The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials

Steven C. Yarbrough

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THE HOBBS ACT IN THE NINETIES:
CONFUSION OR CLARIFICATION OF THE

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Public Officials

Steven C. Yarbrough†

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I. Introduction

Although all politicians are performers and inevitably find themselves on stage, some merely perform as marionettes, controlled by hands holding strings of gold. Each time a politician acts, whether by regulating zoning, rent, taxes, or anything else, a ripple is sent through the economy. Winners and losers appear and, in the high stakes game of political decision making, the gains and losses can be enormous. Given these high stakes, it is not surprising that lobbyists and special interest groups spend billions of dollars each year attempting to influence the votes of politicians. The incentive for politicians to take all the money offered to them is also high, for the road to political success is anything but cheap.¹

Politicians who accept campaign contributions and other benefits, however, must walk a fine line. Although our political system is fueled by campaign contributions and oiled by lobbyists, no politician can be allowed to place his or her vote on the auction table. The very concept is reprehensible to the democratic ideals upon which our nation was founded. One of the primary statutes used to prevent politicians from selling their votes is the Hobbs Act.²

The Hobbs Act provides, in relevant part: “Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.”³ The statute defines “extortion” as “[t]he obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”⁴

The “under color of official right” language of the Hobbs Act has been used to convict public officials who have improperly used their official powers to increase their personal wealth. When a public official enters into an expressly articulated agreement to perform or not perform some official action in exchange for a benefit, the Hobbs Act can be applied with little debate. Politicians, however, are rarely foolish enough to expressly articulate such agreements. Rather, the

¹. For example, in their race for the United States Senate, Dianne Feinstein and Michael Huffington spent almost $100,000 per day over an eleven month period, more than $27 million altogether. R.W. Apple, Jr., Struggle for the Senate, N.Y. Times, Oct. 20, 1994 at A1, A12.
agreements are generally made verbally under cloaks of innuendo and ambiguity.

This paper first discusses the history of the Hobbs Act and its evolution into a sometimes controversial tool used to convict public officials. Next, the paper discusses the *quid pro quo* requirement necessary to prosecute an official using the "under color of official right" language of the Hobbs Act. Although the United States Supreme Court has addressed the *quid pro quo* requirements for a conviction under the Hobbs Act twice this decade, the *quid pro quo* standard remains ambiguous. The ambiguity arises from the seemingly contradictory treatments of the standard in the two cases. While both cases, *United States v. McCormick* and *United States v. Evans*, involved public officials who were convicted for extortion under the Hobbs Act, *McCormick* initially appears to require a stricter *quid pro quo* standard than *Evans*.

Circuit courts that have attempted to define the current *quid pro quo* standard in light of *Evans* and *McCormick* have provided different interpretations of the two cases. The main sources of division among the circuits are: 1) whether *Evans* and *McCormick* provide different *quid pro quo* standards for campaign and non-campaign contribution cases and 2) precisely what *quid pro quo* standard should be applied in each type of case. Most circuits have held that *McCormick* applies to campaign contribution cases while *Evans* applies to non-campaign contribution cases. The majority of circuits also require a stricter *quid pro quo* standard for campaign contribution cases than for non-campaign contribution cases. However, after analyzing *McCormick*, *Evans*, the circuit courts, and social policy, this author concludes that the interpretation of the *quid pro quo* standard reached by the majority of the circuit courts is incorrect. This author argues that both *Evans* and *McCormick* apply to campaign contribution cases and that the *quid pro quo* language in both cases can, and should, be reconciled.

II. Evolution of the Hobbs Act

Congress enacted the Hobbs Act in 1946 in response to the United States Supreme Court decision in *United States v. Local 807*

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5. The first of these cases was *McCormick* v. United States, 500 U.S. 257 (1991). The second case was *Evans* v. United States, 504 U.S. 255 (1992).
7. *Id.* at 273; *Evans*, 504 U.S. at 267.
International Brotherhood of Teamsters. 8 Local 807 was a New York chapter of the Teamsters Union which extorted money from out-of-state truckers coming into New York City. 9 As out-of-state truckers entered the city, Local 807 would stop them and offer to help drive or unload the trucks. 10 Local 807 then demanded payment regardless of whether or not its offer was accepted. 11 Although the out-of-state truckers generally neither needed nor wanted assistance, they complied with the demands of Local 807 in order to get their loads delivered. 12

As a result of its activities, Local 807 was charged with violating the Anti-Racketeering Act of 1934, which made it illegal to obtain “by the use of . . . force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee . . . .” 13 Although the actions of Local 807 clearly constituted extortion, the Supreme Court held that, because payments to Local 807 constituted wages paid by a “bona-fide employer to a bona-fide employee,” Local 807 had not violated the Anti-Racketeering Act. 14

Congress was outraged by the decision in Local 807 and responded by passing the Hobbs Act. 15 While the Hobbs Act, as originally enacted, defined extortion with the same “under the color of official right” language used in the Hobbs Act today, “Congress spent little time discussing the meaning of extortion under color of official right.” 16 Thus, the courts, which looked to legislative intent to determine how broadly the Hobbs Act should be applied, gained little guidance from the brief and ambiguous congressional discourse on the issue. 17

10. Id. at 525-27.
11. Id.
12. Id.
13. Id. at 525 (citing The Anti-Racketeering Act, 18 U.S.C. § 420(a) (1934)).
14. Id. at 535.
15. Lindgren supra note 8, at 889-90; see also 89 Cong. Rec. 3229 (1943); 91 Cong. Rec. 11,900-12.
16. Lindgren, supra note 8, at 890.
17. Id. But see, Naftalis, supra note 8, at 177-78; James P. Fleissner, Note, Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under the Color of
If Congress intended the "under color of official right" language of the Hobbs Act to serve as a means to prosecute public officials for extortion, such intent went unnoticed by prosecutors for at least twenty-five years after the Hobbs Act was passed. Until the early 1960s, all reported cases decided under the Hobbs Act involved labor unions. Prosecutors began to expand the use of the Hobbs Act in the 1960s, but only to prosecute in cases where the extortion was attempted or accomplished through the use of duress. In fact, officials charged with extortion under the Hobbs Act commonly defended the charges by arguing that they used no duress to gain benefits and were, therefore, merely accepting bribes.

In 1972, in *United States v. Kenny*, the Third Circuit affirmed the first extortion conviction based upon the "color of official right" language of the Hobbs Act. Herbert Stem, the prosecutor in *Kenny*, argued that "the distinction between bribery and extortion that has developed under the Hobbs Act is unnecessary when that Act is used to prosecute corruption in public office." Use of the "under color of official right" language to prosecute public officials who received payments in exchange for official acts quickly gained support in the wake of the Watergate scandal, which increased demand for vigorous prosecution of wayward public officials. The eventual expansion of the Hobbs Act into a tool to prosecute public officials who received payments which were neither induced nor coerced has led to bouts of historical interpretation and scholarly debate.

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*Official Right, 52 U. C.H. L. Rev. 1066, 1081-84 (1985) (arguing that although discourse on the "under color of official right" language was brief, close analysis of the discussion indicates that Congress did not intend the "under color of official right" language to be interpreted as broadly as it has been interpreted by modern courts.).


19. NAPTLALIS, supra note 8, at 817.

20. Lindgren, supra note 8, at 817; Uzzo, supra note 18, at 737.

21. Uzzo, supra note 18, at 738 n.12; see also Herbert J. Stem, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 SETON HALL L. REV. 1, 4 (1971);

22. 462 F.2d 1205 (3d Cir. 1972) cert. denied, 409 U.S. 914 (1972); Fleissner, supra note 17, at 1071.

23. Stern, supra note 21, at 17.

24. Lindgren, supra note 8, at 817; NAPTLALIS, supra note 8, at 175.

Although Congress did not enact the Hobbs Act until 1946, the roots which gave life to the modern interpretation of the Act can be traced to the 13th century. Historical interpretation of extortion and bribery laws were of primary importance in both McCormick and Evans. The historical debate pits those in favor of a broad reading of the Hobbs Act ("expansionists") against those who argue that the Hobbs Act should not be used to convict public officials who passively receive payments to which they are not entitled ("revisionists").

Revisionists primarily support their position by arguing that extortion and bribery were distinct crimes under common law and that they should remain distinct crimes today. The revisionists reject the expansionist view that the "under color of official right" language of the Hobbs Act brings passive acceptance of a payment, often thought of as bribery, under the reach of the Hobbs Act. While the expansionists argue that bribery and extortion are essentially the same when prosecuting "under the color of official right," the revisionists argue that extortion has at least three separate characteristics which distinguish it from bribery.

