

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. SUN-DIAMOND  
GROWERS OF CALIFORNIA

CASE NO: 98-131 *c-2*

PLACE: Washington, D.C.

DATE: Tuesday, March 2, 1999

PAGES: 1-55

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES,                   :

4                   Petitioner                   :

5                   v.                                   :   No. 98-131

6   SUN-DIAMOND GROWERS OF                   :

7   CALIFORNIA                                   :

8   - - - - -X

9                                   Washington, D.C.

10                                  Tuesday, March 2, 1999

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:11 a.m.

14   APPEARANCES:

15   ROBERT W. RAY, ESQ., Deputy Independent Counsel,  
16   Alexandria, Virginia; on behalf of the Petitioner.

17   ERIC W. BLOOM, ESQ., Washington, D.C.; on behalf of the  
18   Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ROBERT W. RAY, ESQ.

On behalf of the Petitioner

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ERIC W. BLOOM, ESQ.

On behalf of the Respondent

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 98-131, United States v.  
5 Sun-Diamond Growers of California.

6 Mr. Ray.

7 ORAL ARGUMENT OF ROBERT W. RAY

8 ON BEHALF OF THE PETITIONER

9 MR. RAY: Mr. Chief Justice, and may it please  
10 the Court:

11 Respondent, Sun-Diamond Growers, was extensively  
12 regulated by the United States Department of Agriculture.  
13 In the first 14 months of Secretary of Agriculture Mike  
14 Espy's tenure, Sun-Diamond lavished on its chief regulator  
15 thousands of dollars in gifts, while it had millions of  
16 dollars at stake in USDA programs. The jury convicted  
17 Respondent of giving unlawful gratuities under Section  
18 201(c) by finding that Sun-Diamond gave the gratuities for  
19 or because of the Secretary's official position. Under  
20 the plain language of the statute, an official act --  
21 Section 201(a)(3) -- means any decision or action on any  
22 matter which may be pending before the public official in  
23 his official capacity.

24 Here, the statute reaches \$6,000 in gifts given  
25 by a regulated entity for or because of the official's

1 position, his capacity to act, on matters pending or on  
2 matters which could be brought before USDA. The district  
3 court --

4 QUESTION: Well, counsel, I thought that the  
5 section we're looking at, (c)(1)(a), says that it covers  
6 the situation where the defendant directly or indirectly  
7 gives anything of value to a public official for or  
8 because of any official act performed or to be performed  
9 by that official.

10 MR. RAY: Justice O'Connor --

11 QUESTION: There is a link there between an act  
12 performed or to be performed. It isn't baking brownies  
13 for the Senator or knitting a pair of socks for some  
14 public official, is it?

15 MR. RAY: Justice O'Connor, you are correct.  
16 The element is for or because of an official act. That  
17 element was provided by the district judge to the jury in  
18 this case. The issue, however, is whether or not the  
19 district judge's explanation of what would be sufficient  
20 proof of the requisite motivation was satisfied by a jury  
21 finding that the motivation behind the gift was for or  
22 because of the official's position.

23 In this case, involving a regulated entity, our  
24 position is that the position of the official is  
25 coextensive with his capacity to act on any number of acts

1 coming before him.

2 QUESTION: Well, but that's quite different from  
3 linking it to an act performed or to be performed. And  
4 you want to say that anything given because the official  
5 is an official is enough.

6 MR. RAY: Only, Your Honor -- and that was why  
7 we answered the question presented by the Court in -- in a  
8 qualified way: only when it is the official's position,  
9 understood as the capacity to act, do we believe that  
10 there is an equivalence, that they are coextensive with  
11 one another.

12 QUESTION: But isn't -- isn't the difficulty, or  
13 one of the difficulties, for your position, at least with  
14 respect to these instructions, that the judge, in giving  
15 the instructions, went so far as to say that there --  
16 literally, there need be no link with any act at all? And  
17 at that point, even assuming there's some -- there's some  
18 merit to your argument, it seems to me, at that point, the  
19 judge just totally untethered the -- the -- if you will,  
20 the position from the -- from the capacity to act or the  
21 anticipation of action. And -- and even if we were to  
22 accept your position, we -- wouldn't we have to find error  
23 in -- in that instruction?

24 MR. RAY: No, Justice Souter, for the following  
25 reason. The link that Your Honor is referring to is a

1 link that came during the portion of the instruction where  
2 the judge was making clear to the jury that this was not a  
3 bribery offense. The link being --

4 QUESTION: Well, he sure did that.

5 (Laughter.)

6 QUESTION: But, I mean, he went a lot further  
7 than that, didn't he? I mean, the bribery -- the bribery  
8 offense, as -- as we've described it, requires a -- a  
9 fairly specific quid pro quo kind of link, specific act,  
10 specific gift. This went far beyond anything that would  
11 be appropriate to distinguish this from the bribery  
12 statute.

13 MR. RAY: Your Honor, but it was in the portion  
14 of the charge where the judge was trying to explain to the  
15 jury that no such link was required. That is, that the  
16 jury did not have to find that there was a particular  
17 official act or a matter in mind at the time of the gift.

18 QUESTION: But that isn't what he said. He said  
19 it doesn't have to be linked to any act.

20 MR. RAY: Your Honor, our -- our position --

21 QUESTION: Which -- which seems to go much  
22 further.

23 MR. RAY: Our position is that if it is the  
24 prospect of official conduct that motivates the gift, it's  
25 enough to find that to satisfy this offense. To hold



1 otherwise -- that is, to distinguish between gifts given  
2 for official acts in general --

3 QUESTION: Well, I know that's your position,  
4 but why does it make sense? That is to say, why should we  
5 read a criminal statute to suddenly make a group of old-  
6 age home residents decide to -- to send a little present  
7 because they think the Senator has been generally in favor  
8 of old-age homes?

9 Or -- I mean, why should you have such an  
10 expansive reading of a criminal statute when there are a  
11 large number of ethics rules and other noncriminal matters  
12 that adequately, at least arguably, control conduct like  
13 this when it is unethical? Why should we give prosecutors  
14 such broad discretion to prosecute people who may have  
15 done things that are not even immoral? That -- that's the  
16 general kind of question that I'd like you to address.

17 MR. RAY: Let me answer the "why" question  
18 first. The "why" question is that it shouldn't be any  
19 less offensive to integrity in government that gratuities  
20 were given with a particular matter in mind, a whole  
21 multitude of matters in mind, or no specific or any  
22 official act in mind at the time of the gift, as long as  
23 there is sufficient proof of motivation of the prospect of  
24 official action; in other words, the prospect of official  
25 conduct.

1           To answer your hypothetical, in that  
2 hypothetical circumstance, it is our position that our  
3 logic -- the logic to the "for or because of" official  
4 position argument would be sufficient to encompass your  
5 hypothetical if the motivation behind that gift was the  
6 senior citizen offering a gift to a public official, in --  
7 in that circumstance, because of the official's position  
8 or, indeed, because of official action -- action with  
9 respect to legislation that was of interest to that senior  
10 citizen.

11           QUESTION: Mr. -- Mr. Ray, my -- my -- my  
12 problem is just the opposite of -- of Justice Breyer's.  
13 I -- I don't find it at all amazing that Congress should  
14 seek to write a statute of the sort that you say this is.  
15 And the reason I don't find it amazing is that they  
16 already have, but in a different section of the United  
17 States Code. And the problem is that we normally  
18 interpret a statute in such fashion as not to duplicate  
19 something else that is already on the books.

20           How does this statute, as you interpret it,  
21 differ from 5 U.S.C., Section 7353, which prohibits  
22 Federal employees from accepting anything of value from  
23 persons, quote, whose interests may be substantially  
24 affected by the performance or nonperformance of the  
25 individual's official duties? That sounds like your --

1 your very argument.

