

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: 89-1918

CASE NO: ROBERT L. McCORMICK, Petitioner V.

UNITED STATES

PLACE: Washington, D.C.

DATE: January 8, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ROBERT L. McCORMICK,           :

4                   Petitioner           :

5               v.                       :   No. 89-1918

6   UNITED STATES               :

7   - - - - - X

8                                       Washington, D.C.

9                                       Tuesday, January 8, 1991

10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:55 a.m.

13   APPEARANCES:

14   RUDOLPH L. di TRAPANO, ESQ., Charleston, West Virginia; on  
15       behalf of the Petitioner.

16   CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor  
17       General, Department of Justice, Washington, D.C.; on  
18       behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:55 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 89-1918, Robert L. McCormick v. United States.

5  
6 Mr. di Trapano, you may proceed.

7 ORAL ARGUMENT OF RUDOLPH L. di TRAPANO

8 ON BEHALF OF THE PETITIONER

9 MR. di TRAPANO: Mr. Chief Justice, and may it  
10 please the Court:

11 The essential issue on this appeal is under what  
12 circumstances and to what extent can a noncoercive  
13 solicitation of campaign contributions to defray an  
14 election expense be in violation of the color of official  
15 right provision of the Hobbs Act, and also to what extent  
16 and under what circumstances would income declared or the  
17 failure to declare a campaign contribution as income  
18 violate the tax fraud statutes.

19 The petitioner in this case was a legislator in  
20 the House of Delegates in West Virginia with a history of  
21 having sponsored and having worked very hard for a  
22 hospital in Southern West Virginia that had to be staffed  
23 by foreign-trained doctors, in this case Filipino doctors.  
24 For a period of years the activities of this legislator  
25 was limited to extending a temporary license. Without



1 that extension, without legislative enactment, this  
2 hospital would not be able to have operated, and those  
3 people in need of health care in that region of Appalachia  
4 would have had to travel some 2-1/2 hours to Charleston.  
5 This was a very crucial need in that area, and this -- and  
6 the petitioner involved was heavily involved with that  
7 objective.

8 QUESTION: Where exactly was his district?

9 MR. di TRAPANO: The district is the -- it's the  
10 southern district of West Virginia; Logan County is the  
11 county that he is elected from, Your Honor.

12 QUESTION: Logan County.

13 MR. di TRAPANO: A couple of days before the  
14 June 1 payment, the contribution was made, there was a  
15 phone call -- and this is the only evidence, the only  
16 evidence that links the petitioner with a solicitation. A  
17 phone call made by the lobbyist where the conversation had  
18 to do with the campaign. The petitioner said I have an  
19 expensive campaign, I haven't heard from the doctors, and  
20 what are you going to do about it.

21 The lobbyist who made the phone call and the  
22 Government's chief witness, Vandergrift, goes to see the  
23 head of the foreign-trained doctors organization, a Dr.  
24 Manuel, and repeated the conversation, and said we ought  
25 to help the petitioner in his campaign, Mr. McCormick in

1 his campaign. The -- Dr. Manuel -- they go to the bank,  
2 and although the petitioner did not ask for cash, and  
3 under West Virginia law cash contributions over \$50 is in  
4 violation of the law, punishable by three times the fine,  
5 but not an incarcerative offense. They go to the bank,  
6 writes a check for \$2,000. Part of it goes to the  
7 lobbyist for expenses, and \$900, in \$100 bills, is put in  
8 an envelope and delivered to the petitioner.

9 Now, the court -- rather the United States  
10 Attorney's Office indicted -- had Mr. McCormick indicted  
11 under color of official right. It is the -- it is our  
12 thesis that color of official right, a plain reading, the  
13 plain meaning of color of official right is a pretended  
14 assertion of right, that the Congress of 1946 never  
15 contemplated that color of official right would be used to  
16 prosecute election laws and enforce election laws of the  
17 state. Color of official right and the debate in Congress  
18 in 1943 -- the law was enacted in 1946 but Congressman  
19 Hobbs from Alabama, when questioned about color of  
20 official right and what it meant, the debate is very  
21 limited, and he said it means a pretense assertion of  
22 right. A public official who doesn't have the right who  
23 is asserting the right, more rights than he does have, in  
24 extracting money.

25 Now, for 25 years the Justice Department has

1 never prosecuted for campaign violations until the 1970's.  
2 That particular passage went unobserved and was not used  
3 as a vehicle to prosecute defendants for violating State  
4 election laws. In the Government's brief the Government -  
5 -

6 QUESTION: Excuse me, Mr. di Trapano. As I  
7 understand it, the Government's theory for not using it,  
8 however, is quite different from the one that you have  
9 said.

10 MR. di TRAPANO: Yes, Your Honor. The  
11 Government --

12 QUESTION: Their theory was that there had to be  
13 some coercion or threat of force. That was what they  
14 thought. That it was not an independent clause, color of  
15 official right, that it just went with the other ones.  
16 Right?

17 MR. di TRAPANO: No, Your Honor. The  
18 Government's theory in the case, as I understand it, is  
19 that they contended that this payment was not a political  
20 contribution at all.

21 QUESTION: No, no, no. I'm not talking about  
22 this case. I'm talking about those years --

23 MR. di TRAPANO: In those years, yes.

24 QUESTION: -- in which, as you have just  
25 described, the Government never used this provision --

1 MR. di TRAPANO: Never used it, right.

2 QUESTION: -- for things of this sort, political  
3 corruption. Their reason for not using it was not, was  
4 not the legislative history that you have just described.  
5 Their reason for not using it was not, as I understand it,  
6 that they thought you had -- in order to come within it  
7 you had to assert a right to it that you really didn't  
8 possess.

9 MR. di TRAPANO: That's -- that appears to be  
10 the Government's reasoning, but it's not -- it's not  
11 justified by the, by the language of the act.

12 QUESTION: Well, my understanding is that that  
13 was not the Government's reason. That the Government's  
14 reason for not using it was that they thought it was not  
15 an independent clause at all, but that that whole clause,  
16 "or under color of official right," was attached to the  
17 other clauses, and you had to show the other ones in  
18 addition to that one.

19 MR. di TRAPANO: That's correct.

20 QUESTION: Okay.

21 MR. di TRAPANO: That was used -- for the first  
22 time in the 1970's used, and disjunctive in the Kenny  
23 case. That is correct, Your Honor.

24 In any event, the Government chose to call this  
25 transaction a personal payoff. Now, the contribution was



1 admittedly made in contravention to State law, because the  
2 state law in West Virginia makes cash contributions in  
3 excess of \$50 illegal, and it is punishable, as I have  
4 said, by three times the fine. It also went unreported.

5 Now, we feel that the -- that the color --

6 QUESTION: It went unreported because the  
7 petitioner didn't report it, I take it?

8 MR. di TRAPANO: Yes, Your Honor. Yes, the  
9 petitioner didn't report it.

10 QUESTION: Not only didn't report it for State  
11 law purposes as campaign contribution, but didn't report  
12 it as Federal income.

