Bribery and Campaign Finance: 
*McDonnell’s Double-Edged Sword*

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What is a bribe? Intuitively obvious as the answer may seem, defining the contours of bribery has vexed courts and commentators alike for decades. The unanimous decision in *McDonnell v. United States*1 offers much-needed clarification of what it takes to convict public officials of bribery under federal law. That’s important in itself, but the significance of the Court’s opinion extends beyond the boundaries of bribery into the fiercely contested terrain of campaign finance regulation. The only justification that the Roberts Court has approved for restricting the flow of campaign money is to prevent the reality or appearance of quid pro quo corruption—another term for bribery. *McDonnell*, therefore, has implications for campaign finance law as well as bribery law.

As Doug Squires and Thomas Rovito correctly observe, *McDonnell* takes a balanced approach to federal bribery law.2 It has long been settled that one must receive something of value in exchange for an official act to be guilty of bribery. *McDonnell* clarifies that making phone calls and arranging meetings aren’t themselves official acts, but pressure or advice as to other public officials could be, so long as there’s an agreement to exchange such acts for something of value. The legal standard crafted by the Court thus puts public officials on notice of when their conduct may cross the line separating everyday politics from criminal corruption, while also providing guidance for federal prosecutors on what they’ll have to prove in future bribery cases. Although the Court vacated McDonnell’s convictions, the ruling is hardly a disaster for the government. To the contrary, it offers a reasonable standard that prosecutors should have little trouble meeting in future cases where something of value—like a campaign contribution—is exchanged for tangible government action.

*McDonnell* also clarifies that there need not be an explicit agreement to exchange money for official actions to secure a bribery conviction. This part of *McDonnell* actually eliminates an obstacle to federal bribery prosecutions. It’s likely to become important in future cases where campaign contributions are allegedly traded for political favors. Finally, the Court’s clarification of the bribery standard provides indirect guidance on what must be shown to justify campaign contribution limits against future First Amendment challenges. While

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McDonnell makes it slightly easier to prosecute public officials for bribery, it may ultimately make it even more difficult to defend campaign contribution limits, so long as the Court’s narrow conception of the anti-corruption rationale remains the law.

I. THE “OFFICIAL ACT” REQUIREMENT

To understand why McDonnell is important, it’s helpful to review the basics of bribery. A federal statute, 18 U.S.C. § 201, makes it a crime for a federal official to “corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.” The core of bribery is a quid pro quo: taking money or some other thing of value (the quid) in exchange for (pro) being influenced in an official act (the quo). Although § 201 only applies to bribes of federal officials, two other federal statutes (the Hobbs Act and the “Honest Services” statute) extend to state and local officials. Governor McDonnell was tried and convicted under both of these statutes.

The jury reached its verdict after hearing evidence of multiple gifts and loans that Governor McDonnell and his wife received from a Virginia businessman named Jonnie Williams. Not coincidentally, Williams was the CEO of a company trying to market a nutritional supplement called Anatabloc. The McDonnells received trips on Williams’s private plane, dinner at fancy restaurants, designer clothing, tens of thousands of dollars to help pay for their daughter’s wedding, and a Rolex—all told, over $175,000 in gifts and loans—from Williams. At the same time, Governor McDonnell talked up the benefits of Anatabloc at meetings, made phone calls on Williams’s behalf, and inquired about possible studies of Anatabloc at Virginia state universities.

The jury found that McDonnell received things of value in return for helping Williams. There’s no doubt that the gifts and loans were a sufficient quid under federal bribery law. The question before the Court was whether there was an adequate quo—more precisely, whether McDonnell’s actions counted as “official acts” under federal bribery law. There wasn’t much doubt that McDonnell was trying to help Williams sell Anatabloc. But the Governor didn’t sign legislation or take any other formal government action toward this end. What he did do was to make phone calls, meet with other public officials, and host events regarding the product.

