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Campaign Contributions and the Ethics of Elected Officials: Regulation Under Federal Law

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Summary

Allegations of political corruption often involve questions regarding a public official or candidate's use of campaign funds or the relationship between campaign contributors and the candidate or official. A common concern is that a particular individual, private organization, company, or other entity "bought"—through large campaign contributions widely distributed—particular official favors, official acts, or official forbearance from officers or employees of the federal government. These issues have been highlighted in several high-profile cases over recent years. In 2016, the Supreme Court clarified the boundaries of federal political corruption statutes in *McDonnell v. United States*, in which it examined which actions taken by public officials could be considered "official acts."

In an effort to curb corruption in the political process, Congress has enacted laws that regulate campaign contributions made to federal office candidates. The Federal Election Campaign Act (FECA) regulates contributions in three general ways, by establishing limits, source restrictions, and disclosure requirements. Source restrictions include prohibitions on contributions from government contractors, foreign nationals, and the general treasuries of corporations and labor unions (corporate and labor union political action committee (PAC) contributions are permitted). Further, the law prohibits the converting of campaign funds for personal use; that is, it bans contributions from being used to fulfill any expense that would exist "irrespective" of the candidate's campaign or federal officeholder duties. Courts have generally upheld these regulations in order to maintain the integrity of the democratic process by protecting against *quid pro quo* corruption and its appearance. In addition to civil penalties, it is notable that FECA sets forth a range of criminal penalties.

In addition to the direct federal regulation of campaign contributions, a number of federal political corruption provisions prohibit federal officials from receiving personal benefits that are related, in certain ways, to their official acts. Among some of the most common concerns raised in political corruption cases are bribery, illegal gratuities, and extortion. Laws criminalizing these activities bear upon the relationship of official acts to otherwise lawful contributions: The prohibition on bribery precludes officials from accepting contributions in exchange for performance of an official act. The prohibition on illegal gratuities does not require that the contribution be made in exchange for the official act, but instead precludes officials from accepting contributions made *because of* the official act. The prohibition on extortion precludes officials from using their position to demand contributions in exchange for official action. Additionally, a number of political corruption cases involve charges of so-called "honest services" fraud, alleged when public officials engage in schemes that deprive the public of honest services of government officials.

This report provides an overview of federal campaign finance and public corruption laws that may be relevant to the political campaigns of elected officials, including discussion of provisions that could be implicated in cases involving the misuse of campaign funds or malintent of campaign contributions.

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Allegations of political corruption often involve questions regarding a public official or candidate's use of campaign funds or the relationship between campaign contributors and the candidate or official. A common concern is that a particular individual, private organization, company, or other entity "bought"—through large campaign contributions widely distributed—particular official favors, official acts, or official forbearance from officers or employees of the federal government. These issues have been highlighted in several high-profile cases over recent years. In 2016, the Supreme Court clarified the boundaries of federal political corruption statutes in *McDonnell v. United States*, in which it examined which actions taken by public officials could be considered official acts.[1]

This report provides an overview of federal laws regulating campaign contributions and their acceptance by elected officials. It examines various aspects of campaign finance law, including limits, source restrictions, and disclosure requirements on campaign contributions, as well as the prohibition on converting campaign funds for personal use. It also analyzes various public corruption laws that prohibit bribery, illegal gratuities, extortion, and honest services fraud in the context of campaign contributions.

Overview of Campaign Finance Regulation[2]

Contributions to Candidates

The Federal Election Campaign Act (FECA)[3] regulates campaign contributions in federal elections. FECA defines a "contribution" to include money or anything of value given for the purpose of influencing an election for federal office.[4] A contribution can be distinguished from an "expenditure" in that a contribution involves giving money to an entity, such as a candidate's campaign committee, while an expenditure involves spending money directly for advocacy of the election or defeat of a candidate.

Generally, FECA regulates contributions in three ways, by establishing limits, source restrictions, and disclosure requirements.

Limits and Prohibition on Contributions Made in the Name of Another

FECA provides specific limits on how much individuals can contribute to a candidate, and these limits are periodically adjusted for inflation in odd-numbered years.[5] For example, in the 2015-2016 election cycle, an individual could contribute up to $2,700, per election, to a candidate.[6]

Of importance, the law also prohibits contributions made by one person "in the name of another person," and bans candidates from knowingly accepting such contributions.[7] This provision serves to prevent an individual, who has already contributed the maximum amount to a given

[1] McDonnell v. United States, 84 U.S.L.W. 4565 (U.S. 2016).

[2] For a discussion of campaign finance policy, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

[3] Codified, as amended, at 52 U.S.C. §§-30126.

[4] 52 U.S.C. §30101(8)(A).

[5] 52 U.S.C. §30116(a).

[6] *See* Federal Election Commission, "Contribution Limits for 2015-16," available at http://www.fec.gov/info/contriblimitschart1516.pdf.

[7] 52 U.S.C. §30122.

candidate, from circumventing contribution limits by giving money to someone else to contribute to that same candidate. Regulations promulgated under FECA further specify that a corporation is prohibited from reimbursing employees for their campaign contributions through a bonus, expense account, or other form of compensation.[8] In general, the Supreme Court has upheld reasonable limits on contributions as a means to prevent *quid pro quo* corruption or its appearance by combating improper influence on candidates by contributors.[9] *Quid pro quo* corruption involves an exchange of money or something of value for an official act.

Source Restrictions

Referred to as "source restrictions," federal campaign finance law contains several bans on *who* may make contributions to federal candidates.

Ban on Corporate and Labor Union Contributions

FECA prohibits contributions by corporations and labor unions from their own funds or "general treasuries."[10] Candidates, however, are permitted to accept contributions from separate segregated funds or political action committees (PACs) that are established and administered by such entities.[11] Although the Supreme Court in 2010, in *Citizens United v. Federal Election Commission*,[12] invalidated the federal ban on corporate treasury funding of independent expenditures, it did not appear to affect the ban on corporate *contributions* to candidates and parties.

Ban on Federal Contractor Contributions: "Pay-to-Play" Prohibition

Another type of source restriction—known as a "pay-to-play" prohibition—is the ban on federal candidates accepting or soliciting contributions from federal government contractors.[13] Pay-to-play laws generally serve to restrict officials from conditioning government contracts or benefits on political support. This FECA prohibition applies at any time between the earlier of the commencement of contract negotiations or when the requests for proposals are sent out, and the

[8] 11 C.F.R. §114.5(b)(1).

