

March 2018

How Should Congress Respond to McDonnell?


David Yassky
Elisabeth Haub School of Law at Pace University

Kathleen Clark
Washington University at St. Louis Law School

Allen Dickerson
Institute for Free Speech

Jennifer Rodgers
Center for the Advancement of Public Integrity at Columbia University

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

 Part of the [Criminal Law Commons](#), [Law and Politics Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legislation Commons](#)

Recommended Citation

David Yassky, Kathleen Clark, Allen Dickerson, and Jennifer Rodgers, *How Should Congress Respond to McDonnell?*, 38 Pace L. Rev. 738 (2018)

Available at: <https://digitalcommons.pace.edu/plr/vol38/iss3/4>

This Conference Proceeding is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

How Should Congress Respond to *McDonnell*?

MODERATOR: Dean David Yassky

PANELISTS: Kathleen Clark
Allen Dickerson
Jennifer Rodgers

DEAN YASSKY: We have now gathered three extraordinary thinkers to talk about the question of whether *McDonnell*¹ was essentially right or wrong. As lawyers, I suppose we have to take precedent as we find it, but I also think it's worth thinking for a bit about whether Congress should act to change the *McDonnell* rule, or whether the Supreme Court should reconsider it. What would be an alternative or a better way, if there is one, to approach the question of public corruption prosecution?

I think *McDonnell* illustrates the difficulty here – it is a hard theoretical question to distinguish legitimate politics from illegitimate, corrupt behavior. I've asked these three panelists to think about that question. We have Professor Kathleen Clark from Washington University at St. Louis Law School; we have Allen Dickerson, Legal Director at the Institute for Free Speech; and we have Jennifer Rodgers, Executive Director of the Center for the Advancement of Public Integrity at Columbia University. Let's start with Professor Clark.

MS. CLARK: Thank you, David, and thanks to the wonderful panel that came before us. I am actually going to follow up on one of the questions from the crowd. I want to acknowledge that when the *McDonnell* decision came down almost two years ago, I took it a little bit personally, which might seem a little strange. I hadn't received Rolex watches as a government official or anything like that, but the field I primarily work in is government ethics. It seemed like an affront frankly to the whole endeavor of government ethics. The decision

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

2018

PANEL 2

739

shows that the criminal law is going to be quite limited in its role in government ethics. There's a lot more to government ethics than just criminal prohibitions like honest services fraud, the federal bribery statute² and the Hobbs Act³

What I want to focus on in this presentation is how to respond to the *McDonnell* decision: possibly amending the federal bribery statute, 18 U.S.C. 201.⁴ The basic summary of that statute is that a government official shouldn't accept anything of value in return for being influenced in the performance of an official act.

As we already saw in the first panel discussion, the focus of the Supreme Court's holding is the definition of official act. The Supreme Court narrowed the definition of official act in the federal bribery statute. The statute indicates that an "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy which may . . . be pending . . . before any public official, in such official's official capacity, or in such official's place of trust or profit."⁵ That's from the language of 201 itself.

What the *McDonnell* decision tells us is that eight members of the Supreme Court unanimously decided that "official act" in the federal bribery statute does not include setting up a meeting or hosting an event or talking to another official without more. What that means is that according to the Supreme Court, providing access does not count as an official act. We all know how important it is to be in the room where it happens. We all have an idea of how important it is to have access in order to accomplish one's political or policy goals – but the Supreme Court decided that providing access doesn't count as an official act. And what that means is that a federal official is allowed to accept money for setting up a meeting, hosting an event, or talking to another official, or at least that isn't a crime. Those actions don't violate the bribery statute. Then the question is how should the federal bribery statute be amended.

-
2. 18 U.S.C. § 201 (2012)
 3. 18 U.S.C. § 1951 (2012).
 4. 18 U.S.C. § 201 (2012).
 5. *Id.*

There was a little bit of a discussion of that in the earlier panel. I thought that I would take a look at other federal ethics, statutes and regulations that apply to federal officials, and see if there are any options for redefining “official act” in a way that’s more robust than what we are left with after *McDonnell*.

One possibility, perhaps the broadest approach, is to look to a federal regulation that prohibits the use of public office for private gain.⁶ One way of amending the federal bribery statute would be to prohibit using public office in exchange for something of value.

Another approach comes from the federal Hatch Act, which was in the news earlier this week with Kellyanne Conway’s violation of the Hatch Act.⁷ The Hatch Act tells federal officials that they can’t use official authority or influence to interfere with or affect the result of elections.⁸ Here, the focus would be that officials shouldn’t use official authority or influence in exchange for something of value. The regulation that I referred to earlier and the Hatch Act are not criminal provisions. The Hatch Act can result in civil penalties, but not criminal penalties. Both of these provisions are rather broad formulations.

Another approach says that you should not participate personally and substantially in a particular matter. That’s from a federal criminal post-employment statute, and may lead the way to an alternative approach for expending what “official act” means.⁹ This could re-expand the Federal bribery statute so it has as much breadth as I think it deserves; as I think the public deserves. You can see similar language in another federal criminal statute, that was referred to earlier, the criminal financial conflict of interest statute, 18 U.S.C. 208.¹⁰ It says don’t participate personally and substantially, and then it goes into some examples: decision, approval, disapproval,

6. 5 C.F.R. 2635.702 (2012).

7. U.S. OFF. OF SPECIAL COUNSEL, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT, OSC FILE NO. HA-18-0966 (KELLYANNE CONWAY) (2018), <https://osc.gov/Resources/Conway%20HA-18-0966%20Final%20Report.pdf#search=OSC%20File%20No%2E%20HA%2D18%2D0966>.

8. 5 U.S.C. § 7323 (2012).

9. 18 U.S.C. § 207 (2012).

10. 18 U.S.C. § 208 (2012).

2018

PANEL 2

741

recommendation, rendering of advice.¹¹ The mere rendering of advice will violate the financial conflict of interest statute if you have a financial interest in the matter.

