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PROSECUTING CORRUPTION AFTER

MCDONNELL V. UNITED STATES

Terence A. Parker*

INTRODUCTION

At first glance, the final day of October Term 2015 was a major blow to the fight against public corruption. “The Bob McDonnell Supreme Court ruling makes convicting politicians of corruption almost impossible,” read a headline in the Washington Post.¹ The New York Times, anticipating downstream effects of the decision in McDonnell v. United States,² wrote: “Supreme Court Complicates Corruption Cases From New York to Illinois.”³ The Wall Street Journal, noting the potential impact on pending high-profile corruption cases, wrote that the decision “could make it harder for prosecutors to bring cases against public officials.”⁴ These newspaper articles are only a tiny sample of the coverage dedicated to the Supreme Court’s reversal of former Virginia Governor Bob McDonnell’s corruption convictions.⁵ Yet these articles

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² 136 S. Ct. 2355 (2016).


illustrate a widespread concern that the *McDonnell* decision would make securing bribery convictions significantly more difficult.\(^6\)

In *McDonnell*, the Supreme Court addressed as a matter of statutory interpretation what actions constitute an “official act”—a necessary element for proving honest services wire fraud and Hobbs Act extortion.\(^7\) In answering this question, the Court held that taking meetings, making phone calls, and hosting events, by themselves, could not satisfy the statute’s official act requirement.\(^8\) The question now, with more than two years of hindsight, is whether these fears were well founded. Has *McDonnell*, as so many feared, made it nearly impossible for prosecutors to bring public corruption cases? The answer from the lower courts, at both the circuit and district levels, appears to be that *McDonnell* has had a limited impact.

This Note analyzes a series of federal corruption cases brought around the time of the *McDonnell* decision, to discern patterns in how lower courts have interpreted *McDonnell*, and how federal prosecutors have altered their strategies in its aftermath. In particular, this Note focuses on three high-profile public corruption cases.\(^9\) Two of these cases involve convictions that occurred immediately preceding the *McDonnell* decision, and whose subsequent appeals relied heavily on the Court’s holding in *McDonnell*.\(^10\) The third case, the prosecution of U.S. Senator Robert Menendez from New Jersey, involves a trial that occurred wholly after the *McDonnell* decision.\(^11\) Though these are not the only lower court cases to analyze *McDonnell*, they are representative of the high-profile corruption cases that commentators feared would be impossible in the aftermath of the decision.

These cases represent the lower courts’ first attempts to apply *McDonnell*. The *McDonnell* doctrine will continue to develop with time, however the narrow official act definition has not had the dramatic effect the commentators suggested. This Note makes three arguments derived from post-*McDonnell* caselaw. The first is that the Court’s definition of official act will only make a difference in a narrow subset of public corruption cases, leaving prosecutions in most others relatively unchanged by the decision.\(^12\) Second, the Court’s holding in *McDonnell* did not, as some have argued, foreclose prosecutions under a “stream of benefits”\(^13\) theory of corruption.\(^14\) Third, and finally, the

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7  “Official act” is defined in the federal bribery statute. See 18 U.S.C. § 201(a)(3) (2012). In *McDonnell*, the parties agreed that the federal bribery statute would govern the definition of official act in the honest services fraud and Hobbs Act extortion counts. See infra notes 25–27 and accompanying text.


9  See infra Part II.

10 See infra Part II.

11 See infra Part II.

12 See infra Part III.

13 Under a “stream of benefits” theory of bribery, the bribe does not have to be paid in exchange for a contemporaneous specific official act. Instead, the quid pro quo can be
chief barrier that prosecutors encounter is unchanged by McDonnell’s holding—that is, proving corrupt intent.15

This Note proceeds in five Parts. Part I provides a background discussion of the facts and holding in McDonnell. Part II goes on to analyze McDonnell through the lens of three recent federal public corruption cases, discussing how the decision has been applied to both specific act and stream of benefits prosecutions. Part III argues that the narrower official acts definition announced by the McDonnell Court will not result in a sea change to corruption prosecutions. Part IV argues for the resilience of the stream of benefits theory of public corruption in the aftermath of McDonnell. Finally, Part V argues that proving corrupt intent is still the primary obstacle to federal prosecutors, not a shift in the law caused by McDonnell.

I. MCDONNELL V. UNITED STATES

On January 21, 2014, federal prosecutors in the Eastern District of Virginia announced a fourteen-count indictment against former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell.16 The first eleven counts of the indictment alleged that McDonnell “committed and conspired to commit honest-services wire fraud and extortion under color of official right.”17 The indictment represented one of the Department of Justice’s most ambitious attempts to prosecute a public official for corruption in decades.18 Up until the investigation that culminated in the indictment, McDonnell was seen as a rising star in the Republican Party.19

proven through a pattern of bribes given to the public official, in exchange for the public official taking official undetermined acts when necessary at a later time. See, e.g., United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) (“The quid pro quo requirement is satisfied so long as the evidence shows a ‘course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.’” (emphasis added) (quoting United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976))); see also United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) (“The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific official act.”).

14 See infra Part IV.
15 See infra Part V.
17 McDonnell, 64 F. Supp. 3d at 787.
The charges stemmed from the former Governor’s relationship with Virginia businessman Jonnie Williams, who was the chief executive officer of Star Scientific, a Virginia-based nutrition company. While in office, Governor McDonnell accepted “$175,000 in loans, gifts, and other benefits” from Williams. Among the loans and gifts that federal prosecutors alleged represented bribes included a $20,000 shopping spree paid for by Williams for Mrs. McDonnell; a $50,000 loan to cover the McDonnells’ real estate debts; a $15,000 payment for wedding expenses for the McDonnells’ daughter; a $2380.24 golf outing that Williams did not even attend; and a $6000–$7000 Rolex watch for Governor McDonnell. Far from being an exercise in generosity, prosecutors “sought to prove that [McDonnell] and his wife . . . accepted [the] money and lavish gifts in exchange for efforts to assist [Star Scientific] in securing state university testing of a dietary supplement the company had developed.”

At trial, the Government’s underlying theory for “both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams.” From the outset, the parties agreed that the federal bribery statute, 18 U.S.C. § 201, would govern the definition of honest services fraud and Hobbs Act extortion. Thus, for both charges prosecutors would be required to prove that Governor McDonnell took an official act within the definition of the federal bribery statute. To satisfy this requirement, prosecutors “alleged that Governor McDonnell committed at least five ‘official acts’ in exchange for bribes from Williams.”

The political stature rapidly diminished over the course of 2013 amid a deepening investigation into [possible corruption].