The Supreme Court held that a public official’s phone calls, meetings, and similar contacts aren’t by themselves sufficient to meet the “official act”
requirement of federal bribery law. Although Justice Scalia had died by the time of the Court’s opinion, Chief Justice Roberts’s opinion for the Court follows the textualist approach closely associated with the departed Associate Justice.\(^8\) The federal bribery statute defines an “official act” as a “decision or action on any question, matter, cause, suit, proceeding or controversy.”\(^9\) There wasn’t a suit, proceeding, or controversy, so the Court’s inquiry focused on the meaning of a “question” or “matter.” It observed that one wouldn’t ordinarily refer to a meeting, call, or event as question or matter. Rather, these terms suggested something tangible that can be tracked for progress and checked off when completed.\(^10\)

The government pointed to some questions concerning Anatabloc that were before state entities in Virginia during the relevant time period: whether universities would research the supplement, whether a state commission would allocate grant money to study it, and whether the state health insurance plan would cover it.\(^11\) These would count as questions or matters, the Court acknowledged. The problem was that the trial court’s instructions to the jury allowed for McDonnell to be convicted without a link between these pending matters and McDonnell’s actions. To be guilty of bribery, the Court said, a public official like McDonnell must at least “exert pressure on” or “provide advice to” another public official, knowing that such pressure or advice would form the basis for an official decision or action.\(^12\)

The upshot is that it won’t be that difficult to obtain bribery convictions after McDonnell. Making a phone call or arranging a meeting, without more, isn’t enough to satisfy the quo requirement. But a state official’s decision to allocate money for research or to cover a product through its state health plan would be enough. So too would a public official’s pressure on or advice to another public official with respect to such a decision. Moreover, a public official can be convicted of bribery even if he or she doesn’t actually exert pressure or give advice. It’s enough that the public official agree to exert pressure or offer advice in exchange for something of value.\(^13\)

A careful reading of the Court’s opinion thus dispels some of the overwrought reactions to it. Public officials can be convicted of bribery if they pressured or advised others to take official action, in exchange for something of value. Though some critics of the decision have argued otherwise, it probably won’t be very difficult for federal prosecutors to convince a jury that this standard has been satisfied. In fact, Governor McDonnell himself might have been convicted on the

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\(^8\) Rick Hasen, Influence of Justice Scalia Felt in Unanimous Decision Throwing Out Gov. McDonnell Conviction, ELECTION LAW BLOG (June 27, 2016), http://electionlawblog.org/?p=83878 [https://perma.cc/U5T4-XML7].

\(^9\) Id. at 2367 (citing 18 U.S.C. § 201(a)(3)).

\(^10\) Id. at 2369.

\(^11\) Id. at 2370.

\(^12\) Id.

\(^13\) Id. at 2370–71.


evidence presented, had the jury been properly instructed on the elements of bribery. *McDonnell*’s clarification of the “official act” requirement makes it neither too difficult nor too easy to convict public officials of bribery. The Court has spoken not just unanimously but also with the meticulous clarity that prosecutors, defense attorneys, and lower court judges alike should welcome.

II. NO EXPLICIT AGREEMENT REQUIRED

There’s another, less obvious way in which *McDonnell* dispels some of the uncertainty surrounding federal bribery law. Recall that bribery requires a *quid pro quo*: that a public official demanded or agreed to receive something of value “in return for” an official act. While the primary holding of *McDonnell* is its refinement of the *quo* requirement of federal bribery law, the opinion also clarifies the *pro* requirement—specifically, whether there must be an *explicit* agreement to convict a public official of bribery. The Court answers this question in the negative, rejecting a criterion that some lower courts had imposed.

