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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	
RONALD GILLEY, et. al.	)	
	)	
Defendants.	)	

RONALD E. GILLEY'S OBJECTIONS
TO RECOMMENDATION OF THE MAGISTRATE JUDGE, DOC. 863

Comes now Defendant Ronald E. Gilley and submits this brief in support of his objections to Recommendation of the Magistrate Judge, Doc. 863 (hereinafter, "the Recommendation"). Gilley filed a motion to dismiss counts under 18 U.S.C. § 666 ("Federal Programs Bribery") and 18 U.S.C. §§ 1341, 1343, 1346 & 2 ("Honest Services Bribery") on the grounds that, as applied to Gilley's making campaign contributions, the statutes violate Gilley's rights of free speech and association and are unconstitutionally vague (hereinafter, "motion to dismiss"). Doc. 485. Gilley objects to the Recommendation's conclusion that his motion to dismiss, Doc. 485, be denied.

Summary of the Basis for Gilley's Motion to Dismiss

Gilley will not repeat his arguments in their entirety here, but in summary, Gilley's motion to dismiss is based on his contention that his entering into discussions with candidates for office to determine their degree of commitment to an issue and his right to make a campaign contribution, or decline to make one, on that basis is core political speech protected by the First Amendment. The Supreme Court has repeatedly recognized that it is inherent in the nature of representative democracy that candidates claim support and constituents choose whom to support

financially on the basis of what the candidates state they will do. *See* Gilley's Brief in Support, Doc. 487. "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." *McCormick v. United States*, 500 U.S. 257, 272 (1991). "It is in the nature of an elected representative to . . . favor the voters and contributors who support [certain] policies. *It is well understood that a substantial and legitimate reason, if not the only reason, . . . to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.*" *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.) (emphasis added), *overruled on other grounds*, *Citizens United v. FEC*,130 S.Ct. 876 (2010). *See also, U.S. v. Antico*, 275 F.3d 245, 257 (3rd Cir. 2001) (*abrogated on other grounds by Skilling v. United States*,130 S.Ct. 2896 (2010)) (*abrogation recognized by U.S. v. Riley*, 621 F.3d 312, 323 (3rd Cir. 2010)) ("Because the line [between legal campaign conduct and illegal conduct] is so subtle, the Supreme Court ruled in *McCormick* that an overt quid pro quo is a necessary proof in the context of campaign contributions.").

In summary, under *McCormick*, an elected official cannot be convicted under the Hobbs Act for receipt of a campaign contribution merely because he knows the contribution is made with anticipation of favorable future action, but only where the official has made an explicit promise to take certain official action in exchange for the contribution. *McCormick*, 500 U.S. 257, 273-74. The Supreme Court reasoned that any less a showing would render criminal conduct which is and will be standard procedure "so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* at 272-73.

In fact, in *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009), the Eleventh Circuit acknowledged that because "the bribery, conspiracy and honest services mail fraud convictions in [that] case [were based on a campaign contribution] they 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 campaigning for public office and for issue referenda, there is ample opportunity for that error to be committed." *United States v. Siegelman*, 561 F.3d 1215, 1224 (11th Cir. 2009) (vacated by *Siegelman v. United States*, 130 S. Ct. 3542 (2010) and *Scrushy v. United States*, 130 S. Ct. 3541 (2010)).

Thus, Gilley contends that, because, as the Supreme Court has recognized, making a campaign contribution on the basis of a candidate's stated intention to take certain action or support certain causes is an unavoidable part of our representative democracy, where a *constituent* is concerned, it is not possible to draw a line between protected and unprotected speech in any predictable way.[1] Finally, Gilley contends that, even if his prosecution for a

[1] Neither the Government nor the Recommendation address this issue at all. Gilley gave the following examples, with a fuller discussion, in his brief in support, Doc. 487 at pages 6-7:

> [C]onsider these possible statements by a constituent to his representative:
>
> a. "If you will vote for Bill A, I will give you a $ 100,000 campaign contribution."
> b. "If you are going to vote for Bill A, I will give you a $ 100,000 campaign contribution."
> c. "If you support Bill A, then I believe you are a good American, and I support good Americans. I want to give good Americans a $ 100,000 campaign contribution."
>
> The gist and intent of all of these statements is the same, *i.e.*, that the donor wants to donate $100,000 to a candidate who is going to support Bill A. However, only the first statement is even arguably an explicit quid pro quo. This is because only the first statement arguably asks the representative to do something in return for the contribution. The second statement's use of "are going to" instead of "will" changes the statement from arguably being an offer of a quid pro quo to a statement implying, at most,

campaign contribution survives whatever level of scrutiny is applied, the prosecution violates due process. This is because due process requires that a statute distinguish between legal and illegal conduct with definiteness so that citizens know what conduct is illegal and so that prosecution will not be arbitrary. Where speech is concerned, these requirements are more stringent so that protected speech will not be chilled. Given the First Amendment protection of the constituent's efforts to gage a candidate's degree of support for causes the constituent cares about and to direct his money accordingly, it becomes clear that the line between the protected and arguably non-protected speech of a constituent donor would be absurdly narrow. Because campaign donations are regularly offered on the basis of an official's or candidate's promise to support or oppose legislation, a would-be donor cannot know exactly what he may or may not say to a prospective donee with the degree of certainty required by due process and protection of First Amendment freedoms.

Objections to the Recommendation

Neither the Government nor the Recommendation addresses Gilley's contentions and instead both rely for their conclusions on general and sometimes inapplicable statements of law. This may be in part because, as far as Gilley has been able to determine, Gilley's argument presents an issue of first impression. Gilley has found no controlling authority on the issues he raises and neither the Government nor the Recommendation cite any such authority.

1. First, the Recommendation concludes without any analysis that "'the First Amendment does not protect political contributions made in return for an explicit promise by the

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a willingness to support the representative because of what he *already* plans to do. If a representative is already going to vote for Bill A and receives a contribution based on his intention to do so, there is no quid pro quo. *See McCormick*, 500 U.S. at 272 ("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.").

official to perform an official act.'" Doc. 863 at 5. However, this conclusory statement merely assumes the question at issue and fails to distinguish between prosecution of a constituent and prosecution of an elected official, which distinction is central to Gilley's argument.

Nor does the Recommendation's conclusory statement address the fact that the intention of a donor and an elected official may be different or the fact that the rights and obligations of an elected official and a constituent are not symmetrical, as Gilley argued in his brief in support. Doc. 487, p. 6. An elected official cannot condition his official action on the receipt of a campaign contribution, but, obviously, a constituent has the right to condition his campaign contribution on the representative's official action. *See McConnell v. Federal Election Comm'n,* 540 U.S. 93, 297(2003) (opinion of Kennedy, J.) ("It is well understood that a substantial and legitimate reason, if not the only reason . . . to make a contribution to one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.").

In addition, the Recommendation's conclusion is a quote from a Ninth Circuit case, *United States v. Jackson,* 72 F.3d 1370, 1376 (9th Cir. 1995). Obviously, as a Ninth Circuit case, *Jackson* is not binding authority in the Eleventh Circuit. Furthermore, even if *Jackson* were an Eleventh Circuit case, it would not be controlling authority because the relevant question in *Jackson* involved a state bribery statute, not Honest Services or Federal Programs. The Ninth Circuit held that "the First Amendment does not imply an explicit quid pro quo element into every state bribery offense." *Jackson*, 72 F.3d 1370, 1376.

Jackson is inapposite for other reasons as well. First, the facts in *Jackson* indicate that the vast majority of money given by Jackson to the elected official was not a legitimate campaign contribution but was only disguised as such. In contrast, Gilley's argument is only

directed at campaign contributions which are intended to support the candidate's campaign and not to funnel a *personal* financial reward to the candidate.

