

of slaves from United States

or owner or person having charge of any her person with the knowledge or intent that in any place within the United States to any as a slave, or carries away from any place ch person with the intent that he may be so fined not more than \$5,000 or imprisoned th.

3.)

and Revision Notes

S.C., omitted and "within" substituted, in view of 253, section 5 of this title defining "United States".

of were

References

amend. 13.

Federal Forms

References

CHAPTER 79—PERJURY

- Sec. 1621. Perjury generally.
- 1622. Subornation of perjury.
- 1623. False declarations before grand jury or court.

Historical Note

1970 Amendment. Pub.L. 91-452, Title IV, § 401(b), Oct. 15, 1970, 84 Stat. 933. Added item 1623.

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

(June 25, 1948, c. 645, 62 Stat. 773; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995; Oct. 18, 1976, Pub.L. 94-550, § 2, 90 Stat. 2534.)

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 231, 629 (Mar. 4, 1909, c. 321, § 125, 35 Stat. 1111; June 15, 1917, c. 30, Title XI, § 19, 40 Stat. 230).

Words "except as otherwise expressly provided by law" were inserted to avoid conflict with perjury provisions in other titles where the punishment and application vary.

More than 25 additional provisions are in the code. For construction and application of several such sections, see Behrle v. United States (App.D.C.1938, 100 F.2d 714), United States v. Hammer (D.C.N.Y.1924, 299 F. 1011, affirmed, 6 F.2d 786), Rosenthal v. United States (1918, 248 F. 684, 160 C.C.A.

584), cf. Epstein v. United States (1912, 196 F. 354, 116 C.C.A. 174, certiorari denied 32 S.Ct. 527, 223 U.S. 731, 56 L.Ed. 634).

Mandatory-punishment provisions were rephrased in the alternative.

Minor verbal changes were made.

1976 Amendment. Pub.L. 94-550 divided existing provisions into a single introductory word "Whoever", par. (1), and closing provisions following par. (2), and added par. (2).

1964 Amendment. Pub.L. 88-619 inserted "This section is applicable whether the statement or subscription is made within or without the United States."

thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

[See main volume for text of (b)]

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means—

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term—

(1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;

(2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch; and

(3) "legislative branch" means—

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(As amended Pub.L. 100-191, § 3(a), Dec. 15, 1987, 101 Stat. 1306; Pub.L. 101-194, Title IV, § 401, Nov. 30, 1989, 103 Stat. 1747; Pub.L. 101-280, § 5(a), May 4, 1990, 104 Stat. 158.)

#### HISTORICAL AND STATUTORY NOTES

##### 1990 Amendment

Subsec. (c). Pub.L. 101-280, § 5(a)(1), added provisions relating to section 218 of this title and struck out provisions referring to definitions of "officers" and "employees" found in sections 2104 and 2105, respectively, of Title 5, Government Organization and Employees.

Subsec. (d). Pub.L. 101-280, § 5(a)(2), substituted "means" for "shall include".

Subsec. (e)(1). Pub.L. 101-280, § 5(a)(3)(1), substituted "includes each" for "means any".

Subsec. (e)(3)(A). Pub.L. 101-280, § 5(a)(3)(2)(A), substituted provisions relating to the Congress for provisions relating to Members of Congress and any officers or employees of the Senate or of the House of Representatives.

Subsec. (e)(3)(B). Pub.L. 101-280, § 5(a)(3)(2)(B), substituted "the Office" for "an officer or employee".

##### 1989 Amendment

Subsecs. (c) to (e). Pub.L. 101-194 added subsecs. (c) to (e).

##### 1987 Amendment

Subsec. (a). Pub.L. 100-191 expanded the definition of "special Government employee" to include an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28, regardless of the number of days of appointment.

##### Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 821 of Pub.L. 101-650, set out as a note under section 631 of Title 28.

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102-572, set out as a

note under section 171 of Title 28, Judiciary and Judicial Procedure.

##### Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

##### Effective Date of 1987 Amendment

Amendment by Pub.L. 100-191 effective Dec. 15, 1987, applicable both to independent counsel proceedings initiated prior to, and still pending on, that date as well as to independent counsel proceedings initiated and independent counsels appointed on and after that date, see section 691 of Title 28, Judiciary and Judicial Procedure.

