

# MCDONNELL V. UNITED STATES: DEFINING “OFFICIAL ACTION” IN PUBLIC CORRUPTION LAW

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## INTRODUCTION

In American politics, the practice of political fundraising has blurred the lines regarding what should and should not be considered corruption by public officials. The two primary statutes that cover public corruption on the federal level, the Anti-Bribery statute<sup>1</sup> and the Hobbs Act,<sup>2</sup> both define illegal corruption as a bribe or kickback given to a public official in return for some “official action.”<sup>3</sup> In *McDonnell v. United States*, the Supreme Court defined what constitutes an “official action” under these two statutes.<sup>4</sup> To craft this definition, the Court had to draw a line between benign public official-constituent interactions and illegal corruption. The Court sought to decide which side of this line a “typical meeting, call, or event” falls.<sup>5</sup> In an unanimous opinion, the Court sided with Petitioner McDonnell, holding that a “normal meeting, call, or event” does not constitute an “official action” under both the Anti-Bribery statute and the Hobbs Act.<sup>6</sup>

The Court’s holding draws a reasonable line between permissible conduct and public corruption, but it may have the result of insulating public officials from criminal convictions for certain types of seemingly nefarious conduct. This commentary will begin by summarizing the competing interpretations of “official act” proposed

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1. 18 U.S.C. § 201 (2012).

2. 18 U.S.C. § 1951 (2012).

3. See *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (explaining that the statutory definition of “official act” in the Federal Anti-Bribery statute is also used to define the term “official action” in the Hobbs Act).

4. *Id.* at 2372.

5. *Id.* at 2368.

6. *Id.* at 2372.

by the parties, and explain why the Court adopted the Petitioner’s interpretation over the Government’s. Part I presents the facts and procedural posture of *McDonnell*. Part II explains the language of the statutes in question as well as some of the key precedents interpreting what constitutes an “official act.” Part III summarizes the way each party wanted the Court to define “official act,” and the arguments offered by each party in support of their favored interpretation. Part IV explains the Court’s holding and reasoning. Part V analyzes the Court’s ruling and predicts how this holding will affect public corruption law moving forward.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Factual Background*

This case arose from alleged criminal dealings between Petitioner Robert McDonnell, during his tenure as Governor of Virginia, and his former constituent Jonnie R. Williams, Sr., former CEO of Star Scientific, a Virginia-based nutritional supplement company.<sup>7</sup>

The alleged quid pro quo arrangement between McDonnell and Williams in this case involved Williams giving McDonnell and his family over \$175,000 of value in gifts and loans.<sup>8</sup> This allegedly was in exchange for McDonnell leveraging the power of his office to give Williams access to top Virginia government decision-makers, in order to benefit Williams’ company.<sup>9</sup> Based on this conduct, the federal government indicted McDonnell for violations of the Anti-Bribery statute and the Hobbs Act.<sup>10</sup> McDonnell admitted to requesting and receiving the \$175,000 worth of loans and gifts from Williams,<sup>11</sup> which included, but were not limited to, loans to help the McDonnell family manage their rental properties, a Rolex watch, a weekend vacation, and multiple rounds of golf.<sup>12</sup>

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7. Brief for the Petitioner at 3, *McDonnell*, 136 S. Ct. 2355, No. 15-474 (Feb. 29, 2016) [hereinafter Brief for Petitioner].

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

9. *Id.*

10. *Id.*

11. *Id.* at 2366.

12. *Id.* at 2362–64.

This case’s controversy was whether, by agreeing to help Williams obtain access to top government decision-makers, McDonnell provided Williams with a legally sufficient “quo” in exchange for these gifts and loans.<sup>13</sup>

At the time of these events, Star Scientific was trying to persuade independent researchers to conduct studies on the health benefits of its nutritional supplement, Anatabloc.<sup>14</sup> Initiating these studies would have helped Star Scientific receive FDA approval for Anatabloc as an anti-inflammatory drug.<sup>15</sup> Williams sought McDonnell’s help in initiating these studies in Virginia public universities.<sup>16</sup> Additionally, Williams appeared to enlist McDonnell’s help to add nutritional supplements like Anatabloc to the health insurance plan for Virginia’s state employees.<sup>17</sup> Based on this, the federal government indicted McDonnell, alleging that over the course of his tenure he performed the following five “official acts” to help Williams promote Anatabloc to Virginia government entities:

- (1) arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc;
- (2) hosting, and . . . attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients;
- (3) contacting other government officials in the [Governor’s Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;
- (4) promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s 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.<sup>18</sup>

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13. *See id.* at 2365 (“The issue in this case is the proper interpretation of the term ‘official act.’”).

