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Keywords

Bribery, Criminal law, Government, Politics, States, Statutes

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FEDERAL PUBLIC CORRUPTION STATUTES TARGETING STATE AND LOCAL OFFICIALS: UNDERSTANDING THE CORE LEGAL ELEMENT AND THE GOVERNMENT'S BURDEN OF PROVING A CORRUPT INTENT AFTER MCDONNELL

*THOMAS M. DIBIAGIO**

I. INTRODUCTION

State and local public officials who abuse their office to enrich themselves and their friends directly affect the quality of life in their communities. This conduct, left unchecked, puts into place a culture of corruption and impunity that erodes public trust in government and deters legitimate investment and commerce in the community. In response, there are three separate federal public corruption statutes that target state and local corruption. The federal program integrity statute targets a public official who demands or receives a payment "intending to be influenced" in connection with federally funded programs.[1] The federal extortion statute addresses a public official who demands or receives a benefit "under color of official right."[2] The federal mail and wire fraud statute makes it a federal crime for a public official to deny the public "honest services."[3] The recurring question has been: what conduct falls within the scope of each of these statutes? Stated another way, as practical matter, what do prosecutors need to prove and juries need to find to sustain a public corruption conviction under these three federal criminal laws?

The underlying conduct for each of these public corruption statutes is essentially transactional. All three statutes require that the government prove a connection between a benefit provided to a public official and an official act. It is this agreement—nexus to state action or the conduct of government officials—that is the criterion of guilt. The United States Supreme Court has made this point clear: first by holding that extortion under color of title and honest services fraud are limited to bribery and kickback schemes,[4] and second, by holding in *McDonnell v. United States* that the scope of an "official act" does not include routine political activities and is limited to government action.[5] However, one additional step need be taken to give structure to the statutory scheme. Because the

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1. 18 U.S.C. § 666(a)(1)(B) (2012).
2. 18 U.S.C. § 1951(b)(2) (2012).
3. 18 U.S.C. § 1346 (2012).
4. *See* Skilling v. United States, 561 U.S. 358, 368 (2010) (honest services fraud); Evans v. United States, 504 U.S. 255, 256 (1992) (extortion).
5. McDonnell v. United States, 136 S. Ct. 2355, 2358 (2016).

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three public corruption statutes do not use the term "bribery" or "kickback," the courts have often struggled to correctly define the critical element of the offense and then to correctly translate this element into an evidentiary burden of proof.[6] This failure presents a risk that the application of the law will be inconsistent and therefore, fundamentally unfair.

The reasons for the struggle are numerous. First, courts have used the term *quid pro quo* rather than "corrupt intent" to define the critical element of the offense. Although these terms mean essentially the same thing—a link between the benefit and official act—the courts have struggled to translate *quid pro quo* into a clear evidentiary burden of proof. As a consequence, the courts have characterized the government's burden of proof in a variety of imprecise and vague ways and have stated that prosecutors must prove "some connection between the benefit and official act," "some understanding that the payment is linked to some official act," "some payment conditioned on the performance of some official act," "something short of a formalized and thoroughly articulated contractual agreement," "a corrupt payment sufficiently linked to some official act," "some connection to an official act when opportunities arise," or "some implied *quid pro quo*."

The courts should jettison these perception of the moment standards, which are difficult to truly understand, clearly articulate the critical legal element of these offenses, and bring clarity to the entire statutory scheme. First, courts should recognize that all three offenses—the federal mail and wire fraud statutes, the federal program integrity, and federal extortion statutes—are limited to bribery and kickback schemes. Second, courts should hold that the critical legal element for all three statutes requires the government to prove a corrupt intent—that the benefit provided to the public official was intended to influence or affect state action or the conduct of government officials. Third, to prove a corrupt intent, the government should be required to identify state action or government conduct at or near the time the benefit was provided to the public official. Taken together, this approach would clarify the critical legal element of the offense by limiting the scope of the statutes to bribery and kickback schemes as well as connect this legal element to a more clearly defined requirement of the offense and evidentiary burden of proof. The result would be a statutory scheme that is both fundamentally fair and captures the most pervasive and entrenched corruption schemes.

II. *MCDONNELL V. UNITED STATES*

In *McDonnell*, the former governor of Virginia was charged with honest services fraud and extortion.[7] There was an unambiguous record of the conduct.[8] At trial, the government presented evidence that the defendant accepted $175,000 in loans, gifts, and other benefits in exchange for the defendant's influence in

6. *See* United States v. Tavares, 844 F.3d 46 (1st Cir. 2016) (reversing conviction and finding that government failed to prove requisite link between job offers and official act).

7. McDonnell, 136 S. Ct. at 2355.

8. Id. at 2357.

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connection with an effort to have research studies undertaken at the Medical College of Virginia and University of Virginia School of Medicine.[9] The gifts themselves were legal.[10] However, the government introduced evidence that the defendant accepted these benefits in exchange for at least five "official acts."[11] Those acts included "arranging meetings" with Virginia State officials, "hosting" events at the Governor's Mansion, and "contacting other government officials" concerning the research studies.[12]

The defendant was convicted and he appealed.[13] The defendant did not deny that he received the "benefits" reflected by the evidence.[14] Moreover, the defendant did not challenge that there was some link between the loans and gifts provided and the acts taken by him.[15] He argued, however, that the acts in question were not "official acts" prohibited by the honest services fraud and extortion statute, but rather reflected routine political acts which were not prohibited by the statutes.[16] The Supreme Court agreed and reversed his conviction.[17] The Court held that an "official act" under the statutes "must involve a formal exercise of government power," and in this case, the jury was not instructed that the government was required to prove, and that they were required to find, that the conduct went beyond "simply expressing support for the research study" to "pressuring or advising another government official on a pending matter."[18]

The Supreme Court expressed concern about where the line should be drawn between routine political acts and illegal behavior and held that an "official act" under the federal bribery statute means "a formal exercise of government power."[19] The Court then explained that, "[a]lthough it may be difficult to define the precise reach of those terms, it seems clear that a typical meeting, telephone call, or event arranged by a public official does not qualify as a 'formal exercise of government power.' "[20] On the other hand, the Court found that "[u]sing your official position to exert pressure on another public official to perform an 'official act' would fall within the scope of the formal exercise of government power."[21] The Court held that a conviction was dependent on a specific finding by the jury

9. Id. at 2357.
10. Id. at 2365.
11. *Id.*
12. *Id.* at 2358.
13. *Id.* at 2367.
14. *Id.* at 2366.
15. *Id.*
16. *Id.*
17. Id. at 2355.
18. *Id.* at 2358.
19. *Id.* at 2371.
20. *Id.* at 2358.
21. *Id.* at 2359. *See also* United States v. Repak, ___F.3d ____ (3rd Cir. 2016) (affirming public corruption conviction and finding that influencing and facilitating the award of economic redevelopment contracts by executive director of local redevelopment authority was an "official act" under *McDonnell*).

that the defendant agreed to take formal and concrete government action in exchange for the benefit provided:

> It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an "official act" at the time of the alleged "*quid pro quo*." The jury may consider a broad range of pertinent evidence, including the nature of the transaction, to answer that question.
>
> Simply expressing support for the research study at a meeting, event, or call-or sending a subordinate to such a meeting, event, or call-similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act." Otherwise, if every action somehow related to the research study were an "official act," the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.
>
> Of course, this is not to say that setting up a meeting, hosting an event, or making a phone call is always an innocent act, or is irrelevant, in cases like this one. If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act. A jury could conclude, for example, that the official was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give the advice in exchange for a thing of value, that would be illegal.[22]

The Supreme Court's decision in *McDonnell* provides some structure to the application of the federal statutory scheme used to prosecute state and local officials. However, the decision is also limited and does not resonate beyond the particular conduct of the defendant in that case. On the other hand, there is a more compelling theme being stated. The Court is clearly expressing a concern about the exercise of prosecutorial discretion and the need for a fundamentally fair application of the law—that it should be applied as a "scalpel" rather than a "meat axe."[23]

Accordingly, there is one more step that needs to be taken. This article sets forth a clear outline of the federal statutory scheme used to target corrupt state and local officials and then argues for an additional step—that courts should now require the prosecution to prove a direct connection between the benefit provided to a public official and the official act.

22. Id. The government subsequently abandoned its prosecution of the defendant. See Alan Blinder, U.S. Ends Corruption Case Against Former Governor of Virginia, N.Y. TIMES, September 9, 2016.

