

# Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s

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## INTRODUCTION

A newly elected governor establishes a campaign in support of a ballot initiative to create a state lottery.<sup>1</sup> A wealthy supporter of the governor's opponent in the prior election wishes to curry favor with the new administration.<sup>2</sup> As the CEO of a large healthcare services provider, he also wishes to retain his company's seat on the state's commission for licensing new healthcare facilities.<sup>3</sup> The supporter decides to make a large financial donation to the new governor's lottery campaign.<sup>4</sup> The governor indicates to his aide that he knows the supporter wants to keep his seat.<sup>5</sup> A week later, the governor duly re-appoints the contributor to the commission.<sup>6</sup>

Were the governor's actions corrupt, unethical, or an example of "politics as usual"? One can easily see how this situation could be viewed as any of the above. But should such actions be illegal? The United States Court of Appeals for the Eleventh Circuit believed they should, affirming the conviction of former Alabama Governor Don Siegelman for bribery, honest services mail fraud, and conspiracy for performing the exact actions described above.<sup>7</sup> The Eleventh Circuit

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1. See *United States v. Siegelman*, 561 F.3d 1215, 1220–22 (11th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 3542 (2010).

2. *Id.*

3. *Id.*

4. *Id.* at 1220–21.

5. *Id.* at 1220.

6. *Id.* at 1221–22.

7. *Id.* at 1245.

reasoned that even without proof of an actual agreement or conversation between Governor Siegelman and HealthSouth CEO Richard Scrushy, the jury could infer a direct agreement from their words and actions.<sup>8</sup> It was enough, according to the court, that Governor Siegelman took the payment knowing that it had been made in the hopes that he would perform an official act to benefit Scrushy.<sup>9</sup>

But is this the correct standard for determining whether a campaign donation crosses the line to bribery or extortion? A line of federal cases from the last twenty years strongly signals that it is not. Instead, there must be an explicit quid pro quo agreement between a contributor and public official for a campaign donation to be illegal either under the bribery statute<sup>10</sup> or the Hobbs Act, which bans extortion by public officials.<sup>11</sup> The Supreme Court first set this standard in *McCormick v. United States*,<sup>12</sup> holding that campaign donations to a public official would cross the line into illegal bribery or extortion only if made in return for an explicit quid pro quo agreement from an official to perform or not perform a specific act.<sup>13</sup>

Only a year later, however, the Supreme Court weighed in on another case of Hobbs Act extortion by a public official in *Evans v. United States*.<sup>14</sup> The *Evans* court determined that in such a case of extortion, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”<sup>15</sup> The Court did not indicate, however, whether *Evans* was to be treated as a campaign contribution case, as opposed to a non-campaign case simply dealing with a bribe to a public official, or whether the holding in *Evans* modified *McCormick*’s holding in any sense.<sup>16</sup>

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8. *Id.* at 1226.

9. *See id.* “The ‘Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.’” *Id.* (quoting *United States v. Evans*, 504 U.S. 255, 268 (1992)).

10. 18 U.S.C. § 666 (2006).

11. 18 U.S.C. § 1951.

12. 500 U.S. 257 (1991).

13. *Id.* at 273.

14. 504 U.S. 255 (1992).

15. *Id.* at 268.

16. *See infra* notes 55, 115–16.

Since *Evans*, three Circuits—the Second,<sup>17</sup> Sixth,<sup>18</sup> and Ninth<sup>19</sup>—have determined that *McCormick* and *Evans* established different standards, with *McCormick* governing campaign contribution cases and *Evans* governing any other instances of public officials receiving bribes. Two other Circuits—the Third<sup>20</sup> and Seventh<sup>21</sup>—have indicated that they will hold *McCormick* to be the sole standard for campaign contribution cases in the future. The Eleventh Circuit stands alone in trying to reconcile *McCormick* and *Evans* in the campaign context in *United States v. Siegelman*.<sup>22</sup>

The Eleventh Circuit's decision is highly questionable on several grounds. The court attempts to reconcile *McCormick* and *Evans* by reading language into *Evans* that is not present.<sup>23</sup> The court also boldly states that in some instances, the word “explicit,” as applied to a quid pro quo agreement in *McCormick*, can actually mean the exact opposite, “implicit.”<sup>24</sup> On broader public policy grounds, the Eleventh Circuit's holding could have the effect of chilling political speech and allowing prosecutorial discretion to be wielded in a partisan manner.<sup>25</sup> For these reasons, until the Supreme Court clarifies the proper relationship between *McCormick* and *Evans*, the bright-line rule established by *McCormick* should remain as the sole standard for campaign contribution cases.

Part I of this Note examines the history of the explicit quid pro quo requirement, including: (1) the passage of the Hobbs Act; (2) the early cases considering extortion under the color of official right; (3) the Supreme Court decisions in *McCormick* and *Evans*; and (4) the ways in which the various Circuits have construed the different standards established by these cases. Part II of this Note focuses specifically on the Eleventh Circuit's decision in *Siegelman* and analyzes why this decision is problematic on doctrinal grounds.<sup>26</sup> Part

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17. *United States v. Ganim*, 510 F.3d 134, 142–44 (2d Cir. 2007) (Sotomayor, J.).

18. *United States v. Abbey*, 560 F.3d 513, 516–19 (6th Cir. 2009).

19. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936–38 (9th Cir. 2009).

20. *United States v. Antico*, 275 F.3d 245, 257 (3d Cir. 2001).

21. *United States v. Allen*, 10 F.3d 405, 411–12 (7th Cir. 1993).

22. 561 F.3d 1215 (11th Cir. 2009).

23. *See infra* notes 113–16.

24. *See infra* notes 67, 127–30.

25. *See infra* notes 138–41.

26. This Note will not discuss, however, the serious allegations of prosecutorial

III of this Note proposes that *McCormick* and *Evans* should remain as separate standards governing different contexts, because the Eleventh Circuit's decision could have dire consequences for candidates and elections.

## I. HISTORY

### A. *The Evolution of the Quid Pro Quo Requirement*

Congress adopted the Hobbs Act in 1946,<sup>27</sup> which prohibited extortion affecting interstate commerce.<sup>28</sup> The initial intent of this legislation was to curtail labor racketeering activities<sup>29</sup> rather than the acceptance of bribes by public officials.<sup>30</sup> In 1972, however, the

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misconduct and political motives raised in *Siegelman*, including the fact that the original United States Attorney assigned to the case was the wife of Governor Siegelman's election opponent, initially refusing to recuse herself from the case, and the question of possible improper communication between her office and former White House advisor Karl Rove. For summaries of these allegations, see *Allegations of Selective Prosecution: The Erosion of Public Confidence in our Federal Justice System: Joint Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007); James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARV. L. & POL'Y REV. 237, 249–50 (2008); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 385–87 (2009); see also *60 Minutes: Did Ex-Alabama Governor Get a Raw Deal?* (CBS television broadcast Feb. 24, 2008), available at <http://www.cbsnews.com/stories/2008/02/21/60minutes/main3859830.shtml>.

27. 18 U.S.C. § 1951 (2006).

28. The statute defines “extortion” 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.” *Id.* § 1951(b)(2).

29. The Hobbs Act replaced the Anti-Racketeering Act of 1934, which contained an exception for “the payment of wages by a bona-fide employer to a bona-fide employee” from charges of racketeering. Ch. 569, 48 Stat. 979, 980 (1934). The Supreme Court held that this phrase would remove union activity by an employee from the scope of the act—in this particular case, union members who demanded additional fees from owners and drivers of trucks entering New York City for the union members to unload their trucks. See *United States v. Local 807 Int'l Bhd. of Teamsters*, 315 U.S. 521, 535 (1942). The subsequent debate over the Hobbs Act revealed that Congress intended “to shut off the possibility opened up by the *Local 807* case, that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services.” *United States v. Enmons*, 410 U.S. 396, 403 (1973); see also 91 CONG. REC. 11,900 (1945) (statement of Rep. Hancock) (“This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce.”).