Second, in *Jackson* the Ninth Circuit rejected the defendant's argument that *McCormick* is binding authority for the rule that the First Amendment requires that an explicit quid pro quo be read into state bribery law. So the issue in *Jackson* is not controlling, or even relevant, here. Gilley does not argue that *McCormick* is binding authority for his argument. Instead, Gilley relies on *McCormick* for its rationale, *i.e.,* its recognition that it is not illegal for a candidate to request money from donors because of, for example, his support or opposition of proposed legislation, conduct which, in some sense is an "exchange" of money for influence:

> 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." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick v. United States, 500 U.S. 257, 272. Thus, the rationale of *McCormick* goes, because the exchange of money and influence is part and parcel of representative government, to convict an elected official for extortion/bribery under the Hobbs Act, the Government must prove what might be called a "heightened" quid pro quo. The Government must prove that the elected official received the contribution "in return for an **explicit** promise or undertaking by the

official to perform or not to perform an official act [because] [i]n such situations the official asserts that his official conduct will be **controlled** by the terms of the promise or undertaking." *McCormick*, 500 U.S. at 273 (emphasis added). In other words, under *McCormick*, where a campaign contribution is at issue, it would not be enough for the elected official to be "influenced" in an official act. Instead, he must have **explicitly** promised to be **controlled** by the receipt of the campaign contribution. *Id.*

2. The Recommendation next cites *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), for the principle that "[the fact that] speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." This statement is beside the point. Gilley does not argue that all speech used for political ends is automatically constitutionally protected. But the Recommendation fails utterly to address the authority cited by Gilley to show that Gilley's discussions with candidates for office to determine their support for an issue important to him and his contribution *are* core political speech. Even if the quote above said that the offer of a *bribe* could never be constitutionally protected, it would beg the question of exactly how to distinguish a "bribe" from a "legitimate" campaign contribution.

3. The Recommendation also reasons that, even assuming that in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Supreme Court "emphasized and expanded the First Amendment protections for political spending" that "[would] not affect the Court's analysis because *Citizens United* dealt with independent expenditures." Doc. 863, p. 5-6. Quoting *Buckley v. Valeo*, 424 U.S. 1, 46 (1976), the Recommendation explains that independent expenditures do not pose the same "dangers of real or apparent corruption" as "large campaign contributions." Doc. 863, p. 6.

However, the reasoning of the Recommendation is flawed. Unlike in this case, a limit on the amount any particular person can contribute to a campaign is a *bright line limitation* on a First Amendment freedom. Gilley's argument is that, where the conversation of a constituent with a representative and the decision to make a campaign contribution are at issue, prosecution under Honest Services Bribery and Federal Programs Bribery violates the Constitution because there is no bright line; in other words, there is no reliable way to separate protected from unprotected speech.

For example, if a citizen who is adamantly opposed to a bill expanding abortion access calls a representative and says, "If you give me your word that you'll oppose the bill expanding abortion access, I'll send you a $100.00 campaign contribution," he would appear to be exercising important First Amendment rights. But he has also just offered the representative a "bribe." Whereas a bright line limit on how much the citizen can contribute has a marginal impact on his First Amendment right, statutes which have no bright line protection impermissibly chill speech. Thus, although *Citizens United* dealt with independent expenditures, its statements about the degree of protection afforded political speech are still relevant.

4. The Recommendation erroneously relies on *United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995) to support its denial of Gilley's motion to dismiss. The Recommendation's reliance is erroneous for several reasons.[2] First, after *Skilling, Waymer* is no longer good law.[3] In *Waymer*, the defendant had argued that "'the honest services amendment'

[2] The apparent source of the Recommendation's erroneous reliance on *Waymer* is the Government's opposition to Gilley's motion to dismiss, in which the Government states the following: "Indeed, the Eleventh Circuit has already rejected a First Amendment challenge to the honest services statute. *United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995)." Doc. 604, p. 2.
Many of the errors of the Recommendation discussed herein can be traced directly to the Government's Opposition. For example, the Government also relies on *Jackson* and *Garrison*. See Opposition, Doc. 604, pp. 1-2.

[3] Westlaw indicates that *Waymer* has "some negative history but is not overruled"; however, a keycite search in Westlaw also indicates that *Stayton*, discussed below, recognized the "implied overruling" of *Waymer*.

to the mail fraud statute, 18 U.S.C.A. § 1346, [which allowed] the United States to predicate a mail fraud prosecution on a 'scheme or artifice to deprive another of the intangible right of honest services'" was unconstitutionally vague and overbroad. The Eleventh Circuit rejected defendant's challenge to the "honest services" prosecutions.