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20 McDonnell, 136 S. Ct. at 2361.
21 Id.
22 See United States v. McDonnell, 792 F.3d 478, 487–90 (4th Cir. 2015), vacated, 136 S. Ct. 2355 (2016). This is far from a complete list of the gifts, loans, and other benefits that prosecutors alleged Williams gave to McDonnell. In its opinion affirming Governor McDonnell’s conviction, the Fourth Circuit discussed in meticulous detail the extent of Williams’s gift giving to Governor and Mrs. McDonnell. See id. at 486–93; see also The Supreme Court, 2016 Term—Leading Cases, 130 HARV. L. REV. 467, 467–68 (2016) [hereinafter Leading Cases].
23 McDonnell, 792 F.3d at 486; see also McDonnell, 136 S. Ct. at 2361.
25 Id. The federal bribery statute makes it a crime when a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act. 18 U.S.C. § 201(b)(2) (2012).
26 See McDonnell, 136 S. Ct. at 2365. 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.” 18 U.S.C. § 201(a)(5).
27 McDonnell, 136 S. Ct. at 2365. The five alleged official acts were:
course of the five-week jury trial, the evidence of these five alleged official acts primarily involved McDonnell’s actions setting up meetings between Star Scientific and state officials. Defense counsel argued that setting up meetings with state officials or university researchers was the normal course of business in the Governor’s office, and that McDonnell did not expect “his staff ‘to do anything other than to meet’ with Williams.” In essence, McDonnell’s defense was that these actions were exactly the kind of constituent services expected of public officials.

After closing arguments, the district court instructed the jury that they must find whether McDonnell “agreed ‘to accept a thing of value in exchange for official action.’” The court then reiterated the five specific official acts alleged in the indictment, and read the 18 U.S.C. § 201 definition of official act to the jury. Additionally, the court read the Government’s requested instruction to the jury: “[T]he term encompassed ‘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.’” The court rejected McDonnell’s proposed instruction that “merely arranging a meeting, attending an event, hosting a reception, or making a speech” were insufficient to constitute an official act under § 201.

(1) “arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc”;

(2) “hosting, and . . . attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients”;

(3) “contacting other government officials in the [Governor’s Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine”;

(4) “promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s Mansion”;

(5) “recommending that senior government officials in the [Governor’s Office] meet with Star Scientific executives to discuss ways that the company’s products could lower healthcare costs.”

Id. at 2365–66 (alterations in original) (citing Indictment at ¶ 111, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 14-cr-12)). Anatabloc, or anatabine, was the nutritional supplement developed by Williams’s company. See id. at 2362.

28 Id. at 2365–66.

29 Id. at 2366.

30 Id. (quoting Supplemental Joint Appendix at 68, McDonnell, 136 S. Ct. 2355 (No. 15-474)).

31 Id. The five alleged official acts “involved arranging meetings, hosting events, and contacting other government officials.” Id.

32 Id. (quoting Supplemental Joint Appendix, supra note 30, at 70).

33 Id. (quoting United States v. McDonnell, 792 F.3d 478, 513 (4th Cir. 2015)) (noting McDonnell’s proposed instruction was based on the argument that these actions did not involve “matters pending before the government”).
The jury convicted McDonnell on both the honest services fraud and Hobbs Act extortion charges.\textsuperscript{34} McDonnell appealed to the Fourth Circuit on the grounds (1) that the district court’s definition of official acts was overly broad, (2) that the statutes of conviction were unconstitutionally vague, and (3) that the evidence against him was insufficient to sustain a conviction.\textsuperscript{35} The court of appeals rejected McDonnell’s arguments, and upheld the district court’s jury instructions.\textsuperscript{36}

The Supreme Court granted a writ of certiorari to clarify the meaning of official act, and reversed the Fourth Circuit.\textsuperscript{37} Writing for a unanimous Court, Chief Justice Roberts rejected the sweeping language used in the official act jury instruction.\textsuperscript{38} The Court’s narrow interpretation of § 201(a)(3) created two requirements for proving an official act. First, the Government “must identify a question, matter, cause, suit, proceeding or controversy involving the formal exercise of governmental power.”\textsuperscript{39} Second, the public official must make a decision or take an action on that ‘question, matter, cause, suit, proceeding or controversy,’ or agree to do so."\textsuperscript{40} The second prong can be satisfied if the official (1) makes a “decision or action on a qualifying step” toward an official action,\textsuperscript{41} (2) uses his position to “exert pressure” on another official to take an official act,\textsuperscript{42} or (3) advises another official, “knowing or intending that such advice will form the basis for an ‘official act’ by [that] official.”\textsuperscript{43}

The decision to narrow the definition of official act rested primarily on the Court’s interpretation of the text of the federal bribery statute.\textsuperscript{44} Chief Justice Roberts coupled the statutory interpretation with a discussion of the Court’s decision in \textit{United States v. Sun-Diamond Growers of California}.\textsuperscript{45} That case compelled the conclusion that “something more” is required before “hosting an event, meeting with other officials, or speaking with interested

\begin{footnotes}
\footnotetext{34}{Id. McDonnell was acquitted on the false statement charges. Id.}
\footnotetext{35}{See id. at 2367. The Fourth Circuit also addressed issues relating to severance, voir
dire, evidentiary rulings, and exclusion of expert testimony. See McDonnell, 792 F.3d at 494, 496, 498, 499. These issues, however, were not among those appealed to the Supreme Court. See McDonnell, 136 S. Ct. at 2367.}
\footnotetext{36}{See McDonnell, 792 F.3d at 486.}
\footnotetext{37}{See McDonnell, 136 S. Ct. at 2361, 2375.}
\footnotetext{38}{Id. at 2367–68 ("[W]e reject the Government’s reading of § 201(a)(3) and adopt a more bounded interpretation of ‘official act.’ Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ‘official act.’").}
\footnotetext{39}{Id. at 2374 (internal quotations omitted).}
\footnotetext{40}{Id. at 2372.}
\footnotetext{41}{Id. at 2370.}
\footnotetext{42}{Id. at 2372.}
\footnotetext{43}{Id.; see also Leading Cases, supra note 22, at 475–76.}
\footnotetext{45}{526 U.S. 398 (1999); see McDonnell, 136 S. Ct. at 2370 (discussing the case).}
\end{footnotes}
parties” could constitute an official act.\footnote{McDonnell, 136 S. Ct. at 2370.} In addition to precedent, the Court voiced concern for the constitutional implications of the Government’s broad reading of § 201(a)(3).\footnote{See id. at 2372 (“In addition to being inconsistent with both text and precedent, the Government’s expansive interpretation of ‘official act’ would raise significant constitutional concerns.”).} The Court feared such an interpretation of official act would have a chilling effect on democratic participation.\footnote{See id.} Moreover, the Court noted that a broader interpretation raises both notice and federalism concerns.\footnote{See id. at 2373.} These considerations further convinced the Court that they should give effect to their interpretation of the bribery statute, and thus narrow the official acts definition.\footnote{See id. at 2375 (“[This] 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.”).}

The Court then identified three instructions that the district court should have given the jury.\footnote{Id. at 2374–75.} First, the trial judge should have instructed the jury that they must identify a question or matter within the meaning of § 201(a)(3).\footnote{Id. at 2374.} Second, the district court should have instructed the jury that the question or matter they identify must be something “specific and focused” that either is, or will be, before the public official.\footnote{Id. at 2375.} Third, the Court held that the jury should have been instructed that “merely” setting up a meeting or hosting an event “does not count” as a decision on the identified question or matter.\footnote{Id.}

After suggesting these narrower official acts instructions, the Court rejected McDonnell’s vagueness and insufficient evidence arguments.\footnote{See id.} Chief Justice Roberts closed the opinion with an eye toward the inevitable criticism the decision would receive. The Court’s concern, he wrote, was with the “broader legal implications of the Government’s boundless interpretation of the federal bribery statute” and “not with tawdry tales of Ferraris, Rolexes, and ball gowns.”\footnote{Id.} The final line of the opinion provided one assurance: the narrow interpretation of the term ‘official act’ leaves ample room for prosecuting corruption.\footnote{Id.}

The Chief Justice was correct in anticipating criticism of the decision.\footnote{Id.} The assurance that prosecutors could still go after the crooked official was
met with doubt from many commentators. Criticism, however, ranged from those who thought *McDonnell* signaled an age of legalized bribery, to those who believed that the decision would require prosecutors to simply alter the way they framed corruption cases. The remainder of this Note examines whether these criticisms were well founded.