2 MR. RAY: It is not, Justice Scalia. Because  
3 that --

4 QUESTION: What's the difference between those  
5 two, then?

6 MR. RAY: The difference under 7353(a) is that  
7 the statute is simply asking there, as a fact, whether or  
8 not those interests were ones before the public official.  
9 It is not asking what the motivation was behind the gift.  
10 Our -- our position absolutely depends --

11 QUESTION: Well, this one is included within the  
12 other one, you mean? The other one requires even less.

13 MR. RAY: No, Your Honor. The Federal  
14 gratuities statute requires proof of intent, criminal  
15 intent, a motivation, the motivation for or because of  
16 official position or for or because of official acts, the  
17 prospect of official conduct. 7353(a), first of all, only  
18 applies --

19 QUESTION: To the employee.

20 MR. RAY: -- to the employee. So, it does  
21 not -- it would not encompass Sun-Diamond's conduct in  
22 this case, clearly. But, even apart from that, it doesn't  
23 require any proof of intent. It simply says: If you  
24 shall solicit or accept anything of value from a person --

25 QUESTION: I see.

1 MR. RAY: -- whose interests may be  
2 substantially affected. That is what is encompassed by  
3 that provision.

4 QUESTION: Well, but it still duplicates the  
5 other. I mean, the one is a lesser included of the other,  
6 it seems to me. The one statute says, if you accept it  
7 from someone who can be affected by your decisions,  
8 knowing that he is giving it to you because you -- he --  
9 he is affected by your decisions, you're guilty. That's  
10 your -- that's your statute. This statute says, if you  
11 accept it from somebody who may be substantially affected  
12 by your -- your decisions, even if he doesn't know that he  
13 may be substantially affected by your decisions, you're  
14 guilty.

15 MR. RAY: Your Honor --

16 QUESTION: It doesn't make sense to have two  
17 statutes overlapping like that.

18 MR. RAY: Your Honor, we believe it does make  
19 some sense. First of all, there is, necessarily, some  
20 overlap from what 7353 invites, which is the passage of  
21 regulations that deal in an administrative matter with  
22 conduct of Federal employees. And clearly there may be  
23 circumstances where the conduct of a Federal employee  
24 would violate a regulation, leading to dismissal or other  
25 sanction, and also -- might also, on the same conduct,

1 include criminal prosecution.

2 QUESTION: This is not a regulation. I -- I can  
3 understand how a regulation may go further than a statute,  
4 and render any violation of the regulation automatically a  
5 violation of the statute. But this is another statute.  
6 And it -- it -- since there is another way to read the  
7 statute that -- that you're prosecuting under here, I'm --  
8 I'm inclined to read it in such fashion that it will do  
9 something different, insofar as the employee is concerned,  
10 than 7353 does.

11 MR. RAY: Your Honor, this statute, 5 U.S.C.,  
12 7353, first of all, does not do anything other than  
13 authorize the enactment or passage of Federal regulations  
14 to deal with its -- its general conduct. But, again, to  
15 return to the answer to your question, why this is  
16 different than Section 201, it is significantly different  
17 because there is no criminal intent; there is no knowledge  
18 requirement in this proscription, 7353.

19 Which is -- we believe, is the substantial  
20 difference between what Congress had in mind in 1962, when  
21 it passed 18 U.S.C., Section 201(c), which covers the  
22 situation of a gratuities offense.

23 QUESTION: Well, the other statute doesn't  
24 purport to deal with donors, does it?

25 MR. RAY: It does not, Your Honor. It is

1 limited by its express terms to gifts to Federal  
2 employees, covering only Federal employees.

3 QUESTION: But -- but the point still remains,  
4 if there's more than one plausible reading of -- of the  
5 statute, why should we adopt that reading that creates  
6 such a large gap between the law and everyday practice?

7 MR. RAY: Your Honor, Justice Kennedy, we --  
8 we --

9 QUESTION: I mean, the cookie hypothetical  
10 and -- and any number of such ones. Unless we're just  
11 going to rely on prosecutorial --

12 MR. RAY: Your Honor, the only safe harbor that  
13 is apparent with respect to prosecution under the Federal  
14 gratuity statute, under our theory, again, is this  
15 question of whether or not there's a gift given to a  
16 public official solely because of that public official's  
17 status, completely untethered from official acts. In  
18 other words, the Department of Justice's hypothetical,  
19 which deals with the -- the general question of a status  
20 gift, unconnected to the capacity for official action.

21 QUESTION: But that's exactly the problem.

22 MR. RAY: That's different --

23 QUESTION: That's -- I mean, my position was,  
24 when I asked you the question, was the same, I think, as  
25 Justice Scalia's: 5 U.S.C., 7353 is not a criminal

1 statute, is it?

2 MR. RAY: Correct, Your Honor.

3 QUESTION: All right. So, this kind of area, I  
4 gathered from what you prosecute, sometimes every public  
5 official is sometimes invited to go on a trip, to speak to  
6 people. They -- they might give him dinner. They -- they  
7 might -- and evidently, some of those things are sometimes  
8 actually prosecuted. Well, why not, given the  
9 difficulties in this area, assume that Congress intended  
10 this general kind of present-giving; i.e., we invite you  
11 on a trip to speak to a trade association, or give -- that  
12 kind of thing should be handled by civil regulations  
13 rather than somebody bringing the blunderbuss of the  
14 criminal law in -- into the prosecutor's arsenal, where  
15 they could prosecute trivial things?

16 MR. RAY: Justice Breyer, but that's not what  
17 Congress intended. And it became apparent in 1989, with  
18 the passage of 5 U.S.C., 7353. At the time the Congress  
19 passed this statute, it recognized the Department of  
20 Justice's broad sweep in interpretation to the 201  
21 gratuity statute, consistent with the intent of Congress,  
22 going back to the beginning, which was when it was passed  
23 in 1962.

24 It recognized that there was in fact overlap  
25 between the scheme that it was going to further,

1 post-1989, in connection with Federal regulations that  
2 would be applicable to all Federal employees. It  
3 recognized, further, that the intent, sufficient to  
4 satisfy a 201(c) offense, was motivated for or because of  
5 an official's position. That was the sweep --

6 QUESTION: But the Congress didn't say position;  
7 and that's the problem. You were about to give us a safe  
8 harbor, but the charge to the jury was that the gratuity  
9 statute makes it a crime to give a public official a thing  
10 of value because of his official position, now, whether or  
11 not the giver or receiver intended that particular  
12 official's acts to be influenced. So, that seems to say  
13 it's because of the official position, whether or not  
14 there was any intent that -- that the -- that the  
15 official's acts -- the official's acts, very broadly --  
16 not particular acts, but the particular official's acts,  
17 be influenced.

18 First, I had a question of how this charge came  
19 to be. Was this a result of a request to charge by the  
20 prosecution?

21 MR. RAY: Justice Ginsburg, it was. But it --  
22 it included, as part of that charge, both requests by the  
23 government, as well as requests by the defendant.

24 QUESTION: But this particular charge was  
25 proposed by --



1 MR. RAY: Correct, Your Honor, the part that you  
2 just read, yes.

3 QUESTION: Was --

4 QUESTION: By whom?

5 MR. RAY: By the government.

6 And with respect to that portion of the charge,  
7 the reason the government included it, Your Honor, is  
8 because intent to influence is not an element of a  
9 bribery -- of a gratuity offense. It is, by contrast, an  
10 element of a bribery offense, which is Section 201(b). We  
11 believe the --

12 QUESTION: But you made it -- you could have  
13 done the same thing using the words of the Act instead of  
14 you inserting the word "position."

