# PROSECUTING CORRUPTION AFTER *MCDONNELL V. UNITED STATES*

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## INTRODUCTION

At first glance, the final day of October Term 2015 was a major blow to the fight against public corruption. "The Bob McDonnell Supreme Court ruling makes convicting politicians of corruption almost impossible," read a headline in the *Washington Post*.[1] The *New York Times*, anticipating downstream effects of the decision in *McDonnell v. United States*,[2] wrote: "Supreme Court Complicates Corruption Cases From New York to Illinois."[3] The *Wall Street Journal*, noting the potential impact on pending high-profile corruption cases, wrote that the decision "could make it harder for prosecutors to bring cases against public officials."[4] These newspaper articles are only a tiny sample of the coverage dedicated to the Supreme Court's reversal of former Virginia Governor Bob McDonnell's corruption convictions.[5] Yet these articles

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1 Chris Cillizza, *The Bob McDonnell Supreme Court Ruling Makes Convicting Politicians of Corruption Almost Impossible*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/06/27/the-bob-mcdonnell-scotus-ruling-proves-that-its-almost-impossible-to-convict-politicians-of-corruption/?utm_term=.022989fcd793.

2 136 S. Ct. 2355 (2016).

3 Eric Lipton & Benjamin Weiser, *Supreme Court Complicates Corruption Cases From New York to Illinois*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/politics/supreme-court-complicates-corruption-cases-from-new-york-to-illinois.html.

4 Brent Kendall, *Supreme Court's Bob McDonnell Ruling Could Affect Other Corruption Cases*, WALL ST. J. (June 27, 2016), https://www.wsj.com/articles/supreme-courts-bob-mcdonnell-ruling-could-affect-other-corruption-cases-1467042298.

5 *See, e.g.*, Josh Gerstein, *Supreme Court Overturns Bob McDonnell's Corruption Convictions*, POLITICO (June 27, 2016), https://www.politico.com/story/2016/06/supreme-court-overturns-bob-mcdonnells-corruption-convictions-224833; Amy Davidson Sorkin, *The Supreme Court's Bribery-Blessing McDonnell Decision*, NEW YORKER (June 27, 2016), https://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision.

illustrate a widespread concern that the *McDonnell* decision would make securing bribery convictions significantly more difficult.[6]

In *McDonnell*, the Supreme Court addressed as a matter of statutory interpretation what actions constitute an "official act"—a necessary element for proving honest services wire fraud and Hobbs Act extortion.[7] In answering this question, the Court held that taking meetings, making phone calls, and hosting events, by themselves, could not satisfy the statute's official act requirement.[8] The question now, with more than two years of hindsight, is whether these fears were well founded. Has *McDonnell*, as so many feared, made it nearly impossible for prosecutors to bring public corruption cases? The answer from the lower courts, at both the circuit and district levels, appears to be that *McDonnell* has had a limited impact.

This Note analyzes a series of federal corruption cases brought around the time of the *McDonnell* decision, to discern patterns in how lower courts have interpreted *McDonnell*, and how federal prosecutors have altered their strategies in its aftermath. In particular, this Note focuses on three high-profile public corruption cases.[9] Two of these cases involve convictions that occurred immediately preceding the *McDonnell* decision, and whose subsequent appeals relied heavily on the Court's holding in *McDonnell*.[10] The third case, the prosecution of U.S. Senator Robert Menendez from New Jersey, involves a trial that occurred wholly after the *McDonnell* decision.[11] Though these are not the only lower court cases to analyze *McDonnell*, they are representative of the high-profile corruption cases that commentators feared would be impossible in the aftermath of the decision.

These cases represent the lower courts' first attempts to apply *McDonnell*. The *McDonnell* doctrine will continue to develop with time, however the narrow official act definition has not had the dramatic effect the commentators suggested. This Note makes three arguments derived from post-*McDonnell* caselaw. The first is that the Court's definition of official act will only make a difference in a narrow subset of public corruption cases, leaving prosecutions in most others relatively unchanged by the decision.[12] Second, the Court's holding in *McDonnell* did not, as some have argued, foreclose prosecutions under a "stream of benefits"[13] theory of corruption.[14] Third, and finally, the

6 Matt Ford, *Has the Supreme Court Legalized Public Corruption?*, ATLANTIC (Oct. 19, 2017), https://www.theatlantic.com/politics/archive/2017/10/menendez-mcdonnell-supreme-court/543354/.

7 "Official act" is defined in the federal bribery statute. *See* 18 U.S.C. § 201(a)(3) (2012). In *McDonnell*, the parties agreed that the federal bribery statute would govern the definition of official act in the honest services fraud and Hobbs Act extortion counts. *See infra* notes 25–27 and accompanying text.

8 *See* McDonnell v. United States, 136 S. Ct. 2355, 2374–75 (2016).

9 *See infra* Part II.

10 *See infra* Part II.

11 *See infra* Part II.

12 *See infra* Part III.

13 Under a "stream of benefits" theory of bribery, the bribe does not have to be paid in exchange for a contemporaneous specific official act. Instead, the quid pro quo can be

chief barrier that prosecutors encounter is unchanged by *McDonnell*'s holding—that is, proving corrupt intent.[15]

This Note proceeds in five Parts. Part I provides a background discussion of the facts and holding in *McDonnell*. Part II goes on to analyze *McDonnell* through the lens of three recent federal public corruption cases, discussing how the decision has been applied to both specific act and stream of benefits prosecutions. Part III argues that the narrower official acts definition announced by the *McDonnell* Court will not result in a sea change to corruption prosecutions. Part IV argues for the resilience of the stream of benefits theory of public corruption in the aftermath of *McDonnell*. Finally, Part V argues that proving corrupt intent is still the primary obstacle to federal prosecutors, not a shift in the law caused by *McDonnell*.

## I. *McDonnell v. United States*

On January 21, 2014, federal prosecutors in the Eastern District of Virginia announced a fourteen-count indictment against former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell.[16] The first eleven counts of the indictment alleged that McDonnell "committed and conspired to commit honest-services wire fraud and extortion under color of official right."[17] The indictment represented one of the Department of Justice's most ambitious attempts to prosecute a public official for corruption in decades.[18] Up until the investigation that culminated in the indictment, McDonnell was seen as a rising star in the Republican Party.[19]

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proven through a pattern of bribes given to the public official, in exchange for the public official taking official undetermined acts when necessary at a later time. *See, e.g.*, United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) ("The quid pro quo requirement is satisfied so long as the evidence shows a '*course of conduct* of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.'" (emphasis added) (quoting United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976))); *see also* United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) ("The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific official act.").

14 *See infra* Part IV.

15 *See infra* Part V.

16 United States v. McDonnell, 64 F. Supp. 3d 783, 787 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016). The indictment alleged McDonnell committed violations of 18 U.S.C. §§ 1343, 1349 (honest services wire fraud); 18 U.S.C. § 1951(a) (Hobbs Act extortion); and 18 U.S.C. § 1014 (false statements). *McDonnell*, 136 S. Ct. at 2365.

17 *McDonnell*, 64 F. Supp. 3d at 787.

18 *See* Trip Gabriel, *Ex-Governor of Virginia Is Indicted on Charges Over Loans and Gifts*, N.Y. Times (Jan. 21, 2014), https://www.nytimes.com/2014/01/22/us/former-virginia-governor-and-his-wife-are-indicted.html.

19 *See* Elizabeth Titus & Alexander Burns, *McDonnell and Wife Indicted*, Politico (Jan. 21, 2014), https://www.politico.com/story/2014/01/bob-mcdonnell-and-wife-indicted-virginia-102441 ("Once touted as a strong potential presidential candidate, McDonnell's

The charges stemmed from the former Governor's relationship with Virginia businessman Jonnie Williams, who was the chief executive officer of Star Scientific, a Virginia-based nutrition company.[20] While in office, Governor McDonnell accepted "$175,000 in loans, gifts, and other benefits" from Williams.[21] Among the loans and gifts that federal prosecutors alleged represented bribes included a $20,000 shopping spree paid for by Williams for Mrs. McDonnell; a $50,000 loan to cover the McDonnells' real estate debts; a $15,000 payment for wedding expenses for the McDonnells' daughter; a $2380.24 golf outing that Williams did not even attend; and a $6000–$7000 Rolex watch for Governor McDonnell.[22] Far from being an exercise in generosity, prosecutors "sought to prove that [McDonnell] and his wife . . . accepted [the] money and lavish gifts in exchange for efforts to assist [Star Scientific] in securing state university testing of a dietary supplement the company had developed."[23]

At trial, the Government's underlying theory for "both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams."[24] From the outset, the parties agreed that the federal bribery statute, 18 U.S.C. § 201, would govern the definition of honest services fraud and Hobbs Act extortion.[25] Thus, for both charges prosecutors would be required to prove that Governor McDonnell took an official act within the definition of the federal bribery statute.[26] To satisfy this requirement, prosecutors "alleged that Governor McDonnell committed at least five 'official acts'" in exchange for bribes from Williams.[27] Over the

political stature rapidly diminished over the course of 2013 amid a deepening investigation into [possible corruption].").

