
ESSAY

CORRUPTION LAW AFTER *MCDONNELL*: NOT DEAD YET

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I. INTRODUCTION

The Supreme Court waited until the last day of its October 2015 Term to issue an opinion in *McDonnell v. United States*.¹ One can almost imagine the chagrined Justices not wanting to stick around for the reaction of an increasingly cynical public: money buys votes and money buys action; government of the people, by the people, and for the people is no more. Indeed, the case ends with an unusual sort of elegy: “There is no doubt that this case is distasteful; it may be worse than that. But”²

Could it be that the Court, still battered by two decisions that many continue to feel were more baldly political than most,³ was embarrassed by this latest decision?⁴ Probably not. The Chief Justice wrote the *McDonnell* decision on behalf of a unanimous Court. The indicia of raw politics from

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¹ 136 S. Ct. 2355 (2016).

² *Id.* at 2375.

³ This statement refers to *Bush v. Gore*, 531 U.S. 98 (2000), and *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴ Dahlia Lithwick captures this sentiment nicely, writing, “[W]hen the entire public is more and more convinced—thanks in part to the court’s ruling in *Citizens United*—that business as usual in government consists of millionaires buying access to their elected officials, it’s not clear that the court’s best and most savvy response should be to rule unanimously that since this is merely how government is done we should all stop calling it corruption.” Dahlia Lithwick, *Entry 21: Dietary Supplement Peddlers: They’re Just Like You and Me*, SLATE (June 27, 2016, 7:25 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/the_bob_mcdonnell_ruling_resulted_in_some_absurd_analogies.html [https://perma.cc/FQ2S-9CWE].

those earlier cases are absent. No doubt, the behavior at issue in *McDonnell* is shameful, but the shame rests with lax state regulations and those enticed by lucre, not with the Court.

Predictably, the decision has been received with some degree of panic.⁵ Corruption is never popular, and the ruling will make it more difficult to prosecute. But claims that federal corruption laws are dead are overstated. This Essay examines the *McDonnell* opinion in light of corruption law generally and identifies avenues by which corruption can, and will continue to be, prosecuted. Indeed, while *McDonnell* narrows the path, it also adds some clarity to the difficult nexus between free speech, free elections, representative government, and bribery.

II. *MCDONNELL* AND THE VERY FINE LINE BETWEEN INFLUENCE AND PRESSURE

A. *The Background of McDonnell v. United States*

Robert McDonnell was elected the seventy-first Governor of Virginia on a platform of improving economic development and at a time of personal financial distress.⁶ The two circumstances dovetailed as the Governor found a way to mitigate his own financial distress while simultaneously advocating for the platform that put him in office. Star Scientific, Inc. (“Star”), a Virginia company founded and led by Jonnie Williams, had developed a dietary supplement based on a component of tobacco plants.⁷ The company desired FDA classification as a pharmaceutical because it would greatly enhance its profitability.⁸ However, it lacked the resources to fund the extensive studies required for such approval.⁹

Shortly after the election, Jonnie Williams approached the new Governor, seeking help in convincing state agencies and research universities to conduct the necessary studies.¹⁰ Williams also enlisted the help of McDonnell’s wife, who would eventually be indicted and tried alongside her husband.¹¹ Over the next three years, Williams lavished the gubernatorial family with gifts,

⁵ See, e.g., Amy Davidson, *The Supreme Court’s Bribery-Blessing McDonnell Decision*, THE NEW YORKER (June 27, 2016), <http://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision> [https://perma.cc/YE92-QDS4] (“The Court, in *Citizens United* and now in *McDonnell*, has looked upon the worst, most endemically corrupt aspects of American politics and enshrined them.”).

⁶ *United States v. McDonnell*, 792 F.3d 478, 486 (4th Cir. 2015). The Fourth Circuit decision, overruled by the Supreme Court, presents a far more detailed, and hence more disturbing, factual background.

⁷ *Id.* at 487.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 487-93.