First, revisionists argue that extortion requires coercion whereas bribery does not. This contention is rejected by the expansionists, who cite examples of common law convictions for extortion in the absence of coercion. Beginning with Kenny, American courts began to accept the expansionist approach that, when a public official accepts

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26. See, e.g., Lindgren, supra note 8, at 837-75 (analyzing modern interpretation of the Hobbs Act through use of the common law and 13th century extortion statutes).
27. McCormick, 500 U.S. at 268; Evans, 504 U.S. at 261-68.
28. Lindgren, supra note 8, at 819. While Professor Lindgren coined the term "revisionist," the term "expansionist" is a creation of the present author.
29. See Harary, supra note 25. Justice Scalia's concurrence in McCormick and Justice Thomas's dissent in Evans show that Justice Scalia and Justice Thomas are two of the most notable revisionists.
30. Harary, supra note 25; see also Evans, 504 U.S. 255 (Thomas, J., dissenting).
31. Fleissner, supra note 17, at 1083.
32. Lindgren, supra note 8, at 884-86.
an improper payment, the element of coercion is supplied by the mere existence of the public official’s powers of office. 33 While debate on this issue may continue to exist among scholars, the federal courts now unanimously accept the view that public officials can be convicted under the Hobbs Act even when they have taken no explicit actions to coerce the payors of the benefits. 34

Second, in an argument similar to the coercion argument, the revisionists maintain that extortion requires a showing of inducement, whereas bribery can occur in the absence of such a showing. 35 Some revisionists argue that if prosecutors do not have to show coercion to convict a public official, prosecutors should, at the very least, have to show that the public official induced the illegal payment. 36 Under the revisionist’s view, passive acceptance of an illegal payment may be bribery but it is not extortion and should not be prosecuted as extortion under the Hobbs Act. 37 Expansionists counter that, as with coercion, the powers inherent to a public office are sufficient to provide the element of inducement. 38 Therefore, the “under color of official right” language permits public officials who passively receive benefits in exchange for promises of official action or inaction to be convicted under the Hobbs Act. Until the United States Supreme Court decided Evans in 1992, the issue of inducement was the source of division among the Circuit Courts. 39 In Evans, however, the Court unambiguously held that a showing of inducement is not essential to sustain the conviction of a public official under the Hobbs Act. 40

Finally, the revisionists assert that extortion requires a showing of false pretense. This argument was raised by Justice Scalia in his McCormick concurrence, 41 and was later advocated by Justice Thomas in his Evans dissent, in which Chief Justice Rehnquist and Justice Scalia joined. 42 Under the false pretense argument, in order to be convicted of extortion “under color of official right,” the public official must have held out that, on account of public office, he or she was entitled to the benefit received. 43 This argument, however, has been met with

33. Kenny, 462 F.2d 1295 (3d Cir. 1972); see Uzzo, supra note 18, at 738-42.
34. Evans, 504 U.S. at 258.
35. See Uzzo, supra note 18, at 753-67; see also Fleissner, supra note 17.
37. Id.
38. Lindgren, supra note 8, at 883-84.
40. Id. at 1883-84.
41. McCormick, 500 U.S. at 277-80 (Scalia, J., concurring).
42. Evans, 504 U.S. at 279 (Thomas, J., dissenting);
43. Id. (Thomas, J., dissenting).
scholarly criticism and has been rejected by the majority of the Court.\textsuperscript{44} Professor James Lindgren has made probably the most direct and well researched attack on the false pretense argument.\textsuperscript{45} Lindgren argues that the cases which Justice Thomas cites do not support the false pretense argument.\textsuperscript{46} In Lindgren’s view, “Justice Thomas’s cases offer no support of any kind, merely showing that false pretenses is a proper class of extortion case, not that false pretenses are necessary. Indeed, two of the cases he cites, \textit{Dean v. State} and \textit{Hanley v. State}, held more or less the opposite.”\textsuperscript{47} Lindgren’s criticism of Justice Thomas’ historical interpretation is supported by the majority opinion in \textit{Evans}, as well as by Justice Kennedy’s concurrence in which Justice O’Connor joined.\textsuperscript{48}

Indeed, writing for the majority of the Court in \textit{Evans}, Justice Stevens unequivocally rejected Justice Thomas’ false pretense theory. Justice Stevens wrote:

\begin{quote}
The dissent’s theory notwithstanding, not one of the cases it cites holds that the public official is innocent unless he has deceived the payor by representing that the payment was proper. Indeed, none makes any reference to the state of mind of the payor, and none states that a “false pretense” is an element of the offense. Instead, those cases merely support the proposition that the services for which the fee is paid must be official and that the official must not be entitled to the fee that he collected — both elements of the offense that are clearly satisfied in this case. The complete absence of support for the dissent’s thesis presumably explains why it was not advanced by petitioner in the District Court or the Court of Appeals, is not recognized by any Court of Appeals, and is not advanced in any scholarly commentary.\textsuperscript{49}
\end{quote}

The forceful rejection of Justice Thomas’ historical perspective by six of the Court’s Justices, as well as by Professor Lindgren’s thorough


\textsuperscript{45} The significance of Professor Lindgren’s comments is evidenced by the majority’s reliance on Lindgren in both the \textit{McCormick} and \textit{Evans} decisions, as well as Justice Thomas’s criticism of Lindgren in the \textit{Evans} dissent. See 500 U.S. at 268 n.6; 504 U.S. at 260 nn.4-6, 280-83 (Thomas J., dissenting).

\textsuperscript{46} Lindgren, supra note 44, at 1724.

\textsuperscript{47} Id. at 1723 (citing Dean v. State, 71 S.E. 597 (Ga. Ct. App. 1911) and Hanley v. State, 104 N.W. 57 (Wis. 1905), respectively).

\textsuperscript{48} Evans, 504 U.S. at 272, 275-78.

\textsuperscript{49} Id. at 270-71 (citation omitted).
research, indicates that the false pretense argument is unlikely to be used in the future.50

III. **McCormick — The “Explicit” Quid Pro Quo Requirement**

McCormick involved a West Virginia State legislator, Robert L. McCormick, who was convicted for extortion under the Hobbs Act.51 McCormick had been a strong supporter of a West Virginia program which allowed doctors who had yet to pass their state licensing exams to practice under temporary permits while studying for the exams.52 Some doctors who were unable to pass the exams practiced medicine for several years under this program.53 When discontinuance of the program was threatened, a group of these doctors organized to seek legislation "grant[ing them] permanent medical license[s] by virtue of their years of experience."54

McCormick, who was running for re-election during this same period, informed the doctors’ lobbyist that, although “his campaign was expensive, . . . he had not heard anything from the foreign doctors.”55 In response to McCormick’s comment, the doctors remitted four cash payments to McCormick over the course of the year.56 McCormick neither listed these payments as campaign contributions nor reported the payments on his income tax return.57 After his re-election, McCormick lobbied for the doctors’ bill and, after the bill successfully passed, the doctors gave McCormick one last payment.58 McCormick defended his actions by arguing that the payments were legitimate campaign contributions and that he could not be found guilty unless the government proved a “quid pro quo [—] a promise of official action or inaction in exchange for any payment or property received.”59

The trial court disagreed and instructed the jury that:

50. Although two of these six Justices, Justice White and Justice Blackmun, no longer sit on the bench, the majority of the Court will probably continue to reject the fairly novel false pretense argument. Accepting the false pretense argument would violate the principle of stare decisis and run counter to the historical interpretation of bribery and extortion.
51. McCormick, 500 U.S. at 259, 266.
52. Id. at 259.
53. Id.
54. Id. at 259-60.
55. Id. at 260.
56. Id.
57. Id.
58. Id.
59. Id. at 266 (citations omitted).
[a] claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges [of extortion].

So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed.60

On appeal, the Fourth Circuit affirmed McCormick's conviction, holding that the government need not show a promise of official action or inaction in exchange for any payment or property where the parties never intended the payments to be "legitimate" campaign contributions.61 The Supreme Court granted certiorari to address the narrow question of whether, in a campaign contribution case, an official can be convicted under the "color of official right" language of the Hobbs Act without proof of a quid pro quo.62 The Supreme Court appeared to unanimously decide that proof of a quid pro quo was required.63 However, the Court split, 6-3, as to what this quid pro quo standard should be.64

The majority of the Court held that, "[t]he receipt of [campaign] contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."65 The majority justified its strict "explicit" requirement by arguing that campaign contributions are inherently part of our political system and:

to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'66

The majority did not, however, define what acts or articulations are sufficient to constitute an explicit promise, nor did they address whether a showing of quid pro quo is required in non-campaign contribution cases involving action taken under the color of official right.

60. Id. at 264 n.4.
61. Id. at 265-66.
62. Id. at 266-67 n.5.
63. Id. at 273, 274.
64. Id. at 283, 286-87.
65. Id. at 273 (emphasis added).
66. Id. at 272.
Scholars disagree on exactly what the Supreme Court meant by "explicit." Some scholars believe that the "explicit" standard will prevent the prosecution from convicting some politicians even where the prosecution can show intent and knowledge to make an illegal exchange. 67 Other scholars believe that the "explicit" standard "does not mean a written or spoken promise or agreement necessarily, but rather, perhaps, a form of implicit understanding or undertaking in which the parties are aware of the direct connection between the payment and the anticipated future official action or inaction." 68 Under this view, McCormick provides little protection to public officials charged under the Hobbs Act. 69

The McCormick dissent captures the essence of this scholarly dispute. 70 While the dissent in McCormick agreed that "it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver," the dissent felt that the majority's "explicit" requirement was too stringent to be of practical value. 71 To illustrate its point the dissent drew an analogy to "a known thug's offer to protect a storekeeper against the risk of severe property damage in exchange for a cash consideration." 72 The dissent stated that "[n]either the legislator nor the thug needs to make an explicit threat or an explicit promise to get his message across." 73 The dissent argued that "[s]ubtle extortion is just as [harmful] — and probably much more common — than the kind of express understanding that the Court's opinion seems to require." 74 According to the dissent, the critical issue in determining whether extortion has occurred

67. Thomas Regan McCartney, Note, McCormick v. United States: The Supreme Court Endorses Implicit Extortion by Elected Government Officials, 37 St. Louis U. L.J. 181, 200-03 (1992) (stating that "the explicit requirement becomes virtually impossible to prove"); see also Lindgren, supra note 44, at 1711 (providing examples of how intent and knowledge could be shown without meeting the "explicit" requirement).
69. Carey, supra note 68, at 340-42.
70. Justice Stevens wrote the dissent and was joined by Justice Blackmun and Justice O'Connor. McCormick, 500 U.S. at 280.
71. Id. at 282-83.
72. Id. at 282.
73. Id.
74. Id.
is the “candidate’s and contributor’s intent at the time the specific payment was made.” Therefore, the dissent’s quid pro quo standard would only require a showing that the public official accepted the payment for an implicit promise of preferential treatment.