##### Legislative History

For legislative history and purpose of Pub.L. 100-191, see 1987 U.S. Code Cong. and Adm. News, p. 2150. See, also, Pub.L. 101-194, 1989 U.S. Code Cong. and Adm. News, p. 1225; Pub.L. 101-280, 1990 U.S. Code Cong. and Adm. News, p. 169.

#### FEDERAL PRACTICE AND PROCEDURE

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

#### CODE OF FEDERAL REGULATIONS

Officers and employees of U.S. claims against and matters affecting governmental activities of—

Practice of special government employee permitted, see 14 CFR 300.12.

Temporary disqualification of former Board Members and employees in matters formerly under their responsibility, see 14 CFR 300.14.

#### LAW REVIEW COMMENTARIES

And gifts and travel for all—A summary explanation of the Ethics Reform Act of 1989—The move toward greater parity. June E. Edmondson, 37 Fed.B.News & J. 402 (1990).

Mandatory summary jury trial in federal court: Foundationally flawed. 16 Pepperdine L.Rev. 261 (1989).

Proposed standards of conduct for presidential transition workers. Phillip J. Harter Esquire, 36 Fed.B.News & J. 130 (March/April 1989).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

#### NOTES OF DECISIONS

##### Special government employees 1

##### I. Special government employees

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

So long as Board of Inquiry members, appointed under section 183 of Title 29, Labor, are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 180 days in any period of 365 consecutive days, they would qualify as special

Government employees under this section, and supplementation of their compensation would not be prohibited by section 209 of this title. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 264.

Where an informal Presidential adviser has departed from his usual role in connection with his work on a social issue by calling and chairing a number of meetings that were attended by employees of various agencies, in relationship to this work, and assuming considerable responsibility for coordinating the administration's activities in that area, he is engaging in a governmental function when he performs these duties and should be designated as a special government employee for purposes of the Federal conflict-of-interest laws in connection with the work. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 20.

##### § 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

tures and bribes made with criminal intent that the benefit be received by the official as a quid pro quo for some official act. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

In prosecution for accepting bribe, trial court's instructions, taken as whole, correctly and clearly charged jury that, in case before them, requisite corrupt intent consisted of defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with specific intent to violate law. U.S. v. Strand, C.A.Wash.1978, 574 F.2d 993.

In order to properly deny instruction on charge of giving a gratuity to a public official when defendant is charged with bribery, trial court must be able to say that a jury finding of no specific intent would be irrational. U.S. v. Crutchfield, C.A.Nev.1977, 547 F.2d 496.

#### 152. — Entrapment

Bribery defendant, a government contractor, was not entitled to entrapment instruction where evidence indicated that he had been paying bribes to government inspector overseeing his work for several months before another inspector, who was working undercover, began receiving bribes. U.S. v. Lee, C.A.9 (Cal.) 1988, 846 F.2d 531.

Where border patrolman told defendant that bribing him was illegal, and defendant stated that she knew her actions were unlawful, defendant was not entitled to jury instructions regarding entrapment by estoppel. U.S. v. Hsieh Hui Mei Chen, C.A.Ariz.1986, 764 F.2d 817, certiorari denied 106 S.Ct. 2684, 471 U.S. 1139, 86 L.Ed.2d 701.

In prosecution of United States senator and another on bribery and related charges arising out of Abscam undercover operation, district court did not err in instructing jury that they were not to be concerned with legality or propriety of Abscam investigation where district court properly instructed jury that their function was to decide each defendant's predisposition to commit crimes charged and to consider Abscam tactics only as they related to defense of entrapment. U.S. v. Williams, C.A.N.Y.1983, 705 F.2d 603, certiorari denied 104 S.Ct. 524, 525, 464 U.S. 1007, 78 L.Ed.2d 708.

In bribery prosecution in which person implanting illegal purpose in defendant's mind was "ignorant pawn of the government," trial court, which instructed jury that inducement to commit a crime from a private citizen cannot be deemed sufficient to support a claim of entrapment unless that private citizen was an "agent" of a government officer, committed reversible error in failing to explain the appropriate rules of agency. U.S. v. Anderton, C.A.Tex.1980, 629 F.2d 1044.

In view of want of any evidence whatever tending to show government inducement or defendant's lack of predisposition to commit offense charged, and in view of lack of any evidence of government involvement when defendant first sought out official of company which he had investigated, evidence was insufficient even to raise issue of entrapment to solicit value for work performed as public official, and thus giving instruction on entrapment was not reversible error even though it was assertedly

confusing by reason of distinguishing between "legal" and "illegal" entrapment. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 965, 64 L.Ed.2d 813.

