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New York Law Journal

When is a Campaign Contribution a Bribe?

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May 02, 2024

For good or ill, perhaps some of both, campaign contributions are essential to politics in the United States. Campaign contributions can reflect genuine support for a candidate's positions and appreciation for ordinary aid to constituents. They can also become a bribe—that is, part of an illegal quid pro quo for political favors. What should the test be for deciding when a campaign contribution turns into a bribe? Should the test be the same for giving a campaign contribution and giving something else, such as a gold watch or fancy trip?

These are questions raised by *United States v. Benjamin*, 95 F.4th 60 (2d Cir. 2024). The U.S. Court of Appeals for the Second Circuit reversed a district court decision that had dismissed federal bribery charges against Brian Benjamin, a former New York state senator and lieutenant governor. The government alleged that Benjamin engaged in honest services fraud and bribery by arranging for a grant of state funds in exchange for campaign contributions.

In December 2022, the district court dismissed the fraud and bribery charges, holding that these offenses required an "explicit" quid pro quo agreement between Benjamin and the donor—a stricter test than the one for other things of value—and that the government had not adequately alleged an explicit quid pro quo.

Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

In March 2024, the Second Circuit reversed that decision, holding that a single test applies to campaign contributions and other things of value, and the district court's ruling was incorrect.

Below we summarize the district court opinion, which relied on a close reading of *McCormick v. United States*, 500 U.S. 257 (1991) and *Evans v. United States*, 504 U.S. 255 (1992), and later Second Circuit decisions. We then turn to the Second Circuit's rejection of the district court's reasoning. We conclude by noting that the Second

Circuit may have left us with more questions rather than actually clarifying bribery law.

The Prosecution and District Court Opinion

In March 2019, while Benjamin was a state senator, he wished to become New York City comptroller. He asked Gerald Migdol, a real estate developer and constituent, to contribute to his primary election campaign. Migdol declined, saying that he was raising funds for his not-for-profit organization. Benjamin responded, "Let me see what I can do."

In June 2019, Benjamin used his position as state senator to secure a $50,000 state-funded grant for Migdol's organization. Later, Migdol arranged several campaign contributions, many of which were submitted in the names of people who had not actually supplied the funds. When the Campaign Finance Board informed Benjamin that some contributions were ineligible for matching funds, Benjamin allegedly lied about the contributions.

A grand jury returned an indictment against Benjamin in the U.S. District Court for the Southern District of New York. He moved to dismiss the bribery and honest services fraud charges; charges of falsifying documents were not at issue.

The district court addressed whether the government had adequately alleged the quid pro quo requirement for bribery and honest services fraud. The court's point of departure was the decision in *McCormick*, in which the Supreme Court established the legal standard for quid pro quo bribery prosecutions based on campaign contributions.

Under *McCormick*, a quid pro quo "must involve a payment made in return for an *explicit* promise or undertaking." *United States v. Benjamin*, No. 21-CR-706 (JPO), 2022 WL 17417038, at *6 (S.D.N.Y. Dec. 5, 2022) (emphasis added), *rev'd and remanded*, 95 F.4th 60 (2d Cir. 2024). 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 in this case had not proven an explicit quid pro quo and vacated the conviction. For campaign contributions, criminal liability was limited 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." *McCormick*, 500 U.S. at 273 (emphasis added).

In *Evans*, decided a year after *McCormick*, a county board member accepted 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 the payment was made in return for official acts." *Evans*, 504 U.S. at 268.

The district court recognized that the holdings in *McCormick* and *Evans* were susceptible to different readings—either *Evans* was modifying *McCormick*'s "explicit" quid pro quo test for campaign contributions, or, alternatively, it was setting out a different test for benefits other than (or in addition to) campaign contributions—one where an explicit quid pro quo was not required but could be found based on inferences from an official's conduct.

Judge Paul Oetken rejected the government's argument that *Evans* modified *McCormick*'s test for campaign contributions by eliminating the requirement of an "explicit" quid pro quo for campaign contributions. The district court relied in part on its reading of two Second Circuit decisions which, in the court's analysis, held that *Evans* modified the *McCormick* standard only "in non-campaign contribution cases," and that "proof of an 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, 414 (2d Cir. 1993) and *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007)).

The district court also determined "explicit" and "express" are interchangeable in this context, and they mean "(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."

In the district court's view, "if one thing is clear, it is that an 'explicit' promise cannot be satisfied by implication, as it would be contradictory to hold that a *quid pro quo* agreement could be simultaneously 'explicit' and 'implicit.'"

The district court held that the indictment did not sufficiently allege the existence of an explicit or express agreement because it 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.