30. Medrith Lee Hager, Note, *The Hobbs Act: Maintaining the Distinction Between a*

United States Court of Appeals for the Third Circuit held that the Hobbs Act applied to public officials for government corruption.<sup>31</sup> The court determined that a charge of extortion did not require a specific coercive action.<sup>32</sup> Instead, the court defined extortion “under color of official right” as the “wrongful taking by a public officer of money not due him or his office.”<sup>33</sup>

Following this decision, a number of circuits held that in order to prevent all donations or gifts to public officials from coming under the scope of Hobbs Act extortion, the government must prove that the official received money in exchange “for *specific* promises to do or refrain from doing *specific* things.”<sup>34</sup> The Fifth Circuit first explicitly described this requirement as a quid pro quo in *United States v. Dozier*.<sup>35</sup> The court rejected the argument that a conviction for such agreements would punish the legal solicitation of campaign donations and maintained that the courts needed to overlook attempts by politicians to abuse the fundraising system.<sup>36</sup> The Sixth<sup>37</sup> and the

*Bribe and a Gift*, 83 KY. L.J. 197, 197–98 (1995).

31. See *United States v. Kenny*, 462 F.2d 1205, 1228–29 (2d Cir. 1972).

32. *Id.* at 1229.

33. *Id.* Extortion under color of official right can also be defined as “the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action.” James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1696 (1993).

34. *United States v. Bibby*, 752 F.2d 1116, 1127 n.1 (6th Cir. 1985); *United States v. Haimowitz*, 725 F.2d 1561, 1573 (11th Cir. 1984); *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982).

35. 672 F.2d at 537. Dozier, the onetime Commissioner of Agriculture in Louisiana, had been convicted under the Hobbs Act for soliciting bribes from contributors with interests related to the Louisiana Department of Agriculture. See *id.* at 535.

36. See *id.* at 537 (“Our need to avoid hampering honest candidates who must solicit funds from prospective supporters does not require that the courts abandon this necessary, if troublesome, realm of political maneuver to those who would abuse its opportunities.”). The Fifth Circuit ruled that it could rely on its own discretion to differentiate between legal campaign donations and extortionate activity, defining the latter as involving a payoff or a quid pro quo:

A moment’s reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

*Id.* The court held that because the public official in this case had made the performance or non-performance of his official activities contingent upon the payment of money, he had committed extortion under color of official right. See *id.* at 540.

Eleventh Circuits<sup>38</sup> both followed the Fifth Circuit's requirement shortly thereafter, and held that the government must prove the existence of a quid pro quo to avoid convicting public officials or contributors over legal campaign donations.<sup>39</sup> The Second<sup>40</sup> and Seventh<sup>41</sup> Circuits, however, rejected such a need for a quid pro quo agreement between officials and contributors.

#### B. McCormick v. United States

To resolve this split, the Supreme Court considered whether proof of the existence of a quid pro quo agreement is required for conviction under the Hobbs Act in *McCormick v. United States*.<sup>42</sup> Robert L. McCormick was a member of the West Virginia House of Delegates, who sponsored legislation allowing foreign medical

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At the very least, elected officials are, and have been, on notice that any public officer, elected or otherwise, who makes performance (or non-performance) of an official act contingent upon payment of a fee—whether or not the fee actually is paid or the act actually performed—is guilty of extortion “under color of official right.”

*Id.*

37. *Bibby*, 752 F.2d at 1116. The Sixth Circuit affirmed the Hobbs Act conviction of a Tennessee state senator for receiving payments characterized as campaign contributions from two business associates in return for his assistance in awarding state computer contracts to a particular company. *See id.* at 1119.

38. *Haimowitz*, 725 F.2d at 1561. The court reversed the extortion conviction of a Florida state senator accused of taking a bribe in the form of a campaign contribution to help an unqualified applicant obtain a liquor license. *See id.* at 1564. Citing *Dozier*, the court held that the senator could not be convicted of Hobbs Act extortion if there was no proof that his demands for a contribution were accompanied by a promise “to perform some act of official grace.” *Id.* at 1573.

39. *Bibby*, 752 F.2d at 1127 n.1. The court noted that if the rule were applied literally, “any political contribution could conceivably provide the basis for a Hobbs Act charge.” *Id.* Instead, the government must show that the official made a specific promise to perform a specific act in exchange for money—“[i]n other words, there must be a *quid pro quo*.” *Id.* In *Haimowitz*, the conviction of the state senator was overturned specifically because there was no quid pro quo. 725 F.2d at 1573.

40. *United States v. Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975). The court found that while a quid pro quo may be forthcoming in an extortion case, it is not an essential element of the crime. *See id.* at 1098, 1100. What mattered is that the payments were motivated by the recipient's office. *Id.* at 1100.

41. *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987). The Seventh Circuit considered the act of receiving payments or assistance to be extortion “if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe.” *Id.* at 311.

42. 500 U.S. 257 (1991).

students and doctors to earn licenses to practice in the state prior to taking the state licensing exams in return for a campaign donation from the doctors' organization.<sup>43</sup> As a result, McCormick was indicted by a federal grand jury for "five counts of violating the Hobbs Act, by extorting payments under color of official right, and with one count of filing a false income tax return."<sup>44</sup> The Fourth Circuit affirmed the District Court, rejecting McCormick's argument that the conviction of an elected official under the Hobbs Act required proof of a quid pro quo.<sup>45</sup>

The Supreme Court reversed, holding instead that political contributions taken under color of official right would only be vulnerable to Hobbs Act prosecution if the payments were made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.<sup>46</sup> In these situations, the official asserts that his or her official conduct would be controlled by the terms of the promise or undertaking.<sup>47</sup>

The Court noted that supporting legislation to benefit the district is the everyday business of a legislator and that candidates must constantly solicit money for campaigns.<sup>48</sup> It would be unrealistic, according to the Court, to hold that legislators commit extortion when they act for the benefit of constituents, shortly before or after

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43. *See id.* at 259–61. To alleviate the problem of doctor shortages in rural areas, West Virginia allowed foreign medical students to practice medicine under temporary licenses prior to taking state licensing exams, a program McCormick strongly supported. *Id.* at 259. In response to an attempt in the early 1980s to end this program, a group of temporarily licensed doctors hired a lobbyist to work for legislation to extend the expiration date of the program, while McCormick sponsored a bill in the House of Delegates in 1984 to extend the program for another year. *Id.* at 259–60. During his 1984 reelection campaign, McCormick informed the lobbyist that his campaign was expensive "and that he had not heard anything from the foreign doctors." *Id.* at 260. The lobbyist subsequently arranged for several thousand dollars worth of payments to McCormick, which were neither listed as campaign contributions nor reported on McCormick's 1984 federal income tax return. *Id.*

44. *Id.* at 261.

45. *United States v. McCormick*, 896 F.2d 61, 66 (4th Cir. 1990). The circuit court instead interpreted the statute to not require "such a showing where the parties never intended the payments to be 'legitimate' campaign contributions." *McCormick*, 500 U.S. at 266.

46. *McCormick*, 500 U.S. at 273.

