NOTES

CURBING CORRUPTION OR CAMPAIGN CONTRIBUTIONS? THE AMBIGUOUS PROSECUTION OF "IMPLICIT" QUID PRO QUOS UNDER THE FEDERAL FUNDS BRIBERY STATUTE

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I. INTRODUCTION

For years, federal courts in almost every jurisdiction have struggled to define the crime of bribery under various statutes and in varying contexts.[1] However, defining bribery in the political campaign contribution context has proven to be particularly troublesome, as it requires the careful judicial balancing of two correspondingly fundamental American interests. On one hand, the FBI and federal prosecutors alike have an interest in rooting out public corruption amongst federal, state, and local officials to ensure the public's trust and confidence in the United States government.[2] On the other hand, American election campaigns and political platforms have historically been privately funded; public officials have an interest in soliciting contributions in order to represent and serve their constituents.[3]

Presently, investigating public corruption ranks first among the FBI's criminal priorities[4]—the most common forms of which include bribery and extortion.[5] Not surprisingly, 18 U.S.C. § 1951 (the "Hobbs Act") and 18 U.S.C. § 666 ("federal funds bribery") are often used to prosecute public officials for extortion and bribery, respectively.[6] In *United States v. McCormick*, in an effort to protect

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1. *See* Paul M. Thompson, *When a Bribe Is Not Always a Bribe*, NAT'L LAW J., Apr. 18, 2011, at 1 (discussing how "[i]n today's world of complex multijurisdictional criminal enforcement, bribery means different things under different statutes and in different jurisdictions").

2. *See Public Corruption: Why It's Our #1 Criminal Priority*, THE FED. BUREAU OF INVESTIGATION (Mar. 26, 2010), http://www.fbi.gov/news/stories/2010/march/corruption_032610 (explaining why public corruption is "so high on the FBI's list of investigative priorities").

3. John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 22 (2010) (referring to the American political system as one "that is based upon raising private contributions for campaigns for public office and for issue referenda" (quoting United States v. Siegelman, 561 F.3d 1215, 1224 (11th Cir. 2009)).

4. *What We Investigate*, THE FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate (last visited Jan. 13, 2013).

5. *Public Corruption: Why It's Our #1 Criminal Priority*, THE FED. BUREAU OF INVESTIGATION (Mar. 26, 2010), http://www.fbi.gov/news/stories/2010/march/corruption_032610; *see also* Diamond, *supra* note 3, at 22 ("Bribery, like political extortion, is at the center of political corruption cases.").

6. Hobbs Act, 18 U.S.C. § 1951 (2006); 18 U.S.C. § 666 (2006); *see infra* Part I.A-B (providing an overview of what each of these statutes prohibit, as well as their statutory purpose and history).

the American system of campaign financing while also recognizing the government's need to root out public corruption, the Supreme Court held that payments characterized as campaign contributions constitute extortion in violation of the Hobbs Act, "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."[7] This explicit quid pro quo requirement was implemented as a means to distinguish legitimate campaign contributions from illegal payments, in an effort to balance those countervailing interests.[8] The distinction is necessary because often times, in today's political environment, the line between a legitimate campaign contribution and an illegal payment is quite blurry.[9]

Yet, while the same countervailing interests exist in the prosecution of public officials under the federal funds bribery statute, at least in the campaign contribution context, federal courts have inconsistently accepted and rejected the *McCormick* explicit quid pro quo requirement.[10] This issue has become of particular importance in New Jersey since 2009, when the FBI conducted one of the largest public corruption investigations in the state's history—yielding endless charges of Hobbs Act extortion, federal funds bribery, and, often times, a combination of the two.[11] Yet, the Third Circuit is silent on the issue.[12] At least two New Jersey public officials have since been convicted of federal funds bribery, but they have been acquitted of Hobbs Act extortion based on their acceptance of the very same payment that once formed the basis of both indictments.[13] The only cognizable explanation for the split verdicts is the lack of an explicit quid pro quo requirement under the federal funds bribery statute—the "once-clear clear identifying mark of bribery."[14]

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7. 500 U.S. 257, 273 (1991).

8. Medrith Lee Hager, Note, *The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift,* 83 KY. L.J. 197, 198 (1995).

9. *See* Diamond, *supra* note 3, at 18 ("The problem is that under our political system, campaign contributions are routinely used to reward public officials who cast legislative votes or make executive decisions favored by the contributor. It is the way by which supporters help advance the reelection and advancement of public officials they admire and with whom they agree.").

10. *See infra* Part III (discussing the present circuit split as to whether § 666 bribery, like Hobbs Act extortion, requires proof of an explicit quid pro quo requirement in the narrow campaign contribution context).

11. *See infra* Part IV (providing an overview of what the FBI coined "Operation Bid Rig III," including the plot of the public corruption investigation, the amount of people arrested, the resultant criminal charges, and the guilty pleas and trials that ensued).

12. United States v. Beldini, 443 F. App'x 709, 717 (3d Cir. 2011) ("There is an earnest circuit split on whether § 666 does or does not require proof of a quid pro quo. There is no Supreme Court or Third Circuit precedent on the point.").

13. *See infra* note 134.

14. Thompson, *supra* note 1.

Part II of this Note provides a brief statutory overview of the federal funds bribery statute and the Hobbs Act, including a discussion of their statutory purpose and history. Part III traces the development of the explicit quid pro quo requirement under Hobbs Act extortion under color of official right, as established through case law. Part IV discusses the circuit split following the Supreme Court's pivotal *McCormick* decision regarding the necessity of an explicit quid pro quo requirement when prosecuting a public official under § 666 bribery in the narrow campaign contribution context. Part V provides an overview of "Operation Bid Rig III," the FBI's public corruption investigation, which took place in 2009 and gave new prominence to the prosecutorial use of Hobbs Act extortion under color of official right and federal funds bribery in the District of New Jersey, as well as the Third Circuit. Lastly, Part VI outlines the argument for why prosecutors should be required to demonstrate an explicit quid pro quo under the federal funds bribery statute in the prosecution of money characterized as campaign contributions.

II. THE STATUTORY BACKGROUND

A. 18 U.S.C. § 666: Federal Funds Bribery

Among other things, 18 U.S.C. § 666 ("federal funds bribery" or "§ 666 bribery") makes it illegal to bribe an officer, employee, or agent of any organization, state, or local government that receives more than $10,000 in federal funding during a one-year period.[15] Section 666(a)(1)(B) pertains to the person being bribed,[16] whereas § 666(a)(2) pertains to the person making the bribe.[17] The statute provides up to ten years of imprisonment or a fine, or both.[18]

While the legislative history of § 666 is sparse, we know that it was enacted as part of Title XI of the Comprehensive Crime Control Act of 1984 and it created a new offense "to augment the ability of the United States to vindicate significant acts of . . . bribery involving federal monies that are disbursed to private organizations or state and local governments pursuant to a federal program."[19] At the time § 666 was enacted, there was a gap in the legislation—federal funds were only protected from bribery and theft *prior* to disbursement.[20]

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15. 18 U.S.C § 666 (2006).

16. *See* § 666(a)(1)(B) (making it illegal to corruptly solicit, demand, accept, or agree to accept anything valued $5,000 or greater while "intending to be influenced or rewarded").

17. *See* § 666(a)(2) (making it illegal to corruptly give, offer, or agree to give anything valued $5,000 or greater "with intent to influence or reward" any such agent).

18. § 666(a).

19. S. REP. NO. 98-225, at 369 (1983).

20. *See id.*

Given the federal government's "strong interest in assuring the integrity of such program funds," § 666 was designed to monitor the integrity of the recipient agencies.[21]

B. 18 U.S.C. § 1951: The Hobbs Act

The Hobbs Act, 18 U.S.C. § 1951, makes it illegal to interfere with commerce by committing extortion "under color of official right."[22] The statute provides up to twenty years of imprisonment or fines, or both.[23] Unlike § 666, the Hobbs Act was not intended to combat public corruption. It was originally enacted in 1946 as an amendment to the Anti-Racketeering Act of 1934[24] and was designed "to combat extortion and robbery on the part of organized crime and certain labor movements."[25] However, in the early 1970s, prosecutors began using the Hobbs Act as a tool to root out public corruption.[26] The Third Circuit's decision in *United States v. Kenny*[27] prompted the use of the Hobbs Act in prosecuting public officials.[28] In *Kenny*, the Third Circuit held the lower court's definition of extortion under color of official right as "the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear," was correct.[29] It has since then become a prosecutorial favorite in public corruption cases.[30]

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21. *Id.*

22. 18 U.S.C. § 1951(a), (b)(2) (2006).

23. § 1951(a).

24. Anti-Racketeering Act of 1934, Pub. L. No. 73-376, 48 Stat. 979, 979-80 (1934); *see also* Hobbs Act, Pub. L. No. 79-486, 60 Stat. 420 (1946) (codified as amended at 18 U.S.C. § 1951 (2006)).

25. *See* Hager, *supra* note 8, at 203; Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1629 (1992).

26. *See* Whitaker, *supra* note 25, at 1629-30; Hager, *supra* note 8, at 203-05; Jeremy N. Gayed, Note, *"Corruptly": Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 NOTRE DAME L. REV. 1731, 1732 (2003).

