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“TAWDRY TALES OF FERRARIS, ROLEXES, AND BALL
GOWNS:” HOW MCDONNELL V. U.S. REDEFINED
“OFFICIAL ACTS” IN PUBLIC CORRUPTION
PROSECUTION

Katherine Capito and Michael Crites*

In the summer of 2012, few political stars shined as bright as Robert Francis “Bob” McDonnell. McDonnell, then-Governor of a crucial swing state, was a prominent figure in the Republican Party, seemingly with his brightest political days ahead. Incredibly popular in his adopted home state of Virginia, the Republican Party placed him on the short list of candidates to fill the ticket with Presidential candidate Mitt Romney. Three years later, in the wake of a historically aggressive federal prosecution, theatrical trial, and subsequent conviction on the underlying charges, McDonnell found himself a convicted felon and political pariah with poor odds of staying out of prison. After the United States Court of Appeals for the Fourth Circuit upheld his conviction, McDonnell appealed to the Supreme Court of the United States as a final recourse.

Despite the odds, and in the face of the tawdry facts before it, on June 27, 2016, the Supreme Court unanimously overturned McDonnell’s conviction. While the impact of the Court’s decision on McDonnell’s personal and political future will be unknown for

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some time, the Court's decision in *McDonnell v. United States*¹ significantly—and permanently—altered public corruption laws in the United States.

This article will (1) explore the history of McDonnell's case from state court to federal court; (2) break down the Supreme Court's decision in *McDonnell*; and (3) analyze the case's likely impact on future public corruption cases.²

I. MCDONNELL'S RISE TO THE GOVERNOR'S MANSION

Bob McDonnell was born to Irish-Catholic Democrats in Philadelphia, Pennsylvania, on June 15, 1954. McDonnell later moved to Northern Virginia with his parents and attended high school there.³ While attending Notre Dame on an ROTC scholarship, he met his future wife, Maureen Gardner.⁴ After graduating from Notre Dame, McDonnell entered the Army where he served on active duty until 1981 and later went on to get his master of arts and juris doctor from Regent University.⁵

McDonnell first entered the public sphere in 1991 when he won a seat in Virginia's House of Delegates.⁶ After serving six terms in Virginia's General Assembly, McDonnell became Virginia's Attorney General.⁷ McDonnell distinguished himself during his time as Attorney General. He helped increase mandatory sentencing for individuals convicted of sex crimes against minors, enhanced consumer protection through increased regulation of electrical

¹ *McDonnell v. United States*, No. 15-474, slip op. (U.S. June 27, 2016).

² 18 U.S.C. §§ 1951-1960 (2017).

³ Jessica Rettig, *10 Things You Didn't Know About Bob McDonnell*, U.S. NEWS & WORLD REPORT (November 3, 2009, 6:00 PM); <http://www.usnews.com/news/articles/2009/11/03/10-things-you-didnt-know-about-bob-mcdonnell>.

⁴ See Defendant Maureen G. McDonnell's Sentencing Memorandum at 3, *United States v. McDonnell*, No. 3:14-cr-12 (E.D.V.A. Feb. 6, 2015).

⁵ Rettig, *supra* note 3.

⁶ *Online Elections Database*, VIRGINIA.GOV, http://historical.elections.virginia.gov/elections/search/year_from:1990/year_to:1991/office_id:8 (last updated 2015).

⁷ Maria Glod and Carol Morello, *McDonnell Claims Attorney General Win*, WASH. POST (Nov. 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110902268.html>.

utilities, and helped curtail the Commonwealth's ability to take private land for public use.⁸ McDonnell strengthened his reputation as an attorney during his time as Attorney General, evidenced by the fact his office won all nine cases it argued before the Supreme Court of the United States.⁹

On this same strong record, McDonnell ran for Governor in 2009 and emerged victorious, receiving almost sixty percent of the vote. From the beginning of his term as Virginia's seventy-first Governor, McDonnell seemed primed for higher office. Shortly after his election, McDonnell delivered the Republican Response to President Obama's State of the Union.¹⁰ He later succeeded Rick Perry as the head of the Republican Governor's Association.¹¹ During his time as Governor, McDonnell sought to solidify himself as a likable, pragmatic, and moderate Governor; halfway through his term as Governor, opinion polls indicated that he had largely succeeded. Then, in Spring 2013, authorities began to investigate McDonnell and his wife Maureen's relationship with Jonnie Williams.

II. INVESTIGATION/INDICTMENT/TRIAL

A. *The McDonnells' Interactions with Jonnie Williams*

McDonnell first met Williams in 2009, during his campaign for Governor. Williams was the CEO of Star Scientific, a Virginia nutritional supplement company that was in the midst of developing a tobacco-based nutritional supplement called Antabloc.¹² More than just the formal head of the company, Williams acted as the

⁸ Mary Wood, *McDonnell Announces Plans to Run for Governor, Calls for Return to Federalist Principles*, UNIV. OF VA. SCH. OF L. (March 16, 2007); http://www.law.virginia.edu/html/news/2007_spr/mcdonnell.htm?type=feed.

⁹ Rettig, *supra* note 3.

¹⁰ Robert McDonnell's *2010 State of the Union Response*, CSPAN (Jan. 27, 2010), <https://www.c-span.org/video/?291689-3/state-union-response>.

¹¹ Rosalind Helderman and Laura Vozzella, *Va. Gov. McDonnell on two-way street with chief executive of struggling company*, WASH. POST (March 30, 2013), https://www.washingtonpost.com/local/dc-politics/va-gov-mcdonnell-in-close-relationship-with-owner-of-struggling-company/2013/03/30/43f34fb8-97ea-11e2-814b-063623d80a60_story.html.