¹¹ *Id.*

including the use of a private plane, cognac priced like tuition, haute couture, Ferrari privileges, an engraved Rolex, and much-needed loans.¹² “In total, Williams gave the McDonnells over \$175,000 in gifts and loans.”¹³ McDonnell, in turn, made efforts to help Williams and Star secure the state-sponsored study needed for FDA approval. These efforts included arranging meetings with relevant public officials, hosting and attending events at the Governor’s Mansion designed to encourage the studies, and allowing private access to the Governor’s Mansion to promote the studies.¹⁴

A jury convicted McDonnell of honest services fraud and Hobbs Act extortion.¹⁵ In doing so, the jury found that the Governor had offered his assistance “in exchange for” Williams’s gifts.¹⁶ This was bribery in common parlance. Distasteful, no doubt, and definitely a quid pro quo. And the Supreme Court vacated the convictions without altering any of these findings. The basis for the Court’s holding was that the quo did not count. Or, more precisely, it was that we don’t know whether the quo counted because the trial court defined it too broadly.¹⁷

In his influential book *Bribes*, John Noonan wrote that “[t]he core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.”¹⁸ Although this core definition remains consistent across cultures, Noonan wrote that the scope of each term varies greatly.¹⁹ The Court in *McDonnell* introduced a limit on what counts as a public function meant to be gratuitously exercised.

B. The Meaning of “Official Act”

1. The Court’s Reasoning

Most corruption statutes forbid public officials from receiving or demanding a thing of value, with corrupt intent, in exchange for being influenced in the performance of an official act.²⁰ In *McDonnell*, the trial court

¹² *Id.*

¹³ *McDonnell v. United States*, 136 S. Ct. 2355, 2364 (2016).

¹⁴ *Id.* at 2365-66.

¹⁵ *Id.* at 2366.

¹⁶ *Id.*

¹⁷ *See id.* at 2372 (criticizing and rejecting the broad understanding of what “counts as a quo”).

¹⁸ JOHN T. NOONAN, JR., *BIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA*, at xi (1984).

¹⁹ *Id.*

²⁰ Following *Skilling v. United States*, 561 U.S. 358 (2010), the parties in *McDonnell* agreed to “define honest services fraud with reference to the federal bribery statute, 18 U.S.C. § 201.” *McDonnell*, 136 S. Ct. at 2365. Similarly, the Hobbs Act charges were based on allegations of bribery. *Id.* Specifically, 18 U.S.C. § 201(b) establishes a felony if a public official:

(2) . . . 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:

instructed the jury that the term “official act” includes “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.”²¹ McDonnell argued on appeal that this definition was too broad, while the Government urged the Court to embrace a broad reading of “official act” by reference to the broad definitional language: “any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity.”²² The Supreme Court rejected the Government’s argument and ruled that the trial court’s definitions were too broad, as they risked rendering the “official act” element superfluous by capturing “nearly any activity by a public official.”²³

To isolate those public functions that do constitute “official acts” under federal corruption law, the Court identified two definitional components. First, there must be “a question, matter, cause, suit, proceeding or controversy that may at any time be pending or may by law be brought before a public official.”²⁴ Second, the official must have taken action on that “question, matter, cause, suit, proceeding or controversy.”²⁵ The Court then suggested that the question is whether the alleged meetings, contacts, or events at issue in *McDonnell* can satisfy either prong.²⁶

This is a strange inquiry because there is really no reason to consider whether the actions at issue in *McDonnell* satisfied the first prong; the effort to do so is rather square peg–round hole. The Fourth Circuit took a less circuitous approach—eventually joined by the Supreme Court—finding that the specific questions about and matters of pursuing and funding state-sponsored research of the Star product satisfied the first prong, and the open question was simply whether the meetings, contacts, and events amount to decisions or actions on those matters.²⁷ Considered in this manner, the issue presented was relatively clear. Williams paid McDonnell to support a matter that might be brought before a public official: namely, whether to use public funds to study the health benefits of Star’s product. The issue was simply whether McDonnell’s actions

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person.

²¹ *McDonnell*, 136 S. Ct. at 2366.

²² *Id.* at 2367.

²³ *Id.* at 2368, 2374.

²⁴ *Id.* at 2368 (internal quotation marks omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *United States v. McDonnell*, 792 F.3d 478, 504-13 (4th Cir. 2015).

after being paid should be considered within—to return to Judge Noonan’s phrasing—the “public function meant to be gratuitously exercised.”²⁸

The unhelpfulness of the two-pronged approach is thus clear: the first prong is satisfied (as it almost always will be), and the remaining question is whether the alleged acts are the right kind of acts. In *McDonnell*, the Supreme Court held that McDonnell’s acts were not—thus preserving a space within which public officials may act to benefit anyone for any reason, including that the beneficiary is a constituent, a regionally important labor interest, a systemically important firm, or a rich friend.²⁹

The tension between campaign finance laws, the First Amendment, and anti-corruption efforts has always been pronounced. In this case it was made explicit when the Court highlighted the concern that public service would be chilled if officials were worried about serving those who gave something of value in return, such as “a campaign contribution” or an invitation to “join [constituent homeowners] on their annual outing to the ballgame.”³⁰ Obviously, one of these things is not like the other; the impact of campaign contributions comically dwarfs any possible influence of all the ballgames, picnics, and barbecues in the district. However, that is a different case. Money in politics is the legal reality and, given that reality, the Court is right to be concerned about a corruption law that risks rendering criminal that which is legal in election law.³¹ This concern, that broad corruption laws are at odds with our system of government, undergirds the Court’s analysis.

