Pace Law Review

Volume 38
Issue 3 *Symposium Edition 2018*

Article 3

March 2018

How Has McDonnell Affected Prosecutors' Ability to Police Public Corruption? What Are Politicians And Lobbyists Allowed To Do, And What Are Prosecutors Able To Prosecute?

Vincent L. Briccetti
U.S. District Court, Southern District of New York

Amie Ely
Center for Ethics and Public Integrity

Alexandra Shapiro
Shapiro Arato

Dan Stein
Mayer, Brown & Platt

How Has *McDonnell* Affected Prosecutors' Ability to Police Public Corruption? What Are Politicians And Lobbyists Allowed To Do, And What Are Prosecutors Able To Prosecute?

MODERATOR: Honorable Vincent L. Briccetti

PANELISTS: Amie Ely
Alexandra Shapiro
Dan Stein

DEAN YASSKY: Good morning. My name is David Yassky. I serve as the Dean here at the Elisabeth Haub School of Law at Pace University. I am just here right at the moment to welcome you and thank you for joining us this morning. I have been looking forward to this panel, this entire day of panels, for quite some time.

When the *McDonnell*[1] case came out, I wasn't shocked by the outcome because it seemed like it could go either way, but I was certainly startled by the breadth of some of the language in the opinion. My first thought was, my goodness, how are elected officials and other government officials going to know what they can do and what they can't? How is this going to affect prosecution going forward, and how will it affect the high-profile convictions we have seen here in New York over the past few years? The issue of government corruption or public integrity is always prominent and has seemed extra prominent over the last several years. Here in New York, we've seen the leaders of both Houses of the State Legislature prosecuted, convicted, and now maybe to be retried. We've seen a surprising number of elected officials at both the State and local level prosecuted for various forms of corruption, whether essentially embezzlement or bribe-taking. And now, whatever one's partisan leanings are, I think we might all agree that there's more talk about public integrity at the Federal level than there has been in quite some time.

1. McDonnell v. United States, 136 S. Ct. 2355 (2016).

This symposium could not be timelier, and I just wanted to first thank all of the panelists who are here. We'll recognize this first group in just a moment. I also wanted to thank Mimi Rocah and Carol Barry from our law school who put in a great deal of work to put this together. I want to thank the Pace Law Review, Editor-in-Chief Amanda Fiorilla, and the entire Law Review team. I hope the panelists had a chance to take a look at the briefing memo that the law review staff put together. It was, I thought, a first-grade work of analysis. So, thank you for that. I want to remind everyone also that our discussions today are being transcribed and will be published in a special issue of the Pace Law Review and then circulated to prosecutors throughout the country. So, your work today is going to be setting the tone and helping prosecutors for decades to come. Thank you for undertaking that.

Our first panel and the question posed to the panelists is: How has *McDonnell*[2] affected prosecutors' ability to police public corruption? What can politicians and lobbyists do and what can prosecutors prosecute?

We have, on all three panels, some of the really finest minds in the country who have been thinking about these issues for quite some time. On this first panel we have Amie Ely, who is the Director of National Attorneys General Training and Research Institute's Center for Ethics and Public Integrity; Alexandra Shapiro, former federal prosecutor and partner at Shapiro Arato and has participated in numerous high profile white-collar cases including the public integrity case; and Dan Stein, former Criminal Division Chief and Chief of Public Corruption at the Southern District U.S. Attorney's office and currently now partner at Mayer, Brown & Platt. And to guide and shape the discussion and inform all of us we are very fortunate to have, from the United States District Court for the Southern District of New York right here in White Plains, the Honorable Vincent Briccetti as the moderator. Your Honor, I turn the podium over to you.

2. *Id.*

JUDGE BRICCETTI: Thank you, David, and thanks for inviting me to participate. And also, Mimi, thank you so much for inviting me.

I just want to say a couple of quick things about the panel. Amie really brings a perspective that is unique on the panel, namely that she's working with the National Attorneys General Training and Research Institute. The point is she's very focused on the State side or local side of the investigation and prosecution in this area. All three of my colleagues up here are former AUSAs in the Southern District of New York, as am I. Alexandra and I also have two other things in common. We were both Deputy Chief of Criminal Appeals in the Southern District, and that was a fantastic job. Even more importantly, Alexandra and I both started our own small law firms. It's not easy and that's why I have so much respect for her. Dan is also a former Chief of the Public Corruption Unit in the Southern District which tells you how qualified he is for this.

What I'm going to do is give a quick overview of the *McDonnell*[3] case. These slides were prepared by Amie. So, I take no credit for this whatsoever. Then each of the panelists will say a few words and then I will interrogate them. I'll ask them some questions and hopefully that will elucidate some of the issues here.

McDonnell v. United States,[4] that's the case that gives rise to this symposium and this man's name is Robert McDonnell. Who is he and why do we care? Well, Bob McDonnell is a Virgina lawyer. He was born in 1954. He served many years in the Virginia House of Delegates. He was elected the Attorney General of the Commonwealth of Virginia in 2005, and in 2009, in the midst of the great recession, he was elected governor in a landslide succeeding Tim Kaine, who went on to run for Vice President. Kaine was term limit by Virginia law. Bob's campaign slogan was "Bob for Jobs." That may foreshadow some of the problems he got into later on. His focus in office was economic development. He referred anyone, any constituent or any person who had an idea about promoting business within the state, to meetings with members of his staff and other government

3. *Id.*
4. *Id.*

officials. One of those constituents was a fellow named Jonnie Williams. Jonnie Williams was the CEO of a company that developed a nutritional supplement called Anatabloc. I'm not even sure if that's how you pronounce it, but it's a nutritional supplement made from a compound found in tobacco. Of course, there's lots of tobacco in Virginia, so perfect. What Williams needed to do was to have Virginia state universities do independent research studies on the benefits, the health benefits, of this nutritional supplement in order ultimately to get approval from the Federal Food and Drug Administration. So, it was very important for him to get this independent research done within the State. Now, Jonnie was not shy about asking for assistance from Bob McDonnell in this regard and to frankly grease the skids a little bit. He gave McDonnell free rides on his private plane during the campaign. He later bought McDonnell's wife, Maureen, $20,000 of designer clothing. In the meantime, he repeatedly asked for the Governor's help in getting research studies done at Virginia's public universities, and when Mrs. McDonnell told Williams about her family's financial problems, I guess because Bob had been a public servant for so many years, Williams loaned the McDonnells $70,000. He also gave their daughter a $10,000 cash gift for her wedding and $15,000 to help the McDonnells pay for the wedding. He took them on weekend trips. Mrs. McDonnell at some point said, you know, my husband really likes that Rolex watch that you wear and Jonnie said, no problem. He went out and bought one, gave it to Maureen, and Maureen gave it to Bob for Christmas. And what he was trying to do was to get the Governor to support his plan to get research done on Anatabloc at public universities in the state.

