MEMORANDUM

Date: August 29, 2014

To: Civic Responsibility, LLC **From:** Jeffrey W. Mikoni

Re: The Application Of Public Corruption Laws To Political Campaign Contributions

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Civic Responsibility is exploring the viability of creating a technological platform through which (in oversimplified terms) users could structure campaign contributions to members of Congress as responses to specific legislative actions taken by those members. As part of this development process, you have asked me to provide a general academic overview of the ways in which federal public corruption laws have been applied to cases involving traditional contributions to political campaigns.

Although this subject necessarily touches upon matters of legal interpretation, this memorandum does not constitute legal advice. It includes neither opinions nor conclusions regarding how Civic Responsibility's possible business models would be viewed within this legal framework, nor does it offer any recommendations as to the company's future conduct. Rather, this memorandum is provided for general informational purposes, so that you are aware of subjects upon which the company may wish to seek legal advice at a later date.

EXECUTIVE SUMMARY

- The most salient federal public corruption law—18 U.S.C. § 201—criminalizes the act of providing (or offering to provide) a political official with bribes and/or gratuities. When applying Section 201 to the world of campaign finance, courts have recognized the need to construe the law narrowly in order to avoid either criminalizing or suppressing legitimate political activity. Nevertheless, courts have struggled to define clear lines between illegal bribes, illegal gratuities, and legal campaign contributions. (Part I.)

- Bribery, both within and without the campaign-contribution context, requires the presence of a "*quid pro quo*"—a this-for-that agreement to purchase official action. On its face, this requirement makes it difficult for the unilateral and uncoordinated making or offering of a campaign contribution (*i.e.*, a *bona fide* contribution made without any discussion between the donor and the recipient regarding a promise to conduct official action in exchange for the donation) to constitute bribery. That said, various ambiguities in the law's application make it difficult to definitively rule out such a scenario. (Part II.)

- Gratuity law, on the other hand, broadly criminalizes giving a member of Congress something of value "for or because of any official act performed or to be performed by" the

member, with no *quid pro quo* element. This law stands in unavoidable tension with the fact that most, if not all, campaign contributions are made either as a response to or in anticipation of a member's completed or anticipated official acts. For this reason, the Department of Justice has made the prudential decision to not pursue gratuity charges in cases involving *bona fide* campaign contributions. Should the Department ever depart from this understanding, there are arguments that a blanket exemption for *bona fide* campaign contributions is required as either a matter of statutory or constitutional law. (Part III.)

- Although Section 201 is not the only public corruption law potentially applicable to campaign contributions, in most circumstances any analysis under other statutes would hinge upon the same considerations relevant to bribery charges. In other words, it is unlikely that the offering or making of a given contribution would violate other public corruption statues without also constituting bribery under Section 201. (Part IV.)

DISCUSSION

I. The General Landscape Of Federal Bribery And Gratuity Law

18 U.S.C. § 201, "Bribery of public officials and witnesses"—the public corruption statute most relevant to campaign-contribution concerns—reads in pertinent part as follows:

> (a) For the purpose of this section—
> (1) the term "public official" means Member of Congress[.]
> . . .
> (b) Whoever—
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent—
> (A) to influence any official act; or
> . . .
> (2) being a public official . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
> (A) being influenced in the performance of any official act;
> . . .
> shall be fined under this title . . . or imprisoned for not more than fifteen years, or both[.]
> (c) Whoever—
> (1) otherwise than as provided by law for the proper discharge of official duty—
> (A) directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . ; or
> (B) being a public official . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any

> official act performed or to be performed by such official person;
>
> . . .
>
> Shall be fined under this title or imprisoned for not more than two years, or both[.]

As the Supreme Court has explained, this statute creates "two separate crimes—or two pairs of crimes, if one counts the giving and receiving of unlawful gifts as separate crimes—with two different sets of elements and authorized punishments." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999). The former crime, set forth in Section 201(b)(1) as to the giver and Section 201(b)(2) as to the recipient, is bribery; the latter crime, set forth in Section 201(c)(1)(A) as to the giver and Section 201(c)(1)(B) as to the recipient, is known as "illegal gratuity."[1]

The most critical distinction between the crimes of bribery and gratuity lies in their intent elements. Bribery requires an intent either to "influence" or to be "influenced" in an official act, while illegal gratuity requires only that the thing of value be given or accepted "for or because of" an official act:

> In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may have already determined to take), or for a past act that he has already taken.

