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DISCLOSING BRIBES IN DISGUISE: CAMPAIGN CONTRIBUTIONS AS IMPLICIT BRIBERY AND ENFORCING VIOLATIONS IMPARTIALLY

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INTRODUCTION

When the American media displayed images of federal agents removing stacks of cash from former Congressman William Jefferson's refrigerator, the public's cynicism regarding the integrity of members of Congress reached an all time high. Jefferson's frozen cash and other recent examples of public corruption have perpetuated the image of politicians as self-interested wrongdoers who are for sale to the highest bidder. Although these high profile examples generate consensus about the appropriateness of criminal sanctions for egregious instances of public corruption, the clear solution for more implicit forms of bribery involving campaign contributions continues to evade election law scholars, government officials, and federal courts.[1] Complicating this issue is the central role of privately funded campaigns in American elections and the idea that government officials should be able to actively solicit campaign contributions in order to run successful campaigns.[2] Likewise, the Supreme Court has af-

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1 See generally Ilissa B. Gold, Note, Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s, 36 WASH. U. J.L. & POL'Y 261 (2011) (discussing how different courts have defined the scope of what constitutes extortion under the Hobbs Act); Jane Fritsch, The Envelope, Please; A Bribe's Not a Bribe When It's a Donation, N.Y. TIMES, Jan. 28, 1996, available at http://www.nytimes.com/1996/01/28/ weekinreview/the-envelope-please-a-bribe-s-not-a-bribe-when-it-s-a-donation.html (noting that "[t]he courts have struggled with the campaign-contribution issue" due to the difficulty in showing explicit evidence of a quid pro quo).

2 See Lauren Garcia, Note, Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute, 65 RUTGERS L. REV. 229, 230 (2012) ("American election campaigns and political plat-

firmed the First Amendment's protection of campaign contributions and independent expenditures for those running for elected office in the United States.[3] Thus, any reforms in this area must strike a careful balance to avoid violating the First Amendment.

As interpreted by the Supreme Court of the United States, the exchange of a campaign contribution in return for an explicit promise by a public official to perform or not to perform an official act violates federal law.[4] Although the case law is unclear, some courts have held that "wink and nod" relationships between members of Congress and campaign contributors do not constitute a violation of public corruption statutes—even though these relationships may still undermine the integrity of the democratic process.[5] Moreover, federal circuit courts have reached inconsistent results in interpreting whether a quid pro quo agreement in the context of campaign contributions needs to be "express" or "explicit."[6]

Accordingly, this Essay attempts to fill the void in this topic by arguing that implicit quid pro quo agreements between members of Congress and campaign contributors are worthy of disclosure. These implicit relationships pose great challenges for America's campaign finance system because they undermine the integrity of the democratic process by allowing campaign contributions to function as an improper means of influence over actions taken by public officials. However, the distinction between explicit and implicit quid pro quo agreements is not without merit when penalizing these types of relationships. Hence, this Essay argues that the most desirable way of addressing implicit quid pro quo agreements involving campaign contributions or independent expenditures is through non-criminal remedies that impose civil fines on members of Congress who fail to disclose these relationships under a new statute. The first part of this statute would require members of Congress to disclose solicitations when the member of Congress "knowingly" requests a campaign con-

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forms have historically been privately funded; public officials have an interest in soliciting contributions in order to represent and serve their constituents.").

3 Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) ("The expenditure limitations contained in the Election Campaign Act of 1971 represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

4 McCormick v. United States, 500 U.S. 257, 273 (1991) ("[I]f the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act . . . . This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.").

5 Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) ("The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.").

6 Garcia, *supra* note 2, at 231.

tribution or independent expenditure that is reasonably likely to return a tangible benefit to the contributor. The second part of this statute would require the member of Congress to disclose campaign contributions and independent expenditures offered or made by the contributor. The final part of this statute would authorize the Department of Justice to file civil actions against members of Congress who fail to comply with these disclosure requirements.

Part I of this Essay provides an overview of important statutes used to prosecute federal, state, and local officials for bribery and unlawful gratuities violations. Part II of this Essay explains how federal courts have interpreted and applied federal bribery statutes. Next, Part III argues that the Court properly interpreted federal law to prohibit explicit quid pro quo agreements, but that there is a need for additional remedies to deal with "wink and nod" agreements. Without an additional remedy, campaign contributions can effectively function as "implicit bribes" so long as there is an absence of an explicit quid pro quo agreement. This Part contends that current criminal law penalties are generally ineffective in deterring implicit bribery because of an individual's relative ease in avoiding explicit agreements. Moreover, Part III argues that the political nature of criminal investigations by overly aggressive prosecutors is an additional problem plaguing federal enforcement of bribery laws.

Part IV advocates for reform by proposing a statute that assesses civil penalties on members of Congress who fail to disclose campaign contributions that may not qualify as explicit quid pro quo promises, but still function as a form of implicit bribery. Moreover, this Part recognizes that a problem exists when overly zealous prosecutors use their authority to prosecute instances of bribery when motivated by a political agenda. Accordingly, this Part suggests ways for Congress to facilitate a more impartial process for enforcing bribery violations without risking an overly politicized process.

I. FEDERAL STATUTES REGULATING BRIBERY AND PUBLIC CORRUPTION

Few individuals would disagree over the necessity of criminalizing bribery—especially because the general public is generally harmed most by government officials who illegally benefit from their status as public servants. Unsurprisingly, Congress has enacted several laws to deter and punish these corrupt practices. This Part provides a brief overview of federal statutes targeting bribery and unlawful gratuities. Moreover, this Part explains how federal prosecutors often use the mail and wire fraud statutes and the Hobbs Act to prosecute state and local officials for public corruption.

Generally, most bribery statutes consist of five elements: (1) a public official, (2) a corrupt intent, (3) a benefit with value to the public official, (4) an intent to influence the public official, and (5) a requirement that the intended influence be aimed at an official act.[7] Although the exact wording of federal bribery law varies, these common elements can be identified in most laws prohibiting bribery.[8] Despite the agreement on the benefits of prohibiting forms of public corruption, the United States does not have a cohesive set of federal laws targeting public corruption.[9] Instead, corrupt agreements involving elected officials are prohibited by an overlapping framework of federal laws.[10]

One commonly cited example of federal law prohibiting bribery and unlawful gratuities is 18 U.S.C. § 201, which imposes fines and criminal sanctions for engaging in these acts.[11] Section (b)(1) of this statute applies to individuals engaging in the act of bribing a public official and targets those who "directly or indirectly, corruptly give[], offer[] or promise[] anything of value to any public official . . . or offer[] or promise[] any public official . . . to give anything of value to any other person or entity . . . ."[12] Moreover, under section (b)(1), this provision prohibits those from offering bribes "with intent to influence any official act; or to influence such public official [] . . . to commit . . . or allow, any fraud . . . ; [] or to induce such public official . . . to do or omit to do any act in violation of the lawful duty . . . ."[13]

Section (b)(2) of this statute applies to public officials and prohibits them from "corruptly" demanding, seeking, accepting, or agreeing to receive or accept "anything of value personally or for any other person or entity."[14] However, this section imposes an additional requirement that whoever engages in this conduct must do so in return for being influenced "in the performance of any official act."[15] Additionally, this section targets government officials who are induced to take action or to omit to take action in a manner that vio-

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7 Daniel Hays Lowenstein, Richard L. Hasen & Daniel P. Tokaji, Election Law: Cases and Materials 608 (5th ed. 2012).