23. McDonnell, 136 S. Ct. at 2373.

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III. FEDERAL PUBLIC CORRUPTION STATUTES

A. INTRODUCTION

There are three primary federal statutes employed by federal prosecutors against state and local corruption. First, the federal program integrity statute addresses state and local programs that receive federal funds and makes it a crime for a public official to demand or receive a payment "intending to be influenced."[24] Second, the federal extortion statute makes it a federal crime for a public official to use his position as a government official to extort money or property from a third party.[25] Third, the federal mail and wire fraud statute makes it a federal crime to use the mails or interstate wires in connection with a scheme to defraud.[26] Section 1346 defines a "scheme to defraud" to include defrauding the public of the "intangible right to honest services."[27] In *Evans v. United States*,[28] the Supreme Court limited the scope of the public corruption component of the federal extortion statute to bribery and kickback schemes.[29] In *Skilling v. United States*,[30] the Supreme Court narrowed the scope of honest services fraud to bribes and kickback payments linked to official acts.[31] Because the federal program integrity statute is *in pari materi* with the honest services and extortion statutes—all are bribery related offenses and share the identical core element—extending this limitation to federal program bribery is obvious.

The commonality of each of these federal corruption statutes reaches beyond the objective to hold public officials accountable for pervasive and entrenched corrupt practices. Although the statutes do not use the terms "bribery" or "kickback," all three statutes are essentially bribery and kickback offenses and share a core legal element—that the government prove a sufficient nexus between the benefit provided to a public official and state action or the conduct of government officials. Therefore, to sustain a conviction the government must prove, and the jury must find, a corrupt intent. To establish a corrupt intent, the government must prove that the benefit was intended to influence state action or

24. 18 U.S.C. § 666(a)(1)(B) (2012).

25. 18 U.S.C. § 1951(b)(2) (2012).

26. 18 U.S.C. §§ 1341, 1343, 1346 (2012).

27. 18 U.S.C. § 1346 (2012).

28. Evans v. United States, 504 U.S. 255, 256 (1992).

29. Prosecutions for extortion under color of official right is essentially a bribery offense requiring proof of a *quid pro quo*. *Id.* at 268.

30. Skilling v. United States, 561 U.S. 358 (2010). In *Skilling*, the government alleged that the defendant, an executive of a private corporation, engaged in self-dealing but did not allege that he solicited or accepted a bribe or kickback from a third party in exchange for making misrepresentations to his company's shareholders about the company's fiscal health. The Supreme Court determined that the defendant's honest services fraud conviction was flawed and reversed his conviction. *Id.* at 414–15. *See also* United States v. Cantrell, 617 F.3d 919, 921 (7th Cir. 2010) (affirming honest fraud conviction after *Skilling* based on kickbacks to public official—steering public contracts to a third party in exchange for a share of the proceeds).

31. Skilling, 561 U.S. at 409.

the conduct of a government official. To prove this connection, the prosecution should be required to identify the state action or the conduct of government at or near the time that the benefit is provided to the public official.

B. INTENT OF THE FEDERAL PUBLIC CORRUPTION STATUTES

The federal public corruption statutory scheme is intended to serve the public's interest by holding government officials accountable for pervasive and entrenched corrupt practices. Beyond the erosion of trust in government, public corruption undermines the quality of life in the community. State and local corruption is typically characterized by "pay to play," [32] bribery,[33] and kickback schemes[34] conducted among a class of fixers who specialize in connecting public officials with businessmen.[35] Because state and local governments are primarily

32. The phrase "pay to play" typically references two practices that lead to corruption: (1) companies use political donations and other financial benefits to public officials to bribe their way to securing lucrative government contracts; and (2) public officials extorting financial benefits from companies that wish to do business with the government. See, e.g., Benjamin Weiser, William Rashbaum & Vivian Yee, Ex-Cuomo Aides Charged in Federal Corruption Inquiry, N.Y. TIMES (Sept. 23, 2016), http://www.nytimes.com/2016/09/23/nyregion/cuomo-former-aides-charges.html (federal public corruption indictment alleging that state funded economic development contracts were awarded in exchange for bribes to public officials); Campbell Robertson, Nagin Guilty of 20 Counts of Bribery and Fraud, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/13/us/nagin-corruption-verdict.html?_r=0 (describing conviction of former Mayor of receiving vacations, cash and building supplies in exchange for government contracts).

33. The term "bribe" means a payment in return for a vote, appointment, or other public act by a lawmaker or government official. See, e.g., Benjamin Weiser, Ex-councilwoman and Admirer Found Guilty in Yonkers Case, N.Y. TIMES (Mar. 30, 2012), http://www.nytimes.com/2012/03/30/nyregion/two-convicted-in-yonkers-corruption-case.html. In this case, prosecutors introduced evidence that the defendant, a former City council member, accepted $195,000 in payment (including a down payment on her residences, payments for her student loans and a Mercedes) from a political operative in exchange for votes to approve a proposed luxury mall and housing complex. The jury rejected the defense argument that the benefits reflected gifts and a romantic relationship. See also Benjamin Weiser, Lobbyist is Expected to Enter Guilty Plea in Corruption Case, N.Y. TIMES (Jan. 3, 2012), http://www.nytimes.com/2012/01/04/nyregion/guilty-plea-by-richard-lipsky-lobbyist-is-expected-in-bribery-case.html (describing scheme where lobbyist paid New York State Senator cash in exchange for Senator's public action including sponsoring and supporting legislation, lobbying other elected officials, and directing state funds for the benefit of lobbyist).

34. In the public corruption context, the term "kickback" means a payment in return for a government contract. See William K. Rashbaum, City Official Accused of Taking Bribes, Left in Boxes and Cups, N.Y. TIMES (Oct. 6, 2011), http://www.nytimes.com/2011/10/07/nyregion/nyc-housing-official-is-among-7-charged-with-bribery.html (describing charges against commissioner at the New York Department of Housing Preservation and Development based on allegations that the defendant took $600,000 in bribes and kickbacks from developers in exchange for steering city contracts to the developers and that the cost of the kickbacks were passed on to the city through inflated invoices); See Cantrell, 617 F.3d at 921 (affirming conviction based on defendant's use of his office to secure contracts for company in exchange for share of proceeds).

35. *See* William K. Rashbaum, *Albany Trials Exposed the Power of a Real Estate Firm*, N.Y. TIMES (Dec. 18, 2015), https://www.nytimes.com/2015/12/19/nyregion/real-estate-firms-power-is-laid-bare-in-fall-of-albany-leaders.html ("The recent federal trials that ended in the quick convictions of Sheldon Silver and Dean G. Skelos laid bare a world of greed, flagrant corruption and abuse of power

responsible for providing critical public services such as education, public safety, healthcare, public assistance for the poor, and building roads, bridges, schools, and libraries, corruption at this level has a corrosive and distorting impact on the quality of life in the community.[36] In particular, pervasively corrupting influences intended to manipulate and orchestrate the awarding of public contracts and services in return for bribes or kickbacks divert limited government resources away from needed community services.[37] In addition to diverting public money, corrupt practices that manipulate government contracts and municipal services further undermine economic growth by putting in place a culture of corruption that deters legitimate investment and commerce. The added cost of doing business in a

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in Albany, with evidence showing payoffs taking a deceptive circular route from business interests to the elected officials whose help they sought."). As a practical consequence, the enforcement of these federal corruption statutes typically targets powerful public officials and money interests. The enforcement of these laws, therefore, serves to further public confidence in the justice system by sending a compelling message to the community that the laws apply to everyone. See Joe Nocera, How to Prevent Oil Spills, N.Y. TIMES (Apr. 14, 2012), http://www.nytimes.com/2012/04/14/opinion/nocera-how-to-prevent-oil-spills.html ("I have argued in the past, mainly in the context of the financial crisis, that the country has been poorly served by the Justice Department's unwillingness to hold to account big shots like Angelo Mozillo, the former chief executive of Countrywide, whose companies' illegal practices helped lead us to the brink of financial apocalypse. It has sent a terrible message that there are two kinds of justice; one for the rich and powerful; and another for everybody else."); see also Joe Nocera, Biggest Fish Face Little Risk of Being Caught, N.Y. TIMES (Feb. 25, 2011), http://www.nytimes.com/2011/02/26/business/economy/26nocera.html.