¹² *McDonnell*, slip op. at 3.

consummate salesman. Described as a “charming salesman with a taste for the good life and the grand gesture,” Williams had a mixed history of success, financially backing companies with products based on unproven scientific products.¹³ At the time he met the McDonnells, Star Scientific had begun the unusual transition from discount cigarette maker to a nutritional supplement company.¹⁴

From the outset, Williams’ relationship with the McDonnell family extended beyond that of a typical campaign donor. Williams offered his personal airplane to McDonnell for assistance with McDonnell’s gubernatorial campaign.¹⁵ After McDonnell’s successful bid for Governor, Williams again met with the McDonnells and offered to purchase a dress for Mrs. McDonnell for the upcoming inauguration.¹⁶

After McDonnell took office, his family’s relationship with Williams continued. Following McDonnell’s inauguration, Williams asked the governor for help in furthering research studies of Antabloc inside of the Virginia public university system. Governor McDonnell agreed to set up a meeting with the Virginia Secretary of Health and Human Resources, Dr. William Hazel. Although Dr. Hazel met with Williams, he did not assist Williams in advancing the studies of Antabloc.¹⁷ In late 2010, Mrs. McDonnell contacted Williams and requested that he take her on a shopping trip. In return, Mrs. McDonnell promised to seat Williams next to the Governor at a future fundraising event. Williams then took Mrs. McDonnell on a shopping trip, during which he spent over \$20,000 on items for Mrs. McDonnell. As promised, Mrs. McDonnell placed Williams next to Governor McDonnell at the fundraising event, where the two discussed Antabloc.¹⁸

¹³ Rosalind Helderan and Laura Vozzella, *Jonnie R. Williams, key witness against McDonnells, has a complicated past*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/local/virginia-politics/jonnie-r-williams-key-witness-against-mcdonnells-has-a-complicated-past/2014/02/03/8886cc36-8768-11e3-833c-33098f9e5267_story.html.

¹⁴ Helderan & Vozzella, *supra* note 13.

¹⁵ *McDonnell*, slip op. at 3.

¹⁶ *Id.* (governor-elect McDonnell’s counsel instructed Williams not to purchase the dress).

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 4.

After several additional interactions with Williams, Mrs. McDonnell contacted Williams, explained that the McDonnells were experiencing financial difficulties, and requested Williams provide the McDonnells with financial assistance. Williams testified at trial that Mrs. McDonnell promised to assist him with the advancement of Antabloc if Williams provided financial assistance to the McDonnells. Shortly thereafter, Williams provided the McDonnells with a loan in the amount of \$50,000 and a gift of \$15,000 to pay for Governor and Mrs. McDonnell's daughter's wedding.¹⁹ Around the same time, the McDonnell family used Williams' vacation home, complete with a Ferrari.²⁰ After the trip to Williams' vacation home, Governor McDonnell set up a meeting between an aide of Dr. Hazel and Williams to discuss Antabloc. Williams later provided Mrs. McDonnell with a Rolex watch that Mrs. McDonnell gave to the Governor for Christmas.

In 2011, the McDonnells hosted a lunch for Williams and Star Scientific at the Governor's Mansion and invited researchers from state universities. During the lunch meeting, Williams distributed samples of Antabloc and eight \$25,000 checks to various state researchers for the stated purpose of preparing grant proposals to study Antabloc.²¹ In 2012, Mrs. McDonnell asked Williams for an additional loan, and, after Williams agreed, Governor McDonnell called Williams to discuss the loan.²² Roughly one month later, Governor McDonnell again contacted Williams regarding the status of the requested loan and then emailed his counsel requesting that his counsel visit him regarding Antabloc issues. After meeting with his counsel, Governor McDonnell contacted the Star Scientific lobbyist in an attempt to "change the expectations" regarding the Governor's involvement in Antabloc issues.²³ In February of 2012, the McDonnells hosted a healthcare reception at the Governor's Mansion, which Williams attended. In a departure from normal protocol, the McDonnells permitted Williams to add 25 people to

¹⁹ *McDonnell*, slip op. at 4.

²⁰ *Id.* at 5.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.* at 7.

the invitation list.²⁴ Afterwards, Williams loaned an additional \$50,000 to the McDonnells.²⁵

Governor McDonnell then met with the Virginia Secretary of Administration, Lisa Hicks-Thomas, and the Director of the Virginia Department of Human Resource Management, Sara Wilson, to discuss the Virginia health plan for state employees. During the meeting, Governor McDonnell discussed Antabloc and asked Hicks-Thomas and Wilson whether Antabloc could provide benefits to state employees. Governor McDonnell also asked Hicks-Thomas and Wilson to set up a meeting with a representative from Star Scientific. No such meeting occurred. Finally, in the spring of 2012, Williams provided the McDonnells with an additional \$20,000 loan upon the Governor's request.²⁶ In total, Williams loaned and gifted the McDonnell family with over \$175,000 in money, gifts, and services.²⁷

B. The Investigation

The investigation first began at the state level, but was later taken over by the federal government.²⁸ The government focused on gifts from Williams to the Governor and his family.²⁹ Early reports indicated that Williams provided McDonnell and his family with rides on his corporate jet, loaned the family substantial funds to keep investment properties afloat, provided "personal gifts," and

²⁴ Rosalind Helderman, Laura Vozzella and Matt Zapotosky, *Jonnie Williams had unusual influence over McDonnell's office, Cabinet member says*, WASHINGTON POST (August 7, 2004); https://www.washingtonpost.com/local/virginia-politics/jonnie-williams-had-unusual-influence-over-mcdonnells-office-cabinet-member-says/2014/08/07/2cbc99d8-1e46-11e4-82f9-2cd6fa8da5c4_story.html.

²⁵ *McDonnell*, slip op. at 4.

²⁶ *Id.* at 8.

²⁷ *Id.*

²⁸ Rosalind Helderman, *State Investigation of McDonnell to be dropped without charges*, WASH. POST (January 27, 2014); https://www.washingtonpost.com/local/virginia-politics/no-state-charges-in-mcdonnell-investigation/2014/01/27/979cb7a8-8786-11e3-833c-33098f9e5267_story.html.

²⁹ *Id.*

paid the catering bill for the wedding reception at the Governor's mansion for one of the McDonnells' daughters.³⁰

Virginia's lax ethics laws factored heavily in the McDonnell investigation. Under Virginia law as it existed during the relevant time periods,³¹ members of state government were permitted to accept *unlimited* personal gifts from individuals, even from individuals attempting to influence the state government.³² Under Virginia's ethics rules, many, if not all, of the then-rumored gifts from Williams to the McDonnells were lawful, but for the fact that the Governor failed to disclose the gifts on his required financial disclosures. The McDonnells maintained their innocence during the pendency of the investigation. Then, in the summer of 2013, despite his public protestations that he broke no laws, Governor McDonnell repaid more than \$120,000 in loans he received from Williams and publicly apologized for the "embarrassment" he had caused.³³

C. The Indictment

The repayment and public repentance failed to end the ongoing investigation and, on January 21, 2014, Governor McDonnell and his wife Maureen were indicted on 13 federal counts.³⁴ The

³⁰ Rosalind Helderman, *State Investigation of McDonnell to be dropped without charges*, WASH. POST (January 27, 2014); https://www.washingtonpost.com/local/virginia-politics/no-state-charges-in-mcdonnell-investigation/2014/01/27/979cb7a8-8786-11e3-833c-33098f9e5267_story.html.