In view of disclosures that internal revenue service agent insisted on meeting personally with accused in connection with audit despite accused's efforts to make available all necessary financial papers through his accountant, and in view of fact that accused and accountant both testified that agent repeatedly told accused he had problems with certain claimed expenses and deductions and asked accused what accused wanted agent to do about the problems, denial of accused's request to submit entrapment defense to jury on count two charging offense of gratuitous payment for an official act was erroneous. U.S. v. Cohen, C.A.N.Y.1970, 431 F.2d 830.

Where most defendant who was charged with payment of a bribe or gratuity to internal revenue agents could testify to was that an agent suggested a general financial need several days before \$50 was given to the agent, and where there was no evidence given sufficient to warrant a jury finding that the agent induced or initiated the crime, refusal to charge as to entrapment was proper. U.S. v. Barash, C.A.N.Y. 1969, 412 F.2d 26, certiorari denied 90 S.Ct. 86, 396 U.S. 832, 24 L.Ed.2d 82.

#### 153. — Coercion of jury

Supplemental instruction in bribery prosecution that "you have an obligation to attempt to agree on a verdict" and "to see if you cannot agree without giving up what you believe to be a verdict based on the evidence" and not to "arbitrarily and capriciously give up what [you feel] to be a proper verdict based on the evidence for the sake of unanimity" represented proper attempt to avoid necessity for retrial and was not coercive, even if judge knew that jurors were split 11 to 1 in favor of conviction when instruction was given. U.S. v. Jennings, C.A.N.Y.1973, 471 F.2d 1310, certiorari denied 93 S.Ct. 1909, 411 U.S. 936, 36 L.Ed.2d 395.

#### 154. Deliberations of jury

In prosecution for bribing Internal Revenue Service agent during criminal tax investigation, trial judge did not err in replaying at jury's request all three tape recordings containing defendants' incriminating conversations, even though jury requested that only two of those tapes be replayed, in view of fact that subject matter of tape which jury had not requested was closely related to that of the other two tapes and thus, jury could not have thought that additional playing of that tape indicated any prejudice by judge. U.S. v. Gentile, C.A.N.Y.1975, 525 F.2d 252, certiorari denied 96 S.Ct. 1493, 425 U.S. 903, 47 L.Ed.2d 753.

#### 155. Verdict

Where, with regard to two of the three objects of the conspiracy, indictment rested in large part on acts occurring without limitations period, defendant was entitled to an instruction requiring jury to find an overt act committed within limitations period before it could find him guilty of conspiracy to achieve illegal objectives and trial court's failure to give such instruction

as requested constituted reversible error where basis for jury's general verdict could not be perceived with reasonable certainty. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

Despite fact that defendant was found not guilty of accepting a bribe but was found guilty of lesser included offense of accepting a gratuity, defendant's conviction of engaging in interstate travel in aid of racketeering enterprises was neither logically nor legally inconsistent; even if logical inconsistency existed, there was no legal inconsistency where each verdict was independently supported by evidence. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

#### 156. Sentence

Defendant was properly sentenced on both Hobbs Act and bribery convictions, even though convictions were based on the same acts, in absence of evidence of congressional intent to proscribe dual punishment under the two statutes. U.S. v. Stephenson, C.A.2 (N.Y.) 1990, 896 F.2d 867.

Where, in prosecution for soliciting money in exchange for promise not to testify at trial of another, each telephone call made by defendant required proof distinct from other, the two calls did not constitute single continuing violation or transaction, for sentencing purposes, though defendant's purpose of making calls, i.e., to market his testimony, was constant. U.S. v. Moore, C.A.Cal.1981, 653 F.2d 384, certiorari denied 102 S.Ct. 680, 454 U.S. 1102, 70 L.Ed.2d 646.

In prosecution wherein defendant was found guilty of asking for or receiving thing of value because of official act performed or to be performed, defendant was not shown to be innocent of bribery and thus no abuse of discretion was shown in imposition of sentence even if judge imposed maximum sentence only or largely because he thought defendant could have been convicted of bribery, but, in any event, defendant was not entitled to relief on appeal in view of his opportunity to seek reduction of sentence pursuant to rule 35, Federal Rules of Criminal Procedure, this title. U.S. v. Dobson, C.A.Tex. 1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 965, 64 L.Ed.2d 813.