27. 462 F.2d 1205 (3d Cir. 1972).

28. Ilissa B. Gold, Note, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 WASH. U. J.L. & POL'Y 261, 264-65 (2011).

29. *Kenny*, 462 F.2d at 1229. The Third Circuit reasoned that "while private persons may violate the statute only by use of fear . . . persons holding public office may also violate the statute by a wrongful taking under color of official right," or in other words, by virtue of their position as public officials. *Id.* The Third Circuit also noted that the lower court's definition was simply "repeat[ing] the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress." *Id.*

30. *See* Whitaker, *supra* note 25, at 1617 (referring to the Hobbs Act as "the statute of choice in prosecutions").

III. THE EVOLUTION OF THE EXPLICIT QUID PRO QUO REQUIREMENT UNDER THE HOBBS ACT

A. The Acceptance Requirement

The Hobbs Act defines extortion as obtaining property "from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or under color of official right*."[31] Unlike § 666, which requires a showing of corrupt intent, the Hobbs Act contains no such language.[32] It was not until after the early 1970s, when prosecutors began using the Hobbs Act to prosecute public officials for committing extortion "under color of official right," that courts had to determine what proof was necessary in order for the government to convict a public official based on that language alone.[33]

The prosecutors argued that a public official's mere "acceptance of an unauthorized benefit . . . constituted extortion under color of official right."[34] And at first, almost every circuit court construed the phrase to require only proof of the official's acceptance with knowledge "that the payment was made for the purpose of influencing his official actions."[35]

B. The Inducement Requirement

In *United States v. O'Grady*, the Second Circuit strayed from the other circuits and held that in order to convict a public official under the Hobbs Act's "color of official right" language, "the government must show that the public official *induced* the benefits received."[36] In its reasoning, the Second Circuit emphasized the unique position that public officials occupy in our society, in terms of influence, power, and being the focus of intensive lobbying.[37] The court cautioned that a contrary "interpretation of the Hobbs Act would place every public official in jeopardy by virtue of his status rather

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31. 18 U.S.C.§ 1951(b)(2) (2006) (emphasis added).

32. *See* 18 U.S.C. § 666(a)(1)(B)-(a)(2) (2006); § 1951(b)(2); *see also* Gayed, *supra* note 26, at 1751 ("Since the bribery and extortion statutes apply to substantially similar conduct, the most meaningful difference between the two crimes is the facial presence of a state of mind element.").

33. McCormick v. United States, 500 U.S. 257, 266 n.5 (1991).

34. Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 130 (2004).

35. *McCormick*, 500 U.S. at 266 n.5; *see also* United States v. Jannotti, 673 F.2d 578, 595 (3d Cir. 1982) (en banc); United States v. French, 628 F.2d 1069, 1074 (8th Cir. 1980); United States v. Williams, 621 F.2d 123, 124 (5th Cir. 1980); United States v. Butler, 618 F.2d 411, 418 (6th Cir. 1980); United States v. Hall, 536 F.2d 313, 320-21 (10th Cir. 1976); United States v. Hathaway, 534 F.2d 386, 393 (1st Cir. 1976).

36. 742 F.2d 682, 688 (2d Cir. 1984), *overruled by* Evans v. United States, 504 U.S. 255 (1992).

37. *Id.* at 693.

than his venal acts."[38]

The Second Circuit's holding and reasoning in *O'Grady* touched on one of the many problematic considerations in prosecuting public officials in the context of extortion under color of official right—namely, the very nature of being an elected public official. The court noted that "[v]ast sums of money are spent in efforts to persuade, cajole or appease them."[39]

C. The Birth of the Explicit Quid Pro Quo Requirement: McCormick v. United States

In 1991, seven years after the Second Circuit decided *O'Grady*, the Supreme Court granted certiorari in *McCormick v. United States* to determine the meaning of the phrase "under color of official right" as it is used in the Hobbs Act in an even more problematic context—the campaign contribution context.[40]

Presently, under *McCormick*, in order to convict a public official based on the "under color of official right" language set forth in the Hobbs Act, the government must prove an explicit quid pro quo.[41] The Latin phrase simply means "something for something."[42] "[O]nly if the payments are made in return for an explicit promise . . . to perform or not to perform an official act . . . is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act."[43] In other words, under *McCormick*, in order to commit extortion under color of official right, a public official must allow his acceptance of a particular payment to influence his "decision on an identifiable matter."[44] The Supreme Court specifically limited its holding in *McCormick* to the narrow context of political campaign contributions because the very nature of campaign financing in America seemed to be at odds with previous, lower courts' interpretations of extortion "under color of official right."[45]

However, in order to give full effect to all of the considerations that the Supreme Court carefully balanced in reaching its holding, it is important to lay out a brief recitation of the facts in *McCormick*. In 1984, "Robert L. McCormick was a member of the West Virginia House of Delegates" and a leading advocate of a program that

38. *Id.*

39. *Id.*

40. 500 U.S. at 266.

41. *Id.* at 273-74.

42. BLACK'S LAW DICTIONARY 1367 (9th ed. 2009).

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

44. Hager, *supra* note 8, at 200.

45. *McCormick*, 500 U.S. at 273 (stating the holding must be narrow, "'otherwise any campaign contribution might constitute a violation [of the Hobbs Act]'" (quoting U.S. Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-85A.306, at 9-1938.134 (Supp. 1988-2))).

allowed foreign medical school graduates to practice in the United States "under temporary permits while studying for state licensing exams."[46] During McCormick's re-election campaign, however, he indicated to the foreign doctors' lobbyist that he had spent a considerable amount of his own money to finance his costly re-election campaign and had not "heard anything" from them.[47] The lobbyist contacted one of the doctors, received money, and subsequently delivered four installments of cash payments to McCormick, which McCormick did not report as campaign contributions.[48] In 1985, after re-election, McCormick successfully sponsored the proposed legislation that he and the lobbyist had previously discussed.[49] McCormick received another cash payment from the foreign doctors two weeks after the legislation was successfully enacted, and he was subsequently charged "with five counts of violating the Hobbs Act, by extorting [money] under color of official right."[50]

The Supreme Court agreed that it is proper to "inquire whether payments made to an elected official are in fact campaign contributions," but the Court disagreed that such payments could be found to "violate the Hobbs Act without proof of an explicit *quid pro quo*" to refute their legitimacy.[51] In arriving at the explicit quid pro quo requirement, the Supreme Court discussed the "everyday business of a legislator," which predominantly involves serving constituents and supporting legislation that will ultimately benefit them.[52] The Supreme Court also stressed that in order to finance political campaigns, legislators have historically solicited private contributions "on the basis of their views and what they intend to do or have done" since the birth of our Nation.[53] As such, the Supreme Court reasoned that without requiring proof of an explicit quid pro quo, the Hobbs Act would essentially enable the prosecution of not only conduct that has historically "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

46. *Id.* at 259. Despite the House of Delegates' move to end the program, McCormick successfully sponsored legislation extending the program another year, which was originally proposed by a lobbyist who had been hired by the foreign doctors themselves. *Id.* at 259-60. McCormick and the lobbyist subsequently discussed the possibility of introducing legislation in 1985 that would grant foreign doctors a permanent medical license based on their years of experience. *Id.* at 260.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 260-61 (footnote omitted).

51. *Id.* at 271.

52. *Id.* at 272.

53. *Id.*

expenditures."[54]

D. The End of the O'Grady *Inducement Requirement: Evans v. United States*

One year after *McCormick*, the Supreme Court granted certiorari in *Evans v. United States* to settle the disagreement among the circuits regarding whether the "under color of official right" language of the Hobbs Act also requires proof that the public official *induced* such benefits,[55] as set forth by the Second Circuit in *O'Grady*.[56] The Supreme Court's decision, however, did more than just overrule the *O'Grady* inducement requirement.[57] Even though the issue in *Evans* was entirely separate from the narrow *McCormick* quid pro quo issue as it relates to campaign contributions, the Supreme Court briefly discussed its *McCormick* quid pro quo requirement:

> We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick v. United States* because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense.[58]

Additionally, in his concurrence, Justice Kennedy wrote "[t]he 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. The inducement from the official is criminal if it is express or if it is implied from his words and actions . . . ."[59]

E. Post-McCormick and Evans

After the Supreme Court's decision in *Evans*, circuit courts were forced to somehow reconcile *Evans* with the Supreme Court's previous holding in *McCormick*.[60] The Second,[61] Third,[62] Sixth,[63] and

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54. *Id.*

55. Evans v. United States, 504 U.S. 255, 256 (1992).

56. United States v. O'Grady, 742 F.2d 682, 688 (2d Cir. 1984), *overruled by* Evans v. United States, 504 U.S. 255 (1992).

57. *Evans*, 504 U.S. at 268 ("We hold today that 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.") (emphasis added).

58. *Id.* (internal citations omitted). Notably, in his concurrence, Justice Kennedy concluded that this language implies that there is a quid pro quo requirement in all cases prosecuted under the Hobbs Act, not just those involving campaign contributions. *Id.* at 272 (Kennedy, J., concurring)*; see also* Hager, *supra* note 8, at 214.