[9] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), *but see* McCutcheon v. Federal Election Comm'n, 134 S. Ct. 1434 (2014) (holding that aggregate limits—which restrict how much money a donor may contribute in *total* to all candidates, parties, and political committees—are unconstitutional under the First Amendment, characterizing them as a ban on further contributions once the aggregate amount has been reached). In *McCutcheon*, the Court announced that the Court has identified only one legitimate governmental interest for restricting campaign financing: the prevention of *quid pro quo* corruption or its appearance. While acknowledging that the Court's campaign finance jurisprudence has not always discussed the concept of corruption clearly and consistently, and that the line between *quid pro quo* corruption and general influence may sometimes seem vague, the opinion noted that the Court has consistently rejected campaign finance regulation based on other governmental objectives, such as goals to "level the playing field," "level electoral opportunities," or "equaliz[e] the financial resources of candidates." *Id.* at 1450. For further discussion, *see generally*, CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker.

[10] 52 U.S.C. §30118(a).

[11] 52 U.S.C. §30118(b)(2)(C).

[12] 558 U.S. 310 (2010). *See also* Federal Election Comm'n v. Beaumont, 539 U.S. 146 (2003) (determining that limits on contributions are more clearly justified under the First Amendment than limits on expenditures, and reaffirming the constitutionality of the prohibition on corporations making direct treasury contributions in connection with federal elections). For further discussion of *Citizens United*, *see* CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker, at 12-15.

[13] 52 U.S.C. §30119(a).

termination of negotiations or completion of contract[14] performance, whichever is later.[15] FECA regulations further specify that the ban on contractor contributions applies to the assets of a partnership that is a federal contractor, but permits individual partners to make contributions from personal assets.[16] The ban also applies to the assets of individuals and sole proprietors who are federal contractors, which includes their business, personal, or other funds under their control.[17] The spouses of individuals and sole proprietors who are federal contractors and their employees, however, are permitted to make contributions from their personal funds. As with corporate direct or "treasury fund" contributions, FECA provides an exception to the ban on government contractor contributions. That is, the law permits candidates to accept contributions from PACs that are established and administered by corporations or labor unions contracting with the government.[18]

In 2015, a unanimous *en banc* U.S. Court of Appeals for the D.C. Circuit upheld the ban on campaign contributions by federal government contractors, limiting the application of its ruling to the ban on contractors making contributions to candidates, parties, and traditional PACs that make contributions to candidates and parties.[19] The 11-judge court held that the law comported with both the First Amendment and the equal protection component of the Fifth Amendment.[20] According to the court, the federal ban serves "sufficiently important" government interests by guarding against *quid pro quo* corruption and its appearance, and protecting merit-based administration.[21] The court further determined that the ban is closely drawn to the government's interests because it does not restrict contractors from engaging in other types of political engagement including fundraising or campaigning.[22] In January 2016, the Supreme Court declined to hear an appeal to the ruling.[23]

Generally, allegations of pay-to-play corruption involve charges that businesses or other entities will not be considered for government contracts or other governmental benefits unless those private entities make campaign contributions to the controlling political party or public officials. Pay-to-play can be viewed as a more subtle form of political corruption because it may involve anticipatory action, and potential *future* benefits and conduct, as opposed to any explicit, current *quid pro quo* agreement or understanding. Over the last several decades, it has seen more relevance at the state and local governmental level, rather than at the federal level, and is often facilitated by a complicit political culture within a governing jurisdiction.[24]

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[14] The term contract includes "[a] sole source, negotiated, or advertised procurement." 11 C.F.R. §115.1(c)(1).

[15] 11 C.F.R. §115.1(b).

[16] 11 C.F.R. §115.4.

[17] 11 C.F.R. §115.5.

[18] 52 U.S.C. §30119(b).

[19] *See* Wagner v. Federal Election Comm'n, 793 F.3d 1 (D.C. Cir. 2015), *cert. denied sub nom.* Miller v. Federal Election Comm'n, 136 S. Ct. 895 (2016).

[20] *See id.* at 32-33.

[21] *Id.* at 21-26. Since its landmark decision in *Buckley v. Valeo*, the Court has afforded contributions and expenditures different degrees of First Amendment protection. Under *Buckley*, contribution limits will be upheld if the government can demonstrate that they are a "closely drawn" means of achieving a "sufficiently important" governmental interest. This is the test the D.C. Circuit applied in *Wagner*. For more information, see CRS Legal Sidebar WSLG1335, *D.C. Circuit Upholds Ban on Campaign Contributions by Federal Contractors*, by L. Paige Whitaker.

[22] *See id.* at 25.

[23] *See* Miller v. Federal Election Comm'n, 136 S. Ct. 895 (2016).

[24] *See Wagner*, 793 F.3d at 26-31, and the Federal Election Commission's Proposed Findings of Fact, J.A. 298-313.

There appear to be at least two factors contributing to the prevalence of allegations and instances of pay-to-play corruption at the state and local level, but not at the federal level. First, since 1940, federal contractors or those negotiating for federal contracts have been expressly prohibited from making campaign contributions to federal candidates, political parties, or campaign committees.[25] Although enactment of the 1940 law was in direct response to allegations of dunning contractors to contribute to the coffers of the controlling political party,[26] there have been relatively few instances of such corruption at the federal level since the original enactment of the prohibition. As the D.C. Circuit observed in its 2015 ruling:

> More recent evidence confirms that human nature has not changed since corrupt quid pro quos and other attacks on merit-based administration first spurred the development of the present legislative scheme. Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions because such contributions have been banned since 1940.[27]

In addition, in contrast to certain state contracting procedures, federal contracting requirements and regulations generally stress competitive selection of vendors, and attempt to protect the federal procurement and contracting process from political or partisan influences.[28]

Ban on Foreign National Contributions

FECA also prohibits candidates from accepting contributions, made directly or indirectly, from foreign nationals.[29] This prohibition includes all foreign citizens with the exception of those who have been admitted as lawful permanent residents of the United States (i.e., "green card" holders).[30] FECA regulations further specify that foreign nationals are prohibited from directing or participating in the decision-making process of entities involved in U.S. elections, including decisions regarding contributions.[31]

In a series of advisory opinions, the Federal Election Commission (FEC) has provided specific guidance for compliance with the prohibition on foreign nationals making contributions. For example, the FEC has found that a U.S. corporation that is a subsidiary of a foreign corporation

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[25] 52 U.S.C. §30119(a)(1). The prohibition was originally adopted in 1940 amendments to the Hatch Act, P.L. 76-753, §5(a), 54 Stat. 772 (1940).