What I want to underline here is that the lesson from *McDonnell* is that the criminal law and criminal prohibitions are not the whole ball game when it comes to government ethics. The government is free to use broader language, less well-defined terms in non-criminal provisions, such as the regulation I mentioned earlier and the Hatch Act. The government is obviously going to be limited in its ability to use broad, vague language in criminal provisions, but if Congress looks for ways to respond to *McDonnell*, these other Federal criminal ethics statutes may provide a way forward.

Finally, I want to acknowledge that my presentation was influenced by an article written by Jennifer Ahearn of Citizens for Responsibility of Ethics in Washington. She has an article in Penn State Law Review looking at the Federal criminal conflict of interest statute as a possible way forward.¹² I look forward to hearing from the other panelists and continuing our discussion.

DEAN YASSKY: Allen, I'll invite you to go next. I should also note to those of you who were drawn by our claim that Erica Orden from the Wall Street Journal would be here and participating in this panel, she is not here. She had to cancel because she is covering the Joe Percoco trial, which of course is a public corruption case, and in which the jury is out deliberating, at least as of last night, and has not come back with a verdict. Erica is unable to be here because she is at the courthouse waiting to cover the verdict. So, for anyone who thinks that public corruption is a victimless crime, I think that we here are powerful examples to the contrary.

MR. DICKERSON: Alexandra Shapiro did an excellent job giving a primer on campaign finance law, and I actually found myself in substantial agreement with Professor Clark.

11. *Id.*

12. Jennifer Ahearn, *A Way Forward For Congress On Bribery After McDonnell*, 121 PENN ST. L. REV. 1013 (2017).

I think the question, in many ways, is what remains that you may regulate. And when you say “may,” what you mean is: “what is constitutional.”

There are basically two constitutional provisions that are at play. One is the Fifth Amendment¹³ – due process, vagueness – and the other is the First Amendment¹⁴

To take a stab at answering the question on the panel, what I have written down here is that the Federal government may criminalize quid pro quo arrangements that personally enrich an office holder. And I would add, in addition to that, that there’s obviously a large range of what we call in the First Amendment sphere “prophylaxes” that could be put in place surrounding that. The Hatch Act; contractor bans on contributions to candidates, which have been upheld more or less universally; conflict of interest laws, which we’ve heard something about. And the very fact that in most cases – although interestingly not in Virginia – contributions are, in fact, limited.

So, you already have a prophylactic. In fact, there’s a cap on how much money can go to a candidate. I’m not aware of any state that has a cap in the \$175,000 range. Usually they are a few hundred dollars, a few thousand dollars. The Federal cap is \$2,600 per election.¹⁵ So, that I hope shows where the common ground is.

I want to talk about these two pieces in turn. First the quid pro quo limitation, and second this idea that you should personally enrich the candidate.

I think there are two concerns. I sort of have an unusual perspective on *McDonnell*. One of the advantages of living in D.C. is that I get to go to the Supreme Court pretty regularly. I went in to the argument thinking it was going to be a closer question than it ended up being. I assumed that I could count one or two votes for the government; where the Chief was going to come down, I thought, was an open question.

And then about five minutes into the argument for the government, Justice Breyer did one of these things he occasionally does, which is that he takes off his robe, he puts

13. U.S. CONST. amend. V.

14. U.S. CONST. amend. I.

15. See generally 52 U.S.C. § 30116 (2012).

2018

PANEL 2

743

back on his Harvard University Law Professor robe, and he proceeds to give an extended lecture to the attorney on precisely what he thinks the case is about. If you ever read Supreme Court transcripts, inevitably the paragraph ends with the question-marked “okay?” before launching into a new paragraph, and the question at the end of this will be some version of “so that’s my question for you” or “what do you think about that?”

So, Justice Breyer did one of these. It was at that moment where I think the case really changed for a lot of us who were close observers. What he talked about was – and I don’t want to overstate it – but a sense of discomfort with where the Federal government has been going with the history of these prosecutions, and in particular with the fact that the quid portion of the analysis is not generally \$175,000. It usually does not involve, not only the amount of money, but frankly what I found to be the very discomfiting facts of this case. I know I personally would be a little weirded out if my wife had dinner with someone and liked the Rolex and asked him to get it for me. My wife is a psychologist, so I may be reading too much into this, but that’s a troubling fact.

So, I think you did have a sort of sense that the facts here were really tawdry, and unusual in their tawdriness. The doctrine undergirding the prosecution really had nothing to do with the amount of money that was in play or the tawdry nature of the transactions, but it really had to do with the fact that the government had been doubling down, for decades, on this idea that it simply doesn’t matter how big or impressive or dangerous or tawdry the quid in the transactions. I may be misremembering this, but my memory is that Justice Breyer actually referred to the peppercorn from contracts, that it really doesn’t matter what the consideration is.

So, I think the Court in some ways was disturbed by the fact that the doctrine is being driven by these tawdry facts. I think that’s one of the concerns that comes out of *McDonnell*. It’s one of the reasons I think the quid pro quo restriction is so important: because we have this intuitive sense that the plausibility of the underlying transaction does change with the quid. If I am, in fact, given a peppercorn, then I’m unlikely to enter into any sort of corrupt bargain. On the other hand, if I’m receiving the sort of consideration that is in play in the

McDonnell case, it looks a lot more plausible.

So, I think that instinct was a lot of what was driving the Court. At least, that was my sense of it from the argument.

