 CONT. CAS. FED. (CCH) ¶ 80,791 (Ct.Cl. No.51-79, May 9, 1980) (GS-15 Computer Systems Analyst's discharge for cause sustained, based in part, upon his receipt of in excess of \$3000 in meals and entertainment from a contractor whose \$2.68 million contract he administered as project officer); Monahan v. United States, 354 F.2d 306 (Ct.Cl. 1965) (dismissal sustained of GS-12 who allowed a trucking company, with which he had official dealings, to pay his hotel bill on six occasions). See also Annot., 67 A.L.R.3d 1231 (1975) (overview of gratuities from a state law perspective).
23. See United States v. Head, 641 F.2d 174 (4th Cir. 1981), 697 F.2d 1200 (4th Cir. 1982), cert. denied, U.S., 103 S.Ct. 3113 (1983); United States v. Hare, 618 F.2d 1085, 1086-87 (4th Cir. 1980); United States v. Dobson, 609 F.2d 840, 841 (5th Cir.), cert. denied, 446 U.S. 955 (1980).
24. See United States v. Campbell, 684 F.2d 141, 145 (D.C. Cir. 1982) (free move of household goods); United States v. Hartley, supra note 19, at 967 (boxes of shrimp); United States v. Kenny, 645 F.2d 1323, 1330 (9th Cir.), cert.

- denied, 452 U.S. 920 (1981) (telephone, credit card, business cards and stationery, magazine subscriptions, and a safe); United States v. Crutchfield, supra note 21, at 499 (car); United States v. Austin, 529 F.2d 559, 562 (6th Cir. 1976) (a new AMC automobile); United States v. Pommerening, 500 F.2d 92, 96 (10th Cir.), cert. denied, 419 U.S. 1088 (1974) (Chevrolet Blazer); United States v. Allen, 409 F.Supp. 562, 564 (E.D.Va. 1975) (tires, stereo, travel, clothes, whiskey and food); United States v. Drisko, supra note 6, at 859 (deep freezer and two cars).
25. See, e.g., United States v. Girard, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979). See generally notes 85-114 infra and accompanying text (discussion of gratuities rule structure).
26. See United States v. Pommerening, supra note 24, at 97; United States v. Brewster, supra note 7, at 76-77; United States v. Irwin, supra note 7, at 197.
27. See, e.g., United States v. Heffron, supra note 19; Jones v. United States, supra note 19; Lowery v. Richardson, supra note 20; Lane v. United States, supra note 22; Edwin Parker III v. Richardson, supra note 22; Monahan v. United States, supra note 22. See generally G. Carrle, Acceptance of Gratuities by Gov't Employees (1981) (unpub. paper for Prof. R. Nash, available at Nat'l L. Center, Gov't Cont. Program Off., Geo. Wash. U.).
28. An illegal gratuity will be referenced as lesser included offense of bribery. From a strictly technical standpoint, however, there are situations when this does not necessarily follow. See, e.g., United States v. Zacher, 586 F.2d 912, 915 (2d Cir. 1978); United States v. Raborn, 575 F.2d 688, 691-92 (9th Cir. 1978); United States v. Brewster, supra note 7, at 67-76; United States v. Umans, supra note 17, at 730. But see United States v. Campbell, supra note 24, at 147-48; United States v. Passman, supra note 3, at 916-18.
29. United States v. Standefer, 452 F.Supp. 1178, 1184-85 (W.D.Pa. 1978), aff'd, 610 F.2d 1076, 1080 (3d Cir. 1979), aff'd, 447 U.S. 10 (1980); United States v. Brewster, supra note 7, at 71-72.
30. See 32 C.F.R. § 7-104.16 (1982) (hereinafter all citations to the Defense Acquisition Regs. [DAR] and the Federal Procurement Regs. [FPR] will be referenced by DAR & FPR section numbers only since section citations are identical in the DAR and 32 C.F.R. and in the FPR and 41 C.F.R.), which provides:

Gratuities. Insert the following clause in all fixed-priced supply contracts and purchase orders, except contracts and purchase orders with foreign governments



obligating solely funds other than those contained in Department of Defense appropriation acts.

**Gratuities(1952 MAR)**

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract [emphasis added].

DAR App. D, details the administrative notice and hearing requirements under the Gratuities Clause. Note that no formal criminal conviction is required to trigger the damage and forfeiture provisions of this clause. Consequently, if a DoD employee is disciplined for violating DoDD No. 5500.7, see supra note 2, by accepting a gratuity from a defense contractor whose contract has a Gratuities Clause, and it is also determined that the contractor offered the official the gratuity with a view toward securing a Gov't contract or other favorable treatment, that contractor is at risk. The adverse action against the DoD employee could arguably be used to establish prima facie case against the contractor in view of the broad scope of the Gratuities Clause. Violations of this clause are also grounds for debarment. See

DAR § 1-604. See also I GOV'T CONT. REP. (CCH) ¶ 360 (1982).

Although this clause is not often invoked, DoD contractors should not myopically ignore its existence. Application of this clause on a selected basis could provide any Administration determined to deter procurement-related Fraud, Waste and Abuse (FW&A) with immediate "saber-rattling" credibility. See generally Sherick, Cracking Down on Fraud in Gov't Procurement, DEFENSE/83, Jan. 1983, at 25-28 (comments by the new DoD Inspector General, and then Ass't to the Secretary of Defense for Review and Oversight [ASTD-R&O], on the role of the recently created Defense Procurement Fraud Unit -- a joint DoJ and DoD task force designed to enhance both civil and criminal litigation) (hereinafter cited as Sherick); Defense Review and Oversight: Why Personal Accountability Is the Key, GOV'T EXECUTIVE, Sept. 1981, at 15-18 (general role of the ASTD-R&O in the DoD's FW&A program); Carlucci, Focusing on Fraud and Waste, DEFENSE/81, Aug. 1981, at 3-7 (former Deputy Secretary of Defense's comments on DoD initiatives to combat FW&A).

See also, e.g., General Ship v. United States, 205 F.Supp. 658, 661 (D.N.J. 1962). But cf. Heffron v. United States, supra note 19, at 1310-11, where the Court stated: "whether or nor the contract plaintiff administered was forfeited is not relevant to the charge that plaintiff violated the gratuity regulations . . . It is clear, moreover, that the prohibited act here involved is the acceptance of a gratuity simpliciter regardless of the purpose or intention of the contractor or personnel in giving it." The hapless Gov't employee, consequently, is in jeopardy regardless.

31. 10 U.S.C. § 2207 (1976) provides:

Money appropriated to the Department of Defense may not be spent under a contract other than a contract for personal services unless that contract provides that --

(1) the United States may, by written notice to the contractor, terminate the right of the contractor to proceed under the contract if the Secretary concerned or his designee finds, after notice and hearing, that the contractor, or his agent or representative, offered or gave any gratuity, such as entertainment or a gift, to an officer, official, or employee of the United States to obtain a contract or favorable treatment in the awarding, amending, or making of determinations concerning the performance, of a contract; and

(2) if a contract is terminated under clause (1), the United States has the same remedies against the contractor that it would have had if the contractor

breached the contract, and, in addition to other damages, is entitled to exemplary damages in an amount at least three, but not more than 10, as determined by the Secretary or his designee, times the cost incurred by the contractor in giving gratuities to the officer, official, or employee concerned.

The existence of facts upon which the Secretary makes findings under (clause 1) may be reviewed by any competent court [emphasis added].

Although there is an absence of reported decisions regarding the use of this statutory enforcement tool, the current DoD initiatives against FW&A could breathe life into this tough deterrent sanction. See generally Sullivan, Procurement Fraud: An Unused Weapon, 95 MIL. L. REV. 117, 123 n.18 (1982) (hereinafter cited as Sullivan).

See also 18 U.S.C. § 218 (1976). This statute provides for the rescission of any contract in which there has been a final conviction for bribery, graft, or conflicts-of-interest. Both the Justice Dep't and DoD have recently requested the Administration to administratively implement the tough forfeiture provisions of this act. See 39 FED. CONT. REP. (BNA) 1042 (Apr. 23, 1983):

The Defense and Justice Departments, which have a joint team designed to crack down on fraud in defense contracts, have requested the Administration take steps to allow the statute to be fully implemented.

As written, the statute requires either presidential action or the issuance of regulations giving agency heads the authority to implement the statute. Neither has been done.

The Office of Management and Budget is currently seeking input from the federal departments and agencies on the need for an executive order or regulations.

Needless to say, industry does not approve of the effort. The American Bar Association's Public Contract Law Section is expected to issue a statement soon urging an opportunity for public comment.

See generally Sullivan, id.

32. See United States v. Strand, supra note 17, at 995-96; United States v. Brewster, supra note 7, at 72, 82; United States v. Polansky, 418 F.2d 444, 446 (2d Cir. 1969); United States v. Irwin, supra note 7, at 914. See generally Perkins, Rationale of Mens Rea, 52 HARV. L. REV. 905 (1939). See also White-Collar Crime I, supra note 18, at 240-42; White-Collar Crime II, supra note 2, at 414-16.

33. See United States v. Arthur, 544 F.2d 730, 734-35 (4th Cir. 1979); United States v. Brewster, *supra* note 7, at 71-72; United States v. Barash, 365 F.2d 395, 401-02 (2d Cir. 1966), *aff'd on reh'g*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969). See generally Comment, The Federal Statute: An Argument for Cautious Revision, 68 KY. L. J. 1026, 1037-40 (1979) (hereinafter cited as The Federal Statute). See also Morano, The Mail-Fraud Statute: A Procrustean Bed, 14 J. MAR. L. REV. 45, 57 n.36 (1980) (hereinafter cited as Morano), in which the author highlighted the nexus between scienter/mens rea and the prohibited act:

It is the fundamental principle of criminal law that criminality turns on a concurrence of prohibited action and criminal intent. When the famous actor Garrick declared that he felt like a murderer whenever he acted Richard III, Dr. Johnson, the moralist, retorted: "Then he ought to be hanged whenever he acts it!" But the criminal law cannot punish the mere harboring of evil intentions.

[A]s no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reasons, in all temporal jurisdictions, an overt act, or some open evidence of an intended crime is necessary . . . before the man is liable to punishment. 4 BLACKSTONE'S COMMENTARIES, ON THE LAW OF ENGLAND 21.

34. Supra note 17, at 996.
35. Id.
36. United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980).
37. Id. [emphasis added].
38. Id.
39. 18 U.S.C. § 201(a) (1976) [emphasis added]. See generally Project, White-Collar Crime: Survey of Law -- 1982 Update, 20 AM. CRIM. L. REV. 291, 330-32 (1982) (hereinafter cited as White-Collar Crime III).
40. See generally White-Collar Crime I, *supra* note 18, at 411-12; White-Collar Crime II, *supra* note 2, at 242-43.
41. United States v. Alessio, *supra* note 22, at 1080.
42. See United States v. Johnson, 647 F.2d 815, 816-17 (8th Cir. 1981); United States v. Crutchfield, *supra* note 21, at 498-

- 99; United States v. Harary, *supra* note 21, at 472-74; United States v. Cohen, 387 F.2d 803, 804 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968).
43. See United States v. Ylda, 643 F.2d 348, 349-50 (5th Cir. 1981); United States v. Pezzello, *supra* note 4, at 462-63. Accord, Harlow v. United States, 301 F.2d 361, 370-71 (5th Cir.), cert. denied, 371 U.S. 814 (1962) (European Exchange Service [EES] non-appropriated fund employee); United States v. Greenberg, 223 F.Supp. 350, 351 (S.D.N.Y. 1963) (EES non-appropriated fund employee).
44. United States v. Carson, 464 F.2d 424, 434 (2d Cir.), cert. denied, 409 U.S. 949 (1972).
45. United States v. Dixon, 658 F.2d 181, 183-84 (3d Cir. 1981).
46. United States v. Kirby, 587 F.2d 876, 879 (7th Cir. 1978); United States v. Fleetwood, 528 F.2d 528, 529 n.2 (5th Cir. 1976).
47. United States v. Iaconetti, 406 F.Supp. 554, 555-56, aff'd, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).
48. United States v. Pommerening, *supra* note 24, at 96.
49. Parks v. United States, *supra* note 16, at 168. See also Hurley v. United States, 192 F.2d 297 (4th Cir. 1951) (\$450 bribe to an Army sergeant).
50. United States v. King, 469 F.Supp. 167, 169 (D.S.C. 1979).
51. See United States v. Heffler, 402 F.2d 924, 925 (3d Cir. 1968), cert. denied sub non. Cicchini v. United States, 394 U.S. 946 (1969) (although defendant was a supervising eng'r, the Court stated in dictum that a contracting officer would clearly be a "public official"). See also United States v. Lev, 258 F.2d 9, 11-12 (2d Cir. 1958), aff'd mem., 360 U.S. 470 (1959); United States v. Razette, 199 F.2d 44, 46 (6th Cir.), cert. denied, 344 U.S. 904 (1952).
52. K & R Eng'r Co. v. United States, 616 F.2d 469, 470-71 (Ct.Cl. 1980).
53. United States v. Griffin, *supra* note 3, at 1230.
54. United States v. Dobson, *supra* note 23, at 842.
55. 18 U.S.C. §§ 201(b),(c) (1976). See also United States v. Passman, *supra* note 3, at 917; United States v. Brewster, *supra* note 7, at 81.
56. United States v. Loschiavo, 531 F.2d 659, 661 (2d Cir.

- 1976). See also United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975).
57. United States v. Loschiavo, id. at 661.
58. Id. See also United States v. Del Toro, supra note 56, at 662.
59. United States v. Loschiavo, supra note 56, at 660.
60. United States v. Kirby, supra note 46, at 879 n.2. See also infra notes 61-64.
61. 659 F.2d 812 (7th Cir. 1981) (distinguishing United States v. Loschiavo and United States v. Del Toro, supra note 56). But see United States v. Hoskins, 520 F.Supp. 410 (N.D.Ill. 1981) (contra result involving an Ill. state CETA administrator).
62. Supra note 53. See also United States v. Hinton, 683 F.2d 195 (7th Cir.), cert. granted, 51 U.S.L.W. 3460 (U.S. Dec. 14, 1982) (No.82-5331 [in forma pauperis]); United States v. Kirby, supra note 46; United States v. Fleetwood, supra note 46.
63. 672 F.2d 751 (9th Cir. 1982) (this case also distinguished United States v. Loschiavo and United States v. Del Toro, supra note 56).
64. See, e.g., United States v. Gallegos, 510 F.Supp. 1112 (D.N.M. 1981) (state employee administering federal Farmers Home Admin. grants).
65. 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973).
66. Supra notes 15 & 16. See generally White-Collar Crime I, supra note 18, at 242-44; White-Collar Crime II, supra note 2, at 413-14.
67. United States v. Brewster, supra note 7, at 62.
68. 635 F.2d 932, 934-35 (2d Cir.) aff'g 527 F.Supp. 1206 (E.D.N.Y. 1981), cert. denied, 449 U.S. 956 (1980). See also United States v. Myers, 692 F.2d 823 (2d Cir. 1982), petitions for cert filed, 51 U.S.L.W. 3554, 3555, 3567 (U.S. Jan. 14, 17, 1983) (Nos. 82-1183, -1199, -1255).
69. The word "ABSCAM" was coined from the first two letters of "Abdul Enterprises Ltd". This was the name which FBI agents gave to a fictitious business operation which was involved in a sting investigation. The word "scam" is probably a slang expression for swindle. The infamous "ABSCAM" trials resulted in the criminal convictions of a U.S. Sen., six U.S. Reps., the Mayor of Camden, N.J., three members of the

City Council of Philadelphia, an Immigration and Naturalization Service official, plus several businessmen and lawyers. See Wash. Post, Dec. 28, 1982, at A12, col. 1. See also United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983), rev'g 539 F.Supp. 363 (D.D.C. 1982); United States v. Williams, 705 F.2d 603 (2d Cir. 1983), 644 F.2d 950 (2d Cir. 1981), aff'g 529 F.Supp. 1085 (E.D.N.Y.); United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982); United States v. Myers, id; United States v. Alexandro, 675 F.2d 34 (2d Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 78 (1982); United States v. Janotti, 501 F.Supp. 1182 (E.D.Pa. 1980), rev'd, 673 F.2d 578 (3d Cir. 1981), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 2906 (1982); United States v. Murphy, 642 F.2d 699 (2d Cir. 1980).

See generally The Senate Select Committee to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice, S. REP. NO. 97-682, 97th Cong., 2d Sess. (1982). The report generally gave the ABSCAM investigations a mixed review:

The Select Committee finds that the FBI undercover operation known as Abscam paradigmatically demonstrates many of the benefits, dangers, and costs of the undercover technique. Abscam resulted in the conviction of numerous elected and appointed officials, confidence men, businessmen, and lawyers and in the recovery of millions of dollars of fraudulent securities. Ten separate juries heard the testimony of witnesses, saw videotapes, and read documents; each of those juries found guilty each of the Abscam defendants who appeared before it. All appellate courts to date that have reviewed those convictions have found them to have been achieved without any violation of the defendant's constitutional rights. Abscam's successes are likely to deter public officials in the future from readily selling their offices for private gain. Such results could not have been obtained without the use of undercover techniques.

On the other hand, the absence . . . of Department of Justice guidelines governing undercover operations, the laxness of the guidelines then in existence governing the use of informants, the failure of . . . special agents . . . in the field to review, to catalogue, and to report recordings and other evidence in a timely and otherwise adequate manner, and the absence of rigorous requirements to keep officials at FBI HQ adequately informed . . . created unnecessary and undue risks in Abscam. Some of those risks materialized into real problems . . . Other risks remained only latent in Abscam, but are matters for concern in future operations.

Id. at 21-22.

70. Supra note 17, at 996.
71. United States v. Johnson, supra note 36, at 1076.
72. United States v. Standefer, supra note 29, at 1080; United States v. Niederberger, supra note 20, at 68-69.
73. United States v. Brewster, supra note 7, at 82.
74. United States v. Helstoski, 576 F.2d 511, 517 (3d Cir. 1978), aff'd, 442 U.S. 477, aff'd sub nom. Helstoski v. Meanor, 442 U.S. 500 (1979); United States v. Brewster, 408 U.S. 501, 526 (1972); United States v. Johnson, supra note 36, at 1076; United States v. Rosner, 485 F.2d 1213, 1229 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Deutsch, 475 F.2d 55, 56 (5th Cir. 1973); United States v. Jacobs, supra note 3, at 759-60.
75. Id. See generally, e.g., Annot., 20 A.L.R. FED. 950 (1974) ("consummation" of a bribery offense).
76. See United States v. Dobson, supra note 23, at 842; United States v. Evans, supra note 7, at 479-81; United States v. Carson, supra note 44, at 433-34; United States v. Heffler, supra note 51, at 926; United States v. Vineyard, 335 F.2d 176, 182-83 (8th Cir.), cert. denied, 379 U.S. 930 (1964); United States v. Hurley, supra note 49, at 300. But see United States v. Muntain, 610 F.2d 964, 967-69 (D.C.Cir. 1979), which held that a high ranking HUD employee who received various benefits (including a joint 10 day trip to Ireland with his wife) in return for his involvement in a private group insurance scheme, was not guilty of receiving an illegal gratuity. The promotion of insurance scheme could not properly be brought before the defendant, i.e., it was not a matter within the ambit of his official HUD-related duties.
- The Court adopted this position despite the fact that Muntain directed subordinates to assist in promoting the scheme on at least two occasions. See id. at 969. See also United States v. Dansker, 537 F.2d 40, 49-51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (Travel Act case [18 U.S.C. § 1952] involving violation of N.J. bribery law, rev'd, in part, for failure to prove employee's authority to influence official acts); Woelfel v. United States, 237 F.2d 484 (4th Cir. 1956) (trial court's judgment rev'd for failure to instruct regarding contract inspector's possible absence of authority). See generally Annot., 158 A.L.R. 323 (1945) (bribery -- nonexistence of duty); Annot., 73 A.L.R.3d 374 (1976) (bribery -- lack of officer's authority).
77. United States v. Irwin, supra note 7, at 196; United States v. Miller, 340 F.2d 421, 424-25 (4th Cir. 1965).



78. Supra note 3, at 654-56.
79. United States v. Heffler, supra note 51, at 926.
80. 233 U.S. 223, 230-31 (1914) [citations omitted and emphasis added]. See also United States v. Morlang, 531 F.2d 183, 192 (4th Cir. 1975); Hurley v. United States, supra note 49, at 299-300.
81. See United States v. Muntain, supra note 76, at 967-68 n.3 (i.e., actions held to be "official acts" even within the restrictive interpretation of that case).
82. United States v. Heffler, supra note 51, at 925.
83. Supra note 76.
84. United States v. Johnson, supra note 36, at 1076.
85. See supra notes 28, 54-55.
86. See notes 18-31 & 39-65 supra and accompanying text (discussion of the concepts of "something of value" and "public official").
87. See supra note 6.
88. See supra note 13 (comparison of the different elements required for an illegal gratuity and bribery). See also ELMER & SWENNEN, supra note 13, at 2-43 to -46.
89. See United States v. Passman, supra note 3, at 917; United States v. Brewster, supra note 7, at 80; United States v. Barash, supra note 33, at 29; United States v. Kenner, 354 F.2d 780, 785 (2d Cir.), cert. denied, 383 U.S. 958 (1965); United States v. Fenster, 449 F.Supp. 435, 438 (E.D.Mich. 1978) See generally The Federal Statute, supra note 33, at 1040-45; Perry, The Fuzzy World of Illegal Gratuities, DISTRICT LAW., June-July 1979, at 25 (herein-after cited as Perry).
90. See United States v. Passman, supra note 3, at 914; United States v. Alessio, supra note 22, at 1082; United States v. Brewster, supra note 7, at 82; United States v. Strand, supra note 17, at 995.
91. Supra note 7, at 481.
92. See United States v. Passman, supra note 3, at 915; United States v. Brewster, supra note 7, at 81; United States v. Irwin, supra note 7, at 197.
93. See United States v. Evans, supra note 7, at 480; United States v. Arroyo, supra note 3, at 654-57; United States

- v. Strand, supra note 17, at 995 n.2; United States v. Irwin, supra note 7, at 196.
94. See United States v. Niederberger, supra note 20, at 68; United States v. Evans, supra note 7, at 480-81; United States v. Alessio, supra note 22, at 1082. But see United States v. Umans, supra note 17, at 730.
95. See generally Perry, supra note 89; The Federal Statute, supra note 33, at 1040-45. These two articles discuss the apparent split of authority regarding the specificity required by the "for or because of" element in 18 U.S.C. §§ 201(f),(g). As an aside, the recent decision of United States v. Campbell, supra note 24, appears to have resolved the specificity issue in favor of the more "expansive reading" which the Perry article sought to discredit.
96. Id.
97. Supra note 7, at 81.
98. Id [emphasis added].
99. United States v. Campbell, supra note 24, at 149-50.
100. Id.
101. Id. at 150 n.16. This point was also raised in United States v. Passman, supra note 3, at 915:

If an elected officials receives campaign money given by a grateful constituent who is pleased by a vote that has already been made, then clearly there is no violation of subsection (g). However, if this grateful constituent attaches a note saying this is for your vote which you cast last week in favor of our labor bill which was pending before you, then subsection (g) would be applicable. The difference between the two hypotheticals is that in the first example the contribution was unrelated to an official act while in the second example the elected official knew that the contribution was due to an official act, and therefore within the scope of 18 U.S.C. § 201(g).

102. United States v. Campbell, supra note 24, at 149.
103. Id. [emphasis added].
104. Id. See generally United States v. Gillock, 445 U.S. 360 (1980); United States v. Helstoski, supra note 74; Gravel v. United States, 408 U.S. 606 (1972); United States v. Johnson, 383 U.S. 169 (1966); Case Comment, United States v. Helstoski: The Speech or Debate Clause in the Criminal

Context, 15 NEW ENG. L. REV. 407 (1980); Note, Evidentiary Implications of the Speech or Debate Clause, 88 YALE L. J. 1280 (1979); Note, Campaign Contributions and Federal Bribery Laws, 92 HARV. L. REV. 451 (1978); Ervin, The Gravel and Brewster Cases: An Assault on Congressional Independence, 59 VIR. L. REV. 175 (1973); Note, The Bribed Congressman's Immunity from Prosecution, 75 YALE L. J. 335 (1965).

105. Supra note 33.
106. Id. at 735.
107. United States v. Campbell, supra note 24, at 146.
108. United States v. Arthur, supra note 33, at 733 n.3. Additional compensation in that case involved:

[A]ppellant testified that on various occasions he used \$120 to to buy postage stamps for West Virginia Assistant State Treasurer Joseph RyKoskey who had some control over the deposit of state funds in local banks, \$50 to buy cards for a member of the State House of Delegates who, appellant hoped, might be helpful in obtaining certain state accounts for the bank, \$25 to pay the expenses of a golf outing with RyKoskey (including reimbursing RyKoskey for his travel expenses), \$150 to buy Jackson Day Dinner tickets from RyKoskey, \$100 to join Republican Century Club, \$10 to purchase Heart Association raffle tickets from RyKoskey, \$400 as a contribution to State Treasurer Kelly, \$50 to give, as a contribution to the Republican Party, to the state National Committeewoman who was helping to secure a post office account for the bank, \$100 to buy Inaugural Gala tickets from the State Road Engineer who was helpful with respect to the "bridge account," and \$40 to purchase tickets to the Inaugural Ball for RyKoskey. Appellant testified to numerous other expenditures which were substantially similar in nature to those set forth.

See generally United States v. Caldwell, 544 F.2d 691 (4th Cir. 1976) (related federal mail fraud and mis-application of bank funds case involving similar facts).

109. United States v. Campbell, supra note 24, at 144.
110. See United States v. Niederberger, supra note 20, at 69. See also United States v. Evans, supra note 7, at 481; United States v. Alessio, supra note 22, at 1082; United States v. Barash, supra note 33, at 29.
111. United States v. Standefer, supra note 29, at 1080-81. The following observation by the Court is instructive on this

point:

Although Standefer argued that the trip was given for reasons of friendship, there is no evidence that he ever provided trips for Niederberger prior to his becoming the IRS case manager for Gulf account or that he has done so since Niederberger left that position. Nor does anything in the record show that Standefer was as generous with corporate funds in giving gifts to any non-business friends. And it appears that Standefer had no social relationship with Niederberger, other than the contact he had with him in their various official capacities. Moreover, Standefer's immediate subordinate and own witness, Fitzgerald, testified that he did not believe Standefer and Niederberger to be "close business friends," but that he considered them to be only "business friends" [citations omitted].

112. Perry, supra note 89, at 25. See also Wash. Post, Feb. 18, 1983, A2, at col. 1 (the following allegations are part of the so-called "Sewergate" controversy which has been percolating during the early days of the 98th Cong.), which reported:

Rita M. Lavelle may have violated Environmental Protection Agency regulations while she headed the agency's hazardous waste cleanup program by allowing representatives of the chemical industry to pay for frequent meals at some of Washington's most expensive restaurants, according to the agency's ethics officer.

\* \* \*

Six congressional panels are investigating the activities of Lavelle, whom President Reagan dismissed Feb. 7 as head of the hazardous waste cleanup program, and the possibility that Lavelle and other EPA officials negotiated "sweetheart deals" with firms rather than force them to pay their share for cleaning up hazardous waste sites. Lavelle had primary responsibility for the \$1.6 billion "Superfund" hazardous waste cleanup program.

Her appointment calendars, which were turned over to a Senate committee Wednesday night, read like a Who's Who of the American chemical industry.

\* \* \*

According to the calendars, she met with representatives of Monsanto, Dow Chemical, the Chemical Manufacturers Association, Chevron USA, Du Pont, Union Carbide and Allied Corp., among others.

