Federal Corruption Statutes — Bribery — Definition of "Official Act" — McDonnell v. United States

Most people would assume that giving $175,000 in loans, gifts, and other benefits to a sitting governor while trying to secure his state's help in launching your business would be unequivocally illegal. Most people would now be wrong, despite thirty-eight states prohibiting the receipt of an equivalent amount in campaign contributions.[1] Last Term, in *McDonnell v. United States*,[2] the Supreme Court held that the federal bribery statute's definition of "official act" does not include "arranging a meeting, contacting another public official, or hosting an event" without the presence of something "more."[3] The Court emphasized the consequences of a broader interpretation, but failed to consider existing limitations on federal anticorruption laws and the decision's potential to further undermine participation in the democratic process by facilitating the appearance of corruption. However, the resulting definition still encompasses pressuring others to take an official action, taking initial steps toward an official action, and giving advice that will form the basis of an official action. These qualifications reduce the likelihood that the decision will hamper future prosecutions.

Robert McDonnell's campaign for Virginia Governor focused on job growth, and Jonnie Williams thought he could advance that agenda.[4] Williams headed Star Scientific, a Virginia company developing a nutritional supplement called Anatabloc.[5] Star needed research showing the drug's health benefits, which Virginia's public universities could perform if they received state grants.[6] The two men were introduced during McDonnell's 2009 campaign, and shortly thereafter the businessman asked McDonnell for help.[7] McDonnell agreed to introduce Williams to Virginia's Secretary of Health and Human Resources.[8] A few months later, McDonnell's wife Maureen suggested Williams sit next to her husband at a rally, and Williams bought her $20,000 worth of designer clothing as thanks.[9] Over dinner at the governor's mansion, the three then discussed the proposed studies.[10]

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[1] *See Contribution Limits Overview*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx [https://perma.cc/KT9L-5XQS].

[2] 136 S. Ct. 2355 (2016).

[3] *Id.* at 2367–68.

[4] *See id.* at 2361–62. McDonnell's primary slogan was "Bob's for Jobs." *Id.* at 2361.

[5] *Id.* at 2362.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Id.*

At the same time, the McDonnells' longtime money problems became acute.[11] Mrs. McDonnell told Williams that her husband said, "it's okay for me to help you . . . but I need you to help me."[12] Williams consequently gave the McDonnells $65,000.[13] The Governor began to set up more meetings for Williams with state agencies, and Williams lent the McDonnells his vacation home and Ferrari.[14] At Mrs. McDonnell's suggestion, he also purchased the Governor a Rolex.[15]

In August 2011, Governor McDonnell held a lunch with university researchers to launch Anatabloc.[16] Afterward, the McDonnells asked for a $50,000 loan, but Williams complained about the lack of progress.[17] Mrs. McDonnell emailed the Governor's counsel to express the Governor's desire "to get this going," and Governor McDonnell held another reception for researchers.[18] The money arrived "shortly thereafter," and the Governor then suggested the inclusion of Anatabloc in the state's employee healthcare plan to a cabinet secretary and agency head.[19] Over the next few months, Williams provided McDonnell with a third loan, golf outings, and a vacation.[20]

In January 2014, federal prosecutors indicted the by-then-former Governor.[21] The primary charges of honest services fraud and Hobbs Act extortion reflected the government's belief that Williams bribed McDonnell.[22] The parties stipulated that terms within both the honest services fraud and Hobbs Act extortion statutes would be defined by reference to a federal statute prohibiting bribery: 18 U.S.C. § 201.[23] Most relevant to his ultimate appeal was whether Governor

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[11] *See id.*

[12] *Id.* at 2362.

[13] *Id.* at 2362–63. Most of the money was a loan, but some helped pay for the wedding of one of the McDonnells' daughters. *Id.*

[14] *Id.* at 2363.

[15] *Id.*

[16] *Id.* McDonnell spoke to the researchers about the "scientific validity" of the supplement, "whether or not there was any reason to explore this further," and if it might "be something good for the Commonwealth." *Id.*

[17] *Id.* at 2363–64.