Where essentially the same evidence was relied on to prove both the substantive offenses, i.e., aiding and abetting in offering a bribe and accepting a bribe, and the conspiracy count, the defendant was doubly punished in violation of double jeopardy clause when he was sentenced on both the substantive and conspiracy counts; sentence on conspiracy count, being the longer sentence, would be vacated first so as to avoid any incentive for the government seeking similar multiple punishments in the future. U.S. v. Austin, C.A.Tenn.1976, 529 F.2d 559.

#### § 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and

#### 156a. Restitution

General rule, that seized property other than contraband should be returned to its rightful owner at conclusion of criminal proceedings, did not apply to money which was voluntarily given to public officials as gratuity in violation of criminal statute. U.S. v. Kim, E.D.Va.1990, 738 F.Supp. 1002.

#### 158. Review

Where district court dismissed indictment against former senator for solicitation and acceptance of bribes, on ground that this section, as applied to the senator would violate speech or debate clause of Constitution, U.S.C.A. Const. art. 1, § 6, cl. 1, Supreme Court had jurisdiction of direct appeal by Government, despite district judge's statement "based on the facts of this case," which, in context, referred to facts alleged in the indictment. U.S. v. Brewster, Dist.Col. 1972, 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

Admission of irrelevant evidence regarding defendant's flight was reversible error, in bribery case in which defendant admitted to willfully offering bribe and in which only remaining question was whether defendant had been entrapped into committing offense. U.S. v. Kang, C.A. 5 (Tex.) 1991, 934 F.2d 621.

Although defense counsel interposed general objection to admission of alleged hearsay testimony of an IRS agent that government's chief witness had admitted to him that he had paid a bribe to defendant in a tax case, objection was insufficient to preserve asserted hearsay claim for appeal, in absence of plain error, where defendant did not request instructions which he claimed should have been given and did not object to trial court's charge on subject. U.S. v. Lipton, C.A.N.Y.1972, 467 F.2d 1161, certiorari denied 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 587.

Contention that defendant had been entrapped into conspiring to bribe a government official, bribery of a government official and conspiring to smuggle marijuana into the country would not be considered by reviewing court where such defense was not presented in the court below. U.S. v. Cambre, C.A.Cal.1972, 467 F.2d 216.

Where flaw in bribery indictment under the D.C. Code was highly technical, government's decision to prosecute under such Code rather than under this section, and its decision to appeal dismissal of the original indictment rather than immediately seek a federal indictment did not, in relation to denial of claim of speedy trial, reflect arbitrary, negligent or purposefully oppressive behavior on the part of the Government. U.S. v. Bishton, 1972, 463 F.2d 887, 150 U.S.App.D.C. 51.

thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 307(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

[See main volume for text of (b)]

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means—

- (1) a United States Senator; and
- (2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term—

- (1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;
- (2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch;
- (3) "legislative branch" means—

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(As amended Pub.L. 100-191, § 3(a), Dec. 15, 1987, 101 Stat. 1806; Pub.L. 101-194, Title IV, § 401, Nov. 30, 1989, 103 Stat. 1747; Pub.L. 101-280, § 5(a), May 4, 1990, 104 Stat. 158.)

#### HISTORICAL AND STATUTORY NOTES

##### 1990 Amendment

Subsec. (c). Pub.L. 101-280, § 5(a)(1), added provisions relating to section 218 of this title and struck out provisions referring to definitions of "officers" and "employees" found in sections 2104 and 2105, respectively, of Title 5, Government Organization and Employees.

Subsec. (d). Pub.L. 101-280, § 5(a)(2), substituted "means" for "shall include".

Subsec. (e)(1). Pub.L. 101-280, § 5(a)(3)(1), substituted "includes each" for "means any".

Subsec. (e)(3)(A). Pub.L. 101-280, § 5(a)(3)(2)(A), substituted provisions relating to the Congress for provisions relating to Members of Congress and any officers or employees of the Senate or of the House of Representatives.

Subsec. (e)(3)(B). Pub.L. 101-280, § 5(a)(3)(2)(B), substituted "the Office" for "an officer or employee".

##### 1989 Amendment

Subsecs. (c) to (e). Pub.L. 101-194 added subsecs. (c) to (e).