47. *Id.*

48. *See id.* at 272 ("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.").

soliciting or receiving contributions from those beneficiaries.<sup>49</sup> To do so “would open to prosecution not only [political] conduct . . . long . . . 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.”<sup>50</sup> This holding, however, was expressly limited to cases involving campaign donations.<sup>51</sup>

### C. *Evans v. United States*

Only a year later, the Supreme Court again considered the question of the requirements for conviction under the Hobbs Act in *Evans v. United States*.<sup>52</sup> John Evans was an elected member of the Board of Commissioners of DeKalb County in Georgia who took a bribe from an undercover Federal Bureau of Investigation (FBI) agent.<sup>53</sup> The agent posed as a real estate developer who wanted Evans’ assistance in rezoning a tract of land for the developer’s benefit.<sup>54</sup>

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49. *Id.*

50. *Id.* This holding fits with long-standing Supreme Court precedent of protecting such speech or conduct within the campaign context on First Amendment grounds. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 895 (2010) (“As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.”); *id.* at 898 (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”); *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”).

51. 500 U.S. at 274 n.10 (“[W]e do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value.”). In a concurring opinion, Justice Scalia agreed that this standard would not apply to “campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action.” *Id.* at 276 (Scalia, J., concurring). However, he disagreed with the Court on the proper definition of “under color of official right,” arguing that it connotes a sense of entitlement rather than simply “on account of one’s office.” *Id.* at 278–79.

52. 504 U.S. 255 (1992).

53. *Id.* at 257.

54. *Id.* After several prior meetings, Evans met with the agent again in July of 1986 to inform the agent that he needed money for his re-election campaign and present the agent with a list of his expenses. *See United States v. Evans*, 910 F.2d 790, 793 (11th Cir. 1990). Evans did not explicitly promise to perform a specific act for the agent, but stated, “I’ve promised to help you. I’m gonna work to do that.” *Id.* at 794. On July 25, the agent gave Evans \$7,000 in cash



As a result of his acceptance of this bribe,<sup>55</sup> the United States District Court for the Northern District of Georgia convicted Evans of Hobbs Act extortion and failure to report income.<sup>56</sup> The Eleventh Circuit affirmed, holding that passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation, and the public official need not take any specific affirmative action to induce the offering of the benefit.<sup>57</sup> The Supreme Court affirmed on the inducement issue, holding that to convict a public official under the Hobbs Act, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”<sup>58</sup>

In addition to the inducement claim, Evans challenged the jury instructions from his trial on the grounds that they did not “properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution.”<sup>59</sup> The Court rejected

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and a \$1,000 check for his campaign. *Evans*, 504 U.S. at 257. Evans reported the campaign donation on his disclosure form, but did not report the cash on his federal income tax return. *Id.*

55. The Court never specifically indicated whether or not the bribe in question included the reported campaign contribution. In a dissenting opinion, Justice Thomas stated that the holding in *Evans* extended *McCormick*’s quid pro quo requirement to all Hobbs Act extortion cases. 504 U.S. at 286 (Thomas, J., dissenting). This statement implies that *Evans*, unlike *McCormick*, was not specifically considered to be a campaign contribution case. Peter D. Hardy, Note, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 U. MICH. J.L. REFORM 409, 427 (1995).

56. *Evans*, 504 U.S. at 257–58.

57. *Id.* at 258.

58. *Id.* at 268. The Court reasoned that an act of affirmative inducement was not necessary, because the public office itself provided the coercive element for inducing a bribe. *Id.* at 266. Therefore, “the wrongful acceptance of a bribe [by a public official] establishes all the inducement that the statute requires.” *Id.* Although this case dealt with a conviction for extortion, the Court refers to public officials taking bribes throughout the opinion, observing that under the common law, “[e]xtortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe.’” *Id.* at 260. Furthermore, “[i]f the [Hobbs] Act is read in full, the distinction between bribery and extortion becomes unnecessary where public officials are involved.” *Id.* at 267 n.18 (quoting Herbert J. Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1, 14 (1971)). *Evans* thus brings cases of public officials receiving bribes under the Hobbs Act standards, something Scalia predicted could happen in his concurrence in *McCormick*. See 500 U.S. 257, 278 (1991) (Scalia, J., concurring) (“It is acceptance of the assumption that ‘under color of official right’ means ‘on account of one’s office’ that brings bribery cases within the statute’s reach . . . .”); see also Lindgren, *supra* note 33, at 1718 (arguing that extortion under color of official right and bribery were treated as similar offenses under the common law).

59. *Evans*, 504 U.S. at 268. The relevant jury instructions stated that:

this criticism, specifically noting that the jury instruction satisfied the quid pro quo requirement of *McCormick*, and that the public official completes the offense at the time when he or she receives payment in return for agreeing to perform specific official acts.<sup>60</sup> Fulfillment of the quid pro quo by the public official was not required for the Hobbs Act conviction.<sup>61</sup> *Evans*, therefore, left intact the explicit quid pro quo standard for campaign contribution cases from *McCormick*.<sup>62</sup>

Justice Kennedy's concurring opinion, however, injected some uncertainty into the debate over how *Evans* and *McCormick* fit together.<sup>63</sup> In his opinion, Justice Kennedy addressed the quid pro quo issue "more directly" than the majority.<sup>64</sup> Kennedy defined the

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[T]he acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

*Id.* at 258.

60. *Id.* at 268.

61. *Id.*

62. *Id.* "We reject petitioner's criticism of the [jury] instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick v. United States* . . ." *Id.* Justice Kennedy's concurrence also notes that the majority opinion upheld the quid pro quo requirement:

Although the Court appears to accept the requirement of a *quid pro quo* as an alternative rationale, in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question.

*Id.* at 272–73 (Kennedy, J., concurring); see also Steven C. Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials*, 31 TULSA L.J. 781, 794 (1996) ("[T]he Court expressly stated what the government must show to satisfy the Court's *quid pro quo* element."); Hager, *supra* note 30, at 214–15 ("Thus, after *Evans*, four Justices believed that the government must demonstrate a quid pro quo in all cases involving extortion under color of official right, while the opinion joined by four others included language which could arguably support such an inference.")

63. Hager, *supra* note 30, at 215.

64. *Id.* at 214. Although Kennedy's opinion was a concurrence in a 6–3 decision, many courts since *Evans* have relied on Kennedy's discussion of the quid pro quo issue in determining how to distinguish the opinion from *McCormick*. See, e.g., *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (citing Kennedy's concurrence in *Evans* as a "gloss" on the *McCormick* Court's use of the word "explicit").

quid pro quo in this context as a public official leading a payor to believe that, absent payment, the official will abuse his “official right” to the payor’s detriment, or will give the payor less favorable treatment if the quid pro quo is not satisfied.<sup>65</sup> However, according to Kennedy, “the [public] official and the payor need not state the *quid pro quo* in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”<sup>66</sup> The circuits that have confronted public official extortion cases since *Evans*, therefore, have been left to reconcile the requirement of explicitness in a quid pro quo agreement from *McCormick* with Justice Kennedy’s argument that a quid pro quo need not be express.<sup>67</sup>

#### *D. Majority View—McCormick and Evans Establish Different Standards*

Following *Evans*, the majority of circuits have not attempted to reconcile directly *Evans* and *McCormick*, but have held that the two cases each apply to different situations, with *Evans* as the standard for non-campaign contribution cases and *McCormick* as the standard

65. *Evans*, 504 U.S. at 274 (Kennedy, J., concurring).

