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THE EMERGING ROLE OF THE QUID PRO QUO REQUIREMENT IN PUBLIC CORRUPTION PROSECUTIONS UNDER THE HOBBS ACT

Peter D. Hardy*

This Note discusses the quid pro quo requirement under the Hobbs Act, a federal criminal statute which applies to bribery by public officials. The author first describes two recent decisions by the Supreme Court, McCormick v. United States *and* Evans v. United States, *which established slightly different versions of a quid pro quo requirement in public corruption prosecutions under the Hobbs Act. The author then explains that the lower federal courts interpreting* McCormick *and* Evans *have molded the quid pro quo requirement so that a prosecutor must prove in all public corruption cases under the Hobbs Act that the official intended a bribe-payor to believe that a momentary payment was a condition to the performance or nonperformance of particular official acts. The author further explains that federal courts do not require the official to either express his intent explicitly or actually intend to perform an official act. Although the author argues that explicitness by the official should not be required, he also argues that officials in fact tend to engage in explicit bribery. The author concludes that judges will continue to mold the quid pro quo requirement partly according to their individual moral and political perspectives.*

The Hobbs Act,[1] a federal criminal statute that prohibits the obstruction of commerce through robbery or extortion,[2] defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threat-

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1. 18 U.S.C. § 1951 (1988) (originally enacted as Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420).

2. The Hobbs Act states in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

§ 1951(a).

ened force, violence, or fear, or under color of official right."[3] The last clause of that definition, referring to obtaining property "under color of official right," has evolved[4] into a potent weapon for federal prosecutors battling public corruption and bribery at the federal, state, and local levels.[5]

In response to the Supreme Court's decision in *United States v. Local 807, International Brotherhood of Teamsters*,[6] Congress passed the Hobbs Act in 1946, thereby amending the

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3. § 1951(b)(2).

4. Federal prosecutors did not apply the Hobbs Act successfully to bribery cases until 26 years after its passage. *See infra* notes 9–12 and accompanying text. *Cf.* U.S. DEP'T OF JUSTICE, PROSECUTION OF PUBLIC CORRUPTION CASES 421 (1988) [hereinafter PUBLIC CORRUPTION CASES] (noting that "[t]he Hobbs Act is as useful as it is today because innovative prosecutors and investigators brought sound cases based upon compelling facts when propounding a new theory of prosecution").

5. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 905 (1988) (calling the Hobbs Act "a current darling of the federal prosecutor's nursery"); Charles C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172 (1977) (arguing that the Hobbs Act was the "principal vehicle" behind the 500% increase in federal prosecutions of state and local officials from 1970 to 1976); Hon. 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, 1 (1971) (asserting that the Hobbs Act should allow for federal prosecution of public corruption whenever state prosecutors are either unwilling or unable to do so); 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, 1630 (1992) (asserting that the Hobbs Act's primary advantage is a broad grant of jurisdiction over activity affecting commerce "in any way").

Lee J. Radek, current Chief of the Public Integrity Section of the Criminal Division of the Department of Justice, has stated:

> Despite the fact that the Travel Act (18 U.S.C. § 1952), RICO (18 U.S.C. § 1962), and 18 U.S.C. § 666 provide for more direct Federal jurisdiction over bribery of state and local officials, the most popular statutory tool used by Federal law enforcement for combating state and local corruption continues to be the prohibition against extortion contained in the Hobbs Act. The reasons for this popularity are basic: ease of proof and severity of penalty.

PUBLIC CORRUPTION CASES, *supra* note 4, at 415.

Mr. Radek also notes:

> [The Hobbs Act is] an extremely powerful tool . . . in combating state and local corruption, for it punishes activity with a 20-year maximum sentence which, if engaged in by Federal officials and prosecuted under 18 U.S.C. § 201 [the federal bribery statute], would be punishable by fifteen years for bribery or two years for gratuity.

Id. at 419–20. For a discussion of 18 U.S.C. § 201, see *infra* notes 120–33 and accompanying text.

6. 315 U.S. 521 (1942).

Anti-Racketeering Act of 1934[7] so that it would apply explicitly to labor racketeering.[8] Until the early 1970s, all Hobbs Act extortion convictions rested upon a showing that a person receiving property had obtained that property through the actual or threatened use of "force, violence, or fear."[9] In 1972, however, beginning with *United States v. Kenny*,[10] federal courts embraced the argument that public officials could violate the Hobbs Act without having employed force, violence, or fear.[11] This interpretation of the Hobbs Act, which obviated the need to demonstrate coercion on the part of a public official, paved the way for the Hobbs Act to blossom into an especially effective antibribery statute.[12] Some judges and commentators have criticized vehemently the application of the Hobbs Act to bribery by officials, castigating such an approach as an invitation for an especially insidious form of prosecutorial bias[13] and an unjustifiably broad interpretation of the statute.[14] Recently, however, the Supreme Court acknowledged

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7. Ch. 569, 48 Stat. 979 (1934).

8. Evans v. United States, 504 U.S. 255, 261–63 (1992).

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

10. 462 F.2d 1205 (3d Cir.), *cert. denied sub nom.* Kropke v. United States, 409 U.S. 914 (1972).

11. Eric D. 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, 436 & n.12 (1993) (citing cases in which each individual circuit accepted the argument that a public official need not use duress or coercion to violate the Hobbs Act).

12. *See supra* note 5; *see also* JOHN T. NOONAN, JR., BRIBES 586 (1981) ("[After *Kenny*,] bribery was to be called extortion. The federal policing of state corruption had begun."); U.S. NEWS & WORLD REP., Feb. 28, 1977, at 36 (discussing 337 federal indictments of state and local officials involved in corruption in 1976).

13. *See, e.g.*, United States v. Williams, 480 F. Supp. 1040, 1046 (E.D. La. 1979) ("[W]hether one is prosecuted and convicted or not may ultimately depend not upon one's conduct, but upon one's popularity, political affiliation, influence, and even personality. Potential abuse and erratic verdicts are inherent in the ambiguities of [the Hobbs Act]."), *rev'd*, 621 F.2d 123 (5th Cir. 1980), *and cert. denied*, 450 U.S. 919 (1981); *cf.* Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 337, 343 (1983) (arguing that the unrestrained exercise of discretion by an insulated branch of law enforcement under the Hobbs Act hinders state autonomy and also that decisions to prosecute can be arbitrary); Ruff, *supra* note 5, at 1211 (discussing the breadth of prosecutorial discretion under the Hobbs Act).

14. *See* Evans v. United States, 504 U.S. 255, 278–87 (1992) (Thomas, J., dissenting) (arguing that the Hobbs Act only prohibits officials from taking property under the false pretense that they have an official right to the payment). *But see* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officials*, 62 S. CAL. L. REV. 369, 376–77 (1989) (arguing that the need for citizens to have faith in government at all levels justifies federal prosecution of local and state corruption); Lindgren, *supra* note 5, at 817–18, 905–09 (arguing that because neither

that the Hobbs Act does apply to the acceptance of bribes by public officials.[15] Holding that a public official need not "induce" a payment to commit extortion under the Hobbs Act, the Court stated:

> At common law, extortion was an offense committed by a public official who took "by colour of his office" money that was not due to him for the performance of his official duties. A demand, or request, by the public official was not an element of the offense. Extortion by the public official was the rough equivalent of what we would now describe as "taking a bribe." It is clear that petitioner committed that offense. The question is whether the [Hobbs Act], insofar as it applies to official extortion, has narrowed the common-law definition.[16]

The Court answered this question in the negative.[17]

Although the Supreme Court has acknowledged that the Hobbs Act prevents the acceptance of bribes by public officials, what constitutes a bribe still remains unclear. Courts traditionally have tried to prevent the Hobbs Act from subjecting public officials to liability simply for accepting money or other things of value. Three closely related concerns lie behind such efforts: given the practical realities of the political process, an overly broad Hobbs Act might (1) criminalize valuable political activity, (2) criminalize activity which may be of questionable value but in which all politicians inevitably and constantly

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common law extortion nor the New York statute upon which the Hobbs Act was modelled contemplated that extortion and bribery are mutually exclusive crimes, the Hobbs Act applies to bribery as well as to coercive extortion). *See generally* Dan K. Webb et al., *Limiting Public Corruption Prosecutions Under the Hobbs Act: Will* United States v. Evans *Be the Next* McNalley?, 67 CHI.-KENT L. REV. 29, 40–45 (1991) (arguing that the Hobbs Act does not prohibit the passive receipt of bribes); James P. Fleissner, Note, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1086–87 (1985) (arguing that the Hobbs Act should require "inducement" by the official, lest it unfairly apply to the acceptance of gratuities); Joseph M. Harary, Note, *Misapplication of the Hobbs Act to Bribery*, 85 COLUM. L. REV. 1340, 1348–51 (1985) (stating that the existence of alternative statutes suggests that Congress did not intend for the Hobbs Act to apply to bribery); David R. Purvis, Note, *Limiting Expansion into Public Corruption Under the Hobbs Act:* United States v. O'Grady, 18 CONN. L. REV. 183, 202 (1985) (asserting that officials prosecuted under the Hobbs Act for extortion should be able to defend on the basis that they committed only bribery).

15. Evans v. United States, 504 U.S. 255 (1992).
16. *Id.* at 260–61 (citations omitted).
17. *Id.* at 263–69.

engage, and (3) impose stiff penalties for conduct not clearly meriting such severe punishment.[18]

In 1991, prior to *Evans v. United States*[19] but with these concerns apparently in mind, the Supreme Court announced in *McCormick v. United States*[20] that, under the Hobbs Act, the government must prove the existence of a quid pro quo to convict an official for extortion under color of official right based on the receipt of a campaign contribution.[21] The Court indicated that campaign contributions could be vulnerable under the Hobbs Act "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."[22] Unfortunately, the Court did not elaborate further on the quid pro quo requirement,[23] and subsequent opinions, both by lower courts and by the Supreme Court, indicate that the quid pro quo requirement is subject to several different interpretations.

This Note considers how courts have handled the quid pro quo requirement in Hobbs Act public corruption prosecutions since *McCormick*. Part I analyzes how the Supreme Court has treated the requirement. Part II examines how the lower courts have struggled with the requirement. Finally, Part III suggests what role the quid pro quo requirement should have in future cases.

This Note ultimately attempts to answer four basic questions: (1) whether the payment must be given for particular and identifiable official acts; (2) whether the quid pro quo must be stated explicitly, or whether it may be implied; (3) whether the quid pro quo requirement envisions an actual agreement that the public official intends to carry out; and (4) whether the quid pro quo requirement is limited to campaign contributions.[24] This Note argues that all prosecutions for

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18. *See infra* notes 57, 117–19 and accompanying text.

19. 504 U.S. 255 (1992).

20. 500 U.S. 257 (1991).

21. *Id.* at 274; *see also* PUBLIC CORRUPTION CASES, *supra* note 4, at 299 (defining a quid pro quo as "one thing given in exchange for another").

22. *Id.* at 273.

23. *Id.*

24. For the purposes of this Note, a "campaign contribution" case is an official extortion case in which the trial judge rules that sufficient evidence allows the defendant to make the claim that the payments at issue were campaign contributions. A "non-campaign contribution" case is a case in which the defendant either does not claim that payments were contributions or insufficient evidence supports his claim.

This Note adopts a functional definition of a "campaign contribution": a payment is a campaign contribution when the donor intends it to be spent on the donee's political campaign, and the donee spends it in that manner. Whether a payment

extortion under color of official right, including non-campaign contribution cases, should require the government to prove that the official intended the payor to believe that receipt of a monetary payment was a condition to the performance or nonperformance of specific official acts. No actual agreement should be required, however, and the official should not have to express his intent explicitly.[25]

Despite struggling to identify the limits of a quid pro quo, this Note nonetheless concludes that a careful legal definition can have little practical effect on whether or not any given defendant is convicted. Although courts purport to safeguard strictly political activity from Hobbs Act liability, a review of the case law indicates that public officials consistently provide ample evidence for their own convictions by conducting their illicit deals openly and explicitly. Success for defendants on appeal almost always is based upon some error in the jury instructions rather than insufficient evidence. Prosecutors therefore should not jeopardize likely convictions by demanding favorable jury instructions containing a risky legal theory.

This Note also concludes that judges will mold the evolving quid pro requirement according to their own moral and political viewpoints. Judges uncomfortable with the correlation between wealth and political influence will tend to weaken the quid pro quo requirement, whereas judges untroubled by such a correlation will tend to enforce the quid pro quo requirement strictly.

I. THE SUPREME COURT'S APPROACH TO THE QUID PRO QUO REQUIREMENT: MCCORMICK AND EVANS

The Supreme Court recently rendered two opinions concerning the quid pro quo requirement in Hobbs Act public

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complies with applicable campaign-financing laws and is recorded properly is nondispositive evidence of whether it is in fact a campaign contribution.

