No.

In the Supreme Court of the United States

ROD BLAGOJEVICH, PETITIONER
v.
UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case involving solicitation of campaign contributions, *Evans v. United States*, 504 U.S. 255 (1992), modified the holding of *McCormick v. United States*, 500 U.S. 257, 273 (1991), that an "explicit promise or undertaking" by a public official to perform or not to perform an official act is required to prove extortion under color of official right (and by extension bribery and honest services fraud), and, if so, what is the standard for distinguishing lawful attempts to obtain campaign contributions from criminal violations.

2. Whether the lower court, based on confusion about the first question presented, erred in barring a valid good faith defense to the specific intent crimes of extortion under color of official right, bribery and honest services fraud.

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The opinion of the court of appeals (App. 1a-23a) is reported at 794 F.3d 729 (7th Cir. 2015). The court of appeals' order denying rehearing *en banc* (App. 24a) is unreported and available on PACER (Order, Dkt. 125, Case No. 11-3853 (7th Cir. Aug. 19, 2015)).

JURISDICTION

The decision of the court of appeals was entered on July 21, 2015 and its denial of rehearing *en banc* was entered on August 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Blagojevich was convicted at his second trial of conspiracy and attempted extortion in violation of 18 U.S.C. § 371 and 18 U.S.C. §§ 1951 and 2, conspiracy and soliciting bribes in violation of 18 U.S.C. § 371 and 18 U.S.C. § 666, and honest services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. The relevant statutory provisions are reprinted in the Appendix (App. 36a-41a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner Rod Blagojevich, the former governor of Illinois, was convicted of making a false statement to investigators, and the jury failed to reach a verdict on the remaining charges. Following a retrial, he was convicted of conspiracy and attempted extortion, conspiracy and soliciting bribes, and honest services wire fraud. The jury failed to

reach a verdict as to two counts and acquitted on one. The district court sentenced petitioner to 168 months of imprisonment. The court of appeals vacated his convictions on five counts and affirmed his convictions on the remaining twelve counts.

1. The government's case against Governor Blagojevich

Blagojevich stands convicted of several criminal acts, including three related to solicitation of political contributions for his campaign fund. The evidence relating to the alleged crimes is discussed in four separate sections below.

Blagojevich was elected governor of Illinois in 2002 and reelected in 2006 to a second four-year term. He had previously served six years in the U.S. House of Representatives representing Illinois' 5th Congressional District, and before that four years in Springfield as a State Representative.

The government began investigating Blagojevich in December 2003, during his first term as governor. Tr. 1257.[1] Nearly five years later, in October 2008, the government entered into a cooperation agreement with John Wyma, a former member of the Blagojevich administration turned lobbyist, who was under investigation for conduct unrelated to Blagojevich. Tr. 1228, 2142, 2835. Based on information obtained from Wyma, the government installed court-ordered wiretaps on at least eight phone lines, including the Governor's home phone, his campaign office, and the phones of his close advisors including his brother Robert, his Chief of Staff John Har-

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[1] "Tr-I" refers to the transcript of the first trial, "Tr." refers to the transcript of the retrial; "[date] Tr." refers to other transcripts; "R." refers to the record on appeal.

ris, and his former Chief of Staff turned lobbyist Lon Monk. The government also installed a microphone in the Governor's campaign office in Chicago. Tr. 1238-43. Most of these wiretaps were in place for more than 40 days, ending on December 9, 2008, the day of Blagojevich's arrest. He was subsequently charged by multi-count indictment with extortion, bribery and honest services fraud.

The case against Blagojevich was built primarily on his recorded conversations with his close advisors between late October and early December 2008, bolstered by the testimony of those advisors and associates who cooperated with the government. During the relevant time period—the fall and winter of 2008—Blagojevich was struggling through his second term as governor. His legislative initiatives were being blocked in the Illinois General Assembly, which had begun to discuss publicly his impeachment.

A. The alleged scheme to trade the Senate seat to Jesse Jackson, Jr., in exchange for campaign contributions

Count 10 of the indictment[2] alleges that Blagojevich committed bribery, extortion and fraud by attempting to obtain $1.5 million in campaign contributions in exchange for the appointment of U.S. Congressman Jesse Jackson, Jr., to the Senate.

After Senator Barack Obama was elected president on November 4, 2008, Governor Blagojevich had the authority to appoint Obama's successor in the Senate. Tr.

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[2] The counts in this petition correspond to the streamlined, 20-count indictment on which Blagojevich was retried. Counts 11 and 16 resulted in hung juries at both trials; count 17 resulted in acquittal at the retrial; and counts 2-3 and 18-20 were vacated by the court of appeals.

1305. In October 2008, Rajinder Bedi, a supporter of both the Governor and Jackson, approached Robert Blagojevich (the Governor's brother and fundraising chairman) with an offer that Bedi's associate, Raghu Nayak, would raise funds for Blagojevich's campaign in exchange for the appointment of Jackson to the Senate. Tr. 2039. Robert told Bedi that he did not think his brother would appoint Jackson who has "never supported us." Tr. 2041. On October 31, 2008, Blagojevich told his deputy, somewhat incredulously, about the overture from Jackson's camp.

After October 31, there were no discussions about the Jackson offer until early December. On December 4, 2008, Blagojevich's pollster advised the Governor that Jackson was polling better than any of the other prospective candidates for the Senate seat. Tr. 2113. Later that day, Blagojevich told his Chief of Staff, John Harris, that he was "honestly going to objectively look at the value of putting Jesse, Jr. there." Tr. 1604. Harris testified that Blagojevich wanted to use the threat of appointing Jackson as leverage to obtain support from his political party for the appointment of his preferred candidate to fill the vacancy. Tr. 1604. Other recorded conversations showed Blagojevich trying to get national Democrats to help him make a deal with Illinois House Speaker Mike Madigan to push through some of Blagojevich's legislative priorities in exchange for the appointment of the Illinois Attorney General (Madigan's daughter) to the Senate seat. Tr. 2127, 3505, 3853.

Later on December 4, 2008, Blagojevich told his brother to meet with Nayak and tell him that Jackson was "very much realistic .... And the other point you know all these promises of help. That's all well and good but he's had an experience with Jesse and Jesse promised to endorse him for governor and lied to him okay ... then some of this stuff's got to start happening now." Tr.

2135, 4538. Blagojevich never agreed or decided to appoint Jackson to the Senate seat in exchange for campaign contributions or otherwise, and no campaign contributions were received from Jackson's supporters.

The December 4 call between the Blagojevich brothers was the key evidence cited for conviction. In closing argument, the government told the jury that when Blagojevich directed his brother to tell Raghu Nayak that Jackson was "very much realistic" and that these promises of help "gotta start happening now, right now," he was guilty of soliciting a bribe. Tr. 5301.

B. The alleged attempt to extort campaign contributions from the President of Children's Memorial Hospital

Counts 1, 12 and 13 allege that Blagojevich demanded a $25,000 campaign contribution from Patrick Magoon, the president of Children's Memorial Hospital ("CMH"), in exchange for a Medicaid rate increase for pediatric specialists.

In June 2008, Magoon began lobbying for an increase in the rate of reimbursement under Medicaid for pediatric specialists. Tr. 2145, 2506-10. In September 2008, Blagojevich told Magoon he "was supportive of [the] issue," and asked for further briefing. Tr. 2508-10.

At an October 8, 2008, fundraising meeting, Blagojevich said that he would approve the rate increase to give the hospital $8 million, but that he also wanted to ask Magoon for a $25,000 campaign contribution. Tr. 2364-71, 2415-18. On October 17, 2008, Blagojevich called Magoon to tell him that he had approved the rate increase, which would take effect after January 1, 2009. Tr. 2513. Five days later, Robert Blagojevich called Magoon, introduced himself, and then asked if he would raise $25,000 for the Governor's campaign fund. Magoon said

that he would "have to give some thought to this and talk to a few folks about it" and he gave Robert his cell phone number. Tr. 2515-19.

At trial, Magoon testified that he believed the rate increase "was contingent upon a contribution of $25,000" because Robert had asked him to raise the money "in a very strong suggestion" and had mentioned a January 1 deadline for fundraising. Tr. 2521-22, 2547. Magoon decided not to raise the funds for Blagojevich, although he never told Robert Blagojevich about his decision. Instead, he just told his staff not to put through Robert's calls. Tr. 2522-23. Robert left benign messages for Magoon on October 28 and November 10 but received no response. Tr. 2524. On November 12, Robert told the Governor that he had left three messages for Magoon but never got a call back. "So I'm gonna quit calling," Robert said. "I feel stupid now." Blagojevich made no further attempts to contact Magoon.

During a November 12, 2008, recorded call, Blagojevich's deputy advised that he still had "discretion over" the rate increase, and Blagojevich responded, "that's good to know." Tr. 2159-61. The deputy testified that he interpreted Blagojevich's response as a direction to put a hold on the rate increase, which he did, apparently in an exercise of his own discretion, causing a delay in the start date of the increase. Tr. 2161-65, 2247. (The rate increase did go into effect in January 2009, though the jury never heard this fact. Tr. 2558, 2596.)

C. The alleged attempt to extort campaign contributions from horse racing executive John Johnston

Counts 9, 14 and 15 allege that Blagojevich attempted to extort a campaign contribution from an Illinois

horse racing executive in exchange for the timely signing of a bill that benefitted the horse racing industry.

As governor, Blagojevich was a consistent supporter of the Illinois horse racing industry. Tr. 2744. In September 2008, race track owner and long-time supporter of the Governor, John Johnston, made a commitment to raise $100,000 for the Blagojevich campaign. Tr. 2781-83, 3770. In an offer of proof not heard by the jury, Johnston testified that he regularly contributed to politicians who support the Illinois horse racing industry, including Blagojevich. Between 2002 and 2007, Johnston had contributed $320,000 to the Blagojevich campaign. Tr. 2995-3003.

Johnston had an interest in a "revenue recapture bill" pending in the Illinois legislature which would require Illinois casinos to pay a percentage of their revenue to the horse racing industry.

Blagojevich's former Chief of Staff turned lobbyist, Lon Monk, acted as an intermediary between Blagojevich and Johnston. On several occasions during November 2008, Johnston told Monk that delivery of the contribution was imminent and Monk conveyed that information to Blagojevich.

The recapture bill passed both houses of the Illinois legislature and was sent to the Governor's desk on November 24, 2008. Tr. 1569, 2742-49. On November 26, the Governor's general counsel declared the recapture bill "okay to sign." Tr. 1572.

Monk and others then began lobbying the governor for a quick signing of the recapture bill. Tr. 1569, 2756, 2769, 2986. In a recorded conversation on December 3, Monk told Blagojevich, "I want to go to him [Johnston] without crossing the line ... give us the money and one has nothing to do with the other, but give us the f'ing money." Blagojevich responded, "I think you just say, look, it's been a year. Let's just get this done, just get it

done. Christ." Monk said he would try to see Johnston right away.

