The Trend of Tawdry Tales:
Public Corruption Prosecutions in the Wake of
McDonnell

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The core of legitimate government should be free of corruption. The United States Constitution lists two crimes that may be a basis for public officials to be removed from office: bribery and treason.¹ Federal laws targeting corruption developed out of creative applications of statutes, many of which were not designed by Congress to combat corruption. Charging decisions by prosecutors includes weighing the difference between the normal trading of favors in everyday politics and the attempt to make something happen in exchange for personal gain. Politicians should not sell access to the highest bidder. A review of the historical underpinnings of public corruption law reveals trends that impact prosecutorial discretion.

The 2016 United States Supreme Court’s unanimous decision in McDonnell v. United States drew a line as to when a politician’s unethical behavior becomes a crime by defining the statutory term “official act” as used in bribery prosecutions.² Expansive interpretations of statutes are often followed by the contraction of definitions in corruption law.³ The McDonnell Court continues that trend by reeling in prosecutorial discretion and providing clearer contours to the law upon which public corruption prosecutions are based. The balanced approach in McDonnell constrains charging discretion with a narrower definition without making it too difficult to prove bribery and related crimes in cases where convictions are warranted.

I. RESTRICTING THE “BOUNDLESS INTERPRETATION” OF STATUTES BY PROSECUTORS: CASE LAW NARROWS STATUTORY INTERPRETATION

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and

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¹ U.S. CONST. art. II, § 4.
ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute. A more limited interpretation of the term “official act” leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.  

To prove a bribery offense, the government must show that a public official received “anything of value” in exchange for agreeing to take an official act. The Court’s decision in McDonnell narrowly construed “official act” within the meaning of the crime of bribery, which found that merely setting up a meeting, talking to another official, or organizing an event does not fit the definition of an “official act.” Former Virginia Governor Bob McDonnell was indicted and convicted by a jury for accepting in excess of $175,000 in gifts and loans from businessman Jonnie Williams, who was looking to do business in Virginia. McDonnell obtained funding for his daughter’s wedding and a Rolex watch. Williams owned a company that was marketing a nutritional supplement, which he wanted Virginia universities to study. In exchange for the gifts and loans, McDonnell agreed to arrange meetings between Williams and state officials, host a launch party at the Governor’s Mansion, and contact other officials about the study. McDonnell said he did not seek to influence those officials to do anything in Williams’ favor. The prosecution was not based on violations of gift laws or campaign finance rules, rather, he was charged and convicted for the federal corruption which required an “official act” precluded by bribery law. The Court articulated a test to determine whether something is a bribable official act by considering whether it is “the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete,” and arranging for meetings between business and state officials did not meet that test. The Court reasoned that a broader interpretation may introduce the specter of prosecution over the normal relationships between officials and constituents that are necessary to representative government.

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4 McDonnell, 136 S. Ct. at 2375.
6 McDonnell, 136 S. Ct. at 2371.
7 Id. at 2361.
8 Id. at 2363.
9 Id.
10 Id. at 2361–68.
11 Id.
12 Id. at 2361.
13 Id. at 2369.
14 Id. at 2372.
Over the past three decades, courts have required convictions to be secured on increasingly explicit exchanges of quid pro quo rather than just the appearance of corruption. Let’s revisit the history of how interpretations of statutes are followed by the contraction of definitions and Congressional fixes.

