United States v. Valdes: 'Officially' Defining 'Official Act' Under the Federal Gratuities Statute

"In Mexico, they call it 'la mordida' (literally, the 'bite'); in Iran, 'bakhshish' and in France 'pot-de-vin.' Here in America, we call it a 'payoff' and, today, the majority calls it lawful."[1] So begins Judge Henderson's sharply worded dissent in *United States v. Valdes,* the U.S. Court of Appeals for the District of Columbia Circuit's most recent examination of the federal gratuities statute, 18 U.S.C. § 201(c).

Valdes held that a Washington, D.C., detective who accepted hundreds of dollars from an FBI informant as a reward for looking up license plate and warrant information[2] did *not* violate the federal gratuities statute. Sweeping aside the government's argument that the detective's actions inherently related to his duties of conducting police investigations, the court found that the detective's actions did not constitute an "official act" within the meaning of the statute.[3]

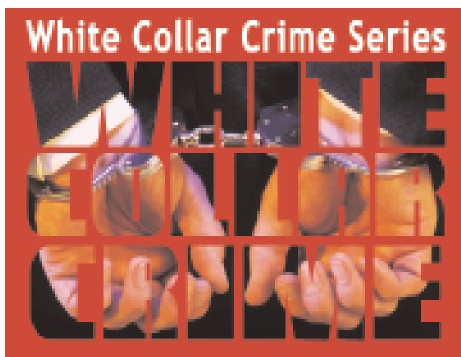
The decision may not stand, however, because on May 15, 2006, the D.C. Circuit granted *en banc* review in *Valdes.*[4] Oral argument is set for September 28, 2006.[5]

Valdes: When Does an Official Commit An "Official Act"?

The Trial

On several occasions in March 2001, William Blake, an FBI informant working undercover, gave cash to Nelson Valdes, then a detective with the D.C. Metropolitan Police Department (MPD), as an apparent reward for Valdes's search of several police databases to supply Blake with information.

Blake and Valdes first met at "1223," a nightclub in Washington, D.C., in February 2001. Blake introduced himself to Valdes as "the judge," and Valdes introduced himself as an MPD detective. At their second meeting at 1223, Valdes gave Blake his card and cell phone number, "just in case [Blake] ever needed a favor."[6] 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). Informant Blake was instructed to see if Valdes would provide him with police information.[7]



Blake first asked Valdes to do him the "favor" of looking up the license plates of several individuals he claimed to be indebted to him. Blake handed Valdes a $50 bill. Using WALES, Valdes obtained the names and addresses of the license holders. Subsequently, Valdes gave Blake the information regarding the first fictitious person; when Blake asked Valdes how much he owed him, Valdes replied: "Just a

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thank-you."[8]

Similar interactions between the two men occurred over the course of the next month. Blake subsequently asked Valdes to run a second license plate; the two men met in person, and Blake paid Valdes $200. That evening, Valdes, having again used WALES, gave Blake the names and addresses for two more license plates. Several days later, Blake requested that Valdes run a fourth plate; when Valdes provided the information, Blake gave him $100. Finally, Blake asked Valdes to determine whether a warrant existed for another person; during this request, he handed Valdes $100 to "give [him] a little more incentive." Valdes, again using WALES, looked up the information and told Blake that no warrant existed.[9]

Valdes was indicted on three counts of bribery in violation of 18 U.S.C. § 201(b)(2)(A) and (C).[10] A jury convicted Valdes of three counts of the lesser-included offense of receipt of an illegal gratuity in violation of 18 U.S.C § 201(c)(1)(B).[11]

The Appeal

The illegal gratuities statute 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."[12] The key difference between the gratuities and bribery statutes is one of intent: bribery requires a *quid pro quo*, whereas an illegal gratuity "may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken."[13]

On appeal, Valdes argued that logging onto WALES to retrieve public information did not constitute an "official act." Specifically, it was not a "decision or action" falling with 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.[14]

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 MPD resources to perform the searches, Valdes was acting on a "matter brought before him in his official capacity."[15]