Monk, a cooperating witness for the government, testified to his "understand[ing]" that Blagojevich wanted him to deliver the message to Johnston that "they were in exchange for one another." Tr. 2776.[3] On December 3, 2008, Monk met with Johnston at his office at the Maywood Racetrack. Tr. 2780. Johnston, who was given immunity, testified that Monk told him that the Governor is "concerned that if he signs the racing legislation you might not be forthcoming with a contribution." Tr. 2989. Monk told Johnston that the contribution was a "different subject matter" from the bill signing, but Johnston said he "didn't believe him." Tr. 2781, 2989-91, 3032.

After his meeting with Johnston, Monk reported to Blagojevich in a recorded call that he told Johnston: "two separate conversations, what about your commitment." Tr. 2781-83.

On December 4, 2008, Blagojevich told Monk, in a recorded call, that he would sign the recapture bill "next week." Tr. 2787. On December 9, Blagojevich was arrested. He had not signed the recapture bill by the time of his arrest. Tr. 2993. Johnston never made the contribution.

D. Discussions about setting up a not-for-profit organization in exchange for the Senate seat

Counts 4-8 alleged that Blagojevich discussed with his advisors the possibility of asking the president-elect and a prominent member of Congress to use their influence to set up a not-for-profit organization that would

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[3] Monk's testimony contradicted his testimony at the first trial that he and Blagojevich were trying to figure out how not to make Johnston feel pressured. Tr-I 1429A.

"advocate [for] children's healthcare," a top priority of the Blagojevich administration, and employ Blagojevich at the conclusion of his tenure as governor, in exchange for naming Valerie Jarrett to the Senate seat. Tr. 1909. No steps were ever taken to carry out any such plan. Tr. 1514, 1739-49, 1836, 1909-11.

2. Jury instructions and government arguments that drew the line for the jury between the lawful solicitation of campaign contributions and the crimes of extortion, bribery and fraud

With respect to the first three schemes described above, involving requests for campaign contributions, the jury could easily have concluded that there was ambiguity regarding whether the requested contributions were solicited with "an explicit promise or undertaking" to carry out the official actions in question, *McCormick v. United States*, 500 U.S. 257, 273 (1991)—if the jury had been properly instructed.

Petitioner asked the district court to instruct the jury, based on *McCormick*, that

> [i]n order for [campaign] contributions to constitute extortion, bribery or wire fraud, the government must prove 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.

App. 31a (Def. Proposed Instruction #24) (emphasis added). The court rejected petitioner's proposed instruction (App. 33a) and instead instructed the jury that

> if an official receives or attempts to obtain money or property *believing that it would be given*

> in exchange for specific requested exercise of his official power, he has committed extortion under color of official right even if the money or property is to be given to the official in the form of a campaign contribution.

App. 27a (emphasis added). The court's instructions did not differentiate between the solicitation of a campaign contribution and the solicitation of bribery. Throughout the trial, the jury was told that solicitations for bribes and for campaign contributions were legally indistinguishable. In its opening statement and summation, the government compared Blagojevich's requests for campaign donations to a police officer's request for a cash bribe in exchange for tearing up a speeding ticket. Tr. 1165, 5264, 5279, 5283, 5286. The government repeatedly characterized the campaign funds as "of value" to Blagojevich. Tr. 4779-81. The government told the jury that Blagojevich was guilty as charged if his request for a campaign contribution was "connected" to an official act. Tr. 5381, 5390.

3. The dispute over the criminal intent or *mens rea* requirement

Prior to trial, Blagojevich proffered that he would assert a defense that he acted in "good faith" and without criminal intent. The Seventh Circuit pattern good faith instruction provides in pertinent part that "[t]he defendant acted in good faith if, at the time, he honestly believed the [truthfulness; validity; insert other specific term] that the government has charged as being [false; fraudulent; insert term used in charge]." Seventh Circuit Pattern Criminal Jury Instruction 6.10 (alterations in original). The "Committee Comment" to this instruction states that "it should be used in cases in which the gov-

ernment must prove some form of 'specific intent,' such as intent to defraud or willfulness."

The meaning of a good faith defense was a subject of much dispute at trial. Prior to trial and again during jury selection, the district court told petitioner that, should he testify, he may say, "I looked at the law and I thought it was legal, I had a good faith belief." 4/14/11 Tr. at 19; Tr. 1028. At the close of the government's case, the court again ruled that, should Blagojevich testify, he would be permitted to rebut the government's evidence by testifying that "I honestly believed that what I was doing was legal." Tr. 3216.

Blagojevich did testify in his defense. But after he took the stand and began to testify, the court changed its mind and barred any testimony that he honestly believed his actions were legal. Tr. 4181, 4183.[4]

The trial court modified the pattern good faith instruction to include the following language drafted by the government: "The government is not required to prove that the defendant knew his acts were unlawful.… In the context of this case, *good faith means that the defendant acted without intending to exchange official actions for personal benefit*s." App. 26a, 28a, 29a (emphasis added). (The final sentence was added after the first trial, which had resulted in a hung jury.) Again, throughout the trial the government had characterized campaign contributions as a personal benefit to Blagojevich.

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[4] The court of appeals' suggestion that Blagojevich tried to present a "mistake of law" defense is not correct. App. 20a-22a. *See infra* p.32.

4. The appellate court opinion

The court of appeals reversed five counts of conviction that were based on Blagojevich's attempt to make a deal with Barack Obama to appoint Valerie Jarrett to his old Senate seat in exchange for an appointment to the Cabinet. The court found that the proposal "to trade one public act for another [was] a form of logrolling" and was not illegal; the Cabinet appointment he sought was a "public job" which paid only a "bona fide salary." App. 5a-9a. This finding is not part of this petition.

As explained below, the court of appeals rejected Blagojevich's claim that the jury instructions conflict with this Court's decision in *McCormick* and fail to differentiate between a campaign contribution and a bribe. First, the court found that the jury was entitled to conclude that money he solicited was for his personal benefit rather than a campaign because he had decided not to run for reelection.[5] App. 3a. Second, the court found that the Blagojevich jury instructions adequately "track *McCormick*." App. 12a. Third, the court rejected Blagojevich's claim that the trial court erred in barring his good faith defense and failed to require the government to prove a *mens rea* sufficient for conviction of specific intent crimes such as extortion, bribery and fraud. App. 12a-14a.

Blagojevich filed a petition for rehearing *en banc* raising the two issues presented in this petition, which was denied. App. 24a.

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[5] There were many legitimate political uses Blagojevich could make of these funds, even barring another run for governor or other elected office. *See infra* note 14.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision presents an ideal vehicle for this Court to provide needed clarity regarding what effect *Evans v. United States*, 504 U.S. 255 (1992), had on *McCormick v. United States*, 500 U.S. 257 (1991), in the context of public corruption prosecutions involving solicitation of campaign contributions.[6] The Seventh Circuit has interpreted *Evans* to weaken the "explicit promise or undertaking" standard of *McCormick*, even in cases involving campaign contributions. Other circuits have spread similar confusion in the extortion, bribery, and honest services fraud contexts. The issue is important and warrants this Court's review because of its potentially significant effect on our system of private financing of election campaigns.

Given the ambiguity created by *Evans* and *McCormick*, this Court should also clarify that extortion, bribery and honest services fraud are specific intent crimes subject to a good faith defense.

I. The Hobbs Act as construed by *McCormick* and *Evans*

The Hobbs Act, 18 U.S.C. § 1951(b)(2), defines extortion in relevant part as "obtaining of property from another, with his consent ... under color of official right." In *McCormick*, a state legislator was convicted of extor-

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[6] The circuits have generally assumed that the *McCormick* standard applies equally to extortion, bribery and honest services fraud cases, so the status of the *McCormick* precedent is relevant to all three offenses of conviction here. *See*, *e.g.*, *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (assuming *McCormick* extends to honest services fraud); *United States v. Siegelman*, 640 F.3d 1159, 1171-74 (11th Cir. 2011) (per curiam) (assuming *McCormick* extends to federal funds bribery and honest services fraud).

tion "under color of official right" for soliciting and receiving campaign contributions from foreign medical school graduates who stood to benefit from his support of legislation that would allow them to practice medicine without passing state licensing exams. McCormick argued that conviction of an elected official under the Hobbs Act requires proof of a quid pro quo. The lower court disagreed, and upheld the conviction based on a jury instruction that stated, in relevant part, that "to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment ... was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct." 500 U.S. at 265.

Reversing the conviction, this Court held that soliciting and receiving campaign contributions constitutes extortion

> 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. In such situations the official *asserts that his official conduct will be controlled by the terms of the promise or undertaking*. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 273 (emphases added).

The Court explained the important, lawful purpose that campaign contributions serve in electing public officials in our democracy, and the need to define clearly the circumstances under which campaign contributions are forbidden:

> Whatever ethical considerations and appearances may indicate, 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." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

Id. at 272-73. The Court concluded that extortion based on soliciting and receiving campaign contributions requires proof of an explicit quid pro quo, but expressly declined to decide whether this requirement applies in other contexts involving non-campaign contribution payments. *Id.* at 268-69.

A year later in *Evans v. United States*, 504 U.S. 255, 256 (1992), the Court addressed the question of "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." *Evans* involved a local official who was convicted of extortion for passively accepting both cash and a check made out to his campaign from an FBI agent posing as a real estate developer. The trial judge instructed the jury, in relevant part, that "if a public official demands or accepts money in exchange for [a] specific requested exer-

cise 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. The court of appeals concluded that passive acceptance of a benefit from a public official is sufficient to prove extortion if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. *Id.* at 258.

Affirming the conviction, this Court held that an affirmative inducement is not required to prove extortion because, under the plain text of the statute, the word "induced" appearing in the definition of the offense does not extend to extortion "under color of official right." *Id.* at 265. The Court concluded that "although the petitioner did not initiate the transaction, his acceptance of the bribe constituted an *implicit* promise to use his official position to serve the interests of the bribegiver." *Id.* at 257 (emphasis added). The Court also rejected the petitioner's contention that the jury instructions did not properly include an explicit quid pro quo requirement for conviction if the jury accepted his contention that the payments at issue were campaign contributions. *Id.* at 267-68. The Court concluded that the relevant jury instruction "satisfies the *quid pro quo* requirement of *McCormick* … because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." *Id.* at 268. The Court held 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." *Id.*

In a concurring opinion, Justice Kennedy explained that "the Court's opinion can be interpreted" to require a quid pro quo as an element of the government's case in a

Hobbs Act prosecution, *id.* at 272, though he would have preferred greater clarity from the majority:

> Although the Court appears to accept the requirement of a *quid pro quo* as an alternative rationale, in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question.