8 *Id.* at 607.

9 Peter J. Henning, Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law, 18 ARIZ. J. INT'L & COMP. L. 793, 798 (2001).

10 *Id.*

11 18 U.S.C. § 201(b) (2000).

12 *Id.* § 201(b)(1).

13 *Id.*

14 *Id.* § 201(b)(2).

15 *Id.* § 201 (b)(2)(A).

lates his or her official duties.[16] Section (a) of 18 U.S.C. § 201, which defines important terms found in this statute, explains that "public officials" includes "federal officials but not state and local officials."[17]

In addition to § 201(b) targeting bribery, § 201(c) of this statute prohibits the giving or receiving of an unlawful gratuity and imposes fines and criminal sanctions for violations.[18] This section prohibits individuals from indirectly or directly providing anything of value to any public official "for or because of any official act . . . ."[19] Similarly, this section prohibits federal public officials from indirectly or directly seeking, demanding, or agreeing to accept "anything of value personally for or because of any official act . . . ."[20] However, unlike the provisions governing bribery, unlawful gratuity offenses apply to former and current public officials and do not require the actions be taken "corruptly."[21] Moreover, this section does not require any intent and the public official must receive the unlawful gratuity personally in order to constitute an offense.[22]

Another federal bribery statute imposing criminal sanctions and fines is 18 U.S.C. § 666, which is known as the "federal funds bribery" statute.[23] Congress enacted this law to prevent individuals from bribing state and local government officials by awarding government contracts that are subsidized by federal funds.[24] Although § 666's provisions contain similar language as 18 U.S.C. § 201, this statute makes it illegal to bribe an officer, employee, or agent of any organization, state, or local government that receives more than $10,000 in federal funding during a one-year period.[25] Overall, section (a)(1)(B) of § 666 applies to the official being bribed, whereas section (a)(2) applies to the individual soliciting the bribe.[26] Moreover, this statute authorizes fines and up to a ten-year maximum prison sentence if individuals are found guilty of violating these provisions.[27]

16 *Id.* § 201 (b)(2)(B).
17 18 U.S.C. § 201(a); LOWENSTEIN ET AL., *supra* note 7, at 608.
18 18 U.S.C. § 201(c).
19 *Id.* § 201(c)(1)(A).
20 *Id.* § 201(c)(1)(B).
21 LOWENSTEIN ET AL., *supra* note 7, at 609.
22 *Id.*
23 Garcia, *supra* note 2, at 232.
24 *Id.*
25 18 U.S.C. § 666(b) (2006).
26 *Id.* § 666(a)(1)(B)–(a)(2).
27 *Id.* § 666(a)(2).

In 1988, Congress expanded the mail and wire fraud statutes to include a public corruption component.[28] Traditionally, the federal mail and wire fraud statutes prohibited individuals from utilizing the mail or interstate wires in connection with a scheme to defraud.[29] Both of these statutes prohibit "any scheme or artifice to defraud" or obtaining money or property "by means of false or fraudulent pretenses, representations, or promises."[30] By amending this statutory scheme to combat corruption, Congress added § 1346 by defining "scheme . . . to defraud" to include actions that defraud another of the "intangible right of honest services."[31] However, Congress failed to adequately define "intangible right to honest services" when it first enacted this provision because this term is ambiguous.[32] Until recently, this provision caused prosecutors and courts considerable headaches in determining the scope of honest services fraud.[33] In *Skilling v. United States*, the Supreme Court partially alleviated this problem by declaring that the statute's definition of "scheme or artifice to defraud" only covers bribery and kickback schemes.[34]

In addition to the action taken by Congress, the Supreme Court construed an important statute as prohibiting public corruption.[35] The Court construed the Hobbs Act, which originally targeted extortion committed by members of organized crime, to prohibit bribery in certain circumstances.[36] The Act defines the term "extortion" as "the 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*."[37] The Court concluded that federal prosecutors could use the Hobbs Act to prosecute public officials, including state and local officials, for acting "under color of official right" in accepting payments that are made in return for an "explicit promise

28 Thomas M. DiBiagio, Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes, 105 DICK. L. REV. 57, 62 (2000).

29 *See* 18 U.S.C. §§ 1341, 1343 (2012) (codifying the mail fraud prohibition in § 1341 and the wire fraud prohibition in § 1343).

30 *Id.* §§ 1341, 1343.

31 18 U.S.C. § 1346 (internal quotation marks omitted).

32 DiBiagio, *supra* note 28, at 63.

33 *Id.*

34 130 S. Ct. 2896, 2907 (2010).

35 McCormick v. United States, 500 U.S. 257 (1991); *see also* Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1629 (1992) (looking at historical interprations of the Hobbs Act).

36 *Id.*

37 18 U.S.C. § 1951(b)(2) (2012) (emphasis added).

or undertaking by the official to perform or not to perform an official act."[38] As will be further explained, this "explicit quid pro quo" violation of the Hobbs Act occurred in the context of a campaign contribution functioning as a means of bribery.[39]

Although the United States does not have a single, cohesive statute targeting public corruption, Congress has enacted several laws prohibiting public officials and individuals from engaging in bribery and accepting of unlawful gratuities. Moreover, Congress has broadened the scope of the wire and mail fraud statutes to cover acts in which federal, state, and local officials engage in schemes to defraud another's "intangible right to honest services."[40] Finally, the Supreme Court has construed the Hobbs Act to prohibit instances where public officials accept campaign contributions with an explicit quid pro quo agreement with contributors.

II. FEDERAL CASE LAW GOVERNING BRIBERY

While Congress has enacted important statutes prohibiting bribery and other forms of public corruption, the Supreme Court and lower courts have grappled with how properly to apply and interpret these statutes. A background on the case law governing bribery is important for understanding the proposed statute that this Essay advances in later sections. Accordingly, this Part briefly explains the Supreme Court's most significant decisions related to bribery and explains how federal courts are struggling to come to a consensus over the proper application of the Court's decisions in this area.

