IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. McGREGOR,	)	
	)	
Defendant.	)	

PROPOSED JURY INSTRUCTIONS OF MILTON McGREGOR

Exhibit A

INTRODUCTORY NOTE TO PROPOSED INSTRUCTIONS #A1-A23

The following set of instructions conveys the concepts and elements that fall generally under the overall heading of "what bribery is," especially but not only in situations involving campaign contributions. In other words, these instructions concern what the Government must prove in terms of *quid pro quo* (explicit, specific, etc.), agreement, intent, corruption, etc., under all of the charges against Mr. McGregor (whether § 666, "honest services" under §§ 1341/1343/1346, or conspiracy).

These instructions in this category will then be appropriate to add to other instructions (proposed elsewhere in this document) about the basic elements of each offense.

Mr. McGregor does not anticipate that the Court will hold, or that the Government will argue, that the requirements discussed in this part are different under § 666 (including the conspiracy to violate § 666) than they are under "honest services" (§§ 1341/1343/1346). If the Court does so hold, Mr. McGregor requests these instructions for each statute and count separately, as well as for all of them.

Many of the following instructions are framed in terms of the requirement of proof of a corrupt "agreement." That framing is directly supported by *United States v. Siegelman*, as explained in the notes to the instructions including quotations from *Siegelman*. That framing also makes the most sense and will avoid jury confusion, given the nature of the Government's allegations (which are not based on allegations of un-accepted offers on Mr. McGregor's part). If the Court declines to instruct the jury that proof of a *quid pro quo* "agreement" is required, and that acts short of an "agreement" (such as the explicit offering of an agreement) will make out a crime, Mr. McGregor requests the opportunity to suggest alternative wording. However, because *Siegelman* so clearly and so repeatedly speaks of an "agreement" as the crucial element, Mr. McGregor does not anticipate any dispute in that regard.

As Mr. McGregor noted in his May 13 filing regarding the impact of *Siegelman*, it is true that the *Siegelman* opinion does not definitively hold that the *McCormick* standard (and associated aspects of *quid pro quo* doctrine) apply to § 666 and "honest services." But the opinion recognizes the strength of the argument in that regard, and fails to give any reason to doubt its applicability. Therefore, it certainly cannot be said that the law was clear enough to put anyone on notice that there can be conviction under § 666 or "honest services" bribery without the *quid pro quo* and *McCormick* standards. The explanation of these proposed instructions will not further belabor that point, but will cite caselaw under *McCormick*, including *Siegelman* itself, as authority for the requested instructions.

Pursuant to the Court's Order, Mr. McGregor may propose more fact-specific "theory of defense" charges that pertain to this set of issues as well, in light of the evidence at trial and in light of Mr. McGregor's theories of defense.

PROPOSED JURY INSTRUCTION #A-1 -
FIRST AMENDMENT AND NEED FOR CAUTION

Some of the charges in this case are based on campaign contributions or other sorts of campaign or election support. As such, these charges impact the First Amendment's core values - protection of free political speech and the right to support issues of great public importance. You cannot convict any defendant for his exercise of either of these constitutionally protected activities. Since our political system is based on raising private contributions for campaigns for public office, you must be careful not to convict any defendant for his political speech (including contributing to campaigns) or for supporting an issue that he believes to be of great public importance.

Explanation and Authority: The jury should be instructed that campaign contributions (and other election-related support) are different from personal enrichment, in the eyes of the law, and that campaign contributions (and the like) are ordinarily protected by the First Amendment. In order to convey this point, Mr. McGregor requests the preceding instruction, which is closely adapted from a passage in *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, *17-18 (11th Cir. 2011):

> Siegelman and Scrushy's bribery convictions in this case were based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such, the convictions impact the First Amendment's core values - protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

If the Court declines to give the instruction in this form, Mr. McGregor requests the opportunity to discuss alternate formulations that would convey the point.