Id. at 272-73. "Something beyond the mere acceptance of property from another is required…. That something … is the *quid pro quo*." *Id.* at 273. Justice Kennedy concluded that "the rationale underlying the Court's holding applies not only in campaign contribution cases, but in all [Hobbs Act] prosecutions. That is as it should be, for, given a corrupt motive, the *quid pro quo* ... is the essence of the offense." *Id.* at 278 (referencing *McCormick*).

II. The need for clarity regarding *Evans* and *McCormick* as applied in public corruption prosecutions for soliciting campaign contributions

The lower courts have also acknowledged a significant lack of clarity regarding whether *Evans* modified or relaxed *McCormick*'s "explicit promise or undertaking" requirement to prove public corruption offenses involving campaign contributions, and have signaled the need for further guidance from this Court. *See United States v. Taylor*, 993 F.2d 382, 383 (4th Cir. 1993) (defining extortion "has proved difficult, and the Supreme Court is still developing an understandable definition"); *United States v. Blandford*, 33 F.3d 685, 695, 697 (6th Cir. 1994) ("Exactly what effect *Evans* had on *McCormick* is not

altogether clear.... [W]e cannot be certain whether the Supreme Court would have courts apply a different standard" in campaign contribution cases versus cases involving other payments); *United States v. Giles*, 246 F.3d 966, 971-72 (7th Cir. 2001) (noting that "not all courts of appeals that have considered the issue have found the *Evans* holding entirely clear," and concluding that there may be policy reasons for treating campaign contributions differently from other payments but those concerns are "outweighed by language in *Evans*, although [it is] not entirely clear"); *United States v. McGregor*, 879 F. Supp. 2d 1308, 1316-17 (M.D. Ala. 2012) (observing there is "considerable debate" over *McCormick* and *Evans*, and "[t]he Circuit Courts of Appeals have struggled with these questions").

The confusion arises in part from uncertainty regarding whether this Court's holding in *Evans*, which involved both cash bribes and what the defendant claimed were campaign contributions, was limited to the question of inducement or was also meant to weaken the requirements for proving extortion involving campaign contributions. The circuit courts have therefore interpreted and applied *Evans* differently. *Compare*, *e.g.*, *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) ("*Evans* modified [extortion] standard in non-campaign contribution cases."); *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994) (*Evans* addressed conduct "outside the context of campaign contributions"), *with United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (reading *Evans* as involving campaign contributions), *and United States v. Collins*, 78 F.3d 1021, 1035 (6th Cir. 1996) ("*Evans* involved a hybrid campaign contribution and non-campaign contribution."). *See also Blandford*, 33 F.3d at 696 ("To the extent *Evans* charted entirely new waters, it did so not to differentiate campaign contribution cases from non-campaign contribution cases, but

only to consider the issue on which certiorari was granted, the issue of inducement."). Indeed, neither the majority nor the concurring opinion in *Evans* resolved whether the payments at issue were considered campaign contributions, or whether it mattered for purposes of the Court's analysis in the context of that case.

Circuit courts have also expressed particular uncertainty about what *McCormick*'s requirement that the quid pro quo be "explicit" means in light of *Evans*. *See United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (Tatel, J.) (*McCormick* "failed to clarify what it meant by 'explicit,' and subsequent courts have struggled to pin down the definition"); *United States v. Terry*, 707 F.3d 607, 612-13 (6th Cir. 2013) ("[C]ases debate how 'specific,' 'express' or 'explicit' a quid pro quo must be to violate the bribery, extortion and kickback laws."); *United States v. Abbey*, 560 F.3d 513, 517 (6th Cir. 2009) ("The showing necessary may still vary based on context."); *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993) ("*Evans* offers two slightly different statements of what satisfies the *quid pro quo* requirement."). *See also McGregor*, 879 F. Supp. 2d at 1314 ("The definition of 'explicit' remains hotly contested.").

Despite these uncertainties, since *Evans* a plurality of the circuits appears to adhere to the distinction between public corruption cases involving campaign contribution and those involving other payments, and has indicated or suggested that *McCormick*'s explicit quid pro quo requirement survives in campaign contributions cases. *See Blandford*, 33 F.3d at 695 (courts assume "[*Evans*] establishes a modified or relaxed *quid pro quo* standard to be applied in non-campaign contribution cases," but "the comparatively strict standard of *McCormick* still would govern … receipt of campaign contributions by a public official"); *Abbey*, 560 F.3d at 517-18 ("[O]utside the campaign context—rather than require

an explicit quid-pro-quo promise, the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement.") (alterations omitted); *United States v. Inzunza*, 638 F.3d 1006, 1013 (9th Cir. 2011); *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) (per curiam); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (per curiam) (*McCormick* requires explicit agreement in campaign contributions case). *Cf. United States v. Salahuddin*, 765 F.3d 329, 343 (3d Cir. 2014) ("[N]either the Supreme Court nor this Court requires an explicit *quid pro quo* for non-campaign charitable contributions.").

The Seventh Circuit's decision in this case presents a notable exception, and directly conflicts with *McCormick* and decisions from other circuits that demand proof of an explicit quid pro quo in campaign contribution political corruption cases notwithstanding *Evans*. Blagojevich was charged with attempted extortion, soliciting a bribe, and honest services fraud. Other than counts 4-8 (described *supra* pp. 8-9), all of his convictions that were affirmed by the court of appeals involved solicitation of campaign contributions. Unlike most political corruption cases, there was no allegation or evidence presented at trial that Blagojevich accepted cash, gifts or other things of value, or ever took a penny out of his campaign fund for personal use. The indictment did not allege any quid pro quo agreement or explicit promise between Blagojevich and a potential donor, and no evidence was presented at trial that Blagojevich ever told a potential donor that there would be any negative consequences if they failed to contribute. Indeed, none of the potential donors felt compelled actually to make the requested contributions at issue in this case.

Blagojevich requested jury instructions modeled on *McCormick*. For example, he requested an instruction that

> [s]olicitation of a campaign contribution only constitutes bribery if the payment was made or sought in return for an explicit promise or undertaking by the public official to perform or not perform a specific act. While the explicit promise may be communicated directly or indirectly, the communication must be explicit.

App. 30a (Def. Proposed Instruction #17); *id.* (Def. Proposed Instruction #16) (same, for extortion). And he requested a general instruction stating that:

> The law recognizes that … [l]egitimate campaign contributions are given to support public officials with whom the donor agrees and in the generalized hope that the official will continue to take similar official acts in the future. As a result, official acts furthering the interests of the donor or his clients (if the donor is a lobbyist), taken shortly before or after campaign contributions are solicited and received from those beneficiaries, are legal and appropriate. In order for those contributions to constitute extortion, bribery or wire fraud, the government must prove 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.

App. 30a-31a (Def. Proposed Instruction #24). He argued that "[w]ithout a finding of an explicit or express *quid pro quo*, campaign contributions honest services

prosecutions are ripe for abuse, violations of due process and erroneous convictions." R. 715, at 3-4.

The district court rejected these instructions on the mistaken belief that an "explicit promise or undertaking" was not required to prove extortion, and the erroneous conclusion that it is "not really true" that campaign contributions and political fundraising are "legally protected." Tr. 3273, 3274, 3307-10. (The latter is false. *See McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1444, 1448, 1451 (2014) (contributions are protected speech under First Amendment; government may limit only quid pro quo corruption, not "appearance of mere influence").)

The court departed from Seventh Circuit pattern jury instructions requiring an "explicit promise or undertaking," and charged the jury that

> [i]n order to prove attempted extortion or conspiracy to commit extortion the government must prove that the defendant attempted or conspired to obtain property or money knowing or believing that it would be given to him in return for the taking, withholding, or other influencing of specific official action.

App. 27a. The court instructed this was so "even if the money or property is to be given to the official in the form of a campaign contribution." *Id.* The prosecution further argued to the jury that Blagojevich was guilty of extortion if he connected the solicitation of campaign contributions with an official act by, for instance, speaking about them in the "same sentence," which plainly misstated the law. Tr. 5381.

Blagojevich appealed his subsequent conviction, challenging the jury instructions on the ground that they violated *McCormick*'s explicit quid pro quo requirement.

The Blagojevich jury instruction that an official commits a public corruption offense when he solicits a contribution "believing that it would be given in exchange for specific requested exercise of his official power" lacked the clarity required by *McCormick*. The instruction this Court rejected in *McCormick* told the jury to convict if "a campaign contribution, was made ... with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation." 500 U.S. 257, 274 (1991). The instructions in both McCormick's and Blagojevich's cases would have allowed them to be convicted based on their belief or knowledge that a contribution was made because of a *donor's* expectation that some future official act will benefit him. Neither jury was told of the requirement that there be an "*explicit* promise or undertaking" *by the defendant* to perform an official act in exchange for the contribution.

The government argued in response that in the years since *McCormick*, courts have made clear that an "explicit" promise means merely a "specific" promise (that is, one identifying the desired official action with specificity) rather than a clear, unambiguous promise.[7] The government relied heavily on the fact that a similar instruction was approved of in *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001), a case where an alderman accepted a series of cash bribes to protect an illegal dump in his ward. *Giles* held that "the government need not show an explicit agreement, but only that the payment was made in return for official acts—that the public official understood that as a result of the payment he was expected to exercise particular kinds of influence on

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[7] Brief of the United States at 55-56, *United States v. Blagojevich*, No. 11-3853 (7th Cir. filed Nov. 12, 2013) (dkt. no. 100) (citing *Evans* and *Siegelman*).

behalf of the payor." *Id.* But *Giles* did not involve only campaign contribution payments,[8] and thus was subject to a lesser quid pro quo standard if *Evans* is read to alter the quid pro quo standard for non-campaign contribution cases. The district court in this case based its instructions on the one approved of in *Giles*, without conducting any analysis of the crucial differences between the cases—the fact that *Giles* involved bribes rather than campaign contributions, and completed payments rather than merely requested ones.

The Seventh Circuit vacated Blagojevich's convictions for attempting to "sell" Obama's Senate seat in exchange for a Cabinet position. The court affirmed the remaining convictions relating to solicitation of campaign contributions. Citing *McCormick*, the panel stated without elaboration that "federal law forbids *any* payment (or agreement to pay), *including* a campaign contribution, in exchange for the performance of an official act." App. 3a (emphases added). The court departed from *McCormick* and other circuit courts that have addressed the issue, and held that there was no *explicit* quid pro quo requirement to convict Blagojevich, whose conduct, unlike the conduct at issue in *Evans* and *Giles*, involved campaign contributions that the government never argued (and the jury never found) were used for his personal benefit. Apparently concluding that "explicit" is synonymous with "express," the court stated:

> Much of Blagojevich's appellate presentation assumes that extortion can violate the Hobbs Act only if a *quid pro quo* is demanded explicitly, but the statute does not have a magic-words requirement. Few politicians say, on or off the rec-

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[8] *See* 246 F.3d at 971 (noting "the bulk of the payments … were not campaign contributions").