20 *McDonnell*, 136 S. Ct. at 2361.

21 *Id.*

22 *See* United States v. McDonnell, 792 F.3d 478, 487–90 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016). This is far from a complete list of the gifts, loans, and other benefits that prosecutors alleged Williams gave to McDonnell. In its opinion affirming Governor McDonnell's conviction, the Fourth Circuit discussed in meticulous detail the extent of Williams's gift giving to Governor and Mrs. McDonnell. *See id.* at 486–93; *see also The Supreme Court, 2016 Term—Leading Cases*, 130 HARV. L. REV. 467, 467–68 (2016) [hereinafter *Leading Cases*].

23 *McDonnell*, 792 F.3d at 486; *see also McDonnell*, 136 S. Ct. at 2361.

24 *McDonnell*, 136 S. Ct. at 2365 (first citing Skilling v. United States, 561 U.S. 358, 404 (2010); and then citing Evans v. United States, 504 U.S. 255, 260, 269 (1992)).

25 *Id.* The federal bribery statute makes it a crime when a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.
18 U.S.C. § 201(b)(2) (2012).

26 *See McDonnell*, 136 S. Ct. at 2365. The bribery statute defines an official act as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

27 *McDonnell*, 136 S. Ct. at 2365. The five alleged official acts were:

course of the five-week jury trial, the evidence of these five alleged official acts primarily involved McDonnell's actions setting up meetings between Star Scientific and state officials.[28] Defense counsel argued that setting up meetings with state officials or university researchers was the normal course of business in the Governor's office, and that McDonnell did not expect "his staff 'to do anything other than to meet' with Williams."[29] In essence, McDonnell's defense was that these actions were exactly the kind of constituent services expected of public officials.

After closing arguments, the district court instructed the jury that they must find whether McDonnell "agreed 'to accept a thing of value in exchange for official action.'"[30] The court then reiterated the five specific official acts alleged in the indictment, and read the 18 U.S.C. § 201 definition of official act to the jury.[31] Additionally, the court read the Government's requested instruction to the jury: "[T]he term encompassed 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'"[32] The court rejected McDonnell's proposed instruction that "merely arranging a meeting, attending an event, hosting a reception, or making a speech" were insufficient to constitute an official act under § 201.[33]

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> (1) "arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc";
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> (2) "hosting, and . . . attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients";
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> (3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine";
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> (4) "promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion"; and
>
> (5) "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs."

*Id.* at 2365–66 (alterations in original) (citing Indictment at ¶ 111, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 14-cr-12)). Anatabloc, or anatabine, was the nutritional supplement developed by Williams's company. *See id.* at 2362.

28 *Id.* at 2365–66.

29 *Id.* at 2366.

30 *Id.* (quoting Supplemental Joint Appendix at 68, *McDonnell*, 136 S. Ct. 2355 (No. 15-474).

31 *Id.* The five alleged official acts "involved arranging meetings, hosting events, and contacting other government officials." *Id.*

32 *Id.* (quoting Supplemental Joint Appendix, *supra* note 30, at 70).

33 *Id.* (quoting United States v. McDonnell, 792 F.3d 478, 513 (4th Cir. 2015)) (noting McDonnell's proposed instruction was based on the argument that these actions did not involve "matters pending before the government").

The jury convicted McDonnell on both the honest services fraud and Hobbs Act extortion charges.[34] McDonnell appealed to the Fourth Circuit on the grounds (1) that the district court's definition of official acts was overly broad, (2) that the statutes of conviction were unconstitutionally vague, and (3) that the evidence against him was insufficient to sustain a conviction.[35] The court of appeals rejected McDonnell's arguments, and upheld the district court's jury instructions.[36]

The Supreme Court granted a writ of certiorari to clarify the meaning of official act, and reversed the Fourth Circuit.[37] Writing for a unanimous Court, Chief Justice Roberts rejected the sweeping language used in the official act jury instruction.[38] The Court's narrow interpretation of § 201(a)(3) created two requirements for proving an official act. First, the Government "must identify a question, matter, cause, suit, proceeding or controversy involving the formal exercise of governmental power."[39] Second, "the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so."[40] The second prong can be satisfied if the official (1) makes a "decision or action on a qualifying step" toward an official action,[41] (2) uses his position to "exert pressure" on another official to take an official act,[42] or (3) advises another official, "knowing or intending that such advice will form the basis for an 'official act' by [that] official."[43]

The decision to narrow the definition of official act rested primarily on the Court's interpretation of the text of the federal bribery statute.[44] Chief Justice Roberts coupled the statutory interpretation with a discussion of the Court's decision in *United States v. Sun-Diamond Growers of California*.[45] That case compelled the conclusion that "something more" is required before "hosting an event, meeting with other officials, or speaking with interested

34 *Id.* McDonnell was acquitted on the false statement charges. *Id.*

35 *See id.* at 2367. The Fourth Circuit also addressed issues relating to severance, voir dire, evidentiary rulings, and exclusion of expert testimony. *See McDonnell*, 792 F.3d at 494, 496, 498, 499. These issues, however, were not among those appealed to the Supreme Court. *See McDonnell*, 136 S. Ct. at 2367.

36 *See McDonnell*, 792 F.3d at 486.

37 *See McDonnell*, 136 S. Ct. at 2361, 2375.

38 *Id.* at 2367–68 ("[W]e reject the Government's reading of § 201(a)(3) and adopt a more bounded interpretation of 'official act.' Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'").

39 *Id.* at 2374 (internal quotations omitted).

40 *Id.* at 2372.

41 *Id.* at 2370.

42 *Id.* at 2372.

43 *Id.*; *see also Leading Cases*, *supra* note 22, at 475–76.

44 *See McDonnell*, 136 S. Ct. at 2368–70 (analyzing the text and structure of the federal bribery statute). For a discussion of Chief Justice Roberts's narrow reading of the bribery statute in *McDonnell*, see Pratik A. Shah, *The Chief Justice and Statutory Construction: Holding the Government's Feet to the Fire*, 38 CARDOZO L. REV. 573, 579–82 (2016).

45 526 U.S. 398 (1999); *see McDonnell*, 136 S. Ct. at 2370 (discussing the case).

parties" could constitute an official act.[46] In addition to precedent, the Court voiced concern for the constitutional implications of the Government's broad reading of § 201(a)(3).[47] The Court feared such an interpretation of official act would have a chilling effect on democratic participation.[48] Moreover, the Court noted that a broader interpretation raises both notice and federalism concerns.[49] These considerations further convinced the Court that they should give effect to their interpretation of the bribery statute, and thus narrow the official acts definition.[50]

The Court then identified three instructions that the district court *should have* given the jury.[51] First, the trial judge should have instructed the jury that they must identify a question or matter within the meaning of § 201(a)(3).[52] Second, the district court should have instructed the jury that the question or matter they identify must be something "specific and focused" that either is, or will be, before the public official.[53] Third, the Court held that the jury should have been instructed that "merely" setting up a meeting or hosting an event "does not count" as a decision on the identified question or matter.[54]

After suggesting these narrower official acts instructions, the Court rejected McDonnell's vagueness and insufficient evidence arguments.[55] Chief Justice Roberts closed the opinion with an eye toward the inevitable criticism the decision would receive. The Court's concern, he wrote, was with the "broader legal implications of the Government's boundless interpretation of the federal bribery statute" and "not with tawdry tales of Ferraris, Rolexes, and ball gowns."[56] The final line of the opinion provided one assurance: the narrow "interpretation of the term 'official act' leaves ample room for prosecuting corruption."[57]

The Chief Justice was correct in anticipating criticism of the decision.[58] The assurance that prosecutors could still go after the crooked official was

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46 *McDonnell*, 136 S. Ct. at 2370.