PROPOSED INSTRUCTION #A-2
FURTHER INSTRUCTION REGARDING LEGITIMACY OF CAMPAIGN CONTRIBUTIONS

Campaign contributions and fundraising are an important, unavoidable, lawful and legitimate part of the American system of privately-financed elections. The law recognizes that virtually every campaign contribution is given to an elected public official because the giver supports the acts done or to be done by the elected official.

The Supreme Court of the United States has recognized that legitimate, lawful, campaign contributions are given to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future.

Lobbyists and others often donate to the political campaigns of public officials and there is nothing illegal about this practice. Official acts that advance the interest of a contributor or of the contributor's clients, taken shortly before or after campaign contributions are solicited or received from the contributor or lobbyist, can, depending on the circumstances, be perfectly legal and appropriate.

Authority and Explanation: This is a very lightly edited version of pertinent parts of an instruction given, as recounted and quoted in *United States v. Ring*, 2011 U.S. Dist. LEXIS 24889, *5 (D.D.C. 2011).

PROPOSED INSTRUCTION #A-3
FURTHER INSTRUCTION REGARDING LEGITIMACY OF CAMPAIGN CONTRIBUTIONS

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, legislators do not commit a crime 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.

Explanation and Authority: This is a lightly edited passage from *United States v. McCormick*, 500 U.S. 257, 272 (1991):

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. 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."

PROPOSED JURY INSTRUCTION #A-4
CAMPAIGN CONTRIBUTIONS CATEGORICALLY NOT "BRIBES"

Under the laws at issue in this case, as to all charges against Mr. McGregor, campaign contributions and similar electoral support are not covered under these charges. They are not bribes, and cannot be the basis of any conviction. Therefore, in order to obtain a conviction on any count against Mr. McGregor, the Government must prove beyond a reasonable doubt that the payment in question was not a campaign contribution and was not electoral support.

Argument and Explanation: This instruction is requested consistent with the argument, which Mr. McGregor has made in motions to dismiss, that § 666 and "honest services" do not cover "campaign contributions" or similar things. (It is framed in a way that excludes "extortion" charges, since there are no such charges against Mr. McGregor.) It is supported by the reasoning and authorities that Mr. McGregor has explained in, e.g., Docs. 917 and 918. Further requested instructions herein, which are based on the assumption for purposes of argument that the Court disagrees with this view of the law, are made without waiver of this contention.

PROPOSED JURY INSTRUCTION #A-5
CONSITUTIONAL CONCERNS, YIELDING REQUIREMENT OF PROOF OF CORRUPT AGREEMENT

Campaign donations are protected First Amendment activity and, indeed, the normal course of politics in this country. Unless there is an explicit agreement to buy a legislator's vote, there is nothing inherently corrupt about a donation followed by the legislator's vote in favor of the position that the contributor supports. It is only when there is proof beyond a reasonable doubt of a corrupt agreement, that there is a crime. There must be proof beyond a reasonable doubt of an agreement to swap money for vote, that is, proof that the legislator sold to the campaign contributor the legislator's duty and authority to vote. A First Amendment protected campaign contribution, and a subsequent vote by a grateful legislator, are not a crime without proof beyond a reasonable doubt of a corrupt agreement.

Explanation and Authority: This conveys the point that, because of constitutional considerations, it is only a particular sort of corrupt agreement that makes a campaign contribution into a crime. This proposed instruction is closely adapted from footnote 21 in *United States v. Siegelman*, 2011 U.S. App. LEXIS 9503, *29-31 ("a campaign donation ... is protected First Amendment activity and, indeed, the normal course of politics in this country, ... Absent an explicit agreement to 'buy an appointment' there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime. ... In *McCormick*, ... the Court protected both the First and the Fifth Amendments by reading the statute to require an agreement to swap money for office, ... The official's duty to provide honest services... would be violated only by an agreement to exchange an appointment for a campaign donation. Such an agreement would amount to the official's 'selling' to the appointee the official's duty and authority to make appointments.") If the Court declines to give the instruction in this form, Mr. McGregor requests the opportunity to discuss alternate formulations that would convey the point.