The D.C. Circuit reversed Valdes's conviction. The majority focused specifically on whether there was any "question, matter, cause, suit, proceeding, or controversy" pending before Valdes; finding there was not, the court held that the government failed to show that Valdes engaged in an official act. An official act, the court reasoned, requires "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 . . . an investigation, a procurement, or a policy adoption."[16] Valdes's 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."[17]

Sun-Diamond Growers: Requiring a Link Between the Gratuity and a Particular Act

To understand *Valdes,* one must first understand the U.S. Supreme Court's decision in *United States v. Sun-Diamond Growers.* In reaching the conclusion that using the WALES system to provide information to Blake was not an "official act," the D.C. Circuit relied heavily on *Sun-Diamond.*

In *Sun-Diamond,* the Supreme Court considered the following question: "whether conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position."[18] Sun Diamond — a trade association that engaged in lobbying activities on behalf of growers of raisins, figs, walnuts, prunes, and hazelnuts — had provided approximately $5,900 in tickets to the U.S. Open, travel expenses, meals, and other gifts to then-Secretary of Agriculture Michael Espy. [19]

While the indictment of Sun-Diamond referenced two matters before Secretary Espy in which Sun-Diamond had an interest, it did not "allege a specific connection between either of them — or between any other action of the Secretary — and the gratuities conferred."[20] At trial, the district court instructed the jury that "it is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office*" and further instructed that the government did not have to show that "the alleged gratuity was linked to a specific or identifiable official act or any act at all."[21] The jury subsequently convicted Sun-Diamond under the gratuities statute. On appeal, the D.C. Circuit reversed the conviction and remanded for a new trial, stating that the jury instructions "invited the jury to convict on materially less evidence than the statute demands."[22] Nonetheless, the D.C. Circuit also stated that the government did not have to show that the gratuity was given for a *particular* official act."[23]

The Supreme Court granted *certiorari* and addressed the question of whether the provision of 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. The United States, as represented by the Independent Counsel and the Solicitor General as *amicus curiae*, contended that the gratuities statute covered "any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be *in a position to act* favorably to the giver's interests."[24]

The Court rejected these arguments. Noting that the drafters took pains to include an official act requirement in the statute, Justice Scalia, writing for a unanimous Court, stated, "The insistence upon an official act, carefully defined, seems pregnant with the requirement that some particular act be identified and proved."[25] 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.[26]

The Open Question

In the course of reaching its holding, the Court in *Sun-Diamond* also addressed what constitutes an official act. Though characterized as *dictum* by Judge Henderson in her dissent, it is central to the majority's reasoning in *Valdes.* While statutorily defined, for purposes of both the bribery[27] and gratuities statute, 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 is such official's place of trust or profit,"[28] this definition provides little real-world guidance as to what types of actions fall under its purview. This question forms the core issue in *Valdes.*

Another "Absurdity"?

To answer this question, *Valdes* turned to a discussion about token gifts in *Sun-Diamond.* 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

statute would criminalize "token gifts" to the President such as jerseys given 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 USDA policy.[29]

To counter arguments that these gifts might also be viewed as having been given "'for or because of' the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA 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."[30] Thus, some official acts are apparently not "official enough." Indeed, the Court stated that it is possible to eliminate the "absurdities" (the jersey, the baseball hat, the free lunch), "*through the definition*" of official act,[31] but the *Sun-Diamond* Court did not offer any guidance on how to define that term.

The *Valdes* majority found that conviction for Valdes's WALES inquiries fell into *Sun-Diamond's* list of absurdities. It noted 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."[32]

A Rudimentary Degree of Formality

Valdes, following *Sun-Diamond*, suggested that official acts sufficient to establish wrongdoing under the gratuities statute must have some level of formality.[33] Speaking of the statutory definition, the Court stated that "[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."[34]

The majority concluded by stating 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."[35] In reaching this holding, the majority also raised significant questions about the parameters of both the bribery and gratuities statutes, the scope of *Sun-Diamond,* and how close to the illegal gratuities line a public official can walk without fear of prosecution.