The dissent further argued that a public official commits extortion even if the public official never acts to fulfill his or her end of the bargain or even if the public official’s actions would have been the same without payment. Under the dissent’s view, extortion occurs at the time an official takes a benefit pursuant to an implicit or explicit agreement to exchange official action for the benefit. The fact that the dissent’s quid pro quo standard — intent of the parties as evidenced through either implicit or explicit communication — was not adopted by the majority indicates that the majority’s use of “explicit” in McCormick must mean something more than the standard advocated by the dissent. Read alone, the “explicit” quid pro quo standard of McCormick seems to require proof of more than just knowledge of an illegal agreement.

One year after McCormick, however, the Court decided Evans, a case which confused the quid pro quo standard as set out in McCormick. The majority’s quid pro quo standard in Evans sounds more like the standard advocated by the dissent in McCormick. In fact, Justice Kennedy, a member of the majority in both decisions, even wrote a concurrence in Evans which nearly restated the quid pro quo standard as advocated by the dissent in McCormick. To understand which quid pro quo standard we are left with today, Evans and subsequent circuit court decisions must be analyzed.

75. Id. at 287.
76. Id. at 281-89.
77. Id. at 283.
78. Id.
79. The quid pro quo suggested by the McCormick dissent would require “that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer’s desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver . . . .” 500 U.S. at 283 (emphasis added). Similarly, the majority in Evans states that, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing the payment was made in return for official acts.” 504 U.S. at 268 (emphasis added).
80. Justice Kennedy wrote, “[t]he official and the payor need not state the quid pro quo in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods” and that “the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.” 504 U.S. at 274.
IV. EVANS — THE "KNOWING" STANDARD

John Evans "was an elected member of the Board of Commissioners of DeKalb County, Georgia." During an investigation of public corruption in the Atlanta area, an undercover agent from the Federal Bureau of Investigation ("FBI") approached Evans and asked for assistance in rezoning a 25-acre tract of land. Evans, who was running for re-election at the time, told the FBI agent, in several conversations, that Evans needed money for his campaign. Eventually, Evans presented the FBI agent with a document showing Evans' outstanding campaign debts and his future anticipated expenses. Evans and the FBI agent then engaged in a fairly cryptic conversation in which Evans at one point stated, "I've promised to help you. I'm gonna work to do that. You understand what I mean." The facts do not indicate, however, that Evans expressly stated that he would perform some official action in exchange for payments. Shortly after this last conversation, and pursuant to Evans' instructions, the agent gave Evans $7,000 in cash and a check for $1,000, payable to Evans' campaign. Evans was subsequently charged and convicted of extortion under the Hobbs Act.

Although Evans challenged the trial court's *quid pro quo* instructions on appeal, the Supreme Court did not grant certiorari to address that issue. Rather, the Court granted certiorari "to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act, 18 U.S.C. § 1951." Thus, certiorari was granted in *Evans* to determine whether the Hobbs Act was applicable to bribery, i.e., situations where a public official accepted, but did not solicit, benefits in return for official action or inaction.

82. *Id.*
83. United States v. Evans, 910 F.2d 790, 793 (11th Cir. 1990). The opinion from the Eleventh Circuit provides more factual background than does the Supreme Court opinion. As a result, the background facts are taken from the Eleventh Circuit opinion.
84. *Id.* at 793.
85. *Id.* at 794.
86. *Id.*
87. *Id.* at 794-95.
89. This issue was also raised in Justice Scalia's concurrence in *McCormick*. 500 U.S. at 277-79. Because the issue was not raised or briefed by the parties in *McCormick*, Justice Scalia did no more than indicate that the Hobbs Act may not apply to bribery.
The *Evans* decision provided a definitive answer on the inducement issue. The Court held that an affirmative act of inducement by a public official, such as a demand, is not an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act. The Court reasoned that, even without inducement by the public official, bribery of a public official falls under the definition of extortion because "the coercive element is provided by the public office itself."

While settling the inducement issue, however, *Evans* revived the conflict concerning the *quid pro quo* requirement. In addition to challenging his conviction on the issue of inducement, the petitioner in *Evans* argued that his conviction could not be sustained because the trial court's instructions "did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." The Court rejected the petitioner's criticism of the trial court's *quid pro quo* instructions and affirmed the extortion conviction against him. In so doing, the Court made two separate holdings concerning the *quid pro quo* issue.

First, the Court determined that an act of extortion "is completed at the time when the public official receives a payment in return for his agreement to perform specific acts; fulfillment of the *quid pro quo* is not an element of the offense." Thus, an official who never actually takes an affirmative step to perform or not perform official action in return for a benefit is nonetheless guilty of extortion if the public official simply agreed to such a step.

Second, the Court expressly stated what the government must show to satisfy the Court's *quid pro quo* element. The Court wrote, "[w]e hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing

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90. 504 U.S. at 268.
91. Id. at 266.
92. Id. at 268. The instructions challenged by the petitioner were most likely those stating:
Thus the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.
Id. at 258 (quoting the instructions of the trial court).
93. Id. at 268.
94. Id.
that the payment was made in return for official acts."95 The Court, however, did not clearly state what effect, if any, this "knowing" language has on the "explicit" language of McCormick.

Significantly, the Court did not re-analyze the facts of the case and scarcely referred to any conversation between Evans and the FBI agent. Instead, the Court stated: "we assume that the jury found that petitioner accepted the cash knowing that it was intended to ensure that he would vote in favor of the rezoning application and that he would try to persuade his fellow commissioners to do likewise."96 This quote indicates that the Supreme Court will affirm a Hobbs Act conviction as long as the Court is satisfied that the jury found the defendant to accept a benefit knowing that the benefit was in exchange for some official action. The Court's affirmation of Evans' conviction in the absence of an express articulation to exchange official conduct for a benefit is extremely significant in determining how Evans should be applied to future cases.

V. RECONCILING EVANS WITH McCORMICK: WHETHER THE CASES MUST BE READ TOGETHER OR APART

After the Supreme Court decisions in Evans and McCormick, a conflict emerged regarding how the language of the two opinions should be reconciled.97 The use of "knowing" in Evans seems to indicate that, as long as an official knew that he was being given a benefit in return for an official act, it does not matter whether the agreement to do the official act was explicit or implicit. McCormick, however, clearly states that the quid pro quo requirement can only be met by an explicit agreement. Although the potential McCormick-Evans quid pro quo conflict is central to an analysis of Hobbs Act violations prosecuted "under color of official right," surprisingly few scholars have commented upon this potential conflict.98 In fact, the only non-student article directly addressing the quid pro quo conflict was written

95. Id. (emphasis added).
96. Id. at 257.
97. The conflict is evidenced by the contrasting interpretations among the circuit courts. See text accompanying notes 109 through 200.
98. Lindgren, supra note 44, at 1737 is the only article to discuss what effect, if any, Evans has on McCormick. Lawrence D. Finder and Joel M. Androphy discuss Evans and McCormick in their article, Crimes and Campaign Contributions, 30 Hous. Law. 32 (June 1993), but do not specifically address the possible effect of Evans on McCormick. Similarly, a Note by Charles N. Whitaker, Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach, 78 Va. L. Rev. 1617 (1992), discusses both McCormick and Evans, but does not provide an in depth discussion of how Evans might affect McCormick.
by Professor James Lindgren in 1993. In contrast to the sparse academic publication on the topic, several district courts have recently addressed which *quid pro quo* standard should be applied in cases where public officials have been charged with extortion under the Hobbs Act.

Since *Evans*, the majority of circuit courts confronted with public official extortion cases have not attempted to reconcile *McCormick* and *Evans*. Instead, these courts have avoided the potential *McCormick-Evans* conflict by holding that the two cases apply to different situations. The Second, Seventh, and Eleventh Circuits all indicate that they will use *Evans* as the guide for non-campaign contribution cases, and *McCormick* as the guide for campaign contribution cases.

However, in the recent case of *United States v. Blandford*, the Sixth Circuit stated that both *McCormick* and *Evans* should apply to campaign contribution cases. The Sixth Circuit then went on to successfully complete the arduous task of reconciling *McCormick* and *Evans*.