PROPOSED JURY INSTRUCTION #A-6
REQUIREMENT OF PROOF OF CORRUPT AGREEMENT

Unless there is proof an explicit agreement to buy a legislator's vote, there is nothing criminal about a donation followed by the legislator's vote in favor of the position that the contributor supports. It is only when there is proof beyond a reasonable doubt of a corrupt agreement, that there is a crime. There must be proof beyond a reasonable doubt of an agreement to swap money for vote, that is, proof that the legislator sold to the campaign contributor the legislator's duty and authority to vote. A campaign contribution, and a subsequent vote by a grateful legislator, are not a crime without proof beyond a reasonable doubt of a corrupt agreement.

Explanation and Authority: As a less-favored (because less instructive and less complete) alternative to #A-5 above, Mr. McGregor proposes this instruction to introduce the requirement of proof of a corrupt agreement, without discussion of the constitutional concerns that give rise to this legal requirement. Like #A-5 above, it is closely adapted from footnote 21 in *Siegelman*.

PROPOSED JURY INSTRUCTION #A-7
QUID PRO QUO FOR ALL ASPECTS OF ALL CHARGES

For all charges, whether based on campaign contributions or otherwise, the Government must prove the type of agreement that is called a "*quid pro quo*." This phrase, which comes from Latin, means an agreement to exchange something for something – in this case, an agreement to exchange the campaign contribution or other thing of value, for action by the official.

Argument and Explanation: Mr. McGregor understands from the May 5 argument that the Government now concedes the propriety of a charge requiring proof of a "*quid pro quo*" in all respects, whether campaign contribution or otherwise.

As to campaign contributions and the like, this proposed instruction is supported by *McCormick* and by *Siegelman*. *See Siegelman*, 2011 U.S. App. LEXIS 9503, *23 (referring to "the *quid pro quo* requirement of *McCormick*," citing *Evans*); *41 (emphasizing that "*quid pro quo*" includes not only the quid and the quo but also the "pro - the corrupt agreement to make a specific exchange.")

As to matters other than campaign contributions, *see, e.g., United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("The 'with intent to be influenced' language prohibits a bribe, which involves a quid pro quo."); *id.* ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994) (holding that there is a "*quid pro quo*" requirement under Hobbs Act even outside campaign contributions, though modified by *Evans* in that category of cases). *See also* Doc. 1018 (Government concedes that *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010) does not do away with a "*quid pro quo*" requirement, and that instead it speaks to the explicitness/specificity of the required *quid pro quo*).

PROPOSED JURY INSTRUCTION #A-8
QUID PRO QUO AGREEMENT MUST BE EXPLICIT

The Government must prove beyond a reasonable doubt not just that there was a *quid pro quo* agreement, but beyond that must prove that the *quid pro quo* agreement was explicit.

Argument and Explanation

The Court should, at least, give this instruction modified to include (at the beginning) the instruction that it applies "As to all matters based on campaign contributions or similar electoral-related things of value, ..." (The extension of this principle beyond strict campaign contributions, to other electoral-related things, was discussed and agreed at the May 5 argument.) On these matters, the instruction is supported by, *e.g.*, *Siegelman*, 2011 U.S. App. LEXIS 9503, *22 ("*McCormick* uses the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions."); *25 (speaking of "*McCormick*'s requirement for an explicit agreement involving a *quid pro quo*."); *30 ("Absent an explicit agreement to 'buy an appointment' there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime.")

As discussed at the May 5 hearing, this instruction should not be limited to campaign contributions and other electoral matters, but should include the entire case. This would help avoid jury confusion that might arise from differentiation between campaign and non-campaign related aspects of the case.