Don Nantkes, EPA's ethics officer, said yesterday, "General government regulations on employe's responsibilities and conduct say employes are not allowed to accept meals or anything of value from anyone dealing with their agency or regulated by the agency."

He said the EPA and many other federal agencies allow an exception so that a federal employe may "accept food and refreshments of nominal value on infrequent occasions," but only during a legitimate business meeting.

"Whenever I'm asked, I say that means if you're at a plant in the middle of a meeting and you go to the corporate dining room and there's no provision for separate billing, or if you're in a meeting and someone sends out for sandwiches -- okay.

"But I've always underlined that you're not allowed to accept business lunches . . . I don't like the appearance of it at all," he said.

See generally 5 C.F.R. § 735.202(b)(2).

113. See, e.g., United States v. Boyett, Crim. No. 81-151 (D.N.J.), Legal Times of Wash., Sept. 21, 1982, at 1, col. 1. This case of first impression involved, inter alia, the gift of gratuities from one Gov't employe to another Gov't employe. The prosecutor argued that "if an official is in a position to aid a subordinate in any way professionally, then accepting a gift (the gratuities in this case involved large quantities of soda, beer, wine and liquor) violates the criminal statute with no showing of actual intent being required." Id. at 13.

The defense, which won a hotly contested acquittal, obtained a jury instruction to the effect that, "to convict, the Gov't had to prove the accused (recipient of the gratuity) had some favor in mind for the gift-giver." Although there are several interesting, albeit unfortunate, aspects to this case, one paragraph of the news article is particularly insightful regarding the consequences which could result from a strict and literal application of the prosecution's logic:

U.S. District Judge H. Lee Sarokin reserved judgement on the defense motion to dismiss the indictment on the statutory grounds. The resolution of the legal issue was then pre-empted by the jury's verdict. The judge did ask some interesting questions, according to the defense lawyers, when the motion was argued, causing the prosecution to acknowledge that, under its theory, a law clerk who took a judge to lunch could be committing a felony.

Id. at 13, col. 4. The apparent logic behind Judge Sarokin's question is problematic from a consistency standpoint. The prosecution is basically arguing that even in the context of a Gov't superior-subordinate relationship, no showing of actual intent is required to satisfy the "for or because" requirement. Notwithstanding the Judge's suspect pre-Campbell instruction, the prosecution's argument is disturbingly consistent with a mechanical interpretation of the gratuity statute.

At the same time, however, if this intent/object rule structure is read in conjunction with the "anything of value" requirement (see notes 17-31 supra and accompanying text), the threshold for a "technical" felony violation is uncomfortably de minimis, i.e., anything of value arguably tending to influence an official act. Yet contrast this, for example, with the following exceptions to the receipt of nominal gratuities by DoD personnel in DoDD No. 5500.7, STANDARDS OF CONDUCT ¶ VIII(C)(2), (13) (Jan. 15, 1977):

Limited Exceptions. The general prohibition in subsection B., above, does not apply to the following:

\* \* \*

2. The acceptance of unsolicited advertising or promotional items that are less than \$5 in retail value.

\* \* \*

13. Situations in which, in the sound judgment of of the individual concerned or his supervisor, the Government's interest will be served by DoD personnel participating in activities otherwise prohibited. In any such case, a written report of the circumstances shall be made in advance, or, when an advance report is not possible, within 48 hours by the individual or his supervisor to the appropriate Standards of Conduct Counselor (or designated Deputy Counselors).

There are 13 separate regulatory exceptions to the receipt of gratuities in the DoD ethics directive. Id. at 5-6. See also DEP'T OF A.F., REG. No. 30-30, STANDARDS OF CONDUCT, atch. 4, ¶¶ 2 (b)(2), (14) (June 21, 1983) (hereinafter cited as AFR 30-30), which provides supplementary guidance on the receipt of gratuities by A.F. personnel.

Notwithstanding these limited administrative exceptions, DoD members who are subject to the Uniform Code of Military Justice (UCMJ), 18 U.S.C. §§ 801-940 (1976), must always exercise cautious discretion, particularly in their

associations with the commercial world. Technical violations of 18 U.S.C. § 201 are still arguably subject to UCMJ prosecution under the "crimes and offenses not capital" section of the Article 134, although this is highly unlikely. Also note that 18 U.S.C. § 201 is a statutory offense which does not have a nominal value exception, and it is applicable to military personnel. See 10 U.S.C. §§ 892, 934 (1976); MANUAL FOR COURTS-MARTIAL, UNITED STATES, §§ 171(a), 213(e) (rev. ed. 1969) (hereinafter cited as MCM). See also, United States v. Carter, 4 M.J. 758 (ACMR 1977) (staff sergeant's courts-martial convictions for violations of 18 U.S.C. § 201[e] affirmed by the Army Court of Military Review); United States v. Brooks, 20 USCMA 28, 42 CMR 220 (1970) (AFR 30-30, § 7 is a mandatory provision enforceable as a penal statute, and dicta indicates other provisions of the regulation are also penal in nature); 10 U.S.C. § 934 (1976); MCM, id., § 127(c), at 25-15 (UCMJ Article 134 -- prohibits bribery and graft [promising, offering, asking, receiving, or accepting]).

A workable solution to the "technical gratuity" felony dilemma would be to amend 18 U.S.C. § 201, and legislatively redefine "value" in terms of a modest dollar amount. This should at least be done for a criminal gratuity which does not require a corrupt intent. It would also provide a much needed ethical touchstone for differentiating between criminal and simple administrative misconduct. Attempts to "game" the new approach could arguably be managed by modifying current agency standard of conduct guidelines and adding annual certification, dollar ceilings, and reporting requirements, but only as a last resort.

Since most minor Gov't employee gratuity violations result in some form of agency administrative disciplinary action if detected, and since the U.S. Att'y does not have time as a practical matter to seek indictments on nominal gratuity cases, an amended definition of "value" in the proposed revision of the Federal Criminal Code -- at least with regard to criminal gratuities -- might offer a salutatory alternative to the dilemma currently posed by a mechanical reading of 18 U.S.C. § 201 as Judge Sarokin wryly inferred.

See generally R. Drinan, M. Ward & D. Beier III, The Federal Criminal Code: The Houses Are Divided, 18 AM. CRIM. L. REV. 509 (1981); A Legal Bibliography on the Proposed Federal Code, 72 J. CRIM. L. C. 631 (1981); Comment, Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism, 28 AM. U. L. REV. 63, 77-81 (1978) (commentary regarding prosecutorial discretion of U.S. Att'y in local political corruption cases) (hereinafter cited as Mail Fraud Local Prosecutions); Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 GEO. L. REV. 1171, 1201-21 (1977) (broad discussion of federal prosecut-

orial discretion) (hereinafter cited as Ruff); LaFave, The Prosecutor's Discretion in the United States, 18 AM. J. COMP. L. 532 (1970).

114. 341 F.2d 613, 620 (Ct.Cl. 1965) (Davis, J., concurring in part, dissenting in part). The Court's majority opinion, however, may have been overcome by events:

Defendant can point to no executive or legislative declaration of public policy that would prohibit the practices of plaintiff in issue. It has cited no court decision in point and has not even presented any quasi-official criticism of the practice. Therefore, we must conclude that the rule in Tank Truck and Lilly controls this case, and that absent a State or national statute or regulation, there exists no sharply defined public policy upon which to ground disallowance of an otherwise permissible business expense deduction.

Id. at 618. Although this was not a bribery or gratuity case as such (it basically involved the construction of an Iowa statute which was similar to 18 U.S.C. § 201), it would appear that ample case law has evolved in the post-Watergate era to seriously question the continued viability of this statement. See also supra note 111.

115. The White House Counsel, Mr. Fred F. Fielding, stated on Jan. 7, 1983, that he intends to investigate whether several senior HUD officials violated federal conflict-of-interest rules by accepting expenses on two dozen trips during 1982 from groups of realtors, builders, city and county officials. See Wash. Post, Jan. 8, 1983, at A7, col 4. The following synopsis of the improprieties allegedly committed by senior HUD Officials is thought provoking in view of the text's previous discussion regarding the acceptance of gratuities:

The Washington Post reported yesterday that industry and civic associations have paid for air fare, hotel bills and meals for senior HUD officials on trips to such places as Italy, Puerto Rico, Santa Barbara, Calif., Orlando, Fla., Las Vegas, Atlantic City and Martha's Vineyard.

HUD employees are prohibited from accepting expenses from cities, counties and specific building and real estate companies, which receive grants and subsidies from HUD and are subject to numerous department decisions.

But Undersecretary Donald I. Hovde has urged senior employees to accept free trips from trade associations, even if their members are regulated by, or do business with, HUD.



Some of these trade groups, such as the National Association of Home Builders, also receive money under HUD contracts. During the Carter administration, HUD policy also was that "donations . . . may be accepted" from trade associations.

But Hovde went one step further in a memo last May, telling senior officials that such expenses should be "not only accepted but encouraged." He said HUD would consider an "organization's willingness to reimburse expenses" in deciding whether to accept its speaking invitation.

\* \* \*

Hovde said this week that because the department's total travel budget has been cut, it is "perfectly legitimate" for him and other senior officials to accept such expenses.

But Rep. Henry B. Gonzalez (D-Tex.), chairman of a House subcommittee on housing, said yesterday that Hovde had made "an error in judgement."

"I think he honestly doesn't see the potential for mischief," Gonzalez said.

"If a HUD official accepts an invitation because it's related to the business of the department, it should be paid for by the department," he said.

Gonzalez added that extensive travel by top HUD officials "is contradictory to what they're preaching. Here they are foisting rent increases on the poorest of the poor, and then this extravaganza," which he characterized as "junkets."

116. See A BEQUAI, WHITE-COLLAR CRIME: A 20TH CENTURY CRISIS 67 (1978) (hereinafter cited as BEQUAI):

Abuses in this area (Gov't contract fraud) are common, and take on various forms. They may involve collusion in bidding, kickbacks and payoffs to government officials, campaign contributions to political figures, delivery of shoddy work, cost overruns, filing of false claims for nonexistent services, padding the cost of material, hiring of friends and associates who formerly worked in government, offering inducements to government officials, and many others. Human ingenuity has proven its ability, when combined with a receptive environment, to easily circumvent the rules and regulations designed to prevent this very form of behavior.

117. Supra note 52, at 470.

118. Id. at 470 nn. 2, 4.
119. Id. at 470. A kickback is basically "a percentage payment . . . for granting assistance by one in a position to open up or control a source of income." United States v. Hancock, 604 F.2d 999, 1002 (7th Cir.), cert. denied, 444 U.S. 991 (1979). It has also been described as "the secret return to an earlier possessor of part of a sum received." United States v. Porter, 591 F.2d 1048, 1054 (5th Cir. 1979). See generally United States v. Hinton, supra note 62, at 197 (example of another scheme in which an official was to receive a percentage of each contract awarded).
120. K & R Eng'r Co. v. United States, supra note 52, at 471.
121. Id. at 472.
122. Id.
123. Id. at 469, 472.
124. Id.
125. See notes 162-70 infra and accompanying text.
126. 348 F.2d 708 (3d Cir. 1965). See also United States v. Iaconetti, supra note 47, at 576 (GSA inspector demanded one percent of face value of contract for favorable pre-award survey); United States v. Lev, supra note 51, at 12 (fraudulent pre-award survey concealed the fact that the contractor did not have adequate machinery to perform the contract).
127. United States v. Laverick, id. at 709.
128. Id. at 710.
129. Id.
130. Id. at 711.
131. Id. at 711-12.
132. Id. at 709 (18 U.S.C. § 202 [1958] was essentially equivalent to the current 18 U.S.C. § 201 [1976] offense).
133. See generally, e.g., United States v. Heffler, supra note 51, at 925; United States v. Lev, supra note 51, at 11-12; United States v. Krogmann, 225 F.2d 220, 223-24 (6th Cir. 1955); United States v. Razette, supra note 51, at 46; Malatkofski v. United States, 179 F.2d 905, 908-912 (1st Cir. 1950).

134. Supra note 24, at 1328.
135. Id.
136. Id.
137. Id. at 1329.
138. Id.
139. Id.
140. Id. at 1327-28.
141. 365 F.2d 982, 984-85 (2d Cir. 1966), cert. denied, 386 U.S. 923 (1967).
142. Id. at 985.
143. Id. at 984-85.
144. Id. at 985.
145. Id. at 984.
146. 213 F.Supp. 38, 39 (E.D.Pa.), rev'd on other grounds sub nom. Schoeneman v. United States, 317 F.2d 173 (D.C. Cir. 1963).
147. Id. at 39-40.
148. Supra note 24.
149. Id. at 562.
150. Id. at 560.
151. The GSA, e.g., also had a series of contract award scandals. See 22 GOV'T CTR (Fed. Pubs.) ¶ 26 (Jan. 28, 1980):

[T]he U.S. attorney's office in Wash., D.C. reportedly filed felony charges against a former State Dept. official, seven former GSA employees, and three GSA contractors in connection with the alleged award of Govt contracts to perform work which never existed. In return for awarding the contracts, the Govt employees purportedly received more than \$125,000 in cash and other gifts from the contractors.

The latest charges bring to 87 the number of indictments in the continuing corruption investigation at GSA begun two years ago. Thus far, 70 of those indictments have resulted in convictions or guilty pleas.

See generally Continued Investigation Into Fraud and Mismgm't in the General Services Administration: Hearings before the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., pts. 1-5 (1979) (the testimony and prepared statement of Mr. William S. Lynch, Chief, DoJ, GSA Task Force [pt. 4, pp. 79-85] provides a succinct overview of the DoJ strike force's criminal prosecutions incident to the so-called "GSA Scandals"). See also United States v. Computer Sciences Corp., 511 F.Supp. 1125, 1130 (E.D.Va. 1981), aff'd in part, rev'd in part, 689 F.2d 1181 (4th Cir.), cert. denied, U.S., 103 S.Ct. 729 (1983); United States v. Blecker, 657 F.2d 629, 631-32 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982); United States v. Lowell, 490 F.Supp. 897, 900 (D.N.J. 1980). See also United States v. Green, Crim. No. 82-00049-A (E.D.Va. 1982); United States v. Haines, et al., Crim. No. 80-146 (E.D.Va. 1980); United States v. Riley, Crim. No. 79-00066-(N.D.W.Va. 1980); United States v. Atlas Paint and Varnish Co., Crim No. 79-239 (D.N.J.).

This analysis does not intentionally focus on any particular agency's corruption problems. Gov't organizations which are comparable in size to the DoD or GSA and which have commensurate commercial procurement responsibilities will arguably encounter similar problems. DoD procurement expenditures, e.g., have risen from a 1981 level of \$51 billion to \$94 billion in 1983. See 39 FED. CONT. REP. (BNA) 380 (Feb. 21, 1983).

152. See supra note 43. See generally, e.g., A.F. Times, Dec. 27, 1982, at 3, col. 1, which reported that a salesman and the firm which he represented recently pled guilty to separate charges of bribing an AAFES buyer. Both the salesman and the firm were suspended from doing business with AAFES in May, 1982. The Gov't buyer, who once headed the AAFES' \$60 million-a-year toy purchasing dep't, was scheduled to stand trial in 1983. The chief of AAFES' Consumables, Stationery, and Toiletry Branch was also scheduled for trial in 1983 for perjury on bribery-related allegations. See also Comp. Gen. Rep. B-148581, Employee Standards Of Conduct: Improvements Needed In The Army And Air Force Exchange Service And The Navy Resale System Office 7-8 (FPCD-79-15, Apr. 24, 1979).
153. 656 F.2d 1101, 1102 (5th Cir. 1981) (the case involved the improper reference to an individual's name in factual resumes which were filed by the U.S. Atty's office in relation to criminal guilty pleas entered by defendants who were identified during the AAFES investigation).
154. Id. at 1102-03. See generally Parker & Wood, Scandal in the Exchange, A.F. Times, mag., July 6, 1981, at 4:

Eleven exchange employees and 14 businessmen have

been convicted on a variety of charges involving fraud and bribery in many types of AAFES contracts. Other high-level exchange officials have been linked to illegal payments in supporting court documents. And 61 civilian firms or their employees have been suspended from doing business with AAFES or other U.S. government agencies. Thirteen AAFES civilian employees have been fired or quit under pressure for violating the organization's code of ethics, and another 16 have been suspended, reprimanded or counseled.

Newspaper accounts have estimated the total of bribes paid to AAFES employees at more than \$10 million.

See also A.F. Times, July 18, 1983, at 37, Col. 1:

The Justice Department has disbanded its five-year-old federal task force investigating bribery and kickbacks in the Army and Air Force Exchange Service after racking up 60 convictions . . .

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The task force's investigation resulted in 60 convictions, 22 of them involving AAFES civilian employees and 38 involving individuals or firms who represented the manufacturers who sell goods to AAFES . . . No service member was charged or convicted [emphasis added].

155. In re Smith, supra note 153, at 103. See also United States v. Miller, supra note 77, at 425-27 (candy distributor made payments to an Army commissary employee to gain a favored sales position).
156. Supra note 63. See also United States v. Johnson, supra note 36, at 1074.
157. United States v. Hollingshead, supra note 63, at 753.
158. See 407 F.Supp. 261, 263-64 (D.Del. 1975). See also United States v. Hinton, supra note 62, at 196-97 (kickbacks required for award of HUD community development grants); United States v. Griffin, supra note 3, at 1222-23 (ten percent kickbacks required by an area management broker for award of HUD contracts). See generally Teleprompter of Erie, Inc. v. City of Erie, 537 F.Supp. 6 (W.D.Pa. 1981) (a somewhat analogous case, rev'd on other grounds, involving an unsuccessful challenge of a local cable franchise award, grounded in part, upon allegations of bribery during the competition).
159. See BEQUAI, supra note 116, at 41:

Kickbacks, bribes, and political corruption usually go

hand-in-hand. They are not new, nor are they characteristic only of our society. Their objectives are usually to gain some competitive edge, to obtain or retain business or services, or to cover up inferior products or short deliveries . . . These frauds have indicators. For example, in some localities the same firms are consistently awarded contracts for services or products, while more qualified firms are refused entry into the government contract market . . . Bureaucrats and politicians, once they leave service, seem to join firms connected with those who have city or state contracts. Law firms connected with political figures consistently represent corporations that have won government contracts . . . These are the symptoms of bribery, kickbacks, and political frauds [footnotes omitted].

160. 516 F.2d 816 (2d Cir.), cert. denied, 423 U.S. 860 (1975).

161. Id. at 817. See also, e.g., United States v. Williams, supra note 69, at 1090-92 ("ABSCAM" conviction of a U.S. Sen. involving an agreement to influence Gov't contract awards for titanium purchases); United States v. Passman, 465 F.Supp. 736, 738-39 (W.D.La. 1979) (conviction of U.S. Rep. for his role in the Korean rice sale scandals involving Mr. Tongsun Park). See generally, e.g., United States v. Dixon, supra note 45, at 183-86 (bribery of an aide to former U.S. Rep. Daniel Flood for his assistance in securing a hospital constr. contract); United States v. Head, supra note 23, at 176-80 (another controversial influence-buying scandal involving U.S. Rep. Flood and a Cong. aide for their help in securing contracts, rev'd and rem'd on other grounds); In the Matter of Representative Daniel J. Flood, H.R. REP. NO. 96-856, 96th Cong., 2d Sess. (1980). See also United States v. Marcello, 508 F.Supp. 586, 589 (E.D.La. 1981) (FBI undercover "sting" operation ["Brilab"] involving the alleged bribery of state officials in connection with insurance contracts).

162. See notes 116-25 supra and accompanying text. White-collar crime is a generic concept which can be applied to a wide variety of "soft" economic criminal offenses. See Hauptly & Rides, The Proposed Federal Criminal Code and White-Collar Crime, 47 GEO. WASH. L. REV. 523, 523 n.1 (1979), which commented:

The description of "white-collar crime" has no significance as a legal concept and is found in no criminal code or statute. Social scientists have grappled with the definition since Professor Sutherland coined the phrase in 1936, see E. SUTHERLAND, WHITE COLLAR CRIME 9 (1949), and have generally defined it in terms of the affluence, influence, or respectability of the offender and the relationship of the offense to his legitimate occupation. For law enforcement purposes, however, the

term "white-collar offense" has relevance only to the elements traditionally associated with such illegal behavior, such as deceit, deception, misrepresentation, breach of trust, and illegal circumvention.

163. K & R Eng'r Co. v. United States, supra note 52, at 471.
164. Id. at n.5. For the authoritative treatise on contract specifications in general, see R. SCHUMANN, SPECIFICATIONS (Geo. Wash. U., Gov't Contract Monograph No. 13) (1980).
165. Id. at 471-72.
166. Id.
167. Id. at 471.
168. Id.
169. Id. at 472.
170. See also United States v. Carter, supra note 6. This case involved a similar profit-sharing scheme by an Army officer. Captain Carter was the supervising eng'r for a river and harbor improvement project in Savannah, Georgia from 1889 until 1897. The captain's collusion with several contractors increased the Gov't's total contract costs by almost 300%. Id. at 288, 297-98. Carter's share of the profits amounted to almost \$500,000. Id. at 298. He also performed a variety of official acts as the project's supervising eng'r pursuant to a profit-sharing arrangement:

[I]t was averred that Carter had shortened the time required by regulations for advertising for bids, that he made it difficult for some intending bidders to secure the plans and specifications, that he had deterred others by unduly magnifying the risks of the work, that the specifications were so drawn as to leave to the Government the option of two or more materials of different value, or two or more methods of doing parts of the work, or the right to substitute one material for another. It was also averred that Greene and Gaynor were in advance advised as to how such options would be exercised, but that other proposing bidders were not, and that by this and other artifices Greene and Gaynor were enabled to secure contracts at unreasonable prices. It is then averred that Carter had collusively and fraudulently increased unduly the quantity of some materials required and diminished that of other kinds; that he had exercised options reserved in such a way as to greatly increase the cost of the work and the profit of the contractors; that he had permitted changes in materials and methods of using the materials and of doing the work in such

manner as to be of disadvantage to the United States and of advantage of the contractors, and that he had permitted the use of cheap and inferior materials and had accepted bad and inferior work.

Id. at 302.

171. See, e.g., United States v. Kennel, 188 F.Supp. 736 (M.D.Pa. 1960), aff'd 295 F.2d 712, cert. denied, 368 U.S. 988 (1962); United States v. Laurelli, 293 F.2d 830 (3rd Cir. 1961), cert. denied, 368 U.S. 961 (1962); United States v. Raff, 161 F.Supp. 276, 278-79; United States v. Allen, supra note 24; See also, e.g., Wormer v. Hampton, 496 F.2d 99 (5th Cir. 1974) (former Army Corps of Eng'rs supervisory inspector's discharge for cause sustained on appeal).
172. See generally II R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 1550-74 (3d ed. 1980) (hereinafter cited as II NASH & CIBINIC).
173. Supra note 19.
174. Id. at 966-68.
175. Id.
176. Id.
177. Id. at 967-68.
178. 583 F.2d 1, 3 (1st Cir. 1978).
179. Id.
180. Supra note 89, at 436 (the court reserved issuance of final findings pending defendant's in-court identification).
181. Id. at 437.
182. Id.
183. Id. at 436-37. See also, e.g., United States v. Mullens, 583 F.2d 134 (5th Cir. 1978); United States v. Murphy, 480 F.2d 256 (1st Cir.), cert. denied, 414 U.S. 912 (1973); United States v. Seuss, 474 F.2d 385 (1st Cir.), cert. denied, 412 U.S. 928 (1973). See generally Annot., 21 A.L.R. FED. 977 (1974) (bribery of federal meat inspectors).
184. See, e.g., supra note 168 and accompanying text. See generally R. NASH, GOV'T CONTRACT CHANGES (1975 & Supp. 1981) (the dispositive single volume treatise on the subject of federal contract changes).



185. Supra note 51, at 925-26.
186. Id. at 926.
187. Supra note 51.
188. Id. at 12.
189. See, e.g., 18 U.S.C. § 287 (1976) (criminal false claims); 18 U.S.C. § 1001 (1976) (criminal false statements); 31 U.S.C. § 231 (1976) (civil false claims). See also 10 U.S.C. § 2306(f) (1976 & Supp. V 1981) (Truth in Negotiations Act [TINA]); DAR § 3-807; FPR § 1-3.807 [pricing of negotiated contracts, requirements for cost and pricing data, and defective pricing in general]; 38 FED. CONT. REP. (BNA) 845-47 (Nov. 22, 1982) (Fed. Bar Ass'n/BNA conferees warned of the Gov't's increased use of TINA to deter and counter procurement "fraud." The article notes the Gov't's relatively relaxed burden of proof for a defective pricing case in comparison to a similar criminal prosecution on the same facts, e.g., a civil TINA recoupment does not require a specific intent to defraud and the Gov't can prove an alleged defective pricing case by a simple preponderance of the evidence).

See also I R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 597, 605 & 608-15 (3d ed. 1977) (hereinafter cited as I NASH & CIBINIC); Annot., 24 A.L.R. FED. 316 (1975) (application of TINA in Gov't price-reduction cases).

190. Compare 18 U.S.C. § 287 (1976) with 18 U.S.C. § 201 (1976).
191. See, e.g., supra notes 166-67 & 169 and accompanying text. See also United States v. Kenny, supra note 24, at 1329:

The evidence showed that OMC could quote on and bill for services under these tasks with very little scrutiny outside Code 1500, and painted a devastating picture of overcharges and sharp practices by OMC, at Navy expense. The Government showed instances where billable hours invoiced on an OMC project vastly exceeded both the reasonable time required to complete such a project and the hours actually devoted to it by OMC.

192. See, e.g., United States v. Kenny, supra note 24; United States v. Labovitz, 251 F.2d 393 (3d Cir. 1958) (Gov't accountant to reduce the amount of a Gov't claim).
193. Supra note 190.
194. For an in-depth discussion of false and fraudulent claims, statements, and certifications, see K. Bunge, Gov't Procurement: Crimes and Offenses [Part II] (1983) (unpub. thesis available at Nat'l L. Center, Gov't Cont. Program

Off., Geo. Wash. U. [hereinafter cited as Bunge]). See generally J. Graham, Federal Criminal Statutory Structure, in DEFENSE PROCUREMENT ENFORCEMENT, at 49-56 (R. Ogren & K. Jackson, Co-Chairmen 1983) (hereinafter cited as Graham); ELMER & SWINNEN, supra note 13, at 2-1 to -13; 1 NASH & CIBINIC, supra note 190, at 597, 612-16; GOV'T BRIEFING PAPERS, The False Claims Act, No. 79-3 (June 1979); Note, The Federal False Claims Act: A Remedial Alternative for Protecting the Government from Fraudulent Practices, 52 S. CAL. L. REV. 159 (1978).

195. Supra note 1.

196. See, e.g., the federal mail fraud statute, Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763 (codified as amended at 18 U.S.C. § 1341 [1976]); the wire fraud statute, Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (codified as amended at 18 U.S.C. § 1343 [1976]); The Travel Act, Act of Sept. 13, 1961, Pub. L. No. 87-228, § 1(a), 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 [1976]); the "Subcontractor" Anti-Kickback Act, Act of Mar. 8, 1946, ch. 80, 60 Stat. 37 (codified as amended at 18 U.S.C. §§ 51-54 [1976]); the Racketeer Influenced and Corrupt Organizations Act (RICO), the Organized Crime Control Act of 1970, Pub. L. No. 91-454, tit. IX, § 901(a), 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68 [1976 & Supp. V 1981]); the Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, tit. 1, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff [Supp. V 1981]).