One implication of *McDonnell* is troubling: so long as the acts paid for are not “official acts,” public officials can be paid to perform acts as public officials—even to exercise influence or achieve specific ends—without it being bribery. Put differently, there exists a subset of public functions to be performed by public officials that may be sold without violating federal corruption law.

2. The Historical Perspective and Limits on the *McDonnell* Limits

The argument that less formal acts should not be brought within the ambit of corruption law had been made and rejected a century before in *United States*

²⁸ NOONAN, *supra* note 18, at xi.

²⁹ *McDonnell*, 136 S. Ct. at 2372-75.

³⁰ *Id.* at 2372.

³¹ In a different context, Dan Richman has speculated that calls for more prosecutions of corporate executives “come from those who would have preferred more regulatory controls on corporate behavior before 2008 and who aren’t satisfied with the regulatory response since then.” Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 280 (2014). A similar dynamic is likely at play in the corruption context with those who are dissatisfied with electoral regulations pushing for corruption prosecutions. But, using the criminal law to remedy a perceived regulatory failure is problematic, especially where one person’s perceived regulatory failure is another’s First Amendment victory.

v. Birdsall.³² There, the question was the legality of payments made to federal officers in exchange for their advising the Commissioner of Indian Affairs to recommend leniency for two people convicted of liquor trafficking offenses.³³ The Court rejected the argument that to count as an “official act” the function must be prescribed by “written rule or regulation,” holding instead that a broader set of activity, including functions “clearly established by settled practice,” constituted “official actions” for purposes of defining bribery.³⁴

The Court again confronted the definition of “official act” in *United States v. Sun-Diamond Growers of California*.³⁵ Although the case involved the federal gratuity statute, that statute shares the same definition of “official act” as the bribery statute.³⁶ In *Sun-Diamond*, the Court specifically addressed the intent component of the corruption statutes, noting that bribery requires intent to influence through a quid pro quo, whereas gratuities require merely “a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.”³⁷ The key to illegal gratuities, however, is that the reward must be for a specific and known act. It is not illegal to reward a public official “to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.”³⁸ The Court supported this conclusion, in part, by describing the strange results if intent to build goodwill were a sufficient basis for charging an illegal gratuity: sports teams gifting the President a jersey at a celebratory White House visit could be guilty of engaging in criminal conduct.³⁹

It is important to recognize these examples from *Sun-Diamond* for what they are and what they are not. They are examples of gifting scenarios in which neither the giver nor the recipient is linking the gift to any specific act by the recipient. They are examples of the absence of mens rea.⁴⁰ They are *not* examples of events that, by their nature, cannot constitute official acts in the bribery and gratuity context. The Fourth Circuit made this point in rejecting McDonnell’s argument, and it is worth quoting because it holds true even after the Fourth Circuit was reversed by the Supreme Court:

The *Sun-Diamond* Court did not rule that receptions, public appearances, and speeches can never constitute “official acts” within the meaning of § 201(a)(3);

³² 233 U.S. 223 (1914).

³³ *Id.* at 229-30.

³⁴ *Id.* at 231.

³⁵ 526 U.S. 398 (1999).

³⁶ *Id.* at 404.

³⁷ *Id.* at 404-05.

³⁸ *Id.* at 405.

³⁹ *Id.* at 406-07.

⁴⁰ In the language of federal bribery law, these are examples where the giving is not done “corruptly.” See 18 U.S.C. § 201(b).

the Court's point was that job functions of a strictly ceremonial or educational nature will rarely, if ever, fall within this definition.⁴¹

Some, no doubt, will read the Supreme Court's decision in *McDonnell* as establishing a rule that setting up meetings and hosting events can never constitute "official acts" for purposes of our corruption laws; and, accordingly, meetings and events can be sold to the highest bidder without running afoul of federal corruption laws.⁴² This, however, is not the rule established by *McDonnell*: it remains the case that meetings, public appearances, and speeches *can* constitute official action, but they rarely, if ever, will if they are of a *strictly* ceremonial or educational nature.