PROPOSED JURY INSTRUCTION #A-9
DEFINITION OF "EXPLICIT"

The word "explicit," in defining the sort of *quid pro quo* agreement that the Government must prove beyond a reasonable doubt, means that the agreement must be "stated clearly and in detail, leaving no room for confusion or doubt."

Explanation and Authority: the quoted definition of "explicit" is from the Oxford English Dictionary online, at http://oxforddictionaries.com/view/entry/m_en_us1245655#m_en_us1245655

The Government may argue that under *United States v. Siegelman*, the word "explicit" has no content other than the *quid pro quo* agreement must be for a "specific" action. Mr. McGregor disagrees. The word "explicit" still must have meaning, even if the Eleventh Circuit sees some daylight between the word "explicit" and the word "express." If the Court reads *United States v. Siegelman* as adopting a definition of "explicit" that means nothing more than that the *quid pro quo* agreement must be for a "specific" action, Mr. McGregor nonetheless preserves the point.

Mr. McGregor recognizes that the convictions in *Siegelman* were affirmed without an instruction on this definition. That, in itself, certainly does not mean that the instruction is wrong, or that the Court should decline to give it. Without a definition of "explicit," the jury will simply be left to guess at what it means; and that is an intolerable result. If the Court concludes that "explicit" has some other definition in this context, Mr. McGregor requests an instruction on the meaning of the word, and requests opportunity to propose an instruction after knowing what alternative meanings have been suggested.

PROPOSED JURY INSTRUCTION #A-10
EXPLICIT = EXPRESS, NOT IMPLIED

The word "explicit," in describing the Government's burden of proving beyond a reasonable doubt that there was an "explicit *quid pro quo* agreement," means that the agreement must have been express. It cannot have been an implied agreement.

Argument and Explanation: This instruction is requested in order to preserve the contention that *Siegelman* was incorrect in indicating that "explicit" does not mean "express," and in its apparent reference to the possibility of an "implied" explicit agreement. The argument is supported by, *e.g.*, *United States v. Ganim*, 510 F.3d 134 (2nd Cir. 2007) (Sotomayor, J.) Mr. McGregor maintains his position, as previously argued, that *Evans* did not in fact modify the *McCormick* "explicit *quid pro quo*" standard for cases based on campaign contributions.

PROPOSED JURY INSTRUCTION #A-11
QUID PRO QUO MUST BE FOR SPECIFIC ACTION

The Government must also prove beyond a reasonable doubt that the *quid pro quo* agreement was for a specific official action. The official must agree to take or forego some specific action in order for the doing of it to be criminal. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

Argument and Explanation: *See Siegelman*, 2011 U.S. App. LEXIS 9503, *23 ("The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.")

Mr. McGregor requests this instruction for all aspects of the case against him. If the Court will not give it as to all aspects of the case, Mr. McGregor then requests that the Court give this instruction with the introductory phrase, "As to all matters based on campaign contributions or similar electoral-related things of value, ..."

PROPOSED JURY INSTRUCTION #A-12
SPECIFIC – AS FRAMED IN INDICTMENT

The Government must prove, beyond a reasonable doubt, that the *quid pro quo* agreement was that the officials in question would take the specific acts alleged in the Indictment, in exchange for the campaign contributions and other things alleged in the Indictment.

For all charges pertaining to Legislators, therefore, the Government must prove beyond a reasonable doubt that the *quid pro quo* agreement was in exchange for the Legislator's vote on "an upcoming vote on … legislation," that is, SB 380.

For the charges pertaining to Mr. Crosby, the Government must prove beyond a reasonable doubt that the *quid pro quo* agreement was in exchange for "his official acts as they pertained to drafting gambling legislation, including SB380."