14. *Id.* at 2362.

15. *Id.*

16. *Id.*

17. *Id.* at 2364.

18. *Id.* at 2365–66.

McDonnell did not dispute that this conduct occurred, but did dispute its illegality. McDonnell claimed that this was all run-of-the-mill conduct and that setting up meetings between constituents and government officials is something he did “literally thousands of times.”<sup>19</sup> McDonnell testified that he did not expect the government officials to do anything other than meet with Williams,<sup>20</sup> and at least one such official likewise claimed they did not feel any pressure to do anything other than attend the meetings.<sup>21</sup> Thus, McDonnell claimed that the only “quo,” provided in exchange for Williams’ “quid,” was setting up meetings, calling other public officials, and hosting events for Williams.<sup>22</sup> McDonnell claimed that this conduct was insufficient for liability under the Anti-Bribery statute and the Hobbs Act.

### *B. Procedural Background*

McDonnell was indicted for committing and conspiring to commit honest services fraud under the Anti-Bribery statute, as well as extortion under the Hobbs Act.<sup>23</sup> After a five week trial in the district court, a jury convicted McDonnell under both statutes and sentenced him to two years in prison.<sup>24</sup> McDonnell appealed to the Fourth Circuit, challenging the definition of “official action” given in the district court’s jury instructions.<sup>25</sup>

These jury instructions quoted the Anti-Bribery statutory definition,<sup>26</sup> which defines “official action” as “any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”<sup>27</sup> Additionally, the district court, at the request of the government, instructed the jury that the term “official action” included “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 and end.”<sup>28</sup> The district court

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19. *Id.* at 2366.

20. *Id.*

21. *Id.* at 2363.

22. *See id.* at 2366 (claiming he did not expect his staff to do anything other than meet with Williams).

23. *Id.* at 2364–65.

24. *Id.* at 2366–67.

25. *Id.* at 2367.

26. *Id.* at 2366.

27. 18 U.S.C. § 201(a)(3) (2012).

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

declined, however, to give McDonnell’s requested set of instructions to the jury, which included, “merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, ‘official acts,’ even if they are settled practices of the official, because they ‘are not decisions on matters pending before the government.’”<sup>29</sup> On appeal, McDonnell argued the instructions given by the court were too broad, because the definition “deemed virtually all of a public servant’s activities . . . ‘official’ no matter how minor or innocuous.”<sup>30</sup>

After the Fourth Circuit affirmed the district court’s ruling, the Supreme Court granted certiorari to “clarify the meaning of ‘official act’” in both statutes.<sup>31</sup> Chief Justice Roberts’ opinion also addressed McDonnell’s additional claims that the statutes in question were unconstitutionally vague.<sup>32</sup>

## II. LEGAL BACKGROUND

The parties disagreed whether the conduct at issue was an “official action” for the purposes of federal public corruption law. The text of the statutes and precedential cases provided guidance in answering this question.

McDonnell was charged with honest-services fraud under the Anti-Bribery statute, and with extortion under the Hobbs Act.<sup>33</sup> Both charges stemmed from the same conduct—McDonnell’s alleged acceptance of bribes from Williams.<sup>34</sup> The Anti-Bribery statute forbids any public official from receiving or accepting anything of value in return for “being influenced in the performance of an official act.”<sup>35</sup> The underlying theory is that a public official who accepts a bribe or kickback has deprived the public of their right to the official’s honest services. Similarly, Hobbs Act extortion has been construed to cover the conduct of a public official receiving a bribe.<sup>36</sup> The parties and courts agreed that an “official action” was a necessary element of such

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29. *Id.*

30. *Id.* at 2367.

31. *See id.* at 2361 (treating the two statutes the same for the purposes of interpreting the term “official act”).

32. *Id.* at 2375.

33. *Id.* at 2365.

34. *Id.*

35. 18 U.S.C. § 201 (2012).

