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A TOUGHER ROAD TO CONVICTION: A CASE STUDY OF THE PROSECUTION OF CORRUPT PUBLIC OFFICIALS IN A POST-MCDONNELL WORLD

David Paul Dornette*

I. INTRODUCTION

Money in politics is a legal and practical reality. Routine political courtesies and constituent services for those who support a politician are an integral part of a representative democracy. A major part of a representative's job is to regularly meet and speak with constituents to better understand their needs. The public official's job is to advocate for those needs. A byproduct of our democratic system, rooted in privately funded campaigns, is that representatives voice most passionately for those who support them – and the best way to support a politician is through political donations. Today, a candidate is unlikely to win an election without significant campaign contributions.

Due to campaign fundraising and lobbying activity, politicians are inevitably tempted with illicit payments. The essence of Corruption occurs when politicians cease acting for the good of their constituents and instead seek to enrich themselves.¹ The quintessential act of corruption is taking secret payments in exchange for political favors. Corruption is reviled and intolerable because it betrays trust at the highest level. Our own Constitution puts it in the same category as treason.² It “destroys democracy, replacing the vote of the people with the vote of the dollar.”³ The line between routine political contributions for influence and illegal secret payments in exchange for political favors is murky. But one the courts have continuously attempted to maintain.

The current system of federal bribery legislation is not a coherent scheme of offenses but rather “a patchwork of statutes aimed at corrupt public officials, some by design and others by accident.”⁴ The difficulty lies in the statutes' broad definition of corruption, because politicians routinely solicit funds for re-election. Justice White stated that these

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1. Randall Eliason, *Sheldon Silver, Bob McDonnell, and the Sorry State of Public Corruption Law*, Sidebars Blog (July 19, 2017), <https://sidebarsblog.com/sheldon-silver-bob-mcdonnell-sorry-state-public-corruption-law/>.

2. U.S. Const. art II, §4. (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

3. John Braithwaite, *Restorative Justice and Responsive Regulation*, 225 (2002).

4. John Gawey, *Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 418 (2013).

broad definitions of corruption:

would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions [,] as they have been from the beginning of the Nation.⁵

These broad and poorly defined statutes led to a constant battle of interpretation between the Department of Justice and the Supreme Court.⁶ Courts have “squeezed and stretched” the statute’s language for decades, trying to maintain a balance between two vitally important public interests: a constituent oriented representative government and stomping out corruption.⁷

The most recent Supreme Court ruling on corruption law may also be the most significant. The seminal holding in *United States v. McDonnell* narrowed the definition of what constitutes an “official act” under federal bribery statutes.⁸ The Court attempted to preserve the line between legal constituent services and graft by establishing a bright-line rule. But in doing so, the Court raised the bar for corruption prosecution to a rigorously high standard.

This paper will argue the ruling in *McDonnell* was a necessary decision that brought much needed clarity to corruption law. But, as with all new laws and legal standards, there are repercussions; some positive and some negative. Perhaps the most negative consequence is the recent reversal of convictions of corrupt public officials. Across the country, corrupt politicians have had their convictions overturned because the jury instructions used to convict, although correct at the time of trial, are no longer valid under the *McDonnell* standard. The first was Sheldon Silver, ex-Speaker of the New York General Assembly, whose prosecution provides a useful case study in what the future of corruption prosecution will look like in a post-*McDonnell* world.

Part II of this paper gives the background of the federal bribery statutes and how the courts have interpreted them. It discusses Sheldon Silver’s alleged corruption scheme, trial, and conviction. Next, it addresses the holding in *McDonnell* and why it compelled overturning Silver’s conviction. Part III will first discuss the future of anti-corruption law and prosecution, and then apply it to what the expected outcome of Sheldon Silver’s retrial should be. It will then conclude with

5. *McCormick v. United States*, 500 U.S. 257, 272 (1991).

6. *See* Gawey, *supra* note 4 at 386.

7. *Id.* at 417.

8. *McDonnell v. United States*, 579 U.S. 1 (2016).

proposed solutions to alleviate concerns that also work in conjuncture with *McDonnell*.

II. BACKGROUND

Before Sheldon Silver earned the title “convicted criminal,” he was referred to by a different name: Speaker of the New York State Assembly where he had the reputation of being “the state’s most powerful Democrat.”⁹ In 1994, he was elected Speaker – a position he would hold until his resignation in 2015.¹⁰ As Speaker, Silver was one of New York’s most powerful public officials who “[controlled] everything from the legislation that can be voted on to how his normally docile members vote on it.”¹¹

In 2015, Silver was convicted of seven counts of “honest services fraud,” extortion and money laundering for his role in two kickback schemes involving nearly \$4 million in payments he received.¹² The two different schemes shared the same premise: in exchange for official acts, Silver received referral fees from third party law firms.¹³

This section outlines the elements necessary for the government to succeed on charges of honest services fraud and Hobbs Act Extortion. Then, it outlines the facts of Mr. Silver’s two schemes: the “Mesothelioma Scheme” and “Real Estate Scheme.” Finally, it discusses his trial, conviction, the Supreme Court’s holding in *U.S. v McDonnell*, and the appellate court’s decision to overturn Mr. Silver’s conviction.

A. Elements of Honest Services Fraud and Hobbs Act Extortion

The law governing public corruption is notoriously confusing. The government often prosecutes individuals under multiple statutes for the same underlying conduct – bribery.¹⁴ Common law bribery required a

9. Ian Fisher, *With Cuomo’s Loss, Speaker is Top Democrat in Albany*, NEW YORK TIMES (November 22, 1994), <http://www.nytimes.com/1994/11/22/nyregion/with-cuomo-s-loss-speaker-is-top-democrat-in-albany.html>.

10. *United States v. Silver*, 864 F.3d 102, 106 (2d Cir. 2017).

11. Danny Hakim and Thomas Kaplan, *Bad Week is Merely Bump for Assembly’s Master of Power*, NEW YORK TIMES (May 20, 2013) <http://www.nytimes.com/2013/05/21/nyregion/silver-longtime-assembly-speaker-faces-new-call-to-quit.html>.

12. Benjamin Weiser, *Sheldon Silver’s 2015 Corruption Conviction Is Overturned*, NEW YORK TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/nyregion/sheldon-silvers-conviction-is-overturned.html>.

13. *Silver*, 864 F.3d at 106.

14. Martin Flumenbaum, Brad Karp, *Defining the Scope of McDonnell v United States*, NEW YORK LAW JOURNAL (Oct. 24, 2017), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/10/24/1025flumenbaum-p3->

corrupt *quid pro quo*: a public official receives or demands something of value from a private party, with corrupt intent, in exchange for being influenced in the performance of an official act.¹⁵ For bribery, the agreement itself is the crime, so it does not matter what the public official did, but rather what he agreed to do.¹⁶ While this principle remains the focal point in modern corruption prosecution, Congress has enacted various statutes each of which has its own scope and intricacies.

1. Honest Services Fraud – 18 USC § 1346

Enacted in 1872, the mail and wire fraud statutes made it a federal crime to knowingly devise or participate in a scheme to defraud that involves the use of mail or interstate wire.¹⁷ While a typical fraud injury is an individual deprived of money or other tangible resources, the statute was interpreted and widely used throughout the 1970s and 80s to prosecute public corruption.¹⁸ The theory was that public officials defrauded the people of their right to honest services.¹⁹ However, in 1988, the Supreme Court held that the mail fraud statute was not written to apply to public officials and thus did not prohibit schemes to defraud the people of their right to honest services.²⁰ In response, Congress codified the “intangible right” theory by passing §1346.²¹ It defines honest services fraud as: “a scheme or artifice to deprive another of the intangible right of honest services.”²²

Honest services fraud is one of the most powerful and commonly used tools to prosecute corruption.²³ This is because jurisdiction – using interstate wire or mail in furtherance of the fraud scheme – is relatively easy to prove.²⁴ Also, a pattern of corrupt activity can be easily charged as a single honest services fraud scheme.²⁵ In response to prosecutors

defining-the-scope-of-mcdonnell-v-united-states/?slreturn=20170925155741.