36. See Richard Perez-Pena, *13 Detroit School Principals Charged in Vendor Kickback Scheme*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/30/us/13-detroit-school-principals-charged-in-vendor-kickback-scheme.html ("In Detroit's crumbling schools, where the threat of insolvency means that basic repairs, supplies and even teachers are in short supply, 13 principals conspired with a vendor to defraud the system, siphoning away millions of dollars . . . The principals . . . ordered supplies like paper, workbooks and chairs from the vendor, the Detroit Public Schools paid the bills. The vendor then delivered only some of the supplies to the schools and paid $908,518 in kickbacks to the principals . . . ."); Benjamin Weiser & Marc Santora, *In 2nd Alleged Bribe Scheme, a Legislator was in on the Case*, N.Y. TIMES (Apr. 4, 2013), http://www.nytimes.com/2013/04/05/nyregion/assemblyman-eric-stevenson-is-accused-of-taking-bribes.html?pagewanted=all (describing corruption charges against New York State assemblymen based on cash payments in exchange for assistance in opening adult day care centers and introducing legislation to block competing operators from opening centers); Mary M. Chapman, Former Mayor of Detroit Guilty in Corruption Case, N.Y. TIMES (Mar. 11, 2013), a http://www.nytimes.com/2013/03/12/us/kwame-kilpatrick-ex-mayor-of-detroit-convicted-in-corruption-case.html (describing conviction of former Mayor of public corruption charges based on an pervasive practice of shakedowns, kickbacks, and bid-rigging schemes); Monica Davey & Mary Williams Walsh, Billions in Debt, Detroit Tumbles into Insolvency, N.Y. TIMES (July 18, 2013), http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=all (describing Detroit's filing for bankruptcy); Mary Williams Walsh, In Alabama, a County that Fell Off the Financial Cliff, N.Y. TIMES (Feb. 18, 2012), http://www.nytimes.com/2012/02/19/business/jefferson-county-ala-falls-off-the-bankruptcy-cliff.html (describing largest Chapter 9 municipal bankruptcy resulting from sewer project and corrupt financial schemes). In addition to the corruption involving government contacts, municipal debt financing and bond issuances has also been corrupted by the self-dealing by public officials.

37. A substantial portion of these public projects, although administered by state and local officials, are funded by federal programs and grants.

culture of corruption deters individuals from starting new businesses and deters existing businesses from growing.[38] However, the clear harm to the community does not outweigh the need to ensure a fundamentally fair application of the law.

C. 18 USC § 1346 MAIL AND WIRE FRAUD

The federal mail and wire fraud statutes make it a crime to use the mails or interstate wires in connection with a scheme to defraud. Section 1346 defines a "scheme to defraud" to include defrauding the public of the "intangible right of honest services."[39] The meaning of the form "intangible right of honest services" has been clearly defined by the Supreme Court to be limited to a bribery or kickback scheme.[40] Therefore, after *Skilling*, to sustain an honest services fraud conviction, the government must prove that: (1) the defendant demanded or accepted a bribe or kickback; and (2) used the mails or wires in furtherance of the criminal activity.[41]

The Fourth Circuit's decision in *McDonnell* provides relevant guidance on the standard of proof to establish corrupt intent. The *McDonnell* court held that to prove a corrupt intent, the prosecution must demonstrate more than an

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38. See Matthew Dolan, Detroit Arena's Revival Points a Way for City, WALL ST. J. (Apr. 23, 2012, 10:32 PM), http://www.wsj.com/articles/SB10001424052702304331204577352101951231234. Describing the challenges in reviving the Cobo convention center after years of widespread corruption, Dolan explained:

> To be sure, the convention center's financial challenges pale next to the fiscal crisis gripping Detroit. Under the weight of a $265 million deficit and no infusion of cash from Michigan on the horizon, it will be a tough road to recovery for a city that lost one-quarter of its population between 2000 and 2010.
>
> . . . Cobo . . . was long a troubled asset for Detroit. Less than one-third of its 700,000 square feet of exhibit space was used for many years. It tied for last place in hosting national conventions and trade shows among similarly sized centers, according to a 2010 report from Conventions, Sports & Leisure, a consulting firm.
>
> A big drawback [to attracting conventions]: widespread corruption that inflated exhibitors' costs. Two successive Cobo directors were sent to federal prison in 2009 for taking bribes from a contractor who provided electrical, janitorial, catering and retail services. Patrons and exhibitors also complained of Cobo's poor food, parking hassles and inefficient loading docks.

Id.

39. 18 U.S.C. § 1346 (2012).

40. *Skilling*, 561 U.S. at 368.

41. *Id.* at 412-13; See United States v. George, 676 F.3d 249, 252 (1st Cir. 2012) (explaining that the Supreme Court "truncated the reach" of the honest services fraud in Skilling by limiting it to bribery and kickback schemes); United States v. Barraza, 655 F.3d 375, 382 (5th Cir. 2011) (stating that "honest services fraud only consists of bribery and kickbacks, not the failure to disclose receipt of money"); United States v. Bryant, 655 F.3d 232, 243–44 (3d Cir. 2011) (stating that Skilling "defined the 'core' of honest services fraud" to include only bribery and kickback schemes); Ryan v. United States, 645 F.3d 913, 914 (7th Cir. 2011), vacated, 132 S. Ct. 2009 (2012), remanded 688 F.3d 845 (7th Cir. 2012) (explaining that Skilling held that the honest services form of the mail-fraud offense "covers only bribery and kickback schemes").

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expectation.[42] On appeal, the *McDonnell* defendant claimed that the district court's jury instruction failed to require the government to sufficiently prove that the benefits were sufficiently linked to a specific official act.[43]

The appellate court agreed with the defendant's contention that a higher standard of proof applied, but rejected his argument that the district court failed to properly instruct the jury on the law.[44] The court clearly affirmed the higher burden of proof and confirmed that the government was required to prove that the benefits were linked to a specific act.[45] The court first acknowledged that both honest services fraud and extortion are essentially bribery offenses requiring the government to prove a *quid pro quo*.[46] The court then defined the term *quid pro quo* to require the government to prove a corrupt intent—intent on the part of the defendant to influence a specific official act.[47] The court found that proving that a benefit was provided to a public official to generate good will is not enough.[48] The court then explained that bribery occurs only if the benefit is "coupled with a particular criminal intent" and this intent must be more than "a vague hope or expectation" that the public official will "reward the generosity."[49] The court then held that the government must show that the defendant intended to secure or influence a "specific official action."[50]

The Court of Appeals in *McDonnell* concluded that the district court clearly articulated this standard to the jury and that the evidence was sufficient to establish a "corrupt understanding."[51] The defendant had received money, loans, favors, and gifts, and those benefits were linked to efforts to obtain research at a state university, state grant funds, and coverage for the dietary supplement under the state employee health care.[52] The "temporal relationship" between the benefits provided to the defendant and the official acts represented "compelling evidence of corrupt intent": none of these gifts were goodwill gifts from one friend to another. Indeed, the defendant had no relationship with the company until after he was elected Governor.[53]

However, courts have generally not articulated such a clear evidentiary standard and have imposed a lower standard of proof on the government. The courts have accepted the ambiguity and have not required the government to identify the temporal connection between the state action and the benefit provided,

42. United States v. McDonnell, 792 F.3d 478, 487-92 (4th Cir. 2015), cert. granted in part, 1365 S. Ct. 89 (2016), and vacated and remanded, 136 S. Ct. 2355 (2016).
43. *Id.* at 505.
44. *Id.* at 514.
45. *Id.*
46. *Id.* at 506.
47. Id. at 514.
48. Id. at 515.
49. *Id.*
50. *Id.*
51. *Id.* at 514.
52. *Id.* at 518-19.
53. *Id.* at 519-20.

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and have held that to sustain an honest services conviction the government meets its burden of proof by demonstrating only that the benefits were provided to the public official to influence some official act.[54] For example, in *United States v. Bryant*, the defendants, a New Jersey State Senator and the Dean of the School of Osteopathic Medicine, were charged with honest services fraud and federal program bribery.[55] At trial, the government presented evidence that the senator received a "low-show" job at the medical school as a "Program Support Coordinator" in exchange for his efforts as the chairman of the Senate Appropriations Committee to funnel state funding to the school.[56] The government asserted that as a result of this corrupt relationship, an additional $10 million in funding was provided to the medical school over a three-year period.[57] The defendants were convicted and appealed.[58] On appeal, the defendants argued that the evidence was insufficient to sustain the convictions and that the district court's jury instruction on both charges was defective.[59]

The Third Circuit first ruled that the evidence was sufficient to prove a link between the employment at the medical school and the state funding.[60] The court found that the evidence indicated that the defendants had an understanding, even if implicit, that his salary, bonus, and pension eligibility from his position at the medical school was given in exchange for efforts to increase state funding for the school.[61] The court primarily relied on the timing of the efforts to increase funding over the course of his nearly three-year employment to establish the link.[62]

The defendants complained that the jury instructions for the honest services fraud counts were flawed in light of *Skilling*.[63] Specifically, the defendants asserted that the district court's jury instruction did not make clear that the jury was required to find that the benefits were intended to "alter" the actions of the public official.[64] The appellate court rejected the defendants' "alter" theory and found that the trial court's instructions correctly set forth the government's burden of proof.[65] The court explained that to prove a *quid pro quo* in support of honest services fraud, the government is not required to present evidence that attributes each corrupt payment to each official action by the public official.[66] Rather, the court found that it was enough for the government to present evidence that there

54. *See, e.g.*, United States v. Bryant, 655 F.3d 232, 236–37 (3d Cir. 2011).
55. *Id.* at 236–37. For other examples from the Third Circuit, see United States v. Wright, 665 F.3d 560 (3d Cir. 2012) and United States v. Kemp, 500 F.3d 259 (3d Cir. 2007).
56. *Id.* at 237.
57. *Id.*
58. *Id.*
59. *Id.* at 240.
60. *Id.*
61. *Id.* at 241.
62. *Id.*
63. *Id.* at 243.
64. *Id.* at 244.
65. *Id.* at 245.
66. *Id.* at 241.