47 *See id.* at 2372 ("In addition to being inconsistent with both text and precedent, the Government's expansive interpretation of 'official act' would raise significant constitutional concerns.").

48 *See id.*

49 *See id.* at 2373.

50 *See id.* at 2375 ("[This] 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.").

51 *Id.* at 2374–75.

52 *Id.* at 2374.

53 *See id.*

54 *Id.* at 2375.

55 *See id.* (stating that the vagueness concerns were alleviated by the narrower interpretation, and that the insufficient evidence argument was something the court of appeals would have to address on remand, in light of the new official acts definition).

56 *Id.*

57 *Id.*

58 This is not to say that the reaction to the Court's decision was across the board negative. To the contrary, several major news outlets published opinion pieces praising

met with doubt from many commentators. Criticism, however, ranged from those who thought *McDonnell* signaled an age of legalized bribery,[59] to those who believed that the decision would require prosecutors to simply alter the way they framed corruption cases.[60] The remainder of this Note examines whether these criticisms were well founded.

## II. Corruption Cases After *McDonnell*

This Part of the Note focuses on three corruption cases that in whole or in part occurred after the Court's decision in *McDonnell*. The use of these cases does require an important caveat: only one of the cases referenced has come to a decisive endpoint. At the time of this writing, two of the three cases examined in this part are ongoing, either on appeal at the circuit court or back at the district court for retrial. Despite the unsettled nature of these cases, they provide valuable insight into how lower courts and prosecutors are grappling with post-*McDonnell* corruption prosecutions.

### *A.* United States v. Silver

On November 30, 2015, just under seven months prior to the Supreme Court's decision in *McDonnell*, a jury in the Southern District of New York convicted Sheldon Silver of honest services fraud and Hobbs Act extortion.[61] Up until his indictment, Silver had been the powerful Speaker of the Assembly in New York.[62] The indictment alleged two schemes, each with the same general structure: "[I]n exchange for official actions, Silver received bribes and kickbacks in the form of referral fees from third-party law firms."[63] Silver was convicted on all seven counts against him, and sentenced to twelve years of imprisonment.[64] All of this occurred *before* the decision in *McDonnell v. United States.*

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the decision's protection of the democratic process. *See, e.g.*, Robert Gebelhoff, *Why the Supreme Court Is Right to Overturn McDonnell's Corruption Conviction*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/06/27/why-the-supreme-court-is-right-to-overturn-mcdonnells-corruption-conviction/?utm_term=.29e7e610b87b.

59 *See, e.g.*, Davidson Sorkin, *supra* note 5; Josh Gerstein, *McDonnell Ruling a Big Blow to Corruption Law*, POLITICO (June 27, 2016), https://www.politico.com/story/2016/06/mcdonnell-ruling-seen-blessing-pay-to-play-224855.

60 *See, e.g.*, Dante Ramos, *Va. Ex-Governor Wins at Supreme Court, but Corruption Is Still Illegal*, BOS. GLOBE (June 27, 2016), https://www.bostonglobe.com/opinion/2016/06/27/governor-wins-supreme-court-but-corruption-still-illegal/1UHYwo06otnV9wkXgU0gLJ/story.html.

61 *See* United States v. Silver, 864 F.3d 102, 110–12 (2d Cir. 2017).

62 *Id.* at 106 ("As Speaker, Silver was one of the most powerful public officials in the State of New York, exercising significant control over the Assembly and state legislative matters.").

63 *Id.*

64 *Id.* at 112.

In post-trial motions, Silver sought to continue his release on bail and stay other penalties, relying on the issues raised in the briefs and at oral argument in *McDonnell*.[65] The district court, recognizing that *McDonnell* had obvious implications for Silver's case, granted the motion.[66] After the *McDonnell* decision and on appeal to the Second Circuit, Silver argued that the jury instructions for the honest services fraud and Hobbs Act extortion in his case were erroneous.[67] Judge José Cabranes, writing for the three judge panel, concluded that the instructions were in fact erroneous in light of *McDonnell*, and vacated the conviction and remanded for retrial.[68]

In reaching this result, the court undertook a thorough examination of the Supreme Court's decision in *McDonnell*. The district court's official act instruction "encompass[ed] any action taken or to be taken under color of official authority."[69] This, the circuit court said, was "overbroad."[70] After examining the record, the court only found one possible action by Silver, within the statute of limitations, that fell under *McDonnell*'s narrow official act definition. This was a relatively meaningless Assembly resolution honoring one of Silver's conspirators.[71]

Of note, the court placed importance on the fact that "the District Court's charge did not contain any of the three instructions specified in *McDonnell*."[72] This suggests that after *McDonnell*, district courts must include all three limiting instructions in order for a conviction to survive appellate review. Courts of appeal, then, will look for these instructions as a threshold matter. Another takeaway from *Silver* is that *McDonnell*'s narrow official acts definition applies even when the potential for a chilling effect on democratic participation is wholly absent. In *McDonnell*, the relationship between McDonnell and Williams began with, at a minimum, the appearance of a political backdrop.[73] In contrast, the bribes to Silver were funneled to him through his positions with law and real estate development firms.[74] The

65 *Id.* at 113. *McDonnell* was argued before the Supreme Court on April 27, 2016. *See* McDonnell v. United States, 136 S. Ct. 2355, 2355 (2016). The district court sentenced Silver on May 4, 2016, and entered its final judgment on May 10, 2016. *Silver*, 864 F.3d at 112–13.

66 *Silver*, 864 F.3d at 113.

67 *Id.*

68 *Id.* at 124.

69 *Id.* at 118 (emphasis omitted) (internal quotations omitted).

70 *Id.*

71 *See id.* at 120. There were more sinister official acts by Silver, but only the Assembly resolution fell within the statute of limitations. The Second Circuit made clear that the only official act required to sustain a conviction was one that (1) fell within the *McDonnell* framework, (2) fell within the statute of limitations, and (3) was an "action in furtherance of the scheme." *Id.* at 121–22.

72 *Id.* at 118; *see also id.* at 117 (listing the three instructions proposed by the *McDonnell* Court); *supra* text accompanying notes 51–53.

73 *See* McDonnell v. United States, 136 S. Ct. 2355, 2362 (2016) ("McDonnell first met Williams . . . when Williams offered McDonnell transportation on his private airplane to assist with McDonnell's election campaign.").

74 *See Silver*, 864 F.3d at 106–09.

bribes were paid to Silver because of his political position, but they were not paid through political channels.[75] The lesson from this is that, at least in the Second Circuit, any conviction relying on official acts will require adherence to the strictures of *McDonnell*'s holding.

In July 2018, more than two and a half years after his initial conviction, Sheldon Silver was again found guilty and sentenced to seven years in prison—a conviction that relied on largely the same evidence as was presented in his first trial.[76]

### *B.* United States v. Fattah

The second case worth examining is the corruption prosecution of former U.S. Congressman Chaka Fattah from Philadelphia. Fattah had served in the House of Representatives for over two decades at the time of his twenty-two count federal indictment alleging pervasive corruption during his tenure.[77] The indictment, returned in July 2015, included counts of honest services fraud and bribery.[78] On June 21, 2017, just six days before the decision in *McDonnell*, a jury found Fattah guilty on all counts.[79] Like Silver, Fattah filed a post-trial motion seeking a judgment of acquittal relying on the Court's decision in *McDonnell*.[80]

In a lengthy opinion, the district court recognized that the jury instructions were erroneous in light of *McDonnell*, yet found that the error was harmless.[81] Arriving at this holding, the court pointed to two alleged official acts that "without any doubt" satisfied *McDonnell*'s requirements.[82] First, during the trial, prosecutors presented evidence that Fattah lobbied both Senator Bob Casey and President Barack Obama to nominate his coconspirator as an ambassador.[83] In his post-trial motion, Fattah argued that "he did not engage in official acts because as a Congressman he had no role in the nam-

75 This is not an ironclad distinction, since some of McDonnell's bribes were paid directly in the form of loans and gifts unrelated to campaign events. However, the initial alleged bribery with McDonnell had political origins, whereas with Silver it did not.

76 *See* Benjamin Weiser, *Sheldon Silver, Ex-New York Assembly Speaker, Gets 7-Year Prison Sentence*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-corruption.html.