The *Blandford* court's reconciliation of the *McCormick* and *Evans* decisions may cause the *Blandford* decision to become a model for future cases in which public officials are convicted under the "color of official right" language of the Hobbs Act. Indeed, prior to *Blandford* the Fourth Circuit took a view similar to that of the Second, Seventh, and Eleventh Circuits. Since *Blandford*, however, the Fourth Circuit appears to have reversed its earlier position and has apparently adopted a view more consistent with the Sixth Circuit's reasoning in

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100. United States v. Allen, 10 F.3d 405 (7th Cir. 1993); United States v. Martinez, 14 F.3d 543 (11th Cir. 1994); United States v. Davis, 30 F.3d 108 (11th Cir. 1994); United States v. Garcia, 992 F.2d 409 (2d Cir. 1993); United States v. Coyne, 4 F.3d 100 (2d Cir. 1993); United States v. Blandford, 33 F.3d 685 (6th Cir. 1994); United States v. Taylor, 993 F.2d 382 (4th Cir. 1993); United States v. Hairston, 46 F.3d 361 (4th Cir. 1995).

101. See *Allen*, 10 F.3d at 411; *Martinez*, 14 F.3d at 553; *Davis*, 30 F.3d at 109; *Garcia*, 992 F.2d at 410-13; *Coyne*, 4 F.3d at 105-09; *Taylor*, 993 F.3d at 384-85.

102. See *Allen*, 10 F.3d at 411; *Martinez*, 14 F.3d at 553; *Davis*, 30 F.3d at 109; *Garcia*, 992 F.2d at 410-13; *Coyne*, 4 F.3d at 105-09; *Taylor*, 993 F.3d at 384-85.

103. See *Allen*, 10 F.3d at 411; *Martinez*, 14 F.3d at 553; *Davis*, 30 F.3d at 109; *Garcia*, 992 F.2d at 410-13; *Coyne*, 4 F.3d at 105-09; *Taylor*, 993 F.3d at 384-85.

104. *Blandford*, 33 F.3d at 695-98.

105. *Id.*

106. See *Taylor*, 993 F.2d at 385.
A review of circuit court decisions demonstrates that the approach to the *quid pro quo* issue taken by the Fourth Circuit and Sixth Circuits best advances public policy and best complies with the intent of the Supreme Court as expressed in *Evans*.108

VI. SEVENTH CIRCUIT: EXCLUSIVE APPLICATION OF *McCormick* TO CAMPAIGN CONTRIBUTION CASES

The Seventh Circuit recently considered which *quid pro quo* standard is required in campaign contribution cases, and indicated that *McCormick*, uninfluenced by *Evans*, governs campaign contribution cases.109 *United States v. Allen* arose from the conviction of Clemmons Allen, an internal affairs investigator for a sheriff’s office in Indiana.110 Allen was found guilty of providing protection to an illegal gambling operation in return for cash payments.111 Allen claimed that these payments were merely innocuous campaign contributions.112

In determining what constituted extortion “under color of official right” the court said that extortion occurs “if the official knows that the bribe . . . is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe.”113 Although this quote came from a 1987 Seventh Circuit decision, the court supported the language with a string cite to *Evans*, which was decided in 1992. The court then stated that:

> the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office — the *quid pro quo* — be explicit . . . absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made

108. Since *Evans*, the Eighth Circuit has issued two opinions in Hobbs Act cases involving public officials. The cases are United States v. Evans, 30 F.3d 1015 (8th Cir. 1994) and United States v. Loftus, 992 F.2d 793 (8th Cir. 1993). Neither of these cases, however, provide discussion on the potential *McCormick-Evans quid pro quo* conflict. Similarly, in United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995), the Fifth Circuit addressed an appeal from a conviction under the “color of official right” language of the Hobbs Act. However, the Fifth Circuit ultimately decided that the defendant was not a public official and therefore could not be convicted under the “color of official right” language of the Hobbs Act. *Id.* at 1383. As a result, the case is not useful to the present analysis and will not be considered. The First, Third, Ninth, Tenth, and Washington D.C. Circuits have not had occasion to address the potential *McCormick-Evans quid pro quo* conflict.
109. See United States v. Allen, 10 F.3d 405 (7th Cir. 1993).
110. *Id.* at 407-08.
111. *Id.* at 408.
112. *Id.* at 410.
113. *Id.* (quoting United States v. Holzer, 816 F.2d 304, 311 (7th Cir. 1987), vacated on other grounds, 484 U.S. 807 (1987)).
in exchange for an explicit promise to perform or not to perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.\textsuperscript{114}

The irony in the court's analysis is that the court cites \textit{Evans} in support of a definition which the court claims was modified by \textit{McCormick}, which was decided in 1991. Because \textit{Evans} was decided after \textit{McCormick}, the court should have addressed the effect that \textit{Evans} had on the \textit{McCormick} standard, not the effect that \textit{McCormick} had on the \textit{Evans} standard. It appears that, under its current analysis, the Seventh Circuit will apply the "explicit" standard of \textit{McCormick} to campaign contribution cases without consideration of how \textit{Evans} might affect this standard.

\section*{VII. Eleventh Circuit: Separation of \textit{McCormick} from \textit{Evans}}

In 1994, the Eleventh Circuit twice spoke on the \textit{quid pro quo} standard; first in \textit{United States v. Martinez},\textsuperscript{115} and shortly thereafter in a rehearing of \textit{United States v. Davis}.\textsuperscript{116} Read together, these two cases indicate that the court will have to apply both \textit{McCormick} and \textit{Evans} to non-campaign contribution cases, but will apply only \textit{McCormick} to campaign contribution cases.

\textit{Martinez} involved a Florida mayor, Raul Martinez, who used his power over zoning regulations to force local realtors to sell him property well below market value.\textsuperscript{117} At trial, the court instructed the jury that extortion occurs, "if the official knows he had been offered the payment in exchange for the exercise of his official power, or that such payment is motivated by hope of influence."\textsuperscript{118} Martinez argued that the instruction was in error because, under \textit{McCormick} and \textit{Evans}, the government must prove the existence of an explicit promise and that the above instruction allowed for a conviction in the absence of any \textit{quid pro quo}.\textsuperscript{119} The government first responded that \textit{Evans} controlled the case and then made the tenuous argument that \textit{Evans} does not require the government to prove a \textit{quid pro quo}.\textsuperscript{120}

\begin{thebibliography}{11}
\bibitem{114} Allen, 10 F.3d at 411 (emphasis added).
\bibitem{115} 14 F.3d 543, 553 (11th Cir. 1994).
\bibitem{116} 30 F.3d 108 (11th Cir. 1994).
\bibitem{117} 14 F.3d at 544-45.
\bibitem{118} \textit{Id.} at 552 (emphasis added).
\bibitem{119} \textit{Id.}
\bibitem{120} \textit{Id.}
\end{thebibliography}
The Eleventh Circuit rejected the government's position by holding that *McCormick* exclusively applied to *Martinez*.\(^{121}\) The court also stated that "after *McCormick*, the Court issued *Evans*, where it considered whether a quid pro quo was required outside the context of campaign contributions" and that "*Evans* modified [the *McCormick* standard for non-campaign contribution cases . . . \(^{122}\) The court ultimately concluded that the instructions to the jury were in error because they "failed to properly inform the jury that the government must prove the existence of a quid pro quo in order to find Martinez guilty."\(^{123}\) Thus, the Eleventh Circuit correctly held that the Hobbs Act requires evidence of a *quid pro quo* to convict an official for extortion "under the color of official right."\(^{124}\) However, the court's determination that *Evans* applies to non-campaign contribution cases and is separate from *McCormick*, can be questioned.

Six months after deciding *Martinez*, the Eleventh Circuit issued a decision in *United States v. Davis* (hereinafter *Davis2*)\(^{125}\) where the Eleventh Circuit reversed its previous decision which had affirmed the conviction of Davis in *United States v. Davis* (hereinafter *Davis1*).\(^{126}\) The case involved an Alabama legislator, Patricia Davis, who was charged with conspiring to extort money in return for help in getting a bill out of her committee. Davis argued on appeal that the *quid pro quo* instructions given to the jury did not satisfy the requirements of *McCormick*. The instructions stated that a Hobbs Act violation occurs "[by] taking or offering to take or agreeing to take or withhold official action for the money . . . \(^{127}\) The court in *Davis1* affirmed Davis' conviction, holding that this language "is near enough to the 'explicit promise or undertaking by the official to perform or not to perform an official act' outlined in *McCormick* . . . ."\(^{128}\) While the court did not indicate that this relaxed interpretation of the *quid pro quo* standard was a response to the recent decision in *Evans*, the court nonetheless gave a liberal reading to the *quid pro quo* requirement set

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\(^{121}\) *Id.* at 553.

\(^{122}\) *Id.* (emphasis added).

\(^{123}\) *Id.* at 554.

\(^{124}\) See Lindgren, * supra* note 44, at 1733-38 (finding that *Evans* requires a *quid pro quo*). But see Whitaker, * supra* note 98, at 1634-35 (arguing that the phrase "in return for" as used in *Evans* does not necessarily indicate the existence of a *quid pro quo* requirement).

\(^{125}\) 30 F.3d 108 (11th Cir. 1994).

\(^{126}\) 967 F.2d 516 (11th Cir. 1992). *Davis1* and *Davis2* were written by the same panel of judges.

\(^{127}\) *Id.* at 521 (citing instructions by the district court).