[26] *See Wagner*, 793 F.3d at 18-19.

[27] *Id.* at 23.

[28] *See generally* archived CRS Report R40516, *Competition in Federal Contracting: Legal Overview*; archived CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*. When using "simplified acquisition procedures," for example, contract officers are instructed to "obtain supplies and services from the source whose offer is the most advantageous to the Government" (48 C.F.R. §13.104); when using sealed bidding, the contract is to be made with a responsible bidder whose bid is "most advantageous to the Government, considering only price and the price-related factors" (48 C.F.R. §14-.408-1(a)); and when using contracting by negotiation "cost or price" plays a "dominant role" in source selection, but other "tradeoff" factors, such as the risk of unsuccessful contract performance, may properly be weighed to determine "the best interest of the Government" in a contract (48 C.F.R. §§15.101, 15.101-1, 15.101-2, 15-304). Contracts may not be awarded on the basis of personal or political favoritism, and all potential contractors should be treated "with complete impartiality and with preferential treatment for none." (48 C.F.R. §§1.102-2(c)(3), 3.101-1): "Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.") General ethical standards in the executive branch similarly note that an executive official is to "act impartially and not give preferential treatment to any private organization or individual." (Executive Order 12674, April 12, 1989, §101(h); *see* 5 C.F.R. §2635.101(b)(8)).

[29] 52 U.S.C. §30121(a).

[30] 52 U.S.C. §30121(b)(2).

[31] 11 C.F.R. §110.20.

may establish a PAC that makes contributions to federal candidates as long as the foreign parent does not finance any contributions either directly or through a subsidiary, and no foreign national participates in PAC operations and decision making, including regarding contributions.[32] In 2012, the Supreme Court summarily affirmed a three-judge federal district court panel ruling that upheld the constitutionality of the prohibition on foreign nationals making campaign contributions.[33] The district court held that for the purposes of First Amendment analysis, the United States has a compelling interest in limiting foreign citizen participation in American democratic self-government, thereby preventing foreign influence over the U.S. political process.[34]

Disclosure Requirements

Under FECA, candidate campaign committees must register with the FEC[35] and comply with disclosure requirements. Such requirements include filing periodic reports that include the total amount of all contributions received, and the identity of any person who contributes more than $200 during a calendar year.[36] The Supreme Court has generally upheld the constitutionality of disclosure requirements as substantially related to the governmental interest of safeguarding the integrity of the electoral process by promoting transparency and accountability.[37]

Coordinated Communications Treated As Contributions

It is important to note that a communication—such as a political advertisement—that is made in "coordination" with a candidate's campaign or political party may be treated as an in-kind contribution.[38] Therefore, it may be subject to FECA's regulation of contributions, including limits.

The regulatory line between coordinated communications and independent expenditures is based on Supreme Court precedent. In various rulings, the Court has determined that the First Amendment does not allow any limits on expenditures that are made independently of a candidate or party.[39] According to the Court, the "constitutionally significant fact" of an independent expenditure is the absence of coordination between the candidate and the source of the expenditure.[40] Individuals, political parties, PACs, Super PACs, and other organizations can engage in unlimited independent expenditures. Furthermore, as a result of the Court's ruling in

[32] *See* Federal Election Commission Advisory Opinions (AOs) 2009-14; 2006-15; 2000-17; 1995-15; 1992-16; 1990-08; and 1985-03.

[33] *See* Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *summ. aff'd*, 132 S. Ct. 1087 (2012).

[34] *Id.* at 288. The court in *Bluman* did not ultimately decide which type of scrutiny to apply because the statute in dispute involves both the First Amendment and national security, as well as limits on both contributions and expenditures. Therefore, the court assumed for the sake of argument that it should apply a "strict scrutiny" analysis (which requires that a statute be narrowly tailored to serve a compelling governmental interest), and found that the prohibition at issue passed muster even under that level of scrutiny. *Id.* at 285.

[35] 52 U.S.C. §30103.

[36] 52 U.S.C. §30104.

[37] *See, e.g.*, *Buckley*, 424 U.S. at 68-84; *Citizens United*, 558 U.S. at 366-371; Doe v. Reed, 561 U.S. 186 (2010).

[38] 11 C.F.R. §109.21(b).

[39] *See Buckley*, 424 U.S. 1; Federal Election Comm'n v. National Conservative Political Action Committee (NCPAC), 479 U.S. 238 (1985)); Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n (Colorado I), 518 U.S. 604 (1996).

[40] *See Colorado I*, 518 U.S. at 617 (1996).

Citizens United, corporations and labor unions can also engage in unlimited independent expenditures from their own funds or "general treasuries."[41]

FECA regulations set forth detailed criteria establishing when a communication by an organization will be considered coordinated with a candidate or a party and thereby treated as a contribution.[42] The regulations include "content" and "conduct" standards. The "content" standard addresses the subject and timing of a communication, and does not require that a communication contain express advocacy (i.e., expressly advocating the election or defeat of a clearly identified candidate, using terms such as "vote for," "elect," or "vote against").[43] For example, an "electioneering communication," which is a type of issue advocacy, can satisfy the content standard. By definition, electioneering communications merely "refer" to federal office candidates; they do not require express advocacy.[44] The "conduct" standard addresses interactions between the organization paying for the communication and the relevant candidate or party. Among other factors, the "conduct" standard can be met if the communication is created at the "request or suggestion" of a candidate or party; the candidate or party is "materially involved" in decisions regarding the communication; or the communication is created after "substantial discussions" between the funder of the communication and the candidate or party.[45]

Prohibition on Conversion of Campaign Funds for Personal Use

In addition to the provisions relating to campaign contributions, FECA also prohibits the converting of campaign funds for personal use.[46] Specifically, the law considers a contribution to be converted to personal use if it is used to fulfill any commitment, obligation, or expense that would exist "irrespective" of the candidate's campaign or duties as a federal officeholder. Examples of such expenses include home mortgage, rent, or utility payments; clothing purchases; noncampaign-related car expenses; country club membership; vacation; household food; tuition payment; admission to sporting events, concerts, theater, or other entertainment not associated with a campaign; and health club fees.[47]

Criminal Penalties

While FECA also sets forth civil penalties,[48] this report addresses the law's criminal penalties. Generally, FECA provides that any person who knowingly and willfully commits a violation of any provision of FECA that involves the making, receiving, or reporting of any contribution, donation, or expenditure of $25,000 or more per calendar year shall be fined under Title 18 of the *United States Code*, or imprisoned for not more than five years, or both.[49] If the amount involved is $2,000 or more per calendar year, but is less than $25,000, the law provides for a fine under Title 18, or imprisonment for not more than one year, or both.[50] Notably, FECA provides specific

[41] *See Citizens United*, 558 U.S. 310 (2010).