13 MR. di TRAPANO: Yes. But the petitioner -- but  
14 there is no evidence that the petitioner had not used this  
15 to reimburse himself for advance that he had made to his  
16 campaign. And the evidence, and the Government concedes  
17 that that was the campaign --

18 QUESTION: Well, I suppose those facts are  
19 evidence about -- that go to whether it was a campaign  
20 contribution or not. If it isn't treated by the candidate  
21 in compliance with the laws for receiving campaign  
22 contributions, I suppose the jury can consider that fact.

23 MR. di TRAPANO: Well, the jury apparently did  
24 consider that, but we, we strongly urged the court not to  
25 instruct the jury because under the color of official

1 right and under the Hobbs Act the means -- the definition  
2 of a political contribution, the purpose of it is to  
3 influence the nomination, the election, or defeat of a  
4 candidate. The form of the contribution has never been  
5 used either in State or Federal definition as part of the  
6 definition.

7 This was in fact a campaign contribution. Every  
8 conversation that had to do with the transaction, it was  
9 described as helping Bob in the election, helping him in  
10 his campaign. There was nothing in any of the  
11 conversations that had to do that this was some kind of a  
12 personal payoff.

13 Now, the, the petitioner -- the court in its --

14 QUESTION: How do you explain the failure to  
15 report it as a campaign contribution and the failure to  
16 report it as income?

17 MR. di TRAPANO: How do I --

18 QUESTION: Explain it.

19 MR. di TRAPANO: Well, the campaign -- money  
20 received to defray expenses is not income. And if it's  
21 not income, it shouldn't be reported. The tax regulations  
22 recognize that, that you can have fund raisers to pay you  
23 back, you can advance money to a campaign and you can have  
24 fund raisers, and that is not income. And there was no  
25 obligation for him to report this as income.

1           With respect to the -- to the application of the  
2       Hobbs Act, the color of official right --

3           QUESTION: Mr. di Trapano, I think Justice  
4       O'Connor also asked how do you explain the failure to  
5       report it under West Virginia law?

6           MR. di TRAPANO: I don't -- I don't have an  
7       explanation why he didn't report it, other than he simply  
8       didn't comply with the West Virginia reporting laws.  
9       There may be -- there may have been other contributions  
10      not reported. But our strenuous objection to the charge  
11      of the, of the, to the jury -- the court in charge of the  
12      jury in connection with these contributions said that it  
13      was -- that if the contribution, and specifically the  
14      contribution from the doctors to the petitioner, if it was  
15      not voluntarily made. And voluntary was described as not  
16      having an expectation of benefit, whatever benediction the  
17      defendant received as a result of that instruction was  
18      stripped away by the court's conditioning every voluntary  
19      contribution unless it was made -- it was not voluntary if  
20      there was some expectation of benefit. In this case,  
21      obviously, the doctors did have an expectation of benefit,  
22      as virtually every political contribution carries.

23           In the instructions that the court gave the jury  
24      after our -- we strenuously objected to these  
25      instructions. But the jury in this case really had no

1 options, because the, the court had labeled this -- the  
2 court said that if, that a political contribution, even if  
3 not reported and even if it was in cash, in violation of  
4 state law, can still be a political contribution if  
5 voluntarily made. But then again destroyed the effect of  
6 that by saying that it's not a voluntary contribution if  
7 there is some expectation of benefit.

8           Going back to the Hobbs Act and the Enmons case,  
9 a request for contribution is a First Amendment  
10 prerogative. Political contributions are necessary, and  
11 the donors, the contributors, as well as the candidate,  
12 has the right to ask for contributions. The court in its  
13 -- the color of official right provision as interpreted,  
14 and the Hobbs Act as interpreted of this Court, if the --  
15 if it had -- if there is a legitimate entitlement to the  
16 contribution -- there was in this case -- then the means,  
17 whether it was not reported, whether it was in  
18 contradiction of State law, is not a dispositive factor as  
19 to whether or not there is guilt in the Hobbs Act.

20           In the Enmons case, as the Court will remember,  
21 there there was a strike, a collective bargaining. The  
22 end, the legitimate end, was a collective bargaining  
23 benefit of higher wages. The means used were violating  
24 State laws by violence, by using rifles, by blowing up  
25 substations, and the Court held that that was not a



1 violation -- the means used, and the use of the word  
2 "wrongful" as when it precedes "wrongful use" --

3 QUESTION: Mr. di Trapano --

4 MR. di TRAPANO: Yes, Your Honor.

5 QUESTION: Do you think that it would be a  
6 violation of the Hobbs Act for a legislator to say if you  
7 will give me a so-called -- a campaign contribution, then  
8 I promise I will try to help you get the legislation you  
9 want?

10 MR. di TRAPANO: If the color of official right  
11 could be expanded to reach into campaign contributions,  
12 I'd say yes.

13 QUESTION: Does it cover that? Does it cover  
14 that?

15 MR. di TRAPANO: I don't think the intent covers  
16 that, but I do --

17 QUESTION: Does the language cover it?

18 MR. di TRAPANO: No, Your Honor.

19 QUESTION: Color of right.

20 MR. di TRAPANO: Color of official right has a  
21 specific meaning.

22 QUESTION: In exchange for a promise.

23 MR. di TRAPANO: Color of official right has a  
24 -- no, Your Honor, I don't think it covers it. I don't  
25 think --

1 QUESTION: Some courts have so held.

2 MR. di TRAPANO: Some courts have held that  
3 there has to be a quid pro quo in order to convict --

4 QUESTION: And a promise could be a quid pro  
5 quo.

6 MR. di TRAPANO: A promise, yes, Your Honor.  
7 And I --

8 QUESTION: Which could be express or implied.

9 MR. di TRAPANO: I think there has to be an  
10 identifiable quid pro quo. There should be a more precise  
11 standard in this situation, because it is --

12 QUESTION: But it could be a promise?

13 MR. di TRAPANO: There should be -- there should  
14 be a promise made on behalf --

15 QUESTION: It could be a promise, is that right?

16 MR. di TRAPANO: Yes, Your Honor. It should  
17 contemplate a promise, it should contemplate a  
18 consideration and a promise.

19 QUESTION: Um-hum.

20 QUESTION: But it should -- it should be  
21 something very specific, because there is a vast  
22 difference in a nonelective public official, who has no  
23 business getting money in the first instance. There is  
24 no, there is no conceivable reason why a nonelective  
25 official should be asking for money. And you can

1 understand the decisions in that context. But where you  
2 have a candidate for public office whose very -- whose  
3 very life depends upon raising campaign contributions,  
4 then the laws, the standards should be different.

5 We were prejudiced by the instructions. The  
6 trial court said if the payment focused on the office.  
7 Now, that has no business in this kind of a case, because  
8 every contribution focuses on the office. And the jury  
9 was instructed --

10 QUESTION: May I just ask you this question? Is  
11 it essential to your position that we conclude that this  
12 was a campaign contribution? The reason I ask the  
13 question is, as I read the instructions, the judge told  
14 the jury that there was nothing illegal about making a  
15 campaign contribution. And do we not have to conclude  
16 from the verdict of guilty that the jury therefore  
17 determined that it was not a campaign contribution?