In return for Jonnie's largesse, totaling some $175,000, the Governor arranged numerous meetings, hosted several events, made numerous phone calls, and contacted government officials, all in an effort to support Williams's plan to get research done on Anatabloc at public universities in the State.

So, the question is: Did Bob McDonnell's conduct constitute public corruption? The jury at his criminal trial said yes. The Supreme Court said no.

Here's what happened: the Department of Justice charged McDonnell and Maureen with bribery for accepting $175,000 worth of gifts and loans, as I've just described, the so-called quid,

money coming in, so to speak, and the quo was that it was in exchange for arranging meetings, hosting events, making phone calls, and contacting government officials to get them to support this drug. He and his wife were charged with Hobbs Act extortion and honest services fraud, which is basically mail fraud and wire fraud, for depriving the citizens of Virginia of the honest services of their governor. Importantly, and there will be some discussion on this later on, the parties agreed that the case turned on the meaning of the term "official act," which is defined in Section 201(a)(3) of Title 18.[5] There was no dispute that he took money, but the question is did he take it in exchange for an "official act?" As I said, the McDonnells were convicted.

So, what is an official act under this statute? Well, it is any decision or action, important words, on any question – all these words are important obviously – or matter 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. That's a breakdown of Section 201(a)(3).[6] The case turned on the definition of the meaning of "official act."

Now, at the Supreme Court, when the case finally made its way there, McDonnell argued that "official acts" were only acts that direct a particular resolution of a specific governmental decision or that pressure another official to do so. So, just setting up meetings or arranging phone calls was really not directing a particular resolution of a specific governmental decision or pressuring another official to do something. He said he was just trying to do his job as the Governor of the State of Virginia to promote economic development in the State. The government said, well, first of all, you took $175,000 number one and number two, we take a somewhat broader view of official act and it is a decision or action that may at any time be pending or which may by law be brought and, therefore, encompasses nearly any activity by a public official. A very broad interpretation of "official act." The Supreme Court looked at the statute.[7] They looked at their own precedents, and they also discussed certain constitutional concerns that they had. This was a decision

5. 18 U.S.C. § 201(a)(3) (2012).
6. *Id.*
7. *Id.*

authorized by Chief Justice Roberts. The text of the statute, again it is a decision or action on – meaning not an event, meeting, or speaking with somebody – but an actual decision or action on a question or matter. They narrowly construed the words "matter" and "question."[8] They did that using principles of statutory interpretation. And, as to the words "pending or [which] may by law be brought,"[9] they said that needs to be something within the specific duties of an official's position. So, it is not just helping a constituent and referring them to the right people within the state government but actually acting upon something that is within the specific duties of an official position.

The precedent that the Supreme Court looked at were cases that dealt with the statute in the past. The *Sun-Diamond*[10] case said that just meeting with officials was not enough without a decision or action. *McDonnell* built on that, and said it would be sufficient to initiate a research study or exert pressure to initiate a research study so long as the official was intending that such advice would form the basis for an official act by another official, but that you need not actually make a decision or take an action, you need only agree to do so. The Supreme Court also addressed certain constitutional concerns. They didn't find that the statute was unconstitutional, but they construed it narrowly so as to avoid constitutional concerns. The problem was that the government's position, as I said earlier, was so broad. What the Supreme Court said is that this would cast a pall of potential prosecution over an official who follows up on citizen complaints and, for example, gets invited to a baseball game by a grateful homeowner. So, a citizen makes a five-dollar contribution to the campaign and says, "you know what, governor or public official, we really need to do X in our neighborhood." The public official does that, and the neighborhood association says, that's great; why don't you come to the minor league baseball game as our guest? The Supreme Court was concerned that that would be a crime, a felony under the Government's interpretation of the statute. The Supreme Court was also concerned about the so-called "vagueness shoal." Vagueness is a due process consideration and the Supreme Court said that it did not want

8. *Id.*
9. *Id.*
10. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

federal prosecutors to set the standards of good government at the local and state level. So, they needed to narrowly construe the statutes involved.

This is the holding of *McDonnell*.[11] An "official act" is a decision or action on a question or matter that must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court or a determination before an agency or a hearing before a committee. It must be specific. It must be focused on something that is pending or may by law be brought before the public official.

So, the Supreme Court said under that definition arranging meetings, hosting events, etc. were not "official acts."

And here is the rationale of *McDonnell*.[12] Chief Justice Roberts likes to have a turn of phrase from time to time and this is his term of phrase in this one. Quote: "There is no doubt that this case is distasteful; it may be worse than that, [b]ut our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the Federal bribery statute."[13] He went on to say that "[a] more limited interpretation of the term 'official act' leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of [this] Court."[14]

I think that might be the theme of today's symposium because that's the question: does it leave ample room from prosecuting corruption? Most people would think that taking $175,000 in gifts and cash and Rolex watches and so forth in connection with your job as a governor is public corruption. The Supreme Court said no, it is not.

So, with that introduction what I would like to do is ask the panelists to talk for a minute or two or however long they want, about their take on this and what they think are the implications of *McDonnell*, and what has actually happened since *McDonnell*.

11. McDonnell v. United States, 136 S. Ct. 2355 (2016).

12. *Id.*

13. Eyder Peralta, *Supreme Court Throws Out Former Virginia Gov. Bob McDonnell's Conviction*, NPR: THE TWO-WAY (June 27, 2016, 12:52 PM), https://www.npr.org/sections/thetwo-way/2016/06/27/483711311/supreme-court-throws-out-former-virginia-governor-bob-mcdonnells-conviction.

14. *Id.*

McDonnell was decided in June of 2016, almost two years ago.[15] What has happened since then and where do we go from here?

So, why don't we start with Dan. Dan was the Chief of Public Corruption at the Southern District and he was also Chief of the Criminal Division. This is a guy who knows what he's talking about, trust me on this. When Dan was doing that I was primarily practicing in the criminal defense area. I've been a prosecutor, but for most of my career, I was a criminal defense lawyer. Dan was well-known for being tough, but fair. The point is, he's going to represent the prosecutor's perspective and I'll ask Dan to go first.