That's one thing. There's also the problem of proof. This was mentioned very briefly by Ms. Shapiro in the earlier panel, but you see this also in the campaign contribution cases where there's basically two lines of precedents. There's the *McCormick* case, which says that if the quid is a campaign contribution, because there are First Amendment interests on both sides of the transaction – the association of the donor with the candidate – that we are going to insist upon some explicit agreement or some objective statements of what the agreement is.¹⁶ There's another line of cases that comes out of a case called *Evans*, which talks about how it is enough if the candidate or the office holder receives the thing of value, receives the quid, subjectively believing it is for the purpose of a quid pro quo bargain.¹⁷

The difference would be: I take the peppercorn and in return for your peppercorn I'll vote this way. Versus I think you are giving me the peppercorn so that I will vote that way, but there's no objective evidence or undertaking that's actually there, and we allow the jury to read that in. So, that's the first thing I would say. The quid pro quo, in terms nailing both those down, makes it clear that juries should not be in a position to guess at transactions on the basis of tawdriness.

And now I'm going to move on to the First Amendment piece. Contributions are the worst example, and this is where I think I will push back a little bit on Professor Clark's paper. The Supreme Court has been pretty clear, at least in the First Amendment doctrine, that, and this is a direct quote, "ingratiation and access are not corruption."¹⁸ Which I think is a very counterintuitive statement, and so it's important to talk about it. Those are statements that are made specifically in the contribution context.

And this goes to something that I think the Chief Justice in particular has been focused on in the last several years, and that's this idea that we need to be careful not to shut down the

16. *McCormick v. United States*, 500 U.S. 257 (1991).

17. *Evans v. United States*, 504 U.S. 255 (1992).

18. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

2018

PANEL 2

745

responsiveness of government to constituents. You see some of that in the *McDonnell* opinion, and you see a lot more of it in the *McCutcheon v. FEC*¹⁹ opinion. He has this view of how government works – and that view is also the view in *Buckley v. Valeo*,²⁰ it's a very old view of how this works – that there are people out there, and they want to get together in associations to support things they think are a good idea. They are going to amalgamate together. They are going to pool their resources and they are going to interact with each other and out of this process, which we'll call the campaign, out of this associative and communicative process you get government officials at the moment of the election.

It's not really the election that matters. It's not really the engagement of political power after the election that matters for this purpose. It's this associative game. And there's a real danger in shutting down the ability of civil society to have that process, to raise the funds required to speak effectively, to raise the funds required to associate with people, to raise the overhead for institutions to allow them to function. We're sitting in one right now. You want to make sure not to chill that, not only because of the office holder – and I think this is an important part of the doctrine as well – not only because we're worried about the office holder becoming corrupt or the office holder's rights.

You'll notice a lot of the larger points about prophylaxes are actually directed not at the office holder but at the contributor. If you have a rule that says if I give a peppercorn, and then you do something that I might like, and the jury decides to read that in, you are not only chilling the activity of the office holder, you are chilling the activity of the contributor. And in circumstances where the contributions sound outside of the direct contributions to candidates context – think of Super PAC contributions or nonprofit activity – you are actually chilling the larger associative exercise as well.

So, I think I'm going to largely end there. I think that sets up the problem, and I think it's a fair characterization of what the Court was worried about. You see that both in Justice

19. *Compare* *McDonnell v. United States*, 136 S. Ct. 2355 (2016), *with* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

20. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975).

Breyer's soliloquy and also in the fact that one of the briefs that was really influential – is just the fact that an enormous range of bipartisan office holders – most of the living former White House counsels, I think all of the living former Attorneys General of Virginia – filed briefs saying “if you do this, if you say that receiving anything at all for setting up a meeting is enough, you've created a level of ambiguity that will shut down government.” I think that's sort of the heart of the case.

DEAN YASSKY: Thank you. We have a lot of interesting issues keyed up for discussion already. But first let me ask Jennifer Rodgers to speak. As I said before, Ms. Rodgers currently serves as Executive Director of the Center for the Advancement of Public Integrity, CAPI, at Columbia Law School. Prior to that she was an Assistant U.S. Attorney right here in the Southern District of New York. I also should have mentioned that Professor Clark previously served as a staff attorney for the Senate Judiciary Committee in Washington. As a legal realist, I feel like it's important to note both those prior positions and experiences.

MS. RODGERS: Thank you for inviting me. I'm glad to be here.

So, I want to talk about possible legislative solutions to the narrowing caused by *McDonnell*. But first I want to say one thing in response to something Allen said. Some of what I'm going to suggest as a possible solution, I think he's going to quibble with me because of his view of the constitutional concerns. Maybe if the statute that I propose goes up for review, maybe it does get struck down on constitutional concerns, but to me – and of course I got *McDonnell* entirely wrong, maybe you should not be listening to me on this – but to me the quid pro quo saves it.

It's not that you can't get a meeting with someone because you have access to a politician; it's not that you can't ingratiate yourself – you can't take something of value for that official act. The quid pro quo could save the constitutionality of the statute. In any event, I want to talk about a couple of solutions that are not directly having to do with the definition of an official act and then a couple that are. And I want to credit Professor

2018

PANEL 2

747

Matthew Stephenson of Harvard Law School for many of these ideas.

One is along the lines of what Kathleen was speaking about, not touching the statutes themselves but more prophylactic efforts. There's a statute that enables the ability of out-of-state donors to contribute in Alaska. I had not seen that before. That's an interesting idea. It wouldn't solve some of the problems of course. You are still going to have donors in state. It would certainly solve a lot of the state's money problems. So, that's kind of interesting. It would solve the problem with the *Menendez* case.²¹

The other thing you could do is put more teeth in the things like disclosure laws and gift laws. We heard that before that Virginia passed a gift law only after the *McDonnell* situation.²² Not all states have gift laws. I know somewhere between fifteen and twenty I think don't. So, that's another thing you can have, gift laws. It both gives state prosecutors more options and would solve some of these problems from the outside.