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was "an intent to influence" sufficient to establish the link between the payments and some official action.[67]

In *United States v. Rosen*, the defendants, the chief executive of a network of hospitals and three New York State legislators, were charged with honest services fraud.[68] At trial, federal prosecutors introduced evidence that showed that the chief executive provided the legislators with consulting fees in exchange for state financial assistance for the hospitals.[69] The defendants argued that the payments were legitimate consulting fees and were not directly connected to any specific official act.[70] However, the government pointed out that a close examination of the evidence revealed that little or no consulting work was performed under the contracts.[71] Thus, the defendants were convicted and subsequently appealed.[72]

On appeal, the defendants argued that the evidence was insufficient to prove the existence of the required *quid pro quo* to sustain the charges.[73] The Second Circuit rejected the defendants' assertion. The court first ruled that the illegality of an "as opportunities arise" or series of corrupt payments was a valid prosecution theory.[74] Therefore, the court held that in cases involving public officials, a trier of fact may "infer guilt from evidence of benefits received and subsequent favorable treatment, as well as from behavior indicating consciousness of guilt."[75] The court was not persuaded that any direct link was required to sustain a conviction, stating, "evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of clear admissions and expressions of intentions in documents or conversations."[76] Rejecting the assertion that the payments were gratuities rather than bribes, the court found that the amounts involved exceeded what reasonably could be expected for a gratuity.[77] Additionally, the court concluded that any collateral benefit to the public from the bribery scheme was irrelevant and held that "an illegal *quid pro quo* exchange persists even though the state legislator's acts also benefit constituents other than the defendant."[78]

In *United States v. McDonough*, the First Circuit held that a lower standard of proof applied and that the government was not required to prove that

67. *Id.* at 241.

68. United States v. Rosen, 716 F.3d 691, 694 (2d Cir. 2013). For other examples from the Second Circuit, see *United States v. Bruno*, 661 F. 3d 733 (2d Cir. 2011) and *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007).

69. *Id.* at 702.

70. *Id.*

71. *Id.* at 702–03.

72. *Id.* at 698–99.

73. *Id.*

74. *Id.* at 700.

75. *Id.* at 702–03.

76. *Id.*

77. *Id.* at 702–04.

78. *Id.* at 701–02.

the defendant intended to influence a specific state action, but rather only that the defendant desired to induce some official act.[79] In this case, the defendants, the former Speaker of the Massachusetts House of Representatives and a lobbyist, were convicted of honest services fraud and extortion.[80] At trial, the government introduced evidence that the defendants were provided cash payments in exchange for influencing the award of and ensuring funding for two state software contracts.[81]

On appeal, the appellate court held that the evidence was sufficient to prove that the defendants received a series of payments that were sufficiently connected to official acts to sustain both the honest services and extortion convictions.[82] The court explained that:

> [T]he government must prove . . . the receipt of something of value "in exchange for" an official act. Such an agreement need not be tied to a specific act by the recipient. "It is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose." Ultimately, [w]hat is needed is an agreement . . . which can be formal or informal, written or oral . . . We start by noting that "evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of intentions."[83]

In *United States v. Whitfield*, the defendants, a trial attorney and two state court judges, were charged with various public corruption offenses based on loan guarantees that were provided in exchange for favorable decisions on cases pending before the judges.[84] At trial, the government introduced evidence that the judges accepted these loan guarantees but never intended to pay them back.[85] The government also presented evidence that called into question the legitimacy of the loans based on the timing of the financial transactions.[86] More specifically, the defendant attorney had a significant contingency fee case pending before each of the defendant judges.[87] The defendants were convicted and they appealed.

The Fifth Circuit rejected the defendants' claim that the government was required to prove a direct link between the payment and specific official acts identified at the time loans were arranged or guaranteed.[88] Rather, the court held

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79. United States v. McDonough, 727 F.3d 143, 153 (1st Cir. 2013). For another example from the First Circuit, see *United States v. Urchiuoli* 613 F.3d 11 (1st Cir. 2010).
80. *Id.* at 148–52.
81. *Id.* at 153.
82. *Id.* at 156.
83. *Id.* at 152–53 (citations omitted).
84. United States v. Whitfield, 590 F.3d 325, 335 (5th Cir. 2009).
85. *Id.* at 336.
86. *Id.* at 337.
87. *Id.*
88. *Id.* at 351–53.

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that the government was only required to prove that the payment was demanded or accepted for some official act.[89] The court explained that as a practical matter, "it would have been impossible" for the defendants to have agreed on what cases the judges would fix at the time the loans were arranged because one of the cases at issue had not been filed in one judge's court and the other judge was only then running for election and "was not yet on the bench."[90] The district court's jury instructions explained that:

> In order to prove the scheme to defraud another of honest services through bribery, the Government must prove beyond a reasonable doubt that the particular defendant entered into a corrupt agreement to provide the particular judge with things of value specifically with the intent to influence the action or judgment of the judge on any question, matter, cause or proceeding which may be then or thereafter pending subject to the judge's action or judgment.[91]

The defendants also complained that because the loan guarantees were made in the context of the defendant's electoral campaigns, their constitutional right to free political speech was at stake in this case.[92] As a consequence, the defendants argued that the *McCormick*[93] standard applied and required the government to prove that there was an explicit *quid pro quo* involving a specific official act identified at the time that the defendant arranged and guaranteed the loans from the bank.[94] The defendants claimed that, by failing to sufficiently require a *quid pro quo* exchange, the district court allowed the jury to convict them for acts that essentially amounted to gratuity, not bribery.[95]

The court acknowledged that the government was required to prove that the payment was sufficiently linked to an official act.[96] However, the court held that the district court accurately set for this the legal element and burden of proof:

> For the sake of argument, we will assume that *McCormick* [does] apply and that a *quid pro quo* instruction was required in this case. In doing so, we are also willing to assume that the initial $40,000 loan guarantee to [defendant] and the $25,000 loan guarantee to [defendant] were campaign contributions. However, we reject any attempt to characterize the $100,000 loan guarantee to [the defendant] for the down-payment on

89. *Id.* at 353.
90. *Id.* at 353 n.17.
91. *Id.* at 348.
92. *Id.* at 348.
93. In *McCormick v. United States*, the Court held that when the benefit takes the form of a campaign contribution, the government must prove a direct connection between the payment and a specific official act. 500 U.S. 257, 273 (1991).
94. 590 F.3d at 348-49.
95. *Id.* at 349.
96. *Id.* at 352-53.

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> a home and the financial and legal assistance provided to [defendant] in connection with his state prosecution for embezzlement as having anything to do with their respective electoral campaigns. Still, even if we assume that a *quid pro quo* instruction was necessary because at least some of the financial transactions in question were campaign-related, we conclude that the jury charge in this case sufficiently fulfilled that requirement.
>
> Despite the district court's failure to include the actual phrase *quid pro quo* in the jury charge, in the instant context the instructions sufficiently conveyed the "essential idea of give-and-take." Under the undisputed facts here, the jury's finding that there was a corrupt agreement necessarily entailed a finding of an *exchange* of things of value for favorable rulings in the judges' courts. Therefore, to the extent that a *quid pro quo* instruction may have been required in this case, the district court adequately delivered one.[97]

In *Ryan v. United States*, the former Governor of Illinois moved to vacate, set aside, or correct his sentence for honest services fraud.[98] At his initial trial, the government introduced evidence that the defendant accepted kickbacks in the form of financial benefits in exchange for steering state contracts.[99] The court denied the defendant's motion to vacate his conviction and found that the jury instructions and evidence supported a corrupt payment theory—that the defendant was provided financial benefits in exchange for an official act.[100]

The court explained that the "stream of benefits theory" allows for a bribery or kickback conviction based on evidence that benefits were provided to the public official during the same period of time that the public official exercised influence and favorable treatment.[101] The court explained that:

> [The defendant] is correct that, post- *Skilling*, an honest services fraud conviction does require a bribery or kickback scheme. As the court reads the challenged instruction, however, nothing in it suggests such a scheme is not a required path to conviction. In fact, this instruction taken alone suggests that a bribe is required for conviction. The instruction requires that "the government prove[ ] beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not

97. *Id.* at 353.

98. Ryan v. United States, 759 F. Supp. 2d 975, 977-78 (N.D. Ill. 2010), aff'd, 645 F.3d 913 (7th Cir. 2011), vacated on other grounds, 132 S. Ct. 2099 (2012), remanded, 688 F.3d 845 (7th Cir. 2012).

99. *See* United States v. Warner, No. 02 CR 506-1, 2006 WL 2583722 at *2 (N.D. Ill. Sept. 7, 2006).