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

60. 500 U.S. 257 (1991); *see* Brief for Petitioner at 11-12, Siegelman v. United States, 640 F.3d 1159 (11th Cir. 2011) (No. 09-182) ("[T]he Circuit Courts are now divided as to whether this Court's decision in *Evans v. United States* dilutes the

Ninth Circuits[64] have essentially separated the *McCormick* and *Evans* decisions by drawing a critical distinction between campaign contributions and other instances of personal payments made to a public official. These circuits require that prosecutors prove an explicit quid pro quo in the campaign contribution context—that is, an *express* promise or agreement linking the contribution to the official action; however, outside of the campaign contribution context, they employ a less stringent standard requiring only proof of an *implicit* quid pro quo.[65] The Third Circuit explained the rationale behind the distinction as such: "Outside the campaign contribution context . . . the line between legal and illegal acceptance of money is not so nuanced."[66] Under this approach, the explicit quid pro quo requirement serves as a protective measure to eliminate, or at least reduce, the likelihood that a public official will get convicted for merely engaging in the legal practice, one inherent in the American

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'explicit *quid pro quo*' standard of *McCormick v. United States* in cases involving campaign contributions.") (internal citations omitted); *see also* Diamond, *supra* note 3, at 18 ("The majority in *McCormick* candidly adopted the explicit quid pro quo requirement to delineate criminal extortion from the necessary and routine solicitation of campaign contributions. Yet *Evans* appears to require only that the public official have knowledge that a campaign contribution was given for an official act; the majority makes no mention of an express agreement . . . .").

61. *See* United States v. Ganim, 510 F.3d 134 (2d Cir. 2007).

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

63. *See* United States v. Abbey, 560 F.3d 513 (6th Cir. 2009).

64. *See* United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009).

65. *See Ganim*, 510 F.3d at 143 ("Although the *McCormick* Court had ruled that extortion under color of official right in circumstances involving campaign contributions occurs '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,' *Evans* modified this standard in non-campaign contribution cases 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.'" (quoting United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993) as "harmonizing" *McCormick* and *Evans*)); *Antico*, 275 F.3d at 258 (finding that the "relevant inquiry is wh ether the District Court's instruction satisfied the *implicit quid pro quo* requirement where non-campaign contribution Hobbs Act 'color of official right' extortion is charged") (emphasis added); *Abbey*, 560 F.3d at 517-18 ("But not all quid pro quos are made of the same stuff. The showing necessary may still vary based on context, though all cases require the existence of some kind of agreement between briber and official . . . in circumstances like this one—outside the campaign context—'rather than require an *explicit* quid-pro-quo promise, the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement . . . .'" (quoting United States v. Hamilton, 263 F.3d 645, 653 (6th Cir. 2001))); *Kincaid-Chauncey*, 556 F.3d at 937 (holding that "a conviction for extortion under color of official right, whether in the campaign or non-campaign contribution context, requires that the government prove a *quid pro quo*," but outside of the campaign contribution context "an agreement implied from the official's words and actions is sufficient to satisfy this element").

66. *Antico*, 275 F.3d at 257.

political scheme that relies almost entirely on the solicitation of private campaign contributions.[67] Whereas outside of the campaign contribution context no such concerns are implicated, 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," and an agreement may be *implied* from the official's words and actions.[68]

IV. THE QUID PRO QUO REQUIREMENT UNDER 18 U.S.C. § 666, OR LACK THEREOF

Like Hobbs Act extortion "under color of official right," bribery is another favorite prosecutorial tool to combat public corruption.[69] It has been noted that "extortion 'under color of official right' and bribery are really different sides of the same coin."[70] Shortly after the Supreme Court set forth an explicit quid pro quo requirement in the campaign contribution context under *McCormick*,[71] federal courts were presented with the question of whether the explicit quid pro quo requirement is also applicable under § 666 bribery within the campaign contribution context. While the circuits are split, the Supreme Court has yet to address whether the *McCormick* explicit quid pro quo requirement should also apply in the campaign contribution context under § 666 bribery, despite the petition for certiorari begging this precise question in *Siegelman v. United States*.[72]

A. Circuit Courts That Require an Explicit Quid Pro Quo

Out of all the circuits that have addressed the narrow question of whether prosecutors must prove an explicit quid pro quo in order to convict a public official under § 666 in the campaign contribution

67. *See* McCormick v. United States, 500 U.S. 257, 272 (1991) (describing the "everyday business of a legislator" as soliciting campaign contributions to finance a campaign, as well as "[s]erving constituents and supporting legislation" that will benefit them). "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." *Id.*

68. Evans v. United States, 504 U.S. 255, 268 (1992); *Kincaid-Chauncey*, 556 F.3d at 937; *Ganim*, 510 F.3d at 143; *Antico*, 275 F.3d at 257-58.

69. *See* Diamond, *supra* note 3, at 15; James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 815, 817 (1988).

70. United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993).

71. 500 U.S. 257, 273-74 (1991).

72. *See* Brief for Petitioner, *supra* note 60 at i; *see also* Siegelman v. United States, 130 S. Ct. 3542 (2010) (granting certiorari, vacating judgment, and remanding the case for further consideration in light of its holding in *Skilling v. United States*, 130 S. Ct. 2896 (2010), which did not concern the *McCormick* issue).

context, at least two circuits have answered the question with some form of a yes.[73] In these circuits, an unspoken state of mind is not enough to satisfy the corrupt intent element set forth in § 666, which applies to the payor, as well as the recipient, of the bribe.[74] While the Eleventh Circuit did not specifically address this narrow issue in *United States v. Allen*, it did, however, explain the rationale behind applying the *McCormick* rule to federal bribery statutes in the campaign contribution context:

> Because of the realities of the American political system, and the fact that the Hobbs Act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office—the quid pro quo—be explicit. Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the McCormick Court did in interpreting the Hobbs Act: 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. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.[75]

The Fourth Circuit, in *United States v. Jennings*, defined the corrupt intent element of bribery as "the intent to engage in a relatively specific quid pro quo."[76] In *Jennings*, while the defendant was not actually a public official, he was charged with allegedly bribing a city official.[77] Therefore, the court was still working under the statutory framework of § 666.[78] The Fourth Circuit emphasized the importance of properly defining the corrupt intent element "because the gravamen of a bribery offense is a payment made to *corruptly* influence or reward an official act (or omission)."[79] Moreover, the court explained, "[w]ithout an appropriate definition of 'corruptly,' an instruction mistakenly suggests that § 666 prohibits

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73. *See Ganim*, 510 F.3d at 151-52; United States v. Jennings, 160 F.3d 1006, 1021 (4th Cir. 1998).

74. Section 666(a)(1)(B), which applies to the recipient of the bribe, makes it illegal to corruptly solicit or demand for the benefit of any person, or accept or agree to accept, anything of value from any person with the intent to be influenced or rewarded. Section 666(a)(2), which applies to the payor of the bribe, makes it illegal to corruptly give, offer, or agree to give anything of value to any person with the intent to influence or reward.

75. *Allen*, 10 F.3d at 411.

76. 160 F.3d at 1020.

77. *Id.* at 1010.

78. *Id.* at 1012-13 (more specifically, the Fourth Circuit was working under 18 U.S.C. § 666(a)(2) (1994), which pertains to the person allegedly *making* the bribe, as opposed to accepting the bribe).

79. *Id.* at 1020.

any payment made with a generalized desire to influence or reward . . . no matter how indefinite or uncertain the payor's hope of future benefit."[80] Despite the fact that the court was only reviewing the district court's jury instructions for plain error, the Fourth Circuit found that the district court improperly instructed the jurors on § 666(a)(2) by failing to require the intent to engage in a quid pro quo.[81]

The Second Circuit, in *United States v. Ganim*, was asked to determine whether the lower court had properly instructed the jury on federal funds bribery pursuant to § 666.[82] There, the Second Circuit found the lower court had properly instructed the jury since "the district court plainly instructed the jury that to convict [the defendant] of federal programs bribery, it would have to find a 'specific quid pro quo.'"[83]

B. Circuit Courts Without an Explicit Quid Pro Quo Requirement

As described in *supra* Part IV.A, while at least two circuits require that prosecutors prove the *McCormick* explicit quid pro quo in order to convict a defendant under § 666 in the campaign contribution context, a number of circuits have held otherwise. The Seventh Circuit, in *United States v. Gee*, expressly held that while "[a] *quid pro quo* of money for a specific legislative act is *sufficient* to violate [§ 666] . . . it is not *necessary*."[84] In its reasoning, the Seventh Circuit wrote that the statute does not require "any such link" and that it is enough if someone

> corruptly solicits or demands for the benefit of any person, or accepts or agrees 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 such organization, government, or agency involving anything of value of $5,000 or more.[85]

While the court found that a sensible jury could conclude that the defendant "had this corrupt intent," it failed to set forth what a showing of such a corrupt intent consists of.[86]

In *United States v. Zimmerman*, the defendant was a Minneapolis City councilmember who had been convicted of

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80. *Id.*

81. *Id.* at 1022.

82. 510 F. 3d 134, 150-51 (2d Cir. 2007).

83. *Id.* at 151-52.

84. 432 F.3d 713, 714 (7th Cir. 2005).

85. *Id.* at 714-15 (quoting 18 U.S.C. § 666(a)(1)(B) (2000)).