³¹ In 2015, Virginia adopted comprehensive ethics reform that placed a \$100 aggregate limit, per year, on gifts to state legislators. See Act of Apr. 30, 2015, ch. 763 (2015).

³² Laura Vozzella, *Virginia has one of nation's most lax ethics laws for politicians*, WASH. POST: VIRGINIA POLITICS (Apr. 27, 2013), https://www.washingtonpost.com/local/va-politics/virginia-has-one-of-nations-most-lax-ethics-laws-for-politicians/2013/04/27/8f1e1218-a774-11e2-a8e2-5b98cb59187f_story.html.

³³ Laura Vozzella and Rosalind Helderman, *McDonnell apologizes, repays loans*, WASH. POST: VIRGINIA POLITICS (Jul. 23, 2013), https://www.washingtonpost.com/local/virginia-politics/mcdonnell-apologizes-repays-loans/2013/07/23/60fc9c1a-f3b9-11e2-9434-60440856fadf_story.html.

³⁴ See Indictment, United States v. Robert F. McDonnell and Maureen G. McDonnell, January 21, 2014, Case No. 3:14-cr-12 (*hereinafter* the "Indictment") (Maureen McDonnell was not charged under count 12 of the indictment and Bob McDonnell was not charged under count 14).

indictment alleged one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, two counts of making a false statement, and one count of obstruction.³⁵ The underpinning of the indictment was that the McDonnells used Governor McDonnell's position as Governor to perform "official acts" in exchange for gifts—in the form of bribes—from Williams, in violation of the Hobbs Act.³⁶ Importantly, the indictment did not follow the traditional "quid pro quo" limiting principle, but instead alleged that a series of smaller, incremental acts taken together constituted an inappropriate official act. Specifically, the government alleged that, in exchange for the gifts from Williams, McDonnell performed the following official acts:

(1) "arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc."

(2) "hosting, and . . . attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients."

(3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine."

(4) "promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion."

(5) "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs."³⁷

D. The Trial

Prior to trial, McDonnell and the government agreed that "honest services fraud" would be defined by 18 U. S. C. § 201. In pertinent part, 18 U.S.C. § 201 prohibits "a public official or person

³⁵ Indictment, *supra* note 34; *McDonnell*, slip op. at 10.

³⁶ *See* Indictment, *supra* note 34, at 7.

³⁷ *Id.* at 7.

selected to be a public official, directly or indirectly, corruptly” to demand, seek, receive, accept, or agree “to receive or accept anything of value” in return for being “influenced in the performance of any *official act*.”³⁸ Under the same statutory scheme, “official act” is defined as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”³⁹

At the conclusion of the presentation of evidence at the five-week jury trial, the District Court judge provided the following instruction to the jury:

The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official’s official capacity. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official’s position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition[,] official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.⁴⁰

³⁸ *McDonnell*, slip op. at 9; 18 U.S.C. § 201 (2016) (emphasis added).

³⁹ 18 U.S.C. § 201(a)(3) (2017).

⁴⁰ *United States v. McDonnell*, 792 F.3d 478, 505-06 (4th Cir. 2015).

McDonnell was acquitted on the false statement charges, but the jury returned a guilty verdict on the honest services and Hobbs Act extortion charges.⁴¹ McDonnell then appealed his conviction to the United States Court of Appeals for the Fourth Circuit.

III. EVOLUTION OF “OFFICIAL ACTS” UNDER FEDERAL ANTI-CORRUPTION LAWS

Central to the Fourth Circuit’s review of McDonnell’s appeal was the United States Supreme Court’s analysis of “official acts” in prior cases, *United States v. Birdsall* and *Sun-Diamond Growers of California*.

A. *United States v. Birdsall*⁴²

In *Birdsall*, the Court considered the conviction of an attorney and two Department of the Interior prohibition officers who were convicted under a then-existing anti-bribery statute.⁴³ In pertinent part, the anti-bribery statute prohibited a government employee from accepting money “with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby.” The statute also prohibited the giving of money to a government official “with intent to influence him to commit . . . any fraud . . . on the United States, or to induce him to do or omit to do any act in violation of his lawful duty.”⁴⁴

Birdsall was an attorney who represented defendants convicted of illegally selling liquor to Native Americans. After the conviction of his clients, Birdsall paid two prohibition officers—employees of the Department of the Interior—in an attempt to lower his clients’ sentences. Birdsall and the two officers were subsequently indicted for violations of the anti-bribery statute. At the trial court level, the

⁴¹ Trip Gabriel, *Former Governor in Virginia Guilty in Bribery Case*, N.Y. TIMES (Sep. 4, 2014), <http://www.nytimes.com/2014/09/05/us/bob-mcdonnell-maureen-mcdonnell-virginia-verdict.html>.

⁴² *United States v. Birdsall*, 233 U.S. 223 (1914).

⁴³ Act of March 4, 1909, ch. 321, § 117, 35 Stat. 1088, 1109-10.

⁴⁴ *Birdsall*, 233 U.S. at 224.

two officers were not convicted because the court found that the officers' actions—accepting bribes, presumably in exchange for their exertion of influence over the trial court judge—were not *specifically* prohibited by statute. On appeal to the Supreme Court, the question was whether the officers' influence, if any, in the sentencing of the defendants constituted a “decision or action on any question, matter, cause, or proceeding” in the officers' “official capacity.”

The Supreme Court reversed the lower court's decision and held that the money paid to the officers was a bribe under the statute. Specifically, the Court held that all official actions were contemplated by the bribery statute in question. Importantly, the Court stated that, in the absence of a written rule or regulation, an “official action” could be established by the custom of practice. In other words, not every job duty needs to be specifically laid out in a statute in order to constitute an “official act.” In addition, the Court held that, where a superior will “necessarily rely” on a subordinate's reports or advice, the subordinate's actions can be considered an “official act.”⁴⁵

Notably, the anti-bribery statute analyzed by the *Birdsall* court was distinct from the Hobbs Act implication in the *McDonnell* case. The Court's interpretation of the statute to include *all actions* taken by officers in their official capacities and its willingness to establish “official acts” by custom of practice as opposed to the express language of the statute, however, is an expansive interpretation of what constitutes an “official action” that would remain largely undisturbed for the better part of the next century.