197. Perrin v. United States, 444 U.S. 37, 41-42 (1979) (state statutes outlawing improper payments to private employees are listed on p. 44, nn. 9-10), aff'g 580 F.2d 730 (5th Cir. 1978). The Circuit Court in Perrin offered the following example of commercial bribery:

Few will ever forget the most notorious commercial bribe in American history -- the bribing of the 1919 Chicago White Sox baseball team. In that sad episode, Abe Attell, supposedly an employee of the New York gambler, Arnold Rothstein, bribed eight players of the Chicago White Sox to throw the first and second games of 1919 World Series to the Cincinnati Reds. Attell paid Eddie Cicotte, Oscar "Happy" Felsch, Chick Gandil, "Shoeless" Joe Jackson, Freddy McMullin, Charles "Swede" Risburg, George "Buck" Weaver, and Claude Williams about \$70,000 for their participation in the scheme [citations omitted].

Id. at 734. See generally Comment, Statutory Construction Ambiguity in the Travel Act -- Commercial Bribery, 10 MEM. ST. U. L. REV. 672 (1980); Weber, Commercial Bribery: The Need for a Federal Criminal Statute, 21 ARIZ. L. REV. 1147 (1979) (hereinafter cited as Weber); Annot., 1 A.L.R.3d

1350 (1965) (validity and construction of commercial bribery statutes). In addition, commercial bribes by subcontractors to federal prime contractors and higher tier subcontractors are prohibited by the "Subcontractor" Anti-Kickback Act, 41 U.S.C. §§ 51-54 (1976). See also Zaman-sky, Preferential Treatment, Payoffs and the Antitrust Laws: Distortion of the Competition Process through Commercial Bribery, 83 COM. L. J. 558 (1978) (broad discussion of the application of the Sherman Antitrust Act and Section 2[c] of the Robinson-Patman Act to commercial bribery).

198. See supra note 196. But cf. Hibey, Application of the Mail and Wire Fraud Statutes to Int'l Bribery: Questionable Prosecutions of Questionable Payments, 9 GA. J. INT'L & COMP. L. 49, 58-60 (1979) (extraterritorial application of the mail fraud statute questioned) (hereinafter cited as Hibey); Surrey, The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime, 20 HARV. INT'L L. J. 293, 297-98 (1979) (hereinafter cited as Surrey).

199. Id.

200. See United States v. Computer Sciences Corp., supra note 151 (case of paramount importance, holding, in part, that the Gov't can prosecute fraudulent claim charges under both the mail fraud statute and the False Claims Act, [18 U.S.C. § 287]); United States v. Blecker, supra note 151, at 636-37 (prime contractor's intracorporate mailings of a subcontractor's fraudulent invoices constituted a mailing for purposes of a sub's mail fraud conviction); United States v. Craig, 573 F.2d 455, 497-505 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978) (dissent of Swygert, J.).

See also Savage, Civil Fraud and Other Remedies, in A.B.A. SEC. OF PUB. CONT. L., NAT'L INST. SUBCOMM., Turning Square Corners: The Hazards of Contracting With the Gov't, Tab #12 (1982); FED. CONT. REP. (BNA) No. 895, A-22 to A-27 (Aug. 17, 1981) (conferees at annual Am. Bar Ass'n meeting warned about the Gov't's increased use of innovative criminal anti-fraud measures) (hereinafter cited as Tough Criminal Countermeasures); A.B.A. SEC. OF CRIM. J., THE PROSECUTION AND DEFENSE OF MAIL FRAUD CASES (1980) (discussion of how the mail fraud statute can be used as a predicate offense for RICO prosecutions) (hereinafter cited as RICO & MAIL FRAUD); Marcey, RICO's Impact on Government Contracting, 18 PUB. CONT. NEWSLETTER, No. 1, Fall 1982, at 3 (hereinafter cited as Marcey); Strafer, Massumi & Skolnick, Civil RICO in the Public Interest: "Everybody's Darling", 19 AM. CRIM. L. REV. 655 (1982) (broad discussion of RICO's collateral civil sanctions); Comp. Gen. Rep. B-198581, Impact Of Foreign Corrupt Practices Act On U.S. Business (AFMD-81-34, Mar. 4, 1981) (hereinafter cited as IMPACT ON U.S. BUSINESS). See generally Ewing, Combating

Official Corruption by All Available Means, 10 MEM. ST. U. L. REV. 423 (1980) (hereinafter cited as Ewing); Henderson, The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption, 8 CUM. L. REV. 385 (1977) (hereinafter cited as Henderson).

201. Although the Covenant Against Contingent Fees does not necessarily involve bribery-related misconduct, these are still otherwise improper payments. See 10 U.S.C. § 2306(b) (1976) & DAR §§ 1-500 to -509, 7-103.20; 41 U.S.C. § 254(a) (1976) & FPR §§ 1-1.500 to .509, 1-7.102-18.

202. 18 U.S.C. § 1341 (1976) provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such schemes . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both [emphasis added].

18 U.S.C. §§ 1341 & 1343 are both specified "racketeering activities" which can be incorporated as predicate offenses in RICO prosecutions. See 18 U.S.C. § 1961(1)(B) (1976). See also United States v. Computer Sciences Corp., *supra* note 151, at 1189-91; United States v. Huber, 603 F.2d 387 (7th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). *But see United States v. Bethea*, 672 F.2d 407, 408-420 (5th Cir. 1982).

203. 18 U.S.C. § 1343 (1976) provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any . . . signals . . . for the purpose of executing such scheme . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both [emphasis added].

204. See generally Graham, *supra* note 194, at 56-58; White-White-Crime III, *supra* note 39, at 316-21; White-Collar Crime II, *supra* note 2, at 287-95; White-Collar Crime I, *supra* note 18, at 197-205; Ewing, *supra* note 200, at 463-68; Rakoff, The Federal Mail Fraud Statute (Part 1), 18 DUQ. L. REV. 771, 772 (1980) (hereinafter cited as Rakoff); Note, A Survey of the Mail Fraud Act, 8 MEM. ST. U. L. REV. 673 (1978); Comment, Survey of the Law of Mail Fraud, 1975 U. ILL. L. F. 237 (hereinafter cited as Mail Fraud); ELMER

& SWENNEN, supra note 13, at 2-18 to -24.

205. Pereira v. United States, 347 U.S. 1, 8 (1954), lists only two elements: "(1) a scheme to defraud, and (2) [a] mailing for the purpose of executing the scheme." United States v. Brown, 540 F.2d 364, 375-76 (8th Cir. 1976), however, subdivides the mailing requirement into two subcomponent parts: "(1) that the defendant caused the use of the mails and (2) that this use was for the purpose of executing the deceptive scheme." Since the mailing requirement actually has two sub-elements, the textual analysis will treat mail and wire fraud as encompassing a total of three separate requirements. This approach is also consistent with the mail and wire fraud sections in the definitive annual AM. CRIM. L. REV. surveys of white-collar crime. Id. See generally DEVITT & BLACKMAR, supra note 13, at § 47.05; VI S. ARKIN, E. DUDLEY, M. EISENSTEIN, J. RAKOFF, D. RE, & J. SIFFERT, BUSINESS CRIME ¶ 32.01-.04 (1981 & Supp. 1982) (hereinafter cited as BUSINESS CRIME).
206. Courts have construed the mail and wire fraud uniformly. See, e.g., United States v. Louderman, 576 F.2d 1383, 1387 n.3 (9th Cir.), cert. denied, 439 U.S. 896 (1978). Since the mail and wire fraud statutes are in pari materia, cases involving one statute may be used to interpret the other. See United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980), cert. denied, 450 U.S. 1032 (1981); United States v. Calandrella, 605 F.2d 236, 253 (6th Cir. 1979), cert. denied, 444 U.S. 991 (1980); United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977); United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976); United States v. Kelly, 507 F.Supp. 495, 500 n.8 (E.D.Pa. 1981). For purposes of this analysis, therefore, the terms "mail fraud" and "wire fraud" will be used interchangeably.
207. The wire fraud statute, however, requires actual use of interstate communication facilities in furtherance of a scheme to defraud. See, e.g., United States v. Pecora, 693 F.2d 421, 424 (5th Cir. 1982); United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981); United States v. Cowart, 595 F.2d 1023, 1031 n.10 (5th Cir. 1979); United States v. Seidlitz, 589 F.2d 152, 160 (4th Cir. 1978), cert. denied, 441 U.S. 922 (1979); United States v. Patterson, 534 F.2d 1113, 1114 (5th Cir.), cert. denied, 429 U.S. 942 (1976); United States v. Dorfman, 532 F.Supp. 1118, 1123 & 1125 (N.D.Ill. 1981).
208. See Badders v. United States, 240 U.S. 391, 393 (1916) (interpreting a predecessor statute); Durland v. United States, 161 U.S. 306, 312-14 (1896) (also interpreting a predecessor statute); United States v. Bohonus, 628 F.2d 1167, 1170 (9th Cir.), cert. denied, 447 U.S. 928 (1980); United States v. Pearlstein, 576 F.2d 531, 534-35 (3d Cir. 1978); United States v. Cady, 567 F.2d 771, 775 (8th Cir.

- 1977), cert. denied, 435 U.S. 944 (1978); United States v. McNeive, 536 F.2d 1245, 1247 (8th Cir. 1976); United States v. States, 488 F.2d 761, 764-65 (8th Cir. 1973), aff'g 362 F.Supp. 1293 (E.D.Mo. 1973), cert. denied, 417 U.S. 909 (1974); Gregory v. United States, 253 F.2d 104, 110 (5th Cir. 1958). But see United States v. Margiotta, 688 F.2d 108, 140 n.3 (2d Cir. 1982); supra note 16.
209. See United States v. McNeive, id. at 1248. See also United States v. Toney, 605 F.2d 200, 205 (5th Cir. 1979), cert. denied, 444 U.S. 1090 (1980). The term "scheme to defraud" is not defined in the statute.
210. See Durland v. United States, supra note 208, at 311-12; United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979), aff'd in relevant part by an equally divided Court, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980) (former governor of Maryland and several codefendants were convicted on 17 counts of mail fraud based upon their involvement in a scheme to promote interests of local race track owners). See generally Attorney Grievance Com'n of Md. v. Mandel, 451 A.2d 910 (Md. 1982).
211. See United States v. Louderman, supra note 206, at 1389; Gregory v. United States, supra note 208, at 109; United States v. Kelly, supra note 206, at 498.
212. Rakoff, supra note 204, at 772 [emphasis added].
213. See United States v. Computer Sciences Corp., supra note 151, at 1186-88; United States v. Blecker, supra note 151, at 636-37 (1982); United States v. Weatherspoon, 581 F.2d 595, 599-600 (7th Cir. 1978); United States v. LaBar, 521 F.Supp. 203, 226-27 (M.D.Pa. 1981). See generally United States v. Ianelli, 420 U.S. 770, 785 n.17 (1975); United States v. Pereira, supra note 205, at 11; Blockburger v. United States, 284 U.S. 299, 304 (1932). Accord, United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 449 U.S. 830 (1980). United States v. Azzarelli Const. Co., 612 F.2d 292, 298 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980); United States v. Climatemp. Inc., 482 F.Supp. 376, 384-85 (N.D.Ill. 1979).
214. Marcey, supra note 200, at 3. See also DAR § 1-114.2.
215. United States v. Mandel, supra note 210, at 1361. But cf. United States v. Boffa, 688 F.2d 919, 926 (9th Cir. 1982). Bribes, kickbacks, and payoffs are pervasive. See CHAMBER OF COM. OF THE U.S., HANDBOOK ON WHITE COLLAR CRIME -- EVERYONE'S PROBLEM EVERYONE'S LOSS 15-16 (1974):

[B]ribes, kickbacks, and payoffs . . . occur in dealings between companies, in transactions between

business and government, and in negotiations between labor and management . . . [T]hey can be associated with a wide range of company operations: purchasing, sales, advertising, capital expenditures, contract services, engineering, employment, insurance, electronic data processing, and others.

The objectives of those offering bribes, kickbacks, and payoffs are numerous and include the following: to obtain new business, to retain old business, to cover up short deliveries or inferior products and services, to secure figures on competing bids, to obtain approval and/or speedy acceptance of plans or completed work from government officials, to influence legislation, to obtain licenses, to receive loans from union pension and welfare funds, to negotiate sweetheart contracts, to prevent work stoppages because of harassment by union officials or politicians, to obtain proprietary information, to influence law enforcement and regulatory personnel, to effect zoning changes, to induce purchase of securities at inflated prices, to prepare or approve false financial statements, etc.

216. Pereira v. United States, supra note 205, at 8-9.
217. United States v. McNeive, supra note 208, at 1247.
218. See United States v. Bohonus, supra note 208, at 1172; United States v. Kent, 608 F.2d 542, 545 n.3 (5th Cir. 1979), rev'g on other grounds 457 F.Supp. 982 (S.D.Tx. 1978), cert. denied, 446 U.S. 936 (1980); United States v. Foshee, 569 F.2d 401, 403 (5th Cir.), modified on reh'g, 578 F.2d 629 (5th Cir. 1978), aff'd, 606 F.2d 111, (5th Cir. 1979), cert. denied, 444 U.S. 1082 (1980); United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); United States v. Bryza, 522 F.2d 414, 421 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); United States v. Nance, 502 F.2d 615, 618 (8th Cir. 1974), cert. denied, 420 U.S. 926 (1975); United States v. Payne, 474 F.2d 603, 604 (9th Cir. 1973). See also United States v. Diggs, 613 F.2d 988, 997 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); United States v Brown, supra note 205, at 374.
219. See United States v. George, 477 F.2d 508, 512 (7th Cir.), cert. denied, 414 U.S. 827 (1973).
220. See Badders v. United States, supra note 208, at 394; United States v. Regent Office Supply, Co., 421 F.2d 1174, 1180 (2d Cir. 1970). But cf. RICO & MAIL FRAUD, supra note 200, at 7, 10-12 (remarks of Richard Beckler and Seymour Glanzer).
221. There is no "smoking gun" requirement for proof of intent.

See, e.g., United States v. Bohonus, supra note 208, at 1172; United States v. Mandel, supra note 210, at 1368; United States v. McCracken, 581 F.2d 719, 722 (8th Cir. 1978); United States v. Cady, supra note 208, at 774; United States v. Nance, supra note 218, at 618; United States v. Porter, 441 F.2d 1204, 1210 (8th Cir.), cert. denied, 404 U.S. 911 (1971). See generally Annot., 90 A.L.R.2d 903 (1963) (similar acts or transactions tending to rebut fraudulent intent).

222. See United States v. Bohonus, id., at 1248-49, which stated:

Included in this category are (1) insurance fraud; (2) "check kiting" schemes; (3) "credit card" swindles in which the defendant either fraudulently secures or fraudulently uses a credit card; (4) "referral plan" schemes in which the defendant persuades individuals to purchase goods and misrepresents the extent to which a purchaser can avoid paying all or part of the purchase price by referring new customers to the defendant; and (5) any other type of nefarious scheme in which the defendant solicits funds or tangible property interests from innocent or misinformed investors by engaging in a deceptive course of action [citations omitted].

See generally United States v. Hoffa, 205 F.Supp. 710 (S.D.Fla. 1962) (scheme to defraud labor unions chartered by the Int'l Bhd. of Teamsters, Chauffers, Warehousemen and Helpers of America).

223. See United States v. Margiotta, supra note 208, at 121 (an important recent fiduciary breach case), which stated:

From these cases, a basic principle may be distilled: a public official may be prosecuted under 18 U.S.C. § 1341 when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political and civil rights of the general citizenry. The definition of fraud is thus construed broadly to effectuate the statute's fundamental purpose in prohibiting the misuse of the mails to further fraudulent enterprises of all kinds.

See also United States v. Pintar, 630 F.2d 1270, 1279-80 (8th Cir. 1980) (several mail charges were rev'd, however, based upon insufficient evidence of a scheme to defraud); United States v. Diggs, supra note 218, at 998; United States v. Mandel, supra note 210, at 1362-64; United States v. Bush, 522 F.2d 641, 648-49 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); United States v. Brown, supra note 205, at 374; United States v. Keane, supra note 218, at 546; United States v. Issacs, 493 F.2d 1124 (7th Cir.),



aff'g 364 F.Supp. 895 (N.D.Ill. 1973), cert. denied sub nom. Kerner v. United States, 417 U.S. 976 (1974); Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), cert. denied, 313 U.S. 574 (1941). But cf. United States v. Rabbitt, 583 F.2d 1014, 1024 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); United States v. McNieve, supra note 208, at 1252. See also Hurson, Limiting the Federal Mail Fraud -- A Legislative Approach, 20 AM. CRIM. L. REV. 423 (1983) (hereinafter cited as Hurson); Comment, The Intangible Rights Doctrine and Political-Corruption: Prosecutions Under the Federal Mail Statute, 47 U. CHI. L. REV. 562 (1982) (hereinafter cited as Intangible Rights); Coffee, From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 AM. CRIM. L. REV. 117 (1981) (hereinafter cited as Coffee).

224. See United States v. Boffa, supra note 215, at 931; United States v. Newman, 664 F.2d 12, 13 (2d Cir. 1981) (rev'd and rem'd on other grounds); United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981), cert. denied, U.S., 102 S.Ct. 1769 (1982); United States v. Barta, 635 F.2d 999, 1006 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); United States v. Bohonus, supra note 208, at 1172; United States v. Lea, 618 F.2d 426, 429 (7th Cir.), cert. denied, 449 U.S. 823 (1980); United States v. Reece, 614 F.2d 1259, 1261 (10th Cir. 1980); United States v. Condolon, 600 F.2d 7, 8-9 (4th Cir. 1979); United States v. Louderman, supra note 206, at 1387; United States v. McCracken, supra note 221, at 723; United States v. Bryza, supra note 218, at 421-22; United States v. Gurule, 437 F.2d 239 (10th Cir. 1970); United States v. George, supra note 219, at 512-14; Abbott v. United States, 239 F.2d 310, 314 (5th Cir. 1956); United States v. Kelly, supra note 206, at 499-504; United States v. Dorfman, 335 F.Supp. 675, 679 (S.D.N.Y. 1971), aff'd, 470 F.2d 246 (2d Cir. 1972), cert. dismissed, 411 U.S. 923 (1973); United States v. Proctor & Gamble Co., 47 F.Supp. 676, 678 (D.Mass. 1942). But cf. United States v. Boffa, supra note 215, at 926 (3d Cir. 1982); United States v. Ballard, 663 F.2d 534, 540-41, 544 (5th Cir. 1981), modified on reh'g, 680 F.2d 352 (5th Cir. 1982). See generally Hurson, id.; Intangible Rights, id.; Coffee, id.
225. See United States v. Barber, 668 F.2d 778, 784-85 (4th Cir. 1982); United States v. Lea, id. at 429 n.3; United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976); United States v. Bryza, supra note 218, at 422; United States v. Bush, supra note 223, at 648; United States v. Reicin, 497 F.2d 563, 571 (7th Cir.), cert. denied, 419 U.S. 996 (1974); United States v. Pinto, 548 F.Supp. 236, 246 (E.D.Pa. 1982).
226. See DeMier v. United States, 616 F.2d 366, 369 (8th Cir.

- 1980); United States v. Curtis, 537 F.2d 1091, 1095 (10th Cir.), cert. denied, 429 U.S. 962 (1976); United States v. Pollack, id. at 971; Blachly v. United States, 380 F.2d 665, 672-73 (5th Cir. 1967); United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).
227. See United States v. Goss, 650 F.2d 1336, 1343 (5th Cir. 1981); United States v. Barta, supra note 224, at 1006.
228. See United States v. Dixon, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976); United States v. Regent Office Supply, Co., supra note 220, at 1180; Gregory v. United States, supra note 208, at 109.
229. See United States v. Bronston, supra note 224, at 926; United States v. Barta, supra note 224, at 1002; United States v. Pinter, supra note 223, at 1280 n.3; United States v. Bohonus, supra note 208, at 1172; United States v. Mandel, supra note 210, at 1362-63; United States v. Rabbitt, supra note 223, at 1024; United States v. McNieve, supra note 208, at 1250; United States v. Bush, supra note 223, at 648.
230. See United States v. Newman, supra note 224, at 19-20; United States v. Bronston, supra note 224, at 926; United States v. Barta, supra note 224, at 1006; United States v. Mandel, supra note 210, at 1362; United States v. Kelly, supra note 206, at 499.
231. See United States v. Greenleaf, 692 F.2d 182, 188 (1st Cir. 1982); United States v. Bohonus, supra note 208, at 1172; United States v. Goss, supra note 227, at 1346.
232. United States v. Bush, supra note 223, at 646.
233. Pereira v. United States, supra note 205, at 8-9. See Annot., 9 A.L.R. FED. 893 (1971) (mail fraud -- "causing" mail to be delivered).
234. Id.
235. Id. See also United States v. Brown, supra note 205, at 376.
236. Pereira v. United States, supra note 205, at 8-9 [citations omitted].
237. Id. See also United States v. Maze, 414 U.S. 395, 399 (1974).
238. See Badders v. United States, supra note 208, at 394; Durland v. United States, supra note 208, at 315; United States v. Alston, 609 F.2d 531, 536 (D.C. Cir. 1979), cert.

- denied, 445 U.S. 918 (1980); United States v. Calvert, 523 F.2d 895, 903 n.6 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Joyce, 499 F.2d 9, 19 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); Henderson v. United States, 425 F.2d 134, 138 n.4 (5th Cir. 1970).
239. See United States v. Maze, supra note 237, 399-400; United States v. Pereira, supra note 205, at 8-9; Kann v. United States, 323 U.S. 88, 93-95 (1944). The "in furtherance" requirement is normally the most difficult element to prove. See generally United States v. Nichols, 695 F.2d 86, 94-96 (5th Cir. 1982) (separate opinion of Garwood, J., concurring in part, dissenting in part); United States v. Staszczuk, 502 F.2d 875, 881 (7th Cir. 1974), modified on other grounds, 517 F.2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975).
240. United States v. Pereira, supra note 205, at 8.
241. See United States v. Maze, supra note 237, at 399-400; Kann v. United States, supra note 239, at 93-95; United States v. Rodgers, 624 F.2d 1303, 1309-10 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981). But cf. United States v. Pereira, supra note 205.
242. Supra note 239. But cf. United States v. Greenleaf, supra note 231, at 186; United States v. Galloway, 664 F.2d 161, 166-69 (7th Cir. 1981).
243. United States v. Maze, supra note 237. See generally Mail Fraud, supra note 204, at 248-53.
244. United States v. Maze, supra note 237, at 402. See also Kann v. United States, supra note 239, at 94.
245. United States v. Maze, supra note 237, at 402-03; Kann v. States, supra note 239, at 94-95.
246. United States v. Maze, supra note 237, at 403 (the Court even suggested that the mailings would be counterproductive since they would tend to expose the defendant's fraudulent scheme); United States v. Kent, supra note 218, at 546; United States v. Tarnopol, supra note 206, at 471-72; United States v. Shryock, 537 F.2d 207, 209 (5th Cir.), cert. denied, 429 U.S. 1100 (1976). But cf. United States v. Sampson, 371 U.S. 75 (1962) (mailings were designed to "lull" victims).
247. Kann v. United States, supra note 239, at 95. Accord Parr v. United States, 363 U.S. 370, 390-91 (1960).
248. United States v. Lebovitz, 669 F.2d 894, 898 (3d Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1979 (1982) [citations omitted].

249. Mail Fraud, supra note 204, at 248-53.
250. See United States v. Shushan, supra note 223, at 115, which held that:

A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. The fact that the official who is bribed is only one of several and could not award the award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view.

251. See supra note 19, at 985; notes 173-77 supra and accompanying text.
252. United States v. Hartley, supra note 19, at 985-86.
253. See BEQUAI, supra note 116, at 42:

We tend to associate corruption with government officials. However, bribes and kickbacks are also found in the private sector. Private corruption may involve payments from one firm to another, or payments from the firm itself, to officers and directors of that firm. For example, one large beer company was accused by federal investigators of making more than \$3 million in illegal payments to numerous other firms in order to induce them to use its beer. The payments were in violation of both state and federal liquor licensing laws. The company employed numerous techniques, including such shams as payments for advertising and phony contracts. Further, to conceal the illegal payments, the firm falsified its books and records, hiding the activity from both federal agencies and its own stockholders [footnotes omitted].

254. Supra note 219; Morano, supra note 33, at 65-66. See also United States v. Bohonus, supra note 208, at 1169; United States v. Reece, supra note 224, at 1260-61; United States v. McCracken, supra note 221, at 720-21; United States v. Allen, 539 F.Supp. 296, 300 (C.D.Cal. 1982) (indictment dismissed on other grounds -- former jeopardy).
255. Supra note 218. See also Morano, supra note 33, at 66-67.
256. Supra note 224.
257. Supra note 241.
258. United States v. Rogers, supra note 241, at 1309-10.

259. Supra note 213, at 298. See also United States v. Prescon Corp., 695 F.2d 1236, 1238 (10th Cir. 1982); United States v. Lyons, 670 F.2d 77, 78 (7th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 102 S.Ct. 2965; United States v. Grande, supra note 213, at 1028-29; United States v. Brighton Building & Maintenance Co., 435 F.Supp. 222, 226-29 (N.D.Ill. 1977), aff'd 598 F.2d 1101 (7th Cir. 1979), cert. denied, 444 U.S. 840 (1980).

260. RICO & MAIL FRAUD, supra note 200, at 12.

261. 18 U.S.C. § 1952 (1976), provides in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified [above], shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or the United States.

18 U.S.C. § 1952 and the related 18 U.S.C. § 1951 Hobbs Act extortion offense are also "racketeering activities" which can be incorporated as predicate crimes in a RICO prosecution. See 18 U.S.C. § 1961(1)(B) (1976); United States v. L'Hoste, 609 F.2d 796 (5th Cir.), 615 F.2d 383 (5th Cir.) cert. denied, 449 U.S. 883 (1980) (bribery of La. officials in relation to const. contracts).

262. See Rewis v. United States, 401 U.S. 808, 811 (1971) (rev'd on other grounds -- insufficient interstate nexus); United States v. Nardello, 393 U.S. 286, 290-91 (1969); United States v. Roselli, 432 F.2d 879, 884-88 (9th Cir. 1970).

263. See generally United States v. Gillock, supra note 104, at 362-66 (conviction on four counts of extortion under 18 U.S.C. § 1951 [Hobbs Act] but Travel Act charge dismissed); United States v. Williams, supra note 69, at 1091, 1107; United States v. Graham, 581 F.2d 789, 790 (9th Cir. 1978);

United States v. Evans, supra note 7, at 463-64; United States v. Hall, 536 F.2d 313, 320 (10th Cir. 1976), cert. denied, 429 U.S. 919 (1976). But cf. United States v. Issacs, supra note 223, at 1146-49 (former state governor's Travel Act convictions rev'd on lack of interstate nexus).