86. *See id.* at 715 (finding that a "sensible jury" could conclude that the defendant had arranged for a Milwaukee organization that had been contracted to administer Wisconsin's welfare-reform program to pay money to the then-Wisconsin State Senate Majority Leader, in exchange for the Majority Leader's influence).

accepting illegal bribes from a real estate developer that was planning a project in the same ward the defendant represented.[87] On appeal, inter alia, the defendant argued the government had failed to prove that he intended an explicit quid pro quo in his dealings with the real estate developer and, further, that he could not be found guilty based on official actions that would have been taken, regardless.[88] Yet, the Eighth Circuit did not require the government "to prove *any* quid pro quo."[89]

Similarly, the Sixth Circuit, in *United States v. Abbey*, held that the text of § 666(a)(1)(B) "says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise."[90] This case involved a former city administrator in Michigan who accepted a free subdivision lot from a local land developer who later testified that by doing so, he hoped to curry favor with the city administrator for future real estate developments.[91] The prosecution alleged that Abbey later exerted his political influence "to obtain municipal financing for the development of other property owned by the developer and to pay the developer to supervise the development of that property."[92] The Sixth Circuit stated that "while a '*quid pro quo* of money for a specific . . . act is sufficient to violate the statute' it is 'not necessary.'"[93] However, unlike the Seventh Circuit which failed to clarify what a sufficient showing of corrupt intent under § 666 consists of, the Sixth Circuit provided a definition for the phrase "corruptly solicits," as it is used in § 666(a)(1)(B). The court wrote:

> [T]he term "corruptly" in criminal laws . . . denotes "an act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another."[94]

The Sixth Circuit ultimately held that "the district court's jury instructions were not improper for failing to include a requirement that the government prove a direct link from some specific payment

87. 509 F.3d 920, 922-25 (8th Cir. 2007).

88. *Id.* at 927.

89. *Id.* (emphasis added) (reasoning that Zimmerman's conviction for "accepting gratuities rather than bribes" abrogates the government's requirement to prove quid pro quo).

90. 560 F.3d 513, 520 (6th Cir. 2009).

91. *Id.* at 515.

92. *Official's Receipt of Gift for Unspecified Favor Established Extortion, Bribery Quid Pro Quo*, 4 WHITE COLLAR CRIME REP. (BNA)287 (Apr. 24, 2009).

93. *Abbey*, 560 F.3d at 520 (quoting United States v. Gee, 432 F.3d 713, 714 (7th Cir. 2005)).

94. *Id.* at 520 n.7 (quoting United States v. Aguilar, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)).

to a promise of some specific official act."[95] As a result, the jury was not asked to specifically find whether "the subdivision lot was given to Abbey in exchange for his agreement at the time at the time to perform, or to refrain from performing, a specific official act."[96]

In *United States v. McNair*, the Eleventh Circuit aligned itself with the Sixth and Seventh Circuits in concluding that § 666 bribery does not require proof of an explicit quid pro quo.[97] The Eleventh Circuit began its analysis with the precise language of § 666, emphasizing the absence of the phrase quid pro quo, as well as other arguably similar phraseologies such as "in exchange for an official act" or "in return for an official act."[98] The court alluded to the fact that its greatest concern in implementing an explicit quid pro quo requirement was not merely the lack of statutory language to support it, but the implication that the court would allow persons such as the defendants to pay a substantial amount of money to a county employee with the intent to produce "a future, as yet unidentified favor without violating § 666."[99] The court then turned to the actual language of § 666, which requires that the defendant act "corruptly," regardless of whether (a)(1)(b) or (a)(2) applies.[100] The court defined the phrase "acting corruptly" as "dishonestly seeking an illegal goal or a legal goal illegally" and determined that by requiring a showing of such a corrupt intent, it had sufficiently narrowed down the type of conduct prohibited by § 666 so as to prevent the prosecution of legal business practices.[101] The court conceded that many § 666 bribery cases do, in fact, involve "identifiable and particularized official act[s]"; however, the court refused to require that the government prove a defendant's intent to engage in a specific quid pro quo.[102] Rather, under *McNair*, all that the government has to prove is "an intent to corruptly influence or be influenced in connection with any business or transaction."[103]

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95. *Id.* at 521.

96. *Official's Receipt of Gift for Unspecified Favor Established Extortion, Bribery Quid Pro Quo*, *supra* note 92.

97. 605 F.3d 1152, 1188 (11th Cir. 2010) (holding "there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*").

98. *Id.* at 1187.

99. *Id.* at 1187-88.

100. *Id.* at 1188.

101. *Id.*

102. *Id.*

103. *Id.* (internal quotation marks omitted).

C. The Eleventh Circuit's Siegelman Explicit, but Not Express, Quid Pro Quo Requirement

In *United States v. Siegelman*,[104] the Eleventh Circuit drew an unprecedented distinction regarding the *McCormick* explicit quid pro quo language,[105] holding that "explicit" does not mean "express."[106] Don Siegelman, the former governor of Alabama, was appealing his conviction of federal funds bribery, among other crimes, on the ground that the district court's jury instructions were inadequate under *McCormick*.[107] More specifically, Siegelman argued that the instructions failed to direct the jury that they had to find an "express" quid pro quo agreement—namely, that he made the decision to appoint Scrushy onto the Certificate of Need Review Board *in exchange for* Scrushy's $500,000 donation.[108]

In its discussion, the court specifically pointed out that it has "not yet considered whether federal funds bribery . . . require[s] a similar [*McCormick*] 'explicit promise.'"[109] And, it opted to avoid deciding the issue, writing:

> The district court agreed to instruct the jury that they could not convict the defendants of bribery in this case unless "the defendant and the official *agree* that the official will take specific action in exchange for the thing of value." . . . So, whether or not a quid pro quo instruction was legally required, such an instruction was given.
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> . . . .
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> . . . Therefore, *assuming* a *quid pro quo* instruction was required in this case, we find no reversible error.[110]

However, the court's assumption did not end its discussion of the

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104. 561 F.3d 1215 (11th Cir. 2009) (per curium).

105. 500 U.S. 257, 273-74 (1991).

106. *Siegelman*, 561 F.3d at 1225-26 ("*McCormick* does use the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. It does not, however, mean *express*."); *see* Gold, *supra* note 28, at 277-79 (referring to the Eleventh Circuit's holding in *Siegelman* as the "minority" view among circuit courts and as having "radically departed" from its previous holding in *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994), where it noted the applicability of the *McCormick* standard when prosecuting Hobbs Act extortion under color of official right in the campaign contribution context and the applicability of the *Evans* standard in the noncampaign contribution context); *see also* Brief for Petitioner, *supra* note 60, at 14 ("It is not clear that any other Circuit shares the view of the Eleventh Circuit in this regard.").

107. *Siegelman*, 561 F.3d. at 1219, 1225. The prosecution's theory was that Siegelman accepted $500,000 from Richard Scrushy, the Chief Executive Officer of a prominent Alabama hospital corporation, and in exchange, Siegelman appointed Scrushy to Alabama's Certificate of Need Review Board. *Id.* at 1219.

108. *Id.* at 1225.

109. *Id.*

110. *Id.* at 1225-27.

quid pro quo requirement. Rather than deciding whether the *McCormick* or *Evans* standard applied by drawing a distinction between the campaign and noncampaign contribution context,[111] the Eleventh Circuit merged the two standards into a single doctrine—one which requires that the agreement "for some specific action or inaction . . . be *explicit*, but . . . [not necessarily] *express*."[112] The court held that this explicit agreement could also "be 'implied from [the official's] words and actions.'"[113] At least one critic has characterized the Eleventh Circuit's distinction as "split[ing] hairs between 'explicit' and 'express' . . . so that an explicit agreement could actually be implicit."[114] Others have characterized this distinction as "stripp[ing] the word 'explicit' of any real meaning."[115]

Displeased with the Eleventh Circuit's decision affirming all of his convictions less two counts of mail fraud,[116] Siegelman petitioned to the United States Supreme Court for certiorari.[117] Siegelman's first question presented asked the Supreme Court to clarify whether the *McCormick*

> standard require[s] proof of an "explicit" *quid pro quo* promise or undertaking in the sense of actually being communicated expressly . . . or . . . on the inference that there was an *unstated* and *implied* agreement, a state of mind, connecting the contribution and an official action.[118]

In other words, the question presented asked whether an explicit quid pro quo must be expressed or can be inferred. Yet, Siegelman's first, and only relevant, question presented failed to identify the critical, threshold issue regarding whether the *McCormick* standard

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111. *See supra* note 65 and accompanying text (discussing how the Second, Third, Sixth, and Ninth Circuit Courts have applied the *McCormick* and *Evans* decisions while prosecuting Hobbs Act extortion under color of official right by drawing a critical distinction between the campaign contribution context and other instances of personal payments to public officials; the former requiring proof an explicit quid pro quo to sustain a conviction, and the latter solely requiring an implicit quid pro quo).

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

113. *Id.* (quoting Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)).

114. Gold, *supra* note 28, at 283 ("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.").

115. Brief for Former Attorneys General as Amici Curiae Supporting Petitioner at 12-13, Siegelman v. United States, 130 S. Ct. 3542 (2010) (No. 09-182) (arguing that "[a]s a matter of plain language, an 'explicit promise to perform or not to perform an official act' in return for a campaign contribution cannot be based on an unspoken, merely implied, exchange of the official act for the contribution") (citation omitted).