15 MR. RAY: That's correct, we could have done  
16 that. And the district court certainly could have  
17 instructed in that fashion. We're -- we're here simply to  
18 say, Your Honor, that a -- an additional requirement  
19 which, if you instruct in a fashion such as official acts,  
20 begs the question about whether or not you're requiring,  
21 for example, a specific official act to be shown. We  
22 believe no such requirement exists in the Federal  
23 gratuities statute.

24 QUESTION: But -- but it may be that no specific  
25 act is required, but it still would -- the language would

1 suggest that perhaps a somewhat more amorphous future  
2 possible acts on the part of the official.

3 MR. RAY: You are correct, Mr. Chief Justice.  
4 That's right. And it could have been -- we -- the  
5 government could have talked in terms, and the district  
6 judge could have talked in terms of acts rather than  
7 position.

8 QUESTION: But there is a difference, don't you  
9 think? I mean, one could give a gratuity to somebody  
10 because he just likes -- you know, who had no connection  
11 with ag -- agriculture at all, just because he likes to  
12 sit next to the Secretary at a football game or something  
13 like that. And I don't think that would come within the  
14 language of the statute. And yet that's given to him  
15 because of his official position.

16 MR. RAY: You are correct, Your Honor, it is not  
17 within the language of the statute. It is not our  
18 position or the Department of Justice's position that that  
19 would be included under our theory of the case under "for  
20 or because of official position." That, however, was not  
21 presented by the facts of this case. And it was not left  
22 to the jury to simply speculate about what type of  
23 official action they were to be concerned about.

24 In this case, the judge further instructed the  
25 jury that the jury had to find official acts -- the

1 portion of the charge which is in the appendix, at page  
2 88, said: With respect to official acts -- I'm reading  
3 from the second full paragraph -- the government has to  
4 prove that Sun-Diamond Growers gave knowingly and  
5 willingly Secretary Espy things of value while it had  
6 issues before the United States Department of Agriculture.

7 I mean, our position is that, ultimately, what  
8 the gratuity statute is about is the prospect of official  
9 action -- in Justice Ginsburg's hypothetical --  
10 ultimately, the prospect of -- of intending to have some  
11 influence on official action. The issue in this case is  
12 what is the element of the offense that Congress required?

13 QUESTION: Well, but I think you've --

14 QUESTION: But it's at least -- at least  
15 confusing if -- if the jury -- you've just isolated this  
16 sentence: thing of value, because of official position,  
17 whether or not there was an intent to influence acts. If  
18 you just took that out and -- I mean, it -- it just says:  
19 official position.

20 MR. RAY: And our difficulty with that, Your  
21 Honor, to answer your question, is that the element of the  
22 offense, intent to influence, is a bribery concept. Much  
23 of what a district judge does -- and this has been proven  
24 by experience since this -- this statute has been enacted  
25 in 1962 -- is a -- a large effort to make sure that the

1 jury understands the difference between a bribery offense  
2 and a gratuities offense.

3 A bribery offense has essentially three  
4 important components different than a gratuity offense.  
5 One of them is an -- an intent to influence. Another is a  
6 corrupt intent. The third is a quid pro quo or an  
7 agreement.

8 QUESTION: Well, may I ask you about your -- the  
9 distinction that you are drawing on "intent to influence,"  
10 because the plausibility of that distinction, it seems to  
11 me, given the text of -- of 201, will vary greatly  
12 depending on whether we use the word "acts" as our focus  
13 or "position" as our focus. What I'm getting at is the --  
14 the phrase -- what is it -- for -- for or because of -- if  
15 we say that a -- a gift violates the statute if it's given  
16 for or because of the position, then I think it follows  
17 quite readily from what -- as you have been saying -- that  
18 the notion of intent to influence is outside the statute;  
19 it's not the focus of the statute.

20 MR. RAY: Yes, Your Honor.

21 QUESTION: But if -- if we -- if we go back to  
22 the original language, and we speak of for or because of  
23 acts, then it becomes quite implausible, in -- in a way,  
24 I -- I suppose, suggested by Judge Wald's remark, to think  
25 of a gift that might plausibly be given for or because of

1 acts which wasn't intended to influence the way those acts  
2 were performed. Would you comment on that?

3 So, I guess my point is, if we -- if we accept  
4 the equation of position and acts, then the notion of  
5 intending to influence really does seem to drop out. But  
6 if we stick to the text, and we say "for or because of  
7 acts, then the notion of intending to influence, it seems  
8 to me, is rather hard to get out of the statute.

9 MR. RAY: We believe Judge Wald correctly  
10 recognized the point, that inherent in a gift given in a  
11 regulated context is ultimately the prospect of official  
12 action. And to talk -- to start to talk about intent to  
13 influence as an -- as a required element of the offense we  
14 believe leads the jury astray.

15 QUESTION: Well, would you -- would you -- would  
16 you request -- would it be appropriate for a judge to say,  
17 in charging under this statute, whether or not there was  
18 any, even general intent, on the part of the donor to  
19 influence the official in the manner in which the official  
20 performed his acts is totally irrelevant; would that be a  
21 correct instruction?

22 MR. RAY: I would think that would be as  
23 misleading as -- as instructing with intent to influence.  
24 We have to be careful about, obviously, how to instruct a  
25 jury.

1           QUESTION: Well, let's just talk as lawyers now  
2 for a minute. As a technical statement of law, would that  
3 instruction have been right or wrong on your view?

4           MR. RAY: With respect to a -- sort of a  
5 generalized intent?

6           QUESTION: That's -- that's right.

7           MR. RAY: I think wherever you talk about -- and  
8 a generalized intent to influence seems to me to be no  
9 different than saying you're going to require some sort of  
10 a specific intent to influence.

11          QUESTION: Was -- was the instruction right or  
12 wrong?

13          MR. RAY: We believe the -- the instruction,  
14 read as a whole, in its entirety --

15          QUESTION: No, I'm -- I'm talking about my  
16 hypothetical instruction.

17          MR. RAY: Oh, your hypothetical.

18          QUESTION: Would that have been right or wrong?

19          MR. RAY: In isolation, I mean, I -- I think, in  
20 isolation, it's not wrong. We think it would require some  
21 further explanation to be clear about what is meant. I  
22 mean, certainly you can envision other ways to explain  
23 this to a jury.

24          QUESTION: It doesn't seem to me that -- that  
25 the choice is -- is between reading this statute as -- as

1 one that -- that requires an intent to influence and  
2 reading it as one that requires merely giving a gift  
3 because of a person's office. It seems to me this statute  
4 covers a situation in which you reward someone for an act  
5 already performed.

6 MR. RAY: That's half of it, Your Honor.

7 QUESTION: Well, I think that's -- that's a part  
8 of it that doesn't trouble me, but it's a good deal short  
9 of saying that any gift because of a person's office comes  
10 within the statute. I mean, let's assume that the -- the  
11 person has -- has come out with a ruling that -- that  
12 greatly favors a particular company. And then the -- then  
13 the company gives him \$10,000. Now, you couldn't get that  
14 under the bribery statute because the decision was already  
15 made.

16 MR. RAY: That's correct, Justice Scalia. And  
17 that would --

18 QUESTION: But you could get it under this  
19 statute, right?

20 MR. RAY: That's correct. And the -- and the  
21 reason --

22 QUESTION: Well, why isn't that enough? Why do  
23 we have to go further, and say, whenever you give a gift  
24 to a -- to a public official, you're covered?

25 MR. RAY: That's only half of the statute. The

1 statute also deals with prospective activity, to be  
2 performed. Your hypothetical deals simply with the first  
3 half, which is what has already been performed, the reward  
4 for past official action. And --

5 QUESTION: Well, suppose -- suppose the -- the  
6 official has announced that he will perform an act, and  
7 then -- but he hasn't performed it yet -- he then gets the  
8 gratuity or the reward Justice Scalia describes.