18 MR. di TRAPANO: Your Honor, to answer your  
19 question, the court did instruct the jury in that  
20 connection. However, it -- the court kept repeating that  
21 the voluntary contribution had to be made without some  
22 expectation of benefit. And that is wrong for two  
23 reasons. Number one is that every contribution has some  
24 expectation of benefit, and that was the definition that  
25 was spontaneously suggested to the court by the United

1 States attorney. There is no basis for that as defining a  
2 voluntary contribution.

3 So it took it outside the ambit of a political  
4 contribution once the court said unless it was voluntarily  
5 made, and voluntary means that the donor cannot have an  
6 expectation of benefit. And, Your Honor, that destroyed  
7 any -- that took it outside the purview of a campaign  
8 contribution.

9 QUESTION: I'm not sure I completely understand  
10 your answer. It seemed to me the judge did say it's not  
11 illegal in and of itself to solicit or accept legitimate  
12 campaign contributions, and so forth.

13 MR. di TRAPANO: He did. He did, Your Honor.

14 QUESTION: And the mere receipt of such  
15 political contribution is not illegal. Now, they found he  
16 acted illegally, so did -- does it not necessarily follow  
17 they found he did not receive such a campaign  
18 contribution?

19 MR. di TRAPANO: No. If the court had -- if the  
20 court had defined -- if the court had not conditioned to  
21 define the voluntary, I agree with you, Your Honor. I  
22 agree with you. But when the court said you must also  
23 find that it is voluntarily made, and when I say voluntary  
24 I mean that the donor had no expectation of benefit.  
25 Again, that, Your Honor, is in conflict with the Enmons



1 case, or rather with the 807 case, I mean, where the state  
2 of mind of the donor, the payer; should not be the guiding  
3 principle in determining the legal liability of the  
4 recipient.

5 QUESTION: You're referring -- I'm sorry.  
6 You're referring to page 34 of the Joint Appendix, I take  
7 it, in which the instruction says in order to find Mr.  
8 McCormick guilty you must be convinced beyond a reasonable  
9 doubt that the payment alleged was made with the  
10 expectation that such payment would influence Mr.  
11 McCormick's official conduct and with knowledge on his  
12 part that it was made, that the payment was made, with  
13 that expectation?

14 MR. di TRAPANO: Yes, Your Honor.

15 QUESTION: And you say that that is quite  
16 different from a quid pro quo?

17 MR. di TRAPANO: Yes, Your Honor. Yes, Your  
18 Honor. I think --

19 QUESTION: So you're saying that the quid pro  
20 quo instruction is necessary in effect to distinguish a  
21 campaign contribution from something which is not? I  
22 mean, that's what it boils down to?

23 MR. di TRAPANO: Yes, Your Honor.

24 QUESTION: All right. Now, you answered -- if I  
25 recall, a moment ago you answered one of Justice

1 O'Connor's questions by saying that a promise merely to  
2 use best efforts to help in the passage of legislation  
3 would not be a sufficient quid pro quo. Is that correct?  
4 Was that your answer?

5 MR. di TRAPANO: I would say that if the  
6 candidate, before he received a contribution, and had no  
7 history one way or the other, would say to a contributor,  
8 to a contributor, that if I get a contribution I'll do my  
9 best, I think that approaches a quid pro quo.

10 QUESTION: So that would be enough?

11 MR. di TRAPANO: I think it approaches it, Your  
12 Honor. I, I still think it should be, when you are  
13 dealing with the First Amendment, when you are dealing  
14 with campaign contributions and with the Buckley-Valeo,  
15 the -- where it says that it will be rigorously -- the  
16 standards will be rigorously reviewed, I believe that  
17 there should be more, or it should be an identifiable quid  
18 pro quo in the -- in the election law.

19 QUESTION: Well, the quid pro quo, I suppose,  
20 can either be a promise to use best efforts, or I suppose  
21 the next step would be a promise to deliver the  
22 legislation. And I take it you're not going so far as to  
23 say that there has somehow got to be a promise to deliver  
24 the finished product before a legislator could provide a  
25 quid pro quo for purposes of this statute?

1 MR. di TRAPANO: If the candidate said to the  
2 contributor, I will not use my best efforts if I don't get  
3 your money, I will use my best efforts if I do, that's a  
4 quid pro quo.

5 QUESTION: Do you think it was finable on the  
6 evidence in this case that that's what your client was  
7 indicating?

8 MR. di TRAPANO: There is not one word to  
9 suggest that.

10 QUESTION: Well, does there have to be one word?

11 MR. di TRAPANO: Yes, there does have to be one.  
12 There has to be --

13 QUESTION: In other words, it's not so much the  
14 definiteness now of the quid pro quo, as the definiteness  
15 of the statement expressing the promise or the demand for  
16 a quid pro -- or the promise of a quid pro quo for the  
17 demand that you are requiring?

18 MR. di TRAPANO: Your Honor --

19 QUESTION: He's just got to be more explicit  
20 about it, is what you're saying. Is that fair to say?

21 MR. di TRAPANO: I'm saying he had to be -- yes,  
22 Your Honor. I think you have to be -- you know, you could  
23 cite 100 examples. The NRA doesn't contribute to people  
24 who don't have a history of voting against gun laws,  
25 against gun regulations. Labor, labor PAC committees

1 would never contribute to somebody who votes against  
2 minimum wage. I mean, it's, it's --

3 QUESTION: No, I don't, I don't need -- I don't  
4 think you need to argue that to me. I just want to make  
5 sure that I am understanding exactly what you're saying.  
6 And I think what you're saying is that if there had been  
7 an explicit solicitation by which your client said either  
8 I am going to use no more efforts to help these doctors if  
9 they don't contribute, or conversely, I will continue to  
10 use my best efforts if they do contribute, that would have  
11 been enough to provide a quid pro quo. Is that correct?

12 MR. di TRAPANO: Yes, Your Honor. I would think  
13 so. And in the --

14 QUESTION: Well, don't you think that that  
15 understanding could be implicit rather than express?  
16 Isn't that possible?

17 MR. di TRAPANO: Your Honor, I do think that is  
18 possible.

19 QUESTION: And if not, why not?

20 MR. di TRAPANO: Your Honor, I think that it's  
21 possible for somebody serving in the legislature, State or  
22 in Congress to -- and implicit in a campaign contribution  
23 is that he's got to continue on a course of conduct. I do  
24 think it's implicit. I think that's the nature in this  
25 country of campaign contributions given to candidates who



1 have empathy with --

2 QUESTION: Well, if the promise is implicit, as  
3 Justice Souter has described it, then it would be a  
4 violation of the Hobbs Act. It's a quid pro quo.

5 MR. di TRAPANO: Well, Your Honor, I don't -- I  
6 think it has to be -- there has to be identifiable quid  
7 pro quo.