100. *Ryan*, 759 F. Supp. 2d at 987–88.

101. *Id.* at 984–85.

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> perform acts in his official capacity in return—an instruction indistinguishable from a bribery instruction.[102]
>
> The law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.
>
> Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return.[103]

The court then addressed the defendant's challenge to the campaign contribution instruction. The defendant asserted that the government was required to prove a direct link between the campaign contribution and a specific official act.[104] The district court found that the *McCormick* standard applied to honest services prosecutions and agreed that the government was required to prove a direct link between a benefit and official act.[105] However, the court found that the jury was given the required instruction: "a campaign contribution can be deemed a bribe only if the money is given in return for a commitment to take (or not take) a specific action."[106]

In *United States v. DiMasi*, the Speaker of Massachusetts House of Representatives, was convicted of honest services fraud and extortion.[107] At trial, the government introduced detailed evidence that the defendant received kickbacks in exchange for steering and funding state contracts for computer software.[108] The government relied on this evidence to support both charges.[109] In a post-trial motion, the defendant asserted that the evidence was not sufficient to support the convictions and that the district court's jury instructions on honest services and extortion were not correct statements of the law.[110] The defendant asserted that the government was required to prove a direct link between the benefits and a specific official act.[111]

102. Id. at 986 (citations omitted).
103. *Id.* at 987–88 (quoting district court's jury instructions).
104. *Id.* at 986–87.
105. *Id.* at 989.
106. *Id.*
107. United States v. DiMasi, 810 F. Supp. 2d 347, 349, 360 (D. Mass. 2011).
108. *Id.* at 357–58.
109. *Id.* at 360.
110. *Id.* at 350.
111. *Id.* at 354 n.4.

The district court denied the defendant's motion.[112] The court first recognized that honest services fraud and extortion share a core legal element and that to sustain the honest services and extortion convictions, the government was required to prove a link between the payment and an official act.[113] The court then found that the evidence was sufficient to support the defendant's convictions.[114] The court determined that the evidence showed that: (1) the firm seeking state contracts made monthly retainer payments to the defendant's law practice; (2) there were discussions with the defendant about potential contracts; (3) the defendant was given talking points in support of the contracts; (4) the defendant actually used one of those points in an effort to influence a state agency to award contracts; (5) the defendant worked consistently and successfully to provide funding; and (6) the state contracts were actually awarded to the firm that provided the benefits.[115]

The court rejected the defendant's assertion that the government was required to prove that the payment was directly linked to an identifiable official act.[116] The court also found that the government could rely on circumstantial evidence to prove the link: "an unlawful agreement . . . need not be express, [and] can be proven by inference, based on circumstantial evidence."[117]

In *United States v. Mosberg*, a real estate developer was charged with honest services fraud in connection with his relationship with the attorney for the local town planning board.[118] The government argued that the defendant engaged in several real estate deals with the attorney's family members in exchange for influence and favorable treatment in connection with numerous pending real estate development projects.[119] Specifically, the indictment alleged that the defendant " 'g[a]ve the Attorney . . . a stream of concealed bribes . . . often in the form of favorable real estate transactions, *in exchange for* the Attorney exercising . . . "official authority" ' to assist the defendant.[120]

Prior to trial, the defendant moved to dismiss the indictment complaining that it failed' to allege a *quid pro quo* bribery scheme consistent with *Skilling* and

112. *Id.* at 362, 366.

113. *Id.* at 353–56.

114. *Id.* at 361.

115. *Id.* at 358–60.

116. *Id.* at 354.

117. *Id.* at 355. The district court's instructions required proof that payments were made with the intent to influence an official act:

> The jury was also instructed that it was not necessary for the government to prove that the scheme involved making a specific payment for a specific official act; rather, it would be sufficient if the government proved beyond a reasonable doubt a scheme to make a series of payments in exchange for [the defendant] performing official actions benefitting [others] as opportunities arose.

Id. at 356.

118. United States v. Mosberg, 866 F. Supp. 2d 275, 280–82 (D.N.J. 2011).

119. *Id.*

120. *Id.* at 288 (quoting the government indictment).

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with pre-*Skilling* case law.[121] In particular, the defendant argued that the indictment was required to allege a direct link between the real estate deals and specific official acts.[122] The district court disagreed and denied the defendant's motion.[123] The court held that the indictment sufficiently alleged a nexus between the payment and some official acts: "[t]he Indictment alleges the elements of honest services fraud, and apprises [the defendant] of the sort of bribery scheme that he must defend against—favorable real estate deals in exchange for expediting or favorably resolving Planning Board matters and Township litigation."[124] The court also acknowledged that this legal element was common to both program bribery and honest services charges.[125]

D. 18 USC § 1951 EXTORTION

Section 1951, the federal extortion statute, or the Hobbs Act, makes it a crime for a person to commit extortion either (1) through threatened force, violence or fear; or (2) "under color of official right."[126] To convict a defendant of extortion under a color of official right, courts have typically identified the elements as follows: (1) the defendant must be a public official; (2) who solicited or accepted a payment ("money or property"); (3) the payment must have been induced "under color of official right"; and (4) there must have been at least a *de minimis* effect on commerce.[127] The text of the statute does not use the term "bribe" or "kickback." However, in *Evans v. United States*, the Supreme Court limited extortion under color or official right to bribery and kickback schemes.[128]

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121. *Id.*

122. *Id.* at 283–84.

123. *Id.* at 315.

124. *Id.*

125. *Id.* at 304. The district court held that a corrupt payment can exist even if the public official takes official action that he always intended:

> [A]n allegation that a [public official] "exchanged" official actions for a bribe necessarily means that the bribe had some influence on that discretion—even if, as things turned out, the official's actions were the same as they would have been absent the bribe. This is because the "exchange" removes discretion from the legislator—which he is obligated to exercise in the best interests of the public—and instead locks him into a position favoring one constituent, as dictated by the *quid pro quo* arrangement.

Id. at 295 (internal citation omitted).

126. 18 U.S.C. § 1951(b)(2) (2012).

127. 18 U.S.C. § 1951. *See* Sekhar v. United States, 133 S. Ct. 2720 (2013) (reversing Hobbs Act conviction and holding that internal recommendations of an attorney are not transferable and therefore not property under Section 1951); United States v. Kincaid-Chauncey, 556 F.3d 923, 936 (9th Cir. 2009); Evans v. United States, 504 U.S. 255, 267 (1992) (defining "money or property" under § 1951 to include any property that is transferable).

128. 504 U.S. at 258, 260, 268 (1992). *See also* United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015) (recognizing that to sustain conviction under extortion statute government must prove a *quid pro quo*–that a public official performed an official act in exchange for a private benefit but reversing conviction and holding that scope of *quid pro quo* does not include the exchange of an official act for another official act).

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Therefore, prosecutions for extortion under color of official right, similar to prosecutions under other bribery related statutes, require the government to prove a corrupt intent—intent to influence state action or the conduct of government.

> The courts, however, have been reluctant to impose this burden of proof in extortion cases and have sustained convictions under lower standards of proof. For example, in *United States v. Kincaid–Chauncey*, the Ninth Circuit held that to sustain an extortion conviction "under color of official right," where the payment is not a campaign contribution, the government is required to prove a direct link between a benefit and official act.[129] In *Kincaid*, a member of the Clark County Commissioners was charged with extortion.[130] At trial, the government introduced evidence that the defendant received cash payments in exchange for influence and favorable treatment in connection with ordinances, permits, and licenses affecting the operation of adult clubs in Las Vegas.[131] The district court instructed the jury that in order for the defendant to be found guilty of extortion "under official right," the government must prove that: (1) the defendant was a public official; (2) the defendant obtained money or property; (3) the defendant knew that the money was given in return for taking some official action; and (4) there was an impact on interstate commerce.[132]

On appeal, the defendant argued that the district court erred by failing to instruct the jury that to sustain the conviction the government was required to prove and the jury was required to find a *quid pro quo*—a direct link between the payment and a specific official act.[133] The Ninth Circuit disagreed and affirmed the conviction.[134] The court viewed extortion and bribery *in pari materia* and held that each requires a connection between the benefit provided to the public official and an official act.[135] However, the court held that a lower standard of proof applied to sustain an extortion conviction and reasoned that where the payment is not a campaign contribution, the government was required to prove only a sufficient link between the payment and some official act, rather than a direct link between the payment and a specific official act.[136] The court's statements as to what was sufficient to sustain a conviction were less than convincing. The court explained that there must be "some understanding that the payment were in exchange for 'some' official act" and that the government was not required to identify the

129. 556 F.3d 923 (9th Cir. 2009), *abrogated by* Skilling v. United States, 561 U.S. 358 (2010).
130. *Id.* at 926.
131. *Id.* at 926–28.
132. *Id.* at 937.
133. *Id.* at 936.
134. *Id.* at 938.
135. *Id.*
136. *Id.*