15. Gregory Gilchrist, *Corruption Law After McDonnell: Not Dead Yet*, 165 U. PA. L. REV. ONLINE at 13 (2016).

16. Randall D. Eliason, *Supreme Court Narrows Federal Bribery Law in a Win For Bob McDonnell*, SIDEBARS BLOG (June 27, 2016), <https://sidebarsblog.com/supreme-court-narrows-federal-bribery-law-in-a-win-for-bob-mcdonnell/>.

17. See 18 U.S.C. §§1341, 1342 & 1346; See also Center for the Advancement of Public Integrity (“CAPI”), *Guide To Commonly Used Federal Statutes in Public Corruption Cases*, 1, at 10 (Columbia Law School, 2017).

18. *United States v Mandel*, 602 F.2d 653 (4th Cir. 1979).

19. *Id.*

20. *McNally v. United States*, 483 U.S. 350 (1988).

21. See 18 U.S.C. §1346.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

extensive use, *Skilling v. United States* narrowed the definition to cover only fraudulent schemes to deprive another of honest services through bribes or kickbacks.²⁶

The elements for honest services fraud are: (1) a public official; (2) in a scheme or plan to defraud; (3) accepts a bribe or kickback; (4) in exchange for official action (the *quid pro quo*); and (5) violated his duty of honest services to the public by using mail or interstate wires to carry out the scheme.²⁷

2. Hobbs Act Extortion – 18 USC §1951

The Hobbs Act, enacted in 1946, makes it a crime to obtain property from another with that person's consent under the color of official right in a manner that affects interstate commerce.²⁸ While the statute does not use the term "bribery," the Supreme Court has held that extortion under the Hobbs Act is "the rough equivalent of what we would now describe as 'taking a bribe.'" ²⁹ Therefore, in practice, both Hobbs Act extortion and honest services fraud function the same way.³⁰ The only major difference is the jurisdictional hook: because the Hobbs Act is based on the commerce clause, the corruption must affect interstate commerce.³¹

The offense is "completed at the time when the public official receives a payment in return for his agreement to perform a specific official act."³² Thus, under the Hobbs Act, a public official need not take any step towards fulfilling the promised action.³³ He can be found guilty for merely agreeing to perform an official act, and does not even need the authority to take that action.³⁴ The government only has to show the official obtained a payment they were not entitled to, and knew the

26. 561 U.S. 358, 404 (2010).

27. Kierston Eastham Rosen, *Meeting Consolidation: Why Criminal Pattern Jury Instructions Should Consolidate Federal Bribery Statutes*, 104 KY. L.J. 75 (2016); citing District Judges Association, Fifth Circuit Pattern Jury Instructions, §§ 2.56, 2.57 (Criminal Cases) (2015) (referring the reader to 18 U.S.C. § 201(b) in order to define bribery within the context of honest services fraud).

28. See CAPI *supra* note 17, at 6.

29. *Id.*; see also *Evans v. United States*, 504 U.S. 255 (1992).

30. Randall Eliason, *Bob McDonnell's New Trial Motion and the Definition of "Official Act,"* SIDEBARS BLOG (November 19, 2014), <https://sidebarsblog.com/bob-mcdonnells-new-trial-motion-and-the-definition-of-official-act/>.

31. Randall Eliason, *Why Bob McDonnell was Convicted of Extortion*, SIDEBARS BLOG (July 19, 2017), <https://sidebarsblog.com/why-bob-mcdonnell-was-convicted-of-extortion/>; see also CAPI *supra* note 17.

32. *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007), quoting *Evans v. United States*, 504 U.S. 255, 268 (1992).

33. *Id.*

34. *Id.*

payment was made in return for official acts.³⁵

In summary, the elements of Hobbs Act extortion under color of official right generally are: (1) a public official obtains, accepts, or agrees to accept; (2) a thing of value the public official was not entitled to; (3) knowing the payment was made in return for official acts (*quid pro quo*); and (4) interstate commerce was affected.³⁶

3. Federal Bribery Statute – 18 USC § 201

In 1962, Congress enacted 18 U.S. Code §201 – the principal federal bribery statute.³⁷ It requires that the public official act with corrupt intent to engage in a *quid pro quo*; that is, “a specific intent to give or receive something of value in exchange for an official act.”³⁸ The statute only applies to federal officials.³⁹

In order to prosecute state and local officials, U.S. Attorneys most commonly use honest services fraud, and Hobbs Act extortion under color of official right.⁴⁰ While both statutes still require a *quid pro quo*,⁴¹ the wording is vague and open to interpretation. Honest service fraud is only a 28-word statute.⁴² Prosecutors like the vagueness because the statutes can be applied to broader conduct than bribery.⁴³ However, there were concerns this broadness resulted in overly zealous prosecution.⁴⁴

4. Supreme Court’s Concerns, and Lower Court Issues

Over the past two decades, the Supreme Court has repeatedly limited the scope of public corruption law.⁴⁵ Over that time, the Court has only

35. *Id.*

36. *See* Rosen, *supra* note 27.

37. 18 U.S. Code §201.

38. *United States v Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999).

39. *See* CAPI, *supra* note 17, at 3.

40. *Id.*

41. *Id.*

42. Kelly Thornton, *Vagueness of Statute on Corruption Stirs Dispute*, SAN DIEGO UNION TRIBUNE (January 12, 2006), http://legacy.sandiegouniontribune.com/uniontrib/20060112/news_1n12compare.html.

43. *Id.* (“I believe they’re interpreting it too broadly, and that creates tremendous risks to our judicial system and our criminal justice system and public officials who are trying to do their jobs . . .”).

44. *See* Gawey, *supra* note 4, at 415 (discussing *United States v Siegelman* where many believe the Governor of Alabama was targeted for being a Democrat); *see also Morrison v Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

45. Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 UC DAVIS L.J. 1619, 1633 (2016).

let stand one conviction of a public figure when substantively interpreting an anti-corruption statute.⁴⁶ Thus, the Court has constructed a rigorously high bar for both drafters of anti-corruption legislation and federal prosecutors.⁴⁷ This trend is a result of both doctrinal requirements and substantive concerns.⁴⁸ This section will first look at these underlying explanations, and then analyze two statutory requirements the courts have struggled with: intent, and the definition of “official acts.”

The main doctrinal requirement the Court has recognized is the canons of statutory interpretation.⁴⁹ Because most federal corruption statutes are vague, the courts have been forced to fill the void left by legislatures through various canons of statutory interpretation.⁵⁰ For instance, in *Skilling*, the Court relied on the principle that when there is uncertainty surrounding a statute’s meaning, it should be subject to a “limiting construction.”⁵¹ Because of the objective uncertainty surrounding many of the corruption statutes, the Courts have favored a narrow construction when interpreting and defining.

However, there are two substantive concerns the Court has identified: the need for the criminal statutes to supply notice that satisfies the Due Process clause of the Constitution, and a fear that over-inclusive corruption law would “chill” representative government. The Supreme Court addressed this first concern in *Skilling*: “there was considerable disarray over the statute’s application to conduct outside [bribery].”⁵² It narrowed the definition of honest service fraud to put public officials on notice and to avoid further Due Process objections for lack of such notice.⁵³

In addressing the second concern, the Court has embraced a political view that promotes a representative government motivated by constituent services and patronage-driven.⁵⁴ The line between “politics-

46. *Id.* (In *Evans v. United States*, 504 U.S. 255, 258-59 (1992), the court affirmed a Hobbs Act conviction when an official “passively” accepted a *quid pro quo*).

47. *Id.*

48. *Id.* at 1633-41.

49. *Id.* at 1634.