77 United States v. Fattah, 223 F. Supp. 3d 336, 341–42 (E.D. Pa. 2016) (federal prosecutors alleged Fattah's involvement in five different criminal schemes), *aff'd in part and rev'd in part*, 902 F.3d 197 (3d Cir. 2018).

78 *Id.*

79 *See id.* at 342, 360.

80 *See id.* at 359–60.

81 *Id.* at 365–67.

82 *Id.* at 367.

83 *See id.* at 362. The opinion thoroughly discusses the extreme efforts Fattah took to secure the ambassadorship. Among other efforts, Fattah wrote a letter strongly recommending the coconspirator to Senator Casey. Fattah then "set up a difficult-to-obtain telephone conference . . . with . . . the President's deputy chief of staff." *Id.* To cap these efforts off, Fattah hand delivered a "glowing letter of recommendation" directly to President Obama. *Id.*

ing of ambassadors."[84] The district court rejected this argument, pointing to the language in *McDonnell* that made it an official act to exert pressure on another official with the intent that that official would take an official act.[85] In reaching this conclusion, the district court distinguished between sending a pro forma letter of support, and engaging in the extensive efforts that Fattah took to secure an ambassadorship for his coconspirator.[86] Fattah was not "immunize[d]" by "[t]he fact that the House of Representatives has no constitutional responsibility" to appoint ambassadors.[87]

The second official act that the district court identified was when Fattah hired the same coconspirator's girlfriend to work in his congressional office.[88] With respect to this official act, the district court found that *McDonnell*'s requirements were satisfied by the expenditure of taxpayer funds to hire the woman onto Fattah's staff.[89] Unlike his efforts to obtain an ambassadorship for the coconspirator, hiring the girlfriend "solely involved [Fattah's] own exercise of governmental power."[90]

The Third Circuit was less sure that the jury instruction errors were harmless, and reversed Fattah's conviction on several bribery related charges. In doing so, the court took a similar tone to the Second Circuit's reversal of Silver's convictions. While at least one of the three charged acts was "clearly an official act," the court could not be sure that the jury solely considered that act when reaching its verdict.[91] As it remanded for retrial on these counts, the Third Circuit provided a useful discussion of *McDonnell*. First, the court noted a meeting Fattah arranged between his coconspirator and the U.S. Trade Representative.[92] This, the court said, was plainly the type of activity that *McDonnell* placed outside the definition of an official act.[93] If *McDonnell* was clear on anything, it was that a meeting, standing alone, could not constitute an official act.

84 *Id.* Here, Fattah's argument was based on the Constitution's assignment of the power to nominate ambassadors to the President, and the power to confirm those nominees to the Senate, and not the House of Representatives of which he was a member. *See* U.S. Const. art. II, § 2, cl. 2.

85 *Fattah*, 223 F. Supp. 3d at 362 (citing McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016)).

86 *See id.*

87 *Id.*

88 *See id.* at 362–63 ("Fattah's decision to employ her was clearly a formal and focused exercise of governmental power . . . .").

89 *See id.* at 363.

90 *Id.*

91 United States v. Fattah, 902 F.3d 197, 238 (3d Cir. 2018). The court further explained that "[b]ecause the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt." *Id.* at 240.

92 *See id.* at 239. Interestingly, the district court opinion made relatively little note of this meeting. *See Fattah*, 223 F. Supp. 3d at 363 n.14. But as the Third Circuit noted, a fair reading of the indictment would lead a juror to believe this meeting was one of the alleged official acts. *See Fattah*, 902 F.3d at 239.

93 *See Fattah*, 902 F.3d at 239.

While the court of appeals found the meeting to clearly fall outside *McDonnell*'s definition of official act, it found Fattah's decision to hire the girlfriend of his coconspirator to clearly meet the *McDonnell* requirements.[94] Agreeing with the district court on this issue, the Third Circuit wrote that "[o]fficial acts need not be momentous decisions—or even notable ones."[95] Despite this obvious official act, the imprecise jury instructions required remand.[96]

Most notable was the appellate court's discussion of Fattah's attempt to secure an ambassadorship for his coconspirator. The court reiterated the idea that the meetings with Senator Casey and President Obama were not, by themselves, official acts. Yet they *might* be "impermissible attempts 'to pressure or advise another official on a pending matter.'"[97] The decision, however, is inherently "fact-intensive" and "falls within the domain of a properly instructed jury."[98] The "cold record" did not afford the court the ability to decide, "just how forceful a strongly worded letter of recommendation must be" before it is considered impermissible pressure.[99] Importantly, like the district court, the Third Circuit placed significance on the hand delivered letter to President Obama.[100] The Third Circuit also made clear that this type of "pressure" analysis should look at all of the relevant conduct, and not isolate each individual action.[101] As of this writing it remains to be seen if Fattah will be retried on the vacated counts. Regardless, the Third Circuit's opinion added clarity to the increasing body of post-*McDonnell* corruption caselaw. Like *Silver*, the reversal in *Fattah* stemmed from errors in the jury instructions, and not from a fatal flaw in the Government's proof.

### *C.* United States v. Menendez

The third case that sheds some light on *McDonnell*'s impact is the prosecution of U.S. Senator Robert Menendez. In late 2016, after the Court's decision in *McDonnell*, federal prosecutors indicted the sitting New Jersey Senator on a number of corruption charges.[102] Among the counts listed in the

94 *See id.* at 241.

95 *Id.*

96 *See id.* at 242.

97 *Id.* at 241 (quoting McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016)).

98 *Id.*

99 *Id.*

100 *See id.* at 244 n.17 ("While we express doubt that some of Fattah's efforts concerning the ambassadorship are, when considered in isolation, enough to cross that line, a properly instructed jury considering all of the facts in context might nonetheless conclude that other efforts—such as a hand-delivered letter to the President of the United States—indeed crossed that line.").

101 *See id.* ("[A] jury might find that *in the aggregate*, three emails, two letters, and a phone call crossed the line and therefore constituted a 'decision or action' on the identified matter of appointment." (emphasis added)).

102 *See generally* Indictment, United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018) (No. 15-cr-155). *See also* Paul Kane & Carol D. Leonnig, *Sen. Robert Menendez Indicted on Corruption Charges*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/polit-

indictment were violations of the federal bribery statute and honest services fraud.[103] The Government alleged that Menendez engaged in a pattern of corruption with his longtime friend, a Florida physician named Salomon Melgen. The case went to trial in late 2017, and eventually resulted in a deadlocked jury that required the judge to declare a mistrial.[104] In January 2018, the federal judge hearing the case granted in part, and denied in part, Menendez's motion to dismiss the charges against him.[105] Following the dismissal of several of the charges against the Senator, the Department of Justice decided to drop its case against Menendez.[106]

Although the prosecution of Senator Menendez did not result in a conviction, it offers a useful case study in how prosecutors can bring federal corruption cases after the *McDonnell* decision. Unlike the cases against Silver and Fattah, the entire Menendez prosecution occurred in the aftermath of *McDonnell*. The case against Menendez was the highest profile corruption prosecution undertaken since the *McDonnell* decision. Therefore, it may indicate how *McDonnell* has changed prosecutorial strategy at both the indictment and trial stages.

The case against Menendez alleged a long-running conspiracy between the Senator and Melgen. The trial judge, in denying part of the motion to dismiss, focused his analysis on four specific alleged official acts.[107] The first official act was Menendez's "visa-related advocacy" on behalf of Melgen's noncitizen girlfriend.[108] The second was the Senator's advocacy related to a Medicare billing dispute between Melgen and the Department of Health and Human Services ("HHS").[109] Third was Menendez's advocacy related to a contract between a company owned by Melgen and the Dominican Republic government for port security services.[110] Fourth, and finally, was Menendez's advocacy on behalf of Melgen to the State Department, opposing a gift of security equipment to the Dominican Republic by the United States, which would have rendered Melgen's previously mentioned contract useless.[111]

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ics/menendez-expected-to-be-indicted-as-soon-as-wednesday-sources-say/2015/04/01/623024c6-d86e-11e4-8103-fa84725dbf9d_story.html?utm_term=.D4f440495f02.

103 *See* Indictment, *supra* note 102; *see also* Superseding Indictment, *Menendez*, 291 F. Supp. 3d 606 (No. 15-cr-155).

104 *See, e.g.*, Laura Jarrett & Sarah Jorgensen, *Bob Menendez Trial Ends in Mistrial After Jury Deadlocks*, CNN (Nov. 16, 2017), https://www.cnn.com/2017/11/16/politics/bob-menendez-trial/index.html.