MR. STEIN: Thank you for your kind introduction. The first point I would want to make is that long before *McDonnell*, it was my view, and I think many prosecutors' view, that public corruption prosecutions – particularly when they involve allegations of quid pro quo bribery – were among the most challenging and difficult cases to prosecute, even aside from the issues presented by *McDonnell*. And to see why, I often thought it was helpful to compare a quid pro quo bribery case to just sort of a run of the mill securities fraud case.

In a securities fraud case, you have an arms-length transaction between two parties where there are typically representations made in an explicit way about what's being bought or sold. The challenge for a prosecutor trying to investigate that transaction for fraud is simply to prove that those representations are false or misleading or they omit material information, that the representations are material, and that the person who made them knowingly made those misrepresentations. You compare that with a public corruption bribery case where there's almost never an explicit conversation. There's certainly not an explicit document that lays out the terms of the transaction. The meetings that occur between those who are seeking the influential elected official and the elected officials in my experience in debriefing, are almost always – there's more left unsaid than said. I remember being at a meeting with a person who we suspected made a bribe to an elected official and this person in my view very candidly

15. McDonnell v. United States, 136 S. Ct. 2355 (2016).

explained the meeting that he had with that official and then said, you know, at the end of the meeting I didn't really know what we agreed to or didn't agree to, and I don't know that the person really knew either. It was all winks and nods and things left unsaid. That always was a challenge. So, prosecutors always had to look for substantial evidence to try to build a complete picture of the circumstances to prove their case.

I think a second factor that also was always an issue before *McDonnell* and public corruption cases is the political overlay that lies behind many of these matters. I think unlike some areas the problem is that in government and politics there can be something of a zero-sum gain. Either my candidate wins or your candidate wins; it's one or the other. It's not the case where we can both succeed. So, the people who are making, providing tips or information about alleged corruption often have motives and agendas which may not be based on the merits of their claim but rather based on their own political interests. So, prosecutors are always also struck by that challenge that exists in public corruption cases.

I think as Judge Briccetti alluded to in his introduction, the critical thing for us to focus on in this discussion is to understand that act is critically important – that the rules that govern public officials and those who interact with public officials are clear especially when the consequence is Federal criminal prosecution. But I would say we should try not to lose sight of what we are talking about here, which is efforts to make sure that our public officials are, in fact, serving the public's interests and not their own private interests, while at the same time making sure that our public officials are engaging the community and are responsive to the public's concerns. That challenge is why these cases are so difficult. From a very high level, my personal view of the consequences of *McDonnell* are that perhaps it means that the way to address these problems is not necessarily the blunt instrument of federal criminal prosecution because it's too hard in some cases for federal court and federal prosecutors to articulate exactly what that line is between pursuing private interests and yet on the other hand making sure people are engaged in the community. I personally think there is a whole array of ways that as citizens we can try to assure that our representatives are really focused on the

public's interests and the reason Federal prosecutors got involved is because the avenues are not being pursued. So, maybe as *McDonnell* scales things back, it will be an incentive for others to step forward and implicate it in other ways.

JUDGE BRICCETTI: Thank you, Dan. Now, Alexandra is also a former federal prosecutor, and she may have a slightly different take on this.

MS. SHAPIRO: I'll start with what I certainly agree with, which is that these are very important problems, and I don't mean to minimize the real harm that's caused by public corruption. But what we are dealing with in *McDonnell* and a lot of the cases we may talk about through the course of the panel discussion are prosecutions of the state and local officials using very vague and rather overbroad Federal statutes that are not really the best instruments for dealing with these problems. I think there are other tools that may be better.

In many states there are already quite a number of rules and regulations and criminal laws in place to govern things like conflicts of interest and other problems short of bribery that can give rise to concerns that public officials are not acting in the public's interest. In my judgment, those are generally better ways to deal with this, and to the extent that federal laws should be used, we need to have clearer statutes.

I thought I would just talk for a few minutes about some of the constitutional concerns, and in particular the due process concerns that I think are animating the Court's opinion in *McDonnell*. If you listen to the oral arguments, they also suggest that that was a very big concern. This case was decided by an eight-justice Court just before Justice Gorsuch was appointed but after Justice Scalia's passing. I think the opinion is quite narrow, but if Justice Scalia had survived and been part of the discussions, you might well have had a different outcome in terms of rationale. Certainly, there is a possibility that a number of justices, if not the majority, might have voted to strike down the honest services statute as unconstitutional and vague.[16]

16. 18 U.S.C. § 1346 (2012).

Regardless, what the Court did do was part of a pattern in a number of cases we've seen in the last decade, where the Justices have expressed concerns with the abuse in some cases by federal prosecutors of very broad statutes. Typically, what the Court has done when confronting these statutes has been to try to narrowly construe them. That's what the Court did in the *Skilling* case,[17] which I think is discussed in the materials that were circulated. In *McDonnell*, Chief Justice Roberts talks about three constitutional concerns. One of them was the First Amendment concern that we may touch on a little bit later – the concern that in a democracy, if you have a statute that permits anything, even a five-dollar payment for example, to count as a "quid," and anything, including a meeting, can be a "quo," then all kinds of normal interactions between constituents and politicians would be potentially criminal.

One big part of the due process concern is notice. People need clear statutes. The statutes are supposed to be written by the legislature. If you look at most of the provisions of Title 18 of the United States Code, it is as you would expect in a penal code. The elements are right there in the statutes. If you look at the jury instructions, they pretty much track the language in the statute. What we are dealing with here, the two statutes at issue in *McDonnell* (the honest services fraud statute[18] and Hobbs Act extortion statute[19]), are quite different. If you compare the language of these statutes to the jury instructions, you will see that the jury instructions contain language nowhere to be found in the statute.

For example, the honest services fraud statute says that mail or wire fraud can include a scheme or artifice "to deprive another of the intangible right of honest services."[20] What does that mean? We might all have our own definition of it, but it could be just about anything. And using mail and wire fraud for bribery is like putting a square peg in a round hole. A typical scheme to defraud under the mail and wire fraud statutes is a scheme to obtain money or property by means of false or fraudulent pretenses, or false representations or promises. Well,

17. Skilling v. United States, 561 U.S. 358 (2010).
18. 18 U.S.C. § 1346 (2012).
19. 18 U.S.C. § 1951 (2012).
20. 18 U.S.C. § 1346 (2012).

bribery typically does not involve any false representation or promise. It is a payment in exchange for some sort of official action.