50. *Id.* at 1633-41; see also Thornton, *supra* note 42; see, e.g., *McDonnell*, 579 U.S. at 15-16 (where the court relied on the “familiar interpretive canon *noscitur a sociis*.”); *Skilling*, 561 U.S. at 401-403 (where the Court engaged in an extensive reading of legal history to determine that the federal honest services doctrine prohibits only bribes and kickbacks, but does not prohibit undisclosed self-dealing); see also *Sun-Diamond*, 526 U.S. 412 (Where the Court used the doctrinal tool of the statutory interpretation principle that when a statute criminalizes conduct in a domain of extensive regulation, it ought to be read narrowly and treated as a “scalpel” rather than a “meat axe.”).

51. *Skilling*, 561 U.S. at 405.

52. *Id.*

53. *Id.*

54. See Eisler, *supra* note 45, at 1639.

as-usual” and institutional corruption is hard to draw and the Court’s concerns of chilling representative government has made it view corruption a narrow field of exceptionally egregious and self-serving behavior.⁵⁵ In the Court’s view, these are issues for campaign financing law, not the criminal justice system.⁵⁶ The Supreme Court did not openly articulate these concerns until *McDonnell*, discussed below.⁵⁷

Against that backdrop, lower courts continued to struggle with two corruption requirements: intent, and the definition of “official act.”⁵⁸ The federal bribery statute includes the intent of “corruptly,” an unusual and poorly defined mindset that does not fall under the normal classifications of purpose, knowledge, recklessness or negligence.⁵⁹

The Supreme Court addressed the intent component of corruption statutes in *United States v Sun-Diamond Growers of California*, the first in their modern line of corruption narrowing holdings.⁶⁰ But, *Sun-Diamond* only focused on illegal “gratuities” in terms of § 201.⁶¹ Later Supreme Court decisions also failed to give lower courts clarity on the intent requirement or the definition of “official act.” The general premise of corruption remained the same: public officials should not receive or demand a thing of value, with corrupt intent, in exchange for being influenced in the performance of an official act.⁶² But the definition of the specific elements continued on as vague areas of law open to varying interpretations, as a former federal prosecutor stated, “There’s almost no fact pattern that cannot be fit around.”⁶³

B. The Mesothelioma Scheme

As courts continued to struggle with interpretation of corruption statutes, clever officials continued to take advantage of their positions, perhaps none more infamously than Sheldon Silver. Of the two schemes that Silver engaged in, the more profitable was his exchange of grants and other acts for Mesothelioma patient referrals. In the fall of 2002, Silver became “of counsel” to the New York firm Weitz & Luxenberg

55. *Id.* at 1630 and 1641.

56. *Id.* at 1637-38; *see also* Gilchrist, *supra* note 15, at 15 and 18 (“But many of the problems are rooted in election and campaign finance law, not our criminal justice system.”).

57. *McDonnell* 579 U.S. at 22-24(2016).

58. *See* Gilchrist, *supra* note 15, at 12.

59. *Id.*

60. 526 U.S. at 404-405 (1999).

61. *Id.*

62. *See* Gilchrist, *supra* note 15, at 11.

63. Roger Parloff, *The Catchall Fraud Law that Catches Too Much*, FORTUNE (January 6, 2010) http://archive.fortune.com/2010/01/04/magazines/fortune/fraud_law.fortune/index.htm?postversion=2010010609.

(“W&L”).⁶⁴ While Silver did not perform any legal services for the firm’s clients, he received a fixed salary, and a set percent referral fee for any case he brought the firm.⁶⁵ W&L was particularly successful with lawsuits involving mesothelioma, a rare form of cancer caused by exposure to asbestos.⁶⁶ In 2003, Silver struck up a friendship with Dr. Robert Taub, a physician and researcher who specialized in mesothelioma.⁶⁷ Dr. Taub sought to develop the relationship in order to receive state and federal research funding, and testified that he believed Silver would benefit personally from such a relationship.⁶⁸

In November 2003, upon Silver’s request, Dr. Taub began referring mesothelioma patients to W&L.⁶⁹ Later, Dr. Taub sent a letter to Silver requesting state funding, and in March 2005, Silver received his first referral fee check from W&L for \$176,048.02.⁷⁰ Soon after, Silver secured a \$250,000 state grant for Taub, followed by a second in August 2006.⁷¹ These grants originated from a pool of discretionary funds that Silver had exclusive control over as Speaker.⁷² Neither grant, nor any of Silver and Taub’s interactions, was ever publicly disclosed.⁷³

In 2007, New York law changed to require public disclosure of state healthcare grants and any potential conflicts of interest between legislators and recipients of the grants.⁷⁴ In response, Silver notified Dr. Taub that any additional requests for state grants would not be approved.⁷⁵ However, Dr. Taub continued his referrals to Silver in order to maintain their relationship and to keep Silver “incentivized.”⁷⁶ When Taub started sending leads to another firm in 2010, Silver went to Taub’s office to complain.⁷⁷ Following the meeting, Dr. Taub again began sending referrals to Silver, remarking in an email to a colleague, “I will keep giving cases to [Silver] because I may need him in the future – he is the most powerful man in New York State.”

Although Silver did not approve any more grants after August 2006, he did continue to help Dr. Taub in other ways. In January 2007 Silver’s

64. *Silver*, 864 F.3d at 107.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Silver*, 864 F.3d at 107.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Silver*, 864 F.3d at 108.

75. *Id.*

76. *Id.*

77. *Id.*

staff asked a state trial judge to hire Dr. Taub's daughter as an unpaid extern.⁷⁸ In May 2008 Silver awarded \$25,000 in state grant funding to a non-profit, whose board included Dr. Taub's wife.⁷⁹ In May 2011, Silver had his staff prepare, and he sponsored, an Assembly resolution with an official proclamation commending Dr. Taub.⁸⁰ In fall 2011 Silver agreed to help Taub "navigate" the process of securing permits for a proposed NYC charity race.⁸¹ In 2012, at Taub's request, Silver helped Taub's son obtain a job with a state agency.⁸² Dr. Taub continued to send mesothelioma leads to Silver through at least 2013, and in total, Silver received roughly \$3 million in referral fees from W&L.⁸³

C. The Real Estate Scheme

Silver's second scheme involved two major New York real estate developers: Glenwood Management ("Glenwood") and the Witkoff Group ("Witkoff").⁸⁴ The companies depended heavily on favorable state legislation such as rent control and tax abatement.⁸⁵ As Speaker, Silver determined which legislation was voted on. Moreover, the Developers depended heavily on tax-exempt financing as determined by the Public Authorities Control Board ("PACB"), of which Silver was a voting member with the power of unilaterally preventing approval of any state financing applications.⁸⁶

Like the mesothelioma scheme, Mr. Silver profited by receiving referral fees from a third-party law firm. Silver's close friend and former staffer, Jay Goldberg, was an attorney who specialized in tax certiorari work, something the Developers pursued in order to reduce property taxes on their buildings.⁸⁷ Silver induced the Developers to hire Goldberg, who secretly agreed to pay Silver 25% of the legal fees.⁸⁸ In 1997, Silver referred Glenwood to Goldberg, and did the same for Witkoff in 2005.⁸⁹ While neither developer knew of Silver's financial arrangements with Goldberg, they both testified they gave work to

78. *Id.*

79. *Silver*, 864 F.3d at 108.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Silver*, 864 F.3d at 109.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Silver*, 864 F.3d at 109.

