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FEDERAL CRIMINAL CONFLICT OF INTEREST

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***700 I. Introduction**

The phrase “conflict of interest legislation” describes the volumes of legislation Congress passed in the post-Watergate era to prevent and punish corruption of our public officials.¹ This article examines the most fundamental of these provisions, which prohibit bribery,² unauthorized compensation,³ certain activities of officers and employees,⁴ post-employment lobbying and representation,⁵ participation in activities in which an official has a financial interest,⁶ and accepting outside salaries.⁷ These provisions impose sanctions on public officials and private citizens making criminal use of a public office for private gain.⁸

II. Bribery and Illegal Gratuities

While not always characterized as a conflict of interest provision,⁹ bribery has been part of the criminal conflict of interest statute since 1961.¹⁰ The prohibition against bribery also criminalizes certain gratuities given to or requested by federal public officials.¹¹

The primary difference between bribery and illegal gratuities is that bribery requires a corrupt intent,¹² while an illegal gratuity does not.¹³ For an illegal gratuity “there need be no intent that the official act be influenced by the benefit,” *701 which is required for a bribery charge.¹⁴ The gratuity guidelines deal with situations in which the offender intends the gift as “a reward for actions the public official has already taken or is already committed to take” as opposed to situations where the defendant intends to influence a government official to use his official position improperly.¹⁵ An exchange involving a former official therefore can only be an illegal gratuity, and not a bribe.¹⁶ Due to the similarity of these two offenses, defendants frequently are charged with both. Additionally, a defendant might plead the offering of an illegal gratuity as a defense to a bribery charge, claiming lack of requisite corrupt intent.¹⁷

A. Elements of the Bribery Offense

To sustain a bribery conviction, the government must show (1) a benefit or anything of value; (2) accruing to a public official; (3) with corrupt intent (4) to influence the public official, or to be influenced if the defendant is the official, (5) in carrying out an official act.¹⁸

1. Thing of Value

Where the alleged bribe is something that is not clearly money, there may be some question as to whether a “thing of value” is exchanged.¹⁹ The term “thing of value” is broadly construed, focusing on the value which the defendant subjectively attached to the items received.²⁰ Where a defendant incorrectly assesses the value of an item, it may still be “of value” for purposes of the statute.²¹ Further, an item may be a “thing of value” regardless of whether it is offered or received in the *702 context of a gratuity or a bribe.²² Courts have found the promise of future employment,²³ shares of stock,²⁴ and unsecured, quickly arranged loans²⁵ all to be “things of value.” Offering information in return for favors does not constitute offering a “thing of value.”²⁶

2. Federal Public Official

The defendant may be either a public official or one who bribes a public official.²⁷ In *Dixson v. United States*,²⁸ the Supreme Court defined federal “public official” to apply to persons who are responsible for carrying out tasks delegated by a federal agency, who are subject to substantial federal supervision, and who are in a position of responsibility, acting for or on behalf of the Federal Government in administering expenditure of federal funds.²⁹

The *Dixson* Court cautioned that the decision was not meant to bring every employee of an organization that receives federal funds within the definition of “public official.”³⁰ Rather, the Court held that public officials are only those individuals who “possess some degree of official responsibility for carrying out a federal program or policy.”³¹

The Court's decision in *Dixson* supports the broad application of § 201. The “public official” question is one of law for the court to decide.³² Courts have found an Army private,³³ a building services manager for a Federal Reserve Bank,³⁴ an *703 intake official for a federal employment program,³⁵ an executive director of a city housing authority who administered federal funds,³⁶ a U.S. Customs official,³⁷ and postal employees³⁸ within the definition of “public official.”

An individual's status as a “mere employee” and ability or inability to carry out the quid pro quo promise does not affect whether the individual is characterized as a public official.³⁹ Likewise, classification as a public official does not depend on the management or distribution of federal funds.⁴⁰ Rather, an individual may be a public official based on his or her “federal responsibilities.”⁴¹

3. Corrupt Intent

While the bribery statute does not define the term “corruptly,” case law makes clear that the bribery offense requires a quid pro quo.⁴² In addition, corrupt intent “incorporates a concept of the bribe being a prime mover or producer of the official act and this element of quid pro quo ... distinguishes the heightened criminal intent requisite under the bribery section of the statute from the simple mens rea required for violation of the gratuity sections.”⁴³

In order to convict a defendant for bribery, the government must prove that the accused intended to bribe the public official.⁴⁴ A defendant lacks an intent to *704 influence where, despite knowing about payments, the defendant does not know they

were intended as bribes.⁴⁵ The jury must also have an opportunity to consider whether the payment in question was intended for a legal purpose, such as contributing to a campaign or settling a tax liability.⁴⁶ Intending to make a campaign contribution does not constitute bribery, even though the contributor often hopes that his contribution will garner some favorable reaction. Absent a showing that a payment is made in exchange for a specific promise to perform or not perform a specific official act, a campaign contribution will not be viewed as a bribe.⁴⁷

4. Influence of a Public Official

One commits bribery when he accepts something of value in return for being influenced in the performance of any official act,⁴⁸ or when he offers something of value to an official for the purpose of influencing government.⁴⁹ In proving this element, the government must show that the individual actually offered or received a bribe.⁵⁰ Courts recognize that there may sometimes be “dual purposes” for payments.⁵¹ However, “a valid purpose that partially motivates a transaction does ***705** not insulate participants in an unlawful transaction from criminal liability.”⁵² For instance, the jury may base a “guilty” decision on circumstantial evidence of a quid pro quo, notwithstanding alternative legal reasons for payments.⁵³

5. Official Act

In evaluating the “official act” element of bribery, courts have rejected the notion that a bribe is not received when the briber over-estimates the bribee's abilities or authority.⁵⁴ A bribe occurs even where the bribee misrepresents his authority and ability to accomplish the official act,⁵⁵ the bribee could accomplish the act, but only illegally as a violation of state law,⁵⁶ or where the official act was not within the bribee's “lawful duties.”⁵⁷ Despite this broad interpretation of the official act element, not every inducement will constitute bribery and the “briber must still have intended that the federal employee utilize employee status to accomplish the illegal goals.”⁵⁸

B. Defenses

Where the government successfully demonstrates that each of the bribery elements is met, the defendant may still raise a number of defenses. The remainder of this section details common, though seldom successful, defenses, including entrapment and its variations, outrageous government conduct, and duress or coercion.

1. Entrapment

Perhaps because of the inevitable involvement of an agent of the government, defendants frequently claim entrapment in bribery cases. In *Jacobson v. United States*,⁵⁹ the Supreme Court recently reviewed the requirements for entrapment in a non-bribery case, reaffirming the required elements for entrapment previously established in *Sorrells v. United States*⁶⁰ and *Sherman v. United States*.⁶¹ While the government may provide the opportunity to commit a crime without it being entrapment,⁶² [g]overnment agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute Where the Government has induced an individual to break the law and the defense of entrapment is at issue ... the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.⁶³

When a defendant claims entrapment, he bears the burden to demonstrate government inducement.⁶⁴ The burden then shifts to the prosecution to show that the defendant was “predisposed to violate the law before the government intervened.”⁶⁵ The defendant must show direct inducement by the government; a claim that he was induced by a “middleman” will not suffice.⁶⁶ Likewise, a defendant is not entrapped simply because a government official goes along with the defendant's conduct as part of an investigation into that conduct.⁶⁷

The following factors are relevant in determining a defendant's predisposition: (1) the character or reputation of the defendant; (2) whether the initial criminal suggestion was made by the defendant or by the government; (3) whether the activity was for profit; (4) whether the defendant indicated reluctance that was overcome by government inducement; and (5) the nature of the inducement.⁶⁸ ***707** Predisposition may be found where the public official first solicits a bribe, and in response, the government establishes a sting operation.⁶⁹ Jury acquittal on one charge does not necessitate a finding of no predisposition on subsequent charges.⁷⁰ The entrapment defense is precluded in a bribery case where the defendant never admits to criminal conduct.⁷¹ An “entrapment by estoppel” defense applies only where “an official tells the defendant that certain conduct is legal and the defendant believes the official.”⁷²

2. Outrageous Government Conduct

In addition to entrapment, defendants frequently claim that the government engaged in “outrageous conduct.” This defense is extremely difficult to prove, and may require a showing of “coercion, violence or brutality” on the part of the government.⁷³ Even illegal or fraudulent activity to re-interest a defendant in offering a bribe⁷⁴ is not outrageous conduct where it does not violate a “protected right of the defendant’s” and its effect is harmless.⁷⁵

3. Duress or Coercion

Without success, defendant-bribers have attempted to show that government duress or coercion led them to offer a bribe to a public official.⁷⁶ Before a § 708 defendant may request a jury instruction on duress or coercion, the following must be shown:

- (1) that defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) that defendant had no reasonable legal alternative to violating the law, like a chance to both refuse to do the criminal act and to avoid the threatened harm; and (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of threatened harm.⁷⁷

Where the defendant could have pursued legal alternatives to bribery, the defendant may not make a claim of duress or coercion.⁷⁸ A claim for economic coercion fails where the defendant pays for something that is due to him anyway or pays for what would be a legal action by the public official.⁷⁹

4. Other Defenses

Courts have refrained from embracing other defenses offered by defendants against a bribery charge. The Supreme Court has held that the Speech or Debate clause of the Constitution⁸⁰ does not bar a bribery prosecution,⁸¹ though “evidence of a legislative act of a Member may not be introduced by the Government in a prosecution under § 201.”⁸² While the limits of the Clause’s protection are not clearly delineated,” the heart of the Clause is speech or debate in either House.”⁸³

The Ninth and Tenth Circuits have each rejected a claim by a defendant-bribee that he was not attempting bribery, but in fact, was conducting his own independent § 709 investigation and took the money to gain evidence against the briber.⁸⁴ A defendant who offers a police officer a bribe during questioning and before Miranda warnings may still be found guilty of bribery, as long as the officer does not engage in coercive conduct.⁸⁵ Claims that the bribery statute is unconstitutionally overbroad have also failed.⁸⁶