[18] *Id.* at 2364.

[19] *Id.*

[20] *Id.* These gifts came on top of a $10,000 wedding present to a McDonnell daughter. *Id.*

[21] *Id.* McDonnell was indicted under several anticorruption statutes. *Id.* at 2365 (citing 18 U.S.C. § 1014 (2012) (false statement); 18 U.S.C. §§ 1343, 1349 (honest services fraud); 18 U.S.C. § 1951 (Hobbs Act extortion)). Maureen McDonnell "was indicted on similar charges, plus obstructing official proceedings." *Id.*

[22] The honest services fraud statute criminalizes "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *Id.* at 2365 (citing Skilling v. United States, 561 U.S. 358, 404 (2010)). The Hobbs Act prohibits obtaining property "under color of official right," 18 U.S.C. § 1951, and the Court has interpreted the statute to encompass "taking a bribe." *McDonnell*, 136 S. Ct. at 2365 (citing Evans v. United States, 504 U.S. 255, 260, 269 (1992)).

[23] *McDonnell*, 136 S. Ct. at 2365. Though not referenced by the Court, 18 U.S.C. § 666 also prohibits the bribery of state officials.

McDonnell had "'receive[d] or accept[ed] anything of value' in return for being 'influenced in the performance of any official act.'"[24] 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."[25] Prosecutors alleged at least five such acts centered on the meetings and events McDonnell set up for Williams.[26]

After trial, the district court gave the government's proposed jury instruction, which added to the statutory definition the admonition that "official act" 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 an end.'"[27] The court rejected Governor McDonnell's suggested qualifications, including that customary duties, "arranging a meeting," or "hosting a reception" could not — on their own — be official acts.[28] The court also declined to require that the officeholder intend to "influence a specific official decision the government actually makes."[29]

The jury convicted McDonnell on all counts except the false statement charge.[30] He appealed on three grounds: that the court had erroneously instructed the jury on what could constitute an "official act," that the honest services statute and Hobbs Act were unconstitutionally vague, and that the evidence was insufficient.[31] The Fourth Circuit affirmed.[32] The panel rejected McDonnell's central argument that the district court's definition of "official act" was too broad, and held that the instruction properly limited the illegal acts to the statutory definition.[33]

The Supreme Court reversed. Writing for a unanimous Court, Chief Justice Roberts rejected the government's contention that the definition of "official act" within § 201(a)(3) included "*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 offi-

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[24] *Id.* (quoting 18 U.S.C. § 201(b)(2)).

[25] 18 U.S.C. § 201(a)(3).

[26] *McDonnell*, 136 S. Ct. at 2365–66.

[27] *Id.* at 2366.

[28] *Id.* (quoting United States v. McDonnell, 792 F.3d 478, 513 (4th Cir. 2015)).

[29] *Id.* (quoting Petition for a Writ of Certiorari app. I at 147a, *McDonnell*, 136 S. Ct. 2355 (No. 15-474)).

[30] *Id.* The jury that convicted Governor McDonnell also found Mrs. McDonnell guilty of several corruption-related charges. *McDonnell*, 792 F.3d at 486 n.1. Her appeal remains pending. *McDonnell*, 136 S. Ct. at 2367.

[31] *McDonnell*, 136 S. Ct. at 2367. This comment does not discuss elements of McDonnell's appeal rejected by the Fourth Circuit and not taken up by the Supreme Court.

[32] *McDonnell*, 792 F.3d at 520.

[33] *Id.* at 509.

cial's official capacity."[34] Instead, the Court read both "question or matter" and "decision or action" more narrowly.

