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Primer

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Primer

By Samantha Conway, David Diab, Amanda Fiorilla, & Eric Grossfeld

I. The Inception of Public Corruption: Pre-*McDonnell*

A. The Mail Fraud Statute

When first enacted in 1872, the mail fraud statute prohibited the use of the mail in furtherance of "any scheme or artifice to defraud."[1] The Supreme Court held in *Durland v. United States* that the mail fraud statute must be read to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[2]

The Court rejected the argument raised by defense counsel, claiming that the statute required some "misrepresentation as to some existing fact," rather than a "mere promise as to the future."[3] The Court clarified that the statute was to be read broadly in light of its ultimate purpose:

> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a promise.[4]

1. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (1872) *amended by* Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873 (1889).

2. 161 U.S. 306, 312-14 (1896). In *Durland*, the Defendant had used the mails to sell bonds to members of the public which he had no intention of honoring. *Id.*

3. *Id.* at 312.

4. *Id.* at 314.

Congress amended the mail fraud statute in 1909 in a manner consistent with the *Durland* holding. The statute read "any scheme or artifice to defraud *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises*."[5]

B. The *Intangible Rights* Theory

This language was construed by each of the circuit courts of appeal to include "schemes to defraud include[ing] those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly."[6] Therefore, depriving members of the public of the *right to honest services* could form the basis of a violation of the mail fraud statute, regardless of whether there was a loss or deprivation of some tangible right.[7]

This *right to honest services* or *intangible-rights theory*, is often credited to an opinion by the Fifth Circuit in *Shushan v. United States*. In *Shushan*, a public official was charged and convicted under the mail fraud statute for accepting a bribe in exchange for a public contract, even though the contract was mutually beneficial and involved no loss of any tangible property on behalf of the city or general public.[8] As an example of this theory:

> [I]f a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. . . . Even if the scheme occasioned a money or property *gain* for

5. Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873 (1889) *amended by* Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088 (1909) (emphasis added).

6. McNally v. United States, 483 U.S. 350, 356-58 (1987).

7. *See, e.g.*, United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (mutually beneficial kick-back agreement with Secretary of State within the scope of § 1341); United States v. States, 488 F.2d 761 (8th Cir. 1973) (use of the mails to fraudulently write-in voter ballots within the scope of § 1341).

8. 117 F.2d 110, 115-19 (5th Cir. 1941).

> the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services."[9]

In *McNally v. United States*, the Supreme Court rejected such a broad interpretation, and construed the statute "as limited in scope to the protection of property rights."[10] The Court reasoned that such a result was necessary, as any alternative would involve "constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[11]

The decision "stopped the development of the intangible-rights doctrine in its tracks," despite a vigorous dissent by Justice Stevens.[12] The court explained, "[i]f Congress desires to go further, it must speak more clearly than it has."[13]

9. Skilling v. United States, 561 U.S. 358, 363 (2010) (internal citations omitted). "Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other . . .the honest-services theory targeted corruption that lacked similar symmetry." *Id.* at 400 (internal citations omitted).

10. 483 U.S. at 360. In *McNally*, the prosecutor argued a state official's kickback scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353. The Supreme Court held the jury instruction permitted a conviction under the mail fraud statute for conduct not within the reach of § 1341, and therefore reversed the conviction. *Id.*

11. *Id.* at 353.

12. *Skilling v. United States*, 561 U.S. 358, 400 (2010); *McNally v. United States*, 483 U.S. at 362 (J., Stevens, dissenting). Justice Stevens cited to several cases, including *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975), in which the Illinois Secretary of State accepted around $50,000 a year to award contracts to a particular company. Although all the parties to the agreement profited from the transaction, the Court of Appeals explained the real victims were the people of Illinois and upheld the conviction. Justice Stevens cautioned "these cases prove just how unwise today's judicial amendment of the mail fraud statute is." *Id.* at 366-68.

13. *McNally v. United States*, 483 U.S. at 360.

