the sentence because the District Court increased the sentence in punishment for out-of-court statements by Governor Siegelman criticizing and questioning the motivations and actions of the prosecutors. Neither the First Amendment, nor 18 U.S.C. § 3553, permits a sentence to be increased for that reason. In this country, public officials are not beyond criticism; and there is no "federal prosecutors are beyond reproach" exception to the First Amendment. In fact, the actions and motivations underlying this prosecution are a matter of grave and widespread public concern.

Argument

1. The prosecution was required to prove an "explicit *quid pro quo*" agreement on the conspiracy, mail fraud, and bribery charges. The District Court failed to instruct the jury on this point. Furthermore, the evidence was insufficient on this point.

The conviction must be reversed as to all counts relating to an alleged connection between the Education Lottery campaign contribution and the C.O.N. Board appointment, based on the legal principle that an "explicit *quid pro quo*" connection is required for conviction. Such proof is required as a matter of statutory interpretation, just as the Supreme Court reached precisely the same result under a related statute in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991). Furthermore, the First Amendment demands such an interpretation of the statutes at issue, in the context of issue-advocacy campaign contributions.

Under the governing law, the evidence was not sufficient to support the conviction; and so a judgment of acquittal should be entered. But at the very least there should be a reversal of the conviction and a new trial, since the jury was not correctly instructed on this point. This argument covers all of the "honest services" mail fraud counts (numbers 6 through 9), the charge of conspiracy to commit mail fraud (number 5), and the bribery count (number 3).

A. As to all of these counts, the alleged connection between the contributions and Governor Siegelman's actions is the key; and Governor Siegelman was entitled to judgment of acquittal on Counts 8 and 9, concerning things with which he had no involvement at all.

As to all of these charges, the alleged connection between the contributions and Governor Siegelman's actions is the key. If the prosecution did not prove the legally-required degree of connection between the contributions and the Governor's action, then there certainly was no federal crime here. We do not understand there to be any dispute about this. There will be a dispute as to what particular degree of connection the law requires in order to establish a crime, but there is no dispute that a connection is the key. For instance, there is no claim that the Governor's conduct with regard to the contribution was itself criminal under federal law, absent an alleged connection to Scrushy's appointment to the C.O.N. Board. Nor is there a claim that the appointment of Scrushy itself was unlawful, absent the legally-required degree of connection to the contributions. It is the alleged connection between the appointment and the contributions, and the precise

nature of that connection, that makes or breaks this case.

As noted in the Statement of Facts, there is no evidence that Governor Siegelman had any part in any alleged misconduct by Scrushy or Carman on the C.O.N. Board, in connection with their service on the Board. There is not even any evidence that Governor Siegelman knew of any such thing, or that he understood or planned that anything remotely like that would occur. This in itself is sufficient grounds for a judgment of acquittal on Counts 8 and 9.

That is, Counts 8 and 9 were mail fraud counts, premised on mailings that occurred in 2002 and 2003 respectively. They related to actions taken by the Certificate of Need Board. The indictment charged that Governor Siegelman "caused" those mailings. [R1-61 p. 35, ¶ 60]. But there is, as we have said, absolutely no evidence that Governor Siegelman "caused" those mailings in any sense whatsoever. Nor is there any evidence that he had any part whatsoever in any "scheme" by Scrushy to fraudulently misuse authority on the C.O.N. Board. There is no evidence that Governor Siegelman even knew of any such alleged scheme, much less that he supported any such scheme. Whether or not Scrushy breached a legal duty of "honest services" on the C.O.N. Board, there is no proof that Governor Siegelman is legally responsible for any such thing.

The indictment alleged, as part of the fraud scheme, that "SCRUSHY and others would and did offer things of value to another CON Board member to

attempt to affect the interests of HealthSouth and its competitors." [R1-61 p. 35]. The other Board member in question was Tim Adams. This is the crucial aspect of the alleged fraud scheme that underlies Counts 8 and 9. But there is, again, not the slightest bit of evidence, nor any way to infer from the evidence, that Governor Siegelman had any knowledge or expectation that this would occur. Despite this complete lack of evidence, the prosecution pursued Counts 8 and 9 against Governor Siegelman; and the jury, despite the lack of evidence against him these counts, followed along.