The Chief Justice first examined the bribery statute's text. Employing the canon of construction *noscitur a sociis* — "a word is known by the company it keeps"[35] — the Court found the otherwise broad terms *question* and *matter* to be constrained by the statutory phrase's later reference to a "cause, suit, proceeding, or controversy."[36] Reading *question* and *matter* expansively would also have encompassed these terms, rendering the more specific words superfluous.[37] The Chief Justice's interpretation, by contrast, excluded most of the meetings, calls, and events in which McDonnell had been involved.[38] The Court, however, affirmed the Fourth Circuit's determination that initiating research studies, allocating grant money, and determining whether state health insurance would cover Anatabloc were questions or matters.[39]

The opinion next turned to § 201(a)(3)'s requirement of a *decision* or *action*. Chief Justice Roberts framed the inquiry as "whether arranging a meeting, contacting another official, or hosting an event" — steps taken by McDonnell — "may qualify as a 'decision or action' *on* a different question or matter."[40] Relying on *United States v. Sun-Diamond Growers of California*,[41] the Court held that "something more" was required before an "event, meeting, or speech . . . related to a pending question or matter" became a decision or action.[42] The Chief Justice allowed that the "something more" could be taking action or making a decision on "a qualifying step" toward an official act, "using [an] official position to exert pressure on *another* official to perform an 'official act,'" or "provid[ing] advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official."[43] The Court thus drew a line between "expressing

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[34] *McDonnell*, 136 S. Ct. at 2367 (quoting Brief for the United States at 20–21, *McDonnell*, 136 S. Ct. 2355 (No. 15-474)) (government's emphasis).

[35] *Id.* at 2368 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)). The example given by the Court for the past use of this canon is widely reviled for its perversion of the statute. *See, e.g.*, Stephen M. Bainbridge, *Securities Act Section 12(2) After the* Gustafson *Debacle*, 50 BUS. LAW. 1231, 1231–32 (1995) (describing the decision as "the most poorly-reasoned, blatantly results-driven securities opinion in recent memory").

[36] *McDonnell*, 136 S. Ct. at 2368. These more specific words all connoted "a formal exercise of government power." *Id.*

[37] *Id.* at 2369.

[38] *Id.*

[39] *Id.* at 2369–70. These instances were sufficiently "focused and concrete," and "involve[d] a formal exercise of governmental power . . . similar in nature to a lawsuit, administrative determination, or hearing." *Id.* at 2370.

[40] *Id.* at 2369.

[41] 526 U.S. 398 (1999). *Sun-Diamond* addressed the related federal prohibition on gratuities. *See id.* at 400.

[42] *McDonnell*, 136 S. Ct. at 2370.

[43] *Id.* An official need not actually take the agreed-upon action. *Id.* at 2370–71.

support" and pressuring another official.[44] When preceded by a *quid* and a *pro*, the former was politics, the latter a crime.

The Court buttressed this narrow definition of official act with the constitutional concerns raised by Governor McDonnell. Emphasizing the "pall of potential prosecution," Chief Justice Roberts wrote that "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns."[45] That "the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm" might feel prevented from making campaign contributions or taking an official "on their annual outing to the ballgame" troubled the Court.[46] The government's preferred definition of official act could lead to a regime in which "citizens with legitimate concerns might shrink from participating in democratic discourse."[47] A broader interpretation also raised the due process specter of inadequate notice to public officials and their constituents, and the Court found prosecutorial discretion an inadequate safeguard.[48] Finally, federalism interests weighed against federal regulation of the conduct of state and local officials.[49] Because the district court's jury instruction failed to narrow official act to the scope embraced by the Court,[50] the Court vacated the convictions.[51]

McDonnell represents the latest victory for the idea that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[52] The Court acknowledged that Governor McDonnell's "tawdry tale[] of Ferraris, Rolexes, and ball gowns" was "distasteful," or even "worse than that."[53] In spite of this criticism, the decision makes it easier for officeholders to spin their own stories of ill repute. The Court need not have reached this result. By focusing on what constitutes an official act in isolation rather than on the function

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[44] *Id.* at 2371. The Court found its earlier decision in *United States v. Birdsall*, 233 U.S. 223 (1914), to comport with the present opinion because the officials there provided advice. *McDonnell*, 136 S. Ct. at 2371.

[45] *McDonnell*, 136 S. Ct. at 2372.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 2372–73.

[49] *Id.* at 2373.