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official act at or near the time that the benefit was provided to the public official.[137] The court then concluded that the jury instruction adequately stated the government's burden of proof:

> In the case of a public official who obtains money, other than a campaign contribution, the Government does not have to prove an explicit promise to perform a particular act made at the time of the payment. Rather, it is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence as specific opportunities arise.
>
> Although "[n]o specific instruction to find an express *quid pro quo* was given," this instruction adequately stated the implicit *quid pro quo* element . . . The instruction tells the jury that it can only find a defendant guilty if it finds that she "knew that the money was given in return for taking some official action." It then elaborates that the government does not have to show an express promise, but the public official must understand that "she is expected as a result of the payment to exercise particular kinds of influence as specific opportunities arise." "[A]lthough the magic words *quid pro quo* were not uttered, a simplified version of the concept, the idea that 'you get something and you give something,' was."[138]

Likewise, the Third Circuit has held that Section 1951 does not require the prosecution to prove a corrupt intent and that the government was only required to prove an implied understanding.[139] In *United States v. Antico*, the defendant, who held various positions at the Department of Licenses and Inspections for the City of Philadelphia, was charged with extortion.[140] At trial, the government introduced evidence that the defendant was provided financial benefits in exchange for approving zoning, use permits, and licenses for several businesses.[141] The defendant was convicted and he appealed.[142] On appeal, the defendant argued that the district court failed to instruct the jury that the government was required to prove a specific *quid pro quo*.[143] The Third Circuit rejected the defendant's argument and held that the extortion statute contains no express *quid pro quo* requirement in the non-campaign contribution context.[144] The appellate court did

137. *Id.*
138. *Id.* at 937–38 (citations omitted).
139. United States v. Antico, 275 F.3d 245 (3d Cir. 2001), *abrogated by* Skilling v. United States, 561 U.S. 358 (2010).
140. *Id.*
141. 275 F.3d at 248–49.
142. *Id.* at 245.
143. *Id.* at 255.
144. *Id.* at 257; *see also* United States v. Salahuddin, 765 F.3d 329, 343 (3rd Cir. 2014) (to sustain a Hobbs Act conviction based on soliciting charitable contributions the government is not required to prove an explicit *quid pro quo*).

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hold, however, that the phrase "under color of official right" requires the government to prove that the defendant accepted benefits with the implied understanding that he would perform or not perform an official act.[145] The court explained that: "The *quid pro quo* can be implicit, that is, a conviction can occur if the Government shows that [the defendant] accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity "under color of official right." [146]

The Sixth Circuit has held that Section 666's "intending to be influenced" and Section 1951's "under color of official right" mean the same thing—that the government is required to prove a connection between the benefit and some official act.[147] In *United States v. Abbey*, a City Administrator for Burton, Michigan was charged with both Section 666 and Section 1951 violations.[148] At trial, the government presented evidence that the defendant was given real estate in exchange for favorable treatment in connection with a decision that would affect a proposed real estate development.[149] The same evidence was used for both charges and the government did not introduce any evidence establishing that when the property was transferred to the defendant, there was an agreement to take a specific official act.[150] On appeal, the defendant argued that to sustain each of his convictions, the government was required to prove that the benefit was linked to a specific official act.[151]

The Sixth Circuit rejected the defendant's contention and held that the statutes do not contain such a heightened standard of proof that requires the prosecution to prove a corrupt intent.[152] The court held that this "*quid pro quo* requirement" was limited to when the benefit takes the form of a campaign contribution.[153] The court then acknowledged that a lesser "*quid pro quo* requirement applies to all" Section 666 and Section 1951 prosecutions.[154] The court tried to distinguish, in a less than clear way, the two standards of proof.[155]

145. *Id.* at 258. In *United States v. Munchak*, 527 F. App'x 191 (3d Cir. 2013), the defendants, County Commissioners in Lackawanna County, Pennsylvania, were charged with Hobbs Act extortion. At trial, the government introduced evidence that the defendants demanded payments in exchange for government contracts. The defendants were convicted and they appealed. On appeal, the defendants argued that the trial court erred when it instructed the jury that it could convict them of extortion and federal program bribery absent an explicit *quid pro quo*. The Third Circuit rejected this assertion and affirmed the conviction.

146. 275 F.3d at 258.

147. *United States v. Abbey*, 560 F.3d 513, 515 (6th Cir. 2009).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 518.

153. *Id.* at 517–18.

154. *Id.* at 517 (emphasis added).

155. *Id.* at 519.

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However, it is doubtful that this effort added to the understanding of the government's burden of proof:

> [N]ot all *quid pro quos* are made of the same stuff. The showing necessary may still vary based on context, though all cases require the existence of some kind of agreement between briber and official . . . "Indeed, in circumstances like this one-outside the campaign context-[r]ather than requir[e] an explicit *quid-pro-quo* promise, the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing that the payment was made in return for official acts is enough)." A public official thus commits extortion 'under color of official right whenever he knowingly receives a bribe.
>
> So [the defendant] is wrong in contending that, to sustain a Hobbs Act conviction, the benefits received must have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. *Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose.*
>
> Similar to his argument regarding the Hobbs Act, he contends that the district court failed to properly instruct the jury that, to sustain a conviction under *18 U.S.C. § 666*, the government must prove "a specific intent element" on [the defendant's] part "that there be a connection between [his] intent and a specific official act."
>
> By its terms, the statute does not require the government to prove that [the defendant] contemplated a specific act when he received the bribe; the text says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise: while a "*quid pro quo* of money for a specific . . . act is sufficient to violate the statute," it is "not necessary." Rather, it is enough if a defendant "corruptly solicits" "anything of value" with the "inten[t] to be influenced or rewarded in connection" with some transaction involving property or services worth $5000 or more.
>
> . . .
>
> The district court's jury instructions were not improper for failing to include a requirement that the government prove a direct link from some specific payment to a promise of some specific official act.[156]

156. *Id.* at 517–18, 520–21. In *United States v. Turner*, 684 F.3d 244 (1st Cir. 2012), the defendant, a member of the Boston City Council, was charged with extortion. At trial, the government presented evidence that the defendant was paid cash in exchange for assistance in obtaining a liquor license. *Id.* at 254. In addition, the government presented evidence that the defendant denied receiving any payment. *Id.* The defendant was convicted and he appealed.

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E. SECTION 666 FEDERAL PROGRAM INTEGRITY

Section 666 is intended to protect the financial integrity of state and local programs receiving federal funds and makes it a federal offense for a state or local official to demand or receive a payment "intending to be influenced."[157] Courts have typically identified the elements of the offense as follows: (1) the defendant must be an employee or agent of a state or local government agency;[158] (2) the agency must receive in excess of $10,000 in federal funding in any one-year period; (3) the employee or agent must demand or accept a benefit; and (4) the benefit must be in connection with any "business" or "transaction" in excess of $5,000.[159]

The term "bribery" or "kickback" is not used in the statute. The statute requires that the benefit must be given with intent to influence or reward a government agent "in connection with any business, transaction, or series of transactions."[160] Section 666 does not say "official act" but states "any business, transaction, or series of transactions."[161] Section 666 does not say "in return for," "because of," or "in exchange for." Rather, it says "in connection with."[162] Regardless, what makes providing a benefit to a public official a crime is the nexus between the benefit and any official "business" or "transaction." In essence, a reading of the statute in a way that does not define "intending to be influenced" as requiring a link between the benefit and an official act, would disregard the core legal element of the offense. Because the federal program statute is *in pari materia* with the honest services and extortion statutes, Section 666 offenses are limited to bribery and kickback schemes.[163]

On appeal, the defendant argued that the jury was not instructed that to sustain his conviction the jury was required to find that the payment was made in exchange for an official act and that the evidence was not sufficient to support the conviction. *Id.* The First Circuit rejected both of the defendant's contentions. The appellate court first held that the jury was instructed that to sustain an extortion conviction the government was required to prove a link between the payment and the official act — "at least an implicit, as opposed to an explicit, *quid pro quo* or reciprocity understanding is necessary." The appellate court then found that the evidence was sufficient and rejected the defendant's contention that the payment was merely a gift and not linked to any official act. *Id.* at 254–259.

157. 18 U.S.C. § 666(a)(2) (2012).

158. The defendant can either be the public official who solicits or accepts the bribe or the individual who pays the bribe.

159. 18 U.S.C. § 666(a)(2) (2012); United States v. Fernandez, 722 F.3d 1, 13 (1st Cir. 2013) ("Thus, the bribe can be 'anything of value' – it need not be worth $5000. The $5000 element instead refers to the value of the 'business' or 'transaction' sought to be influenced by the bribe.").

160. 18 U.S.C. §§ 666(a)(1)(B), (a)(2).