II. CORRUPTION CASES AFTER *MCDONNELL*

This Part of the Note focuses on three corruption cases that in whole or in part occurred after the Court’s decision in *McDonnell*. The use of these cases does require an important caveat: only one of the cases referenced has come to a decisive endpoint. At the time of this writing, two of the three cases examined in this part are ongoing, either on appeal at the circuit court or back at the district court for retrial. Despite the unsettled nature of these cases, they provide valuable insight into how lower courts and prosecutors are grappling with post-*McDonnell* corruption prosecutions.

A. United States v. Silver

On November 30, 2015, just under seven months prior to the Supreme Court’s decision in *McDonnell*, a jury in the Southern District of New York convicted Sheldon Silver of honest services fraud and Hobbs Act extortion. Up until his indictment, Silver had been the powerful Speaker of the Assembly in New York. The indictment alleged two schemes, each with the same general structure: “[I]n exchange for official actions, Silver received bribes and kickbacks in the form of referral fees from third-party law firms.” Silver was convicted on all seven counts against him, and sentenced to twelve years of imprisonment. All of this occurred before the decision in *McDonnell v. United States*. The decision’s protection of the democratic process. See, e.g., Robert Gebelhoff, *Why the Supreme Court Is Right to Overturn McDonnell’s Corruption Conviction*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/06/27/why-the-supreme-court-is-right-to-overturn-mcdonnells-corruption-conviction/?utm_term=.29e7e61db87b.


60 See, e.g., Dante Ramos, *Va. Ex-Governor Wins at Supreme Court, but Corruption Is Still Illegal*, BOS. GLOBE (June 27, 2016), https://www.bostonglobe.com/opinion/2016/06/27/governor-wins-supreme-court-but-corruption-still-illegal/1UHYwo060n9w7XgUl0gLJ/story.html.


62 Id. at 106 (“As Speaker, Silver was one of the most powerful public officials in the State of New York, exercising significant control over the Assembly and state legislative matters.”).

63 Id.

64 Id. at 112.
In post-trial motions, Silver sought to continue his release on bail and stay other penalties, relying on the issues raised in the briefs and at oral argument in McDonnell.\(^{65}\) The district court, recognizing that McDonnell had obvious implications for Silver’s case, granted the motion.\(^{66}\) After the McDonnell decision and on appeal to the Second Circuit, Silver argued that the jury instructions for the honest services fraud and Hobbs Act extortion in his case were erroneous.\(^{67}\) Judge José Cabranes, writing for the three judge panel, concluded that the instructions were in fact erroneous in light of McDonnell, and vacated the conviction and remanded for retrial.\(^{68}\)

In reaching this result, the court undertook a thorough examination of the Supreme Court’s decision in McDonnell. The district court’s official act instruction “encompass[ed] any action taken or to be taken under color of official authority.”\(^{69}\) This, the circuit court said, was “overbroad.”\(^{70}\) After examining the record, the court only found one possible action by Silver, within the statute of limitations, that fell under McDonnell’s narrow official act definition. This was a relatively meaningless Assembly resolution honoring one of Silver’s conspirators.\(^{71}\)

Of note, the court placed importance on the fact that “the District Court’s charge did not contain any of the three instructions specified in McDonnell.”\(^{72}\) This suggests that after McDonnell, district courts must include all three limiting instructions in order for a conviction to survive appellate review. Courts of appeal, then, will look for these instructions as a threshold matter. Another takeaway from Silver is that McDonnell’s narrow official acts definition applies even when the potential for a chilling effect on democratic participation is wholly absent. In McDonnell, the relationship between McDonnell and Williams began with, at a minimum, the appearance of a political backdrop.\(^{73}\) In contrast, the bribes to Silver were funneled to him through his positions with law and real estate development firms.\(^{74}\)


\(^{66}\) Silver, 864 F.3d at 113.

\(^{67}\) Id.

\(^{68}\) Id. at 124.

\(^{69}\) Id. at 118 (emphasis omitted) (internal quotations omitted).

\(^{70}\) Id.

\(^{71}\) See id. at 120. There were more sinister official acts by Silver, but only the Assembly resolution fell within the statute of limitations. The Second Circuit made clear that the only official act required to sustain a conviction was one that (1) fell within the McDonnell framework, (2) fell within the statute of limitations, and (3) was an “action in furtherance of the scheme.” Id. at 121–22.

\(^{72}\) Id. at 118; see also id. at 117 (listing the three instructions proposed by the McDonnell Court); supra text accompanying notes 51–53.

\(^{73}\) See McDonnell v. United States, 136 S. Ct. 2355, 2362 (2016) (“McDonnell first met Williams . . . when Williams offered McDonnell transportation on his private airplane to assist with McDonnell’s election campaign.”).

\(^{74}\) See Silver, 864 F.3d at 106–09.
bribes were paid to Silver because of his political position, but they were not paid through political channels. The lesson from this is that, at least in the Second Circuit, any conviction relying on official acts will require adherence to the strictures of McDonnell’s holding.

In July 2018, more than two and a half years after his initial conviction, Sheldon Silver was again found guilty and sentenced to seven years in prison—a conviction that relied on largely the same evidence as was presented in his first trial.

B. United States v. Fattah

The second case worth examining is the corruption prosecution of former U.S. Congressman Chaka Fattah from Philadelphia. Fattah had served in the House of Representatives for over two decades at the time of his twenty-two count federal indictment alleging pervasive corruption during his tenure. The indictment, returned in July 2015, included counts of honest services fraud and bribery. On June 21, 2017, just six days before the decision in McDonnell, a jury found Fattah guilty on all counts. Like Silver, Fattah filed a post-trial motion seeking a judgment of acquittal relying on the Court’s decision in McDonnell.