Goldberg to gain access to Silver and influence his legislative work.⁹⁰

In return, Silver took actions to benefit the Developers. First, he repeatedly voted, over the course of his tenure as a member of PACB, to approve Glenwood's requests for tax-exempt financing.⁹¹ Second, Silver regularly approved and voted for rent and tax abatement legislation sought by Glenwood. For example, in June 2011, Silver met with Glenwood lobbyists to ensure their satisfaction with proposed legislation ("The Glenwood Meeting").⁹² Silver supported and voted in favor of this legislation, as well as tax abatement legislation later that month, both to the benefit of Glenwood.⁹³ Lastly, in 2011, Silver publicly opposed the relocation of an addiction treatment clinic that was to be located near a Glenwood rental building.⁹⁴

Silver kept his financial arrangement with Goldberg a secret from the developers, confessing the arrangement to Glenwood only after Goldberg sent Glenwood a new retainer agreement that referenced Silver.⁹⁵ Witkoff did not learn of the arrangement until Goldberg admitted to it after receiving a subpoena in connection to Silver's investigation.⁹⁶ Over 18 years, Silver received in total \$835,000 in referral fees.⁹⁷

D. Trial and Conviction

In February 2015, Silver was indicted on four counts of honest service fraud, two counts of Hobbs Act extortion, and one count of money laundering.⁹⁸ The theory was that Silver accepted bribes and kickbacks in exchange for "official acts."⁹⁹

Silver's trial began in November, and one of the most hotly contested issues was the jury instruction's definition of "official act."¹⁰⁰ Silver advocated for a definition of "official act" according to the federal bribery statute, 18 U.S.C. §201(a)(3): "an 'official act' means 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

90. *Id.*

91. *Id.* at 110.

92. *Id.*

93. *Id.*

94. *Silver*, 864 F.3d at 110.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Silver*, 864 F.3d at 111.

100. *Id.*

brought before any public official, in such official's official capacity."¹⁰¹ After the court rejected this instruction, Silver proposed an alternative: "The government must prove the exercise of actual governmental power, the threat to exercise such power, or pressure imposed on others to exercise actual government power."¹⁰² The government urged, and the court ultimately adopted, a much broader definition: "official action includes any action taken or to be taken under color of official authority."¹⁰³

A crucial aspect of the prosecution was application of the five-year statute of limitations for both honest services fraud and Hobbs Act extortion. For the statute of limitations to be satisfied, the jury had to find that some aspect of the scheme continued on or after February 19, 2010.¹⁰⁴ Without such a finding, the jury was required to acquit on that charge.¹⁰⁵

After three days of deliberation, the jury found Silver guilty on all seven counts.¹⁰⁶ The District Court sentenced Silver to twelve years of imprisonment, three years of supervised release, \$5.4 million in forfeiture, and a \$1.75 million fine.¹⁰⁷

On May 13, 2016, Silver motioned to appeal.¹⁰⁸ Silver's motion relied largely on arguments about the definition of "official act" raised in *McDonnell v United States*, which was then pending before the Supreme Court.¹⁰⁹ On June 27, 2016, the Supreme Court decided *McDonnell* and on August 25, 2016, the District Court granted Silver's motion for appeal.¹¹⁰ It stated that while Silver's case is "factually almost nothing like *McDonnell*... there is a substantial question whether, in light of *McDonnell*, the jury charge was in error and [if that] error was harmless."¹¹¹

E. McDonnell v United States

The Supreme Court's decision in *McDonnell v United States*, fundamentally changed corruption prosecution by narrowing the

101. *Id.*

102. *Id.*

103. *Id.* at 112.

104. *Id.*

105. *Silver*, 864 F.3d at 112.

106. *Id.*

107. *Id.* at 112-3.

108. *Id.*

109. *Silver*, 864 F.3d at 113.

110. *Id.*

111. *Id.*

definition of an “official act.”¹¹² Robert McDonnell, former Governor of Virginia, was charged with honest services fraud and Hobbs act extortion after he and his wife accepted \$175,000 worth in loans, gifts, and other benefits from a Virginia businessman.¹¹³ The government alleged the Governor committed five “official acts” in exchange for the gifts, including arranging meetings with state officials, hosting events at the Governor’s Mansion for the business’ benefit, and contacting, promoting, and recommending the business to government officials.¹¹⁴

In overturning McDonnell’s convictions, the Supreme Court sought to bring clarity to the definition of “official act” contained in the federal bribery statute, and applied that definition to both Hobbs Act extortion and honest services fraud.¹¹⁵ While the federal bribery statute defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy,” neither of the other statutes contained any definition.¹¹⁶ The Court’s concern was that under a broad interpretation, nearly anything a public official accepts, such as campaign contributions or lunch, qualifies as a *quid*; and nearly anything a public official does, such as arranging meetings or inviting guests to events, counts as a *quo*.¹¹⁷ Because public officials’ purpose in a representative government is to hear from and act on behalf of constituents, such a broad interpretation would have a chilling effect on public officials’ ability to do the very job they were elected to perform.¹¹⁸ This interpretation would put elected officials at risk of indictment any time they provided heightened access to contributors.¹¹⁹

The Court held that an “official act” for any of the three discussed federal bribery statutes meant “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.”¹²⁰ The Court set forth a two-prong test to meet this definition.¹²¹

112. *McDonnell*, 579 U.S. 1.

113. *Id.*

114. *Id.*

115. *Id.* at 13.

116. *Id.*

117. *Id.* at 22 (“But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns . . . Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse. This concern is substantial.”).

118. *Id.*

119. Brief for the Petitioner at 40, *McDonnell*, 136 S. Ct. 2355, No.15-474 (Feb. 29, 2016).

120. *McDonnell*, 579 U.S. 1 at 21.

121. *Id.*

For the first prong, not just any “question, matter, cause, suit, proceeding or controversy” qualifies.¹²² Rather, that issue must involve:

- (1) A formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or hearing before a committee;
- (2) It must also be something specific and focused (general economic development does not qualify); and
- (3) It must be an issue that is either:
 - (a) Pending; or
 - (b) May by law be brought before a public official¹²³

To state more succinctly, the official act must involve: (1) a formal exercise of governmental power; (2) on a specific and focused issue; and (3) that issue must be either pending or may by law be brought before a public official.¹²⁴

For the second prong to be satisfied, “the public official must make a decision or take an action on the ‘question, matter, cause, suit, proceeding or controversy,’ or agree to do so.”¹²⁵ Such a decision or action “may include using his official position to exert pressure on another official to perform an ‘official act’ or to advise another official, knowing or intending that such advice will form the basis for an official act by another official.”¹²⁶ Even an agreement to make a decision qualifies.¹²⁷ That agreement does not need to be explicit nor does it need to specify the means by which the act will be performed.¹²⁸ The public official does not even have to intend to perform the act, just agree to it.¹²⁹ Also, setting up a meeting, talking to other officials, or organizing events (or agreeing to) does not qualify without evidence showing something more, particularly the intent to exert pressure on another official.¹³⁰

Applying this test, the Supreme Court ruled the jury instructions in the trial court lacked three important qualifications, rendering them significantly over-inclusive.¹³¹ First, the instructions should have stated that the jury “must identify a ‘question, matter, cause, suit, proceeding

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *McDonnell*, 579 U.S. at 21.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 25-27.

or controversy’ involving the formal exercise of governmental power.”¹³² Second, they should have stated “the pertinent ‘question, matter, cause, suit, proceeding or controversy’ must be something specific and focused that is ‘pending’ or ‘may by law be brought before any public official.’”¹³³ Third, they should have included “arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter.”¹³⁴ McDonnell’s convictions were overturned because the jury could have convicted based on acts that were not in fact illegal.¹³⁵ Although controversial, the decision was unanimous.¹³⁶

F. Silver’s Conviction Overturned

Based on *McDonnell*, Silver appealed his conviction and argued that the jury instruction’s definition of “official act” was now erroneous.¹³⁷ As in *McDonnell*, the Second Circuit held that Silver’s jury instructions were over-inclusive.¹³⁸ In fact at trial, the government expressly urged the jury to convict because an official act “*is not limited* to voting on a bill, making a speech, passing legislation, *it is not limited to that*, but rather, includes *any action* taken or to be taken under color of official authority.”¹³⁹ The Court reasoned that although the instructions given were consistent with precedent at the time, the conviction must be overturned because, under *McDonnell*, it was possible a rational jury could have convicted without finding the proper *quid pro quo* elements.¹⁴⁰

Because the statute of limitations only captured conduct occurring after February 19, 2010, only three proven acts in the Mesothelioma scheme applied: agreeing to assist Taub with acquiring permits for a charity race, helping Taub’s son get a job, and obtaining an assembly resolution honoring Taub.¹⁴¹ The Court ruled that agreeing to assist in acquiring permits and writing a letter on behalf of Dr. Taub’s son did not satisfy the standards for an official act because there was not sufficient evidence to conclude that Silver exerted pressure on other

132. *Id.*

133. *McDonnell*, 579 U.S. at 26.

