

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.)	

**MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL INFORMATION
AND ARGUMENT IN SUPPORT OF PENDING RULE 29 MOTION**

Milton McGregor respectfully moves to supplement his Rule 29 briefing in light of newly available information. This information is an update to a matter that Mr. McGregor discussed in prior briefing. Mr. McGregor respectfully submits that it sheds important light on the crucial questions about the scope of § 666 and “honest services” in regard to campaign contributions, and about the First Amendment and Due Process limitations on prosecutions in that area.

The proposed supplementation follows below.

* * * * *

One of the critical questions of law in this case, especially in regard to most of the remaining counts against Mr. McGregor, is the line between lawful political speech and crime, in regard to campaign contributions. Mr. McGregor has argued that it is lawful and constitutionally protected speech, for a citizen to tell an official that he will support

that official's re-election (by making campaign contributions or soliciting them from others) if the official votes as the citizen hopes he will, on a pending issue of legislation and public policy. This is lawful, even if one infers that the citizen's hope is to influence the official's action – and even if one infers that the official knows of that hope and is in fact motivated by it. Even if one deems this to be evidence of an “agreement” of some sort, still it is lawful. The Government contends that such activity is a crime. And the Government's case depends on this assertion, as to most of the remaining counts (including the bulk of the alleged “conspiracy” charge in Count 1).

In prior briefing, Mr. McGregor pointed out a publicized instance in which prominent businesspeople and at least one New York state legislator had conversations that would be a crime on the Government's theory.

Consider, for instance, a prominent story in the New York Times during this trial, about the politics leading up to New York's change in law on the definition of marriage. A State Senator who voted for the bill was quite candid that, in the days leading up to the vote, he had a meeting with some wealthy potential donors who supported the bill. They told him that “they would eagerly support him if he backed same-sex marriage.” Behind Gay Marriage, An Unlikely Mix of Forces, in New York Times, June 25, 2011, available at <<http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all>>. To many people – including, apparently, the State Senator in question and the author of the story – this is merely an interesting point about how politics works. To the Public Integrity Section of the Justice Department, it may be reason to put all of those people in jail.

“Motion for Judgment of Acquittal at the Close of Government's Case,” Doc. 1536, p. 17 n.10. Mr. McGregor used this example to support his assertion that such conduct (which is an extremely close analogy to the conduct that the Government alleges in this case) is lawful – and that it is not clearly established to be unlawful, meaning that it would violate

Mr. McGregor's First Amendment and Due Process rights to declare it unlawful retroactively in this case. To put it simply, Mr. McGregor cannot be convicted of a crime on the theory that he did something that has been, and is even now, so accepted and recognized as a part of politics.

The new information that Mr. McGregor seeks to bring to the Court's attention is as follows. New publicized information shows that not only was that offer made in the New York case (the offer, in paraphrase, "we will support your re-election bid if you vote as we prefer"). Beyond that, it is now known that the offer has come to fruition – that fundraisers are being held for officials who responded as the offerors hoped they would – and indeed that the Mayor of New York City has placed himself squarely in the middle of the picture. Mayor Bloomberg's spokesman has declared that the Mayor was one of those who promised he would support officials' re-election bids if they voted as he preferred; and now, the Mayor is carrying through on that offer.

The information appeared in the New York Times, online, on October 12, in a story titled "A Campaign Windfall for 4 Republicans Who Voted for Same-Sex Marriage."¹

As the State Legislature this year debated the legalization of same-sex marriage, a group of wealthy financiers who support both gay rights and Republican causes offered a reassurance to Republican lawmakers: Stand with us now, and we will stand with you later.

This week, the four Republican state senators who provided the decisive votes to pass the marriage bill are to get a big financial boost from those

¹ http://www.nytimes.com/2011/10/13/nyregion/4-republicans-who-voted-for-gay-marriage-set-to-receive-aid.html?_r=1&hp . The article also appeared on Page A-23 of the October 13 print version of the Times.

donors, including Mayor Michael R. Bloomberg. A fund-raiser planned for Thursday night in Manhattan is expected to raise about \$1.25 million to help finance their re-election bids next year.

...

The emergence of the wealthy donors proved critical to same-sex marriage advocates as they tried to persuade sympathetic Republicans that they would not be left in the political wilderness if they diverged from party leaders and voted to legalize same-sex marriage.