[42] 11 C.F.R §109.21.

[43] 11 C.F.R. §109.21(c).

[44] 52 U.S.C. §30104(f)(3)); 11 C.F.R. §100.29.

[45] 11 C.F.R. §109.21(d).

[46] 52 U.S.C. §30114(b).

[47] 52 U.S.C. §30114(b)(2); 11 C.F.R. §113.1(g).

[48] 52 U.S.C. §30109(a),

[49] 52 U.S.C. §30109(d)(1)(A)(i).

[50] 52 U.S.C. §30109(d)(1)(A)(ii).

penalties for knowing and willful violations of the prohibition on contributions made by one person "in the name of another person,"[51] discussed above. In addition to the possibility of fines being imposed, for violations involving amounts over $10,000 but less than $25,000, violators could be subject to imprisonment for not more than two years; and for violations involving amounts over $25,000, imprisonment for not more than five years.[52]

In most instances, the U.S. Department of Justice initiates the prosecution of criminal violations of FECA, but the law also provides that the FEC may refer an apparent violation to the Justice Department for criminal prosecution under certain circumstances.[53] Specifically, if the FEC, by an affirmative vote of four, determines that there is probable cause to believe that a knowing and willful violation of FECA involving a contribution or expenditure aggregating over $2,000 during a calendar year, or a knowing and willful violation of the Presidential Election Campaign Fund Act[54] or the Presidential Primary Matching Payment Account Act[55] has or is about to occur, the FEC may refer the apparent violation to the U.S. Attorney General.[56] In such instances, the FEC is not required to attempt to correct or prevent such violation.

Campaign Contributions and Official Government Acts

In addition to the campaign finance laws discussed above, a number of federal political corruption provisions impose restrictions on the use of campaign contributions to influence official acts by elected officials, including bribery; illegal gratuities; extortion; and honest services fraud. These laws generally may penalize both the contributor for giving the unlawful contribution as well as the official for receiving the improper contribution.

The political corruption provisions discussed within this report have a number of overlapping elements and often arise within the same case of alleged corruption. Bribery is perhaps the best known of the political corruption crimes, barring an official from accepting a thing of value in exchange for being influenced in the performance of an official act.[57] Illegal gratuities are considered a lesser included offense of the bribery prohibition, barring an official from accepting a thing of value given because of an official act.[58] Extortion has been described as the other side of the coin from bribery, barring an official from demanding a contribution in exchange for an official act.[59] The scope of prohibition on honest services fraud has been limited to apply only to situations that involve bribery or kickbacks that result in public officials engaging in schemes that

[51] 52 U.S.C. §30122.

[52] 52 U.S.C. §30109(d)(1)(D).

[53] According to a media report, since 2008, the FEC has referred no campaign finance enforcement cases to the Department of Justice for criminal prosecution, and prior to that, such referrals were infrequent. *See* Kenneth P. Doyle, *FEC Rarely Votes to Refer Criminal Cases to Justice*, Bloomberg BNA Daily Report for Executives (July 29, 2015), http://www.bna.com/fec-rarely-votes-n17179934048.

[54] Codified at 26 U.S.C. §9001 *et seq*.

[55] Codified at 26 U.S.C. §9031 *et seq*.

[56] 52 U.S.C. §30109(a))(5)(C). For further discussion of FEC enforcement, see CRS Report R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, by R. Sam Garrett.

[57] 18 U.S.C. §201(b).

[58] 18 U.S.C. §201(c).

[59] 18 U.S.C. §1951; United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (citing Evans v. United States, 504 U.S. 255, 265-268 (1992)).

could be seen as depriving the public of honest services expected from government officials.[60] Because of the common elements of these crimes, a decision—like that announced by the Supreme Court in *McDonnell*—regarding what constitutes an official act by an elected official has broad implications in this area of law generally, even though that case deals with personal gifts to a public official rather than campaign contributions.

Bribery

Under federal law, public officials generally cannot receive private benefits in exchange for actions taken in their official capacity. Specifically, the federal bribery statute provides criminal penalties for any federal "public official" who "directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for ... being influenced in the performance of any official act."[61]

By definition, a bribe need not be only for the official "personally," but may be sought "for any other person or entity" (18 U.S.C. §201(b)(2)), such as, presumably, a campaign committee or political party.[62] Thus, campaign contributions to or for federal candidates could be the "thing of value" in a bribe, and can be implicated in a bribery scheme *if* the other elements of the crime of bribery are present.[63] Examination of campaign contributions as potential violations of the prohibition on bribery raises three relevant issues: whether the individual is a public official; whether there was a corrupt nature to the agreement (an explicit *quid pro quo* agreement); and what conduct constitutes an official act.

Candidates As "Public Officials"

Congress has defined "public officials" within the scope of the prohibition broadly to include a Member of Congress or Delegate; an officer or employee of the United States; or any person acting for or on behalf of the United States or any of its departments, agencies, or branches.[64] Notably, the prohibition also applies to individuals who have "been selected to be a public official," meaning any individual who has been nominated or appointed or officially informed of future nomination or appointment.[65] The statutory definitions do not expressly include candidates for public office, but may include Members-elect since the law covers Members of Congress "either before or after such official has qualified."

Campaign Contributions As *Quid Pro Quo* Arrangements

Unlike other criminal provisions that require simple criminal intent (an intent to commit the prohibited act), the federal prohibition on bribes requires a specific intent to be shown—that the transaction be "corrupt."[66] Thus, allegations of bribery must prove existence of some corrupt or

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[60] Skilling v. United States, 561 U.S. 358 (2010).

[61] 18 U.S.C. §201(b)(2)(A). The statute also prohibits, in a complementary manner, the corrupt *giving* or *offering* of something of value by anyone *to* the official in return for the official's being influenced in the performance of an official act. 18 U.S.C. §201(b)(1)(A).

[62] United States v. Kelly, 748 F.2d 691, 699, n.19 (D.C. Cir. 1984).

[63] United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); United States v. Terry, 707 F.3d 607 (6th Cir. 2013); McCormick v. United States, 500 U.S. 257, 272, 273 (1991).

[64] 18 U.S.C. §201(a)(1).