8 QUESTION: Your argument is it has to be  
9 express.

10 MR. di TRAPANO: Yes, Your Honor.

11 QUESTION: But there is nothing in the statute  
12 that says that.

13 MR. di TRAPANO: There is nothing in the statute  
14 that says they have any business in large to cover  
15 campaign contributions, and Congress never intended this  
16 act to get involved in regulating State elections. There  
17 is nothing in this debate that suggests -- suggests that  
18 color of official right has anything to do with regulating  
19 State elections.

20 QUESTION: Counsel, suppose a Congressman says  
21 to some people, I'm not running for the next -- I'm not  
22 running for office next time. I know you want this bill  
23 passed. I will use my best efforts to get the bill passed  
24 if you pay me \$10,000. And there is -- it doesn't even,  
25 it doesn't purport to be a campaign contribution. Now, I

1     suppose you would say that that is subject to the Hobbs  
2     Act.

3             MR. di TRAPANO: I'd say that's -- that could be  
4     subject -- the color -- under color of official right.

5             QUESTION: That's just a payoff.

6             MR. di TRAPANO: That's a payoff.

7             QUESTION: Well, suppose that that same  
8     Congressman's -- suppose the facts are what they exactly  
9     are in this case, and it did not purport to be a campaign  
10    contribution. There was no -- there's no express  
11    anything. The facts are these facts except the legislator  
12    doesn't even claim that it's a campaign contribution.

13            MR. di TRAPANO: Well, the legislator did then  
14    report it. The legislator'll never --

15            QUESTION: All right, but doesn't it -- this pay  
16    -- suppose in this case the payoff never purported to be,  
17    and was never claimed to be a campaign contribution, but  
18    there still was no express quid pro quo agreement? The  
19    facts are just like they are in this case, except that it  
20    doesn't purport to be a campaign contribution.

21            MR. di TRAPANO: Well, Your Honor, in this case  
22    it's not, because the only conversation in evidence is  
23    that --

24            QUESTION: Well, but I -- my question is on  
25    those facts would the legislator be subject to prosecution

1 under the Hobbs Act?

2 MR. di TRAPANO: I don't think so. I don't  
3 think so under the Hobbs Act, Your Honor.

4 QUESTION: Even though there is no claim that  
5 it's even a -- campaign contribution?

6 MR. di TRAPANO: Yes. There's additional reason  
7 in the Hobbs Act, Your Honor, because in the Hobbs Act the  
8 means, the means of attaining a contribution has been  
9 condemned in the Enmons opinion. That's not a relevant  
10 consideration.

11 QUESTION: Well, if it isn't, it's either a  
12 campaign contribution or it's a payoff. I had thought you  
13 said the only way you could win in this case is if it's a  
14 campaign contribution?

15 MR. di TRAPANO: I'd -- I -- I misspoke if I  
16 said that. I'm not suggesting -- if it's a quid pro quo  
17 reason, it violates the law. If the Court is expanding -  
18 -

19 QUESTION: What business has a legislator got  
20 taking this kind of money except as a campaign  
21 contribution?

22 MR. di TRAPANO: He has none. To defray  
23 expenses, that's what this was taken for, to defray  
24 expenses that he had advanced.

25 QUESTION: Mr. di Trapano, let me take you back,

1 if I may, to the jury charge that you were speaking about  
2 and which questions were asked on page 34 of the Joint  
3 Appendix, where the language used in that first paragraph  
4 is that the payment had to be made on behalf of the  
5 doctors with the expectation that such payment would  
6 influence Mr. McCormick's official conduct. Now, that is  
7 the charge that you think was mistaken in stating the law?

8 MR. di TRAPANO: I think that charge is  
9 mistaken, yes, Your Honor.

10 QUESTION: You said earlier that there was a  
11 charge that it had to be -- the jury would have to find it  
12 was given in expectation of benefit, and is there another  
13 charge to that effect, or were you just paraphrasing this  
14 charge?

15 MR. di TRAPANO: No, Your Honor. The court --  
16 let me read this. The court actually said -- the court  
17 said, and the court recognized our defense that the fact  
18 that the contribution was made in violation of State law  
19 could still be a political contribution made in cash. But  
20 the court said that a voluntary political contribution,  
21 though it may have been made in violation of local law, it  
22 was a defense in this case, it was permissible. However,  
23 the court went on to say voluntary is that which is freely  
24 given without expectation of benefit.

25 QUESTION: What page of the Joint Appendix is



1 that on?

2 MR. di TRAPANO: That's on 30, page 30.

3 QUESTION: Thank you.

4 MR. di TRAPANO: And page -- and again the court  
5 repeated on page 31, when it reread. The jury was  
6 confused, came back, and the court said again, the mere  
7 voluntary payment of money, without expectation of  
8 benefit, does not constitute extortion. It had to be  
9 without expectation of benefit, and there is no way we  
10 could argue that these four or five doctors didn't have  
11 some expectation of benefit, because they wanted their  
12 license.

13 QUESTION: Counsel, do you read the Solicitor  
14 General as agreeing with you that if you are going to rely  
15 on a quid pro quo it has to be an explicit agreement?

16 MR. di TRAPANO: Yes, Your Honor.

17 QUESTION: And shouldn't -- and I take it you  
18 read the Solicitor General as not resting on the notion  
19 that there was a quid pro quo for a campaign contribution?

20 MR. di TRAPANO: Yes, Your Honor. I read the  
21 Solicitor General as mischaracterizing the transaction as  
22 being a personal payoff without any evidence in the record  
23 to support that.

24 QUESTION: Okay.

25 MR. di TRAPANO: I would like to reserve my

1 several minutes I have.

2 QUESTION: Very well, Mr. di Trapano.

3 Mr. Wright, we'll hear from you.

4 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

5 ON BEHALF OF THE RESPONDENT

6 MR. WRIGHT: Thank you, Mr. Chief Justice, and  
7 may it please the Court:

8 The issue in this case, in our view, is whether  
9 petitioner received a personal payoff or a campaign  
10 contribution, and the court of appeals held, quote, "The  
11 evidence supports the conclusion that the money was never  
12 intended by any of the parties to be a campaign  
13 contribution." I'd like to briefly review the facts to  
14 show that the court of appeals and the jury were both  
15 correct in that finding.

16 QUESTION: Before you do, the evidence -- one  
17 can concede that the evidence supports that conclusion  
18 without conceding that the jury was required to arrive at  
19 that conclusion. What in the instructions requires the  
20 jury to find that this was not a campaign contribution, in  
21 the sense -- in the proper sense of a campaign  
22 contribution?

23 MR. WRIGHT: I would be happy to review the  
24 instructions with you at this point.

25 QUESTION: What I'm concerned about is

1 specifically the sections of the instruction that we were  
2 talking about. If something is not a campaign  
3 contribution if it is given with the expectation of  
4 deriving some benefit from it, then indeed nothing is a -  
5 - or very little is a campaign contribution.

6 MR. WRIGHT: Well, first let me say that the  
7 portion of the instructions that Mr. di Trapano was  
8 referring to don't really have to do with campaign  
9 contributions. But I'd like to take a minute and really  
10 go through this, if you're troubled by it. I think that  
11 Justice Stevens and others suggested that the instructions  
12 are really quite clear, that the jury could not convict if  
13 they concluded that this was a campaign contribution, and  
14 I think that that is correct.