C. Illegal Salaries for Federal Employees

Section 209⁸⁷ prohibits the receipt or payment of salary from any source other than the United States government as compensation for government services provided by an individual while acting as an officer of the executive branch or an agency.⁸⁸ As with the other conflict of interest statutes, violators are subject to the penalties established in § 216.⁸⁹

Section 209 is “designed to prohibit outsiders from supplementing a government employee’s salary.”⁹⁰ The leading case addressing § 209 is *Crandon v. United States*,⁹¹ in which the Supreme Court held that severance payments made to future federal employees before they begin government service is not a violation of § 209.⁹² In arriving at this result, the Court construed a literal reading of the statute as fostering the continued policy of helping the government attract personnel with special knowledge and skills.⁹³ Section 209 only covers those persons who are currently employed by the government and receive supplemental income from the private sector.⁹⁴

A number of other exceptions are set forth in the statutory language of § 209.⁹⁵ For example, a federal officer or employee is not prevented from “continuing to § 710 participate in a bona fide pension, retirement, group life, health, or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plans maintained by a former employer.”⁹⁶ Moreover, a federal officer or employee may continue to accept any contributions, awards, or other expenses as governed by chapter 41 of title 5 of the United States Code.⁹⁷

D. Penalties

Section 216⁹⁸ provides that violators of conflict of interest provisions are subject to a maximum of one year imprisonment and fines under Title 18.⁹⁹ In addition to providing the criminal sanctions for an offense, § 216 also allows the government to impose certain civil sanctions.¹⁰⁰ Finally, if the Attorney General has reason to believe that a person is engaging in conduct that may violate one of the conflict of interest statutes, § 216 permits the Attorney General to petition the appropriate United States district court for an order enjoining that conduct.¹⁰¹

The Federal Sentencing Guidelines provide for bribery sentences that are considerably higher than average pre-Guidelines sentences because the Commission believed that pre-Guideline sentencing practices did not adequately reflect the gravity of public corruption offenses.¹⁰²

Defendants convicted under §§ 201(b)(1)-(2) (bribery) are sentenced in accordance with § 2C1.1 of the *Federal Sentencing Guidelines*.¹⁰³ The base offense level under this section is 10.¹⁰⁴ If the offense involved more than one bribe or § 711 extortion, the offense level is increased by two.¹⁰⁵ Additionally, the offense level is increased by the greater of: (a) the corresponding number of levels from the table in § 2F1.1, if the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, exceeded \$2,000;¹⁰⁶ or (b) by eight levels if the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position.¹⁰⁷ Section 2C1.1(c) requires the use of alternate Guideline provisions in specified circumstances.¹⁰⁸ Special instructions apply for fines imposed on organizational defendants.¹⁰⁹

Defendants convicted under § 201(c)(1) (illegal gratuities) are sentenced in accordance with § 2C1.2.¹¹⁰ The base offense level under this section is seven.¹¹¹ If the offense involved more than one gratuity, the offense level is increased by two.¹¹² The offense level is also increased by the greater of: (a) the corresponding number of levels from the table in § 2F1.1, if the value of the gratuity exceeded \$2,000; or (b) by eight levels “if the gratuity was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position.”¹¹³ As with § 201(b) offenses, special instructions apply for fines imposed on organizational defendants.¹¹⁴

III. Criminal Conflict of Interest

This section addresses unauthorized compensation, unauthorized representation, the post-employment restrictions on federal employees, and the prohibition on acquiring a financial interest in a public matter.

§ 712 A. Unauthorized Compensation

Section 203 of Title 18¹¹⁵ is the most often referred to of the “federal conflict of interest statutes.”¹¹⁶ Section 203 is closely related to § 201, the public official bribery provision, because like § 201, § 203 criminalizes the use of a public office for private gain whether it be by the officeholder/employee or by an outside individual attempting to influence the government official.¹¹⁷ The penalties for violating § 203 are delineated in § 216.¹¹⁸

1. Elements of the Offense

To gain a conviction under § 203, the government must prove: (a) a person covered by the statute; (b) in connection with a “particular matter” in which influence was sought; (c) received compensation; (d) with corrupt intent; (e) to provide services before a particular governmental forum.¹¹⁹

a. Coverage

“Coverage is not a heavily litigated issue in § 203 case law.”¹²⁰ The statute covers all individuals employed by the federal government including members of Congress, federal judges, or employees of the executive, legislative, and judicial branch as well as those who offer compensation to such public officials for the purpose of influencing government.¹²¹ The statute grants exceptions for individuals working under grants in the national interest,¹²² giving testimony,¹²³ or representing family members without compensation.¹²⁴ The statute also limits coverage of “special government employees”¹²⁵ to “particular matters” where they “participated personally and substantially as a Government employee” or the matter was “pending in the department or agency ... in which such employee § 713 was serving.”¹²⁶ For example, a Coast Guard reserve officer who had served more than the minimum 130 days during the previous 365 was considered an officer of the federal government and subject to §

203 despite being under 69 day orders at the time of the incident for which he was charged.¹²⁷ An individual may also be convicted for conspiracy to violate § 203 and accepting prohibited compensation although that individual never becomes a public official.¹²⁸ However, one court has indicated that the provisions of § 203, and indeed all of the conflict of interest statutes, may not cover Native American federal employment regulation except in certain circumstances.¹²⁹

b. Particular Matter

Section 203 prohibits accepting compensation for representational services in relation to a “particular matter” in which the United States has a direct and substantial interest.¹³⁰ The adjective “particular” modifies each of the matters listed in the statute, including a “contract, claim, controversy, charge ... or other matter.”¹³¹ Nonetheless, the government need not identify one specific contract or claim for which the defendant offered to provide representational services.¹³² Courts have found the statute to require only a general description of, for instance, potential future contracts.¹³³ The government may charge a defendant with a § 203 violation even when a public official had no authority to perform an official act to benefit the payor or no particular matter was pending, such as a contract award.¹³⁴

***714 c. Compensation**

Section 203¹³⁵ requires the receipt or gift of compensation requirement. While compensation may be in the form of cash, it has also been found to include airline tickets¹³⁶ and loans.¹³⁷ The Second Circuit has held that the government must show the defendant knew he or she was receiving compensation.¹³⁸ There is some conflict among the circuits with regard to receipt of compensation and the extent to which the compensation must be for payee's personal benefit. The Tenth Circuit has held that “the government employee need only receive compensation, otherwise than as provided by law,”¹³⁹ while the Second Circuit has been willing to assume that § 203 applies only where the public official receives the compensation “by and for” personal benefit.¹⁴⁰

d. Intent

Section 203 is a “general intent” statute.¹⁴¹ Thus, “the gravamen of each offense, is not an intent by a public official to be corrupted or influenced, but simply the acceptance of an unauthorized compensation.”¹⁴² The District of ***715** Columbia Court of Appeals recently adopted this interpretation,¹⁴³ but reversed a defendant's conviction when the lower court had refused to allow him to bring testimony to respond to the government's evidence that he did manifest corrupt intent.¹⁴⁴

Section 203(a)(2) may, however, allow defendants to argue that defendant-payors, as opposed to defendant-payees, must at least know why they are paying before they are liable under § 203.¹⁴⁵

e. Forum

Perhaps the most complicated question arising from § 203 concerns forum. There are two separate issues relating to forum. The first asks whether the forums before which the officials are prohibited from providing services are limited to those listed in the statute or if they include any forum in which the United States has an interest.¹⁴⁶ The second concerns whether officials are prohibited from providing only representational services or both services and advice.

Two circuits have addressed the first question, reaching opposite conclusions regarding forums covered by § 203.¹⁴⁷ The Tenth Circuit stated that § 203(a)(2) “is not limited to federal employees appearing before the federal forums enumerated in § 203(a)(1).”¹⁴⁸ In contrast, the Second Circuit has stated that § 203(a)(1) reaches only “services performed or to be performed before the federal forums listed in the statute.”¹⁴⁹ Subsequently, however, the Second Circuit found that § 203 is violated by “services rendered indirectly through another federal official.”¹⁵⁰ While the court reaffirmed the limitation to the federal forums listed in ***716** the statute,¹⁵¹ the court found the statute nonetheless applies to a “two-step” process when one official influences another official to provide services before a statutory forum.¹⁵²

The second issue concerns what services officials may or may not perform under the statute. Section 203 prohibits “any compensation for any representational services, as agent or attorney or otherwise.”¹⁵³ The current language of this statute was most recently amended by the Ethics Reform Act of 1989.¹⁵⁴ Without explaining the reasoning behind these changes, the Ethics Reform Act inserted “representational” before “services” and added “courts” to the forums listed in the statute.¹⁵⁵ The leading case in this area, *United States v. Myers*,¹⁵⁶ was decided before the Ethics Reform Act was enacted. In *Myers*, the Second

Circuit interpreted § 203 to prohibit officials from rendering services before federal agencies but to allow the giving of advice on agency proceedings.¹⁵⁷ The court wished to avoid interpreting the statute in a way that would prevent members of Congress, many of whom were also attorneys, from representing clients and providing legal advice.¹⁵⁸

2. Defenses

Defenses to other conflict of interest statutes are also applicable to § 203.¹⁵⁹ Defendants have been unsuccessful in a defense of outrageous behavior on the part of the government.¹⁶⁰ A defense of “official misstatement of law,” however, has been successful. The District of Columbia Court of Appeals considered this defense in *United States v. Baird*.¹⁶¹ The defendant, who was convicted under § 203 for lobbying for compensation while he was a reserve officer, argued in his defense that he first sought legal advice and approval for his action from a Coast Guard official.¹⁶² Although the District Court had not permitted ignorance of the § 203 law as a defense,¹⁶³ the Court of Appeals outlined in detail the test for an official misstatement defense.¹⁶⁴ In applying the test to the Baird case, the court found that because “the indirect character of the legal advice allegedly received by Baird would clearly go to the reasonableness of any reliance on it, ... it appears to fit within the defense.”¹⁶⁵ The court then reversed Baird’s conviction based in part on the success of this defense.¹⁶⁶