B. Sun-Diamond Growers of California

Nearly eighty-five years later, in *United States v. Sun-Diamond Growers of California*,⁴⁶ the Supreme Court significantly reduced the scope of *Birdsall*. In *Sun-Diamond Growers*, the Court reviewed allegations of illegal gifts by Sun-Diamond, a trade association comprised of raisin, fig, walnut, prune, and hazelnut growers, to the former United States Secretary of Agriculture, Michael Espy. The government alleged that Sun-Diamond had given Espy almost

⁴⁵ *Birdsall*, 233 U.S. at 234.

⁴⁶ *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999).

\$6,000 in illegal gifts including tickets to a major sporting event, meals, and luggage.⁴⁷ The indictment also alleged that Sun-Diamond had an interest in at least two decisions that were under the control of Espy: eligibility determinations under a congressional grant program for small growers and the regulation of commonly used pesticides. While the government did not allege that the gifts were directly connected to the items of interest, it argued that Sun-Diamond's provision of the gifts to Espy while Espy had matters of concern under his jurisdiction, constituted an illegal gratuity in violation of 18 U.S.C. § 201, *et seq.*⁴⁸

The question before the Court was whether the gifts from Sun-Diamond to Espy could constitute an illegal gratuity in light of section 201(c)(1)(A) and (B)'s requirements that the gift be given "for or because of any official act performed or to be performed by such public official."⁴⁹ The government argued that the gifts were an impermissible gratuity, not because Espy performed any specific act, but rather because of his official role as Secretary of Agriculture.

The Supreme Court, however, rejected this argument and held that in order for an illegal gratuity to exist, the payment or gifts must be tied to particular official acts as opposed to the "recipient's mere tenure in office."⁵⁰ The Court also held that the Government's preferred interpretation would lead to a criminalization of nominal gifts given to governmental officials such as replica jerseys given to the President when a championship team visits the White House, the gift of a baseball cap from a high school principal to the Secretary of Education, and a complimentary lunch given by a group of farmers to the Secretary of Agriculture, as these government officials would always have matters within their jurisdiction that impacted these constituencies.⁵¹ Perhaps most prophetically, however, the Court held that section 201 should not be read to broadly restrict gifts to officials based solely on their position--combined with the fact that the government official had a matter of

⁴⁷ *Sun-Diamond Growers*, 526 U.S. at 401.

⁴⁸ *Id.* at 403-04.

⁴⁹ 18 U.S.C. § 201 (2017).

⁵⁰ *Sun-Diamond Growers*, 526 U.S. at 408, 413.

⁵¹ *Id.* at 406-07.

interest before them--because congress did not broadly restrict gifts in the statute, but rather tied them to "official acts."⁵²

While the Court in *Sun-Diamond Growers* did not specifically opine on what actions constitute an "official act," it did signal its unwillingness to read the "official act" definition contained in section 201 as synonymous with "official position." In other words, *Sun-Diamond Growers* represents a shift from *Birdsall*'s expansive definition of "official action" and stands for the proposition that an individual does not perform an "official act" merely because of his or her title as a government official; instead, the government must show a link between the "thing of value conferred" on the public official and "a specific 'official act' for or because of which it was given."⁵³

IV. McDONNELL'S APPELLATE PROCEEDINGS

A. *The Fourth Circuit Upheld McDonnell's Conviction.*⁵⁴

Before the Fourth Circuit, McDonnell alleged a litany of reversible errors at the district court level. Central to the court's review, however, was the District Court's jury instruction on the definition of "official acts."

McDonnell argued that the District Court's "official action" instruction was overinclusive and would contemplate essentially all actions undertaken by a public official.⁵⁵ In addition, McDonnell argued that "routine functions" like setting up meetings, posing for photographs, or hosting luncheons should never constitute an "official act."⁵⁶

In rejecting McDonnell's argument, the Fourth Circuit held that while the term "official act" did not include *every* action taken by a

⁵² *Sun-Diamond Growers*, 526 U.S. at 408 ("Our refusal to read § 201(c)(1)(A) as a prohibition of gifts given by reason of the donee's office is supported by the fact that when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion.").

⁵³ *Id.* at 414.

⁵⁴ *United States v. McDonnell*, 792 F.3d 478, 519 (4th Cir. 2015), *vacated*, No. 15-474 (U.S. June 27, 2016).

⁵⁵ *McDonnell*, 792 F.3d at 506.

⁵⁶ *Id.*

public official in his official capacity, the District Court “adequately delineated” that official acts are those actions taken on matters which “may at any time be pending” or “which may by law be brought” before the public official in question.⁵⁷ The Fourth Circuit interpreted *Birdsall* to stand for the proposition that official acts “may” include those acts that a public official customarily performs, “even if the act falls outside the formal legislative process.”⁵⁸ Continuing, the Court held that while *Sun-Diamond Growers* to exclude some “settled acts”—like receptions, public appearances, and speeches—from automatically being considered “official acts”—it did not preclude those settled acts from sometimes being considered official acts.⁵⁹

With their analysis of *Birdsall* and *Sun-Diamond Growers* as the backdrop, the Fourth Circuit confirmed the District Court’s instruction to the jury holding:

“In view of these precedents, we are satisfied that the reach of § 201 (a)(3) is broad enough to encompass the customary and settled practices of an office, but only insofar as the purpose or effect of those practices is to influence a ‘question, matter, cause, suit, proceeding or controversy’ that may be brought before the government.”⁶⁰

In applying this standard to McDonnell’s appeal and affirming McDonnell’s conviction, the Fourth Circuit held that “mere steps in furtherance of a final action or decision may constitute an ‘official act,’” and that the public official need not have actual control over the matter in question, but that the bribe payor’s belief that the public official had such power controlled the analysis.⁶¹

⁵⁷ *McDonnell*, 792 F.3d at 506.

⁵⁸ *McDonnell*, 792 F.3d at 507 (citing *United States v. Jefferson*, 674 F.3d 332, 338 (4th Cir. 2012)).

⁵⁹ *Id.* at 508.

⁶⁰ *Id.* at 509.

⁶¹ *Id.* at 510-511.