Same-sex marriage supporters pointed to Thursday's event as evidence that they would stand by the four Republicans. The fund-raiser's hosts include Mr. Bloomberg; the philanthropist and gay rights activist Tim Gill; and several top-tier Republican donors, including the hedge fund managers Paul E. Singer and Daniel S. Loeb.

"Our support not only assists each of these leaders but will send a signal to other legislators across the nation that if they stand with freedom and civil liberties, they will not be abandoned by those who care deeply about gay rights and marriage equality," Mr. Singer wrote to possible donors last month.

Invitations asked potential donors to contribute up to \$16,800, the maximum total allowed, for each senator's re-election effort. The fund-raiser, featuring wine and hors d'oeuvres, will be held at the Union League Club in Midtown. About 200 people are expected to attend, and Mr. Bloomberg is among those scheduled to speak.

"The mayor made it very clear early on that he would be a vocal supporter of those senators who stood up and did the right thing in light of a tough political climate," a Bloomberg spokesman, Mark Botnick, said.

About \$900,000 is expected to be spread among the four senators — Mark J. Grisanti of Buffalo, James S. Alesi of Rochester, Stephen M. Saland of Poughkeepsie and Roy J. McDonald of Saratoga County — which would amount to a windfall by Albany standards. In the first six months of this year, state senators raised an average of \$103,000 apiece, according to the New York Public Interest Research Group.

The balance of the contributions raised Thursday will go toward the campaign committee for the Senate Republicans, to help defend the four

lawmakers and also to recognize the party, which controls the Senate, for allowing a vote on the marriage bill.

Mr. Alesi said he appreciated the support.

“The message has to go to Republicans that Republicans can vote for the right thing and live to tell about it,” he said.

Surely we can all agree that Mayor Bloomberg’s spokesperson would not tell the New York Times that the Mayor is doing something that a reasonable person would know was a federal crime.

The Court should hold that the laws involved in this case do not cover such activity, and that they cannot cover such activity in this case as a matter of constitutional law. The Court should also recognize that this example shows the danger of arbitrary prosecutions, if campaign contributions can be charged as “bribes” under federal law. Promises of campaign contributions offered in support of one cause can be prosecuted as crimes, while promises of campaign contributions offered in support of another are treated as standard politics, depending on prosecutors’ intuitions. Such a system violates Due Process and the First Amendment, as Mr. McGregor has previously argued.

We respectfully submit that the Court should require an explanation from the United States, in this case, as to whether it takes the position that the facts as described above are *prima facie* evidence of federal felonies. An answer to that question will help the Court in evaluating the Government’s arguments in this case. If the facts as described above are not crimes, then the facts in this case are not crimes either.² If the Government

² Consider, for instance, Count Eight. As Mr. McGregor has explained (Doc. 1804, p. 19, Doc. 1895, pp. 10-13), the Government’s theory is that Mr. McGregor is liable on the

says that the facts as described above are crimes, then this will certainly come as a surprise to many prominent people in New York, thus highlighting the Due Process problem. The Government cannot evade the question by saying that the decision whether to investigate in New York is up to federal prosecutors in New York. This prosecution is being run by the Public Integrity Section of the Department of Justice, which is involved in the investigation and prosecution of cases nationwide and which should have a uniform standard nationwide.

Though it should be obvious, we emphasize that Mr. McGregor's view is that the facts as reported regarding New York are not a crime. Mr. McGregor does not suggest that the people discussed above, including Mayor Bloomberg, other donors, or state legislators, have done anything wrong. They have engaged in lawful and

basis of an offer from Mr. Gilley to Senator Preuitt of future re-election campaign support, in the form of country music entertainment. The Government theorizes that the offer was conditional on how Senator Preuitt voted: he would get the support only if he voted for SB 380. There was no evidence that such a condition was stated, or was known to Mr. McGregor, but that is the theory.

Consider also Count Five. Senator Means asked for Mr. McGregor's support in his upcoming re-election. Mr. McGregor promised it. (J-146). The Government's theory is that the promise was contingent on how Senator Means voted. The evidence does not support the theory, but that is the theory.

Consider also the call with Rep. Mask, which the Government still apparently contends was part of the alleged conspiracy in Count 1 even after judgment of acquittal on Count 3. The Government's theory is that Mr. McGregor promised to raise future campaign support for Rep. Mask from others, if Rep. Mask voted as Mr. McGregor hoped he would.

All of these, on the Government's theory in this case, are quite closely analogous to the example discussed herein: a promise of future campaign support (either from the promisor himself, or from others whom he will ask to contribute) *if* the official takes action that the promisor supports.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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