152

##### 1987 Amendment

Subsec. (a). Pub.L. 100-191 expanded the definition of "special Government employee" to include an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28, regardless of the number of days of appointment.

##### Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101-650, set out as a note under section 631 of Title 28.

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102-572, set out as a

note under section 171 of Title 28, Judiciary and Judicial Procedure.

##### Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

##### Effective Date of 1987 Amendment

Amendment by Pub.L. 100-191 effective Dec. 15, 1987, applicable both to independent counsel proceedings initiated prior to, and still pending on, that date as well as to independent counsel proceedings initiated and independent counsels appointed on and after that date, see section 591 of Title 28, Judiciary and Judicial Procedure.

##### Legislative History

For legislative history and purpose of Pub.L. 100-191, see 1987 U.S. Code Cong. and Adm. News, p. 2150. See, also, Pub.L. 101-194, 1989 U.S. Code Cong. and Adm. News, p. 1225; Pub.L. 101-280, 1990 U.S. Code Cong. and Adm. News, p. 169.

#### FEDERAL PRACTICE AND PROCEDURE

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 128.

#### CODE OF FEDERAL REGULATIONS

Officers and employees of U.S. claims against and matters affecting governmental activities of—

Practice of special government employee permitted, see 14 CFR 300.12.

Temporary disqualification of former Board Members and employees in matters formerly under their responsibility, see 14 CFR 300.14.

#### LAW REVIEW COMMENTARIES

And gifts and travel for all—A summary explanation of the Ethics Reform Act of 1989—The move toward greater parity. June E. Edmondson, 37 Fed.B.News & J. 402 (1990).

Mandatory summary jury trial in federal court: Foundationally flawed. 16 Pepperdine L.Rev. 251 (1989).

Proposed standards of conduct for presidential transition workers. Phillip J. Harter Esquire, 36 Fed.B.News & J. 130 (March/April 1989).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

#### NOTES OF DECISIONS

##### Special government employees 1

##### 1. Special government employees

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

So long as Board of Inquiry members, appointed under section 183 of Title 29, Labor, are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 130 days in any period of 365 consecutive days, they would qualify as special

Government employees under this section, and supplementation of their compensation would not be prohibited by section 209 of this title. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 264.

Where an informal Presidential adviser has departed from his usual role in connection with his work on a social issue by calling and chairing a number of meetings that were attended by employees of various agencies, in relationship to this work, and assuming considerable responsibility for coordinating the administration's activities in that area, he is engaging in a governmental function when he performs these duties and should be designated as a special government employee for purposes of the Federal conflict-of-interest laws in connection with the work. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 20.

##### § 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

153

## Note 4

responsibilities where he does not intend to participate in the litigation on behalf of the United States or to act as agent or attorney on behalf of the corporation and the action is not being handled by his departmental section. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 7.

## 5. Contracts

Generally, carriers' earnings in excess of authorized rate of return are not subject to refund orders by Federal Communications Commission (FCC), but rates carrier charges in future may be lowered if there is history of consistent over-earnings. *Ohio Bell Telephone Co. v. F.C.C.*, C.A.6 1991, 949 F.2d 864.

## 9. Assistance of counsel

In this section forbidding federal employee from representing anyone before agency or court, exclusion permitting one to act without compensation as agent or attorney for any person who is subject of disciplinary, loyalty or other personnel administration proceedings in connection with those proceedings is applicable only in "administration proceedings" and not in proceedings before courts. *Bachman v. Pertschuk*, D.C.D.C.1977, 437 F.Supp. 973.

Petitioner being investigated by Army to determine his suitability for retention in Army ROTC program and whether he should be ordered to active duty was not entitled to legally qualified counsel; in any event, petitioner knowingly and voluntarily waived any right that he had, if any such right existed, to legally qualified counsel. *Scarth v. Geraci*, D.C.Tex.1974, 382 F.Supp. 876, affirmed 510 F.2d 1963.

This section does not prohibit government attorneys from representing federal employees in personnel administration proceedings in court as well as before agencies, so long as the representation does not conflict with the attorney's official duties. 1982 (Counsel-Inf.Op.) 6 O.L.C. 461.

## 10. Representation of relatives

Attorneys employed by the federal government are barred by this section from participat-

### § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

#### (a) Restrictions on all officers and employees of the executive branch and certain other agencies.—

(1) **Permanent restrictions on representation on particular matters.**—Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

ing in any case in which the District of Columbia is a party or has a direct and substantial interest. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 800.