25. A semantic problem that will continue to plague this Note and the cases examined is that the words "explicit" and "specific" can be, and sometimes are, used interchangeably. This Note uses the word "explicit" to refer only to an agreement whose existence has been acknowledged clearly in words by the parties. This Note uses the word "specific" to refer to an agreement which concerns particular, identifiable official acts. A non-explicit agreement therefore can be "specific" when parties operate with the knowledge that the agreement entails a particular payment for a particular act, even if no one has expressly stated so. Conversely, a non-specific agreement can be "explicit" when a party has acknowledged in express words that the payments are for a general benefit, such as the official's increased "goodwill."

corruption prosecutions. The first opinion, *McCormick v. United States*,[26] established the necessity of an explicit quid pro quo in campaign contribution cases.[27] The second opinion, *Evans v. United States*,[28] discussed the quid pro quo requirement somewhat cryptically, leaving considerable uncertainty as to whether the quid pro quo requirement announced only one year earlier in *McCormick* was being expanded, relaxed, or both.

A. *McCormick v. United States*

Robert L. McCormick was a state representative in West Virginia who routinely supported a state program allowing foreign medical school graduates to practice under temporary permits while studying for the state licensing exams, even if the graduates repeatedly had failed such exams.[29] When the state legislature threatened to terminate this program in the 1980s, several of the temporarily licensed doctors organized and hired a lobbyist, John Vandergrift, to represent them in the state capital.[30] In 1984, after McCormick sponsored successful legislation to extend the program for another year, he and Vandergrift agreed that McCormick would sponsor legislation granting the doctors permanent medical licenses based on their years of experience.[31]

During his 1984 reelection bid, McCormick told Vandergrift that his campaign was expensive and that he had not heard from the doctors.[32] Vandergrift contacted the doctors and eventually delivered nine one-hundred dollar bills from the doctors to McCormick.[33] That same day, Vandergrift delivered an additional two thousand dollars in cash.[34] Later in 1984, McCormick received three more cash payments directly from members of the doctors' organization.[35] McCormick failed to

26. 500 U.S. 257 (1991).
27. *Id.* at 273.
28. 504 U.S. 255 (1992).
29. *McCormick*, 500 U.S. at 259.
30. *Id.*
31. *Id.* at 260.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

report these payments as campaign contributions or to list them as income on his federal tax return.[36] Similarly, the doctors' organization did not list these expenditures as campaign contributions.[37]

In 1985, McCormick sponsored the legislation that he and Vandergrift had discussed the previous year, speaking at length in favor of the bill during floor debate.[38] Two weeks after the bill had been passed and signed into law, McCormick received a final cash payment from the doctors.[39]

The government eventually prosecuted McCormick on five counts of violating the Hobbs Act and one count of filing a false income tax return.[40] The trial judge gave extensive jury instructions regarding the Hobbs Act claims, especially regarding the sort of relationship McCormick needed to have maintained with the doctors' organization to have violated the Hobbs Act.[41] On the second day of deliberations, the jury

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36. *Id.* State law limited cash campaign contributions to $50 per person. *Id.* (citing W. VA. CODE § 3-8-5d (1990)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 261.

41. The jury instructions, as quoted by the Supreme Court, stated:

> "In proving [that Mr. McCormick induced the doctors to part with property under color of official right], it is enough that the government prove beyond a reasonable doubt that the benefactor transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.
>
> . . . .
>
> "It would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from foreign doctors who would benefit from this legislation.
>
> "In order to find Mr. McCormick guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.
>
> "It is not illegal, in and of itself, for an elected legislator to solicit or accept legitimate campaign contributions, on behalf of himself or other legislators, from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law only when the payment is wrongfully induced under color of official right.
>
> "Many public officials receive legitimate political contributions from individuals who, the official knows, are motivated by a general gratitude toward him

requested that the trial judge read the instructions again, " 'with particular emphasis on the definition of extortion under the color of official right and on the law as regards the portion of moneys received that does not have to be reported as income.' "[42] The trial judge restated most of the instructions, but he also made what the Supreme Court eventually would describe as a "significant addition"[43] by stating the following:

> "Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit."[44]

The jury convicted McCormick on the tax evasion count and the first Hobbs Act count.[45]

McCormick appealed, arguing that his conviction under the Hobbs Act was not supported by sufficient evidence. Specifically, McCormick claimed that "the payments were campaign contributions and not illegal payoffs because there was no coercion or quid pro quo exchange for the payments."[46] The Fourth Circuit, stating that the crucial question was whether

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because of his position on certain issues important to them, or even in the hope that the good will generated by such contributions will make the official more receptive to their cause.

"The mere solicitation or receipt of such political contributions is not illegal.

. . . .

"So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime."

Id. at 262–64 n.4.

42. *Id.* at 262–63.

43. *Id.* at 264.

44. *Id.* at 264–65.

45. *Id.* at 265.

46. United States v. McCormick, 896 F.2d 61, 64 (4th Cir. 1990), *rev'd*, 500 U.S. 257 (1991).

McCormick had extorted money or merely accepted an illegal campaign contribution, ruled that sufficient evidence supported McCormick's conviction.[47]

The Fourth Circuit first noted a Second Circuit ruling that an official could violate the Hobbs Act without participating in a quid pro quo exchange, i.e., a "specifically identifiable misuse of office by the official on behalf of the payor in return for the payment of money."[48] The court then declared that when neither the official nor the payor treats a payment as a legitimate contribution, a jury reasonably may infer that the payment was induced by the official's office in violation of the Hobbs Act.[49] The court indicated that such a rule seeks to prevent officials from escaping criminal liability simply by designating illicit payments as "campaign contributions" and avoiding explicit agreements.[50] The court listed seven factors to consider when determining whether payments were "legitimate" contributions,[51] but it stressed that violating election laws alone does not violate the Hobbs Act.[52] The opinion suggests that an illegal agreement need not be either explicit or specific.[53]

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47. *Id.* at 65. Specifically, the Fourth Circuit found that both the violations of state campaign financing laws and McCormick's statement to Vandergrift that he had not "heard from" the doctors, made with the knowledge that the doctors needed his continued support to obtain permanent licenses, allowed a jury to find that McCormick extorted money from the doctors for his support of the licensing legislation and to find that neither McCormick nor the doctors intended the payments to be campaign contributions. *Id.* at 67. Whether the Fourth Circuit considered these two possible jury findings to be separate or identical is unclear.

48. *Id.* at 66.

49. *Id.*

50. *Id.*

51. The Fourth Circuit's non-exhaustive list of factors included the following:

> (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

Id.

52. *Id.*

53. Whether the Fourth Circuit rejected a specificity requirement is admittedly unclear. Nonetheless, the fact that the court (1) stated that the Hobbs Act merely requires use of official power; (2) approved prior cases holding that no specifically

The Supreme Court reversed the Fourth Circuit in an opinion by Justice White.[54] The Court acknowledged that the court of appeals was correct to note the importance, under the Hobbs Act, of whether payments to officials are in fact campaign contributions and that the intent of the parties is relevant to such a classification.[55] The Court nonetheless ruled that proving a quid pro quo is necessary to convict an official for accepting a campaign contribution.[56]

The Court based its holding on a concern for the realities of interest-group politics, noting that it was limiting the reach of the Hobbs Act because the financing of any campaign necessarily involves officials taking contributions from payors expecting some sort of benefit:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries . . . 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. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.[57]

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identifiable official act need be at issue; and (3) emphasized that the parties simply intended a payment not to be a legitimate campaign contribution, strongly suggests that the court did not require specificity. *See id.* at 63–67.

For an explanation of the distinction that this Note draws between agreements which are "explicit" and those which are "specific," see *supra* note 25.

54. McCormick v. United States, 500 U.S. 257 (1991).

55. *Id.* at 271.

56. *Id.* at 274.

57. *Id.* at 272–73. Professor Lindgren has characterized the *McCormick* Court's reasoning as "neither textual nor historical" but rather "pragmatic and logical."

The Court then attempted to define the contours of the quid pro quo requirement, stating that an official violates the Hobbs Act by accepting campaign contributions "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. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."[58] The Court further rejected the Fourth Circuit's seven-factor test, stating that the first four factors "could not possibly by themselves amount to extortion"[59] and that the Hobbs Act still might not be violated even if every factor indicated that a payment was not a legitimate campaign contribution.[60] The Court, however, noted that it was not addressing whether sufficient evidence of a quid pro quo existed in the instant case,[61] nor whether a quid pro quo requirement also existed in non-campaign contribution cases.[62]

Finally, the Court rejected the prosecution's argument that the jury instructions at trial captured the quid pro quo requirement.

> [U]nder the instructions a contribution was not "voluntary" if given with *any* expectation of benefit; and as we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's

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James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1709 (1993).

58. *McCormick*, 500 U.S. at 273. The Court also looked to the language of another case to assist with its definition of the quid pro quo requirement:

> "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. (quoting United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982)). The *Dozier* court, however, never held that the quid pro quo requirement must be explicit. *See Dozier*, 672 F.2d at 536–39.

59. *McCormick*, 500 U.S. at 272. The Court described the last three factors as "more telling." *Id.* For the complete list of factors, see *supra* note 51.

60. *McCormick*, 500 U.S. at 272.

61. *Id.* at 267 n.5.

62. *Id.* at 274 & n.10.

> official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation.[63]

The jury, therefore, "might well have found that the payments were campaign contributions but not voluntary because they were given with an expectation of benefit."[64] The jury instructions were unacceptable because they allowed the jury to convict upon a finding that the payors had only a nonspecific expectation of a general benefit.[65]

Justice Stevens, joined by Justices Blackmun and O'Connor, dissented. The dissent first argued that sufficient evidence supported McCormick's conviction.[66] Justice Stevens then criticized the majority for requiring that the agreement between the payor and the official be explicit, noting the absence of a statutory or policy basis for the requirement.[67] Justice Stevens agreed, however, that the Hobbs Act requires a mutual understanding that a payment is for a specific official act:

> Nevertheless, to prove a violation of the Hobbs Act, I agree with the Court that it is essential that the payment

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63. *Id.* at 274.

64. *Id.* at 275.

65. *Id.* at 274–75. The Supreme Court's holding constituted a departure from the established law of some federal circuits. *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 133 (2d Cir. 1982) (stating that an official extortion conviction need only rest upon the fact that an official accepted payments knowing that they were "motivated as a result of his exercise of the powers of his public office"), *cert. denied*, 461 U.S. 913 (1983); United States v. Butler, 618 F.2d 411, 418 (6th Cir.) (holding that the motivation of the payor need only focus on the recipient's office), *cert. denied*, 447 U.S. 927 (1980).

66. *McCormick*, 500 U.S. at 282 (Stevens, J., dissenting) ("[McCormick's] covert acceptance of the cash—indeed, his denial at trial that he received any such payment—supports the conclusion that [McCormick] understood the payers' intention and that he had implicitly (at least) promised to provide them with the benefit that they sought.").

67. Justice Stevens stated that "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.* Justice Stevens also argued:

> [W]rongful use of political power by a public official . . . [is] comparable to a known thug's offer to protect a storekeeper against the risk of severe property damage in exchange for a cash consideration. Neither the legislator nor the thug needs to make an explicit threat or an explicit promise to get his message across.

Id.

> in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office. In this sense, the crime does require a "*quid pro quo*."[68]

The dissent characterized the majority's holding as follows: to convict a public official under the Hobbs Act for accepting payments claimed to be campaign contributions,[69] the government must prove the existence of an explicit agreement regarding a specific official act.[70]

B. *Evans v. United States*

One year after deciding *McCormick*, the Supreme Court again considered the reach of the Hobbs Act in *Evans v.*

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68. *Id.* at 283. Justice Stevens elaborated on his position, asserting that McCormick completed his crime as soon as he accepted money from the doctors with the understanding that he would exercise his official powers on their behalf. "What [McCormick] did thereafter might have evidentiary significance, but could neither undo a completed crime nor complete an uncommitted offense." *Id.* Justice Stevens also argued that the jury instructions properly focused on the parties' intent and sufficiently advised the jury that McCormick's acceptance of payments was not criminal unless he accepted money pursuant to a mutual understanding that his support of the licensing legislation was contingent upon the tendering of such payments. *Id.* at 283–84.

69. Based on the facts and the ultimate holding, the *McCormick* Court apparently would require that the jury be given a quid pro quo instruction whenever a defendant simply asserts that payments were in fact campaign contributions. *See id.* at 274. Other than the fact that McCormick made his first demand for payment by communicating to Vandergrift that he had an election coming up and that he had not heard from the doctors, the opinion contains no facts indicating that the payments actually were campaign contributions; rather, the payments were in cash, went unrecorded by all parties, and violated state election laws. *Id.* at 260 & n.1. Further, McCormick apparently never introduced any evidence that the money actually went towards particular campaign debts.

The fact that a payment is a campaign contribution does not mean necessarily that the official is immune from Hobbs Act liability. A payment which is properly recorded, complies with applicable campaign financing laws, and is used to fund the official's campaign violates the Hobbs Act if it was made in exchange for the performance of a specific official act. *Id.* at 273. Conversely, a completely personal payment to an official does not violate the Hobbs Act unless the requisite intent is present.

70. *Id.* at 283. Justice Scalia, in a concurring opinion, likewise implied that the Court was requiring "an explicit promise of favorable future action" by an official in Hobbs Act prosecutions involving the acceptance of campaign contributions. *Id.* at 276.