116. *Siegelman*, 561 F.3d at 1245.

117. *See generally* Brief for Petitioner, *supra* note 60.

118. *Id.* at i.

even applies to federal funds bribery. Remember, the Supreme Court's earlier decision in *McCormick* solely dealt with Hobbs Act extortion under color of official right in the narrow campaign contribution context, not 18 U.S.C. § 666.[119]

Notably, in his petition, Siegelman both mischaracterized and oversimplified the two circuit court splits by treating them as one singular split.[120] Whereas the first circuit court split involves how the *McCormick* and *Evans* rulings apply to Hobbs Act extortion under color of official right,[121] the second split pertains to the rudimentary issue of whether the *McCormick* explicit quid pro quo requirement even applies to § 666 bribery in the narrow campaign contribution context.[122] Siegelman subsequently conceded that his case did not involve the Hobbs Act and argued that, regardless, the statutes at issue "implicate[] the same concerns and considerations that drove the decision in *McCormick*."[123] And yet, while the Eleventh Circuit "did not deny that the *McCormick* standard applies to . . . § 666, just as it does to the Hobbs Act,"[124] Siegelman failed to raise this rudimentary issue in his petition for certiorari.[125] Ultimately, the Supreme Court vacated and remanded the Eleventh Circuit's holding in *Siegelman* in light of another decision, which was irrelevant to the *McCormick* question presented.[126] And so, the question remains.

V. FEDERAL FUNDING BRIBERY, THE HOBBS ACT, AND THEIR NEWFOUND RELEVANCE IN NEW JERSEY

A. "Operation Bid Rig III"

Tuesday, July 23, 2009, marked the pinnacle of a two-year New Jersey political corruption and international money laundering investigation, referred to as phase three of "Bid Rig" by the FBI, IRS, and U.S. Attorney's Office who jointly conducted the operation.[127]

119. *See* McCormick v. United States, 500 U.S. 257, 274 (1991).

120. *See* Brief for Petitioner, *supra* note 60, at 11-12 ("[T]here is deep disagreement among the federal Circuit Courts about the legal standard that makes a crime of the alleged connection between a campaign contribution and an official action. As a result of the decision below, the Circuit Courts are now divided as to whether this Court's decision in *Evans* . . . dilutes the 'explicit *quid pro quo*' standard of *McCormick* . . . .") (internal citations omitted).

121. *See supra* Part III.E (discussing the circuit courts post-*McCormick* and *Evans*).

122. *See* discussion *supra* Part IV.A-B.

123. Brief for Petitioner, *supra* note 60, at 4.

124. *Id.* at 7.

125. *See generally* Brief for Petitioner, supra note 60 (failing to raise the issue).

126. *See* Siegelman v. United States, 130 S. Ct. 3542 (2010).

127. *See* Press Release, U.S. Dep't of Justice U.S. Attorney, Dist. of N.J., Two-Track Investigation of Political Corruption and International Money Laundering Rings Nets 44 Individuals (July 23, 2009), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2009/bidrig0723.rel.pdf.

Forty-four people were arrested and criminally charged based on their dealings with one man: Solomon Dwek.[128] The plot of the New Jersey political corruption investigation was essentially identical for each defendant.[129] Dwek, a federal informant operating under an assumed identity, posed as a real estate developer interested in building high-rises, hotels, and other projects in each public official's respective town, city, or county.[130] He met with several "public officials, mayoral and council candidates, and their confidants" and offered thousands of dollars "in cash for an upcoming campaign, or as a straight-up bribe, with the promise of more to come, and with earnest pleas that his official requests [regarding his upcoming projects] 'be taken care of.'"[131] And as each of the defendants chose to either plead guilty or proceed to trial, the specific details of their interactions with Dwek unraveled.

It is not surprising, given the plot, that a majority of the defendants were criminally charged with either Hobbs Act extortion under color of official right, conspiracy to commit Hobbs Act extortion under color of official right, § 666 bribery, or some combination thereof.[132] While a majority of the public officials simply pled

128. *See* David M. Halbfinger, *44 Charged by U.S. in New Jersey Corruption Sweep*, N.Y. TIMES, July 24, 2009, at A1. *See generally* TED SHERMAN & JOSH MARGOLIN, THE JERSEY STING 7-21 (2011)

129. *See* SHERMAN & MARGOLIN, *supra* note 128, at 19 (describing the "scripts" for the politicians). "The CW took on an assumed name and became a fast-talking, seemingly reckless Orthodox Jewish real estate developer with a loose wallet, loose lips, and a plan to put up big high-rises on what seemed to be impossibly tiny tracts of land . . . . To the politicians, the CW was just another businessman willing to pay off anyone to get the jobs fast-tracked." *Id.*

130. Halbfinger, *supra* note 128.

131. *Id.*

132. *See* Criminal Complaint at 2-3, United States v. Shaw, Mag. No. 09-8127 (MCA) (D.N.J. July 2009), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2009/Beldinicheatamshawcomplaint.pdf (charging Leona Beldini, the deputy mayor of Jersey City, New Jersey, and Edward Cheatam, the affirmative action officer for Hudson County and a commissioner on the Jersey City Housing Authority, with one count of conspiracy to commit extortion under color of official right and charging Cheatam, individually, with one count of substantive extortion under color of official right); Criminal Complaint at 1-2, United States v. Cammarano III, Mag. No. 09-8128 (MCA) (D.N.J. July 2009), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2009/CammaranoSchaffer%20compl1.pdf (charging Peter Cammarano III, the mayor of the city of Hoboken, New Jersey, and an attorney specializing in election law, with conspiracy to commit extortion under color of official right); Criminal Complaint at 1-2, United States v. Cardwell, Mag. No. 09-8129 (MCA) (D.N.J. July 2009), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2009/Cardwellcomplaint.pdf (charging Joseph Cardwell, the commissioner of the Jersey City Municipal Utilities Authority, with § 666 bribery); Criminal Complaint at 1-2, United States v. Elwell, Mag. No. 09-8144 (MCA) (D.N.J. July 2009), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2009/ElwellManzo.pdf (charging Dennis Elwell, the mayor of the town of Secaucus, New Jersey, with conspiracy to commit extortion under color of official right).

guilty,[133] it was the handful of defendants who maintained their innocence and elected to go to trial who gave the question—whether a § 666 bribery conviction, in the narrow campaign contribution context, requires proof of an explicit quid pro quo—a newfound importance in the District of New Jersey and the Third Circuit.

B. The "Operation Bid Rig III" Trials

The following trials are of such significance because they demonstrate the apparent difference between a prosecutor's burden of proof under the Hobbs Act and § 666 bribery—at least according to the jury verdicts.[134] The first trial involved Leona Beldini, former

133. The following defendants all pled guilty to conspiracy to commit extortion under color of official right in violation of the Hobbs Act: Maher Khalil, the former deputy director of the Jersey City Department of Health and Human Services; Edward Cheatam, the former Jersey City Housing Authority Commissioner; Philip Kenny, the former Jersey City Councilman; Michael Manzo, a Jersey City Council candidate; Peter Cammarano III, former Hoboken Mayor; and Mariano Vega, former City Council President of Jersey City. *See* Ron Zeitlinger, *Jersey City Official Maher Khalil Pleads Guilty in Corruption Case*, JERSEY J. (Sept. 9, 2009, 2:50 PM), http://www.nj.com/hudson/index. ssf/2009/09/jersey_city_official_maher_kha.html; Margaret Schmidt, *Former Jersey City Housing Official Pleads Guilty, Says Bribes Went to Mayor Healy's Campaign*, JERSEY J. (Sept. 18, 2009, 12:34 PM), http://www.nj.com/hudson/index.ssf/2009/09/former_jersey_ city_housing_off.html; Michaelangelo Conte, *Jersey City Councilman Phil Kenny Pleads Guilty in Massive NJ Corruption Case*, THE JERSEY J. (Oct. 6, 2009, 12:50 PM), http://www. nj.com/hudson/index.ssf/2009/10/jersey_city_councilman_phil_ke.html; *Michael Manzo Pleads Guilty to Accepting a Bribe, Faces 10 to 16 Months*, JERSEY J. (Dec. 3, 2009, 8:30 AM), http://www.nj.com/hudson/index.ssf/2009/12/michael_manzo_pleads_guilty_ to.html; Joe Ryan, *Ex-Hoboken Mayor Peter Cammarano III Pleads Guilty to Extortion in N.J. Corruption Bust*, STAR-LEDGER (Apr. 20, 2010, 8:30 AM), http://www.nj.com /hudson/index.ssf/2009/12/michael_manzo_pleads_guilty_to.html; Press Release, FBI, Newark Div., Former City Council President for Jersey City Pleads Guilty to Corrupt Payments Conspiracy (Sept. 14, 2010), *available at* http://www.fbi.gov/newark/press-releases/2010/nk091410.htm. Also, Guy Catrillo, a former member of the Jersey City Mayor's Action Bureau and planning aide for the Jersey City Division of Planning, pled guilty to attempted extortion under color of official right. Agustin C. Torres, *Jersey City Official Guy Catrillo Pleads Guilty in Major Federal Corruption Case*, JERSEY J., (Sept. 9, 2009, 4:50 PM), http://www.nj.com/hudson/index.ssf/2009/ 09/former_jersey_city_official_gu.html. Both Joseph Cardwell, a former Jersey City political consultant, and Denis Jaslow, a former investigator for the Hudson County Board of Elections, pled guilty to federal funds bribery. *See* MaryAnn Spoto, *Jersey City Political Consultant Cardwell Admits to Accepting $30K Bribe in Massive Corruption Case*, STAR-LEDGER (Mar. 01, 2011, 4:06 PM), http://www.nj.com/news/ index.ssf/2011/03/ex-jersey_city_mua_consultant.html; Press Release, U.S. Attorney's Office, Dist. of N.J., Former Hudson County Official Admits to Agreeing to Pass Cash Bribes to Former Secaucus Mayor (June 7, 2011), *available at* http://www.just ice.gov/usao/nj/Press/files/Jaslow,%20Denis%20News%20Release.html.