105 *See Menendez*, 291 F. Supp. 3d at 623 (dismissing several counts, but denying Menendez's motion to dismiss on official act grounds).

106 *See* Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. Times (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html.

107 *See Menendez*, 291 F. Supp. 3d at 617.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

The trial judge, responding to Menendez's claim that the government could not prove an official act, determined that a rational juror could have found all four of the actions to be official acts.[112] The analysis in the district judge's decision, like that by the district judge in *Fattah*, suggests that lower courts will limit *McDonnell*'s impact to a narrow subset of cases. In *Menendez*, the judge held that interbranch lobbying can qualify as an official act under *McDonnell*.[113] Similar to the discussion of the ambassadorship in *Fattah*, the decision that lobbying an executive branch official by a member of Congress can be an official act emphasized the *McDonnell* holding that the charged official does not himself need to "make a decision or take an action."[114] In Menendez's case, the interbranch lobbying, according to the trial judge, fit with *McDonnell*'s language that the official act requirement can be satisfied when an official "exerts pressure" on another official to take an act, or "provides advice" with the knowledge and intent that the advice will form the basis of an official act.[115]

The trial court's discussion of *McDonnell*'s holding in relation to interbranch lobbying is important in another way. Among the official acts that the trial court said a rational juror could find was Menendez's lobbying of various HHS and State Department officials.[116] In the case of Menendez's lobbying of HHS officials to resolve a Medicare billing dispute for Melgen, the official acts were a series of phone calls between Menendez's staff and HHS officials and an in-person meeting between Menendez and the Secretary of Health and Human Services.[117] The court, in denying the motion to dismiss on official act grounds, focused on the meeting between Menendez and the Secretary. Similarly, with regard to Menendez's lobbying of State Department officials on Melgen's behalf, the court noted the fact that Menendez met with an official "of ambassadorial rank."[118] The focus on Menendez's meetings with high-level officials suggests that this kind of out-of-the-ordinary action by a high-level public official may be sufficient to constitute "pressure" within the meaning of *McDonnell*.

## III. *McDonnell*'s Definition of "Official Act" Will Have Limited Impact

In the aftermath of *McDonnell*, commentators suggested that the Court's narrowed definition of official act would spell an end to prosecuting corrupt public officials.[119] These fears focused on the Court's holding in *McDonnell*

112 *Id.* at 617 ("In this case, there are four incidents from which a rational juror could conclude official acts arise . . . .").

113 *See id.* at 618–19.

114 *See id.* at 618.

115 *Id.*

116 *See id.* at 617.

117 *See id.* (noting the intent to exert pressure on these other officials to take an official act).

118 *Id.*

119 *See supra* notes 1–6 and accompanying text.

too generally, failing to recognize the intricacies of the Court's reasoning. The unanimous opinion by Chief Justice Roberts left more than enough room for federal prosecutors to do their jobs. Moreover, lower court decisions, including decisions made at the trial court level discussed above, hint at two distinct reasons *McDonnell* is not the death knell that commentators predicted.

The first reason is that lower courts have readily found charged public officials to have "exert[ed] pressure on *another* official" to take an official act.[120] This method of satisfying *McDonnell*'s requirement that the "official make a decision or take an action"[121] is what this Note will refer to as the "pressure theory."[122] This is most apparent in *Fattah* and *Menendez*, where the trial courts decided that persistent lobbying, albeit at a high level of government, constituted pressure with the intent to trigger an official act under the Court's holding in *McDonnell*. In *Fattah*, the Third Circuit suggested that Representative Fattah's advocacy to Senator Casey and President Obama, aimed at securing an ambassadorship for a coconspirator, could satisfy *McDonnell*'s official act requirement.[123] In *Menendez*, the district judge held that a reasonable juror could find that Senator Menendez's meeting with the Secretary of Health and Human Services—to advocate for his coconspirator in a Medicare billing dispute—constituted an official act.[124] This finding in *Menendez* was explicitly based on the *McDonnell* language about the charged official exerting pressure on another.[125]

At first glance both *Fattah* and *Menendez* may seem to set a high bar for finding an official act using *McDonnell*'s pressure theory. After all, Fattah hand delivered a letter to President Obama,[126] and Senator Menendez went out of his way to schedule an in-person meeting with a cabinet member, each with the alleged hope of triggering an official act. But it would be a mistake to think that the pressure theory is difficult to satisfy, for two reasons. First, the district court in *Fattah* distinguished between sending a pro forma letter on behalf of an individual—something an elected representative might be expected to do frequently—and engaging in a more involved form of lobbying another high-level government official in order pressure them into a

120 McDonnell v. United States, 136 S. Ct. 2355, 2370 (2016). The Court made clear, however, that the official would have to *intend* to exert pressure. *Id.* at 2370–71. Thus, the pressure theory contains a mens rea element. *See id.*

121 *Id.* at 2371.

122 Though *McDonnell* and subsequent cases have not expressly used the term pressure theory, the lower courts in the cases discussed in Part II have taken seriously the ability to satisfy the official act requirement through evidence that proves the corrupt official exerted pressure on another official with the intent that the other official take an official act.

123 *See* United States v. Fattah, 902 F.3d 197, 244 (3d Cir. 2018).

124 *See* United States v. Menendez, 291 F. Supp. 3d 606, 617 (D.N.J. 2018).

125 *See id.*

126 *See Fattah*, 902 F.3d at 244 n.17 (placing significant weight on the unique nature of Fattah's conduct).

decision.[127] The Third Circuit, noting Fattah's extensive advocacy on behalf of his coconspirator, implicitly agreed with the district court on this point.[128] If this line of reasoning develops across circuits, the question may become whether the official advocated in a manner out of the ordinary (i.e., more than pro forma) to pressure another official to take an action. At the very least, this gives prosecutors a baseline level of advocacy to judge the charged official's conduct against.

The second reason that *McDonnell*'s pressure theory will likely be satisfied in many cases flows from common sense. Why is the coconspirator paying the bribe after all? It is so that the public official makes calls, sends letters, takes meetings, and otherwise uses his or her influence in a manner above and beyond the typical constituent services he or she performs. Why pay the bribe if you could simply write your congressman to achieve the necessary official act? In bona fide cases of corruption, the quid is not paid so that the official staffs out the quo. If the corrupt official cannot take the official act under his or her own authority, then he or she will necessarily have to exert influence over another official. This will likely involve taking on the matter personally, which inherently makes any pressure the official exerts well above that of pro forma advocacy. The pressure theory, moreover, does not necessarily require the corrupt official to have leverage over the other official. In Fattah's case, he did not have any actual leverage over Senator Casey or President Obama. Yet the Third Circuit held that a properly instructed jury may conclude that these actions satisfied *McDonnell*'s pressure theory. This further evidences the idea that when the corrupt official personally gets involved—through a meeting, phone call, or other advocacy—in triggering the official act, then *McDonnell* may be satisfied.

There are, of course, limits to this use of the pressure theory.[129] The Court in *McDonnell* noted that the pressure theory only works when the official exerting pressure uses "his official position."[130] Thus, an official facing a pressure theory prosecution may argue that he was not using his official position when exerting pressure on another official to take an action. Another key criticism is that while the pressure theory may work well in corruption cases against high-level officials, it may not help prove an official act in cases

127 *See* United States v. Fattah, 223 F. Supp. 3d 336, 362 (E.D. Pa. 2016) ("[Fattah] did not simply sign routine or pro forma letters of support . . . .").

128 *See Fattah*, 902 F.3d at 244 n.17. *But see id.* at 241 ("Official acts need not be momentous decisions—or even notable ones.").

129 For an argument that the pressure theory will not be effective, see Eugene Temchenko, Note, *A First Amendment Right to Corrupt Your Politician*, 103 CORNELL L. REV. 465, 478–79 (2018).

130 McDonnell v. United States, 136 S. Ct. 2355, 2370 (2016) ("A public official may also make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy' by *using his official position* to exert pressure on *another* official to perform an 'official act.' In addition, if a public official *uses his official position* to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official, that too can qualify as a decision or action for purposes of § 201(a)(3)." (first and third emphases added)).

against mid-level or low-level public officials. Demanding a personal meeting with the Secretary of Health and Human Services, or handing a letter directly to the President is one thing. Demanding a personal meeting with a member of the state liquor board, or hand delivering a letter to the director of the regional development authority, might be another in the eyes of a juror. Moreover, the pressure theory requires prosecutors prove the official acted with the intent to influence.[131] What is unclear is whether this will require significantly more evidence than prosecutors would already need to prove the separate intent element in the honest services and Hobbs Act extortion statutes.[132] More caselaw is needed before the boundaries of the pressure theory become clear. But two years after *McDonnell*, it has the potential to be a major asset to federal prosecutors.