United States.[71] The Court declined to limit the Act further and concluded that an official need not have "induced" payments to commit extortion under color of official right.[72] The *Evans* opinion suggests that the quid pro quo requirement is not as rigorous as a literal reading of *McCormick* might indicate.

In March 1985, Clifford Cormany, Jr., a special agent for the Federal Bureau of Investigation (FBI), was introduced to John Evans, a member of the Board of Commissioners of DeKalb County, Georgia.[73] Cormany, posing as a land developer representing a group of investors seeking a rezoning of certain property, had a series of meetings and telephone conversations with Evans over the next nineteen months.[74] These discussions often concerned Evans' ability to assist Cormany and the group he represented in rezoning the property, as well as Cormany's ability to help defray Evans' campaign expenses.[75] Cormany's initial application for rezoning was rejected because local regulation required a two year period between rezonings, and Cormany's land had been rezoned less than two years earlier. Cormany and Evans then discussed the possibility of getting this two-year requirement waived. During this discussion, Cormany gave Evans a check for $1000, which was marked as a campaign contribution and later reported as such.[76] Cormany also gave Evans an additional $7000 in cash, which Evans did not report until learning that he was under investigation and which he failed to mention to FBI agents who questioned him about Cormany's campaign contributions.[77] The Board of Commissioners did waive the two-year requirement, although Cormany ultimately withdrew the zoning application without prejudice.[78]

The government prosecuted Evans on one count of Hobbs Act official extortion and one count of failure to report income on his federal tax return.[79] The trial judge instructed the jury on the Hobbs Act official extortion count, stating that although

71. 504 U.S. 255 (1992).
72. *Id.* at 265–66.
73. United States v. Evans, 910 F.2d 790, 792 (11th Cir. 1990).
74. *Id.*
75. *Id.* at 792–94.
76. *Id.* at 794–95. Evans himself had suggested earlier that day that $1000 of the money be given as a check and be reported. *Id.* at 794.
77. *Id.* at 794–95.
78. *Id.* at 794.
79. *Evans*, 504 U.S. at 257.

" 'the 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,' " a public official does violate the Hobbs Act if he " 'demands or *accepts* money in exchange for [a] specific requested exercise of his or her official power . . . regardless of whether the payment is made in the form of a campaign contribution.' "[80] The agreement between Evans and Cormany therefore had to concern a specific official act, but it did not have to be explicit. The jury convicted Evans on both counts.[81]

Evans argued on appeal that the jury instructions improperly eliminated the "inducement" requirement (a showing of coercive activity by the official) and thereby allowed the jury to convict without even finding that Evans had conditioned the performance of some official act upon payment of the money.[82] The Eleventh Circuit held that the power of the official's public office always satisfies any "inducement" requirement; therefore, once the government shows "that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown."[83] Accordingly, "passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power."[84]

Although the Eleventh Circuit's opinion was written before the Supreme Court decided *McCormick*, and therefore did not directly address the quid pro quo requirement, its rejection of an "inducement" requirement nonetheless affected the breadth of the quid pro quo requirement. The Eleventh Circuit's holding that an official violates the Hobbs Act by passively accepting a campaign contribution known to be in return for a specific official act requested by the payor[85] obviated the need for *any* words or actions on the part of the official, explicit or implicit. Although the holding could be interpreted as only

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80. *Evans*, 910 F.2d at 796.

81. *Id.* at 792.

82. *Id.* at 796. At the time of Evans' appeal, only the Second and Ninth Circuits required an act of inducement by a public official in official extortion cases. *Id.* at 796 n.3 (citing United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc), and United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984)).

83. *Id.* at 796–97.

84. *Id.* at 796.

85. *Id.* ("The official need not take any specific action to induce the offering of the benefit.").

refusing to require that the official be the party to make the agreement explicit, nothing in the Eleventh Circuit's opinion suggests any sort of explicitness requirement.

The Supreme Court upheld the conviction, holding that no "inducement" requirement exists under the Hobbs Act.[86] The Court further rejected Evans' argument that, because the jury instructions allowed a conviction for passively accepting a campaign contribution, the instructions failed to adequately describe the quid pro quo requirement:

> [Not instructing the jury to find an element of duress such as a demand] 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. We also reject petitioner's contention that an affirmative step is an element of the offense . . . . 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.[87]

Taken literally, the last sentence suggests that an official can violate the Hobbs Act simply by accepting a payment that he knows is motivated by the payor's desire for the official to take certain action on the payor's behalf, even though the official never actually agreed or intended to perform the requested act.[88] Moreover, the discussion of the quid pro quo requirement in *Evans* never states that the apparent agreement between the payor and the official must be explicit. Rather, the opinion asserts that the facts of the case, when viewed in the light most favorable to the government, demonstrate that Evans'

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86. *Evans*, 504 U.S. at 268–69. The Court examined the history of official extortion at common law and the legislative history of the Hobbs Act to reach its conclusion. *Id.* at 259–67.

87. *Id.* at 268. For language in Justice Stevens' dissent in *McCormick* that closely tracks this language in the *Evans* majority decision, see *supra* note 68.

88. *See* Lindgren, *supra* note 57, at 1735 (arguing that the majority's language "doesn't require any actual agreement or intent to take any official act; what's required is the receipt of a payment knowing it was made in return for official acts"); see also *supra* note 68, for the argument by Justice Stevens in *McCormick* that an official does not have to perform any official act once he has accepted payments which he knows were made for official acts.

"acceptance of the bribe constituted an *implicit* promise to use his official position to serve the interests of the bribegiver."[89]

Justice Kennedy concurred, but he argued that, while the Hobbs Act does require "inducement," it does not require initiation by the official.[90] Rather, "inducement" simply requires the existence of a quid pro quo.[91] Justice Kennedy explained that the quid pro quo requirement essentially involves a finding of criminal intent[92] and "a real understanding [created by the official's course of conduct] that failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment."[93] The quid pro quo does not have to be stated expressly by either the official or the payor, however, "for otherwise the law's effect could be frustrated by knowing winks and nods."[94] Finally, Justice Kennedy's assertion that "[t]he 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," implied that *Evans* was, like *McCormick*, a campaign contribution case.[95]

Justice Thomas dissented on the ground that the majority completely disregarded the common-law meaning of extortion.[96] He concluded that the Hobbs Act merely prohibits an official from accepting a payment under the pretense that it actually is due to him because of his office.[97] Justice Thomas also declared, without explanation, that the holding in *Evans* extended *McCormick*'s quid pro quo requirement to all Hobbs

89. *Evans*, 504 U.S. at 257 (emphasis added). The Court did state in a footnote that even though "inducement" was unnecessary to prove violation of the Hobbs Act, several discussions between Evans and Cormany indicated efforts to "clarify their understanding with each other." *Id.* at 266 n.17. Whether the Court was intimating that these conversations constituted evidence of an explicit agreement is unclear. The *Evans* Court's failure to require or even discuss explicitness may have resulted simply from an oversight or strategic mistake by Evans' counsel, who focused the argument on whether Evans had to take steps to honor his agreement. Brief of Petitioner, Evans v. United States, 504 U.S. 255 (1992) (No. 90-6105), *available in* LEXIS, Genfed library, Briefs file [hereinafter Evans' Brief].

90. *Evans*, 504 U.S. at 273–74 (Kennedy, J., concurring).

91. *Id.* at 272–73.

92. *Id.*

93. *Id.* at 274–75.

94. *Id.* at 274.

95. *Id.* at 277–78. Justice Kennedy also stated that "the rationale underlying the Court's holding applies not only in campaign contribution cases, but in all § 1951 prosecutions." *Id.* at 278.

96. *Id.* at 278–80 (Thomas, J., dissenting).

97. *Id.* at 281–82.

Act official extortion cases, implying that *Evans*, unlike *McCormick*, was not a campaign contribution case.[98]

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.[99] The majority, however, did assert that the standard that it was announcing satisfied the quid pro quo requirement of *McCormick*,[100] suggesting that the scope of *Evans* at least overlapped with that of *McCormick*.

The facts in *Evans* arguably contain more compelling evidence compared to the facts in *McCormick* that the payments at issue were actual campaign contributions; they at least allow for a plausible argument that the payments, even if made in return for official acts, also were intended to be contributions.[101] Further, the jury instructions[102] and both parties' briefs to the Supreme Court all assumed that the case involved what was claimed to be campaign contributions.[103]

II. THE LOWER COURTS' INTERPRETATIONS OF THE QUID PRO QUO REQUIREMENT

Although *McCormick* and *Evans* sought to provide guidance on the exact breadth of the Hobbs Act, the two opinions have raised new questions regarding the quid pro quo requirement. This section examines the lower courts' approaches to determining how specific the quid pro quo must be, how explicit it

98. *Id.* at 286.

99. *See id.* at 277–78 (Kennedy, J., concurring); *id.* at 286 (Thomas, J., dissenting).

100. *Id.* at 268.

101. Evans' conversations with Cormany frequently concerned Evans' need to fund his campaign and the fact that Evans would use any payments from Cormany to cover such expenses. *Evans*, 910 F.2d at 792–95. Additionally, Evans kept all the money at his campaign office, reported some of the payments on his state campaign-financing disclosure form, and testified at trial that he used the unreported sums to repay his campaign debts. *Id.* at 794–95. In contrast, there was little evidence in *McCormick* that the payments were campaign contributions. *See supra* note 69.

102. *Evans*, 910 F.2d at 795–96.

103. *See* Evans' Brief, *supra* note 89; Brief for the United States, Evans v. United States, 504 U.S. 255 (1992) (No. 90-6105), *available in* LEXIS, Genfed Library, Briefs file [hereinafter Government's Brief].

must be, and whether it must involve an actual agreement between an official and a donor.[104]

A. The Need for a Specific Official Action

Case law demonstrates that courts uniformly emphasize the need for specificity[105] and usually interpret *Evans* as having imposed a diluted quid pro quo requirement in non-campaign contribution cases.[106] Although this interpretation might imply that campaign contribution cases should retain the undiluted quid pro quo requirement of *McCormick*, most courts nonetheless minimize or simply reject the need for explicitness in any official extortion case.[107]

1. General Acceptance of the Specificity Requirement—If courts have interpreted the quid pro quo requirement consistently at all, it is by uniformly stressing that it entails an understanding between a payor and an official concerning *specific* official acts. For example, in *United States v. Davis*,[108] the Eleventh Circuit stated that "the quid pro quo inquiry is whether the link between extorted property and official power is sufficiently specific"[109] and asserted that the primary flaw of the instructions in *McCormick* was that they implied that campaign contributions accompanied by the mere expectation of benefits were illegal under the Hobbs Act.[110] Likewise, in *United States v. Allen*,[111] the Seventh Circuit stated that, after *McCormick*, "[v]ague expectations of some future benefit should not be sufficient to make a payment a bribe."[112] The

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104. These three inquiries admittedly are interrelated, and because analysis of one facet of the quid pro quo often implicates another or all other such facets, attempting to neatly categorize these inquiries can result in artificial distinctions or can be an exercise in futility. Such categorization is nonetheless necessary for a coherent presentation of the material.

105. *See infra* notes 108–15 and accompanying text.

106. *See infra* notes 147–49 and accompanying text.

107. *See infra* notes 151–73 and accompanying text.

108. 967 F.2d 516 (11th Cir. 1992).

109. *Id.* at 520.

110. *Id.* at 522.

111. 10 F.3d 405 (7th Cir. 1993).

112. *Id.* at 411. This language strongly resembles the following language from United States v. Dozier, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982):

> Where the accused is or was an elected official authorized under our system to solicit contributions, however, a fine line may separate a request for support

Allen court also declared that a jury instruction stating that an official cannot be convicted for accepting a campaign contribution paid *"to create good will or with the vague expectation of help in the future"* captured *McCormick's* central idea.[113] This "specificity" requirement, however, requires only a specific goal; the official does not have to specify the means

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> from the sale of a favor. As a sister court has observed, "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation." Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting "donations," demand money in return for some act of official grace.

Id. at 537 (citation omitted).

113. *Allen*, 10 F.3d at 412; *see also* United States v. Martinez, 14 F.3d 543, 552–53 (11th Cir. 1994) (holding that jury instructions had failed to convey the quid pro quo requirement by stating that an official has violated the Hobbs Act by accepting a benefit if he "knows he had been offered the payment in exchange for the exercise of his official power, or that such payment is motivated by hope of influence"); United States v. Coyne, 4 F.3d 100, 113–14 (2d Cir. 1993) (upholding instructions stating that the official must know that a payment is made in exchange for specific official acts), *cert. denied*, 114 S. Ct. 929 (1994); United States v. Farley, 2 F.3d 645, 651 (6th Cir.) (describing the rule in United States v. Bibby, 752 F.2d 1116, 1127 n.1 (6th Cir. 1985), *cert. denied*, 114 S. Ct. 649 (1993), that "[w]hat the Hobbs Act proscribes is the taking of money by a public official in exchange for *specific* promises to do or refrain from doing *specific* things" as consistent with *McCormick*); United States v. Taylor, 993 F.2d 382, 384–85 (4th Cir.) (holding that two jury charges were erroneous under *Evans* because they only required an official to know that payments were motivated by the official's office), *cert. denied*, 114 S. Ct. 249 (1993); United States v. Carpenter, 961 F.2d 824, 826 (9th Cir.) (holding that a jury charge stating that "the Government need not prove that the defendant promised to do anything in particular in return for the payment of money" was in error), *cert. denied*, 113 S. Ct. 332 (1992).

