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WHITE-COLLAR CRIME

'U.S. v. Benjamin' Sheds Light On Tangled Federal Bribery Law

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In 1980, Jed Rakoff (before he took the bench) wrote that, for federal prosecutors, the mail fraud statute was "our Stradivarious, … our Louisville Slugger, … our true love." No one would say the same about the federal statutes used to prosecute public corruption. Over time, the law has become less clear and predictable, and what constitutes bribery has become more difficult to articulate, regardless of the statute at issue. The resulting complexity has become pronounced in the case of elected politicians.

A good illustration is the recent dismissal of bribery charges against former lieutenant governor Brian Benjamin. The indictment in the Southern District of New York alleged that Benjamin, as a state senator, engaged in honest services wire fraud and bribery, and then falsified documents to conceal his crimes. The charges arose from an alleged agreement to secure a grant for a supporter's not-for-profit organization in exchange for campaign contributions. In December, Judge J. Paul Oetken granted a defense motion to dismiss the bribery and honest services fraud charges on the ground that the indictment had failed adequately to allege an "explicit" or "express" *quid pro quo* understanding between Benjamin and the supporter. *United States v. Benjamin*, 2022 WL 17417038 (S.D.N.Y. Dec. 5, 2022).

After discussing the allegations in *Benjamin*, we turn to Judge Oetken's lucid description of the state of the law, most importantly, his analysis of Supreme Court decisions decided one year apart—*McCormick v. United States*, 500 U.S. 257, 273 (1991) and *Evans v. United States*, 504 U.S. 255 (1992). The cases considered the circumstances in which financial support for an elected official may be considered an illegal bribe. We conclude with observations about the *Benjamin* decision in the context of other public corruption cases.

The Prosecution

The case against Benjamin grew out of his relationship with real estate developer Gerald Migdol. According to the indictment, in March 2019, when Benjamin was a New York State Senator, he asked Migdol to procure contributions for a primary election campaign to become New York City Comptroller. Migdol declined, saying that he was focusing his efforts on his own not-for-profit organization. Benjamin responded, "Let me see what I can do." About three months later, Benjamin secured a $50,000 grant for the organization.

From October 2019 through January 2021, Migdol arranged contributions to Benjamin's campaign, many of which were submitted in the names of people who had not authorized them or supplied the funds. Other donors were reimbursed for their contributions after the fact. When the Campaign Finance Board informed Benjamin that certain of Migdol's contributions were ineligible for matching funds, Benjamin allegedly lied to the Board about the contributions. Benjamin lost the primary election, and Benjamin was appointed to serve as lieutenant governor in August 2021.

In 2022, a grand jury returned a five-count indictment against Benjamin. The indictment alleged that Benjamin

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used his official authority and influence as a state senator to obtain a grant of state funds for Migdol's organization in exchange for campaign contributions. The principal charges were bribery, in violation of 18 U.S.C. §666(a)(1)(B), and honest services wire fraud, in violation of 18 U.S.C. §§1343 and 1346. The same day Benjamin was indicted, Migdol pleaded guilty to wire fraud charges related to the alleged bribery scheme. Benjamin resigned from his position as lieutenant governor.

'McCormick' and 'Evans'

An essential element of a federal bribery charge is a quid pro quo—an agreement by an official to perform an official act in exchange for something of value. Courts recognize that campaign contributions are lawful and ubiquitous in politics. As a result, the law has sought to distinguish between making contributions to an election campaign and giving other things of value to an elected official.

In the case of campaign contributions, the Supreme Court in *McCormick* limited criminal liability to cases in which contributions were made "in return for an *explicit* promise or undertaking by the official to perform or not perform an official act," such that "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." 500 U.S. at 273 (emphasis added). In *McCormick*, the defendant received campaign contributions from a lobbying group and then sponsored legislation that benefited the group's members. The Supreme Court held that the government had not proven an explicit quid pro quo and vacated the conviction. In the case of something of value other than a campaign contribution, the government would be required to allege and prove a quid pro quo, but it would not have to be "explicit." See id. at 274 n.10.

As Judge Oetken aptly observed, "[a]ny momentary clarity rapidly diminished" when, the following year, the Supreme Court decided *Evans.* In that case, an elected county board member accepted both campaign contributions and a cash payment from an undercover FBI agent posing as a real estate developer in return for his vote to rezone a tract of land. The *Evans* Court said 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." *Evans*, 504 U.S. at 268.

The two holdings were susceptible to different readings—either *Evans* was modifying *McCormick's* "explicit" quid pro quo test for campaign contributions (though the Court did not say that it was doing that*)* or, alternatively, *Evans* was just saying that when the alleged bribe consisted of something other than (or in addition to) campaign contributions, the quid pro quo could be found on the basis of inferences drawn from an official's conduct. In the latter view, *Evans* set out a different test for benefits other than campaign contributions—one that did not require an explicit quid pro quo.