36. *McDonnell*, 136 S. Ct. at 2365.

extortion as well as the federal bribery statute.<sup>37</sup> Violating these statutes is a felony punishable by significant jail time.<sup>38</sup> In this case, it was undisputed that McDonnell was a public official who received something of value from Williams.<sup>39</sup> Therefore, the only legal issue considered by the Supreme Court was whether McDonnell's acts supporting Williams and Star Scientific were "official acts" under the statutory definitions.

The parties and district court agreed that the definition of "official act" given in the Anti-Bribery statute should also control the Hobbs Act analysis.<sup>40</sup> The Anti-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 be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."<sup>41</sup>

*United States v. Sun-Diamond Growers of California*<sup>42</sup> provided a key precedent guiding the interpretation of "official action" in this context. There, the Supreme Court held that the "[g]overnment must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."<sup>43</sup> This is a narrow interpretation of "official act" that forces the government to prove that the thing of value was given to a public official in exchange for the public official doing a specific, identifiable "official action."<sup>44</sup>

This opinion also provided some examples of conduct that might seem like an "official action" in the definitional sense, but do not count as "official actions" under the Anti-Bribery statute. The two examples given by the Court were the President accepting token gifts from championship sports teams upon their ceremonial visits to the White House, and the Secretary of Education visiting a high school and accepting a school baseball cap from the principal of the high school.<sup>45</sup> These actions could have been found to be illegal under a

37. *Id.*

38. *See id.* at 2366–67 (showing the government requested 10 years imprisonment, and the district court actually imposed 2 years imprisonment for violating the statutes).

39. *Id.* at 2366.

40. *Id.* at 2365.

41. 18 U.S.C. § 201(a)(3) (2012).

42. 526 U.S. 398 (1999).

43. *Id.* at 414.

44. *Id.* at 404–05.

45. *Id.* at 406–07.

broader interpretation of “official act” in the Anti-Bribery statute, as the President always has before him matters that affect college and professional sports, and the Secretary of Education always has before him matters that affect high schools.<sup>46</sup> The Court determined that these actions should not be covered by the statute, and used the analogy as support for it adopting the narrower interpretation of “official action” that made this conduct permissible.<sup>47</sup>

*United States v. Birdsall*<sup>48</sup> also guided the Court’s analysis. In this case, the Court clarified that the official who accepts the thing of value does not need to be the official who performs the “official act” in order for the conduct to be an illegal bribe.<sup>49</sup> Instead, a public official can violate the statute if he uses his position to provide advice to another public official with the knowledge or intent that the advice will lead the other public official to perform an “official act.”<sup>50</sup>

Additionally, *Evans v. United States*<sup>51</sup> clarified that the illegal conduct is the *agreement* to perform an official action in exchange for the thing of value.<sup>52</sup> Therefore, it is no defense if the public official does not actually perform their end of the bargain.<sup>53</sup> In fact, the public official does not even have to intend to perform the agreed-upon official act.<sup>54</sup> It is enough that the public official received a thing of value with the expectation that he would perform an “official act” in return.<sup>55</sup>

### III. ARGUMENTS

#### A. *The Government’s Arguments*

The Government argued for a broad interpretation of “official action,” relying heavily on *Birdsall*. The Government claimed both that the statutory text compelled this interpretation and that Petitioner’s proposed narrow interpretation would “radically restrict the reach of the bribery laws and allow the purchase and sale of much

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46. *Id.* at 407.

47. *Id.*

48. 233 U.S. 223 (1914).

49. *Id.* at 234.

50. *Id.*

51. 504 U.S. 255 (1992).

52. *Id.* at 268 (emphasis added).

53. *McDonnell v. United States* 136 S. Ct. 2355, 2370–71 (2016).

54. *Id.* at 2371.