There are a couple of things you can do directly related to the definition of "official acts." On the first panel somebody mentioned the *McNally* decision and that's when the Supreme Court decided that honest services could not be fairly read into the mail wire fraud statute and as a matter of statutory destruction it wasn't covered.²³ What happened is a year later, very soon after, Congress passed Section 1346 which explicitly says honest services fraud is contained within the mail and wire fraud statutes.²⁴ So, the legislative solution is to add what the Supreme Court said wasn't covered. Reading *McDonnell* as what I think it is, a statutory interpretation case, the Court has said that these kinds of activities cannot be fairly read into the official act definition.

What you could do, *McNally*-style, is you could pass a new statute that defines "official act." You could take the language from the jury instructions, and you have to look back at what instructions looked like in the *McDonnell* case or one of the pre-

21. United States v. Menendez, No. 15-155, 2018 U.S. Dist. LEXIS 11737 (D.N.J. Jan. 24, 2018).

22. VA. CODE ANN. § 2.2-3103.1 (2018).

23. McNally v. United States, 483 U.S. 350 (1987).

24. 18 U.S.C. § 1346 (2012).

McDonnell cases where the instructions defined official acts with broader scope. It could be something like: if you are an official and you take an action in your official capacity, that's an official act. We could legislate that, and then we'll see what the Court says about it. That's what happened after *McNally*, and that to me gets you back to where you want to be as a prosecutor in terms of being able to prosecute a true quid pro quo arrangement without giving up the conduct that the *McDonnell* Court said was not fairly read into that statute.

We have a draft statute²⁵ that was circulated to get the discussion rolling, that the Dean and some of the students put together. That statute is great to get the conversation going, but basically codifies *McDonnell*. It basically lists a bunch of things that presumably the *McDonnell* Court would agree fall within its narrow interpretation of official acts. It also states that campaign contributions would not be chargeable under the bribery statute, which I don't like either as someone who favors more prosecution in this area rather than less as long as the quid pro quo element is satisfied.

25. The following draft of a bribery statute was prepared before the symposium as a topic of discussion:

- (1) Any public official who solicits, accepts or agrees to personally accept anything of value in exchange for an official act is guilty of bribery.
- (2) An "official act" includes any act which is intended to materially influence, or which does materially influence –
 - (a) A vote in any government legislative body, commission or formal decision-making entity; or
 - (b) The award of a government contract, the decision to make a government payment or a government purchase or to create any government account payable; or
 - (c) The decision to issue any rule, regulation or formal guidance document; or
 - (d) The decision to issue any license, permit or approval, or to confer any particularized benefit on a person or entity; or
 - (e) The decision to initiate or settle any government litigation; or
 - (f) The decision to release any government information not available to the general public or to provide any government service other than in the ordinary course of business.
- (3) A contribution to an authorized campaign committee is not a thing of value for purposes of paragraph (1).

2018

PANEL 2

749

A week ago, we had the first Federal conviction after *McDonnell*, that, the Mayor of Allentown, Pennsylvania, using all of these statutes that we've been talking about, for a case involving campaign contributions.²⁶ What the jury found was an explicit quid pro quo: contributions in exchange for government contracts in Allentown. We'll see what happens to that case on appeal. The jury just came back a week or so ago. But I don't think we want to decriminalize a public official who explicitly says if you donate to my campaign, I will give you the government contract.

So, getting back to the fix for *McDonnell*, you would just take one of those jury instructions that has a broader read of official act, put that definition into legislation, and we'll see what happens and if it holds up after *McDonnell* the way the 1346 statute did after *McNally*. I don't have any realistic belief that Congress is going to do something like that, but frankly that's probably slightly more likely than the Supreme Court deciding to reverse course given that *McDonnell* was eight to nothing. That may be the most aggressive way to deal with this problem.

There are a couple of other things you could do that are not quite as strong, but you could start to try to codify some of the things that *McDonnell* may totally do away with or is chipping away at. If you could, for example, try to codify a statute that says the stream of benefits theory works. This came up in the *Mendendez* case.²⁷

McDonnell didn't say anything about this and it was actually a little puzzling to some observers why the judge in the *Menendez* case took such time with this question. The defense had claimed that the stream of benefits theory was not viable after *McDonnell*. The stream of benefits theory says that, in a quid pro quo, the quo doesn't have to be explicitly identified. It can be, I'm going to give you something, and in exchange get a benefit that isn't identified at the time, but will be benefits of value over time. You could try to codify that. You could also try to make more definitive what the *McDonnell* Court said about

26. Press Release, U.S. Attorney's Office, E. Dist. of Pa., Allentown Mayor Charged in Pay to Play Scheme (July 26, 2017) (<https://www.justice.gov/usao-edpa/pr/allentown-mayor-charged-pay-play-scheme>).

27. *United States v. Menendez*, No. 15-155, 2018 U.S. Dist. LEXIS 11737 (D.N.J. Jan. 24, 2018).

this notion that the official doesn't have to do the action himself or herself. If they pressure or advise or even encourage another official to do an official act, that that counts as an official act.

Another way to strengthen the prosecution's hand in these cases would be to make either an affirmative defense or some sort of a rebuttable presumption that if the defendant substantially participates in an action, there is a presumption that that constitutes pressure or persuasion in connection with an official act, and therefore an official act itself. I think many people thought reading *McDonnell* and thinking about it, that it's unlikely that when the governor says, "this is really good stuff, I'm very impressed by it. I think we should meet with Jonnie Williams and talk with him about this product and about how we can help him," That's not actually pressure. Ultimately that issue wasn't really litigated because the government decided not to retry the *McDonnell* case but you might be able to, as I said, put in some rebuttable presumption that that is pressure, that that kind of involvement is pressure and then it's up to the defense to rebut that. So, those are some ideas. I look forward to discussing a little further.

DEAN YASSKY: Thank you to each of you. I'll start a broad question, which is: should Congress amend the honest services statute to fix *McDonnell*? Now, that presumes that something needs fixing.