> ord, "I will exchange official act X for payment Y."

App. 12a. Of course, "explicit" is not synonymous with "express"; instead, it means set forth or demonstrated *very clearly*, leaving no ambiguity or room for doubt. *See United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) ("Explicit, however, does not mean *express*.") (emphasis in original); *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (same); *Utah v. United States EPA*, 750 F.3d 1182, 1185 (10th Cir. 2014) (offering various dictionary definitions); *United States v. Sanchez*, 639 F.3d 1201, 1205 (9th Cir. 2011) (same).

The court conducted no further analysis of *McCormick* or the "explicit promise or undertaking" requirement in a case involving solicitation of campaign contributions. Like the district court before it, the court of appeals panel offered no analysis or even citation to *Evans*, despite the fact that *Evans* was the basis for *Giles*' holding that "the government need not show an explicit [quid pro quo] agreement,"[9] and that *Giles* was the basis for the district court's jury instruction. As a result, the court of appeals concluded that "the jury instructions are unexceptional. They track *McCormick*." App. 12a.

III. The explicit quid pro quo requirement is necessary to avoid a chilling effect on both candidates and donors, particularly in the context of solicitations of contributions

The funding of campaigns by private contributions has been accepted as a legitimate part of our political system "from the beginning of the Nation." *McCormick*, 500 U.S. at 272. Candidates have a First Amendment

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[9] *Giles*, 246 F.3d at 972.

right to solicit and receive contributions and donors have a First Amendment right to respond with contributions, which are a form of political speech regardless of whether they also are made in the expectation that they may further the donors' self-interest. *See United States v. McGregor*, 879 F. Supp. 2d 1308, 1312 (M.D. Ala. 2012); *see also McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1444, 1448 (2014); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359 (2010) ("It is well understood that a substantial and legitimate reason, if not the only reason … to make a contribution to … one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.") (citation omitted); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) ("All payments to elected officials are intended to influence their official conduct."); *Blandford*, 33 F.3d at 697 ("Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy.").

Demanding a mutually clear understanding as to the agreed terms of the quid pro quo is necessary in order to avert the chilling effect that might otherwise attend contributions by donors with vested interests in the future actions of candidates. *McCormick*'s "explicit promise or undertaking" requirement is especially important in a case like this that involves only the *solicitation* or *attempt* to obtain campaign contributions. Such situations create a heightened risk of misunderstanding about what exactly the candidate or official has promised to do—"undertaken" in *McCormick*'s words—if the requested contribution is made. *Cf. McGregor*, 879 F. Supp. 2d at 1319 (imposing heightened standards for cases involving "promises and solicitations because one-sided offers can be misinterpreted").

Blurring *McCormick*'s bright-line rule distinguishing lawful solicitation from criminal extortion would also

invite arbitrary and discriminatory enforcement against politicians like Blagojevich who are outspoken, controversial, polarizing or simply have become unpopular since their election, in violation of Fifth Amendment due process. *Cf. Skilling v. United States*, 561 U.S. 358, 412 (2010) (construing honest services fraud statute narrowly to avoid vagueness).

Contrary to the implication of the court of appeals panel below, App. 12a, no party here contends that a corrupt solicitation need be *express*, with formal language setting forth the terms of the exchange laid out in literal detail by the defendant. *McCormick* demands only an *explicit* solicitation, and such a solicitation can be inferred from circumstantial evidence, including the defendant's words, conduct, and surrounding context.[10] However, the promise of *certain* action if the requested contribution is made must be understood as such by both the official and the prospective donor—the solicitation must be in the nature of a "firm offer" in contract law, and must be communicated (by language, action, or context) clearly to the prospective donor. *See McCormick*, 500 U.S. at 273 ("[E]xplicit promise or undertaking [means] the official asserts that his official conduct *will be controlled by the terms of the promise or undertaking*.") (emphasis added).

In contrast, the government argued below that "explicit" simply means "specific,"[11] and the court of appeals concluded that Blagojevich's argument that a "*quid pro quo* [be] demanded explicitly" was in effect a demand that the defendant be proven to have stated literally, "I

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[10] *See United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992); *Blandford*, 33 F.3d at 696 ("Put simply, *Evans* instructed that by 'explicit,' *McCormick* did not mean 'express.'"); *McGregor*, 879 F. Supp. 2d at 1319.

[11] Brief of the United States at 57, *United States v. Blagojevich*, No. 11-3853 (7th Cir. filed Nov. 12, 2013) (dkt. no. 100).

will exchange official act X for payment Y." App. 12a. Again, that would impose a requirement of an express solicitation, which Blagojevich did not propose below and does not argue for here. But whether or not the terms of the agreement are articulated in express language, the significant First and Fifth Amendment interests of both elected officials and donors demand that the promise be expressed with sufficient clarity to avoid chilling the political speech of both groups and opening the door to selective prosecution.[12]

McCormick's requirement of an "explicit" promise of a quid pro quo exchange is best understood as implementing such a heightened safeguard. But the instructions given at trial here did not demand such clarity. Instead, they simply require that the soliciting official "believ[e] that [the campaign contribution] would be given in exchange for [the] specific requested exercise of his official power" and "believing that [the contribution] would be given to him in return for" the action. These instructions plainly allow conviction where an official simply *believes* (or assumes) that a donor's behavior would be motivated by anticipation of or a desire for the requested outcome, but the official has not *agreed* to execute the desired action in the event the contribution is made. In no way does this instruction demand the degree of clarity that is mandated by *McCormick*'s explicit promise requirement.[13]

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[12] *See Blandford*, 33 F.3d at 696 ("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.").

[13] The government defended the instruction in the court of appeals as clear enough to satisfy *McCormick* in demanding an exchange of quid for quo. But *McCormick* rejected a similarly unspecific instruction, repeatedly noting the distinction between this Court's formulation, which "defines the forbidden zone of conduct

As Judge Thompson recently summarized the state of the law in the lower courts:

> In the public-corruption context, courts have been particularly lax in the use of certain words—explicit, express, agreement, promise, and quid pro quo—that should have clear legal meanings. Imprecise diction has caused considerable confusion over the scope of federal corruption laws as applied to campaign contributions. Uncertainty in this area of law breeds corruption and chills legitimate political speech.... Much ink has been spilled over the contours of campaign finance law. Far less attention has been paid to what actually constitutes a "bribe".... Ultimately, the Supreme Court needs to address this issue and provide guidance to lower courts, prosecutors, politicians, donors, and the general public.

McGregor, 879 F. Supp. 2d at 1319-20.

This case presents an ideal vehicle for providing the needed clarity. It is a pure campaign contribution case, unlike *Evans*.[14] *See* 504 U.S. at 257 ("assum[ing] that the

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with sufficient clarity," and the instructions given by the lower court. *McCormick*, 500 U.S. at 273; *id.* at 274 ("The instructions given [below] are not a model of clarity."). *See also Carpenter*, 961 F.2d at 827 ("*McCormick* requires ... that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain"); *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (in light of *Evans*, "[n]o generalized expectation of some future favorable action will do" for a § 666 conviction, but rather "agreement" is required).

[14] The court of appeals questioned whether monies solicited legitimately constituted campaign contributions because Blagojevich was not running for reelection as governor, stating that the "jury was

jury found" cash payment was a "bribe"). Moreover, this case involved *solicitations* for contributions, not completed contributions. As noted above, solicitation cases will typically implicate a heightened risk of factual ambiguity—ambiguity that will have to be unpacked and resolved by a jury—and the uncertainties produced by unclear standards in such prosecutions will surely cast a broad chilling effect on the behavior of candidates and donors as well.

IV. The need to clarify that extortion, bribery and honest services fraud are specific intent crimes subject to a good faith defense

Blagojevich was charged with the specific intent crimes of fraud, bribery and extortion. Initially the trial judge ruled that Blagojevich could testify that his good faith understanding was that his actions complied with the law. In a proffer outside the hearing of the jury, the defense explained that this defense was based in part on

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entitled to conclude that" a campaign donation "was for Blagojevich's personal benefit rather than for his campaign." App. 3a. But the jury was never asked to make such a finding. The government effectively conceded as much at trial. Tr. 4767. Illinois law strictly forbade expenditure of campaign funds for personal use, 10 ILCS 5/9-8.10, even after leaving office, 10 ILCS 5/9-5. Even assuming he would not seek reelection, nothing prevented Blagojevich using campaign funds to disseminate his message while in office, or from running for some other local or statewide office. Even if he chose not to seek elected office again, Illinois law permits funds remaining in a candidate's political committee upon dissolution to be "transferred to other political or charitable organizations consistent with the positions of the committee or the candidates it represented." 10 ILCS 5/9-5. Thus Blagojevich could have continued to pursue progress on political issues important to him and his supporters using their contributions without running for office himself. *See* 10 ILCS 5/9-8.10.

Blagojevich's good faith belief that he was not "crossing any lines" and was following the law as he understood it. Tr. 4150-84 (defendant's offer of proof describing his good faith defense). The confusion over the legal distinction between the solicitation of a bribe and the solicitation of a campaign contribution led the trial judge to reject this legitimate good faith defense to all of the counts. The trial judge barred this testimony based on a clear misunderstanding of *McCormick*'s explicit promise requirement in campaign contribution cases, *see supra* p.22; *see also* App. 13a (stating good faith defense is "stalking horse" for *McCormick* explicit quid pro quo argument that court of appeals had rejected).

The trial court erred in excluding a good faith defense to these specific intent crimes. It instructed the jury that the charges included as an essential element of the offense the requirement that Blagojevich "intended to deceive" (fraud) or acted with "intent to commit extortion"[15] or "corruptly" (bribery), but barred him from testifying about his good faith belief that he had properly performed the duties of his elected office and followed the law as he understood it. Tr. 4152-73, 4181-83. The court amended the pattern good faith jury instructions to include an instruction that, "[i]n the context of this case, good faith means that the defendant acted without intending to exchange official acts for personal benefits." App. 26a, 28a, 30a. This instruction was not included in the first trial, which resulted in a hung jury, and when combined with the instruction that "[t]he government is not required to prove that the defendant knew his acts were unlawful," *id.*, it improperly allowed the jury to convict Blagojevich of each offense without concluding that he had a guilty mind or believed he was breaking

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[15] *See also Evans*, 504 U.S. at 278 (Kennedy, J., concurring) (concluding "corrupt motive" is essence of extortion offense).

the law. The court of appeals compounded this error by misconstruing this as a mistake of law defense—which Blagojevich never argued—and concluding that such a defense did not apply because the extortion, bribery and honest services fraud statutes do not include a textual "wilfulness" *mens rea* requirement. App.13a (citing *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 410-11 (1833), involving ignorance of the law defense).