134. *Id.*

135. *Id.* at 27.

136. *Id.*

137. *Silver*, 864 F.3d at 106.

138. *Id.*

139. *Id.* at 118.

140. *Id.*

141. *Id.* at 120.

officials.¹⁴²

Thus, the only act remaining within the statute of limitations was the assembly resolution honoring Dr. Taub.¹⁴³ While the Court described that it was clearly a formal exercise of government power on a specific matter, it held that a rational jury could conclude such action is so commonplace as to be worthy of being a *quid*.¹⁴⁴

While none of the acts within the statute of limitations qualified under *McDonnell*, the court agreed the government only needed to prove that some aspect of the *quid pro quo* scheme continued into the statute of limitation period.¹⁴⁵ However, the Court ruled that a rational jury could have found that the *quid pro quo* could have ended upon Silver's notifying Taub he would not receive any more grants, long before the statute of limitations period began to run in 2010.¹⁴⁶

In the Real Estate Scheme, the government had identified four actions within the statute of limitation: Silver's PACB votes for bond approvals, Silver's opposition to a methadone clinic near a Glenwood property, meetings with Glenwood lobbyists prior to the passage of crucial 2011 legislation, and Silver's continuous approval of other legislation that benefited the developers.¹⁴⁷ However, each of these acts struggled to qualify as 'official acts' under the *McDonnell* standard.

The Court held that a juror could reasonably conclude the PACB approvals were too perfunctory to be regarded as a *quo* – especially because the government witness stated that, in his experience, the PACB approved every financing request.¹⁴⁸ The Court also concluded that since taking a public position on an issue by itself is not a formal exercise of governmental power, Silver's public opposition to the methadone clinic was not an "official act" under *McDonnell*.¹⁴⁹

Furthermore, because the jury instruction did not specifically instruct that a meeting by itself is not official action, it was possible the jury improperly concluded the "Glenwood Meeting" was an "official act."¹⁵⁰ The Court noted the Glenwood meeting was the most compelling evidence the jury could have relied on to conclude Silver understood and intended a *quid pro quo* agreement.¹⁵¹ Without this piece of evidence, a rational jury with proper instructions could conclude that

142. *Id.* at 121.

143. *Id.*

144. *Id.*

145. *Silver*, 864 F.3d at 122.

146. *Id.*

147. *Id.*

148. *Id.* at 123.

149. *Id.*

150. *Id.*

151. *Silver*, 864 F.3d at 123.

Silver's actions were not part of a *quid pro quo*.¹⁵² Because the court could not conclude beyond a reasonable doubt that a rational jury would have convicted Silver if given the proper instructions, the judgment of conviction was vacated and remanded.¹⁵³

As in *McDonnell*, the court acknowledged that while its decision may be unpopular and distasteful, the Court was simply upholding the current law.¹⁵⁴ The Court stated they cannot make a decision on what a jury would likely do, but rather only if it is clear beyond reasonable doubt that a jury would have found Silver guilty.¹⁵⁵ Under the current *McDonnell* standard, they were unable to do so.¹⁵⁶

III. DISCUSSION

While many have been critical of the ruling in *McDonnell* and the effects it will have on public corruption, its holding does not mean the end of anti-corruption prosecution. While the *McDonnell* standard makes prosecution of corrupt public officials harder, Congress enacted vague statutes, and the Court sought to interpret them in a way that provides a bright-line rule. This limited scope added needed clarity to bribery law by providing notice to politicians of what they can and cannot do and reined in prosecution of some perfectly legal functions of representative government. Sheldon Silver's retrial will be a case study of the immediate repercussions the new bribery standard and the future landscape of anti-corruption law.

These sections first discuss what the landscape of anti-corruption law will look like going forward, and then apply that to predict the likely outcome of what Silver's retrial *should* be. Next, it looks at the immediate repercussions for prosecutors and other already convicted corrupt public officials. Last, it offers up solutions that work in conjuncture with *McDonnell* that will make it harder to get away with public corruption.

A. It's All About Intent – Future of Anti-Corruption Law

Chief Justice Roberts knew his *McDonnell* opinion would be unpopular and stated: "There is no doubt that this case is distasteful; it may be worse than that."¹⁵⁷ Predictably, the decision was received with

152. *Id.*

153. *Id.* at 124.

154. *Id.*

155. *Id.* at 124.

156. *Id.*

157. *McDonnell*, 579 U.S. at 28.

some degree of panic.¹⁵⁸ The voting public unilaterally reviles corruption and the ruling certainly makes prosecution harder. Critics have expounded concerns that *McDonnell* creates a zone of “soft-corruption” that may be legal, especially when disguised as campaign contributions.¹⁵⁹

On the other hand, the opinion provided much needed clarity to a vague and confusing area of law. It established a bright-line rule that drew a logical marker between what constitutes corruption and what is ordinary “politics-as-usual.”¹⁶⁰ This section first discusses the future of corruption prosecution and the likely shift of prosecutorial focus towards evidence that establishes two things: the existence of a corrupt agreement, and proving intent to exert pressure.¹⁶¹ Next, it discusses positive results of *McDonnell* and explains the holding does not kill anti-corruption law; it merely narrows and clarifies it.

1. Future Focus of Corruption Prosecution

While the *McDonnell* holding certainly limits prosecutorial power, federal prosecutors will be able to succeed by shifting their focus towards evidence that proves an “intent to exert pressure” and the existence of a corrupt agreement.

Some critics believe the court has revived “pay to play” politics and given a green light for politicians to trade access for money.¹⁶² This argument relies on Justice Robert’s holding that setting up meetings, calling other officials, or hosting events, standing alone, do not qualify as an “official act.”¹⁶³ Although this zone of “soft-corruption” may seem to be deemed acceptable by *McDonnell*, these critics have misinterpreted the holding.

The Court was saying that a meeting or event can still constitute corruption, it just is not enough evidence on its own to warrant a conviction. Thus, the first check on corruption that *McDonnell* leaves is

158. See Gilchrist, *supra* note 15, at 12; see, e.g., Amy Davidson, The Supreme Court’s Bribery-Blessing McDonnell Decision, THE NEW YORKER (June 27, 2016), <http://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessingmcdonnell-decision> (“The Court, in Citizens United and now in McDonnell, has looked upon the worst, most endemically corrupt aspects of American politics and enshrined them.”).

159. *Id.* at 19.

160. Christopher Murphy, *McDonnell v United States: Defining “Official Action” in Public Corruption Law*, 12 DUKE L. REV. 269, 283 (2016).

161. *Id.*

162. See Josh Gerstein, *McDonnell Ruling a Big Blow to Corruption Law*, POLITICO (June 26, 2016, 7:50 pm), <http://www.politico.com/story/2016/06/mcdonnell-ruling-seen-blessing-pay-to-play-224855>.