In *McCormick v. United States*, the Supreme Court considered whether a conviction for extortion under the Hobbs Act required federal prosecutors to prove the existence of an explicit quid pro quo agreement between a public official and a campaign contributor.[41] A member of the West Virginia legislature sponsored legislation benefitting a specific cause supported by a physician interest group.[42] In return, this group provided the legislator with a campaign contribution.[43] After a grand jury indicted the legislator for violating the Hobbs Act by extorting payments "under color of official right," the legislator argued a violation required an explicit quid pro quo ar-

38 *McCormick*, 500 U.S. at 273–74.
39 *Id.* at 260.
40 18 U.S.C. § 1346.
41 *Id.* at 274.
42 *Id.* at 259–60.
43 *Id.*

rangement.[44] Agreeing with the legislator's argument, the Supreme Court held that the Hobbs Act required an explicit quid pro quo exchange between contributor and public official for a campaign contribution to be considered extortion under the Hobbs Act.[45]

Shortly after the *McCormick* decision, another public corruption case prosecuted under the Hobbs Act appeared before the Supreme Court.[46] In *Evans v. United States*, federal agents successfully convinced a Georgia public official to support a rezoning proposal in exchange for a bribe.[47] The Court held that passive acceptance of a bribe by a public official constituted a violation of the Hobbs Act even without the official taking any specific affirmative action in exchange for the benefit.[48] The Court explained that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[49] Justice Anthony Kennedy's concurring opinion tried to provide guidance for how this decision fit within *McCormick*'s framework.[50] Arguing that a quid pro quo agreement does not need to be express, Justice Kennedy explained that "the [public] 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."[51] However, Justice Kennedy's argument against an "express" requirement seemed to conflict with the requirement of an "explicit" agreement between the public official and campaign contributor under *McCormick*.[52]

In the aftermath of Justice Kennedy's concurring opinion in *Evans*, federal courts have struggled over the distinctions between the express and explicit language and in what context these distinctions apply.[53] Moreover, the Court did not explain whether *Evans* estab-

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44 *Id.* at 261, 265–66.

45 *Id.* at 273–74.

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

47 *Id.* at 257.

48 *Id.* at 269–270 (quoting Commonwealth v. Wilson, 30 Pa. Super. 26 (Pa. Super. Ct. 1906)).

49 *Id.* at 268.

50 *See* Gold, *supra* note 1, at 270–71 (analyzing Justice Kennedy's concurrence).

51 *Id.* at 271 (alteration in original) (quoting Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)) (internal quotation marks omitted).

52 *See id.* at 270–71 (stating that there is tension between the requirement of explicitness in a quid pro quo agreement and Justice Kennedy's concurrence that a quir pro quo does not need to be express).

53 Steven C. Yarbrough, The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials, 31 TULSA L.J. 781, 794–96 (1996).

lished a separate standard for prosecuting bribery outside of the campaign contribution context or whether *Evans* modified the standard set forth in *McCormick*.[54] In addition, it remains unclear whether the explicit quid pro agreement as interpreted in *McCormick* and *Evans* applies to other federal bribery statutes such as § 666 federal funds bribery.[55]

Hence, the circuit courts have been left to reconcile the requirement of explicitness in a quid pro quo agreement from *McCormick* with Justice Kennedy's argument in *Evans* that a quid pro quo need not be "express" in order to violate the Hobbs Act.[56] Without clear guidance from the Supreme Court on these questions, the circuit courts have split on some of these issues.[57] The majority view among circuit courts is that *Evans* established a separate standard that applies in bribery cases outside of campaign contributions whereas *McCormick* applies exclusively in the campaign contribution context.[58] Taking the minority view on this issue, the Eleventh Circuit reconciled *McCormick* and *Evans* by explaining that the quid pro quo need only be explicit, not express, and that an explicit agreement "may be 'implied from [the official's] words and actions.'"[59] Until the Supreme Court resolves this split, the confusion regarding the differences between "express" and "explicit" and other questions regarding *McCormick* and *Evans* are likely to persist.

Another recent Supreme Court decision that relates to Congress's decision to amend the mail and wire fraud statutes is *Skilling v. United States*.[60] Among other charges, federal prosecutors alleged that former Enron executive, Jeffrey Skilling, violated the wire fraud statute by seeking to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services" by propping up Enron's financial statements prior to bankruptcy.[61] In response to this charge, Skilling

54 *Id.* at 794–95.

55 Garcia, *supra* note 2, at 239.

56 Gold, *supra* note 1, at 271–72.

57 *Id.* at 271.

58 *See, e.g.*, United States v. Abbey, 560 F.3d 513, 517–18 (6th Cir. 2009); United States v. Kincaid-Chauncey, 556 F.3d 923, 936–38 (9th Cir. 2009); United States v. Antico, 275 F.3d 245, 256–57 (3d Cir. 2001); United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993); United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993).

59 United States v. Siegelman, 561 F.3d 1215, 1226 (11th Cir. 2009) (alteration in original) (quoting Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring)).

60 130 S. Ct. 2896, 2908 (2010); *see also* John S. Gawey, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 413 (2011) (discussing the *Skilling* decision).

61 *Skilling*, 130 S. Ct. at 2908 (alteration in original) (citations omitted) (internal quotation marks omitted).

alleged that § 1346 was unconstitutionally vague.[62] Agreeing with Skilling, the Supreme Court narrowed this provision by declaring that the statute's definition of "scheme or artifice to defraud" only covers bribery and kickback schemes.[63]

In the aftermath of the Supreme Court's important decisions in *McCormick* and *Evans*, the circuit courts' decisions demonstrate that federal courts far from agree on the proper scope and interpretation of the explicit and express agreements in the context of campaign contributions. However, as will be discussed in the next Part, the complex issues raised by bribery involving campaign contributions raise far more challenging questions than the confusion facilitated by the explicit-or-express distinction.

III. PROBLEMS WITH THE SYSTEM: THE *MCCORMICK* STANDARD, THE INADEQUACY OF CRIMINAL SANCTIONS, AND POLITICALLY MOTIVATED ENFORCEMENT.

Even aside from the uncertainty with respect to the quid pro quo requirement for bribery and extortion, other important problems related to federal bribery laws pose great challenges for policymakers and federal judges. Three are especially significant. First, the Court in *McCormick* properly interpreted the statute to require an explicit agreement or promise, but there is a need for additional remedies to deal with "wink and nod" agreements. Without an additional remedy, campaign contributions can effectively function as "implicit bribes" so long as there is an absence of an explicit quid pro quo agreement. Similarly, criminal penalties for bribery are both ineffective and undesirable for implicit quid pro quo agreements. Finally, the expansive discretion of politically motivated prosecutors in enforcing bribery laws presents a major challenge in the current system.

A. Implicit and Explicit Bribes and Constitutional Considerations

Among the challenging problems facing government officials is the artificial delineation of campaign contributions as legitimate or illegitimate by the Court's decision in *McCormick*. Because the *McCormick* standard requires an explicit agreement, public officials can still seek bribes without promising an explicit benefit in return—

62 *Id.* at 2925.
63 *Id.* at 2932.

all without violating the Hobbs Act.[64] For instance, if a lobbyist provides an elected official with a sum of money to introduce legislation on his or her behalf or to vote on a bill in a particular way, then the two individuals are obvious criminals under federal law.[65] On the other hand, a campaign contributor can provide an elected official's campaign with large sums of money and the public official can easily return favors to this contributor through a "wink and nod" relationship.[66] Likewise, public officials and individuals seeking influence can arrange for large independent expenditures on behalf of the public official in exchange for a benefit. As long as the contributor, or independent spender, and the public official do not explicitly arrange for this agreement, then it is legal under *McCormick* as an "implicit" bribe.[67]

Despite this distinction facilitated by the Court in *McCormick*, the practical difference between explicit and implicit agreements involving campaign contributions in terms of public corruption is immaterial.[68] Indeed, Justice John Paul Stevens recognized this problem in his dissenting opinion in *McCormick* by stating, "Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require."[69] Further, without meaningful reform, these relationships involving campaign donations will continue to undermine the public's trust and confidence in the ability of elected officials to make objective decisions in the best interest of the public.[70]

However, this problem involving "implicit" forms of bribery with campaign contributions is not so simple. Under the Hobbs Act, the easy solution to this problem would allow federal prosecutors to bring extortion charges against public officials who accepted or solicited campaign contributions without an express agreement to provide a corresponding benefit. The only problem with this potential solution is the First Amendment to the Constitution of the United States. Although the Framers of the Bill of Rights did not include campaign

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64 Jeremy N. Gayed, "Corruptly": Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right, 78 NOTRE DAME L. REV. 1731, 1770 (2003).