The Supreme Court wrote that "hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action' within the meaning of § 201(a)(3), even if the event, meeting, or speech is related to a pending question or matter."⁴³ Consequently, even

expressing support for [a particular policy] at a meeting, event, or call . . . does not qualify as a decision or action on the [policy], *as long as* the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act."⁴⁴

This statement, which might be mistaken as the death knell for corruption law, includes critical qualifying language mapping the future of anti-corruption prosecutions. It's about intent.

III. CORRUPTION, INFLUENCE, AND INTENT

McDonnell arranged meetings, hosted and attended events, and encouraged state officials to consider conducting public studies of Star's dietary supplement in exchange for gifts and loans worth nearly two-hundred-thousand dollars.⁴⁵ His conviction was vacated because it was predicated on an overbroad definition of official acts.⁴⁶

Meetings, calls, and events, "standing alone" are not enough.⁴⁷ It remains possible, however, to premise a violation of federal bribery statutes on meetings, calls, and events where those actions are performed with intent "to

⁴¹ United States v. McDonnell, 792 F.3d 478, 508 (4th Cir. 2015).

⁴² State regulations and ethics rules remain a distinct matter.

⁴³ McDonnell v. United States, 136 S. Ct. 2355, 2370 (2016).

⁴⁴ *Id.* at 2371 (emphasis added).

⁴⁵ *Id.* at 2361-67. This statement is predicated on the jury verdict, and that introduces a bit of uncertainty. The jury returned only a general verdict of guilt, and accordingly, it is possible that they found certain, but not all, of the alleged acts to have been performed in exchange for the gifts.

⁴⁶ *See id.* at 2375 ("Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful.").

⁴⁷ *Id.* at 2366.

exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an ‘official act.’”⁴⁸

One strange result of *McDonnell* is that it defines the “official act” element of federal bribery law in part by reference to a mens rea standard. This is particularly odd given that the bribery law already includes a mens rea element: “corruptly.”⁴⁹ “Corruptly,” however, is an unusual and poorly defined mindset that fails classification within the normal purpose, knowledge, recklessness, or negligence hierarchy. Far clearer is the standard set forth in *McDonnell*: intent to exert pressure.⁵⁰

Corruption law is not dead; it has been narrowed and clarified. May a public official accept gifts in exchange for arranging a meeting with officials empowered with deciding a key issue? Sure. May she accept gifts in exchange for giving a speech in favor of that issue? Yes. May she even host an event to advocate in favor of the issue, in exchange for gifts? She may.

What she cannot do, however, is perform any of these actions with the intent to pressure other officials into making a particular decision. At first, this distinction appears elusive. Why advocate if not to prevail? Does not the very act of arranging a meeting, giving a speech, or hosting an event suggest the official intends to pressure others into supporting her position? It does not. It does suggest that she hopes to prevail—but not necessarily by pressure. She may intend to prevail by influencing others. Pressure or influence? This is the line between corruption and politics left by *McDonnell*. Pressure is impermissible; influence is not.⁵¹ The line is undoubtedly problematic. But many of the problems are rooted in election and campaign finance law, not our criminal justice system. And, it is a line that prosecutors can navigate, maintaining a role for federal corruption law going forward.

⁴⁸ *Id.* at 2371.

⁴⁹ 18 U.S.C. § 201(b)(2).

⁵⁰ The *McDonnell* Court included a second prong regarding advice: the term “official act” includes “advis[ing] another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official.” *McDonnell*, 136 S. Ct. at 2372. The Court did not further explain this prong. Looking only at the language of *McDonnell*, the advice prong has the potential to expand the scope of the term official act considerably. However, because the language of “advise” comes directly from the *Birdsall* case, it is best understood through those facts. There, the advice supplied was “contrary to the truth” and regarding an issue subject to a formal or well-established standard governing the eventual decision (in that case, the effect of clemency or leniency on the enforcement of liquor laws). *United States v. Birdsall*, 233 U.S. 223, 229 (1914). The advice prong thus offers at least two possibilities. It may provide a textual basis for expanding on the pressure prong; or, it may be a reluctant nod to the existence of *Birdsall*, acknowledging that advice can be an “official act” where the advice regarding an established standard is itself contrary to the truth. The latter is quite narrow: advice is generally a question of judgment, which makes it difficult to establish it was “contrary to truth” as was the case in *Birdsall*.

⁵¹ Also, “advice . . . knowing or intending that such advice will form the basis for an ‘official act’ by another official,” is impermissible, at least where it is contrary to truth. *McDonnell*, 136 S. Ct. at 2370. For a brief comment on why the advice prong is likely to be construed narrowly, see *supra* note 50.