Jennifer gave what I thought was a pretty clear answer to that question. She said that we absolutely do want prosecutors to be able to prosecute quid pro quos, and that *McDonnell* hampers prosecutors unduly. I don't mean to put words in your mouth. I'm wondering if Allen and Kathleen agree with that. Kathleen, I heard you say that criminal law has limited utility in combatting public corruption. Does this mean we are better off not worrying about *McDonnell*, and focusing on other means of addressing public corruption?

And Allen, you suggested that the "tawdry tales" nature of the *McDonnell* facts made it a harder case for the defense, and maybe the Court thought that was unfair. But I'm wondering whether tawdry cases make bad law, or at least bad law for cases with less tawdry and more circuitous facts, which are maybe the cases we have to worry most about. For example, in the *Silver*

2018

PANEL 2

751

prosecution, the allegation – one of the allegations, there are several – is that a doctor referred clients to a law firm which employed Silver, and in return Silver steered a research grant to the doctor.²⁸ Maybe that's a little harder for a jury to get at than a Rolex watch. In a case like that, where an elected official has an outside job and the alleged “quid” is in the form of payments to the employer – or really, in the form of opportunities made available to the employer – I'm wondering if that's an example where it would be very difficult to characterize the money that eventually winds up in the elected official's bank account as a “gift” but it would be a heck of a lot easier to get a jury to agree there was a quid pro quo. So maybe in that case, gift rules are not enough. Ok, should we fix it or not, Kathleen?

MS. CLARK: Congress ought to fix the mistake that the Supreme Court made when it decriminalized the practice of Federal officials selling access to the Federal government. I don't think it's proper for a Federal official to take something in exchange for setting up a meeting, hosting an event, or talking to another Federal official about a contract or a research program. The idea that the Supreme Court decriminalized this is problematic, and I do think that we need a fix.

I want to acknowledge how successful Allen and his colleagues have been in their advocacy, in convincing this Supreme Court that the very heart of the First Amendment is money. Not that money is a peripheral thing that becomes relevant when it becomes speech, but that spending money for this Supreme Court seems to be central to their view of democratic action and democratic participation. I think that rather than simply doing a straight fix where Congress says: “we really mean this,” it makes sense to come up with a fix that will make it harder for the Supreme Court to overturn on the basis of their embrace of money as speech. One way of doing that is using the language from other criminal statutes that have a long history. I do think it's a problem that needs to be fixed.

The last thing I'll say in response to your question is, I also think it's important to acknowledge that the criminal law is just one aspect of protecting public integrity, and I think the record

28. *United States v. Silver*, 864 F.3d 102, 106 (2d Cir. 2017).

of the last fourteen months demonstrates that criminal law is not sufficient or necessarily the most important aspect of protecting public integrity. Our criminal laws have not changed significantly on the Federal level in the last fourteen months, but what has changed is the leadership at the top and the tone set at the top. In that time, we've seen the evisceration of ethics in the White House and in the leadership of the Federal government. That's its own disaster regardless of the criminal law. The mistake that the Supreme Court made in *McDonnell* is a mistake of statutory interpretation. As Jennifer pointed out, it's not the whole ball game, but I think it's significant.

DEAN YASSKY: Allen?

MR. DICKERSON: The short answer to the question is yes, and actually my thinking tracks Professor Clark's pretty closely. I agree that the Supreme Court, and as a litigator I take this as a premise, does have this view that associative liberty – which is how I would put it – is central to the political process and that *Buckley* was correctly decided. And if that is, in fact, correct, and I think that is a correct statement of law, then I think a lot of what is worrying the Court in *McDonnell* is not the specific facts of the case. It is this doctrinal problem that if we give you, the government, what you're asking for, you are going to use it in these ways that pose First Amendment problems. So, to the extent that Congress has a vague statute that raises those problems, Congress should fix it by eliminating the vagueness that leads to those problems.

For instance, I really enjoyed the draft bribery statute that the folks at Pace put together, because it has a few things in it that are helpful toward that end. One is really making this about profiting. To the extent what we're talking about is the office holder taking money or anything of value, or on the other side, the person giving the money is doing it for a profiteering motive, I think that's helpful. And it's helpful because it eliminates all the questions about ideology. The problem is that people get together and set up some sort of nonprofit which has a particular view – let's call it the Sierra Club – and the Sierra Club raises a bunch of money and it uses it in various ways, some of which are political and some of which aren't; some of which is sent to

2018

PANEL 2

753

candidates and committees they control it in various ways and some of which is used to talk about issue. You see how this gets complicated very quickly.

If you can take that off the scale, and just make it about: if you give my law firm X amount of money, I'm going to give you a contract, no one thinks that should be legal because you're taking the First Amendment question completely off the table. I think to the extent Congress can make it easier to prosecute really bad behavior of that nature, what we actually think of as corruption, and take off the sort of ideological fellow traveler questions, that would be very much to the good.

DEAN YASSKY: Let me follow up on that just for a second. I want to ask Jennifer and Kathleen if you agree with that. The point that I want to focus on is whether campaign contributions should be distinguished from personal gain. Analytically there's no reason a campaign contribution cannot be the quid in the quid pro quo. Really, it's not hard to imagine: I will give you this contribution if you do this or if you give me this contribution, I will do X. I'm sure that happens from time to time.

But I think we intuitively recognize a big difference between a campaign contribution and giving an elected official a Rolex watch, or simply a check. To go back to the *Silver* example, it seems to me that if the doctor had written checks to Silver's campaign committee, instead of arranging for Silver to receive bonus payments from a law firm – again, that's the allegation, that's how the prosecution characterizes the facts – if it were a campaign contribution, it seems to me the U.S. Attorney would have been much less likely to prosecute, and the case would be much harder to take to a jury. The inference of quid pro quo is the same in both cases. But we balk – rightly, I think – at making that inference in the campaign contribution context because that opens the door to a huge number of possible prosecutions.