In a lengthy opinion, the district court recognized that the jury instructions were erroneous in light of McDonnell, yet found that the error was harmless. Arriving at this holding, the court pointed to two alleged official acts that “without any doubt” satisfied McDonnell’s requirements. First, during the trial, prosecutors presented evidence that Fattah lobbied both Senator Bob Casey and President Barack Obama to nominate his coconspirator as an ambassador. In his post-trial motion, Fattah argued that “he did not engage in official acts because as a Congressman he had no role in the nam-

75 This is not an ironclad distinction, since some of McDonnell’s bribes were paid directly in the form of loans and gifts unrelated to campaign events. However, the initial alleged bribery with McDonnell had political origins, whereas with Silver it did not.
78 Id.
79 See id. at 342, 360.
80 See id. at 359–60.
81 Id. at 365–67.
82 Id. at 367.
83 See id. at 362. The opinion thoroughly discusses the extreme efforts Fattah took to secure the ambassadorship. Among other efforts, Fattah wrote a letter strongly recommending the coconspirator to Senator Casey. Fattah then “set up a difficult-to-obtain telephone conference . . . with . . . the President’s deputy chief of staff.” Id. To cap these efforts off, Fattah hand delivered a “glowing letter of recommendation” directly to President Obama. Id.
The district court rejected this argument, pointing to the language in McDonnell that made it an official act to exert pressure on another official with the intent that that official would take an official act. In reaching this conclusion, the district court distinguished between sending a pro forma letter of support, and engaging in the extensive efforts that Fattah took to secure an ambassadorship for his coconspirator. Fattah was not “immunize[d]” by “[t]he fact that the House of Representatives has no constitutional responsibility” to appoint ambassadors.

The second official act that the district court identified was when Fattah hired the same coconspirator’s girlfriend to work in his congressional office. With respect to this official act, the district court found that McDonnell’s requirements were satisfied by the expenditure of taxpayer funds to hire the woman onto Fattah’s staff. Unlike his efforts to obtain an ambassadorship for the coconspirator, hiring the girlfriend “solely involved [Fattah’s] own exercise of governmental power.”

The Third Circuit was less sure that the jury instruction errors were harmless, and reversed Fattah’s conviction on several bribery related charges. In doing so, the court took a similar tone to the Second Circuit’s reversal of Silver’s convictions. While at least one of the three charged acts was “clearly an official act,” the court could not be sure that the jury solely considered that act when reaching its verdict. As it remanded for retrial on these counts, the Third Circuit provided a useful discussion of McDonnell. First, the court noted a meeting Fattah arranged between his coconspirator and the U.S. Trade Representative. This, the court said, was plainly the type of activity that McDonnell placed outside the definition of an official act.

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84 Id. Here, Fattah’s argument was based on the Constitution’s assignment of the power to nominate ambassadors to the President, and the power to confirm those nominees to the Senate, and not the House of Representatives of which he was a member. See U.S. Const. art. II, § 2, cl. 2.

85 Fattah, 223 F. Supp. 3d at 362 (citing McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016)).

86 See id.

87 Id.

88 See id. at 362–63 (“Fattah’s decision to employ her was clearly a formal and focused exercise of governmental power . . . .”).

89 See id. at 363.

90 Id.

91 United States v. Fattah, 902 F.3d 197, 238 (3d Cir. 2018). The court further explained that “[b]ecause the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt.” Id. at 240.

92 See id. at 239. Interestingly, the district court opinion made relatively little note of this meeting. See Fattah, 223 F. Supp. 3d at 363 n.14. But as the Third Circuit noted, a fair reading of the indictment would lead a juror to believe this meeting was one of the alleged official acts. See Fattah, 902 F.3d at 239.

93 See Fattah, 902 F.3d at 239.
While the court of appeals found the meeting to clearly fall outside McDonnell's definition of official act, it found Fattah's decision to hire the girlfriend of his coconspirator to clearly meet the McDonnell requirements.\textsuperscript{94} Agreeing with the district court on this issue, the Third Circuit wrote that “[o]fficial acts need not be momentous decisions—or even notable ones.”\textsuperscript{95} Despite this obvious official act, the imprecise jury instructions required remand.\textsuperscript{96} Most notable was the appellate court’s discussion of Fattah’s attempt to secure an ambassadorship for his coconspirator. The court reiterated the idea that the meetings with Senator Casey and President Obama were not, by themselves, official acts. Yet they might be “impermissible attempts ’to pressure or advise another official on a pending matter.’”\textsuperscript{97} The decision, however, is inherently “fact-intensive” and “falls within the domain of a properly instructed jury.”\textsuperscript{98} The “cold record” did not afford the court the ability to decide, “just how forceful a strongly worded letter of recommendation must be” before it is considered impermissible pressure.\textsuperscript{99} Importantly, like the district court, the Third Circuit placed significance on the hand delivered letter to President Obama.\textsuperscript{100} The Third Circuit also made clear that this type of “pressure” analysis should look at all of the relevant conduct, and not isolate each individual action.\textsuperscript{101} As of this writing it remains to be seen if Fattah will be retried on the vacated counts. Regardless, the Third Circuit’s opinion added clarity to the increasing body of post-McDonnell corruption caselaw. Like Silver, the reversal in Fattah stemmed from errors in the jury instructions, and not from a fatal flaw in the Government’s proof.

C. United States v. Menendez

The third case that sheds some light on McDonnell’s impact is the prosecution of U.S. Senator Robert Menendez. In late 2016, after the Court’s decision in McDonnell, federal prosecutors indicted the sitting New Jersey Senator on a number of corruption charges.\textsuperscript{102} Among the counts listed in the

\begin{itemize}
  \item \textsuperscript{94} See id. at 241.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} See id. at 242.
  \item \textsuperscript{97} Id. at 241 (quoting McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016)).
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} See id. at 244 n.17 (“While we express doubt that some of Fattah’s efforts concerning the ambassadorship are, when considered in isolation, enough to cross that line, a properly instructed jury considering all of the facts in context might nonetheless conclude that other efforts—such as a hand-delivered letter to the President of the United States—indeed crossed that line.”).
  \item \textsuperscript{101} See id. (“[A] jury might find that in the aggregate, three emails, two letters, and a phone call crossed the line and therefore constituted a ‘decision or action’ on the identified matter of appointment.” (emphasis added)).
indictment were violations of the federal bribery statute and honest services fraud.\textsuperscript{103} The Government alleged that Menendez engaged in a pattern of corruption with his longtime friend, a Florida physician named Salomon Melgen. The case went to trial in late 2017, and eventually resulted in a deadlocked jury that required the judge to declare a mistrial.\textsuperscript{104} In January 2018, the federal judge hearing the case granted in part, and denied in part, Menendez’s motion to dismiss the charges against him.\textsuperscript{105} Following the dismissal of several of the charges against the Senator, the Department of Justice decided to drop its case against Menendez.\textsuperscript{106}

Although the prosecution of Senator Menendez did not result in a conviction, it offers a useful case study in how prosecutors can bring federal corruption cases after the \textit{McDonnell} decision. Unlike the cases against Silver and Fattah, the entire Menendez prosecution occurred in the aftermath of \textit{McDonnell}. The case against Menendez was the highest profile corruption prosecution undertaken since the \textit{McDonnell} decision. Therefore, it may indicate how \textit{McDonnell} has changed prosecutorial strategy at both the indictment and trial stages.