66. *Id.* Inducement from a public official would be criminal regardless of whether it is express or “implied from his words and actions, so long as he intends it to be so and the payor so interprets it.” *Id.*

67. The difference between “explicit” and “express” is not entirely clear. In one of the earliest federal cases of Hobbs Act extortion following *Evans*, the Sixth Circuit tried to reconcile the two standards and determined that “*Evans* instructed that by ‘explicit’ *McCormick* did not mean ‘express.’” *Blandford*, 33 F.3d at 696. The Court distinguished the two words by their respective definitions in Black’s Law Dictionary, which defined “explicit” as “[n]ot obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding.” BLACK’S LAW DICTIONARY 579 (6th ed. 1990). “Express,” however, was defined as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

*Id.* at 580 (citations omitted). The Eleventh Circuit later relied upon the distinction in *Blandford* in determining that *McCormick* did not require quid pro quo agreements to be express. See *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 3542 (2010). However, the most recent edition of Black’s Law Dictionary does not even define “explicit” as a separate term, but only defines “express” as “clearly and unmistakably communicated; directly stated.” BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

for campaign contribution cases.<sup>68</sup> The Seventh Circuit first held *McCormick* as the proper standard for a campaign contribution case in *United States v. Allen*.<sup>69</sup> When it discussed *McCormick*, the court noted that “absent some fairly explicit language otherwise, accepting 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.”<sup>70</sup> Vague expectations of a future benefit would not be sufficient to make a campaign contribution an illegal bribe.<sup>71</sup>

While not specifically ruling on a *McCormick* issue, the Third Circuit nonetheless also indicated it would hold *McCormick* as the sole standard for campaign contribution cases.<sup>72</sup> In *United States v. Antico*, the court declined to extend the holding of *McCormick* to a non-campaign contribution case.<sup>73</sup> The court noted that the Supreme Court had expressly limited its holding in *McCormick* to the campaign contribution cases, and indicated that the *Evans* standard applies only in the non-campaign contribution context.<sup>74</sup>

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68. Yarbrough, *supra* note 62, at 796.

69. 10 F.3d 405, 411 (7th Cir. 1993). The Seventh Circuit affirmed the conviction of a deputy sheriff and former city councilman in Gary, Indiana, who solicited campaign contributions for the Lake County Sheriff’s re-election campaign from two undercover FBI agents in return for protecting an illegal gambling establishment set up by the FBI. *Id.* at 407–10.

70. *Id.* at 411. The Seventh Circuit ultimately declined to apply *McCormick* to this case, as Allen had not been convicted of Hobbs Act extortion but of racketeering, which did not require the government to prove bribery. *Id.* at 412. The court did note, however, that extortion “under color of official right” and bribery were simply “different sides of the same coin,” with minimal differences. *Id.* at 411.

71. *Id.* Moreover, according to the court, “[i]t would be naive to suppose that contributors do not expect some benefit—support for favorable legislation, for example—for their contributions.” *Id.* Although the Seventh Circuit acknowledged the different holding in *Evans* in a string cite, it held *McCormick* as the sole standard for a campaign contribution case. *Id.*; see also Yarbrough, *supra* note 62, at 798 (“It appears that, under its current analysis, the Seventh Circuit will apply the explicit standard of *McCormick* to campaign contribution cases without consideration of how *Evans* might affect this standard.”).

72. *United States v. Antico*, 275 F.3d 245, 254 (3d Cir. 2001).

73. *Id.* at 257. The case dealt with an official in the Philadelphia Department of Licenses and Inspections demanding payment from businesses to approve their zoning permits and licenses and threatening retaliation if they did not pay. *Id.* at 249.

74. The court explained:

Outside the campaign contribution context, where *Antico*’s case falls, the line between legal and illegal acceptance of money is not so nuanced. The Hobbs Act simply states that use of one’s office to obtain money or services not due is extortion: “the

### 1. The Second Circuit: Explicit and Express

Through a series of decisions, the Second Circuit has firmly determined that the *Evans* standard applies exclusively to non-campaign contribution cases.<sup>75</sup> The court, in *United States v. Garcia*, initially held that *McCormick* and *Evans* establish different standards.<sup>76</sup> Immediately thereafter, the Second Circuit upheld the standard of applying *Evans* exclusively to non-campaign contribution cases in two more decisions.<sup>77</sup> Although the Second Circuit did not decide any cases dealing specifically with campaign contributions during this period, the court firmly determined that *Evans* was the sole standard for non-campaign contribution cases, implying *McCormick* to be a separate standard for campaign contribution cases.<sup>78</sup>

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Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”

*Id.* at 257–58 (quoting *United States v. Evans*, 504 U.S. 255, 268 (1992)).

75. See *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) (Sotomayor, J.); *United States v. Delano*, 55 F.3d 720, 731 (2d Cir. 1995); *United States v. Coyne*, 4 F.3d 100, 113–14 (2d Cir. 1993); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); see also Yarbrough, *supra* note 62, at 801 (“The Second Circuit has issued three opinions since 1993 which demonstrate that the Second Circuit will decide non-campaign contribution cases exclusively by reference to *Evans*.”).

76. 992 F.2d at 414. The case dealt with a congressman from New York City convicted of extorting cash and loans from a defense company in return for helping the company obtain contracts with the Navy and the Postal Service. *Id.* at 410–12. However, the Second Circuit reversed Garcia’s conviction, holding that *McCormick* and *Evans* both required the district court to issue a jury instruction on quid pro quo agreements. *Id.* at 414. Specifically, the court held that while *McCormick* mandated the finding of an explicit quid pro quo agreement in circumstances involving campaign contributions, “*Evans* modified this standard in non-campaign contribution cases.” *Id.* *Evans* modified the standard “by requiring that the government show only ‘that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.’” *Id.* (quoting *Evans*, 504 U.S. at 268). The government was still required to prove a quid pro quo, but such an agreement did not need to be explicit because this was a non-campaign contribution case. See *id.* at 415.

77. See *Delano*, 55 F.3d at 731 (“[P]roof of an explicit promise to perform the official acts in return for the payment is not required.”); *Coyne*, 4 F.3d at 111 (“Proof of an explicit promise at the time of payment to perform certain acts is not necessary, and the jury was free to infer that Coyne accepted the \$30,000 knowing that it was payment related to his using his influence as County Executive . . .”).

78. See Yarbrough, *supra* note 62, at 801 (“[T]he Second Circuit’s interpretation of *Evans* cannot be reconciled with *McCormick*, which incontrovertibly applies to campaign contribution cases.”). The Second Circuit could not easily reconcile *McCormick* and *Evans* now because

The Second Circuit recently reaffirmed this separation between the *McCormick* and *Evans* standards in another extortion case, *United States v. Ganim*.<sup>79</sup> The court applied the *Evans* standard,<sup>80</sup> holding that the government did not need to prove an explicit quid pro quo for a Hobbs Act conviction, but only rather must prove that a payment was made to a public official in exchange for a commitment to perform official acts to benefit the payor in the future.<sup>81</sup>

Notably, the Second Circuit also firmly held that *McCormick* establishes a different standard from *Evans*. The court characterized the holding of *McCormick* by stating “proof of an *express* promise is necessary when the payments are made in the form of campaign contributions.”<sup>82</sup> However, “*Evans* modified this standard in the non-campaign [context],” and Kennedy’s concurrence from *Evans* only applied to those non-campaign contribution cases.<sup>83</sup> Through this holding, the Second Circuit established that it will apply *McCormick*’s requirement of an explicit quid pro quo agreement for extortion and bribery convictions to campaign contribution cases,

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*Garcia*, *Coyne*, and *Delano* all expressly state that an explicit promise is not required under *Evans*, while *McCormick* does expressly state that such a promise is required. *Id.* at 802.

79. 510 F.3d at 142–43. Joseph Ganim, the former mayor of Bridgeport, Connecticut, was convicted of racketeering and Hobbs Act extortion in 2003 for funneling government contracts to companies fronted by two of his aides, who in turn provided Ganim with cash, meals, and other benefits out of their earnings over several years. *See id.* at 137–41.

80. *See id.* at 143 (“Drawing from Justice Kennedy’s concurrence in *Evans*, we found [in *Garcia*] that a quid pro quo was required to sustain a conviction in the non-campaign context, but that the agreement may be implied from the official’s words and actions . . .”).