65 Fritsch, *supra* note 1.

66 *Id.*

67 *Id.*

68 Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369, 374–75 (1993).

69 McCormick v. United States, 500 U.S. 257, 282 (1991) (Stevens, J., dissenting).

70 Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 42 (1996).

contributions as explicitly protected by the text of the First Amendment, the Supreme Court has affirmed the fundamental role of campaign contributions and expenditures functioning as protected political speech under the First Amendment.[71] The ability of public officials to solicit campaign contributions and the freedom of individuals to donate campaign contributions enjoy constitutional protection.[72]

Thus, simply allowing federal prosecutors to bring charges against public officials for implicit bribery involving campaign contributions or independent expenditures could be problematic. For instance, say an interest group against a specific provision of a federal farm bill provided a $500 campaign contribution to a member of Congress who the group believed would align with its interests—without an implicit agreement that the member would provide a benefit. Later, the member of Congress changes the provision in the farm bill and meets with this group a few times. If prosecutors could bring criminal charges against the group or the member of Congress by alleging an implicit agreement, then this may chill both the legislator's meeting with the group and the group's donation because of fear of prosecutors "linking" this arrangement as an implicit quid pro quo exchange.

Further complicating this problem is the fact that privately funded campaigns have maintained an essential role in American elections. In fact, raising large sums of money through campaign contributions, whether this is desirable or not, is a fundamental aspect of the American political system.[73] Raising campaign contributions has become so important to the re-election efforts of public officials, that widespread concerns have developed about the amount of time members of Congress must spend fundraising in order to be competitive for reelection.[74] With dim hopes of presidential candidates accepting public financing in the near future and without a corresponding scheme of public financing for members of Congress, the vital role of privately funded campaigns and the importance of campaign contributions is unlikely to change soon.[75] Hence, any reform in this area needs to

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71 *See* Buckley v. Valeo, 424 U.S. 1,16–19 (1976) (per curiam) (holding that contributions and expenditures are speech protected by the First Amendment).

72 *Id.* at 19.

73 Jason B. Frasco, Note, Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States, 92 CORNELL L. REV. 733, 735–37 (2007).

74 *Id.* at 737.

75 *See* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 327–28 (2010) (considering ideas for campaign finance reform).

be carefully executed to avoid chilling constitutionally protected political speech or stifling campaign activities.

After examining the constitutional and political considerations making this problem more complex than at first glance, the ultimate question becomes how to regulate implicit bribes in the context of campaign contributions without rendering these reforms as constitutionally suspect. Before evaluating how to address this tension, it is worth discussing two other problems related to bribery involving campaign contributions.

B. The Inadequacy of Criminal Sanctions

Despite constitutional issues related to bribery and campaign contributions, other problems with federal statutes relate to the adequacy and desirability of criminal sanctions for those who violate public corruption laws. First, this Part argues that the current criminal penalties that are imposed for violating an explicit quid pro quo exchange are generally ineffective in deterring implicit forms of public corruption—especially bribery. Second, this Part contends that imposing criminal penalties on public officials or those seeking influence based on implicit agreements are inappropriate given the devastating effects these penalties can have on an individual's personal life, career, and freedom.

Although the Supreme Court's delineation of illegitimate and legitimate campaign contributions may have appealed to lower courts because of the appearance of a bright-line rule involving "explicit" agreements, the *McCormick* test has certainly caused headaches for prosecutors.[76] On one hand, this distinction has allowed prosecutors to successfully convict public officials when the official maintains records of their interactions with those seeking influence or when clear evidence exists of these illicit agreements. For instance, former Senator Bob Packwood maintained diary entries that detailed his interactions with third parties and provided clear evidence of explicit quid pro quo agreements involving campaign contributions.[77] Likewise, former Congressman Randy "Duke" Cunningham kept detailed records of his bribes based on the price paid and the project requested.[78]

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76 *See* Alexa Lawson-Remer, Note, *Rightful Prosecution or Wrongful Persecution? Abuse of Honest Services Fraud for Political Purpose*, 82 S. CAL. L. REV. 1289, 1318 (2009) (stating that there are problems distinct to public corruption prosecutions).

77 S. Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 19, 21 (D.D.C. 1994); Fritsch, *supra* note 1.

78 Nick Stewart, Striking the New Balance: Redefining Earmarking in the Post Randy "Duke" Cunningham World, 39 PUB. CONT. L.J. 919, 922 n.12 (2010).

In other instances, undercover federal agents can provide taped evidence of a public official's willingness to engage in an agreement involving campaign contributions.

On the other hand, this clear distinction between legitimate and illegitimate campaign contributions is problematic for prosecutors in most cases because usually legislators and public officials are intelligent enough not to keep extensive paper trails detailing their explicit quid pro quo arrangements. Without documented evidence, the prosecutor is left without sufficient proof to secure a conviction for violating the Hobbs Act.[79] Because public officials and individuals seeking influence know they are unlikely to be prosecuted as long as they do not keep records of their exchanges, politicians can easily evade criminal liability.[80] Therefore, the line between explicit and implicit quid pro quo agreements in this context is insufficient in deterring implicit forms of corruption when public officials can easily circumvent prosecution.

Even in the late 1990s, one Washington D.C. lawyer who previously represented politicians in corruption cases remarked, "[I]t is hard for a prosecutor to make a campaign contribution look like a bribe unless there is 'the most explicit evidence' of a quid pro quo . . . people seem to have smartened up to where they don't have those conversations and writings."[81] With the line between illegal and legal clearly drawn, public officials can avoid crossing the illegal line with simple "wink and nods" that evade criminal liability.[82] Regardless of the explicitness, the problem of public corruption still lingers in these implicit agreements because they facilitate unequal access and influence over politicians based on the contribution or independent expenditure.