134. *See* United States v. Beldini, 443 F. App'x 709, 712 (3d Cir. 2011) (resulting in Beldini's conviction of two counts of federal funds bribery and her acquittal of two counts of substantive Hobbs Act violations and one count of conspiracy to commit extortion following a jury trial); *see also* United States v. Elwell, No. 09-864 (JLL), 2011 WL 5007883, at *1 (D.N.J. Oct. 20, 2011) (resulting in Elwell's conviction of one

deputy mayor of Jersey City, New Jersey.[135] While Beldini was indicted on six counts—one count of conspiracy to commit extortion, two counts of substantive Hobbs Act violations, and three counts of federal funds bribery—the jury convicted her solely on two counts of federal funds bribery.[136] The trial of former New Jersey State Assemblyman Daniel Van Pelt followed the Beldini trial.[137] Van Pelt was indicted for attempted extortion under color of official right and federal funds bribery, but unlike Beldini, the jury convicted him on both counts.[138]

Then the gears suddenly changed. While Anthony Suarez, the mayor of the Borough of Ridgefield, New Jersey, was also indicted for conspiracy to commit extortion under color of official right, attempted extortion under color of official right, and federal funds bribery,[139] the jury returned a not-guilty verdict on all three counts.[140] Following the Suarez acquittal, former New Jersey Assemblyman L. Harvey Smith was also acquitted of six counts including: one count of conspiracy to commit extortion under color of official right, two counts of attempted extortion under color of official right, two counts of federal funds bribery, and one count of money laundering.[141]

However, on July 6, 2011, the acquittal streak quickly came to an end. Similar to Beldini, Dennis Elwell—the former mayor of Secaucus, New Jersey—was found not guilty of conspiracy to commit extortion under color of official right and attempted extortion under

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count of federal funds bribery and his acquittal of one count of conspiracy to commit extortion under color of official right and attempted extortion under color of official right following a jury trial).

135. Associated Press, *Jersey City Official Is Convicted in First Trial in Corruption Sting*, N.Y. TIMES, Feb. 12, 2010, at A28.

136. *Beldini*, 443 F. App'x at 712; *see also* Associated Press, *supra* note 135 (reporting that Beldini was convicted on bribery charges but "acquitted of the most-serious [sic] charges against her," in reference to the extortion counts, which "carried a maximum sentence of 20 years each," as opposed to the ten-year maximum sentence that the bribery counts carried).

137. *See* MaryAnn Spoto, *Van Pelt Convicted of Bribery, Extortion; Ex-Ocean Official Faces 30 Years*, STAR-LEDGER, May 20, 2010, at 15 ("Van Pelt's case was the second of last year's arrests to go to trial.").

138. United States v. Van Pelt, 448 F. App'x 301, 302 (3d Cir. 2011).

139. Indictment, United States v. Suarez, No. 09-932 (D.N.J. Dec. 18, 2009).

140. Verdict Sheet, United States v. Suarez, No. 09-932 (D.N.J. Dec. 18, 2009); *see also* Joe Ryan, *He Beat the Feds: Ridgefield Mayor First to Walk Away from Bribery Sting*, STAR-LEDGER, Oct. 28, 2010, at 1 (reporting that Suarez's not-guilty verdict was "the first resounding rebuke to a prosecution stemming from the largest federal sting in state history" and also the first case to break U.S. prosecutors' winning streak "includ[ing] convictions and guilty pleas in more than 200 [corruption] cases" dating back to 1999).

141. Indictment at 1-20, United States v. Smith, No. 10-83 (D.N.J. Feb. 16, 2010); *see also* Verdict, United States v. Smith, No. 10-83 (D.N.J. Dec. 16, 2010).

color of official right, but was found guilty of federal funds bribery.[142] Elwell's attorney subsequently commented on the split jury verdict to a news reporter: "When it came to the decision between the attempted extortion and the bribery, the point of contention was whether there was [an] acceptance of money in exchange for the official action, and it's the same for both charges."[143] However, there *is* a difference, and it is a critical difference: the *McCormick* explicit quid pro quo requirement under the Hobbs Act. Judging from the *Beldini* and *Elwell* split verdicts, neither jury was persuaded that the prosecutors had demonstrated proof of an explicit quid pro quo in either case, as required under the *McCormick* standard. Yet, both of the juries' willingness to, instead, convict the defendants under the federal funding bribery statute indicates that this charge required a lesser showing of proof. Presumably, it would follow that if the district court, in either case, had instructed the jurors on an explicit quid pro quo requirement under § 666, the jurors would have also found the defendants not-guilty on those counts, as well.

C. The Third Circuit's Silence on the Issue

After being convicted on two counts of § 666 bribery, Leona Beldini filed a motion for a judgment of acquittal or for a new trial, arguing, among other things, that the jury instructions on both counts of federal funding bribery "erroneously omitted the explicit quid pro quo requirement contained in the instructions" for her three alleged violations of the Hobbs Act.[144] However, the district court found that Beldini had waived her objection to the jury instructions[145] and, regardless, § 666 bribery's "corrupt intent requirement obviated the need for an explicit quid pro quo in cases involving campaign contributions."[146]

Beldini raised the same issue again on appeal.[147] Yet, the Third Circuit found that Beldini's failure to object to the § 666 jury instructions, as well as her failure to place the district court on notice

142. United States v. Elwell, No. 09-864 (JLL), 2011 WL 5007883, at *1 (D.N.J. Oct. 20, 2011); *see also* Jason Grant, *Ex-Secaucus Mayor Found Guilty of Bribery: Jurors Acquit Elwell on Two Related Charges in $10,000 Dwek Deal*, STAR-LEDGER, July 7, 2011, at 13 ("Yesterday's split verdict was reminiscent of the verdict against former Jersey City Deputy Mayor Leona Beldini, who was convicted last year of two counts of bribery but acquitted of four counts, including conspiracy to commit extortion and two counts of attempted extortion.").

143. Grant, *supra* note 142, at 13.

144. United States v. Beldini, 443 F. App'x 709, 712 (3d Cir. 2011).

145. *Id.* at 712-13 ("[T]here was no indication in court transcripts . . . that [Beldini] at any time objected to the fact that the quid pro quo, *McCormick* standard was not being charged with regard to the § 666 violations as [the judge] did with regard to the Hobbs Act." (internal quotation marks omitted)).

146. *Id.* at 713.

147. *Id.*

of the issue before the jury deliberated, precluded its appellate review of the § 666 jury instructions except for plain error.[148] Despite pointing out the "earnest circuit split on whether § 666 does or does not require proof of a quid pro quo," the Third Circuit opted not to weigh in on the issue.[149] Instead, it held that there was no plain error because "[t]here is no Supreme Court or Third Circuit precedent on the point. . . . Thus, any alleged 'error was unclear at the time of trial' and remains unclear on appeal because the applicable law has not been clarified."[150]

To further bolster its holding, the Third Circuit reasoned that even if its failure to instruct the jury on an explicit quid pro quo requirement under § 666 "is deemed an error, it is not a clear or obvious error because the Supreme Court has not held that an *express* quid pro quo is required even for Hobbs Act . . . convictions."[151] While technically accurate, the problem with that proposition is that it seems to be differentiating between the term *explicit* and the term *express*—a distinction that first appeared in the Eleventh Circuit's holding in *Siegelman*[152] and, apparently, has ensued.[153] But, the Supreme Court in *McCormick* made it clear that Hobbs Act convictions require proof of an *explicit* quid pro quo.[154]

This very same issue appeared on appeal to the Third Circuit for the second time in one year in *United States v. Van Pelt*.[155] However, just as it did in *Beldini*, the Third Circuit solely reviewed Van Pelt's issues on appeal for plain error, given his failure to object to the jury instructions at trial.[156] And, again, the Third Circuit remained silent, finding there was no plain error[157] and conceding that "Van Pelt's failure to raise the issue in the District Court makes this case an unsuitable occasion for us to decide on which side of the circuit split we fall."[158]

And so, the issue remains as to whether § 666 requires proof of an explicit quid pro quo in order to convict a public official of bribery.

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148. *Id.* at 716.

149. *Id.* at 717-18.

150. *Id.* at 717 (citation omitted).

151. *Id.* (emphasis added).

152. 561 F.3d 1215, 1226 (11th Cir. 2009).

153. *See supra* Part IV.C.

154. 500 U.S. 257, 272-73 (1991).

155. 448 F. App'x 301, 303 (3d Cir. 2011).