The court in United States v. Garcia, 992 F.2d 409 (2d Cir. 1993), held that only the second of the following three jury instructions sufficiently described the quid pro quo requirement:

> First, if a defendant sought or solicited [payments] . . . *in connection with [his] official duties* or otherwise communicated that he expected to receive money or benefits, he induced the payments for purposes of the statute; or
>
> Second, if a defendant conferred or offered to confer some benefit, or refrained or offered to refrain from *some official act*, in exchange for the payment of monies or benefits . . . , then he induced the payment of monies; or
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> Third, if the defendant repeatedly accepted monies or benefits . . . , and if the amount of money or the benefits accepted could reasonably *have affected the defendant's exercise of his duties*, then you may find that the defendant induced the payment of monies.

Id. at 413, 415 (emphasis added).

he will use.[114] Further, an official act may be nothing more than fair treatment by an official.[115]

This uniformity among courts is not surprising. The Court in *Evans* and in *McCormick* emphasized that payors must have had specific expectations regarding what the official was going to do in return. In *McCormick*, the Court based its decision to except from Hobbs Act coverage payments made with only vague hopes of benefit on a perceived need to accommodate the practical realities of politics; a contrary ruling, the Court reasoned, would criminalize routine campaign financing.[116] The Court also implied that the making of contributions to influence officials serves not only to finance political campaigns, but also to inform officials of constituent preferences.[117] Lower courts have echoed these themes,[118] and commentators have noted that the law of bribery in general should be tailored to avoid thwarting the valuable functions served by campaign contributions.[119]

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114. *E.g.*, *Coyne*, 4 F.3d at 114 (holding that the Hobbs Act applies when an official has an understanding that he is to exercise influence as opportunities arise); *cf.* United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976) (concluding that the quid pro quo under a state bribery statute includes the official's "agreement to act favorably to the donor when necessary"); *see also* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826 (1985) (arguing that most state bribery statutes prohibit gifts made in order to influence an official "either with respect to a specific official action, or . . . 'when necessary' ").

115. *See, e.g.*, Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) (noting that the Hobbs Act also applies to an official's promise to not victimize potential payors).

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

117. *Id.* at 272; *see supra* text accompanying note 57.

118. *See, e.g.*, United States v. Allen, 10 F.3d 405, 410–11 (7th Cir. 1993); United States v. Davis, 967 F.2d 516, 521 (11th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *and cert. denied*, 114 S. Ct. 249 (1993); United States v. Taylor, 966 F.2d 830, 835 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *and cert. denied*, 114 S. Ct. 249 (1993); United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

119. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1068–74, 1083 (1985) (defending the free expression of speech through political contributions and praising campaign contributions both as effective signals of public support and providers of information to officials and to the public); Lowenstein, *supra* note 114, at 836–37 (arguing that the law of bribery can be neither obeyed nor enforced if it "condemns much of what a politician needs to do on a daily basis" and urging that the law of bribery should encourage officials to pursue their self-interest in a manner that allows them simultaneously to enact wise policies, encourage political participation, and preserve freedom of speech); Weissman, *supra* note 11, at 450–51 (stating that federal courts adopted the quid pro quo requirement because they did not want to limit campaign contributions, which express political viewpoints and provide the funds necessary for a broad exchange of ideas).

2. Relationship of the Specificity Requirement to the Federal Bribery Statute—Case law interpreting the federal bribery statute[120] provides strong support for a requirement under the Hobbs Act that payments be made in return for specific official acts. The federal bribery statute prohibits federal officials, employees, and jurors from accepting bribes or gratuities.[121] The general difference between a "bribe" and a "gratuity" under the federal bribery statute is that bribery involves a higher level of criminal intent; an official accepting a bribe must be acting "corruptly" and with the intent to be influenced,[122] whereas an official accepting a gratuity must be acting "otherwise than as provided by law for the proper discharge of official duty" and accepting a payment "for or because of any official act performed or to be performed by the public official."[123] What these vague distinctions mean in practice is that bribery involves a quid pro quo,[124] whereas accepting a gratuity does not.[125] The gratuity provision also prohibits two different kinds of payments: those made as an after-the-fact "thank you" to an official and those made in anticipation of some future official action.[126] Further, many circuits have held that a gratuity only need be linked to the official position of the

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It is doubtful, however, that the specter of Hobbs Act liability significantly deters payments to officials, legal or illegal. *See Dozier*, 672 F.2d at 540 n.5 (dismissing fears that prosecutions of local bribery might chill campaign contributions by observing that "the last ten years of constant litigation in this area does not appear to have produced such paralysis"); Lindgren, *supra* note 57, at 1710 (asserting an inability to remember a single case in which an official acted properly and had his conviction upheld on appeal, and stating that the law has not chilled large contributions or influence-peddling).

120. 18 U.S.C. § 201 (1988).

121. *Id.* This statute applies only to federal employees, officials, and jurors, *id.* § 201(a), and, therefore, it cannot be used like the Hobbs Act to prosecute local or state public officials.

122. PUBLIC CORRUPTION CASES, *supra* note 4, at 298–99.

123. *Id.* at 299 (quoting 18 U.S.C. § 201(c)); *see also* United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir.) (noting that bribery requires a showing of "corrupt intent," a higher level of intent than that present in the payment of a gratuity), *cert. denied*, 471 U.S. 1139 (1985).

124. *See, e.g.*, United States v. Biaggi, 909 F.2d 662, 683–84 (2d Cir. 1990) (stating that payments motivated by "vague possibilities" are not bribes and noting that a bribery conviction under 18 U.S.C. § 201(b) requires proof of a quid pro quo), *cert. denied sub nom.* Simon v. United States, 499 U.S. 904 (1991).

125. *See, e.g.*, United States v. Niederberger, 580 F.2d 63, 68 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978); United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978). *See generally* PUBLIC CORRUPTION CASES, *supra* note 4, at 300 (noting that courts require some "lesser connection between the payment and an official act" in gratuity cases).

126. *See* United States v. Secord, 726 F. Supp. 845, 846–47 (D.D.C. 1989).

recipient, rather than to a specific official act.[127] Gratuities in these circuits, therefore, include payments made to public officials merely "to keep [the public official] 'happy' "[128] or to "create a better working atmosphere"[129] with that official.

The long-standing requirement in federal bribery cases that the government prove that the official accepted a payment in return for the performance of specific official acts is closely tracked by the quid pro quo requirement only recently imposed in Hobbs Act official extortion cases.[130] Likewise, the established rule under the federal bribery statute that an official merely is accepting a gratuity, rather than a bribe, when he accepts a payment motivated by a payor's generalized hope of benefit mirrors the recent rule that an official who accepts a payment motivated by a payor's general hope of benefit has not committed official extortion.[131]

Thus, requiring the government in official extortion cases to prove that the official accepted a payment in return for specific

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127. The Second, Third, and Ninth Circuits refuse to require gratuities to be for specific acts. *See, e.g.*, *Niederberger*, 580 F.2d at 68–69; United States v. Alessio, 528 F.2d 1079, 1083 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Barash, 412 F.2d 26, 29 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *see also* United States v. Campbell, 684 F.2d 141, 150 (D.C. Cir. 1982) (requiring proof that an official accepted a gratuity knowing that it was compensation for an official act, but refusing to require proof that she had "specific knowledge" that the compensation was for a "definite official act").

128. PUBLIC CORRUPTION CASES, *supra* note 4, at 300 (quoting United States v. Evans, 572 F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978)).

129. *Id.* (quoting United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978), *aff'd*, 610 F.2d 1076 (3d Cir. 1979)); *see also* Randy J. Curato et al., Note, *Government Fraud, Waste and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1082 (1983) (arguing that "goodwill gifts and favors to government officials that are motivated by a donor's generalized hope of benefit will not satisfy the requisite intent for bribery, but will probably be construed to be an illegal gratuity"); Whitaker, *supra* note 5, at 1622, 1650 (suggesting that gratuities include payments designed to generate goodwill and not necessarily for a specific official act).

130. *See supra* notes 108–15 and accompanying text.

131. *See supra* notes 111–13 and accompanying text; *see also* Whitaker, *supra* note 5, at 1633 (arguing that the *Evans* Court effectively prevented the Hobbs Act from applying to the acceptance of gratuities).

Case law, however, apparently has neither mentioned this phenomenon nor invoked the long-standing quid pro quo requirement under the federal bribery statute as a reason to impose a similar quid quo pro requirement under the Hobbs Act. *But cf.* United States v. McDade, 827 F. Supp. 1153, 1171 (E.D. Pa. 1993) (refusing to apply the quid pro quo requirement under the Hobbs Act to a gratuity prosecution, but only on the grounds that, even if a quid pro quo requirement did apply to the gratuities statute, *McCormick* and *Evans* imposed a quid pro quo requirement only in cases involving campaign contributions), *aff'd*, 28 F.3d 283 (3d Cir. 1994), *and cert. denied*, 115 S. Ct. 1312 (1995).

official acts advances both practical and equitable concerns. Such a requirement is practical because it provides judges and litigators with a uniform rule to determine when activity constitutes bribery under either the federal bribery statute or the official extortion clause of the Hobbs Act. Such a requirement also advances fairness by preventing the conviction of an individual for official extortion, an act punishable by up to twenty years in prison,[132] if all she has done is accept what would be considered a gratuity under the federal bribery statute, an act punishable by up to only two years in prison.[133]

3. Limits to the Specificity Requirement—The Hobbs Act does not prohibit an official from providing payors of campaign contributions with access to officials, no matter how identifiable or specific the provision of access may be. The Ninth Circuit has cited *McCormick* for the proposition that, given the realities of an elected official's schedule, an official who conditions access to himself according to a lobbyist's level of campaign contributions has not performed an "official act" under the Hobbs Act.[134] This holding resembles a pre-*McCormick*

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132. 18 U.S.C. § 1951(a) (1988).

133. 18 U.S.C. § 201(c) (1988). Although the federal bribery statute still carries a lesser punishment than the Hobbs Act by imposing a possible sentence of only 15 years, *id.* at § 201(b), the disparity between a possible sentence of 20 years and a possible sentence of 15 years is much less stark than the disparity between a possible sentence of 20 years and a possible sentence of two years.

See Whitaker, *supra* note 5, at 1622, 1628 (noting that "[t]he typical one- to two-year penalty under gratuities statutes evidences the lesser degree of culpability in accepting a gratuity as opposed to a bribe," and criticizing federal prosecutors and courts for convicting officials for extortion under the Hobbs Act when those officials had accepted only gratuities); *cf.* Curato et al., *supra* note 129, at 1083 (arguing that courts have construed a "gratuity" as covering a broader spectrum of activities than "bribery" at least partly because of the severity of the bribery penalty).

Of course, the concern that corrupt public officials may endure draconian punishments may not be a realistic one. As of 1980, one might see "a person convicted of bribery . . . receive probation or a maximum of 1 to 3 years in prison." GENERAL ACCOUNTING OFFICE, JUSTICE NEEDS TO BETTER MANAGE ITS FIGHT AGAINST PUBLIC CORRUPTION 36 (1980).

134. United States v. Carpenter, 961 F.2d 824, 827 (9th Cir.), *cert. denied*, 113 S. Ct. 332 (1992). The *Carpenter* court explained that "[e]lected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time. This practice 'has long been thought to be well within the law [and] in a very real sense is unavoidable.'" *Id.* (quoting McCormick v. United States, 500 U.S. 257, 272 (1991)).

The court went on to say, however, that the conditioning of access can provide circumstantial proof of a Hobbs Act violation when an official conditions access under circumstances in which the grant or denial of access serves as a "clear and unambiguous message" that the official is conditioning either his vote on specific legislation or his intervention with colleagues upon a lobbyist's campaign contribution level. *Carpenter*, 961 F.2d at 827–28. The official then would be using the grant or denial of

decision, *United States v. Rabbitt*,[135] in which the Eighth Circuit overturned a Hobbs Act conviction because the payors, who knew that all the official could and would do was introduce them to other influential persons and "gain [the payors] a friendly ear," lacked any reasonable belief in the official's authority to award certain contracts.[136] Therefore, even though the giving of campaign contributions in return for a potentially useful introduction to another official or for a few minutes of an official's time appears to comply with the technical requirements of a quid pro quo, courts should refuse to prohibit such activity.[137] Courts apparently protect the selling of access for the same reasons that a quid pro quo was imposed under the Hobbs Act: to do otherwise would outlaw the day-to-day operations of politics, an unacceptable result.[138]

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access as a subtle way of communicating his willingness to sell his vote. *See id.* at 827. Under this test, evidence of a quid pro quo existed in *Carpenter* because the defendant, when meeting with lobbyists to discuss specific legislation, refused to discuss the legislation and instead insisted on reviewing the lobbyist's level of contributions. *Id.* at 828.