Argument and Explanation: It should go without saying that the Government must prove the central allegation as framed in the Indictment, not some other crime. *See*, *e.g.*, Fifth Circuit Pattern Instruction 1.19 ("You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment.") This instruction, therefore, should be given based on the allegation that each Legislator was allegedly bribed "in connection with an upcoming vote on pro- gambling legislation." (Indictment, ¶¶ 194, 196, 198, 204, 208). The only reasonable reading of this allegation, given the indictment as a whole, is that it refers to SB380. As to Mr. Crosby, the indictment alleges that he was bribed "in connection with his official acts as they pertained to drafting gambling legislation, including SB380." (¶ 218). *See also* Doc. 1018, p. 3 (Government argues that the Indictment "alleged an explicit agreement to exchange benefits (campaign contributions) for specific official action (votes in favor of pro-gambling legislation).")

PROPOSED INSTRUCTION #A-13
"SPECIFIC" AS CONTRASTED WITH ONGOING POLITICAL ALLIANCE

Because the laws at issue prohibit only a "*quid pro quo*" agreement in exchange for specific action [in exchange for campaign contributions or other electoral support], it is not a crime to offer, give or agree to give [something/campaign contributions or other electoral support] in furtherance of an existing, or future, ongoing political alliance.

Argument and Explanation: This instruction will help the jury understand, on a matter that is very important to some charges, the meaning of the "specific" *quid pro quo* requirement. The correctness of the instruction follows, logically, from the "specific" requirement as explained above. Mr. McGregor requests this instruction as to all aspects of the case; but if the Court held that the "specific" requirement does not apply outside of campaign contributions and electoral support, Mr. McGregor requests at least that the Court give the instruction with the bracketed material about campaign contributions included.

PROPOSED JURY INSTRUCTION #A-14
BRIBE AS REQUIRING PROOF OF ALTERING/CHANGING OFFICIAL ACTION

In addition to the other aspects of the required proof of a *quid pro quo* agreement that I have explained to you, there is a further requirement. The Government must prove that the agreement was to affect the official's action.

What this means more particularly is that the Government must prove beyond a reasonable doubt that the agreement was made to *alter* the official's action from what it otherwise would have been -- that is, to cause the official to change an official position that he otherwise would have taken, or to take official action that he would not have taken but for the agreement.

Explanation and Authority: This instruction is necessary, in order to convey the concept that part of the definition of a bribe is that it must be designed to *alter*, *affect*, *change* the official's action. Mr. McGregor requests each of the above paragraphs; if the Court will not give both, Mr. McGregor requests each separately. If the Court sees some fault in the detail of the phrasing, Mr. McGregor requests other wording (to be discussed with the Court) to convey the point. This instruction is supported by, *e.g.*, *United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action -- a quid pro quo."); *Siegelman*, 2011 U.S. App. LEXIS 9503 *22 ("The government's initial brief on appeal states that, as to Counts 8 and 9, 'the jury had to find that Scrushy and Siegelman intended to deprive the public of their right to honest services and intended to deceive the public, and that Siegelman intended to alter his official actions as a result of Scrushy's purported campaign contributions.'"); *United States v. Urciuoli*, 613 F.3d 11, 15 (1st Cir. 2010) (affirming, and quoting jury instruction that required the government to "prove beyond a reasonable doubt the [the defendant] intended the payment to cause [the named legislator] to change an official position that he would otherwise have taken or to take official actions that he would not have taken but for the payment"); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("This court has held that 'payments to a public official for acts that would have been performed in any event ... are probably illegal gratuities rather than bribes'").

PROPOSED JURY INSTRUCTION #A-15
BRIBE AS PRIME MOVER OF ACTION

The Government must prove beyond a reasonable doubt that the payment, which is alleged to have been a bribe, was the prime mover or producer of the official act.