156. *Id.*

157. The Third Circuit premised its plain error review on the notion that even if there is a quid pro quo requirement under § 666, "our case law does not require that such a phrase be included verbatim in the charge." *See id.* at 304 (discussing how the district court adequately "required the jury to find that Van Pelt was 'influenced' by or 'rewarded' with a payment in connection with New Jersey's business").

158. *Id.* at 305 ("Because we have not yet decided the question, it necessarily follows that there can be no plain error.").

One attorney's remark following the Eleventh Circuit's holding in *McNair*[159] back in 2010 still sounds true today: "This issue may be ripe, in the appropriate case, for Supreme Court review and resolution."[160] Just not in *Siegelman*.[161]

VI. THE IMPORTANCE OF PROVING AN EXPLICIT QUID PRO QUO UNDER § 666 IN THE CAMPAIGN CONTRIBUTION CONTEXT

Because of the difficulty discerning the line between a legal campaign contribution and an illegal bribe,[162] as well as the importance of setting forth a clear, uniform standard in the prosecution of public corruption,[163] courts should incorporate the *McCormick* explicit quid pro quo requirement into the federal funds bribery statute to parallel Hobbs Act extortion under color of official right. Realistically, "[a]s the law has evolved, extortion 'under color of official right' and bribery are really different sides of the same coin."[164] The Supreme Court identified this reality in *Evans v. United States*—conceding that the evidence of the case could have also supported a charge of bribery, noting the argument that extortion

159. United States v. McNair, 605 F.3d 1152 (11th Cir. 2010).

160. Alain Leibman, *Section 666 Requires No Quid Pro Quo in Order to Convict State Official of Bribery, the Eleventh Circuit Holds*, WHITE COLLAR DEF. & COMPLIANCE (June 13, 2010, 5:48 PM), http://whitecollarcrime.foxrothschild.com/2010/06/articles/offense-elements/section-666-requires-no-quid-pro-quo-in-order-to-convict-state-official-of-bribery-the-eleventh-circuit-holds/print.html.

161. *See* United States v. Siegelman, 130 S. Ct. 3542 (2010) (granting certiorari, but vacating judgment and remanding the case for further consideration in light of a different Supreme Court decision, which did not concern the *McCormick* issue).

162. *See* Diamond, *supra* note 3, at 19 ("When is the quid pro quo only implicit and not criminally explicit? The answer is unfortunately not clear. The difference would not be so significant if the solicitation and acceptance by government officials of campaign contributions were not so commonplace, but our political system practically deems it necessary, appropriate, and indeed laudatory for the right causes."); *see also* Gayed, *supra* note 26, at 1788 ("Potentially corrupt behavior often straddles already murky lines of propriety."); Gold, *supra* note 28, at 286 ("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. The presence of large private campaign contributions will always raise questions of how public officials can act objectively . . . ." (footnote omitted)); Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 845 (2001) (discussing the "difficulties in applying federal anti-corruption law to an area in which it is permissible to solicit and donate money in order to influence a position" (footnote omitted)) [hereinafter Henning, *Public Corruption*].

163. *See* Brief for Former Attorneys General as Amici Curiae Supporting Petitioner, *supra* note 115, at 4 ("As former state Attorneys General, we understand the importance of clearly defining the legal duties that criminal defendants are accused of violating, which not only protects against uncertain liability, but also minimizes the risk of politically motivated prosecutions.").

164. United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993).

and bribery are overlapping crimes and describing common law extortion by a public official as "the rough equivalent of what we would now describe as 'taking a bribe.'"[165] Naturally, it follows that these two "overlapping" statutes should require the same showing of an explicit quid pro quo when being utilized in the same exact context—to prosecute the acceptance of payments characterized as campaign contributions. This is especially true in instances where the defendant public official's acceptance of one particular payment forms the basis of both charges, as often times occurs.[166]

But perhaps the single most fundamental reason to incorporate an explicit quid pro quo requirement into § 666 bribery, in the narrow campaign contribution context, is couched within the rationale of the *McCormick* decision.[167] Remember, *McCormick* was not decided based on the precise language of the Hobbs Act, nor its statutory history.[168] Rather, the Supreme Court based its decision on the concerns inherent in the statute's use as a prosecutorial tool to root out public corruption in the narrow campaign contribution context:[169]

> [T]o 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." 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

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165. 504 U.S. 255, 260, 267 n.18 (1992); *see also* Henning, *Public Corruption*, *supra* note 162, at 847 (describing extortion under color of official right as "effectively a form of bribery," because "courts recognized explicitly that a public official charged with violating the Hobbs Act was in reality alleged to have taken a bribe").

166. *See, e.g.*, United States v. Ganim, 510 F.3d 134, 136 (2d Cir. 2007); United States v. Abbey, 560 F.3d 513, 515 (6th Cir. 2009); *supra* note 133 and accompanying text.

167. Henning, *Public Corruption*, *supra* note 162, at 846 ("The Court's analysis is instructive on the difficulties in applying the criminal law to donations to elected officials.").

168. *See Allen*, 10 F.3d at 411 (explaining that in *McCormick* the Supreme Court incorporated an explicit quid pro quo requirement "[b]ecause of the realities of the American political system"); *see also* Whitaker, *supra* note 25, at 1632 ("[T]he the Court did not base its holding on the language of the statute, but instead focused on the practical difficulty of distinguishing an unlawful payment from conduct traditionally thought to be lawful and unavoidable in election campaigns.") (footnote omitted).

169. *See* McCormick v. United States, 500 U.S. 257, 272-73 (1991).

> been from the beginning of the Nation.[170]

In an effort to deter the law from unduly encroaching upon the campaign finance system and to set forth a clear standard of illegal conduct, the Court set forth the explicit quid pro quo requirement.[171]

Because the very same countervailing interests are implicated in the prosecution of payments characterized as campaign contributions under § 666, courts should exert the same level of caution in interpreting and applying the federal funds bribery statute, as the Supreme Court did in *McCormick* in its interpretation and application of the Hobbs Act.[172] After all, the message set forth in *McCormick* was clear: courts ought to tread carefully when prosecuting public officials based on their acceptance of payments characterized as campaign contributions.[173] Since *McCormick*, the Second and Fourth Circuits have properly held that proof of an explicit quid pro quo is also required under § 666 bribery.[174] The

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170. *Id.* at 272.

171. *Id.* at 273.

172. *See* United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (explaining the rationale behind applying the *McCormick* explicit quid pro quo requirement to § 666 bribery, without actually holding that it does apply).

> Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the McCormick Court did in interpreting the Hobbs Act: 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. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.

Id.; *see* Brief for Former Attorneys General as Amici Curiae Supporting Petitioner, *supra* note 115, at 15 (arguing that proof of an explicit quid pro quo is required under the federal funds bribery statute because, like the Hobbs Act, the statute does not contain language that a crime occurs "when an official accepts a campaign contribution that he understands is motivated by the donor's desire for the official to take certain actions, which are thereafter taken").

173. Henning, *Public Corruption*, *supra* note 162, at 851 (reflecting "the concern that the inevitable clash of an anti-corruption statute with a core facet of the democratic system implicates significant constitutional issues").

174. *See* United States v. Jennings, 160 F.3d 1006, 1021 (4th Cir. 1998) (finding the district court erred by failing to include the § 666(a)(2) quid pro quo requirement in the jury instructions). In *Jennings*, the Fourth Circuit defined the "'corrupt intent' element of bribery" as "the intent to engage in a relatively specific quid pro quo," emphasizing that "[w]ithout an appropriate definition of 'corruptly,' an instruction mistakenly suggests that § 666 prohibits *any* payment made with a generalized desire to influence or reward . . . no matter how indefinite or uncertain the payor's hope of future benefit." *Id.* at 1020 (citation omitted); *see also* United States v. Ganim, 510 F.3d 134, 151-52 (2d Cir. 2007) (finding the jury necessarily convicted Ganim of federal funds bribery because the "district court plainly instructed" that they "would have to find a 'specific quid pro quo'").

Fifth Circuit has notably held that "[u]nder the bribery statutes, the government must prove a quid pro quo, that is, that the official took money *in return for* an exercise of his official power" and cited directly to *McCormick* to support the proposition.[175] The Fifth Circuit's direct citation to *McCormick* implies that, in the narrow campaign contribution context, the explicit quid pro quo requirement is also directly applicable to bribery. While the *Tomblin* case involved a different federal bribery statute than § 666, the Fifth Circuit's broad use of the phrase "[u]nder the bribery statutes"[176] seemingly supports the proposition that the *McCormick* explicit quid pro quo requirement is applicable to *all* bribery statutes, including § 666.

While only two circuit courts have held that proof of an explicit quid pro quo is also required under § 666 bribery, courts have recognized that prosecuting public officials for accepting money characterized as a campaign contribution, in general, requires careful consideration.[177] As the Third Circuit phrased it, "Outside the campaign contribution context . . . the line between legal and illegal acceptance of money is not so nuanced."[178] Requiring an explicit quid pro quo under the federal funds bribery statute in the campaign contribution context would properly balance the countervailing interests that once troubled the Supreme Court in *McCormick* by adequately protecting the American campaign finance system, while allowing for the effective prosecution of political corruption.