*B. The United States Supreme Court**i. Oral Argument*

On April 27, 2016, the United States Supreme Court heard oral arguments on McDonnell's case. Noel Francisco represented the Petitioner, McDonnell. Michael Dreeben, Deputy Solicitor General, represented the Respondent.

Francisco started the oral argument, emphasizing the lack of an official action. He stated, "[h]ere the jury wasn't instructed on any of this. They didn't have to find that Governor McDonnell tried to influence anything."⁶²

The Justices were not shy in their questioning of Francisco and Dreeben. Their main concerns focused on the potential for prosecutorial abuse. The breath of Dreeben's description of federal corruption law under his interpretation also concerned the Justices.

Justice Anthony M. Kennedy said it was not enough for the government to tell public officials, "[d]on't worry" because "[t]he jury has to be convinced beyond a reasonable doubt, and that's tough."⁶³ Justice Stephen Breyer agreed and also said that the government provided a "recipe" for giving too much power to prosecutors.⁶⁴

Justice Breyer also had a unique perspective for *McDonnell*. Indeed, Breyer had a background in public corruption law. In 1973, Breyer served as an assistant special prosecutor in the Watergate investigation.⁶⁵ He then served for two years as special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee.⁶⁶ In 1979, he also served for two years as chief counsel of the Senate Judiciary Committee.⁶⁷

Justice Breyer noted his experience during oral argument:

⁶² Transcript of Oral Argument at 6, *McDonnell v. United States*, No. 15-474, (U.S. April 27, 2016).

⁶³ *Id.* at 37.

⁶⁴ *Id.* at 38.

⁶⁵ *The Current Court: Justice Stephen G. Breyer*, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/the-current-court/justice-stephen-breyer/> (last visited Sept. 24, 2017).

⁶⁶ *Id.*

⁶⁷ *Id.*

I've only been peripherally involved in political campaigns, but my peripheral convinces me that a candidate will go out and he'll have lunch with hundreds of people, hundreds. Everyone wants to give him lunch. Great. And - - and he wants to meet as many people as possible. He wants to be friendly. He might receive a raincoat. He might receive all kinds of things. And at some point, it becomes very dishonest.

MR. DREEBEN: So—

JUSTICE BREYER: But that's a matter for campaign laws. Wait. Now, I've also been involved in the Justice Department. And we would receive many, many letters in the antitrust division. Have you looked into such and such? I know perfectly well that that Senator just wants to go back to the constituent and say, see, I did my best. That's all. Now, you're saying to the jury, take those facts I just gave you, and you look into the state of mind—the state of mind of which the amounts being given will be somewhat indicative, of which the nature of the letter will be somewhat indicative, of whether he writes in personal writing at the bottom will be somewhat indicative, and we're going to let you people work out what was really in that Senator's mind. I say that is a recipe for giving the Department of Justice and the prosecutors enormous power over elected officials who are not necessarily behaving honestly. And I am looking for the line. I am looking for the line that will control the shift of power that I fear without allowing too much honesty through this law. You know, other laws exist on the other side.⁶⁸

⁶⁸ Transcript of Oral Argument, *supra* note 62, at 39.

Thus, Breyer applied his unique perspective in government having unlimited prosecutorial power and the danger in interpreting the statute as the government desires.

Chief Justice John Roberts also noted that “[g]iven the difficulty that we’re having in settling on what these words in the statute mean, there is an argument in the Petitioner’s brief that you have responded to in yours that the statute is unconstitutionally vague.”⁶⁹ Similarly, Chief Justice Roberts noted that three Justices, Kennedy, Thomas, and Scalia, who passed away in February 2016, previously stated that one of the corruption laws in the case was unconstitutionally vague.⁷⁰ Specifically, Chief Justice Roberts stated that the Court made a halfway attempt to narrow the honest-services law to only refer to bribery and kickbacks.⁷¹ He noted that the lackluster attempt may have been ill-advised as the law is still not clear.⁷²

Roberts even commented that there was an “extraordinary document in this case.”⁷³ Specifically, he said that there was an “amicus brief filed by former White House counsel to President[s] Obama,” President George W. Bush, President Clinton, President George H.W. Bush, and President Reagan which stated that, “if the decision was upheld, it would cripple the ability of elected officials to fulfill their role in our representative democracy.”⁷⁴ Roberts added, “[n]ow, I think it’s extraordinary that those people agree on anything.”⁷⁵

While Justices Roberts, Breyer, and Kennedy appeared to side with the Petitioner’s position, Justices Sonia Sotomayor and Ruth Bader Ginsburg indicated that they supported the government’s position. Ginsburg told Francisco that under his reading of the law, a government official would be able to say, “[y]ou want a meeting,

⁶⁹ Transcript of Oral Argument, *supra* note 62, at 49.

⁷⁰ *Id.* at 50.

⁷¹ *Id.* at 50.

⁷² *Id.* at 50.

⁷³ *Id.* at 28.

⁷⁴ *Id.* at 28-29.

⁷⁵ Transcript of Oral Argument, *supra* note 62, at 28-29.

pay me a thousand dollars.”⁷⁶ Francisco agreed, however he noted that it would be illegal if the official then influenced a government decision.

Sotomayor also asked, “[w]hat do we do with the evidence in the case where university individuals were assessing whether or not to do these studies themselves [feel government pressure]?”⁷⁷ Francisco replied, “you still need to instruct the jury that it had to find that Governor McDonnell tried to actually influence a government decision,” which was not done in McDonnell’s case.⁷⁸

ii. The United State Supreme Court’s Decision

While early prognosticators were split on how the high Court would rule on McDonnell’s appeal, most agreed that the *McDonnell* case provided the Court with a clear opportunity to define “official acts” under the Hobbs Act and the Court did, in fact, utilize the opportunity.⁷⁹ The Supreme Court not only unanimously reversed the Fourth Circuit’s opinion, but it established a new standard for “official acts.”

In *McDonnell*, the questions presented to the United States Supreme Court were whether an “official action,” for the purpose of the federal bribery statute, is limited to the exercise or threatened

⁷⁶ Transcript of Oral Argument, *supra* note 62, at 59-60 (asking whether it is the government’s position that it is permissible to agree to facilitate a meeting in exchange for a thousand dollars).

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 9.