[65] 18 U.S.C. §201(a)(2).

[66] "Corruptly" engaging in the conduct "bespeaks a higher degree of criminal knowledge and purpose" than simple criminal intent (an intent to do the act). United States v. Brewster, 506 F.2d 62, 71 (D.C. Cir. 1974); United States v.

wrongful agreement or bargain, which is often described as a *quid pro quo*—something given in exchange for something received.[67] In order to meet this standard, the bribe must be shown to be the thing that is the "prime mover or producer of the official act" performed or agreed to be performed.[68] The fact that bribery requires such an agreement in advance is one reason why the Supreme Court has noted that bribery is among the least subtle and most blatant forms of public corruption.[69] While such an agreement must be present, it does not appear necessary that it be stated verbally or written. Otherwise, as noted by the U.S. Court of Appeals for the Ninth Circuit, public officials could escape liability "with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money."[70]

Identification of a *quid pro quo* or corrupt agreement in the context of campaign contributions depends on the specific details of the transaction. There must be evidence of some agreement directly linking the motivation for the official act to the contribution, but contributions made merely to create a favorable relationship with the donor without an express or implied agreement are not bribes.[71] In other words, a situation in which a donor contributes money to a public official's campaign and the official later makes an official act that is favorable to a donor does not provide sufficient evidence to constitute a *quid pro quo*.[72] However, if a public official were to indicate an intention to support legislation or policy in exchange for a campaign contribution to his or her political committee, the public official has been influenced to do the act in return for the campaign contribution, in violation of the bribery statute.[73]

Courts have recognized the significance of this element when examining contributions as potential bribes.[74] The nature of campaign contributions inherently implies a relationship between

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Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985), *cert. denied*, 471 U.S. 1139 (1985). The House report on the bribery provision recodified in 1962 described the word "corruptly" to mean "with wrongful or dishonest intent." H.Rept. 748, 87th Cong., 1st Sess. 18 (1961). The "corrupt" intent of the bribery provision requires a "specific intent" to be shown, as opposed to a simple *mens rea*. United States v. Strand, 574 F.2d 993, 995-996 (9th Cir. 1978).

[67] United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404 (1999); *Brewster*, 506 F.2d at 72; United States v. Arthur, 544 F.2d 730, 734, 735 (4th Cir. 1976); *Strand*, 574 F.2d 993; United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995).

[68] *Brewster*, 506 F.2d at 72, 82.

[69] *Buckley*, 424 U.S. at 27-28.

[70] United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992). As noted by the Court of Appeals for the Fourth Circuit in a case involving personal gifts (and not campaign contributions), "Direct proof of a corrupt intent is not necessary, and '[s]uch an intent may be established by circumstantial evidence.'" United States v. McDonnell, 792 F.3d 478, 518 (quoting United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998)), *vacated and remanded on other grounds*, 84 U.S.L.W. 4565 (2016).

[71] Campaign contributions made as so-called "goodwill" payments or with "some generalized hope or expectation of ultimate benefit on the part of the donor" do not constitute bribes under the statute. United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980); *Arthur*, 544 F.2d at 734, 735; United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993). Additionally, political contributions to entities such as a candidate's political campaign committee do not independently constitute bribes "even though many contributors hope that the official will act favorably because of their contributions." *Tomblin*, 46 F.3d at 1379.

[72] *Terry*, 707 F.3d at 615 ("Without anything more, a jury could not reasonably infer that a campaign contribution is a bribe solely because a public official accepts a contribution and later takes an action that benefits a donor.").

[73] *Brewster*, 506 F.2d 62; *Anderson*, 509 F.2d at 330. *See also Allen*, 10 F.3d at 411 ("[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe").

[74] *See Brewster*, 506 F.2d 62; *Anderson*, 509 F.2d at 330 (approving jury instructions in case challenging campaign contributions as bribes that "exonerated campaign contributions inspired by the recipient's general position of support on particular legislation.").

the donor and candidate in which the donor expects that the candidate will act in the donor's interests (either material or policy interests).[75] Without a corrupt bargain or *quid pro quo* arrangement, campaign contributions given to a candidate or official merely as support, or in appreciation for certain official positions or votes taken, as is the case for many or most campaign contributions, are not considered to be bribes. As one federal judge has explained, campaign contributions may be distinguished from bribes as a matter of reciprocity and resulting obligations.[76] Campaign contributions to candidates for public office are associated with some expectation of reciprocity—that the donor's interests will be represented favorably in the official's votes.[77] However, lawful campaign contributions, unlike bribes, "do not express or create overriding obligations."[78]

Performance of an "Official Act"

One of the required elements of the bribery statute is that a thing of value is received or sought in return for being influenced in an "official act." An "official act" is defined in the bribery statute to mean "[A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[79]

Although the term "official act" often is interpreted broadly to include any decisions and actions on governmental matters taken by an official within his official capacity, even if such duties are not prescribed by statute or regulation (such as those activities established by settled practice),[80] there generally must be some action affecting a governmental matter pending or to be brought before a government official. In the legislative branch context, an official act could encompass more than purely "legislative" acts such as voting on legislation, and could reach certain other so-called "representational" actions typically performed by a Member's office for constituents where some governmental or official matter is involved.[81] Thus, recommending the adoption or rejection of a particular official policy, or intervening on behalf of a private party before another public official or agency on an official governmental matter, most likely would involve "official acts."

Campaign contributors may often consider making contributions to secure an opportunity for access or a personal meeting with a public official, raising questions as to whether special access to and the meeting with a contributor by a public official, particularly an elected official, constitutes an "official act" prohibited by the bribery statute. As a general matter, merely meeting with a constituent or other private individual by the recipient public official likely would not

[75] *Brewster*, 506 F.2d at 73 n. 26 ("Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official."). *See also id*. at 81 ("No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.").

[76] Judge John T. Noonan, Jr., BRIBES, 621, 696-97 (Macmillan 1984).

[77] *Id*.

[78] *Id*. ("[T]here is no absolute obligation on the part of the contributor to recognize past work by the candidate, and there is no absolute obligation on the part of the candidate to do the work the contributor expects.")

[79] 18 U.S.C. §201(a)(3).

[80] *Note* H.Rept. 748 at 18; S.Rept. 2213, 87th Cong., 2d Session, 8 (1962); United States v. Birdsall, 233 U.S. 223, 231 (1914); United States v. Biaggi, 853 F.2d 89, 97-98 (2d Cir. 1988), *cert. denied*, 489 U.S.1052 (1989). *But see McDonnell*, 84 U.S.L.W. 4565.