264. See Perrin v. United States, supra note 197, at 49 (bribery of private employees prohibited by state criminal statutes can also violate the Travel Act assuming the requisite jurisdiction attaches); United States v. Nardello, supra note 262, at 293 (term "whoever" includes private persons as well as public officials); United States v. Archer, 486 F.2d 670, 678-80 (2d Cir. 1973) (rev'd on other grounds -- jurisdiction was artificially manufactured by authorities). See also United States v. Seregos, 655 F.2d 33, 34-36 (2d Cir. 1981); United States v. Tilton, 610 F.2d 302, 304 (5th Cir. 1980); United States v. Pomponio, 511 F.2d 953, 956-57 (4th Cir.), cert. denied, 423 U.S. 874 (1975); United States v. Billups, 522 F.Supp. 935, 945-46 (E.D.Va. 1981). If interstate travel or use of interstate facilities is incident to the bribery of a public official, the offense is subject to prosecution under the Travel Act. See United States v. Bertman, 686 F.2d 772, 773 (9th Cir. 1982); United States v. Kahn, 472 F.2d 272, 277-80 (2d Cir.), cert. denied, 411 U.S. 982 (1973). See generally V BUSINESS CRIME, supra note 205, at ¶¶ 23.04[4], 22.01-.06.
265. See United States v. Wilson, 591 F.2d 546, 547 (9th Cir. 1979); United States v. Evans, supra note 7, at 482; United States v. Craig, supra note 200, at 489; United States v. Peskin, 527 F.2d 71, 74-75 (7th Cir.), cert. denied, 429 U.S. 818 (1976); United States v. Ryan, 548 F.2d 782, 784-86 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977); United States v. Dansker, supra note 76, at 44-47; United States v. Rauhoff, 525 F.2d 1170, 1171-75 (7th Cir. 1975); United States v. Michael, 456 F.Supp. 335, 346-51 (D.N.J. 1978). But see United States v. Dowdy, 479 F.2d 213, 223-26 (4th Cir.), cert. denied, 414 U.S. 823, reh'g denied, 414 U.S. 1117 (1973) (Travel Act charges against former U.S. Rep. rev'd on "speech and debate" grounds).
266. Extortion between private parties generally occurs when "funds are obtained from the victim with his consent produced by wrongful use of force, fear, or threats." United States v. Nardello, supra note 262, at 295. The Supreme Court also noted in Nardello that "[a]lthough Congress directed that content should be given to the term 'extortion' in § 1952 (the Travel Act) by resort to state law, it otherwise left the term undefined." Id. at 289. See generally, Annot., 4 A.L.R. FED. 881 (1970) (elements of a Hobbs Act [18 U.S.C. § 1951] offense).

There are several differences, however, between the elements required for a predicate extortion offense under the Travel Act and extortion as defined for purposes of an 18 U.S.C. § 1951 Hobbs Act prosecution. For example, the Hobbs Act specifically prohibits extortionate conduct which in any way or degree obstructs, delays, or otherwise affects interstate commerce. See United States v. Culbert, 435 U.S. 371, 380 (1978); Stirone v. United States, 361 U.S. 212, 215 (1960). In addition, the essential elements required for an 18 U.S.C. § 1951 offense are: "(1) [T]he defendant induced his victim(s) to part with property; (2) that he [the defendant] did so by extortionate means; and (3) that interstate commerce was thereby affected." United States v. Brown, *supra* note 205, at 371. No proof of actual interstate travel or use of interstate facilities is required since the Hobbs Act jurisdictional nexus is related to the extortionate act's impact or effect on interstate commerce. See United States v. Hathaway, 534 F.2d 386, 396-98 (1st Cir.), cert. denied, 429 U.S. 819 (1976).

Extortion is defined in 18 U.S.C. § 1951(b)(2) as: "The obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right [emphasis added]. Fear of future economic loss (e.g., loss of possible contract opportunities) is sufficient to constitute extortion. United States v. Hedman, 630 F.2d 1184, 1192-93 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Rabbitt, *supra* note 223, at 1027.

Moreover, a public official can be convicted of extortion in violation of the Hobbs Act if the official "makes wrongful use of his office to obtain money not due him or his office . . . The public officer's misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear [citations omitted]." United States v. Margiotta, *supra* note 208, at 130-31. The preceding analysis assumes the requisite jurisdictional impact on interstate commerce. See generally Note, Extortion "Under Color of Official Right": Federal Prosecution of Official Corruption Under the Hobbs Act, 5 LOY. CHI. L. J. 513 (1974). The crimes of bribery and extortion, as a result, are not mutually exclusive since the Hobbs Acts defines extortion as including the wrongful use of public office "under color of official right." See United States v. Butler, 618 F.2d 411, 417-18 (6th Cir.), cert. denied, 447 U.S. 927 (1980); United States v. Price, 617 F.2d 455, 456-57 (7th Cir. 1980); United States v. Phillips, 577 F.2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978). See also Henderson, *supra* note 200, at 388-93; Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary

Distinction Between Bribery and Extortion, 3 SEATON HALL L. REV. 1 (1971). But cf. Ruff, supra note 113, at 1194. See generally V BUSINESS CRIME, supra note 205, at ¶ 23.04 [ii].

The Hobbs Act is the most commonly utilized statute to prosecute corrupt officials. See Ewing, supra note 200, at 446. This is probably due in large part to the expansive reading of "under color of official right" and the de minimis effect on interstate commerce required for jurisdictional purposes. For examples of extortionate schemes involving contractors, see United States v. Hedman, id.; United States v. Phillips, id.; United States v. Brown, supra note 205; United States v. Hathaway, id.; United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied sub nom. Kropke v. United States, 409 U.S. 914 (1972); United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972); United States v. Sopher, 362 F.2d 523 (7th Cir.), cert. denied, 385 U.S. 928 (1966).

267. The Travel Act's business enterprise requirement for proof of a criminal course of conduct does not apply to covered bribery and extortion offenses. See United States v. Wander, 601 F.2d 1251, 1257 (3d Cir. 1979); United States v. Gooding, 473 F.2d 425, 427 (5th Cir. 1973), cert. denied, 412 U.S. 928 (1974); United States v. Mahler, 442 F.2d 1172, 1174-75 (9th Cir.), cert. denied, 404 U.S. 993 (1971).
268. United States v. Perrin, supra note 197, at 50 ("[T]he statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement"). See also Tough Criminal Countermeasures, supra note 200, at A-23 to A-24. See generally United States v. Wander, id. at 1263-68 (opinion by Aldisert, J., concurring in part, dissenting in part, which challenges the federal subject matter jurisdiction of an extortionate scheme involving a lawyer whose illicit liaison in a local motel bedroom was documented on film).
269. See United States v. Perrin, supra note 197, at 50. See also United States v. Hines, 696 F.2d 722, 725 (10th Cir. 1982) ("Congress defined as a federal crime the use of interstate travel and facilities for the purpose of violating or attempting to violate state law. It is not the violation of state law which constitutes an offense under section 1952, but rather the use of interstate means . . ."); United States v. Perkin, supra note 265, at 79 n.3 ("The federal crime is the use of interstate facilities in furtherance of the unlawful activity, not the violation of state law").



270. See Weber, supra note 197, at 1155; V BUSINESS CRIME, supra note 205, at ¶ 22.03.
271. See V BUSINESS CRIME, supra note 205, at ¶ 22.02. See, e.g., United States v. Loucas, 629 F.2d 989, 991-92 (4th Cir. 1980); United States v. Polozzi, 500 F.2d 856, 872-74 (9th Cir. 1974), cert. denied, 419 U.S. 1121 (1975).
272. See United States v. Stevens, 612 F.2d 1226, 1231 (10th Cir. 1979); United States v. Wander, supra note 267, at 1258. See generally White-Collar Crime III, supra note 39, at 322-23; White-Collar Crime II, supra note 2, at 339-50; White-Collar Crime I, supra note 18, at 222-33; Ewing, supra note 200, at 458-63; DEVITT & BLACKMAR, supra note 13, at §§ 56.11-.17; V BUSINESS CRIME, supra note 205, at ¶¶ 23.04-.05; Bergan, Defending Cases Under the Hobbs and Travel Act, in II CRIMINAL DEFENSE TECHNIQUES §§ 35.01-.05 (M. Eisenstein & S. Allen eds. 1982) (hereinafter cited as Bergan); Annot., 1 A.L.R. FED. 838 (1969) (validity, construction & effect of the Travel Act).
273. See supra note 261. See also United States v. Goldfarb, 643 F.2d 422, 433 (6th Cir.), cert. denied, 454 U.S. 827 (1981); United States v. Forsythe, 560 F.2d 1127, 1137-38 (3d Cir. 1977).
274. See White Collar Crime III, supra note 39, at 322-23; Henderson, supra note 200, at 399-400. See generally United States v. Eisner, 533 F.2d 987, 990-92 (6th Cir.), cert. denied, 429 U.S. 919 (1976).
275. Id. See also, e.g., United States v. O'Dell, 671 F.2d 191, 193 (6th Cir. 1982); V BUSINESS CRIME, supra note 205, at ¶ 23.05.
276. See generally supra note 274. See, e.g., United States v. LeFaivre, 507 F.2d 1288, 1296-7 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975) ("[T]ravel in interstate commerce or use of facilities in interstate commerce [does not have to] be a 'substantial' or an 'integral' part of the activity"). See also White-Collar Crime II, supra note 2, at 341-44.
277. See generally supra note 274. See, e.g., United States v. Raineri, 670 F.2d 702, 717 (7th Cir. 1982) ("We test the sufficiency of the jurisdictional basis, not by black-letter rules, but by 'the nature and degree of the interstate activity in furtherance of the state crime'"). But cf. Note, The Travel Act: It's Limitation by the Seventh Circuit Within the Context of Local Political Corruption, 52 CHI.-KENT L. REV. 505, 515-16 (1975):

Altobella and Isaacs involved factual situations where there was proof of use of interstate facilities

with intent to promote an unlawful bribery or extortion with some subsequent act "thereafter." In order to prevent application of the Act, the Seventh Circuit was compelled to create a requirement which does not appear in the wording of the statute. Further, prior to Altobella, there was no authority in either the case law or the legislative history to support such a position.

The words of the statute did not justify the court's position in either Isaacs or Altobella. The legislative history in fact revealed no congressional desire to limit the application of the bill to only situations where the use of the interstate facility has been substantial. Only the dictum of Rewis, a case which considered extending the Act beyond the clear scope of its words, was correctly cited in support of the court's position in Issacs [footnotes omitted].

See also Comment, The Continuing Debate over Federal Criminal Jurisdiction Under the Travel Act, 60 IOWA L. REV. 1401, 1403-15 (1977).

278. See United States v. Perrin, supra note 197, at 736; United States v. Pecora, supra note 207, at 423-24.
279. See United States v. Raineri, supra note 277, at 717 n.12. See also United States v. Seregos, supra note 264, at 36 n.3; United States v. Herrera, 584 F.2d 1137, 1150 (2d Cir. 1978); United States v. Craig, supra note 200, at 489; United States v. LeFaivre, supra note 276, at 1297.
280. See United States v. McPartlin, 595 F.2d 1321, 1361 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Peskin, supra note 265, at 78; United States v. Polizzi, supra note 271, at 876-77; United States v. LeFaivre, supra note 276, at 1297 n.14.
281. See United States v. Alsobrook, 620 F.2d 139, 143-44 (6th Cir.), cert. denied, 449 U.S. 843 (1980); United States v. Barbieri, 614 F.2d 715, 718 (10th Cir. 1980); United States v. Tilton, supra note 264, at 308; United States v. Gooding, supra note 267, at 427-28. But cf. United States v. Hawthorne, 356 F.2d 740, 741-42 (4th Cir.), cert. denied, 384 U.S. 908 (1966).
282. See United States v. Raineri, supra note 277, at 715 n.9; United States v. Alsobrook, id. at 142; United States v. Polizzi, supra note 271, at 898.
283. See United States v. Jones, 642 F.2d 909, 912 (5th Cir. 1981); United States v. Eisner, supra note 274, at 992-93; United States v. LeFaivre, supra note 276, at 1291-93.

284. See United States v. Wander, supra note 267, at 1258-59.
285. See supra notes 269-71. See, e.g., United States v. Steele, 685 F.2d 793, 804 (3d Cir. 1982) (alleged payment of a bribe by a major company on a multi-million dollar power plant const. contract in Puerto Rico); United States v. McPartlin, supra note 280, at 1327-32 (\$900,000 in illegal payments to secure a multi-million dollar sludge-hauling contract).
286. See, e.g., United States v. Evans, supra note 7, at 482; United States v. Williams, supra note 69, at 1092.
287. See supra note 266. See also, e.g., United States v. Graham, supra note 263, at 790 (\$5,000 extortionate payment to derail an engineering contract).
288. See supra note 266, at 54-58. See also United States v. Walsh, 700 F.2d 846 (2d Cir. 1983) (bribes to city officials in violation of N.J. law in relation to lucrative engineering contracts for municipal public work projects); Henderson, supra note 200, at 389.
289. United States v. Addonzio, supra note 266, at 75-77.
290. Compare notes 202-60 supra and accompanying text with notes 261-65 supra and accompanying text.
291. Marcey, supra note 200, at 4. But see McLaughlin, The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 FORDHAM L. REV. 1071 1098-99 (persuasive argument that since federal and state bribery statutes define "public official" basically in terms of U.S. officials and covered state officials, the bribery of a foreign official would not constitute either a federal or state predicate Travel Act offense, but the author does not probe the indirect application of state commerical bribery statutes) (hereinafter cited as FCPA Comparative Analysis).
292. Bergan, supra note 272, at § 35.05.
293. 41 U.S.C. §§ 51, 54 (1976) provide in pertinent part that:

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor . . . (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever . . . as an inducement for the award of a subcontract or order

from the prime contractor . . . is hereby prohibited. The amount of such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor . . . The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff . . . for by an action in an appropriate court of the United States . . .

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Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than \$10,000 or be imprisoned for not more than two years, or both.

The "Subcontractor" Anti-Kickback Act, 41 U.S.C. §§ 51-54 (1976) should not be confused with the Copeland Anti-Kickback Act, 18 U.S.C. § 874; 40 U.S.C. § 276(c) (1976). The Copeland Act protects construction employees subject to federal labor standard provisions who are working on federally financed public works or construction contracts. The act specifically prohibits the wrongful deprivation (e.g., extortionate kickbacks) of any wages from covered public works employees. See generally I GOV'T CONT. REP. (CCH) ¶¶ 3635-41.

The Copeland Act provides in 18 U.S.C. § 874 (1976) that:

Whoever by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

See e.g., United States v. Carbone, 327 U.S. 633, 641 (1946) (statute does not reach bona fide union deductions for legitimate initiation fees); United States v. Loudani, 320 U.S. 543, 547 (1944) (conviction affirmed of company foreman with power to hire and fire who extorted money from employees). See also Slater v. United States, 562 F.2d 58 (1st Cir. 1976) (excellent comparison between the requirements of the Copeland Act and the Subcontractor Anti-Kickback Act); United States v. Price, 224 F.2d 604

(6th Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Alsup, 219 F.2d 72 (5th Cir.), cert. denied, 348 U.S. 982 (1955). See generally I NASH & CIBINIC, supra note 190, at 605; G. GINSBURG, CASES AND MATERIALS ON FEDERAL LABOR STANDARDS 202-10 (2d ed. 1976); L. Crowley, LABOR STANDARDS AND EQUAL EMPLOYMENT (Geo. Wash. U., Gov't Contract Monograph No. 11) (1971).

294. Act of Sept. 2, 1960, Pub. L. No. 86-695, 74 Stat. 740 (codified as amended at 41 U.S.C. §§ 51-54 [1976]). See also 1960 U.S. CODE CONG. & ADM. NEWS 3292-96.
295. Acme Process Equip. Co. v. United States, 347 F.2d 509 (Ct.Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966), at 145, which noted: "where there is commercial bribery in the form of a kickback, there is something specific the Government can recover." See generally supra note 197; United States v. Olin Mathieson Chemical Corp., 368 F.2d 525, 526 (2d Cir. 1966).
296. See, e.g., Acme Process Equip. Co. v. United States, id. at 143 n.5:

Acme in 1953 submitted cost data for price redetermination purposes that included the charges of the five subcontractors which had paid kickbacks to Acme's employees. These subcontracting charges in turn included the amounts paid as kickbacks. Had the kickbacks not been discovered and the contract not been canceled, Acme would have been able to use these costs to renegotiate the price per rifle from \$337 to \$385. Such price redetermination could have cost the Government about \$132,000 more on the entire contract.

See also United States v. Dobar, 223 F.Supp. 8, 11 (M.D.Fla. 1963); United States v. Davio, 136 F.Supp. 423, 429 (E.D.Mich. 1955).

297. See 41 U.S.C. § 54 (1976).
298. See 41 U.S.C. § 51 (1976). See generally Travers v. United States, 361 F.2d 753, 755 (1st Cir.), cert. denied, 385 U.S. 834 (1966); Annot., 19 A.L.R. FED 545 (1974) (validity, construction, and application of the "Subcontractor" Anti-Kickback Act).
299. See supra note 298; United States v. Hutchins, 47 F.R.D. 340, 341 (D.Ore. 1969); United States v. Gemmell, 160 F.Supp. 792, 793-95 (E.D.Pa. 1958). The payor and the recipient of the kickback are jointly and severally liable for the amount of the payment. United States v. Gemmell, id. at 794. The setoff procedures, provided by 41 U.S.C. § 51, permit direct recovery the United States or indirect recovery by a prime contractor under any contract. These

setoff provisions are somewhat similar to liquidated damages. See generally I GOV'T CONT. REP. (CCH) ¶ 395 (1982).

300. Acme Process Equip. Co. v. United States, supra note 295.
301. See Howard v. United States, 345 F.2d 126, 129 (1st Cir.), cert. denied, 382 U.S. 838 (1965); United States v. Dobar, supra note 296, at 11; Marketing Consultants Int'l, Ltd., Comp. Gen. Dec. B-183705, 75-2 CPD ¶ 384 (1975), at 6. See also Graham, supra note 194, at 63-66; I GOV'T CONT. REP. (CCH) ¶ 355 (1982); I NASH & CIBINIC, supra note 190, at 605; OFF. OF GEN. COUNS., DEP'T OF NAVY, NAVY CONTRACT LAW § 9.18A (2d ed. 1959 & Supp. 1965) (hereinafter cited as NAVY CONTRACT LAW); Ethics in Procurement, supra note 13, at 7-8.
302. See 41 U.S.C. §§ 51-52 (1976). See, e.g., Acme Process Equip. Co. v. United States, supra note 295, at 147 (company accountable for conduct of agents); United States v. Perry, 431 F.2d 1020, 1021-24 (9th Cir. 1970) (summary judgment vacated and rem'd on issues of fact); United States v. Moore, 347 F.2d 942, 943 (9th Cir. 1965) (rev'd on issue of whether payments were on behalf of subcontractors); Jensen v. United States, 326 F.2d 891, 895 (9th Cir. 1964) (civil action rev'd in part and rem'd on the issue of the amount of fees and commissions received by the covered employees of first tier contractor).
303. See 41 U.S.C. §§ 51-52 (1976). See also United States v. Barnard, 255 F.2d 583, 588 (10th Cir.), cert. denied, 358 U.S. 919 (1958) (contract containing a provision for unlimited price redetermination is a "cost reimbursable" contract for purposes of the act); United States v. Dobar, supra note 296, at 11.
304. See 41 U.S.C. § 51 (1976). See also Travers v. United States, supra note 298, at 754-55; Moore v. United States, supra note 302, at 943; Jensen v. United States, supra note 302, at 895.
305. See Howard v. United States, supra note 301, at 128.
306. See United States v. Grossman, 400 F.2d 951, 952 (4th Cir.), cert. denied, 393 U.S. 982 (1968) (gift of corporate shares, cigars, whiskey, 255 lbs. of candy, and 14 cases of beer).
307. Howard v. United States, supra note 301, at 129.
308. United States v. Grossman, supra note 306, at 954; Hanis v. United States, 246 F.2d 781, 784-85 (8th Cir. 1957) (the underlying contract was actually classified); Howard v. United States, supra note 301, at 129.

309. See generally supra note 302.
310. Howard v. United States, supra note 301, at 129.
311. Id. at 128.
312. See generally id. at 127-28 (materials and labor supplied to an ass't plant manager who was building a new home); Hanis v. United States, supra note 308, at 783 (various items of value including stock shares, an automobile, plus over \$65,000 in checks were given to a Westinghouse Electric Corp. buyer). But cf. Perry v. United States, supra note 302, at 1021-23 (summary judgment vacated and rem'd on material issues of fact in case allegedly involving \$150,000 in contract kickbacks).
313. See Howard v. United States, supra note 301, at 128:

The gist of the crime therefore is the receipt of a prohibited payment with knowledge that it is made for the purpose of inducing the award of a subcontract. Whether the receipt actually induces the award of a subcontract is irrelevant. The statute forbids the purchase of good will in the contracting process [emphasis added].

This reasoning is similar to the rationale in United States v. Campbell. See notes 96-115 supra and accompanying text.

314. 523 F.Supp. 790, 793, 796 & 807 (D.D.C. 1981) (civil action). See also In re AlSCO-Harvard Fraud Litigation, 325 F.Supp. 315 (J.P.M.D.L 1971), 328 F.Supp. 1405. See generally St. Louis Union Trust Co. v. United States, 617 F.2d 1293 (1980); Stone v. United States, 405 F.Supp. 642 (S.D.N.Y. 1975). Although the defendant owners were convicted of these criminal criminal in 1970, the civil case was not settled for over another 10 years. See In re AlSCO-Harvard Fraud Litigation, id. at 800.
315. AlSCO-Harvard Fraud Litigation, id. at 796.
316. Id. at 807.
317. Id.
318. Id.
319. Id. at 796, 810.
320. Id.
321. Id. at 810 [footnotes omitted].

322. See generally Annot., 60 A.L.R. FED. 263 (1983) (contingent fee provisions under the DAR & FPR); Ethics in Procurement, supra note 13, at 5-6; I NASH & CIBINIC, supra note 190, at 599, 607; NAVY CONTRACT LAW, supra note 301, at 501-03; Barron & Munves, The Gov't versus the Five-Percenters: Analysis of Regulations Governing Contingent Fees in Gov't Contracts, 25 GEO. WASH. L. REV. 127 (1957) (hereinafter cited as Barron & Munves). See also VI J. McBRIDE & T. TOUHEY, GOV'T CONTRACTS, ch. 42 (1978 & Supp. 1982) (hereinafter cited as McBRIDE & TOUHEY).
323. See, e.g., Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941). For a broad historical perspective of Gov't policy in this area, see Annot., 148 A.L.R. 768 (1944). (validity of contract to influence admin. or exec. officer or dep't); Annot., 46 A.L.R. 196 (1927) (validity of contract to influence admin. or exec. officer or dep't).
324. See DAR § 7-103.20; FPR § 1-1.503, which provide:
- COVENANT AGAINST CONTINGENT FEES (JAN. 1958)
- The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee [emphasis added].
325. See 10 U.S.C. § 2306(b) (1976) & DAR §§ 1-502 to -503; 41 U.S.C. § 254(a) (1976) & FPR §§ 1-1.500 to 1.501. See, e.g., Mitchell v. Flintkote Co., 185 F.2d 1008, 1009-10 (2d Cir.), cert. denied, 341 U.S. 931 (1951) (example of a contingent fee which was not permissible in an advertised contract).
326. See Muschany v. United States, 324 U.S. 49, 64 (1945). See also 17 AM.JUR.2D Contracts §§ 210-14 (1964 & Supp. 1983); Ethics in Procurement, supra note 13, at 5. See generally Crocker v. United States, 240 U.S. 74 (1916); Hazelton v. Scheckells, 202 U.S. 71 (1906); Trist v. Child, 88 U.S. (21 Wall.) 441 (1874); Providence Tool Co. v. Norris, 69 U.S. (2 Wall.) 45 (1865). See also Quinn v. Gulf & Western, 644 F.2d 89, 93 (2d Cir. 1981), which noted:



[I]t is obvious from the requirement of the warranty that commission or contingent fee arrangements are contrary to federal policy. The purpose of the warranty requirement is to "protect government agencies against corrupting influences." Such arrangements would present the patent threat of persons selling government influence or access to government officials. These arrangements could easily result in higher prices for government goods and services as well as contracts which would not have been awarded had all the potential contractors been afforded equal consideration. Thus, enforcement of such an agreement would be contrary to the intent of the procurement statute and regulation [citation omitted].

327. Acme Process Equip. Co. v. United States, supra note 295, at 516 n.7. See generally, Annot., supra note 322, at 286.
328. A contractor becomes an ineligible bidder if a breach of the warranty is discovered prior to award. If a contractor is awarded a Gov't contract because he improperly concealed a contingent fee arrangement, the contract may be annulled and the Gov't may deduct the fee from the contract price. The contractor is also subject to debarment or suspension. See DAR §§ 1-508.3, 1-605.2; FPR §§ 1-1.508-3, 1-1.604. See also Walter M. Ballard Co. v. Supreme Equip. & Systems Corp., 18 GOV'T CTR. (Fed. Pubs.) ¶ 293 (D.D.C. 1976); Le John Mfg. Co. v. Webb, 222 F.2d 48 (D.C. Cir. 1955). See generally Note, Recovery of Contingent Fees for the Procurement of Federal Gov't Contracts, 69 HARV. L. REV. 1280 (1956) (hereinafter cited as Recovery of Contingent Fees).
329. Detailed regulatory guidance has been developed to clarify the scope of permissible contingent fees. See DAR § 1-505; FPR § 1-1.504. See also NAVY CONTRACT LAW, supra note 301, at 502:

Divergent opinions as to what constitutes a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business resulted in administrative difficulties in enforcing the covenant against contingent fees. To promote much-needed uniformity throughout the Government with respect to the use of the "covenant against contingent fees" and with respect to the procedure for obtaining information concerning contingent or other fees paid by contractors for soliciting and securing government contracts, the Department of Defense and the General Services Administration have cooperatively developed and agreed upon the form, procedure, principles, and standards set forth in General Regulation

No. 12, General Services Administration, dated December 29, 1952. The stated objectives of this regulation, also published in Part 5 of Section I of the Armed Services Procurement Regulation, are the prevention of improper influence in connection with the obtaining of government contracts, the elimination of arrangements which encourage the payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed, and the prevention of the unwarranted expenditure of public funds which inevitably results therefrom [citations omitted].

330. See P. SHNITZER, GOV'T CONTRACT BIDDING 373 (1976) (hereinafter cited as SHNITZER):

However, there is a no prohibition against retaining firms or individuals who are paid a fee contingent on receiving an award, as long as the arrangement is not undertaken for the purpose of exerting improper influence. The important element is the purpose to exert improper influence -- it does not matter whether the spurious effort ultimately succeeded or failed.

331. See DAR §§ 1-505.2 to -505.3; FPR §§ 1-1.504-3 to 1.504-4.  
332. See DAR §§ 1-505.2, 1-505.4; FPR §§ 1-1.504-3, 1-1.504-5.  
333. See I NASH & CIBINIC, supra note 190, at 607.  
334. See DAR § 1-505.1; FPR § 1-1.504-2, which provide:

Contingent Character of the Fee. Any fee whether called commission, percentage, brokerage, or contingent fee, or otherwise denominated, is within the purview of the covenant if, in fact, any portion thereof is dependent upon success in obtaining or securing the Government contract or contracts involved. The fact, however, that a fee of a contingent nature is involved does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant.

335. See generally DAR §§ 1-504 to 505.3; FPR §§ 1-1.502 to 1.504-4; Barron & Munves, supra note 322, at 143-45.  
336. See Annot., supra note 322, at 274.  
337. See DAR § 1-505.3(b); FPR § 1-1.504(b).  
338. See DAR § 1-505.3; FPR § 1-1.504; Ethics in Procurement, supra note 13, at 5-6; Barron & Munves, supra note 322, at 156-57.  
339. See DAR §§ 1-504, 1-505.3(c); FPR §§ 1-1.502, 1-1.504-

4(c); See generally Weitzel v. Brown-Neil Corp., 251 F.2d 661 (4th Cir. 1958); Companhia Atlantica De Desen., Etc. v. United States, 180 F.Supp. 342 (Ct.Cl. 1960), cert. denied, 364 U.S. 862 (1960); Wickes Industries, Inc., ASBCA 17376, 75-1 BCA ¶ 11,180 (1975), at 53,240:

[A] total of ten (10) contracts were subject to Mr. Taylor's Sales Representative Agreement. These include three contracts with Philco-Ford; two contracts with Hughes Aircraft; the one contract with the U.S. Navy Purchasing Office in Los Angeles; one contract with Energy System; one contract with Resalab; one contract with Associated Industries; and one contract with General Dynamics.