135. 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

136. *Id.* at 1028. The Eighth Circuit cited *Rabbitt* with approval in United States v. Loftus, 992 F.2d 793 (8th Cir. 1993), in which the court held that although *Rabbitt* precludes Hobbs Act liability for merely introducing payors to other officials, it does not preclude such liability for intending to or actively influencing other officials on behalf of payors. *Id.* at 796.

137. Professor Lindgren argues that although the following two situations both involve an explicit quid pro quo, neither would be illegal because they do not involve any intent that is sufficiently "corrupt" under the Hobbs Act:

> (1) A legislator says to a trucking company owner, "If you make this large contribution to my campaign, I promise you three things. First, I won't vote on any trucking legislation without calling you first. Second, when you call me, I will drop whatever official business I am doing to take your call personally. Third, when you or your clients come to town, I will rearrange my schedule whenever possible to entertain you in the legislative dining room. I can't promise you how I'll vote, but you can buy what any large contributor buys: direct access to me."
>
> (2) A legislator says to a large contributor, "If you give me a large contribution, I'll consult you on my choice of my next chief of staff. Understand me, he'll be working for me, not you. But I promise you that I'll pick someone you can work with."

Lindgren, *supra* note 57, at 1736. Lindgren comments that the contributors in his example receive the benefit of access through explicit, reciprocal deals, and these deals might offend a person with very high ethical standards, but they simply would not violate the Hobbs Act because the Supreme Court would not consider them "corrupt." *Id.* at 1737. *See also* Lowenstein, *supra* note 114, at 806 (noting that conduct fitting the literal description of bribery is regarded as criminal only if it is "corrupt").

138. *See supra* notes 116–19, 134, and accompanying text. Whether courts would protect the conditioning of access to officials upon receipt of payments that are not

This reasoning ignores the plausible argument made by some commentators that many large campaign contributors buy impressive influence among officials under the guise of simply seeking "access."[139] According to this view, an official's "time is so limited that the decision to listen to one person's arguments and information on an issue and not another's is itself an official action."[140] Some payments in return for access therefore are in reality bribes, albeit judicially sanctioned ones.[141]

B. The Need for an Explicit Understanding

1. General Hostility Towards the Explicitness Requirement—The Supreme Court announced in *McCormick* that an official only violates the Hobbs Act by accepting payments claimed to be campaign contributions "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. In such situations the official *asserts* that his official conduct will be controlled by the terms of the promise or undertaking."[142] Both Justice Scalia's concurrence and Justice Stevens' dissent

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campaign contributions is unclear. For example, in *Loftus*, 992 F.2d at 796–97, a non-campaign contribution case, the court ruled against the defendant because it determined that he was providing more than just access, thereby giving no indication as to whether non-campaign contributions used to secure only official access can violate the Hobbs Act.

Courts should not protect officials who provide access to themselves or other officials in exchange for payments that are not campaign contributions. Courts that have protected the conditioning of access have done so in order to avoid interfering with normal political activities. *See supra* note 134. It is neither common nor accepted among officials, however, to exchange access for personal payments. For example, while a senator's habit of agreeing to meet with her most generous campaign contributors would not surprise most people, a judicial clerk's habit of introducing litigants to the judge in return for $50 payments would surprise people. *Cf.* NOONAN, *supra* note 12, at 698 (arguing that access payments that are small, open, and uniformly imposed are morally legitimate "entrance fee[s]" but that such payments that are large, secret and variable are not because they cannot help but be understood to have been made in return for official acts).

139. *See, e.g.*, NOONAN, *supra* note 12, at 649–51, 688–90 (discussing the difficulties of distinguishing between contributions and bribes, access and votes); Lowenstein, *supra* note 114, at 826–28 (arguing that even if the monetary amounts of campaign contributions do not alone influence officials—an assumption that Lowenstein greatly doubts—the moments of access gained by making contributions surely do).

140. Lowenstein, *supra* note 114, at 828 (citation omitted).

141. *See* NOONAN, *supra* note 12, at 689 (suggesting that the distinctions have become arbitrary).

142. McCormick v. United States, 500 U.S. 257, 273 (1991) (emphasis added).

characterized the holding in *McCormick* as requiring an explicitly stated understanding.[143]

The holding in *Evans*, however, undermined this apparently straightforward rule. The *Evans* majority never mentioned explicitness and instead enunciated a rule subjecting officials to liability for passively accepting payments known to be made for official acts. The *Evans* Court further asserted that the facts of the case, when viewed in the light *most favorable* to the government, demonstrated that the defendant had made an *implicit* promise to perform official acts.[144] Moreover, Justice Kennedy emphasized in his concurrence that a quid pro quo does not have to be explicit but can be implied from words and actions.[145]

Given this tension between *McCormick* and *Evans*, lower courts have grappled with whether officials must engage in explicit bribery to be convicted under the Hobbs Act, and, if so, just how explicit an "explicit" bribe must be. Some courts have found that the existence of an explicitness requirement depends upon whether the payments at issue are campaign contributions. For example, the Second Circuit has stated that "we have held since *Evans* that the government does not have to prove an explicit promise to perform a particular act."[146] In an earlier case, however, the Second Circuit interpreted *Evans* as applying only to non-campaign contribution cases.[147] Similarly, the Eleventh Circuit has interpreted *Evans* as modifying the explicitness prong of the quid pro quo requirement only in non-campaign contribution cases.[148] The

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143. *Id.* at 276 (Scalia, J., concurring); *id.* at 282 (Stevens, J., dissenting); *see also supra* notes 67, 70 and accompanying text.

144. Evans v. United States, 504 U.S. 255, 268 (1992); *see also supra* notes 87–89 and accompanying text.

145. *Evans*, 504 U.S. at 274 (Kennedy, J., concurring); *see also* Lindgren, *supra* note 57, at 1738 ("In *Evans*, the Court has moved away from an *explicit* quid pro quo to a much less strict reciprocity requirement.").

146. United States v. Coyne, 4 F.3d 100, 114 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 929 (1994). The facts of *Coyne* indicate that it was not a campaign contribution case because the $30,000 received by the official and deposited into his own bank account was at best a personal loan and at worst a personal payment. *Id.* at 106.

147. United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993) (construing *Evans* as having modified *McCormick*'s quid pro quo requirement in non-campaign contribution cases).

148. United States v. Martinez, 14 F.3d 543, 552–53 (11th Cir. 1994). The *Martinez* court overturned the appellant's convictions because the jury instructions allowed his convictions to rest upon payments motivated only by the hope of influence. *Id.* at 553. Thus, although the *Martinez* court stated that an explicit promise was required in campaign contribution cases, the court never actually had to decide whether a conviction premised upon a nonexplicit promise had to be overturned.

Sixth[149] and Seventh[150] Circuits have stated that *McCormick* requires explicitness, but they have done so only in campaign contribution cases and have not mentioned *Evans*.

Both the Sixth and Eleventh Circuits, however, appear ambivalent about imposing a rigorous explicitness requirement even in campaign contribution cases. One Sixth Circuit case, *United States v. Farley*,[151] suggests that *McCormick*'s quid pro quo requirement might not entail true explicitness in practice. Although the *Farley* opinion dutifully quotes language from *McCormick* stating that a quid pro quo refers to campaign contributions "made in return for an explicit promise or undertaking,"[152] it nonetheless upholds a conviction on the basis that the payor simply "understood" that his $500 donation to a sheriff's department was a requirement for receiving an "honorary" deputy sheriff commission which would shield the payor's business from unwanted police attention.[153] The

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Two years earlier, in United States v. Davis, 967 F.2d 516 (11th Cir. 1992), the Eleventh Circuit had implied that the quid pro quo requirement was confined to campaign contribution cases by stating that the *McCormick* opinion was "not deciding a rule applicable to payments that were *not* campaign contributions" and by upholding contested jury instructions that had stated that a quid pro quo was not *always* necessary. *Id.* at 521.

149. *See* United States v. Farley, 2 F.3d 645, 651 (6th Cir.), *cert. denied*, 114 S. Ct. 649 (1993).

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

When considering whether *McCormick* should inform an interpretation of Indiana's bribery statute, the *Allen* court noted that *McCormick* held that "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." *Id.* at 411. The *Allen* court stressed, however, that the central idea in *McCormick* was that a payment made to create goodwill or with vague expectations of future help is not a bribe. *Id.* at 412.

151. 2 F.3d at 645.

152. *Id.* at 651 (emphasis omitted).

153. *Id.* at 653. The *Farley* court stressed that the following testimony by the payor provided sufficient evidence to uphold an official extortion conviction:

> Q: What did you do personally in order to obtain the Deputy Sheriff commission or to apply for it?
> A: Well, I approached [the officials' representative] and I asked him about it . . .
>
> . . . .
>
> I filled out the paper and he took the paper, and, of course, there was a $500 contribution or—
> Q: Continue please.
> A: —fee, you know, to—I can't explain this. Donation more or less.
> Q: Did you get the commission?
> A: I'd say, yeah.

Eleventh Circuit also has downplayed the need for explicitness in campaign contribution cases,[154] despite having held that *Evans* does not disturb *McCormick*'s explicitness requirement in campaign contribution cases.[155]

The Fourth Circuit has suggested that official extortion exchanges never have to be explicit. In 1992, the court in *United States v. Taylor*[156] found that jury instructions on inducement did not sufficiently incorporate the quid pro quo requirement of *McCormick*.[157] The government appealed this decision in 1993, post-*Evans*, but the Fourth Circuit held that the instructions were still in error.[158]

The reasoning behind the *Taylor* decisions is instructive. The defendant, a state representative, was convicted for accepting cash payments in connection with pending legislation; the defendant maintained that the payments were all campaign contributions.[159] The first decision approved of two jury charges, one of which conditioned liability on "[p]roof of a *quid pro quo*," the other on "[p]roof of a request, demand or solicitation no matter how subtle."[160] Two other charges, however, improperly conditioned liability on "[p]roof of custom or expectation of receiving payment such as might have been communicated by the nature of the public official's prior conduct of his office" and "[r]eliance on a system of expecting payment in exchange for public favors if the public official establishes or acquiesces in the system and the person making the payment is aware of the expectation."[161] The court explained that the last two instructions were improper because they allowed the jury to convict for prior conduct, or for having

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Id. The *Farley* court further highlighted the importance of the particular circumstances surrounding an exchange by noting that this payor testified that he wanted the commission "because 'it seemed like the thing going around at the time.'" *Id.* at 650.

154. United States v. Davis, 967 F.2d 516, 522 (11th Cir. 1992) (stressing that the primary flaw in the instructions in *McCormick* was that they subjected campaign contributions accompanied by the mere expectation of benefit to Hobbs Act liability). The *Davis* court further downplayed a strict explicitness requirement by upholding jury instructions that did not specifically mandate explicitness. *Id.*

155. *See* United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994).

156. 966 F.2d 830 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *and cert. denied*, 114 S. Ct. 249 (1993).

157. *Id.* at 833.

158. United States v. Taylor, 993 F.2d 382 (4th Cir.), *cert. denied*, 114 S. Ct. 249 (1993).

159. *Taylor*, 966 F.2d at 831.

160. *Id.* at 833 (quoting jury instructions).

161. *Id.* at 834 (quoting jury instructions).

"acquiesced" to a corrupt system which the official neither originated nor participated in.[162] The court, however, did not criticize the instructions for failing to convey a need for explicitness. The instructions were erroneous because they allowed the jury to convict even though the defendant had never reached *any* understanding with the payor, not because they allowed conviction for an *implicit* understanding. The first *Taylor* opinion also focused on the need for specificity, noting that the jury could have convicted for a payment motivated only by vague expectations of general benefits.[163]

In the second appeal, the court likewise held that the last two charges were error under *Evans* as well as under *McCormick*, because they only required the official to know that the payments were motivated by his office rather than by any particular official action.[164] Both *Taylor* decisions dispensed with any explicitness requirement by approving the charge that the government could prove Hobbs Act bribery through "[p]roof of a request, demand or solicitation *no matter how subtle*"[165] and by apparently ignoring the defendant's claim that the payments had been campaign contributions.[166]

The Ninth Circuit has provided the clearest interpretation of *McCormick*'s explicitness requirement, eschewing an overly rigorous conception of what constitutes an "explicit" arrangement even in campaign contribution cases. In *United States v. Carpenter*,[167] the defendant argued that "the explicitness requirement cannot be met unless an official has specifically stated that he will exchange official action for a contribu-

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162. *Id.* at 834–35.

163. *Id.* at 835. The Fourth Circuit criticized:

> The portion of the charge, "So long as the defendant knows that the money sought would be paid because of the public office involved, there need be no promise with respect to official action in return for the payment," would allow a Hobbs Act prosecution for almost all campaign contributions to incumbent office-holders.

Id. (citation omitted).

164. *Taylor*, 993 F.2d at 385. This second *Taylor* decision hinted that the *Evans* standard might apply to campaign contribution cases, stating that "*Evans* makes clear that the Hobbs Act applies to *any* payment to a public official to which the official is not entitled and which payment the government official knows is made in return for his official acts." *Id.* at 384 (emphasis added).

165. *Taylor*, 966 F.2d at 833 (quoting jury instructions) (emphasis added).

166. *Id.* at 831.