Jennifer, you said you don't want to immunize campaign contributions from quid pro quo analysis. I think, Kathleen, you said something in the same direction. But are you concerned that it becomes really difficult to distinguish true quid pro quos from what Allen called "fellow traveler" situations, and that the chilling effect that Allen talked about earlier is a real cost. In the *McDonnell* case, if pushing the supplement was in return for not

754

PACE LAW REVIEW

Vol. 38:3

\$175,000 of personal gifts but a campaign contribution, would you be comfortable with that prosecution? And would you be comfortable even letting the jury decide if that's a quid pro quo?

MS. RODGERS: Well, no because we know in the Supreme Court that a campaign contribution – Does it have to be an explicit quid pro quo?

DEAN YASSKY: Yes.

MS. RODGERS: You would have to have evidence that there was an explicit discussion, an e-mail, something like that where the Governor says or they have a communication where they say in exchange for these campaign contributions, I'm going to do the following things and those things have to be an official act.

They didn't have that evidence in *McDonnell*, but that evidence does exist sometimes. So, I don't think we want to not bring those cases. If politicians are actually dumb enough to have those explicit arrangements made, which fewer and fewer will be, then we should prosecute them.

DEAN YASSKY: Other than government engineered cases, maybe –

MS. RODGERS: In the Allentown mayor case, for example, they got a wiretap. So, the government did manage to get that covertly and listen to those conversations. That's one of the things prosecutors were saying after *McDonnell* is you've now given these people a roadmap as to how to be corrupt without getting caught. You have to be very careful about how you phrase things and make sure you are not agreeing to do anything specific and that what you are agreeing to is more in line with access and the meetings and phone calls and so on.

DEAN YASSKY: Kathleen, are you comfortable narrowly limiting prosecution of campaign contributions as bribes, so that only explicit quid pro quos would count?

MS. CLARK: Yes.

2018

PANEL 2

755

DEAN YASSKY: Even though one would think that that is really easy to avoid?

MS. CLARK: It may well be easy to avoid. I want to acknowledge that campaign contributions should be treated differently than personal enrichment. That makes sense to me. Within our current system, which requires politicians to raise money for their campaigns, there is a public interest in enabling politicians to raise money for their campaigns. There is no public interest in enabling government officials to personally enrich themselves in connection with matters before the government, period. So, yes, campaign contributions should be treated differently. There should be a higher standard for them.

What I want to come back to is the language of the Federal bribery statute itself. It prohibits corruptly accepting something of value in exchange for being influenced. I want to put emphasis on the word “corruptly.” It’s quite difficult to figure out what kind of campaign contributions actually are corrupt because we recognize that campaign contributions have some expressive value. We can see how much support a candidate has by looking at the number of campaign contributions that the candidate has received.

What does “corrupt” means in that statute? Dan Loewenstein wrote decades ago extensively on this.²⁹ That is the heart of the difficulty: figuring out what “corrupt” means. In the context of personal enrichment, it’s not hard to figure out whether something is corruptly given. But in the context of campaign contributions, it’s very difficult. If someone has come across a really clear and simple explanation, please draw it to my attention because I have not found it. I think it’s really, really tough.

DEAN YASSKY: I’ll just say that great difficulty is itself an argument against the standard. It’s very difficult for an ordinary person or an ordinary politician to decide if the contribution is going to be considered corrupt later on. That’s as bad as having the most broad version of the statute because people may be

29. See, e.g., Daniel H. Loewenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985).

burned when they thought they were acting in a legitimate fashion.

MS. RODGERS: I just have to disagree because they are exchanging something for it. Even though the campaign contribution, well, yes, you are entitled to solicit those, you're entitled to receive them. It's not the same as taking a Rolex.

The point is when you agree to exchange that for something explicitly. That's where you get into the problem. So, to me I don't think it's that challenging. We ask juries all the time to interpret these words, intentionally, willfully, knowingly, all of these terms are what a jury has to decide. So, to me it's not that complicated. If you're taking campaign contributions, don't say to the guy who writes you the check, hey, I'm going to do something for you. Here's what it's going to be and let's get explicit about it. That's all that he has to avoid.

DEAN YASSKY: I'm going to stay strong on the choice.

MR. DICKERSON: I also think that there's an important premise here, which is that *McCormick* is the law. There's a circuit split on that. In fact, there's a cert petition pending in the Supreme Court right now. The Seventh Circuit upheld Rod Blagojevich's conviction under a different theory, under the *Evans* theory.³⁰ So they didn't have to show the explicit quid pro quo agreement. I agree with the premise and that that should be the law, but that's not necessarily what the law is.

DEAN YASSKY: So, there's hope for people on the other side or there's fear.

MR. DICKERSON: Again, not the world's greatest and most sympathetic person.

DEAN YASSKY: Let me ask one more law professor question. Let's stick with *McDonnell*. Do you think it would have made a difference to the Supreme Court, and should it have

30. *United States v. Blagojevich*, 854 F.3d 918 (7th Cir. 2018).

2018

PANEL 2

757

made a difference, if UVA had done a study of the supplement, a study that showed the supplement to be super effective, so that it was very useful to Jonnie Williams. Do you think that would have made a difference? And should it have? When the Court said that a phone call is not an “official act,” was that because the phone call didn’t lead to anything?

MS. RODGERS: I guess I’m not sure what you’re asking. *McDonnell* doesn’t have to be successful in his attempt to persuade the people to do the studies in order to be guilty.

DEAN YASSKY: Indeed. I guess what I’m saying is do you think the Court would in practice have been less willing to say, well, this was not an official act, if Williams had gotten what he was seeking. It seems clear from the facts that what Williams ultimately wanted was for UVA, a part of the government, to do a study. It’s less clear what McDonnell was trying to accomplish. Maybe he really wanted to get UVA to do the study, but he was unsuccessful. Or maybe he wasn’t really serious about it. Maybe I’m wrong, but I read the opinion as saying, if all the Governor did was set up a meeting, we are not going to count that as an official action. Or do you think that if UVA had actually done the study, the Supreme Court would have said, well, McDonnell didn’t just set up a meeting, he delivered a study, a clear benefit to this guy.