163. *McDonnell*, 579 U.S. at 21.

its own holding.¹⁶⁴ The qualifying language of the decision is key to the future of anti-corruption prosecution: intent to exert pressure.¹⁶⁵ Influential meetings are fine, but an effort or intention to pressure those with decision-making is corrupt. Thus, *McDonnell* covers conduct where a public official exerts pressure or undue influence on other public officials.¹⁶⁶ Engaging with other officials is an essential, everyday aspect of politicians' jobs, so the second they cross the line into exerting pressure, or show the intention to do so, they are open to prosecution.

The "intent to exert pressure" standard is clearer cut than the previous standard of "corruptly." In a post-*McDonnell* world, prosecutors will now look to evidence that shows an exertion of pressure or a differential power structure through, for example, the settings of meetings, who joined those meetings, or any correspondence that shows the officials alluding to their public authority or any information or authority that could be leveraged.¹⁶⁷ Prosecutors should also look for any prior "tit-for-tat" or promotional actions based on willingness to accede to pressure. For example, one key piece of evidence in *McDonnell* that may not have garnered the attention it deserved was a pro/con list drafted by a University of Virginia employee.¹⁶⁸ "The first 'pro' was the 'perception to the Governor that UVA would like to work with local companies, and the first 'con' was the political pressure from Governor and impact on future UVA requests from the Governor."¹⁶⁹ This is the type of evidence that prosecutors will look for to show a politician is intending to wrongfully exert pressure.¹⁷⁰

The other focus of future prosecution will be on the existence of the agreement. One of the most substantial pieces of evidence will be the nature of the gifts/donations the public official received.¹⁷¹ If there seems to be no apparent or legitimate reason for the politician to be receiving the gifts, a corrupt agreement may be more readily inferred if

164. *Id.*

165. See Gilchrist, *supra* note 15, at 17; citing in part *McDonnell*, 579 U.S. at 20 ("expressing support for [a particular policy] at a meeting, event, or call does not qualify as a decision or action on the [policy], as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.' This statement, which might be mistaken as the death knell for corruption law, includes critical qualifying language mapping the future of anti-corruption prosecutions. It's about intent.").

166. *Id.* at 17-20; see also Murphy, *supra* note 160, at 284.

167. See Gilchrist, *supra* note 15, at 19-20.

168. *McDonnell* 579 U.S. at 11.

169. *Id.*

170. See Gilchrist, *supra* note 15.

171. Randall Eliason, *Supreme Court Rejects Rod Blagojevichs Appeal: Monty Python and Public Corruption*, *SIDEBARS BLOG* (April 7, 2016), <https://sidebarsblog.com/supreme-court-rejects-rod-blagojevichs-appeal-monty-python-and-public-corruption/>.

the politician then acts in favor of the donor.¹⁷² This is especially true if the gifts are secret and unrelated to campaign fundraising.¹⁷³

However, this will be much harder to prove with campaign contributions. A central feature of our democracy is that donors can contribute to politicians they support and have shared beliefs with, and for those candidates to later act in favor of those donor's interests.¹⁷⁴ First the prosecution must look at the nature of the contributions and see if they are within the relevant legal limit, or if they show up on any required public campaign financing report. Proof of that will be hard to find, so the focus must be on the corrupt agreement itself. While the evidence must prove that an explicit agreement existed, that agreement does not need to be expressed.¹⁷⁵ Therefore circumstantial evidence can be used, and a *quid pro quo* agreement can be implied from words or actions and the totality of the evidence surrounding the transaction.¹⁷⁶

The new standard is tougher to prove, but constant advancements in technology helps make politics more transparent and communications harder to hide.¹⁷⁷ This is one advantage that federal prosecutors can utilize to help find evidence to satisfy the stringent requirements of current corruption law.

2. Positive Results of *McDonnell*

While many have criticized *McDonnell*,¹⁷⁸ it has brought clarity to a confusing area of law.¹⁷⁹ With the vaguely worded and broadly interpreted corruption statutes prosecutors use, convictions were susceptible to unconstitutional vagueness attacks.¹⁸⁰ By establishing a bright-line rule, public officials are sufficiently put on notice, constitutional due process concerns are alleviated, and politicians know what are, and what are not, legal constituent services.

Chief Justice Roberts said the Court sought to put the brakes on a “pall of potential prosecution” that could disrupt the healthy functioning

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Mark Anderson, *A Christmas Future: Bribery and Corruption in 2022*, PWC (December 7, 2016), http://pwc.blogs.com/fraud_academy/2016/12/a-christmas-future-bribery-and-corruption-in-2022.html.

178. Davidson, *supra* note 158 (“The Court . . . in *McDonnell*, has looked upon the worst, most endemically corrupt aspects of American politics and enshrined them.”).

179. See Gilchrist, *supra* note 15, at 18-20.

180. See Gawey, *supra* note 44, at 413.

of democratic discourse.¹⁸¹ The decision also quoted White House lawyers who expressed concern that the “breathtaking expansion of public-corruption law would likely chill federal officials interactions with the people.”¹⁸² The Court was clear in their intention to create a narrower standard aimed to protect representative government.

B. Expected Retrial of Sheldon Silver

Immediately after the Second Circuit Court of Appeals overturned Silver’s convictions, the U.S. Attorney’s office expressed optimism in convicting Silver on retrial.¹⁸³ Former U.S. Attorney Bharara tweeted that the evidence was strong and he expects Silver to again be convicted.¹⁸⁴ Jury selection has been scheduled for April 16, 2018; however, the *McDonnell* standard and five-year statute of limitations will make it harder for the government.¹⁸⁵ This section examines application of *McDonnell* on the Silver retrial and specifically the “Mesothelioma Scheme,” and “Real Estate Scheme.”

1. Mesothelioma Scheme

While the statute of limitations only captures conduct occurring after February 19, 2010, the government needs to prove that some aspect of the *quid pro quo* continued into the statutory period.¹⁸⁶ The evidence of Silver’s *quid pro quo* is strong, and will almost certainly qualify, but it will be harder proving the agreement lasted into the statutory period. The easiest way for the prosecution to prove existence of a *quid pro quo* is to establish Silver’s 2005 agreement to provide Dr. Taub with state

181. *McDonnell*, 579 U.S. at 22.

182. *Id.*

183. See Joon H. Kim, *Statement of Acting U.S. Attorney on Second Circuit Decision In United States v Sheldon Silver*, Department of Justice (July 13, 2017), <https://www.justice.gov/usao-sdny/pr/statement-acting-us-attorney-joon-h-kim-second-circuit-decision-united-states-v-sheldon>:

(“While we are disappointed by the Second Circuit’s decision, we respect it, and look forward to retrying the case. Although finding that the Supreme Court’s *McDonnell* decision issued after Silver’s conviction required a different legal instruction to the jury, the Second Circuit also held that the evidence presented at the trial was sufficient to prove all the crimes charged against Silver, even under the new legal standard. Although this decision puts on hold the justice that New Yorkers got upon Silver’s conviction, we look forward to presenting to another jury the evidence of decades-long corruption by one of the most powerful politicians in New York State history. Although it will be delayed, we do not expect justice to be denied.”).

184. Preet Bharara (@PreetBharara), TWITTER (July 13, 2017, 7:26am), <https://twitter.com/PreetBharara/status/885505741192409088>.

185. Matthew Hamilton, *Judge sets ‘likely’ re-trial date for Sheldon Silver*, TIMES UNION (August 15, 2017, 3:59pm), <http://www.timesunion.com/7day-state/article/Judge-sets-likely-re-trial-date-for-Sheldon-11821088.php>.

186. *Silver*, 864 F.3d at 122.

grants in exchange for referrals, and then prove that this agreement lasted until at least February 19, 2010.

Under the first prong of the *McDonnell* test, the “question, matter, cause, suit, proceeding or controversy” must be on: (1) a formal exercise of governmental power; (2) that is specific and focused; and (3) must be an issue that is either pending or may by law be brought before a public official.¹⁸⁷ Silver’s control of a discretionary pool of funds as Speaker of the New York State Legislature certainly qualifies as a formal exercise of governmental power. The matter at hand, whether to issue a grant to help fund Dr. Taub’s mesothelioma research, was specific and focused, and clearly pending before a public official as Silver had to act to secure the grant.