C. The Honest-Services Statute

Congress responded a year later by enacting the honest-services statute.[14] The honest-services statute defines the term "scheme or artifice to defraud," to include "a scheme or artifice to deprive another of the intangible right of honest services," for purposes of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). As interpreted by the Second Circuit:

> The definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* 'intangible right of honest services,' which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.[15]

In *Skilling v. United States*, the defense urged the Court to hold the honest-services statute unconstitutional as impermissibly vague.[16] Although acknowledging Skilling's vagueness challenge carried some weight, the court declined to overturn the statute and opted for a limited construction:

> Although some applications of the pre-McNally honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.[17]

14. 18 U.S.C. § 1346. "There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud." *Skilling v. United States*, 561 U.S. 358, 404 (2010).

15. *Id.* at 404-05 (citing *United States v. Rybicki*, 354 F.3d 124, 137-38 (2d Cir. 2003) (en banc)).

16. *Id.*

17. *Id.* at 407-08.

The Court reasoned that "Congress intended § 1346 to reach *at least* bribes and kickbacks," and "[t]o preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law.[18]

Notably, the Government had argued that the honest-services provision encompassed other proscribed conduct, specifically "undisclosed self-dealing by a public official or private employee -*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[19]

The Court declined to extend its interpretation of the honest-services to provision to encompass the "mere failure" to disclose conflict-of-interests. The Court stated that such conduct fell outside the "core application" of the honest-services doctrine that had developed pre-*McNally*. The court continued:

> Although the Courts of Appeals upheld honest-services convictions for "some schemes of non-disclosure and concealment of material information," . . . they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.[20]

The government had claimed that Skilling conspired to defraud the shareholders of Enron Corporation by misrepresenting the company's financial growth, which had inflated the company's stock prices. The Government argued that through the fraudulent scheme, Skilling profited

18. *Id.* at 408-09 (emphasis added).

19. Brief for United States at 43-44, *Skilling v. United States*, 561 U.S. at 409.

20. *Skilling*, 561 U.S. at 410-11 (internal citations omitted).

approximately $89 million.

However, the government did not allege that Skilling had either solicited or accepted "side payments from a third party in exchange for making these representations." In the absence of such conduct, the Court held "[i]t is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud."[21]

Justice Scalia, concurring with the majority in its opinion and judgment, noted the inconsistency between the congressional intent behind the honest-services provision and the Court's limited construction:

> To say that bribery and kickbacks represented "the core" of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. But the doctrine itself is much more. Among all the pre-*McNally* smorgasbord offerings of varieties of honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.
>
> Thus, the Court's claim to "respec[t] the legislature," is false. It is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that that prohibited much more (though precisely what more is uncertain) than bribery and kickbacks. Perhaps it is true that "Congress intended § 1346 to reach *at least* bribes and kickbacks[.] "That simply does not mean, as the Court now holds, that" § 1346 criminalizes *only*" bribery and kickbacks.[22]

21. *Id.* at 413. In *Black v. United States*, 561 U.S. 465, 471 (2010), in reliance on the *Skilling* opinion issued the same day, the court vacated a conviction because the jury instructions improperly defined what conduct fell within the scope of the honest services statute.

22. Id. at 421-22 (J., Scalia concurring). Notably, Scalia later clarified his disdain for the *Skilling* opinion. *See Sykes v. United States*, 564 U.S. 1, 34

II. Continued Implications: Beyond Mail Fraud

The Supreme Court has confirmed the limitation placed on the previously coined "honest services" theory, as codified at 18 U.S.C. § 1346. In *Sekar v. United States*, the New York State Comptroller was responsible for issuing a Commitment regarding potential investments of New York's Common Retirement Fund.[23] The General Counsel of the Comptroller's office had considered investing in FA Technology Ventures, but ultimately wrote a recommendation not to invest in the fund.