MS. RODGERS: I think that’s right. I think they should have written the same opinion and then the government can decide whether the facts and the study were actually done – meaning that they have better evidence under the pressure theory so that on retrial they can try to draw that out. It shouldn’t make any difference if the jury is instructed properly. The pressure can be enough for an official act. So, you can read into the fact that it was done, that the person who actually took the relevant action was pressured, even if they say they weren’t, but, the truth is it shouldn’t make a difference.

DEAN YASSKY: If that's right, then Alexandra Shapiro was right when she said it's a very narrow holding.³¹ The holding is not as one might read it, a phone call or arrange a meeting is not an official act. The holding is we have to know more about what happened to see. If the phone call results in some benefit being conferred on the donor – or maybe I should say if the phone call is made, and then there is some benefit conferred on the donor – then *McDonnell* does allow prosecution.

MS. RODGERS: A quid pro quo can be on a phone call. A call can be good enough.

DEAN YASSKY: A phone call in which one calls and says, you should really meet with this guy. The jury is going to be asked to think more about that. Then that is a pretty narrow holding and the instructions are not necessarily all that different from what they were before, and then *McDonnell* isn't that much of a hindrance to prosecutors.

MS. CLARK: There is one part of the decision in *McDonnell* that I find really puzzling. Here's the sentence:

Simply expressing support for the research study at a meeting, . . . or sending a subordinate to such a meeting . . . does not qualify as [an official act] . . . as long as the public official does not intend to exert pressure on another official or provide advice.³²

I look at that and say: What universe do these people live in – where the boss directs you to go to the meeting and the boss has not then engaged in an official act by encouraging the subordinate to go to an official meeting?

31. Vincent L. Briccetti, Amie Ely, Alexandra Shapiro & Dan Stein, *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?*, 38 PACE L. REV. 707, 716 (2018).

32. *McDonnell*, 136 S. Ct. at 2371.

2018

PANEL 2

759

MR. DICKERSON: Putting on the hat of a defense lawyer, I think partially the record here is important. Here there were meetings, and nothing came of those meetings because the people taking the meetings thought the guy was a crank. This actually happened. The governor told his Secretary of Health and Human Resources that he should take this meeting. They have the meeting, and then the Secretary just laughs it off. So, the fact is that there wasn't any directive is a provable fact on this record.

MS. CLARK: There wasn't any direction, direction in the meeting?

MR. DICKERSON: But not direction on the actual, fundamental action taken by the commonwealth. The Article 2 power of Virginia didn't act on this request.

MS. CLARK: That Article 2 power didn't engage when the governor said, "take the meeting."

MR. DICKERSON: It's a factual question.

MS. RODGERS: I think *McDonnell* talks about holding hearings. That's one of the things. If instead of taking the meeting the governor had said, let's hold a hearing and then all of a sudden we have an official act because you held a hearing now instead of having a private meeting. I don't see any meaningful difference there that would justify one being in one bucket and one being in another bucket.

DEAN YASSKY: When Jennifer says, it's the same act either way, I feel like Allen is saying that's not quite right or at least it's not right in the sense that we understand the act differently depending on what outcome it produces. We understand a phone call to be a simple request for a meeting, and not an "official act" if the meeting is all that takes place. But in another case, where some decision comes out of that meeting, the phone call is then an act of exerting pressure, and it counts as an "official act" that can support a bribery conviction. I guess I'm wondering if that really is a sustainable place for the law to

760

PACE LAW REVIEW

Vol. 38:3

be.

MR. DICKERSON: I guess I'm suggesting two things. Not all actions are the same in two important ways. One is that formalism matters in our system. Simply making a phone call, and holding a hearing, are not commensurate actions, just as a general principle.

Second, is what you're saying and have suggested a few times in the questions, and which I think we've all responded to. At the back of this is the question of what goes to the jury. And a lot of the concern is over protecting some sort of space that's constitutionally important in its own right from the jury. There is a real skepticism of the jury in the back of all of this.

DEAN YASSKY: Does anyone out in the group have any questions because I know we only have about ten minutes or so left to go. Yes, sir.

ATTENDEE: There are other acts out there that Congress has had like the foreign corrupt practices act.³³ When I was a government employee I had to sign something saying I never took something more than \$150. My question to you is: is there some act out there already that Congress should say, okay, this applies to this particular situation rather than trying to invent something or do we say because Congress hasn't done that they really don't want to go down that road because they are all elected officials?

DEAN YASSKY: From my part, and I'm not on the panel, but I'll echo what Jennifer said, that I wouldn't bet heavily on Congress changing any of these statutes because indeed they are elected officials. They are self-interested. Like Justice Breyer they understand that democratic politics is a little messy and it is hard to clearly separate desirable from undesirable.

MS. RODGERS: That's a real problem with legislatures being unwilling to pass things that could come back to bite them. We have a real problem with that here in New York State, a

33. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2012).

2018

PANEL 2

761

constant struggle to get the legislature to pass, not even criminal statutes, but stronger disclosure provisions and other things.

DEAN YASSKY: Another question?

ATTENDEE: It's not a question; it's a comment. I'm amazed that acting in my official capacity means something different from engaging in an official act.

DEAN YASSKY: As Allen said, you are right. I've asked that question a few times because I can't figure it out either. Any others? If not, I have one more question which is about the opinion itself – the part where the Court uses an example of a neighborhood group giving an elected official a ticket to a local baseball game. I think the opinion there is definitely moving from defining an official act to defining what would count as the thing of value, even though it isn't very clear. We would all agree if the baseball ticket was an explicit bargain for a vote on a zoning matter, there is an official act there.

So, is the Court trying say there should be some threshold for things of value or is that just writing in support of the outcome?