The second reason that *McDonnell*'s narrow official act definition will have a limited impact is because it primarily changes how prosecutors frame their theory of the case, rather than changing the underlying evidence they will rely on. *McDonnell*'s impact will be most prevalent in cases where the individual paying the bribe does not actually achieve their desired outcome. Remember, in *McDonnell*, Jonnie Williams never received his scientific study. In *Fattah*, the coconspirator was never nominated to be an ambassador. In *Menendez*, Melgen's billing dispute with Medicare was not resolved by Senator Menendez's intervention. Proving that an official act occurred, within the meaning of *McDonnell*, will obviously be easier when the official act actually occurs.[133]

*McDonnell* makes clear, however, that there is no requirement, at least under the pressure theory, that the official act actually occurs.[134] If the official act requirement can be satisfied by proving that the official simply *agreed* to make a decision or take an action on a qualifying matter, then what *McDonnell* really changed is how prosecutors frame their case. After *McDonnell*, prosecutors will no longer argue that a meeting, phone call, or event was *itself* an official act. Instead, *McDonnell* offers prosecutors two ways to argue that those actions represent evidence of corruption. The first is to argue that the meeting, phone call, or event is evidence of the agreement to make a

131 *See id.* at 2370–71; Temchenko, *supra* note 129, at 478.

132 *See Leading Cases*, *supra* note 22, at 473–74 (discussing the intent elements in those statutes); *see also infra* Part V.

133 *See* Arlo Devlin-Brown & Stephen Dee, *Introduction: The Shifting Sands of Public Corruption*, 121 PENN ST. L. REV. 979, 985–86 (2017) ("The reality is that *McDonnell* only precludes prosecutions where the government's theory is that the public official agreed to provide preferential access rather than an actual exercise of governmental power.").

134 *See* McDonnell, 136 S. Ct. at 2370–71 ("[A] public official is not required to actually make a decision or take an action on a question, matter, cause, suit, proceeding or controversy; it is enough that the official agree to do so. The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain. Nor must the public official in fact intend to perform the official act, so long as he agrees to do so." (internal quotations omitted) (citation omitted)); *see also* United States v. Fattah, 902 F.3d 197, 246 (3d Cir. 2018) (affirming Fattah's conviction on a count that alleged his *agreement* to misappropriate funds).

decision or take an action.[135] The second method is for a prosecutor to argue those actions are evidence of an effort to exert pressure on another official to take an official act.[136] The evidence would likely remain the same. What changes is how the prosecution frames the case.

The sameness of the evidence before and after the decision is important to understanding the impact of *McDonnell*. In the aftermath of *McDonnell* prosecutors still brought high-profile corruption cases, and the evidence largely mirrored the type of evidence used in similar cases preceding *McDonnell*.[137] In fact, immediately following the *McDonnell* decision, federal prosecutors announced their intent to retry Governor McDonnell.[138] The prosecution would have presumably used the evidence of meetings, phone calls, and events as evidence of the intent to pressure state officials into taking the official action of initiating a research study.

The case against Senator Menendez, brought entirely after the decision in *McDonnell*, provides an example of this shift in framing. One critical piece of the indictment was Senator Menendez's meeting with the Secretary of HHS to advocate on behalf of Melgen in his Medicare billing dispute.[139] Prosecutors framed this meeting not as an official act in and of itself, but rather as evidence of Menendez's alleged effort to pressure the Secretary to take an official act to benefit Melgen. Though the trial court eventually dismissed several counts of the indictment, the Government's use of the pressure theory regarding the meeting with the Secretary of HHS survived a motion to dismiss.[140] In response to post-trial motions following the *McDonnell* decision, the *Fattah* trial court found similar framing persuasive. There,

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135 *See* Devlin-Brown & Dee, *supra* note 133, at 986. The meetings, phone calls, and events at issue in *McDonnell* would be useful evidence of the intent to agree to take an official act. *See* George D. Brown, McDonnell *and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 30 (2017); *see also Leading Cases*, *supra* note 22, at 476 n.85.

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

137 *Compare* Superseding Indictment, United States v. Percoco, 2017 WL 6314146 (S.D.N.Y. Dec. 11, 2017) (No. 16-cr-776) (indicting a senior aide to the New York Governor after *McDonnell*), *with* Superseding Indictment, United States v. Silver, 184 F. Supp. 3d 33 (S.D.N.Y. 2016) (No. 15-cr-093) (indicting the New York Assembly Speaker prior to *McDonnell*).

138 *See* Matt Zapotosky et al., *Prosecutors Will Drop Cases Against Former Va. Governor Robert McDonnell, Wife*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.Bf062041ec4a ("The U.S. attorney's office . . . had pushed to move forward and retry the McDonnells" even after the Court's decision).

139 Superseding Indictment, *supra* note 103, at 49.

140 *See* United States v. Menendez, 291 F. Supp. 3d 606, 617 (D.N.J. 2018) ("There is evidence to support the conclusion that . . . with various representatives of Medicare and with cabinet officials, Menendez sought to pressure or advise such officials to look at the controversy favorably to Melgen by making personal phone calls to officials in the Department of Health and Human Services . . . and meeting with the then-secretary of that agency in August 2012. There is evidence from which a rational juror could conclude that the meeting was not regarding general policy matters, but was in reality about securing a

the court denied a motion to dismiss, noting that while Fattah's conduct in taking a meeting with high-level officials, including the President and Senator Casey, was not independently an official act, it was evidence of Fattah exerting pressure to trigger an official act by those officials.[141]

The notion that *McDonnell* only changed the way prosecutors frame cases is not entirely without criticism. What a prosecutor frames as an exertion of pressure in order to achieve an official act may appear to a rational juror to simply be constituent services. Not every case will present facts like those in *Fattah* or *Menendez*. But commentators ringing the death knell of anticorruption efforts in the aftermath of *McDonnell* were not concerned about the borderline cases where it is impossible to truly distinguish between exerting pressure and performing constituent services. Rather, they were concerned about cases where high-level officials used their power to make government work for those who paid. *McDonnell*'s narrower definition of official act will not greatly impact the outcome in those cases. Certainly, prosecutors will have to rewrite *some* of their playbook, but they will not have to rewrite the book from scratch.

## IV. The "Stream of Benefits" Theory of Corruption is Unaffected by *McDonnell*

Prosecutors have long used the "stream of benefits" theory to bring complex corruption cases, and lower courts have largely approved of this tactic.[142] The theory alleviates the need to link each individual quid to a specific and contemporaneous quo.[143] In the aftermath of *McDonnell*, defendants began to argue that the Court rejected the steam of benefits theory when it announced the narrower definition of an official act.[144] Scholarship following *McDonnell* similarly questioned the theory's continued

favorable ruling or decision for Melgen, who was the only doctor seeking to change that particular policy, and who had $8.9 million at stake." (citations omitted)).

141 United States v. Fattah, 223 F. Supp. 3d 336, 362–64 (E.D. Pa. 2016) (citing United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007)), *aff'd in part and rev'd in part*, 902 F.3d 197 (3d Cir. 2018).

142 *See* Julie R. O'Sullivan, Federal White Collar Crime 480–81 (6th ed. 2016); George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 Notre Dame L. Rev. 177, 221 (2015) ("The stream-of-benefits cases show a particularly aggressive attitude toward corruption on the part of the lower courts."); *see also* United States v. Lopez-Cotto, 884 F.3d 1, 8 n.5 (1st Cir. 2018) ("[T]he case law on 'stream of benefits' mostly involves cases of honest services fraud . . . [and] program bribery [under 18 U.S.C. § 666].").

143 *See* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 479–82 (2015) (criticizing the stream of benefits theory).