As for the extortion provision of the Hobbs Act, bribery is somewhat divorced from what the statute says and what its purpose was. It talks about extortion "under color of official right,"[21] and the Supreme Court has held that that includes bribery. But several justices starting with Justice Thomas in the Evans case in the early '90s and more recently Justices Breyer and Sotomayor, both expressed some doubts about whether the statute even covers bribery.[22] The history and the language both suggest that what the statute is actually addressing is an effort by an official to get property by pretending to be entitled to it by virtue of his official position. It's very different from bribery.

There's one other thing I want to mention that illustrates why the Court was rightly concerned the dangers of the overbroad use of these Federal statutes to prosecute state and local officials. We can all agree with Chief Justice Roberts' sentiment in the *McDonnell* opinion that the facts were "tawdry." We don't want public officials to be taking lavish gifts from their constituents. Unfortunately, at the time in question, under Virginia law it was not illegal for public officials to take these kinds of gifts. When the decision came out, in fact, the press revealed that Senator Tim Kaine, who had previously also been the Governor of Virginia, had taken some gifts from time to time as Governor (although they weren't nearly as lavish). There was nothing wrong with it under state law, yet here you had the federal government coming in and saying this is criminal conduct. Fortunately, Virginia changed its law after the prosecution of Governor McDonnell. I don't know exactly what the limits are, but I think there's a pretty tight limit on the amount of gifts public officials can accept in Virginia now. What this illustrates, in my judgment, is that best way to deal with these issues is to have appropriate state laws, and, to the extent of there are loopholes in the state laws, to try to close them up.

21. 18 U.S.C. § 1951(b)(2) (2012).

22. *See* Ocasio v. United States, 136 S. Ct. 1423, 1437 (2016) (Breyer, J., concurring); *id.* at 1445 n.3 (Sotomayor, J., dissenting); Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

It would be great if Congress could pass a clearer criminal statute to deal with state and local public corruption in appropriate circumstances, but who knows if that will happen.

JUDGE BRICCETTI: This is actually a great segue to Amie's expertise because she is focusing on what the impact of *McDonnell* on state corruption prosecutions, and Alexandra just said these kinds of things can be done locally and it is better if it is done locally than it is federally so that seems to be the perfect segue for Amie's presentation.

MS. ELY: Thank you, Judge. Does *McDonnell* impact state cases or do state prosecutors really need to worry about it? It kind of depends on how you see *McDonnell*.

Some ways of looking at it are rather narrow: It is really just a question of "official acts" under 201 and what that means, and the case begins and ends with that. There is a paragraph in McDonnell that talks a lot about the federalism issues, which I think it is a great thing for state prosecutors to key in on if they have *McDonnell* motions. If this is what *McDonnell* means, then why be worried? This is not such a problem for state prosecutors.

There is another way of looking at it – I think Alexandra will probably touch on some of these during our conversations that will follow: Yes, this is a question of statutory construction, but it's also broader than that. In this reading, *McDonnell* is the sibling of the chemical weapons case. It is the sibling of the "fish case," *Yates*,[23] where the Supreme Court says an undersized grouper is not a tangible thing. It is the sort of case that stands for the idea that federal prosecutors, in particular, are overreaching and the Supreme Court is going to construe statutes narrowly to try to prevent that overreaching. It can also be seen as more of our general "prosecutors are overreaching" case, in that regard, and in that way can cause some problems even for state prosecutors. There is also the Rule of Lenity aspect, if the statute is vague, and then again we have the federalism paragraph. If *that* is what *McDonnell* means, it's a little bit more troubling for state prosecutors.

23. Yates v. United States, 135 S. Ct. 1074 (2015).

So, which is it? Is *McDonnell* narrow? Is it broad? Well, it's both. The cases have not been all of one mind. The judges have not been all of one mind. We've got federal support for both readings. We will talk about a narrow construction in the *Ferriero* case.[24] Some decisions have sort of a broad construction of *McDonnell*, like the *Tavares* case.[25] We'll talk about that a little bit and what it means for states with 201 cognates. There are some state bribery statutes, like that in Massachusetts, that are intentionally patterned after the federal section 201. In those states, then I think *McDonnell* does pose a problem for state prosecutors.

There is also state support for both the narrow and broad reading. Again, we'll talk a little bit more about the narrow reading.

There's a Pennsylvania Supreme Court case, *Veon,*[26] which sort of talks about the *McDonnell* penumbra and suggests that in cases that involve public officials, some of the animating concerns – again that Alexandra talked about – about wanting to have them representative democracy, about wanting to make sure that your politicians can be responsive to the people who they represent, are important. There is at least one case where the Supreme Court of one state sort of took those concerns and imported them into a state statute that was not similar to 201. If *McDonnell* was construed narrowly by that Court, the judges would not have cited it in the way they did to really reverse the conviction.

So, looking a little bit more closely at a narrow state decision, *Degnan*.[27] It involves a garbage truck. So, in this case the Mayor's Chief of Staff, Mr. Degnan, threatened to terminate a contract if the trash company did not donate a truck to a small town in the Dominican Republic. Again, another Massachusetts case. We've got that same cognate, but the Prosecutors here charged both the official acts prong – which is very similar to 201's official acts prong – and something a little bit broader: the "official responsibilities" prong that was charged by the state prosecutors in this case refers to the "direct administrative or

24. United States v. Ferriero, 866 F.3d 107 (3d Cir.2017).
25. Tavares v. Commonwealth, 89 N.E.3d 1168 (Mass. 2018).
26. Commonwealth v. Veon, 150 A.3d 435 (Pa. 2016).
27. Commonwealth v. Degnan, 73 N.E.3d 823 (Mass. 2017).

operating authority, whether intermediate or final, and either exercisable alone or with others, [and either] personal[ly] or through subordinates, to approve, disapprove, or otherwise direct [Government] action."[28] This is much broader than the definition of "official act" under 201, and that was what saved the day in this case.

The Court held that the contract was certainly within the Defendant's official responsibility. They cited *McDonnell* only for the proposition that the jury was permitted to consider broad range of pertinent evidence. We will get back to some of the ways that prosecutors might deal with that. This gives you an idea that what you charge, looking carefully at your statutes really matters. And trying to find statutes that are not directly imperiled by *McDonnell* can be a very helpful way to avoid a falling prey to it.