The case against Menendez alleged a long-running conspiracy between the Senator and Melgen. The trial judge, in denying part of the motion to dismiss, focused his analysis on four specific alleged official acts.\textsuperscript{107} The first official act was Menendez’s “visa-related advocacy” on behalf of Melgen’s noncitizen girlfriend.\textsuperscript{108} The second was the Senator’s advocacy related to a Medicare billing dispute between Melgen and the Department of Health and Human Services (“HHS”).\textsuperscript{109} Third was Menendez’s advocacy related to a contract between a company owned by Melgen and the Dominican Republic government for port security services.\textsuperscript{110} Fourth, and finally, was Menendez’s advocacy on behalf of Melgen to the State Department, opposing a gift of security equipment to the Dominican Republic by the United States, which would have rendered Melgen’s previously mentioned contract useless.\textsuperscript{111}
The trial judge, responding to Menendez’s claim that the government could not prove an official act, determined that a rational juror could have found all four of the actions to be official acts.\[^{112}\] The analysis in the district judge’s decision, like that by the district judge in *Fattah* suggests that lower courts will limit *McDonnell*’s impact to a narrow subset of cases. In *Menendez*, the judge held that interbranch lobbying can qualify as an official act under *McDonnell*.\[^{113}\] Similar to the discussion of the ambassadorship in *Fattah*, the decision that lobbying an executive branch official by a member of Congress can be an official act emphasized the *McDonnell* holding that the charged official does not himself need to “make a decision or take an action.”\[^{114}\] In *Menendez*’s case, the interbranch lobbying, according to the trial judge, fit with *McDonnell*’s language that the official act requirement can be satisfied when an official “exerts pressure” on another official to take an act, or “provides advice” with the knowledge and intent that the advice will form the basis of an official act.\[^{115}\]

The trial court’s discussion of *McDonnell*’s holding in relation to interbranch lobbying is important in another way. Among the official acts that the trial court said a rational juror could find was Menendez’s lobbying of various HHS and State Department officials.\[^{116}\] In the case of Menendez’s lobbying of HHS officials to resolve a Medicare billing dispute for Melgen, the official acts were a series of phone calls between Menendez’s staff and HHS officials and an in-person meeting between Menendez and the Secretary of Health and Human Services.\[^{117}\] The court, in denying the motion to dismiss on official act grounds, focused on the meeting between Menendez and the Secretary. Similarly, with regard to Menendez’s lobbying of State Department officials on Melgen’s behalf, the court noted the fact that Menendez met with an official “of ambassadorial rank.”\[^{118}\] The focus on Menendez’s meetings with high-level officials suggests that this kind of out-of-the-ordinary action by a high-level public official may be sufficient to constitute “pressure” within the meaning of *McDonnell*.

### III. *McDonnell*’s Definition of “Official Act” Will Have Limited Impact

In the aftermath of *McDonnell*, commentators suggested that the Court’s narrowed definition of official act would spell an end to prosecuting corrupt public officials.\[^{119}\] These fears focused on the Court’s holding in *McDonnell*...
too generally, failing to recognize the intricacies of the Court’s reasoning. The unanimous opinion by Chief Justice Roberts left more than enough room for federal prosecutors to do their jobs. Moreover, lower court decisions, including decisions made at the trial court level discussed above, hint at two distinct reasons _McDonnell_ is not the death knell that commentators predicted.

The first reason is that lower courts have readily found charged public officials to have “exert[ed] pressure on another official” to take an official act.120 This method of satisfying _McDonnell’s_ requirement that the “official make a decision or take an action”121 is what this Note will refer to as the “pressure theory.”122 This is most apparent in _Fattah_ and _Menendez_, where the trial courts decided that persistent lobbying, albeit at a high level of government, constituted pressure with the intent to trigger an official act under the Court’s holding in _McDonnell_. In _Fattah_, the Third Circuit suggested that Representative Fattah’s advocacy to Senator Casey and President Obama, aimed at securing an ambassadorship for a coconspirator, could satisfy _McDonnell’s_ official act requirement.123 In _Menendez_, the district judge held that a reasonable juror could find that Senator Menendez’s meeting with the Secretary of Health and Human Services—to advocate for his coconspirator in a Medicare billing dispute—constituted an official act.124 This finding in _Menendez_ was explicitly based on the _McDonnell_ language about the charged official exerting pressure on another.125

At first glance both _Fattah_ and _Menendez_ may seem to set a high bar for finding an official act using _McDonnell’s_ pressure theory. After all, Fattah hand delivered a letter to President Obama,126 and Senator Menendez went out of his way to schedule an in-person meeting with a cabinet member, each with the alleged hope of triggering an official act. But it would be a mistake to think that the pressure theory is difficult to satisfy, for two reasons. First, the district court in _Fattah_ distinguished between sending a pro forma letter on behalf of an individual—something an elected representative might be expected to do frequently—and engaging in a more involved form of lobbying another high-level government official in order pressure them into a

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120 _McDonnell v. United States_, 136 S. Ct. 2355, 2370 (2016). The Court made clear, however, that the official would have to _intend_ to exert pressure. _Id._ at 2370–71. Thus, the pressure theory contains a mens rea element. _See id._
121 _Id._ at 2371.
122 Though _McDonnell_ and subsequent cases have not expressly used the term pressure theory, the lower courts in the cases discussed in Part II have taken seriously the ability to satisfy the official act requirement through evidence that proves the corrupt official exerted pressure on another official with the intent that the other official take an official act.
123 _See United States v. Fattah_, 902 F.3d 197, 244 (3d Cir. 2018).
125 _See id._
126 _See Fattah_, 902 F.3d at 244 n.17 (placing significant weight on the unique nature of Fattah’s conduct).
The Third Circuit, noting Fattah’s extensive advocacy on behalf of his coconspirator, implicitly agreed with the district court on this point. If this line of reasoning develops across circuits, the question may become whether the official advocated in a manner out of the ordinary (i.e., more than pro forma) to pressure another official to take an action. At the very least, this gives prosecutors a baseline level of advocacy to judge the charged official’s conduct against.

The second reason that McDonnell’s pressure theory will likely be satisfied in many cases flows from common sense. Why is the coconspirator paying the bribe after all? It is so that the public official makes calls, sends letters, takes meetings, and otherwise uses his or her influence in a manner above and beyond the typical constituent services he or she performs. Why pay the bribe if you could simply write your congressman to achieve the necessary official act? In bona fide cases of corruption, the quid is not paid so that the official staffs out the quo. If the corrupt official cannot take the official act under his or her own authority, then he or she will necessarily have to exert influence over another official. This will likely involve taking on the matter personally, which inherently makes any pressure the official exerts well above that of pro forma advocacy. The pressure theory, moreover, does not necessarily require the corrupt official to have leverage over the other official. In Fattah’s case, he did not have any actual leverage over Senator Casey or President Obama. Yet the Third Circuit held that a properly instructed jury may conclude that these actions satisfied McDonnell’s pressure theory. This further evidences the idea that when the corrupt official personally gets involved—through a meeting, phone call, or other advocacy—in triggering the official act, then McDonnell may be satisfied.