81. *Id.* at 147. The Second Circuit also found that proof of a quid pro quo was required not only for the Hobbs Act extortion charges, but for the charges of bribery and honest services mail fraud as well. *Id.* at 141 (“[E]ach of these statutes criminalizes, in some respect, a quid pro quo agreement—to wit, a government official’s receipt of a benefit in exchange for an act he has performed, or promised to perform, in the exercise of his official authority.”); *id.* at 148 (“[T]he crime of bribery requires a quid pro quo.”). The court continued:

[B]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver’s interests—favorably to the giver’s interest. That describes legal lobbying.

*Id.* at 149 (citation omitted).

82. *Id.* at 142 (emphasis added). Here, “express” is used as a synonym for “explicit,” the word used in *McCormick*. *See supra* note 67 for an explanation on the difference between the two words.

83. 510 F.3d at 143.

while *Evans* will remain the separate standard for non-campaign contribution cases.<sup>84</sup>

## 2. The Sixth Circuit: Reconciliation and Separation

The Sixth Circuit initially attempted to reconcile *McCormick* and *Evans*<sup>85</sup> when it held that both standards applied to campaign contribution cases in *United States v. Blandford*.<sup>86</sup> In evaluating the different standards for a quid pro quo agreement as set forth in *McCormick* and *Evans*, the Sixth Circuit acknowledged the ambiguous effect of *Evans* on *McCormick*.<sup>87</sup> However, the court ultimately rejected the idea that the two decisions led to two different standards, holding that *Evans* had modified *McCormick* such that the quid pro quo element would be “satisfied by something short of a formalized and thoroughly articulated contractual arrangement.”<sup>88</sup> The court cited Justice Kennedy’s concurrence from *Evans* in finding that the latter decision had clarified the definition of the word “explicit.”<sup>89</sup> *Evans* did not differentiate between campaign and non-

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84. *Id.* at 143–44. Recently, the Ninth Circuit relied heavily on the holding in *Ganim* in determining that *McCormick* and *Evans* establish different standards. *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir. 2009) (“In the case of a public official who obtains money, other than a campaign contribution, the Government does not have to prove an explicit promise to perform a particular act made at the time of the payment.”).

85. Yarbrough, *supra* note 62, at 803.

86. 33 F.3d 685, 697 (6th Cir. 1994). The court affirmed the Hobbs Act conviction of the Speaker of the House of Representatives of Kentucky for extorting cash payments from horse racing industry lobbyists in return for helping to block restrictive regulations on horse racing. *See id.* at 688–90. On appeal, Blandford claimed that the jury should have been required to find that he had entered into an explicit quid pro quo agreement in order to convict him. *Id.* at 693.

87. *Id.* at 695. The Sixth Circuit acknowledged the public policy arguments for treating campaign contribution cases different from non-campaign contribution cases, noting that campaign contributions enjoy “a presumption of legitimacy.” *Id.* at 697 (“[L]egitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to support the payor’s interests . . .”). Meanwhile, it would be difficult for a public official receiving payments from a private source outside of the campaign context to explain his actions. *See id.* (“[W]here, as in this case, a public official’s primary justification for receiving, with relative impunity, cash payments from private sources, *i.e.*, our present campaign financing system, is not available, that public official is left with few other means of rationalizing his actions.”).

88. *Id.* at 696. “[M]erely knowing the payment was made in return for official acts is enough.” *Id.*

89. *Id.* (“In this sense, then, *Evans* provided a gloss on the *McCormick* Court’s use of the word ‘explicit’ to qualify its *quid pro quo* requirement.”).

campaign contribution cases, according to the court, but simply “instructed that by ‘explicit’ *McCormick* did not mean ‘express.’”<sup>90</sup>

The Sixth Circuit reasoned that both standards applied to campaign contribution cases, holding that to sustain a Hobbs Act conviction, the government must establish the existence of a quid pro quo as in *McCormick*, but informed by the standard from *Evans*.<sup>91</sup> While the Sixth Circuit did not rule on the proper standard for the non-campaign context, it reconciled the “explicit” and “knowing” standards specifically within the campaign contribution context.<sup>92</sup>

Recently, however, the Sixth Circuit appeared to adopt a standard more in line with that of the Second and Ninth Circuits. In *United States v. Abbey*, the court firmly held that *Evans* established a different standard for non-campaign contribution cases.<sup>93</sup> The court characterized its holding from *Blandford* not as a reconciliation of the *McCormick* and *Evans* standards, but merely as a statement that *McCormick*’s quid pro quo requirement—the explicitness requirement—should not apply outside of the campaign context.<sup>94</sup> While an explicit quid pro quo promise would be required within the campaign context, “merely knowing that the payment was made in return for official acts is enough” to prove extortion in a non-campaign case such as *Abbey*.<sup>95</sup> While not specifically stating how

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90. *Id.* “Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and the payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated.” *Id.* For a fuller explanation of the difference between the words “explicit” and “express,” see *supra* note 67.

91. 33 F.3d at 696–97.

92. Yarbrough, *supra* note 62, at 805–06.

93. 560 F.3d 513, 517–18 (6th Cir. 2009). The case concerned the Hobbs Act conviction of the former City Administrator of Burton, Michigan, for taking bribes and a free subdivision lot from a local land developer in return for unspecified future official favors. *See id.* at 515–16.

94. *Id.* at 517. The court further observed that the campaign contribution context was unique because almost all lawful contributions are given to influence future legislative or executive actions. *Id.* at 516. However, “if the quid pro quo requirement exists to ensure that an otherwise permissible activity is not unfairly criminalized, then an opposite presumption is likely appropriate when a public official obtains cash or property outside the campaign system because there are few legitimate explanations for such gifts.” *Id.* at 517.

95. *See id.* at 518 (quoting *United States v. Hamilton*, 263 F.3d 645, 653 (6th Cir. 2001)) (“Indeed, in circumstances like this one—outside the campaign context—[r]ather than requir[e] an explicit quid-pro-quo promise, the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement . . .”). Furthermore, the Sixth Circuit adopted the exact same language from the Second Circuit in determining that “*Evans* modified the standard in non-campaign contribution cases.” *Id.* at 517.



the court will adjudicate future campaign contribution cases, the Sixth Circuit's holding in *Abbey* strongly indicates that it now views *McCormick* and *Evans* as establishing two separate standards.

*E. Minority View—The Eleventh Circuit and  
United States v. Siegelman*

Initially, the Eleventh Circuit held that *McCormick* and *Evans* established two different standards, with *McCormick* applying solely to campaign contribution cases.<sup>96</sup> In *United States v. Martinez*,<sup>97</sup> the court ruled that under *Evans*, any jury instructions for Hobbs Act extortion trials must contain a quid pro quo instruction.<sup>98</sup>

In the recent case of *United States v. Siegelman*, the Eleventh Circuit radically departed from the precedent established in *Martinez*.<sup>99</sup> The former Governor of Alabama, Don Eugene Siegelman, was convicted of federal funds bribery,<sup>100</sup> honest services mail fraud,<sup>101</sup> and conspiracy<sup>102</sup> in 2006.<sup>103</sup> On appeal, Siegelman

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96. Yarbrough, *supra* note 62, at 798.

97. 14 F.3d 543 (11th Cir. 1994). The case dealt with the Hobbs Act conviction of the former mayor of Hialeah, Florida, who forced local realtors to sell him property for below market value. *See id.* at 544–46.

98. *Id.* at 553. Notably, the court characterized *Evans* as establishing the quid pro quo requirement “outside the context of campaign contributions” and held that *Evans* modified the *McCormick* standard for non-campaign contribution cases. *Id.* The court explicitly noted that the Second Circuit had reached the same conclusion in *Garcia*, and agreed with it. *See id.* at 553 n.4. The Eleventh Circuit thus made it clear that it would apply the *McCormick* requirement of explicit quid pro quo agreements to campaign contribution cases. Yarbrough, *supra* note 62, at 800.