As this Court has recently reiterated, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime," *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted), and traditionally fraud is a specific intent crime where a good faith defense is available. This Court will "read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" but even in *Elonis*, a case involving statements many reasonable persons would perceive as threats, this Court held "what Elonis thinks does matter." 135 S. Ct. at 2010-11 (alterations omitted). This standard should properly apply to the specific intent crimes at issue here. *See Morissette v. United States*, 342 U.S. 246, 262-63 (1952) (applying specific intent requirement even where statutory text omits it); *id.* at 250, 252 (noting "universal" principle that "wrongdoing must be conscious to be criminal"); *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982) ("[G]ood faith ... is a complete defense to a charge of mail fraud."). *Cf. Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) ("Only persons conscious of wrongdoing can be said to 'knowingly ... corruptly persuade'" under obstruction of justice statute). This Court should clarify that extortion, bribery and honest services fraud are specific intent crimes subject to a good faith defense.

In the alternative, this Court should grant the petition, vacate Blagojevich's extortion, bribery and fraud

convictions and remand for further proceedings consistent with *Elonis*, which was decided after briefing and argument below, and was not addressed in the court of appeals' opinion or on rehearing *en banc*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 17, 2015

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11-3853

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v. ROD BLAGOJEVICH, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 CR 888-1 -- James B. Zagel, Judge.

Before EASTERBROOK, KANNE, and ROVNER, Circuit Judges.

For United States of America, Plaintiff - Appellee: Debra Riggs Bonamci, Attorney, Office of The United States Attorney, Chicago, IL.

For Rod R. Blagojevich, Defendant - Appellant: Leonard Goodman, Attorney, Len Goodman Law Office LLC, Chicago, IL; Lauren Faust Kaeseberg, Attorney, Kaplan & Sorosky, Chicago, IL

December 13, 2013, Argued
July 21, 2015, Decided

EASTERBROOK, *Circuit Judge*. Rod Blagojevich was convicted of 18 crimes after two jury trials. The crimes include attempted extortion from campaign contributors, corrupt solicitation of funds, wire fraud, and lying to federal investigators. The first trial ended with a conviction on the false-statement count and a mistrial on the others after the jury could not agree. The second trial produced convictions on 17 additional counts. At the time of his arrest in December 2008, Blagojevich was Governor of Illinois; the state legislature impeached and removed him from office the next month. The district court sentenced Blagojevich to 168 months' imprisonment on the counts that authorize 20-year maximum terms, and lesser terms on all other counts. All sentences run concurrently, so the total is 168 months. Because the charges are complex, the trials long, and the issues numerous, an effort to relate many details would produce a book-length opinion. Instead we present only the most important facts and discuss only the parties' principal arguments. All else has been considered but does not require discussion.

The events leading to Blagojevich's arrest began when Barack Obama, then a Senator from Illinois, won the election for President in November 2008. When Obama took office in January 2009, Blagojevich would appoint his replacement, to serve until the time set by a writ of election. See *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010). Before the 2008 election, federal agents had been investigating Blagojevich and his associates. Evidence from some of those associates had led to warrants authorizing the interception of Blagojevich's phone calls. (The validity of these warrants has not been contested on this appeal.) Interceptions revealed that Blagojevich viewed the opportunity to appoint a new Senator as a bonanza.

Through intermediaries (his own and the President-elect's), Blagojevich sought a favor from Sen. Obama in exchange for appointing Valerie Jarrett, who Blagojevich perceived as the person Sen. Obama would like to have succeed him. Blagojevich asked for an appointment to the Cabinet or for the President-elect to persuade a foundation to hire him at a substantial salary after his term as Governor ended, or find someone to donate $10 million and up to a new "social-welfare" organization that he would control. The President-elect was not willing to make a deal, and Blagojevich would not appoint Jarrett without compensation, saying: "They're not willing to give me anything except appreciation. Fuck them."

Blagojevich then turned to supporters of Rep. Jesse Jackson, Jr., offering the appointment in exchange for a $1.5 million "campaign contribution." (We put "campaign contribution" in quotation marks because Blagojevich was serving his second term as Governor and had decided not to run for a third. A jury was entitled to conclude that the money was for his personal benefit rather than a campaign.) Blagojevich broke off negotiations after learning about the wiretaps, and he was arrested before he could negotiate with anyone else.

The indictment charged these negotiations as attempted extortion, in violation of 18 U.S.C. §§ 2 and 1951, plus corrupt solicitation of funds (18 U.S.C. §§ 371 and 666(a)(1)(B)) and wire fraud (18 U.S.C. §§ 1343 and 1346). The indictment also charged Blagojevich with other attempts to raise money in exchange for the performance of official acts, even though federal law forbids any payment (or agreement to pay), including a campaign contribution, in exchange for the performance of an official act. See *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). We give just two examples.

First, when lobbyists for Children's Memorial Hospital sought an increase in reimbursement rates for Medicaid patients, Blagojevich (through intermediaries) replied that he would approve an extra $8 to $10 million of reimbursement in exchange for a "campaign contribution" of $50,000. Blagojevich initially approved a rate increase but delayed and then rescinded it when waiting for a contribution n; he was arrested before any money changed hands.

Second, after the state legislature had approved an extension of a program that taxed casinos for the benefit of racetracks--see *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (en banc); *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723 (7th Cir. 2014)--but before Blagojevich signed the bill, he attempted to ensure that John Johnston, who owned interests in two of the racetracks, fulfilled a $100,000 "campaign" pledge. Blagojevich had intermediaries inform Johnston that the bill would not be signed until the money arrived. Blagojevich was arrested before he signed the bill (and before Johnston signed a check).

These charges led to guilty verdicts at the second trial. The charge that produced a guilty verdict at the first trial was that Blagojevich had lied to the FBI in 2005, violating 18 U.S.C. §1001. Investigations of Blagojevich's associates began shortly after he took office as Governor in 2003, and by 2005 the FBI wanted to ask Blagojevich what he knew about his associates' conduct. He agreed to an interview in his lawyer's office. Agents asked whether Blagojevich took contributions into account when approving state contracts or making appointments. He replied "that he does not track who contributes to him and does not want to know and does not keep track of how much they contribute to him." So an agent testified, relying on his notes. At Blagojevich's in-

sistence, the interview was not recorded, but a jury could find the agent's testimony accurate. The jury also concluded that this answer was knowingly false, because in 2005 and earlier Blagojevich regularly found out who contributed how much. (The jury was told to assess the honesty of this answer based solely on how Blagojevich had conducted himself from 2003 through 2005.)

Blagojevich now asks us to hold that the evidence is insufficient to convict him on any count. The argument is frivolous. The evidence, much of it from Blagojevich's own mouth, is overwhelming. To the extent there are factual disputes, the jury was entitled to credit the prosecution's evidence and to find that Blagojevich acted with the knowledge required for conviction.

But a problem in the way the instructions told the jury to consider the evidence requires us to vacate the convictions on counts that concern Blagojevich's proposal to appoint Valerie Jarrett to the Senate in exchange for an appointment to the Cabinet. A jury could have found that Blagojevich asked the President-elect for a private-sector job, or for funds that he could control, but the instructions permitted the jury to convict even if it found that his only request of Sen. Obama was for a position in the Cabinet. The instructions treated all proposals alike. We conclude, however, that they are legally different: a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment.

Because the instructions do not enable us to be sure that the jury found that Blagojevich offered to trade the appointment for a private salary after leaving the Governorship, these convictions cannot stand. Compare *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), and *United States v. Rivera Borrero*, 771 F.3d 973 (7th Cir. 2014), with *Griffin v. United*

States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). (Perhaps because the jury deadlocked at the first trial, the United States does not seriously contend that any error was harmless; a one-line statement in the brief differs from an argument. Cf. *Hedgpeth v. Pulido*, 555 U.S. 57, 60-62, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) (an error of this kind is not "structural").)

McCormick describes the offense as a *quid pro quo*: a public official performs an official act (or promises to do so) in exchange for a private benefit, such as money. See also *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999); *United States v. McDonnell*, 2015 U.S. App. LEXIS 11889 (4th Cir. July 10, 2015). A political logroll, by contrast, is the swap of one official act for another. Representative A agrees with Representative B to vote for milk price supports, if B agrees to vote for tighter controls on air pollution. A President appoints C as an ambassador, which Senator D asked the President to do, in exchange for D's promise to vote to confirm E as a member of the National Labor Relations Board. Governance would hardly be possible without these accommodations, which allow each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly.

A proposal to appoint a particular person to one office (say, the Cabinet) in exchange for someone else's promise to appoint a different person to a different office (say, the Senate), is a common exercise in logrolling. We asked the prosecutor at oral argument if, before this case, logrolling had been the basis of a criminal conviction in the history of the United States. Counsel was unaware of any earlier conviction for an exchange of political favors. Our own research did not turn one up. It

would be more than a little surprising to Members of Congress if the judiciary found in the Hobbs Act, or the mail fraud statute, a rule making everyday politics criminal.

Let's work this through statute by statute. Section 1951, the Hobbs Act, which underlies Counts 21 and 22, forbids interference with commerce by robbery or extortion. Blagojevich did not rob anyone, and extortion, a defined term, "means 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" (§1951(b)(2)). The indictment charged Blagojevich with the "color of official right" version of extortion, but none of the evidence suggests that Blagojevich claimed to have an "official right" to a job in the Cabinet. He did have an "official right" to appoint a new Senator, but unless a position in the Cabinet is "property" from the President's perspective, then seeking it does not amount to extortion. Yet a political office belongs to the people, not to the incumbent (or to someone hankering after the position). *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000), holds that state and municipal licenses, and similar documents, are not "property" in the hands of a public agency. That's equally true of public positions. The President-elect did not have a property interest in any Cabinet job, so an attempt to get him to appoint a particular person to the Cabinet is not an attempt to secure "property" from the President (or the citizenry at large).

Sekhar v. United States, 133 S. Ct. 2720, 186 L. Ed. 2d 794 (2013), shows that the phrase "obtaining of property" in the Hobbs Act must not be extended just to penalize shady dealings. *Sekhar* holds that a recommendation about investments is not "property" under §1951(b)(2) for two principal reasons: first, in the long

history of extortion law it had never before been so understood (similarly, political logrolling has never before been condemned as extortion); second, the making of a recommendation is not transferrable. The Court restricted "property" to what one owner can transfer to another. By that standard a job in the Cabinet (or any other public job) is not "property" from the employer's perspective. It is not owned by the person with appointing power, and it cannot be deeded over. The position may be *filled* by different people, but the position itself is not a transferrable property interest. A position is "held" or "occupied" but not "obtained," and under *Sekhar* something that cannot be "obtained" also cannot be the subject of extortion.