Ferriero is a federal case.[29] There were New Jersey state law bribery predicates in this racketeering case. Ferriero was the Chair of the county party organization. He recommended a business to officials and got a kickback. The Third Circuit said *McDonnell* is about statutory construction of one federal statute, constitutional concerns raised by the Government's position, vagueness, and federalism.

Then, applying those four concepts to this racketeering case, the Third Circuit said these are both bribery statutes but there is no reason to transplant the conclusions of *McDonnell* that stem solely from the Court's application of general statutory construction principles to 201, the particular statute at issue in that case.

The Judges said that the New Jersey state bribery statute was narrower than 201, so its constitutional concerns that animated the Supreme Court's decision in *McDonnell* were not a problem here, and that the statute was not unconstitutionally vague.

And they acknowledged the federalism issue. This is an interesting thing, I think particularly for federal prosecutors. They said that even though the federal prosecutors are those who are enforcing the law in this case, they are applying a *state*

28. 17 C.F.R. § 140.735-6(b), n.14 (2018).
29. United States v. Ferriero, 866 F.3d 107 (3d Cir. 2017).

statute. They are applying a statute from New Jersey written by the New Jersey legislature.

That was not an issue that was discussed in *Tavares*, that First Circuit case, which was also a racketeering case. Again, we've got the Massachusetts cognate there, so I think that that may be one of the reasons why *Ferriero* and *Tavares* come out differently.

I want to talk very briefly about a couple of state cases and I think we will talk about some of the challenges that state prosecutors can face in corruption cases. These cases can both show some of the opportunity for enforcement at the state level and some of the difficulties that prosecutors can face.

This photograph was taken, I believe, either the day that Mike Hubbard was indicted or possibly the day after. He was the Speaker of the House. He's having a press conference. The people around him are his fellow legislators in the state. This was the response to charges brought by the Alabama Attorney General's office: It was a press conference held by the Defendant, with the support of the people who he served with on the state legislature. I'm so glad to see Dan Cort here, who you will have a chance to hear from on a later panel, but having strong leadership at the Attorney General level, and at the actual unit level, I think is hugely important in these sort of cases. The lead prosecutor was somebody who had been a federal prosecutor. He'd been a state prosecutor. He was somebody who knew how to build corruption cases.

There were allegations of politics, which I may get into a bit once we have our discussions, and the sorts of things that federal prosecutors do not have to deal with in quite the degree I think than state prosecutors.

Hubbard was convicted after trial. At the trial level – even though he wasn't charged with violating the Alabama bribery statute – at the trial level, there were *McDonnell* motions. On appeal, I was told by the prosecutors, defense counsel abandoned the *McDonnell* arguments.

This is another case that is, I think, more about sort of the penumbra of *McDonnell*. This was a case, *Utah v. Shurtleff*, where the former Attorney General of Utah was charged by a local prosecutor. After those charges were filed, the *McDonnell* case came out. The local prosecutor moved to dismiss the case

based on both *McDonnell* and on *Brady* grounds.

The Utah bribery statute is quite dissimilar from the federal bribery statute. I think that there are very strong arguments that could have been made that *McDonnell* did not apply to it – but I think the concern that *McDonnell* did may have animated the decision by this Prosecutor to dismiss the case. One important note, though: the Court, in its dismissal did not cite *McDonnell* as grounds for dismissing the case.

A few final points: I think it is important for prosecutors to be prepared to argue the limits of *McDonnell* and to make sure they understand it, and that they look carefully at whether their statutes are actually imperiled by it. I think there are very strong arguments that it does not apply in most cases, as long as your state does not have a cognate to 201.

I think for federal prosecutors, RICO prosecutions may be safer, if they're charging somebody in a state where the state bribery law is not a cognate 201.

It is important for prosecutors to think about *McDonnell* during the investigation. If you're lucky enough to have a proactive investigation where you've got a confidential informant who can make a specific request for what it is the official is going to do, make sure that "act" the CI requests is for something that actually falls under your statute when you are charging them.

Look really carefully at the statutes. If you've got something where part of your statute is a cognate and part of your statute is not, make sure you charge, if the facts support, the broader possibility under your statute.

When you are thinking about your jury instructions, obviously be precise. If you need to acknowledge *McDonnell*, do that.

When you are looking at your verdict forms, you should consider special verdict forms. You should consider whether you think you are going to have official act issues. You should consider listing what the quo was, what it is that you are alleging that your official did and let the jury make a specific determination about what quos you have proven. They are obviously downsides to using special verdict forms, as well, but it is something that the prosecutors should consider.

JUDGE BRICCETTI: Dan, I have a question for you. Here's my question:

Of course, you were Chief of Public Corruption; where do you see *McDonnell* having a greater impact for prosecutors, at the charging stage, in other words, when they have to decide whether to indict and decide whether a prosecution will be successful because naturally you do not want to indict unless you are pretty darn sure you are going to prevail, or does it have a greater impact at the trial phrase, meaning the higher burden articulated by *McDonnell*? Where do you think *McDonnell* has the greatest impact?

MR. STEIN: So, I think in the short term it can be the trial phase because there were cases before *McDonnell* that prosecutors had to sort out at a trial and retrial.

JUDGE BRICCETTI: Such as *Skelos*[30] and *Silver*.[31]

MR. STEIN: But I think in the long term you are going to see it more at the charging phase. I think one example that we should all think about, although I do not have direct first-hand knowledge, but you can see in New York City, where there was a long-running investigation that became public of the Mayor. You had people who pled guilty to paying bribes to the Mayor, and the Mayor was not charged. The U.S. Attorney's office announced that they were not to charge him. I suspect, although I do not know, that *McDonnell* had something to do with that because the evidence might have been that at least in the Mayor's perspective of what he was doing was receiving contributions in order to have meetings and not to perform official acts.

I think the other places where you are going to see an impact of *McDonnell* is in how prosecutors allocate their resources. Whereas *McDonnell* they might have focused on trying to prove cases of quid pro quo corruption. They might decide now that there are other areas where they can focus their resources. There are many cases that we did in the Southern District before

30. United States v. Skelos, 707 F. App'x. 733 (2d Cir. 2017).
31. United States v. Silver, 864 F.3d 102 (2d Cir. 2017).

McDonnell and hopefully will after *McDonnell*, that have nothing to do with quid pro quo bribery. They have to do with elected officials putting supporters or cronies or girlfriends or siblings in charge of not-for-profit organizations, directing grants to those not-for-profit organizations, and having the money circle back to them. *McDonnell* has nothing to say about those cases. You might see prosecutors focused more on that. I feel sometimes certainly in the news these days, I have not heard enough discussion of this, but at the Federal level there is a conflict of interest statute that does not require a quid pro quo, but does require that federal officials participate personally and substantially in some official action while having a conflict of interest. You might see prosecutors focusing more on those kinds of cases where again *McDonnell* has nothing to say about it.