9 MR. RAY: Justice Kennedy, that's three --

10 QUESTION: I -- I think -- I think that would be  
11 covered by the statute. And that also explains the "to be  
12 performed" language.

13 MR. RAY: It does, Your Honor. And our position  
14 is that's three-quarters of the way there.

15 QUESTION: But if -- if he has under -- if the  
16 official has under advisement a proposed regulation, I  
17 think the -- your view is it would be covered --

18 MR. RAY: Yes.

19 QUESTION: -- because it's an act to be  
20 performed.

21 MR. RAY: That's correct. And that would get us  
22 even further the way there, but not all of the way there.

23 QUESTION: Well, where are we lacking?

24 MR. RAY: Where we're lacking --

25 (Laughter.)



1 MR. RAY: We'll get there eventually.

2 (Laughter.)

3 MR. RAY: Mr. Chief Justice, where we're lacking  
4 is, again, the prospect of future conduct, where it is not  
5 speculative, but there's a likelihood that it will be  
6 there. Clearly presented by the facts of this case,  
7 absolutely no question, in a regulated context, where  
8 Sun-Diamond is a large agricultural cooperate --  
9 cooperative, regulated on a day-to-day basis by the  
10 Secretary of Agriculture, in a situation where the jury is  
11 also required to find that there were matters pending  
12 before the Department of Agriculture of interest to  
13 Sun-Diamond, that it is sufficient, under the statute, to  
14 embrace and encompass within its scope the prospect of  
15 official actions by that official.

16 QUESTION: Well, Mr. Ray, it could well be that  
17 the evidence in this case could support a conviction by a  
18 properly instructed jury. And I think the question is  
19 whether the jury is properly instructed here.

20 Let me ask you this. The -- you have filed this  
21 petition on behalf of the independent counsel.

22 MR. RAY: That's correct, Your Honor.

23 QUESTION: And the Solicitor General has filed a  
24 separate brief on behalf, I guess, of the Department of  
25 Justice.

1 MR. RAY: Yes.

2 QUESTION: How does the Solicitor General's  
3 position differ from yours, would you say?

4 MR. RAY: We believe that the positions are the  
5 same. Both deal with the question of whether or not "for  
6 or because of official position" is sufficient to satisfy  
7 the statute. The Department of Justice explains that  
8 that's an appropriate shorthand, a shorthand used by the  
9 Fifth Circuit in Evans and Bustamante and by the Third  
10 Circuit in Standefer for a showing for or because of  
11 official acts so long as official position is understood  
12 to mean the prospect of official action, the capacity to  
13 act, consistent with the definition under 201(a)(3). As  
14 long as it is properly understood, our position and the  
15 Department of Justice's position is the same. We don't  
16 believe there's any discrepancy.

17 Your Honor's question goes toward, ultimately,  
18 whether or not this was a properly instructed jury. We  
19 believe that it was. If there was any error in the  
20 instruction, we believe that it was harmless beyond a  
21 reasonable doubt, and that the jury's verdict should be  
22 reinstated. That's our position.

23 Also, every --

24 QUESTION: Did you -- I really didn't read the  
25 Solicitor General's brief as being identical to yours.

1 You really think it's the exact same position you  
2 maintain?

3 MR. RAY: Ultimately, we believe the positions  
4 are the same, yes, Your Honor. It is the capacity to act.

5 QUESTION: So, we can rely entirely on his  
6 brief, and you'll be satisfied?

7 MR. RAY: Well, I wouldn't go that far.

8 (Laughter.)

9 QUESTION: Well, why not? Why not?

10 MR. RAY: Obviously, we have an interest in  
11 defending the instruction that was given by the district  
12 court in this case. That is not a position that the  
13 Solicitor General rendered any opinion on, for obvious  
14 reasons. I mean, every lawsuit is a -- a dispute between  
15 the parties. We believe, in this lawsuit --

16 QUESTION: What are the obvious reasons?  
17 They're not obvious to me.

18 MR. RAY: I'm sorry?

19 QUESTION: What are the obvious reasons?

20 MR. RAY: Well, we have an interest in defending  
21 the -- the -- the instruction and the jury's verdict. The  
22 Department of Justice's position in this case as an amicus  
23 is in making sure there's a proper understanding and  
24 interpretation of the language of the Federal gratuity  
25 statute. So, in that sense, they are different.

1           QUESTION: How -- how does it work, in your  
2 opinion? Suppose a -- a group of farmers asks the  
3 Secretary of Agriculture to come and talk to us. They  
4 say, we'd like you to tell us about the Department's  
5 policies that affect us. Here is the ticket, or we'll buy  
6 you lunch. It's a banquet. Bring your wife to the  
7 banquet. In your view, is that a Federal crime?

8           MR. RAY: We don't believe --

9           QUESTION: And if not, why not?

10          MR. RAY: We don't believe there's a sufficient  
11 showing of motivation, based on the facts.

12          QUESTION: No, no. What they want is they  
13 definitely want him to come out, indeed, what they want  
14 him to do is talk about price supports. They're in favor  
15 of price supports. They want him to talk at lunch.

16          MR. RAY: If it's completely untethered to the  
17 prospect of official action, that would not be a  
18 sufficient showing.

19          QUESTION: What do you mean "untethered"? They  
20 want him to talk about official action. They want him to  
21 talk about his policies as Secretary of Agriculture. I  
22 give you the example, and I want to know, in your opinion,  
23 how does this statute apply?

24          MR. RAY: On those facts as you've just added  
25 them, that would appear to suggest a motivation involving

1 some capacity to act.

2 QUESTION: It's a Federal crime, in your  
3 opinion?

4 MR. RAY: There would have to be additional  
5 facts that were not present in your hypothetical that were  
6 present here. Did they have any matters before that  
7 official?

8 QUESTION: Yes, yes. Of course, farmers do.  
9 They all do. That's what the Secretary of Agriculture  
10 does. He decides things that affect farmers.

11 MR. RAY: And -- and under those circumstances,  
12 if that motivation were shown that it was for or because  
13 of that position, we believe that would be within the four  
14 corners of this statute, yes.

15 QUESTION: And, therefore, if farmers who ask  
16 the Secretary to speak, to come to lunch, to talk about  
17 his policies, are all committing Federal crimes. I would  
18 have thought that was fairly common. I may not  
19 understand --

20 MR. RAY: Well, unless -- remember that there  
21 were also defenses presented in this case. In this  
22 particular case, as in your case potentially, the defense  
23 of friendship might apply, social purpose, or other  
24 innocent reason.

25 QUESTION: Business.

1 MR. RAY: And -- and that -- if those defenses  
2 were shown, then that would be sufficient -- if that was  
3 the motivation for the gift, to defeat liability.

4 QUESTION: In any case, you're saying --

5 QUESTION: Do you think any public officials in  
6 Washington will be surprised by your interpretation?

7 (Laughter.)

8 MR. RAY: Well, public officials --

9 QUESTION: I'm serious about that. There's a  
10 huge gap between the general understanding and your  
11 interpretation. And if -- and if the statute is open to  
12 two plausible interpretations, it seems to me that we  
13 shouldn't adopt yours for that reason.

14 MR. RAY: Your Honor, we don't think so.  
15 Because already there's a scheme in place, under the  
16 Federal regulations, that deal with precisely the issue  
17 that you describe. Public officials are already on notice  
18 about --

19 QUESTION: They don't go -- I would have thought  
20 it was good for Secretaries of Agriculture to explain to  
21 farmers what their policies will be in the future. I  
22 mean, is it now the -- the general understanding that they  
23 don't?