[81] United States v. Biaggi, 853 F.2d at 97-98 (assisting a constituent before a state or local governmental unit); United States v. Jefferson, 674 F.3d 332 (4th Cir. 2012) (assisting constituent business before foreign government).

involve any specific decision, duty, or other official act.[82] The Department of Justice has explained in congressional testimony that "The courts that have addressed the issue have held that such access in exchange for political contributions is not an 'official act' that can provide the basis for a bribery or extortion prosecution."[83] In *United States v. Carpenter*, the court expressly found that "granting or denying a lobbyist access to present her views" to a legislator did not constitute an "official act" of the legislator;[84] and in *United States v. Sawyer*, the court found that "the desire to gain access, by itself," does not amount "to an intent to influence improperly the legislator's exercise of official duties."[85]

Being available for and showing deference toward contributors—particularly generous contributors—by offering special, more regular, or greater access for such contributors may be described as an unavoidable, even if unpleasant, reality in the world of political fundraising.[86] It has been described by one federal judge as a kind of "access" payment which is permitted in practice in our form of private funding of campaigns for elective office.[87] "Granting or denying access to an elected official's time based on levels of contributions," noted the court in *Carpenter*, appears to be conduct that should not be criminalized because it is, as expressed by the Supreme Court, "unavoidable so long as election campaigns are financed by private contributions," and has "long been thought to be well within the law."[88] The court in *Carpenter* noted specifically that "[e]lected officials must ration their time among those that seek access to them and they commonly consider campaign contributions when deciding how to ration their time."[89] While such explicit connections between contributions and personal access may offend Americans' sense of equal representation, fairness, and egalitarianism—and may also violate specific congressional ethics rules[90]—it appears that it has not been considered to rise to the type of corrupt bargain that involves an official act.

The question of whether particular "access," as well as arranging meetings with other public officials, would constitute official acts of a public official, or be outside of that realm for bribery and other public corruption statutes, was clarified by the Supreme Court in 2016. In *McDonnell v.*

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[82] *See Sun-Diamond*, 526 U.S.at 407-08; *McDonnell*, 84 U.S.L.W. 4565.

[83] Testimony of Attorney General Janet Reno, to the House Committee on the Judiciary, Hearings, 105th Cong., 1st Sess. at 32 (October 15, 1997) (hereinafter "Testimony of Attorney General").

[84] 961 F.2d 824, 827 (9th Cir. 1992).

[85] 85 F.3d 713,731 (4th Cir. 1996). *See also* Testimony of Attorney General (citing other cases); United States v. Rabbitt, 583 F.2d 1014, 1028 (4th Cir. 1978); United States v. Loftus, 992 F.2d 793, 796 (8th Cir. 1993).

[86] Noonan, BRIBES, at 689, 623-624.

[87] "Campaign contributions may be considered a subspecies of a larger class - access payments. 'I'm not paying for my congressman's vote,' the large contributor will say. 'I simply want to be sure he will listen to my side of the case.'.... [T]he access buyer is paying not only for attention but for favorable attention. The payment is close to what would be called a bribe if made to a judge; but access to and favorable attention by, a legislator has not generally been regarded in the same way as an approach to a judge. ...The hypotheticals show that a legislator is not in the position of a judge. The judge's office is modeled on the paradigm of the transcendent Judge of the Bible and a sharp line distinguishes him from the litigants before him. The legislator, on the contrary, is his constituent's *representative*.... A certain identity of interest is expected to exist between constituent and legislator ..." Noonan, BRIBES, at 689, 623-624.

[88] *Carpenter*, 961 F.2d at 827 (quoting *McCormick*, 500 U.S. at 272).

[89] *Carpenter*, 961 F.2d at 827.

[90] The Senate Select Committee on Ethics has ruled that although offering campaign contributors "special" access to policy discussions with the Senator "may violate no law or Senate rule, they nonetheless affect public confidence in the Senate" and that campaign contributions should not be solicited in a manner in which "special treatment" or "special access" is offered as incentives for such contributions. Senate Select Committee on Ethics, Interpretative Ruling No. 427, September 25, 1987.

United States,[91] the Court unanimously defined a more limited scope of enforcement for federal public corruption laws than had been advanced by federal law enforcement authorities. The Court vacated the conviction of former Virginia Governor Robert McDonnell, who a federal jury had found to have traded official favors for lavish personal gifts and loans from the maker of a dietary supplement who had sought, among other things, state testing of the supplement and inclusion of the supplement in the health insurance plan for state employees.[92] On appeal, the U.S. Court of Appeals for the Fourth Circuit found that the acts of the former governor that were at issue in the case constituted official acts under the relevant corruption statutes.[93] These acts included (1) setting up a meeting with state officials to look into state-sponsored drug trials at state higher educational facilities; (2) hosting a product launch for the supplement at the governor's mansion that sought to "encourag[e] universities to do research on the product"; and (3) sending emails "to push for state university research" on the supplement.[94] However, the Supreme Court held that these actions, which afforded the constituent access to certain state officials, absent other evidence of prohibited corrupt activity, were beyond the scope of the prohibition on trading personal favors for official acts under the bribery statute.[95] According to the Court, a meeting, event, or call itself could not meet the threshold of an official act for purposes of the bribery statute.[96] The Court also held that arranging meetings, hosting events, or calling other officials must be coupled with an effort to "pressure or advise another official on a pending matter" that would result in an official decision or action.[97] The Court explained that "official acts" must relate to formal exercises of governmental power; must be specific and focused (not merely broad generalities about policy); and must involve a decision or action by a public official, which may include using the official's position to exert pressure on or advise another official to take action.[98]

Illegal Gratuities

Federal law also prohibits illegal gratuities, which are included within the federal bribery statute as a lesser included offense.[99] The prohibition on illegal gratuities penalizes public officials who, other than as provided by law for the discharge of official duties, seek or accept something of value "personally for or because of any official act performed or to be performed by such official."[100] Notably, like the bribery statute, the offering or giving of an illegal gratuity to a public official is also prohibited, meaning that the statute regulates behavior both on the part of

[91] McDonnell v. United States, 84 U.S.L.W. 2565 (U.S. 2016).

[92] *Id.* Former Governor McDonnell had been convicted on charges of extortion and honest services fraud, which are specifically discussed in later sections of this report. *See* 18 U.S.C. §1951; 18 U.S.C. §1346. The underlying theory of the charges was that the former governor had accepted bribes from the constituent in exchange for promoting the dietary supplement, requiring the Court to determine whether the former governor had committed or agreed to commit an official act for the purposes of the bribery statute. *See McDonnell*, 84 U.S.L.W. 2565 at *21-*23.