Over ninety former state attorneys general agree that in the prosecution of money characterized as campaign contributions, § 666 bribery should require proof of an explicit quid pro quo for the precise reasons that drove the Supreme Court's decision in *McCormick*.[179] They argued their position as amici in support of the petitioner in *Siegelman v. United States*, which unfortunately did not yield a definitive answer from the Supreme Court regarding this issue.[180] In their amicus brief, the former state attorneys general carefully set forth a slew of problems that would result from requiring anything less than proof of an explicit quid pro quo in the prosecution of public officials under § 666:

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175. United States v. Tomblin, 46 F.3d 1369, 1379 (5th Cir. 1995) (emphasis added).

176. *Id.*

177. *See* United States v. Abbey, 560 F.3d 513, 517-18 (6th Cir. 2009) ("But not all quid pro quos are made of the same stuff. . . . [I]n circumstances like this one—outside the campaign content—[r]ather than requir[e] an *explicit* quid-pro-quo promise, the elements of extortion are satisfied by something short of [it] . . . .") (internal quotation marks omitted) (alterations in original).

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

179. *See generally* Brief for Former Attorneys General as Amici Curiae Supporting Petitioner, *supra* note 115, at 6-12.

180. *See* United States v. Siegelman, 130 S. Ct. 3542, 3542 (2010) (remanding on other grounds separate from the *McCormick* issue).

> [F]irst, it subjects public officials to the unreasonable burden of having to reject campaign contributions if there is any reason to believe that such contributions were made by donors desiring that the officials take certain actions; second, if public officials choose to actually accept campaign contributions with that same belief, they now must take pains to *not do* what the donors desire or else face the threat of criminal recriminations; third, donors may fear that their conduct will be subject to retrospective determinations of corruption by unguided juries any time public officials act consistent with their interests; and finally, it exposes public officials and donors alike to politically motivated prosecutions based on an indefinite and potentially all-encompassing standard that may be invoked to justify the prosecution of all sorts of legitimate conduct.[181]

Notably, of the ninety-one former state attorneys general who joined as amici, eight of them once served as the chief legal officer in New Jersey, two in Delaware, and another two in Pennsylvania,[182] together which, on the federal level, comprise the Third Circuit—the very same circuit that has been silent on the issue, despite its pressing relevance in the prosecution of the individuals arrested and charged as a result of "Operation Bid Rig III."[183]

However, in addition to the similarities between the Hobbs Act and § 666 bribery in their use to prosecute public corruption, the countervailing interests that are implicated in the campaign contribution context, and the agreement of over ninety former state attorneys general, it is also worth noting that requiring proof of an explicit quid pro quo under a federal bribery statute is not an unprecedented concept. In *United States v. Sun-Diamond Growers of California*, the Supreme Court read an explicit quid pro quo requirement into 18 U.S.C. § 201(c)(1)(A),[184] "which prohibits giving 'anything of value' to a present, past, or future public official 'for or because of any official act performed or to be performed by such public official.'"[185] While § 201 is an explicitly federal anticorruption statute, unlike § 666 it does not reach state and local public officials.[186] In fact, § 666 was enacted to fill the gap created by § 201

181. Brief for Former Attorneys General as Amici Curiae Supporting Petitioner, *supra* note 115, at 25.

182. *Id.*

183. *See supra* Part V.

184. 526 U.S. 398, 400, 406 (1999) (holding the statute required a quid pro quo because the statutory language that prohibited anything of value being given "for or because of any official act performed or to be performed" seemed "pregnant with the requirement that some particular official act be identified and proved").

185. *Id.* at 398 (quoting 18 U.S.C. § 201(c)(1)(A) (1994)).

186. *See* 18 U.S.C. § 201 (a)(1) (2006) (defining the term "public official" within the meaning of the statute as a "Member of Congress, Delegate, or Resident Commissioner . . . or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof").

by enabling the prosecution of state and local government officials in addition to federal officers and employees.[187] It would seem inconsistent to give federal officials the protection of an explicit quid pro quo requirement under § 201 and not state and local officials under § 666 when the two statutes share such similar statutory purposes and prosecutorial uses.

Ultimately, without an explicit quid pro quo requirement, all of the concerns that once troubled the Supreme Court in *McCormick* will continue to persist; only now under § 666 instead of the Hobbs Act. This proposal is not meant to oversimplify the often problematic factual circumstances that give rise to public corruption cases—such as instances where a payment was not actually reported as a campaign contribution,[188] the dollar amount of an accepted payment exceeded the permissible cash limit under electoral law,[189] or the payment was inexplicably broken up into smaller increments.[190] However, requiring proof of an unmistakable quid pro quo offers the relief necessary to alleviate the concerns regarding public officials' and political donors' fear that they could be indicted, and even convicted, based on a mere *inferential* connection between a contribution and an official action, rather than an *explicit* connection—a concern that could have a "chilling effect on the First Amendment right to contribute to political campaigns."[191]

Over ninety states' attorneys general, along with other commentators, are concerned that prosecutors will simply wield too much discretion in the prosecution of public officials without an explicit quid pro quo requirement in place.[192] This concern is notably

187. *See supra* notes 19-21 and accompanying text.

188. *See, e.g.*, McCormick v. United States, 500 U.S. 257, 260 (1991) ("McCormick did not list any of these payments as campaign contributions, nor did he report the money as income on his 1984 federal income tax return.").

189. *See, e.g.*, Grant, *supra* note 142 ("Elwell claimed he thought the $10,000 cash was being given to him as a legal contribution to his 2009 re-election campaign. . . . [A]lthough he knew campaign contributions of more than $300 must not be in cash, he held the cash for 56 days, until his arrest in 2009.").

190. *See, e.g.*, United States v. Beldini, 443 Fed. App'x 709, 710, 712 (3d Cir. 2011) ("Beldini listed the straw donor checks instead of a $10,000 contribution from Dwek," the FBI's cooperating witness who was posing as a real estate developer.).

191. Brief for Former Attorneys General as Amici Curiae Supporting Petitioner, *supra* note 115, at 20-26 (discussing the importance of "ascertainable standards of guilt in the sensitive First Amendment area").

192. *Id.* at 23-24 ("Indeed, the fear of unfettered prosecutorial discretion afforded by a statute whose broad language permits such indictments can only have a chilling effect on free speech and political association protected by the First Amendment."); *see also* Diamond, *supra* note 3, at 19 ("[P]olitical extortion may afford prosecutors too much discretion to declare and characterize political conduct as criminal. In the context of hardball politics, that can be extremely dangerous."); Gold, *supra* note 28, at 285 ("It also creates the danger that, in a politically charged atmosphere, prosecutors will wield this discretion in a partisan fashion.").

voiced in Justice Thomas' dissent in *Evans v. United States*, as it pertained to the Hobbs Act:

> Where, as here, those [criminal] boundaries [set by the legislature] are breached, it becomes impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins. The potential for abuse, of course, is particularly grave in the inherently political context of public corruption prosecutions.[193]

Branching off the concern over unhindered prosecutorial discretion is the concern that the public may simply grow too accustomed to accusations of public corruption.[194] Yet all of these concerns, which apply equally in the narrow campaign contribution context, whether under § 666 bribery or the Hobbs Act, can and should be resolved with the implementation of an explicit quid pro quo requirement. Because, just as the Supreme Court characterized it in *McCormick v. United States*, "[t]his formulation defines the forbidden zone of conduct with sufficient clarity."[195] That is, clarity for public officials, political donors, prosecutors, and jurors alike.

VII. CONCLUSION

As long as public corruption continues to be the subject of FBI investigations, and even more so as it remains the FBI's criminal priority, the question of whether the federal funds bribery statute requires proof of an explicit quid pro quo in the campaign contribution context will continue to recur. The issue has presented itself twice in just one year in the Third Circuit. Yet, despite the Supreme Court's recognition of the interests at stake and their implementation of the explicit quid pro quo as a means to strike a careful balance between the protection of the American campaign finance system and the prosecution of corrupt public officials, and despite the subsequent distinctions drawn by circuit courts between the campaign and non-campaign contribution context, circuit courts have been reluctant to uniformly incorporate the *McCormick* explicit quid pro quo requirement into the federal funds bribery statute, as they have done with the Hobbs Act. However, with the mutual countervailing interests presented in the narrow campaign contribution context and the parallel use of the Hobbs Act and § 666 bribery in the prosecution of public officials, courts should afford the same protections for federal, state, and local officials alike—namely the requirement that prosecutors demonstrate an explicit, not inferential, quid pro quo. This requirement would provide necessary

193. 504 U.S. 255, 296-97 (1992) (Thomas, J., dissenting).

194. *See* Diamond, *supra* note 3, at 26 ("Undoubtedly prosecutors require leeway to both dissuade and prosecute officials for bribery, but if the office pursues cases too often with questionable motivation and shaky evidence, the public will eventually grow tired–or worse, will grow accustomed to accusations of corruption . . . .").

195. 500 U.S. 257, 273 (1991).

clarity so that public officials and political donors will no longer fear that some agreement will be *inferred* in the absence of any explicit illegal agreement, prosecutors can better delimit illegal payments made to public officials, and jurors can accordingly render consistent verdicts regarding the same controversial payment at issue. And most importantly, this is a requirement that the Supreme Court has already determined is suitable to do precisely that.