See also Quinn v. Gulf & Western Corp., supra note 326.

340. See DAR §§ 1-505.3(a), 15-205.37(c); FPR §§ 1-1.504-4(d), 1-15.205-37(c). See also DAR § 15-107; FPR § 1-15.107; McBRIDE & TOUHEY, supra note 322, at § 42.50[2]; Barron & Munves, supra note 322, at 149-51.
341. Compare DAR § 1-505.3; FPR § 1-1.504-4 (factors included in a bona fide employee exemption) with DAR § 1-505.4 and FPR § 1-1.504-5 (factors included in a bona fide agency exception). See generally SHNITZER, supra note 330, at 373-74; NAVY CONTRACT LAW, supra note 301, at 503; Barron & Munves, supra note 322, at 145-49. See also Metro Engineering & Mfg. Co., Inc., ASBCA 1495, 6 CONT. CAS. FED. (CCH) ¶ 61,567 (Mar. 15, 1954).
342. See DAR § 1-505.4; FPR § 1-1.504-5; Barron & Munves, supra note 322, at 145-49.
343. See DAR § 1-505.4(d); FPR § 1-1.504-5(b)(4) ("The agency may be either one which has been in business for a considerable period of time or a new agency which is a presently going concern and which is likely to continue in business as a commercial or selling agency in the future"). See also Comp. Gen. Dec. B-157815, Jan. 21, 1966, Unpub., 11 CONT. CAS. FED. (CCH) ¶ 80,257, at 85,364-65:

The record before us establishes that Horsley met all the criteria listed above, and it may be particularly pointed out that the agency relationship is a continuing one; that Horsley is experienced in the material handling field as well as in the conveyor manufacturing field; that its fee is most reasonable in relation to the value of the expected contract; and that Horsley is a well-established agency which has represented another firm in related manufacturing activities for 20 years.

See generally McBRIDE & TOUHEY, supra note 332, at § 42.30[8]; Barron & Munves, supra note 322, at 151-52.

344. This concept is similar to the continuity requirement in DAR § 1-505.4(c) & FPR § 1-1.504-5(b)(3). Despite earlier holdings, such as United States v. Paddock, 178 F.2d 394 (5th Cr. 1949), cert. denied, 340 U.S. 813 (1950) (employment relationship which is supported entirely by a contingent arrangement does not qualify for the fee exception), the present thrust of the bona agency exception is on the continuity of the employment relationship, a general agency agreement, and several other important factors. See, e.g., Comp. Gen. Dec. B-157815, id., which noted that:

The factors to be applied in determining whether such a bona fide relationship exists are:

1. The fee must be reasonable, that is, not inequitable or exorbitant;
2. The agent should have an adequate knowledge of the product being procured;
3. There should be a continuity of relationship between the agent and contractor;
4. The agent should be an established concern; and
5. The agent is to be regarded favorably if its functions include the solicitation of both commercial and Government business.

\* \* \*

Our office has not questioned the reasonableness of these regulations which were promulgated as an implementation of 44 CFR 150, prescribing the procedures, principles and standards to be followed by the executive agencies of the Government in administering the contingent fee covenant. While certain early court decisions interpreted the contingent fee covenant more strictly against the contractor, we are inclined to accept the current regulations as in harmony with the general line of judicial authority as well as decisions of the departmental boards of contract appeals wherein the bona fide agency requirement was reassured against the criteria listed above [citations omitted].

See generally Barron & Munves, supra note 322, at 152-57; McBRIDE & TOUHEY, supra note 322, at § 42.40.

345. See DAR § 1-506.3 which provides:

Exceptions. The inquiry and agreement specified in 1-506.1 need not be made and submission of Standard Form 119 need not be requested in connection with the following:

- (i) any contract in which the aggregate amount involved does not exceed \$25,000;
- (ii) any contract for services which are required to be performed by an individual contractor in person under Government supervision and paid for on a time basis;
- (iii) any contract for public utility services furnished by a public utility company where the utility company's rates for the services furnished are subject to regulation by Federal, State, or other regulatory body and the public utility company is the sole source of supply;
- (iv) contracts to be made in foreign countries; and
- (v) any other contracts, individually or by class, designated by the Secretary. (Reports of any such exceptions shall be filed promptly with the Administrator of General Services.)

See also FPR § 1-1.507-3.

346. See DAR § 1-506; FPR § 1-1.505; I NASH & CIBINIC, supra note 190, at 607; SHNITZER, supra note 322, at 77; NAVY CONTRACT LAW, supra note 301, at 502-03.
347. See DAR § 1-506.1; FPR § 1-1.505.
348. The Covenant permits commercial and selling agency arrangements which do not qualify as a "full-time, bona fide employee working solely for the offeror." See supra note 324. See also DAR § 1-506.2(b); FPR § 1-1.506(b), which provide:

The fact that the prospective contractor retains a person who does not devote his full time solely to the prospective contractor does not necessarily mean that the relationship involved is in violation of the covenant against contingent fees or that there is any stigma attached to the contractor-agent relationship. It does mean, however, that the prospective contractor must fill out the representation in the affirmative and, as required, furnish information with respect to such employment or retainer.

349. See DAR § 1-506.1; FPR § 1-1.505. See generally supra  
note 346.
350. Id.
351. See DAR § 1-508.1(c); FPR § 1-1.508-1. See also supra  
note 346.
352. See DAR § 1-506.1; FPR § 1-1.505.
353. See DAR § 1-508.2; FPR § 1-1.508-2.
354. Supra note 326.
355. Id. at 91-92.
356. Id. at 94.
357. Id. at 93.
358. Id. at 93-94.
359. 279 F.2d 268 (Ct.Cl. 1960).
360. Id. at 269-70.
361. Id.
362. Id.
363. Supra note 339.
364. Id. at 53,239-40.
365. Id.
366. Id. at 53,240.
367. Supra note 339.
368. Id. at 345.
369. Id. at 345-47.
370. See notes 335-44 supra and accompanying text.
371. Supra note 328.
372. 251 F.2d 661 (4th. Cir. 1958).
373. See DAR § 1-505.2; FPR § 1-1.504-3.
374. 15 U.S.C. § 78dd-1 (1976 & Supp. V 1981) provides that:

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to --

(1) any foreign official for purposes of --

- (A) Influencing any act of decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or
- (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

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

- (A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or
- (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or

promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of --

- (A) influencing any act of decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or
- (B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

- (b) As used in this section, the term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical [emphasis supplied].

The FCPA is not listed as a predicate RICO offense in 18 U.S.C. § 1961(B) (1976 & Supp. V 1981).

The provisions of 15 U.S.C. § 78dd-2 (1976 & Supp. V 1981) are basically in pari materia with 15 U.S.C. § 78dd-1 except that 15 U.S.C. § 78dd-2 applies to individuals or firms which are not regulated by the Securities & Exchange Commission (SEC). See V BUSINESS CRIME, supra note 205, at ¶ 18.04[c] n.32; 15 U.S.C. § 78dd-2(d)(1)(A)-(B). However, the Justice Dep't has criminal jurisdiction over both "domestic concerns" and U.S. public companies for violations of 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

See generally 39 FED. CONT. REP. (BNA) 352 (Feb. 14, 1983); G. GREANIAS & D. WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 96-103 (1982) (hereinafter cited as GREANIAS & WINDSOR); Georges, The Foreign Corrupt Practices Act Review Procedure: A Quest for Clarity, 14 CORNELL INT'L



L. J. 57, 58-59 (1981) (hereinafter cited as Quest for Clarity).

375. Heavy reliance must be placed, regrettably, on secondary sources for interpretation of the criminal antibribery sections of the act due to the absence of reported cases. See GREANIAS & WINDSOR, id. at 75-89. See generally Atchinson, The Foreign Corrupt Practices Act -- A Practical Look, 53 N. Y. ST. B. J. 342 (1981) (hereinafter cited as Atchinson); White-Collar Crime II, supra note 2, at 454; Pierce, The Foreign Corrupt Practices Act of 1977, 8 INT'L BUS. L. 13 (1980) (hereinafter cited as Pierce); Note, The Foreign Corrupt Practices Act of 1977: A Transactional Analysis, 13 J. INT'L L. & ECON. 367 (1979) (an excellent article which provides a series of five practical hypothetical FCPA transactions which are subsequently analyzed and discussed. The article is particularly useful in view of the lack of meaningful FCPA criminal case law precedents) (hereinafter cited as Transactional Analysis); White-Collar Crime I, supra note 18, at 290; Baruch, The Foreign Corrupt Practices Act, 57 HARV. BUS. REV. 32 (1979) (hereinafter cited as Baruch); Note, In Search of an Int'l Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior, 12 VAND. J. TRANSNAT'L L. 359 (1979) (hereinafter cited as Corporate Impact); Sprow & Benedict, The Foreign Corrupt Practices Act of 1977: Some Practical Problems and Suggested Procedures, 1 CORP. L. REV. 357 (1978) (hereinafter cited as Sprow & Benedict); Estey & Marston, Pitfalls (and Loopholes) in the Foreign Bribery Law, FORTUNE, Oct. 9, 1978, at 182 (hereinafter cited as Estey & Marston); V. BUSINESS CRIME, supra note 205, at ¶ 18.01-.06; ELMER & SWINNEN, supra note 13, at 2-24 to -39.
376. The penalties imposed under the issuer provisions of 15 U.S.C. § 78ff (1976 & Supp. V 1981) for prohibited payment violations of 15 U.S.C. § 78dd-1(a) are some of the most stringent sanctions in the U.S. Criminal Code:
- (c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than \$1,000,000.
  - (2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.
  - (3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a

United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act of practice constituting such violation shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years or both.

- (4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

The penalties for violations of 15 U.S.C. § 78dd-2(a) by domestic concerns parallel those of 15 U.S.C. § 78dd-1(a). See 15 U.S.C. § 78dd-2(b).

377. Comment, The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977, 13 N. Y. U. J. INT'L L. & POL. 645, 645 (1981) (hereinafter cited as Extraterritorial Bribery). For an excellent synopsis of the legislative background and history of the FCPA, see Corporate Impact, supra note 375, at 360-68.
378. Extraterritorial Bribery, id. at 645. See also Comment, Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard, 4 NW. J. INT'L L. & BUS. 203, 203 (1982) (hereinafter cited as Modifying the FCPA); Kane & Butler, Improper Corporate Payments: The Second Half of Watergate, 8 LOY. CHI. L. J. 1 (1976); Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 LAW & POL. INT'L BUS. 547 (1976); Mann, Watergate to Bananagate: What Lies Beyond?, 31 BUS. LAW. 1663 (1976).
379. See FCPA Comparative Analysis, supra note 291, at 1072:
- Among other things, their disclosure has forced the removal of a Central American president, embarrassed a Phillipine regime, led to a constitutional crisis in the Netherlands, caused legislative paralysis in Japan, and shaken an Italian Government. In the United States, questions over the propriety of foreign payments recently delayed the confirmation of the chairman of the Federal Reserve Board [citations omitted].
380. See supra note 374. See also Pierce, supra note 375, at 13; Surrey, supra note 198, at 296.

381. See, e.g., Feller, An Examination of the Accounting Provisions of the FCPA, 9 SYR. J. INT'L L. & COM. 245 (1982); Sweeny, The SEC Interpretive and Enforcement Program Under the FCPA, 9 SYR. J. INT'L L. & COM. 273 (1982); Timmeny, Int'l Aspects of the Accounting Provisions of the Foreign Corrupt Practices Act, 360 CORP. L. & PRAC. 53 (1981); Goelzer, The Accounting Provisions of the Foreign Corrupt Practices Act -- The Federalization of Corporate Record Keeping and Internal Control, 5 J. CORP. L. 1 (1979) (excellent article prepared in partial satisfaction of requirements for an LL.M. Degree at the Nat'l L. Center, Geo. Wash. U.); Timmeny, SEC Enforcement of the Foreign Corrupt Practices Act, 2 LOY. L. A. INT'L & COMP. L. ANN. 25 (1979); Best, The Foreign Corrupt Practices Act, 11 REV. SEC. REG. 975 (1978); A.B.A. COMM. ON CORP. L. & ACCT., A Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934, 34 BUS. LAW. 307 (1978); Chu & Magraw, The Deductibility of Questionable Foreign Payments, 87 YALE L. J. 1091 (1978). See generally Dundas & George, Historical Analysis of the Accounting Standards of the Foreign Corrupt Practices Act, 10 MEM. ST. U. L. REV. 449 (1980).
382. See AD HOC COMM. ON FOREIGN PAYMENTS, ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION 1 (1977) ("No single issue of corporate behavior has engendered in recent times as much discussion in the United States -- both in the private and public arenas -- and as much administrative and legislative activity, as payments made abroad by corporations."); George & Dundas, Responsibilities of Domestic Corporate Management Under the Foreign Corrupt Practices Act, 31 SYR. L. REV. 865 (1980).
383. Hibey, supra note 198, at 51 [footnotes omitted and emphasis added].
384. See Surrey, supra note 198, at 298; GREANIAS & WINDSOR, supra note 374, at 17-31 (discussion and documentation of the former magnitude of the illicit corporate payments problem). See also Securities & Exchange Com'n v. Dresser Indus., 628 F.2d 1368, 1371-72 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); Note, S. 708: A Proposed Amendment to the Foreign Corrupt Practices Act, 1 B. U. INT'L L. J. 187, 187-90 (1982) (hereinafter cited as Proposed Amendment); Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payment Abroad, 10 CORNELL INT'L L. J. 231, 246-48 (1977).
385. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). See generally Pierce, supra note 375, at 15; Corporate Impact, supra note 375, at 370-71; Sprow & Benedict, supra note 375, at 358; ELMER & SWINNEN, supra note 13, at 2-25 to -26; V BUSINESS

CRIME, supra note 205, at ¶ 18.04 [e][2].

386. 15 U.S.C. § 78dd-2(d) provides that:

(1) The term "domestic concern" means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

387. See notes 233-38 & 274-78 supra and accompanying text. See also Estey & Marston, supra note 375, at 183:

An early proposal requiring that the interstate facility be used directly in the improper payment was scrapped in favor of the much broader "in furtherance of" language. As a practical matter, anyone whose defense depends on disproving use of an interstate facility should probably be packing his toothbrush.

388. See Sprow & Benedict, supra note 375, at 359. See also Comment, Baksheesh and Wong Wogok: An American Business Guide to the Foreign Corrupt Practices Act and the Anti-Bribery Laws of Certain OPEC Nations, 4 LOY. L. A. INT'L & COMP. L. J. 99, 103 (1981) (hereinafter cited as Business Guide); V BUSINESS CRIME, supra note 205, at ¶ 18.04[e].

389. Pierce, supra note 375, at 358-59.

390. See Baruch, supra note 375, at 46:

Congress clearly did not want to forbid small payments -- frequently called "grease" or "facilitating" payments -- to minor foreign officials to get them to perform customary services that they might refuse to do in the absence of such payments. However, Congress did not provide any set minimum figure below which payments were not prohibited.

391. See 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2), which defines a "foreign official" as:

[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical [emphasis added].

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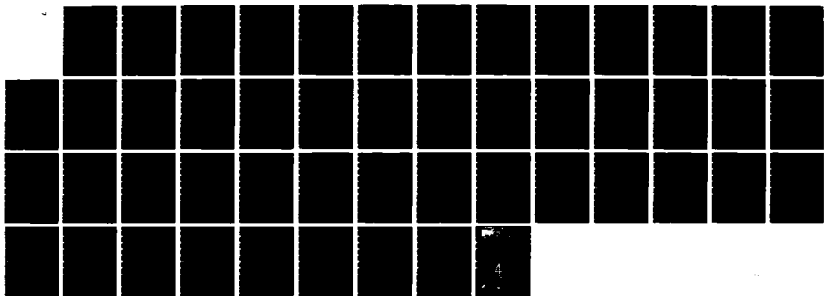
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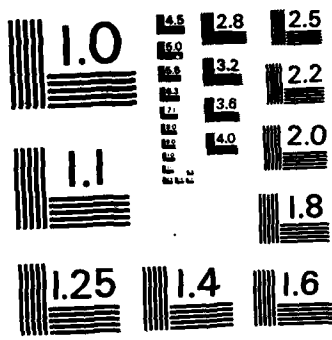
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MICROCOPY RESOLUTION TEST CHART  
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392. Consider, e.g., the following hypothetical—posed in Estey & Marston, supra note 375, at 182:

A million-dollar chemical shipment has been off-loaded from a refrigerated cargo ship onto the sweltering Asian pier. A customs official watches indifferently as condensation pours off the containers, while the temperature climbs. He looks languidly at the customs documents and shrugs: "Your papers are in order, but I am too busy to clear this shipment now." The local American manager of the chemical company slips a packet of U.S. currency totaling \$10,000 with the sheaf of customs documents and suddenly the official brightens: "You are thoughtful to understand. Your shipment is cleared."

Under the new U.S. anti-bribery law, that's a legal facilitating payment.

On the next pier over, another American manager of a similar company, anticipating the same problem, has had his documents precleared with the Cabinet minister in charge of such matters. Still the customs official dawdles, and finally explains: "The minister expected some consideration for approving your papers." The manager slips him a \$100 bill. The customs official says: "I will send this to the minister. Your cargo is cleared."

That American manager has just committed a federal felony.

See generally S. REP. NO. 95-114, 95th Cong., 1st Sess. 10 reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4098, 4107-08 (hereinafter cited as SENATE REPORT).

393. Estey & Marston, supra note 375, at 184 [emphasis added]. See also Pierce, supra note 375, at 360-61.
394. Baruch, supra note 375, at 46. See also Pierce, supra note 375, at 15.
395. See Corporate Impact, supra note 375, at 372-73, 382-85; Pierce, supra note 375, at 15; Modifying the FCPA, supra note 378, at 207-08. See also PRACTICING LAW INSTITUTE, FOREIGN CORRUPT PRACTICES ACT: THREE YEARS AFTER PASSAGE 203-05 (1981), which noted:

The test is not whether the payment was made to secure the performance of "essentially ministerial or clerical duties." That test was discussed during the legislative process and rejected in favor a test that looks to the type of official involved -- not to the

particular duty he or she is asked to perform . . . [i.e.,] What is the recipient's role in the overall government process?

- (a) Does he have superiors?
- (b) Does he have subordinates?
- (c) Does he have discretionary authority?

1. Is he required to exercise discretionary authority in return for the payment made?

396. See Comment, The Foreign Corrupt Practices Act of 1977: A Solution or a Problem, 11 CALIF. W. INT'L L. J. 111, 113-16, 122 (1981) (hereinafter cited as Solution or Problem).
397. See SENATE REPORT, supra note 392, at 4107-09. See also Corporate Impact, supra note 375, 371-72; Pierce, supra note 375, at 15.
398. See id. See generally supra note 266.
399. Pierce, supra note 375, at 15.
400. See id. See generally Elden & Sableman, Negligence Is Not Corruption: The Scienter Requirements of the Foreign Corrupt Practices Act, 49 GEO. WASH. L. REV. 819, 827-28 (1981) (hereinafter cited as Elden & Sableman); Baruch, supra note 375, at 46; V BUSINESS CRIME, supra note 205, at ¶ 18.04[e].
401. See SENATE REPORT, supra note 392, at 4108 (1977):

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.

See also Elden & Sableman, id. at 823; V BUSINESS CRIME, supra note 205, at ¶ 18.05 [3][a]; Surrey, supra note 198, at 294 ("Under both the United States legal and moral structure, offering, giving or receiving a bribe to an official is prohibited. The Act [FCPA] effectively provides for extraterritorial enforcement of the 18 U.S.C. § 201 prohibition at least with regard to U.S. related enterprises"). For a discussion of corrupt specific



- intent, see notes 32-38 supra and accompanying text.
402. See notes 32-38 supra and accompanying text.
403. For a discussion of the problems associated with the "anything of value" standard, see notes 17-31 supra and accompanying text.
404. See Elden & Sableman, supra note 400, at 827-28; Pierce, supra note 375, at 15; V BUSINESS CRIME, supra note 205, at ¶ 18.04[c].
405. See Baruch, supra note 375, at 46. See generally supra note 221.
406. Pierce, supra note 375, at 15 [footnotes omitted].
407. See V BUSINESS CRIME, supra note 205, at ¶ 18.04 ("In the context of foreign practices, the determination of whether a defendant acted with an evil motive may sometimes prove elusive in the extreme."); Sprow & Benedict, supra note 375, at 359.
408. See Pierce, supra note 375, at 15; Sprow & Benedict, supra note 375, at 359-60.
409. See Corporate Impact, supra note 375, at 374. See also Hibey, The Practical Necessity for Amendment of the Foreign Corrupt Practices Act: S. 708 -- The Current Legislative Initiative, 10 HOFSTRA L. REV. 1121, 1128-31 (1982) (hereinafter cited as Hibey II).
410. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) [emphasis added].
411. See also Baruch, supra note 375, at 48 ("You do not have the right to close your eyes when you drop off a large payment") (quoting SEC Chairman Hills). See also Schweitzer, Criminal Defense of a Federal Corrupt Practices Act Prosecution, in DEFENSE TECHNIQUES, supra note 272, at ¶ 34.04[4][a] (hereinafter cited as Schweitzer):

Whether or not a particular situation involves bribery by the corporation or by an individual acting on his own will depend on all the facts and circumstances, including the position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards set forth under section 102 [footnotes omitted].

See generally Transactional Analysis, supra note 375, at 382-88; 39 FED. CONT. REP. (BNA) 514 (Mar. 7, 1983), which

reported that:

U.S. Trade Representative Bill Brock said the "reason to know" provision has had a "chilling effect" on U.S. firms seeking overseas business because the provision would force a company official to prove that he did not have a reason to know or suspect possible wrongdoing by a company representative or agent before the fact. "This has proved to be an unreasonable and nearly impossible test to fulfill," he said.

412. Elden & Sableman, supra note 400, at 828 [footnotes omitted and emphasis added]. These authors also note that: "The phrase 'having reason to know' appears in only one of the Act's three substantive subsections. The word 'corruptly,' however, applies to all three. Thus, a United States business violates the act when it 'corruptly' transfers anything of value . . ." Id. at 828 n.42. Several courts have referenced the FCPA's "reason to know" standard in dictum, while sustaining the use of this standard in criminal cases involving drug paraphernalia. See, e.g. Casbah, Inc. v. Thone, 651 F.2d 551, 561 (8th Cir. 1981); Kansas Retail Trade Co-Op. v. Stephan, 522 F.Supp. 632, 639 (D.Kan. 1981); Delaware Accessories Trade Ass'n v. Gebelein, 497 F.Supp. 289, 294-95 (D.Del. 1980).
413. See Corporate Impact, supra note 375, at 373-75. See generally, e.g., Crossen v. Foremost-McKesson, Inc., 537 F.Supp. 1076, 1078 (N.D.Cal. 1982) (wrongful discharge action brought against an employer, based in part, upon allegations that the employee was discharged because the employee sought to correct violations of Thailand law involving improper payments to foreign officials); Alder v. American Standard Corp., 538 F.Supp. 572 (D.Md. 1982) (an abusive discharge case based in part upon plaintiff's decision to expose employer's alleged bribes to Mexican officials).
414. See Modifying the FCPA, supra note 378, at 209-10; Proposed Amendment, supra note 384, at 192; Sprow & Benedict, supra note 375, at 361-62.
415. Modifying the FCPA, supra note 378, at 208.
416. See Transactional Analysis, supra note 375, at 399.
417. Modifying the FCPA, supra note 378, at 208-09 [footnotes omitted and emphasis added].
418. See Pierce, supra note 375, at 15-16. See generally Corporate Impact, supra note 375, at 373-74.
419. See Pierce, supra note 375, at 16; Baruch, supra note 375,

at 48-49; Corporate Impact, supra note 375, at 374-75; Business Guide, supra note 388, at 104-05; V-BUSINESS CRIME, supra note 205, at § 18.05[b]; Schweitzer, supra note 411, at § 34.04[1][b].

420. See Hibey II, supra note 409, at 129 ("After little more than four years of experience under the FCPA, lawyers are no closer to giving clear answers to these questions than when the law passed. There are important reasons for this puzzlement. First, courts have not reported any decisions interpreting the Act [footnotes omitted]"). See generally Shine, Enforcement of the FCPA by the Dep't of Justice, 9 SYR. J. INT'L L. & COM. 283, 290-91 (1982) (insights by the former Chief, Multinational Fraud Branch, Crim. Div., DoJ, on the application of the FCPA):

One of the reasons for the limited number of prosecutions under the Act is that much of our time, until quite recently, has been spent in the investigation and prosecution of what has been commonly referred to as the pre-Act or pre-Foreign Corrupt Practices Act overseas payment cases. There were a long series of prosecutions of companies in connection with those overseas payment cases in which the conduct pre-dated the existence of the FCPA. A variety of criminal statutes were utilized, including the Currency and Foreign Transactions Reporting Act, the false statements statutes, and, to a lesser extent, the mail and wire fraud statutes. Much of the Department's time until now has been devoted to finishing those cases, many of which were enormously complex. The Department is now completing the final phases of that pre-Act enforcement effort and has begun to focus more attention on post-FCPA investigations and prosecutions [footnotes omitted].

421. See Hibey II, supra note 409, at 129-30:

[N]otwithstanding the promise of President Carter that government would issue guidelines under the Act, the Justice Department initially refused to do so on the ground that advisory opinions on criminal law compliance were inappropriate. The "guidelines" that Justice eventually issued were so lopsided in their disclosure requirements vis-a-vis the guidance they might have provided that very few companies every resorted to the procedure set forth in that program [footnotes omitted].

422. The following comment by Stanley Sporkin, SEC enforcement chief, is characteristic of the agency reluctance to implement administrative regulations in this area: "We do not have guidelines for rapists, muggers, and embezzlers, and I do not think we need guidelines for companies who

want to bribe foreign officials [footnotes omitted]."  
GERANIAS & WINDSOR, supra note 374, at 85. See also Quest for Clarity, supra note 374, at 62, which noted:

These ambiguities in the FCPA are especially troublesome because of the virtual absence of enforcement history under the Act. Companies cannot look to court decisions as aids in interpreting the Act or to SEC or Justice actions to determine enforcement policies. Companies are left in a legal void where commonplace business transactions must be undertaken with uncertain legal foundation and subject to harsh civil and criminal penalties. Small companies and new exporters without access to specialized counsel experienced in dealing with the Act are especially disadvantaged [footnotes omitted].