\(^{128}\) *Id.*
forth in *McCormick*. On rehearing, however, the Eleventh Circuit reversed *Davis* and stated that “under United States Supreme Court precedent, an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion.”  

This language can arguably be viewed as an indication that the Eleventh Circuit intends to apply the McCormick “explicit” standard to non-campaign contribution cases such as *Davis*, as well as to campaign contribution cases. Indeed, the court actually cited *Evans*, which the court classified as a non-campaign contribution case in *Martinez*, as a source supporting the proposition that an “explicit promise” is an essential element of Hobbs Act extortion.  

Furthermore, while citing *Evans*, the court never acknowledged or in any way referred to the “knowing” language of *Evans*.

Despite the court’s analysis in *Davis*, the Eleventh Circuit probably does not intend to recognize the *McCormick* “explicit” standard in non-campaign contribution cases exclusive of the “knowing” language in *Evans*.  

Applying *McCormick* in such a manner would run counter to the Eleventh Circuit’s opinion in *Martinez* and to the clear language of the Supreme Court in *Evans*.  

Thus, the Eleventh Circuit will probably not continue to disregard *Evans* in its analysis of non-campaign contribution cases. Because the Eleventh Circuit has applied both *McCormick* and *Evans* to non-campaign contribution cases, it appears that in future non-campaign contribution cases, the court must reconcile the “knowing” language of *Evans* with the “explicit” language of *McCormick*. Doing so would bring the Eleventh Circuit more in line with the Fourth and Sixth Circuits, and would allow the Eleventh Circuit to avoid overruling *Davis*.

In contrast to the confusion the Eleventh Circuit precedent has created in non-campaign contribution cases, the Eleventh Circuit’s approach to campaign contribution cases is unambiguous. The Eleventh Circuit opinion in *Martinez* makes it clear that the Eleventh Circuit will apply *McCormick*, without reference to *Evans*, in campaign contribution cases.

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129. *Davis*, 30 F.3d at 109.
130. *Id.* at 109 n.1.
131. *Id.* at 109.
132. It should be noted that *Davis* was only a two paragraph opinion which did not fully explain the court’s rationale.
133. 504 U.S. at 268.
VIII. SECOND CIRCUIT: EXCLUSIVE APPLICATION OF EVANS TO NON-CAMPaign CONTRIBUTION CASES

The Second Circuit has issued three opinions since 1993 which demonstrate that the Second Circuit will decide non-campaign contribution cases exclusively by reference to Evans. The first of the three decisions, United States v. Garcia, involved a New York Congressman who was charged under the Hobbs Act with extorting money from companies in return for assistance in obtaining government contracts. The second case, United States v. Coyne, concerned a county executive charged with receiving a $30,000 payment in return for helping an architectural firm to gain a government contract. Finally, in the third case, United States v. Delano, the government charged the Commissioner of the Parks Department of the City of Buffalo with extortion for ordering employees under his control to perform work on private homes and businesses.

The Second Circuit determined that the "knowing" quid pro quo standard of Evans controlled each of the above cases. The court further determined that the language in McCormick was irrelevant because McCormick applied only to campaign contribution cases. The court stated: "Evans modified [the McCormick] standard in non-campaign contribution cases by requiring that the government show only 'that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'" The Second Circuit did not, however, indicate whether Evans also modified the standard for campaign contribution cases.

Even so, the court's interpretation of Evans in Coyne, Garcia, and Delano, makes it doubtful that the Second Circuit can now apply Evans to campaign contribution cases. This is true because the Second Circuit's interpretation of Evans cannot be reconciled with McCormick, which incontrovertibly applies to campaign contribution cases. The Second Circuit in Garcia wrote, "[a]lthough no explicit agreement . . . need have been shown, the government must have

134. United States v. Coyne, 4 F.3d 100 (2d Cir. 1993); United States v. Garcia, 992 F.2d 409 (2d Cir. 1993); United States v. Delano, 55 F.3d 720 (2d Cir. 1995).
136. Coyne, 4 F.3d 100 at 105-09.
137. Delano, 55 F.3d at 722-23.
138. Garcia, 992 F.2d at 415; Coyne, 4 F.3d at 111, 113-14; Delano, 55 F.3d at 731.
139. Garcia, 992 F.2d at 414.
140. Id. at 415 (quoting Evans, 504 U.S. 255 at 268).
141. The Supreme Court expressly limited McCormick to campaign contribution cases. 500 U.S. at 274 n.10.
shown that Garcia received the payment ‘knowing that [it] was made in return for official acts.’”

Similarly, in Coyne, the court stated: “[p]roof of an explicit promise at the time of payment to perform certain acts is not necessary, and the jury was free to infer that Coyne accepted the $30,000 knowing that it was payment related to his using his influence as County Executive on Crozier’s behalf . . . .” Similarly, in Delano, the court held, “[c]ontrary to Delano’s contention, however, [proof of an explicit promise] to perform the official acts in return for the payment is not required.” McCormick, on the other hand, states that campaign contributions taken under the color of official right are vulnerable under the Hobbs Act “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” Because Garcia, Coyne and Delano expressly state that under Evans an “explicit promise” is not required and McCormick expressly states that an “explicit promise” is required, the Second Circuit cannot easily reconcile McCormick and Evans.

In order to apply Evans to campaign contribution cases, the Second Circuit would have to take one of two unlikely actions. First, the court could revise its interpretation of Evans as set forth in Garcia, Coyne, and Delano. Second, the court could maintain its present interpretation of Evans and further find that Evans overrules McCormick, so that any conflict between the Second Circuit’s interpretation of Evans and the language of McCormick would be irrelevant. The latter finding, however, would be extremely bold. McCormick and Evans were issued only one year apart, three of the same Justices were on the majority in each case, and nowhere does Evans indicate that it overruled McCormick. Thus, while the Second Circuit has yet to decide a post-Evans campaign contribution case, it appears that when presented with such a case the Second Circuit, like the Seventh and Eleventh Circuits, will determine that Evans does not affect the McCormick quid pro quo standard in campaign contribution cases.

IX. SIXTH CIRCUIT: RECONCILING MCCORMICK AND EVANS

The Sixth Circuit diverged from the other circuits and, in deciding United States v. Blandford, developed a more logical approach toward

142. Garcia, 992 at 415 (quoting Evans, 504 U.S. at 268) (emphasis added).
143. Coyne, 4 F.3d at 111 (citations omitted).
144. Delano, 55 F.3d at 731.
resolution of Hobbs Act cases. Unlike the circuit court cases preceding Blandford, the Sixth Circuit held that both McCormick and Evans apply to campaign contribution cases and that McCormick and Evans are reconcilable. In 1990, Donald J. Blandford was the Speaker of Kentucky's House of Representatives. Blandford was also the target of an FBI investigation concerning public officials suspected of extorting cash payments in exchange for help in blocking restrictive "breed-to-breed" regulation on the horse racing industry.

As a result of the FBI investigation, Blandford was arrested and convicted of extortion under the Hobbs Act.

Payments to Blandford on three separate occasions formed the basis for the extortion charges against him. The first payment occurred when William McBee, an FBI informant, handed Blandford $500 which McBee described as "walking around" money. Although McBee "did not mention breed-to-breed legislation" at this time, he testified that "on at least one prior occasion" he had given money to Blandford which Blandford knew was given with the intent to influence Blandford's position on breed-to-breed legislation.

The second payment occurred during a dinner party at Spurrier's hotel suite; McBee gave Blandford another $500 in one of the bedrooms. While handing over the money, McBee told Blandford, "[h]ere's a little something from Mr. Spurrier and me and the harness horse people and . . . so forth." Blandford replied, "All right. Well that's wonderful!"

The final payment occurred at a second dinner party in Spurrier's hotel suite. McBee gave Blandford another $500 but, as the Sixth Circuit stated, "McBee was only marginally less cryptic than before when it came to informing Blandford about the reason behind the payment."

146. 33 F.3d 685 (6th Cir. 1994).
147. Id. at 695-98.
148. Id. at 688-89.
149. Id.
150. Id. at 688, 698.
151. Id. at 689-90.
152. Id.
153. Id.
154. Id. at 690. John "Jay" Spurrier was a prominent Frankfurt lobbyist who chaired Kentucky's Harness Racing Commission and who had been recruited by the FBI. Id. at 688-90.
155. Id. at 690.
156. Id.
157. Id.
158. Id.
On appeal of his conviction, Blandford argued that "[t]he instructions [the District Court gave to the jury] were in error because [the instructions] did not require the jury to find that [Blandford] had entered into an explicit agreement . . . to oppose breed-to-breed legislation." The Sixth Circuit could easily and simply have rejected this argument by holding that Blandford is not a campaign contribution case and that the explicit requirement of McCormick is expressly limited to campaign contribution cases. Instead the Sixth Circuit performed a thorough analysis of McCormick and Evans, and adopted a quid pro quo standard consistent with both cases.

The Sixth Circuit began its analysis by acknowledging that "[e]xactly what effect Evans had on McCormick is not altogether clear." The court, however, felt that analysis of that effect as determined by the Second, Fourth, and Eleventh Circuits was incorrect. The Sixth Circuit stated:

The federal circuit courts that have considered the matter assume that Evans establishes a modified or relaxed quid pro quo standard to be applied in non-campaign contribution cases. Under this view, the comparatively strict standard of McCormick still would govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official. These courts evidently assume, without engaging in any rigorous analysis, the validity of their position.