From *Birdsall* to *Valdes*: Rejecting a Broad Reading Of "Official Act"

A key issue for the D.C. Circuit in reconsidering the *Valdes* decision *en banc* will be the applicability of the Supreme Court's decision in *United States v. Birdsall.*[36] In *Birdsall*, the Court stated that "[e]very action that is within the range of official duty comes within the purview" of the bribery statute.[37] *Birdsall* held that official action could be found in "established usage" or "settled practice," not just acts explicitly authorized by statute, written rule, or regulation.[38] Not surprisingly, the government focuses on *Birdsall*'s statement that official action includes every action that is within the range of official duty. But the *Valdes* majority rejected the government's "proposed broad reading," stating that *Birdsall* was focused simply on the appellant's contention that an official act must be one established by statute.[39]

The *Valdes* majority, however, placed great reliance on the D.C. Circuit's 1979 decision in *United States v. Muntain.*[40] In *Muntain*, the D.C. Circuit declined to declare a Secretary of Labor's use of government resources in a private scheme to sell group automobile insurance an official act. Though the defendant took trips at government expense to meet with labor officials and used his subordinates to assist in his insurance scheme, *Muntain* construed "official act" narrowly, stating that the actions taken or decisions made had to involve "matters falling indisputably within the ambit of a public official's official duties."[41] *Muntain* foreclosed the possibility that any act in which official resources were used could, without more, fall "within the range of official duty," and rejected what it perceived as the government's attempt to construe "18 U.S.C. § 201(g) as a statutory prohibition against the misuse of public office and contacts gained through that office to promote private ends."[42]

Both Valdes and the National Association of Criminal Defense Lawyers (NACDL), in an *amicus* brief filed on behalf of Valdes,[43] rely on *Muntain* to argue that Valdes's accessing of WALES was not an official act. Valdes argued that because Muntain's use of government property and resources to assist in a private insurance scheme was not enough to sustain his conviction, Valdes's own use of government resources should likewise be insufficient for conviction. The NACDL brief, relying on the D.C. Circuit's statement that conduct can be "reprehensible" though not criminal under the strictures of § 201,[44] likewise views Valdes's actions as comparable to Muntain's: "like the federal official in *Muntain*, Mr. Valdes's conduct — the access of police records for personal reasons — was not criminal; it consisted merely of the 'misuse of public office . . . to promote private ends.'"[45]

Both the government and Judge Henderson, however, contend that even given the holdings in *Sun Diamond* and *Muntain*, Valdes's actions should qualify as "official acts."[46] Judge Henderson noted that Valdes used a restricted police database, WALES, on which he was trained and certified, and accepted money for the information produced. WALES users, argued the government, are trained that it can be "used for criminal purposes only," and its use is "restricted to those persons responsible for the administration of justice."[47] Accessing WALES was a routine part of Valdes's official duties,[48] and accessing police databases is the "very type of 'questions' and 'matters' that detectives handle on a daily basis."[49]

Major Impact

Whether or not one agrees with the *Valdes* decision or Judge Henderson's dissent, the debate reveals sharp disagreements about the reach of the statute. The government argues that if affirmed, *Valdes* could 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' government functions."[50] It contends that 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.[51]

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."[52] Valdes uses the example of a judge, who, given an honorarium for delivering a law school address, prepared for the address by log-

ging onto LEXIS or PACER on his office computer.[53] Is Valdes correct in arguing that this judge, if violating a policy that the databases be used only for "official court business," could be prosecuted merely for violating a computer access policy under the gratuity statute if his own conviction is upheld?[54]

The outcome of *Valdes* is no trivial matter, as the definition of "official act" is used in both the bribery and gratuities statutes and prosecutors may potentially apply them to a wide range of activity. While the definition, as the government notes in its petition for *en banc* review, will apply in a venue that has been the location "historically, for many of this country's most significant public corruption investigations,"[55] it is also an issue of fundamental importance to millions of federal employees whose actions are potentially subject to prosecution and who must conform their conduct accordingly. In that regard, both the Supreme Court in *Sun Diamond* and the majority in *Valdes* were plainly concerned about an overbroad interpretation of the statute, preferring instead to interpret the statute as a "scalpel" rather than a "meat axe."[56] Now it is up to the D.C. Circuit sitting *en banc* to determine how far the statute goes, and then perhaps (again), the Supreme Court itself.