JUDGE BRICCETTI: So, you really think that the direct impact of *McDonnell* is going to encourage the prosecutors to move away from the honest services prosecution which has been so prevalent in the past? No one suggested that a governor taking all this money in gifts is okay. So, they are going to still find ways to prosecute, right?

MR. STEIN: That is right. I think what is really telling *McDonnell* is that Virginia did not have a law that made it impermissible for the governor to take gifts. If you look at some of the cases, for example, they sort of respond to some of the points Alexandra made. The prosecutor still has to prove corrupt intent and they still have to look for evidence that the target was intentionally concealing his conduct or trying to invade state restrictions of what they could or could not do or be dishonest about what they were taking or receiving. I think when you have that kind of evidence of someone who is not just receiving gifts in exchange for some official action but someone who is clearly concealing it, lying about it, or trying to structure their behavior or evade state requirements, that would go to establish a corrupt intent and be helpful facts to prosecutors.

One other point I would make is part of what worries me a little bit about *McDonnell*, as a former prosecutor, is the fact that the people who are engaged in the conduct at issue are aware of *McDonnell* in many instances. Amie mentioned that it would be

wise for prosecutors to instruct their informants to make a specific act or a specific official action and the thought occurred to me that if someone is running an investigation, that that is sure fire way of getting your targets. As soon as they heard that, they would say, no, this is just a meeting to not engage an official action but rather to have access to public officials.

JUDGE BRICCETTI: There are other statutes that could be utilized by federal prosecutors such as Section 666 of Title 18,[32] which, as I understand it, basically makes it a crime to accept or demand money with the intent to be influenced in connection with one's official duties, when the person is an official of an agency that receives federal benefits in excess of $10,000 within a one-year period. Does *McDonnell* apply to Section 666 prosecutions, and what recent cases involve Section 666?

MS. SHAPIRO: That is an interesting question that has been litigated a bit already in the Southern District of New York and in the Second Circuit.

There was a case decided last summer, a few days before the *Silver* decision,[33] *United States v. Boyland*,[34] in which the Circuit affirmed the conviction. Boyland had been charged under several different statutes including Section 666. The Court held that the jury instruction in *Boyland* on the honest services fraud statute was no good after *McDonnell* because of the constitutional concerns, even though unlike in *McDonnell*, the parties had not agreed to use the Section 201 definition. Nevertheless, the Court goes on to say that it does not reach the same conclusion with respect to the instructions about the § 666 count, supposedly because § 666 "is more expansive than § 201," in that it "prohibits individuals from 'solicit[ing]. . . anything of value from any person, *intending to be influenced* or rewarded *in connection with any* business, transaction, or series of transactions of [an] organization, government, or agency. . . . We do not see that the *McDonnell* standard applied to these

32. 18 U.S.C. § 666 (2012)
33. United States v. Silver, 864 F.3d 102 (2d Cir. 2017).
34. 862 F.3d 279 (2d Cir. 2017).

counts."[35]

I think this is a little odd, because clearly the honest services fraud statute doesn't remotely contain these terms in Section 201 either. But in any event, this is somewhat of a throw away paragraph in this opinion which goes on, by the way, to find that the errors in the other jury instructions are harmless errors. There are several § 666 cases that are pending where this issue has come up, and in some of them the government has taken the position that under *Boyland McDonnell* doesn't apply.

We had this issue with the *Skelos* case, which was decided about a month after this.[36] There, the Court asked us for supplemental briefing on *Boyland* as well as *Silver*, which also was decided before they decided *Skelos*. We argued two things: first, we argued that *Skelos* was different, because the "official act" instruction was the same for the § 666 count and the other charges (Hobbs Act extortion as well honest services fraud). The District Court had given one official act instructions that applied to all the counts. The government had asked for that, and the indictment also described eight alleged official acts that were applicable to all the counts. That was our main argument. We also argued, without quite saying that *Boyland* should be overturned, that it didn't make sense. The Court of Appeals in the *Skelos* case ended up agreeing with us. The Court held that because of the way the case was indicted and tried, it could not affirm the § 666 count on the grounds that *McDonnell* did not apply. And the Government has indicated in a letter to us that they are not going to take the position at the retrial that the § 666 count does not require proof of an official act as defined in *McDonnell*.

There was another case which I tried last summer involving alleged bribery of two U.N. officials by a Chinese businessman, in which we had a similar debate at the charge conference. The Government argued very strongly that *McDonnell* should not apply and opposed an official act of instruction, and Judge Broderick gave an official act of instruction. But it was a watered-down version of the instruction and did not use the specific language from the definition of *McDonnell*. I suspect

35. *Id.* at 291 (quoting 18 U.S.C. § 666 (2012); emphases and alterations in original).

36. *See* United States v. Skelos, 707 F. App'x. 733 (2d Cir. 2017).

that issue eventually may be decided by the Second Circuit.

In the *Percoco* case,[37] which as far as I know is still on trial unless there's been a verdict or a mistrial this morning, this issue came up as well. Judge Caproni did decide that the official act instructions should be consistent with *McDonnell* and applied to all the counts, including those based on § 666. She said she was only doing it because of the way the indictment was charged. She also issued an opinion on the motion to dismiss rejecting the applicability of *McDonnell* to § 666.[38] So, I think you are going to see more percolation of this issue, and maybe the Second Circuit will revisit it in a case where it has a lot more importance to the outcome than it did in *Boyland*.

JUDGE BRICCETTI: Now, Amie, traditionally the principal reason why federal prosecutors have pursued investigations and prosecutions of state and local officials is because of the perception that federal prosecutors have more resources. They have the FBI. They have the federal government, but as you said earlier, it doesn't have to be done by the feds. It could be done by the state. Is there a problem about resources? Are there resources available to local prosecutors to meet the challenges of prosecuting local officials?

MS. ELY: The short answer is it depends. Just looking at the state attorney general office systems, some attorneys general have complete criminal jurisdiction in their state. Some attorneys general have very little. Like the district attorney's office, the very, very busy places are less likely to be able to do the long-term, thoughtful investigation that you need to do in any kind of white-collar case – including and especially public corruption cases.