Aside from the ease with which politicians can evade explicit agreements and thus prosecution under the Hobbs Act, the question becomes whether criminal sanctions are appropriate for implicit agreements involving campaign contributions. While criminal sanctions are appropriate for egregious violations of bribery statutes, imposing criminal sanctions on public officials and campaign contributors for "wink and nod" relationships is undesirable for a number of reasons. Foremost among these reasons is the risk of chilling legitimate contributions or solicitations by criminalizing implicit quid pro quo agreements. Because the line between explicit and implicit quid

79 Fritsch, *supra* note 1.

80 *Id.*

81 *Id.*

82 *See* LOWENSTEIN ET AL., *supra* note 7, at 628.

pro quo agreements is not clear in all cases, criminalizing implicit forms of bribery involving campaign contributions could chill protected activity altogether.[83] If an individual could be prosecuted for donating to a member of Congress's campaign, even without a preconceived implicit agreement with the legislator, contributors could fear criminal liability if a benefit from the legislator eventually makes its way in their direction. Accordingly, the contributor would be chilled into not donating to the public official's campaign. Likewise, members of Congress may fear that soliciting campaign contributions could result in criminal liability if implicit agreements are criminalized, which would also decrease their likelihood of engaging in constitutionally protected activities.[84]

Furthermore, criminalizing implicit forms of bribery is inappropriate because of the idea that criminal penalties should be reserved for serious forms of immoral behavior that are deserving of more severe repercussions.[85] As will be discussed more extensively in the following section, allowing prosecutors the discretion to bring criminal charges against public officials and contributors for "implicit agreements" could ignite a new storm of politically motivated witch hunts where members of Congress face harsh criminal sanctions for conduct that is inherently political—not criminal.[86]

While the explicit quid pro quo requirement does little to deter public officials from engaging in implicit forms of bribery involving campaign contributions, imposing criminal sanctions on these types of agreements is neither an appropriate nor desirable solution. Hence, reform must carefully assess these constitutional and criminal law considerations to avoid sabotaging a meaningful and effective solution. Before outlining this solution, the next Part considers the problems that result from prosecutorial discretion and politically motivated enforcement of bribery violations more closely.

C. Politically Motivated Prosecution and Enforcement

The problems associated with bribery and campaign contributions are not limited to the adequacy of criminal penalties. Instead, the enforcement of these laws raises concerns when prosecutors abuse

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83 John L. Diamond, Reviving Lenity and Honest Belief at the Boundaries of Criminal Law, 44 U. MICH. J.L. REFORM 1, 19 (2010).

84 *See supra* Part III.A for an example demonstrating this point.

85 *See* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 560–62 (2012) ("[C]ongress clearly viewed illegal-gratuities offenses as distinct from, and far less blame-worthy than, bribery.").

86 Diamond, *supra* note 83, at 19.

their discretion by bringing public corruption charges for political or career-oriented purposes. First, this Part argues that current bribery laws allow federal prosecutors expansive discretion to bring actions for bribery and other related offenses under the Hobbs Act, and the mail and wire fraud statutes. Moreover, this Part argues that criminalizing implicit agreements between legislators and campaign contributors could compound the problems associated with prosecutorial discretion, which supports non-criminal penalties as the most desirable mechanism of regulating implicit quid pro quo agreements.

Despite claims that federal prosecutors occupy an independent role by serving in the Department of Justice, such assertions are overly idealistic. United States Attorneys are appointed by the President, serve at pleasure of the Commander-in-Chief, and are thus political appointees.[87] Generally, federal prosecutors are provided with a wide degree of discretion when deciding whether to file charges against an individual or entity.[88] Given this expansive discretion, federal prosecutors often face external pressures from members of Congress, the White House, and other elected officials to initiate investigations or charges that are politically motivated.[89] Furthermore, politics can play a major role in prosecutorial discretion when U.S. Attorneys conduct investigations and instigate prosecutions that are aimed at furthering their own careers in public service.[90] Thus, public corruption statutes can be used as a powerful weapon when federal prosecutors are motivated by political or personal calculations.

Under § 1346's definition[91] of "scheme or artifice to defraud," the wire and mail fraud statutes are particularly susceptible to being used by prosecutors for political means because of this provision's broad scope and flexible standards for proving violations.[92] Indeed, numerous examples have occurred in recent times and can have extremely damaging effects on the targeted public official's personal lives, careers, and liberty. For example, federal prosecutors brought criminal charges against former Alabama Governor Don Siegelman for violat-

87 Lawson-Remer, *supra* note 76, at 1310.

88 *Id.* at 1312.

89 *Id.* at 1316.

90 Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 752 (2005).

91 18 U.S.C. § 1346.

92 Lawson-Remer, *supra* note 76, at 1291; *see also* Anthony J. Gaughan, *The Case for Limiting Federal Criminal Jurisdiction over State and Local Campaign Contributions*, 65 ARK. L. REV. 587, 590, 598 (2012) ("Section 1346 empowers the Justice Department to substitute its own judgment of what constitutes a corrupt campaign contribution for the judgment of state legislatures across the country.").

ing § 1346 by committing honest services fraud.[93] After Siegelman's conviction and subsequent appeal process, it was revealed that gross prosecutorial misconduct occurred in this case because of political calculations.[94] The political motivations may have originated from the fact that Siegelman was a popular Democrat in a traditionally conservative state while the Department of Justice was packed with George W. Bush appointees who may have wanted to capitalize on the governor's missteps.[95] Among the most egregious charges of prosecutorial misconduct in this case were that federal prosecutors knowingly relied on false evidence in securing Siegelman's conviction and that these prosecutors also withheld exculpatory evidence from the defense.[96] However, after a six-year legal battle involving numerous appeals, Siegelman returned to prison in 2012 to serve a remaining sixty-nine month sentence.[97] The Siegelman example alone demonstrates how the political motivations of aggressive prosecutors hell-bent on a bribery conviction can destroy the career and liberty of a popular governor even if the prosecutors engage in misconduct.

Another prominent example demonstrating the abuse of prosecutorial discretion is evidenced by the fate of former Alaska Senator Ted Stevens. While the case against Stevens did not specifically involve bribery charges, federal prosecutors brought charges against him for failing to disclose numerous expensive gifts he received, which included extensive renovations to one of his homes in Alaska.[98] In late October 2008, Stevens was convicted on all seven charges

93 United States v. Siegelman, 467 F. Supp. 2d 1253, 1257 (M.D. Ala. 2006) (detailing the various counts against Governor Siegelman, including a charge for "conspiracy to 'defraud and deprive the State of Alabama of its right to the honest and faithful services' of Siegelman in his role as governor").

94 *See* Scott Horton, *CBS: More Prosecutorial Misconduct in Siegelman Case*, HARPER'S MAG. (Feb. 24, 2008, 9:18 PM), http://harpers.org/blog/2008/02/cbs-more-prosecutorial-misconduct-in-siegelman-case-alleged/ ("In other words, not being able to beat Siegelman at the polls, Woods believes that his own party corruptly used the criminal justice process to take out an adversary.").

95 Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. REV. 1, 13–14 (2008) (detailing the unusually tenacious nature of the investigation against Siegelman in proportion to the conduct under investigation).

96 *See* Gershman, *supra* note 95, at 13–14 (detailing the evidence showing that the prosecution of Siegelman was politically motivated); Horton, *supra* note 94 ("[T]he key evidence that the prosecutors brought forward was false, and they knew it was false.").

