Between a Crime and a Dime: Bribery and Campaign Contributions[1]

I. "The Appearance of Corruption" A Brief Background on Campaign Finance Policy Concerns.

The possibility of using campaign contributions to bribe public officials or candidates for public office is a problem with deep historical roots. In 1828, Martin Van Buren organized the first popular mass campaign for Andrew Jackson and the Democratic party, resulting in a novel need for campaign contributions to cover expenses.[2] Originally, the parties who were most amenable to support these campaigns were government employees whose jobs often depended on whoever was in office.[3] However, as federal and state governments began to expansively regulate industry and businesses, corporations targeted their extensive resources at candidates who were aligned with their interests.[4] In response to concerns over potential corporate dominance over politics, several generally ineffective laws were passed at local and federal levels beginning in the early 1900s.[5]

A change came in 1974 following the Watergate scandal and its corresponding discoveries of large contributors to the Nixon campaign. In response, Congress passed the Federal Election Campaign Act Amendments of 1974 ("FECA"). which limited contributions from individuals, parties, and political action committees ("PACs"), limited candidate's personal spending, placed a cap on total campaign spending for federal offices and limited independent spending by groups

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[2] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1053 (Jan. 1996).
[3] *Id.*
[4] *Id.* 1054.
[5] *Id.* at 1055.

that were not facially affiliated with a particular campaign.[6] However, the extent of the FECA's restrictions was subsequently reduced with the Supreme Court's decision in *Buckley v. Valeo*.[7]

In *Buckley*, the Court found that limits on independent and personal spending and mandatory campaign *spending* ceilings violated the First Amendment.[8] However, limitations on campaign *contributions* remained largely intact, most likely in recognition that these limits were needed to reduce any undue influence over candidates from campaign cash.[9] Recently, the 2002 Bipartisan Campaign Reform Act prohibits national parties from accepting funds that are outside the contribution limits for an election.

II. The Role of Federal and State Bribery Laws.

Although Congress's first response to the public's perception of candidate corruption was to curb the amount a person or entity could contribute to a campaign, it has also turned to criminal statutes to combat these issues. The federal bribery statute requires the government to prove that "(i) a thing of value was given, offered, or promised to (or, in the case of a recipient, demanded, sought, received, or accepted by); (ii) a present or future public official; (iii) for an "official act" (iv) with corrupt intent or intent to influence (or be influenced).[10] "Public official" is construed broadly to include practically any person in a position of political influence. An "official act" is "a decision or act on any question, matter, cause, suit, proceeding or controversy,

[6] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.
[7] 424 U.S. 1 (1976).
[8] *See id.* at 3-5.
[9] Smith, *supra* note 1 at 1055-56. "To the extent that large contributions are given to secure political quid pro quo's [sic] from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Buckley*, 424 U.S. at 26-27.
[10] 18 U.S.C.A. § 201(b).

which may at any time be pending, or which may by law be brought before any public official."[11]

The term "thing of value" has been interpreted widely by the courts to include both monetary and other tangible payments as well as intangible benefits such as promises or future employment, vacation trips, illegal immigration documents, shares of stock, and unsecured, quickly arranged loans. If the recipient subjectively believes that the item has value, it qualifies, even if it has no objective worth.[12] One court has noted that no authority incorporates a "comparable value" requirement.[13] Therefore, the objective value of the consideration given in return for a political favor is not a mandatory factor for the court to consider.

In contrast to the federal statute, Louisiana law directly addresses the specific issue of bribes posing as campaign contributions. "Bribery of a candidate is the giving, promising or offering to give, directly or indirectly, a campaign contribution, by a candidate, political committee or other person, with the intention that the candidate will provide or influence another to provide the contributor or another person a position of public employment, an appointive governmental position, a public contract, or anything of apparent present or prospective value." La. R.S. § 18:1469. Currently, there is no case law using this statute as a basis for bribery charges.

III. The Biggest Piece of the Puzzle: *Quid Pro Quo*.

The trademark of corruption is the existence of a *quid pro quo* – defined as "a specific intent to give or receive something of value *in exchange* for an official act.[14] One court has interpreted this language as requiring that a quid pro quo be clear and unambiguous, and leave no

[11] 18 U.S.C. A. § 201 (a)(3).
[12] *See* 18 U.S.C. A. §201(b) or (c)(1).
[13] *United States v. Farley*, 2 F.3d 645, 651 (6th Cir. 1993).
[14] *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999).

uncertainty as to the terms of the bargain.[15] This differentiates between contributions given for anticipation of undefined future official actions, and those given for the promise of a particular action.[16]