The prosecution's response to this point, if it has one, will certainly be based solely on the evidence surrounding the alleged connection between the appointments and the contributions; so we will not belabor this point further, and will instead focus the following discussion on the lack of a criminally culpable connection between the appointments and the contributions.

B. Both the "honest services" mail fraud statute, and the "bribery" statute, require proof of an explicit *quid pro quo* in cases involving campaign or issue-advocacy contributions.

The core legal issue is an important one that crosses all partisan boundaries and that affects officials, candidates, and citizens at every level of government. The issue, in a nutshell, is how close a connection there must be, between a campaign contribution (in this case, specifically, a contribution to an issue-advocacy or referendum campaign) and an official act, in order to take the case out

of the realm of politics into the realm of crime. The answer is that there must be an "explicit *quid pro quo*," within the meaning of that phrase as used in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991).

We are not talking, here, of cases in which an elected official takes money (or things of value) himself, for his personal use. It is understandable that, in the context of personal gifts of "things of value" to public servants, Congress might enact a broad prophylactic ban. Government officials don't *need* to take gifts from their constituents or from those who are affected by government action. And so it might make sense to have a ban on accepting them, and even to impose criminal penalties without requiring proof of a *quid pro quo*. But this is not that sort of case. Here, Governor Siegelman personally received nothing.

We are talking instead about cases in which the alleged crime is premised on First Amendment-protected activity, of campaign or issue-advocacy contributions. The contributions context is different from the personal-benefit context. It is different, first, because *all* politicians (leaving aside perhaps a few billionaires) *must* raise contributions. They have to raise money for their own campaigns. And when crucial issues must be put before the public in a referendum vote, politicians must raise money for those issue-oriented elections as well. Like it or not, contributions of money are the mother's milk of politics in modern campaigns (for election or for issue-oriented referenda). "Campaigning for elected office

necessarily entails raising campaign funds." *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002). And the contributions context is different, too, because the giving of contributions is a constitutionally-protected activity under the First Amendment. The constitutional protection is not absolute, to be sure, in the sense that some campaign finance laws are permissible; but it is real, and it is especially powerful in referendum or issue campaigns as contrasted with candidate election campaigns. *See*, *e.g.*, *First. Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407 (1978) (holding unconstitutional a state law banning corporate contributions or expenditures in referendum campaign). In short, unlike personal gifts to politicians, contributions to elections and referenda are actually necessary and even in many ways *good*; they are a major type of political expression, participation and involvement.

So when it comes to criminal prosecutions based on campaign or referendum contributions, it is important that there be clear rules as to what an elected official can lawfully do, and what by contrast is a crime. An official must be able to know, in advance, the rules as to when action benefiting a contributor will be legally acceptable (subject perhaps only to correction at the ballot-box), and when by contrast it will result in a prison term.

The existence of such rules is important not only so that officials can conform their conduct to the law. The existence of clear rules is important, beyond

that, so that we can all be sure that prosecutors are applying the same rules to everyone regardless of political preference. Every President who has ever appointed a contributor as Ambassador to France, every Senator who has ever exercised the Senatorial prerogative of putting forward a nominee for the United States District Court after such person supported the Senator's campaign, every Governor and state Legislator, every Mayor and City Council member throughout the nation, and indeed every constituent of every such person, needs to know where the line is drawn between politics and crime. And the line must not be subject to the whim of prosecutors.

For cases involving contributions rather than personal kickbacks or the like, the line should be drawn between cases where the proof establishes the existence of an explicit *quid pro quo*, and cases where it does not. Proof of an "explicit *quid pro quo*" in this sense requires much more than the mere existence of a contribution and an official action. It requires more, even, than inferences as to what the thoughts, wishes or expectations of the contributor and of the official were. It requires just what the phrase "explicit *quid pro quo*" implies: an explicit, which is to say an expressly communicated, statement or agreement that the contribution and the action were linked.

