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Criminalization of Political Processes

"To the victors belong the spoils"[1] and "money is the mother's milk of politics"[2] are adages growing in obsolescence in the context of a recent trend to criminalize conduct which historically had been deemed politically acceptable.

While political patronage flourishes in some spheres of government (from presidential appointments to local clubhouse politics), some legislative limits have been imposed and criminally enforced. In addition, some political benefits procured by way of campaign contributions have been criminalized despite recognition by the U.S. Supreme Court that:

> 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…, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant….[3]

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Although no one would countenance bribery and political favoritism toward incompetent politically affiliated supporters,[4] the conversion of traditionally acceptable political practices[5] into aggressively interpreted criminal law violations by "good government" prosecutors flirts with the danger of unfairness, or worse, revenge politics. Discussed below are some recent illustrative cases.

Chicago long has had the reputation of extreme uses of political patronage. This July, in federal court in Chicago, four former aides of Mayor Richard Daley were convicted of mail fraud conspiracy charges for awarding jobs and promotions in return for political contributions and campaign work. The indictment named Richard Sorich, the former assistant director of Chicago's Intergovernmental Affairs and confidant of Mayor Daley, and three other former city officials. In the indictment, the government set forth numerous specific incidents in which the defendants favored campaign workers and contributors with public jobs and promotions in violation of city, state, and federal law, and civil decrees enjoining such actions.[6]

The allegations set forth in the indictment were not new to Chicago city government. In 1972 and 1983, the city of Chicago entered into civil consent decrees in which city employees permanently were enjoined from making employment or promotion decisions "upon or because of any political reason or factor, including…any prospective employee's political affiliation, political support or activity, [or] political financial contributions…."[7] Instead, employment decisions were to be made according to a clearly defined process which included interviews, ratings forms completed by interviewers, and the computation of a candidate's score. Hiring and promotion decisions were to be made in accordance with each candidate's final score.[8]

According to First Assistant United States Attorney Gary Shapiro, Sorich and the others disregarded this process altogether and were central to the "creation of a new machine, a corrupt jobs machine, a machine that stole jobs that should have gone to qualified applicants without political favor and instead went to fuel the political armies."[9] Discovery of the scheme was made after federal agents conducted an all-night raid of Mayor Daley's patronage office in City Hall. Implying that the corruption scheme may go higher in the Daley administration, government lawyer Shapiro was quoted as saying "stay tuned" after the guilty verdicts were returned.

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Mr. Sorich, who has vowed to appeal the verdict, has indicated his belief that the prosecution was politically motivated and that although his actions may have violated civil consent decrees, they did not amount to criminal conduct.[10]

Boundaries of Permissible Political Activity

Another area that has received attention from prosecutors has been the use of political contributions to secure benefits. Historically, the criminal prosecution of politicians and their contributors has been rare. Recent focus on campaign finance reform and perceived abuses of governmental processes in favor of high-powered contributors and lobbyists,[11] however, has resulted in increased law enforcement attention in this area. The prosecution of cases involving improper patronage or other favors awarded in return for campaign donations requires the government to prove an explicit agreement between a politician and his contributor. In other words, the government must show that a payment was made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.

This requirement, known as a quid pro quo, was established in a 1991 Supreme Court decision. In *United States v. McCormick*,[12] the Court reviewed the conviction of a West Virginia state senator for extorting payments under the color of official right in violation of the Hobbs Act.[13] The senator, Robert L. McCormick who was a member of the West Virginia House of Delegates in 1984, was a long-time supporter of legislation that permitted foreign doctors to practice in West Virginia under a temporary license while taking the state licensing exams, even if they failed the exams repeatedly.

In supporting these physicians, Mr. McCormick had extensive contact and discussions with John Vandergrift, a lobbyist hired by an organization of foreign doctors. During Mr. McCormick's 1984 reelection campaign, through Mr. Vandergrift, the senator sought and received cash contributions from the foreign-educated physicians. These payments were not recorded as campaign contributions or reported as income on Mr. McCormick's tax returns. In 1985, Mr. McCormick discussed with Mr. Vandergrift the possibility of introducing legislation that would grant these doctors a permanent medical license by virtue of their years of experience. Shortly thereafter, Mr. McCormick introduced such legislation and saw it enacted into law. Two weeks after the law's enactment, Mr. McCormick received another cash payment from the foreign doctors' association. These payments formed the basis of the government's Hobbs Act prosecution of Mr. McCormick.