Sun-Diamond, 526 U.S. at 404–405 (emphasis in original).

Beyond the intent requirement, the elements of the two crimes differ in a few subtle, but potentially relevant, ways. Although both bribery and gratuity cover payments to present and future public officials, only gratuity applies to payments to former public officials. *Compare* Section 201(b)(1) and (2) *with* Section 201(c)(1)(A) and (B). Bribery requires an intent to act "corruptly," *see* Section 201(b)(1), whereas gratuity at most requires an intent to act "otherwise than as provided for by law," *see* Section 201(c)(1). And gratuity only applies to payments received by a public official "personally," *see* Section 201(c)(1)(B), whereas bribery also reaches payments accepted "for any other person or entity," *see* Section 201(b)(2). *See also* Department of Justice, *United States Attorneys' Manual*, Title 9, Criminal Resource Manual (hereafter, "Criminal Resource Manual") § 2043 (chart noting differences between definitions of bribery and gratuity).

These distinctions are easy to articulate but, often, harder to put into practice. In the end, perhaps the easiest common-sense understanding lies in pithy aphorism: "a bribe says 'please' and a gratuity says 'thank you.'" Criminal Resource Manual § 2044.

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[1] Although this memorandum will often refer simply to "gratuity" for the sake of convenience, it is more technically accurate to refer to the crime as "illegal gratuity," as many gratuities are permissible under the law. The crime of bribery does not provide any room for such linguistic confusion, because "legal bribery" would be an oxymoron.

Complicating matters further is the fact that that the crimes of bribery and gratuity also must be distinguished from the practice of making legal campaign contributions. *See, e.g., United States v. Brewster*, 506 F.2d 62, 69 (D.C. Cir. 1974) (acknowledging the difficulty in drawing clear lines among "the receipt of a bribe, an illegal gratuity, or an innocent contribution"). It is, at this point, beyond dispute that the making or receipt of a campaign contribution *can* violate bribery and/or gratuity laws, so long as all of the elements of one or both of those crimes are satisfied: [2]

> That a bribe doubles as a campaign contribution does not by itself insulate it from scrutiny. No doubt, a contribution is more likely to be a duty-free gift than a bribe because a contribution has a legitimate alternative explanation: The donor supports the candidate's election for all manner of possible reasons. But the prosecution may rebut that alternative explanation, and context may show that an otherwise legitimate contribution is a bribe.

United States v. Terry, 707 F.3d 607, 613 (6th Cir. 2013); *see also Brewster*, 506 F.2d at 77 (rejecting constitutional challenge to gratuity law based on conclusion that lawful campaign contributions could be distinguished from illegal gratuities styled as campaign contributions). In the absence of a bright-line rule exempting campaign contributions from scrutiny under Section 201, it is necessary to give each aspect of the statute deeper scrutiny.

II. Campaign Contributions As Bribes

Bribery is, in many respects, the platonic ideal of public corruption—the straightforward buying and selling of political action. *See, e.g.*, *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). For this reason, the Supreme Court's efforts to harmonize campaign finance regulations with First Amendment protections have consistently permitted efforts to target *quid pro quo* corruption or its appearance, even as support for more broader regulations have ebbed over time. *Cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

The crux of bribery lies in its *quid pro quo* requirement. To again quote *Sun-Diamond*:

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

Sun-Diamond, 523 U.S. at 404–405; *see also Brewster*, 506 F.2d at 72 ("The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is

[2] As a doctrinal matter, this is best understood as a determination that a campaign contribution can be a "thing of value," as that term is used in the bribery and gratuity statutes, but that the remaining statutory elements must still be present to render such a contribution illegal.

involved[.]"); *Terry*, 707 F.3d at 612 (bribery "must include a quid pro quo—the receipt of something of value 'in exchange for an official act'"); *United States v. Ring*, 706 F.3d 460, 465 (D.C. Cir. 2013) (bribery requires government to prove intent to influence an official act by way of "a corrupt quid pro quo").

On its face, then, Section 201(b) bribery seems to be a comparatively straightforward law, making it a crime to form "this-for-that" agreements[3] to trade money for specific political influence. Were it so clear, however, it would be difficult to envision how a *bona fide* arms-length campaign contribution—*i.e.*, one freely offered by a constituent without any effort to induce or secure a promise from the recipient to behave in a certain manner—could rise to the level of bribery. Some important qualifications serve to undermine this theoretical purity.