99. 561 F.3d 1215 (11th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 3542 (2010).

100. 18 U.S.C. § 666 (2006). Public officials may not corruptly solicit or demand, or accept or agree “to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of” the official’s organization. *Id.* § 666(a)(1)(B).

101. 18 U.S.C. § 1341 bans the use of the Postal Services or the mails to further “any scheme or artifice to defraud.” Section 1346 defines “any scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right of honest services.” The Supreme Court recently narrowed the honest services fraud statute to apply to only bribery or kickback schemes. *See Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010).

102. Conspiracy occurs “[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.” 18 U.S.C. § 371.

103. *Siegelman*, 561 F.3d at 1223. The conviction was based upon allegations that

argued that under *McCormick*, the government was required to prove the existence of an explicit quid pro quo between himself and the contributor for a campaign contribution case.<sup>104</sup>

The Eleventh Circuit, however, chose to apply both *McCormick* and *Evans* to Siegelman's case.<sup>105</sup> The court noted the strong public policy reasons to not infringe upon legal campaign donations.<sup>106</sup> The court found, however, that while *McCormick* had required an explicit quid pro quo agreement, the Supreme Court in *Evans* modified the

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Siegelman had accepted a donation for a ballot initiative campaign he sponsored in return for giving the contributor a seat on Alabama's Certificate of Need Review Board. *See id.* at 1219–23. The campaign was for a ballot initiative to establish a state lottery in Alabama, a platform of Siegelman's initial gubernatorial campaign. *Id.* at 1220. Siegelman had solicited a donation from Richard Scrushy, the former CEO of HealthSouth, a large hospital corporation in Alabama. *Id.* at 1219–20. The Certificate of Need (CON) Board regulated healthcare services in Alabama, and Scrushy had already served on the CON Board under the three previous governors. *Id.* Former Siegelman aide Nick Bailey testified that Scrushy had delivered a check to Siegelman, and when Bailey asked Siegelman what Scrushy would want for it, Siegelman responded, "the CON Board." *Id.* at 1221. The court later cited this exchange as proof of the existence of a quid pro quo agreement between Siegelman and Scrushy. *See id.* at 1227. Bailey later testified that he could not remember the details of that meeting. *Id.* at 1221 n.6.

104. *See* Brief of Governor Don Siegelman, Appellant at 24, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009) (No. 07-13163-B), 2008 WL 2442104, at \*24.

105. *Siegelman*, 561 F.3d at 1226. Notably, this case did not deal with Hobbs Act extortion, as *McCormick*, *Evans*, and all prior and subsequent case law did. *See supra* Part I.B–C. However, the Eleventh Circuit determined that the same standards established by *McCormick* and *Evans* applied to bribery and honest services mail fraud, noting "that extortion and bribery are but 'different sides of the same coin.'" *Id.* at 1225 (citing *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)).

106. *See id.* at 1224. It explained:

[The convictions] impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities.

*Id.* Furthermore, the court noted that these protections would apply with special force to an issue-advocacy campaign such as this one, because individual politicians would not directly benefit from donations to the campaigns:

Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign does.

*Id.* at 1224 n.13. The Supreme Court has made the same observation, describing referendums or issue-advocacy campaigns as "the type of speech indispensable to decision-making in a democracy." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

standard even in campaign contribution cases.<sup>107</sup> The *quid pro quo* need only be explicit, not express, and an explicit agreement “may be ‘implied from [the official’s] words and actions.’”<sup>108</sup> Therefore, even if there was no jury instruction regarding an explicit *quid pro quo* requirement, and even if there was no direct evidence of an explicit agreement, the court found that the jury could still infer an agreement for a specific action in return for a campaign donation.<sup>109</sup> The Eleventh Circuit thus became the only circuit since the early 1990s to find that *McCormick* and *Evans* do not establish separate standards.

## II. ANALYSIS

While the proper relationship between *McCormick* and *Evans* for the campaign contribution context is not entirely clear, the Eleventh Circuit’s reasoning in *Siegelman* seems highly questionable. The Eleventh Circuit inserted its own language into *Evans* with the *Siegelman* decision, forcing a false reconciliation between *McCormick* and *Evans*.<sup>110</sup> The court both reads too far into the connection between *McCormick* and *Evans* for campaign contribution cases and places too much emphasis on the difference between “explicit” and “express” for determining how to define the *McCormick* standard.<sup>111</sup>

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107. *Siegelman*, 561 F.3d at 1226 (“The instruction . . . in *Evans* required that the acceptance of the campaign donation be in return for a *specific* official action—a *quid pro quo*.”).

108. *Id.* (quoting *United States v. Evans*, 504 U.S. 255, 274 (1992)). The court claimed that *Siegelman* had argued in his brief that “only *express* words of promise overheard by third parties or by means of electronic surveillance will do.” *Id.* The court cited the now-outdated distinction between “explicit” and “express” from *Blandford* in determining that an agreement need not be express. *See id.*; *see also supra* note 67 (explaining the prior distinction and showing that “explicit” and “express” are now defined interchangeably). Furthermore, nowhere in the brief does *Siegelman* argue that an agreement need be express rather than explicit, and in fact refers to “explicit *quid pro quo*” throughout. *See* Brief of Governor Don Siegelman, Appellant, *supra* note 104.

109. *Siegelman*, 561 F.3d at 1228–29.

110. *See supra* notes 112–16 and accompanying text.

111. For an explanation on the difference between the two definitions, *see supra* note 67.

### A. False Reconciliation

In *Siegelman*, the Eleventh Circuit believed that *McCormick* and *Evans* could be reconciled, holding that the explicit agreement for a campaign donation required by *McCormick* could be implied from an official's words or actions, citing Justice Kennedy's concurrence in *Evans*.<sup>112</sup> However, nowhere in the *Evans* opinion does the majority refer to *McCormick* or state that the decision in any way modifies *McCormick*, except to say that the jury instructions given in *Evans* satisfies the *McCormick* quid pro quo requirement.<sup>113</sup> *Evans* also does not refer to campaign contributions in the majority opinion, except to note that the public official in that case had received both cash and a check for his re-election campaign, only the latter of which was properly disclosed.<sup>114</sup> Therefore, the only way *Evans* could have completely modified *McCormick* in the campaign contribution context without the Supreme Court needing to say so explicitly is if *Evans* was in fact a campaign contribution case. The record on that point is entirely unclear,<sup>115</sup> but what is clear is that the Supreme Court itself did not agree on that one fact.<sup>116</sup> To read *Evans* as a clear

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112. *Siegelman*, 561 F.3d at 1226.

113. *Evans*, 504 U.S. at 268.

114. *See id.* at 257.

115. Some commentators believe that by mentioning both campaign contributions and ordinary bribes in the record, the Court makes *Evans* a campaign contribution case, thus modifying *McCormick*. *See, e.g.*, Yarbrough, *supra* note 62, at 812 ("The language of the Court's decision and the fact that *Evans* involved alleged campaign contributions indicates that *Evans* should be read with, rather than separate from, *McCormick*."). However, others note that the Supreme Court treated that fact ambiguously. *See Hager, supra* note 30, at 216 ("[T]he Court [in *Evans*] measures the 'bribe' against the *McCormick* standard, without ever addressing the difference between the \$1,000 donation to the campaign and the \$7,000 received directly by *Evans* . . ."); Hardy, *supra* note 55, at 427 ("The majority opinion in *Evans* never explicitly indicated whether it considered the case to involve a claimed campaign contribution, although the concurring and dissenting opinions offered contradictory interpretations.").