B. Limitations on Activities of Government Officers and Employees

Section 205 prohibits government employees from either prosecuting any claim against the government or representing any person before enumerated government forums.¹⁶⁷ To a great degree, this section is coextensive with § 203, which prohibits government employees from receiving compensation in exchange for representational services in matters in which the United States has an interest.¹⁶⁸ As in § 203, the prohibition applies to officers of the federal government¹⁶⁹ as well as the government of the District of Columbia.¹⁷⁰

According to one commentator, § 205 was originally created to address three practical considerations.¹⁷¹ First, the statute “was intended for the benefit of ... the poor and ignorant, who have claims against the United States.”¹⁷² Second, it was intended “to protect the United States” from “crafty or dishonest men.”¹⁷³ Finally, the statute was also meant “to protect the Government, by preventing the Executive officers of the Government from ... availing themselves of their opportunities to hunt up and to prosecute claims against the Government.”¹⁷⁴ Thus, this provision centers not on compensation, as § 203 does,¹⁷⁵ but instead focuses on the prevention of any representational activity by government officials.¹⁷⁶

§ 205, in sweeping language, applies to individuals employed in “the executive, legislative, or judicial branch of the Government or in any agency of the United States,”¹⁷⁷ though it provides for the same limited exception for “special government employees” as § 203.¹⁷⁸ According to the statute, a special government employee shall be subject to the § 205 restrictions only if he or she participated “personally and substantially” in the covered matter while a government employee,¹⁷⁹ or if the covered matter is pending in the department or agency in which the employee is serving.¹⁸⁰

Subsection (e) allows government officials or employees to represent, with or without compensation, persons with whom they have a personal relation, provided that the matter is not one in which he or she has participated personally or substantially and the matter is not his or her official responsibility.¹⁸¹ Officials may still testify under oath as required.¹⁸²

Section 205 provides for several exceptions not included in § 203. One of these exceptions is a pro bono exception for the representation of a “person who is the subject of disciplinary, loyalty, or other personnel administration proceedings.”¹⁸³ However, the exception is only applicable to administrative proceedings; court representation is excluded.¹⁸⁴ The exclusion is “designed to allow government employees to represent others in defense of actions brought by the agency for disciplinary, loyalty, or other personnel reasons.”¹⁸⁵ “With memories of the McCarthy era still fresh, Congress presumably carved out this exception to preserve government employees’ ability to accept the obligation of defending the honor or reputation of an accused employee.”¹⁸⁶

Finally, subsection (f) of § 205 allows special government employees to represent parties who are grant recipients or under contract to the United States, but only if the head of the agency involved in the contract certifies in writing that such representation is necessary and publishes such certification in the Federal Register.¹⁸⁷

*719 Section 205 is of special interest because of its limitation on pro bono representation.¹⁸⁸ Section 205 has been invoked to prohibit two part-time law students working for the government from participating in an appellate litigation clinic representing indigent clients.¹⁸⁹ In *United States v. Bailey*, the court held that “criminal cases could pose special problems where the defendant might also suffer, or claim to suffer, from his agent or attorney occupying a dual role, especially one where his motives might be questioned.”¹⁹⁰

C. Post-Employment Activities

Section 207¹⁹¹ controls lobbying on the part of individuals after they leave government service. In the words of one writer, the rules are intended to turn what had been perceived as a “revolving door” into a “decompression tank.”¹⁹² The Ethics Reform Act of 1989¹⁹³ expanded § 207 by extending its reach to legislative branch employees, including members of Congress.¹⁹⁴ As with the other conflict of interest statutes, penalties are delineated in § 216.¹⁹⁵

1. Elements of the Offense

To obtain a conviction under § 207, the government must prove: (a) the defendant was covered by the statute; (b) the defendant, within two years from the termination of employment, knowingly acted as agent for or represented another in appearance before his or her former agency or employees; (c) the United States had a direct and substantial interest in the matter; (d) the defendant had official responsibility for the particular matter within one year from his retirement; and (e) the defendant's representation was knowing.¹⁹⁶

*720 a. Coverage

Section 207 places certain prohibitions on federal legislative and executive branch employees after they leave government service.¹⁹⁷ This applies to special government employees in the executive branch as well.¹⁹⁸

Section 207(j) lists several exceptions to the otherwise prohibited conduct. For example, § 207(j)(5) states that the statute does not apply to communications made “solely for the purpose of furnishing scientific or technological information,” provided that the communication is made either “under procedures acceptable to the department or agency concerned” or under a complicated certification process involving publication of a notice in the Federal Register.¹⁹⁹

The statute establishes specific periods of time during which the former employee may not have contact with his former employer in particular or the federal government in general.²⁰⁰ For example, § 207(a)(1) places permanent restrictions on former branch executive employees when they participated personally and substantially in the particular matter as an employee.²⁰¹

Other provisions also help determine when lobbying and representation may be permissible for former employees. Section 207(a)(2) places a two year restriction on a former executive branch employee when the particular matter was pending under the individual's official responsibility.²⁰² Section 207(b) prohibits former executive branch employees and Members of Congress from providing aid or advice regarding any ongoing treaty or trade negotiation.²⁰³ Section 207(e) sets forth a one-year ban for former employees of the legislative branch.²⁰⁴ These bans do not apply, however, to special government employees who worked less than sixty days in the one year period before government employment ended.²⁰⁵

Section 207(j)(6) states that “[n]othing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury.”²⁰⁶ However, the statute places limitations on this exception. Section 207(j)(6)(A) provides that a former executive branch employee subject to the restrictions of 207(a)(1) “with respect to a particular matter” may not, except under court order, serve as an expert witness for any party other than *721 the United States in that matter.²⁰⁷ In at least two tort cases, parties have been unable to call former federal employees as expert witnesses because of the threat of § 207 prosecutions against these witnesses.²⁰⁸

b. Representative or Agent

Section 207 applies only to instances in which a former official had contact with the federal government or was the representative or agent of a party practicing before the government. The key inquiry is whether the defendant actually represented another party for the purposes of the statute. In *United States v. Schaltenbrand*,²⁰⁹ an Air Force reserve officer, who was employed by a private contractor after his government service ended, attended a meeting between the Air Force and his new employer. The court examined agency law, stating that the defendant needed to have “actual” or “apparent” authority to bind the principal

in order to be considered an agent or representative.²¹⁰ It concluded that since the defendant spoke little at the meeting, and since he had no ability to make binding decisions on the part of his employer, he could not be considered a representative or agent in violation of § 207(a).²¹¹

c. Direct and Substantial Interest of the United States

Section 207(a)(1)(B) requires that the United States be a party to, or have a direct and substantial interest in, the particular matter if a prosecution is to succeed.²¹² A “direct and substantial interest” is to be interpreted by its “common well understood meanings.”²¹³ For example, one court has determined the government's involvement in contract negotiations constitutes a direct and substantial interest.²¹⁴

d. Particular Matter and Official Responsibility

In order for an individual to be convicted under § 207, the government must ***722** show that the illegal conduct was related to a “particular matter” over which the defendant had official responsibility as a federal employee.²¹⁵ Section 207(i)(3) defines “particular matter” as “any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.”²¹⁶

The Federal Circuit examined the scope of “particular matter” in some detail in *CACI, Inc.-Federal v. United States*,²¹⁷ emphasizing that the illegal conduct must be related to the same matter in which the defendant had official responsibility. In that case, one of several firms bidding on a service contract with the Department of Justice was represented by a former DOJ employee who had evaluated such bids during his employment there.²¹⁸ Although the plaintiff argued that the bidding process was a particular matter for the purposes of § 207, the court found that the bidding process was “not the ‘same particular matter’ with which the former employee was involved while chief of the Group.”²¹⁹ Similarly, the Seventh Circuit has found that a series of contracts was not a single “particular matter” for the purpose of this statute.²²⁰

The government must also prove that the defendant had “official responsibility” for the particular matter.²²¹ In one case, a former army procurement officer attempted to alter a series of contracts initially negotiated while he was still enlisted.²²² The court determined that the defendant had been involved “personally and substantially” in the particular matter and stated that “if the matter was just within his job description, but he did not work on it himself, the officer would be free to represent a private party after leaving the government.”²²³ The *CACI, Inc.-Federal* court summarized this element as: “the proposal must have been the same ‘particular matter’ in which the former federal employee ‘participated personally and substantially’.”²²⁴

***723** e. Knowledge/Intent

Subsection 207(c) has been interpreted as requiring knowledge of each of the elements that made the conduct unlawful.²²⁵ In *United States v. Nofziger*, a former presidential aide contended that he could not be convicted under subsection 207(c) because he did not know that the United States government had a direct and substantial interest in the particular matter involved when he forwarded a letter to the Deputy Counselor from the President.²²⁶ The District of Columbia Court of Appeals agreed, holding that “knowingly” applied to all of subsection 207(c), and reversed the conviction.²²⁷

No cases have been litigated on the question of knowledge under any other subsections of 207, but the identical construction of those provisions would seemingly lead to the conclusion that all of § 207 requires that the defendant had knowledge of the facts.

Although the statute also requires “intent to influence,”²²⁸ there are no decisions examining this provision. The penalties in § 216 establish two separate sanctions for merely engaging in the conduct and “willfully” engaging in the conduct, implying that scienter is not required for a conviction under § 207.²²⁹ The exact meaning of “intent to influence” for the purposes of this section is, therefore, unsettled.

2. Defenses

There are a number of exceptions to the prohibitions of § 207.²³⁰ These exceptions, and attempts to deny that the government has proven all the elements, are the only defenses that have been raised in recorded opinions dealing with § 207.