24 MR. RAY: Your Honor, I see that my time has  
25 expired. May I respond?

1 QUESTION: You may answer the question.

2 (Laughter.)

3 MR. RAY: We're not saying that we're trying to  
4 bar access. There's no question that farmers have a right  
5 to appear before these individuals, these officials,  
6 and -- and advance their position. The question is buying  
7 access. I mean, the official can appear as long as the  
8 official pays his own way. The problem is when the  
9 official is in a relationship with someone who  
10 prospectively has action before them and takes these gifts  
11 and takes them on the nickel of the -- the person who has  
12 an interest.

13 QUESTION: I think you've answered the question,  
14 Mr. Ray.

15 MR. RAY: Thank you, Your Honor.

16 QUESTION: Thank you.

17 We'll hear from you, Mr. Bloom.

18 ORAL ARGUMENT OF ERIC W. BLOOM

19 ON BEHALF OF RESPONDENT

20 MR. BLOOM: Thank you, Your Honor.

21 Mr. Chief Justice, and may it please the Court:

22 I'd like to turn immediately to a couple of  
23 issues raised in the questioning of the Appellant.

24 Justice Ginsburg, you asked the question: How  
25 did these instructions come to be? And I think it's very

1 important to go through the procedural posture.

2 In this case, Sun-Diamond filed a motion to  
3 dismiss the indictment. The government opposed that  
4 motion and, in very explicit terms, said that courts have  
5 made clear that for a gratuity to be established, it is  
6 not necessary to allege a direct nexus between the value  
7 conferred and an official act by the public official.  
8 That's page 5 in the government's opposition.

9 Indeed, after --

10 QUESTION: But do you -- do you --

11 QUESTION: -- in the district court?

12 MR. BLOOM: Yes. That was --

13 QUESTION: Do you contend that was erroneous?

14 MR. BLOOM: I'm sorry?

15 QUESTION: Do you contend that that statement  
16 was erroneous, about the direct nexus?

17 MR. BLOOM: Yes, Your Honor, we do.

18 QUESTION: Well, that's way, way back in time  
19 in -- in the proceedings. I mean, it's something the  
20 government said in opposition or a motion to dismiss in  
21 the district court. How does that bear on what we have  
22 here? The government may have changed its position.

23 MR. BLOOM: I understand that. And I literally  
24 want to walk you through it. Because the next step was --

25 QUESTION: We've got half an hour.



1 (Laughter.)

2 MR. BLOOM: I understand. I walk very quickly.

3 (Laughter.)

4 MR. BLOOM: Then we go to trial. And at trial,  
5 in opening statements, the independent counsel -- when I  
6 refer to the independent counsel, I mean the Office of  
7 Independent Counsel -- told the jury, quote, what this is  
8 and what the law prohibits is giving a thing of value to a  
9 public official because the person is a public official,  
10 when there's some business that you have before the public  
11 official. That's pages 3 and 4 of the transcript.

12 Then, at a sidebar, the independent counsel  
13 reaffirmed this view.

14 QUESTION: -- it's the United States that's the  
15 Petitioner here.

16 MR. BLOOM: I'm sorry -- after 4 years -- the  
17 United States. The prosecutor then reaffirmed this view  
18 to the court, and said, essentially, the court did not  
19 require the showing of a nexus between the thing of value  
20 and the particular acts the Secretary may have taken. It  
21 is not necessary under the law. And that's page 734 of  
22 the transcript.

23 This case was being tried under the "for or  
24 because of an official position" standard. So, when the  
25 parties filed our respective proposed jury instructions,

1 it is not surprising that the jury instructions do not  
2 come close to one another.

3 With respect to the jury instructions  
4 themselves, we believe that, effectively, it stripped the  
5 factfinder of finding the one question -- essential  
6 question -- in this case. Specifically, whether in fact  
7 Sun-Diamond's gifts were for or because of any official  
8 act.

9 Now, as I understand Mr. Ray --

10 QUESTION: Do you say it has to be because of  
11 some particular official act?

12 MR. BLOOM: Ultimately, that's not Sun-Diamond's  
13 battle, but we do believe that -- that the statute calls  
14 for a link between a gift on one hand and some specific or  
15 identifiable official act.

16 QUESTION: Specific or identifiable. Well, I  
17 mean -- I mean, let's say I'm -- I'm AT&T, and I just give  
18 enormous quantities of money to the Chairman of the  
19 Federal Communications Commission.

20 MR. BLOOM: Well --

21 QUESTION: That doesn't violate this Act?

22 MR. BLOOM: Well, two answers --

23 QUESTION: Saying, you know, I'm not asking you  
24 to do anything in particular. I have no particular case  
25 in mind.

1 (Laughter.)

2 MR. BLOOM: Two answers --

3 QUESTION: I just -- I just want you -- just --  
4 I just want you to be a friend; that's all.

5 (Laughter.)

6 MR. BLOOM: I strongly suspect that if I had  
7 matters before the FCC or before any department, it's not  
8 going to be terribly difficult for the prosecutor,  
9 especially with the resources of the grand jury, to be  
10 able to identify matters.

11 The second point --

12 QUESTION: No, no. Wait. You have to take my  
13 hypothetical. There is no particular matter that AT&T  
14 mentioned to the Chairman. It just said, you know, I just  
15 love Chairmen of the FCC. They are wonderful people.  
16 They're -- you know, they could make a lot more money  
17 elsewhere. I -- this is in appreciation of your taking  
18 all this time out to serve the people. And I -- you know,  
19 here's a couple of million dollars.

20 (Laughter.)

21 MR. BLOOM: Well, I strongly suspect that a jury  
22 could find that it was for an act, if one were identified.  
23 But using your hypothetical --

24 QUESTION: No particular act.

25 MR. BLOOM: I understand, sir. Using your

1 hypothetical, I would suspect that that person could be  
2 charged under one of the other statutes -- the salary  
3 supplementation statute. It sounds like he's giving the  
4 money because of the job and because of his acts as --  
5 pursuant --

6 QUESTION: My question was -- was not whether he  
7 could be charged under one of the other statutes. It's  
8 whether he can be charged under this statute.

9 MR. BLOOM: Right. And our answer is no.

10 QUESTION: Is no?

11 MR. BLOOM: Is no.

12 QUESTION: Now, in your view, what's the -- tell  
13 me what the distinction is between the requirement of --  
14 the specificity requirement of this statute and the  
15 specificity requirement of the bribery statute.

16 MR. BLOOM: Under bribery, you need a quid pro  
17 quo, there's clearly strings attached.

18 QUESTION: Well, the quid pro quo is the  
19 agreement that connects the -- the thing given with a  
20 specific act.

21 MR. BLOOM: Right, I understand.

22 QUESTION: It doesn't have to -- the act doesn't  
23 have to be completed to violate the bribery statute --

24 MR. BLOOM: Right.

25 QUESTION: We agree on that. So -- so,

1 there's -- there's a specific gift, specific act. Now,  
2 you've been talking about -- I think -- about specific  
3 acts under the gratuity statute. So, what's -- how do we  
4 distinguish between the two?

5 MR. BLOOM: Let us hypothesize that I'm giving a  
6 lot of gifts, not in exchange for, not with any implicit  
7 or explicit agreement that the government official is  
8 going to do me a favor in return. There are no strings  
9 attached. I'm plying this guy with gifts, hoping that it  
10 may influence him. Hoping that when the time comes, that  
11 he's going to rule on MPP or methyl bromide, that he's  
12 going to think twice about me.

13 QUESTION: Well, then there is no -- then I --  
14 maybe I misunderstood your position. There is no  
15 specificity requirement under the -- specificity as to the  
16 act requirement under the gratuity statute on your view;  
17 is that correct?