There are, of course, limits to this use of the pressure theory. The Court in McDonnell noted that the pressure theory only works when the official exerting pressure uses “his official position.” Thus, an official facing a pressure theory prosecution may argue that he was not using his official position when exerting pressure on another official to take an action. Another key criticism is that while the pressure theory may work well in corruption cases against high-level officials, it may not help prove an official act in cases

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128 See Fattah, 902 F.3d at 244 n.17. But see id. at 241 (“Official acts need not be momentous decisions—or even notable ones.”).
129 For an argument that the pressure theory will not be effective, see Eugene Temchenko, Note, A First Amendment Right to Corrupt Your Politician, 103 CORNELL L. REV. 465, 478–79 (2018).
130 McDonnell v. United States, 136 S. Ct. 2355, 2370 (2016) (“A public official may also make a decision or take an action on a ‘question, matter, cause, suit, proceeding or controversy’ by using his official position to exert pressure on another official to perform an ‘official act.’ In addition, if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official, that too can qualify as a decision or action for purposes of § 201(a)(3).” (first and third emphases added)).
against mid-level or low-level public officials. Demanding a personal meeting with the Secretary of Health and Human Services, or handing a letter directly to the President is one thing. Demanding a personal meeting with a member of the state liquor board, or hand delivering a letter to the director of the regional development authority, might be another in the eyes of a juror. Moreover, the pressure theory requires prosecutors prove the official acted with the intent to influence.\textsuperscript{131} What is unclear is whether this will require significantly more evidence than prosecutors would already need to prove the separate intent element in the honest services and Hobbs Act extortion statutes.\textsuperscript{132} More caselaw is needed before the boundaries of the pressure theory become clear. But two years after McDonnell, it has the potential to be a major asset to federal prosecutors.

The second reason that McDonnell’s narrow official act definition will have a limited impact is because it primarily changes how prosecutors frame their theory of the case, rather than changing the underlying evidence they will rely on. McDonnell’s impact will be most prevalent in cases where the individual paying the bribe does not actually achieve their desired outcome. Remember, in McDonnell, Jonnie Williams never received his scientific study. In Fattah, the coconspirator was never nominated to be an ambassador. In Menendez, Melgen’s billing dispute with Medicare was not resolved by Senator Menendez’s intervention. Proving that an official act occurred, within the meaning of McDonnell, will obviously be easier when the official act actually occurs.\textsuperscript{133}

McDonnell makes clear, however, that there is no requirement, at least under the pressure theory, that the official act actually occurs.\textsuperscript{134} If the official act requirement can be satisfied by proving that the official simply agreed to make a decision or take an action on a qualifying matter, then what McDonnell really changed is how prosecutors frame their case. After McDonnell, prosecutors will no longer argue that a meeting, phone call, or event was itself an official act. Instead, McDonnell offers prosecutors two ways to argue that those actions represent evidence of corruption. The first is to argue that the meeting, phone call, or event is evidence of the agreement to make a

\textsuperscript{131} See id. at 2370–71; Temchenko, supra note 129, at 478.

\textsuperscript{132} See Leading Cases, supra note 22, at 473–74 (discussing the intent elements in those statutes); see also infra Part V.

\textsuperscript{133} See Arlo Devlin-Brown & Stephen Dec, Introduction: The Shifting Sands of Public Corruption, 121 PENN ST. L. Rev. 979, 985–86 (2017) (“The reality is that McDonnell only precludes prosecutions where the government’s theory is that the public official agreed to provide preferential access rather than an actual exercise of governmental power.”).

\textsuperscript{134} See McDonnell, 136 S. Ct. at 2370–71 (“[A] public official is not required to actually make a decision or take an action on a question, matter, cause, suit, proceeding or controversy; it is enough that the official agree to do so. 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. Nor must the public official in fact intend to perform the official act, so long as he agrees to do so.” (internal quotations omitted) (citation omitted)); see also United States v. Fattah, 902 F.3d 197, 246 (3d Cir. 2018) (affirming Fattah’s conviction on a count that alleged his agreement to misappropriate funds).
decision or take an action.\textsuperscript{135} The second method is for a prosecutor to argue those actions are evidence of an effort to exert pressure on another official to take an official act.\textsuperscript{136} The evidence would likely remain the same. What changes is how the prosecution frames the case.

The sameness of the evidence before and after the decision is important to understanding the impact of \textit{McDonnell}. In the aftermath of \textit{McDonnell} prosecutors still brought high-profile corruption cases, and the evidence largely mirrored the type of evidence used in similar cases preceding \textit{McDonnell}.\textsuperscript{137} In fact, immediately following the \textit{McDonnell} decision, federal prosecutors announced their intent to retry Governor McDonnell.\textsuperscript{138} The prosecution would have presumably used the evidence of meetings, phone calls, and events as evidence of the intent to pressure state officials into taking the official action of initiating a research study.

The case against Senator Menendez, brought entirely after the decision in \textit{McDonnell}, provides an example of this shift in framing. One critical piece of the indictment was Senator Menendez’s meeting with the Secretary of HHS to advocate on behalf of Melgen in his Medicare billing dispute.\textsuperscript{139} Prosecutors framed this meeting not as an official act in and of itself, but rather as evidence of Menendez’s alleged effort to pressure the Secretary to take an official act to benefit Melgen. Though the trial court eventually dismissed several counts of the indictment, the Government’s use of the pressure theory regarding the meeting with the Secretary of HHS survived a motion to dismiss.\textsuperscript{140} In response to post-trial motions following the \textit{McDonnell} decision, the \textit{Fattah} trial court found similar framing persuasive. There,

\textsuperscript{135} See Devlin-Brown & Dec, supra note 133, at 986. The meetings, phone calls, and events at issue in \textit{McDonnell} would be useful evidence of the intent to agree to take an official act. See George D. Brown, \textit{McDonnell} and the Criminalization of Politics, 5 V.A. J. CRIM. L. 1, 30 (2017); see also Leading Cases, supra note 22, at 476 n.85.

\textsuperscript{136} McDonnell, 136 S. Ct. at 2372.


\textsuperscript{139} Superseding Indictment, supra note 103, at 49.

\textsuperscript{140} See United States v. Menendez, 291 F. Supp. 3d 606, 617 (D.N.J. 2018) (“There is evidence to support the conclusion that . . . with various representatives of Medicare and with cabinet officials, Menendez sought to pressure or advise such officials to look at the controversy favorably to Melgen by making personal phone calls to officials in the Department of Health and Human Services . . . and meeting with the then-secretary of that agency in August 2012. There is evidence from which a rational juror could conclude that the meeting was not regarding general policy matters, but was in reality about securing a
the court denied a motion to dismiss, noting that while Fattah’s conduct in
taking a meeting with high-level officials, including the President and Sena-
tor Casey, was not independently an official act, it was evidence of Fattah
exerting pressure to trigger an official act by those officials.141

The notion that McDonnell only changed the way prosecutors frame
cases is not entirely without criticism. What a prosecutor frames as an exer-
tion of pressure in order to achieve an official act may appear to a rational
juror to simply be constituent services. Not every case will present facts like
those in Fattah or Menendez. But commentators ringing the death knell of
anticorruption efforts in the aftermath of McDonnell were not concerned
about the borderline cases where it is impossible to truly distinguish between
exerting pressure and performing constituent services. Rather, they were
concerned about cases where high-level officials used their power to make
government work for those who paid. McDonnell’s narrower definition of
official act will not greatly impact the outcome in those cases. Certainly,
prosecutors will have to rewrite some of their playbook, but they will not have
to rewrite the book from scratch.