55. *Id.*

of much of what government employee's do."<sup>56</sup> Additionally, the Government disputed Petitioner's contention that a broad interpretation will be a slippery slope opening up any elected official for bribery prosecution based on the standard practice of receiving campaign contributions in exchange for increased access.<sup>57</sup> Finally, the Government contended that under Supreme Court precedent, the Anti-Bribery statute was not unconstitutionally vague on its face when limited to bribes and kickbacks.<sup>58</sup>

Using language from *Birdsall*, the Government argued that the Anti-Bribery statute covers "every action that is within the range of official duty, including efforts to influence decisions made by others."<sup>59</sup> In support of this contention, the Government showed that the definition of "official act" refers to "any decision or action, on any question or matter, that may at any time be pending, or which may be brought before any public official, in such official's capacity."<sup>60</sup> The Government then noted that when "read naturally, the word 'any' has an expansive meaning," and that Congress used disjunctive formulations such as "'decision or action' to ensure the statute had an expansive reach."<sup>61</sup>

The Government used *Birdsall* to show that precedent broadly interpreted older versions of the Anti-Bribery statute, which had identical language on this point.<sup>62</sup> In *Birdsall*, the Court found that two government officers had violated the statute by accepting bribes in return for recommending lighter prison sentences.<sup>63</sup> The key fact for the Government was that in *Birdsall*, these two officers did not have any formal authority over sentencing.<sup>64</sup> Instead, they provided information and recommendations to their boss, the Commissioner of Indian Affairs, who would regularly be consulted by sentencing judges.<sup>65</sup> According to the Government, this brought the act of merely using one's official position to influence other officials within the

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56. Brief for the Respondent at 15, *McDonnell*, 136 S. Ct. 2355, No. 15-474 (Mar. 30, 2016) [hereinafter Brief for Respondent].

57. *Id.*

58. *Id.* at 16.

59. *Id.* at 20.

60. *Id.* at 20–21.

61. *Id.* at 21.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*



scope of “official action.”<sup>66</sup> It argued that McDonnell did the same thing by setting up meetings between Williams and other government officials, and inviting government officials to events he hosted for Star Scientific.

Additionally, the Government took issue with McDonnell’s argument that a broad interpretation of “official act” would criminalize routine political activity, such as granting access to campaign contributors.<sup>67</sup> It began by noting that the bribes involved in this case were “personal payoffs, not campaign contributions.”<sup>68</sup> Nevertheless, the Government addressed the campaign contribution hypothetical by distinguishing formal quid pro quo arrangements from the general gratitude and access that often accompanies campaign contributions.<sup>69</sup>

This distinction relied on the Court’s previous holding that the “ingratiation and access” that often accompany political contributions were not corruption.<sup>70</sup> Instead, these arrangements “embody a central feature of democracy—that constituents support candidates that share their beliefs and interests, and the candidates who are elected can be expected to be responsive to those concerns.”<sup>71</sup> The Government referred to this arrangement as a candidate’s “general gratitude” toward his supporters, and they argue it is not unlawful for this gratitude to lead to meetings or actions down the line.<sup>72</sup> According to the Government, this is unlike a formal quid pro quo arrangement where there is a “corrupt *agreement*” for money to be paid in exchange for benefits in the future<sup>73</sup>: “It is this corrupt *agreement*, made at the time of the campaign contribution, that transforms the exchange from a First Amendment protected campaign contribution and a subsequent action taken by a grateful official into an unprotected crime.”<sup>74</sup> Thus, the Anti-Bribery statute and Hobbs Act extortion violations were completed at the time of the agreement, not when the government official follows through by performing the “official act.”<sup>75</sup> The Government contended that there was sufficient

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66. *Id.* at 25.

67. *Id.* at 32.

68. *Id.*

69. *Id.* at 33.

70. *Id.* at 32.

71. *Id.*

72. *Id.* at 33–34.

73. *Id.* at 34.

74. *Id.*

75. *Id.* at 40.

evidence for the jury to conclude that there was a quid pro quo corrupt agreement between Williams and McDonnell.<sup>76</sup>

Finally, the Government disputed Petitioner's claim that the Anti-Bribery statute and the Hobbs Act were unconstitutionally vague.<sup>77</sup> It cited *Skilling v. United States*,<sup>78</sup> in which the Court held that the Anti-Bribery statute was not unconstitutionally vague as long as it is only interpreted to cover schemes involving bribes or kickbacks.<sup>79</sup> As McDonnell failed to identify any justification for overruling *Skilling*, the Government contended the statute cannot be unconstitutionally vague.<sup>80</sup> The Government similarly disputed McDonnell's as-applied claim of unconstitutionality. Its argument was simple: McDonnell's conduct involved accepting a bribe and thus fell squarely into a category of conduct to which the Court in *Skilling* held the Anti-Bribery statute could permissibly be applied.<sup>81</sup>

### B. Governor McDonnell's Arguments

Governor McDonnell challenged both the district court's definition of "official action," and the constitutionality of the relevant statutes both facially and as-applied to his conduct.

