Key Takeaways In Ex-NY Lt. Gov.'s Tossed Bribery Charges

By **Murad Hussain, Michael Kim Krouse and Melissa Romanovich** (March 24, 2023)

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On Dec. 5, 2022, the U.S. District Court for the Southern District of New York dismissed three counts of a five-count indictment against former New York Lt. Gov. Brian Benjamin, holding that the prosecution's corruption charges failed to satisfy the First Amendment's heightened standard for an alleged quid pro quo involving political contributions.[1]

U.S. District Judge J. Paul Oetken's decision in U.S. v. Migdol was the latest in a recent string of federal rulings that have narrowed the enforcement options available to public corruption prosecutors — particularly when they pursue state-level officials.

A Closer Look at the Case

Benjamin resigned from his position in April 2022, immediately after federal prosecutors charged him with diverting $50,000 in state funds to a charitable organization in return for bribes in the form of campaign contributions.

The indictment also accused Benjamin of lying to the New York City Campaign Finance Board about his comptroller campaign and falsifying his executive appointment questionnaire in order to conceal the alleged bribery.

The indictment included three bribery-related corruption charges — federal programs bribery, honest services wire fraud, and conspiracy to commit those two offenses — and two charges of obstructing an investigation by falsifying records.

Benjamin moved to dismiss the entire indictment.

In dismissing the bribery-related charges, Judge Oetken first reviewed U.S. Supreme Court case law on quid pro quo agreements in the context of campaign contributions.

As the Supreme Court explained in 1991 in the Hobbs Act extortion case of McCormick v. U.S., an unlawful quid pro quo between a public official and a private citizen cannot be inferred simply from the fact that an official received a contribution and then took action favorable to the donor.[2]

In our privately financed system of elections, political contributions are expressive and associative acts protected by the First Amendment, and people will typically donate to officials whom they expect to act favorably to their interests.

Thus, to avoid criminalizing commonplace political activity, corruption prosecutions involving political contributions must prove more than a chronological connection between contributions and official conduct.[3]

As such, the McCormick court explained, a political contribution only violates federal law if a contribution is made "in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[4]

Like the many cases that have followed McCormick, Judge Oetken determined that McCormick's First Amendment standard applied to Benjamin's bribery-related corruption charges.[5]

Judge Oetken's decision then closely examined what constitutes an explicit quid pro quo under McCormick and subsequent U.S. Court of Appeals for the Second Circuit precedent, ultimately relying on its 2007 U.S. v. Ganim decision — written by Justice Sonia Sotomayor when she was a circuit judge — which explained that "proof of an express promise is necessary when the payments are made in the form of campaign contributions."[6]

After considering various complexities and inconsistencies in the relevant case law, and then working through several hypothetical scenarios, Judge Oetken concluded that, "for criminal liability for bribery in the context of campaign contributions," a quid pro quo agreement requires a contemporaneous, "clear and unambiguous" mutual understanding between the public official and the payor that specific things are being exchanged for specific official actions.[7]

Under the McCormick standard, an explicit agreement in the campaign-contribution context "cannot be satisfied by implication."[8] The parties' meeting of the minds need not be "stated or transcribed," but rather can be executed through explicit oral statements or conduct.[9]

In Benjamin's case, the government failed to allege that he made an explicit agreement to receive contributions that would then control his official conduct as a state senator.

Although the indictment used the phrase "in exchange for" to describe the nature and timing of Benjamin's conduct, this language alone was insufficient to satisfy the McCormick standard because "the existence of an exchange or agreement does not necessarily imply the existence of an explicit or express agreement."[10]

Because the government failed to charge Benjamin with an explicit quid pro quo, and because the facts of the indictment did not establish criminal liability, the court dismissed these three counts for failure to charge an essential element.

However, the court denied Benjamin's motion to dismiss the obstruction counts.

Takeaways

Judge Oetken's analysis reinforces and updates the requirements that the First Amendment imposes upon bribery charges involving campaign funding.

In our political system, it is unremarkable for an official to contact a constituent or donor for a political contribution. Judge Oetken's ruling ensures that these acts are treated as such.

The Benjamin decision acknowledges the importance of political speech and association, and protects these constitutional guarantees by requiring "a specific quid" in exchange for "a specific quo" before criminal liability can attach in the campaign contributions setting.

But the decision also goes further than other cases have by stringently defining an explicit

quid pro quo.

For example, exploring several hypothetical interactions between a businessperson and a mayor about a government contract and a campaign contribution, Judge Oetken explained that "winks and nods ... and vague phrases like 'let me see what I can do'" would not be enough.[11]

Rather, the opinion suggests that the amount of the promised contribution must be clear and unambiguous in advance of the agreement to exchange money for political action, and that this meeting of the minds must itself be simultaneous.[12]

More broadly, the Benjamin decision is the latest example of judicial skepticism toward the use of federal public corruption laws to pursue state-level officials, as shown by the recent Supreme Court oral argument in Percoco v. U.S. in 2022,[13] and by the Supreme Court's opinions in Kelly v. U.S.[14] in 2020 and McDonnell v. U.S. in 2016.[15]

For example, unlike the federal-official bribery and gratuities statute, the honest services fraud statute does not reference bribery at all — and yet it is frequently used in bribery-based prosecutions of state officials, such as in Benjamin and McDonnell.

Given the potential vagueness and overbreadth of honest services fraud and similar federal anti-corruption statutes, courts have begun engaging in more rigorous line-drawing and offering judge-made glosses to those federal statutes when applied to campaign contribution and public corruption cases against state officials.

These decisions may create a clearer basis for such prosecutions that avoids overcriminalizing ordinary political activities.

As the Supreme Court explained in McDonnell, "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time." Indeed, "[t]he basic compact underlying representative government assumes that public officials will hear from their constituents," who may have previously donated to their campaigns, and then "act appropriately on their concerns."

Thus, the court concluded,

> [o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.[17]

The government has taken an interlocutory appeal of the order dismissing the bribery-related counts,[18] leading Judge Oetken to adjourn the trial date and hold all other proceedings in abeyance pending the resolution of that appeal.

But it seems unlikely that the appeal will affect the undismissed obstruction counts — so for now, at least, the case will go on eventually, regardless of the appellate outcome.

And more broadly, we should expect to see similar rulings in campaign contribution and public corruption prosecutions moving forward, as courts attempt to sharpen the blurred lines between ordinary political conduct and bribery by strictly and precisely defining the quid, the pro and the quo.

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[1] https://www.nysd.uscourts.gov/sites/default/files/2022-12/Benjamin%20MTD%20opinion.pdf.

[2] McCormick v. United States, 500 U.S. 257, 272–73 (1991).

[3] See id. at 272.

[4] Id. at 273.

[5] See Opinion and Order at 8 n.4.

[6] United States v. Ganim, 510 F.3d 134, 142 (2d Cir. 2007).

[7] Opinion and Order at 23.

[8] Id. at 17.

[9] Id. at 21–23.

[10] Id. at 28.

[11] Id. at 20.

[12] Id. at 23.

[13] Percoco v. United States, No. 21-1158 (Nov. 28, 2022).

[14] Kelly v. United States, 140 S. Ct. 1565 (2020).

[15] McDonnell v. United States, 579 U.S. 550 (2016).

[16] 18 U.S.C. § 201 and 18 U.S.C. § 1346, respectively.

[17] McDonnell at 575.

[18] No. 22-3091 (2d Cir.).