IV. The “Stream of Benefits” Theory of Corruption is
Unaffected by McDonnell

Prosecutors have long used the “stream of benefits” theory to bring com-
plicated corruption cases, and lower courts have largely approved of this tac-

tic.142 The theory alleviates the need to link each individual quid to a
specific and contemporaneous quo.143 In the aftermath of McDonnell,
defendants began to argue that the Court rejected the steam of benefits the-
ory when it announced the narrower definition of an official act.144 Scholar-
ship following McDonnell similarly questioned the theory’s continued

favorable ruling or decision for Melgen, who was the only doctor seeking to change that
particular policy, and who had $8.9 million at stake.” (citations omitted)).

States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007)), aff’d in part and rev’d in part,
902 F.3d 197 (3d Cir. 2018).

142 See Julie R. O’Sullivan, Federal White Collar Crime 480–81 (6th ed. 2016);
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, 221 (2015) (“The stream-of-benefits cases show a particularly aggressive attitude toward
corruption on the part of the lower courts.”); see also United States v. Lopez-Cotto,
884 F.3d 1, 8 n.5 (1st Cir. 2018) (“[T]he case law on ‘stream of benefits’ mostly involves cases of honest
services fraud . . . [and] program bribery [under 18 U.S.C. § 666].”).

143 See Albert W. Alschuler, Criminal Corruption: Why Broad Definitions of Bribery Make
Things Worse, 84 Fordham L. Rev. 463, 479–82 (2015) (criticizing the stream of benefits
theory).

144 See, e.g., Defendants’ Reply Brief in Support of Their Motion to Dismiss Pursuant to
McDonnell v. United States at 1–7, United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J.
validity. Yet no court addressing this argument at either the trial or appellate level has found *McDonnell* to have foreclosed use of the steam of benefits theory.

This Note argues that these courts are correct in deciding that there is nothing in *McDonnell* that is inconsistent with the stream of benefits theory of corruption. The stream of benefits theory focuses on the *relationship* between the quid and the quo. It does not in any way alleviate the need to prove that either occurred. Questions about the soundness of the stream of benefits theory rest not on whether there needs to be an official act, but rather on the exchange of valuable consideration for an official act. *McDonnell*, as courts have rightly noted, did not focus on the exchange element, but on the definition of official act. Importantly, lower courts have built up a body of caselaw on the stream of benefits theory, which they have continued to rely on in the aftermath of *McDonnell*.

The trial courts in *Menendez* and *Fattah*, as well as the circuit court in *Silver*, had an opportunity to address the continuing viability of the stream of benefits theory. In *Menendez*, the district judge completely rejected the notion that *McDonnell* foreclosed the theory. There, the defense argued that *McDonnell* “requires the Government to prove . . . that [Menendez] had an agreement to exchange a specific quid for a specific, identified quo.” The court pointed to Third Circuit precedent that a course of conduct of gifts and favors can satisfy the quid pro quo requirement, as long as that


146 This proposition is based on the results of Westlaw searches of cases citing *McDonnell*, containing the search terms “stream of benefits” and separately “retain!.” The latter search is a reference to the “retainer theory,” which is analogous to the stream of benefits theory. For a brief description of the different terms used by courts describing the stream of benefits theory of corruption, see Brown, *supra* note 142, at 218.

147 This is not to say, however, that no Supreme Court precedent calls into question the validity of the stream of benefits theory. This Note merely argues that *McDonnell* has no effect on the theory.

148 See, e.g., United States v. Silver, No. 15-cr-93, 2018 WL 1406617, at *4 (S.D.N.Y. Mar. 20, 2018) (“Silver is mistaken when he argues that *McDonnell* found the ‘retainer’ or ‘as opportunities arise’ theory of bribery impermissible. *McDonnell* held only that the matter on which official action is *ultimately* taken must be specific and focused . . . .”); see also *Leading Cases, supra* note 22, at 472 (critically noting that “[t]he Court’s opinion evaluates the definition of ‘official act’ as though it were the sole limitation on the sweep of the anticorruption regime”).

149 For examples of the pre-*McDonnell* caselaw in several circuits, see United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009); United States v. Ganim, 510 F.3d 134 (2d Cir. 2007); United States v. Kemp, 500 F.3d 257 (3d Cir. 2007). See also Alschuler, *supra* note 143, at 479–80 (discussing the major stream of benefits cases).


151 *Id.* at 614.
prosecuting corruption

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pattern of behavior is “in exchange for a pattern of official actions favorable to the donor.”

Cutting to the crux of the argument, the judge noted that “[a]s long as that action is an ‘official act’ under McDonnell, it is a crime.”

Similarly, in Fattah, there was a presumption that the stream of benefits theory was unaffected by McDonnell. There, the court noted with approval the Government’s proof that Fattah engaged in a pattern of receiving gifts and favors in exchange for favorable action on behalf of the coconspirator.

Like the district court in Menendez, the Fattah opinion cites prior stream of benefits circuit precedent without any hint that McDonnell has fundamentally altered the theory.

Because the prosecution is still required to prove an official act took place, now using the McDonnell definition, the stream of benefits theory remains viable.

Several recent decisions out of the Second Circuit further bolster the belief that McDonnell did not alter the stream of benefits theory. These cases provide critical insight into the use of the theory going forward, because they primarily rely on then-Judge Sotomayor’s opinion in United States v. Ganim, one of the most cited stream of benefits cases. Though Ganim was decided prior to McDonnell, courts both inside and outside of the Second Circuit have continued to cite it as thoroughly persuasive on the issue.

In a recent corruption case brought against a county executive and town supervisor, Judge Joan Azrack of the Eastern District of New York cited to Ganim and rejected the notion that McDonnell altered the stream of benefits theory.

In another recent prosecution of a New York public official, Judge Valerie Caproni of the Southern District of New York similarly cited Ganim with continued approval, stating that “McDonnell did not invalidate the retainer theory of bribery.”
These are, of course, district court decisions, and thus could not overrule *Ganim* even if they wanted. But they offer useful evidence that the stream of benefits theory is alive and well in the fact that they refused to limit the theory in the aftermath of *McDonnell*. Further evidence for the continued viability of the theory is found in the fact that neither the Second Circuit’s decision in *United States v. Silver*,162 nor *United States v. Skelos*,163 hinted at a desire to revisit *Ganim* in light of *McDonnell*. As noted, other circuits have cited to *Ganim*, and the stream of benefits theory generally, with approval as well. A recent example comes from the First Circuit’s decision in *United States v. Lopez-Cotto*, which upheld a conviction that relied on a stream of benefits theory.164

Perhaps the most prominent argument that *McDonnell* overruled the stream of benefits theory derives not from anything the Court said, but rather what it did not say.165 This argument goes, in part, that because the Court in *Skilling v. United States*166 favorably cited stream of benefits cases like *Ganim*, the absence of such favorable citations in *McDonnell* signals a change in the Court’s approval of the theory.167 Further, the proponents of this argument state that because *McDonnell* requires identification of a specific official act, it is inconsistent with the stream of benefits theory.168 The argument that *McDonnell* “silently rejected” the stream of benefits theory is grasping at straws. Those making this argument are, however, correct on one point: *McDonnell* was certainly silent on the stream of benefits theory. Not only was there no mention of it in the opinion itself,169 but there was also no mention in the parties’ briefs.170 Of the eighteen amicus briefs filed in the case, only one makes a reference to the stream of benefits theory.171 This was not one of the briefs cited in the *McDonnell* opinion, and there is nothing that would