⁷⁹ Any attempt at predicting the outcome of McDonnell’s appeal was further complicated by the death of conservative Associate Justice Antonin Scalia on February 13, 2016. See Josh Gernstein, *Scalia’s Death could doom McDonnell and hurt Menendez*, POLITICO (Feb. 16, 2016) <http://www.politico.com/story/2016/02/mcdonnell-menendez-scalia-antonin-supreme-court-219305>; Travis Fain, *Supreme Court to review McDonnell conviction*, DAILY PRESS (Jan. 16, 2016) <http://www.dailypress.com/news/dp-wns-mcdonnell-supreme-court-story.html>; Travis Jackman, *Will Scalia’s death spell doom for McDonnell’s appeal? Not necessarily*, WASH. POST (Feb. 13, 2016) https://www.washingtonpost.com/local/public-safety/will-scalias-death-spell-doom-for-mcdonnells-appeal-not-necessarily/2016/02/18/f0ea938a-d5b2-11e5-be55-2cc3c1e4b76b_story.html.

exercise of actual governmental power, and if the term is not limited in this manner, whether the statutes using that term are unconstitutional.⁸⁰

The federal bribery statute, 18 U.S.C. § 201, makes it a crime for a public official to “receive or accept anything of value” in exchange for being “influenced in the performance of any official act.”⁸¹ An “official act” is defined by the federal bribery statute as a decision or action on a “question, matter, cause, suit, proceeding, or controversy.”⁸² The Court stated that § 201’s definition implied a two-step analysis.⁸³ First, the government must identify a “question, matter, cause, suit, proceeding, or controversy” that “may at any time be pending” or “may by law be brought” before a public official.⁸⁴ Second, the government must prove that the public official made a decision or took an action “on” that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.⁸⁵

As to the first step of the analysis, the Court looked to the meaning of a “formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.”⁸⁶ The Court concluded that an ordinary meeting arranged by a public official is not itself enough to constitute a “question or matter” involving a formal exercise of power.⁸⁷ The Court reasoned that “a ‘question’ or ‘matter’ must be similar in nature to a ‘cause, suit, proceeding or controversy.’”⁸⁸ Thus, “[b]ecause a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit

⁸⁰ See *McDonnell v. United States*, No. 15–474, slip op. at 13 (U.S. June 27, 2016).

⁸¹ 18 U.S.C. § 201(b)(2) (2017).

⁸² 18 U.S.C. § 201(a)(3) (2017).

⁸³ *McDonnell*, slip op. at 14.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 14–15.

⁸⁷ *Id.* at 15; see also Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor’s Graft Conviction*, N.Y. TIMES (June 27, 2016) <http://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html>; Kevin J. Whelan, *Supreme Court Limits Reach of Federal Corruption Statutes in McDonnell v. U.S.*, 2016 NAT’L L. REV. 1–3 <http://www.natlawreview.com/article/supreme-court-limits-reach-federal-corruption-statutes-mcdonnell-v-us>.

⁸⁸ *McDonnell*, slip op. at 16.

before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a ‘question’ or ‘matter’ under §201(a)(3).”⁸⁹ Under the Court’s “more confined interpretation” of the statutory language, “‘question’ and ‘matter’ may be understood to refer to a formal exercise of governmental power that is similar in nature to a ‘cause, suit, proceeding or controversy,’ but that does not necessarily fall into one of those prescribed categories.”⁹⁰

Indeed, the Fourth Circuit found that there were three questions or matters at issue in McDonnell’s case:

- (1) “whether the researchers at any of Virginia’s state universities would initiate a study of Anatabloc”; (2) whether the state-created Tobacco Indemnification and Community Revitalization Commission would “allocate grant money for the study of Anatabloc”; and (3) “whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug.”⁹¹

The Court agreed that these three questions or matters constituted formal exercises of government power.

The Court disagreed with the Fourth Circuit on the next step—whether a decision or action was taken. Indeed, for the second step, the Supreme Court considered whether arranging a meeting, contacting another official, or hosting an event may qualify as a “decision or action” in a different question or matter.⁹² The Supreme Court held:

Setting up a meeting, hosting an event, . . . calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, [or] [s]imply expressing support for the research study at a meeting, event, or call . . . does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on

⁸⁹ *McDonnell*, slip op. at 16.

⁹⁰ *Id.*

⁹¹ *Id.* at 17-18 (quoting *McDonnell v. United States*, 792 F.3d 478, 515-16 (4th Cir. 2015)).

⁹² *Id.* at 18.

another official or provide advice, knowing or intending such advice to form the basis for an "official act."⁹³

"Instead, something more is required: §201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so."⁹⁴ The Court reasoned that "if every action somehow related to the research study were an 'official act,' the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless."⁹⁵

The Court noted, however, that setting up a meeting, hosting an event, or making a phone call is not always an innocent or irrelevant act.⁹⁶ Moreover, the Court "provided three examples of actions that would be 'official acts,' ultimately deciding to initiate a state university study, narrowing a list of potential university research topics, or using an official position to pressure another governmental official to act on a 'question, matter, cause, suit, proceeding or controversy.'"⁹⁷ The Court also pointed out that "agreeing to carry out an official act triggers criminal liability, even if the public official never follows through."⁹⁸

The Court found three errors in the jury instructions that were approved by the Fourth Circuit. The jury instructions included the statutory definition of "official action," and further defined the term to include "actions that have been clearly established by settled practice as part of a public official's position. This is true even if the action was not taken pursuant to responsibilities explicitly assigned by law."⁹⁹ "The instructions also stated that 'official actions may include acts that a public official customarily performs,' including acts 'in furtherance of long-term goals,' or 'in a series of steps to exercise influence or achieve an end.'"¹⁰⁰ The Supreme Court held that, "[i]n light of our interpretation of the term 'official

⁹³ *McDonnell*, slip op. at 20.

⁹⁴ *Id.* at 19.

⁹⁵ *Id.* at 20.

⁹⁶ *Id.* at 19.

⁹⁷ *Id.* at 19; see also Whelan, *supra* note 87.

⁹⁸ *McDonnell*, slip op. at 19; see also Whelan, *supra* note 87.

⁹⁹ *McDonnell*, slip op. at 24-25.