144 *See, e.g.*, Defendants' Reply Brief in Support of Their Motion to Dismiss Pursuant to *McDonnell v. United States* at 1–7, United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018) (No. 15-cr-155).

validity.[145] Yet no court addressing this argument at either the trial or appellate level has found *McDonnell* to have foreclosed use of the steam of benefits theory.[146]

This Note argues that these courts are correct in deciding that there is nothing in *McDonnell* that is inconsistent with the stream of benefits theory of corruption.[147] The stream of benefits theory focuses on the *relationship* between the quid and the quo. It does not in any way alleviate the need to prove that either occurred. Questions about the soundness of the stream of benefits theory rest not on whether there needs to be an official act, but rather on the exchange of valuable consideration for an official act. *McDonnell*, as courts have rightly noted, did not focus on the exchange element, but on the definition of official act.[148] Importantly, lower courts have built up a body of caselaw on the stream of benefits theory, which they have continued to rely on in the aftermath of *McDonnell*.[149]

The trial courts in *Menendez* and *Fattah*, as well as the circuit court in *Silver*, had an opportunity to address the continuing viability of the stream of benefits theory. In *Menendez*, the district judge completely rejected the notion that *McDonnell* foreclosed the theory.[150] There, the defense argued that *McDonnell* "requires the Government to prove . . . that [Menendez] had an agreement to exchange a specific *quid* for a specific, identified *quo*."[151] The court pointed to Third Circuit precedent that a course of conduct of gifts and favors can satisfy the quid pro quo requirement, as long as that

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145 *Compare* Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt?* McDonnell *Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2015 CATO SUP. CT. REV. 189, 207–08 (arguing *McDonnell* "silently rejected" the stream of benefits theory), *with* Adam F. Minchew, Note, *Who Put the Quo in Quid Pro Quo?: Why Courts Should Apply* McDonnell*'s "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1825 (2017).

146 This proposition is based on the results of Westlaw searches of cases citing *McDonnell*, containing the search terms "stream of benefits" and separately "retain!." The latter search is a reference to the "retainer theory," which is analogous to the stream of benefits theory. For a brief description of the different terms used by courts describing the stream of benefits theory of corruption, see Brown, *supra* note 142, at 218.

147 This is not to say, however, that no Supreme Court precedent calls into question the validity of the stream of benefits theory. This Note merely argues that *McDonnell* has no effect on the theory.

148 *See, e.g.*, United States v. Silver, No. 15-cr-93, 2018 WL 1406617, at *4 (S.D.N.Y. Mar. 20, 2018) ("Silver is mistaken when he argues that *McDonnell* found the 'retainer' or 'as opportunities arise' theory of bribery impermissible. *McDonnell* held only that the matter on which official action is *ultimately* taken must be specific and focused . . . ."); *see also Leading Cases*, *supra* note 22, at 472 (critically noting that "[t]he Court's opinion evaluates the definition of 'official act' as though it were the sole limitation on the sweep of the anticorruption regime").

149 For examples of the pre-*McDonnell* caselaw in several circuits, see United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009); United States v. Ganim, 510 F.3d 134 (2d Cir. 2007); United States v. Kemp, 500 F.3d 257 (3d Cir. 2007). *See also* Alschuler, *supra* note 143, at 479–80 (discussing the major stream of benefits cases).

150 United States v. Menendez, 291 F. Supp. 3d 606, 613–19 (D.N.J. 2018).

151 *Id.* at 614.

pattern of behavior is "*in exchange for* a pattern of official actions favorable to the donor."[152] Cutting to the crux of the argument, the judge noted that "[a]s long as that action is an 'official act' under *McDonnell*, it is a crime."[153] Similarly, in *Fattah*, there was a presumption that the stream of benefits theory was unaffected by *McDonnell*. There, the court noted with approval the Government's proof that Fattah engaged in a pattern of receiving gifts and favors in exchange for favorable action on behalf of the coconspirator.[154] Like the district court in *Menendez*, the *Fattah* opinion cites prior stream of benefits circuit precedent without any hint that *McDonnell* has fundamentally altered the theory.[155] Because the prosecution is still required to prove an official act took place, now using the *McDonnell* definition, the stream of benefits theory remains viable.[156]

Several recent decisions out of the Second Circuit further bolster the belief that *McDonnell* did not alter the stream of benefits theory.[157] These cases provide critical insight into the use of the theory going forward, because they primarily rely on then-Judge Sotomayor's opinion in *United States v. Ganim*,[158] one of the most cited stream of benefits cases. Though *Ganim* was decided prior to *McDonnell*, courts both inside and outside of the Second Circuit have continued to cite it as thoroughly persuasive on the issue.[159] In a recent corruption case brought against a county executive and town supervisor, Judge Joan Azrack of the Eastern District of New York cited to *Ganim* and rejected the notion that *McDonnell* altered the stream of benefits theory.[160] In another recent prosecution of a New York public official, Judge Valerie Caproni of the Southern District of New York similarly cited *Ganim* with continued approval, stating that "*McDonnell* [d]id [n]ot [i]nvalidate the [r]etainer [t]heory of [b]ribery."[161]

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152 *Id.* (quoting *Kemp*, 500 F.3d at 282).

153 *Id.* (noting that "[o]ther Circuits agree" on this point).

154 *See* United States v. Fattah, 223 F. Supp. 3d 336, 362 (E.D. Pa. 2016) (citing *Kemp*, 500 F.3d at 282), *aff'd in part and rev'd in part*, 902 F.3d 197 (3d Cir. 2018).

155 *See id.* (citing *Kemp*, 500 F.3d at 282). Though the Third Circuit opinion in *Fattah* did not discuss the stream of benefits theory in detail, it did note the Government's use of the theory at trial. The opinion did not couple these brief references with any hint that the theory was undercut by *McDonell*. *See Fattah*, 902 F.3d at 242–43.

156 This includes the notion that the government can satisfy the official act requirement using the pressure theory or by proving an agreement with the knowledge and intent to trigger an official act by another.

157 *See* United States v. Mangano, No. 16-cr-540, 2018 WL 851860, at *4 (E.D.N.Y. Feb. 9, 2018); United States v. Percoco, No. 16-cr-776, 2017 WL 6314146, at *4 (S.D.N.Y. Dec. 11, 2017); *see also* United States v. Skelos, 707 F. App'x 733, 738–39 (2d Cir. 2017).

158 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.).

159 *See, e.g.*, United States v. Lopez-Cotto, 884 F.3d 1, 8 (1st Cir. 2018); United States v. Menendez, 291 F. Supp. 3d 606, 614–15 (D.N.J. 2018).

160 *See Mangano*, 2018 WL 851860, at *4 ("[Defendant] appears to assert that the stream-of-benefits theory is no longer viable after (or is at least limited by) *McDonnell*. . . . To the extent that [defendant] is raising such an argument, the Court rejects it. As multiple courts have held, *McDonnell* did not eliminate the stream-of-benefits theory.").

161 *Percoco*, 2017 WL 6314146, at *4.

These are, of course, district court decisions, and thus could not overrule *Ganim* even if they wanted. But they offer useful evidence that the stream of benefits theory is alive and well in the fact that they refused to limit the theory in the aftermath of *McDonnell*. Further evidence for the continued viability of the theory is found in the fact that neither the Second Circuit's decision in *United States v. Silver*,[162] nor *United States v. Skelos*,[163] hinted at a desire to revisit *Ganim* in light of *McDonnell*. As noted, other circuits have cited to *Ganim*, and the stream of benefits theory generally, with approval as well. A recent example comes from the First Circuit's decision in *United States v. Lopez-Cotto*, which upheld a conviction that relied on a stream of benefits theory.[164]

Perhaps the most prominent argument that *McDonnell* overturned the stream of benefits theory derives not from anything the Court said, but rather what it did not say.[165] This argument goes, in part, that because the Court in *Skilling v. United States*[166] favorably cited stream of benefits cases like *Ganim*, the absence of such favorable citations in *McDonnell* signals a change in the Court's approval of the theory.[167] Further, the proponents of this argument state that because *McDonnell* requires identification of a specific official act, it is inconsistent with the stream of benefits theory.[168] The argument that *McDonnell* "silently rejected" the stream of benefits theory is grasping at straws. Those making this argument are, however, correct on one point: *McDonnell* was certainly silent on the stream of benefits theory. Not only was there no mention of it in the opinion itself,[169] but there was also no mention in the parties' briefs.[170] Of the eighteen amicus briefs filed in the case, only one makes a reference to the stream of benefits theory.[171] This was not one of the briefs cited in the *McDonnell* opinion, and there is nothing that would

162 *See generally* United States v. Silver, 864 F.3d 102, 110–12 (2d Cir. 2017).