First, although the cases interpreting Section 201(b) and other federal bribery laws repeatedly focus on the "this-for-that" nature of the *quid pro quo* requirement, the "that" portion of the exchange need not be spelled out with precision:

> The agreement between the public official and the person offering the bribe need not spell out which payments control which particular official acts. Rather, "it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose."

Terry, 707 F.3d at 612 (quoting *United States v. Abbey*, 500 F.3d 513, 518 (6th Cir. 2009)). Under this so-called "stream of benefits" theory of bribery, so long as the payor and recipient intend or understand that the thing of value received by the official is being given in exchange for controlling influence, a certain amount of ambiguity as to the exact form that influence will take may be permissible. *Cf. Terry* (nature of *quid pro quo* requirement "does not give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale"). Thus, so long as there is a corrupt understanding between the donor and the official, the lack of a specifically designated action-in-return from the public official will not defeat a bribery charge. In the campaign-contribution context, this makes it harder to be certain that a given donation will not be viewed with skepticism simply because it is not tied to a specifically identified official act.

Second, there is an ongoing and unresolved dispute among the courts about how "specific," "express," or "explicit" a *quid pro quo* agreement must be in order to constitute Section 201(b) bribery. *See, e.g.*, *Terry*, 707 F.3d at 612–613 (collecting cases). This confusion has its roots in *United States v. McCormick*, 500 U.S. 257 (1991), a Hobbs Act extortion case.[4] In *McCormick*, the Supreme Court stated that a campaign contribution could only constitute criminal extortion under the Hobbs Act when made pursuant to an "explicit promise or undertaking by the official," *id.* at 273—in other words, an "explicit quid pro quo agreement," *Ring*, 706 F.3d at 465. By its own terms, *McCormick* only applies to Hobbs Act cases, but there are strong doctrinal similarities between Hobbes Act extortion and Section 201(b) bribery cases. *See* Part IV.A, below.

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[3] *Quid pro quo* translates from the Latin as "something for something." *Black's Law Dictionary* 1282 (8th ed. 2004).

[4] The Hobbs Act and *McCormick* are discussed in further detail in Part IV.A, below.

Working without clear guidance from the Supreme Court, the lower courts have reached contradictory opinions regarding whether or not *McCormick*'s "explicit" requirement applies to non-Hobbs Act cases. *Compare United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (stating that, absent clear statutory language to the contrary, *McCormick*'s "explicit promise" standard should control all campaign-contribution/bribery questions) *with Ring*, 706 F.3d at 465–466 (assuming, without deciding, that *McCormick* extends beyond extortion cases). In the event that it does apply, courts have similarly disagreed regarding its exact meaning, scope, or application. *See, e.g.*, *United States v. Ganim*, 510 F.3d 134, 142–144 (2d Cir. 2007) (finding that *McCormick* requires "proof of an express promise" in the campaign contribution context but that an "agreement may be implied" in "the non-campaign context"); *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (drawing distinction between "explicit" and "express"); *United States v. Whitfield*, 590 F.3d 325, 348–353 (5th Cir. 2009) (exploring morass of explicit/implicit/express case law). Indeed, it is even possible that these considerations are ultimately irrelevant:

> [T]he adjectives do not add a new element to these criminal statutes but signal that the statutory requirements must be met—that the payments were made in connection with an agreement, which is to say "in return for" official actions under it. So long as a public official agrees that payments will influence an official act, that suffices. What is needed is an agreement, full stop, which can be formal or informal, written or oral. As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess.

Terry, 707 F.3d at 613 (acknowledging and then sidestepping the issue). Suffice to say, the fact that something less than a formal, explicit *quid pro quo* agreement may suffice to establish bribery also makes it harder to ensure that innocuous transactions are not mistaken for impermissible bribes.