D. Acts Affecting Financial Interest

Section 208 generally prohibits officers and employees of the executive branch from ‘personally and substantially’ participating in any particular matter in which, to his knowledge, the officer, his spouse, partner, or organization with which he is involved, has

a financial interest.²³¹ The purpose of § 208 is “to insure honesty in ***724** the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare.”²³² In order to achieve this objective, courts have interpreted § 208 broadly.²³³ As with the other conflict of interest statutes, this section is punishable by the sanctions set forth in § 216.²³⁴

1. Elements of the Offense

To obtain a conviction under § 208, the Government must prove that the defendant: “(1) was an officer or employee of the executive branch or of an independent agency, (2) participated personally and substantially in his official, governmental capacity in a matter, and (3) knew that he, his spouse, or another statutorily-listed person had a financial interest in that particular matter.”²³⁵

a. Officer or Employee

Section 208 requires that the defendant be an officer or employee of the executive branch or any independent agency of the federal government, including special government employees.²³⁶ The section establishes several exemptions from coverage under this statute.²³⁷ First, an employee may seek prior approval of his or her actions from his or her appointing officer even though the employee has a financial interest, if the appointing official determines that the particular interest will not be so substantial as to affect the integrity of the employee's services.²³⁸ Second, § 208 shall not apply if, by general rule, the particular kind of interest has been exempted by the Director of the Office of Government Ethics.²³⁹ Additionally, the section does not apply to a special government employee serving on an advisory committee if the appointing official “certifies in writing that the need for ***725** the individual's services outweighs the potential for a conflict of interest created by the financial interest involved.”²⁴⁰ Finally, § 208 is inapplicable to a financial interest that would affect a matter of a Native American tribe or nation.²⁴¹

b. Participated “Personally and Substantially” in a “Particular Matter”

Few court decisions have discussed the definitions of “personally and substantially” or “particular matter” under § 208.²⁴² However, one court, in examining § 208, noted from the House Report that the section was designed to address “ ‘a growing concern, both in and out of Congress, with the ever present and perplexing problems of how best to assure high ethical standards in the conduct of the Federal Government.’ ”²⁴³ This statement of purpose, combined with the dearth of precedent on the issue, seems to imply that the courts will be lenient in finding this element in prosecutions.

c. Knowledge of a Financial Interest

This third element is perhaps the most complex under § 208, and has been the focus of the most controversy involving prosecutions under this section. It is a composite element, involving questions of intent, financial interest, and also negotiation.

First, the defendant must have known that she, her spouse, partner, or the organization with which she was involved had a financial interest at stake. Some courts have determined that the government does not need to prove specific intent, but only needs to establish general intent for conviction.²⁴⁴ The Eleventh Circuit requires an even lower threshold: declaring that § 208 is a strict liability offense.²⁴⁵ In either case, scienter is not required for conviction.

Second, the government must prove that a financial interest was in fact at stake: ***726** that is, that the defendant stood to gain from the matter in question.²⁴⁶

Finally, the defendant's personal conduct must also be found to constitute “negotiations” or “arrangements” under this statute.²⁴⁷ In keeping with the purpose of the statute, courts have liberally interpreted this element of § 208.²⁴⁸

2. Defenses

One “defense” that has been raised is multiplicity. In *United States v. Jewell*,²⁴⁹ the defendant claimed that thirteen counts of violating subsection 208(a) were “multiplicitous,” since they were based upon the defendant signing invoices pertaining to the same contract.²⁵⁰ The court found that these multiple incidents actually constituted the same “particular matter” for the purposes of § 208, and therefore, the defendant could be charged with only one count of violating subsection 208(a).²⁵¹ Thus, although not truly a “defense,” this decision provides some protection to the defendant against multiple counts.²⁵²

E. Penalties

Defendants convicted under most of the conflict of interest statutes²⁵³ are sentenced in accordance with § 2C1.3.²⁵⁴ The base offense level for these offenses [*727](#) is six.²⁵⁵ If the offense involved harm to the government, the offense level is increased by four.²⁵⁶ Defendants convicted of violating 18 U.S.C. § 209 (accepting outside salaries) are sentenced in accordance with § 2C1.4,²⁵⁷ which carries a base offense level of six.²⁵⁸

Footnotes

- 1 For a discussion of the history of conflict of interest legislation see Robert N. Roberts, *White House Ethics: The History of the Politics of Conflict of Interest Regulation* (1988); Note, *The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest?*, 28 *Am. Crim. L. Rev.* 323, 335-36 n.82 (1991) [hereinafter *The Congressional Ethics Dilemma*].
- 2 18 U.S.C. § 201 (1994).
- 3 18 U.S.C. § 203 (1994).
- 4 18 U.S.C. § 205 (1994) (government employees prohibited from prosecuting any claim against the government or representing any person before a listed selection of government forums).
- 5 18 U.S.C. § 207 (1994).
- 6 18 U.S.C. § 208 (1994).
- 7 18 U.S.C. § 209 (1994).
- 8 “The federal conflict of interest statute is an omnibus statute encompassing seven provisions relating to illegal payments, restrictions on post-government employment, and congressional practice in [the] Court of Claims.” Carolyn Elefant, *When Helping Others is a Crime*, 3 *Geo. J. Legal Ethics* 719, 719 n.2 (1990).
- 9 Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 *Geo. Wash. L. Rev.* 417, 420 (1990).
- 10 See 18 U.S.C. §§ 201-209 (setting out conflict of interest statutes); see also Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 *Harv. L. Rev.* 1113, 1119 n.27 (April 1963) (“A comprehensive bribery statute is an essential element to an effective structure of conflict-of-interest protection.”).
- 11 18 U.S.C. § 201(c) (1994).
- 12 18 U.S.C. § 201(b)(1)-(2) (1994).
- 13 18 U.S.C. § 201(c).
- 14 *Id.*; see also *United States v. Bustamonte*, 45 F.3d 933, 940 (5th Cir. 1995) (discussing the distinction between bribery and illegal gratuities); *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (same); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1990) (same).
- 15 “To find a public official guilty of accepting an illegal gratuity, ... it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office.” *Bustamonte*, 45 F.3d at 940; see also *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (gratuity need not influence future action of a public official); *Mariano*, 983 F.2d at 1159 (1st Cir. 1993) (corrupt purpose is not a necessary element of the offense).
- 16 Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 *UCLA L. Rev.* 784 (1985).
- 17 For a general discussion of the differences between bribes and gifts, see Medrith Lee Hager, *The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift*, 83 *Ky. L.J.* 197 (1995).
- 18 18 U.S.C. § 201 (1994). See also, Lowenstein, *supra* note 16, at 796 (outlining § 201).
- 19 See 18 U.S.C. §§ 201(b)(1), 201(b)(2) (requiring the exchange to be of a “thing of value.”).
- 20 See *United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir.) (given defendant’s “severe financial difficulties,” loans and the promise of future employment at three times his current salary were each things of value), cert. denied, 484 U.S. 815 (1986); *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir.) (in case against U.S. Senator, trial judge correctly found shares of stock in unproven mining venture “things of value” based on the defendant’s evaluation of their worth), cert. denied, 464 U.S. 1007 (1983).

- 21 Williams, 705 F.2d at 622-23.
- 22 See, e.g., *United States v. Biaggi*, 909 F.2d 662, 684 (2d Cir. 1990) (promise of future job “thing of value” whether offered as a reward for past action or a quid pro quo for future actions).
- 23 E.g., *id.* at 684; *Gorman*, 807 F.2d at 1304.
- 24 E.g., *Williams*, 705 F.2d at 622-23.
- 25 E.g., *Gorman*, 807 F.2d at 1304.
- 26 See, e.g., *United States v. Sandoval*, 20 F.3d 134, 137 (5th Cir. 1994). In *Sandoval*, the court found a taxpayer not guilty of bribing IRS official where taxpayer offered to provide information regarding other tax evaders, in exchange for lenient treatment. The court stated: “[N]o federal authority has ever found that trading information for lenience runs afoul of 18 U.S.C. § 201”. *Id.*
- 27 18 U.S.C. § 201(b)(1)-(2).
- 28 465 U.S. 482 (1984).
- 29 *Id.* at 498. The Court in *Dixson* found that executives of private nonprofit corporations who were responsible for administering a federal housing grant program became “public officials” within the meaning of § 201 “[b]y accepting the responsibility for distributing these federal fiscal resources ... [and assuming] the quintessentially official role of administering a social service program established by the United States Congress.” *Id.* at 497.
- 30 *Dixson*, 465 U.S. at 499.
- 31 *Id.* Congress subsequently addressed state and local officials who, in the course of receiving a minimum level of federal assistance, accept a bribe. 18 U.S.C. § 666 (1988); see also *Project, Eighth Survey of White Collar Crime: Bribery*, 30 Am. Crim. L. Rev. 471, 481 (1993) (discussing elements of a § 666 offense).
- 32 See *United States v. Madeoy*, 912 F.2d 1486, 1494 (D.C. Cir.) (affirming trial court's refusal to allow the jury to decide whether a Veterans Affairs fee appraiser was a public official), cert. denied, 498 U.S. 1105 (1990). The *Madeoy* court stated that the *Dixson* “public official” determination was based on statutory analysis and legislative history rather than a review of the evidence or a consideration of the jury's determination. *Id.* As a result, the Court concluded that *Dixson* establishes the public official question as one of law. *Id.*
- 33 *United States v. Kidd*, 734 F.2d 409, 412 (9th Cir. 1984) (Army private held to be “public official”).
- 34 *United States v. Hollingshead*, 672 F.2d 751, 753-4 (9th Cir. 1982) (as the Federal Reserve Bank is an arm of the federal government, defendant's recommendations regarding capital expenditures were those of a public official).
- 35 *United States v. Mosley*, 659 F.2d 812, 814 (7th Cir. 1981) (substantial federal government involvement in locally administered employment program enough to find local intake worker a public official operating on behalf of the Department of Labor).
- 36 *United States v. Strissel*, 920 F.2d 1162, 1165-66 (4th Cir. 1990).
- 37 *United States v. Soto*, 47 F.3d 546, 549-550 (2d Cir. 1995).
- 38 *United States v. Gelb*, 881 F.2d 1155, 1163 (2d Cir.), cert. denied, 493 U.S. 994 (1989).
- 39 See, e.g., *United States v. Romano*, 879 F.2d 1056, 1060 (2d Cir. 1989) (former EPA employee still a “public official” despite being stripped of authority and serving only as a government informant: “[T]he bribery statute was drafted with broad jurisdictional language ... to reach all people performing activities for the federal government regardless of the form of federal authority”).
- 40 See, e.g., *United States v. Velazquez*, 847 F.2d 140, 142 (4th Cir. 1988) (county sheriff's supervision of both state and federal prisoners under a contract with the federal government was sufficient to classify him as a public official because his activities were the same as those of a federal prison supervisor).
- 41 *Id.*
- 42 *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995); *McCormick v. United States*, 500 U.S. 257, 269-73 (1991); see also *United States v. Bustamonte*, 45 F.3d 933, 940 (5th Cir. 1995) (distinguishing bribery, in which an elected official's actions are influenced by payment, from a gratuity, in which she is paid for something done or planned, but she is not influenced directly); *United States v. Biaggi*, 909 F.2d 662, 684 (2d Cir. 1990) (same), cert. denied, 499 U.S. 904 (1991); *United States v. Hseih Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir.) (even where full price for immigration card was paid, a reasonable jury could consider additional sum to be not only a tip constituting a gratuity but also a bribe where the defendant paid for and received the card at the same meeting), cert. denied, 471 U.S. 1139 (1985).