A. The Interaction of the Court and Congress on Corruption—
Limiting Prosecutorial Discretion through the Narrow Interpretation of Statutes

Chief Justice Roberts’ comment on the government’s “boundless interpretation” evidences concerns not only regarding the breadth of the government’s reading, but the accompanying breadth of prosecutorial discretion. Before McDonnell, critics complained that prosecutors brought bribery cases based on how luxurious a gift seemed or how guarded the transaction was when the focus should have been on what act the public official actually did for something specific and pending, not routine political activities. Bipartisan commentators say that public corruption prosecutions severely impact the political process. Corruption is most often associated with personal gain by public officials who engage in bribery. But try to search for the definition of bribery—you find a long and winding road of different acts and a long list of non-criminal reciprocal arrangements. In general, anti-corruption law relies on many statutes that were not designed by Congress to combat corruption. For example, mail and wire fraud statutes are now commonly used to charge schemes that deprive the right of citizens to the honest services of their public officials. It is not easy to distinguish the difference between the political norm of trading of favors and a criminal act done in exchange for personal gain. The line between ethically bent conduct and corrupt criminal acts is defined by critical facts that expose the intent of both the bribe payer and receiver. How far can a public official go before helping a generous constituent, or a political donor, becomes an actual exercise of governmental power? Some say that prison is warranted only for the most serious bribery schemes involving campaign contributions and that non-criminal civil fines

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16 See George D. Brown, Applying Citizens United to Ordinary Corruption: With A Note on Blagojevich, McDonnell, and the Criminalization of Politics, 91 NOTRE DAME L. REV. 177, 228 (2015) (reasoning that McDonnell represented “what might be called the critique of the criminalization of politics”); Brief of Former Federal Officials as Amici Curiae in Support of Defendant-Appellant at 2–3, United States v. McDonnell, 792 F.3d 478 (4th Cir. 2015) (framing such behavior as “innocent conduct that occurs on a routine basis”).
should be used for not disclosing improper relationships.19 What is clear is that our
criminal justice system is designed to provide just punishment and deterrence.20
The McDonnell decision had the effect of checking prosecutorial discretion in
federal bribery matters while further defining bribery.

Historically, discretion afforded to American prosecutors has been the
bedrock of delivering justice. Prosecutorial discretion means that government
prosecuting attorneys choose whether or not to bring criminal charges and what
charges to bring. Some of the tools prosecutors use in exercising discretion
include charge drafting, plea bargaining, and the construction of contractual terms
incorporated into plea agreements. Prosecutors in the United States decide if a
matter is charged and what charges to bring right up to the time of conviction.
This adversarial principal of prosecutions frees up U.S. Courts to focus on settling
disputes, ensuring the proceedings are lawful, and reflect upon the law and facts in
handing down sentences.

Overzealous prosecutors have, from time to time, been smacked down with
narrow interpretations of criminal statutes by the Supreme Court.21 Take the case of
Yates v. United States, in which the government invoked the Sarbanes-Oxley
Act, concerning the destruction of tangible objects in the context of financial
records, to prosecute a fisherman for illegally discarding an undersized red
grouper.22 Or Bond v. United States, which concerned the prosecution of a jilted
lover under the Chemical Weapons Convention Implementation Act for amateur
tries to inflict a rash on her husband’s mistress.23 Creative prosecutions have
resulted in great victories for public protection. In the 1930s, American urban
crime relied upon corrupt activity. Notorious and violent Chicago gangster Al
Capone was prosecuted and ultimately convicted under a white collar statute for
income tax evasion, crippling his criminal enterprise that routinely bribed public
officials.24 Laws are the tools prosecutors use in bringing cases to combat modern
corruption and deters sophisticated criminal conduct. Refining corruption law
sends a message as to what is illegal and helps prosecutors in exercising
prosecutorial discretion.

19 See generally Brian F. Jordan, Disclosing Bribes in Disguise: Campaign Contributions as
 Implicit Bribery and Enforcing Violations Impartially, 17 U. PA. J. CONST. L. 1435 (2015); Mark S.
 Gaioni, Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C.


