Legal Times
WEEK OF SEPTEMBER 25, 2006 • VOL. XXIX, NO. 39
ALM

A Little White Bribe

D.C. Circuit revisits *United States v. Valdes*.

Decision Must Draw the Line Between Mere 'Absurdities' and Public Corruption

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With questions about lobbyists' influence over public officials rocking the nation's capital, an *en banc* U.S. Court of Appeals for the D.C. Circuit is poised this week to address the reach of the federal statute that prevents government officials from accepting private gifts for performing official acts.

The result has potentially far-reaching implications for the federal work force and political corruption cases generally—and for the lawyers who defend or prosecute them.

At first glance, *United States v. Valdes* seems to be a routine, relatively low-level gratuities case. Nelson Valdes, a D.C. Metropolitan Police Department detective, accepted several hundred dollars from an FBI informant, William Blake, as an apparent reward for accessing an official police database and providing Blake with the information from it.

Indicted on three counts of bribery, Valdes was ultimately convicted of three counts of the lesser-included offense of receipt of an illegal gratuity. The illegal gratuities statute, 18 U.S.C. §201(c)(1)(B), prohibits a public official from demanding, seeking, receiving, accepting, or agreeing to receive or accept "anything of value personally for or because of any official act performed or to be performed by such public official or person."

On appeal, however, a sharply divided three-judge panel of the D.C. Circuit reversed Valdes' conviction. The judicial divide makes clear that the legal questions raised in *Valdes* are anything but routine. The court reached its decision over the objections of Judge Karen LeCraft Henderson. Her scathing dissent warned that the majority was rendering "payoffs" legal and embracing the likes of the notorious Capt. Mark McCluskey, the corrupt cop in *The Godfather* who took money for ignoring local businesses' infractions and offering them "protection."

Now the stage is set for further review. On May 15 the D.C. Circuit granted *en banc* review. Oral argument is scheduled for Sept. 28.

Valdes raises critical questions about the scope of the gratuities statute and, more specifically, the definition of "official act." The phrase is statutorily defined, for purposes of both the bribery and gratuities statutes, as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which at the time may be pending, or which may be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." Unfortunately, this definition provides little real-world guidance to public officials trying to stay within the law.

The D.C. Circuit's forthcoming answers, especially in a venue that has historically been the location for many of this country's most significant public corruption investigations, will be of fundamental importance to millions of federal employees whose actions are potentially subject to prosecution and who thus must act accordingly.

According to the opinion, in February 2001, Valdes and Blake met in a D.C. nightclub. Blake was introduced to Valdes as "the judge," and Valdes introduced himself as a D.C. police detective. At their second meeting at the same club, Valdes gave Blake his card and cell phone number, "just in case [Blake] ever needed a favor."

The FBI then entered fictitious information, including the names of fictitious individuals, into state computer databases; these databases linked to the Washington Area Law Enforcement System (WALES). The FBI instructed informant Blake to see if Valdes would provide him with police information. Over the next month, Valdes, at Blake's request, used WALES several times to look up license plates and warrant information for the fictitious individuals. In return, Blake gave Valdes several hundred dollars.

On appeal, Valdes argued that logging on to WALES to retrieve public information did not constitute an "official act." Specifically, he contends that it was not a "decision or action" falling within the statutory definition of "official act," and there was no "question, matter, cause, suit, proceeding or controversy" related to any of the (fictitious) individuals that was or could be pending before Valdes.

The government countered that accessing WALES, a system available only to authorized users who had undergone training and certification requirements, was an "action," and that by using police resources to perform the searches, Valdes was acting on a "matter brought before him in his official capacity."

Siding with Valdes, the D.C. Circuit held that the government failed to show that he engaged in an official act. Valdes' acts were not, the court held, "a 'decision or action' that directly affects any formal government decision made in fulfillment of government's public responsibilities."

A LIST OF ABSURDITIES

The *Valdes* majority relied heavily on the Supreme Court's seminal 1999 decision in *United States v. Sun-Diamond Growers*. In doing so, it raised significant questions about the the parameters of both the bribery and gratuities statutes—which both rely on the same definition of "official act."

In *Sun-Diamond* the Supreme Court addressed the question of whether giving a gratuity to a public official, in the absence of a specific connection between the giver's intent and a particular, specific act by the recipient, was sufficient to support a gratuities conviction.