116. Nowhere in the majority opinion does the Supreme Court state that *Evans* is or is not a campaign contribution case. Justice Kennedy's concurrence indicates that *Evans* is a campaign contribution case. *See Evans*, 504 U.S. at 277–78 (Kennedy, J., concurring) ("The requirement of a *quid pro quo* in a § 1951 prosecution such as the one before us, in which it is alleged that money was given to the public official in the form of a campaign contribution, was established by our decision last Term in *McCormick v. United States*."). In his dissenting opinion, however, Justice Thomas noted that the holding in *McCormick* was expressly limited to campaign contributions, and stated that *Evans* extended *McCormick*'s limitation to all cases of official extortion. *See id.* at 287 (Thomas, J., dissenting).

campaign contribution case that extensively modifies *McCormick*, as the Eleventh Circuit did in *Siegelman*, is to insert language into *Evans* that is simply not there.

Furthermore, *McCormick* and *Evans* were decided only one year apart.<sup>117</sup> Justice Stevens wrote the majority opinion in *Evans* after dissenting a year earlier in *McCormick*, partially on the grounds that he did not then believe that the quid pro quo agreement for a campaign contribution needs to be explicit.<sup>118</sup> Justice Kennedy's concurrence in *Evans* largely echoed Justice Stevens' dissent from *McCormick* on that issue.<sup>119</sup> However, Justice Stevens did not refer to explicitness at all in the majority opinion in *Evans*. If Justice Stevens had meant for *Evans* to modify *McCormick* in the context of campaign contribution explicitness and allow the quid pro quo requirement to encompass implied agreements, it seems strange he would have neglected to say anything at all on the issue when writing the majority opinion in *Evans*.

### B. Explicit vs. Express

Much of the Eleventh Circuit's analysis in *Siegelman* focuses on the difference between "explicit" and "express." The court noted that while *McCormick* used "explicit" to describe the necessary quid pro quo agreement, "explicit" did not have the same definition as "express."<sup>120</sup> The court defined an "express" agreement as actual conversations "overheard by third parties or by means of electronic surveillance."<sup>121</sup>

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117. *McCormick* was decided on May 23, 1991. *McCormick v. United States*, 500 U.S. 257 (1991). *Evans* was decided on May 26, 1992. 504 U.S. at 255.

118. See *McCormick*, 500 U.S. at 282 (Stevens, J., dissenting). "In my opinion there is no statutory requirement that illegal agreements, threats, or promises be in writing, or in any particular form. Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require." *Id.* However, Stevens did agree that the crime does require a quid pro quo. See *id.* at 283.

119. See 504 U.S. at 274 (Kennedy, J., concurring). Like Stevens, Kennedy cautioned against subtle extortion: "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *Id.*

120. *United States v. Siegelman*, 561 F.3d 1215, 1225–26 (11th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 3542 (2010).

121. *Id.* at 1226. The court claimed that Siegelman himself had advanced that argument. "Defendants argue that only 'proof of actual conversations by defendants,' will do, suggesting

Largely relying on the Sixth Circuit's analysis in *Blandford*,<sup>122</sup> the Eleventh Circuit determined that *McCormick* required quid pro quo agreements to be explicit, not express, and that under *Evans*, an explicit agreement could be implied from an official's words or actions.<sup>123</sup> Therefore, the court held that the jury could have determined that Governor Siegelman had an explicit agreement with his campaign contributor absent any proof of such conversation having taken place.<sup>124</sup> The Sixth Circuit in *Blandford* looked to Black's Law Dictionary and determined that while an "explicit" agreement merely meant clear and unambiguous, an "express" agreement meant one "directly and distinctly stated."<sup>125</sup> The Eleventh Circuit in *Siegelman* adopted this rationale, noting that there was no need for a quid pro quo agreement to actually be stated.<sup>126</sup>

The current legal definitions of those terms, however, make no such distinction. In the most recent edition of Black's Law Dictionary, "explicit" is not even defined as a separate term, while "express" is defined as "[c]learly and unmistakably communicated; directly stated."<sup>127</sup> Barron's likewise does not define explicit as a separate term, but lists it as part of the definition of "express."<sup>128</sup>

The non-legal, plain meaning definitions of "explicit" and "express" further indicate that the two words are synonymous. New Oxford defines both words as stated clearly and definitively.<sup>129</sup>

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in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do." *Id.* However, the defendant's brief did not actually argue that the agreement needed to be express, only explicit. See Brief of Governor Don Siegelman, Appellant, *supra* note 104, at 24.

122. See *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean 'express.'").

123. *Siegelman*, 561 F.3d at 1226.

124. See *id.* at 1227–28.

125. 33 F.3d at 696 n.13. For the full definitions from the 1990 edition of Black's Law Dictionary as used in *Blandford*, see *supra* note 67.

126. See 561 F.3d at 1226 ("But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party.").

127. BLACK'S LAW DICTIONARY 661 (9th ed. 2009); see also *supra* note 67.

128. Barron's definition of "express" is "to make known *explicitly* and in declared terms. To set forth an actual agreement in words, written or spoken, which unambiguously signifies intent. As distinguished from 'implied,' the term is not left to implication or inference from conduct or circumstances." BARRON'S LAW DICTIONARY 189–90 (5th ed. 2003) (emphasis added).

129. The New Oxford American Dictionary defines "explicit" as "stated clearly and in

Webster's defines explicit and express as synonyms, characterized as not leaving anything implied.<sup>130</sup> These definitions all indicate that the Eleventh Circuit simply split hairs between "explicit" and "express" in determining that *Evans* modified *McCormick* in the campaign context so that an explicit agreement could actually be implicit.<sup>131</sup> There is simply no indication in either *McCormick* or *Evans* that the Court meant for the word "explicit" to mean anything other than its plain meaning—clear, unambiguous, direct, and leaving nothing to inference. By their very definitions, a quid pro quo agreement cannot be both explicit and implicit, as the Eleventh Circuit indicates it can.<sup>132</sup>

### III. PROPOSAL

Absent a clearer statement from the Supreme Court regarding the proper relationship between *McCormick* and *Evans* in the campaign contribution context, other courts should be wary of adopting the Eleventh Circuit's rationale from *Siegelman*. As has been demonstrated, *Siegelman's* approach to *McCormick* and *Evans* is at once overly broad and overly narrow—broad in that it reads into *Evans* a wholesale change to *McCormick*, and narrow in that it hinges the entire rationale for the change on the doubtful difference between "explicit" and "express."<sup>133</sup> The Supreme Court should grant certiorari in the *Siegelman* case to resolve the dispute.<sup>134</sup> It is

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detail, leaving no room for confusion or doubt." NEW OXFORD AMERICAN DICTIONARY 594 (2d ed. 2005). It defines "express" as "definitely stated, not merely implied." *Id.* at 595.

130. Webster's Dictionary defines "explicit" as "characterized by full clear expression; being without vagueness or ambiguity; leaving nothing implied." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 801 (1993). "Express" is defined as "directly and distinctly stated or expressed rather than implied or left to inference; not dubious or ambiguous." *Id.* at 803. The dictionary states under each entry that explicit and express are synonyms for each other. *Id.* at 801, 803.

131. See Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner at 12, *Siegelman v. United States*, 130 S. Ct. 3542 (2010) (No. 09-182), 2009 WL 2943372, at \*12 ("The Eleventh Circuit's holding that 'explicit' does not mean 'express' ignores the ordinary meaning of 'explicit' . . .").

132. See *Siegelman*, 561 F.3d at 1227–28.

133. *Id.* at 1225–27.

134. In June 2010, the Supreme Court vacated and remanded the original *Siegelman* decision to the Eleventh Circuit for further consideration on the issue of the honest services fraud charge, after narrowing the application of the honest services fraud statute in *Skilling v.*

especially important in light of the recent *Citizens United* decision,<sup>135</sup> which affirmed the importance of unfettered political speech under the First Amendment regardless of the identity or influence of the speaker, that the Supreme Court clarifies the status of this other restriction on the political process.<sup>136</sup> In the meantime, other courts should differentiate the *McCormick* and *Evans* standards by context as articulated by the Second, Sixth, and Ninth Circuits, as this rule strikes an appropriate balance between prosecuting corruption without unduly burdening legitimate political activity.