An employee in the office of a United States Attorney may appear on behalf of his daughter in an Internal Revenue Service office audit of her tax return. 1977 (Counsel-Inf. Op.) 1 Op. O.L.C. 148.

#### 11. Prosecutor and defender exchange programs

This section is not a bar to having one or more Assistant United States Attorneys and assistant Federal Public Defenders temporarily exchange duties. 1977 (Counsel-Inf. Op.) 1 Op. O.L.C. 110.

#### 12. Agency personnel exchanges

The detailing of Environmental Protection Agency employees to important positions in state agencies, the duties of which may require them to represent the state before the Environmental Protection Agency, is integral to the substantive environmental programs which the Agency administers, and is not prohibited by this section or section 203 of this title. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 498.

#### 13. Union activities

The representational bar of this section applies to union organizing activities of a federal employee in which he acts as "agent or attorney" for other federal employees before their agency. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 194.

#### 14. Class actions

This section does not bar Assistant United States Attorneys from participating as plaintiffs in a class action suit challenging the authority of the Office of Personnel Management to reduce the cost of living allowance paid to all federal employees in Alaska, though they may not accept any compensation for assisting in prosecuting the claims of the class or act as agents or attorneys for the class. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 74.

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) **Two-year restrictions concerning particular matters under official responsibility.**—Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

(3) **Clarification of restrictions.**—The restrictions contained in paragraphs (1) and (2) shall apply—

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

#### (b) One-year restrictions on aiding or advising.—

(1) **In general.**—Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) **Definition.**—For purposes of this paragraph—

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) **One-year restrictions on certain senior personnel of the executive branch and independent agencies.**—

(1) **Restrictions.**—In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) **Persons to whom restrictions apply.**—(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule;

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that—

(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

(d) **Restrictions on very senior personnel of the executive branch and independent agencies.**—

(1) **Restrictions.**—In addition to the restrictions set forth in subsections (a) and (b), any person who—

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,

and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) **Persons who may not be contacted.**—The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are—

(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in sections 5312, 5313, 5314, 5315, or 5316 of title 5.

(e) **Restrictions on members of Congress and officers and employees of the legislative branch.**—

(1) **Members of congress and elected officers.**—(A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.

(2) **Personal staff.**—(A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Senator or Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Senator or Member of the House of Representatives.

(3) **Committee staff.**—Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) **Leadership staff.**—(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House

of Representatives and any employee on the leadership staff of the House of Representatives; and

(ii) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.

(5) **Other legislative offices.**—(A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that person's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(6) **Limitation on restrictions.**—(A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level V of the Executive Schedule.

(7) **Definitions.**—As used in this subsection—

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

(f) **Restrictions relating to foreign entities.**—

(1) **Restrictions.**—Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) **Special rule for trade representative.**—With respect to a person who is the United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities within 3 years after the termination of that person's service as the United States Trade Representative.

(3) **Definition.**—For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

(g) **Special rules for detailees.**—For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

(h) **Designations of separate statutory agencies and bureaus.**—

(1) **Designations.**—For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

tures and bribes made with criminal intent that the benefit be received by the official as a quid pro quo for some official act. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

In prosecution for accepting bribe, trial court's instructions, taken as whole, correctly and clearly charged jury that, in case before them, requisite corrupt intent consisted of defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with specific intent to violate law. U.S. v. Strand, C.A.Wash.1978, 674 F.2d 998.

In order to properly deny instruction on charge of giving a gratuity to a public official when defendant is charged with bribery, trial court must be able to say that a jury finding of no specific intent would be irrational. Crutchfield, C.A.Nev.1977, 547 F.2d 496.

152. — Entrapment

Bribery defendant, a government contractor, was not entitled to entrapment instruction where evidence indicated that he had been paying bribes to government inspector overseeing his work for several months before another inspector, who was working undercover, began receiving bribes. U.S. v. Lee, C.A.9 (Cal.) 1988, 846 F.2d 631.

Where border patrolman told defendant that bribing him was illegal, and defendant stated that she knew her actions were unlawful, defendant was not entitled to jury instructions regarding entrapment by estoppel. U.S. v. Hsieh Hui Mei Chen, C.A.Ariz.1986, 764 F.2d 817, certiorari denied 106 S.Ct. 2884, 471 U.S. 1189, 86 L.Ed.2d 701.