Second Circuit's Opinion

On appeal, the Second Circuit rejected the district court's conclusion that "*McCormick* and *Evans* set out two different standards that apply in two different contexts." *Benjamin*, 95 F.4th at 67. Rather, "*Evans* is an application and clarification of *McCormick*," which resulted in "a single quid pro quo requirement that applies regardless of whether the case involves purported campaign contributions."

The Second Circuit agreed with the district court that "the *quid pro quo* must be clear and unambiguous," but it rejected the district court's conclusion that the agreement must be "shown by something more than mere implication." As the Second Circuit put it, "there is no reason why [the *quid pro quo*] cannot be implied from the official's and the payor's words and actions." In other words, "'the agreement must be *explicit*, but there is no requirement that it be *express*'" (quoting *United States v. Seligman*, 640 F.3d 1159, 1171 (11th Cir. 2011)).

According to the Second Circuit, the district court erred because it misunderstood the relationship between *McCormick* and *Evans*. The Second Circuit maintained that "*Evans* is an elaboration of *McCormick* rather than a separate test."

First, *Evans* clarified that an explicit quid pro quo may be inferred from words and actions. The agreement must be explicit "in the sense that it must be clear that the official "obtained a payment… knowing that the payment was made in return for official acts" (citing *Evans*, 504 U.S. at 286).

Second, *Evans* clarified that a quid pro quo may exist even if the official took no affirmative steps to induce the bribe—the requirement can be satisfied if the official accepted the bribe with knowledge that it was intended as consideration for official acts.

Third, because *Evans* involved both campaign contributions and personal payments to the official, *Evans* clarified that the test in *McCormick* also applies to payments other than campaign contributions.

The Second Circuit also rejected the district court's reliance on prior Second Circuit decisions.

The district court found that in prior decisions, including *Garcia* and *Ganim*, the Second Circuit made "clear pronouncements" that *Evans* modified the *McCormick* standard only "in non-campaign contribution cases." *Benjamin,* 2022 WL 17417038 at *8 (quoting *Garcia*, 992 F.2d at 414 and *Ganim*, 510 F.3d at 142).

The Second Circuit disagreed, saying that prior statements that suggested different standards for campaign contribution and other types of payments–-in prior Hobbs Act bribery cases, including *Ganim* and *Garcia*–-were dicta. *Benjamin*, 95 F.4th at 73.

Open Issues

The Second Circuit's decision does not fully resolve at least two issues.

First, the Second Circuit held that a single test applies "to cases involving an illicit payment to a public official…" But contributions to a political campaign are different from gold watches and fancy trips. Contributions are not made "to a public official," but rather to a campaign committee subject to disclosure requirements. In addition, campaign contributions implicate First Amendment considerations in a way that a gold watch or cash payment does not. The Second Circuit alludes to these factual and legal differences but does not explain why the differences are not important.

Given the ubiquity of campaign contributions, a single test that allows conviction based on implication alone would arguably raise concerns about overbreadth, and criminalizing "politics as usual." These concerns were central to the Supreme Court's decision in *McCormick,* and they animated the decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which the Supreme Court had "constitutional concerns" with a scope of liability which "could cast a pall of potential prosecution over" relationships between constituents and public officials. The Second Circuit does not engage with these concerns.

Second, the Second Circuit's interpretation of the *Evans* decision is not beyond cavil. The question in *Evans* was whether Hobbs Act extortion "under color of official right" required a defendant to have affirmatively induced a bribe payment, as opposed to merely accepting the payment; the nuances of proving quid pro quo in different contexts were tangential to the decision.

In holding that a campaign contribution must be judged under an "explicit" quid pro quo test, the Supreme Court in *McCormick* specifically noted that it was not addressing the test for gifts "or other items of value." *McCormick*, 500 U.S. at 274, n.10. In *Evans*, the Supreme Court did not address *McCormick*'s distinction and say whether it agreed or disagreed with it. Yet the Second Circuit now says that *Evans* clarified *McCormick* and erased the distinction between campaign contributions and personal gifts, albeit silently.

The Second Circuit may not have fully captured the continuing import of *McCormick*.

Conclusion

Under the district court's *Benjamin* decision, the law was complex but clear on a significant point: in the context of bribery, the test applied to campaign contributions was different from that applicable to other things of value. The government needed stronger evidence of a quid pro quo agreement to prove that a campaign contribution was a bribe.

Under the Second Circuit's *Benjamin* decision, we now have a single test. A campaign contribution is no different from a gold bar or private plane trip to an exotic island. Time will tell which approach is more appropriate and which prevails when the Supreme Court addresses the issue.

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