161. *Id.*

162. *Id.*

163. There are no other potential theories that could fall within the scope of the conduct precluded by the statute. The failure to disclose a conflict of interest or providing a gratuity do not require a corrupt payment and a nexus between a benefit and an official act and, therefore, would not fall within the scope of the statute. In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the defendants, a commonwealth Senator and a businessman, were charged with violating § 666. At trial, the government introduced evidence that the Senator promoted legislation favorable to the defendant's business

The courts, however, have not articulated such a clear evidentiary path to conviction and have imposed a lower standard of proof on the government. Courts have not required the government to prove a direct connection or identify the state action or conduct of government at or near the time that the benefit is provided to the public official; rather, to sustain a Section 666 conviction, the government must prove only that the benefits were provided to the public official to influence some official act. For example, the Eleventh Circuit has held that when the benefit does not take the form of a campaign contribution, the government can sustain a conviction by proving a connection between the benefit and some official act, as opposed to a specific official act.[164] In *United States v. McNair*, county officials of Jefferson County, Alabama and contractors were charged with numerous public corruption offenses related to a municipal sewer and wastewater repair and rehabilitation project.[165] At trial, the government presented evidence that the county officials overseeing the project received kickbacks from the contractors in exchange for construction and engineering contracts.[166] On appeal, the defendants argued that "intending to be influenced" requires a direct link between the benefit and a specific official act.[167] The Eleventh Circuit rejected the defendants' assertion and held that the government was not required to prove a direct link between the kickback and a specific official act.[168] The court explained:

> [W]e now expressly hold that there is no requirement in [Section 666] that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.[169]
>
> Importantly, § 666(a)(1)(B) and (a)(2) do not contain the Latin phrase *quid pro quo*. Nor do those sections contain language such as "in exchange for an official act" or "in return for an official act." In short, nothing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act.
>
> Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee.

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interests at the same time he received travel and entertainment expenses. The defendants were convicted and they appealed. On appeal they argued that the trial court erred in instructing the jury that they could find the defendants guilty of a § 666 offense for offering and receiving a gratuity rather than a bribe. The First Circuit agreed and vacated the conviction. The court held that § 666 does not encompass illegal gratuities. The court explained that the statute specifically require that the government prove a corrupt payment. Therefore, to sustain a § 666 conviction, the government must prove a connection between the payment and an official act. *Id.* at 23–24.

164. United States v. McNair, 605 F.3d 1152, 1188 (11th Cir. 2010).

165. *Id.* at 1164–65.

166. *Id.* at 1164, 1169.

167. *Id.* at 1184-85.

168. *Id.* at 1187-88.

169. *Id.*

> The intent that must be proven is an intent to corruptly influence or to be influenced "in connection with any business" or "transaction," not an intent to engage in any specific *quid pro quo*.[170]

Nevertheless, the court did acknowledge, that the government was required to prove *some* connection between the payment and official act.[171] The court found that "sizable benefits" were provided with the intent to influence the county officials.[172] There was no evidence of gifts to the county officials before the projects began, and the extent to which the defendants attempted to conceal the benefits was "powerful evidence" of the corrupt payments.[173]

When the payment takes the form of a campaign contribution, the Eleventh Circuit has extended *McCormick* to Section 666 prosecutions and defined "intending to be influenced" to mean a direct connection between the payment and a specific official act.[174] In *United States v. Siegelman*, the former Governor of Alabama was charged with various public corruption offenses based on accepting a campaign contribution to an education lottery campaign in exchange for a political

170. *Id.* at 1187-88.

171. *Id.* at 1188–89.

172. *Id.* at 1196.

173. *Id.* The court also rejected the defendant's assertion that that benefits were "gifts" not bribes. *See id.* at 1194-95. In *United States v. Langford*, 647 F.3d 1309, 1331–32 (11th Cir. 2011), the defendant, a Commissioner for Jefferson County, Alabama, was charged with federal program bribery. At trial, the government introduced evidence that while he was serving as a Commissioner, the defendant accepted more than $240,000 in cash, clothing and jewelry from a local investment banker in exchange for steering municipal contracts involving the underwriting and marketing of municipal bonds to his firm. The defendant was convicted and he appealed. On appeal, the defendant asserted that a specific *quid pro quo* was required and that the government failed to prove a link between the benefit and a specific official act. The Eleventh Circuit rejected the defendant's contention and affirmed the conviction. In *United States v. Keen*, 679 F.3d 981 (11th Cir. 2012), the defendants, county commissioners for Dixie County, Florida, were charged with federal program bribery. At trial, the government introduced evidence that the defendant was provided cash by an undercover FBI agent in exchange for favorable decisions in connection with a fictitious development project. The defendants were convicted and they appealed. On appeal, the defendants argued that the evidence was insufficient to support their convictions. In particular, the defendants argued that the government failed to prove "which particular business or transaction before the Dixie County Board of Commissioners was connected to the bribes nor the value of the benefit to be attained through bribes." *Id.* at 994. The Eleventh Circuit rejected the defendants arguments and affirmed the conviction. The court explained that:

> This Court has made it clear that § 666(a)(1)(B) does not require the government to prove a specific official act for which a bribe was received. Rather, the government must show only that [the defendants] "corruptly" accepted "anything of value" with the intent "to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the Board. That is precisely what the government did when it presented evidence that [the defendants] accepted bribes from [undercover FBI agent] with the understanding that they would facilitate the approval of zoning changes benefitting the fictitious company of "Sean Michaels."

Id. (citations omitted).

174. United States v. Siegelman, 640 F.3d 1159, 1171–72 (11th Cir. 2011).

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appointment to the board that determined the number of healthcare facilities in the state.[175] At trial, the government introduced evidence that the campaign contribution was provided in exchange for the specific appointment.[176] On appeal, the defendant argued that district court erred in not requiring the jury to find a direct link between the campaign contribution and the specific appointment.[177] The court of appeals agreed that the *McCormick* standard applied to Section 666 prosecutions, and held that because the payment took the form of a campaign contribution, to sustain these convictions, the government was required to prove and the jury must find a direct link between the payment and a specific official act.[178] The court found, however, that the government had proven this direct nexus. The court explained that:

> The district court in this case instructed the jury that they could not convict the defendants of bribery in this case unless "the defendant and the official agree that the official will take specific action in exchange for the thing of value." This instruction was fashioned by the court in direct response to defendants' request for a *quid pro quo* instruction, and was given in addition to the Eleventh Circuit's pattern jury instruction for § 666 bribery cases. So, even if a *quid pro quo* instruction was required, such an instruction was given.[179]

The defendants further argued that the district court erred in not requiring the government to prove the link with direct, rather than circumstantial, evidence.[180] The court of appeals disagreed and held that the government could rely on circumstantial evidence even in cases where the government was required to prove a direct nexus to a specific official act:

> *McCormick* uses the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. Explicit, however, does not mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do. But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be explicit, but there is no requirement that it be express.
>
> . . .

175. *Id.* at 1163.
176. *Id.*
177. *Id.* at 1171.
178. *Id.* at 1171–72.
179. *Id.* at 1170–71.
180. *Id.* at 1171.

> In this case, the jury was instructed that they could not convict the defendants of bribery unless they found that "the Defendant and official agree[d] that the official will take specific action in exchange for the thing of value." This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution. Finding this fact would satisfy *McCormick's* requirement for an explicit agreement involving a *quid pro quo*. Therefore, even assuming a *quid pro quo* instruction is required to convict the defendants under § 666, we find no reversible error in the bribery instructions given by the district court.[181]

Finally, the defendant asserted that *Skilling* compelled the reversal of the honest services conviction because the jury was not instructed that the government was required to prove a *quid pro quo* in order to convict them on a bribery theory of honest services fraud.[182] The court, while declining to extend the *McCormick* standard to honest services fraud, nevertheless held that because the evidence sustaining the pay-to-play scheme was applicable to both the Section 666 charge and honest services fraud, the jury was properly instructed that they could not convict the defendant unless they found that the payment was linked to a specific official act.[183] The court correctly observed, however, that, "After *Skilling*, it may well be that the honest services fraud statute, like the extortion statute in *McCormick*, required a *quid pro quo* in a campaign donation case."[184]

In *United States v. Beldini*, the Third Circuit declined the opportunity to find that Section 666 was limited to bribery and kickback schemes and that the government was required to prove a direct link between the benefit and a specific official act.[185] In *Beldini*, the defendant was the Deputy Mayor of Jersey City, New Jersey, who reported directly to the Mayor.[186] An FBI Confidential Informant ("CI"), posing as a real estate developer, offered to make campaign contributions in return for the Mayor expediting approval for a fictitious real estate development project.[187] The defendant facilitated meetings with the Mayor and promised to work to provide the CI relief from existing zoning regulations.[188] Later, the CI made a second $10,000 campaign contribution that was funneled to the Mayor's campaign through third-party intermediaries.[189] The defendant was convicted and appealed.[190] On appeal, the defendant argued that the district court failed to instruct