15 I'll focus on the instructions that were given,  
16 the supplemental instructions, since --

17 QUESTION: What page of the Joint Appendix will  
18 you be dealing with?

19 MR. WRIGHT: They start on page 27 and they run  
20 until the end. I'd like to first note that if you start  
21 on page 29 the court sets out the basic elements of a  
22 Hobbs Act violation, and on page 29 and 30 it talks about  
23 inducement. On page 30 through 32 it speaks about the  
24 meaning of color of official right.

25 On page 33 and going over to the top of 34 the

1 court is still speaking of the Hobbs Act and it covers  
2 campaign contributions. It returns to campaign  
3 contributions on page 37 as part of the tax fraud defense.

4 Now, looking at pages 33 to 34 I'd like to note  
5 that there are 1, 2, 3, 4 -- 5 paragraphs. Each one of  
6 those paragraphs was delivered verbatim from the  
7 instructions the petitioner requested. Of course there  
8 was no objection. Nothing was deleted from their  
9 requested instructions. Excuse me. It says that many  
10 public officials in this country receive campaign  
11 contributions --

12 QUESTION: Where are you reading from now?

13 MR. WRIGHT: The second full paragraph.

14 QUESTION: Of what page?

15 MR. WRIGHT: 33. "Many public officials in this  
16 country receive political contributions from individuals  
17 who, the official knows, are motivated by a general  
18 gratitude toward him." I won't finish that paragraph.  
19 The next paragraph says, "The mere solicitation or receipt  
20 of such political contributions is not of itself illegal."  
21

22 The next paragraph reviews the facts of this  
23 case and says that there is evidence that Mr. McCormick  
24 might have received campaign contributions. The paragraph  
25 after that says, and I'll quote it, "It would not be



1 illegal, in and of itself, for Mr. McCormick to solicit or  
2 accept political contributions from foreign doctors who  
3 would benefit from this legislation."

4 I'd like to turn briefly to page 37. The tax  
5 fraud instruction --

6 QUESTION: Excuse me, before you do that, what  
7 about the top paragraph on 34? The first full paragraph  
8 on 34. Was that a part of the instructions that the  
9 defendant requested?

10 MR. WRIGHT: No. No, I don't believe that that  
11 is part of the campaign contribution defense instruction.  
12 And --

13 QUESTION: Well, wait --

14 MR. WRIGHT: Let me say next that they did not  
15 object to this instruction either.

16 QUESTION: There was no objection to the  
17 instructions at all?

18 MR. WRIGHT: Not to the paragraph on page 34  
19 that you've just referred to.

20 QUESTION: Well, as I see the difference between  
21 34, the first paragraph on 34 says what extortion does  
22 consist of, and the paragraph you just quoted says what a  
23 campaign contribution that is not extortion consists of.  
24 And the only difference between the two is that paragraph  
25 on page 33 beginning "Many public officials." It says

1 it's okay if you give the money even in the hope that the  
2 goodwill generated will make the official more receptive.

3 And then this paragraph on 34 says however, it's  
4 bad and it's extortion if it's given not with the hope but  
5 with the expectation that it will produce his conduct. Is  
6 that the line that you think is the correct one between  
7 hope and expectation? That's the line between extortion  
8 and a campaign contribution?

9 MR. WRIGHT: No, Your Honor. I don't think the  
10 jury instructions are reasonably read that way. I think,  
11 reading them in context, the court has explained what  
12 color of official right means, and the instruction you're  
13 speaking of goes more to that. But the jury has also been  
14 instructed at considerable length that if it was a  
15 campaign contribution he can't be convicted. And I don't  
16 think that anything in the color of official right  
17 instructions can be read to negate the longer express  
18 instruction that petitioner requested on campaign  
19 contributions.

20 QUESTION: Well, Mr. Wright, how about the  
21 instruction that petitioner mentioned, the last full  
22 paragraph on page 30 of the Joint Appendix?

23 MR. WRIGHT: Well, I think that it's very  
24 unusual for a petitioner to be commenting on this. Let me  
25 explain that it was the Government who objected to this

1 instruction. As originally given, the Government objected  
2 to the word "voluntary" because in context it seemed to  
3 suggest that because the doctors consented to the payments  
4 that it would be a defense, and hence it would be  
5 impossible to convict anyone who consensually made a  
6 payment. The district court then came up with the phrase  
7 "freely given without expectation of benefit." And --

8 QUESTION: Do you think that's a correct  
9 statement of the law?

10 MR. WRIGHT: I think that in context it  
11 distinguishes what the district court meant it to  
12 distinguish, and what I think the jury understood it to  
13 be, that there is a difference between a consensual  
14 payment and a voluntary --

15 QUESTION: But Mr. Wright, doesn't every person  
16 who makes a political contribution almost expect some kind  
17 of benefit in some form?

18 MR. WRIGHT: Yes.

19 QUESTION: You expect to be benefitted by having  
20 their service, or because of the positions you expect them  
21 to take. I mean, it's a very difficult line unless you  
22 rely on a line that says there has to be a quid pro quo.  
23 And in that event we know what is a contribution and what  
24 isn't.

25 MR. WRIGHT: Well, Your Honor, I think whether

1 it's a contribution or not can be determined from the  
2 facts. Now, we agree that if it is in fact a campaign  
3 contribution, a sort of heightened quid pro quo would be  
4 required. In our view vote selling is what is covered in  
5 the case of campaign contributions. If it's a personal  
6 payoff, however, in our view, it is always a misuse of  
7 public office for an official to accept a payoff for doing  
8 his job.

9 QUESTION: But Mr. Wright, isn't it the case  
10 that the jury would be left, given these instructions,  
11 with the understanding that the difference between the --  
12 what is or is not a campaign contribution, and hence what  
13 is or is not a payoff, is a difference which depends on  
14 the distinction between giving with hope and giving with  
15 expectation? Isn't that a fair assessment of the  
16 instructions?

17 MR. WRIGHT: I don't think so. I think, again,  
18 that the jury was instructed what the meaning of color of  
19 official right was, and was instructed that that meant  
20 that the official had to know that the public official was  
21 receiving money on account of his office. In this case  
22 that Mr. McCormick was receiving it --

23 QUESTION: Yeah, but every -- every candidate  
24 receives money on account either of the office that he  
25 holds or hopes to hold.



1 MR. WRIGHT: And it was told that it couldn't  
2 convict if it was a campaign contribution.

3 QUESTION: But -- and maybe I'm just going  
4 around in circles here, but I don't see what the jury had  
5 to go on to determine what was or was not a contribution,  
6 except this distinction between hope and expectation.

7 MR. WRIGHT: Well, Your Honor, let me turn  
8 briefly to the tax fraud instructions. Let me add first  
9 that any ambiguity in the campaign contribution charge  
10 would be chargeable to petitioner, who again requested  
11 those instructions.