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Benjamin's Motion To Dismiss

In his motion to dismiss the indictment, Benjamin argued that the government had failed to allege an explicit quid pro quo and sufficient facts to establish an explicit agreement between him and Migdol. The government opposed the motion, arguing that *Evans* had overruled *McCormick,* meaning that allegations of an explicit agreement were not required, and, in any event, the indictment had sufficient allegations to meet the explicit quid pro quo test.

The district court rejected the government's arguments. The court explained that the majority in *Evans* did not change the standard in *McCormick* for campaign contribution cases. The question in *Evans* was whether Hobbs Act extortion "under color of official right" required a defendant to have affirmatively induced a bribe payment; quid pro quo was at most tangential to the decision. In addition, the *Evans* majority was focused on the cash payment, not campaign contributions.

Judge Oetken also analyzed Second Circuit decisions construing the holdings in *McCormick* and *Evans.* Although those decisions did not involve campaign contributions, the district court concluded that the government's reading of *Evans* was incorrect in light of the Second Circuit's "clear pronouncements" that "*Evans* modified [the *McCormick*] standard in non-campaign contribution cases," and that "proof of express promise is necessary when the payments are made in the form of campaign contributions." *Benjamin,* 2022 WL 17417038 at *8 (quoting *United States v. Garcia*, 992 F.2d 409 at 414 (2d Cir. 1993) and *United States v. Ganim*, 510 F.3d 134 at 142 (2d Cir. 2007) (Sotomayor, J.)).

The government argued that the statements in *Garcia* and *Ganim* were dicta which did not control the issue in *Benjamin*. The district court rejected

that argument, finding that the quid pro quo standard for campaign contributions was an issue necessary to the holdings in those cases, and thus not dicta, and, in any event, the Second Circuit had reiterated its view of the law in two later cases. See *United States v. Silver*, 948 F.3d 538, 548 (2d Cir. 2020); *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013). The district court concluded that it was constrained to apply *McCormick's* "explicit" quid pro quo standard.

That conclusion led to the next question: What does "explicit" mean in this context? The district court found that in prior decisions the Second Circuit had permitted non-campaign contribution prosecutions to rely on proof by implication. Consequently, in the absence of a direct statement from the Second Circuit, the district court held that an "explicit" promise must require something more than "implication." But how much more? For example, does "explicit" mean that the promise must be "stated or transcribed," or "actually, clearly, and unambiguously expressed by the parties[?]" *Benjamin*, 2022 WL 17417038, at *9. The Second Circuit had previously used the word "express" in place of "explicit" in describing the *McCormick* standard, but the meaning of "express" and "explicit" remained open. See *Ganim*, 510 F.3d at 134.

After discussing the holdings of other courts, and different hypothetical situations, the court concluded that "explicit" and "express" are interchangeable, and they mean that "(1) the link between the official act and the payment or benefit—the *pro*—must be shown by something more than mere implication, and (2) there must be a contemporaneous mutual understanding that a specific *quid* and a specific *quo* are conditioned upon each other." *Benjamin*, 2022 WL 17417038 at *12.

The Court's Holding

Applying these principles, the court then turned to two related issues—whether the government had alleged an essential element of the crime (the explicit quid pro quo) and whether the facts as alleged constituted an offense. The court ruled for Benjamin on both questions.

While the indictment contained phrases such as "in exchange for" that arguably hint at an agreement, the court concluded that "the existence of an exchange or agreement does not necessarily imply the existence of an *explicit or express agreement*." Id. at *13 (emphasis added). Additionally, the timeline of events set forth in the indictment did not provide evidence of an agreement. The court found it significant that the indictment lacked an allegation that Migdol had, at any time, directly responded to Benjamin's offer to obtain a grant for Migdol's organization. The indictment did not allege that Migdol had expressed an intent to do what Benjamin had asked of him, or that Migdol had asked for anything in return. Because the indictment failed to charge an essential element, and the facts as alleged did not constitute unlawful acts under *McCormick*, the court granted the motion to dismiss bribery and wire fraud charges. The government has appealed the district court's decision.

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Conclusion

The case against Benjamin is hardly the only public corruption case in recent years to run into legal difficulties. High-profile prosecutions of former Virginia Governor Robert McDonnell and New Jersey Senator Robert Menendez both failed. *McDonnell v. United States*, 579 U.S. 550 (2016) (government failed to prove an "official act"); *United States v. Menendez*, 2018 WL 526746 (D.N.J. Jan. 24, 2018) (government failed to demonstrate an "explicit" quid pro quo). Now awaiting decision in the Supreme Court is the prosecution of a former close associate of Governor Andrew Cuomo, Joseph Percoco, following his conviction in the Second Circuit for honest services wire fraud. *United States v. Percoco*, 13 F.4th 180 (2d Cir. 2021), cert. granted, No. 21-1158, 142 S. Ct. 2901 (2022). At issue in that case is whether, and under what circumstances, an individual who does not hold an official position may be prosecuted for public corruption..

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