423. See generally American Business Guide, supra note 388; Quest for Clarity, supra note 374, at 58-62.
424. Quest for Clarity, supra note 374, at 61-65; Note, Effective Enforcement of the Foreign Corrupt Practices Act, 32 STAN L. REV. 561, 568-70 (1980) (hereinafter cited as Effective Enforcement); Modifying the FCPA, supra note 378, at 211.
425. Effective Enforcement, id. at 563-67, 570-80.
426. Id. at 569-70 [footnotes omitted and emphasis added].
427. Extraterritorial Bribery, supra note 377, at 661 ("Even if the violation is discovered, the cooperation of foreign individuals and governments -- which may be difficult or impossible to procure -- would almost always be required for effective prosecution of a crime committed abroad").
428. See generally supra note 381.
429. See, e.g., SEC v. Int'l Sys. & Controls Corp., Civ. No. 79-1760, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,922 (D.D.C. 1979); SEC v. Katy Industries, Inc., Civ. No. 78C-3476, 469 SEC. REG. & L. REP. (BNA) A-1 (N.D.Ill. 1978); SEC v. Page Airways, Inc., Civ. No. 78-0656 [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,393 (D.D.C. 1978); SEC v. McDonnell Douglas, 484 SEC. REG. & L. REP. (BNA) A-6 (D.D.C. 1978). See generally Solution or Problem, supra note 396, at 135-39; White-Collar Crime II, supra note 2, at 461-65.
430. Crim. No. 79-00372 (D.D.C., filed Aug. 2, 1979); Civ. No. 79-2038 (D.D.C., filed Aug. 2, 1979). See generally Comment, Multinational Corporations: Foreign Corrupt Practices Act of 1977 -- United States v. Kenny Int'l Corp., Crim. No. 79-372 (D.D.C., Aug. 2, 1979); United

States v. Kenny, Civ. No. 79-2038 (D.D.C., Aug. 2, 1979), 20 HARV. INT'L L. J. 716 (1979) (hereinafter-cited as Kenny Int'l).

431. Kenny Int'l, id. at 716.
432. Id. at 716-17.
433. Id. at 717.
434. Id.
435. Id.
436. Id. at 719-21.
437. See, e.g., In Re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) ("Fortune 500" multinational corp. under grand jury proceedings for several alleged criminal violations including payments to foreign officials). See also Wall St. J., Feb. 23, 1983, at 1, col. 5, which reported that the DoJ was currently engaged in its biggest FCPA prosecution to date:

Mr. Crawford is accused by the federal government of master-minding one of the biggest overseas payoffs ever uncovered. He is charged in a 49-count federal indictment filed in Houston with paying nearly \$10 million through a Mexico City middleman to two top officials -- whom he allegedly code-named "the folks" -- of Mexico's state owned oil monopoly, Petroleos Mexicanos, or Pemex.

The case is by far the biggest yet prosecuted under the five-year-old Foreign Corrupt Practices Act, which forbids bribery of foreign officials by U.S. companies. In Mexico, it is being treated as potentially a huge scandal -- not another Watergate, exactly; more like a Teapot Dome, with bribes 50 times larger than those paid to Albert Fall in the 1920s scandal.

Mr. Crawford and several codefendants say they are innocent. Trial is set for August. It should be colorful, judging from court papers in Washington, D.C., Houston, Laredo, Texas, and Los Angeles and from interviews with Mexican officials and American attorneys familiar with the case.

See also BUS. WEEK, Feb. 28, 1983, at 60, which noted:

For U.S. companies, a familiar hazard in dealing with Pemex has long been demands for kickbacks and bribes at many levels, from labor union leaders to managers. "It's just too big a headache. Everywhere

you turn you are having to pay someone off," says B. Gill Clements, president of Dallas-based drilling contractor Sedco Inc., which drilled offshore for Pemex in the 1970s. One measure of the scale of corruption is the case brought by the U.S. Justice Dept. against a Houston company, Crawford Enterprises, Inc., charging it with paying bribes estimated at \$10 million to \$45 million to two former Pemex officials to obtain \$647 million in oil-field equipment contracts. Seven U.S. business executives and companies, including Int'l Harvester Co., have pleaded guilty to bribing Pemex officials in this and other cases, and the Justice Dept. says it is investigating dealings with Pemex by 20 U.S. companies.

438. Crim. No. 79-516 (D.D.C. 1979). See also FED. CONT. REP. (BNA) No. 898, A-8 (Sept. 14, 1981) (hereinafter cited as McDonnell Douglas).

439. Id.

440. See Legal Times of Wash., Sept. 14, 1981, at 2, col. 1, which noted:

For lawyers interested in white-collar defense work, here's a tip that can save several hundred dollars. As an alternative to attending a trial practice program, go to the courthouse and read the file of the McDonnell Douglas foreign payments and fraud case.

The case captured headlines from its filing in November 1979 to its resolution by plea bargain last week. What the headlines don't reflect, though, is that United States v. McDonnell Douglas Corp. (No. 79-516, D.D.C.) could be a textbook example of white-collar motions practice. The file of nearly 400 entries contains many dozens of defense motions running the gamut from routine to precedential.

The corporation, on Sept. 8, pleaded guilty to counts alleging violations of mail fraud, wire fraud, and false statements statutes, arising from aircraft sales to airlines in Pakistan and other countries. McDonnell Douglas agreed on criminal penalties and civil payments totaling \$1,255,000.

In return for the plea, the Justice Department moved to dismiss criminal charges against four McDonnell Douglas executives. Associate Attorney General Rudolph Giuliani said he believed that the case against all the defendants was legally sufficient but that the filing of charges against the individuals had been an "overzealous" exercise of prosecutorial discretion [emphasis added].

441. M. CLINARD & P. YEAGER, CORPORATE CRIME 170 (1980) (hereinafter cited as CLINARD & YEAGER) [footnotes omitted and emphasis added].
442. McDonnell Douglas, supra note 438, at A-8.
443. Several civil shareholder derivative suits, alleging violations of the Securities Exchange Act of 1934 based on undisclosed and improper payments to foreign sources, have also been brought against major U.S. corps. See, e.g., Decker v. Massey-Ferguson, Ltd., 681 F.2d 111 (2d Cir. 1982); Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981) (Lockheed Corp.); Goldman v. Northrop Corp., 603 F.2d 106 (9th Cir. 1979); Rosengarten v. Intern. Tel. & Tel. Corp., 466 F.Supp. 817 (S.D.N.Y. 1979) (IT&T).
444. See Arnavas, Foreign Military Sales -- A Current Look at Some Problem Areas, 9 PUB. CONT. L. J. 154 (1977) (hereinafter cited Arnavas). See generally The Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified as amended in scattered sections of 22 U.S.C.); DEP'T OF DEFENSE DIRECTIVE NO. 5105.38-M, MILITARY ASSISTANCE & SALES MANUAL (MASM), pt. III (Aug. 1, 1978); Sherzer, Janik & Green, Foreign Military Sales: A Guide to the United States Bureaucracy, 13 J. INT'L L. & ECON. 545 (1983) (hereinafter cited as Sherzer, Janik & Green).
445. West, The U.S. Security Assistance Program: Giveaway or Bargain?, STRATEGIC REVIEW, Winter 1983, at 52.
446. Arnavas, supra note 444, at 155-56.
447. Foreign purchaser Gov't's can request sole source new procurements under DAR § 6-1307(a). See, e.g., Allied Repair Service, Inc., Comp. Gen. Dec. B-207629, 82-2 CPD ¶ 541 (1982) (U.S. Gov't properly honored a Saudi Arabian Gov't request for sole source award of a ship overhaul contract). Int'l sales agents and marketing consultants, consequently, may sometimes succumb to corrupt practices in order to generate a sole source foreign sale for their client's firm:

Armaments sales provide the most dramatic and dangerous example of corporate profit-seeking, foreign customs, and U.S. policy goals combining to create a massive network of bribery. As cutbacks in Western defense budgets have dried up domestic markets for arms, purchases by Third World countries have increased.

\* \* \*

Given the stiff competition from other countries and

the way business is done in that region, the Middle East arms race was bound to generate millions of dollars in graft. Under recent Saudi Arabian law, no foreign company could do business without a local agent. When Northrop, with strong encouragement from the Pentagon, undertook to sell its F-5 fighter plane there, the Saudi minister of defense told [Northrop's "international consultant"] Kermit Roosevelt to advise the firm to hire Adnan Kashogghi, who had previously been the agent for Lockheed and Raytheon. To get the sale approved, the firm fattened Kashogghi's fee to include \$450,000 for two Saudi air force generals who were threatening to hold up the deal.

Northrop President Thomas Jones says he knew nothing about this, but admits that on a quick trip to Jidda, the graft question was raised, and he told Kashogghi that "Northrop is a company that meets its obligations." The bribe money was deducted from Northrop's income tax and included as a reimburseable cost in its bill to the Department of Defense. Since the recent scandals, both claims have been withdrawn.

Gwartzman, Is Bribery Defensible?, in CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS 333, 339-40 (J. Johnson & J. Douglas eds. 1978). See also CLINARD & YEAGER, supra note 441, at 172-75 (other examples of several questionable arms sales payments, particularly in Iran during the reign of the Shah).

448. See DAR § 6-1305; Sherzer, Janik & Green, supra note 444, at 571-75; Arnavas, supra note 444, at 154; notes 322-73 supra and accompanying text (discussion of contingent fees). See, e.g., Spain Expected to Sign F/A-18 Letter of Intent by End of September, Aerospace Daily, Sept. 7, 1982, at 226-27, which highlighted the problems which can arise in delicate int'l negotiations when sensitive agent fees become public knowledge:

The announcement of the suspension [Spain's suspension of negotiations] was made after reports surfaced in the U.S. and Spanish press that McDonnell Douglas had agreed to pay \$4 million in sales commissions to Compania Aeronautica Espanola, S.A. (CAESA), a Spanish agent.

The Spanish Ministry of Defense halted negotiations until the question of agent payments could be "clarified."

U.S. law allows for payment of only \$50,000 per contract to be made to an agent.

The Spanish government said publicly it would not



pay the \$50,000 fee, but Pentagon officials said last week that the Spanish government has told the U.S. privately that it would.

"For years, the Spanish government knew that McDonnell Douglas was employing an agent and there was no problem," a Pentagon official said.

According to Pentagon sources, Ricardo Fuester, who heads the Madrid-based CAESA, has been an agent for McDonnell Douglas since 1969 and is "also employed by other U.S. aerospace firms such as Rockwell International and E-Systems."

A McDonnell Douglas official said Fuester "is a knowledgeable expert with impeccable credentials, an upright guy." Pentagon officials agreed, saying Fuester enjoys a good standing "with Navy officials involved in the F/A-18 project [citation omitted]."

449. See 39 FED. CONT. REP. (BNA) 514 (Mar. 7, 1983); 39 FED. CONT. REP. (BNA) 352 (Feb. 14, 1983).

450. Id. See also Marinaccio, S. 708: An Amended Version of the Foreign Corrupt Practices Act, 9 SYR. J. INT'L L. & COM. 345 (1982); Proposed Amendment, supra note 384; Hibey II, supra note 409; Extraterritorial Bribery, supra note 377, at 666-74.

451. 39 FED. CONT. REP. (BNA) 352 (Feb. 14, 1983).

452. See, e.g., FED. CONT. REP. (BNA) No. 915, K-16 (Jan. 18, 1982), which reported that:

Efforts to get S. 708 through the House are compounded by the reluctance of Telecommunications Subcommittee Chairman Wirth to move the measure. He has rejected corporate and Administration arguments that the FCPA has hurt U.S. business operating overseas. Wirth contends there is no reason to amend the FCPA until solid evidence is presented linking the FCPA with a loss of export business.

But cf. IMPACT ON U.S. BUSINESS, supra note 200, at 15-16:

Although the majority of our questionnaire respondents [250 companies were randomly selected from the "Fortune 1000"] reported that the act has had little or no effect on their overseas business, more than 30 percent of our respondents engaged in foreign business reported they had lost overseas business as a result of the act. In addition, over 60 percent reported that, assuming all other conditions were similar, American companies could not successfully compete abroad

against foreign competitors that were bribing.

Almost all the respondents that reported decreases in business stated that the act had discouraged foreign buyers and agents from doing business with their firms. In some countries, the use of foreign agents is a recommended practice; in other countries, it is necessary. About 45 percent of the respondents that reported lost business stated that the act has limited the number of countries in which they do business. The impact on overseas business was felt more by respondents from the top 500 companies.

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Claims that U.S. companies have lost sales, however, are difficult, if not impossible to substantiate and quantify because of the sensitivity of the bribery subject and the numerous factors affecting overseas business. Very few companies have publicly come forward and disclosed instances of sales lost as a result of the act. Companies may be reluctant to do this, even if promised confidentiality, because it could be construed as an admission that the company made illegal or questionable payments before the act. Further, the company could incur the wrath of the foreign country in question.

The act also has a disparate impact on different export markets:

The food and drug industries are primarily concerned with import and export duties and customs inspection. Contractual obligations necessitate smooth and swift transactions among governmental employees. Furthermore, the food industry has a peculiar need to clear products through customs because spoiled goods are worthless. The dependence upon the speed and acceptance of goods encourages the use of facilitating payments to governmental officials.

It is apparent that the aircraft and oil industries are unfairly affected by the FCPA. These industries, which typically use political contributions and bribes as a means of promoting their business goals, are penalized for business practices which are, by necessity, fundamental to their existence. Conversely, the food and drug industries, which characteristically resort to facilitating payments, remain relatively untouched by the FCPA [footnotes omitted].

Solution or Problem, supra note 396, at 137.

453. Wash. Post, Mar. 18, 1983, at C8, col. 5.

454. GREANIAS & WINDSOR, supra note 374, at 121 [emphasis added].
455. Several commentators are skeptical that S. 414, as currently drafted, will be the long sought FCPA pancea. Since any detailed discussion of S. 414, as currently proposed, is likely to be overcome by political events during the legislative process, no detailed sectional analysis of the Bill will be attempted. For comprehensive commentaries on S. 414, however, see generally supra note 450; Modifying the FCPA, supra note 378; GREANIAS & WINDSOR, supra note 374, at 121-51; Quest for Clarity, supra note 374; White-Collar Crime II, supra note 2, at 465-68.
456. Id.
457. See 39 FED. CONT. REP. (BNA) 1094-95 (June 6, 1983). See generally supra notes 450, 455.
458. See Modifying the FCPA, supra note 378, 221-23 ("During the five years since the FCPA was passed, the legislature has been filled with calls for an international agreement to the problems of foreign corrupt practices. Nonetheless, there is still no international agreement, and it appears that none will soon be reached.") See generally Comment, Foreign Corrupt Payments: Enforcing a Multilateral Agreement, 22 HARV. INT'L L. J. 117 (1981); Lashbrooke, The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an Int'l Problem, 12 CORNELL INT'L L. J. 227 (1979); Corporate Impact, supra note 375, at 385-90; Coonrod, The United Nations Code of Conduct for Transnational Corporations, 18 HARV. INT'L L. J. 273 (1977); Note, Legislating Business Morality: A Look at Efforts by Two Int'l Organizations to Deal with Questionable Behavior by Transnational Corporations, 10 VAND. J. TRANSNAT'L L. 459 (1977). A major hurdle in reaching any int'l accord on foreign corrupt practices is that not all nations share the U.S. concern for strict controls over extraterritorial bribes. The following passage provides an insight into the business mores of some other nations:

Many of America's trading partners and competitors even promote foreign bribery, as the United States formerly did. West Germany, for example, allows its companies to deduct foreign bribes from tax returns. The French Defense Ministry has for years been known as the "Ministry of Bribes" because of its role in promoting the sale of French arms overseas. In Britain, the British Petroleum Company, largely government-owned, has admitted to making foreign payments. In addition, bribery still persists in the Middle East, where the distribution of gifts in

exchange for government sales is an ancient practice. Ironically, while the United States has been concerned about its overseas bribery, some foreign governments are now paying money illegally to U.S. officials for favors [footnotes omitted].

Extraterritorial Bribery, supra note 377, at 650-51.

459. See Harno, Intent in Criminal Conspiracy, 89 U. PA. L. REV. 624, 628 (1941) (hereinafter cited as Harno). See also Braverman v. United States, 317 U.S. 49, 53 (1942); Pettibone v. United States, 148 U.S. 197, 203 (1893); Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 123 (1842); Rex v. Jones, 110 Eng. Rep. 485, 487 (K.B. 1832). But see Krulewitch v. United States, 336 U.S. 440, 446 (Jackson, J., concurring 1949) ("The modern crime of conspiracy is so vague that it almost defies definition").

460. R. PERKINS, CRIMINAL LAW 614 (2d ed. 1975) (hereinafter cited as PERKINS). Professor Perkins also provides the following useful, but admittedly, deceptive comparison between a lawful agreement (a contract) and an illegal agreement (i.e., a conspiracy):

A statement which is clearly in layman's language rather than with legal precision is to the effect that, "An agreement for a lawful purpose is a contract; an agreement for an unlawful purpose is a conspiracy." This conveys the idea in a very general way but is too broad to be of much help in the solution of specific problems. Probably no one would expect the contract technicalities of offer and acceptance to be carried over into the law of conspiracy, but a word of caution is needed to emphasize that, at least so far as criminal conspiracy is concerned, the word "unlawful" is not a true antonym of the word "lawful" as the two are used in the sentence quoted, and the use of "contract" as an analogy is misleading [footnotes omitted].

Id. See also United States v. Kissel, 218 U.S. 601, 608 (1910) (conspiracy described as "a partnership in crime").

461. See Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act"); Braverman v. United States, supra note 459, at 53 ("The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts . . ."); United States v. Falcone, 311 U.S. 205, 210 (1940) ("The gist of the offense of conspiracy . . . is agreement among the conspirators . . ."); Krulewitch v. United States, supra note 459, at 447-48 (Jackson J., concurring) (conspiracy is "always 'predominantly mental in composition' because it

consists primarily of a meeting of minds and an intent [footnotes omitted]"); United States v. Rabinowich, 238 U.S. 78, 87-89 (1915); United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964), cert.denied, 379 U.S. 960 (1965):

The basic difficulty arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an agreement to commit a readily identifiable crime or series of crimes, such as murder or robbery . . . to what in substance is the conduct of an illegal business over a period of years. There has been a tendency in such cases "to deal with the crime of conspiracy as though it were a group [of men] rather than an act" of agreement . . . Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.

462. 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

There are several more specific conspiracy provisions in other sections of the U.S. Code. See, e.g., Tarlow, Defense of a Federal Conspiracy Prosecution, 4 J. CRIM. DEF. 183, 186 n.4 (1978) (hereinafter cited as Tarlow).

463. Id. See also United States v. Feola, 420 U.S. 671, 687 (1975); Wong Tai v. United States, 273 U.S. 77, 81 (1927); United States v. Vazquez, 319 F.2d 381, 384 (3d Cir. 1963). See generally Developments in the Law -- Criminal Conspiracy, 72 HARV. L. REV. 920 (1959) (hereinafter cited as Developments). If the object of the conspiracy involves an offense which is prohibited in the interest of the public policy of the United States, and even if only a civil penalty is attached, such a conspiracy is within the meaning of 18 U.S.C. § 371. United States v. Hutto, 256 U.S. 524, 529 (1921).

464. See supra note 462. See also Dennis v. United States, 384 U.S. 855 (1966); United States v. Johnson, 383 U.S.

169 (1966); Bridges v. United States, 346 U.S. 209 (1953); Lutwak v. United States, 344 U.S. 604 (1953); Hammerschmidt v. United States, 265 U.S. 182 (1924); Hass v. Henkel, 216 U.S. 462 (1910); United States v. Pintar, *supra* note 223, at 1277-78; United States v. Rosenblatt, 554 F.2d 36, 40-42 (2d Cir. 1977); United States v. Peltz, 433 F.2d 48, 51-52 (2d Cir. 1970); United States v. Vasquez, *id.* See generally Graham, *supra* note 194, at 58-63; OFF. OF U.S. ATT'Y GEN., S.D.N.Y., CRIM. DIV., PROVING FEDERAL CRIMES 216-28 (6th ed. 1976) (hereinafter cited as PROVING FEDERAL CRIMES); Goldstein, Conspiracy to Defraud the United States, 68 YALE L. J. 405 (1959) (hereinafter cited as Goldstein).

465. See Glasser v. United States, 315 U.S. 60, 66-67 (1942); United States v. Vasquez, *supra* note 463. See also United States v. Peltz, *id.* at 51.

The portion of the enactment relating to defrauding the Government is peculiar, perhaps even unique, in the federal penal code in that it punishes a conspiracy to defraud although the fraud may not constitute a substantive offense under any of the statutes dealing with various forms of corrupting government employees.

466. See *supra* note 462. See also Hunsaker v. United States, 279 F.2d 111, 112-13 (9th Cir.), *cert. denied*, 364 U.S. 819 (1960); United States v. Weisner, 216 F.2d 739, 741-42 (2d Cir. 1954).
467. See Callanan v. United States, 364 U.S. 587, 593-97 (1961); Pereira v. United States, *supra* note 205, at 11; Dennis v. United States, *supra* note 464, at 573-74 (1951) (concurring opinion); Pinkerton v. United States, 328 U.S. 640, 643-44 (1946); United States v. Rabinowich, *supra* note 461, at 85.
468. Pereira v. United States, *supra* note 205, at 11 ("Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy"). See also Illinois v. Vitale, 447 U.S. 410, 416 (1980); Town v. Ohio, 432 U.S. 161, 166 (1977); Iannelli v. United States, *supra* note 461 (the case also contains an in-depth discussion of "Wharton's Rule"); Sealfon v. United States, 358 U.S. 575, 578 (1948); Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Rosenblatt, *supra* note 464, at 42 n.7:

"An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission," I R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 89, at

191 (1957). The rule is now limited to such crimes as adultery, incest, bigamy and duelling.

See generally Note, A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition, 90 YALE L. J. 632 (1981).

469. See Iannelli v. United States, supra note 461, at 778; United States v. Feola, supra note 463, at 693-94; Marcus, Conspiracy: The Criminal Agreement in Theory and Practice, 65 GEO. L. REV. 925, 929-30 (1977) (hereinafter cited as Conspiracy: Theory & Practice). See also Note, Criminal Attempt, Conspiracy, and Solicitation Under the Criminal Code Reform Bill of 1978, 47 GEO. WASH. L. REV. 550, 555 (1979) (hereinafter cited as Conspiracy & Reform).
470. See United States v. Feola, supra note 463, at 693-94; Conspiracy & Reform, id. at 550, 555; Conspiracy: Theory & Practice, id. at 929.
471. See Iannelli v. United States, supra note 461, at 778; United States v. Feola, supra note 463, at 693-94; Conspiracy & Reform, id. at 555; Conspiracy: Theory & Practice, id. at 929-30. See also United States v. Rabinowich, supra note 461, at 88:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes outweighing, in injury to the public, the mere commission of the contemplated crime. It involves a deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

472. See, e.g., United States v. Shoup, 608 F.2d 950, 956 n.10 (3d Cir. 1979):

The crime of conspiracy dates back to the enactment of three statutes during the reign of Edward I. These statutes were intended to correct historical abuses of the criminal process and thus proscribed combinations to procure false indictments, to bring false appeals, and to maintain vexatious lawsuits. Under the statutes, however, the conspiracy was not complete unless the person falsely accused was actually indicted and acquitted. In 1611, the Court of the Star Chamber expanded the statutory doctrine of conspiracy and established the rule that a completed conspiracy does not require that the objectives of the agreement be attained. In Poulterers' Case, 77 Eng. Rep. 813 (1611),

a group of poulterers had confederated to accuse Stone of robbery. The grand jury refused to indict him, however. In Stone's subsequent suit for damages against the poulterers, the Star Chamber held that the failure to indict was no defense. The confederation itself constituted the conspiracy; success of the common plan was unnecessary.

See generally Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393 (1922) (excellent historical analysis of the checkered and controversial development of the law of conspiracy).

473. See, e.g., Grunewald v. United States, 353 U.S. 391, 404-06 (1957); Krulewitsch v. United States, supra note 459, at 445-58 (Jackson, J. concurring); Kotteakos v. United States, 328 U.S. 750, 760-74 (1946); United States v. Falcone, supra note 461, at 209-11.

474. See, e.g., Marcus, Defense of a Conspiracy Case, in III CRIMINAL DEFENSE TECHNIQUES § 59.01, at 59-3 (M. Eisenstein & S. Allen eds. 1982) (hereinafter cited as Marcus):

The crime of conspiracy is either the single most effective tool against serious organized crime or the most dangerous anti-civil liberties weapon in the prosecutor's arsenal, the debate continues to rage. What is not truly debatable about the crime is that it attaches liability at an earlier stage than any other inchoate crime and that it has a wider scope than any other substantive offense [footnotes omitted].

See generally Graham, supra note 194, at 58-63; White-Collar Crime II, supra note 2, at 295-317; White-Collar Crime I, supra note 18, at 206-21; ELMER & SWINNEN, supra note 13, at 2-14 to -18; Obermaier, Defending Charges of Conspiracy, in WHITE COLLAR CRIMES 33-104 (G. Naftalis, ed.) (1980) (hereinafter cited as Obermaier); Tarlow, supra note 462; MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES §§ 9.01-.04 (1978 & Supp. 1981) (hereinafter cited as Prosecution & Defense); Marcus, Defending Conspiracy Cases: Mission Impossible, TRIAL, Oct. 1980, at 61; Note, Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts, 64 VA. L. REV. 881 (1978); Conspiracy: Theory & Practice, supra note 469; PERKINS, supra note 460; Johnson, The Unnecessary Crime of Conspiracy, 61 CALIF. L. REV. 1137 (1973); Comment, Criminal Conspiracy and Political Dissent, 44 TUL. L. REV. 587 (1970); J. EPSTEIN, THE GREAT CONSPIRACY TRIAL (1970) (detailed chronicle of the trial of the "Chicago 7" for conspiring to cross state lines to incite riots at the 1968 Democratic National Convention in Chicago); Goldstein, supra note 464; Developments, supra note 463; Arens, Conspiracy Revisited, 3 BUFFALO L. REV. 242 (1954); Note, The Conspiracy Dilemma: Prosecution of Group Crime or



Protection of Individual Defendants, 62 HARV. L. REV. (1948); Harno, supra note 459; O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 BROOKLYN L. REV. 263 (1940); Sayre, supra note 472.

See also Grand, 7 COURSE MATERIALS J. 109 (1982) (hereinafter cited as Grand); DEVITT & BLACKMAR, supra note 13, at §§ 27.01-.17; CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 298-308 (H. Greene & A. Guidoboni, eds.) (3d ed. 1978) (hereinafter cited as D.C. CRIMINAL JURY INSTRUCTIONS); PROVING FEDERAL CRIMES, supra note 264, at 216-28; 36 F.R.D. 457, 502-12 (1964) (Manual on Jury Instructions -- Criminal).

475. Campane, Chains, Wheels, and The Single Conspiracy (Part I), F.B.I. L. ENFORCEMENT BULL., Aug. 1981, at 24 (hereinafter cited as Campane [Part 1]).

476. Id. See also Obermaier, supra note 474, at 33:

Conspiracy may be one of the most often charged crimes in federal prosecutions. Almost without exception, an indictment charging a "white collar" or economic regulatory offense will contain a conspiracy count. Conspiracy was once viewed as an extraordinary crime. It is no longer.

Neither the Dep't of Justice nor the Federal Judicial Center keeps complete statistics of how often conspiracy is charged. The statistics that are available indicate that it is one of the most commonly charged crimes. In its report the Dep't of Justice indicated that in fiscal 1975 there were 842 conspiracy cases involving 2,186 defendants, making it the sixteenth most frequently charged federal offense [footnotes omitted].

477. See Campane (Part I), id. at 24. See generally Conspiracy: Theory & Practice, supra note 469.

478. See Campane (Part I), id. at 24-25 [footnotes omitted]. See generally Bergman, The Co-conspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence, 5 HOFSTRA L. REV. 99 (1976). See also United States v. Alvarez, 610 F.2d 1250, 1254 n.3 (5th Cir. 1980).