That said, I will talk about some successes and then I will talk about some challenges.

37. United States v. Percoco et al., 16-CR-776 (VEC), 2017 WL 6314146 (S.D.N.Y. Dec. 11, 2017).

38. *Id.* at *4.

Right around the same time that the *Menendez*[39] case and the *Seabrook*[40] cases in New Jersey and New York, respectively, were declared mistrials, a state Senator named Phil Griego was convicted in New Mexico in a case brought by the Attorney General. It is not a one-to-one sort of comparison, but it is an example of a state corruption prosecution success. Michael Hubbard was convicted in Alabama, despite some real political issues. The attorney general's office there also successfully prosecuted the Governor of the State.

New York has convicted a number – at the DA-level and through the AG's office – a number of officials including Rubin Willis, a city councilman.

And New Jersey, at the AG office level, convicted the Mayor of Paterson.

So, there are some really terrific cases, perhaps that are not in the press quite so much but are really important and show that there are in some states really capable, strong enforcers.

There are resource issues. Some of those can be financial. Some of those financial issues can be occasioned by the cases themselves. In Alabama, when Mike Hubbard was charged, at some point during his trial, the legislature threatened to strip the funding from the entire attorney general's office. Not just the corruption unit, but the entire office. That is the sort of challenge that a federal prosecutor does not have to face.

That said, about a week ago the now-former Attorney General of the state whose office was imperiled in that way gave a speech to other Attorneys General in D.C., and encouraged them to have corruption units. He said, "[i]f you're looking for something that's turbulence free, this is not the way to do it. If you really care about representing the people of your state about ensuring that we have good government, this is a really important space for us to work in."

For the attorneys general offices that have jurisdiction to do this kind of work, they do have a little bit more ability, I think, than district attorneys to do the longer-term cases, to start trying to partner with federal authorities.

39. United States v. Menendez, 291 F. Supp. 3d 606 (2018).

40. United States v. Seabrook, 16-CR-467, 2017 WL 3995630 (S.D.N.Y. Sept. 9, 2017).

There are certainly cases that are investigated by both federal and state authorities, which is something that I'm frankly trying to push, particularly after *McDonnell*. I think *McDonnell* does provide an opportunity for the state and federal officials to intentionally work together in a thoughtful way to figure out who's got the resources and who has the laws to appropriately deal with behaviors that, without a doubt, citizens are very unhappy about and very disgusted by.

There are some ways resources and training available for state and local prosecutors, including my Center for Ethics and Public Integrity. We can do training for prosecutors to teach them how to investigate these more complex cases. Jennifer Rodgers's Center on Advancement of Public Integrity also has a lot of terrific resources.

I will end on this: one of the big changes from being a federal prosecutor to working with state prosecutors is recognizing that federal subpoenas are a beautiful thing and they go everywhere. State subpoenas only go to the end of state line. So, there's something called the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. This is the sort of thing that is important to state prosecutors doing more complicated cases where you need to have the ability to, for example, get bank records from outside of your state. You need to have the ability to not have the boundary of your state be impermeable. We've pulled together a chart with information about the Uniform Act statutes across the country and are trying to develop contacts around country so we can "matchmake" when prosecutors need help in another state. And we have provided training about how to get out-of-state materials, so they can investigate these more complicated cases, including corruption cases.

JUDGE BRICCETTI: Thank you, Amie. Dan, we have been talking about the prosecution of state and local officials, but of course, federal officials have been the subject of corruption prosecutions as well. My question is, is there a difference between how federal prosecutors approach corruption investigations of state and local officials as opposed to cases involving federal officials?

MR. STEIN: In some ways, yes and in some ways, I think the answer is no. The benefit of working on an investigation of a federal official as a federal prosecutor is you don't need to worry about all the legal complexities that come including at the honest services fraud statute or the § 666 statute or Hobbs Act extortion which in my view are all really efforts to shoehorn Federal jurisdiction over State and Local officials, perhaps appropriately, perhaps not.

People have different views about that. In federal cases dealing with federal officials you really do not have to worry about those things. You have statutes that apply. You have the conflicts of interest statute. That is a good example. In *Skilling*,[41] the Supreme Court said that honest services fraud would not reach claims of conflicts of interest. Pure conflicts of interest about a quid pro quo of a bribery or a kickback because the statute does not provide for that and made an analysis about what the core of the statute was. You do not have the concern with federal officials because as I said in this conflicts of interest statute that Congress has spoken about clearly. It was my experience at least that most of my cases involved New York officials there was a much greater degree of transparency when dealing with the federal government whether in the legislature or an executive agency where you could at least track in a clear way what bills you were to produce, by whom, who lobbied on support of those bills, what action were taken by a federal agency. It is much more transparent at the federal level than it sometimes is at the state level.

In New York State, to just figure out when a bill was issued and what was introduced and by whom, can be a real challenge, and so I think often and also even trying to track state funds through state agencies can be incredibly complicated. In my experience in the federal government, there is much greater transparency and, therefore, at least I think, it makes it easy for prosecutors to trace money and to try to figure out whether those cases were at the state level.

41. Skilling v. United States, 561 U.S. 358 (2010).

JUDGE BRICCETTI: Alexandra, most of what we have been talking about today involves private benefits received by a public official or his family rather than receiving campaign contributions, but why are not there more prosecutions involving campaign contributions? Hypothetically, I'll contribute $100,000 to your campaign but you've got to do this for me. Quid pro quo, no question about it. Why aren't there more of those prosecutions?

MS. SHAPIRO: I think the main reason has to do with a Supreme Court case called *McCormick*,[42] and because campaign contributions are speech protected by the First Amendment.

It goes all the way back the way back to *Buckley v. Valeo* in the '70s.[43] The Supreme Court held that campaign contributions are protected by the First Amendment. As a result of that, the Court later held that in a quid pro quo bribery case, where the bribe was allegedly a campaign contribution, prosecutors had to prove that an explicit quid pro quo. By contrast, when you're talking about a private benefit, like the gifts to Governor McDonnell, the agreement does not need to be explicit. There is a notion that if you can prove winks and nods, that's enough, because it would be rare that you could really prove a more explicit agreement, unless you had wiretap. And, by the way, some Courts have said in this context that there is a difference between "express" and "explicit." I think that is a bit silly, personally, but regardless, it is much more difficult to prove a quid pro quo in the campaign contribution context because of the McCormick case.