Finally, although most bribery cases focus upon an examination of the nature of the "agreement" between the payor and recipient as an appropriate way to discern the presence of corrupt intent—*see, e.g.*, *Terry*, 707 F.3d at 612 (elements of bribery include requirement that the public official must agree that their official conduct will be controlled by the terms of the promise or the undertaking)—there is no actual requirement that an agreement be reached for bribery to exist. Section 201(b) creates two offenses: offering a bribe, in Section 201(b)(1), and accepting a bribe, in Section 201(b)(2). As the second of these offenses, receiving a bribe, speaks of receiving payment "in return for" political influence, and where the two crimes are correctly thought of as a related pair, a *completed* bribe certainly requires a payor and recipient to reach a bilateral, *quid pro quo* agreement to trade money for official action, subject to the caveats above of "what counts as sufficient *quo*?" and "what counts as an explicit-enough agreement?" But Section 201(b)(1) defines the unilateral idea of *offering* a bribe as a separate offense, rather than treating it as "attempted bribery" under more traditional theories of criminal liability:

> No court requires an actual, bilateral agreement for a bribe. A bribe can occur even if it is intended only by the briber or only by the recipient. Since the statutes prohibit not only giving and receiving bribes but also offering and soliciting them, what ordinarily would be an "attempt" in criminal law is itself bribery. There is

> some controversy as to precisely what is required to meet the element of "intent to influence," short of an actual, bilateral agreement, but it is difficult to separate substantive disagreements on this issue from mere differences in verbal formulations.

See Daniel Hays Lowenstein, *Political Bribery And The Intermediate Theory Of Politics*, 32 UCLA L. Rev. 784, 820–821 (1985). In some respects, this makes sense. From the vantage point of considering whether a payor has "offered" a bribe, there is no requirement that the official accept the offer, that either the payor or the official is capable of fulfilling the offer, or that the payment ever be made to the official. *See, e.g.*, *United States v. Jacobs*, 431 F.2d 754, 759–760 (2d Cir. 1970) (rejecting arguments that conversations between defendants and IRS agent suggesting a *quid pro quo* scheme did not constitute attempted bribery because the official was never corrupted and/or the defendants could not afford the proposed payment). Rather, the crime of "offering" a bribe is complete the moment a party proposes to create a corrupt agreement:

> To establish the crime of offering a bribe under [Section 201(b)(1)], the government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. The money must be given with more than some generalized hope or expectation of ultimate benefit on the part of the donor. The money must be offered, in other words, with the intent and design to influence official action in exchange for the donation.

United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980); *see also Ring*, 706 F.3d at 466–467 (*quid pro quo* requirement does not mean that Section 201(b)(1) bribery requires "an official to agree to or actually complete a corrupt exchange").

Indeed, this focus on individual intent even allows a single transaction to be understood as two different crimes, depending upon whether it is viewed from the vantage point of the payor or the recipient. For example, in *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974)—the companion case to the D.C. Circuit's *Brewster* decision, which remains the seminal decision regarding the distinctions between bribes, illegal gratuities, and legal campaign contributions—the court stressed that there was no injustice in finding a payor and recipient guilty of differing offenses:

> The payment and the receipt of a bribe are not interdependent offenses, for obviously the donor's intent may differ completely from the donee's. Thus the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.
>
> As ever so recently we recognized, these mental elements are the factors differentiating the offense of bribery from the lesser offense of unlawfully receiving gratuities. Here, on the evidence, the jury could reasonably conclude that Anderson gave Brewster monies with corrupt intent to influence his vote on the proposed rate-increase legislation, and that Brewster, though insensitive to any

> influence, accepted the monies with knowledge that Anderson's purpose was to reward him for his stance on such legislation.

Id. at 332. To be sure, the *Brewster/Anderson* cases involved payments that were the subject of some conversation between the accused parties, and the "campaign contributions" involved were not subject to modern campaign finance regulations, leaving open the question of whether (or how) such concepts could be applied to a case involving contemporary, unilateral campaign contributions. But *Anderson* establishes that the lack of a meeting of the minds, or any other clear conversations intended to define the nature of influence a donor hopes to receive in exchange for their donation, does not preclude a prosecutorial argument that the donor nevertheless made the payment with a corrupt intent to influence a public official's decisions and thereby committed a bribery offense.

Thus, in any analysis of the legitimacy of a campaign contribution, one must pay critical attention to the donor's intent. If a payment is offered or made with the specific intent that it will influence the public official's decision, then Section 201(b) has most likely been violated, even if the offer is never accepted by the public official and/or if the public official was already planning on deciding in a certain way (be it for or against the payor's position). But, absent that corrupt intent, a given campaign contribution should not be deemed a bribe.