¹⁰⁰ *Id.* at 25.

acts,' those instructions lacked important qualifications, rendering them significantly overinclusive."¹⁰¹

"First, the instructions did not adequately explain to the jury how to identify the 'question, matter, cause, suit, proceeding[,] or controversy.'"¹⁰² Indeed, the testimony at trial described how McDonnell set up meetings, contacted officials, and hosted events.¹⁰³ Thus, it was possible that the jury thought that a typical meeting, call, or event was a "question, matter, cause, suit, proceeding, or controversy."¹⁰⁴ As a result, the jury may not have found that he committed, or agreed to commit, an "official act," as properly defined.¹⁰⁵ To prevent this error, the Supreme Court held that the District Court should have instructed the jury that it must identify a "'question, matter, cause, suit, proceeding[,] or controversy' involving the formal exercise of governmental power."¹⁰⁶

Second, the District Court's instructions "did not inform the jury that the 'question, matter, cause, suit, proceeding[,] or controversy' must be specific and more focused than a broad policy objective."¹⁰⁷ Rather, the Court found that the jury must be instructed that it had to be "something specific and focused that is 'pending' or 'may by law be brought before any public official.'"¹⁰⁸

Finally, the District Court did not instruct the jury that to convict, it had to find that "he made a decision or took an action—or agreed to do so—on the identified 'question, matter, cause, suit, proceeding, or controversy.'"¹⁰⁹ Rather, the District Court should have instructed the jury that "merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter."¹¹⁰

¹⁰¹ *McDonnell*, slip op. at 25.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *McDonnell*, slip op. at 26.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

iii. Rationale

The Court's "more limited reading of the statutory text gives each word a meaning that is proper in context and 'not superfluous,' which is the best reading of the statute."¹¹¹ The Court's reading still leaves prosecutors with enough room to "pursue classic bribery and kickbacks."¹¹² However, some may argue, that this holding will make it more difficult for prosecutors to prove corruption.¹¹³ The Court disagrees with that notion and characterized its decision as a relatively modest correction of the government's "boundless interpretation of the federal bribery statute" and asserting that the decision will "leave [] ample room for prosecuting corruption."¹¹⁴

As highlighted in Section III, previous Supreme Court precedent has established that the existence of matters pending before a government official was not sufficient to find that any action related to those matters constituted an "official act."¹¹⁵ According to the Court, adopting a broader reading of the statutory language would likely chill public officials' interactions with their constituents due to fears of prosecution and, therefore, make it more difficult for them to perform their jobs.¹¹⁶ The Court noted that "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns."¹¹⁷ Thus, the Court altered the government's interpretation of the federal bribery statute.¹¹⁸

¹¹¹ *McDonnell*, slip op. at 25.

¹¹² Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor's Graft Conviction*, N.Y. TIMES, June 28, 2016 at A1.

¹¹³ *Id.*; Fred Wertheimer, *Symposium: McDonnell decision substantially weakens the government's ability to prevent corruption and protect citizens*, SCOTUSBLOG (June 28, 2016, 12:38 PM), <http://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/>.

¹¹⁴ *McDonnell*, slip op. at 28.

¹¹⁵ *Id.* at 18; *see also* United States v. Sun-Diamond Growers, 526 U.S. 398, 406 (1999) (concluding that the existence of pending matters was not enough to find that any action related to them constituted an "official act").

¹¹⁶ *McDonnell*, slip op. at 22-23.

¹¹⁷ *Id.* at 22.

¹¹⁸ *See id.* at 22-24.

Based on the Court's interpretation of the statutory language, the Court determined that the jury instructions in McDonnell's case were impermissibly broad and did not provide enough guidance to the jury regarding whether the actions in question needed to be formal exercises of governmental power.¹¹⁹ The Court held that the District Court should have instructed the jury in accordance with the two-step analysis and specifically should have explained "that merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter."¹²⁰ Because the jury instructions were erroneous, and those errors were not harmless beyond a reasonable doubt, the Supreme Court vacated McDonnell's convictions.¹²¹

McDonnell also argued that the honest services statute and the Hobbs Act were unconstitutionally vague.¹²² The Court, however, refused to invalidate these statutes under the facts of this case because it "interpreted the term 'official act' in § 201(a)(3) in a way that avoids the vagueness concerns raised by Governor McDonnell."¹²³ Additionally, the Court declined to hold that the government lacked sufficient evidence to prove McDonnell committed an "official act," or that he agreed to do so, because "the parties have not had an opportunity to address that question in light of the interpretation of §201(a)(3) adopted by [the] Court."¹²⁴

D. Result for the McDonnells

On September 8, 2016, the United States Department of Justice released the following press release: "[t]oday, the United States moved to dismiss the charges against Robert F. McDonnell and his wife Maureen McDonnell. After carefully considering the Supreme Court's recent decision and the principles of federal prosecution, we

¹¹⁹ See *McDonnell*, slip op. at 24-27.

¹²⁰ *Id.* at 27; see also Whelan, *supra* note 87 (explaining that incorrect jury instructions allowed for conviction for lawful conduct).

¹²¹ *McDonnell*, slip op. at 27.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 28.

have made the decision not to pursue the case further.”¹²⁵ Thus, the McDonnells were released of all charges from that point forward.

V. FUTURE IMPLICATIONS

A. Appearance of Authority

Another outstanding issue when contrasting the Supreme Court and the Fourth Circuit is whether a public official can be charged under the statute if the public official does not have actual or final authority over the end result sought by a bribe payer. The Fourth Circuit held that “a bribery conviction will stand regardless of whether the bribe recipient ‘had actual authority to carry out his commitments under the bribery scheme.’”¹²⁶

While the Fourth Circuit seemed firm in its conviction on this, it is questionable whether this holding would withstand the scrutiny required by the Supreme Court’s decision in *McDonnell*. Indeed, in its decision, the Supreme Court concluded that the jury had to have found that McDonnell “made a decision or took an action—or agreed to do so—on the identified ‘question, matter, cause, suit, proceeding, or controversy.’”¹²⁷ It further stated that the question, matter, cause, suit, proceeding, or controversy must have involved the “formal exercise of governmental power.”¹²⁸ As such, the public official must formally exercise governmental power on a question, matter, cause, suit, proceeding, or controversy. Logic dictates that if he or she must make a formal exercise of government power, then the act must have been something that the public official had actual authority to do. If he or she does not have authority to do it, then it would not be a formal exercise of governmental power. Accordingly, it stands to reason that this portion of the Fourth Circuit’s opinion, and the cases that support it, may not withstand post-*McDonnell* scrutiny.

¹²⁵ DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, JUSTICE DEPARTMENT MOVES TO DISMISS MCDONNELL CHARGES (Sept. 8, 2016).