- 43 *United States v. Strand*, 574 F.2d 933, 995 (9th Cir. 1978) (citations omitted). Compare 18 U.S.C. § 201(b) (1994) (“Whoever—directly or indirectly, corruptly gives, offers, or promises ...”) with 18 U.S.C. § 201(c) (1994) (“Whoever ... directly or indirectly gives, offers, or promises ...”); see also Lowenstein, *supra* note 16, at 797 (discussing the differences between bribery and illegal gratuities).
- 44 *Tomblin*, 46 F.3d at 1379; *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993); *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir.), cert. denied, 459 U.S. 943 (1982).
- 45 See, e.g., *Biaggi*, 909 F.2d at 681, 691 (where government failed to show congressman's son knew shares of stock were issued for and to influence his father, and other defendant knew payments were made, but government failed to show defendant knew payments were used as bribes, both convictions were reversed); see also *Hseih Hui Mei Chen*, 754 F.2d at 823-25 (where elderly immigrants knew payments were illegal, but may not have known “solicitation is unacceptable in this country,” conviction upheld).
- 46 See *Tomblin*, 46 F.3d at 1379 (5th Cir. 1995) (jury instruction must distinguish between lawful intent associated with making a campaign contribution and unlawful intent associated with bribery); *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (where undercover agent stated that even low-level IRS officials are able to make immediate settlements for tax deficiencies, trial judge incorrectly disallowed a jury instruction to consider whether defendant-briber merely intended to settle tax liability); cf. *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993) (valid purpose that partially motivates a transaction does not insulate participants in unlawful transaction from liability).
- 47 *Tomblin*, 46 F.3d at 1379; *Allen*, 10 F.3d at 411; *Dozier*, 672 F.2d at 537 (“[W]e do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting ‘donations,’ demand money in return for some act of official grace.”); see also Hager, *supra* note 17, at 205-215 (examining the quid pro quo requirement in campaign contribution cases).
- 48 *United States v. Donathan*, 65 F.3d 537, 540 (6th Cir. 1995) (witness sought and accepted \$20,000 to be influenced in her testimony); *Coyne*, 4 F.3d at 111 (county executive accepted \$30,000 payment from architect, then made contacts and lobbied on architect's behalf); *Biaggi*, 909 F.2d at 684 (citing 18 U.S.C. § 201); *Strand*, 574 F.2d at 996 (customs agent accepted payment for allowing cocaine into the United States).
- 49 18 U.S.C. § 201 (1994); see, e.g., *United States v. Bonito*, 57 F.3d 167, 170-71 (2d Cir. 1995) (real estate developer gave car to city real estate services official); *Hseih Hui Mei Chen*, 754 F.2d at 822 (defendant offered to do something in exchange for the public official's action, which he knew to be in violation of the law).
- 50 See, e.g., *United States v. Hernandez*, 731 F.2d 1147, 1149-50 (5th Cir. 1984) (discussions by defendant about bribing a witness under current 18 U.S.C. § 201(b)(3) were mere preparation to commit a crime and not an offer, i.e., an “expressed ability and desire to pay” a bribe (citing *United States v. Jacobs*, 431 F.2d 754, 760 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971))).
- 51 See, e.g., *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993) (affirming conviction of county executive for accepting bribes, even though payment was accepted, in part, for “friendship”).
- 52 See, e.g., *id.* at 113 (valid purpose that partially motivates a transaction does not insulate participants in unlawful transaction from liability). See also *United States v. Biaggi*, 909 F.2d 662, 682-84 (2d Cir. 1990) (although defendant alleged that briber performed legal services that were part of the bill, additional circumstances such as prior extortionate demand by bribee and close proximity in time to alleged favor by bribee allowed jury to reasonably find payment was a bribe).
- 53 See, e.g., *United States v. Sutton*, 801 F.2d 1346, 1358-60 (D.C. Cir. 1986) (evidence that defendant-briber made payment either directly before or after receipt of a document was sufficient to find bribery despite defendant's claims that payments were for lobbying services).
- 54 See, e.g., *United States v. Gjeli*, 717 F.2d 968, 972-977 (6th Cir. 1983) (bribe occurred regardless of the fact that the briber was incorrect in believing that the bribee could accomplish the desired official act and the fact that the act was beyond the bribee's authority (collecting cases)), cert. denied, 465 U.S. 1101 (1984).
- 55 See *United States v. Romano*, 879 F.2d 1056, 1060 (2d Cir. 1989) (“It was irrelevant that Stecker [defendant-briber] was unable to achieve the objective of Romano's bribe after Stecker began cooperating with the government.” (citing *Louie Gim Hall*, 245 F.2d at 339)).
- 56 See *Gjeli*, 717 F.2d at 971-73 (although ATF agent operating undercover could not have legally freed a prisoner—the official act in question—for the defendant-briber, the agent demonstrated he could use his position for this purpose in violation of his duty to uphold the law, state or federal).
- 57 See *United States v. Kidd*, 734 F.2d 409, 412 (9th Cir. 1984) (although army private's “lawful duties” did not include issuing military identification cards, attempt to pay her in exchange for cards still constituted bribery).
- 58 *Gjeli*, 717 F.2d at 976 n.8.
- 59 503 U.S. 540 (1992).
- 60 287 U.S. 435 (1932).

- 61 356 U.S. 369 (1958).
- 62 Sherman, 356 U.S. at 372.
- 63 Jacobson, 503 U.S. at 548-49.
- 64 *Id.* at 549 n.2. For a discussion of this defense, see *United States v. Sandoval*, 20 F.3d 134, 136-39 (5th Cir. 1994) (entrapment defense succeeded where government failed to show that taxpayer was predisposed to bribe IRS agent); *United States v. Lew*, 980 F.2d 855, 856 (2d Cir. 1992) (defendant's initial offer of \$3000 to I.R.S. agent to "take care of" tax liability and subsequent initiation of complex tax scheme involving multiple tax avoiders was sufficient to find predisposition).
- 65 E.g., *United States v. Collins*, 972 F.2d 1385, 1396 (5th Cir. 1992) (theory of entrapment claiming due process violation will be found only in rarest and most outrageous of circumstances; otherwise, predisposition is proper test).
- 66 *United States v. Pilarinos*, 864 F.2d 253, 256 (2d Cir. 1988). "[W]here a government agent 'induces a middleman to commit a crime, and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime' ... the latter person is not entitled to a derivative entrapment charge." *Id.*
- 67 *United States v. Patel*, 32 F.3d 340, 345 n.7 (8th Cir. 1994) (defendant not entrapped where Resolution Trust Corporation agent, as part of an investigation, went along with defendant's plan to bribe the agent in return for favorable treatment in purchasing a hotel).
- 68 *United States v. Lee*, 846 F.2d 531, 537 n.3 (9th Cir. 1988) (citing *United States v. Reynoso-Ulloa*, 548 F.2d 1239, 1336 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978)).
- 69 See *United States v. Gomez*, 807 F.2d 1523, 1527 (10th Cir. 1986) (where public official suggested to contractor that he would fix a contract in return for payment, predisposition was shown and subsequent government sting operation not entrapment).
- 70 See *United States v. LeMaster*, 54 F.3d 1224, 1233 (6th Cir. 1995) (defendant may not upset a verdict solely because the verdict is not reconcilable with other verdicts for or against the defendant); *United States v. Lahey*, 55 F.3d 1289, 1296 (7th Cir. 1995) (jury's failure to convict defendant on one count does not estop them from convicting on a separate count); *United States v. Romano*, 879 F.2d 1056, 1060 (2d Cir. 1989) (same).
- 71 *Gomez*, 807 F.2d at 1527.
- 72 See *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 825 (9th Cir.) (defendant cannot claim entrapment by estoppel where the agent told her the conduct was illegal and she stated she knew the conduct was illegal) (citing *Cox v. Louisiana*, 379 U.S. 559 (1965)), cert. denied, 471 U.S. 1139 (1985).
- 73 Proving outrageous government conduct requires not merely "a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad 'fundamental fairness' guarantee, it appears from High Court decisions, is not transgressed absent "coercion, violence or brutality to the person." *United States v. Kelly*, 707 F.2d 1460, 1476 (D.C. Cir. 1983) (Ginsburg, J. concurring) (citing *Irvine v. California*, 347 U.S. 128, 132-33 (1954)), cert. denied 464 U.S. 908 (1983)). Despite "extraordinary" importuning "in excess of real-world opportunities" in the Abscam case against Congressman Kelly, the activities did not "involve the infliction of pain or physical or psychological coercion" and the court was thus "constrained to reverse" a lower court decision for Kelly. *Id.* at 1475, 1477.
- 74 *United States v. Gjieli*, 717 F.2d 968, 970 (6th Cir. 1983) (ATF agent fraudulently obtained a writ of habeas corpus ad testificandum, posed as a U.S. Marshal, and obtained custody of a federal prisoner in order to re-interest prisoner's son and associates in bribing the agent), cert. denied, 465 U.S. 1101 (1984).
- 75 *Id.* at 978.
- 76 E.g., *United States v. An Chyi Liu et al.*, 960 F.2d 449, 453 (5th Cir.) (citing *United States v. Michelson*, 559 F.2d 567, 569 (9th Cir. 1977)), cert. denied, 113 S.Ct. 418 (1992); *United States v. Lee*, 694 F.2d 649, 654 (11th Cir.), cert. denied 460 U.S. 1086 (1983); *United States v. Campbell*, 675 F.2d 815, 820-821 (6th Cir.), cert. denied 459 U.S. 850 (1982).
- 77 *An Chyi Liu*, 960 F.2d at 453.
- 78 *Id.* at 454-55 (defendant could have turned himself in to other federal agents in other cities rather than purchasing illegal green cards).
- 79 E.g., *United States v. Lee*, 846 F.2d 531, 534 (9th Cir. 1988) (citation omitted); *United States v. Miller*, 340 F.2d 421, 424-5 (4th Cir. 1965); *United States v. Labovitz*, 251 F.2d 393, 394 (3d Cir. 1958).
- 80 "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art.I, § 6.
- 81 *United States v. Brewster*, 408 U.S. 501, 528-29 (1972).