18 MR. BLOOM: No. Our view is that the prosecutor  
19 has to identify one or more acts for which the gifts are  
20 given.

21 QUESTION: Okay, we're back to the specific.  
22 What's the difference between the one or more acts that  
23 he's got to identify for the gratuity statute and the  
24 identification of one or more acts under the bribery  
25 statute?

1 MR. BLOOM: Under the bribery statute, there's a  
2 quid pro quo.

3 QUESTION: Well, the quid pro quo -- and correct  
4 me here -- I thought quid pro quo meant that there was an  
5 agreement that the -- that the gift would be in exchange  
6 for action in this particular instance.

7 MR. BLOOM: That is correct.

8 QUESTION: All right. And I think what you're  
9 saying is, if you have to -- the only difference, then, is  
10 you don't get too explicit about the agreement under the  
11 gratuity statute.

12 MR. BLOOM: There is no agreement.

13 QUESTION: You've got an -- you've got an  
14 explicit -- you've got a -- you've got a particular gift,  
15 and you've got a specific act in mind, and the prosecutor  
16 has got to show it and prove it, but we just don't get  
17 down to so many words in identifying -- when -- when we're  
18 giving the gift, we don't get down to so many words in  
19 identifying the connection between this gift and this act;  
20 that's the difference?

21 MR. BLOOM: Right. Essentially, there is no  
22 agreement in the case of a gratuity. The -- the typical  
23 or classical or traditional gratuity is the reward. A  
24 reward for not taking -- or one where the government  
25 official has committed themselves to performing that act.

1 QUESTION: Okay. But -- but the distinction is  
2 simply one of -- of explicitness, of a lack of  
3 articulation of the connection; is that your position?

4 MR. BLOOM: Well, not even articulation. There  
5 is no agreement.

6 QUESTION: Then why does the prosecutor have to  
7 prove specific acts?

8 MR. BLOOM: Because we believe that the statute  
9 almost cries out for it. The words of the statute --

10 QUESTION: When you were asking -- if you're  
11 arguing this, then you're going beyond where the Court of  
12 Appeals went, because the Court of Appeals didn't say it  
13 had to be this act or that act. It -- didn't the Court of  
14 Appeals contemplate a multitude of acts that might be in  
15 the agency's bailiwick?

16 MR. BLOOM: In the appendix, the Court of  
17 Appeals decision is attached and -- at page 8 -- and  
18 whatever degree of intent to influence may be necessary  
19 for a bribe. A gift looking to future acts can be an  
20 unlawful gratuity, where the giver is motivated simply by  
21 the desire to increase the likelihood of one or more  
22 specific favorable acts.

23 QUESTION: And you say that's -- that's wrong?

24 MR. BLOOM: No, we say that's correct.

25 QUESTION: Well, why? Why is it -- I -- I am

1 confused by the two. I thought the classical bribe is I  
2 want the public official to do something for me. And,  
3 moreover, I go to him and say, I'll pay you \$1,000 if you  
4 do X. And it's a fairly specific thing.

5 I thought the classical gratuity is what it  
6 says; it's a tip. The person did it anyway. I say, thank  
7 you; thank you for giving me 48 million acres. Thank you.  
8 And here's your tip, \$1,000.

9 Now, normally, that would be in the past. He  
10 would have done it. But sometimes, I guess, it could be  
11 in the future. He just doesn't know I want him to do it,  
12 but he does it --

13 MR. BLOOM: Well --

14 QUESTION: -- independently, and I give him a  
15 tip. And I give him a tip for what -- I mean, I don't  
16 understand how the future works. But if that's the  
17 distinction, you don't need any agreement whatsoever in  
18 the gratuity case. None. Nor does it matter that you're  
19 trying to influence him. It couldn't matter less that  
20 you're trying to influence him. Influence has nothing to  
21 do with it.

22 Now, am I right? Explain -- I'm not at all sure  
23 I'm right.

24 MR. BLOOM: No. You are absolutely, perfectly  
25 correct. As a matter of fact, what you articulated is



1 very recently what the Fourth Circuit adopted in United  
2 States v. Jennings. And perhaps it's best to kind of set  
3 up a hierarchy of conduct. Clearly, the top tier would be  
4 bribery. And there you have a quid pro quo, this for  
5 that, there are strings attached.

6 There is a tier -- gratuities -- clearly  
7 covering -- and I believe what Congress, in the  
8 legislative history, suggested it was intending to  
9 cover -- were rewards, a tip, a thank you. The question  
10 is whether a gratuity can also cover instances with  
11 respect to influence. And I kind of like the Court of  
12 Appeals --

13 QUESTION: Well, how -- how about the "to be  
14 performed" part of the statute?

15 MR. BLOOM: Well, what the courts have done that  
16 interpret the gratuity statute as merely a reward -- in  
17 fact, there was an Eighth Circuit case that affirmed an  
18 instruction. And the instruction said this: Find the  
19 defendant guilty if you find that the gift was intended as  
20 a reward for any acts the government official committed or  
21 committed to perform.

22 QUESTION: Well, but committed to perform is  
23 bribery.

24 MR. BLOOM: No, because --

25 QUESTION: That's simply reading out the part of

1 the statute that says "to be performed."

2 MR. BLOOM: Well, let me give you the  
3 hypothetical. What about a --

4 QUESTION: Well, don't ask me questions.

5 (Laughter.)

6 MR. BLOOM: Let me give you an example of what  
7 it is I'm talking about, Mr. Chief Justice.

8 (Laughter.)

9 MR. BLOOM: And that is, I, as a Senator, make  
10 out a very public statement: I am going to vote for this  
11 piece of legislation. I am committed to performing it. I  
12 haven't acted on it yet. In fact, that legislation may  
13 not even be pending. I'm thrilled that he's taking this  
14 stance. It is an act to be performed. I give him the  
15 reward.

16 QUESTION: But then the dif -- the difficult --  
17 why this case isn't so totally obvious, is because -- take  
18 a gratuity statute -- you'd say that that -- that, okay, I  
19 understand perfectly well you're giving a person a tip.  
20 That's what you're not supposed to do. Well, you don't  
21 give a person a tip for being who he is; that's clear -- I  
22 don't think -- that's not a tip. So, being in a position,  
23 no, that's not in the statute. But it isn't so clear that  
24 it has to be an absolutely precise act.

25 You could give -- you could be giving a person a

1 tip because of a whole series of things that he did or a  
2 whole series of things that he now has promised to do.  
3 What a good guy he is. He says: I promise to buy this  
4 piece of property next year. That's to be performed. You  
5 say: That's wonderful.

6 Now, he doesn't say to buy this piece of  
7 property, he says to buy some property. Now, he doesn't  
8 say to buy some property, he says to take a certain course  
9 of action. And then it becomes vaguer and vaguer. And  
10 that doesn't necessarily stop it from being a tip. And  
11 that's why I think this case isn't obvious, one way or the  
12 other.

13 MR. BLOOM: And certainly it's a legitimate  
14 question --

15 QUESTION: Yes.

16 MR. BLOOM: -- whether or not --

17 QUESTION: What's your response?

18 MR. BLOOM: That -- that's exactly right. And  
19 one of the things that we try to grapple with is --

20 QUESTION: Yeah, but you've got to argue that  
21 this general course of conduct is not something that falls  
22 within the statute. Rather, you want it to be more  
23 specific acts.