Section 666, the basis (through a conspiracy charge) of Count 23, forbids theft or bribery in publicly funded programs (of which the State of Illinois is one). Count 23 relies on §666(a)(1)(B), which makes it a crime for an agent of a covered organization to solicit "corruptly...anything of value" in connection with a transaction worth $5,000 or more. "Corruptly" refers to the recipient's state of mind and indicates that he understands the payment as a bribe or gratuity. *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015). It would not be plausible to describe a political trade of favors as an offer or attempt to bribe the other side. What is more, §666(c) provides that the section as a whole does not apply "to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Compensation for a job by someone other than a ghost worker is a "bona fide salary"--and, as we've pointed out, the "usual course of business" in politics includes logrolling.

The indictment also charged Blagojevich with wire fraud, in violation of 18 U.S.C. §1343. That the negotia-

tions used the phone system is indisputable, but where's the fraud? Blagojevich did not try to deceive Sen. Obama. The prosecutor contended that Blagojevich deprived the public of its intangible right to his honest services, which 18 U.S.C. §1346 defines as a form of fraud. To call this an honest-services fraud supposes an extreme version of truth in politics, in which a politician commits a felony unless the ostensible reason for an official act also is the real one. So if a Governor appoints someone to a public commission and proclaims the appointee "the best person for the job," while the real reason is that some state legislator had asked for a friend's appointment as a favor, then the Governor has committed wire fraud because the Governor does not actually believe that the appointee is the best person for the job. That's not a plausible understanding of §1346, even if (as is unlikely) it would be valid under the First Amendment as a criminal penalty for misleading political speech. And no matter what one makes of the subject, the holding of *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), prevents resort to §1346 to penalize political horse-trading. *Skilling* holds that only bribery and kickbacks violate §1346. So unless political logrolling is a form of bribery, which it is not, §1346 drops out.

The prosecutor insists, however, that Blagojevich's situation is different and uncommon because he sought a post in the Cabinet for himself. It isn't clear to us that this is unusual. The current Secretary of State was appointed to that position from a seat in the Senate, and it wouldn't surprise us if this happened at least in part because he had performed a political service for the President. Ambassadors, too, come from the House or Senate (or from state politics) as part of political deals.

Some historians say that this is how Earl Warren came to be Chief Justice of the United States: he delivered the California delegation at the 1952 Republican convention to Eisenhower (rather than Senator Taft) in exchange for a commitment to appoint him to the next vacancy on the Supreme Court. See, e.g., Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* 7 (1998); Arthur Paulson, *Realignment and Party Revival: Understanding American Electoral Politics at the Turn of the Twenty-First Century* 86 (2000). Whether this account is correct is debatable, see Jim Newton, *Justice for All*: *Earl Warren and the Nation He Made* 6-11 (2006), and Chief Justice Warren himself denied that a deal had been made (though perhaps a political debt had been incurred), *The Memoirs of Earl Warren* 250-61 (1977). If the prosecutor is right, and a swap of political favors involving a job for one of the politicians is a felony, then if the standard account is true both the President of the United States and the Chief Justice of the United States should have gone to prison. Yet although historians and political scientists have debated whether this deal was made, or whether if made was ethical (or politically unwise), no one to our knowledge has suggested that it violated the statutes involved in this case. (Whether it might have violated 18 U.S.C. §599, and whether that statute is compatible with the First Amendment, are issues we do not address.)

Let us go through the three statutes again. *McCormick* holds that a politician's offer to perform a valuable service can violate §1951 as extortion if it involves a *quid pro quo*: a public act in exchange for a valuable return promise. We've already explained, however, why logrolling does not violate §1951. The exclusion in §666(c) for bona fide employment also applies no matter who gets the job. Who would get the public job does not matter to §1346 either. Indeed, the analysis in *United States v.*

Thompson, 484 F.3d 877 (7th Cir. 2007), applies to Blagojevich too. *Thompson* reversed convictions under §666 and §1346 that had been obtained on a theory that a public employee's interest in keeping her job meant that she violated federal law if she performed any aspect of her job in ways that she knew she shouldn't. (The asserted error in *Thompson* was an incorrect ranking of bidders for a travel-services contract.) *Thompson* holds, among other things, that the interest in receiving a salary from a public job is not a form of private benefit for the purpose of federal criminal statutes.

Put to one side for a moment the fact that a position in the Cabinet carries a salary. Suppose that Blagojevich had asked, instead, that Sen. Obama commit himself to supporting a program to build new bridges and highways in Illinois as soon as he became President. Many politicians believe that public-works projects promote their re-election. If the prosecutor is right that a public job counts as a private benefit, then the benefit to a politician from improved chances of election to a paying job such as Governor--or a better prospect of a lucrative career as a lobbyist after leaving office--also would be a private benefit, and we would be back to the proposition that all logrolling is criminal. Even a politician who asks another politician for favors only because he sincerely believes that these favors assist his constituents could be condemned as a felon, because grateful constituents make their gratitude known by votes or post-office employment.

What we have said so far requires the reversal of the convictions on Counts 5, 6, 21, 22, and 23, though the prosecutor is free to try again without reliance on Blagojevich's quest for a position in the Cabinet. (The evidence that Blagojevich sought money in exchange for appointing Valerie Jarrett to the Senate is sufficient to convict,

so there is no double-jeopardy obstacle to retrial. See *Burks v. United States*, 437 U.S. 1 (1978).) Because many other convictions remain and the district judge imposed concurrent sentences, the prosecutor may think retrial unnecessary--but the judge may have considered the sought-after Cabinet appointment in determining the length of the sentence, so we remand for resentencing across the board. (The concluding part of this opinion discusses some other sentencing issues.)

With the exception of the proposed Cabinet deal, the jury instructions are unexceptionable. They track *McCormick*. Much of Blagojevich's appellate presentation assumes that extortion can violate the Hobbs Act only if a *quid pro quo* is demanded explicitly, but the statute does not have a magic-words requirement. Few politicians say, on or off the record, "I will exchange official act X for payment Y." Similarly persons who conspire to rob banks or distribute drugs do not propose or sign contracts in the statutory language. "Nudge, nudge, wink, wink, you know what I mean" can amount to extortion under the Hobbs Act, just as it can furnish the gist of a Monty Python sketch.

Blagojevich contends that he was entitled to an instruction that, if he believed in good faith that his conduct was lawful, then he must be acquitted. That is not so; an open-ended "good faith" defense would be either a mistake-of-law defense in disguise or an advice-of-counsel defense without demonstrating advice of counsel. This circuit's pattern jury instructions call for a good-faith instruction only when the statute contains a term such as "willful" that (as understood for that particular statute) makes knowledge of the law essential. *Pattern Criminal Jury Instructions of the Seventh Circuit* § 6.10 (2012 revision).

Suppose Blagojevich believed that winks and nudges avoid the *McCormick* standard. That would be legally wrong, and the fact that he *believed* it would not support acquittal unless mistake of law is a defense. Blagojevich does not argue that knowledge of the law is essential to conviction under § 666 or § 1951, so there's no basis for a good-faith instruction. See *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008); *United States v. Wheeler*, 540 F.3d 683, 689-90 (7th Cir. 2008). It is enough for the instruction to cover the mental elements required by each statute. That a given defendant wants to apply the phrase "good faith" to the lack of essential knowledge or intent does not imply the need for a separate instruction; a jury's task is hard enough as it is without using multiple phrases to cover the same subject. These instructions defined the statutes' *mens rea* elements correctly; no more was required.

The argument for a good-faith instruction relies principally on *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991), but that's a different kettle of fish. The Justices read the word "willfully" in a particular tax law to require proof that the accused knew the law, which the Justices saw as technical and beyond the ken of many taxpayers. The word "willfully" does not appear in any of the statutes that Blagojevich was charged with violating. Anyway, he does not deny knowing the rule of *McCormick*, under which the exchange of an official act for a private benefit is illegal, so *Cheek* would not help him even if it applied. The "good faith" argument is just a stalking horse for the contention that the *quid pro quo* must be stated explicitly and cannot be implied from hints and nudges; as we have rejected that contention directly, it cannot be resuscitated in the form of a "good faith" instruction untethered from statutory language. The district judge *did* give a good-faith instruction limited to the wire-fraud counts, which have an

intent requirement within the scope of § 6.10. The judge used the language of § 6.10, as modified to fit the specific charges, and added one sentence at the end. Here's how the instruction wrapped up:

> The burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with the requisite intent. The government is not required to prove that the defendant knew his acts were unlawful.

Blagojevich contends that this instruction's final sentence is improper. To the contrary, the sentence just reminds the jury that mistake of law is not a defense. The wire-fraud statute requires a specific intent to defraud but *not* wilfulness or any other proxy for knowledge of the law. To the extent that Blagojevich may think that a need to show intent to defraud is the same as a need to show knowledge about what the law requires, he misreads *United States v. LeDonne*, 21 F.3d 1418, 1430 (7th Cir. 1994). See *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 410-11, 8 L. Ed. 728 (1833) (distinguishing these two subjects). The district judge was concerned that Blagojevich had been trying to argue mistake-of-law indirectly even though none of the statutes requires legal knowledge; under the circumstances, it was not an abuse of discretion to add a caution to the instructions. Cf. *United States v. Curtis*, 781 F.3d 904, 907 (7th Cir. 2015) (an instruction is proper unless "as a whole [it] misled the jury as to the applicable law").

We now take up challenges to the admission and exclusion of evidence. Each trial lasted about a month, so there were plenty of evidentiary rulings. On the whole, the district judge allowed the defense considerable latitude, but Blagojevich can't complain about the rulings in

his favor. He does complain about several that went the prosecution's way, and we discuss three of them.

The first concerns a ruling that excluded wiretap transcripts showing that at the same time Blagojevich was asking the President-elect for something in exchange for appointing Valerie Jarrett to the Senate, he was asking Michael Madigan (Speaker of the state's House of Representatives) to support his political program in exchange for appointing Lisa Madigan, Michael's daughter, to the Senate. Blagojevich's lawyers contended that his objective all along was to appoint Lisa Madigan, then (and now) the Attorney General of Illinois. The district judge did not allow this wiretap evidence, ruling that it would divert attention from the indictment's charges. A bank robber cannot show that on many other occasions he entered a bank without pulling a gun on a teller, nor can a teller charged with embezzlement show how often he made correct entries in the books.

As we've mentioned, the district court gave the defense a long leash, and the judge was entitled to conclude that evidence about negotiations with Speaker Madigan would sidetrack this trial. See Fed. R. Evid. 403. The Madigan conversations could have shown that Blagojevich was negotiating with many people for the best deal; they would not have shown that any of his requests to the President-elect or Rep. Jackson was lawful. The judge did permit Blagojevich to testify that he had planned to appoint Lisa Madigan all along and that he was deceiving rather than extorting the President-elect. (In the end, however, he appointed Roland Burris, not Lisa Madigan.) Some transcripts admitted for other purposes also contained Lisa Madigan's name.