- 82 *United States v. Helstoski*, 442 U.S. 477, 487 (1979); cf. *United States v. McDade*, 28 F.3d 283, 289-97 (3d Cir. 1994) (no violation of the Speech or Debate Clause where prosecution cited examples of legislative acts against a Member of Congress when the Member first offered such acts in his own defense), cert. denied, 115 S.Ct. 1312 (1995).
- 83 *McDade*, 28 F.3d at 295. “Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” *Id.* For a complete analysis of the scope of the Speech or Debate clause, see Matthew R. Walker, *Constitutional Law—Narrowing the Scope of Speech or Debate Clause Immunity—United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), cert. denied, 1995 U.S. Lexis 1841 (U.S. Mar. 6 1995), 68 Temp. I. Rev. 377 (Spring, 1995).
- 84 *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (no evidence to support contention that Customs agent was trying for a promotion rather than accepting a bribe); *United States v. Gomez*, 807 F.2d 1523, 1526 (10th Cir. 1986) (no evidence to support similar claim by maintenance mechanic at Army commissary).
- 85 *United States v. Paskett*, 950 F.2d 705, 707-08 (11th Cir. 1992) (“[N]o person has a constitutional right to be warned of his rights before he commits a crime.” (quoting *United States v. Castro*, 723 F.2d 1527, 1537-38 n.1 (11th Cir. 1984) (Kravitch, J., concurring in part and dissenting in part))).
- 86 *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), cert. denied, 113 S.Ct. 1348 (1993).
- 87 18 U.S.C. § 209 (1994).
- 88 If a payment, however, bears “no relation to governmental services, there can be no violation of 18 U.S.C. § 209.” *United States v. Muntain*, 610 F.2d 964, 970 (D.C. Cir. 1979) (where reimbursement of airfare expenses of labor relations assistant to the Secretary of Housing and Urban Development on a trip to Ireland sponsored by the International Laborers Union was related not to the official’s governmental duties but to his outside business venture of selling automobile insurance to union members, no § 209 violation could occur).
- 89 18 U.S.C. § 216 (1994).
- 90 *Exchange Nat’l Bank of Chicago v. Abramson*, 295 F.Supp. 87, 89-90 (D.Minn. 1969). One commentator noted four specific concerns that the statute attempts to address: “the danger of divided loyalty, . . . appearance of impropriety, buying of access, and improper ‘sale’ of office.” Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U. L. Rev. 57, 89 (1992).
- 91 494 U.S. 152 (1990).
- 92 *Id.* at 167.
- 93 *Id.*
- 94 *Id.*
- 95 See 18 U.S.C. § 209(b)-(f) (1994) (delineating exceptions).
- 96 18 U.S.C. § 209(b).
- 97 18 U.S.C. § 209(c). 5 U.S.C. § 4111 (1994) provides:
(a) To the extent authorized by regulation of the President, contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee, without regard to section 209 of title 18, if the contributions, awards, and payments are made by an organization determined by the Secretary of the Treasury to be an organization described by section 501(c)(3) of title 26 which is exempt from taxation under section 501(a) of title 26.
- 98 18 U.S.C. § 216
- 99 Section 216(a) provides as follows:
(a) The punishment for an offense under sections 203, 204, 205, 207, 208, or 209 of this title is the following:
(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.
- 100 Section 216(b) provides:
(b) The Attorney General may bring a civil action . . . and upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.

- 101 18 U.S.C. § 216(c).
- 102 United States Sentencing Commission, Guidelines Manual, § 2C1.1, intro. comment. (Nov. 1994).
- 103 U.S.S.G. App. A.
- 104 U.S.S.G. § 2C1.1(a).
- 105 U.S.S.G. § 2C1.1(b)(1). But see U.S.S.G. § 2C1.1(b)(1) comment, n.6 (“related payments that, in essence, constituted a single incident of bribery ... are to be treated as a single bribe ..., even if charged in separate counts”); see also *United States v. Kahlon*, 38 F.3d 467, 470 (9th Cir. 1994) (defendant made more than one bribe, because, “[a]lthough the payments were part of a larger conspiracy, they were not installment payments for a single action”).
- 106 It should be stressed that the greatest of these three values is the correct value to use to determine the proper number of levels to add to the base. See, e.g., *United States v. Falcioni*, 45 F.3d 24, 26, 28 (2d Cir. 1995) (intended loss of \$41,000 to government was correctly used to increase base offense level of defendant who attempted to bribe IRS official to discharge friend's \$41,000 tax liability, even though defendant stood to benefit only \$3,500 and had no apparent knowledge of the extent of the tax liability).
- 107 U.S.S.G. § 2C1.1(b)(2). See also, *United States v. Lazarre*, 14 F.3d 580, 581 (11th Cir. 1994) (Assistant director of Immigration and Naturalization Service is “high level official,” as his discretion and responsibility were “similar to that of a supervisory law enforcement officer or prosecuting attorney or judge.” While each must work within certain confines, the jobs involve the exercise of substantial discretion.).
- 108 See U.S.S.G. § 2C1.1(c)(1) (facilitating commission of another crime), § 2C1.1(c)(2) (concealing or obstructing justice in respect to another criminal offense), § 2C1.1(c)(3) (threat of physical injury or property destruction).
- 109 U.S.S.G. § 2C1.1(d)(1).
- 110 U.S.S.G. App. A.
- 111 U.S.S.G. § 2C1.2(a).
- 112 U.S.S.G. § 2C1.2(b)(1).
- 113 U.S.S.G. § 2C1.2(B)(2).
- 114 U.S.S.G. § 2C1.2(c).
- 115 18 U.S.C. § 203 (1994).
- 116 E.g., *United States v. Wallach*, 935 F.2d 445, 454 (2d Cir. 1991), cert. denied, 113 S.Ct. 2414 (1993).
- 117 Note that as with the bribery offense, the defendant may be either a public official or one who attempts to influence a public official and that most principles apply equally to either instance. For a comprehensive discussion of § 203 (as well as comparisons of this section to § 205 and others) see generally Perkins, *supra* note 10; The Congressional Ethics Dilemma, *supra* note 1.
- 118 18 U.S.C. § 216 (1994).
- 119 See *United States v. Quinn*, 141 F.Supp. 622, 626-27 (S.D.N.Y. 1956) (delineating elements under former § 281, now § 203).
- 120 The Congressional Ethics Dilemma, *supra* note 1, at 339.
- 121 18 U.S.C. § 203(a)(1)(A) and (B).
- 122 18 U.S.C. § 203(e).
- 123 18 U.S.C. § 203(f).
- 124 18 U.S.C. § 203(d).
- 125 A special government employee for the purposes of § 203 is defined to include “an officer or employee of the executive or legislative branch of the United States Government ... who is retained ... with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days.” 18 U.S.C. § 202(a) (1994).
- 126 18 U.S.C. § 203(c).