24 MR. BLOOM: Well, we believe that the statute  
25 does call for that, that's right.

1 MR. BLOOM: And one of the questions here that I  
2 think it's a difficult --

3 QUESTION: But -- but Judge Williams didn't say  
4 that. Indeed, I think he rejected your position. You  
5 called our attention to page 8 in the appendix. If you  
6 look at page 13 and 14, where Judge Williams said: at the  
7 same time, we reject Sun-Diamond's broader tack on the  
8 indictment --

9 QUESTION: Where are you reading from?

10 QUESTION: Appendix page 13. The -- the  
11 paragraph --

12 QUESTION: Okay, thank you.

13 QUESTION: -- at the end of the page.

14 QUESTION: Okay.

15 QUESTION: Where the D.C. Circuit said that it  
16 isn't necessary to tie the particular free service  
17 provided to particular ticket or tickets. Leniency in a  
18 multitude of specific acts was enough. That an official  
19 has an abundance of relative -- relevant matters on his  
20 plate should not in -- insulate him from the gratuity  
21 statute.

22 MR. BLOOM: And, ironically, we actually agree  
23 with this. It's still a multitude of specific acts. You  
24 can tell us what those -- what the group of specific acts  
25 are.

1 QUESTION: I -- okay, let's use a hypothetical.  
2 I -- the new Chairman of the FCC, and AT&T comes in and  
3 says: You're going to have a multitude of acts in your  
4 office. And, you know, no specific one, but here's \$2  
5 million; think well of us in all of these -- in everything  
6 you do in this office.

7 (Laughter.)

8 QUESTION: Okay. Is that a violation?

9 MR. BLOOM: Well, I think the answer is probably  
10 yes. And I think that the answer to why it's probably  
11 yes --

12 QUESTION: What specific acts are involved?

13 MR. BLOOM: Well, I was going to just say,  
14 provided the government can identify the myriad of  
15 specific acts. In other words, clearly, if I've got 10  
16 matters pending, and I could literally give all that  
17 money --

18 QUESTION: It's just everything he does. It's  
19 just everything he does in his office. Which is why it's  
20 not a very -- a very far stretch to say that I'm giving  
21 him the money because of his office. Because everything  
22 that he does as Chairman of the FCC --

23 MR. BLOOM: What we're trying to --

24 QUESTION: -- or at least everything that  
25 affects point-to-point telecommunications.

1 MR. BLOOM: What we're trying to protect against  
2 is a jury just saying, wait a minute, these guys gave  
3 money; it must have been to influence. Influence what?

4 The Act requires a gift on the one hand, act or  
5 acts on the other hand, and some nexus for or because of  
6 an official act in the middle. And --

7 QUESTION: To influence -- in -- in the  
8 hypothetical, here is the money, now think well of us.  
9 I'm giving you some money. Please, think well of us.  
10 That's bribery, not a gratuity, isn't it?

11 MR. BLOOM: Well, I -- I --

12 QUESTION: It's not -- if -- if I'm giving you  
13 the money because you will think well of us, it's a  
14 gratuity.

15 MR. BLOOM: Well, I think that's correct.

16 QUESTION: If I'm giving you the money in order  
17 to, is it bribery? Or may -- maybe I'm not right about  
18 that.

19 MR. BLOOM: Well, certainly, I think what the  
20 jury would infer there is I'm giving the money so that he  
21 will act favorably with respect to us, with respect to  
22 these 10 matters we have pending.

23 QUESTION: Well, that's -- that's -- you don't  
24 think it's a -- it's a violation of the bribery statute,  
25 do you?

1 MR. BLOOM: If it's a quid pro quo --

2 QUESTION: But I haven't asked for any  
3 commitment on his part. You -- you've been telling us  
4 that there has to be an agreement.

5 MR. BLOOM: Right. If there's an implicit  
6 agreement, I mean, that's going to be a question in fact  
7 for the jury.

8 QUESTION: How is it an implicit agreement when  
9 I say, here, please, think well of us?

10 MR. BLOOM: If that's all there is -- if that's  
11 all there is --

12 QUESTION: That -- that was my hypothetical.

13 MR. BLOOM: Then it may well be a gratuity. And  
14 all we would say is, in the indictment, identify what  
15 those acts are that are pending.

16 QUESTION: Well, but then, also, if he rules  
17 against the giver in every case, it would pretty clearly  
18 not be a bribery, but it would clearly still be a gratuity  
19 if the gift was given in order to motivate him to -- to  
20 act favorably.

21 MR. BLOOM: To make acts more likely.

22 QUESTION: Yes.

23 MR. BLOOM: Yes.

24 QUESTION: And is it possible to interpret the  
25 statute so that it has a retroactive reach? There has to

1 be a commitment to take an act or an act has to be taken?

2 MR. BLOOM: Well --

3 QUESTION: You apparently don't take that  
4 position.

5 MR. BLOOM: Well, I was going to say, several  
6 courts have. The reason why we haven't is because the  
7 words "for or because of" we think are probably broad  
8 enough to capture not only a reward, but it probably  
9 embraces improper attempts to influence, where it does not  
10 rise to the level of bribery.

11 QUESTION: The problem, once you do that, and  
12 couple the analysis with the possibility of being  
13 multiple, specific acts, or at least more than one, you're  
14 very close to "official position."

15 MR. BLOOM: Well, I -- I disagree. Oh, no, I  
16 don't disagree, because it's actually close, but it's --  
17 it's still a long way from -- from home.

18 In fact, this is really, I think, the key, as I  
19 understand it, to the independent counsel's argument. The  
20 independent counsel says, in this case --

21 QUESTION: The government.

22 MR. BLOOM: I'm sorry. The government. Thank  
23 you.

24 In this case, Sun-Diamond is a regulated entity.  
25 Therefore, we don't have to prove it's for or because of



1 any official act. We merely have to prove it was for or  
2 because of an official position. Essentially, as I  
3 understand what the government is doing here, is they are  
4 saying that there are two classes of potential defendants.  
5 And the matter of proof is different, depending on whether  
6 or not you are within one class or the other.

7 QUESTION: Well, the -- the hypothetical that  
8 might distinguish the situation is where someone who just  
9 likes to be around high -- high-ranking government  
10 officials, if Sun-Diamond gave the money to the Secretary  
11 of Energy, and -- or gave a gift -- and they had nothing  
12 in the world the Secretary of Energy could do to affect  
13 Sun-Diamond -- that would be because of official position,  
14 but not because of acts to be performed, don't you think?

15 MR. BLOOM: Yes, I do. And I think -- and I  
16 don't think we should presume that because they like to be  
17 around cabinet officers, that because it happens to be the  
18 Secretary of Agriculture, that it must have been for or  
19 because of an official act.

20 QUESTION: Well, but at least it was  
21 permissible -- it would be permissible for the jury to  
22 find that, in that case.

23 MR. BLOOM: Yes. Yes. And that's obviously our  
24 concern here. The jury did not get that question. And,  
25 look, the jury can take a look at a lot of factors to

1 determine whether or not it should make the inference that  
2 indeed the gift is for or because of an official act. The  
3 jury may take a look at the fact that the entity giving  
4 the gifts has matters pending.

5 QUESTION: Is one of those factors whether or  
6 not the receiving official could reasonably interpret, or  
7 should reasonably interpret, the action as being designed  
8 to reward a particular official act?

9 MR. BLOOM: I think it could be a factor, yes.  
10 I mean, clearly, what I would think are the most --

11 QUESTION: Should you instruct the jury to that  
12 effect in every case?

13 MR. BLOOM: I tend to be partial to the plain  
14 vanilla circumstantial evidence that we get in all the  
15 jury instructions. What I do believe --

16 QUESTION: You keep saying "specific act." You  
17 keep using that term. But -- but the kind of  
18 hypotheticals you're accepting do not have "specific act."  
19 Why isn't it enough that the person gave the money to  
20 obtain favorable action in the abstract? I gave him money  
21 just because, you know, you have been a friend to AT&T  
22 over the years, in -- in your position as Chairman. I'm  
23 not referring to any particular decisions.