#### A. Separate Standards Create a Bright-Line Rule

The Supreme Court should uphold the separation of the *McCormick* and *Evans* standards in order to maintain a bright-line distinction between campaign contributions and other payoffs to public officials.<sup>137</sup> The entire purpose of the explicit quid pro quo standard from *McCormick* was “to clearly define and delimit the type of conduct that may be criminalized in the campaign contribution context.”<sup>138</sup> The explicit quid pro quo requirement as upheld by the other circuits strikes the proper balance between respecting legitimate

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*United States*, 130 S. Ct. 2896 (2010). See *Siegelman v. United States*, 130 S. Ct. 3542 (2010). The Eleventh Circuit subsequently affirmed its prior decision. See *United States v. Siegelman*, 640 F.3d 1159 (2011).

135. See generally *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

136. As Justice Kennedy himself noted:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

*Id.* at 910 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring and dissenting in part)). This undoubtedly fits with the observation in *McCormick* that such behavior “is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.” *McCormick v. United States*, 500 U.S. 257, 272 (1991).

137. See Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, *supra* note 131, at 15.

138. *Id.* at 4. The explicit quid pro quo requirement from *McCormick* “defines the forbidden zone of conduct with sufficient clarity.” 500 U.S. at 273.



fundraising activity and maintaining the effectiveness of the extortion or bribery statutes.<sup>139</sup>

To muddle this bright line between campaign contributions and ordinary payoffs would expose every government official who acts to the benefit of a contributor to criminal prosecution.<sup>140</sup> It would grant prosecutors “the unbridled power to potentially indict and convict any public official” for merely accepting a campaign donation knowing that the donation was made with the expectation that the official would act for the contributor’s benefit.<sup>141</sup> It also creates the danger that, in a politically charged atmosphere, prosecutors will wield this discretion in a partisan fashion.<sup>142</sup> Having a clear legal standard for campaign contribution cases will protect individuals “from politically-motivated prosecutions based on conduct that” has always been considered legal within the campaign finance system.<sup>143</sup>

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139. Eric David Weissman, Note, *McCormick v. United States: The Quid Pro Quo Requirement in Hobbs Act Extortion Under Color of Official Right*, 42 CATH. U. L. REV. 433, 461 (1993).

140. Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, *supra* note 131, at 4; *see also* Brief of Law Professors as *Amici Curiae* in Support of the Petition for a Writ of Certiorari at 15, *Siegelman v. United States*, 130 S. Ct. 3542 (2010) (No. 09-182), 2009 WL 2759758, at \*15 (“[I]t creates a genuine uncertainty for public officials and potential contributors to political campaigns as to whether criminal charges may result from making a contribution with the hope or expectation . . . that some favorable treatment will come from the recipient, and the expectation is then fulfilled.”).

141. Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, *supra* note 131, at 19. This result was explicitly rejected in *McCormick*:

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 beneficiaries, is an unrealistic 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.”

500 U.S. at 272.

142. This has been one of the main criticisms of the *Siegelman* decision. *See* Beale, *supra* note 26, at 387 (“[T]he main focus of concern has been on the allegations that the *Siegelman* prosecution was politically motivated and orchestrated by Karl Rove and others . . .”). This was also a concern of the former state attorneys general who filed a brief *amici curiae* in support of *Siegelman*. *See* Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, *supra* note 131, at 19 (“*Amici* have grave concerns that this opportunity for arbitrary and discriminatory enforcement of the ‘honest services’ and ‘bribery’ statutes has resulted in the selective and unfair prosecution and conviction of Governor *Siegelman*.”).

143. Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner, *supra* note 131, at 25.

As Justice Kennedy himself has noted, equating favoritism or influence with corruption would prohibit pure political loyalty altogether.<sup>144</sup>

*B. Are Systemic Changes Needed?*

Perhaps corruption in the form of quid pro quo agreements between contributors and public officials, whether explicit or not, is inherent in an electoral system that heavily relies upon large contributions to finance campaigns.<sup>145</sup> The presence of large private campaign contributions will always raise questions of how public officials can act objectively for the benefit of the entire electorate, not just for wealthy contributors.<sup>146</sup> In a system that depends on large private donations, public officials perhaps cannot always say that they represent only the public good.<sup>147</sup>

In order to combat this risk of corruption, the electorate must demand either a change in the role of private money in elections or strict regulations on campaigns to ensure that candidates are not subject to inappropriate influence.<sup>148</sup> A move towards public financing of campaigns would take “direct aim at the large private donations that are argued to lead to greater perceptions of corruption.”<sup>149</sup> A public financing system able to provide sufficient

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144. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring and dissenting in part) (“Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular.”); *id.* (“Any given action might be favored by any given person, so by the Court’s reasoning political loyalty of the purest sort can be prohibited.”).

145. See *McCormick*, 500 U.S. at 272.

146. See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 42 (1996) (“Yet our system of election financing permits extensive private, including corporate, financing of candidates’ campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.”).

147. See *id.* (“Can elected officials say with credibility that they are carrying out the mandate of a ‘democratic’ society, representing only the general public good, when private money plays such a large role in their campaigns?”).

148. *Id.*

149. Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 35 (2009).

funding would also free up candidates' time to communicate directly with voters, time they would otherwise spend fundraising.<sup>150</sup>

Failure to enact meaningful reform, either public financing or other measures to regulate large private donations, will continue to damage public trust in elected officials and candidates.<sup>151</sup> However, the responsibility to enact such changes to the campaign finance system lies with Congress. Until Congress passes these reforms, courts must continue to apply the precedent established by *McCormick*—that large campaign contributions do not constitute bribery or extortion unless accompanied by an explicit quid pro quo agreement between the contributor and the candidate.<sup>152</sup>

#### CONCLUSION

Stopping the corrupt practice of public officials agreeing to perform an official act in return for payoffs is an important objective. Anytime a candidate accepts a kickback from a campaign contributor in return for performing a specific official action, it serves to undermine public trust in the government. However, attempts to regulate illicit quid pro quo agreements in the campaign context must not unduly restrict legitimate campaign fundraising. As the Court noted in *McCormick*, candidates soliciting money from supporters who expect favorable treatment constitutes conduct well within the law.<sup>153</sup> In contrast, a public official not running for office would have few legitimate reasons to solicit or accept political funds.<sup>154</sup> The *McCormick* standard, which criminalizes only explicit quid pro quo agreements between a candidate and a campaign contributor, provides a bright-line rule that strikes a balance between protecting legitimate campaign activity while punishing true corruption.<sup>155</sup>

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150. Emma Greenman, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-Wisconsin Right to Life Era*, 24 J.L. & POL. 209, 245 (2008).

151. Sotomayor & Gordon, *supra* note 146, at 42.

152. *Id.* at 272–73.

153. *McCormick v. United States*, 500 U.S. 257, 273 (1991).

154. Weissman, *supra* note 139, at 462.

155. 500 U.S. at 272–73.

The majority of circuits have accepted this important distinction between the campaign and non-campaign contexts.<sup>156</sup> Only the Eleventh Circuit has held that there is no distinction, and that quid pro quo agreements do not need to be explicit in order to be illegal.<sup>157</sup> This decision muddles the law of campaign finance and exposes to possible prosecution any public official who solicits campaign donations.<sup>158</sup> In order to prevent this outcome, other courts should reject the Eleventh Circuit's rationale and maintain the stricter evidentiary standard for campaign contributions.

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156. *See supra* notes 17–21.

157. *See supra* notes 99–109.

158. *See supra* notes 138–41.