167. 961 F.2d 824 (9th Cir.), *cert. denied*, 113 S. Ct. 332 (1992).

tion."[168] The *Carpenter* court rejected that claim in a response which anticipated Justice Kennedy's concurring opinion in *Evans*: "To read *McCormick* as imposing such a requirement would allow officials to escape liability under the Hobbs Act with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money."[169] The court then explained that the explicitness requirement is intended merely to further indirectly the primary goal of the quid pro quo requirement—the prevention of convictions based upon payments made with only vague expectations of benefit.[170] The court arrived at the following conclusion:

> In our view, what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain. . . . [T]he explicitness requirement serves to distinguish between contributions that are given or received with the "anticipation" of official action and contributions that are given or received in exchange for a "promise" of official action. . . . When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond "anticipation" and into an arrangement that the Hobbs Act forbids. This understanding need not be verbally explicit.[171]

According to this interpretation, to require an "explicit" arrangement is to require only sufficiently reliable proof, direct or circumstantial, that an arrangement involving particular official acts exists. Although the Ninth Circuit has yet to consider *Evans*, it is unlikely that *Evans* would affect its analysis of explicitness. First, the court's analysis in *Carpenter* largely tracks Justice Kennedy's analysis in *Evans*. Second, even if the Ninth Circuit regards *Evans* as a non-campaign contribution case, the circuit already has suggested that the

168. *Id.* at 827.

169. *Id.*

170. *Id.*

171. *Id.* (citations omitted). The Ninth Circuit in other opinions stated, without elaboration, that *McCormick* requires proof that the official made an explicit promise. *See* United States v. Freeman, 6 F.3d 586, 598 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1661, *and cert. denied sub nom.* Netters v. United States, 114 S. Ct. 2177 (1994); United States v. Montoya, 945 F.2d 1068, 1073–74 (9th Cir. 1991).

quid pro quo requirement remains the same whether or not campaign contributions are involved.[172]

2. *Reasons to Reject the Explicitness Requirement*—Decisions such as *Carpenter* properly regard the quid pro quo requirement as not requiring true explicitness. First, a proper interpretation of Supreme Court precedent indicates that *Evans* is best understood as a campaign contribution case.[173] So understood, *Evans* replaces *McCormick*'s "explicit promise" standard in campaign contribution cases with a new standard requiring proof "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."[174]

Second, even if *Evans* is understood to have announced a quid pro quo standard only for non-campaign contribution cases, imposing an explicitness requirement would protect those corrupt officials who are careful or lucky enough to avoid explicit bribery, even when a jury has or could have found, *beyond a reasonable doubt*, that they accepted payments known to be made in return for specific official acts.[175] Insisting on explicitness ignores the importance of circumstantial evidence[176] and allows corrupt public officials to frustrate the purpose of the Hobbs Act "by knowing winks and nods."[177] As

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172. *See Montoya*, 945 F.2d at 1074 n.2 ("[W]e see no rational distinction between cash payments claimed by the official to be lawful campaign contributions or those alleged to be legitimate honoraria. The critical question is whether . . . a *quid pro quo* exists, not how an official labels the payments . . . .").

173. *See infra* notes 191–95 and accompanying text.

174. Evans v. United States, 504 U.S. 255, 268 (1992).

175. Professor Lindgren has criticized *McCormick*, inquiring "[i]f you can prove a quid pro quo beyond a reasonable doubt, why should you also have to prove beyond a reasonable doubt that the quid pro quo is *explicit*?" Lindgren, *supra* note 57, at 1733. He argues that requiring explicitness is both superfluous and harmful: "[T]he incentives already lead crooks to make their deals less explicit, since enforcement in court is never desired." *Id.* Furthermore, "[i]f one must test extortion by whether it's corrupt in any event, a reciprocity requirement only adds another layer that may exculpate those otherwise guilty of wrongful extortion." *Id.* at 1737; *see also Evans*, 504 U.S. at 274 (1992) (Kennedy, J., concurring) ("The criminal law . . . concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.").

176. Contextual evidence can be crucial in contradicting an official's claims of innocence. Evidence of the following can reveal an official's guilt in the absence of direct evidence: a temporal relationship between payments and official acts; the nonperformance of, or disproportionate compensation for, service by the official; an extraordinary undertaking by the official; or a mischaracterization or concealment of a payment. PUBLIC CORRUPTION CASES, *supra* note 4, at 234.

177. *Evans*, 504 U.S. at 274 (Kennedy, J., concurring); *cf.* AMITAI ETZIONI, CAPITAL CORRUPTION 58 (1984) (criticizing the law of bribery in general because it does not deter sufficiently the making of unexplicit bribes).

Justice Stevens has stated, "[s]ubtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that [*McCormick*] seems to require."[178]

Third, case law interpreting the federal bribery statute[179] provides another reason not to require explicitness for official extortion exchanges under the Hobbs Act. The comparable quid pro quo requirement under the federal bribery statute does not demand explicitness.[180] Tailoring the Hobbs Act quid pro quo requirement to parallel the quid pro quo requirement under the federal bribery statute promotes ease of decision making by establishing a single standard for when conduct constitutes bribery under either the Hobbs Act or the federal bribery statute. It also promotes substantive fairness by treating equally defendants who have committed the same crime but are prosecuted under different federal statutes. Just as the requirement that bribes prosecuted under the Hobbs Act must involve specific official actions appropriately harmonizes the Hobbs Act with the federal bribery statute,[181] the Hobbs Act should con-

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178. McCormick v. United States, 500 U.S. 257, 282 (1991) (Stevens, J., dissenting).

Professor Lowenstein argues that, even though requiring bribes to be expressly arranged has an admitted evidentiary advantage,

> [c]orrupt arrangements in the most conventional sense and in the most conventional settings often are carried out without express *quid pro quo* agreements . . . . To read a *quid pro quo* element into the majority of bribery statutes that do not contain such a requirement would be to reward deviousness and hypocrisy. Even if it would simplify the law of bribery, it would do so in an entirely arbitrary manner.

Lowenstein, *supra* note 114, at 825–26 (citations omitted). *But see* Weissman, *supra* note 11, at 460–62 (supporting the explicitness requirement in campaign contribution cases).

179. 18 U.S.C. § 201 (1988).

180. *See, e.g.*, United States v. Biaggi, 909 F.2d 662, 684 (2d Cir. 1990) (recognizing that the quid pro quo element under the federal bribery statute can be established through circumstantial evidence), *cert. denied*, 499 U.S. 904 (1991). *But see* United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) (stating without elaboration that bribery under the federal bribery statute involves an explicit quid pro quo). The statement in *Brewster* that the quid pro quo in bribery prosecutions must be explicit is of questionable significance, however, given the court's later holding in United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). In *Anderson*, a case involving the appeal of the lobbyist convicted of bribing the defendant in *Brewster*, the court held that the evidence was sufficient to sustain a conviction for bribery based upon the circumstances of the dealings between the defendant and Brewster. *Id.* at 331.

181. *See supra* notes 120–33 and accompanying text.

tinue to mirror the federal bribery statute by not requiring that officials arrange their bribes explicitly.

Individuals hostile to the use of the Hobbs Act to combat local corruption may respond that the federal interest in prosecuting local corruption is not as strong as the federal interest in prosecuting corruption within the federal system. Requiring a quid pro quo to be explicit under the Hobbs Act therefore would be acceptable or even desirable because such a requirement would reduce federal intervention in local affairs. This objection does not explain, however, why *federal* officials should be treated differently under the Hobbs Act and the federal bribery statute. Further, there is no reason to believe that only explicit instances of local bribery should be liable under the Hobbs Act, because local bribery is so much more difficult to identify than bribery by federal officials. Moreover, given the unavoidable fact that the Hobbs Act does apply to state and local officials, allowing a state governor who avoids explicit bribery to elude federal criminal liability, while simultaneously subjecting a forest service worker who accepts tacit bribes to federal criminal liability, defeats the fair and uniform application of punishment.

C. The Need for an Actual Agreement

The quid pro quo requirement mandates the objective appearance of an agreement,[182] but it does not mandate the existence of an actual bilateral agreement between an official and a payor. The most obvious indication that a bilateral agreement is not required is the fact that the payors in many cases which reach trial are actually undercover government agents. Aside from a possible desire to accumulate more evidence, government agents presumably will have had no subjective desire to see an official misuse her position in return for the payments.[183] Conversely, although the official

182. An "objective" appearance of an agreement must exist to the extent that the jury can determine beyond a reasonable doubt that the official intended the payor to believe that a payment was likely to buy official action, *see infra* note 184 and accompanying text, even though the jury also may determine that only one or neither party actually intended for the apparent agreement to be honored.

183. *See* Lowenstein, *supra* note 114, at 820–21 (arguing that "[n]o court requires an actual, bilateral agreement for a bribe" and that a mistaken agreement, such as when one party is acting on behalf of law enforcement, can constitute a bribe).

must have intended the payor to believe that she was likely to perform an official act in exchange for a payment,[184] the official can be guilty of Hobbs Act extortion even if she never intended actually to perform the act[185] or if she always intended to perform the act irrespective of receiving a payment.[186] Furthermore, an official's attempts to shield herself from criminal liability by refusing to guarantee results should fail, as long as the official intended the payor to believe that a payment likely would secure the official's *efforts* to attain a possibly unattainable goal.

III. THE FUTURE OF THE QUID PRO QUO REQUIREMENT

A. The Evans *Standard Should Replace the* McCormick *Standard*

McCormick announced an apparently clear definition of a quid pro quo requirement in campaign contribution cases: "[T]he payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[187] *Evans*, however, without noting whether it was deciding a campaign contribution case, announced a different

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184. *See* Evans v. United States, 504 U.S. 255, 268 (1992) (finding that prosecutors "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"); *see also id.* at 274 (Kennedy, J., concurring) ("[A] public official violates § 1951 if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor.").

Likewise, the dissent in *McCormick* argued that an official violates the Hobbs Act by accepting a payment "pursuant to an understanding that he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise to take favorable action." McCormick v. United States, 500 U.S. 257, 283 (1991) (Stevens, J., dissenting).

185. *See* Lindgren, *supra* note 57, at 1735 (noting that *Evans* "doesn't require any actual agreement or intent to take any official act [sic]"); *see also Evans*, 504 U.S. at 268 (stating that, "the offense is completed at the time when the public official receives a payment . . . fulfillment of the *quid pro quo* is not an element of the offense").

186. *McCormick*, 500 U.S. at 283 (Stevens, J., dissenting) ("[E]vidence that [an official] would have supported the legislation anyway is not a defense to the already completed crime."). *But cf.* Whitaker, *supra* note 5, at 1651–52 & n.195 (arguing that a model federal public corruption statute should require proof that an official act would not have occurred without a payment, but citing United States v. Arroyo, 581 F.2d 649, 653–54 (7th Cir. 1978), for the proposition that such proof should be unnecessary if the official led the payor to believe that the performance of the official act depended upon the making of a payment).

187. McCormick v. United States, 500 U.S. at 273.

standard: A public official violates the Hobbs Act when he "receives a payment in return for his agreement to perform specific official acts."[188]

Whether the contours of the quid pro quo requirement can or should vary according to whether the payments are claimed to be campaign contributions depends upon how one interprets *Evans*. As this Note has discussed, courts uniformly have interpreted both *McCormick* and *Evans* to require proof that the official intended the payor to believe that the official likely would perform or not perform *specific* official acts in return for a payment.[189] *Evans* and *McCormick* differ, however, as to whether the official and the payor *explicitly* must agree to trade money for action or whether the official merely must know that a payment is being made in return for specific official acts.[190] If *Evans* is understood to be a campaign contribution case, it may have diluted the quid pro quo requirement described in *McCormick* by rejecting an explicitness requirement in such cases. In non-campaign contribution cases, courts would remain free to reject the specificity, apparent agreement, or explicitness requirements. If *Evans* is understood to be a non-campaign contribution case, however, then it may have left the holding of *McCormick* intact in campaign contribution cases and merely extended a diluted quid pro quo requirement—one not demanding explicitness—to non-campaign contribution cases. Alternatively, *Evans* may have replaced the *McCormick* standard entirely and extended a diluted quid pro quo requirement to all official extortion cases.

Evans is best interpreted as a campaign contribution case. First, the concurrence by Justice Kennedy implied that it was such a case.[191] Second, the facts in *Evans* contain more compelling evidence that the payments at issue were actual campaign contributions than do the facts in *McCormick*,[192] a case explicitly analyzed as a campaign contribution case.[193] Third, the jury instructions and both parties' briefs before the Supreme Court

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

189. *See supra* notes 108–19, 182–86 and accompanying text.

190. *See supra* notes 142–45, 155 and accompanying text.

191. *See Evans*, 504 U.S. at 272–78 (Kennedy, J., concurring); *see also supra* note 95 and accompanying text.

192. *See* United States v. Evans, 910 F.2d 790, 792–95 (11th Cir. 1990) (discussing conversations between Evans and an undercover FBI agent); *see also supra* notes 69, 101 and accompanying text.