At that point, the analytical problem may best be understood as a problem of evidence, rather than one of pure doctrine. "A flow of benefits from one person to a public official, to be sure, does not by itself establish bribery. The benefits instead must be part and parcel of an agreement by the beneficiary to perform public acts for the patron." *Terry*, 707 F.3d at 615. It therefore must be true that, "[w]ithout anything more, a jury could not reasonably infer that a campaign contribution is a bribe solely because a public official accepts a contribution and later taken an action that benefits a donor." *Terry*, 707 F.3d at 615 (citing *McCormick*, 500 U.S. at 272). But precedent provides few touchstones upon which to determine how much "more" suffices for a jury to fairly make such an inference in a case involving *bona fide* campaign contributions. Few bribery cases examine the propriety of campaign contributions, as opposed to self-evidently corrupt personal gifts. Fewer still deal with ordinary political decisionmaking, as opposed to targeted or atypical action benefitting the narrow self-interest of a donor. *Contra Terry*, 707 F.3d at 610 (determining propriety of alleged campaign contributions in light of specific evidence that, in return for such contributions, elected judge granted summary judgment in donors favor in two pending cases). And even fewer, if any, also deal with a unilateral offer to bribe, divorced from any dialog about creating the necessary agreement. As a result, while the fact that a recipient of a campaign contribution later takes action favoring the donor's interests does not transform the contribution into a bribe, it is unclear what, if anything, a donor is permitted to say about their hopes regarding the recipient's future actions.

III. Campaign Contributions As Illegal Gratuities

A. The Current Landscape

Whereas bribery's "*quid pro quo*" requirement provides a strict (albeit often-unclear) limitation upon the statute's ability to reach lawful campaign contributions, the gratuity statute is broader in

scope. As a result, a plain reading of the definition of "illegal gratuity" threatens to encompass a number of ordinary campaign contribution practices.

As a framing device for this discussion, consider Professor Lowenstein's hypothetical:

> Veronica, a voter, has written letters to the seven members of the House of Representatives from her state urging them to vote for a particular bill. Three of the Representatives, Alan, Barbara, and Charles, vote for the bill and the other four vote against it. Immediately after the vote she sends $25 campaign contributions to Alan, Barbara, and Charles. Each covering letter states that Veronica is making the contribution to show her appreciation for the Representative's vote on the bill.

Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?, in* PRIVATE AND PUBLIC CORRUPTION 134 (2004). On one hand, Lowenstein is almost certainly correct when he opines that "[n]o one would regard Veronica's conduct as wrongful, much less corrupt." *Id.* But, setting aside such moral considerations, it is hard to disagree with his conclusion that Veronica's conduct appears to violate the letter of the law:

> [A]ll of the elements of 18 U.S.C. § 201(c) are present, assuming that a campaign contribution is a "thing of value" for purposes of the gratuity offense.[5] The three Representatives certainly are public officials, and their votes for the bill are official acts. There is no requirement under the unlawful gratuity statute that Veronica act corruptly, and her contributions were avowedly made "for or because of" the votes for the bill.

Id.

The *Sun-Diamond* decision cabins the statute's reach somewhat, but not enough to ameliorate this concern. In *Sun-Diamond*, the Supreme Court held that, in order to establish the crime of illegal gratuity, "the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." 526 U.S. at 414. This decision ensures that things of value given to public officials merely because of their official position—so-called "goodwill gifts"—are not treated as gratuities.

Such a holding offers minimal solace in the campaign-contribution context,[6] as "[e]very campaign contribution is given to an elected official probably because the giver supports the acts

[5] Lowenstein most likely offers this caveat because his proposed solution to Section 201's overreach problem is that the law should be amended to provide that campaign contributions to elected officials are not "things of value" under the statute. *See id.* at 135. As explained in note 2, above, the courts have shown no reluctance in treating at least *some* campaign contributions as "things of value" under the statute's present language.

[6] *Sun-Diamond* was not a campaign-contribution case; it focused on the propriety of approximately $6,000-worth of physical gifts given to the Secretary of Agriculture by a lobbying organization.

done or to be done by the elected official." *Brewster*, 506 F.2d at 72 n.26.[7] At minimum, *Sun-Diamond* provides no aid to Hypothetical Veronica, whose representations regarding her contributions would establish that they were made in response to a specific vote and, therefore, appear to fall within the gratuity statute's ambit. The risk therefore remains that "innocent" campaign contributions could be prosecuted as illegal gratuities under Section 201(c).