In prosecution of United States senator and another on bribery and related charges stating out of Abscam undercover operation, district court did not err in instructing jury that they were not to be concerned with legality or propriety of Abscam investigation where district court properly instructed jury that their function was to decide each defendant's predisposition to commit crimes charged and to consider Abscam tactics only as they related to defense of entrapment. U.S. v. Williams, C.A.N.Y.1983, 706 F.2d 608, certiorari denied 104 S.Ct. 824, 625, 464 U.S. 1097, 78 L.Ed.2d 708.

In bribery prosecution in which person implanting illegal purpose in defendant's mind was "ignorant pawn of the government," trial court, which instructed jury that inducement to commit a crime from a private citizen cannot be deemed sufficient to support a claim of entrapment unless that private citizen was an "agent" of a government officer, committed reversible error in failing to explain the appropriate rules of agency. U.S. v. Anderson, C.A.Tex.1990, 629 F.2d 1044.

In view of want of any evidence whatsoever tending to show government inducement or defendant's lack of predisposition to commit offense charged, and in view of lack of any evidence of government involvement when defendant first sought out official of company which he had investigated, evidence was insufficient even to raise issue of entrapment to solicit value for work performed as public official, and thus giving instruction on entrapment was not reversible error even though it was assertedly

containing by reason of distinguishing between "legal" and "illegal" entrapment. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2325, 446 U.S. 965, 64 L.Ed.2d 813.

In view of disclosures that Internal Revenue Service agent insisted on meeting personally with accused in connection with audit despite accused's efforts to make available all necessary financial papers through his accountant, and in view of fact that accused and accountant both testified that agent repeatedly told accused he had problems with certain claimed expenses and deductions and asked accused what accused wanted agent to do about the problems, denial of accused's request to submit entrapment defense to jury on count two charging offense of gratuities payment for an official act was erroneous. U.S. v. Cohen, C.A.N.Y.1970, 431 F.2d 880.

Where most defendant who was charged with payment of a bribe or gratuity to Internal Revenue agents could testify to was that an agent suggested a general financial need several days before \$50 was given to the agent, and where there was no evidence given sufficient to warrant a jury finding that the agent induced or initiated the crime, refusal to charge as to entrapment was proper. U.S. v. Barash, C.A.N.Y. 1969, 412 F.2d 24, certiorari denied 90 S.Ct. 98, 396 U.S. 832, 24 L.Ed.2d 82.

153. — Coercion of jury

Supplemental instruction in bribery prosecution that "you have an obligation to attempt to agree on a verdict" and "to see if you cannot agree without giving up what you believe to be a verdict based on the evidence" and not to "arbitrarily and capriciously give up what [you feel] to be a proper verdict based on the evidence for the sake of unanimity," represented proper attempt to avoid necessity for retrial and was not coercive, even if judge knew that jurors were split 11 to 1 in favor of conviction when instruction was given. U.S. v. Jennings, C.A.N.Y.1973, 471 F.2d 1310, certiorari denied 98 S.Ct. 1909, 411 U.S. 985, 36 L.Ed.2d 386.

154. Deliberations of jury

In prosecution for bribing Internal Revenue Service agent during criminal tax investigation, trial judge did not err in replaying at jury's request all three tape recordings containing defendant's incriminating conversations, even though jury requested that only two of those tapes be replayed, in view of fact that subject matter of tape which jury had not requested was closely related to that of the other two tapes and thus, jury could not have thought that additional playing of that tape indicated any prejudice by judge. U.S. v. Gentile, C.A.N.Y.1975, 625 F.2d 252, certiorari denied 96 S.Ct. 1499, 425 U.S. 909, 47 L.Ed.2d 783.

155. Verdict

Where, with regard to two of the three objects of the conspiracy, indictment rested in large part on acts occurring without limitations period, defendant was entitled to an instruction requiring jury to find an overt act committed within limitations period before it could find him guilty of conspiracy to achieve illegal objectives and trial court's failure to give such instruction

as requested constituted reversible error where basis for jury's general verdict could not be perceived with reasonable certainty. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

Despite fact that defendant was found not guilty of accepting a bribe but was found guilty of lesser included offense of accepting a gratuity, defendant's conviction of accepting a gratuity travel in aid of racketeering enterprises was neither logically nor legally inconsistent, even if logical inconsistency existed, there was no legal inconsistency where each verdict was independently supported by evidence. U.S. v. Evans, C.A.Tex.1978, 672 F.2d 465, rehearing denied 676 F.2d 881, certiorari denied 99 S.Ct. 200, 489 U.S. 870, 83 L.Ed.2d 182.