181. *Id.* at 1171–72.
182. *Id.* at 1173.
183. *Id.* at 1173–74.
184. *Id.* at 1173 n.21.
185. United States v. Beldini, 443 F. App'x 709, 710 (3d Cir. 2011).
186. *Id.*
187. *Id.*
188. *Id.* at 711–12.
189. *Id.*
190. *Id.* at 710.

the jury that, to sustain the conviction, the government was required to prove a link between the payment and a specific act.[191]

The Third Circuit affirmed the conviction and rejected the defendant's argument.[192] Because the defendant failed to object to the district court's decision not to give a *quid pro quo* instruction, the Third Circuit held that the plain error standard applied.[193] Because there was no binding precedent requiring the government to prove a direct link between the benefit and an official act, any "error" in failing to instruct the jury was not plain, clear, or obvious to require a reversal under the plain error rule.[194] The appellate court applied the lower standard of proof and held that the government was only required to prove some connection between the benefit and some official action.[195]

In *United States v. McGregor*, four Alabama state lawmakers, several lobbyists, and gambling company executives were charged with federal program integrity, extortion, and honest services fraud.[196] At trial the government introduced evidence that suggested that campaign contributions were offered in return for official acts.[197] After the defendants were acquitted, the district court filed an opinion intended to provide guidance on the question of when a campaign contribution may be considered a bribe.[198]

The district court first recognized that to sustain a conviction for each offense, the government is required to prove a sufficient nexus between a benefit to a public official and an official act.[199] The trial court then explained that when the benefit to the public official takes the form of a campaign contribution, a heightened *quid pro quo* "standard" is warranted.[200] As a result, the district court gave the jury an instruction that required the government to prove a direct link between the campaign contribution and specific official act.[201]

191. *Id.* at 710, 714, 717.
192. *Id.* at 717, 721.
193. *Id.* at 713.
194. *Id.* at 717.
195. *Id.*
196. United States v. McGregor, 879 F. Supp. 2d 1308, 1310 (M.D. Ala. 2012).
197. *Id.* at 1311–12.
198. *Id.* at 1310.
199. *Id.* at 1314.
200. *Id.*
201. The district court's jury instruction stated that:

> Campaign contributions and fundraising are an important, unavoidable and legitimate part of the American system of privately financed elections. The law recognizes that campaign contributions may be given to an elected public official because the giver supports the acts done or to be done by the elected official. The law thus also recognizes that legitimate, honest campaign contributions are given to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future.
>
> Therefore, the solicitation or acceptance by an elected official of a campaign contribution does not, in itself, constitute a federal crime, even though the donor

F. DIRECT AND CIRCUMSTANTIAL EVIDENCE

Imposing the higher standard of proof on the government should not present an obstacle to conviction. In addition to identifying the state action or conduct of government close in time to when the benefit is provided to the public official, there are several ways that the prosecution can further support the evidence of a corrupt intent. Once the benefit is traced to the public official, the question remaining is whether there is a sufficient nexus between the benefit and state action and conduct of government. To prove this link, the prosecutor will examine the facts and circumstances surrounding the exchange, including: (1) the value of the benefit; (2) the timing of the benefit;[202] (3) the nature of the official act; (4) the value of the official act to the source of the benefit; (5) the relationship between the public official and source of the benefit; (6) any effort to conceal the payment; (7) the use of third-party agents as conduits for the benefit; (8) the falsification of any documents; (9) any effort to conceal the relationship between the public official and source of the benefit; (10) any effort to destroy evidence; and (11) the defendant's behavior before and after the corrupt scheme came under scrutiny. The defense will attempt to undermine the government's assertion by arguing that that the payment and official were not linked to any official act.[203]

> has business pending before the official, and even if the contribution is made shortly before or after the official acts favorably to the donor.
>
> However, when there is a *quid pro quo agreement*, orally or in writing, that is, a mutual understanding, between the donor and the elected official that a campaign contribution is conditioned on the performance of a *specific official action*, it constitutes a bribe under federal law. By this phrase, I mean that a generalized expectation of some future favorable action is not sufficient for a quid pro quo agreement; rather, the agreement must be one that the campaign contribution will be given in exchange for the official agreeing to take or forgo some specific action in order for the agreement to be criminal. A close-in-time relationship between the donation and the act is not enough to establish an illegal agreement.
>
> A *promise* of a campaign contribution or a *solicitation* of a campaign contribution may be an illegal quid pro quo, as well. But to be illegal (1) it must be a promise or solicitation conditioned on the performance of a specific official action as I explained that phrase in the preceding paragraph; (2) it must be *explicit*; and (3) it must be *material*. To be explicit, the promise or solicitation need not be in writing but must be clearly set forth. An explicit promise or solicitation can be inferred from both direct and circumstantial evidence, including the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence, as well as the rational or logical inferences that may be drawn from them.

Id. at 1310–1311; 18 U.S.C. § 1951 (2012).

202. The receipt of a benefit for an official act that would have been taken *regardless* of the benefit violates the federal public corruption statutes. *See United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998).

203. *See, e.g.*, United States v. White, 663 F.3d 1207 (11th Cir. 2011) (rejecting defendant's argument that cash payments were not taken with corrupt intent to influence an official act); United States v. Abbey, 560 F.3d 513 (6th Cir. 2009) (rejecting defendant's argument that there was no agreement to take a specific act when property was transferred to defendant).

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Therefore, the facts and circumstance surrounding the payment and official act will be critical in determining the legitimacy of the benefit provided.

IV. CONCLUSION

It is not a crime to provide a gift, loan, employment, or other financial benefit to a public official or those close to him. What makes such a practice corrupt and a federal criminal offense is when public officials abuse their position for financial gain and use their government positions and discretion over state action or the conduct of government as a lucrative financial opportunities for themselves, their family, friends, or associates. As a consequence, each of the federal public corruption statutes require that the government prove a sufficient nexus or connection between a financial benefit provided to a public official[204] and an official act. It is this agreement or corrupt intent that makes the conduct a federal criminal offense. Although the central legal element is this link between the benefit to the public official and official act, the courts have failed to provide the government with a path to conviction that is fundamentally fair to the defendant.

In *McDonnell*, the Supreme Court clearly expressed a concern about the exercise of prosecutorial discretion and the need for a fundamentally fair application of the law—that it should be applied as a "scalpel" rather than a "meat axe."[205] The courts have repeatedly used the term *quid pro quo* to describe the critical element of a bribery or kickback offense and have required the government prove a nexus between the benefit and official act. However, this term is used regardless of the form of the benefit or inducement provided to the public official. As a result, the term *quid pro quo* has been used to mean two different evidentiary requirements: that a payment was made to a public official in exchange for some official action, and that a payment was made in exchange for a specific official act. This is a significant distinction because the burden of proving a direct connection is significantly higher than proving some connection. The courts have imposed the higher burden of proof only when the benefit takes the form of a campaign

204. Corrupt payments are typically tendered with the intent to induce the following official acts: (1) provide government financial support for public and private projects; (2) favorable legislation or regulatory scrutiny; or (3) awarding government contracts. The form of benefit provided to the public official may include: (1) campaign contributions; (2) cash payments; (3) gifts of luxury items; (4) consulting fees; (5) travel and entertainment expenses and/or; (6) insider information regarding financial transactions. The scope of the benefits include benefits provided directly to the public official, family members and/or close associates. The benefits provided to or on behalf of the public official should be of some consequence. *See e.g.*, *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (holding that to sustain insider trading conviction the government must prove that the defendant received a benefit of some consequence).

205. *McDonnell*, 136 S. Ct. at 2373; *see also* United States v. Weimert, 819 F.3d 351, 370 (7th Cir. 2016) (reversing wire fraud conviction based on deceptive statements about negotiation positions and finding that the limits of the federal wire fraud statute must be "defined by more than just prosecutorial discretion."); United States ex rel. O'Connell v. Countrywide Home Loans, Inc., 822 F.3d 650, 658 (2d Cir. 2016) (reversing civil judgment and holding that breach of contract does not support fraud claim absent evidence of fraudulent intent not to perform the promise at the time of contract execution).

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contribution. This is a distinction without merit. The criterion of guilt is the corrupt intent—not the form of the benefit provided to the public official. The lower evidentiary standard provides no comfort to justice. This lower standard is ambiguous, inconsistent, and allows for doubt. Ambiguous and inconsistent evidentiary standards rarely translate into meaningful jury verdicts or appellate review. Therefore, courts should jettison this distinction and uniformly impose a higher standard of proof. To trigger the corruption statutes, the courts should require the government to prove a corrupt intent—a direct connection between the benefit and intent to influence or affect state action or the conduct of government. Moreover, the courts should require the prosecution to identify this official act at the time the benefit is provided to the public official. This will result in clarifying the criterion of guilt and the fundamentally fair application of each of these federal corruption statutes.

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