[50] *Id.* at 2374. The instructions failed to make clear that, without more, a "typical meeting, call, or event" could not be a question or matter under § 201(a)(3), nor could the Governor's general agenda of economic development be a question or matter. *Id.* They also did not define decision or action to require intent to pressure or advise. *Id.*

[51] *Id.* at 2375. In light of the narrowed definition of "official act," the Court rejected McDonnell's claim that the honest services statute and the Hobbs Act were unconstitutionally vague. *Id.* It also declined to address McDonnell's argument that insufficient evidence existed to convict him, remanding the question. *Id.*

[52] Citizens United v. FEC, 558 U.S. 310, 360 (2010).

[53] *McDonnell*, 136 S. Ct. at 2375.

of the anticorruption statutes more broadly, the Court ignored the limitations it had already placed on prosecutions of constituent service. Nevertheless, the Court's determination that preliminary steps, pressure, and advice could all constitute decisions or actions under § 201(a)(3) will reduce the practical impact of the case in future public-corruption prosecutions. More damaging will be the continued erosion of public confidence in elected officials and that loss's effect on participation in the democratic process — the very value the Court sought to protect.

The Court's opinion evaluates the definition of "official act" as though it were the sole limitation on the sweep of the anticorruption regime. Each of the three statutes the decision used in defining that regime, however, contains additional elements that further narrow its scope. First, within the anticorruption context, the Hobbs Act prohibits only "obtaining a 'thing of value . . . knowing that the thing of value was given in return for official action.'"[54] The person accepting that to which he is not entitled must know it was given in return for specific official acts,[55] though the explicitness of the quid pro quo depends on whether campaign contributions constitute the thing of value.[56] The sort of "generalized goodwill" engendered by a lunch or normal political interaction not tied to an exchange does not rise to a violation.[57] In the labor union hypothetical posed by the Court,[58] the exacting standard for when a campaign contribution becomes a bribe would require "an explicit promise or undertaking by the official" whereby "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."[59]

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[54] *Id.* at 2365 (quoting United States v. McDonnell, 792 F.3d 478, 505 (4th Cir. 2015) (alteration in original)). This prohibition stems from the Court's interpretation of extortion carried out "under color of official right" in 18 U.S.C. § 1951(b)(2). The statutes reviewed in this comment also prohibit other behavior, but the prosecution relied on only the provisions discussed here. *Id.*

[55] Evans v. United States, 504 U.S. 255, 268 (1992).

[56] *See, e.g.*, United States v. Ganim, 510 F.3d 134, 143 (2d Cir. 2007) (Sotomayor, J.) (explaining that when the thing of value is not a campaign contribution, a quid pro quo is still required, but "the agreement may be implied from the official's words and actions"); United States v. Giles, 246 F.3d 966, 972–73 (7th Cir. 2001) (requiring at least an implied quid pro quo); United States v. Collins, 78 F.3d 1021, 1035 (6th Cir. 1996) (holding a quid pro quo to be necessary even outside of campaign contribution cases).

[57] *See Ganim*, 510 F.3d at 149.

[58] *McDonnell*, 136 S. Ct. at 2372 (mentioning a "union [that] had given a campaign contribution in the past"). At oral argument, the Justices frequently conflated campaign contributions and other things of value. *See, e.g.*, Transcript of Oral Argument at 30–31, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), https://www.supremecourt.gov/oral_arguments/argument_transcripts/15-474_1bn2.pdf [https://perma.cc/EV4G-RMGL] (referring to "high-dollar donors").