- 127 *United States v. Baird*, 29 F.3d 647, 650 (D.C. Cir. 1994).
- 128 See *United States v. Wallach*, 935 F.2d 445, 471 (2d Cir. 1991) (although defendant never became a government official, conspiracy charge under § 203 for taking illegal compensation was legally sufficient), cert. denied, 113 S.Ct. 2414 (1993).
- 129 See *Mescalero Apache Tribe v. Rhoades*, 804 F.Supp. 251, 261 n.16 (D.N.M. 1992) (absent procedural safeguards, such as tribal input on a potential conflict or promulgation of a specific regulation by the government agency involved, the federal government could not prosecute a tribal council member under the conflict of interest provisions).
- 130 18 U.S.C. § 203(a)(1)(B)
- 131 *United States v. Williams*, 705 F.2d 603, 622 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). The court stated, “We accept the appellants’ argument, based on the structure of the statute, that the phrase “other particular matter” has the effect of causing the adjective “particular” to modify all of the preceding nouns, including “contract.” Id. Nonetheless, the court rejected a claim that the government was required to define the matter with particularity. Id.
- 132 Id.
- 133 See, e.g., Id. at 622 (although the Senator received compensation for future government titanium contracts and not specific contracts, a charge under § 203 “is sufficient if the compensation has been received for services to be rendered with respect to a particular category of contracts”); *United States v. Wallach*, 979 F.2d 912, 920-921 (2d Cir. 1992) [hereinafter *Wallach II*] (indictment satisfied § 203 particularity requirement by referring to Defense Department contracts with the alleged payee).
- 134 *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978). The Court stated:
Evans is also incorrect in asserting that the government was required to prove that the unlawful compensation was earmarked for a particular matter then pending before Evans and over which he had authority [I]t is immaterial that the donee-official’s position is ministerial or subordinate, or even that he actually lacks the authority to perform an act to benefit the donor.
Id. Evans was a Health, Education, and Welfare official who accepted a trip to Las Vegas and gambling money. Id. at 466. The payees were attempting to “keep him happy” in the event Congress ever allowed Evans’ office to contract directly with student loan collection agencies such as the co-defendant’s. Id.; see also *United States v. Myers*, 692 F.2d 823, 854 n.26 (2d Cir. 1982) (charge need not specify a matter pending at the time compensation is received).
- 135 18 U.S.C. § 203(a)(1)-(2).
- 136 *Evans*, 572 F.2d at 481.
- 137 See *United States v. Williams*, 705 F.2d 603, 607 n.2 (2d Cir.) (indictment charged conflict of interest under 18 U.S.C. § 203 for receipt of a loan and a “sum of money”), cert. denied, 464 U.S. 1007 (1983).
- 138 See *Myers*, 692 F.2d at 852-853 (noting that the district court judge had “emphasized that the element of receipt could not be established unless the jury found that [the defendant] knew that money was in the briefcase”).
- 139 *United States v. Freeman*, 813 F.2d 303, 306 (10th Cir. 1987) (prosecution must prove that “the official accepted, because of his position, a thing of value “otherwise than as provided by law for the proper discharge of official duty”” (quoting *Evans*, 572 F.2d at 480)).
- 140 *Myers*, 692 F.2d at 853 n.24. The court noted the “prosecution’s obligation to prove that [the defendant] must be shown to have received the money for his benefit ...” Id. However, the court also expressed some doubt regarding this assumption by citing *United States v. Shirey*, 359 U.S. 255, 257 (1959) (holding that conflict of interest charge could stand where defendant promised to confer benefits of payment to Republican Party in exchange for congressman’s influence). Id.
- 141 *Evans*, 572 F.2d at 481. “Specific intent is not an element of ... § 203(a).” Id. (citing *United States v. Podell*, 59 F.2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975)).
- 142 *Evans*, 572 F.2d at 481; accord *United States v. Schackelford*, 738 F.2d 776, 781 (7th Cir. 1984) (extortion statute requiring ‘knowing participation’ is not a specific intent crime); *United States v. Udofot*, 711 F.2d 831, 835-36 (8th Cir.) (use of the word ‘knowingly’ in federal firearms laws does not require specific intent), cert. denied, 464 U.S. 896 (1983). The District Court for the Eastern District of Virginia found the § 203 general intent requirement so well established that the court applied the principal to another conflict of interest statute. *United States v. Lord*, 710 F.Supp. 615, 617 (E.D. Va. 1989) (applying general intent standard by analogy to 18 U.S.C. § 208, prohibiting participation in acts involving a federal officer’s personal financial interest), aff’d, 902 F.2d 1567 (4th Cir. 1990).
- 143 The Court of Appeals stated, “[w]e did not find that the statute required knowledge that those facts added up to a crime.” *United States v. Baird*, 29 F.3d 647, 652 (D.C. Cir. 1994).
- 144 Id. at 653-54. The Court of Appeals determined that “the government ‘opened the door’ on the matter of defendant’s state of mind ... Once the door is opened, the other party can get through it otherwise irrelevant evidence ‘to the extent necessary to remove any unfair prejudice which might otherwise have ensued.’ ” Id. (quoting *United States v. Brown*, 921 F.2d 1304, 1307 (D.C.Cir. 1990)).

- 145 The District Court for the District of Columbia acknowledged this difference in the Baird case, surmising that Congress intended to “treat government employees receiving payments ... more harshly than the donors of such payments.” *United States v. Baird*, 778 F.Supp. 533, 537 (D.D.C. 1990). Compare § 203(a) (“Whoever ... directly or indirectly—(1) demands, seeks, receives...”) with § 203(a)(2) (“knowingly gives, promises, or offers ...”) (emphasis added).
- 146 See § 203(a)(1)(B) (listing as forums “any department, agency, court, court-martial, officer, or any civil, military or naval commission”).
- 147 Compare *United States v. Freeman*, 813 F.2d 303, 306 (10th Cir. 1987) (rejecting an argument by the defendant that he had not compensated a public official for services before any of listed fora, and therefore, should not be subject to § 203) with *United States v. Myers*, 692 F.2d 823, 857 (2d Cir. 1982) (reversing defendant’s § 203 conviction where defendant provided compensated advice, but did not perform services before a listed federal forum), cert. denied, 461 U.S.961 (1983).
- 148 *Freeman*, 813 F.2d at 306.
- 149 *Myers*, 692 F.2d at 857.
- 150 *Wallach II*, 979 F.2d at 920 (defendant’s compensated promise to influence the United States Attorney General to influence the Department of Defense on payor’s behalf was a violation of § 203(a)(1)).
- 151 *Id.*
- 152 *Id.*
- 153 18 U.S.C. § 203(a)(1).
- 154 Pub. L. No. 101-194 (§ 402); 103 Stat. 1716 (1989) (codified at scattered sections of the United States Code).
- 155 135 Cong. Rec. S15956 (daily ed. Nov. 17, 1989) (section-by-section analysis of Pub. L. No. 101-194).
- 156 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983).
- 157 *Id.*
- 158 *Id.* at 855.
- 159 See *supra* section II.B. (discussing defenses).
- 160 *United States v. Carpentier*, 689 F.2d 21, 26-27 (2d Cir. 1982) (it was not outrageous governmental behavior for government to have invited defendant to a yacht party, where defendant offered to set up an illegal green card scheme (citing *United States v. Alexandro*, 675 F.2d 34, 40 (2d Cir.) (failing to find outrageous governmental behavior with regard to a co-defendant of Carpentier’s), cert. denied 459 U.S. 835 (1982))), cert. denied, 459 U.S. 1108 (1983).
- 161 29 F.3d 647 (D.C.Cir. 1994).
- 162 *Id.* at 655.
- 163 *United States v. Baird*, 778 F.Supp. 534, 537 (D.D.C. 1990), rev’d, 29 F.3d 647 (D.C.Cir. 1994).
- 164 The defense of “official misstatement of the law” is available to a defendant who: “(1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field.” *Baird*, 29 F.3d at 654 (citing *United States v. Barker*, 546 F.2d 940, 955 (D.C.Cir. 1976)).
- 165 *Id.*
- 166 *Id.* at 655.
- 167 18 U.S.C. § 205 (1994).
- 168 *Id.*; see also *Elefant*, *supra* note 8, at 728 n.42 (discussing the detrimental effect of § 205 on pro bono representation).
- 169 18 U.S.C. § 205(a).
- 170 18 U.S.C. § 205(b).
- 171 Lisa G. Lerman, *Public Service by Public Servants*, 19 *Hofstra L. Rev.* 1141, 1174 (1991).

- 172 *Id.* (quoting speech of Senator Badger, Cong. Globe, 32nd Cong., 1st Sess. 1339 (1852)).
- 173 *Id.*
- 174 *Id.*
- 175 See *supra* notes 144-150 and accompanying text (discussing compensation element of § 203).
- 176 18 U.S.C. § 205(a)(1) & (2) (no mention of compensation); see *Refine Constr. Co., Inc. v. United States*, 12 Cl. Ct. 56, 61-62 (1987) (defendant found to have violated § 205 even though he did not receive or expect to receive anything of value); *United States v. Myers*, 692 F.2d 823, 841-43 (2nd Cir. 1982) (§ 205 prohibited conduct whether or not performed for compensation).
- 177 18 U.S.C. § 205(a).
- 178 18 U.S.C. § 205(c); see *supra* notes 134-136 and accompanying text (discussing special government employee limitation).
- 179 18 U.S.C. § 205(c)(1).
- 180 18 U.S.C. § 205(c)(2).
- 181 18 U.S.C. § 205(e) (1994).
- 182 18 U.S.C. § 205(g) (1994); see *DeMarrias v. United States*, 713 F.Supp. 346, 347 (D.S.D. 1989) (neither § 203 or § 205 prevents a physician from testifying under oath in court).
- 183 18 U.S.C. § 205(d); see, e.g., *Bachman v. Pertschuk*, 437 F.Supp. 973, 976 (D.D.C. 1977) (recognizing pro bono exception to § 205 in administrative proceeding); see generally *Elefant*, *supra* note 8 (discussing the detrimental effect of § 205 on pro bono representation).
- 184 *Bachman*, 437 F.Supp. at 976 (attorney for plaintiff class who is employed by defendant federal agency and who is himself a member of class has conflict of interest).
- 185 *Id.*; see generally *Elefant*, *supra* note 8 (discussing the pro bono representation impacts of § 205).
- 186 *Elefant*, *supra* note 8, at 729.
- 187 18 U.S.C. § 205(f) (1994). The legislative history explains that:
[t]his narrow authority is given to take care of any situations involving the national interest where an intermittent employee's special knowledge or skills may be required by his employer or other private person to effect the proper performance of a Government contract but where his services may be unavailable in the absence of a waiver of section 205.
S.Rep. No. 2213, 87th Cong., 2d Sess. (1962).
- 188 The law may pose problems for attorney compliance with the pro bono obligations of all attorneys according to the Model Code of Professional Responsibility. *Elefant*, *supra* note 8, at 719.
- 189 *United States v. Bailey*, 498 F.2d 677, 680 (D.C. Cir. 1974).
- 190 *Id.*
- 191 18 U.S.C. § 207 (1994).
- 192 David S. Cloud, "Revolving Door" Slows Down For All Federal Employees, 47 Cong. Q. Wkly. Rpt. 3234 (1989).
- 193 Pub. L. No. 101-194, 103 Stat. 1716, as amended by Act of May 4, 1990, Pub. L. No. 101-280, 104 Stat. 149, 159 (adding technical corrections to the Ethics Reform Act of 1989), and as amended by Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 529, 104 Stat. 1389, 1440-41 (conforming Ethics Reform Act of 1989 to Federal Employees Pay Comparability Act of 1990) [hereinafter Ethics Reform Act of 1989].
- 194 18 U.S.C. § 207.
- 195 18 U.S.C. § 216 (1994).
- 196 18 U.S.C. § 207; see also, *Robert E. Derektor, Inc. v. United States*, 762 F.Supp. 1019, 1026 (D.R.I. 1991) (court used these factors to determine that former Navy employee had not violated § 207 (citing *United States v. Coleman*, 805 F.2d 474, 478 (3d Cir. 1986) (construing old § 18 U.S.C. § 207(b)))).
- 197 18 U.S.C. § 207(a),(e).