In challenging the definition of "official action," McDonnell argued that these statutes have historically been, and should continue to be, construed to apply only to acts that "exercise (or pressure others to exercise) the power of the state."<sup>82</sup> He urged that the broad interpretation suggested by the Government would be a slippery slope, criminalizing normal conduct done by every elected official and campaign contributor.<sup>83</sup> If his proposed interpretation was applied, and "official acts" were cabined to include only exercises of sovereign power, McDonnell claimed that his conduct could not qualify as an "official action."<sup>84</sup>

The next argument put forth by McDonnell was that *United States v. McNally*<sup>85</sup> and *Skilling* have confined these statutes to their "bribe

76. *Id.*

77. *Id.* at 56.

78. 561 U.S. 358 (2010).

79. Brief for Respondent, *supra* note 56, at 56.

80. *Id.* at 57.

81. *Id.*

82. Brief for Petitioner, *supra* note 7, at 18.

83. *Id.* at 19.

84. *Id.*

85. 483 U.S. 350 (1987).

and kickback core,” and that “core bribery” requires agreeing to exercise sovereign power.<sup>86</sup> Bribery, McDonnell argued, “has always meant receiving a reward to pervert the judgment.”<sup>87</sup> Thus, the focus of bribery law was to ensure independent judgement of government officials, not to punish government officials for corrupt self-interest.<sup>88</sup> This is evidenced by the fact common law courts focused their analysis on the “perversion” of governmental decision making.<sup>89</sup> Modern courts have also recognized this, as the Court rejected the only pre-*McNally* case to charge an official who never took or urged another public official to take governmental action.<sup>90</sup> Thus, according to McDonnell, he could not have violated the statutes, as he did not agree to or actually exercise any government decision making power in exchange for the loans and gifts from Mr. Williams.<sup>91</sup>

Another major part of McDonnell’s argument was that the broad interpretation of “official action” proposed by the Government would have disastrous consequences.<sup>92</sup> The core of his argument was that if “official action” is interpreted to include “anything that could have the purpose or effect of exerting some influence,” elected government officials would be at risk of indictment any time they provide heightened access to contributors.<sup>93</sup> To highlight this point, McDonnell posited routine exchanges elected officials have with their contributors that he argued would now be criminal under the Government’s interpretation.<sup>94</sup> These routine exchanges included posing for a photo with the contributor in exchange for a donation, answering a donor’s call to discuss an official policy, or referring a contributor to an agency with jurisdiction over the issue of concern.<sup>95</sup> McDonnell urged the Court to avoid this massive upheaval of our political process by adopting his proposed narrow interpretation of official action.<sup>96</sup>

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86. Brief for Petitioner, *supra* note 7, at 26–27.

87. *Id.* at 30 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed.1785)).

88. *Id.* at 31.

89. *Id.*

90. *Id.* at 29.

91. *Id.* at 29.

92. *Id.* at 40.

93. *Id.*

94. *See id.* at 41.

95. *Id.* at 40–41.

96. *See id.* at 43 (“This Court should decisively reject that attempt, drawing a clear line to prevent future episodes of prosecutorial exuberance.”).

Finally, McDonnell urged the Court to declare these “notoriously vague” statutes as unconstitutional on their face, or at least in their application to his conduct.<sup>97</sup> He initially conceded that in *Skilling*, the Court pronounced that these statutes were not unconstitutionally vague if constrained to conduct involving bribes and kickbacks.<sup>98</sup> The problem, according to McDonnell, was that the Government is circumventing this limitation in cases like this one by construing “virtually everything officials do into quid pro quo bribery.”<sup>99</sup> This results in an atmosphere where a government official is deprived of fair notice of “the line between permissible politics and federal felonies.”<sup>100</sup> According to McDonnell, the Government’s willingness to surpass these judicially created limits illustrates why Congress, not the courts, should rework these potent statutes.<sup>101</sup> Essentially the statutes were argued to have been currently lacking in any legislative guidance on how they should be applied, resulting in laws shapeless to the point of being constitutionally impermissible.<sup>102</sup>

