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NEWSLETTER

Lobbying and Campaign Contributions as Honest-Services Fraud: Two Appellate Courts Weigh In

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In the span of three weeks, two courts of appeals have passed on the *quid pro quo* element for a bribery conviction under 18 U.S.C. § 1346, the honest-services fraud statute. Section 1346 expanded the federal mail- and wire-fraud statute to prohibit not only schemes to defraud another of money or property, but also "scheme[s] or artifice[s] to deprive another of the intangible right of honest services." A 2010 Supreme Court decision held that the honest-services fraud provision "covers only bribery and kickback schemes." Since January, both the D.C. Circuit and the Sixth Circuit have examined the law as it touches on two staples of political activity: lobbying and campaign contributions.

On January 25, the D.C. Circuit upheld the conviction of Kevin Ring, a key player in the Jack Abramoff lobbying scandal, in a decision reported as *United States v. Ring*, 706 F. 3d 460 (D.C. Cir. 2013). Among other charges, a jury found Ring guilty of three honest-services counts stemming from gifts to federal officials of dinners, drinks, concert tickets and sporting events. On appeal, Ring said that the district court should have required the government to prove an "explicit" *quid pro quo* relationship between him and the officials. According to Ring, the government should be held to a more rigorous standard because his lobbying activities implicated the First Amendment. As the court framed his position, "[c]riminalizing implicit agreements to exchange things of value for official acts . . . would result in confused juries convicting on the basis of constitutionally protected conduct and chill First Amendment activity." The D.C. Circuit disagreed, however. While requiring an explicit *quid pro quo* might be warranted for cases involving core political activity, Ring's lobbying practices presented fewer concerns. "[T]he First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, de minimis," the court remarked. In this way, the D.C. Circuit left the door open to divergent bribery standards depending on the constitutional value of a defendant's conduct. Even if the government should shoulder the heavier burden of proving "explicit" *quid pro quo* agreements for dealings involving core political activity, the court affirmed that "no such [standard] is required outside the campaign contribution context."

On February 14, the Sixth Circuit addressed the question left unanswered by its sister circuit–how must the government prove bribery stemming from campaign contributions? In *United States v. Terry,* 707 F. 3d 607 (6th Cir. 2013), the court affirmed the conviction of a state court judge who, the government charged, had

disposed of two cases based on contributions that he had received. Like Ring, the convicted judge argued that the trial court had erred by failing to require proof of a "specific," "express" or "explicit" *quid pro quo* argeement between him and the donor. But unlike Ring, the convicted judge called for a unique element for bribery charges involving campaign contributions: the *quid pro quo* element for contributions could be met, he argued, only by proving that a contribution was made in exchange for a *specific* official act or omission. The Sixth Circuit disagreed, stressing that "Congress . . . did not distinguish between public officials who may legally accept contributions and those who may not in the bribery statutes." Thus, the *quid pro quo* element was met even though the contribution, when made, had not been tied to a specific official act. "[A]n elected judge" cannot "sell a case so long as the buyer has not picked out *which* case at the time of sale," the Sixth Circuit remarked. The court thus tacitly discounted the D.C. Circuit's suggestion that a heightened *quid pro quo* standard might apply for campaign contributions. As a practical matter, though, the Sixth Circuit acknowledged that bribery convictions based on contributions would present a steeper hurdle for prosecutors. "A contribution is more likely to be a duty-free gift than a bribe," the court explained, "because a contribution has a legitimate alternative explanation." The court nonetheless held that the government had easily carried its burden in *Terry*; whereas the D.C. Circuit had affirmed Ring's conviction despite what the court admitted was a "close" case, the Sixth Circuit in *Terry* maintained that "ample evidence" clearly supported the convicted judge's *quid pro quo* dealings.