Notes

1. *United States v. Valdes*, 437 F.3d 1276, 1282 (D.C. Cir. 2006) (Henderson, J., dissenting).
2. Valdes accepted $400 for the requested information and $50 for unspecified favors. *Id.* at 1282-83 (Henderson, J., dissenting).
3. *Id.* at 1279.
4. General Docket, U.S. Court of Appeals for the D.C. Circuit, *United States v. Valdes*, No. 03-3066.
5. *Id.*
6. *Valdes*, 437 F.3d at 1277.
7. *Id.* at 1277-78
8. *Id.* at 1277.
9. *Id.* at 1277-78.
10. *Id.* at 1278.
11. *Id.*
12. 18 U.S.C. § 201(c)(1)(B).
13. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-405 (1999).
14. *Id.*
15. Corrected Brief and Addendum for Appellee at 47-48, *United States v. Valdes*, No. 03-3066 (D.C. Cir. July 29, 2005).
16. *Valdes*, 437 F.3d at 1279.
17. *Id.* at 1280.
18. *Sun-Diamond*, 526 U.S. at 400.
19. *Id.* at 401.
20. The government alleged that the gifts were given for two purposes — getting certain cooperatives to be deemed small-sized entities and getting the Environmental Protection Agency to abandon its proposed rules for regulation of methyl bromide. *Id.* at 402.
21. *Id.* at 403 (emphasis added).
22. *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 968 (D.C. Cir. 1998).
23. *Id.*
24. *Sun-Diamond*, 526 U.S. at 405 (quoting Brief for United States 22 (emphasis added)).
25. *Id.* at 406 (internal quotations omitted).
26. *Id.* at 414.
27. 18 U.S.C. § 201(b).
28. 18 U.S.C. § 201(a)(3).
29. *Sun-Diamond Growers*, 526 U.S. at 406-07 (internal citation omitted).
30. *Id.* at 407.
31. *Id.* at 408.
32. *Valdes,* 437 U.S. at 1280.
33. *Id.* at 1279.
34. *Id.*.
35. *Id.* at 1281-82.
36. 233 U.S. 223 (1914).
37. *Id.* at 230.
38. *Id.* at 231.
39. *Valdes*, 437 F.3d at 1281.
40. 610 F.2d 964 (D.C. Cir. 1979).
41. *Id.* at 968 n.3.
42. *Id.* at 967.
43. *En Banc* Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellant, *United States v. Valdes*, No. 03-3066 (D.C. Cir. July 3 2006).
44. *Id.* at 13.
45. *Id.* at 16.
46. *Valdes*, 437 F.3d at 1286 n. 9 (Henderson, J., dissenting) (noting that even though she does not agree with the formal/informal dichotomy, if adopted, Valdes's actions should fall in the "formal" category); Petition for Panel Rehearing or Rehearing *En Banc* and Addendum for Appellee at 10, *United States v. Valdes*, No. 03-3066 (D.C. Cir. Apr. 10, 2006)
47. Corrected Brief and Addendum for Appellee, *supra* note 15, at 14.
48. *Valdes*, 437 F.3d at 1286 (Henderson, J., dissenting).
49. Petition for Panel Rehearing, *supra* note 46, at 11. *See also Valdes*¸ 437 F.3d at 1286 (Henderson, J., dissenting).
50. Petition for Panel Rehearing, *supra* note 46, at 4.
51. *Id.*, at 10 n.8.
52. *En Banc Brief* for Appellant at 27, *United States v. Valdes*, No. 03-3066 (D.C. Cir. June 26, 2006).
53. *Id.* at 27-28.
54. *Id.* at 28.
55. Petition for Panel Rehearing, *supra* note 46, at 4.
56. *Id.* at 412; *Valdes*, 437 F.3d at 1281 (quoting *Sun-Diamond*, 526 U.S. at 412)

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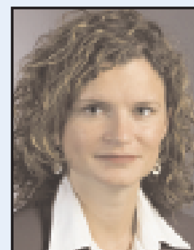

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