97 Kim Chandler, *Don Siegelman Returns to Prison Tuesday*, AL.COM (Sept. 10, 2012, 7:40 PM), http://blog.al.com/spotnews/2012/09/don_siegelman_returns_to_priso.html.

98 Elizabeth Cameron Hernandez & Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 207 (2011) ("The evidence presented at trial revealed that VECO Corporation, an oil services company, remodeled Senator Stevens'[s] home.").

brought against him[99] and narrowly lost re-election the following month despite being the longest-serving Republican senator in history.[100] However, in December 2008, an FBI agent came forward and accused the prosecution team of committing numerous forms of misconduct in the Stevens case.[101] Prosecutors purposefully withheld exculpatory evidence from the defense and were alleged to have sent a key witness back to Alaska knowing he would provide favorable testimony to the defense.[102] By early 2009, a federal court set aside Steven's conviction and Attorney General Eric Holder began an official investigation into the numerous allegations of prosecutorial misconduct.[103]

The Stevens and Siegelman examples demonstrate the devastating effects of federal authorities bringing public corruption charges that may be warranted, but are tainted by prosecutorial misconduct as a result of improper motivations. Hence, in proposing meaningful reform, Congress and other federal agencies must find ways to ensure impartiality when conducting investigations that involve bribery and other forms of public corruption. Without ensuring increased independence in the manner in which federal prosecutors investigate and bring bribery charges, the public's trust in those who investigate corrupt politicians may be undermined by the improper motivations of these prosecutors. More importantly, without meaningful reform to prevent these abuses, public officials' careers, lives, and families will continue to be at the mercy of aggressive federal prosecutors.

Similarly, reform that would allow federal prosecutors the authority to bring bribery criminal charges for an implicit agreement involving campaign contributions would compound the problems that already exist with prosecutorial discretion. If federal prosecutors could bring criminal charges against a public official for receiving a campaign contribution based on evidence that demonstrated less than an explicit agreement, then these prosecutors could be even more empowered to declare political conduct as criminal.[104] With the essential

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99 *Id.* at 208.

100 Paul Kane, *Ted Stevens Loses Battle for Alaska Senate Seat*, WASH. POST, Nov. 19, 2008, *available at* http://articles.washingtonpost.com/2008-11-19/politics/36878154_1_republican-in-senate-history-gail-fenumiai-alaska-republican-party/.

101 *See* Hernandez & Ferguson, *supra* note 98, at 209 ("Most importantly, Agent Joy revealed that the prosecutors purposefully withheld exculpatory evidence from the defense.").

102 *Id.*

103 *Id.*

104 *See* Diamond, *supra* note 83, at 19 ("At least three circuits have attempted to reconcile *McCormick* and *Evans* by suggesting express agreements are required for campaign contributions, but not other payments." (footnote omitted)).

role of privately funded campaigns, public officials cannot avoid fundraising. Soon, public officials of opposing political parties could become the prime target of federal prosecutors looking to taint the official's re-election hopes by bringing criminal charges for an implicit agreement.[105] Thus, criminalizing implicit quid pro quo arrangements that involve campaign contributions may serve to strengthen prosecutorial discretion by broadening the scope of charges for which prosecutors can target public officials for political purposes.

Although federal prosecutors maintain a vital role in bringing those who violate public corruption statutes to justice, expansive discretion can create major problems with how the federal government enforces its laws. In working to solve these problems, criminalizing implicit agreements between legislators and campaign contributors is not the proper solution. Criminalizing implicit relationships could compound the problems associated with prosecutorial discretion, which is an additional factor supporting non-criminal penalties—a solution that will be fully addressed in the following Part of this Essay.

IV. REFORMING THE CURRENT SYSTEM

With criminal sanctions too harsh and otherwise inappropriate for implicit agreements between public officials and campaign contributors, civil penalties and disclosure are the best means of overcoming these challenges. Facing complicated constitutional issues, the campaign finance system needs a standard that will provide meaningful reform by illuminating improper "wink and nod" relationships without deterring protected political speech or campaign activities. Additionally, the current system needs a more fair and independent process of investigating instances where contributors and public officials act improperly. The first part of this section proposes a statutory scheme that addresses the challenges created by implicit quid pro quo agreements. The second part urges Congress to adopt procedures that facilitate a more independent process of enforcing federal laws targeting public corruption.

A. The Creation of Civil Penalties for Implicit Bribes

While the Supreme Court's hostility toward direct limits on independent expenditures has been well publicized in wake of *Citizens United*, the Court has generally been more receptive to disclosure re-

105 *See id.* at 19, 21.

quirements.[106] Although the effectiveness of disclosure has been questioned among election law scholars,[107] disclosure requirements still provide a number of benefits to voters, organizations, and the media by providing these groups with information that may not otherwise be available and by allowing these groups to make more informed decisions about who sits in Congress.[108] Further, disclosure requirements may deter public officials and contributors from engaging in improper agreements that taint the political system by granting unfair access and influence over the legislative process.[109] Accordingly, this Part proposes a statute that imposes civil fines on members of Congress who fail to disclose implicit quid pro quo agreements involving campaign contributions or independent expenditures.

The first part of the proposed statute covers requests for campaign contributions or independent expenditures initiated by a member of Congress or his or her staff members. The italicized parts of this provision will be discussed in greater detail below. Part (A) of this proposed statute reads:

> (A) A member of Congress who *knowingly* solicits, requests, seeks to obtain, or obtains a campaign contribution or independent expenditure from an individual or group, where the member of Congress knows or should know that the individual or group is reasonably likely *to have an interest* in legislation or official actions taken by the member of Congress in his or her service on a committee or in general congressional service, must:
>
> Disclose such solicitation request, seeking of or receiving of campaign contribution or independent expenditure to the Federal Elections Commission within two weeks from the time in which the member of Congress's campaign solicits, requests, or receives such contribution or within two weeks in which the independent expenditure is solicited, requested, or made on behalf of the member Congress.

Importantly, this statute includes a "knowingly" scienter requirement in order for a member of Congress to be required to disclose the request for a campaign contribution or independent expendi-

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106 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) (noting that disclosure requirements are preferable to a restriction of activity because "[t]ransparency enables the electorate to make informed decisions").

107 *See, e.g.*, Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 288 (2010) ("[I]t is doubtful that disclosure really enables the voters generally to police campaign finance practices."); Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1849 (2013) (arguing that "disclosure does not necessarily inform voters").

108 *See* Gilbert, *supra* note 107, at 1852 ("Yes, [disclosure] exposes the sources of speech, and that provides voters with information, just as *Buckley* and conventional wisdom hold.").

109 *See* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 442–43 (2012) (crediting disclosure for its anticorruption function).

ture. This "knowingly" requirement would prevent trapping members of Congress in situations where the member is reasonably weary of conflict of interest agreements and genuinely wants to avoid violating the provisions of this statute. Moreover, this "knowingly" requirement would also prevent politically motivated enforcement of this statute by overly aggressive prosecutors. In situations where a member of Congress possesses a culpability that is less than "knowingly," the public official would not have to fear violating this statute given the large amount of time that these public officials spend raising money in order to secure re-election. Finally, this "knowingly" standard would also prevent the chilling of First Amendment protected activities since the member of Congress would be required to possess knowledge of the fact that the individual or group in which the member is requesting a contribution or expenditure is "reasonably likely" to have an interest in legislation or other official actions taken by the member on the individual or group's behalf.