21 Jeffrey Green & Ivan Dominguez, Symposium, Federal Criminal Statutes are not Blank
 Checks for Prosecutors, SCOTUSBLOG (June 28, 2016, 11:44 AM), http://www.scotusblog.com/
 2016/06/symposium-federal-criminal-statutes-are-not-blank-checks-for-prosecutors/ [https://perma.
 cc/QB89-NFBA].


 faculty/projects/frtrials/capone/caponeaccount.html [https://perma.cc/QM3D-ATU5].
B. A Narrow Interpretation in McNally Leads to a Congressional Response

The Supreme Court has challenged Congress to develop clear statutory law on corruption through the narrow textual reading of statutes. In *McNally v. United States*, the government accused a former state official of violating the federal mail fraud statute, 18 U.S.C. § 1341, against the people of the Commonwealth of Kentucky through a patronage scheme.\(^{25}\) The Court narrowly read this statute, and found that mail fraud did not include “schemes to defraud citizens of their intangible rights to honest and impartial government.”\(^{26}\) Rather, the mail fraud statute was “limited in scope to the protection of property rights.”\(^{27}\) While the Court narrowly construed the statute, it acknowledged that, “[i]f Congress desires to go further, it must speak more clearly than it has.”\(^{28}\) Congress responded to the Court’s decision by drafting 18 U.S.C. § 1346, which mandated that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”\(^{29}\) While the Court had narrowly construed what constituted mail fraud, Congress responded to the Court’s invitations, and drafted a new statute on honest services.

C. The Court Deems a Quid Pro Quo as Necessary for a Hobbs Act Extortion Conviction

The Court later determined that an extortion conviction of an elected legislator under the Hobbs Act, 18 U.S.C. § 1951, required a quid pro quo.\(^{30}\) In *McCormick*, a member of the West Virginia House of Delegates accepted funds from a lobbyist after developing legislation with him for his clients.\(^{31}\) The Court sought to use this case to clarify the meaning of “under color of official right” for a conviction under § 1951, which defines extortion as, “the obtaining of property from another, with his consent . . . under color of official right.”\(^{32}\) The Court determined that “[t]he receipt of [campaign] contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments


\(^{26}\) Id. at 355, 360.

\(^{27}\) Id. at 360.


\(^{29}\) 18 U.S.C. § 1346.


\(^{31}\) Id. at 259–61.

\(^{32}\) Id. at 277; 18 U.S.C. § 1951(b)(2).
are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” 33 Thus, a quid pro quo was necessary for a successful conviction under the Hobbs Act. 34 Later, the Court reasoned in Evans that the Hobbs Act did not require the official to perform an affirmative act for the bribe, and held that “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” 35 Corruption often involves the use of code words, and participants avoid plain language. These cases, when taken together, left some ambiguity as to whether the quid pro quo had to be explicit or inferred from the facts. The case law did lead the U.S. Attorney’s Manual to summarize the general rule of a Hobbs Act fact situation as follows: “a public official trading his/her official actions in a[n] area in which he/she has actual authority in exchange for the payment of money.” 36 Thus, the Court has clarified that “under color of official right” as an official performing or not performing an official act as a result of a quid pro quo.

The Court further refined the definition of bribery in United States v. Sun-Diamond Growers of California, writing that “for bribery[,] there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.” 37 Bribery was juxtaposed with “[a]n illegal gratuity,” which “may constitute 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.” 38 The Court ultimately adopted a “narrow, rather than a sweeping, prohibition” concerning § 201(c)(1)(A), reading the definition of “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,” because it fit better with the natural reading of the statute to identify a particular official act, and was but one of many regulations on corruption. 39 Justice Scalia ultimately concluded that:

[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.

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33 Id. at 273.
34 Id. at 274.
38 Id. at 405.
a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits. As discussed earlier, not only does the text here not require that result; its more natural reading forbids it.\textsuperscript{40}

Thus, the Court narrowly defined an official act in terms of bribery, as it fit better with the natural reading of the statute and was part of a broad regulatory scheme.