Fortunately, the Department of Justice has (correctly) recognized the many problems that such a broad interpretation of gratuity law would create:

> It is problematical that a gratuity charge under 201(c) can rest on a *bona fide* campaign contribution, unless the contribution was a ruse that masqueraded for a gift to the personal benefit of the public officer . . . . This is because campaign contributions represent a necessary feature of the American political process, they normally inure to the benefit of a campaign committee rather than directly to the personal benefit of a public officer, and they are almost always given and received with a generalized expectation of currying favor with the candidate benefitting therefrom.

Criminal Resource Manual § 2046. For this reason, the Department's policy is that, where "the transaction represents a *bona fide* campaign contribution, prosecutors must normally be prepared to prove that it involved a *quid pro quo* understanding and thereby constituted a 'bribe' offense actionable under section 201(b)." *Id.*; *see also id.* § 2041 ("In addition, with a 'bribe' the payment may go to anyone or to anything and may include campaign contributions, while with a 'gratuity' the payment must inure to the personal benefit of the public official and cannot include campaign contributions."). As a practical matter, then, Hypothetical Veronica should not need to worry about being prosecuted for gratuity, so long as her conduct does not rise to the level of *quid pro quo* bribery discussed above.

B. Possible Future Considerations

Although the Department's policy of non-prosecution is styled as a prudential decision—gratuity charges "can" rest on campaign contributions, but prosecutors must be "prepared" to prove that they are bribes—there are arguments that such a limitation is nevertheless required as a matter of either statutory or constitutional law.

The statutory argument is alluded to in the Criminal Resource Manual's discussion. As noted in Part A, above, one difference between bribes and gratuities is that bribes may be structured to benefit either the public official or a third party, but gratuities must benefit the recipient "personally." In the case of a *bona fide* campaign contribution, any payment is made to the recipient's political committee, not to the recipient themselves, and therefore should not fall within the statute's reach. The *Brewster* court invoked this idea repeatedly, even going so far as to state that "all bona fide campaign contributions directed to a lawfully conducted campaign

[7] An interpretive note: the *Brewster* decision preceded a reorganization of Section 201, which relocated the gratuity prohibition from subsection (g) to subsection (c). This distinction has no effect on the substance of *Brewster*'s analysis, but the decision's failure to discuss Section 201(c) would confuse the unaware reader.

committee or other person or entity are not prohibited by [the gratuity statute]." 506 F.2d at 77. But such a conclusion does not categorically render campaign contributions immune from scrutiny, as prosecutors remain free to contend (and juries remain free to conclude) that a given committee is "merely a conduit" for concealing a payment made to the direct benefit of a public official. *See id.* at 81.

That said, changes in campaign finance law since *Brewster* was decided make it far less likely, if not impossible, for *bona fide* campaign contributions to actually be sham payments to a political official. *Brewster* preceded the adoption of modern 2 U.S.C. § 439a, which broadly bars personal use of campaign donations:

> A contribution or donation [received by an individual as support for activities of the individual as holder of Federal office] shall not be converted by any person to personal use.

Id. § 439a(b)(1); *see also id.* § 439a(b)(2) (providing several examples of impermissible personal use). This restriction extends to use of funds donated to campaign accounts. 11 CFR §§ 113.1(g)(1)(i) and 113.1(g)(1)(i)(A)–(J) (making application to campaign-account funds explicit; providing expanded list of categorical examples of personal use); *id.* § 113.1(g)(1)(ii) (providing further examples of potential personal uses). During *Brewster*'s time, then, it was far easier (and, even, legal) for members of Congress to personally benefit from campaign contributions. To the extent that fact motivated the *Brewster* court's refusal to explicitly create a categorical immunity for *bona fide* campaign contributions,[8] these subsequent developments in campaign-finance law greatly mitigate that concern—justifying, perhaps, a reconsideration of the question.

Finally, where the crime of offering a bribe focuses on the specific intent of the donor, rather than the recipient, a prosecutor arguing that a given *bona fide* contribution constituted a legal gratuity would likely have to prove that the donor knew (or, at least, intended) that the member of Congress would also circumvent Section 439a in order to find some manner of converting the contribution to personal use. As a result, even if Section 439a's adoption does not create a complete statutory bar to such prosecutions, it at minimum complicates them from an evidentiary standpoint, making them even harder to prove.