Come the closing argument, the prosecutor used the judge's ruling to advantage, stating:

> And the Lisa Madigan deal, you'll have the calls, November 1st through November 13th. Go back and look at the calls and see how many times Lisa Madigan is actually mentioned ... . That's one, and two, how often is she mentioned in a way that she is not a stalking horse, and you're not going to find it. She was a stalking horse.

Blagojevich contends that this argument violated the Due Process Clause by so misleading the jury that it could no longer think rationally about his guilt. See *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Having persuaded the judge to keep most Madigan transcripts out of evidence, the prosecutor should not have argued that the record contains very few references to her. The paucity of references was a result of the prosecutor's strategy, not the defense's strategy or a shortage of references in the recordings. But *Darden* sets a very high bar for a due-process challenge to a prosecutor's closing argument. In the main, the right response is argument from the defense or correction from the judge, not reversal on appeal. Especially not when the trial lasted five weeks and the prosecutorial comment lasted a few seconds. It is extraordinarily unlikely that this comment, about what is (as we have mentioned) a collateral if not an irrelevant matter, could have affected the jury's evaluation of the contention that Blagojevich violated the Hobbs Act and § 666 by asking the President-elect or Rep. Jackson for cash (or a lucrative private-sector job) in exchange for Blagojevich's appointment of the new Senator.

The second evidentiary subject concerns a recording of a conversation between John Harris, Blagojevich's

chief of staff, and William Quinlan, his general counsel. Harris testified; Quinlan did not. During the direct examination of Harris, the prosecutor introduced a recording of a call between Harris and Quinlan, during which Harris asked why Blagojevich had not yet signed the bill extending the racetrack subsidy, and Quinlan replied: "Ah, let's just say, it is what you think." The district judge admitted the statement "not for [its] truth but for the effect [it] had on ... Harris and the decisions that he ma[de] as a result of th[e] conversation." The Federal Rules of Evidence prohibit hearsay, which is an out of court statement used to prove the truth of the matter stated, see Fed. R. Evid. 801(c)(2), but with the judge's limitation Quinlan's statement was not hearsay. The prosecutor then asked Harris what he understood (he answered that Blagojevich "was holding the bill because he wanted to talk to [people] about getting campaign contributions from the racetrack owners before he signed") and what actions he took as a result. No problems so far.

Once again, though, a problem cropped up in the closing argument. The prosecutor said this:

> John Harris talks to the defendant, and you got that call at Tab 54, and he asks him what to do about the racing bill because what he knows is he has approved it, there's a green light. The defendant tells him in that call "I'm sitting on the bill." He already had a hold on that bill as of noon of November the 26th. What John Harris told you is that the excuse that he got from the defendant on that call made no sense to him, it was a red flag. He said something to him like "I want to see how it all fits together." What Harris told you there is there was nothing to see on this bill about how it fit in with anything else that

> was pending at that time. And so what John Harris says, "I bet he's holding this up for a campaign contribution."
>
> John Harris goes to Bill Quinlan, he tells him what his concern is, and he asks him to talk to the defendant and find out if that's what he's doing. *And you got the call at Tab 56 where Bill Quinlan confirms that's exactly what the defendant is doing*. And what John Harris testified is once he knew that, he stepped out, and he left it to the defendant and Lon Monk [a lobbyist; formerly Blagojevich's chief of staff] to figure out. He knew he wasn't going to be able to do anything once he had a hold on that bill waiting for a campaign contribution.

The language we have italicized is the problem. It takes Quinlan's statement as the proposition that Blagojevich was waiting for money. That's a hearsay use. The only proper use of the statement was for the effect it had on Harris.

Perhaps one could rescue the argument by saying that the italicized sentence is just shorthand for the permitted use of Quinlan's recorded words: Harris *understood* them as confirming his belief that Blagojevich was holding the bill in order to extract money from racetrack owners. Jurors might have been hard pressed to tell the difference between "Quinlan confirmed X" and "Harris understood Quinlan to confirm X." This may reflect adversely on the hearsay doctrine; jurors do not draw subtle distinctions just because they have been part of the common law since the eighteenth century. At all events, "subtle" is the important word. Given the duration of this trial and the power of the evidence, the fact that a prosecutor says "Quinlan confirmed X" when he

should have said "Harris understood Quinlan to have confirmed X" cannot have affected the outcome. The judge himself seems to have missed the distinction, despite his earlier ruling. The likelihood of prejudice from this misstatement is minute, and without prejudice there's no basis for a reversal. See *United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013).

Now for the third evidentiary issue, and the last we discuss. During trial, the judge admitted evidence that, before his arrest, Blagojevich had retained the services of lawyers with experience in criminal defense. Blagojevich's appellate brief contends that the only function of this evidence was to imply consciousness of guilt. The prosecutor replies, however, that this evidence served a different function: to address what seemed to be a developing advice-of-counsel defense. To this Blagojevich rejoins that he never raised such a defense, so the evidence was both irrelevant and prejudicial.

"Advice of counsel is not a free-standing defense, though a lawyer's fully informed opinion that certain conduct is lawful (followed by conduct strictly in compliance with that opinion) can negate the mental state required for some crimes, including fraud." *United States v. Roti*, 484 F.3d 934, 935 (7th Cir. 2007). Blagojevich did not mount an advice-of-counsel defense. He did not fully reveal his actions to any lawyer, did not receive an opinion that the acts were lawful, and did not comport himself strictly in compliance with any such opinion. But he hinted in that direction. Here is some of his testimony:

> * "I immediately had Mary [Stewart] find Bill Quinlan for me so that I could talk to Bill Quinlan my lawyer, the governor's lawyer, about what do I do about this, how do I handle this, because I wanted to be very careful that I don't get

caught up in something that I'm not aware of that isn't--that is potentially wrong and could very well be wrong." Tr. 3809.

* "And then I was reconstructing for Bill Quinlan, my lawyer, basically, you know, spilling whatever I knew, whatever was coming into my mind to him about that call, about that conversation about the fundraising requests from Patrick Magoon [the President of Children's Memorial Hospital] in connection with Dusty Baker [a former manager of the Chicago Cubs who was lobbying on Magoon's behalf] calling me. And so I was relating this to Bill Quinlan ... because I was basically trying to find out from Quinlan do you think I said something wrong? Could I have done--could I have stumbled into crossing a line of some sort?" Tr. 4078.

* "Q: Why were you telling Bill Quinlan that? A: Because Bill Quinlan's my general counsel, he's my lawyer and he was in many ways, you know, a--he was in many ways--you know, he--I talked to him about everything that was remotely connected to anything that was on legal issues or pending investigation and all the rest because I wanted to be careful not to do anything wrong." Tr. 4079.

* "Bill Quinlan ... was my general counsel, and there was nothing I would do of any magnitude that I felt I needed to discuss with my general counsel, my lawyer Bill Quinlan." Tr. 4092.

* "Q: Did you also have several conversations with Bill Quinlan about the Senate seat? A: Yes. I talked to Bill Quinlan about it constantly, continuously, almost every day. Almost every

> day. Q: Did you have conversations with Bill Quinlan about [establishing] a 501(c)(4) [social-welfare organization] in relation to the Senate seat? A: I had several conversations with Bill Quinlan about a 501(c)(4) in relation to the Senate seat." Tr. 4112.

The prosecutor objected to all of this testimony, observing that Blagojevich had not tried to meet the requirements of an advice-of-counsel defense, but the judge allowed the testimony (this is one of the many examples of resolving debatable questions in the defense's favor). Having asserted that he consulted with counsel, Blagojevich opened the door to evidence that he had other lawyers too yet was keeping mum about what they told him. That's an appropriate topic for evidence and for comment during closing argument.

Sentencing is the only other subject that requires discussion. The district judge concluded that the Sentencing Guidelines recommend a range of 360 months to life imprisonment for Blagojevich's offenses, and the actual sentence is 168 months. Instead of expressing relief, Blagojevich maintains that the sentence is too high because the range was too high. The judge erred in two respects, Blagojevich contends: first, the judge included as loss the $1.5 million that, he found, Blagojevich had asked Rep. Jackson's supporters to supply. See U.S.S.G. § 2C1.1(b)(2). He calls this finding "speculative." The judge also added four levels under U.S.S.G. § 3B1.1(a) after finding that Blagojevich was the leader or organizer of criminal activity that included five or more participants or was "otherwise extensive". Blagojevich contends that the many persons he consulted or used as intermediaries should not count.

The district judge did not err in either respect. The $1.5 million figure did not come out of a hat; it was a number discussed in the recordings. That nothing came of these overtures does not affect the calculation of loss under § 2C1.1(b)(2), because it is an amount Blagojevich intended to receive from criminal conduct even though not a sum anyone else turned out to be willing (or able) to pay. As for the leadership enhancement for an "otherwise extensive" organization: This applies whether or not the defendant's subordinates and associates are criminally culpable. U.S.S.G. § 3B1.1 Application Note 3. The numbers involved here substantially exceed five and qualify as "otherwise extensive."

Any error in the Guidelines calculation went in Blagojevich's favor. After calculating the 360-to-life range, the judge concluded that it is too high and began making reductions, producing a range of 151 to 188 months. For example, the judge gave Blagojevich a two-level reduction for accepting responsibility, see U.S.S.G. § 3E1.1, and took off two more for good measure, even though he pleaded not guilty, denied culpability at two lengthy trials, and even now contends that the evidence is insufficient on *every* count and that he should have been acquitted across the board. That's the antithesis of accepting responsibility. The judge reduced the range further by deciding not to count all of the $1.5 million as loss, even though he had decided earlier that it is the right figure. The prosecutor has not filed a cross-appeal in quest of a higher sentence but is entitled to defend the actual sentence of 168 months (and to ask for its re-imposition on remand) without needing to file an appeal. Removing the convictions on the Cabinet counts does not affect the range calculated under the Guidelines. It is not possible to call 168 months unlawfully high for Blagojevich's crimes, but the district judge should consider on remand whether it is the most appropriate sentence.

The convictions on Counts 5, 6, 21, 22, and 23 are vacated; the remaining convictions are affirmed. The sentence is vacated, and the case is remanded for retrial on the vacated counts. Circuit Rule 36 will not apply. If the prosecutor elects to drop these charges, then the district court should proceed directly to resentencing. Because we have affirmed the convictions on most counts and concluded that the advisory sentencing range lies above 168 months, Blagojevich is not entitled to be released pending these further proceedings.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

August 19, 2015

Before
FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 11-3853

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern
v.	District of Illinois, Eastern Division
ROD BLAGOJEVICH, Defendant-Appellant.	No. 08 CR 888-1 James B. Zagel, *Judge*

Order

Defendant-appellant filed a petition for rehearing [*sic*] and rehearing en banc on August 4, 2015. No judge in regular active service has requested a vote on the petition for rehearing en banc,[*] and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

[*] Judge Flaum did not participate in the consideration of this petition.