¹²⁶ *United States v. McDonnell*, 792 F.3d 478, 511 (4th Cir. 2015) (quoting *Wilson v. United States*, 230 F.2d 521, 526 (4th Cir. 1956)).

¹²⁷ *McDonnell*, slip op. at 14.

¹²⁸ *Id.* at 15.

B. Outstanding Cases

For future cases and before bringing charges, the government must identify a “question, matter, cause, suit, proceeding or controversy” that involves a formal exercise of governmental power similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.¹²⁹ The subject “question, matter, cause, suit, proceeding or controversy” must also be “something specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.”¹³⁰ To qualify as an “official act,” the public official must “make a decision to take an action on that ‘question, matter, cause, suit, proceeding or controversy,’ or agree to do so.”¹³¹

McDonnell clarifies that routine political favors cannot, without more, be the basis of a bribery charge—even if the public official accepts money or gifts in exchange for favors.¹³² Overall, this decision significantly limits the government’s ability to employ the federal bribery statute and the Hobbs Act to prosecute political favors that do not reach the level of *quid pro quo* and involve a clear exercise of official governmental power.¹³³ Regardless of that fact, the Court’s holding does not leave prosecutors incapable of fighting corruption.¹³⁴ For example, McDonnell’s counsel argued the statutes under review “are not meant to be comprehensive codes of ethical conduct,” but rather lay out over illegal political actions. Indeed, according to McDonnell’s counsel, an official,

[M]ight actually be violating a lot of other laws, including the separate provision of Section 201 that prohibits you from undertaking any act in violation of your official duties in exchange for money, or 5

¹²⁹ *McDonnell*, slip op. at 21.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² James W. Cooper et al., *McDonnell, Supreme Court Overturns Ex-Governor’s Corruption Conviction and Narrowly Defines “Official Act,”* LEXOLOGY (June 28, 2016), <http://www.lexology.com/library/detail.aspx?g=cc42d6f5-6e47-4c75-ac3a-a51a8285c557>.

¹³³ See Whelan, *supra* note 87.

¹³⁴ *Id.*

U.S.C. 7353, which prohibits you from . . . taking anything from anyone whose interests could be affected by the performance or nonperformance of your duties.¹³⁵

Therefore, even though *McDonnell* significantly limits the scope of prosecutorial discretion under the relevant corruption statutes, prosecutors can use other means to fight corruption.¹³⁶

The *McDonnell* decision could affect at least two cases currently on appeal as of the date this article was drafted: *United States v. Silver*¹³⁷ and *United States v. Skelos*.¹³⁸

In the *Silver* case, [Sheldon Silver], the former Democratic Assembly speaker of New York, was found to have engaged in a two-track corruption scheme making him an estimated \$4 million in bribes and kickbacks disguised at legal fees.¹³⁹ The beneficiaries of those schemes were a doctor who received state grants in exchange for funneling mesothelioma patients to a law firm where Silver was of counsel, and real estate developers who provided work to another firm that employed Silver.¹⁴⁰

In addition, Dean Skelos, the former Republican New York Senate majority leader, and his son were arrested on charges that they conspired over the course of a year to trade legislative favors for

¹³⁵ Transcript of Oral Argument, *supra* note 62, at 14.

¹³⁶ See Whelan, *supra* note 87.

¹³⁷ *United States v. Silver*, 103 F. Supp. 3d 370 (S.D.N.Y. 2015).

¹³⁸ *United States v. Skelos*, No. 15 CR 317 (KMW) (S.D.N.Y. 2015).

¹³⁹ See generally *Silver*, 103 F. Supp. 3d 370; see also Matthew Hamilton, *Supreme Court Decision Could Affect Silver, Skelos*, TIMES UNION (June 27, 2016), <http://www.timesunion.com/local/article/Supreme-Court-decision-could-affect-Silver-Skelos-8328367.php>.

¹⁴⁰ See generally *Silver*, 103 F. Supp. 3d 370; see also Hamilton, *supra* note 135.

personal and political benefits.¹⁴¹ One individual called Skelos' scheme "an effort to 'monetize' the lawmaker's power."¹⁴²

Legal analysts are mixed on whether the Court's *McDonnell* decision will impact these cases. For example, Joseph diGenova, a former U.S. attorney, said that the *McDonnell* decision will have no effect on the cases because unlike *McDonnell*, "[t]he New York cases are replete with contracts being given, law firms being paid," and so on.¹⁴³ Thus, according to diGenova, the two New York cases are completely different from *McDonnell*.¹⁴⁴ On the other hand, Albany Law School professor Vincent Bonventre said, "[i]t's possible that the appeals court could order retrials in both cases or overturn the convictions."¹⁴⁵ According to Bonventre,

"[The court] must find that there was some actual government decision that the politician made—some vote or some other actual dispositive action, direct action, in government by the politician—and that the politician did this or refrained from doing it because of, in direct return for, either some payment or some other kind of blackmail."¹⁴⁶

Bonventre believes that this will be "very, very difficult" in the Silver case.¹⁴⁷ Thus, it is fair to say that the Court's *McDonnell* decision could affect current and future cases involving public corruption.

Further, "[w]hile the *McDonnell* decision is limited to alleged honest services fraud involving public officials," it may, according to one commentator, have "important implications for cases

¹⁴¹ See generally *Silver*, 103 F.Supp.3d 370; see also Hamilton, *supra* note 135.

¹⁴² *Skelos*, No. 15 CR 317; see also Hamilton, *supra* note 135.

¹⁴³ Hamilton, *supra* note 135.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

involving private citizens in which the same concerns about vagueness are present.”¹⁴⁸

V. CONCLUSION.

In sum, the *McDonnell* decision still leaves a question as to what is considered public corruption. It is not entirely clear what constitutes an official act. While it does help eliminate what is not public corruption—it leaves open the question of what is prohibited. At this point, we have three examples of what official acts an official cannot take but outside that realm is still unknown. This can make it difficult for public officials to perform their jobs and for prosecutors to decide when to prosecute a case. In any event, one takeaway from the McDonnell’s case is that accepting gifts in exchange for political favors that do not involve official acts is not enough to send Virginia’s Governor to prison.

¹⁴⁸ Kathleen L. Matsoukas, *McDonnell Decision Indicates Supreme Court’s Desire to Limit Application of the Honest Services Fraud Statute*, LEXOLOGY (June 28, 2016), <http://www.lexology.com/library/detail.aspx?g=ad154274-5675-40d6-80bd-6225fed2ca44>.