193. *McCormick*, 500 U.S. at 271.

assumed that *Evans* involved putative campaign contributions.[194] The *Evans* standard, therefore, should be interpreted to have replaced the *McCormick* standard and to have removed the explicitness requirement in campaign contribution cases.[195]

Policy reasons also support such an interpretation. The easily-met definition of a campaign contribution for Hobbs Act purposes allows defendants to claim that money, although never documented nor spent as campaign funds, was actually a campaign contribution.[196] Requiring explicitness in campaign contribution cases would result in defendants claiming as a matter of course that payments were campaign contributions. Moreover, the *Evans* standard should be applied uniformly, and explicitness should never be required, in order to harmonize the Hobbs Act with the federal bribery statute, which neither requires explicit bribes[197] nor makes distinctions according to whether a defendant has claimed that the payments at issue are campaign contributions.[198]

Judicial application of the *McCormick* and *Evans* decisions supports this analysis. Although the Second and Eleventh Circuits have interpreted *Evans* as a non-campaign contribution case that imposed a diluted quid pro quo requirement that did not affect the holding of *McCormick* in campaign contribution cases,[199] the Fourth Circuit has implied that *Evans* announced a new standard for all official extortion

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194. *See Evans*, 910 F.2d at 795–96; Evans' Brief, *supra* note 89; Government's Brief, *supra* note 103; *see also* Whitaker, *supra* note 5, at 1651 & n.194 (analyzing *Evans* as a campaign contribution case).

195. Special judicial deference to officials' needs to fund their political campaigns has resulted in the imposition of the explicitness requirement. *See supra* notes 116–19 and accompanying text. Since any special deference would be unwarranted when payments are not claimed to be political contributions, explicitness logically should not be required in non-campaign contribution cases.

196. *See McCormick*, 500 U.S. at 260 (describing unreported cash payments in violation of state law as campaign contributions); United States v. Davis, 967 F.2d 516, 518, 521 (11th Cir. 1992) (reviewing as a campaign contribution a payment made to an official who gave a lobbyist a piece of paper with the figure $25,000 on it while stating that she could get a desired bill out of committee for that amount).

197. 18 U.S.C. § 201 (1988); *see also supra* notes 179–80 and accompanying text.

198. *See* PUBLIC CORRUPTION CASES, *supra* note 4, at 302–03 (stating that a bribery or gratuity charge under the federal bribery statute can be premised upon a campaign contribution and noting no other special requirements in campaign contribution cases other than the need to "distinguish between a lawful campaign contribution . . . and an unlawful bribe or gratuity").

199. *See* United States v. Martinez, 14 F.3d 543, 552–53 (11th Cir. 1994); United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993); *see also supra* notes 146–48 and accompanying text.

cases,[200] and one district court explicitly has held that *Evans* is a campaign contribution case.[201] Further, courts have weakened the explicitness requirement when applying *McCormick*,[202] in effect applying the *Evans* standard in all official extortion cases.

The *Evans* requirement of an apparent agreement regarding specific official acts also should apply to cases where defendants do not claim that the payments were campaign contributions. As Justice Kennedy stressed in his concurrence in *Evans*, the most important requirement in any official extortion prosecution is that the defendant harbored the requisite criminal intent.[203] The degree of requisite culpability that the prosecution must prove should not depend upon how the defendant labels a payment. Giving a thing of value, regardless of whether it is a gift, an honorarium, a salary, a loan, a consulting fee, or a campaign contribution, should never violate the Hobbs Act, unless the gift is in return for specific official acts.[204] Limiting the *Evans* requirement of an apparent agreement regarding specific official acts to campaign contribution cases would subject officials to liability under the Hobbs Act merely for accepting non-campaign contribution payments that would be considered only gratuities under the federal bribery statute.[205]

One might argue that the Hobbs Act should require an apparent agreement regarding specific official acts only in campaign contribution cases because other things of value exert a stronger influence on officials.[206] Although such a dis-

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200. United States v. Taylor, 993 F.2d 382, 384 (4th Cir. 1993); *see supra* note 164.

201. United States v. McDade, 827 F. Supp. 1153, 1171 & n.8 (E.D. Pa. 1993), *aff'd*, 28 F.3d 283 (3d Cir. 1994).

202. *See supra* notes 151–72 and accompanying text.

203. Evans v. United States, 504 U.S. 255, 272–78 (1992) (Kennedy, J., concurring) (arguing that the quid pro quo requirement in *Evans* is proper both as a matter of statutory construction and because criminal laws traditionally require intent).

204. *See id.* at 278. ("Readers of [*Evans*] should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all § 1951 prosecutions. That is as it should be, for, given a corrupt motive, the *quid pro quo* . . . is the essence of the offense.").

205. *See supra* notes 121–33 and accompanying text.

206. *See* Lowenstein, *supra* note 114, at 847. Professor Lowenstein argues:

> Contributions intended to influence official conduct and accepted with the knowledge that they are so intended therefore may be regarded as corrupt. The political pressure that they generate appeals solely to the official's self-interest. This pressure is not a by-product of legitimate activity engaged in for reasons

tinction between campaign contributions and other things of value may be a plausible theoretical proposition, qualitatively distinguishing between different forms of payments for the purposes of the Hobbs Act would be arbitrary and impractical. Implementing a blanket rule limiting the requirements of *Evans* to campaign contribution cases would be arbitrary because, for example, it would subject a $50 gift given with only a general expectation of benefit to Hobbs Act liability, but would except a $20,000 campaign contribution given with the exact same expectations. Even assuming that the official actually spends the $20,000 contribution on his campaign, such a large contribution presumably would exert more influence than the $50 gift. Likewise, distinguishing between campaign contributions and other things of value would be useless in practice if defendants learn routinely to characterize payments as campaign contributions for the purpose of securing a higher criminal intent requirement.[207]

Evans therefore should be acknowledged as a campaign contribution case that provides a uniform rule for *all* official extortion cases: An official must intend a payor to believe that he likely will perform or not perform specific official acts in return for a payment, and the official must accept a payment knowing that it was made in return for specific official acts. Accordingly, prosecutors always should be required to prove the existence of an apparent agreement concerning the performance of particular official acts, regardless of whether the defendant claims that the payments were campaign contributions. Prosecutors, however, never should be required to prove that an understanding between an official and a payor was explicit or that an actual agreement existed.

> other than influencing official decisions. On the other hand, contributions intended solely to help the candidate get elected also might generate political pressure, but this pressure, like that generated by endorsements, is a by-product of the contributor pursuing his goals in a manner accepted within the system.

Id. (citation omitted). Professor Lowenstein then considers a "contribution made for the dual purpose of influencing official action and improving the official's electoral prospects," and concludes that such payments are still unacceptably harmful and properly regarded as corrupt. *Id.* at 847 n.235.

207. Courts have, for the purpose of invoking the requirements of *McCormick*, treated indulgently a defendant's claim that particular payments were campaign contributions. *See supra* note 196 and accompanying text.

B. The Practical Effect of the Quid Pro Quo Requirement

Case law demonstrates that a quid pro quo requirement is usually an obstacle for prosecutors only with regard to legal, rather than factual, issues, because defendants usually are explicit and specific in their dealings. Defendants succeed on appeal only by contesting the jury instructions, not the sufficiency of the evidence. Prosecutors, therefore, should not risk quibbling over the semantics of jury instructions.

One case in particular, *United States v. Garcia*,[208] shows how insufficient jury instructions can result in a retrial, even when the evidence of a defendant's guilt is very strong. In *Garcia*, Congressman Robert Garcia, his wife, Jane Lee Garcia, and their associate, Ralph Vallone, all successfully appealed their official extortion convictions in a case arising out of Congressman Garcia's involvement with the Wedtech Corporation. In 1984, a Wedtech officer told Garcia over dinner about Wedtech's current contract with the Navy and its desire to obtain another contract to produce mail containers. Garcia responded by describing his increasing influence in Congress and suggesting that Wedtech hire his wife as a consultant.[209] Garcia's wife told the Wedtech officer that they "could do a lot of things" for Wedtech, including setting up appointments to see the Secretary of the Navy and the Postmaster General to discuss possible contracts.[210] She also explained that they had a friend, a lawyer in Puerto Rico (Vallone), who could act as an intermediary for the payments.[211]

Wedtech eventually agreed and ultimately paid $86,000 to Vallone through monthly "retainers" of $4100 each. Vallone in turn paid $76,000 in alleged "consulting fees" to Mrs. Garcia.[212] At trial, the Wedtech officer testified that " 'we knew that if those payments were not made . . . we could kiss the . . . potential contracts, good-bye.' "[213] Over the course of the relationship, Garcia contacted the Postmaster General about contracting with Wedtech and interceded on Wedtech's behalf

208. 992 F.2d 409 (2d Cir. 1993).
209. *Id.* at 410–11.
210. *Id.* at 411.
211. *Id.*
212. *Id.*
213. *Id.*

with three banks and a congressional investigation.[214] At Garcia's request, Wedtech donated $65,000 to Garcia's sister's church and gave Mrs. Garcia a diamond and emerald necklace after the Garcias had arranged for Wedtech to meet with the governor of Puerto Rico and receive additional building contracts.[215] Garcia also requested a $20,000 loan from Wedtech for his sister, and although he eventually repaid the loan, he did so without paying interest and only after unsuccessfully asking Wedtech to donate the money to his sister's church.[216]

The government's meticulous efforts to compile all of this evidence, however, did not prevent the Second Circuit from reversing the convictions and remanding for a new trial on the grounds that the trial court had not required the jury to find, under *Evans*, that the defendants had accepted payments knowing that they were in return for specific official acts.[217] The *Garcia* court noted that its decision was based on a legal, as opposed to an evidentiary, deficiency.[218]

The Ninth Circuit reached a similar result in *United States v. Carpenter*,[219] reversing a conviction because the instruction was inadequate under *McCormick* while acknowledging that sufficient evidence existed of two separate quid pro quo exchanges.[220] The first exchange occurred when the defendant's aide told a government agent that the defendant was "the best person to 'front' the legislation" and that his services would cost $20,000; the second exchange occurred when the defendant, after having been told of that conversation, informed his aide that he "would assist the bill through the Senate" and told an undercover agent that "things were going smoothly" because the defendant had the "right friends" in the State Senate.[221] Other courts also have reversed official extortion convictions on the basis of inadequate jury instructions, despite the existence of strong evidence of guilt.[222]

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214. *Id.*
215. *Id.* at 411–12.
216. *Id.* at 412.
217. *Id.* at 414–16.
218. *Id.* at 416.
219. 961 F.2d 824 (9th Cir.), *cert. denied*, 113 S. Ct. 332 (1992).
220. *Id.* at 828–29.
221. *Id.* at 826–28.
222. McCormick v. United States, 500 U.S. 257 (1991), is the most prominent example of an opinion reversing a conviction due to improper jury instructions, irrespective of strong evidence of guilt. The majority in *McCormick* indicated that it was not ruling on the sufficiency of the evidence. *Id.* at 267–68 n.5, 274. The dissent believed "that the evidence presented to the jury was adequate to prove [guilt] beyond

A survey of the facts of the official extortion cases published after *McCormick* and *Evans* indicates that officials tend to implicate themselves in rather clear and explicit ways. In *United States v. Davis*,[223] the Eleventh Circuit upheld, under *McCormick*, the conviction of a state representative who had invited a lobbyist into her office, given him a piece of paper with the figure $25,000 written on it, and stated that she could get desired legislation out of committee for that amount.[224] In *United States v. Loftus*,[225] the Eighth Circuit rejected an official's claim that the evidence indicated only that he had acted as a lobbyist.[226] The official had told an FBI informant that he would work on a rezoning application for $25,000; told the informant that he should not be hired as a lobbyist because then the official would not be able to use his title; insisted on using an intermediary because "[i]f they're handing me something directly then they've got me"; and suspended his efforts on the rezoning application due to an expressed desire to avoid being implicated in an ongoing bribery investigation.[227] Other cases contain similarly strong evidence.[228]

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a reasonable doubt." *Id.* at 281 (Stevens, J., dissenting). *See also* United States v. Derrick, No. 92-5084, 1994 U.S. App. LEXIS 1651, at *3–8 (4th Cir. Feb. 3, 1994) (reversing conviction for lack of quid pro quo instructions complying with either *McCormick* or *Evans* but refusing to find insufficient evidence where tapes showed defendant stating to a lobbyist that he knew that the lobbyist needed him either to vote for or fail to oppose a bill, which referred to a prior understanding that the lobbyist would pay the defendant for either action); United States v. Taylor, 966 F.2d 830, 831, 833–35 (4th Cir. 1992) (noting that videotapes showed government informant giving payments to defendant but reversing under *McCormick* for failure to instruct on quid pro quo requirement), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *and cert. denied*, 114 S. Ct. 249 (1993).

223. 967 F.2d 516 (11th Cir. 1992).

224. *Id.* at 520–22.

225. 992 F.2d 793 (8th Cir. 1993).

226. *Id.* at 797.

227. *Id.* at 794–97.