I do not have any personal knowledge of the investigation of the Mayor, but I always wondered if part of the problem for the prosecutors might also have something to do with this principle there as well. As I understood it, the allegations were all contribution-related, and perhaps proof of an explicit agreement was lacking. Unlike *McDonnell*, that has been the state of the law for a long time. It is just a function of our Constitution and how the Supreme Court treats campaign contributions.

42. McCormick v. United States, 500 U.S. 257 (1991).
43. 424 U.S. 1 (1976).

MR. STEIN: Can I jump in on that question, as well?

JUDGE BRICCETTI: Sure.

MR. STEIN: I think that is right in terms of the investigation of the Mayor. One quick point that I would like to see more prosecutors try to do, if possible, is it always occurred to me that it makes perfect sense to say, I am making a contribution of an exercise of one's speech rights if you are supporting a candidate in their efforts to get out the message and make public their positions. I would like to see more prosecutors look at candidates than take campaign funds for their own personal uses. There's a fraud on their contributors because their contributors are making donations thinking the money is going to be used for these speech-related purposes, but if it is just going into the candidate's pocket, that really is something different.

One quick story on that that I always laughed at: We had a Senator in New York who was prosecuted many years ago. He was picked up on a wiretap talking to another elected official about how campaign funds could be used and could not be used and his explanation was as long as my constituents would want it, then I could spend the campaign money on it. For example, he said my constituents want me to look good. I can use the money to buy some new suits.

JUDGE BRICCETTI: I am going to ask Dan one more question and then I am going to try to leave a few minutes to take questions from the audience. It is kind of related to the last thing you said. Does it matter whether the action taken by a public official was desirable or beneficial; does it matter if the public official has taken the same action regardless of the money received, or if he does a good thing with the money he received? Does that matter in this context?

MR. STEIN: I think the short answer is no. It really does not matter. As a legal matter, I think in the Silver case, for example, one of his defenses was the grant money that I gave as the quo, in the quid pro quo, was for cancer research and who would oppose cancer research, and that prosecution's take was

that may or may not be, but the reason you gave that money was not out of some public minded purpose but because of the private interest.

JUDGE BRICCETTI: The private interests were what in that case?

MR. STEIN: That he was receiving referrals for asbestos cases.

JUDGE BRICCETTI: Under New York law he was able to affiliate with the law firm and in effect receive referral fees for cases that came in the law firm involving people who have had cancer as a result from asbestos; is that correct?

MR. STEIN: Correct.

MS. SHAPIRO: Can I just make one comment?

JUDGE BRICCETTI: Sure.

MS. SHAPIRO: I agree with what you said. It is definitely never the case that there would be any defense based on the public good that comes from the legislation. But certainly in the *Skelos*[44] case and in some other cases, there might be an argument that has to do with the strength of the government's proof of the politician's supposed corrupt intent.

For example, in the *Skelos*[45] case, the parts of the case that do not involve the meetings and all of the things that aren't official acts after *McDonnell*, involved two kinds of legislation. One of our arguments was, and will continue to be, that there is no way that he could have had a corrupt purpose or intended to sell his vote on the legislation in exchange for these folks hiring his son, because he was known to be a supporter of the legislation already and would have continued to support it regardless.

44. United States v. Skelos, 707 F. App'x. 733 (2d Cir. 2017).
45. *Id.*

JUDGE BRICCETTI: We could go on all day. These issues are not new. Those of us who are old enough to remember the Abscam prosecution back in the '70s involving basically sting operations with both federal and local officials. A lot of these issues came up then, and they continue to come up today. This panel is unbelievably knowledgeable about this. So, we could spend a whole day just with this panel, but we are not going to do that. There are other panels who are terrific, as well. Does anybody have a question or a comment? Yes, sir?

ATTENDEE: Mr. Stein, with relation to *Silver*,[46] ultimately a conviction or gets a new conviction, would that have an effect on the asbestos cases? Can now because of his referrals to say a litigant who feels or thinks they did not get the proper representation and they should have gotten a bigger piece of that pie, do you think there is going to be a trickle-down effect?

MR. STEIN: To be honest, I've never thought about that possibility.

JUDGE BRICCETTI: Usually you say that is a great question.

MR. STEIN: I think I have to say I do not know if there would be any implication. There was never, as far as I know, any allegation that the law firm did not do a good job on the asbestos cases. I think from the prosecution's perspective it was merely a way to get money to Mr. Silver, but that is a good question.

JUDGE BRICCETTI: For which there is no answer. Everyone who is in law school, well, the answer could be this or it could be that. Does anybody else have a question?

ATTENDEE: Could one of you comment more about the *Boyland*[47] case and the implications of *McDonnell* setion 666 prosecutions? I guess I am trying to understand how the

46. United States v. Silver, 864 F.3d 102 (2d Cir. 2017).
47. United States v. Boyland, 862 F.3d 279 (2d Cir. 2017).

McDonnell[48] ruling affects or could affect future section 666 prosecutions because a quick look at the *Boyland*[49] decision did not clarify it.

MS. SHAPIRO: No, it doesn't. It really is just that paragraph that I read. And, if I remember the facts of the case correctly, one of the reasons the error was harmless was that it was pretty obvious that the acts *Boyland*[50] was allegedly taking in exchange for the payments for were clearly official acts under *McDonnell*.

JUDGE BRICCETTI: One last question. Yes, sir?

ATTENDEE: Dan, you had mentioned possibly using the public – the conflict of interest statute when prosecuting federal officials as opposed to *McDonnell*. Would the definition for "public action" be the same under that statute because that is where *McDonnell* kind of stepped in? I just wondered what the public action would be in a conflict of interest case as opposed to the other way?

MR. STEIN: I would have to look more closely at the exact language. I think it is pretty similar in the conflict of interest statute that the real difference is you do not have to prove that there was a quid pro quo. Simply taking an action while having a conflict of interest is sufficient. It does not have to be that you took the action in exchange for some payments and benefits.

ATTENDEE: It is just that *McDonnell* technically said he did not take an official action. I was just wondering if that would change under 208.

MR. STEIN: That is an excellent question. It probably does not change on that piece. It is more on the quid pro quo side of it.

48. McDonnell v. United States, 136 S. Ct. 2355 (2016).
49. United States v. Boyland, 862 F.3d 279 (2d Cir. 2017).
50. *Id.*

JUDGE BRICCETTI: We have had a terrific panel. Thank you all very much.