The caselaw we will discuss below, in support of this argument, has arisen in the context of candidate-election campaign contributions. But of course, issue-

advocacy contributions are just as important to the legitimate political process as are election campaign contributions. *See FEC v. Wis. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2677 (2007) (Scalia, J., concurring) (describing issue-advocacy expenditures as "at the heart of the First Amendment's protection" and "indispensable to decisionmaking in a democracy"); *First. Nat. Bank v. Bellotti, supra*. From what we can tell, this is the first case *ever* in which charges like these have been premised on issue-advocacy campaign contributions.

If anything, it is *more* important for the criminal law to leave breathing-room for issue-advocacy contributions, than it is for candidate-election contributions. Just as the Supreme Court's First Amendment jurisprudence has been somewhat *more* protective of issue-advocacy expenditures and contributions than of candidate-campaign contributions (*see generally FEC v. Wis. Right to Life*, *supra*), so the criminal law ought to be more protective as well. Issue-advocacy contributions do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. So, the law should permit no federal criminal prosecution based on an issue-advocacy or referendum campaign contribution, unless such a prosecution is brought under a statute that actually speaks clearly and specifically to that particular context. Such a holding would be reasonable, as an application of a "clear statement" rule of statutory interpretation.

But in any event, this Court can and should decide this case on the narrower

basis that we propose: a conviction, for a case arising under the statutes at issue here and involving a referendum campaign contribution, requires proof beyond a reasonable doubt of an "explicit *quid pro quo*" connection between the contribution and the official action.

To recognize the correctness of our argument on this point, it is useful to begin with *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807 (1991). There, the Supreme Court read the extortion statute, 18 U.S.C. § 1951, in precisely the way that we are suggesting that the present statutes ought to be read as well. Recognizing that campaign contributions are a constant in the real life of politicians, the Court held that a link between such a contribution and an official act would constitute the crime of extortion only if there was an "explicit *quid pro quo*." *Id.*, 500 U.S. at 271 & n.9, 111 S.Ct. at 1815 & n.9 (formulating the question in that way); 500 U.S. at 273, 111 S.Ct. at 1816 ("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."). The Court held that if the Congress wanted to criminalize conduct short of that, conduct that "in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures," Congress would have to be explicit about it. 500 U.S. at 272-73, 111 S.Ct. at 1816.

The Court was adamant that the line being drawn was between an *explicit*

agreement or *promise* that favorable action would be given in return for the contribution (the illegal side of the line) and an *expectation* of such a result (the side of the line that, under *McCormick*, was not a crime). The Supreme Court declared that the illegal side of the line was as follows:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but 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.

500 U.S. at 273, 111 S.Ct. at 1816 (emphasis supplied). "This formulation defines the forbidden zone of conduct with sufficient clarity." *Id.*

The Court was thus speaking overtly in terms of *explicit*, *express*, promises and agreements. The criminally-prohibited situations, said the Court, are those in which there is an "explicit promise or undertaking" by the official to act in exchange for the contribution, in which "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id*., 500 S.Ct. at 273, 111 S.Ct. at 1816. To rise to the level of a crime, there must be a *communication* by the official, amounting to an overt promise or undertaking.

The Court made clear, by contrast, that a contributor's *expectation* that favorable official action would follow from the contribution – and the official's *knowledge* of that expectation – did not place the conduct on the illegal side of the

line. Indeed, the Supreme Court noted that this was one of the central flaws in the jury instructions:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation.

500 U.S. at 274, 111 S.Ct. at 1817. A contributor's expectation of a linkage between the contribution and the action, even combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*.