Another important aspect of this statutory language is the requirement that the member of Congress know or should know that the individual or group from which the member is making a request "is reasonably likely to have an interest in legislation or official actions taken by the member." In order to avoid risking this proposed law's invalidation for constitutional vagueness, it is necessary to provide a definition for "to have an interest." Overall, this definition applies to both of the statute's main sections (parts A and B) and the definition reads:

> "To have an interest" is defined as:
>
> (a) those situations in which an individual or group *expressly* requests or demands that a member of Congress or his or her staff members take some official action or omit to take some official action; or
>
> (b) other situations when an individual or group is reasonably likely to *tangibly benefit* from official actions or omissions taken by a member of Congress or his or her staff members and are thus inclined or induced to provide members of Congress with campaign contributions or independent expenditures that are *reasonably likely to advance the tangible benefit sought by this individual or group.*

Again, it is necessary to discuss the italicized terms in greater detail. Part (a) of this definition is meant to trigger disclosure in situations where an individual or group "expressly" requests or demands that a member of Congress or his or her staff take official action or omit to take action in exchange for a campaign contribution or independent expenditure. On the other hand, part (b) of this definition is meant to address situations not covered by part (a), where the individual or group offering a campaign contribution does not ex-

plicitly ask for an official action by the member of Congress and thus may be seeking an implicit benefit from the legislator.

The "tangibly benefit" requirement in part (b) is included to provide greater clarity to members of Congress in distinguishing when disclosure is required under this statute. Overall, this definition is intended to prevent disclosure for solicitations in which policy benefits are likely to accrue to those providing the contribution or expenditure. This "tangibly benefit" language would require more than incidental access to the public official or purely policy benefits that may occur after the contribution or expenditure is made at the request of the member. Instead, actions such as making earmarking requests, changing the text of legislation, providing favorable or unfavorable treatment to legislation in which the member sits on the committee where the legislation is pending, or advancing government contracts in which the individual or group has an interest are the types of "tangible benefits" that this definition seeks to target for disclosure.

Another part of this definition that is worth further discussion is the requirement that the contribution or expenditure be "reasonably likely to advance the tangible benefit sought by this individual or group." This language is necessary to prevent situations where an individual or group responds to the member of Congress's request to make a contribution or expenditure, but provides a relatively small amount that is therefore unlikely to provide them with a tangible benefit in which they may have an interest. For example, assume that a member of Congress requests an individual to provide a campaign contribution and the individual writes a check to the congresswoman's campaign for $30. Even if the individual has an interest in which the congresswoman is likely to have influence over, it is unlikely that a $30 contribution is "reasonably likely" to advance the tangible benefit sought by the contributor when the congresswoman is likely receiving contributions or independent expenditures that are much larger—and thus more likely to advance the tangible benefit sought. Thus, the congresswoman would not have to disclose this contribution under this definition.

On the other hand, the second part of the proposed statute covers situations where campaign contributors or those providing independent expenditures initiate the implicit quid pro quo agreement by approaching the legislator or her staff members. Part (B) of this proposed statute reads:

> (B) A member of Congress who knows or has reason to know of an individual or group that makes or offers a campaign contribution or independent expenditure of which the individual or group is reasonably likely to have an interest in legislation before or official actions taken by the

> member of Congress in his or her service on a committee or in general congressional service, must:
>
> Disclose such campaign contribution or independent expenditure to the Federal Elections Commission within two weeks from the time in which the member of Congress's campaign receives the contribution or within two weeks in which the independent expenditure is made on behalf of the member Congress.

Again, this part of the statute incorporates the "knowingly" scienter requirement and the same definition of "to have an interest in" would apply to this part of the statute for the same reasons addressed above. The reason for requiring the member of Congress be the party to disclose these types of offers from individuals or groups is based on the idea that members of Congress are generally the better situated party disclose these implicit agreements. Generally, the member of Congress is more likely to be aware of the reasonable benefits that will accrue to those providing the contributions or expenditures since the public official is the party in this relationship that holds the power to provide these tangible benefits in return for the contribution or expenditure.

Moving along, the proposed statutory scheme also provides a definition of "independent expenditure" and authorizes civil fines for members of Congress who fail to comply with this statute. The final part of this proposed statute authorizes the Department of Justice to file a civil suit against the member of Congress for failing to comply with the disclosure provisions found in this law. The definition of "independent expenditure" for purposes of this statute and the sections authorizing civil fines and suits provides:

> (C) For purposes of this scheme, an independent expenditure is made on behalf of a member of Congress when the expenditure indirectly or directly supports the member of Congress in being re-elected to Congress.
>
> (D) Failure to comply with the disclosure provisions of this section shall result in civil fines of up to $10,000 for each individual disclosure violation under this section, if:
>
> An investigating member of the Department of Justice with proper authority determines that the member of Congress has failed to comply with the disclosure requirements of this section.
>
> (E) The Department of Justice shall have the authority to bring civil actions against members of Congress for violations of this section in a U.S. District Court with proper jurisdiction.

These sections authorizing civil actions are the most desirable solution to combat the improper influence created by implicit quid pro quo agreements between public officials and campaign contributors or those providing independent expenditures. Unlike criminal penalties, civil fines would not unduly interfere with a congresswoman's

constitutionally protected right to solicit campaign contributions because she would not have to fear being imprisoned or being subjected to lengthy criminal proceedings for a potential violation. Likewise, this statute would not chill the First Amendment protections afforded to those desiring to provide public officials with campaign contributions or independent expenditures because this statute takes a narrow approach in only allowing the Department of Justice to file civil actions against public officials—not the individual or group providing the donation.

Although disclosure will not prevent all implicit quid pro quo agreements from materializing or granting improper influence, this statutory scheme is the first step in addressing these challenges by providing information to the Federal Elections Commission, the media, voters, and the general public about the types of improper implicit quid pro quo agreements in the context of campaign contributions and independent expenditures. This enhanced disclosure could allow the media to disseminate this information to voters and thus allow the electorate to make more informed choices about who to send back to Washington, D.C. Not only will this increased disclosure provide enhanced transparency, this new statute may actually deter members of Congress from providing tangible benefits to contributors as a result in "wink and nod" relationships altogether. Furthermore, without the threat of harsh criminal penalties in their arsenal, federal prosecutors would not be able to use this statute to engage in the types of devastating prosecutions that ruined the lives of Ted Stevens and Don Siegelman.

In proposing a new standard to combat the lingering problems associated with implicit quid pro quo agreements, civil penalties are the best solution when considering the problems that can arise in the areas of criminal and constitutional law. While requiring disclosure of these implicit agreements may not be a panacea in the area of public corruption, it is the first step in facilitating increased transparency and deterring public officials from providing improper tangible benefits to those who provide them with donations or independent expenditures.