McDonnell presents a new challenge to what might be called soft corruption cases, where the official act secured by payment is not the goal itself (for example, the decision to award a public contract or sign a particular bill), but rather an effort to achieve a particular goal. In these cases, the key question now turns on intent to pressure other officials in the performance of their duties. The *McDonnell* Court bolstered this distinction by differentiating meetings, calls, and events from “cause[s], suit[s], proceeding[s] or controver[ies]” as follows:

Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a “question” or “matter” under § 201(a)(3).⁵²

Unlike lawsuits, agency determinations, or committee hearings, the typical meeting, call, or event does not formally resolve official matters. They foster debate and may influence others. But, they are not dispositive. The meeting, call, or event where a government official pressures another official into acting, by virtue of his or her position, is atypical.⁵³ Where this does result, however, the intent to pressure renders the meeting, call, or event more like a “cause, suit, proceeding or controversy.”⁵⁴ There is no actual effort to foster debate or influence. The purpose is to be dispositive through the assertion of pressure, nothing more. This sort of official action may not be bought, even after *McDonnell*.

Indeed, the facts of *McDonnell* provide an example as to how the intent to pressure distinction might work in future prosecutions. The Supreme Court references a pro/con list drafted by a University of Virginia employee about studying the compound comprising Star’s product.⁵⁵ “The first ‘pro’ was the ‘[p]erception to [the] Governor that UVA would like to work with local companies,’ and the first ‘con’ was the ‘[p]olitical pressure from Governor and impact on future UVA requests from the Governor.”⁵⁶ The “con” is probative of the fact that university personnel felt pressure from the Governor, and this fact tends to prove that the Governor intended to exert such pressure.⁵⁷ This is precisely the sort of evidence one should expect future corruption

⁵² *McDonnell*, 136 S. Ct. at 2369.

⁵³ By “atypical,” I am making only a claim about the ideal of law. Empirically it may be the case that many or most official decisions are made through meetings, calls, and events. The empirical answer likely varies between governments, agencies, and subject matters, and the net answer is irrelevant. The question in any one case will be whether the acting official had reason to believe that the meeting, call, or event would be dispositive by virtue of pressure created by her position.

⁵⁴ *McDonnell*, 136 S. Ct. at 2369.

⁵⁵ *Id.* at 2366.

⁵⁶ *Id.* (alterations in original).

⁵⁷ This is only meant to be a weak statement that the evidence is probative of such intent—the fact that people felt pressure makes it more likely that pressure was intended than had they not felt pressure. It is of course not dispositive on the issue of intent.

prosecutions to introduce in soft corruption cases. Additionally, expect prosecutors to introduce evidence about the settings for meetings (to establish a differential power structure suggestive of pressure), prior retaliatory or promotional actions based on willingness to accede to pressure, and other factors suggesting the paid official was putting too much bully in her pulpit. In the end, the key question is about intent, and it is one for the jury.⁵⁸

IV. CONCLUSION

The “pro/con” list referenced by the Supreme Court highlights an issue that casts a pall across not only anticorruption efforts, but also the campaign finance debate. What about mixed motives? McDonnell ran and won on the platform of promoting business in his state. Star was a Virginia company with a product situated in the lucrative field between medicine and weight loss. Moreover, Star’s product was based on Virginia’s most iconic crop, tobacco. There were plenty of reasons Governor McDonnell would want to see Star do well, even absent the lavish treatment from Williams. Mixed motives undermine easy black and white distinctions, but in the corruption context they do not impact the “official act” or mens rea analysis. That an official acted for a number of different reasons goes to whether the action was performed “*in return for*” the things of value.⁵⁹

In McDonnell’s case, the verdict establishes that the jury was satisfied that the prosecution proved beyond a reasonable doubt some of McDonnell’s actions were undertaken in return for the gifts. The open question is whether the actions he took amounted to merely influential meetings, calls, and events or efforts to pressure those with decisionmaking authority. The latter are corruption. This difference can be quite difficult to discern, and there are bound to be challenging cases in the future. But make no mistake, the *McDonnell* decision no more ends corruption prosecutions than it authorizes bribery. It limits their scope, and in doing so, it adds a bit of clarity.

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⁵⁸ See *McDonnell*, 136 S. Ct. at 2371 (“A jury could conclude, for example, that the official [by having the meeting, event, or call] was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give that advice in exchange for a thing of value, that would be illegal.”).

⁵⁹ *Id.* at 2365.