In pointedly including the requirement that the *quid pro quo* be "explicit," the Supreme Court helped not only to ensure that the rules for conduct are clear, but also to increase the chances that they are applied by prosecutors in an even-handed way. Without that requirement of explicitness, there would be too much room for prosecutorial selectiveness in choosing which politicians to target, even if that selectiveness might be subconscious. If a criminal prosecution can be undertaken without proof of an explicit *quid pro quo*, and if instead an implicit connection between contribution and official action is enough to make out a crime, prosecutorial discretion will be markedly expanded. Prosecutors will then, in deciding whom to seek to indict, be in the position of inferring the unspoken mental states of elected officials – inferring which of them took action for "good"

reasons (such as a belief that an appointee will be a valuable member of the board in question) and which of them was motivated by "bad" reasons (contributions). Prosecutorial mindreading will be the order of the day. That is an important reason why the *McCormick* standard makes good sense: it reduces the likelihood of, and the public perception of, selective prosecutions.

The reasoning of *McCormick* is equally applicable to the statutes at issue here (18 U.S.C. § 666, and 18 U.S.C. §§ 1341, 1346). The basis for *McCormick*, as we have shown, was at its root a "clear statement" rule: that in the realm of campaign contributions (a realm that is at the core of the First Amendment), a criminal statute requires an "explicit *quid pro quo*" unless the Congress clearly states that it means to eliminate such a requirement. *McCormick*, 500 U.S. at 272-73, 111 S.Ct. at 1816. (The fact that this was an application of a "clear statement" doctrine is further demonstrated by the Court's citation to *U.S. v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007 (1973); the cited passage of *Enmons* was about "clear statement" rules in the construction of criminal statutes.) *McCormick*'s interpretive principle is dispositive as to the statutes at issue in this case, as well: like the extortion statute interpreted in *McCormick*, the "honest services" and federal bribery statutes do not include any clear statement by Congress drawing the line of forbidden conduct to criminalize situations lacking an explicit *quid pro quo*, in cases involving campaign contributions.

The prosecution might retort that these statutes do "clearly" set a governing legal standard that does not differentiate between cases involving campaign contributions and cases involving personal payments to government officials. But this is not the sort of clear statement that the Supreme Court demanded in *McCormick*. One might as well have said in *McCormick* that the law "clearly" made no distinction between campaign contributions and personal graft. The Supreme Court recognized, however, that there is a vast and legally significant distinction there. What the Congress must intentionally and plainly do, under *McCormick*'s rule of statutory interpretation, is to speak clearly to the context of contributions in particular, if it means to impose a rule other than "explicit *quid pro quo*" in that specific context.

The various courts that have addressed the issue have recognized that the reasoning of *McCormick* applies to campaign-contribution cases brought under the federal bribery and "honest services" statutes. For instance, this was the holding of *U.S. v. Zucchet*, No. 03cr2434 JM (S.D. Cal. Nov. 10, 2005) (attached as Appendix A) (granting judgment of acquittal in part, and new trial in part): "A prerequisite to criminal liability involving campaign contributions under the Hobbs Act and honest services wire fraud is the indispensable requirement of a quid pro quo. See McCormick v. United States, 500 U.S. 257 (1991)." (Slip Op., p. 2). Notably, while the Government has appealed the judgment in *Zucchet*, the Government has

not argued that the District Court was wrong in applying the *McCormick* standard to the "honest services" charges. *See* Brief of United States in *U.S. v. Zucchet* (9th Cir. No. 05-50960). It is striking that the Government is taking a position in this case that it has declined to take in the *Zucchet* appeal. There is no reason why Governor Siegelman should be subjected to prosecution on a legal theory that other federal prosecutors are not even willing to advance in an appellate court.

Equally compelling, on the applicability of *McCormick*'s reasoning not only to the Hobbs Act but to "bribery statutes," is the Seventh Circuit's discussion in *U.S. v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

> Allen maintains that whether the charge against a defendant be extortion or bribery, the concerns that led the Supreme Court to adopt the quid pro quo requirement in *McCormick* exist. This argument is not without force. *McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. People vote for candidates and contribute to the candidates' campaigns because of those candidates' views, performance, and promises. It would be naive to suppose that contributors do not expect some benefit – support for favorable legislation, for example – for their contributions. To hold that a politician committed extortion merely by acting for some constituents' benefit shortly before or after receiving campaign contributions from those constituents "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." 111 S. Ct. at 1816. Only statutory language much more explicit than that in the Hobbs Act would justify a contrary conclusion. Id.
>
> As the law has evolved, extortion "under color of official right" and

> bribery are really different sides of the same coin. … Because of the realities of the American political system, and the fact that the Hobbs Act's language did not justify making commonly accepted political behavior criminal, the Supreme Court in *McCormick* added to this definition of extortion the requirement that the connection between the payment and the exercise of office – the quid pro quo – be explicit. Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.