Explanation and Authority: This instruction adds the concept of the alleged bribe as the "prime mover," which is necessary both in order to differentiate between a bribe and a gratuity, and in order to differentiate between a briber and a victim. It is supported by *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) ("We have laid emphasis under the bribery section on "corruptly . . . in return for being influenced" as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act.") and cases following *Brewster* in this respect. *Brewster* was a case under 18 U.S.C. § 201, but the same concept should apply under both § 666 and "honest services," given (a) the fact that 18 U.S.C. § 666 was designed after § 201 to a significant extent, and (b) the fact that the Supreme Court in *Skilling* cited § 201 as guidance for the concept of "bribery" in "honest services."

PROPOSED JURY INSTRUCTION #A-16
PERSONAL BENEFIT

A campaign contribution or other election-related support cannot be a bribe unless it amounts to a personal benefit to the official.

Argument and Explanation: This proposition of law was recognized by Judge Capel as correct, in Doc. 863, pp. 8-9. Even if the Government questions the correctness of it, still this limitation must be adopted under "rule of lenity" and "fair warning" principles since the law is not (and was not, at the times in question in this case) clearly to the contrary. Judge Capel's discussion of this proposition came in discussion of "honest services." If the Court will not give this instruction as to § 666 and conspiracy charges as well, Mr. McGregor requests that it be given with specific reference to the "honest services" counts.

PROPOSED JURY INSTRUCTION #A-17
"CORRUPT"

In addition to the other requirements that I have explained, the Government must prove beyond a reasonable doubt that there was an agreement that was "corrupt."

Argument and Explanation: The additional element of "corruptness" is reflected in, *e.g.*, *Siegelman,* 2011 U.S. App. LEXIS 9503, *30 ("corrupt agreement"); *41 (emphasizing that "*quid pro quo*" includes not only the quid and the quo but also the "pro - the corrupt agreement to make a specific exchange.") Section 666 on its face requires the element of "corruptly." That requirement also inheres in "honest services," especially by virtue of the discussion in *Skilling* about § 666 as a statute that gives further notice of the nature of what a *Skilling* "bribe" is.

PROPOSED JURY INSTRUCTION #A-18
DEFINITION OF "CORRUPT"/"CORRUPTLY"

As to campaign contributions, an agreement of the type that I have explained to you is "corrupt" only if it is made for the sake of private benefit to the contributor, and not because of the contributor's belief that the vote in question would be beneficial to the public.

Explanation and Authority: This instruction is an effort to avoid the problem of sometimes-used definitions of "corrupt" or "corruptly" that are entirely circular and conclusory. For instance, some definitions of corrupt are circular in that they are defined in terms of what is "unlawful." That is hopelessly circular. Other definitions are conclusory in that they are defined in terms of what is "wrongful." That is hopelessly conclusory, and merely invites the jury to rely on private moral and ethical intuitions rather than on a definable legal standard. This instruction avoids those problems, and also protects against the criminalization of good-faith support of politicians on account of their campaign promises. The definition of corruptness in terms of private benefit is supported by the discussion in *United States v. Popkin*, 943 F.2d 1535, 1539-40 (11th Cir. 1991), although that case was decided under a different statute:

> In *[United States v.] Reeves* [, 752 F.2d 995 (5th Cir. 1985),] the district court had defined "corruptly" as meaning done "with motive or bad or evil purpose." Id. at 997. The court of appeals disagreed, and reversed on this ground. Reasoning that to define "corruptly" in this way would render the "key word" redundant and could potentially raise questions of overbreadth and vagueness, the court concluded that "corruptly" is used for the purpose of "forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." Id. at 1001.
> ...
> We agree with the definition adopted in Reeves.

It is also supported by the following from *United States v. North*, 910 F.2d 843, 881-82 (D.C. Cir. 1990): "A 'corrupt' intent may also be defined as 'the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others.' Ballentine's Law Dictionary 276 (3d ed. 1969) (definition of 'corruptly')." While some authorities (including *North*, in passing) mention bribery as an example of what is "corrupt," still there must be this definition in order to avoid the

problem of circularity. The question is, what is a bribe, where bribery includes the element of corruptness.