In order to demonstrate that a contribution was actually intended to affect an official action, the prosecutor arguably has to prove a relationship between the campaign finance contribution and political action. Consequently, there must be some evidence as to what the political action would have been minus the contribution.[17] It is extremely rare for concrete evidence to surface that demonstrates a causal relationship between a campaign contribution and a change in a politician's position. A recent controversy surrounded a Tulane Law Review article that accused Louisiana Supreme Court Justices who had accepted campaign contributions of bias in their cases.[18] The article was based on a study relating special interest contributors to judicial verdicts of particular judges.[19]. The Louisiana Supreme Court and others responded with articles criticizing the methodology of calculating such an influence, prompting the Dean of Tulane Law School to apologize to the court.[20] The debate highlights the difficulty of proving a quid pro quo. Moreover, the likelihood of proving a *quid pro quo* is reduced when there is an absence of prearrangement and coordination between the candidate and the contributor. Representatives may have voted for the bill anyway, and contributors may finance politicians

[15] *United States v. Carpenter*, 961 F.2d 824, 826-27 (9th Cir. 2002).
[16] *Id.*
[17] Nathanial Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, Univ. of Penn. L. Sch., available at http://lsr.nellco.org/upenn/wps/papers/30..
[18] Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, Tul. L. Rev. 1291 (Mar. 2008).
[19] *Id.*
[20] Kevin R. Tully & E. Phelps Gay, *Rebuttal of "The Louisiana Supreme Court in Question: An Empirical and Statisticaql Study of the Effects of Campaign Money on the Judicial Function*, available in pdf format at http://www.lasc.org.

who follow their ideologies, not to influence them to change their minds.[21] These sticky credibility determinations often hamper government bribery trials.

For instance, an officer of a state employees' union was charged with accepting free media services for her campaign in exchange for steering union work to her media provider.[22] The media provider had informed the defendant that he would work on her campaign if she would "consider him for future work."[23] He also stated that he expected to profit from the campaign work in that he might get future work with the union if they liked his work.[24] The defendant was indicted for bribery under 18 U.S.C. § 666(a)(1)(B).[25] The court found that the act that was the basis for the bribery charge was "not only innocuous but also rather commonplace."[26] It was not unusual for similar services to be offered during elections, and it is hard to distinguish whether the work is for securing future employment, or if it is to demonstrate the merit of that work for purposes of reputation, or if it is performed on the actual understanding that the candidate will reciprocate.[27] In order to have an actual quid pro quo, the court found it is not sufficient that a recipient is merely aware that the donor might have an expectation of future reward.[28] The court rejected the jury's instructions, holding instead that a jury must be clearly instructed that the recipient must intend to participate in a bargain, and not simply be aware that the donor intends to influence him.[29]

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[21] Persily & Lammie, *supra* note 17 at 136.
[22] *United States v. Ford*, 435 F.3d 204, 206 (2d Cir. 2006).
[23] *Id.* at 207.
[24] *Id.*
[25] *Id.* at 208. Section 666(a)(1)(B) states that bribery occurs when an agent of an organization "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transactionm, or series of transactions of such organization … involving anything of value of $5000 or more[.]" 18 U.S.C.A. § 666(a)(1)(B).
[26] *Ford*, 435 F.3d at 212.
[27] *Id.*
[28] *Id.*
[29] *Id.*

However, other cases demonstrate that proof of quid pro quo is indeed possible. In *United States v. Ketner*, the Department of Justice ("DOJ") alleged that a public school board member took in campaign contributions from vendors who were later awarded school contracts.[30] The defendant and several others had met with the vendors in a small bathroom where they were promised campaign contributions in exchange for their votes to secure county contracts for the vendors.[31] When the vendor was not selected by other officials, the officials receiving the campaign contributions successfully used their influence to make the other members of the board reconsider.[32]

In another case, an undercover agent allegedly offered a member of a county's Board of Commissioners $8,000 dollars in cash and check in exchange for an effort to rezone a 25-acre tract for residential use.[33] The defendant failed to report the cash payment.[34] The court held that, based on this fact, a reasonable juror could have found that the defendant accepted the money knowing that it was to ensure his vote.[35] In addition, it noted that a transaction does not have to be initiated by the recipient of the bribe, so long as the bribed is accepted.[36]

Other evidence of a quid pro quo is a sudden change in a public official's pattern of voting on particular issues following large contributions from interested parties.[37] For example, the defendant in *United States v. Lipscomb*, a City Council member, reversed his position on measures affecting cab companies.[38] After meeting with a cab company owner who gave the