However, in *Skilling*, the Supreme Court agreed with the same argument made by the defendant in *Waymer* and held that the the Honest Services provision of 18 U.S.C. § 1346 was unconstitutionally vague because the outer limits of the conduct prohibited by the statute could not be defined. *Skilling v. United States*, 130 S.Ct. 2896, 2931. The Supreme Court imposed a limiting construction on § 1346 so that, rather than including the failure to provide "honest services," the statute only encompasses bribes and kickbacks. The Court explained that, without a narrowing construction, the statute failed to define the prohibited conduct with "sufficient definiteness" required by due process. *Skilling*, 130 S. Ct. at 2927-28. *See Stayton v. U.S.*, --- F.Supp.2d ----, 2011 WL 691238 (M.D. Ala. Feb. 28, 2011) (vacating defendants' honest services convictions in light of Supreme Court's decision in *Skilling* and noting that in *Waymer*, the Eleventh Circuit had rejected the argument accepted by the Supreme Court in *Skilling*).

5. Even if *Waymer* were still good law, it would not be controlling authority against Gilley's argument because unlike in *Waymer*, Gilley is not making a facial challenge of Honest Services. Gilley argues only that Honest Services Bribery should not apply to the making of campaign contributions by a *constituent*, which is tantamount to arguing for a limiting construction, the same remedy imposed by the Supreme Court in *Skilling.* Gilley does not argue that the statutes at issue cannot be applied without violating the Constitution nor that the statutes at issue would be unconstitutional under any circumstances. Gilley is not complaining about

"potential problems" with a statute, but about a real and present problem with the application of Honest Services Bribery and Federal Programs Bribery to his conduct.

6. The Recommendation makes the conclusory statement, "If at trial the Government can show that there was a bribery scheme to deprive the citizenry of honest services, the Defendants' conduct, not their speech, will have been regulated by the statute." Doc. 863, p. 6. However, this statement assumes the issue in contention, which is whether Gilley's discussions with legislators and his promises of support were speech protected by the First Amendment.[4]

7. In Section (2), the Recommendation addresses due process concerns raised by the defendants. However, in this section, the Recommendation addresses only the argument that this prosecution falls outside the pre-*McNally* core. See Doc. 863, pp. 4-5. The Recommendation does not address the due process concerns raised by Gilley in his motion and brief, documents 485 and 487 respectively.

Gilley argued that "What renders a statute vague is . . . the indeterminacy of precisely what . . . fact [must be established to show guilt]." *United States v. Williams*, 553 U.S. 285, 306 (2008). Thus, the application of Federal Programs Bribery and Honest Services Bribery to campaign contributions by constituents would be unconstitutionally vague even under "run-of-the-mill" vagueness. But a more stringent vagueness standard applies to statutes which burden political speech: "when [a] statute infringes on constitutionally protected rights, such as the right to free speech or of association, the Supreme Court has said that a more stringent vagueness standard should apply." *U.S. v. Di Pietro*, 615 F.3d 1369, 1371 n.2 (11th Cir. 2010) (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). When a statute

[4] Gilley's motion to dismiss was limited to those counts which pertained to the giving of campaign contributions or in-kind campaign support. See Motion to Dismiss, Doc. 485, p.1 and Brief of Ronald E. Gilley in Support of Motion to Dismiss, Doc. 487, p. 1 and n.1.

"imposes criminal penalties in an area permeated by First Amendment interests," then the statute's language must be precise in defining exactly what conduct is proscribed. *Buckley,* 424 U.S. at 40-41 (internal quotations omitted); *see also, City of Chicago v. Morales*, 527 U.S. 41 (1999).

Thus, the application of Federal Programs Bribery and Honest Services Bribery to campaign contributions by constituents violates due process because there is no way to define exactly what conduct would violate the statutes with precision and predictability, as required for a criminal statute that affects First Amendment rights.

8. Gilley objects to the Recommendation's finding at page 8 that the Government can show that a campaign contribution is "personal benefit" to a defendant. The court relies on its conclusion for a statement made by the Government at Doc. 237 at page ten. Neither the Government nor the Recommendation cite any authority for the proposition that receipt of a campaign contribution is a personal benefit to the candidate.

Conclusion

In light of the preceding objections, under Federal Rule of Criminal Procedure 59(b)(3), Gilley requests that the Court reject the Recommendation. In addition, Gilley urges the Court to grant Gilley's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 20th day of April, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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