McDonnell also alluded to federalism concerns, claiming that federal corruption laws “intrude deeply into states’ authority to regulate their officials.”<sup>103</sup> He based this argument on *McNally*, where the Court refused to construe the statutes “in a matter that . . . involves the Federal Government in setting standards of disclosure and good government for local and state officials.”<sup>104</sup> Governor McDonnell also contended that the vagueness concerns described above amplify these federalism concerns, and the combined result is federal prosecutors imposing a national code of ethics through case-by-case convictions.<sup>105</sup>

First Amendment issues were also raised by these statutes because campaign contributions have been found to be protected speech by the Court in the past.<sup>106</sup> Essentially, “citizens cannot fully express their First Amendment rights to support their candidates and petition officials—and officials will be reticent to meet with constituents who

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98. *See id.* at 58 (stating that *Skilling* confined the law to “the bribe and kickback core”).

99. *Id.*

100. *Id.* at 18.

101. *Id.*

102. *See id.* at 59–60 (“Invoking so shapeless a provision to condemn someone to prison . . . does not comport with the Constitution’s guarantee of due process.”).

103. *Id.* at 24.

104. *Id.*

105. *Id.*

106. *Id.*

have exercised that constitutional right—if all are under perpetual threat of indictment.”<sup>107</sup> McDonnell argued that these three areas of concern—due process, federalism, First Amendment—combined to compel the Court to adopt a narrow interpretation of these statutes so that they fully comply with the constitution.

McDonnell’s as-applied challenge was based on similar grounds. McDonnell claimed that these statutes failed to give him fair notice that his conduct would be considered criminal.<sup>108</sup> This is because the wording of the statutes did not make clear that his conduct would be covered, and there was no precedent for someone being convicted based on this benign conduct.<sup>109</sup> McDonnell argued that knowing the statutes covered his conduct would have required him to see the future.<sup>110</sup> Because these statutes and the relevant case law did not adequately put McDonnell on notice of the criminality of his conduct prior to him engaging in said conduct, he argued it would be unconstitutional to convict him based on those statutes.<sup>111</sup>

#### IV. HOLDING

The Supreme Court in a unanimous decision reversed the Court of Appeals and vacated the convictions of Petitioner McDonnell.<sup>112</sup> In the opinion written by Chief Justice Roberts, the Court chose to adopt a narrower interpretation of “official act,” and set up a framework to analyze future controversies.<sup>113</sup> In so doing, the Court rejected McDonnell’s constitutional claims, stating that the narrow interpretation adopted in the opinion remedied any constitutional concerns.<sup>114</sup>

The Court began by setting up a framework for the analysis by describing two requirements of an “official act”:

First, the Government must identify a “question, matter, cause, suit, proceeding or controversy” that “may at any time be pending” or “may by law be brought” before a public official. Second, the Government must prove that the public official made a decision or

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107. *Id.* at 25.

108. *Id.* at 60.

109. *Id.*

110. *See id.* (“Public officials should not need to consult Nostradamus to know what federal law prohibits, but that is what the Government’s position would require.”).

111. *Id.*

112. *McDonnell v. United States*, 136 S. Ct. 2355, 2734 (2016).

113. *Id.* at 2367–68.

114. *Id.* at 2375.

took an action “on” that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.<sup>115</sup>

Then the Court explained that a normal meeting, call, or event like the conduct at issue here was not itself an identifiable “question, matter, cause, suit, proceeding or controversy” under the statute.<sup>116</sup> The rationale behind this determination relied on the inclusion of the phrases “may at any time be pending,” and “may by law be brought.”<sup>117</sup> The Court determined that those phrases “connote a formal exercise of governmental power,” and that the interpretive canon *noscitur a sociis* compelled them to interpret “question, matter, cause, suit, proceeding or controversy” in the same narrow manner.<sup>118</sup>

The Court also determined that by itself, a normal meeting, call, or event could not qualify as a “decision or action” on another “question, matter, cause, suit, proceeding, or controversy.”<sup>119</sup> Here, the Court followed its precedent from *Sun-Diamond*, which made it clear 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 [the Anti-Bribery Statute].”<sup>120</sup> Instead, a public official “must make a decision or take action *on* that question or matter, or agree to do so.”<sup>121</sup> However, this does not mean that setting up a meeting, hosting an event, or making a phone call can never be conduct triggering the Anti-Bribery Statute.<sup>122</sup> For example, if a jury concluded that this conduct was done as a result of a public officials agreement to pressure another official on a pending matter in exchange for something of value, that would be illegal.<sup>123</sup>

In coming to these determinations, the Court agreed with many of the arguments raised by McDonnell. For example, the Court was very concerned that the Government’s proposed interpretation would open up almost every elected official and their contributors to criminal prosecution based on run-of-the-mill conduct.<sup>124</sup> Additionally,

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115. *Id.* at 2368.