Sekar sent various anonymous emails demanding that the general counsel move forward with the investment, and threatened to disclose an extra-marital affair if he failed to do so.[24] Sekar was indicted and convicted of attempted extortion under the Hobbs Act, 18 U.S.C. § 1951(a).[25]

The jury was specifically charged, and ultimately based its verdict, on finding Sekar had attempted to extort "the General Counsel's recommendation to approve the Commitment."[26] Under the Hobbs Act, a conviction for extortion required "the obtaining of property from another."[27] The Second Circuit held that the General Counsel "had a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment."[28]

The Supreme Court rejected such an interpretation, relying on its earlier decision in *Scheidler v. NOW, Inc.*, which held that extortion required depriving "something of value" that the person could "exercise, transfer, or sell."[29] The Court continued:

(2011) ("We have, I recognize, upheld hopelessly vague criminal statutes in the past – indeed, in the recent past. That is regrettable." (citing *Skilling v. United States*, 561 U.S. 358, 415 (2010)).

23. Sekhar v. United States, 570 U.S. 729, 731 (2013).

24. *Id.*

25. *Id.* at 730-32.

26. *Id.* at 732.

27. *Id.* at 731

28. *Id.* at 732 (quoting United States v. Sekhar, 683 F.3d 436, 441 (2d Cir. 2012)).

29. Scheidler v. NOW, Inc., 537 U.S. 393, 397 (2003).

> The principle announced [in *Scheidler*]—that a defendant must pursue something of value from the victim that can be exercised, transferred, or sold—applies with equal force here. Whether one considers the personal right at issue to be "property" in a broad sense or not, it certainly was not obtainable property under the Hobbs Act.[30]

Specifically, the Court noted "[a]dopting the Government's theory here would not only make nonsense of words; it would collapse the longstanding distinction between extortion and coercion and ignore Congress's choice to penalize one but not the other."[31] Therefore, outside the context of bribery and kickback schemes, the Supreme Court has continued to apply a strict tangible "property rights" theory.

However, Justice Scalia's caution in *Skilling v. United States* concerned more than which specific offenses fell within the scope of the honest services provision:

> The pre-McNally cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to.[32]

Even accepting as true that the "core" offenses covered by the honest-services provision consisted of only bribery and kickbacks, Justice Scalia believed the inherent vagueness of the statute would persist: "[E]ven with the bribery and kickback limitation the statute does not answer the question, 'What is the criterion of guilt?'"[33]

30. *Sekhar*, 570 U.S. at 736-37 (emphasis added).
31. *Id.* at 738.
32. Skilling v. United States, 561 U.S. 358, 420 (2010).
33. *Id.* at 421.

III. The Build-Up to *McDonnell*

Although the issue arose in the context of the mail fraud statute, the inherent vagueness and lack of clear outer-boundaries would continue to plague the court for years to come in the context of public corruption. Ultimately, the question remains unanswered: when does a public official cross the line from lawful to culpable conduct?

The Supreme Court weighed in on the issue in 1991. In *McCormick v. United States*, McCormick was a member of the house of delegates and was working with a lobbyist interested in extending a license that allowed foreign medical school graduates to practice in the state before passing the state licensing exam.[34] McCormick had expressed to the lobbyist that he paid out-of-pocket for a large part of his campaign, and thereafter accepted cash payments of $900 and $2,000 dollars from various foreign doctors, which he failed to report as campaign contributions or on his federal tax return. He then sponsored a bill to extend the license regarding foreign medical school graduates and spoke at length about the bills benefits, which was ultimately passed into law. He was later indicted by a federal grand jury for five counts of violating the Hobbs Act, including extortion under color of official right.

18 U.S.C § 1951 (commonly known as the "Hobbs Act") prohibits any person who

> in any way or degree obstructs, delays, or affects commerce or the movement of any article of commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.[35]

Extortion is defined to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official

34. McCormick v. United States, 500 U.S. 257, 259-60 (1991).
35. 18 U.S.C. § 1951(a).

right[.]"[36]

The jury was instructed on extortion as follows:

> Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit.[37]

McCormick was convicted of one, but not all, of the Hobbs Act extortion charges. On appeal, the Fourth Circuit held that proof of a quid pro quo was not required in all circumstances, specifically where it is shown that the parties never intended the payment as a legitimate campaign contribution in the first place.[38] Although the Supreme Court limited its holding to payments made to elected officials in the context of campaign contributions, the Court clarified:

> Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.* In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.[39]

36. 18 U.S.C. § 1951(b)(2).
37. *McCormick*, 500 U.S. at 264-65.
38. *Id.* at 265-66.
39. *Id.* at 273 (emphasis added).