The Supreme Court granted certiorari to examine the meaning of "under the color of official right" as set forth in the Hobbs Act and specifically to determine whether proof of a quid pro quo is necessary for a Hobbs Act conviction. The Supreme Court stated that political contributions clearly are extorted if induced by the use of force, violence or fear. In addition, such contributions may be dubious if evidence exists of an explicit promise or undertaking by the official in exchange for the financial remuneration because the official asserts that his conduct will be controlled by the terms of the promise or undertaking in such situations. Absent such quid pro quo, however, the Court found that a Hobbs Act violation does not exist. On this basis, Mr. McCormick's conviction was reversed.

One year after issuing its decision in *McCormick*, the Supreme Court considered another political extortion case brought under the Hobbs Act in *Evans v. United States*. Mr. Evans was an elected member of the DeKalb County Board of Commissioners in Georgia. As part of an investigation into public corruption in that state, an FBI agent developed a relationship with Mr. Evans while posing as a real estate developer. In seeking Mr. Evans' support for an application to re-zone a certain piece of land, the agent gave Mr. Evans $7,000 in cash which Mr. Evans neither reported on his tax returns nor claimed as a campaign contribution. Like Mr. McCormick, Mr. Evans was convicted of extortion under the Hobbs Act and also tax law violations.[14]

The question before the Court was whether an affirmative act of inducement by a public official is an element of extortion under the Hobbs Act. In Mr. Evans' case, all of the contact he had with the undercover agent, including the exchange in which the agent gave Mr. Evans the unreported money, was initiated by the agent. Noting that a demand or request by the public official was not an element of the offense of extortion at common law, the Court held that no affirmative act was required under the Hobbs Act. Accordingly, despite the fact that Mr. Evans did not instigate the transaction at issue, his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver.[15]

Moreover, the Court concluded that the facts in *Evans* satisfied the quid pro quo requirement articulated in *McCormick* even though *Evans* did not fulfill his promise to the agent "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform special official acts [and] fulfillment of the quid pro quo is not an element of the offense."[16] These cases make it clear, therefore, that in seeking to prosecute dubious political contributions, the government must show that the public official obtained a payment, solicited or not, to which he was not entitled because it was made in return for official acts.

Quid Pro Quo Requirement

Tying political contributions to specific actions taken or not taken by public officials and an explicit agreement between the parties is a difficult threshold to meet. A recent case arising out of San Diego demonstrates this point. Last year, two San Diego councilmen, Ralph Inzunza and Michael Zucchet, were convicted by a jury on corruption charges in a trial referred to as "Strippergate" by the local San Diego press. The government alleged that the council members had accepted money from the owner of several adult entertainment clubs in San Diego in exchange for their support in repealing a local ordinance prohibiting adult entertainers and patrons from intentionally touching each other during any performance. The indictment charged the councilmen with violations of the Hobbs Act and a wire fraud conspiracy.[17]

Months later, U.S. District Court Judge Jeffrey Miller overturned the jury's guilty verdicts as against one of the councilmen, Mr. Zucchet, acquitting him of seven corruption counts and granting a new trial as to two remaining counts. In so ruling, the court found

that no clear relationship was established between campaign contributions Mr. Zucchet received in 2001 and 2002 and the action he took on behalf of those donors in 2003. The government still has not indicated whether it will appeal the decision.[18]

The boundaries of the quid pro quo requirement as articulated in *McCormick* and *Evans* currently are being tested in a well-publicized prosecution of former HealthSouth CEO, Richard Scrushy. Post-conviction motion practice in that case has raised the issue whether evidence of an explicit agreement is required in all campaign contribution cases alleging bribery of a public official or is limited to cases brought under the Hobbs Act.

Mr. Scrushy was indicted in October 2005 for allegedly directing the payment of $500,000 to the campaign efforts of former Alabama Governor Don Siegelman in exchange for a seat on that state's Certificate of Need Review Board which regulated, among other things, hospital expansions. These charges were not related to the federal securities fraud charges of which Mr. Scrushy was acquitted in summer 2005. Rather, the charges levied in the more recent indictment were set forth under the federal funds bribery and honest services mail fraud statutes.