This proposed instruction is related to, and supported by, the argument that Mr. McGregor has made on motions to dismiss, about the absurd overbreadth that would follow from the Government's reading of the definition of "bribery" under § 666 and "honest services." The Government reads these laws to cover not only personal enrichment but (a) campaign contributions and (b) "intangibles" as bribes. That reading, if taken seriously, would mean that a Governor violates those laws by engaging in political horse-trading with legislators: I will support you on this (e.g., roads in your district) if you support me on that (i.e., anti-gaming votes). This surely cannot be the law. And it is not, in fact, the law – by virtue of the word "corrupt" among other required elements. *See, e.g., United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) ("Legislative logrolling [--] Senator A tells Senator B 'I'll vote for your bill if you vote for a bailout of Corporation C' [--] isn't corrupt, unless A owns a chunk of C."); *id.* at 892 (majority opinion) ("We have no quarrel with the dissent's very eloquent explanation of the law of bribery.") But what is it that differentiates that, from a citizen's effort to combat that sort of opposition-through-logrolling? It certainly can't be that juries are given the opportunity to apply their own sense of right and wrong, to make the distinction. (As Judge Kozinksi explained in footnote 5, *id.*, "Nor can 'corruptness' be a question of fact for the jury to decide. A jury isn't free to conclude logrolling is bad and the senators in the example above are acting 'corruptly.' What's legal and what's not is for courts to decide.") And it can't be just that legislators are given some implicit, judge-created, exemption from crimes like bribery; in other words, it can't be that legislators and Governors are free to make whatever deals they want, no matter how explicit and specific, yet citizens are barred. A definition of "corrupt" that excludes acts motivated by honestly-held opinions about the public good, such as we have proposed, is the only way, or certainly the best way for the Court to resolve this problem.

PROPOSED JURY INSTRUCTION #A-19
SUPPLEMENTAL OR ALTERNATIVE DEFINITION OF "CORRUPT"

Furthermore, the Government must prove that any agreement was "corrupt" in the sense that it was wrongful, immoral, depraved or evil.

Argument and Explanation: *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005) ("'Corrupt' and 'corruptly' are normally associated with wrongful, immoral, depraved, or evil. See Black's 371; Webster's 3d 512; Am. Hert. 299-300.")

Mr. McGregor will also request the pattern instruction on § 666, modified in some respects, as reflected elsewhere in this set of proposals. That pattern instruction includes the following: "To act 'corruptly' means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result." The definition in terms of "voluntarily, deliberately, and dishonestly" is useful and important, and should be given. The remainder, though, is entirely circular since it is premised on "unlawful," which begs the question. Thus the necessity for further definitions as offered herein, to supplement the pattern instruction.

PROPOSED JURY INSTRUCTION #A-20
GOOD FAITH/*BONA FIDE*

A campaign contribution or other payment is not a crime, under the statutes at issue in this case [as to Mr. McGregor], if it was done in good faith.

The Government must prove that any payment made or offered was not "bona fide (that is, good faith) salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

Argument and Explanation: The concept of "good faith" is part of the law of both "honest services" and § 666. As to "honest services," *see*, *e.g.*, *United States v. Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996) (affirming, and quoting instruction given: "Now, in this case good faith is a complete defense … because good faith on the part of the defendants is inconsistent with the intent to defraud or willfulness, which is an essential part of the charges."); *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981) ("Good faith is a complete defense to the charge of intent to defraud under the mail fraud statute."). The second sentence is taken directly from § 666(c) (with the added explanation that "bona fide" means "good faith," which is a correct definition/translation of the term.) By virtue of *Skilling*'s discussion of § 666 as a guide to what "bribery" is under "honest services," the same principle should apply under "honest services."

Mr. McGregor requests both of these sentences, and requests each separately if the Court declines to use both.