156. Sentence

Defendant was properly sentenced on both Hobbs Act and bribery convictions even though convictions were based on the same acts, in absence of evidence of congressional intent to prescribe dual punishment, under the two statutes. U.S. v. Stephenson, C.A.2 (N.Y.) 1990, 895 F.2d 967.

Where, in prosecution for soliciting money in exchange for promise not to testify at trial of another, each telephone call made by defendant requested proof distinct from other, the two calls did not constitute single continuing violation or transaction, for sentencing purposes, though defendant's purpose of making calls, i.e., to market his testimony, was constant. U.S. v. Moore, S.Ct. 680, 464 U.S. 1102, 70 L.Ed.2d 646.

In prosecution wherein defendant was found guilty of aiding or receiving thing of value because of official act performed or to be performed, defendant was not shown to be innocent of bribery and thus no abuse of discretion was shown in imposition of sentence even if judge imposed maximum sentence only or largely because he thought defendant could have been convicted of bribery, but in any event, defendant was not entitled to relief on appeal in view of his opportunity to seek reduction of sentence pursuant to rule 35, Federal Rules of Criminal Procedure, this title. U.S. v. Dobson, C.A.Tex. 1989, 609 F.2d 840, certiorari denied 100 S.Ct. 2225, 446 U.S. 965, 64 L.Ed.2d 813.

Where essentially the same evidence was relied on to prove both the substantive offense, i.e., aiding and abetting in offering a bribe and accepting a bribe, and the conspiracy count, the defendant was doubly punished in violation of the double jeopardy clause when he was sentenced on both the substantive and conspiracy counts; sentence on conspiracy count, being the longer sentence, would be vacated first so as to avoid his multiple punishments in the future. U.S. v. Auelin, C.A.Tenn.1976, 629 F.2d 559.

§ 202. Definitions

(a) For the purpose of sections 208, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and

156a. Restitution  
General rule, that seized property other than contraband should be returned to its rightful owner at conclusion of criminal proceedings, did not apply to money which was voluntarily given to public officials as gratuity in violation of criminal statute. U.S. v. Kim, E.D.Va.1990, 739 F.Supp. 1002.

158. Review

Where district court dismissed indictment against former senator for solicitation and acceptance of bribes, on ground that this section, as applied to the senator would violate speech or debate clause of Constitution, U.S.C.A. Const. art. I, § 6, cl. 1, Supreme Court had jurisdiction of direct appeal by Government, despite district judge's statement "based on the facts of this case," which, in context, referred to facts alleged in the indictment. U.S. v. Brewster, Dist.Col. 1972, 92 S.Ct. 2831, 408 U.S. 601, 33 L.Ed.2d 607.

Admission of irrelevant evidence regarding defendant's flight was reversible error, in bribing offering bribe and in which only remaining question was whether defendant had been entrapped (Tex.) 1991, 534 F.2d 621.

Although defense counsel interposed general objection to admission of alleged hearsay testimony of an IRS agent that government's chief witness had admitted to him that he had paid a bribe to defendant in a tax case, objection was insufficient to preserve asserted hearsay claim for appeal, in absence of plain error, where defendant did not request instructions which he claimed should have been given and did not object to trial court's charge on subject. U.S. v. Lipson, C.A.N.Y.1972, 467 F.2d 1161, certiorari denied 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 857.

Contention that defendant had been entrapped into conspiring to bribe a government official, bribery of a government official and conspiring to smuggle marijuana into the country would not be considered by reviewing court where such defense was not presented in the court below. U.S. v. Cambre, C.A.Cal.1972, 467 F.2d 216.

Where flaw in bribery indictment under the D.C. Code was highly technical, government's decision to prosecute under such Code rather than under this section, and its decision to appeal dismissal of the original indictment rather than immediately seek a federal indictment did not, in relation to denial of claim of speedy trial, reflect arbitrary, negligent or purposefully oppressive behavior on the part of the Government. U.S. v. Blinton, 1972, 468 F.2d 887, 150 U.S.App.D.C. 51.