In June, Mr. Scrushy was found guilty of all charges. He has sought a reversal of the conviction, arguing that federal prosecutors had failed to prove that he had an explicit agreement with Mr. Siegelman to trade the donations for an appointment.[19] Mr. Scrushy relied on *McCormick*'s quid pro quo requirement in arguing that the evidence presented at trial demonstrated only that the political contributions were legitimate campaign contributions, made for the purpose of establishing a relationship with an elected official, but were not made "in return for an explicit promise or undertaking by the official to perform or not perform an official act."[20]

In its response to Mr. Scrushy's motion, the government argued that the quid pro quo requirement set forth in *McCormick* was specific to the Hobbs Act and was not an element of either the federal funds bribery or honest services mail fraud statute. A violation of the federal funds bribery statute, set forth in 18 USC §666, occurs when an individual "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State…in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more." According to the government, the intent element of "corruptly" is satisfied when evidence shows the defendant acted "voluntarily, deliberately and dishonestly" in giving money with the intent to influence the official's actions. The government argued that although proof of a specific quid pro quo arrangement was sufficient for a conviction under the federal funds bribery statute, it was not a necessity.[21]

Similarly, the government asserted that a defendant is guilty of honest service mail fraud as set forth in 18 USC §§1341 and 1346, when he knowingly devises or participates in a scheme to fraudulently deprive the public of the intangible right of honest services and makes mailings in furtherance of such an intentional scheme. The government argued that the quid pro quo requirement of *McCormick* could not be drafted as an element of either crime, but was specific to the Hobbs Act violation examined in that case. Finally, the government stated its belief that even if required to prove a quid pro quo between Mr. Scrushy and Mr. Siegelman, the evidence produced at trial was sufficient.

In reply, Mr. Scrushy quoted the 1999 Supreme Court case, *United States v. Sun Diamond Growers*, to argue that the Court explicitly had held that all bribery offenses, regardless of the statute under which they are asserted, required proof of a quid pro quo. The statute at issue in *Sun Diamond* was 18 USC §201(c)(1)(A), the gratuities portion of the federal bribery statute. In holding that the government was required to submit sufficient evidence of a link between the thing of value conferred upon a federal official and a specific "official act" for or because of which it was given, the Court stated that "[b]ribery requires 'intent to influence' an official act or 'to be influenced' in an official act…."[22]

Mr. Scrushy's motion and the issues raised therein currently are pending decision. The court's decision as to whether the quid pro quo requirement is specific to the Hobbs Act or is a required element of all political bribery cases may significantly impact the government's prosecution of campaign crimes. In his concurring opinion in *McCormick*, Justice Antonin Scalia stated that the law should draw a distinction between "campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action."[23] According to Mr. Scrushy's lawyers, should the government be successful in broadening the scope of federal bribery statutes, every contributor who receives a benefit from a politician to whom he gave money and every politician who acts on behalf of a contributing constituent is at jeopardy.[24]

1. William Learned Marcy, United States Senator from 1831 to 1833.
2. Jesse Unruh, Speaker of the California State Assembly from 1961 to 1968.
3. *United States v. McCormick*, 500 U.S. 257, 272 (1991).
4. See James E. McGreevey, "The Confession" (Regan Books 2006).
5. American Heritage Encyclopedia (available at http://www.answers.com/topic/patronage).
6. *United States v. Sorich, et al., Superseding Indictment*, No. 05 CR 644 (N.D. Ill. Feb. 2002).
7. Id. at ¶10.
8. Id. at 1(C).
9. Rudolph Bush and Dan Mihalopoulos, "Daley Jobs Chief Guilty," Chicago Tribune, July 7, 2006.
10. Id.
11. See, e.g., *United States v. Jack A. Abramoff*, 05-60204-CR (S.D.Fl. 2005) (indictment of powerful lobbyist for wire fraud and conspiracy to commit mail and wire fraud); *State of Texas v. Thomas DeLay*, Nos. 03-05-00817-CR, Nos. 03-05-00818-CR (District Ct., Travis Cty. 2005) (indictment for campaign finance violations). See also Randal C. Archibold, "Ex-Congressman Gets 8-Year Term in Bribery Case," New York Times, March 4, 2006 (detailing U.S. Government's case against Randy "Duke" Cunningham).
12. 500 U.S. 257 (1991).
13. 18 U.S.C. §1951.
14. 504 U.S. 255 (1992)
15. Id. at 257-58.
16. Id. at 268.
17. *United States v. Inzunza, et al.*, Indictment, No. 03 CR 2434 (S.D. Ca. January 2003).
18. Kelly Thornton, "Still No Word on Zucchet Appeal," SignOnSanDiego.com, July 16, 2006.
19. Kim Chandler, "Scrushy Asks Judge Again to Toss Conviction," The Birmingham News, Aug. 26, 2006.
20. Defendant Richard M. Scrushy's Motion for Judgment of Acquittal Pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure.
21. United States' Response to Defendants' Motions for Judgment of Acquittal Pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure.
22. Defendant Richard M. Scrushy's Reply to United State's Response to Defendants' Motions for Judgment of Acquittal Pursuant to Rule 29 of the Federal Rules of Criminal Procedure ("Scrushy Reply").
23. 500 U.S. at 276 (Scalia, J., concurring).
24. Scrushy Reply at p. 2.