479. See Campane (Part I), id. at 24, quoting L. Hand, J., in Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

480. See Ingram v. United States, 360 U.S. 672, 678-80 (1959); United States v. Pintar, supra note 223, at 1275; United States v. Melchor-Lopez, 627 F.2d 886, 890-91 (9th Cir. 1980); Shoup v. United States, supra note 472, at 956;

United States v. McCarty, 611 F.2d 220, 222-23 (8th Cir. 1979); United States v. Brown, 584 F.2d 252, 259-60 (8th Cir. 1978); United States v. Fuel, 583 F.2d 978, 981 (8th Cir. 1978); United States v. Evans, *supra* note 7, at 468-69; United States v. Thomas, 468 F.2d 422, 424-25 (10th Cir. 1972); United States v. Skillman, 442 F.2d 542 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971); United States v. Peltz, *supra* note 464, at 51-52; Cross v. United States, 392 F.2d 360, 362 (8th Cir. 1968). See generally D.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 474, at 298-308 (excellent, succinct synopsis of each conspiracy element); DEVITT & BLACKMAR, *supra* note 13, at § 27.08; White-Collar Crime II, *supra* note 2, at 298.

481. See Rogers v. United States, 340 U.S. 367 (1951); Morrison v. California, 291 U.S. 82 (1934).
482. See note 463 *supra* and accompanying text.
483. See notes 464-65 *supra* and accompanying text.
484. See United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978) ("In a conspiracy, two different types of intent are generally required -- the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy [citations omitted]"). See also United States v. Feola, *supra* note 463; Ingram v. United States, *supra* note 480; Direct Sales Co. v. United States, 319 U.S. 703 (1943); United States v. Falcone, *supra* note 461; United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941); United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938). See generally Harno, *supra* note 459, at 635-36.
485. See, e.g., Yates v. United States, 354 U.S. 298 (1957); United States v. Bayer, 331 U.S. 532 (1947); Fiswick v. United States, 329 U.S. 211 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Braverman v. United States, *supra* note 459; United States v. Falcone, *supra* note 461; United States v. Rabinowich, *supra* note 461. See generally Developments, *supra* note 463, at 948.
486. Supra note 461. See generally Comment, The Role of Joint Endeavor in Establishing Conspiratorial Agreement, 1979 UTAH L. REV. 133; D.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 474; DEVITT & BLACKMAR, *supra* note 13, at § 27.04; Orchard, "Agreement" in Criminal Conspiracy - I, 1974 CRIM. L. REV. 297; Developments, *supra* note 463, at 925-35; Note, Agreement as an Element in Conspiracy, 23 VA. L. REV. 898 (1937).
487. See American Tobacco Co. v. United States, *supra* note 485, at 809 ("No formal agreement is necessary to constitute

an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose"); Glasser v. United States, *supra* note 465, at 80; United States v. Taylor, 599 F.2d 832, 838 (8th Cir. 1979); United States v. Pelton, 578 F.2d 701, 712 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978); United States v. Varelli, 407 F.2d 735, 741 (7th Cir. 1969).

488. See, e.g., Iannelli v. United States, *supra* note 461, at 778-79; Callanan v. United States, *supra* note 467, at 593-94; Blumenthal v. United States, 332 U.S. 539, 556-57 (1947); United States v. Rabinowich, *supra* note 461, at 78; United States v. Evans, *supra* note 7, at 468.
489. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); Nilva v. United States, 212 F.2d 115, 121 (8th Cir. 1954). But see United States v. Bufalino, 285 F.2d 408, 411 (2d Cir. 1960) (Convictions for conspiracy to obstruct justice and commit perjury reversed and remanded with directions to dismiss the conspiracy count. The case involved a large gathering of 80 plus alleged Mafia underworld figures at Apalachin, New York, but the indictment "did not allege what the . . . gathering was about, and the government stated that it could present no evidence of its [the gathering's] purpose." There was nothing in the record to show that "any violation of federal or state law took place or was planned at the gathering").
490. See Hawling v. United States, 418 U.S. 87, 124 (1974); Norfolk Monument Co. v. Woodlawn Men. Gardens, 394 U.S. 700, 704 (1969); Glasser v. United States, *supra* note 465, at 80 ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances'"); Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Pelton, *supra* note 487, at 712; United States v. Evans, *supra* note 7, at 468; United States v. Tyninski, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970); United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1938).
491. 365 F.2d 87, 89 (10th Cir. 1966). See also United States v. Marx, 635 F.2d 436, 439 (5th Cir. 1981) ("Defendant's assent to a conspiracy may be inferred from acts which furthered the conspiracy."); United States v. Johns-Manville Corp., 231 F.Supp. 690, 692-93 (E.D.Pa. 1964) ("A conspiracy may be shown by: a course of dealings, tacit understanding, agreement or acquiescence, circumstantial evidence; and acts and declarations of co-conspirators [footnotes omitted]").
492. See United States v. Feola, *supra* note 463, at 694; United

States v. Conlon, 481 F.Supp. 654, 662 (D.D.C. 1979).

493. See supra notes 487, 489. See also Martin v. United States, 100 F.2d 490, 495-96 (10th Cir. 1938) (It is sufficient "if the minds of the parties meet and unite in an understanding way with the single design to accomplish a common purpose . . .").
494. See United States v. Tyminski, supra note 490, at 1062.
495. United States v. Feola, supra note 463, at 694; United States v. Rabinowich, supra note 461, at 86; United States v. Croxton, 482 F.2d 231, 233 (9th Cir. 1973); See also United States v. Giordano, 693 F.2d 245, 249 (2d Cir. 1982); United States v. Sanford, 547 F.2d 1085, 1091 (9th Cir. 1976); United States v. Thompson, 493 F.2d 305, 310 (9th Cir.), cert. denied, 419 U.S. 834 (1974). But see United States v. Ventimiglia, 242 F.2d 620 (4th Cir. 1957).
496. United States v. Falcone, supra note 461, at 210.
497. Rogers v. United States, supra note 481, at 375; Morrison v. California, supra note 481, at 92 ("It is impossible in the nature of things for a man to conspire with himself. In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each [citations omitted]"); United States v. Kissel, supra note 460, at 608. See generally Campane, Conspiracy and the Defense of Feigned Acquiescence, F.B.I. L. ENFORCEMENT BULL., Oct. 1981, at 24 (hereinafter cited as Campane [Part III]); Obermaier, supra note 474, at 52-54.
498. See, e.g., United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976); Issacs v. United States, 301 F.2d 706, 725 (8th Cir.), cert. denied, 371 U.S. 818 (1962).
499. Krulewitch v. United States, supra note 459, at 448.
500. See United States v. Rosenblatt, supra note 464, at 38, quoting, Developments, supra note 463, at 926. See also United States v. Chase, 372 F.2d 453, 459 (4th Cir.), cert. denied, 387 U.S. 907 (1967); Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965). See generally Campane (Part III), supra note 497, at 26:

It should logically follow from this traditional premise that if one person only feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there can be no conspiracy, since there is no meeting of two minds. This has been the prevalent view throughout the country, and where one of only two

persons conspiring is a law enforcement officer acting in the discharge of his duties or is a government informer who intends to frustrate the conspiracy covertly, the only remaining participant cannot be convicted of conspiracy. Although he may possess the requisite criminal intent, there has been no agreement with another person to act together to achieve an unlawful purpose [citations omitted].

United States v. Rosenblatt, *supra* note 464, at 38 n.2, also contains a useful explanation of the difference between the Model Penal Code's doctrine of "unilateral" conspiracy and the more traditional "bilateral" approach of 18 U.S.C. § 371:

Many jurisdictions have adopted the Model Penal Code's "unilateral" formulation of conspiracy. Under that formulation, conspiracy is defined in terms of one persons' agreeing with another another, rather than in terms of an agreement among or between two or more people. See Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy -- Part II*, 61 Colum. L. Rev. 957, 965-66 (1961); Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 Colum. L. Rev. 1122, 1135-45 (1975). The federal definition retains the traditional, common law, "bilateral" formulation.

501. Rogers v. United States, *supra* note 481, at 375. See also Annot., 91 A.L.R.2d 700 (1963) (prosecution or conviction of one party to an alleged conspiracy as affected by the disposition of cases against other parties).
502. See United States v. Cross, *supra* note 480, at 362; United States v. Gordon, 242 F.2d 122, 125 (3d Cir.), cert. denied, 354 U.S. 921 (1957). See also Rogers v. United States, *supra* note 481, at 375; Rosenthal v. United States, 45 F.2d 1000, 1003 (8th Cir. 1930). See generally Campane (Part III), *supra* note 497, at 25; Annot., 91 A.L.R.2d 700 (1963) (prosecution of one party to a conspiracy as affected by disposition of cases against other defendants).
503. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166 (1940); Joplin Mercantile Co. v. United States, 213 F. 926, 936 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915); Alamo Fence v. United States, 240 F.2d 179, 181 (7th Cir. 1957).
504. Compare United States v. Hartley, *supra* note 19, at 968-72 with Nelson Radio & Supply v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); Dombroski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) ("corporate entity" doctrine applied to an alleged civil rights

intracorporate conspiracy). See generally ELMER & SWINNEN, supra note 13, at 2-16 to -17; Developments, supra note 463, at 951-53.

505. See United States v. Hartley, supra note 19, at 970-71. See generally Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 CARDOZO L. REV. 23 (1983) (history of this controversial concept from an antitrust perspective); Note, Intracorporate Conspiracies Under 42 U.S.C. § 1985(c), 92 HARV. L. REV. 470 (1978) (a discussion of the "corporate entity" doctrine applied in the context of alleged civil rights violations).
506. Supra note 504, at 914. See also Jagielski v. Package Machine Co., 489 F.Supp. 232 (E.D.Pa. 1980) (succinct three page District Court opinion adopting the traditional view that a corporation cannot conspire with itself); United States v. Carroll, 144 F.Supp. 939 (S.D.N.Y. 1956).
507. 496 F.2d 391 (4th Cir. 1974).
508. Id. at 399.
509. Supra note 504.
510. Supra note 19.
511. 704 F.2d 914, 920 (6th Cir. 1983), quoting United States v. Hartley, supra note 19, at 970. See also United States v. Wise, 370 U.S. 405, 417 (1962) (Harlan, J., concurring) ("the fiction of corporate entity, operative to protect officers from contract liability, had never been applied as a shield against criminal prosecutions . . .").
512. See United States v. Hartley, supra note 19, at 968-72; Developments, supra note 463, at 953:

When a corporation acts through more than one person to accomplish an antisocial end, the increased likelihood of success, potentially more serious effects of the contemplated offense, and the danger of further unlawful conduct which are the essence of conspiracy rationales are present to the same extent as if the same persons combined their resources without incorporation. Society is benefited by viewing a corporation as a single legal entity only when its acts for proper ends. The policy should not be construed as requiring treatment of the group as an individual when it plans antisocial activities. In addition, to apply these agency principles to criminal conspiracy would allow corporate agents to act inter sese with relative impunity, fearing only a corporate fine, the burden of which may not affect them, should the object of the conspiracy be punished. On the other hand conspirators not operating within a corporate

framework might under similar circumstances face imprisonment (emphasis added).

513. See notes 462-66 supra and accompanying text; D.C. CRIMINAL JURY INSTRUCTIONS, supra note 474; DEVITT & BLACKMAR, supra note 13, at §§ 27.03-.04; White-Collar Crime II, supra note 2, at 300-01.

514. Supra note 463. See also United States v. Feloa, supra note 463, at 687:

The statute makes it unlawful simply to "conspire . . . to commit any offense against the United States." A natural reading of these words would be that since one can violate a criminal statute simply by engaging in the forbidden conduct, a conspiracy to commit that offense is nothing more than an agreement to engage in prohibited conduct.

See generally Developments, supra note 463, at 944.

515. Id. See also notes 459-62 supra and accompanying text.

516. See generally notes 464-66 supra and accompanying text. See also Obermaier, supra note 474, at 46-47.

517. Supra note 464, at 188. See also United States v. Keitel, 211 U.S. 370, 394 (1908); Hyde v. Shine, 199 U.S. 62, 81 (1905).

518. Supra note 464, at 861. See also United States v. Johnson, supra note 464, at 172. See generally Lutwak v. United States, supra note 464; Hass v. Henkel, supra note 464; United States v. Anderson, 579 F.2d 455 (8th Cir.), cert. denied, 439 U.S. 980 (1978); United States v. Hay, 527 F.2d 990 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976); United States v. Jacobs, 475 F.2d 270, 283 (2d Cir.), cert. denied, 414 U.S. 821 (1973); United States v. Klein, 247 F.2d 908, 915-18 (2d Cir. 1957).

519. Id. See also United States v. Walker, 653 F.2d 1345 (9th Cir. 1981); United States v. Pintar, supra note 223, at 1273; United States v. D'Andrea, 585 F.2d 1351 (7th Cir. 1978). But see Dennis v. United States, supra note 464, at 860 (conspiracy to defraud prosecutions are "scrutinized carefully"); Grunewald v. United States, supra note 473, at 404 (courts must be alert to "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions"); United States v. Shoup, supra note 472, at 955-56; United States v. Rosenblatt, supra note 464, at 40.

520. Supra note 480. See also Marcus, Criminal Conspiracy: The State of Mind Crime -- Intent, Proving Intent, Anti-Federal Intent, 1976 U. ILL. L. F. 627; Note, The Krulewitch Warn-

ing: Guilt by Association, 54 GEO. L. J. 133 (1965); Harno, supra note 459. See generally D.C. CRIMINAL JURY INSTRUCTIONS, supra note 474; DEVITT & BLACKMAR, supra note 13, at §§ 27.05, 27.10-.12; White Collar Crime II, supra note 2, at 298-300.

521. United States v. Blumenthal, supra note 488, at 577; United States v. Conroy, 589 F.2d 1258, 1269 (5th Cir.), cert. denied, 444 U.S. 831 (1979) ("All that is necessary is that the person 'be aware of the essential nature and scope of the enterprise and intend to participate'"); United States v. Rosenblatt, supra note 464, at 38. See also supra note 484.
522. Id. See also United States v. Flaherty, 668 F.2d 566, 580 (1st Cir. 1981) ("Two types of intent must be proved: intent to agree and intent to commit the substantive offense").
523. Developments, supra note 463, at 935 [footnotes omitted and emphasis added]. See also Marcus, supra note 474, at 59-18 to -24.
524. See generally DEVITT & BLACKMAR, supra note 13, at § 27.05 (this section contains an excellent abstract of cases on this complicated issue). See also D.C. CRIMINAL JURY INSTRUCTIONS, supra note 474.
525. See United States v. Feloa, supra note 463, at 696:

To summarize, with the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.

See also Ingram v. United States, supra note 480, at 678; Developments, supra note 463, at 939-40; United States v. Mauro, 501 F.2d 45, 51 (2d Cir. 1974) ("There is no rule that the criminal intent required to satisfy a conviction of conspiracy must be greater than that necessary to commit the substantive crime. It cannot be less, but it need not be more").

526. 452 F.2d 1186, 1190 (2d Cir. 1971), cert. denied, 406 U.S. 947 (1972) [footnotes omitted].
527. See Blumenthal v. United States, supra note 488, at 557; United States v. Melchor-Lopez, supra note 480, at 891; United States v. McCarty, supra note 480, at 222-23;



- United States v. DiGeronimo, 598 F.2d 746, 755 (2d Cir.), cert. denied, 448 U.S. 886 (1979); United States v. Rosenblatt, supra note 464, at 38; United States v. Bernstein, 533 F.2d 775, 793-94 & n.12 (2d Cir.), cert. denied, 429 U.S. 998 (1976).
528. See Blumenthal v. United States, supra note 488, at 557; United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 971 (1977); United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir. 1974); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, 419 U.S. 1008 (1974); United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944); Developments, supra note 463, 922-35.
529. See United States v. Fuel, 583 F.2d 978, 981 (8th Cir. 1978); United States v. Jones, 545 F.2d 1112, 1115 (8th Cir. 1976), cert. denied, 429 U.S. 1075 (1977); United States v. Scholle, 553 F.2d 1109, 1118 (8th Cir.), cert. denied, 434 U.S. 940 (1977); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).
530. See United States v. Wrehe, 628 F.2d 1079, 1085 (8th Cir. 1980); United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979); United States v. Fuel, id. at 982; United States v. Brown, 584 F.2d 252, 262-63 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979); United States v. Cloughessy, 572 F.2d 190, 191 (9th Cir. 1977); United States v. Peterson, 549 F.2d 654, 658 (9th Cir. 1977); United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974); Miller v. United States, 382 F.2d 583, 587 (9th Cir. 1967).
531. United States v. Collins, 552 F.2d 243, 245 (8th Cir.), cert. denied, 434 U.S. 870 (1977) ("Knowledge of the existence or acquiescence in a conspiracy does not serve to render one a part of the conspiracy. There must exist some element of affirmative cooperation or at least an agreement to cooperate."). See also United States v. Brown, id. at 262; United States v. Dyar, 574 F.2d 1385, 1389 (5th Cir. 1978); United States v. Cloughessy, id.; United States v. Driscoll, 449 F.2d 894, 897 (1st Cir. 1971), cert. denied, 405 U.S. 920 (1972).
532. United States v. Falcone, 102 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940).
533. See notes 489-91 supra and accompanying text.
534. See notes 521-23 supra and accompanying text.
535. Supra note 461, at 210-11 [citations omitted and emphasis added]. But see Direct Sales Co. v. United States, supra note 484 (the Supreme Court indicated that a defendant who

sells to a conspirator with knowledge of a conspiracy can become a party to the conspiracy by aiding and abetting it). See also United States v. Shoup, supra note 472, at 957 n.12

536. Id. See also United States v. Ingram, supra note 484, at 368; Direct Sales Co. v. United States, supra note 484, at 711 ("Without the knowledge, the intent cannot exist"); United States v. Sisca, supra note 528, at 1343; United States v. Thomas, supra note 480, at 425; United States v. Chambers, 382 F.2d 910, 913 (6th Cir. 1967).

537. Id.

538. See Fed. Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A. (1976 & Supp. 1983) which provides:

RULE 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if --

\* \* \*

(2) Admission by a party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

539. See United States v. Shelton, 669 F.2d 446, 465 (7th Cir.), cert. denied sub. nom. Bledsoe v. United States, 456 U.S. 934 (1982). See generally Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917):

In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the

combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves.

See also United States v. Hartley, *supra* note 19, at 973-75; United States v. Williams, *supra* note 69, at 1070-71.

540. See, e.g., United States v. Kendall, 665 F.2d 126, 131 (7th Cir. 1981), *cert. denied*, 456 U.S. 934 (1982); United States v. Gil, 604 F.2d 546 (7th Cir. 1979); United States v. James, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979). United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977). See generally Kessler, The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back in the Co-Conspirators Rule, 5 HOFSTRA L. REV. 77 (1976); White-Collar Crime II, *supra* note 2, at 303-09.
541. See notes 486-519 *supra* and accompanying text.
542. See notes 520-37 *supra* and accompanying text.
543. A given course of criminal conduct can involve either a single or multiple conspiracies. For example, an intricate mail fraud scheme might involve only one basic agreement or it could possibly include several separate and distinct combinations. It depends upon the nature of the underlying agreement(s). A defendant, of course, is only guilty of those conspiracies in which he knowingly and actively participates. See Blumenthal v. United States, *supra* note 488 (a "chain" conspiracy); Kotteakos v. United States, 328 U.S. 750 (1946) (a "wheel" conspiracy); United States v. Braverman, *supra* note 459 (the Supreme Court concluded that one conspiracy existed notwithstanding its several different illegal objects).
- See generally Campane (Part I), *supra* note 475 (first part of a two-part series which provides an excellent analysis of the dynamics of multiple vs. single conspiracies); Campane, Chains, Wheels, and the Single Conspiracy (Conclusion), F.B.I. L. ENFORCEMENT BULL., Sept. 1981, at 24; Note, "Single vs. Multiple" Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 MINN. L. REV. 295 (1980); Note, Federal Treatment of Multiple Conspiracies, 57 COLUM. L. REV. 387 (1957).
544. See United States v. Bayer, *supra* note 485, at 542; Fiswick v. United States, *supra* note 485, at 216 n.4; United States v. Brown, 604 F.2d 557, 560 (8th Cir. 1979); United States v. Parker, 586 F.2d 1253, 1258 n.2 (8th Cir. 1978). See generally D.C. CRIMINAL JURY INSTRUCTIONS, *supra* note 474; DEVITT & BLACKMAR, *supra* note 13, at §§ 27.07, 27.09;

White-Collar Crime II, supra note 2, at 301-03. But see notes 548-49 infra and accompanying text.

545. See Iannelli v. United States, supra note 461, at 786 n.17 ("Indeed, the act can be innocent in nature provided it furthers the purpose of the conspiracy."); Yates v. United States, supra note 485, at 334; Braverman v. United States, supra note 459, at 53; United States v. Palmieri, 630 F.2d 192, 200 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980); United States v. Bass, 472 F.2d 207, 213 (8th Cir.), cert. denied, 412 U.S. 928 (1973).
546. United States v. Braverman, supra note 459, at 53.
547. 366 F.2d 377, 383 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967), quoted in Cross v. United States, supra note 480, at 363.
548. See 15 U.S.C. § 1 (1976). See also, e.g., United States v. Bermudez, 526 F.2d 89, 94 (2d Cir.), cert. denied., 425 U.S. 970 (1975).
549. Id. See also Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting):

The overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a condition to punishment, but it is no more a part of the crime than it was at common law, where it was customary to allege such an act . . .

550. See Pinkerton v. United States, supra note 467, at 645-48; United States v. Oropeza, 564 F.2d 316, 322 (9th Cir. 1977).
551. See Fiswick v. United States, supra note 485, at 216-17; Hyde v. United States, supra note 549, at 367-70; United States v. Kissel, supra note 460, at 608; United States v. Borelli, supra note 461, at 388-90; United States v. Stromberg, 268 F.2d 256, 263 (2d Cir. 1959); United States v. Cohen, 145 F.2d 82, 93-94 (2d Cir. 1944), cert. denied, 323 U.S. 799 (1945).
552. 18 U.S.C. § 286 (1976) provides:

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

553. See notes 514-15 supra and accompanying text.
554. See supra note 552.
555. Compare supra note 552 with supra note 462.
556. Id.
557. See notes 486-512 supra and accompanying text.
558. See notes 553-54 supra and accompanying text.
559. See notes 520-40 supra and accompanying text.
560. See notes 542-551 supra and accompanying text. A literal reading of 18 U.S.C. § 286 would indicate that an overt act is not required. But see United States v. Bramblett, 231 F.2d 489, 493 (D.C. Cir.), cert. denied, 350 U.S. 1015 (1956) (Bazelon, C.J., dissenting); United States v. Reichert, 32 F. 142, 145 (C.C.D.Cal. 1887).
561. See notes 553-54 supra and accompanying text.
562. Supra note 552.
563. See notes 513-19 supra and accompanying text.
564. Id.
565. 390 U.S. 228, 233 (1968) (civil action). See also United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956); United States v. Hess, 127 F.2d 233, 237 (3d Cir. 1942).
566. 591 F.2d 666, 677-78 (Ct.Cl. 1979) [emphasis added].
567. Supra note 565, at 232-33.
568. Supra note 190.
569. Supra note 566.
570. See, e.g., O'Brien Gear & Mach. Co. v. United States, supra note 566; United States v. John Bernard Industries, Inc., 589 F.2d 1353, 1356-57 (8th Cir. 1979).
571. For similar difficulties in determining the metes and bounds of a "claim" for purposes of the Contracts Disputes Act of 1978, see, e.g., Paragon Energy Corporation v. United States, 645 F.2d 966, 976 (Ct.Cl. 1981); Federal Electric Corporation, ASBCA 24002, 82-2 BCA ¶ 15,862 (1982), aff'd, United States v. Federal Electric Corp., No. 83-571, slip op. (Fed. Cir. July 19, 1983); General Dynamics Corporation, ASBCA 25919, 82-1 BCA ¶ 15,616

- (1982); Dawson Construction Company, GSBGA 5777, 80-2 BCA § 14,817 (1980).
572. See note 519 supra and accompanying text.
573. See notes 517-19 supra and accompanying text.
574. See notes 459-551 supra and accompanying text.
575. See White-Collar Crime II, supra note 2, at 295 n.953.
576. See, e.g., 18 U.S.C. § 1951(a) (1976) (a Hobbes Act conspiracy); 18 U.S.C. § 1962(d) (1976) (a RICO conspiracy).
577. See notes 513-19 supra and accompanying text.
578. See United States v. Tyminski, supra note 490, at 1060-62.
579. See, e.g., United States v. Richmond, 700 F.2d 1183, 1186-87 (8th Cir. 1983); Maxwell v. United States, 277 F.2d 481, 482-99 (6th Cir. 1960). See generally United States v. Lichenstein, 610 F.2d 1272 (5th Cir. 1980).
580. See, e.g., United States v. Allen, 539 F.Supp. 296, 299-301 (C.D.Cal. 1982).
581. See, e.g., United States v. Williams, supra note 69, at 606-07; United States v. Previte, 648 F.2d 73, 77 (1st Cir. 1981); United States v. Brasco, supra note 160, at 817-18; United States v. Laverick, supra note 126, at 709-12.
582. See supra note 580.
583. See, e.g., United States v. Finazzo, 704 F.2d 300, 301-03 (6th Cir. 1983), aff'g 520 F.Supp. 1085 (E.D.Mich. 1981); United States v. Garmatz, 445 F.Supp. 54, 56-59 (D.Md. 1977).
584. See notes 496-502 supra and accompanying text.
585. Supra note 547.
586. Supra note 495.
587. See notes 541-51 supra and accompanying text.
588. Supra note 578, at 1061.
589. Supra note 578, at 1060-61.
590. Supra note 578, at 1061.
591. Supra note 579.

592. Id.
593. See United States v. Richmond, supra note 579, at 1197; Maxwell v. United States, supra note 579, at 511.
594. Supra note 579, at 1186.
595. Id.
596. Id. at 1189-91.
597. Supra note 579, at 1197.
598. Supra note 579, at 482-84.
599. Supra note 579, at 511.
600. Supra note 580, at 299.
601. Supra note 580, at 300-03.
602. Id.
603. Id. at 322.
604. Supra note 581, at 607.
605. Id. at 606.
606. Id. at 608-12.
607. Supra note 581, at 817.
608. See supra note 468. See generally United States v. Previte, supra note 581, at 76-77.
609. See United States v. Finazzo, supra note 583, at 306; United States v. Previte, supra note 581, at 79-80. See generally supra note 468.
610. See United States v. Finazzo, supra note 583, at 305; United States v. Previte, supra note 581, at 79.
611. See United States v. Finazzo, supra note 583, at 306; United States v. Previte, supra note 581, at 77.
612. See United States v. Finazzo, id.; United States v. Previte, supra note 581, at 79. See also United States v. Evans, supra note 7, at 480.
613. Supra note 581, at 79 [citations omitted and emphasis added].
614. See United States v. Finazzo, supra note 583, at 306;

- United States v. Previte, supra note 581, at 79-80.
615. Supra note 308, at 782-83.
616. Id. at 783-85.
617. Compare, e.g., 18 U.S.C. § 371 (the general conspiracy statute) with 18 U.S.C. § 1962(d) (a RICO conspiracy).
618. See notes 516-19 supra and accompanying text.
619. See, e.g., United States v. Walker, supra note 519, at 1344; United States v. Kates, 508 F.2d 308, 313 (3d Cir. 1975). See also United States v. Kates, 419 F.Supp. 846 (E.D.Pa. 1976) (a subsequent civil false claims action). See generally GOV'T CONT. BRIEFING PAPERS, Antitrust Considerations in Gov't Contracting, No. 83-5 (May 1983).
620. See, e.g., United States v. Balk, 706 F.2d 1056, 1058 (9th Cir. 1983); United States v. Anderson, 579 F.2d 455, 456-58 (8th Cir. 1978); United States v. Bass, 472 F.2d 207, 209-10 (8th Cir. 1973); United States v. Ebling, 248 F.2d 429, 431-33 (8th Cir. 1957). See generally United States v. Race, 632 F.2d 1114 (4th Cir. 1980).
621. See, e.g., United States v. Cincotta, 689 F.2d 238, 240 (1st Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 103 S.Ct. 347 (1982); United States v. Mininsohn, 101 F.2d 477, 477-78 (3d Cir. 1939).
622. See, e.g., United States v. Hartley, supra note 19, at 967; United States v. Thompson, 366 F.2d 167, 168-69 (6th Cir.), cert. denied, 385 U.S. 973 (1966); United States v. Razzette, supra note 51, at 46.
623. See White-Collar Crime II, supra note 2, at 295-97. See also United States v. Ackal, 706 F.2d 523, 524-29 (5th Cir. 1983) (mail fraud case).
624. Supra note 519, at 1344-45.
625. Id.
626. Supra note 619, 309-10.
627. Id. at 313.
628. Supra note 620, at 209-10.
629. Id. at 210.
630. Supra note 620, at 431-33.