Allen, 10 F.3d at 410-11.[9]

Other caselaw is in accord, not only as to bribery statutes but also as to "honest services" fraud. *See*, *e.g.*, *U.S. v. Malone*, 2006 U.S. Dist. LEXIS 63814, *3-4 (D. Nev. 2006):[10]

> In *United States v. McCormick*, the Supreme Court held that a showing of *quid pro quo* is necessary for a conviction under the Hobbs Act when a public official receives a campaign contribution. … This court has previously found the Supreme Court's reasoning in *McCormick* equally applicable to charges of honest services wire fraud where the "scheme or artifice to defraud" involved the payment of campaign contributions. … Therefore, to the extent the Government alleges that campaign contributions amount to violations of 18 U.S.C. §§ 1343, 1346, and 1951, the Government must show the

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[9] This Court has cited and followed the relevant portion of *Allen*. *U.S. v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994).

[10] Although the quoted passage in *Malone* did not use the word "explicit" along with "*quid pro quo*," the Court was expressly following the *McCormick* standard; as seen above the requirement that the *quid pro quo* be "explicit" is the core of the *McCormick* rule.

requisite *quid pro quo*.

Luzerne County Retirement Bd. v. Makowski, 2007 U.S. Dist. LEXIS 87246, *155-59 (M.D. Pa. 2007), arising in the context of a RICO claim, also agreed that the *McCormick* standard applies to "honest services" and to bribery; the Court cited *Malone* as well as *United States v. Warner*, 2005 WL 2367769, at *5 (N.D. Ill. Sept. 23, 2005), in support.

Notably, in its submissions on this issue, the prosecution has never cited any opinion that has *disagreed* with the application of the *McCormick* standard to these statutes, in a case involving campaign or issue-advocacy contributions. Instead it has relied on cases that do *not* involve campaign or issue-advocacy contributions. In such cases, it may be true that there is no explicit *quid pro quo* requirement under "honest services" or § 666. But this, even if correct, is beside the point. The Supreme Court's discussion in *McCormick* was specifically about cases that involve campaign contributions, rather than personal kickbacks or the like. Such cases raise concerns that are not present in cases involving personal kickbacks and other personal payments: concerns about the First Amendment, concerns about the realities of fundraising as a practical necessity, and concerns about criminalizing too much conduct without a clear Congressional mandate. Those concerns drove the decision in *McCormick*, and should drive a parallel decision in this case. Cases not involving campaign or issue-advocacy contributions are different. *See Malone*,

2006 U.S. Dist. LEXIS 63814, *7 ("The issue of *quid pro quo* only arises when the alleged scheme or artifice to defraud involves campaign contributions.").

C. The First and Fifth Amendments, and the rule of lenity, require the application of the "explicit *quid pro quo*" standard here.

If there is any doubt about the applicability of the *McCormick* "explicit *quid pro quo*" standard to the statutes at issue here, such doubt must be resolved in favor of Governor Siegelman. The reason is two-fold: the related doctrines of fair notice and the rule of lenity, and the First Amendment.

Criminal statutes must give fair notice of what is covered; and where there is ambiguity, the rule of lenity requires a narrow construction of the statute. This Court recognized this in *U.S. v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996), with specific reference to the federal mail fraud statute.

> "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." Robert Bolt, "A Man For All Seasons" Act II, 89 (Vintage 1960) (speech of Sir Thomas More). To be free of tyranny in a free country, the causeway's edges must be clearly marked. The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons, by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along.

The prosecutors in this case should not be allowed to take advantage of the vagueness of the "honest services" statute.. That vagueness is not a virtue, but a danger to liberty that requires a narrow interpretation of the statute: the same