Under the second prong of *McDonnell*, the public official must take, or agree to take, official action on that “question, matter, cause, suit, proceeding or controversy.” Here, the agreement between Taub and Silver is well documented in letters, emails, and Taub’s trial testimony, and the culmination of two grants totaling \$500,000 in exchange for Silver receiving roughly \$3 million in referral fees.

Although Silver notified Taub in 2007 he would no longer approve any more grants, it is likely a jury would find that their *quid pro quo* relationship existed well into the statutory period. A key piece of evidence will be Silver’s May 25, 2010 visit to Dr. Taub’s office – within the statutory limitations period – to demand he continue sending referrals to W&L. While this meeting does not qualify as an “official act,” it is strong circumstantial evidence that shows the *quid pro quo* existed into the statutory period. The government only needs to prove the existence of the agreement and Silver’s intention to take steps towards fulfilling an action. So, while they may not be able to prove Silver did an official act within the statutory period, this meeting proves the agreement was still in place, especially since Silver continued to receive payments through at least 2013.

A second route prosecution will likely pursue is proving that the May 2011 Assembly resolution with an official proclamation commending Dr. Taub represents an “official act.” Silver sponsored the resolution and presented it to Dr. Taub on the floor of the Assembly. This could be an “official act” under *McDonnell* as it is a formal exercise of power, on a specific and focused issue (the commendation of Dr. Taub), which may be brought before a public official. But *McDonnell* also states that while public appearances can constitute official action, they rarely, if ever, will if of *strictly* a ceremonial nature.¹⁸⁸ The jury could decide that such

187. *McDonnell*, 579 U.S. at 21.

188. See Gilchrist, *supra* note 15, at 17.

an action, in conjuncture with the ongoing referral payments to Silver, is sufficient to constitute a *quid pro quo*. Even if not, the resolution is still strong evidence the *quid pro quo* lasted into the statutory period.

2. Real Estate Scheme

On retrial, the *McDonnell* standard will make it significantly harder for the prosecution in the “Real Estate Scheme.” The evidence shows Silver routinely approved and voted for favorable legislation, as well as repeatedly voted to approve the Developers PACB/tax-exempt financing requests. It also plainly establishes that he received referral fees. However, the problem with the Real Estate scheme will be proving the *pro* – the linkage between the passage of votes and referrals.

The key piece of evidence in the “Real Estate Scheme” was Silver’s meeting with Glenwood lobbyists prior to the passage of legislation.¹⁸⁹ During the government’s closing, they expressly argued this meeting, by itself, was an official action. However, under *McDonnell* such a meeting, on its own, is not an official act.¹⁹⁰ The government may still be able to prove the meeting was an official act, but only if it can admit further evidence showing Silver held the meeting with the intent to exert pressure. If they can, this meeting will be an “official action” within itself, as well as a link between Silver’s continuous passages of real estate legislation to the Developers referral fees. If the government cannot establish intent, then convicting Silver on retrial will be difficult, as there is little else that links an official action to the referral fees. While the meeting could be used as circumstantial evidence proving a *quid pro quo* for legislative votes, a properly instructed jury may not find it convincing beyond a reasonable doubt.

The other two actions taken by Silver – his PACB votes and public opposition to the methadone clinic – do not withstand *McDonnell*’s definition of “official act.” Thus, the government will have a much harder time garnering a conviction on retrial.

C. Panic in the Second Circuit?

The overturning of Sheldon Silver’s conviction illuminates a major consequence of *McDonnell*: appellate attorneys phones will be ringing off the hook from every recently convicted corrupt public official. This will be of especial consequence in the Second Circuit, which stands to have the biggest impact as fourteen New York State Legislators have

189. *Silver*, 864 F.3d at 122.

190. *McDonnell*, 579 U.S. at 21-22.

been convicted in the last ten years.¹⁹¹

Sheldon Silver is not the only prominent New York politician to recently avoid jail time. Dean Skelos, the former majority leader of the New York State Senate and Republican opponent of Silver, was convicted for Hobbs act extortion and honest services fraud.¹⁹² But in an opinion that cited almost exclusively to *McDonnell* and *Silver*, his conviction was overturned because the jury instructions did not meet *McDonnell*.¹⁹³ While the court made it clear the evidence was sufficient to allow a properly instructed jury to convict, it is still a temporary setback for justice against two of New York's highest profile white-collar criminals.¹⁹⁴

In the same week it released its decision in *Silver*, the Second Circuit released another corruption opinion: *U.S. v. Boyland*.¹⁹⁵ However, in *Boyland*, the Court upheld his convictions.¹⁹⁶ Although the jury instructions in *Boyland* were even broader than Silver's, the trial attorneys failed to object and a plain error standard was applied, under which Boyland's convictions were upheld.¹⁹⁷ Thus, convictions where attorneys failed to object to jury instructions will most likely be upheld. However, convicted public officials who did make timely objections have a strong chance to get their conviction overturned.

This result has been felt outside the Second Circuit as well, as corruption cases seem to be crumbling all around the U.S.¹⁹⁸ Ex-Louisiana Congressman William Jefferson, who in 2009 was sentenced to 13 years in prison – the longest sentence ever handed down to a congressman for bribery – was recently released from prison after seven of his ten charges were vacated.¹⁹⁹ Chaka Fattah, former Democratic congressman from Philadelphia, and Ray Nagin, the Ex-New Orleans Mayor, have both filed to overturn their convictions.²⁰⁰ The definition of

191. *The Second Circuit Clarifies Corruption Standards Following Supreme Court's McDonnell Decision*, CLEARY GOTTLEIB (July 20, 2017), <https://www.clearygottlieb.com/~media/cgsh/files/2017/publications/alert-memos/second-circuit-clarifies-corruption-standards-7-21-17.pdf>.

192. *U.S. v. Skelos*, No. 16-1618-CR, 2017 WL 4250021, at *1 (2d Cir. Sept. 26, 2017).

193. *Id.*

194. *Id.*

195. *See United States v. Boyland*, No. 15-3118, 2017 WL 2918840 (2d Cir. July 10, 2017).

196. *Id.*

197. *Id.*

198. Alan Feuer, *Why Are Corruption Cases Crumbling? Some Blame the Supreme Court*, NEW YORK TIMES (November 17, 2017) <https://www.nytimes.com/2017/11/17/nyregion/menendez-seabrook-corruption-cases-crumbling-.html>; *see also* Alan Feuer, *Silver May Start 'Parade of Horribles' Out of McDonnell Case, Critics Say*, NEW YORK TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/nyregion/sheldon-silver-bob-mcdonnell.html>.

199. *Id.*

200. *Id.*

“official act” also resulted in the mistrial of New Jersey Senator Robert Menendez, the first sitting United States Senator to face a federal bribery trial and verdict in decades.²⁰¹

But the new landscape of corruption law may also have a chilling effect on future corruption investigations. In March 2017, the United States Attorney’s office in Manhattan said it would not seek charges against Mayor Bill de Blasio after months of inquiry.²⁰² The statement released by the U.S. Attorney’s office stated it had found a pattern from the mayor or his associates of soliciting contributions from favor seeking donors, but decided not to bring a case after weighing, among other things, the “high burden of proof” created by *McDonnell*.²⁰³

D. Possible Solutions

Although *McDonnell* has had a widespread effect on overturning convictions, it is merely a ripple effect that is often felt when a new legal standard is put in place. The same thing happened following *Skilling*, and once these criminals face retrial under correct jury instructions, most will be convicted again.²⁰⁴

Nevertheless, problems still exist because of *McDonnell*. Randall Eliason has stated that the Supreme Court’s obsessive focus on determining a narrow and overly legalistic definition of official acts “missed the corruption forest for the trees.”²⁰⁵ He is right; the Court spent their entire analysis determining the qualifications of an adequate *quo*, and in doing so ignored the fundamental overarching principle of bribery: the *quid pro quo*. However, *McDonnell* was a 9-0 unanimous decision, and the possibility of it being overturned is not only unlikely, it is unrealistic. The solution to stomping out corruption must be found in other ways that work in conjuncture with *McDonnell*.