631. Id. at 432.
632. Supra note 620, at 1058.
633. Supra note 621, at 240.
634. Id.
635. Supra note 621, at 477-78.
636. Id. at 478.
637. See supra note 622. See also United States v. Kenny, supra note 24, at 1327-33; United States v. Laverick, supra note 126, at 709-12; United States v. Lev, supra note 51, at 10-11.
638. See notes 173-77 supra and accompanying text.
639. See United States v. Hartley, supra note 19, at 967.
640. See supra note 622, 46-47. See also 40 FED. CONT. REP. (BNA) 98 (July 18, 1983):

FRAUD: Thomas M. Lofgren, a former contracting officer at the Defense Industrial Supply Center in Philadelphia, has been indicted on charges of bribery and conspiracy to defraud the government. According to DOD Inspector General Joseph H. Sherick, Lofgren allegedly received \$6,900 in bribes from Standard Air Parts, Inc. of Sylmar, Calif., an inducement to provide confidential bid receipts from Standard's competitors. The Defense Logistics Agency suspended Standard Air Parts on June 8; the firm is thus currently ineligible to receive government contracts.

641. See supra note 622, at 168-69.
642. Id. at 168.
643. Quoted in Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981) (hereinafter cited as Coffee II).
644. 212 U.S. 481, 493 (1909). See also United States v. Union Supply Co., 215 U.S. 50 (1909).
645. New York C. & H. R. R. Co. v. United States, id. at 492, 495-96.
646. Id. at 494-96.
647. See, e.g., United States v. A & P Trucking Co., 358 U.S.

121, 123-26 (1958); United States v. Illinois Central R. Co., 303 U.S. 239 (1938); United States v. Union Supply, supra note 644, at 55; United States v. Cincotta, supra note 633, at 241-42; United States v. DeMauro, 581 F.2d 50, 53 (2d Cir. 1978); Boise Dodge, Inc. v. United States, 406 F.2d 771, 772 (9th Cir. 1969); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721 (5th Cir. 1963); United States v. Carter, 311 F.2d 934, 941-42 (6th Cir.), cert. denied, 373 U.S. 915 (1963); United States v. Gibson Products Co., 426 F.Supp. 768 (S.D.Tex. 1976).

648. See, e.g., J.C.B. Super Markets, Inc. v. United States, 530 F.2d 1119 (2d Cir. 1976); United States v. Northside Realty Associates, Inc., 474 F.2d 1164, 1168 (5th Cir. 1973), cert. denied, 424 U.S. 977 (1976); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); United States v. Ridgley State Bank, 357 F.2d 495, 498-500 (5th Cir. 1966); Standard Oil Co. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962).

See generally Brosnahan, Miller & Foy, Corporate Criminal Liability, 26 PRAC. LAW., No. 6, at 23 (Sept. 1980); Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 HARV. L. J. 1227 (1979) (hereinafter cited as Corporate Developments); Miller, Corporate Criminal Liability: A Principle Extended To Its Limits, 38 FED. B. J. 49 (1979); Note, Is Corporate Criminal Liability Really Necessary?, 29 SW. L. J. 908 (1975) (hereinafter cited as Criminal Liability).

649. See United States v. DeMauro, supra note 647, at 53 n.3:

Under a respondeat superior theory of corporate criminal liability, the master's liability would depend on whether the servant's acts were within the "scope of the employment." See Prosser, Torts 352 (1955). As Professor Prosser has described it, to be within the scope of the employment, the "servant's conduct" must be "the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part, by a desire to serve the master." Id. Thus Demauro underestimates Chemical's argument that it could not have been held criminally liable solely on the basis of acts of bribed employees pursuing their own interests.

650. See J.C.B. Supermarkets, Inc. v. United States, supra note 648, at 1122; Standard Oil Co. v. United States, supra note 648, at 127-28. See generally United States v. Wise, 370 U.S. 405, 411-15 (1962).

651. See supra note 648. See also St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955); NLRB v. Glenn

L. Martin-Nebraska Co., 141 F.2d 371 (8th Cir. 1944); Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943). See also Treadway, Cooked Books: No New Recipes, FED. B. NEWS. & J., June 1983, at 323 (article by the Commissioner of the SEC):

Business schools have long taught, and presumably continue to teach, that management-by-objective is a sound approach. I have no quarrel with the approach as such. But, too often, its overzealous application has led to unfortunate results.

Some recent cases have been egregious and have involved major, respected publicly-held companies. In these cases -- and it initially struck me as puzzling -- there has been no direct, personal gain in the sense of kickbacks, bribes, theft or diversion of assets. Instead, books and records have been altered, with those who participated in the improper activities apparently believing that the manner in which they acted was in the best interests of the company. In some cases, it was an admitted feeling of "team effort."

652. See, e.g., United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), cert. denied, 337 U.S. 959 (1949); United States v. Carter, supra note 647.
653. See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir.), cert. denied, 409 U.S. 1125 (1973). But see United States v. Hangar One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977), rev'g 406 F.Supp. 60 (W.D.Ala. 1975).
654. See United States v. DeMauro, supra note 647, at 53-54; United States v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946); C.I.T. Corp. v. United States, 150 F.2d 85, 89-90 (9th Cir. 1945).
655. See, e.g., United States v. Beusch, 596 F.2d 871, 877-78 (9th Cir. 1979); United States v. Hilton Hotels Corp., supra note 653, at 1004; United States v. American Radiator & Standard Sanitary Corp., supra note 648, at 204-05; United States v. Gibson Products Co., supra note 647, at 770. See generally Note, The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability, 29 UCLA L. REV. 447 (1982); Note, Corporate Criminal Liability for Acts in Violation of Company Policy, 50 GEO. L. J. 547 (1962); Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 KY. L. J. 73 (1976).
656. Supra note 650, at 128. See also United States v. Cincotta, supra note 621, at 242 ("Thus where intent is

an element of a crime [as it is here], a corporation may not be held strictly accountable for acts that could not benefit the stockholders, such as acts of corporate officers that are performed in exchange for bribes paid to the officers personally."); United States v. Beusch, supra note 655, at 877-78; United States v. DeMauro, supra note 647, at 54; United States v. Hilton Hotels Corp., supra note 653, at 1006 n.4; United States v. Ridglea State Bank, supra note 648, at 498; Steere Tank Lines, Inc. v. United States, supra note 647, at 723.

657. Supra note 650, at 123-25.
658. See Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.), cert. denied, 326 U.S. 734 (1945) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative fact."). See also United States v. DeMauro, supra note 647, at 54; Steere Tank Lines, Inc. v. United States, supra note 647, at 722-23; United States v. Empire Packing Co., supra note 652, at 20.
659. See notes 646 & 648-55 supra and accompanying text.
660. Grant, The Law of Principals and Accessories, in THE PROSECUTOR'S DESKBOOK (P. Healy & J. Manak, eds. 1971) (hereinafter cited as Grant). See generally Sayre, Criminal Responsibility for the Acts of Another, 43 HARV. L. REV. 689, 708 (1930).
661. Id., citing 4 BLACKSTONE, COMMENTARIES 34-39, quoted in PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 418 (1962).
662. See, e.g., United States v. Park, 421 U.S. 658 (1975); United States v. Wise, 370 U.S. 405 (1962); Morissette v. United States, 342 U.S. 246 (1952); United States v. Dotterweich, 320 U.S. 277 (1943).
663. See notes 665-69 infra and accompanying text.
664. See notes 670-84 infra and accompanying text.
665. Grant, supra note 660, at 275. See also United States v. Wise, supra note 662 (Harland, J., concurring):

In fact I think there can have been no serious doubt even as early as 1890 that officers could be punished for crimes committed for their corporations. Until well into the nineteenth century the corporation itself could not be convicted; the individuals who acted in its name could be. However, it was recognized that corporate officers could be convicted for "representative" crimes even after the corporation's immunity was

worn away . . . A substantial volume of convictions of individuals for corporate crimes had accumulated by 1890 [citations and footnotes omitted].

See generally Corporate Developments, supra note 648, at 1259-75.

666. COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE 7TH CIR., FEDERAL CRIMINAL JURY INSTRUCTIONS 65-66 (1980).
667. 512 F.2d 1361, 1372 (D.C. Cir. 1975).
668. 202 F.Supp. 639, 644 (D.D.C. 1962).
669. Id. See also United States v. Wise, supra note 662, at 409; United States v. Dotterweich, supra note 662, at 284-85; United States v. Bach, 151 F.2d 177, 179 (7th Cir. 1945).
670. Cf. supra note 662 with the statutory elements of 18 U.S.C. § 2 (1976). See generally Watkins, Electrical Equipment Antitrust Cases -- Their Implications for Gov't and for Business, 29 U. CHI. L. REV. 97 (1961).
671. See United States v. Forbes, 515 F.2d 676, 684 (D.C. Cir. 1975). See also Corporate Developments, supra note 648, at 1259-75; Note, Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Code, 31 VAND. L. REV. 965 (1978). For a brief synopsis of the essence of aiding & abetting and a conspiracy, see Pinkerton v. United States, supra note 467, at 649 (Rutledge, J., dissenting in part):

The gist of conspiracy is the agreement; that of aiding and abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding and abetting, counseling to completion of the offense.

672. See supra note 662. See also United States v. Gypsum, supra note 484.
673. Supra note 662.
674. United States v. Park, supra note 662, at 661-64.
675. United States v. Park, supra note 462, at 673-74 [emphasis added].
676. See Corporate Developments, supra note 648, at 1264-65.
677. See Corporate Developments, supra note 648, at 1265. See

also United States v. Wise, supra note 462, at 416:

Based upon the foregoing, we hold that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy -- be he one who authorizes, orders, or helps perpetrate the crime -- regardless of whether he is acting in a representative capacity [emphasis added].

678. See Corporate Developments, supra note 648, at 1261-70.
679. Id.
680. Id.
681. See id.; McAdams, The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative, 46 U. CINN. L. REV. 989, 999-1000 (1977) (hereinafter cited as McAdams).
682. See supra note 672.
683. Id. See also notes 672-76 supra and accompanying text. See generally, Sethi & Katz, The Expanding Scope of Personal Liability of Corporate Executives -- Some Implications of United States v. Park, 32 FOOD DRUG COSM. L. J. 544 (1977).
684. Id. See also notes 520-40 supra and accompanying text.
685. Compare Renfrew, The Paper Label Sentences: An Evaluation, 86 YALE L. J. 590 (1977) with Baker & Reeves, The Paper Label Sentences: Critiques, 86 YALE L. J. 619 (1977). See also Orland, Reflections on Corporate Crime: Law in Search of Theory and Scholarship, 17 AM. CRIM. L. REV. 501, 511 (1980) ("The major problem of corporate criminal law is to determine what corporate conduct should be regulated by criminal sanction and then to devise effective sanctions to achieve the traditional objectives of the criminal law: deterrence, retribution, and rehabilitation [emphasis added].") (hereinafter cited as Orland).

See generally Comment, The Economic Inefficiency of Corporate Criminal Liability, 73 J. CRIM. L. C. 582 (1982) (hereinafter cited as Economic Inefficiency); Braithwaite, Challenging Just Deserts: Punishing White-Collar Criminals, 73 J. CRIM. L. C. 723 (1982); Chemerinsky, supra note 4; Coffee II, supra note 643; Ross, How Lawless Are Big Companies?, FORTUNE, Dec. 1, 1980, at 56; Coffee, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, 17 AM. CRIM. L. REV. 419 (1980); Mann, Wheeler & Sarat, Sentencing the White-Collar Offender, 17 AM. CRIM. L. REV. 479 (1980); Posner, Optimal

Sentences for White-Collar Criminals, 17 AM. CRIM. L. REV. 409 (1980); Corporate Developments, *supra* note 648; Note, Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing, 89 YALE L. J. 353 (1979); Coffee, Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 VA. L. REV. 1099 (1977); McAdams, *supra* note 681; Note, Disparity and Discretion in Sentencing: A Proposal for Uniformity, 25 UCLA L. REV. 323 (1977); Ogren, The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime, 11 AM. CRIM. L. REV. 959 (1973) (hereinafter cited as Ogren); Comment, The Criminal Responsibility of Corporate Officials for Pollution of the Environment, 37 ALBANY L. REV. 61 (1972); Geis, Criminal Penalties for Corporate Criminals, 8 CRIM. L. BULL. 377 (1972) (hereinafter cited as Geis); Ball & Friedman, The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View, 17 STAN. L. REV. 197 (1965); Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. CHI. L. REV. 423 (1963); Note, Increasing Community Control Over Corporate Crime: A Problem in the Law of Sanctions, 71 YALE L. J. 280 (1961) (hereinafter cited as Community Controls).

686. Id.

687. Id. But see TIME, Aug. 8, 1983, at 82, col.3:

Creating a punishment to fit a crime is not always easy. All too often, the judicial choices come in two basic modes: prison terms or fines. But some judges have experimented with inventing appropriate alternatives. Federal Judge Warren Urbom last week came up with one of the most dramatic efforts to date. The Missouri Valley Const. Co. of Grand Island, Neb., had pled guilty to bid-rigging charges and faced a \$2 million fine. Instead, at the company's suggestion, Urbom sought to do something more concrete about the bid-rigging crime. Missouri Valley will now pay a \$325,000 fine, but will then ante up \$1,475,000 to endow a chair in business ethics at the University of Nebraska.

As part of the agreement, the company will be on probation for five years, so that the judge can review its future bidding practices. It will have no say in who is chosen for the chair, which may not be named for the enforced donor, nor can the gift be deducted on tax returns. Since any fine would have to be paid to the Federal Government, the Justice Dep't opposed the endowment plan, arguing that Urbom lacked the authority to order payments to a third party not connected with the case. As it happens,

the Eighth Circuit Court of Appeals has already upheld nine earlier inventive sentences by Urbom, calling them "creative, innovative and imaginative." Among previous beneficiaries of the judge's rulings on bid-rigging cases: a nursing home, a youth home, a Y.M.C.A. and a hospital. Like the University of Nebraska, all the recipients have been delighted.

See also United States v. Danilow Pastry Co., Inc., 563 F.Supp. 1159 (S.D.N.Y. 1983) (This case contains several examples of other creative sentences under the probationary powers provided by 18 U.S.C. § 3651 [1976 & Supp. V 1981]. The six wholesale bakeries in this case, e.g., were sentenced to donate fresh baked goods to needy organizations designated by the court and to pay substantial criminal fines).

688. See Corporate Developments, supra note 648, at 1231; McAdams, supra note 681, at 992; Criminal Liability, supra note 648, at 919.
689. See Corporate Developments, supra note 648, at 1236 ("[D]eterrence plays a more significant role in the area of corporate crime than in other areas of the criminal law. An examination of the statutes appears to support the conclusion that deterrence is the major goal of corporate criminal sanctions."). See also Economic Inefficiency, supra note 685, at 582; McAdams, supra note 648, at 992. See generally Block & Sidak, The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?, 68 GEO. L. J. 1131 (1980); Note, Deterring Air Polluters Through Economically Efficient Sanctions: A Proposal for Amending the Clean Air Act, 32 STAN. L. REV. 807 (1980).
690. See Corporate Developments, supra note 468, at 1236-39; McAdams, supra note 648, at 992.
691. Supra note 689. See also Coffee II, supra note 643, at 389-93; Community Controls, supra note 685, at 281-83.
692. Community Controls, supra note 685, at 282.
693. See generally supra note 685. See also Gov't Program Fraud, supra note 1.
694. See Ogren, supra note 685, at 960:

In striking contrast to this assumption, there is virtually no evidence that the criminal sanction has succeeded in controlling white-collar crime. In general, deterrence has not been realized, rehabilitation has been ignored, repeat offenders have not been removed from society, and victims have not been compensated. In large measure, these results are a product of



the natural limits of the criminal justice system. As a consequence, a large number of successful white-collar prosecutions serve no more than a symbolic purpose [emphasis added].

See also Coffee II, supra note 643, at 459:

The strategies outlined in this [73 page] Article -- the equity fine, adverse publicity, integration of civil and criminal remedies, plea bargaining for restitution, and corporate probation -- have a common denominator: like the judo wrestler they use existing forces within the legal environment and the corporation's social system to increase corporate deterrence with a minimum of socially counter-productive results. Unless we follow such a course, the Lord Chancellor's frustrated observation that the corporation has neither a soul to damn nor body to kick may remain an epitaph for society's attempt to control organizational misbehavior.

For an in-depth discussion of the collateral application of punitive administrative sanctions, see Bunge, supra note 194, at Pt. IV. See generally Smith, Contracting Officer Actions in Cases of Fraud, THE ARMY LAW., June 1982, at 7.

695. See McAdams, supra note 681, at 999-1000; Ogren, supra note 685, at 960; Community Controls, supra note 685, at 291-93.
696. Id. See also, e.g., Rickover, The Scandals of Military Contracting, 41 BUS. & SOC'Y REV., Spring 1982, at 50:

In the 1970's, the Navy referred the claims of four large shipbuilders to the Justice Department for investigation. The Justice Department, however, seems incapable of dealing with sophisticated procurement fraud -- or perhaps undesirous of doing so. After nearly a decade of work, the status of the Justice Department's record in these cases is as follows:

Litton was indicted four years ago for fraud, but the Justice Department has taken no action to try the case.

The Justice Department conducted a lengthy investigation of Lockheed claims but did not issue an indictment. By now, the statute of limitations has expired.

After investigating General Dynamics for four years, the Justice Department recently announced it could find no evidence of criminal intent, although the claims were almost five times what the Navy actually owed.

The Newport News investigation was recently dealt a

serious blow when the Justice Department split up the investigating team and assigned the leading investigators other work. This happened shortly after they had reported their findings in the Newport News case and had asked the Department for more help to track down other promising leads.

I believe the grossly inflated claims to which the Navy was subjected during the past decade are an outgrowth of the philosophy that in some companies "anything goes" in meeting the profit objectives set by senior corporate officials.

697. Supra note 695. See also Ogren, supra note 685, at 961-62:

The threat of incarceration is the major deterrent of the criminal sanction. In business crime cases, however prevailing sentencing practices make the only certain sanctions upon conviction a suspended sentence or a very short prison term. While for some white-collar offenders who occupy positions of social, economic, or professional status, mere indictment or conviction can have enormous consequences and may in themselves be credible and effective threat, the elimination of the serious possibility of jail from the calculus of potential offenders, by any rational standard, diminishes the seriousness of the threat.

See generally, Orland, supra note 685 at 510-12.

698. Ogren, supra note 685, at 960.

699. Id. at 961.

700. See generally Nagel & Hagan, The Sentencing of White-Collar Criminals in Federal Courts: A Socio-legal Exploration of Disparity, 80 MICH. L. REV. 1427 (1982). But see Hagan & Nagel, White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York, 20 AM. CRIM. L. REV. 259 (1982) ("This single difference notwithstanding, the overall pattern is clear: in the Southern District of New York between 1963 and 1976, white-collar criminals received less severe sentences than did non-white-collar criminals").

701. See, e.g., Community Controls, supra note 685, at 291-92:

The history of antitrust enforcement indicates, however, that severe criminal sanctions have rarely been imposed directly upon the formulators of endocratic corporate policy. During the first five decades of the antitrust laws 252 criminal prosecutions were conducted. Twenty-four such prosecutions resulted in jail sentences, thirteen of which were imposed upon trade

union leaders. Of the eleven cases involving businessmen, ten concerned actual racketeering such as threats, intimidations and violence. In the one remaining case the jail sentence was suspended and not actually served. Since 1940, twenty businessmen have served, or are now serving jail sentences for violation of the antitrust laws. These sentences range from thirty to ninety days each. Analysis reveals that these sentenced businessmen are two major types. They are either the principal officers of small closely held corporations, or they are relatively minor executives of large endocratic corporations . . . [I]t is difficult if not impossible to pinpoint guilt above the level of those who carry out the necessary overt acts. Thus, although imprisonment, regardless of duration, is probably the most effective practical deterrent that can be imposed upon the formulators of endocratic policy, the present system almost dictates misdirection [footnotes omitted and emphasis added].

See also Orland, supra note 685, at 512-14.

702. President's Comm'n on Law Enforcement and Admin. of Justice, White-Collar Crime and the Criminal Process, in CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS (J. Johnson & J. Douglas, eds. 1978), at 348. See also Community Controls, supra note 685, at 291; McAdams, supra note 681, at 999-1000.
703. See, e.g., Geis, supra note 685, at 377 ("Criminal penalties, particularly those involving incarceration, leveled against corporate executives for violations of statutes carrying such penalties constitute an effective protection -- probably the most effective protection -- against the likelihood of such offenses being committed again either by such executives or by others like them"). See also Coffee II, supra note 643, at 407-11; McAdams, supra note 381, at 999; Ogden, supra note 685, at 961-62.
704. See notes 695-702 supra and accompanying text. See also Orland, supra note 685, at 515-17; Corporate Developments, supra note 648, at 1365-69.
705. See Community Controls, supra note 685, at 282-83; Economic Inefficiency, supra note 685; Coffee II, supra note 643, at 389-93; McAdams, supra note 681, at 997-98.
706. For an in-depth discussion of RICO, see Bunge, supra note 194, at Pt. III. See also supra note 376; Taylor, Forfeiture Under 18 U.S.C. § 1963 -- RICO's Most Powerful Weapon, 17 AM. CRIM. L. REV. 379 (1980).
707. See Coffee II, supra note 643, at 392-93. But see supra note 376 (possible corporate fines of up to \$1 million

for violations of the FCPA & the Sherman Act [15 U.S.C. § 1]).

708. Community Controls, supra note 685, at 294 [citation omitted].
709. Supra note 705.
710. See generally supra note 694; Ogren, supra note 685, at 988. See also Corporate Developments, supra note 648, at 1369; McAdams, supra note 681, at 1000.
711. Ogren, supra note 685, at 988.
712. See notes 685-711 supra and accompanying text. For an in-depth analysis of the Govt's more flexible administrative and civil remedies, see Bunge, supra note 194, at chs. IV-V.
713. Wall St. J., Jan. 17, 1983, at 1, col. 5.
714. See, e.g., IGs Could Prosecute Small Fraud Claims, Wash. Post, July 22, 1983, at A21, col. 3:

Each year, about 200,000 potential federal crimes are referred to the Justice Department for litigation, but only about 40 percent of them are accepted, a recent General Accounting Office Study found.

"With limited resources, the department is forced to concentrate on those cases . . . of greatest importance and the most likely to attract public attention," the GAO said.

That has prompted Sen. William V. Roth Jr. (R-Del.) to introduce legislation to create a sort of small claims court at many federal agencies. His bill, which has been endorsed by Justice and the GAO, would permit the government's 18 inspectors general to subpoena witnesses and file civil fraud suits for amounts under \$50,000 before the agency's administrative law judges.

Justice could continue to prosecute any case that it wanted to take on, but the IGs would be able to proceed on their own if Justice didn't take action within 120 days.

"An unscrupulous contractor," Roth contends, "can take advantage of the current system and make millions in overcharges."

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The American Bar Association's public contract law

section opposes Roth's bill, partly because it thinks the government already has enough laws to prosecute fraud cases. It also contends the bill would make it easier for the government to accuse legitimate contractors of fraud and give the government an unfair advantage in contract disputes.

"We do not believe that there is any justification for expanding remedies to permit individual agencies to act as prosecutor, judge and jury," said David L. Hirsch, a former chairman of the ABA group.

See also 40 FED. CONT. REP. (BNA) 98 (July 18, 1983).

715. See 39 FED. CONT. REP (BNA) 117 (Feb. 21, 1983).

716. Id.

717. See Wash. Post, Jan. 26, 1983, at C4, col. 1; Sherick, supra note 30.

718. See Wash. Post, Jan. 26, 1983, at C4, col. 3.

719. See 39 FED. CONT. REP. (BNA) 1042 (Apr. 23, 1983). See generally Sullivan, supra note 31.

720. Id.

721. Supra note 151.

722. Supra note 151, at 1127-28; Wash. Post, June 4, 1983, at A8, col. 1 (CSC & four individual defendants were acquitted in the first of three scheduled trials which Williams, J., somewhat suprisingly described as "not a case so much as . . . lovers' quarrel").

723. See supra note 151, at 1127-28.

724. See United States v. Computer Sciences Corp., Crim. No. 80-158-A (E.D.Va. 1983).

725. See 39 FED. CONT. REP. (BNA) 380 (Feb. 21, 1983). See also Sherick, Audit + Follow-up = Savings, DEFENSE/83, July 1983, at 14-15 ("Contract audits by DCAA resulted in savings of \$7.1 billion in Fiscal Year 1982 . . ."). But see note 714 supra and accompanying text (GAO indicates that DoJ only accepts about 40% of the federal crimes which are referred for litigation. Quere, is the ratio of investigative "watchdogs" to prosecutors out of proportion?).

726. See generally FED. CONT. REP. (BNA), No. 884, at A-2 to A-3 (June 1, 1981) (former OFPP Chief concerned about the Gov't confusing mismanagement with fraud).

727. Gov't Program Fraud, supra note 1. See also Wash. Post, Aug. 5, 1983, at A6, col. 1:

Five Republican senators warned senior defense and military officials yesterday that recent "horror stories" on spare-parts overcharges have endangered the "national consensus" on defense spending.

\* \* \*

They sounded their warnings at an Appropriations defense subcommittee hearing called to address a series of embarrassing revelations about the purchase of military spare parts. Celebrated cases in the past month included the payment of \$110 to Sperry Corp. for a 4-cent diode and of more than \$430 each to Gould Inc. for an ordinary claw hammer and a 12-foot measuring tape.

The senators reserved their harshest language for the private contractors who set these "outrageous" prices. Three senators -- D'Amato, Rudman and Stevens -- used the word "fraud," and Rudman asked Defense Inspector General Joseph H. Sherick to consider seeking a grand jury investigation that could lead to criminal indictment.

"I don't understand how someone in the business community who is dealing in good faith with the military can be charging some of the prices that they have been charging without bordering on fraud," Rudman said. "I'd like to see whether or not we can teach some people a lesson."

"I think we should sue them," D'Amato said. ". . . They should know that if they're going to engage in conduct that is nothing more than theft, they're going to pay the price [emphasis added]."

728. See, e.g., CAP Gets Tough, TIME, 1 Aug. 1983, at 12, col. 3:

"If there have been wrongdoings . . . that in any way defrauded the Government or caused waste . . . I don't have the slightest hesitancy in asking the Dep't of Justice to take whatever remedies are appropriate to deal with the situation." What that warning, Defense Secretary Caspar Weinberger last week announced a long-overdue crackdown on military purchasing agents and on contractors who may have charged inflated prices for spare parts.

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