

WHITE-COLLAR CRIME

Where's the Quid? DOJ Tests the Limits Of Public Corruption Law

Proof of a “quid pro quo,” giving something of value in return for a specific action, is central to federal public corruption prosecutions. In recent years, cases have tended to focus on the “quid” part of the exchange—that is, the act a public official takes in return for the “quid.” See generally Elkan Abramowitz and Jonathan S. Sack, *Limiting the Reach of the Supreme Court’s ‘McDonnell’ Decision*, NYLJ (Oct. 1, 2019). The Supreme Court’s adoption of a narrow definition of “official act,” in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), turned out to have a significant impact on public corruption cases, for example, the Second Circuit’s partial reversal of convictions of former New York State Assembly Speaker Sheldon Silver. See *United States v. Silver*, 948 F.3d 538, 545 (2d Cir. 2020).

In contrast, some recent prosecutions have drawn attention to the



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“quid” part of the equation—that is, the thing of value a public official receives in return for a corrupt official act. These prosecutions, alleging benefit beyond the traditional receipt of money or other gifts, have led to interesting questions regarding wheth-

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er, and under what circumstances, the enhancement of a public official’s political power and patronage amount to an improper “quid.”

In this article, we first describe two pending federal prosecutions, which level corruption charges against high-level officials in Ohio and Illinois, and

then turn to consider how the theories of prosecution in these cases might be viewed in light of court decisions in other public corruption cases. We conclude with some observations about the outer limits of federal public corruption prosecutions.

‘United States v. Householder’

In July 2020, a grand jury in the Southern District of Ohio returned an indictment against the Speaker of the Ohio House of Representatives, Larry Householder. *United States v. Householder*, No. 1:20-CR-077, Dkt. 22 (S.D. Ohio July 30, 2020). According to the complaint, Householder, a well-known legislator, was looking for a way to become Speaker. Householder’s associates set up Generation Now as a tax-exempt organization under §501(c)(4) of the Internal Revenue Code that would operate independently of any political candidate. Such §501(c)(4) organizations need not disclose their contributors, may make independent expenditures to support public policy outcomes, and are required to have as their primary purpose the promotion of “social welfare.” Generation Now was ostensibly created to promote certain energy-related policies but, allegedly,

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was controlled by Householder and used primarily to achieve his political goals.

In violation of Generation Now's stated purpose—as well as potentially in violation of the Internal Revenue Code and election laws—Generation Now did not keep its political activities independent of Householder. Rather, as alleged by the government, Householder exercised de facto control over Generation Now. Moreover, Generation Now allegedly passed its money through multiple entities for the purpose of providing financial support to a slate of candidates who were committed to electing Householder to the Speaker position.

During the same period, a public utility in Ohio, reportedly FirstEnergy Solutions (though not identified in the indictment), was looking for a champion to support financial assistance for two nuclear power plants. To secure this support, FirstEnergy Solutions gave roughly \$60 million to Generation Now. Of this money, a relatively small portion—chiefly, \$300,000 to cover legal fees and \$100,000 to cover property-related expenses and credit card debt—is alleged to have gone directly to benefit Householder personally. The vast majority of the \$60 million was allegedly used to support Householder's preferred slate of candidates. According to the indictment, the scheme came to fruition when Householder's slate of candidates won election and elected him Speaker, after which Householder helped get legislation passed which benefited the utility.

The indictment accuses Householder and others of joining a racketeering conspiracy that engaged in various predicate acts, which included violating

Ohio state bribery statutes and committing honest services fraud in violation of 18 U.S.C. §1346. The corruption charges against Householder are premised on a quid pro quo in which the quo consisted of his promise to use his position as Speaker to carry out an "official act," namely, to help pass legislation.

But rather than building their case exclusively on a straightforward "quid"—here, giving Householder money to cover personal expenses—prosecutors have taken a broader approach. The indictment zeroes in on the \$60 million in contributions to Generation Now, which, in the words of the criminal complaint, Householder used for the purpose of "obtaining, preserving, and expanding [his] political power in the State of Ohio." The vast majority of the contributions at issue in the case did not go to Householder's campaign, but rather went to other candidates who were supportive of Householder's quest to be Speaker. The case thereby raises the prospect of treating political contributions used to enhance a politician's power as an illicit "quid."