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

164 *See Lopez-Cotto*, 884 F.3d at 8–9 (citing United States v. Ganim, 510 F.3d 134, 149 (2d Cir. 2007)). Though *Lopez-Cotto* involves a conviction under 18 U.S.C. § 666, which does not contain the same official act requirement as the honest services fraud or Hobbs Act extortion, courts have treated the stream of benefits theory as applying in to federal bribery-related crimes generally, and the *Lopez-Cotto* court did not note any distinction between the theory's application to § 666 cases and other bribery crimes as a result of *McDonnell*. *See, e.g.*, *Percoco*, 2017 WL 6314146, at *4.

165 *See* Silverglate & Quinn-Judge, *supra* note 145, at 207–08.

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

167 *See* Silverglate & Quinn-Judge, *supra* note 145, at 207 n.76 (citing *Skilling* and several stream of benefits cases mentioned in that opinion).

168 *See id.* at 207–08.

169 *See generally* McDonnell v. United States, 136 S. Ct. 2355 (2016).

170 *See generally* Brief for Petitioner, *McDonnell*, 136 S. Ct. 2355 (No. 15-474); Brief for the United States, *McDonnell*, 136 S. Ct. 2355 (No. 15-474); Reply Brief for Petitioner, *McDonnell*, 136 S. Ct. 2355 (No. 15-474).

171 *See* Brief of Amici Curiae Public Policy Advocates and Business Leaders in Support of Petitioner at 16–17, *McDonnell*, 136 S. Ct. 2355 (No. 15-474).

make one think that the brief's relatively sparse discussion of the stream of benefits led to the theory's downfall.[172]

It is simply too difficult to tell why the Court cited stream of benefits cases in *Skilling* and not in *McDonnell*. Perhaps, given the political nature of the case, the Court prized unanimity in *McDonnell* in a manner it did not in *Skilling*. Perhaps the Court thought that defining official act simply did not implicate the stream of benefits theory the way that the holding in *Skilling* did. It is impossible to tell. An equally "fair reading" would be that the court's silence, especially on an important prosecutorial tool against corruption, silently affirms the theory.[173]

Undoubtedly a case will arise that cleanly presents whether *McDonnell* has altered the availability of the stream of benefits theory of corruption. But with nearly two years of corruption cases since the *McDonnell* decision, lower courts across the board have approved of the theory's use. This Note argues that those courts are correct, because they rightly note that *McDonnell* redefined an existing element—an official act—rather than added an entirely new element. Prosecutors had to prove an official act before *McDonnell*, and they have to prove one after. The stream of benefits theory is simply one means of proving corruption under the honest services fraud or Hobbs Act extortion statutes. Defendants facing corruption charges likely will continue to attack the stream of benefits theory when used against them. And there may well be some yet undiscovered rationale for attacking the stream of benefits theory. But a fair reading of *McDonnell*, and the lower court decisions that followed, make clear that *McDonnell* does not offer any assistance to those defendants.

## V. Proving Intent Remains the Primary Obstacle in Corruption Cases

The dire commentary in the aftermath of *McDonnell* resulted far more from the judgment of the Court than the reasoning. The Court's sole focus in *McDonnell* was the official act element of the federal bribery statute. There will, of course, be cases that are affected by the *McDonnell* Court's narrowing of this element; however, the reality is that other elements of the bribery statute remain the greater source of headaches for federal prosecutors. As one commentator wrote shortly after the *McDonnell* decision, "[t]he Court's opinion evaluates the definition of 'official act' as though it were the sole limitation on the sweep of the anticorruption regime."[174] Yet, the true scope of the bribery statute is much narrower. Section 201 "lays out the five parts of a bribe: (1) a public official (2) with corrupt intent (3) receives a benefit (4) given with the intent to influence (5) an official act."[175] There are also further elemental limitations found in the honest services fraud and the Hobbs

172 *See generally McDonnell*, 136 S. Ct. 2355.

173 *See* Silverglate & Quinn-Judge, *supra* note 145, at 207.

174 *Leading Cases*, *supra* note 22, at 472.

175 *Id.* at 473 (discussing 18 U.S.C. § 201 (2012)).

Act extortion statutes.[176] In corruption prosecutions, the official act element relates to the actus reus—what the official must do. Yet it is not the actus reus element that is the primary limiting principle in corruption cases, but rather the mens rea. Proving corrupt intent is what separates political action or constituent services from corruption. It is thus the intent element where the case is typically won or lost.[177]

After *McDonnell*, the highest hurdle facing federal prosecutors is the same as it was before *McDonnell*: proving corrupt intent.[178] The *Menendez* case is a good example of this fact. The prosecution was not doomed by a legal judgment that Senator Menendez's alleged interbranch lobbying could not have constituted an official act under *McDonnell*. Rather, the difficulty was in proving that Menendez had the requisite corrupt intent when he lobbied on behalf of Melgen, his longtime friend.[179] But this difficulty would have existed even absent the Court's decision in *McDonnell*. Though *Menendez* is only one data point, it is notable that in the first major corruption prosecution following *McDonnell* the main issue confronting prosecutors was nothing new.

Nor can it be said that *McDonnell* added much, if anything, to the task of proving intent. As discussed in Part III, the pressure theory that can be used to satisfy *McDonnell*'s official act definition, contains a separate mens rea. It requires that there be proof that the official acted with the intent to exert pressure.[180] What remains to be seen is whether this pressure theory mens rea will place a greater evidentiary burden on prosecutors, or whether evidence proving the separate statutory intent element will tend to prove the pressure theory's intent requirement as well. It is difficult to conjure a scenario where an official who exerts some kind of pressure to trigger an official act does so with corrupt intent but *without* the intent to exert pressure.[181] Proving the former was a pre-*McDonnell* requirement, proving the latter is what *McDonnell* added via the pressure theory.[182] At the end of the day, it is not proving an official act that will substantially hinder corruption prosecu-

176 *See* Brennan T. Hughes, *The Crucial "Corrupt Intent" Element in Federal Bribery Laws*, 51 CAL. W. L. REV. 25, 44–46 (2014) (discussing the Hobbs Act extortion and honest services fraud intent elements).

177 *See id.* at 53 ("By requiring an 'evil state of mind' to satisfy corrupt intent, the law criminalizes corrupt behavior without criminalizing more benign political behavior . . . which neither corrupt public officials nor betray public trust.").

178 *See, e.g.*, Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 566–70 (2015) (discussing the difficulty of proving intent in corruption cases).

179 For a thorough commentary on the *Menendez* case, see Randall Eliason, *The State of Public Corruption Law After* Menendez, SIDEBARS (Mar. 8, 2018), https://sidebarsblog.com/why-difficult-prosecute-public-corruption/.

180 *See supra* notes 121–23 and accompanying text.

181 Indeed, the Third Circuit's discussion of the pressure theory in *Fattah* did not even reference the theory's intent requirement. *See* United States v. Fattah, 902 F.3d 197, 240–41 (3d Cir. 2018).

182 *See* Hughes, *supra* note 176, at 44–46 (discussing the pre-*McDonnell* intent requirements).

tions, but rather proving the requisite intent—something that has long stymied corruption prosecutions.

## Conclusion

When it was decided, *McDonnell* threatened to upend public corruption convictions and investigations throughout the country. Indeed, in some cases, *McDonnell* resulted in convictions being overturned. But a deeper analysis of the lower courts' reasoning in post-*McDonnell* corruption cases reveals a different story. This story is one that is far more nuanced than the initial reactions to the Supreme Court's narrow reading of the term official act. The Court's language in *McDonnell* did, as Chief Justice Roberts assured, "leave[ ] ample room for prosecuting corruption."[183]

Particularly important was the Court's articulation of what this Note has called the pressure theory. This theory allows prosecutors to reframe existing cases, no longer arguing that meetings, phone calls, and events are official acts in and of themselves, but rather evidence of intentional pressure on another official to take an official act. This Note also argued that *McDonnell* left the often-used stream of benefits theory of corruption untouched. There has been some scholarly debate on this issue, yet courts have upheld the theory across the board. Finally, this Note argued that proving corrupt intent, not a narrower definition of official act, is the primary issue plaguing corruption prosecutions. What remains after these three arguments is the realization that *McDonnell* has had a limited effect on corruption prosecutions, and is far from the death knell that it was originally touted to be.

183 McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016).