116. *Id.* at 2369.

117. *Id.* at 2368.

118. *Id.* at 2368–69.

119. *Id.* at 2370.

120. *Id.*

121. *Id.*

122. *Id.* at 2371.

123. *Id.*

124. *See id.* at 2372 (“In the Government’s view, nearly everything a public official accepts . . . counts as *quid*; and nearly anything a public official does . . . counts as *quo*.”).

the Court identified that the Government’s proposed interpretation would have raised significant due process and federalism concerns.<sup>125</sup>

Finally, having cabined the statutes using the narrow interpretation proposed by McDonnell, the Court rejected McDonnell’s vagueness arguments. As a result of adopting this narrow interpretation, the Court felt the law was now sufficiently specific, both facially and as-applied to Governor McDonnell.<sup>126</sup>

## V. ANALYSIS

When the Supreme Court granted certiorari in this case, commentators saw it as an “important test of what kinds of official conduct amount to forbidden corruption.”<sup>127</sup> In resolving this test, the Court drew a logical line and provided much needed clarity into this area of the law. That being said, the rule emerging from this opinion may not be a perfect remedy to solve the entire problem of public corruption.

Many commentators have lauded this decision for drawing a clear line in a previously indeterminate area of the law. According to political strategist Larry Ciesler, “it sends a pretty clear signal to prosecutors and elected officials as to where the line is.”<sup>128</sup> This is important constitutionally, as indeterminate rules of law are susceptible to the types of vagueness arguments put forth by McDonnell. It is also important practically, as this bright line rule allows public officials to moderate their interactions with constituents to ensure compliance with public corruption laws. This avoids any chilling effect that public corruption laws may have on interactions between public officials and their constituents. Now both parties will have certainty they will not be criminally investigated or indicted as long as they stay within clearly marked boundaries.

On the other hand, this opinion raises concerns that the bright line rule enacted by the Court will lead to the creation of a zone of legally permissible soft corruption. This zone would be the area in between

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125. *Id.* at 2373.

126. *Id.* at 2375.

127. Adam Liptak, *Justices to Hear Appeal by Bob McDonnell, Ex-Governor of Virginia*, N.Y. TIMES (Jan. 15, 2016), [https://www.nytimes.com/2016/01/16/us/politics/bob-mcdonnell-supreme-court-appeal.html?\\_r=0](https://www.nytimes.com/2016/01/16/us/politics/bob-mcdonnell-supreme-court-appeal.html?_r=0).

128. P.J. D’Annunzio, *McDonnell Case Casts Long Shadow in Public Corruption Prosecutions*, LEGAL INTELLIGENCER (Dec. 22, 2016), <http://www.thelegalintelligencer.com/id=1202775470287/McDonnell-Case-Casts-Long-Shadow-in-Public-Corruption-Prosecutions>.

the poles of innocent campaign contributions and the general access they often provide, and illegal quid pro quo corruption. The idea is that an interested constituent could give large sums of money to a public official, in the form of a campaign contribution or otherwise, in return for the public official generally “being a friend” or supporting the constituent in ways that do not trigger the Anti-Bribery statute. Indeed this opinion has been described as giving elected officials a “blank check to trade gifts for access and ‘unofficial’ favors.”<sup>129</sup>

The best example of this type of soft corruption comes from the facts of this case. Mr. Williams provided Governor McDonnell with lavish gifts, and in return received the benefits of having the Governor of Virginia as a supporter. This led the Governor of Virginia to make calls, host events, make recommendations, and generally act in furtherance of the agenda of a private citizen (and his private business). To many lay people, this would appear to be textbook public corruption, that should violate the law. Polls showed that most Virginians thought Governor McDonnell was guilty, and this public condemnation indicates that most people would perceive his conduct to be “corrupt.”<sup>130</sup> Even the Court found time to call this behavior distasteful, although it did so in the process of declaring it legal.<sup>131</sup>