To understand the significance of this portion of *McDonnell*, it’s necessary to review a pair of decisions from the early 1990s that sowed confusion among both lower courts and commentators. The first is *McCormick v. United States*, 14 which arose from a West Virginia state legislator’s conviction under the Hobbs Act. The legislator allegedly received campaign contributions in exchange for supporting a program that allowed foreign medical students to practice in the state. A jury convicted him for having received a $900 contribution with the expectation that it would influence his conduct. 15 The Court of Appeals affirmed, but the Supreme Court reversed the conviction in an opinion by Justice White. *McCormick* first held that there must be a *quid pro quo*, the exchange of something of value for an official act. 16 It’s not enough that the legislator has received a contribution shortly before or after supporting legislation favored by a contributor. 17 In addition, the Court said that the public official’s commitment to taking an official action must be explicit. Only where “the payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act” could a conviction be sustained. 18 Justice Stevens dissented (joined by Justices Blackmun and O’Connor), agreeing that there must be a *quid pro quo*, but believing that the district court’s instructions to the jury had been adequate, 19 including an instruction

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15 Id. at 265.
16 Id. at 274.
17 Id. at 272.
18 Id. at 273 (emphasis added). The Court also said that one could be convicted under the Hobbs Act for having induced a contribution by force, violence, or fear, *id.*, a crime closer to the traditional definition of extortion than bribery.
19 Id. at 283–89.
that an “implicit promise” was sufficient to convict.\textsuperscript{20} The *McCormick* majority thus thought an explicit promise by the public official was essential, while the dissenters didn’t.

Just a year later, the Court appeared to backtrack on *McCormick*’s requirement of an explicit promise. *Evans v. United States*\textsuperscript{21} was another Hobbs Act case, this one involving payments to a local county commissioner, some of which took the form of campaign contributions. The jury found that the commissioner took the money knowing that it was intended to influence his actions on a rezoning application.\textsuperscript{22} The Supreme Court affirmed the conviction, with Justice Stevens (dissenter in *McCormick*) writing for the majority. *Evans* held that the bribe-taker need not initiate transaction to be convicted.\textsuperscript{23} Rather, the *quid pro quo* requirement was satisfied if the public official “receive[d] a payment in return for his agreement to perform specific official acts.”\textsuperscript{24} The Court went on to explain that no “affirmative step” on the part of the public official is necessary. Seeming to dispense with *McCormick*’s stated requirement of an explicit promise, Justice Stevens’s opinion for the *Evans* majority said: “We hold today 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.”\textsuperscript{25} This framing implies that there need not be an explicit promise or agreement. Concurring in the judgment, Justice Kennedy was less ambiguous in renouncing any requirement of an explicit exchange. The briber and bribee “need not state the *quid pro quo* in express terms,” he said, “for otherwise the law’s effect could be frustrated by knowing winks and nods.”\textsuperscript{26} Justice Kennedy’s observation has an undeniable common-sense appeal. It would be all too easy for bribery to go unpunished if an explicit promise or agreement were required. For example, a public official could take a paper bag full of cash while offering to help pass a bill, but would not be subject to prosecution so long as the parties avoid explicitly saying that one is being traded for the other. Still, there was some tension between Justice Kennedy’s concurring opinion in *Evans* and the majority opinion in *McCormick* (an opinion Justice Kennedy joined).

*McCormick* and *Evans* left the lower courts in something of a quandary with respect to the *pro* requirement. While *McCormick* said that an explicit promise was required to convict a public official of bribery, *Evans* suggested otherwise. Courts resolved this discrepancy in various ways. The Second Circuit, for example, held that an explicit agreement is required where the *quid* is a campaign

\begin{itemize}
  \item \textsuperscript{20} Id. at 287–88.
  \item \textsuperscript{21} Evans v. United States, 504 U.S. 255 (1992).
  \item \textsuperscript{22} Id. at 257.
  \item \textsuperscript{23} Id. at 265–68.
  \item \textsuperscript{24} Id. at 268.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. at 274 (Kennedy, J., concurring).
\end{itemize}
contribution, given the greater likelihood of close-in-time transactions being misinterpreted, but not in other contexts.\textsuperscript{27} The Eleventh Circuit drew a tenuous distinction between “explicit” and “express” agreements, holding that the agreement must be for a \textit{specific} official act (a curious understanding of the term “explicit”) but that there need not be an express statement that something of value is being exchanged for that act.\textsuperscript{28} More plausibly, District Judge Myron Thompson distinguished \textit{agreements} from the \textit{promise or solicitation} of a bribe, requiring explicitness for the latter but not the former on the rationale that one-sided offers are more subject to misinterpretation than completed agreements.\textsuperscript{29}