D. The Court Constrains § 1346 to “the Bribe-and-Kickback Core”

In \textit{Skilling}, the Court narrowed its reading of § 1346 during the proceedings concerning Enron’s chief executive officer’s actions in the months leading up the corporation’s stock crash, by concluding that the statute “criminalizes only the bribe-and-kickback core of the pre-\textit{McNally} case law.”\textsuperscript{41} The Court adopted such a restrained view because “[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine.”\textsuperscript{42} \textit{Skilling} ultimately meant that the U.S. Government needed to prove there was a proverbial shoebox full of money exchanged for illegitimate promises for a successful § 1346 conviction.

Federal prosecutors paid immediate attention to \textit{Skilling} and so did defendants with pending cases. In November 2011, the Second Circuit reversed and dismissed (without prejudice) the conviction of former New York State Senate Majority Leader Joseph L. Bruno for honest services fraud for his failure to disclose alleged conflicts of interest.\textsuperscript{43} The reversal was based on the Supreme Court decision in \textit{Skilling}, limiting § 1346, the honest services statute, to cases involving bribery and kickbacks.\textsuperscript{44} The Second Circuit ultimately reasoned that Bruno’s conviction had to be thrown out because conflicts of interest were not in the “bribe-and-kickback core” of § 1346.\textsuperscript{45}

Also in November 2011, a Southern District of New York jury acquitted William Boyland, Jr., a New York State Assemblyman, of honest services fraud for allegedly receiving bribes from David Rosen, the chief executive of a hospital conglomerate, apparently because of lack of sufficient proof of a quid pro quo.\textsuperscript{46} Despite the initial acquittal, Boyland was found guilty of seeking bribes within

\textsuperscript{40} Sun-Diamond Growers of California, 526 U.S. at 412.

\textsuperscript{41} \textit{Skilling}, 561 U.S. at 409 (emphasis omitted).

\textsuperscript{42} \textit{Id.} at 408.

\textsuperscript{43} United States v. Bruno, 661 F.3d 733, 736 (2d Cir. 2011).

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.}

days after his first trial, and was sentenced to 14 years imprisonment.\textsuperscript{47} \textit{Skilling} demonstrated the Court’s return to the “bribe-and-kickback core” of § 1346, which resulted in acquittals of state public officials when their activities went outside the narrow reading of the federal corruption statute.

E. Money Talks: Campaign Donations, Free Speech Jurisprudence Limits the Scope of Corruption

Let’s take a step back and look at how most Americans view money in politics. For most of us, the role of money in American politics is strange indeed. This is especially so after the 2014 5-to-4 U.S. Supreme Court decision in \textit{McCutcheon}, which echoed \textit{Citizens United}, the 2010 decision that struck down limits on independent campaign spending by corporations and unions finding that the government cannot suppress political speech of corporations.\textsuperscript{48} In \textit{McCutcheon}, Chief Justice Roberts opined:

Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.\textsuperscript{49}

Chief Justice Roberts said that leveling the playing field is not an acceptable interest for the government, nor is “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties,” quoting \textit{Citizens United}.\textsuperscript{50} The only acceptable justification, he said, was rooting out “quid pro quo corruption” or the appearance of it.\textsuperscript{51} Justice Breyer countered that such an analysis was too narrow. “[T]he anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges,” he wrote; “[i]t is an interest in maintaining the integrity of our public governmental institutions.”\textsuperscript{52}


\textsuperscript{49} \textit{McCutcheon}, 134 S. Ct. at 1441.

\textsuperscript{50} \textit{Id.} at 1451 (citing \textit{Citizens United}, 558 U.S. at 359).

\textsuperscript{51} \textit{Id.} at 1441.

\textsuperscript{52} \textit{Id.} at 1466–67 (Breyer, J., dissenting).
enough money calls the tune,” he wrote, “the general public will not be heard.”53 Other commentators have vocalized similar outcries, such as Thomas Frank, who noted: “Today’s court understands ‘corruption’ as a remarkably rare malady, a straight-up exchange of money for official acts. Any definition broader than that, the justices say, transgresses the all-important First Amendment.”54 Up to that point, it was only in campaign finance cases that the Court had articulated a vision of corruption. Public corruption law has clashed with First Amendment jurisprudence on campaign finance, with political campaign speech trumping bribery concerns.