A year later, the Supreme Court addressed the question outside the context of campaign contributions in *Evans v. United States.*[40] Evans was elected to the Board of Commissioners of a county in Georgia.[41] After assuming office, he was contacted by an FBI agent posing as a real estate developer attempting to re-zone a tract of land. After several conversations, all initiated by the FBI agent, Evans accepted $7,000 in cash and a $1,000 check payable to his campaign. He did not report the cash on his campaign-financing disclosure form or federal income tax return.[42] Evans was later indicted and convicted of extortion under the Hobbs Act, codified at 18 U.S.C. § 1951.

On appeal, the main issue before the Court was "whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right[.]'"

The Eleventh Circuit noted that the jury was not required to find that petitioner had demanded or requested the money, or that he had "conditioned the performance of an official act upon payment of money."[43] Rather, the Court held:

> [P]assive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.[44]

On certiorari, the Supreme Court endorsed the position of the Eleventh Circuit, noting that eight other circuits had reached similar holdings. Two Circuits required "an affirmative act or inducement by the public official" to support an extortion conviction under the Hobbs Act, which the Supreme Court declined to follow.[45] The Court reasoned:

40. Evans v. United States, 504 U.S. 255 (1992).
41. *Id.*
42. *Id.* at 257.
43. *Id.* (citing United States v. Evans, 910 F.2d 790, 796 (11th Cir. 1990)).
44. *Id.* at 796.
45. *Id.* (citing United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984)

> First, we think the word "induced" is a part of the definition of the offense by the private individual, but not the offense by the public official. In the case of the private individual, the victim's consent must be "induced by wrongful use of actual or threatened force, violence or fear." In the case of the public official, however, there is no such requirement. The statute merely requires of the public official that he obtain "property from another, with his consent, . . . under color of official right." The use of the word "or" before" under color of official right" supports this reading.
>
> Second, even if the statute were parsed so that the word "induced" applied to the public officeholder, we do not believe the word "induced" necessarily indicates that the transaction must be *initiated* by the recipient of the bribe. Many of the cases applying the majority rule have concluded that the wrongful acceptance of a bribe establishes all the inducement that the statute requires. They conclude that the coercive element is provided by the public office itself.[46]

Evans also argued that to support a charge of extortion "under color of official right" there must be an "affirmative step" on behalf of the public official, and that such requirement must be reflected in the jury instructions. The Court rejected his argument, holding "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[47]

(en banc) ("Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits.")); United States v. Aguon, 851 F.2d 1158, 1166 (9th Cir. 1988) (en banc) ("We find ourselves in accord with the Second Circuit's conclusion that inducement is an element required for conviction under the Hobbs Act.")).

46. Evans, 504 U.S. at 265-66.

47. *Id.* at 268.

In 1999, the Court confronted the need to provide a clear definition of "official act" in the context of the federal bribery and illegal gratuities provisions:

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo*-a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.[48]

The District Court's instructions in this case, in differentiating between a bribe and an illegal gratuity, correctly noted that only a bribe requires proof of a *quid pro quo*. The point in controversy here is that the instructions went on to suggest that § 201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act.[49] Rather, the court held the Government is required to prove "a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[50]

IV. The *McDonnell* Decision

Former Virginia Governor Bob McDonnell was charged and convicted of eleven counts of bribery-related charges after receiving over $175,000 in gifts and loans from Jonnie Williams, Sr., in exchange for the former governor's assistance in making profitable a dietary supplement sold by Mr. Williams.[51] The

48. United States v. Sun-Diamond Growers, 526 U.S. 398, 404-05 (1999).
49. *Id.* at 404-05 (emphasis added).
50. *Id.* at 414.
51. McDonnell v. United States, 136 S. Ct. 2355 (2016); *see also* Tara

charges included conspiracy to attempt honest-services wire fraud, committing honest-services wire fraud, and extortion under the Hobbs Act by obtaining property under color of official right under U.S.C. § 1951. The underlying theory of the charges was that McDonnell accepted bribes from Williams.[52]