\textit{McDonnell} appears to resolve the uncertainty over whether explicitness is required to convict public officials of bribery. After its discussion of what does and doesn’t count as an official act, Chief Justice Roberts’s opinion for the Court turns to the question of how a prohibited \textit{quid pro quo} might be proven. The Court notes that a public official need not actually take action but simply “agree to do so,” citing \textit{Evans}.\textsuperscript{30} It then says: “\textit{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}.”\textsuperscript{31} It’s up to the jury to determine whether there was an agreement, the Court explained, taking a “\textit{broad range of pertinent evidence}” into consideration.\textsuperscript{32} This seems to put the matter to rest. The absence of any qualifying language suggests that an explicit agreement is never required, regardless of whether the \textit{quid} is cash, gifts, campaign contribution, or some other thing of value.

It’s conceivable that \textit{McDonnell}’s rejection of explicitness might be deemed dicta in a future case involving campaign contributions. After all, McDonnell and his wife received a stream of cash and gifts that were less subject to innocent explanations than other things public officials might receive. It’s possible that an explicit agreement could be required where an official receives, say, campaign contributions contemporaneous with official actions that aided the contributor. It’s also possible that explicitness could be required in the context of offers or solicitations of a bribe but not for completed bribery agreements, as Judge Thompson suggested. This would be consistent with the language of \textit{McCormick}, which demanded that the public official’s “promise to act (or not act) be explicit, but not necessarily that the agreement be explicit.

That said, the best reading of \textit{McDonnell} is that it eliminates any requirement of explicitness in bribery cases. It’s unlikely that the Court was unaware of the lower courts’ confusion over whether an explicit promise or agreement is required to convict a public official of bribery. Accordingly, \textit{McDonnell} should be read as dispensing with an explicitness requirement in federal bribery cases—regardless of

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  \item \textsuperscript{27} United States v. Ganim, 510 F.3d 134, 142–44 (2d Cir. 2007).
  \item \textsuperscript{28} United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011).
  \item \textsuperscript{29} United States v. McGregor, 879 F. Supp. 2d 1308, 1317–19 (M.D. Ala. 2012).
  \item \textsuperscript{30} \textit{McDonnell}, 136 S. Ct. at 2370–71 (citing \textit{Evans}, 504 U.S. at 268).
  \item \textsuperscript{31} \textit{Id.} at 2371 (emphasis added).
  \item \textsuperscript{32} \textit{Id.}
what the alleged *quid* is (a campaign contribution or something else) and regardless of whether there was an agreement (or merely an offer or solicitation of a bribe). In this respect, *McDonnell* can be expected to make it easier for federal prosecutors to obtain convictions under the federal bribery statute, the Hobbs Act, or the honest services fraud statute.

### III. IMPLICATIONS FOR CAMPAIGN FINANCE

*McDonnell* is important not just because of its clarification of bribery law, but also because of its effects on campaign finance. As unified as the Roberts Court was over the federal bribery standard in *McDonnell*, it has been every bit as divided over the constitutionality of campaign finance laws over the past decade. Although *Citizens United v. Federal Election Commission* has received the most attention, it is the most conspicuous example of the Court’s increasing skepticism of campaign finance rules. *McDonnell* is sure to affect how public officials raise money and, in particular, should cause them to avoid pressure or advice that a jury might perceive as having been given in exchange for campaign contributions. It will also affect the evidence that federal, state, and local legislative bodies will have to muster to defend campaign finance restrictions in future litigation.