The constitutional argument, on the other hand, sounds in the broader tradition of protecting campaign contributions as a form of political speech. Given that some degree of interrelationship between legislators acting for the benefit of their constituents and legislators soliciting or receiving campaign donations from those same constituents "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[,]" the gratuity law cannot reasonably be construed to apply to garden variety, *bona fide* campaign contributions made in support of ordinary legislative activity. *Cf. McCormick*, 500 U.S. at 257 (relying on parallel logic in

[8] Where *Brewster* does state that "all bona fide campaign contributions directed to a lawfully conducted campaign committee . . . are not prohibited," 506 F.2d at 77, the "sham" caveat is perhaps the only thing that precludes reading the decision to implicitly establish such a protection.

extortion case). This observation gains additional traction in light of the recent Supreme Court trend towards deregulation of campaign contributions:

> [G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such speech may afford. "Ingratiation and access . . . are not corruption." They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

McCutcheon, 134 S. Ct. at 1441 (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). As a result, it is reasonable to assume that the courts will avoid any interpretation of the gratuity statute that threatens to criminalize traditional "political associational activity protected by the First Amendment." *Brewster*, 506 F.2d at 77; *see also Private and Public Corruption* 135 (noting that campaign contributions could be excluded from gratuity law "as a means of avoiding a constitutional question[,]" but that amending Section 201(c) to do so would be "more intellectually honest"). The courts, however, have not yet been presented with a *bona fide* gratuity case that would necessitate reaching such a constitutional holding—or, at least, they have not to my knowledge accepted a defendant's arguments that such *bona fide* contributions were involved in their case.

In the absence of definitive judicial interpretation, the question remains open. On one hand, the Department of Justice is correct to observe that "recent Federal jurisprudence . . . suggests substantial judicial reluctance to extend the Federal crime of gratuities under section 201(c) to *bona fide* campaign donations." Criminal Resource Manual § 2046. On the other hand, the courts have yet to categorically immunize campaign contributions from scrutiny under Section 201(c). Fortunately for campaign donors (if not for proponents of legal clarity), this debate will remain academic so long as the Department of Justice limits Section 201 prosecutions involving campaign contributions to cases of *quid pro quo* bribery.

IV. The Application Of Other Public Corruption Statutes

In the interest of being comprehensive, this section addresses the potential relevance of other prominent federal anti-corruption laws. As a general matter, however, it is unlikely that any such laws would apply in a situation not already criminalized under Section 201(c)'s general prohibition against bribery.

A. Extortion Under The Hobbs Act

18 U.S.C. § 1951—the "Hobbs Act"—generally criminalizes "interference with commerce by threats or violence." As part of its terms, it outlaws extortion, "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear, or under color of official right." *Id.* § 1951(b)(2). As applied to the world of public corruption law, extortion and bribery "are really different sides of the same coin." *Allen*, 10 F.3d at 411. In the latter, public officials solicit payments through their willingness to trade beneficial political favors for money; in the latter, public officials instead induce payments through their threats to take adverse political action unless not incentivized to do otherwise.

In the context of extortion, however—unlike with Section 201(b) bribery—the Supreme Court has specifically considered the question of whether, and to what extent, campaign contributions can be focal point of an extortion case. *See McCormick v. United States*, 500 U.S. 257 (1991). In doing so, the Court adopted a bright-line rule: the receipt of campaign contributions can be considered 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 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.

Id. at 273.

In other words, as alluded to earlier in this memorandum, extortion cases involving campaign contributions have a *quid pro quo* requirement, just as all bribery cases do under Section 201(b). *See also Evans v. United States*, 504 U.S. 255, 268 (1992) (discussing "the *quid pro quo* requirement of *McCormick v. United States*"). And, in the extortion context, at least, the Supreme Court has been clear: "Whatever ethical considerations and appearance 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 [criminalizing extortion]."