[59] McCormick v. United States, 500 U.S. 257, 273 (1991). Though *Evans v. United States*, 504 U.S. 255, is less clear about the required agreement, most courts of appeals have reconciled the cases by holding that *McCormick*'s demand of an explicit agreement applies only in the campaign contribution context. *See, e.g.*, *Ganim*, 510 F.3d at 143. The precise form of the required agreement continues to produce variation among the lower courts, but all require an agreement in the campaign contribution context to be at least as clear as the quid pro quo necessary when dealing

The terms of the quid pro quo in such a case must be "clear and unambiguous."[60]

The honest services fraud statute contains similarly restrictive limitations after *Skilling v. United States*,[61] which had already dramatically narrowed the scope of federal anticorruption law by interpreting the statute to prohibit only "fraudulent schemes to deprive another of honest services through bribes or kickbacks."[62] That case emphatically dismissed the constitutional concerns regarding fair notice and arbitrary prosecutions later presented in *McDonnell*, holding that the statute "does not present a problem on either score."[63] The statute's mens rea requirement precluded officeholders from somehow being duped into committing a crime, and the interlocking restrictions of the anticorruption statutes left "no significant risk" of arbitrary prosecutions.[64] *McDonnell*'s discussion of the potential breadth of the statutory regime never reckoned with *Skilling*'s resolution of these arguments.[65]

Finally, the federal bribery statute considered by the Court also criminalizes only a narrow swath of behavior. In relevant part, § 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.[66] The Court explored the fifth element, but — just as with

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with other things of value. *See, e.g.*, United States v. McGregor, 879 F. Supp. 2d 1308, 1314–19 (M.D. Ala. 2012) (collecting cases and observing that "[i]mprecise diction has caused considerable confusion over the scope of federal corruption laws as applied to campaign contributions," *id.* at 1319).

[60] *See* United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992); *see also Ganim*, 510 F.3d at 142 (requiring an "express promise"); United States v. Tomblin, 46 F.3d 1369, 1381 (5th Cir. 1995) (quoting *Carpenter*, 961 F.2d at 827). *But see* United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995) (describing the quid pro quo requirement as "not onerous").

[61] 561 U.S. 358 (2010).

[62] *Id.* at 404; *cf.* Andrew M. Stengel, *Albany's Decade of Corruption: Public Integrity Enforcement After* Skilling v. United States*, New York's Dormant Honest Services Fraud Statute, and Remedial Criminal Law Reform*, 76 ALB. L. REV. 1357, 1358 (2013) (describing *Skilling* as "upending nearly twenty-five years of public corruption prosecutions" through its narrowing of honest services fraud).

[63] *Skilling*, 561 U.S. at 412. *Compare id.* at 412–13, *with McDonnell*, 136 S. Ct. at 2372.

[64] *Skilling*, 561 U.S. at 412.

[65] *Id.* Whether *Skilling* requires an explicit quid pro quo — which would only further restrict the statute — remains less clear. *See, e.g.*, Brian H. Connor, Comment, *The* Quid Pro Quo *Quark: Unstable Elementary Particle of Honest Services Fraud*, 65 CATH. U. L. REV. 335, 356–57 (2015) (comparing post-*Skilling* approaches to honest services fraud across circuits). At least the Second Circuit has held a quid pro quo to be "an essential element" of honest services fraud when prosecutors base the charge on bribery. United States v. Bruno, 661 F.3d 733, 743 (2d Cir. 2011) (citing *Ganim*, 510 F.3d at 148–49). In any event, the parties in *McDonnell* stipulated to the quid pro quo requirement. *See* United States v. McDonnell, 792 F.3d 478, 505 (4th Cir. 2015).

[66] Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 795–96, 795 n.39 (1985). These elements distill the verbose statute. *See* 18 U.S.C. § 201(b)(2) (2012) (making it a crime to be a public official who "directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value . . . in return for . . . being influenced in the performance of any official act").

the honest services fraud statute — the two intent requirements further limit the law. Indeed, requiring "corrupt intent" prevents from becoming criminal the sort of innocuous exchanges repeatedly posited by the Court.[67] Prosecutors must demonstrate that an official "saw a normative stop sign of some sort, whether social or legal, and chose to proceed on past it."[68] Though the exact contours of the element remain disputed,[69] it prevents the rightly responsive representative from wandering into receiving bribes.[70] Constituents are similarly protected because the giver must also specifically intend to exchange benefits for acts.[71] The Court's repeated citations to *Sun-Diamond* ignore this aspect of the statute, despite that decision having characterized it as a "distinguishing feature" of the law's reach.[72]