24 And if the government had to come up with the  
25 particular ones that it was given for, you couldn't

1 identify any particular ones. But I think you'd be under  
2 the statute if you said, I'm just giving you this because  
3 you have been a good friend to our company over the years.  
4 Wouldn't that be a violation of the statute?

5 MR. BLOOM: I don't believe so. I don't believe  
6 so.

7 QUESTION: May I ask --

8 QUESTION: Well, it would be if --

9 QUESTION: May I just -- one question, if I may.  
10 Would you tell me the difference between your position and  
11 the position of the Department of Justice in their  
12 separate brief?

13 MR. BLOOM: Well, we certainly agree a lot with  
14 the Department of Justice, in that it's generally a jury  
15 matter to determine the issue of intent. We probably  
16 disagree with the Solicitor General, I could think of, in  
17 three ways. First, the Solicitor General says that based  
18 on the regulatory relationship only, a jury should be able  
19 to infer guilt beyond a reasonable doubt.

20 We agree that the substantiality of the gifts  
21 and the fact that there are matters pending are in fact  
22 factors for the -- for the jury to consider. And I think  
23 we can't decide in a vacuum whether or not that would be  
24 sufficient from which a reasonable jury can find beyond a  
25 reasonable doubt that gifts were given for or because of

1 an official act.

2 Second --

3 QUESTION: Could you clarify that in terms of an  
4 instruction? Suppose the judge said: You may, but are  
5 not required, to infer from the fact that this corporation  
6 has matters, or this entity, has matters pending before  
7 the agency that this gift was given to influence official  
8 acts.

9 MR. BLOOM: I would prefer --

10 QUESTION: Would that be a proper charge?

11 MR. BLOOM: I would prefer a broader charge,  
12 that -- that instructs the jury --

13 QUESTION: Well, I didn't ask whether you  
14 preferred it; I asked if that would be a legally correct  
15 charge?

16 MR. BLOOM: It -- it may be. I, frankly, think  
17 it may be a bit prejudicial. The charge, if I may, that I  
18 would suggest to the jury is that the jury may consider  
19 the substantiality of the gifts, both to the donor and to  
20 the donee, the substantiality of the interests to the  
21 donor, the timing of the gifts vis-a-vis acts.

22 QUESTION: Would you finish your answer to my  
23 question, please?

24 MR. BLOOM: Sure. The second place where we  
25 disagree with the Solicitor General is that at one point

1 it seems to us that he equates capacity to act with act.  
2 And I believe that capacity to act is an awful lot like  
3 position, and suggests status. For example, I may want to  
4 hobnob with someone who has the capacity to act because it  
5 will enhance my prestige.

6 The third place where we disagree is  
7 specifically on the -- whether or not the statute requires  
8 a nexus to a particular act or just a general act. Aside  
9 from that, I think --

10 QUESTION: On that point, we don't have to agree  
11 with you on that position to affirm the judgment below, do  
12 we?

13 MR. BLOOM: Absolutely not, Your Honor.

14 QUESTION: But let me get back to your -- what  
15 you mean by "the nexus to the particular act." And I  
16 guess I'm going back to Justice Ginsburg's hypothetical.  
17 If the -- if the jury charge -- if the judge charged the  
18 following, would it be legally sufficient?

19 In order to show that the gift was given for or  
20 because of an official act, the government must prove that  
21 the gift was given with an intent to influence the  
22 performance of an official act. You may -- you need not  
23 necessarily, but you may find, on this evidence, that the  
24 gift was so given because, at the time it was given, there  
25 were two matters pending before the Secretary in which the

1 donor, Sun-Diamond, had an interest. One was the  
2 insecticide interest and the other was the -- the grants  
3 to subsidiaries interest.

4 Would that have been a legally sufficient  
5 instruction?

6 MR. BLOOM: I suspect that the answer is yes.  
7 But, to be candid, the converse of that question says,  
8 could I, as a defendant, prevail on a Rule 29 motion? And  
9 I will tell you that I, as a defense counsel, would make a  
10 very strong Rule 29 motion, based on the facts in this  
11 case, that no rational trier of fact could find  
12 Sun-Diamond guilty on this record.

13 QUESTION: Why? Make your argument.

14 MR. BLOOM: Certainly. There were two matters  
15 that the government proved were pending. One was the MPP,  
16 the grant program.

17 QUESTION: Yeah.

18 MR. BLOOM: The evidence was that Sun-Diamond  
19 wanted -- wanted the Secretary -- this is -- I'm sorry,  
20 this is the -- the indictment -- alleged that Sun-Diamond  
21 wanted the Secretary to adopt a definition of a small  
22 entity to cover its member cooperatives. Yet the evidence  
23 at trial was that Richard Douglas told the Secretary this  
24 is probably something that is better left for Congress.  
25 That's one.

1           There's no effort and there's no evidence to  
2 reflect an effort to influence the Secretary of  
3 Agriculture in any way to assist Sun-Diamond.

4           The second matter that was pending dealt with  
5 the issue of methyl bromide. Methyl bromide is a fumigant  
6 that the EPA was proposing to phase out. The history, I  
7 would argue, of the USDA was opposing the phaseout.  
8 Indeed, the evidence in the record demonstrates that the  
9 USDA was the largest user of methyl bromide.

10           QUESTION: So, you're saying they were doing it  
11 anyway. That's your argument. Okay.

12           MR. BLOOM: That is correct.

13           QUESTION: I understand.

14           MR. BLOOM: What I was going to go back to is  
15 the issue of these two classes, and the fact that because  
16 Sun-Diamond is a regulated entity, somehow we deserve a  
17 different standard. I think, effectively, what that does  
18 is create an impermissible irrebuttable presumption. That  
19 is, if the jury were to find -- and if the jury did  
20 find -- that Sun-Diamond gave gifts for or because of any  
21 official position, then the court, as a matter of law, was  
22 saying, then Sun-Diamond must have given it for or because  
23 of any official act.

24           And under *In re Winship*, of course, it is the  
25 government's burden to prove each and every element of the

1 offense beyond a reasonable doubt.

2 I wanted to go back, also to the issue of this  
3 hierarchy of conduct. Clearly, at the top of the  
4 hierarchy is bribery. Clearly, below that we have the  
5 gratuity as a reward. In our view, at the bottom is for  
6 or because of an official position, which is governed, we  
7 believe, administratively.

8 There is a question as to whether or not there  
9 is a gap between bribery and the gratuity. Does  
10 bribery -- clearly, bribery covers improper attempts to  
11 influence. Clearly, gratuity covers the issue of rewards.

12 The difficult issue is whether or not there is a  
13 gap that is filled by the gratuity statute. And that's  
14 why I'm partial to the language of the Court of Appeals  
15 that says, essentially, we don't have to decide what the  
16 bribery statute line is. But wherever we draw that line,  
17 the gap will be filled by the gratuity statute.

18 To conclude, we believe that the district court,  
19 by instructing the jury that the government did not have  
20 to prove that Sun-Diamond gave gifts for any act at all  
21 stripped the jury of its fact-finding mission. It simply  
22 did not have an opportunity to decide the one question  
23 that was crucial to this case.

24 That question was purposefully kept away from  
25 the jury because the government argued, and the district



1 court agreed, that no connection needed to be shown. That  
2 relieved the government of its constitutional obligation  
3 to prove every element of the offense beyond a reasonable  
4 doubt. That was error. And for that reason, we therefore  
5 ask for this Court to affirm the decision of the Court of  
6 Appeals.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bloom.  
8 The case is submitted.

9 (Whereupon, at 11:11 a.m., the case in the  
10 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. SUN-DIAMOND GROWERS OF CALIFORNIA  
CASE NO: 98-131

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Jonathan May  
(REPORTER)