Noting that the drafters took pains to include an official-act requirement in the statute, Justice Antonin Scalia, writing for a unanimous Supreme Court, stated, "The insistence upon an official act, carefully defined, seems pregnant with the requirement that some particular act be identified and proved." Accordingly, the Court held that the government must prove a link between the thing of value conferred and a "specific 'official act' for or because of which it was given" to sustain a gratuities conviction.

A much-discussed portion of the *Sun-Diamond* opinion focused on token gifts. In concluding that the gratuities statute required a connection to a specific act, *Sun-Diamond* reasoned that "absurdities" would result without such a requirement. For example, the Court reasoned that the statute would criminalize "token gifts," such as jerseys given to the president by sports teams during visits to the White House; a school baseball hat given to the secretary of education upon a visit to the school; or a complimentary lunch for the secretary of agriculture provided in connection with a speech to farmers about agriculture policy.

Sun-Diamond further reasoned that while these acts "are assuredly 'official acts' in some sense," they are not, in fact, " 'official acts' within the meaning of the statute." The decision stated that it is possible to eliminate the "absurdities" (the jersey, the baseball hat, the free lunch) "through the definition" of an "official act."

GOING FORMAL

Although the *Sun-Diamond* Court did not offer clear guidance on how to define "official act," the *Valdes* majority relied on the *Sun-Diamond* absurdities discussion and found that conviction for Valdes' WALES inquiries fell into *Sun-Diamond*'s list of absurdities. It concluded that "[a]ll the officials' acts (the WALES queries, ceremony, visit, or speech) have in common that none is a 'decision or action' that directly affects any formal government decision made in fulfillment of government's public responsibilities."

The majority reasoned that the "crucial" words in *Sun-Diamond* were "the reference to a 'question, matter, cause, suit, proceeding or controversy' " and that the government had not shown that the payments to Valdes were for any "decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official."

In defining "official act," the *Valdes* majority also found that "official act" entails some level of formality: "[t]he words are far from self-defining, but they suggest at least a rudimentary degree of formality, such as would be associated with a decision or action directly related to an adjudication, a license issuance (or withdrawal or modification), an investigation, a procurement, or a policy adoption."

Henderson, however, contended that "the majority puts all its eggs in the *Sun-Diamond* basket, and, in so doing, scrambles them." Arguing that the *Sun-Diamond* absurdities discussion was mere dicta, Henderson lamented the imposition of an "amorphous" test based on the "formality" of the action taken, but also noted that Valdes' actions should qualify as "official acts" even under the "new" test.

Henderson reasoned that Valdes used the restricted WALES police database on which he was trained and certified and accepted money for the information produced. WALES users, the government argued, are trained that WALES can be "used for criminal purposes only," and its use is "restricted to those persons responsible for the administration of justice." Accessing WALES was a routine part of Valdes' official duties, and accessing police databases is the "very type of 'questions' and 'matters' that detectives handle on a daily basis."

THE OPEN QUESTIONS

The two sides of the debate could not be more polarized. The government argues that an affirmance would signal that "the gratuities statute does not protect the public from a detective who peddles police information to an outsider looking to settle his private debts" and would call into question "the government's ability to prosecute under the bribery and gratuity statutes corrupt profit-making by public officials involving their insufficiently 'formal' governmental functions." The government also questions whether *Sun-Diamond*'s list of petty-value absurdities was meant to encompass "large cash payments . . . pocketed for personal use." If, for example, instead of receiving a baseball hat for a school visit, the secretary of education received a large cash payment, the Supreme Court might not be so quick to define away such a payment as an absurdity.

On the other hand, Valdes argues that if his conviction is reinstated, the precedent would allow for successful prosecutions in cases where corruption "of the official decision-making process is utterly lacking." For example, Valdes argues, a judge who, given an honorarium for delivering a law school address, prepared for the address by logging on to Lexis or PACER on his office computer could be prosecuted under the statute.

Is Valdes correct in arguing that minor infractions of internal policies could become the stuff of criminal convictions if his own conviction is upheld? Or is Henderson correct that the majority opinion could give a pass to a cop who takes money for not doing his duty?

Whether one agrees with the *Valdes* decision or Henderson's dissent, the debate reveals sharp disagreements about the reach of the gratuities statute. The Supreme Court itself, in *Sun-Diamond*, expressed concern about an overbroad interpretation of the gratuities statute; the *Valdes* majority likewise concluded that not all acts by officials are "official" acts.

Now we will see whether the D.C. Circuit sitting *en banc* shares those concerns, and if so, how it draws the line between "absurdities" and illegal gratuities.

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