Given the robust protections the additional elements of these three statutes provide against vagueness, prosecutorial abuse, and the criminalization of routine constituent service, the Court's overarching focus on the *quo* — as if that element alone delineated politics from bribes — confounds.[73] The Court's approach becomes even more puzzling in light of the policy and constitutional arguments supporting a broader definition of corruption. These justifications likely surpass the magnitude of the downsides envisioned by the Chief Justice. While *McDonnell* ultimately accepts that money should be able to buy access and influence, by most measures, citizens disagree. More than three-quarters of all Americans believe that the role of money in politics continues to grow.[74] Less than a third believe that elected officials are

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[67] *See* Brennan T. Hughes, *The Crucial "Corrupt Intent" Element in Federal Bribery Laws*, 51 CAL. W. L. REV. 25, 26 (2014).

[68] Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 568 (2015).

[69] *Compare* United States v. Jennings, 160 F.3d 1006, 1013 (4th Cir. 1998) (equating "corrupt intent" to a quid pro quo), *with* United States v. Strand, 574 F.2d 993, 996 (9th Cir. 1978) ("An act is 'corruptly' done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.").

[70] *See* Lowenstein, *supra* note 66, at 798–99.

[71] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999). The contention that without a narrow definition of official act prosecutors could bring charges when "homeowners" ask an "official to join them on their annual outing to the ballgame" and are told "why it took five days to restore power . . . after a storm," *McDonnell*, 136 S. Ct. at 2372, thus fails to reckon with this element.

[72] 526 U.S. at 404–05 (distinguishing bribes from illegal gratuities).

[73] *See* Transcript of Oral Argument, *supra* note 58, at 30 (Chief Justice Roberts: "So is your answer, yes, that that's a felony?"; Deputy Solicitor General Dreeben: "If somebody pays me —"; Chief Justice Roberts: "No, no. That's the quid — that's the quid side of it."); *see also McDonnell*, 136 S. Ct. at 2370 (noting that the Court could "avoid the 'absurdities' of convicting individuals on corruption charges for engaging in" constituent service "by adopting a more limited definition of 'official acts'") (quoting *Sun-Diamond*, 526 U.S. at 408).

[74] *See* PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 72 (2015), http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf [https://perma.cc/7GC6-X9SZ].

honest.[75] It may well be that "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns."[76] But when it comes to the "[i]ngratiation and access" constitutionalized by the Roberts Court,[77] "the public reads the money as corruption."[78] Having become pervasive,[79] this money threatens the representative compact.[80] Individuals unable to give tens of thousands of dollars may feel voiceless, "lose confidence in the political system and become less willing to participate in the political process."[81] The perception that cash buys representation creates "a world where the vast majority of us disengage"[82] — precisely the problem the Chief Justice concluded a broad definition of official act would engender.[83]

Still, the Court's qualification of what constitutes a decision or action on an official act under the control of *another government official* will likely mitigate the effect of a narrower definition of "official act." Chief Justice Roberts described three situations in which a jury might yet find criminal activity: (1) the taking of "a decision or action on a qualifying step" toward an official action; (2) the using of an "official position to exert pressure on *another* official to perform an 'official act,'"; and (3) the giving of "advice to another official, knowing or in-

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[75] *See id.* at 75.

[76] *McDonnell*, 136 S. Ct. at 2372.

[77] Citizens United v. FEC, 558 U.S. 310, 360 (2010); *see also* Laurence H. Tribe, *Dividing* Citizens United*: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 463 (2015) (describing "a bizarrely cramped and naïve vision of political corruption and improper influence in the electoral process" as "characteristic of [the] Roberts Court").

[78] LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT 88 (2011).

[79] *See* Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS (Oct. 17, 1996), http://www.nybooks.com/articles/1996/10/17/the-curse-of-american-politics [https://perma.cc/3PRU-9Q57] ("The power of money in our politics, long a scandal, has now become a disaster."); *see also* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126 (1994) (describing "influence-seeking money" as "a pervasive force").