II. MCDONNELL CONFIRMS A NARROW READING OF CORRUPTION LAW

About every six years or so, the U.S. Supreme Court has weighed in regarding how prosecutors have applied the law and exercised prosecutorial discretion in public corruption cases. The tension between “normal, everyday politics” and a criminal exchange of a thing of value for an official act, or quid pro quo requires the law to yield guidance. The latest of such guidance is the U.S. Supreme Court reversal of the bribery conviction of Bob McDonnell in McDonnell v. United States.55 The government charged and alleged that the acceptance of $175,000 in gifts and loans in exchange for making calls and setting up meetings was a violation of the law that makes it a crime for a public official to “receive or accept anything of value” in exchange for “being influenced in the performance of any official act.”56 An “official act” is a decision or action on “any question, matter, cause, suit, proceeding or controversy”; that question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is “pending” or “may by law be brought” before a public official.57 To qualify as an “official act,” the public official must make a decision to take an action on that question or matter, or agree to do so.58 Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of “official act,” as the Court applied a rigid Scalia-esque analysis.59 But it would still be a crime to exchange a Rolex for an attempt to influence a governmental decision; that has not changed. Ultimately, because jury instructions in the case of former Virginia governor Bob McDonnell were erroneous, and those

53 Id. at 1467.
54 Thomas Frank, Zephyr Teachout’s ‘Corruption in America,’ N.Y. TIMES (Oct. 16, 2014),
59 Id. at 2371–72.
errors were not harmless beyond a reasonable doubt, McDonnell’s convictions were vacated by a unanimous Court.60

This decision fits well into the Court’s jurisprudence of narrowing public corruption statutes, and illustrates the Court’s continued trajectory even in the wake of Justice Scalia’s passing. The key precedent that the Court referred to in this case was Justice Scalia’s writing in *United States v. Sun-Diamond Growers of California.*61 Famed election law professor Rick Hasen wrote that McDonnell “shows the continuing important influence of Justice Scalia in this area of the law,” as the Court utilized a textual analysis of the statute through the canons of construction to reach its unanimous verdict.62 The media at large observed this influence, with the *Christian Science Monitor* noting that the decision included “both Scalia’s vision for the high court and his concerns for it,” and the *Washington Post* publishing McDonnell’s statement after the Department of Justice dropped charges against him, which quipped that “I express my appreciation to the US Department of Justice for applying the correct rule of law articulated by the Supreme Court.”63 The unanimous decision in McDonnell is even more remarkable as pundits considered the possibility of a 4-to-4 split in this case after Justice Scalia’s passing.64 Instead, Justice Scalia’s influence was heavily felt in the unanimous decision by the Court adopting his mode of analysis and precedent.

60 Id. at 2373–75.
III. JEFFERSON SEeks TO EXPLOIT McDoNNELL FOR A SIMILAR CORRUPTION PROSECUTION

McDonnell helps clarify what is illegal when public officials accept anything of value, and will impact recent public corruption prosecutions. For instance, Representative William Jefferson was convicted of fraud, bribery, and racketeering, and was sentenced to 13 years imprisonment after the FBI found $90,000 stuffed in Boca Burger and Pillsbury Pie boxes in Representative Jefferson’s freezer and obtained video footage of him taking a briefcase filled with money.65 Following the decision in McDonnell, Jefferson filed a motion to vacate his sentence, citing similarities between his case and McDonnell’s concerning whether the politicians performed an official act.66 Jefferson’s motion noted his case was “like the instructions in McDonnell,” to compare the cases; he went as far as to write “the Fourth Circuit noted that ‘[t]o a large extent, the instruction [in McDonell] echoed the ‘official act’ instruction in United States v. Jefferson.’”67 McDonnell has breathed new life into defense attempts to defend a similar corruption case, with even worse facts, signifying a possible trend of challenges concerning past convictions turning on the meaning of “official act.”