To understand *McDonnell*’s likely effects on campaign finance, it’s helpful to review how the constitutional requirements for regulation have changed over the past four decades. Since *Buckley v. Valeo*, the Court has required that restrictions on campaign funding be justified by the interest in preventing the reality or appearance of corruption. Yet the Court has vacillated on what counts as “corruption” in the intervening. Though *Buckley* itself wasn’t very clear on the issue, there’s language in the *per curiam* opinion suggesting it means the *quid pro quo* exchange of money for official acts. The Court upheld federal contribution limits on the ground that they were sufficiently tailored to serve the interest in preventing corruption or its appearance, while rejecting restrictions on independent expenditures on the ground that they weren’t.

The Court has never wavered from its holding that contribution limits may be justified by the interest in preventing corruption, but its definition of corruption has shifted. The Rehnquist Court embraced a more expansive conception of corruption, most notably in *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission*. The former understood the
corruption to encompass the “corrosive and distorting effects” arising from corporate expenditures, while the latter understood it to include the superior “access” and “influence” that soft money donors enjoyed. But the Roberts Court rejected both views. Citizens United struck down the federal ban on independent expenditures by corporations, overruling Austin and part of McConnell, on the ground that it wasn’t justified by the interest in preventing the reality or appearance of corruption. More recently, McCutcheon v. Federal Election Commission struck down federal limits on aggregate contributions, doubling down on the narrow conception of corruption advanced in Citizens United. Preventing the reality or appearance of quid pro quo corruption—that is, bribery—is now the only justification for restricting the flow of money into election campaigns.

The upshot is that the constitutional law of campaign finance is now closely tied to bribery law. That doesn’t necessarily mean that proven violations of federal bribery law will be required to establish the evidentiary predicate for campaign contribution limits. The federal statutory definition of bribery isn’t necessarily identical to the definition of quid pro quo corruption applied in constitutional cases. Moreover, the Court has repeatedly said contribution limits may be justified by the interest in preventing the “appearance” of corruption, not just its reality. McDonnell’s definition of what counts as a bribe is nevertheless likely to reappear in future First Amendment challenges to contribution limits, given the close connection that now exists between bribery and campaign finance law.

There are two major ways in which McDonnell is likely to affect campaign finance regulation. The first concerns the enforcement of federal bribery laws against federal, state, and local officials who solicit campaign contributions. To reiterate, McDonnell holds that public officials may be convicted of bribery if they exerted “pressure” or offered “advice” to another official in exchange for campaign contribution and implies that the agreed-to-exchange need not be explicit. Public officials would thus be well-advised to act with caution when they receive contributions from someone with an interest in a pending decision or action.

To see how this might play out, imagine a businessperson like Johnnie Williams who’s trying to market a nutritional supplement Anatabev by encouraging a state university to undertake a research study on the product’s benefits. The businessperson makes substantial campaign contributions, up to the limit allowed by law, in support of the state’s governor. Suppose further that the businessperson calls the governor, asking for her help in encouraging research on Anatabev. Knowing the businessperson’s contributions, the governor proceeds to call the chancellor of the state university, encouraging her to support a university

39 494 U.S. at 660.
40 540 U.S. at 149.
study of the benefits of Anatabev. Let’s further suppose that, during that same phone conversation, the governor and chancellor also talk about whether the university will receive the full amount the chancellor requested in next year’s state budget. Under those circumstances, a jury might conclude that the governor was exerting “pressure” on the chancellor, knowing that this pressure could form the basis of an official act. That alone wouldn’t be enough to convict the governor of bribery but, if the jury also found that the governor’s pressure was exchanged for campaign contributions, then the jury could find the requisite quid pro quo for a conviction.

The possibility of such bribery prosecutions means that public officials should be careful not to exert “pressure” or give “advice” on behalf of those from whom they have received campaign contributions. Especially where such pressure or advice occurs around the same time as the public official interacts with the contributor, a zealous prosecutor or cynical jury could find an agreement that constitutes bribery. It’s even possible that public officials could be prosecuted for bribery, if they exert pressure or give advice in exchange for expenditures made in support of their campaign.