B. Mail, Wire, And "Honest Services" Fraud

18 U.S.C. §§ 1341, 1343, and 1346 combine to provide a further mechanism through which federal prosecutors monitor the behavior of public officials—the doctrine of "honest services" fraud. While this doctrine once imposed broad, amorphous ethical duties upon legislators and other officials, it has since been cabined to reach only bribery or kickback schemes. As a result, at least as applied to members of Congress, the statute should not create liability in any circumstances not already criminalized under Section 201(b), the federal bribery statute.[9]

The doctrine of "honest services fraud" grew out of the efforts of enterprising federal prosecutors in the 1970s, who were looking for additional means of regulating the behavior of public officials. They turned their attention to the federal mail and wire fraud statutes, Sections 1341 and 1343.

As originally drafted, these fraud statutes were narrowly targeted, vindicating only the government's interest in preventing use of the federal mail and wire systems in furtherance of get-rich-schemes and other examples of pecuniary fraud. This focus was reflected in the statutes' text, both of which criminalize schemes to defraud or to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises[.]" 18 U.S.C. §§ 1341, 1343.

[9] With respect to state governmental officials, over whom Section 201 has no reach, the doctrine of honest services fraud retains increased vitality, even when limited to bribery/kickback cases.

Prosecutors expanded these statutes by arguing that the laws should also address deprivations of certain intangible rights, rather than just "money or property." In doing so, the government developed a new theory of "honest services fraud"—using the mail and wire fraud statutes to regulate a variety of fiduciary duties, including a public servant's obligation to respect the "intangible right of the citizenry to good government." *McNally v. United States*, 483 U.S. 350, 356 (1987). Under this theory, instances of bribery, kickbacks, self-dealing, conflicts of interest, or other such behavior subverted this intangible right and, therefore, became actionable as federal fraud.

Suffice to say, this novel argument was met with some judicial skepticism. In 1987, the Supreme Court rejected the theory of honest services fraud on statutory grounds. *See McNally*, 483 U.S. 350. As the *McNally* Court explained, the ad-hoc development of the honest-services doctrine had rendered it inherent vague and ambiguous, leaving it difficult to determine a line between permissible and impermissible conduct. *Id.* at 360. Rather than invalidating the doctrine on constitutional grounds, the Court invoked the rule of lenity[10] to hold that the mail and wire fraud statutes did not actually reach deprivations of "honest services" in the absence of clear language to that effect. *Id.* As the Court explained, if Congress actually wished to make honest services fraud a crime, then it would have to speak more clearly to the subject. *Id.*

Congress responded within a year, adopting Section 1346—a provision that both succeeded and failed at addressing the *McNally* Court's concerns. On one hand, Section 1346 made it explicit that "honest services" could form the basis of a mail or wire fraud action: "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." 18 U.S.C. § 1346. On the other hand, Section 1346 made no effort to actually define what the "intangible right of honest services" was, or to specify what types of conduct created a deprivation of "honest services."

Decades later, when the question of Section 1346's legitimacy finally returned to the Supreme Court, the Court substantially narrowed the doctrine. In a trilogy of cases resolved through *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Court was again asked to invalidate the doctrine of honest services fraud on the grounds that it was so vague as to violate constitutional due process. The *Skilling* Court acknowledged the force of those due-process concerns, 130 S. Ct. at 2931, but decided to address them through a limiting construction rather than completely invalidate Section 1346. To do so, the Court reviewed the body of pre-*McNally* case law and determined that the vast majority of it "involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* In light thereof, the Court concluded that Section 1346 provided constitutionally-sufficient notice of its meaning and reach, so long as it was limited to only criminalize such bribery-or-kickback schemes. *Id.* at 2930–2931. Other variations of the doctrine advanced by the government—most notably, conflict-of-interest cases in which a public official took public action that furthered their own undisclosed financial interests—were excluded from Section 1346's newly defined scope.

[10] The rule of lenity, in brief, counsels courts to give criminal defendants the "benefit of the doubt" by resolving ambiguous criminal statutes in their favor. Otherwise, courts risk punishing defendants for conduct that was not clearly illegal under the governing law.

In short, Section 1346 remains in effect, but it is now limited to a narrow core of bribery and kickback offenses. As a result, at least within the context of federal public officials relevant to Civic Responsibility, the statute's reach is coextensive with the Section 201(b) bribery discussed in Part II, above. While conduct that violates Section 201(b) could also be held to constitute honest services fraud, the *Skilling* Court's interpretation renders it nearly-impossible for conduct that does *not* constitute Section 201(b) bribery to somehow constitute "bribery" for the purposes of a Section 1346 analysis.