12 QUESTION: Yes, but he was -- he was also  
13 requesting more. I mean, it's not as though, at least as  
14 I understand it, the petitioner never said implicitly or  
15 otherwise that the instructions as they stand are fine. I  
16 think he was saying that the instructions without the  
17 addition of some kind of quid pro quo language are  
18 misleading. Isn't that true?

19 MR. WRIGHT: There was one objection to the quid  
20 pro quo instruction, yes. None to the campaign  
21 contribution portion of the charge.

22 On page 37 of the Joint Appendix with respect to  
23 the tax fraud charge with jury was told that in order to  
24 constitute nontaxable political contributions payments  
25 must have been made for one or more of the following

1 purposes. (1) utilized for generally recognized campaign  
2 expenses, regardless of when such expenses were incurred,  
3 or (2) used to reimburse the political candidate for out-  
4 of-pocket campaign expenses paid by him, et cetera.

5 In light of those instructions, and the jury  
6 convicted petitioner on the tax fraud offense, I think  
7 it's really very clear that the jury could not have  
8 concluded that these were in fact campaign contributions.  
9 They just couldn't have convicted him on the tax fraud  
10 charge otherwise.

11 If I may return briefly to the facts --

12 QUESTION: So is this a harmless error analysis?

13 MR. WRIGHT: Your Honor, I don't -- the way I  
14 read the instructions, I don't believe there was any  
15 error. I think --

16 QUESTION: Well, suppose there had been no  
17 conviction, an acquittal on the tax charge?

18 MR. WRIGHT: I still, I believe --

19 QUESTION: Then you couldn't make the argument  
20 you just made.

21 MR. WRIGHT: Well, I believe that the argument  
22 that the instructions on pages 33 to 34 of the Joint  
23 Appendix with respect to the campaign contribution defense  
24 to the Hobbs Act violation are perfectly adequate. So,  
25 that is the argument I would make. I think that the tax

1 fraud instructions are perhaps even more clear.

2 QUESTION: Well, Mr. Wright, if we thought a  
3 quid pro quo was an element of the offense, then I suppose  
4 the instructions were deficient?

5 MR. WRIGHT: It depends on exactly what you  
6 mean, again, by quid pro quo. If you mean only vote  
7 selling is illegal, the instructions are deficient.

8 QUESTION: Well, that there has to be some  
9 promise, express or implied, of benefit that the office  
10 holder makes in exchange for the payment.

11 MR. WRIGHT: Oh, I'm sorry. If you mean quid  
12 pro quo in that sense --

13 QUESTION: Yes.

14 MR. WRIGHT: -- I don't think that they are  
15 deficient. I think the jury understood that Petitioner  
16 was going to continue to support them.

17 What's missing in this case --

18 QUESTION: Well, did the instructions not say  
19 that it is not necessary that the Government prove the  
20 defendant promised to commit a quid pro quo?

21 MR. WRIGHT: What the -- no, they don't say  
22 that, phrased that way. What the instructions --

23 QUESTION: Well, would you look at the bottom of  
24 page 32 and 33 and tell me?

25 MR. WRIGHT: Yes, that's where I am, Your Honor.

1 The instructions first say, in the last full paragraph on  
2 page 32, that whether a public official accepts a payment  
3 for an implicit promise of fair treatment, there is an  
4 inherent threat that without such payment the public  
5 official would exercise his discretion in an adverse  
6 manner. But it then goes on to reject a defense. In the  
7 next paragraph, it says it's not necessary that the  
8 Government prove that the defendant committed or promised  
9 to commit a quid pro quo.

10 Now, that means it's not a defense for  
11 petitioner here to say he would have supported the doctors  
12 anyway. The fact is he obtained the money from the  
13 doctors, knowing that they were giving it to secure his  
14 support. Now, he never said I'm going to change my  
15 position unless you give me the money.

16 QUESTION: Well, but it goes on and says in  
17 either event a quid pro quo -- it says it -- a quid pro  
18 quo is not an essential element of the crime. Now, I  
19 guess some courts think it is, and I suppose that's why we  
20 took this case.

21 MR. WRIGHT: Well, I don't think any court  
22 thinks it is in a payoff case. I know of no holding of  
23 that sort. And we agree that if this were a campaign  
24 contribution that what was missing here was better  
25 evidence of vote selling.



1 QUESTION: When you say it isn't necessary in a  
2 payoff case, isn't that the paradigm example of a quid pro  
3 quo? What is a payoff if it isn't a quid pro quo?

4 MR. WRIGHT: Well, that's why, Your Honor, I  
5 think there --

6 QUESTION: I don't understand.

7 MR. WRIGHT: There are two different sorts of  
8 quid pro quo's that we're talking about here. There was a  
9 quid pro quo here. The doctors understood that their  
10 payoffs to petitioner were to secure and retain his  
11 support of the bill. But we didn't --

12 QUESTION: Is that not a quid pro quo?

13 MR. WRIGHT: Yes, it is. Yes, it is, Your  
14 Honor.

15 QUESTION: And you think the statute doesn't  
16 require that?

17 MR. WRIGHT: No, the statute does --

18 QUESTION: That there be a quid pro quo?

19 MR. WRIGHT: -- does require that.

20 QUESTION: It does.

21 MR. WRIGHT: And the jury was told --

22 QUESTION: But the jury was told that there is  
23 -- that's not an essential element, that it's not  
24 necessary.

25 MR. WRIGHT: I -- I think that this -- the jury

1 has been told previously on the color of official right --  
2 instructions, rather -- that the jury has to understand --  
3 or, I'm sorry, the jury has to be convinced that the money  
4 was given on account of the official's office. That's  
5 under color of office. What the jury was told, on the  
6 quid pro quo instruction that you're focusing on, was that  
7 it's not a defense for the doctor to say that -- I mean  
8 for petitioner to say that he would have voted for the  
9 doctors anyway, and it's not a deficiency in the  
10 Government's --

11 QUESTION: Well, it doesn't say that. It isn't  
12 couched in terms of a defense at all.

13 MR. WRIGHT: I -- well, and it's not a  
14 deficiency in the Government's evidence that we didn't  
15 show that he said give me the money or I will switch  
16 position. It's enough that they gave him the money  
17 knowing that -- expecting that this would keep him from  
18 switching position. If this were a campaign contribution  
19 we would think that we would need clearer evidence of vote  
20 selling.

21 QUESTION: Well, Mr. Wright, you know, it isn't  
22 as if the Hobbs Act had a legislative exception for  
23 campaign contributions. I mean, the statute prohibits  
24 certain conduct, and you're agreeing that ordinarily a  
25 campaign contribution does not come within that

1 prohibition. But to charge the jury that the money must  
2 have been given on account of the defendant's office,  
3 certainly that covers an awful lot of campaign  
4 contributions, doesn't it?

5 MR. WRIGHT: Yes.

6 QUESTION: If you're -- you know, if I'm Senator  
7 so-and-so and I go before some group that -- raising  
8 funds, and they say well, gee, he has sure voted the way  
9 we wanted him to the last 6 years, let's give him some.  
10 Isn't that giving him money on account of his official --  
11 his office?