MS. CLARK: I think that's a very sympathetic reading of the Court's decision and it may well be the right reading of it in terms of direction to Congress.

I look at that sentence – here it is: “The government's position could cast a pall of potential prosecutions over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to a ballgame.”³⁴

The less sympathetic reading of that – and my reading of it is: What counts for democracy is being able to offer tickets to ball games or make contributions, and if you can't make that threshold, you don't count. The more sympathetic reading of it is: For the purposes of the criminal law, we should impose this kind of criminal penalty only if the personal benefit rises to a certain level.

34. *McDonnell*, 136 S. Ct. at 2372.

One of the issues where I think you're right is that Congress should look at setting a threshold for the quid, the amount of the personal benefit that is at play.

MR. DICKERSON: I completely agree. I think it's hard when you're reading a unanimous opinion to determine the fault lines. But I think this was very much one of the fault lines, and I think the vote would have been different if the statute had – I'm not going to call it a materiality requirement, but if the amount that was required was material. It would say something about the corrupt bargain. I think you would have seen dissents.

DEAN YASSKY: That's interesting. That goes along with what you said earlier about the Court showing an increasing concern with the peppercorn problem, as we'll call it.

ATTENDEE: How many peppercorns amount to an amount?

MR. DICKERSON: My sense from the campaign finance laws is: that's a question where Congress would get a fair amount of deference. I think that's the short answer.

DEAN YASSKY: Jennifer, I want to touch on what you said earlier about the draft statute we prepared for the purpose of this discussion. You said you were reading that to codify *McDonnell*. I want to go back to the question of defining an official act. This draft statute says it is any act which is intended to influence a government outcome.

So, is that your reading of *McDonnell*? Are you reading it to say that we only want to criminalize a quid pro quo where the quo is a genuine effort to change policy in some way, and one way we know whether it is genuine is to look at whether the policy is changed – if they do the study in *McDonnell*, for example. Or, is it really a more formalist distinction, where we can look at the acts of the government official objectively and classify them as “official” or not. Or, is the best we can do just to let the jury decide, like the jury decides so many other things?

2018

PANEL 2

763

MS. RODGERS: If you took as a given that you weren't going to do any better than the lines that the Court drew in *McDonnell*, then it would be helpful to have something that not only lists the few things that the Court described in *McDonnell* but other things that are like that.

In that sense I think this is helpful because it does contain a list of more things than the *McDonnell* Court mentioned. My point was only that it doesn't push it. It basically says here's where *McDonnell* drew a line. These things are all alike – holding hearings, judicial proceedings, having votes in the legislative body. So, they are all akin to that as opposed to introducing someone to another person and the setting up of a meeting and that sort of thing. This helps with clarity and adding things to the list but only within the confines of what *McDonnell* said.

DEAN YASSKY: How strongly do you read the pressure part?

MR. DICKERSON: I think the pressure part is intended as a backstop. Now, I don't think that that's the only backstop that the Court would necessarily accept. But given the language that we have and given the fact that you've drafted a far less invasive statute, that that's the role it is playing. I don't envy the District Court Judge who has to write this jury instruction. But I do think it remains a jury question as to whether or not that pressure was imposed.

DEAN YASSKY: Let me put it then this way. I don't know if you're involved in the *Silver* or *Skelos*³⁵ cases but, does *McDonnell* prevent – I mean just based on the newspapers, which I recognize is necessarily terrible and incomplete but does *McDonnell* prevent conviction in those cases, do you think?

MR. DICKERSON: I don't see why, partially because there was personal benefit which I think will eliminate a lot of the objections that some of the justices may have. And also, because – we heard earlier about this argument that as long as you're

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

doing it for a good purpose it doesn't matter. I'm completely unimpressed by that argument. Part of the problem in government is deciding what to do with scarce resources. The fact a particular cause is "good" doesn't mean it's entitled to scarce resources. That's begging the entire question of legislative power. So, no, I don't think those prosecutions are foreclosed.

MS. CLARK: Let's think about this *Silver* situation. I think that's a really good example of how limited criminal prohibitions are. If you want to ensure public integrity, it would be a mistake for the state to rely on the criminal law. What we really need is a lot more disclosure about Silver's income, and the fact that he was receiving a lot of money, not because he actually worked on these legal cases, but because the Columbia clinic referred patients to the law firm.³⁶ As a footnote, I would just add that I'm surprised that there has not been more attention to the legal ethics rule that permits lawyers to have these arrangements, fee sharing, when they don't actually work on a case.³⁷ The legal ethics rule made it possible for Silver to get all this money. But perhaps that's for a different symposium.

MS. RODGERS: The problem is – and I don't know about the legal ethics side but I totally agree with you – the problem is here in New York there were some changes to the disclosure laws after the *Silver* case broke but not good enough. And there's such trouble getting those things passed. You can't get them through the governor. And you certainly can't get them through the legislature.

DEAN YASSKY: The other question that I'll just leave hanging is how much does disclosure matter when someone says, "but you took all this money for not doing anything." It's

36. See Benjamin Weiser and Susanne Craig, *Doctor at Sheldon Silver Trial Tells of Elaborate Arrangement, Years in Making*, N.Y. TIMES (Nov. 4, 2015) (Columbia University doctor referred mesothelioma patients to law firm that employed Sheldon Silver; law firm paid Silver a third of its earning in those cases, totaling \$3 million; Silver, as State Assembly Speaker, arranged for the doctor's clinic to receive \$500,000 in state grants).

37. N.Y. RULES OF PROF'L CONDUCT r. 1.5(g) (permitting lawyers within a firm to split fees in a matter without regard for the division of labor or responsibility on that matter).

2018

PANEL 2

765

right there on the form and if their response is, “yeah, that makes me smart,” then I don’t know.

Anyway, I have kept you longer than I think you contractually agreed to be here and for that I apologize. Mostly I express my gratitude for all the enlightenment you’ve shared.