To see how, imagine a slight tweak to the preceding example. Suppose the businessperson informs the governor that he’s considering whether to spend $800,000 in support of the governor’s next campaign, then asks for her help in marketing Anatabev. Under Buckley and Citizens United, independent expenditures from individuals and corporations can’t constitutionally be limited. But if there were really an agreement to make an expenditure in return for an official act, then the expenditure would be coordinated rather than independent. So, if a public official agreed to exert pressure in exchange for the businessperson making an expenditure in support of the public official’s campaign, that expenditure could be treated as a contribution. It could also conceivably give rise to a bribery prosecution, even if the agreement to trade an expenditure for political pressure was never made explicit. That means that prudent public officials should exercise caution when deciding whether to help those spending money on the official’s behalf, not just those contributing directly to their campaigns.

The second way in which McDonnell affects campaign finance regulation concerns the evidentiary showing that government entities will have to make when their laws are challenged. For example, consider a city that is considering adoption of a relatively low limit on individual contributions to city council campaigns, say $200. What will the city have to show in order to justify this limit? The Supreme Court applies something less than strict scrutiny to contribution limits, requiring that they be closely drawn to a sufficiently important government interest.43 It has sometimes upheld these limits, but not always. In Randall v. Sorrell,44 for example, the Court struck down exceptionally low contribution limits.

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($200 in state legislative races), concluding they weren’t sufficiently tailored to prevent corruption or its appearance.

By clarifying the *quid pro quo* necessary to convict a public official of bribery, *McDonnell* provides legislative bodies with additional guidance on what they will have to show to justify campaign contribution limits. To reiterate, the only interest that the Roberts Court has approved for campaign contribution limits is to prevent the reality or appearance of *quid pro quo* corruption. For a city considering contribution limits, it may not be enough to show that councilmembers who received campaign contributions of that order made phone calls or held meetings on a subject of interest to the contributors. It would be in a stronger position to defend such limits if there is evidence of “advice” or “pressure” from the public officials receiving those contributions. At the very least, the city would have to show that its limits were needed to address the *appearance* that contributions were exchanged for official acts like these. If neither bribery (in the sense that *McDonnell* has now defined it) nor its appearance be shown, then restrictions on campaign contributions will be more difficult to justify under current First Amendment doctrine. In this sense, then, *McDonnell* could ultimately buttress the Supreme Court’s skeptical approach to campaign finance regulation.

**IV. CONCLUSION**

The close connection of bribery and campaign finance law magnifies the significance of *McDonnell*. Although it was already established that a *quid pro quo* is required to convict a public official of bribery under federal law, the meaning of this requirement has proven elusive for lower courts and commentators alike. *McDonnell* helps resolve this uncertainty by clarifying both the *quo* and the *pro* requirements. While calls and meetings alone aren’t sufficient to show an “official act,” a public official’s pressure or advice may satisfy this requirement. In addition, there is no need for prosecutors to prove an *explicit* agreement to take action in exchange for something of value. As important as these definitional questions are, *McDonnell*’s implications for campaign finance regulation are of even greater significance. Public officials who are involved in decisions affecting large campaign contributors would be well-advised to exercise caution. If they exert pressure or give advice that may result in official action benefitting their contributors, they may open themselves up for bribery prosecutions—even where there’s no explicit agreement to exchange contributions for such pressure or advice. On the other hand, the decision may ultimately make it more difficult for federal, state, and local government entities to justify restrictions on the flow of campaign money. Given that campaign finance restrictions must be justified by the interest in preventing *quid pro quo* corruption or its appearance, *McDonnell*’s redefinition of bribery could make it even more difficult to justify such laws in the future. In this sense, *McDonnell* is likely to be a double-edged sword for those concerned with the potentially corrupting effect of campaign contributions and expenditures. It makes it somewhat easier to prosecute public officials for bribes
that take the form of campaign cash, but potentially more difficult to justify legislation that restricts the flow of campaign money.