While allowing this “distasteful” behavior to persist legally appears unsatisfying, there are reasons the Court was probably right to do so. Mainly, this zone of permissible soft corruption is probably not that large, as conduct by a public official that exerts pressure on another public official is still covered.<sup>132</sup> Therefore, if the soft corruption associated with access and unofficial favors exerts any pressure or undue influence on government actors, the conduct will be covered by the statutes. But if the conduct does not lead to public officials feeling pressure to act in a way differently than they would otherwise, then the conduct, while distasteful, did not have the type of pernicious effects that Congress appeared to be worried about when they centered these statutes around quid pro quo bribery and kickback schemes.

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129. Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor’s Graft Conviction*, N.Y. TIMES (June 27, 2016), [https://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html?\\_r=0](https://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html?_r=0).

130. *Id.*

131. *McDonnell*, 136 S. Ct at 2375.

132. *Id.* at 2371.



If the Court was actually interested in stamping out this soft corruption, another option they could have chosen was a third interpretation of “official act.” The Court could have chosen to set up a flexible standard and largely leave this area of law up to juries for case-by-case determinations of what constitutes an “official act” when a public official is charged with bribery for setting up a normal meeting, call, or event. This would allow a jury of average citizens to decide normatively if the actual conduct taken by their public official constituted a bribe or kickback based upon the balancing of various factors. The types of factors that could be involved in a test like this could include the amount of value given by the constituent to the public official; the amount of meetings, calls, or events set up by the public official for the constituent; the nature of these meetings, calls or events such as who was invited/called and the nature of the discussions; if any benefit was ever actually construed onto the constituent as a result of these meetings, calls or events; and anything else the Court thinks is relevant in helping juries determine whether this conduct was “corrupt” within the plain meaning of the term.

The advantage of this kind of case-by-case adjudication is that it would allow the federal public corruption statutes to reach “distasteful” conduct that looks like corruption, while avoiding covering the benign interactions between campaign donors and candidates the Court is so worried about criminalizing. For example, no reasonable prosecutor would charge, and no reasonable jury would convict, a public official for taking a picture with a campaign donor at a fundraiser, because this is not commonly thought of as a corrupt activity. This would allow prosecutors to focus on finding and eradicating improper influence over our public officials, by taking away the public officials’ “blank check” for trading unofficial favors for gifts of value.

The main problem with this approach, and the reason the Court was probably correct not to adopt it, is that it would probably trigger many of the same constitutional and practical concerns of the Government’s proposed broad interpretation of “official act.” Case-by-case determinations would not allow public officials to adequately ensure that their interactions with constituents do not cross the line into impermissible corruption, as the line may change depending on the jury in that particular case. Additionally, a system where corruption is not clearly defined could theoretically lead to legally dubious, politically motivated prosecutions, for which juries in heavily

partisan areas may not be an effective check. However, this should not have the same chilling effect on interactions between constituents and public officials as the Government's proposed interpretation of "official act." Under this system public officials should only be concerned with interactions with constituents that might be viewed as corrupt or improper. Thus, this system should only chill interactions between public officials and constituents at the margins of permissibility, which leaves out innocent, run-of-the-mill interactions between public officials and constituents the Court was particularly worried about criminalizing.

Ultimately, the Court was probably correct in its interpretation of the federal public corruption statutes, leaving out this type of soft corruption. It does not necessarily follow however, that this conduct is not bad for society and *should not* be illegal. Alternatively, this case actually highlights many of the exact reasons why this conduct is in fact bad for society, and *should* be against the law.

The Court correctly left this issue to Congress, who as the lawmaking body is the proper institution to make these normative decisions. Thus far, Congress has made the normative judgment that public corruption laws should only extend to cases of quid pro quo bribery and kickbacks. Hopefully this case does not signal the end of the development of the law in this and instead works to spur new debate and possibly legislation regarding the proper relationship between public officials and their private constituents.

#### CONCLUSION

In this case the Court had to choose between two competing interpretations of the law, that would have drastically different effects. The Court chose the interpretation drawing a reasonable and logical line, limiting practical and constitutional concerns from a previously broad rule. This may not come without a downside. Public officials and constituents may now feel emboldened to engage in conduct that many would consider "corrupt," but is now legally deemed permissible.