12 MR. WRIGHT: Yes, Your Honor. And if it's a  
13 campaign contribution it's not a misuse of office.

14 QUESTION: But you talk as if the term, quote,  
15 "campaign contribution" is somewhere defined in a statute.  
16 It isn't.

17 MR. WRIGHT: Let me try to explain where we get  
18 it. In Classic this Court defined the similar phrase  
19 under color of laws, under color of State laws by misuse  
20 of State law. And the lower courts have similarly defined  
21 under color of official office to mean by misuse of  
22 official office. It is a misuse of official office to  
23 accept a payoff to do your job. It is always a misuse.  
24 It is not a misuse in the example you gave for an elected  
25 official to seek a campaign contribution from people whose

1 positions he has supported. And that -- that's the real  
2 difference.

3 QUESTION: Your argument suggests that there is  
4 a very clearly established definition of the term campaign  
5 contribution which he who runs may read, and therefore we  
6 don't have to worry about the line between campaign  
7 contribution and something that violates the Hobbs Act.  
8 It turns out to be a very fuzzy line.

9 MR. WRIGHT: Well, there is a line. I guess I  
10 disagree as to just how fuzzy it is. Any money that is  
11 given to be used to defray campaign expenses is, in our  
12 view, a campaign contribution, whether or not it violates  
13 a State election law, although we would certainly agree  
14 that whether --

15 QUESTION: Unless there's an explicit promise to  
16 exchange legislative efforts for the money.

17 MR. WRIGHT: That's right. That's the vote  
18 selling example that we think is the one case where a  
19 campaign contribution constitutes extortion.

20 QUESTION: Mr. Wright, as I -- may I call your  
21 attention again to page 37 of the Appendix? You made an  
22 argument to the effect that whatever error was made in the  
23 campaign contribution section of the instructions was  
24 harmless because the jury found that there hadn't been a  
25 campaign contribution anyway, and you quoted that section



1 on 37 where in order to constitute nontaxable political  
2 contributions the payment must have been made for one or  
3 more of the following purposes. And then you say the  
4 jury, in order to find him guilty of this count, must have  
5 found that one of those two existed. Correct? Did I  
6 understand your argument correctly?

7 MR. WRIGHT: The jury must have rejected that it  
8 was used for generally recognized campaign expenses or to  
9 reimburse the candidate. If it found that he had -- that  
10 he had either used them to pay campaign expenses or to  
11 reimburse himself, then it would have concluded that they  
12 were nontaxable, and would not have convicted him of tax  
13 fraud.

14 QUESTION: That's right, but they would have  
15 been non-taxable not because they were not political  
16 contributions originally when made, but because they were  
17 not nontaxable political contributions, because although  
18 they may have been contributed for his campaign, he  
19 converted them to his own use. That would make them  
20 taxable, but it wouldn't prove that the jury did not find  
21 them to have been political contributions originally.

22 MR. WRIGHT: Well, I don't think that that's  
23 right with the instruction you have read, Your Honor.  
24 Now, on the prior page there is an instruction that says  
25 that conversion would make a campaign contribution

1 taxable. However, Ms. Beatty suggested that there was  
2 simply no evidence for such a, an instruction, and I'd  
3 agree that that was right. They certainly never argued  
4 that he accepted a campaign contribution and then pocketed  
5 it. Their argument has always been -- well, of course,  
6 first their argument was he didn't take the money.

7 QUESTION: But the issue is what the jury  
8 understood by these instructions. And at the bottom of  
9 page 36 the judge says if you find that they were campaign  
10 contributions you must further be convinced that the --  
11 that he converted them. And that's what the later  
12 instruction goes to: even if they were campaign  
13 contributions. I don't see that this, that the jury's  
14 conviction on the later count necessarily shows that they  
15 came to any conclusion on campaign contributions, other  
16 than the kind of conclusion that would have been affected  
17 by the campaign contribution instructions, which didn't  
18 require a quid pro quo to invalidate it.

19 MR. WRIGHT: I'm not sure I followed all that.  
20 I would agree that there are two different kinds of  
21 instructions here. One is a conversion instruction and  
22 one is if these were used for campaign expenses or to  
23 reimburse the candidate, then they are not taxable in any  
24 event. There was no conversion argument here. There was  
25 a reimbursement argument in this case. We think that the

1 jury clearly rejected that reimbursement argument.

2 QUESTION: Well, Mr. Wright, suppose we --  
3 suppose we think the jury might have found that these were  
4 campaign contributions, but that there was a quid pro quo,  
5 based on these facts? I take it you would say to -- that  
6 the jury was wrong as a matter of law?

7 MR. WRIGHT: That these were campaign  
8 contributions, but that there was a quid pro quo?

9 QUESTION: Based on these facts.

10 MR. WRIGHT: I don't think that the jury could  
11 have found that in light of these instructions. Or I  
12 don't think that they did.

13 QUESTION: I thought you a while ago said that  
14 if it's a campaign contribution there has to be an  
15 explicit statement of the exchange, and I thought you  
16 meant that on the facts of this case there wasn't such an  
17 explicit --

18 MR. WRIGHT: We -- that's right, we did not  
19 present evidence, and I am sorry, when I said quid pro quo  
20 again I meant the heightened sort of quid pro quo.

21 QUESTION: All right, but there was not evidence  
22 --

23 MR. WRIGHT: Mr. McCormick --

24 QUESTION: -- in the campaign contribution there  
25 was not evidence to justify a conviction in this case.

1 MR. WRIGHT: Yes, we did not show that the  
2 doctors reasonably believed that Mr. McCormick was  
3 definitely going to change position unless they gave him  
4 this. We simply argued they gave him the money to secure  
5 his support, but it wasn't clear vote selling.

6 QUESTION: Mr. Wright, can I ask you a rather  
7 basic question? In the court of appeals, as I understand  
8 the opinion, the basic argument the appellate made was  
9 there wasn't sufficient evidence to support the  
10 conviction. I don't understand from the court of appeals'  
11 opinion that there was any argument about instructions at  
12 all. Am I right, or did they specifically challenge  
13 particular instructions that were erroneously given or  
14 erroneously failed to be given?

15 MR. WRIGHT: They objected to one portion of an  
16 argument, of an instruction respecting the quid pro quo  
17 instructions.

18 QUESTION: They objected in the trial court?

19 MR. WRIGHT: Yes. The first time --

20 QUESTION: And did they argue that on appeal in  
21 the court of appeals?

22 MR. WRIGHT: I believe that they mentioned that  
23 in their brief, but --

24 QUESTION: Because the court of appeals --  
25 reading the court of appeals' opinion, one would get the



1 impression that the case was argued on the assumption that  
2 the jury was properly instructed.

3 MR. WRIGHT: Yes.

4 QUESTION: And I don't find in your opponent's  
5 brief a particularization of the instructions that he  
6 contends were erroneously given or failed to be given.

7 MR. WRIGHT: Oh, no, no. They -- the focus of  
8 their argument has always been that this --

9 QUESTION: That the evidence is insufficient --

10 MR. WRIGHT: -- is a campaign contribution, not  
11 a payoff. That's right, and that the evidence is  
12 insufficient to support the conclusion that it was a  
13 payoff. That's certainly how the case was argued in the  
14 court of appeals, and that's how it was argued in the --  
15 in the district court once they gave up the position that  
16 the money had never been paid at all, halfway through the  
17 trial.