'United States v. McClain'

In November 2020, a federal indictment of senior executives of an Illinois-based utility was unsealed. *United States v. McClain*, 1:20-cr-00812, Dkt. 1 (Nov. 18, 2020). In that case, the government is pursuing a more traditional theory of quid pro quo than in *Householder*. As in *Householder*, a public utility allegedly made corrupt payments—in the *McClain* case, directly into the pockets of associates of "Public Official A," who is reportedly Michael Madigan, former Speaker of

the Illinois House of Representatives. In return for these payments, Madigan's associates allegedly used their patron's power to cause House passage of legislation which benefitted the utility. The indictment contains some hints that Madigan might have benefitted politically from the alleged bribery scheme. For example, the defendants allegedly ensured that the public utility hired interns from among Madigan's constituents in the 13th Ward. Presumably, voters appreciated the opportunity to be hired as interns at a powerful utility company, and they may have rewarded Madigan at the ballot box accordingly.

Notwithstanding the ways in which Madigan might have benefitted politically from the scheme, prosecutors have so far refrained from charging Madigan. In so doing, they have thus far avoided the issue raised in *Householder*: whether a "quid" that consists primarily of increasing the political power of a public official may give rise to an illegal quid pro quo exchange.

'McCormick' and 'Menendez'

As the *Householder* case indicates, financial contributions can play an important role in increasing a politician's standing. Prior high-profile public corruption cases have considered the ways in which political contributions may give rise to charges of corruption.

In *McCormick v. United States*, 500 U.S. 257 (1991), the Supreme Court considered the role that direct contributions to a politician's campaign can play in federal corruption prosecutions. In that case, the court considered whether Robert McCormick, a

member of the West Virginia House of Delegates, had violated the Hobbs Act by supporting legislation beneficial to a group of foreign doctors after they had given him a campaign contribution. In reversing McCormick's conviction, the Supreme Court emphasized that political contributions were a fact of political life, and that politicians often passed legislation that helped constituents who made such contributions. Accordingly, the court set a high bar for proving an illegal quid pro quo by explaining that the two acts—receiving a political contribution from a special interest group and voting for legislation beneficial to that group—would amount to an unlawful quid pro quo only when “the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” *McCormick*, 500 U.S. at 273.

More recently, the public corruption prosecution of New Jersey Senator Robert Menendez concerned, among other things, an allegedly corrupt scheme in which a donor gave funds to an independent expenditure group that were earmarked for get-out-the-vote efforts in New Jersey that would benefit Menendez's reelection campaign. After the jury deadlocked and the court declared a mistrial, the district court partially granted Menendez's motion for a judgment of acquittal. *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018). The government ultimately declined to retry Menendez.

Concerning the contributions to the independent expenditure group at issue in the *Menendez* prosecution, the district court emphasized that, in the case of bribery based on campaign

contributions, the government has a higher evidentiary burden than it does in typical bribery cases. Relying on *McCormick*, the district court explained that the government must establish an “explicit” exchange, which requires evidence “connecting the *quid* and the *quo*.” *Id.* at 613, 629. The court concluded that the government had failed to produce such evidence, and ultimately reversed Menendez's convictions on the charges stemming from contributions to the independent expenditure group. See generally Elkan Abramowitz and Jonathan S. Sack, *'Menendez' Decision Clarifies Issues in Public Corruption Cases*, NYLJ (March 21, 2018).

The charges in *Householder* will likely be judged, at least in part, under the principles set forth in *McCormick* and elucidated in *Menendez*. As these cases indicate, establishing an “explicit” quid pro quo is difficult. One of the distinctions between the allegations in *Householder* and those in *Menendez* and *McCormick* may turn out to be critical. It is the allegation that *Householder* secretly controlled the supposedly independent §501(c)(4) organization, Generation Now, and used it primarily for his own political ends. If proven, this deceptive arrangement might suggest a corrupt arrangement that goes beyond a violation of tax or election laws. Whether contributions to Generation Now can establish the “quid” part of an explicit quid pro quo will be an important question if the case goes to trial.

Conclusion

In the *Householder* case, the charges raise the vexing question of whether a political benefit to a politician can

properly serve as the basis of an impermissible quid pro quo. Prosecutors have hedged their bets by including a traditional theory of personal benefit as well as the more novel claim of personal benefit by virtue of contributions to a purportedly independent organization. The outcome of the *Householder* case may suggest the extent to which prosecutors will succeed in broadening the benefit, or “quid,” that a judge and jury will find sufficient to sustain a public corruption charge.