B. The Need for a More Impartial Enforcement Process

If Congress acts by enacting the proposed statute or a similar federal law targeting implicit quid pro quo agreements, other reforms should be enacted to facilitate a more independent process of investigating and enforcing civil penalties assessed on members of Congress. Without updated mechanisms that ensure the fair enforce-

ment of these laws, the public's trust in federal prosecutors may continue to wane while public officials' careers may continue to be at the mercy of politically motivated prosecutors. This Part urges Congress to adopt procedures that facilitate an independent process of enforcing federal laws targeting public corruption and provides some suggestions to Congress in achieving this goal.

Besides the Stevens and Siegelman examples, it is well known that other former prosecutors, including Rudy Giuliani, have aggressively prosecuted public officials in hopes of furthering their own careers.[110] With the negative implications of these investigations, the federal government needs a more impartial way of enforcing public corruption statutes to prevent undermining the integrity of the justice system and the public's faith in this process. Indeed, enacting new laws that combat public corruption through civil penalties is only one part of the solution—changing the ways in which the federal government enforces these laws is essential to achieving meaningful reform in this area.

One way in which Congress could ensure greater fairness in these investigations is to provide the Federal Elections Commission ("FEC") with an independent counsel. This independent counsel could be granted the authority to investigate alleged violations of campaign finance and public corruption statutes. Once this independent counsel possessed sufficient evidence of a violation, the FEC counsel could turn the investigation over to the Department of Justice for further investigation or prosecution. The independence of this counsel could mirror reforms made in other countries such as Canada where independent election commissioners have a much more significant role in investigating and enforcing alleged violations of campaign finance and public corruption laws.[111] These independent election commissioners help facilitate a more impartial investigation process that avoids some of the problems related to the discretion of federal prosecutors in the United States.[112]

Delegating some of this investigatory authority to the FEC independent counsel could serve as a "filtering-out" function that prevents claims against public officials that may be initiated by authorities in the Department of Justice who possess improper motives for

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110 Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 16 (1997).

111 *See* Diane R. Davidson, *Enforcing Campaign Finance Laws: What Others Can Learn from Canada*, 3 ELECTION L.J. 537, 538 (2004) ("The Commissioner is [] independent of the political process and the government.").

112 *Id.*

beginning the investigation in the first place. Although the structure of the FEC has led to considerable partisan gridlock over the years,[113] this problem could be avoided by granting this independent counsel the authority to turn over an investigation to the Department of Justice without requiring the approval of the FEC commissioners. Allowing the FEC commissioners to remove the independent commissioner at-will by a majority vote could avoid separation of powers issues implicated by this proposal[114] and could insulate the independent counsel from the partisanship that has characterized the FEC in recent times.[115]

Another possible reform related to the enforcement of public corruption laws is for Congress to have its own inspector general. This congressional inspector general would be in charge of monitoring conflicts of interest within Congress and could recommend investigations to the Department of Justice. Overall, this congressional inspector general could provide an additional level of monitoring that could contribute to a more independent process of investigation. In terms of structure, this inspector general could reflect similar models adopted by state legislatures such as the Ohio General Assembly, which has a Legislative Inspector General who is charged with monitoring the legislators and their staff members for possible lobbying and ethics violations, and reporting these instances for further investigation.[116] This congressional inspector general could report to members of Congress, but still have the authority to turn over evidence from investigations to the Department of Justice for further investigation. As long as the proposed statute does not mandate that the Department of Justice take specific actions once the inspector general turned over evidence from an investigation, then this proposal would avoid separation of powers issues. Since the evidence provided by the inspector general to the Department of Justice would

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113 *See* Amanda S. La Forge, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 359 (1996) (detailing the difficulties faced by the FEC due to partisanship gridlock).

114 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146 (2010) (explaining the separation of powers in place that limit Article II powers).

115 I spoke with Professor Peter M. Shane, Moritz College of Law, regarding the possible separation of powers issues that could be implicated by this proposal. Professor Shane concluded that as long as the FEC commissioners could remove the independent counsel at will by a majority vote that this structure would avoid a "double layer of protection" from presidential removal as prohibited by the Court in the *Free Enterprise* case. *See* Arizona Free Enterprise Club v. Bonnett, 131 S. Ct. 2806 (2011).

116 *See generally*, The Ohio General Assembly Joint Legislative Ethics Committee: Office of the Legislative Inspector General, http://www.jlec-olig.state.oh.us (last visited Feb. 16, 2015).

serve an informational function, this proposal would not impinge on executive branch discretion to file charges against those who violate federal law.[117]

Although these are general suggestions for ensuring an impartial and effective enforcement of public corruption laws, Congress must act in the near future to prevent federal prosecutors from unfairly capitalizing on their power by conducting investigations that are not only politically motivated, but also undermine the general public's faith in the justice system. Adopting reforms that incorporate either the FEC independent counsel or congressional inspector general are steps in the right direction in reaching these goals and preventing prosecutorial misconduct when combatting bribery the United States.

CONCLUSION

Instances of public officials trading influence in exchange for campaign contributions and other items of value continue to make headlines despite the widespread coverage these stories receive in the media. When members of Congress or other public officials engage in explicit quid pro quo agreements involving campaign contributions or independent expenditures that undermine the integrity of America's government, there is little doubt that tough criminal sanctions are warranted by these relationships. Under the current standard, when legislators engage in "wink and nod" agreements with campaign contributors, these implicit quid pro quo agreements do not rise to the "explicit" standard where federal prosecutors can file charges. However, these implicit agreements are still problematic because they provide improper influence and access to the legislative process and prevent elected officials from making objective decisions.

Hence, a solution is needed. Although criminal sanctions are appropriate for more serious explicit agreements, these penalties are inappropriate for implicit quid pro quo agreements because they may deter constitutionally protected activities that impinge on the Ameri-

117 Because Congress may authorize any of its own committees to turn information over to the Justice Department, allowing the inspector general to perform such a function is simply delegating to that official an informational task that a legislative body may perform. For that reason, the inspector general would not be an "officer of the United States" in the Article II sense and need not be appointed pursuant to any of the methods specified in Article II. *See* Buckley v. Valeo, 424 U.S. 1, 137 (1976) (per curiam) ("Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted [that is, not pursuant to Article II] may exercise them.").

can political process. Moreover, criminalizing implicit quid pro quo relationships could compound pre-existing problems associated with prosecutorial discretion.

Accordingly, the most desirable way of addressing implicit quid pro quo relationships involving campaign contributions is through non-criminal remedies that impose civil fines on members of Congress who fail to disclose these improper relationships under the new statute proposed in this paper. While the effectiveness of disclosure is not universally accepted, this disclosure scheme is a step in the right direction by providing the media, interest groups, and voters with more information about members of Congress that will enable citizens to make more informed choices about who to support for re-election. On a related point, Congress must consider mechanisms that will promote greater impartiality in the manner in which the federal government enforces its public corruption laws. Reform in this area has promise in avoiding current problems associated with federal prosecutors that risk destroying America's faith in the justice system and the lives of those holding public office.