PROPOSED JURY INSTRUCTION #A-21
BRIBERY AS DIFFERENT FROM CURRYING FAVOR OR GOODWILL

Giving a campaign contribution or giving a thing of value to a legislator or official is not a bribe if it is a mere attempt to curry favor, or a generalized attempt to build goodwill.

Argument and Explanation: This is supported by cases as such as *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) ("[B]ribery may not be founded on a mere attempt to curry favor, ... there is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill.") Recognizing that the failure to give a somewhat similar instruction was rejected as an argument for reversal in *McNair*, 605 F.3d at 1194-95, this does not mean that refusing the instruction is the best decision. This instruction would help to clarify the law for the jury. Although the trial judge in *McNair* said in the context of that case that giving the instruction requested in that case might "carr[y] with it some sort of suggestion that I'm adopting that idea that that's what these payments were," *id.*, the instruction requested herein does not ask the Court to tell or hint to the jury the Court's own views in this regard.

PROPOSED JURY INSTRUCTION #A-22
REWARD IS NOT A BRIBE

In this case, you may not convict [Mr. McGregor/any defendant] on the theory that payments or campaign contributions were offered to Legislators or others in order to reward them for their past actions. Instead, the Government must prove beyond a reasonable doubt that payments were offered in regard to future actions by the officials, under the rules and definitions that I have explained to you.

Argument and Explanation: This distinction between reward for past actions, and influence/*quid pro quo* agreement regarding future actions, is required both by the law and by the framing of the Indictment. All of the § 666 charges are framed in the Indictment, explicitly, as bribery, not gratuities (for instance, in the title of each § 666 count). And "honest services" covers (insofar as pertinent to this case) only bribery, which is again the way the Indictment is framed. A reward for a past act that is offered only after the act is, at most, a gratuity rather than a bribe. *E.g.*, *Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) ("a bribe involves a specific understanding that it will affect an official action--a quid pro quo.") (emphasis, on future tense "will," supplied); *McNair*, 605 F.3d at 1191 (quoting *Sun-Diamond*, which distinguishes gratuities and bribes on this basis among others); *United States v. Frega*, 179 F.3d 793, 807 n.17 (9th Cir. 1999) (quoting instruction given: "Nor does giving a judge something as a reward for an official act on his part that he has already undertaken constitute a bribe unless there was an understanding prior to the act being taken that the judge would be so rewarded."). (The fact that § 666 includes the word "reward" indicates only at most the possibility that *some* § 666 cases might be brought as "reward" cases based on past actions, in which case it would constitute a gratuity case rather than a bribe case. The Government has brought this case, explicitly as stated in the Indictment, as a bribe case as to all payments allegedly made by Mr. McGregor.)

At the very least, this instruction should be given as to all campaign contributions and the like, because the concept of criminal liability for a campaign contribution as reward for past action is incompatible with *McCormick*.

PROPOSED JURY INSTRUCTION #A-23
CLOSE-IN-TIME DISCUSSION OF CONTRIBUTION AND ACTION

It is not a crime to discuss campaign contributions near in time to, or even in the same conversation as, discussing an official's vote. It is only when the discussion rises to the level of an explicit agreement, and when it meets the other requirements that I have explained to you, that the laws at issue in this case are implicated.

Argument and Explanation: This instruction gives a specific point that would likely otherwise be missed, and that the Government may try to obscure. (The Government has, heretofore, tried to obscure it both in the Indictment and in oral argument on motions to dismiss.) The point is supported by *Siegelman*, *McCormick*, and the other authorities cited earlier in this document.

The argument may be made, against this proposal, that the point is "adequately covered" by other instructions requiring proof of an explicit, specific, corrupt *quid pro quo* agreement. Even if the Court gives all of the other instructions requested herein, adding this short additional instruction would still be useful. It would take extremely little time to give it. It would enlighten rather than confuse the jury. There is no general principle to the effect that, after a trial that has taken weeks or months, the Court should give jury instructions that are edited severely in order to be brief. There is no good reason why the Court should decline to give this correct instruction.