- 198 18 U.S.C. § 207(a).
- 199 18 U.S.C. § 207(j)(5).
- 200 *Id.*
- 201 18 U.S.C. § 207(a)(1); see *infra* text accompanying notes 256-57 (discussing the phrase “personally and substantially”).
- 202 18 U.S.C. § 207(a)(2).
- 203 18 U.S.C. § 207(b)(1).
- 204 18 U.S.C. § 207(e)(1)-(5). For a discussion of the rationale for and problems with this differentiation between the executive and legislative branch, see Wendy L. Gerlach, Note, Amendment of the Post-Government Employment Laws, 33 *Ariz. L. Rev.* 401, 420-21 (1991).
- 205 18 U.S.C. § 207(c)(2)(B).
- 206 18 U.S.C. § 207(j)(6).
- 207 18 U.S.C. § 207(j)(6)(A) (emphasis added); see *infra* notes 228-237 and accompanying text (discussing the definition of “particular matter”).
- 208 For example, in a medical malpractice suit arising from care given to a civilian at a Naval Air Station hospital, the Navy warned the plaintiff’s lawyer that if a civilian doctor-contractor was deposed “beyond the scope of this authorization,” i.e. as an expert witness, the doctor’s testimony could lead to his prosecution under § 207. *McElya v. Sterling Medical, Inc.*, 129 F.R.D. 510, 512 (W.D. Tenn. 1990); accord *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F.Supp. 399, 400-01 (E.D. Mich. 1989) (third-party defendant United States kept witnesses from testifying by threats of § 207 prosecution).
- 209 930 F.2d 1554 (11th Cir.), cert. denied, 942 F.2d 798 (1991).
- 210 *Id.* at 1560.
- 211 *Id.* at 1561.
- 212 18 U.S.C. § 207(a)(1).
- 213 *United States v. Nofziger*, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *35, (D.D.C. Nov. 10, 1987), rev’d on other grounds, 878 F.2d 442 (D.C. Cir.), cert. denied, 493 U.S. 1003 (1989).
- 214 *United States v. Medico Indus., Inc.*, 784 F.2d 840, 842 (7th Cir. 1986).
- 215 In the first administrative debarment proceeding brought under § 207, the court said “the initial ruling ... hinged upon the legal interpretation of what constitutes participation in a ‘particular matter.’” *Becker v. Sullivan*, No. HAR-90-1889, 1991 U.S. Dist. LEXIS 8229, at *10 (D. Md. June 12, 1991).
- 216 18 U.S.C. § 207(i)(3).
- 217 719 F.2d 1567 (Fed Cir. 1983). See also *Robert E. Derecktor of Rhode Island, Inc. v. United States*, 762 F. Supp. 1019, 1027 (D.R.I. 1991) (examining the same).
- 218 719 F.2d at 1571.
- 219 *Id.* at 1576.
- 220 *United States v. Medico Indus., Inc.*, 784 F.2d 840, 844 (7th Cir. 1986).
- 221 *Robert E. Derecktor of Rhode Island, Inc.* 762 F.Supp. at 1026 (citing *United States v. Coleman*, 805 F.2d 474, 478 (3d Cir. 1986)).
- 222 *Medico Indus.*, 784 F.2d at 842.
- 223 *Id.* at 843; accord *United States v. Nofziger*, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *35, (D.D.C. Nov. 10, 1987) (finding that “personally and substantially” is to be interpreted by its “well understood common meaning”), rev’d on other grounds, 878 F.2d 442 (D.C. Cir. 1989). A close relation exists between this “personally and substantially” definition and the particular matter.
- 224 *Caci, Inc.-Federal v. United States*, 719 F.2d 1567, 1576 (Fed. Cir. 1983).

- 225 See *United States v. Nofziger*, 878 F.2d 442, 454 (D.C. Cir. 1989) (reversing conviction on grounds that government had not proven that defendant had knowledge of each element of offense).
- 226 *Id.* at 446.
- 227 *Id.* at 454.
- 228 18 U.S.C. § 207(a)(1),(2),(e)(1)-(5).
- 229 Compare 18 U.S.C. § 216(a)(1) with § 216(a)(2).
- 230 See 18 U.S.C. § 207(j)(setting out exceptions).
- 231 18 U.S.C. § 208(a) (1994). The statute extends as far as to cover personnel decisions affecting one's spouse. *United States v. Lund*, 853 F.2d 242,244-47 (4th Cir. 1988). But cf. *United States v. Tierney*, 947 F.2d 854, 865 (8th Cir. 1991) (where a prosecutor's spouse was a partner in a law firm representing the defendant's insurer and the insurer had sued the defendant, the "interest [was] simply too insubstantial to require disqualification of a partner's spouse in related litigation").
- 232 *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 548 (1961) (discussing old § 434, which governed conflict of interest of federal employees at the time of decision).
- 233 See *United States v. Lund*, 853 F.2d 242, 246 (4th Cir. 1988) ("the legislative history and purpose of 208(a) fully support giving its unambiguous terms the full breadth of their ordinary meaning"); *United States v. Jewell*, 827 F.2d 586, 587 (9th Cir. 1987) ("[t]he section's 'catch-all' language ... was designed to allow prosecution on the basis of any type of action taken to execute or carry to completion a contract") (citing *United States v. Irons*, 640 F.2d 872, 878 (7th Cir. 1981); *United States v. Conlon*, 628 F.2d 150, 154 (D.C. Cir. 1980) ("a narrow construction does not comport with legislative history").
- 234 18 U.S.C. § 216.
- 235 *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993), cert. denied, 114 S. Ct. 1124 (1994). This formulation of the elements is composite, i.e. containing questions of "personally and substantially" and "particular matter" in the same element.
- 236 18 U.S.C. § 208(a) (1994).
- 237 18 U.S.C. § 208(b) (1994).
- 238 18 U.S.C. § 208(b)(1).
- 239 18 U.S.C. § 208(b)(2). This option has been utilized often by federal appointees who might otherwise be required to divest themselves of property to avoid conflicts of interest. Stuart A. Smith, *Deferred Taxation of Gains Realized Upon Divestiture of Property to Avoid Conflicts of Interest*, 36 Fed. B. News & J. 126 (1989).
- 240 18 U.S.C. § 208(b)(3).
- 241 18 U.S.C. § 208(b)(4).
- 242 See supra notes 194-203 and accompanying text (discussing the definition of "particular matter"). The only recorded discussion of "particular matter" in the context of § 208 came in *United States v. Jewell*, 827 F.2d 586, 588 (9th Cir. 1987). In this case, the defendant had been charged with multiple counts of violating § 208(a). The court found that the thirteen separate incidents, relating to the signing of invoices by the defendant, actually constituted one contract. The court stated, "[a] matter may form a separate basis for liability under § 208 only if it is a discrete transaction." *Id.*
- 243 *United States v. Conlon*, 628 F.2d 150, 154 (D.C. Cir. 1980) (quoting H.R. Rep. No. 748, 87th Cong., 1st Sess. 2 (1962)).
- 244 *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986) (stating that § 208 "sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor"); *United States v. Lord*, 710 F.Supp. 615, 617 (E.D. Va. 1989) (finding through comparison of § 203 and § 208 that specific intent was not a requisite element of the latter).
- 245 *United States v. Hedges*, 912 F.2d 1397, 1400-02 (11th Cir. 1990) (§ 208(a) is not a general intent statute requiring scienter for each applicable element, but is a strict liability offense).
- 246 *United States v. Lund*, 853 F.2d 242, 245 (4th Cir. 1988) (spouse's potential gain from defendant's actions constituted financial interest for purposes of § 208(a)); *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986) (defendant had a cognizable financial interest where he stood to gain from a contingent fee arrangement). The Gorman court expressly found financial interest to exist "on the part of a party to a § 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter." *Id.* (citing Office of Government Ethics Advisory Opinion, 83 OGE 1 (Jan. 7, 1983)). Furthermore, the court stated, "[g]ain or loss

need not be probable for the prohibition to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.” Id.

247 *CACI-Federal, Inc., v. United States*, 719 F.2d 1567, 1578 (Fed. Cir. 1983) (discussions were only “preliminary exploratory talks, directed to possibilities that never materialized” and therefore did not violate § 208); *United States v. Conlon*, 628 F.2d 150, 154 (D.C.Cir. 1980) (it was not necessary to plead “specific acts of negotiating” in order to enforce § 208); *United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991).

248 The D.C. Circuit summarized, “Congress meant the words ‘negotiating’ and ‘arrangement’ ... to be given a broad reading,” and stated, “the terms ‘negotiating’ and ‘arrangement’ are not exotic or abstruse words ... They are common words of universal usage.” *Conlon*, 628 F.2d at 154-55; see also *United States v. Schaltenbrand*, 930 F.2d 1554, 1558 (11th Cir. 1991) (Air Force reservist defendant had negotiated with private employer despite fact that no offers had been made); *Express One Int’l v. United States Postal Service*, 814 F. Supp. 93, 98 (D.D.C. 1993) (federal employee had negotiated with private entity because he did not “affirmatively reject” invitation of future employment).

249 827 F.2d 586 (9th Cir. 1987).

250 Id. at 587.

251 Id. at 588.

252 It must be noted that the court still upheld the conviction of the defendant in *Jewell* on one count of violating § 208 and remanded to adjust the sentence accordingly. Id. at 588-89.

253 18 U.S.C. §§ 203, 205, 207, 208 (1994).

254 U.S.S.G. App.A.

255 U.S.S.G. § 2C1.3(a).

256 U.S.S.G. § 2C1.3(b)(1).

257 U.S.S.G. App.A.

258 U.S.S.G. § 2C1.4(a).

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