The parties had conceded that knowledge that the "thing of value" was obtained "in return for official action" was a requirement of the Hobbs Act extortion charge. Therefore, "the Government was required to prove that Governor McDonnell committed or agreed to commit an 'official act' in exchange for the loans and gifts from Williams."[53] The Government alleged that the following qualified as 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

Malloy, *Symposium: Is it bribery or "the basic compact underlying representative government?"*, (July 28, 2016 4:03 PM) SCOTUSBLOG, http://www.scotusblog.com/2016/06/symposium-is-it-bribery-or-the-basic-compact-underlying-representative-government/.

52. *McDonnell*, 136 S. Ct. at 2366.

53. *Id.* at 2365.

> Mansion; and
>
> (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.[54]

A unanimous Supreme Court overturned McDonnell's conviction holding the district court erred by improperly instructing the jury on the definition of "official act" to encompass setting up meetings or other related conduct, without more.

18 U.S.C. § 201(a)(3) defines "official act" 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."[55] The Court chose to adopt a "bounded interpretation" of "official act." The Court explained there are two requirements for conduct to fall within the scope of an "official act," pursuant § 201(a)(3):

> 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. 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.[56]

The Court explained the terminology "may *by law*" connotes "something within the specific duties of an official's position — the function conferred by the authority of his office."[57]

54. *Id.* at 2365-66.
55. 18 U.S.C. § 201(a)(3).
56. *McDonnell*, 136 S. Ct. at 2358.
57. *Id.* at 2369.

Additionally, the Court clarified that, "[t]he word 'any' conveys that the matter may be pending either before the public official who is performing the official act, or before another public official."[58]

Furthermore, the Court expressly rejected that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)" would not fall within the scope of an official act, without more.[59] Rather, "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."[60] The court listed several examples:

> [A] decision or action to initiate a research study — or a decision or action on a qualifying step, such as narrowing down the list of potential research topics — would qualify as an "official act." A public official may also make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy" by using his official position to exert pressure on *another* official to perform an "official act." In addition, if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an "official act" by another official, that too can qualify as a decision or action for purposes of §201(a)(3).[61]

The Court did add that ultimately acting upon a promise to act is not necessary, nor does a public official need to explain the means of accomplishing how he will fulfill said promise as part of the bargain. The court explained that a limiting interpretation was necessary, otherwise any decision or action by a public official could potentially fall within the scope of the statutory prohibition.

58. *Id.* at 2358.
59. *Id.* at 2372.
60. *Id.* at 2370.
61. *Id.*

V. Post-*McDonnell*: Lasting Implications

Since *McDonnell*, even though the statute has not changed, the standard has. *McDonnell* has broadened what falls within the scope of "routine political favors" and clarified that such conduct will not, in and of itself, constitute public corruption.

In response to the McDonnell scandal, the Virginia legislature passed a law limiting the value of gifts that the Governor and members of the Virginia General Assembly may receive to $100.[62] Therefore, although the former-governor's conduct would not constitute an "official act" under federal law, Virginia state law would prohibit similar conduct moving forward.

One scholar has noted that courts may apply the narrow definition to all of the public corruption statutes. Will courts apply the narrow definition to all similarly-phrased statutory provisions, or only to those similar to *McDonnell*?[63] In the Second Circuit, convictions have been vacated because the jury instructions did not comply with the Supreme Court's narrow interpretation of official act.[64]

62. Va. Code Ann. § 2.2-3103.1 (West 2015). Campaign contributions are excluded from the coverage of the statute. Va. Code Ann. § 2.2-3101.

63. Adam F. Minchew, Note, *Who Put The Quo In Quid Pro Quo?: Why Courts Should Apply McDonnell's "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793 (2017).