18 QUESTION: I'm not sure it follows that because  
19 the legislator said he wouldn't change his position that  
20 there is still not, that you still can't prove some quid  
21 pro quo.

22 MR. WRIGHT: I'm not sure that we couldn't have  
23 proved a quid pro quo, but we didn't -- we didn't go for  
24 the very strict -- we proved that this money was given to  
25 secure his support. We didn't prove that he explicitly

1 said I'm going to change position, or we didn't meet that  
2 heightened requirement that we think might well be needed  
3 in a case of a campaign contribution.

4 QUESTION: But you seem to be saying that a quid  
5 pro quo is very constrictive of this statute, as  
6 exemplified by your answer to Justice O'Connor, that oh,  
7 well, a payoff is not a quid pro quo -- which is something  
8 I still can't understand. And here it seems to me that  
9 there can very well be a quid pro quo if he simply says  
10 he's going to maintain his position with vigor, and that  
11 that is quite a plausible requirement to put into this  
12 statute.

13 MR. WRIGHT: That's true, Your Honor. We --  
14 we're very sensitive about not, not criminalizing ordinary  
15 campaign behavior, and we want to make quite clear that we  
16 don't think it's a misuse of office -- I believe it was  
17 the Chief Justice's hypothetical -- for a candidate to  
18 stand in front of a group and say I'm a supporter of your  
19 position and I'm running for reelection and you ought to  
20 contribute to my campaign.

21 But again, that's not this case, where Mr.  
22 McCormick went to the doctors' lobbyist, who had  
23 previously picked up a \$766 hotel tab for him, thus  
24 indicating his willingness to dispense favors, and said  
25 I've paid about \$2,000 out of my own pocket and I haven't

1 heard from your doctors. They deliver \$2,900 in cash the  
2 next day, which is even more than he claimed he'd spent.  
3 They deliver it in \$100 bills, placed in sealed envelopes,  
4 personally delivered to him. They make three more  
5 payments later on, long after the election, and petitioner  
6 finally says the debt is paid, and they cease to make  
7 payments.

8 Now, under those facts we think it's plain that  
9 this was a payoff, not a campaign contribution, and that  
10 it was a misuse of office for him to obtain them.

11 QUESTION: Would you just help me on the term  
12 payoff? By that I take it you mean money that was to be  
13 received and used by him personally, as opposed to  
14 reimbursing campaign expenditures?

15 MR. WRIGHT: Yes. Money given to him  
16 unconditionally, to be used for any purpose he wanted.

17 QUESTION: If he proved that he had in fact used  
18 it for campaign purposes, would it be a payoff?

19 MR. WRIGHT: If it was given to him as a payoff  
20 and he happened to pay them off -- to use it towards a  
21 campaign contribution, yes, it would still be a payoff. I  
22 think that might get him off the tax fraud charge. I'm  
23 not sure of that.

24 But of course, the jury found that this was a  
25 payoff, and also convicted him of tax fraud in this case.

1 So it clearly rejected his argument, as did the court of  
2 appeals, and we think it's decision is reasonable.

3 If there are no further questions, I have  
4 nothing more.

5 QUESTION: Thank you, Mr. Wright.

6 Mr. di Trapano, do you have rebuttal? You have  
7 3 minutes remaining.

8 REBUTTAL ARGUMENT OF RUDOLPH L. di TRAPANO

9 ON BEHALF OF THE PETITIONER

10 MR. di TRAPANO: Thank you, Your Honor. I would  
11 just like to make --

12 QUESTION: Mr. di Trapano, before you start may  
13 I just ask you to tell us specifically which instructions  
14 you objected to that -- and argued in the court of appeals  
15 were erroneously given, and you still pertain?

16 MR. di TRAPANO: We devoted a third of our brief  
17 to the instructions in the court of appeals. The court  
18 never mentioned it.

19 QUESTION: You did? The court of appeals never  
20 mentioned the issue?

21 MR. di TRAPANO: No. It didn't address it at  
22 all.

23 QUESTION: You don't identify in your brief here  
24 which instructions you thought were erroneously given, do  
25 you?



1 MR. di TRAPANO: Well, what we didn't -- the  
2 court of appeals didn't rule on it and we don't address it  
3 in our -- in this brief, except we do --

4 QUESTION: So your argument is basically not  
5 that the jury was improperly instructed, but rather that  
6 the evidence in the record is insufficient to support the  
7 conviction?

8 MR. di TRAPANO: No, we objected to the -- we  
9 vigorously objected to the court defining or instructing  
10 the jury with respect to what a voluntary payment, that it  
11 -- the expectation of benefit took it outside the ambit of  
12 a campaign contribution. We debated that, vigorously  
13 objected to it. We fought over -- see, our trial judge  
14 did not let us read the charge he was going to give the  
15 jury. We have to -- after the charge, he says what he's  
16 going to do -- for example, we didn't -- specific intent  
17 was just -- was charged to the jury without our having any  
18 prior knowledge of what the instruction was going to be.

19 But we did object to the instruction. We  
20 offered instructions that made quid pro quo an essential -  
21 - and quid pro quo has to be conditional. And that was  
22 our -- that was our argument. We did object to it, Your  
23 Honor, and we objected vigorous to it, and devoted a third  
24 of our brief. Not mention it, as the Assistant Solicitor  
25 says. We devoted a substantial portion of our brief

1     arguing over the instructions that were given to the jury.  
2     We objected vigorously to them, to the instruction. The  
3     one instruction was where the court said every payment --  
4     any payment made, in focusing on the official office is  
5     illegal and comes within the purview of the color of  
6     official right provision.

7             But moreover, see, the Government charged -- the  
8     Government argued to the jury, he says we don't have to  
9     show that he gave some quid pro quo or threatened any  
10    action. Simply that when it was paid the doctors paid it  
11    with an expectation of benefit. That's what they argued  
12    here. Whether it's a campaign contribution makes no  
13    difference, either if it was extorted or under color of  
14    official right. That's what the Government argued in  
15    their instructions, that's what they argued to the jury,  
16    and the defendant was prejudiced by those instructions.

17            The court, moreover, as Justice Scalia was  
18    questioning about the tax fraud case, again voluntary was  
19    -- on four occasions that definition was given to the jury  
20    that voluntary is that which is given without expectation  
21    of benefit. And if they found that it was a contribution  
22    with that definition, then he was -- then he was guilty of  
23    the tax fraud case. The jury was, in our opinion, and as  
24    we point out in our brief to the Fourth Circuit, was badly  
25    instructed with respect to those matters I have just

1 mentioned.

2 Thank you very much, Your Honor.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. di  
4 Trapano.

5 The case is submitted.

6 (Whereupon, at 11:53 a.m., the case in the  
7 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 89-1918 - ROBERT L. McCORMICK, Petitioner V. UNITED STATES

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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Judy Freilicher

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