The Sixth Circuit then made two conclusions. First, the court concluded that Evans does not address what quid pro quo is required in non-campaign contribution cases. The court felt that Evans was a campaign contribution case, and that therefore, the question of what

159. Id. at 693. The district court gave a jury instruction which quoted directly from Evans. The district court instructed the jury:

> Extortion means the obtaining of property, to which one is not entitled, from another with that person's consent, under color of official right. A public official commits extortion when he obtains a payment to which he was not entitled, knowing that the payment was made in return for his official acts.

> To find the defendant guilty, the government must prove that the defendant intended to obtain property or a payment to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of his official authority in regard to legislation potentially including Breed to Breed provisions.

Id. at 698 (emphasis omitted) (alterations in original).

160. See id. at 696-97.

161. Id. at 695.

162. Id. at 695-96. At the time Blandford was decided, the Fourth Circuit held a view similar to that of the Second and Eleventh Circuits.

163. Id. at 695.

164. Id. at 696-97.
quid pro quo is required in non-campaign contribution cases remains unanswered. Second, the court concluded that “Evans provided a gloss on the McCormick Court’s use of the word ‘explicit’ to qualify its quid pro quo requirement.” Thus, the Sixth Circuit felt that Evans helped define, rather than confuse, the quid pro quo requirement set forth in McCormick. While the Sixth Circuit’s conclusion that Evans did not apply to non-campaign contribution cases is questionable, the court’s more important conclusion, that Evans helped to define the “explicit” quid pro quo standard of McCormick is practical and well-reasoned.

Contrary to the Sixth Circuit’s conclusion, Evans probably does establish a quid pro quo standard for both non-campaign and campaign contribution cases. The Court worded Evans much more broadly than McCormick and, unlike in McCormick, never implicitly or explicitly restricted its holding to campaign contribution cases. Regardless of whether Evans is limited to campaign contribution cases or not, however, Evans effectively sets a ceiling on the rigidity of the quid pro quo standard in non-campaign contribution cases. This is because “non-campaign contribution cases . . . are perhaps less, but clearly not more, difficult to prove [than campaign contribution cases] from the government’s standpoint, [and] the same showing of a quid pro quo also would suffice.” By holding that Evans does not necessarily apply to non-campaign contribution cases, the Sixth Circuit simply stated that no standard higher than the “knowing” quid pro quo standard of Evans can be required in either campaign or non-campaign contribution cases.

The more significant determination of the Sixth Circuit, however, is that McCormick and Evans can, and should, both be applied to

165. Id.
166. Id. at 696.
167. See id. at 696.
168. Id. at 696.
169. Compare McCormick, 500 U.S. at 271-73 with Evans, 504 U.S. at 267-69. See also Whitaker, supra note 98, at 1632-34. See infra part XI, “Efficacy of Combining McCormick and Evans” for further analysis.
170. The Second and Eleventh Circuits have both held that Evans only applies to non-campaign contribution cases. See text accompanying footnotes 115 through 145 for a discussion of the Second and Eleventh Circuit cases. See, e.g., United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994) (stating that “Evans modified [the McCormick] standard for non-campaign contributions.”). The Fourth Circuit has held that Evans applies to both campaign and non-campaign contribution cases. See text accompanying footnotes 179 through 199. The views of these courts support the argument that Evans should apply to campaign contribution cases.
171. Blandford, 33 F.3d at 697.
campaign contribution cases. The Sixth Circuit reconciled the "explicit" standard of *McCormick* with the "knowing" standard of *Evans* by stating:

Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated. Put simply, *Evans* instructed that by 'explicit' *McCormick* did not mean 'express.'

The court cited the definitions of "explicit" and "express" as found in *Black's Law Dictionary* to support this interpretation of the meaning of "explicit." The Sixth Circuit's interpretation of "explicit," as used in *McCormick*, is also supported by the fact that Justice White, who wrote *McCormick*, was also in the *Evans* majority. One must assume that the Supreme Court would not write two opinions, one year apart, which conflict on such an essential and specific issue as the *quid pro quo* requirement in extortion cases. By joining the *Evans* majority without comment on the "knowing" standard as set out in *Evans*, one also might assume that Justice White did not view the "knowing" standard of *Evans* to be in conflict with the "explicit" standard of *McCormick*. Furthermore, the fact that only the approach taken by the Sixth Circuit can successfully reconcile *McCormick* and *Evans* lends credibility to the Sixth Circuit's interpretation.

The *Evans* clarification of *McCormick* leads to the conclusion that: "the *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing the payment was made in return for official acts is enough.)." Given this standard, the Sixth Circuit affirmed Blandford's Hobbs Act conviction because "a rational juror could have surmised that Blandford accepted the payments despite being aware that his acceptance would engender certain expectations on the part of the payor." Thus, as its strictest possible *quid pro quo* standard required to support a conviction, the Sixth Circuit only requires evidence upon which a rational juror could infer that a public official knew he or she made an agreement to exchange official action for benefit. This language should not, however, be read as concluding

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172. Id. at 696.
173. Id.
174. Id. at 696 n.13.
175. *McCormick*, 500 U.S. at 259; *Evans*, 504 U.S. at 256.
176. *Blandford*, 33 F.3d at 696.
177. Id. at 699.
that a public official commits extortion just because the official accepts a contribution knowing that the contributor has expectations of official action or inaction. In order to be convicted, the prosecutor must also show a quid pro quo, that the public official agreed to official action or inaction in return for the payment. Blandford does, however, leave open the possibility that, in non-campaign contribution cases, public officials charged with extortion under the Hobbs Act can be convicted without any showing of a quid pro quo.

X. FOURTH CIRCUIT: ADOPTION OF THE BLANDFORD RECONCILIATION

Since Evans, the Fourth Circuit has decided two cases involving public officials convicted of extortion under the Hobbs Act. In the first case, United States v. Taylor, the court took a position similar to that taken by the Second, Seventh, and Eleventh Circuits. However, in the second case, United States v. Hairston, the court took a position more similar to that of the Sixth Circuit. Analysis of the two cases demonstrates an evolution to a more lucid and rational quid pro quo standard in extortion cases brought under the “color of official right” language of the Hobbs Act.

Taylor arose from the conviction of Luther Langford Taylor, Jr., a member of the South Carolina House of Representatives. Taylor was convicted for illegally accepting payments in return for assistance in passing a bill which would legalize parimutuel betting at race tracks in South Carolina. Taylor argued that the payments were nothing more than permissible campaign contributions and that the conviction could not stand because the trial court did not “describe the quid pro quo required by McCormick for a conviction if the jury found that the payment was a campaign contribution.” The district court had instructed the jury that:

In order to find the defendant guilty of an attempt to commit extortion under color of official right, you must be convinced beyond a

\[178. \quad \text{The } Blandford \text{ court noted that “[i]t would be naive to suppose that contributors do not expect some benefit — support for favorable legislation, for example — for their contributions.” } Id. \text{ at 694 n.11 (quoting United States v. Allen, 10 F.3d 405, 410-11 (7th Cir. 1993)).} \]

\[179. \quad \text{Id. at 696-97.} \]

\[180. \quad 993 F.2d 382, 384-85 (4th Cir. 1993). \]

\[181. \quad 46 F.3d 361, 372-73 (4th Cir. 1995). \]

\[182. \quad 993 F.2d at 382-83. \]

\[183. \quad \text{Id.} \]

\[184. \quad \text{Id. at 383.} \]
reasonable doubt that at the time payments were made to the defendant he was aware that the payments were intended to influence his official conduct.185

The Fourth Circuit determined that this instruction did not comply with either McCormick or Evans because "[a]ll payments to elected officials are intended to influence their official conduct" and "[t]he above instructions would allow the jury to convict upon a finding that the payments were made to Taylor simply because he held office . . .."186 Close analysis of the trial court's instructions indicate that the Fourth Circuit was correct in determining that because the instruction did not require a finding that Taylor agreed to perform an official action or inaction in return for the payments, the instruction was deficient.187

The more significant aspect of Taylor, however, is that the court interpreted McCormick and Evans as providing two separate quid pro quo standards. At trial, the jury in Taylor was instructed to determine whether or not the payment to Taylor was a campaign contribution.188 On appeal, the Fourth Circuit indicated that if the payment was not a campaign contribution, the Evans standard would apply.189 After setting forth the Evans standard, the court then stated, "[o]r, if the jury finds the payment to be a campaign contribution, then, under McCormick, it must find that 'the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act'."190 Analysis of the language used by the Fourth Circuit in Taylor shows that the court intended to separate Evans from McCormick. First, using the disjunctive to separate the Evans quid pro quo standard from the McCormick standard shows that the court viewed Evans and McCormick as setting forth separate standards.191 Second, the court exclusively cited to McCormick when setting forth the quid pro quo standard governing Taylor.192 Evans is more recent than McCormick, so if the Fourth Circuit had intended Evans to apply to campaign contribution cases, the court would have cited Evans when describing the quid pro quo standard in campaign contribution cases. Finally, the Fourth Circuit stated that the trial court's instruction was

185. Id. at 385 (emphasis omitted).
186. Id. at 385.
187. Id.
188. Id. at 384-85.
189. See id. at 385.
190. Id. at 385 (quoting McCormick, 500 U.S. at 273).
191. Id.
192. Id.
"not sufficient under either McCormick or Evans." Had the court intended McCormick and Evans to be read together, the court would not have applied the cases with "either-or" language.