[80] *See* LESSIG, *supra* note 78, at 8–9; *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 507 (2007) (Souter, J., dissenting) (noting "pervasive public cynicism" resulting from the increased role of money in politics).

[81] STEPHEN BREYER, ACTIVE LIBERTY 44–45 (2006).

[82] LESSIG, *supra* note 78, at 169. Some contest this relationship between the perception of corruption and participation in the political process. *See generally* William J. Rinner, Note, *Maximizing Participation Through Campaign Finance Regulation: A Cap and Trade Mechanism for Political Money*, 119 YALE L.J. 1060, 1082–83 (2010) (reviewing literature disputing that the appearance of corruption reduces democratic engagement). Indeed, several 2016 presidential campaigns effectively mobilized voters with critiques of the role of money in politics. Engagement during presidential elections, though, may not reflect participation more broadly. *Cf.* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 384 (critiquing broad conclusions about voter behavior drawn from studies of national politics).

[83] *McDonnell*, 136 S. Ct. at 2372.

tending that such advice will form the basis for an 'official act' by another official."[84] That Governor McDonnell's behavior likely fell into all three categories demonstrates their pliability. By choosing which company representatives to invite to meetings in which grant proposals were discussed, he may have been "narrowing down the list of potential research topics."[85] His subordinates at the state universities seem to have "perceived that he was trying to influence them."[86] He arguably gave advice to state officials when he suggested that Anatabloc "would be good for . . . state employees."[87] Furthermore, throughout every interaction, his position as "Chief Executive of the Commonwealth" gave his assertions additional "credibility" and force,[88] offering a jury ample grounds to infer pressure.[89]

After *McDonnell*, lower courts and the Department of Justice retain the power to reframe prosecutions based on theories of access and influence — like Governor McDonnell's — as cases in which officials used their offices to pressure subordinates, offer advice, or take initial steps somewhat attenuated from the ultimate official action.[90] Given these qualifications, *McDonnell* may best be understood as revising jury instructions rather than rewriting what constitutes corruption itself. Regardless of how prosecutors and judges eventually respond, citizens already perceive the pay-to-play rhetoric of the Court as reason enough to "shrink from participating in democratic discourse."[91] Reversing that trend will require more than creative prosecutions.

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[84] *Id.* at 2370.

[85] *Id.* Though the decision often discusses actually taking actions, *id.*, the statutes require only an agreement to perform them, *see, e.g.*, Evans v. United States, 504 U.S. 255, 268 (1992) (holding that "fulfillment of the *quid pro quo* is not an element" of a Hobbs Act violation). Prosecutors might also reframe meetings, calls, and events as circumstantial evidence of an agreement regarding *other* official acts.

[86] Transcript of Oral Argument, *supra* note 58, at 8; *accord McDonnell*, 136 S. Ct. at 2366 (noting a subordinate's perception of pressure).

[87] United States v. McDonnell, 792 F.3d 478, 517 (4th Cir. 2015).

[88] *Id.* at 516.

[89] Simply put, subordinates are heavily influenced by the preferences of their superiors. Known as "obedience pressures," the impact on subordinates' decisionmaking within a hierarchical system — like government — can be significant. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1004 (2005); Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1096–97 (2003).

[90] That prosecutors can reframe cases in this way does not mean that they will. *Compare* Matt Zapotosky, *U.S. Attorney's Office Recommends Putting Robert McDonnell on Trial Again*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/world/national-security/us-attorneys-office-recommends-putting-robert-mcdonnell-on-trial-again/2016/09/02/3ea3eff0-6fb8-11e6-8533-6bobodedo253_story.html [https://perma.cc/CH98-GMHG], *with* Alan Blinder, *U.S. Ends Corruption Case Against Former Virginia Governor*, N.Y. TIMES (Sept. 8, 2016), http://www.nytimes.com/2016/09/09/us/us-ends-corruption-case-against-former-virginia-governor.html [https://perma.cc/RR2D-Y3NR].

[91] *McDonnell*, 136 S. Ct. at 2372.