[93] *See* United States v. McDonnell, 792 F.3d 478 (4th Cir. 2015), vacated and remanded, 84 U.S.L.W. 2565.

[94] *See id.* at 516-17.

[95] *McDonnell*, 84 U.S.L.W. 2565.

[96] *Id.* at *29.

[97] *Id.* at *39-*40.

[98] *Id.* at *41.

[99] *See* 18 U.S.C. §201(c); *Brewster*, 506 F.2d at 68-76.

[100] 18 U.S.C. §201(c)(1)(B). Although the statute originally read "for himself," technical amendments to the criminal code substituted the term "personally." P.L. 99-646, §46(f), (g), 100 Stat. 3601-04 (November 10, 1986). There is no indication of an intent to change the substance of the elements of the offense (as opposed to merely making the wording gender-neutral), and therefore in this report the terms "personally" and "for himself" are used interchangeably.

the donor and the recipient (the public official).[101] The issues under the illegal gratuities clause would involve whether there is the requisite intent—which is less than the corrupt intent required for bribery—and whether the thing of value offered or received is for that public official *personally*.

Lesser Intent Than Bribery

The prohibition on illegal gratuities closely resembles the prohibition on bribery but differs in the requisite intent of the parties. While bribery requires a corrupt intent, an illegal gratuity does not, meaning it does not require evidence of an express or implied *quid pro quo*.[102] That is, unlike bribes, there is no requirement to demonstrate an intent to influence or be influenced. A thing of value received even after the official act is performed, as a "thank you" or in appreciation for doing an act that would have been done in any event regardless of the donation, might still constitute an illegal gratuity. To be considered a bribe, on the other hand, the donation must be shown to be the "prime mover" influencing the act.[103]

The Supreme Court expanded on the distinction between the intent for bribery and the intent for illegal gratuities, explaining:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may have already determined to take), or for a past act that he has already taken.[104]

Although no specific illegal bargain, or "corrupt" intent, in receiving an illegal gratuity need be shown, there is a criminal intent required of an illegal gratuity which would distinguish this wrongful receipt of a payment from a mere gift unrelated to any official act, or from a lawful campaign contribution given to an elected public official "because of" his stand, vote, or position on an issue. The intent has been described by one court as the knowledge that one is being compensated or rewarded for a particular official act or acts:

> [U]nder the gratuity section, "otherwise than as provided by law ... for or because of any official act" carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, "with knowledge that the donor was paying him compensation for an official act ... evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient."[105]

Contributions for the Public Official *Personally*

The lower standard of intent for illegal gratuities may seem to imply a higher risk that a campaign contribution may violate the prohibition, because such a contribution may be given or accepted based on a donor's perception of the candidate's official acts. However, in the case of an

[101] *See* 18 U.S.C. §201(c)(1)(A).

[102] *Brewster*, 506 F.2d at 72; *Sun-Diamond*, 526 U.S. at 404 - 405.

[103] *Brewster*, 506 F.2d at 72, 82.

[104] *Sun-Diamond*, 526 U.S. at 404 - 405.

[105] *Brewster*, 506 F.2d at 81-82 (quoting from earlier, related Supreme Court decision in United States v. Brewster, 408 U.S. 501, 527 (1972)).

otherwise lawful campaign contribution given for or because of an official position, official vote, or other official act of a government officer, the donation or the receipt of such a campaign contribution generally is not considered to be an illegal gratuity. Such payments are not considered to have been received or sought with the requisite intent to compensate the public official *personally* for his acts, as they are not received by the official himself but rather by another entity or person for campaign or other similar political uses.[106]

Improper contributions to campaigns therefore are more likely to be scrutinized under campaign finance laws, as discussed earlier in this report. Generally, under federal campaign laws all federal candidates are required to have a principal campaign committee to which campaign contributions are given or transferred, and from which they are expended, under authority of the committees' treasurers, for campaign or other designated purposes.[107] Furthermore, as discussed earlier, federal law specifically prohibits candidates from converting campaign contributions to their own personal use.[108] Therefore, it may be difficult in the case of campaign contributions to candidate committees to show that the money donated was received by the official with the requisite criminal intent to be "personally" compensated or rewarded for or because of an official act. The U.S. Court of Appeals for the District of Columbia has confirmed that "[A] public official's acceptance of a thing of value unrelated to the performance of any official act and *all bona fide contributions directed to a lawfully conducted campaign committee or other person or entity are not prohibited* by 201(g) [now 201(c)]."[109]

If facts are developed, however, that contributions or payments directed to a third party or entity "for or because of" official acts done or to be done by a public official, were used or expended in a manner to financially enrich or financially benefit the official personally, then it might be argued that such funds were received personally even if originally directed to a third-party entity. Contributions to a committee or any third party, therefore, which are used, for example, to pay for personal living expenses of a public official, a personal car, or other personal expenses such as transportation, clothing, food, or the college tuition for one's child, might arguably be considered payments for the official personally.[110] In the *United States v. Brewster* case, the court found that the monies given ostensibly as campaign contributions were given by a lobbyist to a sham committee which was merely the "alter ego" of the Senator.[111] That committee did not report or keep records such as other political committees under the federal law at that time and the Senator freely drew funds from it for his own personal use.[112] Therefore, the campaign contributions could be considered illegal gratuities received by the Senator.[113]

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[106] *Brewster*, 506 F.2d at 77.

[107] 52 U.S.C. §30102(e); 52 U.S.C. §30102(a); 52 U.S.C. §30114.

[108] 52 U.S.C. §30114. *See* 11 C.F.R. Part 113 "Permitted and Prohibited Uses of Campaign Accounts," and *supra*, "Prohibition on Conversion of Campaign Funds For Personal Use."

[109] *Brewster*, 506 F.2d at 77 (emphasis added).

[110] *Brewster*, 506 F.2d at 69-70, 75-76; *see also* United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986) (payment made to third party on direction of official so that "money could not be linked to him").

[111] *Brewster*, 506 F.2d at 69-70, 75-76.

[112] *Id*.

[113] *Id*.