In the more recent case of Hairston, however, the Fourth Circuit indicated that McCormick and Evans are both campaign contribution cases. Hairston arose when defendant Patrick Hairston appealed his conviction for extortion under the Hobbs Act. Hairston was a member of the Board of Alderman in Winston-Salem, North Carolina, which decided city zoning matters and provided city contracts. Hairston was convicted for using his power over zoning and city contracts to extort payments to charitable organizations with which Hairston was associated. Because Hairston was never charged with extorting campaign contributions, the case was indisputably a non-campaign contribution case.

Contrary to what one might expect after the Taylor decision, however, the court did not decide Hairston by summarily holding that Evans controlled non-campaign contribution cases. Instead, the court determined Evans to be a campaign contribution case which, nonetheless, applied to non-campaign contribution cases because "the Court wrote broadly enough to require proof of a quid pro quo in all cases charging extortion under color of official right." By recognizing Evans as a campaign contribution case, the court necessarily grouped Evans with McCormick, which was also a campaign contribution case. Thus, under Hairston, campaign contribution cases before the Fourth Circuit must now be decided by reading McCormick and Evans together.

193. Id.
194. 46 F.3d at 364, 372-73.
195. Id. at 364-65. Hairston was one of several defendants in this case. For simplicity, however, this paper only considers the case as it relates to Hairston.
196. Id. at 364.
197. Id. at 364-73.
198. Id. at 372-73 (emphasis added).
199. Despite the fact that the Fourth Circuit, like the Sixth Circuit, found Evans to be a campaign contribution case, the Hairston court cited to Blandford through use of a "But cf." cite. 46 F.3d at 365. The "But cf." cite, however, only indicates that, unlike the Sixth Circuit, the Fourth Circuit viewed Evans as being worded so broadly as to apply to non-campaign as well as campaign contribution cases.

The Fourth Circuit did not acknowledge that Hairston represents a change in position from Taylor. Yet, unlike the court in Hairston, the court in Taylor separated McCormick and Evans and only cited McCormick as authority in campaign contribution cases. See infra part X, the discussion of Taylor in this section.
The Fourth Circuit did not, however, indicate whether non-campaign contribution cases, such as *Hairston*, can be decided without reference to *McCormick*. Because the Supreme Court expressly limited *McCormick* to campaign contribution cases, one can argue that *McCormick* should have no effect on non-campaign contribution cases. Therefore, one can argue that, in the Fourth Circuit, the *quid pro quo* standard in non-campaign contribution cases may be lower than the *quid pro quo* standard in campaign contribution cases. Indeed, in deciding *Hairston* the Fourth Circuit may not have considered the *McCormick quid pro quo* requirement that payments be made “in return for an explicit promise or undertaking.”

However, even though *McCormick* does not apply to non-campaign contribution cases, one should not apply *Evans* to non-campaign contribution cases without consideration of *McCormick*. Regardless of whether *Evans* is applied to a campaign contribution case or to a non-campaign contribution case, the controlling “knowing” language of *Evans* is still the same. When *Evans* is applied to campaign contribution cases, this language must be read together with, and modified by, *McCormick*. Thus, if a more liberal interpretation of the “knowing” language is applied to non-campaign contribution, courts must give two different interpretations of the same language from the same case. If so, the subject of the pending case will determine how to analyze the legal precedent rather than the legal precedent determining how to analyze the pending case. Legal precedent should not be a variable controlled by the facts of the case before the court, and therefore, only one interpretation of the *Evans*

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200. The instruction given in *Hairston* barely qualifies as setting forth a valid *quid pro quo* requirement. See 46 F.3d at 373. The judge gave the following instruction at trial:

The term ‘under color of official right’ is the wrongful taking by a public officer of money or property not due to his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, while the mere acceptance of voluntary contributions by public officials is not extortion under color of official right, the wrongful use of otherwise valid official power may convert lawful action into unlawful extortion. So, if a public official accepts things of significant value to which he was not entitled, and which he knows were given to him with the expectation of influencing his conduct of his public office, such action would constitute extortion.

*Id.* at 372 (emphasis omitted). The last sentence standing alone probably does not provide a sufficient *quid pro quo* standard, but the court determined that the instruction as a whole, while “not a model for future cases... adequately conveyed the necessity of proof of a *quid pro quo...*” *Id.* at 373 (emphasis added).

While the above instruction is probably valid within a liberal reading of the “knowing” standard, the instruction may not have held up under the “knowing” standard as modified by the “explicit” standard of *McCormick*.
"knowing" language should exist. Furthermore, the best interpreta-
tion of the "knowing" language is a product of reading McCormick
and Evans together.

XI. Efficacy of Combining McCormick and Evans

Although it is a minority view among the circuits, the interpreta-
tion that Evans applies to both campaign and non-campaign contribu-
tion cases is the most rational view. Evans should be applied to
campaign contribution cases because Evans actually involved alleged
campaign contributions.201 One of the payments in Evans involved a
$1,000 check made payable to the defendant’s campaign. The defend-
ant in Evans also claimed that the entire $8,000 he received was a
campaign contribution.202 Given the check made payable to defend-
ant’s campaign, and a “campaign contribution” defense to the extor-
tion charges, it is difficult to understand how Evans can be interpreted
as to apply only to non-campaign contribution cases.

Nowhere in its decision does the Supreme Court state that Evans
is not a campaign contribution case or that Evans should not be ap-
plied to future campaign contribution cases. In fact, the Supreme
Court acknowledged that one basis for the appeal in Evans concerned
the petitioner’s allegation that the trial court “did not properly de-
scribe the quid pro quo requirement for conviction if the jury found
that the payment was a campaign contribution.”203 As Justice Ken-
nedy writes in his concurrence in Evans: “[r]eaders of today’s opinion
should have little difficulty in understanding that the rationale under-
ying the Court’s holding applies not only in campaign contribution
cases, but in all 18 U.S.C. § 1951 prosecutions.”204

A close reading of Evans also indicates that the Court intended
Evans to be reconciled with, rather than separated from, McCormick.
In addressing the adequacy of the trial court’s quid pro quo instruc-
tion, the Evans Court stated that the instruction “satisfies the quid pro

201. Evans, 504 U.S. at 257.
202. Id.
203. Id. at 268.
204. Id. at 278. The fact that none of the other Justices joined Kennedy in his concurrence
should not be interpreted as an indication that Kennedy stands alone on his view of the quid pro
quo standard. The main focus of Evans involved inducement, and Kennedy took a position on
the inducement issue different from the majority of the Court. The fact that the Kennedy con-
currence is not joined by any of the other Justices is most likely a reflection of Kennedy’s dispa-
rate views on the inducement issue. Kennedy's view on the quid pro quo issue is not much
different than the view advocated by Justice Stevens, who delivered the opinion of the Court in
Evans. See Lindgren, supra note 44, at 1735.
qu" requirement of McCormick . . . ."²⁰⁵ If the Court had wanted Evans and McCormick to apply to different situations and to be read separately, the Court would not have intermingled the two cases as it did. The language of the Court’s decision and the fact that Evans involved alleged campaign contributions indicates that Evans should be read with, rather than separate from, McCormick.

XII. SOCIAL POLICY: CONSIDERATIONS IN CHOOSING A QUID PRO QUO STANDARD

Selling a vote can be compared to selling any other piece of property.²⁰⁶ A sale is a contract requiring an offer, an acceptance, and some consideration. Selling a vote, however, has at least one crucial distinction from legally selling a piece of property. While society has an incentive to require proof of the legal sale through express terms, society has a contrasting incentive to allow proof of the illegal sale through less than express terms.²⁰⁷

Society requires expressness in its legal contracts because it wants the terms of these contracts to be clear.²⁰⁸ If people are fully informed when signing contracts, fewer disputes will subsequently arise over the contracts. Thus, a requirement of expressness perpetuates the end a contract is designed to achieve.²⁰⁹

Requiring expressness as proof of a criminal sale, however, defeats the end which society is trying to achieve.²¹⁰ In contrast to legal sales, those involved in criminal sales (whether of votes, drugs, or stolen property) have an incentive to establish their contracts in non-express terms.²¹¹ If the law requires these terms to be express in order to gain convictions, law enforcement can be frustrated by agreements made through "winks and nods."²¹² The issue in criminal contracts is not an issue of what was said, but an issue of what was understood.

²⁰⁵. Evans, 504 U.S. at 268. This quotation addressed the issue of whether a public official must take an affirmative step towards fulfilling the quid pro quo; the quotation arguably does not address whether the trial court instructions met the “explicit” requirement of McCormick. Nonetheless, the fact that the Court feels Evans and McCormick must be read together on any aspect of the quid pro quo issue is significant.
²⁰⁶. See Evans, 504 U.S. at 273-75 (Kennedy, J., concurring).
²⁰⁷. Lindgren, supra note 44, at 1733.
²⁰⁸. Id.
²⁰⁹. Id.
²¹⁰. Id.
²¹¹. Id.
²¹². Evans, 504 U.S. at 274 (Kennedy, J., concurring).
Thus, the development of a quid pro quo standard revolves around the issue of intent.\textsuperscript{213} The quid pro quo standard which we choose will depend upon how difficult we wish to make the prosecutor's burden of proving intent. Reading McCormick as requiring an express articulation establishes a high prosecutorial burden. An express articulation standard does not allow a jury to infer intent based upon the facts; intent must be self-evident, as shown through the express articulation.