164 See *Lopez-Cotto*, 884 F.3d at 8–9 (citing *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007)). Though *Lopez-Cotto* involves a conviction under 18 U.S.C. § 666, which does not contain the same official act requirement as the honest services fraud or Hobbs Act extortion, courts have treated the stream of benefits theory as applying in to federal bribery-related crimes generally, and the *Lopez-Cotto* court did not note any distinction between the theory’s application to § 666 cases and other bribery crimes as a result of *McDonnell*. See, e.g., *Percoco*, 2017 WL 6314446, at *4.
165 See *Silverglate & Quinn-Judge*, supra note 145, at 207–08.
167 See *Silverglate & Quinn-Judge*, supra note 145, at 207 n.76 (citing *Skilling* and several stream of benefits cases mentioned in that opinion).
168 See id. at 207–08.
make one think that the brief’s relatively sparse discussion of the stream of benefits led to the theory’s downfall.  

It is simply too difficult to tell why the Court cited stream of benefits cases in _Skilling_ and not in _McDonnell_. Perhaps, given the political nature of the case, the Court prized unanimity in _McDonnell_ in a manner it did not in _Skilling_. Perhaps the Court thought that defining official act simply did not implicate the stream of benefits theory the way that the holding in _Skilling_ did. It is impossible to tell. An equally “fair reading” would be that the court’s silence, especially on an important prosecutorial tool against corruption, silently affirms the theory.

Undoubtedly a case will arise that cleanly presents whether _McDonnell_ has altered the availability of the stream of benefits theory of corruption. But with nearly two years of corruption cases since the _McDonnell_ decision, lower courts across the board have approved of the theory’s use. This Note argues that those courts are correct, because they rightly note that _McDonnell_ redefined an existing element—an official act—rather than added an entirely new element. Prosecutors had to prove an official act before _McDonnell_, and they have to prove one after. The stream of benefits theory is simply one means of proving corruption under the honest services fraud or Hobbs Act extortion statutes. Defendants facing corruption charges likely will continue to attack the stream of benefits theory when used against them. And there may well be some yet undiscovered rationale for attacking the stream of benefits theory. But a fair reading of _McDonnell_, and the lower court decisions that followed, make clear that _McDonnell_ does not offer any assistance to those defendants.

V. Proving Intent Remains the Primary Obstacle in Corruption Cases

The dire commentary in the aftermath of _McDonnell_ resulted far more from the judgment of the Court than the reasoning. The Court’s sole focus in _McDonnell_ was the official act element of the federal bribery statute. There will, of course, be cases that are affected by the _McDonnell_ Court’s narrowing of this element; however, the reality is that other elements of the bribery statute remain the greater source of headaches for federal prosecutors. As one commentator wrote shortly after the _McDonnell_ decision, “[t]he Court’s opinion evaluates the definition of ‘official act’ as though it were the sole limitation on the sweep of the anticorruption regime.” Yet, the true scope of the bribery statute is much narrower. Section 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.” There are also further elemental limitations found in the honest services fraud and the Hobbs

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172 See generally _McDonnell_, 136 S. Ct. 2355.
173 See Silverglate & Quinn-Judge, supra note 145, at 297.
174 Leading Cases, supra note 22, at 472.
175 Id. at 473 (discussing 18 U.S.C. § 201 (2012)).
Act extortion statutes. In corruption prosecutions, the official act element relates to the actus reus—what the official must do. Yet it is not the actus reus element that is the primary limiting principle in corruption cases, but rather the mens rea. Proving corrupt intent is what separates political action or constituent services from corruption. It is thus the intent element where the case is typically won or lost.

After McDonnell, the highest hurdle facing federal prosecutors is the same as it was before McDonnell: proving corrupt intent. The Menendez case is a good example of this fact. The prosecution was not doomed by a legal judgment that Senator Menendez’s alleged interbranch lobbying could not have constituted an official act under McDonnell. Rather, the difficulty was in proving that Menendez had the requisite corrupt intent when he lobbied on behalf of Melgen, his longtime friend. But this difficulty would have existed even absent the Court’s decision in McDonnell. Though Menendez is only one data point, it is notable that in the first major corruption prosecution following McDonnell the main issue confronting prosecutors was nothing new.

Nor can it be said that McDonnell added much, if anything, to the task of proving intent. As discussed in Part III, the pressure theory that can be used to satisfy McDonnell’s official act definition, contains a separate mens rea. It requires that there be proof that the official acted with the intent to exert pressure. What remains to be seen is whether this pressure theory mens rea will place a greater evidentiary burden on prosecutors, or whether evidence proving the separate statutory intent element will tend to prove the pressure theory’s intent requirement as well. It is difficult to conjure a scenario where an official who exerts some kind of pressure to trigger an official act does so with corrupt intent but without the intent to exert pressure. Proving the former was a pre-McDonnell requirement, proving the latter is what McDonnell added via the pressure theory. At the end of the day, it is not proving an official act that will substantially hinder corruption prosecu-

177 See id. at 53 (“By requiring an ‘evil state of mind’ to satisfy corrupt intent, the law criminalizes corrupt behavior without criminalizing more benign political behavior . . . which neither corrupt public officials nor betray public trust.”).
180 See supra notes 121–23 and accompanying text.
181 Indeed, the Third Circuit’s discussion of the pressure theory in Fattah did not even reference the theory’s intent requirement. See United States v. Fattah, 902 F.3d 197, 240–41 (3d Cir. 2018).
182 See Hughes, supra note 176, at 44–46 (discussing the pre-McDonnell intent requirements).
tions, but rather proving the requisite intent—something that has long stymied corruption prosecutions.

**CONCLUSION**

When it was decided, *McDonnell* threatened to upend public corruption convictions and investigations throughout the country. Indeed, in some cases, *McDonnell* resulted in convictions being overturned. But a deeper analysis of the lower courts’ reasoning in post-*McDonnell* corruption cases reveals a different story. This story is one that is far more nuanced than the initial reactions to the Supreme Court’s narrow reading of the term official act. The Court’s language in *McDonnell* did, as Chief Justice Roberts assured, “leave[] ample room for prosecuting corruption.”

Particularly important was the Court’s articulation of what this Note has called the pressure theory. This theory allows prosecutors to reframe existing cases, no longer arguing that meetings, phone calls, and events are official acts in and of themselves, but rather evidence of intentional pressure on another official to take an official act. This Note also argued that *McDonnell* left the often-used stream of benefits theory of corruption untouched. There has been some scholarly debate on this issue, yet courts have upheld the theory across the board. Finally, this Note argued that proving corrupt intent, not a narrower definition of official act, is the primary issue plaguing corruption prosecutions. What remains after these three arguments is the realization that *McDonnell* has had a limited effect on corruption prosecutions, and is far from the death knell that it was originally touted to be.

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