[30] *United States v. Ketner*, Cause No. EP-06-CR-1369FM-1 (W.D. Tex.)
[31] *Id.*
[32] *Id*.
[33] *Evans v. United States*, 504 U.S. 255, 257 (1992).
[34] *Id.*
[35] *Id.*
[36] *Id.* at 266. The Court also noted that charges of extortion and bribery are not mutually exclusive. *Id.* at 267.
[37] *United States v. Lipscomb*, 299 F.3d 303, 307 (5th Cir. 2002).
[38] *Id.* at 305-07.

defendant $30,000 in campaign contributions,[39] the defendant began to strongly support measures in contrast to his previous agenda.[40] All of these measures benefited the cab company directly, and many were passed to the detriment of its competitors.[41]

IV. From All Sides: Corruption Charges That Often Accompany Bribery.

Like many other types of crime, a "pay to play" scenario can spawn diverse charges. In contrast to other crimes that are connected to campaign contributions as a source of political influence, bribery has a strict requirement of *quid pro quo*.[42] Historically, prosecutors have rarely investigated campaign funds as the source of bribes.[43] Without such evidence as audio and video recordings, proving a bribe may present too much of a challenge for a prosecutor who could go after a more general charge instead.

Recent developments may encourage charges that lack bribery's quid pro quo standard. In *McConnell v.* FEC, the Court focused on the idea of a contributor's "undue influence" on the political acts of a candidate.[44] For instance, the *McConnell* Court noted that Congress has a legitimate regulatory interest in curbing undue influence on an officeholder's judgment that goes beyond preventing simple cash-for-votes corruption.[45] Although based on the same concerns, this standard is potentially far more liberal than the traditional standards to prove corruption crimes.[46] In *Nixon v. United States*, the Court held that the amount of proof required to

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[39] Because Federal law prohibits contributions of more than $1000, the owner "lent" money to a corporation owned by the defendant's daughter. *Id.* at 306.
[40] *Id.* at 306-07.
[41] *Id.* at 307.
[42] *Sun Diamond Growers of California*, 526 U.S. 398, 405 (1999).
[43] *Id.*
[44] *McConnell v. FEC*, 540 U.S. 93 (2003).
[45] *Id.* at 150.
[46] *Id.* at 152. (Majority opposing Justice Kennedy's dissenting opinion that "would limit Congress's regulatory interest *only* to the prevention of the actual or apparent *quid pro quo* corruption inherent in contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with a federal officeholder or candidate … This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.")(internal quotations omitted).

demonstrate corruption or the appearance of corruption will "vary up or down with the novelty and plausibility of the justification raised."[47] It has been suggested that such a standard "may only need to pass the laugh test."[48] Furthermore, the choice as to what charges to bring is often left to prosecutors, who may lean toward crimes that require neither a specific proof of intent, nor a causal connection between an action favoring a contributor and the contributor's donation to a campaign. For example, prosecutors may bring, *inter alia*, charges of honest services fraud, RICO, the Foreign Corrupt Practices Act, obstruction of justice, wire fraud, extortion, money laundering, election fraud, tax evasion, and lobbying laws.

One of the recent trends is toward the crime of deprivation of honest services, a crime defined as "a scheme or artifice to deprive another of the intangible right of honest services."[49] For example, Representative Bob Ney of Ohio pled guilty to accepting campaign contributions for political favors, but instead of the original bribery charge, he pled guilty to deprivation of honest services. The *Warner* case out of the Northern District of Illinois involved a defendant who was charged with deprivation of honest services[50] after his receipt of campaign contributions from parties for whom he subsequently secured contracts.[51] The defendant argued that quid pro quo evidence is nonetheless required where mail fraud charges are predicted on the receipt of campaign contributions. *Id.* at *3. He based this argument on policy reasons; namely, that not requiring a quid pro quo would open up any campaign contribution as a violation of federal law.[52] The court concluded that the government does not have to identify any specific act

[47] 528 U.S. 377, 391-92 (2000).
[48] Persily *supra* note 17 at 131
[49] 18 U.S.C. § 1346.

[51] *United States v. Warner*, 2005 WL 2367769, at *1-*2 (N.D. Ill. Sept 23, 2005).
[52] *Id.* at *3.

so long as the defendant accepted campaign contributions with the understanding that in return he would perform or not perform acts in this official capacity.[53]

Although the DOJ has used these type of charges more frequently, it cannot be assumed that the DOJ has given up on the investigation of bribery in campaign finance corruption cases. In particular, following several recent corruption scandals, the DOJ has expressed a new interest in corruption crimes that involve bribery. Whether or not this interest will survive remains to be seen.