APPENDIX C

EXCERPTS OF JURY INSTRUCTIONS

[HONEST SERVICES FRAUD/BRIBERY]

[*Tr. 5535] Counts 1 through 10 of the indictment charge the defendant with wire fraud.

To sustain the charge of wire fraud as charged in Counts 1 through 10 the government must prove the following propositions beyond a reasonable doubt:

First, that the defendant knowingly devised [*5536] or participated in a scheme to defraud the public of its right to the honest services of Rod Blagojevich or John Harris by demanding, soliciting, seeking, asking for, or agreeing to accept a bribe in the manner described in the particular count you are considering;

…

[*5537] A public official commits bribery when he directly or indirectly demands, solicits, seeks, or asks for, or agrees to accept something of value from another person in exchange for a promise for or [*5538] performance of an official act. The proposed exchange may be communicated in any manner and need not be communicated in any specific or particular words so long as the public official intends to seek or accept something of value in exchange for a specific official act.

…

[*5539] It is not enough that the contributor is making the contribution to create good will or with the vague expectation of help in the future; however, if a public offi-

cial demands, solicits, seeks or asks for directly or indirectly, or agrees to accept money or property believing that it would be given in exchange for a specific requested exercise of his official power, he has committed bribery even if the money or property is to be given to the official in the f[o]rm of a campaign contribution.

…

[*5541] For purposes of Counts 1 through 10, good faith on the part of the defendant is inconsistent with the intent to defraud which is an element of the charges.

In the context of this case, good faith means that the defendant acted without intending to exchange official actions for personal benefits.

The burden is not on the defendant to prove [*5542] his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud. The government is not required to prove that the defendant knew his acts were unlawful.

[EXTORTION]

[*5542] The next series of instructions deals with the charged extortion, attempted extortion in this case.

The defendant is charged with attempted extortion in Counts 11, 12, 16 and 19. To sustain the charge of attempted extortion as charged in Counts 11, 12, 16 and 19 the government must prove the following propositions:

…

[*5543] Extortion under color of official right occurs when a public official receives or attempts to obtain money or property to which he is not entitled believing that the money or property would be given in return for the taking, withholding, or other influencing of official action.

Although the official must receive or attempt to obtain the money or property, the government does not have to prove that the public official first suggested the giving of money or property or that the official asked for or solicited it.

While the official must receive or attempt to obtain the money or property in return for the [*5544] official action, the government does not have to prove the official actually took or intended to take that action or that the initially could have actually taken the action in return for which payment was made or demanded or that the official would not have taken the same action even without payment.

Acceptance by a public official of a campaign contribution by itself does not constitute extortion under color of official right even if the person making the contribution has business pending before the official. However, if an official receives or attempts to obtain money or property believing that it would be given in exchange for specific requested exercise of his official power, he has committed extortion under color of official right even if the money or property is to be given to the official in the form of a campaign contribution.

The term "property" as used in these instructions includes any valuable right considered as a source of wealth.

In order to prove attempted extortion or conspiracy to commit extortion the government must prove that the defendant attempted or conspired to obtain property or money knowing or believing that [*5545] it would be given to him in return for the taking, withholding, or other influencing of specific official action.

The exchange or proposed exchange may be communicated in any manner and need not be communicated in any specific or particular words as long as the public official intends to seek or accept the money or property in return for the taking, withholding, or other influencing of a specific act.

For the purposes of Counts 11, 12, 14, 16, 18 and 19, good faith on the part of the defendant is inconsistent with intent to commit extortion, an element of the charges. In the context of this case, good faith means that the defendant acted without intending to exchange official actions for personal financial benefits.

The burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to commit extortion. The government is not required to prove that the defendant knew his acts were unlawful.

[BRIBERY]

[*5549] To sustain the charge of soliciting bribes as charged in Counts 13 and 17, the government must prove the following propositions:

… that the defendant did so corruptly with the intent to be influenced or rewarded in connection with some business, some transaction, or series of transactions of the State of Illinois;

…

[*5550] For purposes of Counts 13, 15, 17 and 20, a person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties.

A defendant may act corruptly even if he's only partially motivated by the expectation or desire for reward.

The term "anything of value" may include [*5551] campaign contributions and potential salaries from a job.

A public official solicitation of campaign contributions by itself does not constitute bribery even if the person making the contribution has business pending before the official.

It is not enough that the contributor making the contribution create good will or with the vague expectation of help in the future. However, if a public official demands, seeks or asks for, directly or indirectly, or agrees to accept money or property believing it will be given in exchange for a specific requested exercise of his official power, he has committed bribery even if the money or property is to be given to the official in the form of a campaign contribution.

It is not necessary that the defendant's solicitation or demand for a thing of value in exchange for influence or reward with respect to state business be communicated in expressed terms. The proposed exchange may be communicated in any manner and need not be communicated in any specific or particular words so long as the public official intends to solicit or demand something of

value in exchange for influence or reward with respect to a [*5552] specific item of state business.

For purposes of 13, 15, 17 and 20, again, good faith on the part of the defendant is inconsistent with having acted corruptly an element of the charges. In the context of this case, good faith means that the defendant acted without intending to exchange official action for personal benefits. The burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with the requisite intent. The government is not required to prove that the defendant knew his acts were unlawful.

APPENDIX D

PROPOSED DEFENSE INSTRUCTIONS

R. 715 (Def. Proposed Instruction #16):

The receipt of campaign contributions constitutes extortion under color of official right only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act.

R. 715 (Def. Proposed Instruction #17):

"Solicitation of a campaign contribution only constitutes bribery if the payment was made or sought in return for an explicit promise or undertaking by the public official to perform or not perform a specific act. While the explicit promise may be communicated directly or indirectly, the communication must be explicit."

R. 715 (Def. Proposed Instruction #20):

"Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. It is not enough that the contributor is making the contribution to create good will or with the vague expectation of help in the future."

R. 715 (Def. Proposed Instruction #24):

"Campaign contributions and political fundraising are a legally protected and legitimate part of the American system of privately financed elections. The law rec-

ognizes that campaign contributions are given to an elected public official because the giver supports the acts done or to be done by the elected official. Legitimate campaign contributions are given to support public officials with whom the donor agrees and in the generalized hope that the official will continue to take similar official acts in the future. As a result, official acts furthering the interests of the donor or his clients (if the donor is a lobbyist), taken shortly before or after campaign contributions are solicited and received from those beneficiaries, are legal and appropriate. In order for those contributions to constitute extortion, bribery or wire fraud, the government must prove 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."

R. 715 (Def. Proposed Instruction #26):

"An elected public officer is authorized by law to receive campaign contributions. A public officer's receipt of a campaign contribution constitutes bribery only if the payment was made in return for an explicit promise or undertaking by the public officer to perform or not to perform a specific act."

R. 715 (Def. Proposed Instruction #27):

"Campaign contributions are not bribes even if the contributor expects to have business before the public officer in the future. For a campaign contribution to be a bribe, there must be a specific request by the contributor made of the official to act or refrain from acting as a quid pro quo for the contribution. It is not enough that the contributor is making the contribution to create good will or with the vague expectation of help in the future."

R. 715 (Def. Proposed Instruction #30):

"For purposes of the bribery charges an elected official's solicitation of a campaign contribution constitutes bribery only if the payment was made in return for an explicit promise or undertaking by the public officer to perform or not to perform a specific act."

APPENDIX E

TRIAL COURT RULINGS ON INSTRUCTIONS

[*Tr. 3310] [I]f you can think of some way, maybe a statement which says all campaign contributions are not illegal, some are legal and some aren't, maybe you can put a line like in somewhere, should be with the rest of it. That thought is fine, the rest of it, "the law recognizes campaign contributions are given to an elected official because the giver supports the acts done or to be done by the elected official," that I think is just wrong. "Legitimate campaign contributions are given to support public officials with whom the donor agrees and .... the official continue to take similar official acts in the future," I think that the law does not actually approve this, they just disapprove certain things. It's a prohibitive law, not an enabling law, and the rest of it is basically an argument. And you could make that argument on the grounds that these campaign contributions were legal. In fact, that's the argument you're going to make, at least one of them. So I think my proposed remedy is about all I'm willing to give you. And I think it's even consistent with the government's instructions, because it's implicit in the government's instructions. So I'm going to refuse defendant's 24.

…

[*3273] THE COURT: Defense instruction 16 does tie to government 28. Okay, what does 16 do that 28 doesn't do?

DEF COUNSEL: Well, it's the explicit language in defendant's 16 that we're seeking.

THE COURT: You're objecting to this?

AUSA: Yes.

THE COURT: Sustained.

…

[*3274] COURT: And [Defendant's] #17?

…

AUSA: Same objection.... That relates to Government's 39.

THE COURT: 39, okay.

(Brief pause).

THE COURT: Leaving aside the issue of the use of the word "express" in 39, it obviously covers the concept in 17 and I'm sustaining the government's objection.

APPENDIX F

STATUTORY PROVISIONS

HOBBS ACT

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 95: RACKETEERING

§ 1951. Interference with commerce by threats or violence

(a) 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, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means 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.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

(June 25, 1948, ch. 645, 62 Stat. 793; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

FEDERAL BRIBERY STATUTE

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 31: EMBEZZLEMENT AND THEFT

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to

the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

(Added Pub. L. 98–473, title II, § 1104(a), Oct. 12, 1984, 98 Stat. 2143; amended Pub. L. 99–646, § 59(a), Nov. 10, 1986, 100 Stat. 3612; Pub. L. 101–647, title XII, §§ 1205(d), 1209, Nov. 29, 1990, 104 Stat. 4831, 4832; Pub. L. 103–322, title XXXIII, § 330003(c), Sept. 13, 1994, 108 Stat. 2140.)

FEDERAL WIRE FRAUD STATUTE

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 63: MAIL FRAUD
AND OTHER FRAUD OFFENSES

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(Added July 16, 1952, ch. 879, § 18(a), 66 Stat. 722; amended July 11, 1956, ch. 561, 70 Stat. 523; Pub. L. 101–73, title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub. L. 101–647, title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub. L. 103–322, title XXXIII, § 330016(1)(H),

Sept. 13, 1994, 108 Stat. 2147; Pub. L. 107–204, title IX, § 903(b), July 30, 2002, 116 Stat. 805; Pub. L. 110–179, § 3, Jan. 7, 2008, 121 Stat. 2557.)

§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

(Added Pub. L. 100–690, title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)