228. *See supra* notes 208–22; *see also* United States v. Freeman, 6 F.3d 586, 588–89 (9th Cir. 1993) (legislative aide told FBI agent that another aide would revive desired legislation in exchange for $5000, some of which replaced money that would be given back to the agent in order to avoid the appearance of bribery), *cert. denied*, 114 S. Ct. 1661, *and cert. denied sub nom.* Netters v. United States, 114 S. Ct. 2177 (1994); United States v. Coyne, 4 F.3d 100, 105–06 (2d Cir. 1993) (defendant accepted $30,000 from architects who had secured a lucrative county contract through the efforts of defendant; defendant suggested that the payment be made to appear as a loan in order to "legitimize" the action), *cert. denied*, 114 S. Ct. 929 (1994); United States v. Farley, 2 F.3d 645, 648–50 (6th Cir.) (county sheriffs and their representatives routinely asked persons to pay $500 in cash in exchange for "honorary" deputy sheriff commissions), *cert. denied*, 114 S. Ct. 649 (1993); United States v. Fant, 776 F. Supp. 257, 261 (D.S.C. 1991) (defendant had a conversation with a lobbyist in which the lobbyist promised "hits" or "pops" of "five hundred" for particular official acts).

These cases suggest that an explicitness requirement would not prove to be a significant obstacle to prosecutors in practice,[229] despite the vast array of tactics based on subtlety that a corrupt public official can employ to defeat a charge of official extortion.[230] The potential significance of an explicitness re-

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Admittedly, this survey of only published opinions may present an extremely inaccurate picture of official extortion cases overall. Published opinions necessarily involve only cases in which the government decided that it was worth the time and money to investigate and go to trial, rather than forego either an investigation or a prosecution due to a lack of evidence. Moreover, opinions by circuit courts necessarily involve only convicted defendants, rather than those found to be completely innocent. On the other hand, rarely would a court publish an opinion in a case in which the defendant has pled guilty.

229. Several commentators have argued, however, that most bribes are performed quite subtly. For example, Professor Lindgren has mocked the explicitness requirement of *McCormick*:

> Justice White seems to think that corrupt officials act like the killers in movie and television murder mysteries. In the last few minutes of most hack mysteries, the villain pauses before murdering the clever detective to explain to the detective how and why he killed; this pause . . . makes explicit to the audience what happened. But in government corruption, only idiots or targets of government stings are likely to make things explicit. That's not how things are usually done. As Noonan notes, "[d]ealing with intelligent donees, the donor may reasonably expect a better return if he is not specific."
>
> Justice White commits what I call the Lawyer's Fallacy, named by analogy to the Psychologist's Fallacy and the Historian's Fallacy. The Lawyer's Fallacy assumes that people understand what they do, while they do it, from the perspective of a lawyer or that people act as if they are creating evidence for lawyers to find later. It sees people cooperatively climbing into pigeonholes where lawyers can easily find them.

Lindgren, *supra* note 57, at 1734 (footnotes omitted). Professor Lindgren describes the practical difference between requiring explicitness and not requiring explicitness as "stark." *Id.* at 1733.

The "Lawyer's Fallacy," however, is a double-edged sword. Public officials presumably do not act like spies, and, just as they do not conduct their everyday lives for the benefit of prosecuting attorneys later preparing for trial, they do not conduct their everyday lives for the benefit of *defense* attorneys later preparing for trial. The case law demonstrates that even supposedly "sophisticated" criminals such as corrupt public officials are not as clever and far-sighted as sometimes thought to be. *Cf.* Lowenstein, *supra* note 114, at 848. Lowenstein notes that "under our present system of campaign finance, politicians and interest groups engage routinely, not in 'legalized' bribery, as is commonly supposed, but in felonious bribery that goes unprosecuted primarily because the crime is so pervasive." *Id.*

230. Perhaps the best tactic that a corrupt official can adopt is to perform only those favors commonly performed in his particular community, thereby relying on the unspoken understandings of his environment to communicate his intentions. Although an adept prosecutor could introduce evidence of the context in which an official operated in order to demonstrate the true import of any potentially ambiguous words or deeds, the official's reliance on values which many individuals in the community embrace will increase the chances that citizens, from witnesses to jurors, will not cooperate with the government in securing a conviction. *See* PUBLIC CORRUPTION CASES,

quirement is undermined further by the fact that government undercover agents purposefully can render an official's transactions conveniently explicit.[231]

Even though the existence of an explicitness requirement may have little practical effect, the Hobbs Act still should not contain such a requirement. First, as an empirical matter, whether bribes usually are arranged explicitly is at best controversial and at worst unknowable. Second, it is unlikely that officials mistakenly will be convicted for accepting legitimate payments in the absence of an explicitness requirement, because juries must determine beyond a reasonable doubt that an official accepted a payment knowing that it was in return for a specific official act. Third, given the very necessity of campaign contributions, it is extremely improbable that legitimate political contributions in general will be chilled merely because the Hobbs Act does not require explicitness.

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supra note 4, at 20 (stating that "government contract corruption" exists because of "substantial ignorance" or, even worse, "outright acquiescence" by the community and arguing that prosecutors must know what the community considers "real lawbreaking," because the "level of public morality . . . will determine whether prosecution will succeed or not"); *see also id.* at 161–62 (noting that many witnesses will refuse to cooperate with the government because they will resent the prosecutor for interfering with business as usual).

A corrupt official can structure his transactions so that bribes appear to be payments for services, profits from business investments, or informal loans unrelated to his public office. *Id.* at 233. Similarly, an official might attempt to camouflage an official act performed for a payor as merely "a customary constituent service or some other government entitlement for which the citizen qualified," *id.*, possibly by frequently performing services identical to those sometimes conditioned upon payment or by limiting the extent of the services performed for any one payor. An official also might restrict his illicit favors to activities which plausibly could be construed as providing access only, *see supra* notes 134–41 and accompanying text, or, as the defendant in *McCormick* did, to performing favors consistent with his usual and well-known stance on a given issue, *see supra* text accompanying notes 29–31. Use of an intermediary may backfire, however, because that tactic may provide the government with a potential witness and the opportunity to bring a conspiracy charge. *See* Weissman, *supra* note 11, at 462 n.209 (noting that the use of intermediaries can result in a conspiracy conviction).

231. For example, when cataloguing the evidence against the petitioner, the Government's brief before the Supreme Court in *Evans* asserted that the undercover agent "repeated the terms of the arrangement [between the defendant and himself] explicitly, as he understood them." Government's Brief, *supra* note 103. In another case, the defendant chided the undercover government agent for having been too explicit with a legislative aide, warning the agent while being taped that "[s]ome things are best never said." *Freeman*, 6 F.3d at 589.

C. Judges' Philosophies Will Mold the Quid Pro Quo Requirement

Ultimately, how strictly a judge will interpret the quid pro quo requirement will depend partly upon her particular moral and political viewpoints.[232] Professor Lowenstein has drawn a parallel between three theories of political representation and three theories of corruption. The first political theory, the trusteeship theory, regards outside pressure as harmful to the extent that it interferes with a legislator's ability to pursue the objective public interest. This parallels a view of corruption as being that which is immoral.[233] The second political theory, the mandate theory, regards outside pressure as harmful to the extent that it interferes with a legislator's willingness to enact popular preferences. This parallels a view of corruption as being that which thwarts public opinion.[234] The third political theory, pluralism, stresses the importance of a legislator's ability to register accurately the various forces exerted by competing groups. This parallels a view of corruption as being that which is legally defined as such.[235]

Professor Lowenstein's discussion is useful because it provides a backdrop for understanding how one's political and moral philosophy can affect how rigorous one thinks laws against political corruption should be. Individuals who subscribe to either of the first two political theories, the trusteeship or the mandate theories, presumably will be more alarmed by the fact that wealthy individuals may purchase disproportionate political influence—regardless of whether they do so through exchanges involving quid pro quo arrangements—because disproportionate influence by the wealthy tends to deter a legislator from exercising independent judgment or responding to popular preferences. Conversely, pluralists will be less alarmed by the purchasing of political

232. *Cf.* MICHAEL JOHNSTON, POLITICAL CORRUPTION AND PUBLIC POLICY IN AMERICA 144 (1982) ("[D]ecisions about institutional reform are still decisions about what kind of politics and policy we want, whether we realize it or not."); Lowenstein, *supra* note 114, at 848 (asserting that deciding when a campaign contribution is in fact a bribe is not a neutral political question).

233. *See* Lowenstein, *supra* note 114, at 833–34 & n.193.

234. *See id.* at 834–36 & n.193.

235. *Id.* at 837 & n.193.

influence. As Professor Lowenstein explains, under the pluralism model of politics,

> [t]he public official is seen as a purely passive agent, who responds more or less perfectly to group pressures. Under this conception, preoccupation with the integrity of representatives is beside the point, and there is little sense in a concept like corruption, at least at the policy-making level. Any practice that seriously interferes with the accuracy with which officials register the strength of contending forces is perhaps a source of concern, but the pluralist conception of policy as the outcome of a mechanical process provides no basis for assessing the accuracy of the registering of group forces. Accuracy is assumed.[236]

What pluralism considers corrupt, therefore, is simply that which traditionally has been prohibited, such as quid pro quo exchanges with officials, rather than what newer, more expansive theories of public accountability may consider unacceptable.[237]

Given the connection between money and political influence, the imposition of a strict quid pro quo requirement in official extortion cases partly reflects an acceptance of the fact that people who are able to give money to officials to maintain goodwill enjoy much greater political influence than those who cannot give money.[238] Conversely, to impose Hobbs Act liability

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236. *Id.* at 838 (citation omitted).

237. For two examples of commentators who reflect a pluralist perspective and attack what they perceive to be overly-aggressive attempts at campaign finance reform, see BeVier, *supra* note 119, and Miriam Cytryn, Comment, *Defining the Specter of Corruption:* Austin v. Michigan State Chamber of Commerce, 57 BROOK. L. REV. 903 (1991). Professor BeVier criticizes "reformers who have tended to imply that corruption is synonymous both with outright bribery on the one hand and with the general possession or specific exercise of 'too much' political power on the other" and asserts that judicial opinions, in refusing to equate corruption with undue political power, have prohibited only quid pro quo exchanges. BeVier, *supra* note 119, at 1081–82. Cytryn likewise criticizes the majority opinion in Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), for "defin[ing] corruption to include what it found was the unfair influence of corporate money on the outcome of an election," rather than defining corruption as only "the trading of money by a constituent for political favors from a candidate." Cytryn, *supra*, at 904.

238. *See generally* ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983) (discussing how the need to raise money has affected politics); NOONAN, *supra* note 12, at 647–51 (discussing political action committees and how their influence correlates to the amount of their campaign contributions). The fact that judges have imposed a quid pro quo requirement in official extortion cases,

when an official accepts payments made with general hopes of benefit, to secure access, or pursuant to a shared, implicit understanding, is to be less tolerant of the correlation between wealth and political influence.[239] Although advocates of a strict quid pro quo requirement could justify the requirement solely according to a vision of what is practical in politics[240] instead of what is the moral ideal, a person's actual moral principles will affect how much inequality in influence he is prepared to accept in the name of practicality before he considers such inequality to be corrupt.[241]

CONCLUSION

Despite the recent imposition of a quid pro quo requirement, the Hobbs Act remains one of the most potent weapons for combating local and public corruption. Although courts have prevented the Hobbs Act from transcending the traditional law of bribery by limiting the statute's reach to payments made for specific official acts, courts also either have rejected or ignored any requirement that the parties engage in explicit bribery. Courts instead focus on whether an official has manifested the requisite criminal intent, and the prosecutor remains free to prove such intent through any available evidence. Nevertheless, a survey of the published case law reveals that corrupt officials

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however, of course does not indicate a judicial acceptance of bribery. *See* NOONAN, *supra* note 12, at 590 (arguing that judges' corporate ethic encouraged the general expansion of federal prosecutions of local political corruption).

239. Noonan, after explaining that one argument raised by apologists for political corruption is that foes of corruption are acting simply out of envy and spite, notes that to oppose corruption is normally to oppose those in power. He later argues that to condone official corruption is to pander to the wealthy. NOONAN, *supra* note 12, at 691–92, 699, 703–04; *see also* PUBLIC CORRUPTION CASES, *supra* note 4, at iii (attacking political corruption as "almost always [working] to the detriment of the most disadvantaged members of society"); Lowenstein, *supra* note 114, at 849 (arguing that the influencing of officials with money corruptly favors the wealthy and skews political outcomes so as to reinforce previously-existing inequalities); *see generally* Peter M. Manikas, *Campaign Finance, Public Contracts and Equal Protection*, 59 CHI.-KENT L. REV. 817, 819 (1983) (invoking equal protection concerns as compelling reasons to regulate campaign contributions).

240. *See supra* notes 116–19 and accompanying text.

241. *Cf.* NOONAN, *supra* note 12, at 705 ("[O]ne's existing balance of values go[es] into the perception of one's ends; at the same time the ends chosen affect the person one becomes. The dynamism of movement to ends determines what one regards as human needs and affects one's choice of the means necessary to satisfy them.").

eventually implicate themselves through explicit statements, a phenomenon that belies any assumptions that corrupt officials are always carefully discreet when arranging and accepting bribes.

Courts should continue to require in all Hobbs Act public corruption prosecutions proof that the payments were made in return for specific official acts; they also should continue to reject an explicitness requirement. Whether a defendant claims that payments were campaign contributions therefore should not affect the quid pro quo requirement. Ultimately, the way in which courts interpret the evolving quid pro quo requirement will turn partly upon the individual political and moral beliefs of judges.