Extortion

Separate from, but related to the offenses of bribery and illegal gratuities, a federal law known as the Hobbs Act prohibits the interference with commerce by way of extortion.[114] While the bribery and illegal gratuity provisions prohibit public officials from seeking or accepting contributions related to official acts, extortion prohibits public officials from using their position to demand contributions. Extortion is defined as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, *or under color of official right*."[115] Federal courts have noted that the crime of extortion and the crime of bribery under federal law "are really different sides of the same coin," and that the intent requirements of the two federal offenses are parallel.[116]

Demands by elected public officials on private citizens for payments, such as for campaign contributions, even when the payments are to be made to third parties such as campaign committees, may fall within the extortion provisions when there is some wrongful use of one's official position to induce or coerce the contribution. As stated by one court, the Hobbs Act would "penalize those who, under the guise of requesting 'donations,' demand money in return for some act of official grace."[117]

Required *Quid Pro Quo*

The Supreme Court has found that elected officials who ask for *bona fide* campaign contributions would only violate this law when there is evidence of a specific *quid pro quo*, similar to the bribery statute. The Court noted in *McCormick v. United States,*[118] that the mere nearness in time of official acts by a recipient public official and campaign contributions from the beneficiaries of those acts does not evidence "extortion" under the law, and is an "unrealistic assessment" of the requirements of the crime, particularly in light of how "election campaigns are financed by private contributions and expenditures."[119] Rather, the Court found that the statute would be violated by a request from an elected official to a member of the public for a voluntary campaign contribution "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," where the "official asserts that his official conduct will be controlled by the terms of the promise or undertaking."[120] The Court explained:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those

[114] 18 U.S.C. §1951.

[115] 18 U.S.C. §1951(b)(2) (emphasis added).

[116] United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (citing Evans v. United States, 504 U.S. 255, 265-268 (1992)).

[117] United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

[118] 500 U.S. 257 (1991).

[119] *McCormick*, 500 U.S. at 272.

[120] *Id.* at 273.

> beneficiaries, is an unreal assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.[121]

In a similar vein as the bribery provision, the making of campaign contributions, either on one's own initiative or in response to a request from an official or the official's campaign, with the mere hope or expectation that one might be treated favorably in the future because of one's generosity and support in making such campaign contributions, does not provide the necessary *quid pro quo* or corrupt character for an extortion charge:

> ... [T]he explicitness requirement serves to distinguish between contributions that are given or received with the "anticipation" of official action and contributions that are given or received in exchange for a "promise" of official action. ... When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond "anticipation" and into an arrangement that the Hobbs Act forbids. This understanding need not be verbally explicit. The jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo. ...[T]he explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous.[122]

The U.S. Court of Appeals for the Seventh Circuit, upholding certain extortion convictions of former Illinois Governor Rod Blagojevich under the Hobbs Act, noted that the *quid pro quo* required for an extortion with regard to payments or contributions to a politician does not have to be "demanded explicitly" because the "statute does not have a magic words requirement."[123] The court noted that "[f]ew politicians say, on or off the record, 'I will exchange official act X or payment Y'" and that non-verbal understandings "can amount to extortion under the Hobbs Act."[124]

Honest Services Fraud

Corruption in the political process is also subject to prohibitions under the federal wire and mail fraud statutes. These statutes proscribe schemes to defraud that are carried out using wire communications or the mail.[125] After a 1987 Supreme Court decision limited the wire and mail fraud laws only to schemes to deprive someone of *tangible* benefits,[126] Congress amended the law in 1988 to add specifically that a "scheme or artifice to defraud" may include a scheme to deprive another of the "intangible right of honest services."[127] This provision has been commonly referred to as the prohibition on honest services fraud.

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[121] *Id.* at 272.

[122] *Carpenter*, 961 F.2d at 827.

[123] United States v. Blagojevich, 794 F.3d 729, 738 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 1491 (2016).

[124] *Id.* at 738. "Much of Blagojevich's appellate presentation assumes that extortion can violate the Hobbs Act only if a *quid pro* quo is demanded explicitly, but the statute does not have a magic words requirement. ... 'Nudge, nudge, wink, wink, you know what I mean' can amount to extortion under the Hobbs Act, just as it can furnish the gist of a Monty Python sketch." *Id.*

[125] 18 U.S.C. §§1341, 1343.

[126] McNally v. United States, 483 U.S. 350 (1987).

[127] *See now* 18 U.S.C. §1346. P.L. 100-690, §7603, 102 Stat. 4181 (1988).

The honest services fraud provision was initially unclear in scope, however. Generally, it might have been applied to public officials who participate in any scheme or activity which could be seen as depriving the public of the honest, unbiased services that the public should receive from their government officials. As such, it became a common charge in a wide range of public corruption cases by federal prosecutors, particularly as these federal prosecutors targeted alleged corruption at the state and local level.[128] In 2010, though, the Supreme Court clarified application of the provision while narrowing its scope in *Skilling v. United States*.[129] The Court upheld the statute, finding that it was not unconstitutionally vague, by narrowing its application to schemes in which there is shown to involve either bribery or kickbacks.[130]

More recent consideration of honest services fraud in courts has clarified its application related to bribery cases. For example, a federal court has held that the government does not have to prove an "explicit" *quid pro quo* bribery scheme (when the thing of value transferred or offered is not a campaign contribution), but rather may prove such intent as "inferred" from the evidence.[131] In 2016, the Supreme Court reaffirmed the required link between bribery and honest services fraud in the case of former Virginia Governor Robert McDonnell (discussed earlier in this report)—who had been charged, in part, under the honest services fraud statute. The Court applied precedents under the bribery statute, and used the express bribery statutory definition, to determine if acts engaged in by the public official should be considered "official acts" of that public official.[132]

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[128] For a general and detailed discussion of the honest services fraud provision, see CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle.

[129] 561 U.S. 358 (2010).

[130] Going beyond bribery and kickbacks traditionally prosecuted under honest services fraud provisions, the Court noted, "would raise the due process concerns underlying the vagueness doctrine." *Id*. at 408. The Court employed the doctrine of constitutional avoidance, which calls for courts to avoid deciding constitutional questions by "adopting a limiting interpretation if such a construction is fairly possible." *Id.* at 406 (internal quotations and citations omitted).

[131] United States v. Ring, 768 F.Supp. 2d 302, 305 (D.D.C. 2011). Furthermore, the bribery scheme does not need to be successful, nor does it require proof that a public official has taken part in the scheme, rather only that a scheme to defraud using bribery existed to attempt to influence a public official, and that the defendant joined in that scheme. *Id*. at 307-308.

[132] *McDonnell*, 84 U.S.L.W. 4565 at *21-*23.

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