64. *See generally* United States v. Silver, 864 F.3d 102 (2d Cir. 2017); United States v. Boyland, 862 F.3d 279 (2d Cir. 2017); United States v. Skelos, 2017 U.S. App. LEXIS 18525 (2d Cir. 2017). *See also* Eugene Temchenko, Note, *A First Amendment Right To Corrupt Your Politician,* 103 CORNELL L. REV. 465, 490-91, 495 (2018) ("*McDonnell* changed things. On July 13, 2017, the Court of Appeals for the Second Circuit overturned the conviction of New York State Assembly Speaker Sheldon Silver, citing *McDonnell v. United States*. The prosecution charged Silver with many corrupt schemes. For example, Silver allegedly funneled $500,000 in taxpayer-funded research grants to a doctor in exchange for the doctor steering his patients to Silver's law firm. Silver also met with lobbyists, hosted parties and voted for legislation that benefited real estate developers, allegedly in exchange for the developers' use of a law firm that paid Silver referral fees. Despite finding ample evidence, the Court of Appeals reversed Silver's conviction and remanded for a new trial, holding that the jury instruction 'captured lawful conduct, such as arranging meetings or hosting events with constituents.' The jury instructions were overbroad because, post *McDonnell*, the instructions captured examples of lawful influence peddling.").

VI. Opinions & Views

- Jessica Tillipman, an Assistant Dean at George Washington University Law School, stated: "It just raises the standard of prosecution to a very, very high level. I think it's going to make it a lot easier for politicians to accept gifts and hospitality and payments in return for taking action."[65]
- Stephen Farnsworth, a political scientist at the University of Mary Washington in Virginia, stated: "The Supreme Court decision really gives a green light to elected officials to solicit whatever goodies they may wish, as long as they're not clear about doing anything in return."[66]
- Randall Eliason, a former federal prosecutor commented: "The Supreme Court has actually opened the door for public officials to charge businesspeople and the like for access to political-natured meetings. He outlined a scenario, which he said would now be legal, in which a governor could accept money in exchange for arranging a business owner to meet with public officials, specifically stipulating that they won't influence the outcome."[67]

> The first policy reason Chief Justice Roberts offered in support of the *McDonnell* decision is that broad application of bribery statutes could deter officials from "respond[ing] to even the most commonplace requests for assistance," and citizens "from participating in democratic discourse." This formulation raises the question of why broad application of a *bribery* statute, or any other *anti-corruption* statute, would deter citizens from democratic discourse. That is, if the citizen were merely speaking, there would be no grounds

65. Matt Zapotosky, *In McDonnell case, Supreme Court makes it harder to prosecute corruption*, THE WASHINGTON POST (June 27, 2016) https://www.washingtonpost.com/world/national-security/in-mcdonnell-case-supreme-court-makes-it-harder-to-prosecute-corruption/2016/06/27/dedf4baa-3c81-11e6-a66f-aa6c1883b6b1_story.html?noredirect=on&utm_term=.782691d5b391.

66. Alan Greenblatt, *In Wake of McDonnell Ruling, What Counts as Corruption?*, GOVERNING (June 29, 2016), http://www.governing.com/topics/politics/gov-scotus-mcdonnell-virginia-corruption.html.

67. *Id.*

> for finding corruption—no quid. Chief Justice Roberts's formulation only makes sense if the citizen engages in democratic discourse with money or other consideration, as in *Citizens United*. Similarly, anti-corruption statutes would rarely apply to an official's response to a constituent's request for assistance. For example, no one would suspect corruption if a senator were to advocate a bill to assist victims of a natural disaster. Common sense dictates that official acts that benefit the public in general would make for poor prosecutions. Anticorruption statutes are only relevant, therefore, when a public official shows undue favor to an individual or a select group of individuals in exchange for some benefit. Thus explained, the Chief Justice appears concerned that broad bribery statutes would deter citizens from contributing funds in exchange for special treatment. In fact, the Chief Justice labels such exchanges as "participat[ion] in democratic discourse" rather than corruption. Accordingly, Chief Justice Roberts's public policy concern is congruent with *Citizens United*'s First Amendment concern. As in *Citizens United*, the *McDonnell* Court asserts that "[i]ngratiation and access . . . are not corruption."[68]

68. Temchenko, *supra* note 64, at 490-91 (internal citations omitted).