IV. CONCLUSION: THE RAMIFICATIONS OF THE McDoNNELL DECISION

Federal prosecutors are not beholden to law enforcement or to a particular victim, but rather, represent the interests of the United States and its citizens as a whole. It is no coincidence that the exterior of the building housing the U.S. Department of Justice contains the inscription: “Justice to each is the good of all.” A core federal interest rests in battling corruption, which is highlighted in another inscription on that same building: “Where law ends tyranny begins.” Richard Pilger, who handles election crimes at the U.S. Department of Justice, Criminal Division, Public Integrity Section, addressed the McDonnell decision by stating, “[w]e can still bring those cases and, if the evidence is compelling, we will do

66 United States v. Jefferson, Motion to Vacate and Set Aside Judgment of Conviction and Sentence Pursuant to § 2255 (Sept. 23, 2016), ECF 757; United States v. Jefferson, Memorandum in Support of Motion to Vacate and Set Aside Judgment of Conviction and Sentence Pursuant to § 2255 (Sept. 26, 2016), ECF 758.
67 United States v. Jefferson, Memorandum in Support of Motion to Vacate and Set Aside Judgment of Conviction and Sentence Pursuant to § 2255, 2, 17 (Sept. 26, 2016), ECF 758 (quoting McDonnell, 792 F.3d at 509 (footnote omitted)).
so. It may seem that the narrowing interpretation of corruption statutes would irk prosecutors, but practically, it outlines the contours of what is illegal, aiding in the deliberative process of whether to bring charges. In addition, rules of professional conduct or state ethics laws may further deter and define corrupt behaviors.

Not surprisingly, a majority of comments following McDonnell come from former government officials and private counsel, who offer favorable opinions on the McDonnell decision. For instance, C. Boyden Gray, White House counsel to President George H.W. Bush, noted that if the Court did not find for McDonnell, it would have created a risk of “turn[ing] the Constitution on its head,” as elected public officials would become isolated from their constituents. Henry E. Hockeimer Jr. and Thomas F. Burke of Ballard Spahr LLP articulated that McDonnell’s impact was such “that prosecutors can no longer transform any governmental act into an ‘official act’ under the bribery statutes. Something more, something real, is now needed.” The general consensus from a panel of lawyers with experience in white collar defense seems to be that the decision would rein in overzealous prosecutors from attacking elected officials over routine political activities.

But public officials do have power that goes beyond any “formal exercise of governmental power,” and critics of McDonnell say the decision allows people to buy that power without consequences. Stephen Farnsworth, a political science professor at the University of Mary Washington in Virginia, claimed that “[t]he Supreme Court decision really gives a green light to elected officials to solicit whatever goodies they may wish, as long as they’re not clear about doing anything in return.”

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Ohio State University Moritz College of Law Professor, Dan Tokaji, says *McDonnell* will leave the door open to future public corruption prosecutions in two areas: First, “exerting ‘pressure’ or offering ‘advice’ regarding such an official action” could still result in a successful prosecution.74 Second, there does not have to be an explicit agreement for the underlying quid pro quo, settling uncertainty raised in *McCormack* and *Evans*, as he cited: “*The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain.*”75 So, while narrowing definitions, it seems the *McDonnell* Court has not made it more difficult to prosecute bribery, since clearer lines defining illegal conduct have been drawn.

*McDonnell* limits prosecutorial discretion, but is not a game changer. Public officials, and folks that interact with them, now have better definitions of what is illegal. Would-be bribe payers and bribe receivers, and those that counsel them, are on notice as to what is an actual exercise of government power in a criminal bribe scheme. Hopefully, that notice has a deterrent effect. As Chief Justice Roberts noted, if routine political activities are swept into the federal bribery statute, it would “cast a pall” on the “basic compact underlying representative government”—that is to say, how business gets done in politics and government.76

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75 *Id.* (quoting *McDonnell*, 136 S. Ct. at 2371).

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