Those in favor of a high quid pro quo standard cite the historical importance of and practical need for contributions to support political campaigns.\textsuperscript{214} Under this view, "the importance of amassing monies for broad-based political campaigns outweighs the burden on society caused by the few cases in which the government will be unable to show a quid pro quo."\textsuperscript{215} One can further argue that an express quid pro quo standard still leaves the jury with room for debate on the issue of intent.\textsuperscript{216}

Assume that the expressness standard would only take effect in campaign contribution cases. If so, for the expressness standard to take effect, the jury would have to first determine that the parties intended the payment to be a campaign contribution.\textsuperscript{217} If the jury determined that the parties never intended the payment to be a campaign contribution, the more stringent quid pro quo requirement would never be implicated.\textsuperscript{218}

Even using the above reasoning, however, a politician who received campaign contributions conditioned on an agreement for official action or inaction could avoid prosecution by simply stating the agreement in non-express terms. Those who advocate a quid pro quo standard which would allow a jury to infer a non-express agreement argue that any less stringent standard would make it too easy for corrupt officials to escape prosecution under the Hobbs Act.\textsuperscript{219} Since the

\textsuperscript{213} Most scholarly commentators, regardless of what quid pro quo standard they advocate, recognize intent as a crucial issue. Lindgren, supra note 44, at 1733-37; Finder & Androphy, supra note 98; Weissman, supra note 68, at 461; McCartney, supra note 67, at 198-204; Carey et al., supra note 68, at 340-42.

\textsuperscript{214} Weissman, supra note 68, at 460; see also McCormick, 500 U.S. at 272.

\textsuperscript{215} Weissman, supra note 68, at 462.

\textsuperscript{216} Id. at 461.

\textsuperscript{217} Id.

\textsuperscript{218} Id.

\textsuperscript{219} See Evans, 504 U.S. at 274 (Kennedy, J., concurring); Lindgren, supra note 44, at 1734 (stating that "in government corruption, only idiots or targets of government stings are likely to make things explicit"); McCartney, supra note 67, at 202 (stating that "a politician would have to be ignorant or apathetic to make direct promises of legislative benefit in exchange for payment")
inception of the jury system, juries have undertaken the onerous task of inferring intent from the facts. Thus, it is difficult to comprehend why we should suddenly retract this responsibility from the jury in cases where public officials are charged with extortion under the Hobbs Act. The prosecution’s high burden of establishing intent beyond a reasonable doubt provides public officials with the same guarantees of trustworthiness always associated with our criminal justice system.

A fair and effective *quid pro quo* standard must allow politicians to legally solicit funds which are vital to our political system and allow prosecutors to effectively prosecute those politicians who extort or sell their official power. Because the standard draws such a fine line, the standard must also be sufficiently lucid that politicians have adequate notice of what conduct will be considered illegal.

To determine how various interpretations of the *quid pro quo* standard would work, consider two hypotheticals which, I argue, straddle the line between permissible and impermissible conduct:

(1) The National Rifle Association (NRA) contributes a substantial sum of money to the campaign of Senator Smith. Senator Smith knows that the NRA expects him to vote favorably to the NRA’s position on any upcoming gun legislation. Despite this knowledge, Senator Smith never implicitly nor explicitly indicates that his vote will be influenced by the donation.

(2) Same facts as in Hypothetical (1), except the money is given to Senator Jones, who takes the money pursuant to a mutual non-express understanding and agreement that Senator Jones will vote favorably to the NRA’s position on any upcoming gun legislation.

In the first hypothetical, Mr. Smith does not take the money conditional to an agreement to vote in any certain way. Although Mr. Smith knows that the NRA is giving him the money because the NRA would like Mr. Smith to vote in line with the NRA’s agenda, Mr. Smith makes no agreement to perform a *quid pro quo* and, therefore, does not act illegally. In the second hypothetical, Mr. Jones does make an agreement, although not expressly articulated, to perform an official action in exchange for the contribution. Mr. Jones sold his vote and, therefore, I argue, acts illegally.

If a strict interpretation of the *McCormick quid pro quo* standard is applied to Hypothetical (2), the fact that Mr. Jones did not expressly articulate his agreement would allow Mr. Jones to escape conviction.

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and that "[t]he explicit requirement becomes virtually impossible to prove, and thus emasculates the Hobbs Act").
Such an interpretation would allow politicians smart enough to implicitly state their agreements to commit extortion with immunity. In contrast, the “knowing” standard of *Evans* would allow a jury to convict Mr. Jones of extortion under the Hobbs Act.

*Evans*, however, states that a public official can be convicted for receiving a payment “knowing that the payment was made in return for official acts.” In Hypothetical (1), even though Mr. Smith never made a *quid pro quo* agreement, he, arguably, did know that the NRA expected official acts in return for the campaign contribution. Thus, under a liberal reading of *Evans*, Mr. Smith could be convicted of extortion under the Hobbs Act. While Mr. Smith may act wrongfully in not expressly informing the NRA that their contribution will not affect his vote, Mr. Smith makes no agreement and has no intention of letting the NRA’s contribution affect his vote. Therefore, it would be unjust to convict Mr. Smith for extortion under the Hobbs Act.

The best *quid pro quo* standard comes from reading *McCormick* and *Evans* together, rather than separately. Read together, an explicit *quid pro quo* must be shown. The term “explicit,” however, simply means “not obscure or ambiguous, having no disguised meaning or reservation. *Clear in understanding.*” Thus, if a prosecutor presents facts to a jury which permit that jury to infer an unambiguous understanding between the official and the payor, the explicit requirement can be met. Because understanding of an unambiguous *quid pro quo* agreement cannot be shown in Hypothetical (1), Mr. Smith could not be convicted under the Hobbs Act. Mr. Jones, however, could be convicted even if he and the NRA never expressly articulated their *quid pro quo* agreement.

When *McCormick* and *Evans* are read together, the resulting product is a well defined *quid pro quo* standard which strikes a balance between the politician’s need to legally solicit contributions and the government’s need to effectively prosecute politicians who charge

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220. *Evans*, 504 U.S. at 268. The payments which the Supreme Court refers to are “payment[s] to which [the public official] was not entitled.” *Id.* Because payments received in return for an official act are, by definition, payments to which the official is not entitled, this language does not add to the Supreme Court’s holding.

221. By stating that *Evans* could be read in this manner I do not suggest that *Evans* should be read in this manner.

222. One should note, however, that because the Court expressly limited *McCormick* to campaign contribution cases, the requirement that *Evans* be read together with *McCormick* only exists in campaign contribution cases. Thus, the added protection of *McCormick* might not exist in non-campaign contribution cases.

for their votes. While effectively applied by the Sixth Circuit in Blandford, and by the Fourth Circuit in Hairston, this quid pro quo requirement is best expressed by Justice Kennedy in his concurrence in Evans.224 Justice Kennedy wrote:

a public official violates [the Hobbs Act] if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the quid pro quo is not satisfied. The official and the payor need not state the quid pro quo in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods . . . the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.225

This standard allows the jury to determine intent and to fulfill its role as the trier of fact - the role upon which our judicial system is founded. This standard also protects politicians by requiring strong proof of a quid pro quo agreement but does not emasculate the Hobbs Act by requiring an express showing of the quid pro quo agreement.

The quid pro quo requirement advocated by Justice Kennedy and applied by the Fourth and Sixth Circuits is the only quid pro quo requirement under which McCormick and Evans can be reconciled. That the Supreme Court intended the two cases to be reconciled in this manner is evidenced by the fact that three of the same Justices who advocated the “explicit” standard in McCormick also advocated the “knowing” standard in Evans.226 We must assume that our Supreme Court Justices are rational and would not issue two irreconcilable opinions on a single issue within a one year period.

XIII. CONCLUSION

The status of the quid pro quo requirement in cases involving public officials charged with extortion under the Hobbs Act has been in disarray since the Supreme Court issued the Evans decision in 1992. For two years after the Supreme Court decided Evans, circuit courts avoided any attempt to reconcile McCormick with Evans by failing to acknowledge that both cases involved campaign contributions. Avoiding the potential McCormick-Evans conflict by only applying Evans to

224. Evans, 504 U.S. at 274.
225. Id.
226. Justices White, Souter, and Kennedy were members of the majority in both McCormick and Evans. 500 U.S. at 259; 504 U.S. at 256.
non-campaign contribution cases may have been an easy solution, but it was not the correct solution. The two cases must be reconciled. Fortunately, the Sixth Circuit addressed the facts of Evans and McCormick and found a way to reconcile them. The solution of the Sixth Circuit provides a practical and effective approach to the quid pro quo requirement. The requirement properly emphasizes intent as the crucial element to be proved and correctly empowers the jury to infer that intent from the facts. Support for the Sixth Circuit’s position was provided by the Fourth Circuit’s recent decision in Hairston. More importantly, however, the Fourth Circuit opinion demonstrates that circuit courts in conflict with the Sixth Circuit may be willing to reverse their positions and avoid the need for yet another Supreme Court opinion on the quid pro quo issue.