V. What The Courts Use As Evidence of Bribery

Courts have relied on several categories of evidence to prove the existence of corruption: newspaper stories, politicians' testimony, experts and other witnesses, referendum results, and public opinion polls.[54] The U.S. First Circuit has found that evidence of both corruption and the appearance of corruption can include the perceptions of voters and constituents, as well as testimony from politicians who have found themselves in coercive positions either following generous contributions or after being threatened with a withdrawal of funds.[55] During the course of a trial on campaign finance corruption issues in Alaska, one of the facts that swayed the court was a politician's admission that large contributions and favors from lobbyists influenced many of his votes while in office.[56]

In *McConnell v.* FEC, the Court noted that "lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal

[53] *Id.* at *4.
[54] Persily, *supra* note 17 at 140.
[55] *Daggett v. Comm'n on Gov'l Ethics and Election Practices*, 205 F.3d 445, 456-57 (5th Cir. 2000).
[56] *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597,618 (Alaska 1999).

officials."[57] The Court found compelling evidence that connected contributors' donations to several failures to enact legislation that was contrary to contributors' designated agendas.[58]

VI. Recent Events Implicating Bribery and Other Forms of Corruption.

- In early 2008, **Senator Mary Landrieu** was labeled by the Citizens for Ethics and Responsibility ("CER") as one of the most corrupt politicians in Washington, D.C. An educational company allegedly made contributions and held fundraisers in support of Landrieu's campaign, and later was the beneficiary of a $2 million earmark urged by Landrieu. CER claimed that the company's president, Mr. Best, was contacted by Landrieu's aide to ask if he would throw a fundraiser to support Landrieu's campaign. Prior to this contact, Mr. Best supposedly had never contributed to Landrieu's campaigns. Landrieu's claimed the charges were flawed, as she had "long championed … innovative programs like Voyager."[59]

- Congressman **William Jefferson**, was indicted for bribery on allegations that from or about August 2000 through August 2005, Jefferson used his position as a member of the House of Representatives and his office to solicit payments to Jefferson and his family members in exchange for political favors. The official acts allegedly undertaken by Jefferson included leading official business delegations to Africa, corresponding with U.S. and foreign government officials, and utilizing congressional staff members to promote businesses and businesspersons. Business ventures that Congressman Jefferson sought to promote included: telecommunications deals in Nigeria, Ghana, and elsewhere; oil concessions in Equatorial Guinea; satellite transmission contracts in Botswana, Equatorial Guinea, and the Republic of Congo; and development of different plants and facilities in Nigeria. During an FBI search, $90,000 was found in his freezer, wrapped in foil.

- **Dianne Wilkerson**, a former Massachusetts State Senator was indicted on October 27, 2008 for a series of bribes she took from a nightclub owner in order to obtain a liquor license. The allegations include that after receiving cash payments on multiple occasions from the witness, Wilkerson assured him that he would receive a license. She then began to lobby the Mayor and other authorities for the license. She also boasted that she had put a hold on legislation in order to obtain the liquor license and threatened the licensing board members that they would not receive a raise. She continued to meet with the nightclub owner, and accept payments from him on a regular basis. After the nightclub owner received his license, he gave Wilkerson another payment.

- New York State Supreme Court Justice **Gerald Garson**, was convicted of receiving bribes from a lawyer in exchange for profitable case assignments and favorable

[57] 540 U.S. at 147.
[58] *Id.* at 149-50.
[59] James V. Grimaldo, *Reading Program's Powerful Patron.*, WASH. POST, Feb. 17, 2004, at A01.

treatment. In addition, the Judge was accused of fixing divorce verdicts in exchange for campaign contributions for his wife.

- Former California Congressman **Randall Cunningham** pleaded guilty to bribery and was sentenced in March 2006 to more than eight years in prison In 1997, Cunningham pushed the Pentagon into buying a $20 million document-digitization system created by ADCS Inc., one of several defense companies owned by an acquaintance.. The Pentagon was unwilling to buy the system, and after three years, Cunningham angrily demanded the firing of an assistant undersecretary of defense he held responsible for the delays It later emerged that Wilkes reportedly gave Cunningham more than $630,000 in cash and favors.
- The **Jack Abramoff** lobbyist case, which involved contributions in the form of lavish gifts, entertainment, and charitable donations in exchange for legislation, resulted in several bribery convictions, including former lobbyists Michael Scanlon and Neil Volz.

- Former St. Tammany Parish Councilman **Joe Impastato** of Lacombe admitted to a federal judge in April 2008 that he sought a kickback for steering a Hurricane Katrina debris-disposal contract to a Lacombe businessman. Impastato pleaded guilty to illegally soliciting and receiving kickbacks for a debris-disposal contract he brokered for a Lacombe business after Hurricane Katrina.