One theory prosecutors are likely to explore – and argue is consistent with *McDonnell* – is the “stream of benefits” theory. It is used in corruption cases where the public official is on retainer and is being influenced in the performance of official acts as they arise.²⁰⁶ While it

201. *Id.*; see also Matt Friedman, *Mistrial Declared in Menendez corruption case*, POLITICO (November 16, 2017) <https://www.politico.com/story/2017/11/16/menendez-jury-still-deadlocked-244980>.

202. *Id.*

203. *Id.*

204. Roger Parloff, *Why White Collar Crime Just Got Harder to Battle*, FORTUNE (June 25, 2010) http://archive.fortune.com/2010/06/25/news/companies/Supreme_Court_White_Collar_Skilling.fortune/index.htm (Both Conrad Black and Bruce Weyhrauch had their convictions overturned and retried under the standard set forth in *Skilling*).

205. See Eliason, *supra* note 1.

206. Randall Eliason, *The Menendez Trial and the Future of Bribery*, SIDEBARS BLOG (October

might not be possible to prove a direct link between any gift and any particular official act, what is charged is the continuing corrupt relationship.²⁰⁷

The Supreme Court has never weighed in on this theory but it has been widely accepted in the lower courts.²⁰⁸ It could potentially survive *McDonnell* as “I’ll give you a stream of benefits over time, in exchange you agree to do things for me, as opportunities arise, that qualify as official acts.”²⁰⁹ So while the parties agree the official will perform official acts, what those acts will be is undetermined at the time of the agreement.²¹⁰

The government in the Robert Menendez trial presented this theory, but since it resulted in a mistrial we will have to wait and see if judges believe it has survived *McDonnell*.²¹¹ If the Supreme Court were to consider and approve application of the stream of benefits theory, it would certainly help prosecutors deal with the negative effect of *McDonnell*.

Some have proposed unifying all federal bribery statutes.²¹² Because the courts have essentially interpreted the federal bribery statutes to all function the same way, it is not too far-fetched to suggest an interpretation that completely unifies the definitions. However, Congress wrote the statutes with differing definitions and intentions, and it seems unlikely that absent congressional action, the current Supreme Court would adopt such an approach.

Rather than unify the statutes, others have suggested the opposite approach, which is that the definition of “official act” should be determined on a case-by-case basis.²¹³ Courts could choose to set up a flexible standard and leave the responsibility of defining “official act” up to the discretion of the trial judge or jury.²¹⁴ Or in a more practical application of this idea, the definition of “official act” could be defined under whatever the most localized bribery law the public official served in reads. For example, if Cincinnati had a municipal bribery law, and federal prosecutors indicted the Mayor for honest services fraud and Hobbs Act extortion, official act would be defined as it is in the Cincinnati statute. So on for state-level officials, leaving federal officials to be prosecuted under the definition of § 201, as is the standard in

20, 2017), <https://sidebarsblog.com/menendez-bribery-stream-benefits/>.

207. *Id.*

208. *United States v. Bryant*, 655 F.3d 232, 241 (3d Cir. 2011).

209. Eliason, *supra* note 206.

210. *Id.*

211. *Id.*

212. *See Rosen*, *supra* note 27.

213. *See Murphy*, *supra* note 160, at 285.

214. *Id.*

McDonnell.

However, the entire problem discussed is a result of poor legislation, both on the federal and state levels. Congress passed vague legislation, while some state statutes, like Virginia's in *McDonnell*, failed to adequately address corruption. The Supreme Court was forced to rewrite the federal corruption statutes to protect the line between constituent services and graft. If Congress does not like the result, they should pass new laws that are not as vague. This is exactly what happened in 1988 when Congress enacted honest service fraud, which came because of the Supreme Court's decision in *McNally*.²¹⁵

For the states, *McDonnell* sent a clear message to local legislators that it was time for them to step up and write effective anti-corruption laws. *McDonnell* was only an interpretation of the definition of "official act" for the federal bribery and honest service fraud statutes; it does not affect state and local corruption laws. *McDonnell* showed the Supreme Court is unwilling to use federal bribery laws to pick up the slack in states like Virginia that have lax ethics regulations.²¹⁶ The Court strongly insinuated the problem is not with the federal criminal justice system, but rather rooted in election and campaign finance law, weak state and local legislation, and the corrupt officials themselves.²¹⁷

Another solution is to increase the statutory period for bribery charges from five years to ten. Currently, all mail and wire fraud crimes have a statute of limitation for five years, except for schemes that affect financial institutions, which extends to ten years.²¹⁸ The reasoning is that by expanding the statute of limitations, Congress has put a priority on protecting financial institutions and aims to deter criminals from including financial institutions in their schemes.²¹⁹ Congress is saying that defrauding financial institutions is such a severe crime that punishment should be easier to establish.

Under the same logic, Congress should extend the statute of limitations for bribery charges to ten years. As shown in *Silver*, the addition of five years to the statutory period would make a crucial difference in prosecution.²²⁰ As our very own Constitution equates corruption to treason, it certainly is of equal severity, if not more so,

215. Randall Eliason, *Federal Prosecution of State and Local Corruption From Sea to Shining Sea*, SIDEBARS BLOG (March 30, 2015), <https://sidebarsblog.com/federal-prosecution-of-state-and-local-corruption-from-sea-to-shining-sea/>.

216. See Gerstein, *supra* note 162.

217. Gilchrist, *supra* note 56, at 12, 18.

218. United States Attorney Manual 9-43.100 CRM 968 – Statute of Limitations; see also 18 U.S.C. §3293.

219. *United States v. Serpico*, 320 F.3d 691,693-694 (7th Cir. 2003).

220. *Silver*, 864 F.3d at 220.

than defrauding financial institutions.²²¹ Moreover, rooting out corruption is harder and takes longer to track. Pulling long lists of campaign contributions is easy, but finding the underlying corrupt agreement takes a long time. Politicians are highly intelligent people who make a living by convincing others that they are right. This makes finding convincing evidence of a corrupt agreement even harder. Accordingly, prosecutors should be given a longer timetable from which to build a case, and as shown in *Silver*, the difference a five-year extension to the statutory period would make for a crucial modification to prosecution.

Ultimately, the most viable and most effective tool against corruption is the voting public. The United States is a government of checks and balances, so corrupt, or seemingly corrupt public officials must be held accountable by the most powerful tool in democracy: the ballot box. While Bob McDonald escaped jail time, he will never have the opportunity to defraud citizens of his honest services because he will never hold public office again. Beyond holding corrupt public officials accountable, voters must elect officials committed to passing common-sense anti-corruption and campaign finance law in order to protect the future of our country from corrupt governing officials.

The simplest and easiest way to advance both of these objectives is for states to pass extensive disclosure laws, such as the ones New York passed that forced Silver to discontinue providing grants to Dr. Taub. Imagine the results on election night if the people of Virginia had known that Bob McDonald was accepting \$175,000 in gifts from a specific businessman. Voters should be able to know the politicians they support have not succumbed to corruption, and the best way to ensure that voters have access to that knowledge is through such disclosure laws.

IV. CONCLUSION

While the holding in *McDonnell* has set the bar high for prosecuting public corruption high, it brought much needed clarity to a confusing area of the law and brought a balance to the competing interests of federal anti-corruption laws and protection of a representative democracy. While it has resulted in many recent convictions being overturned, this ripple effect will soon subside, as each criminal who should be tried under the appropriate *McDonnell* jury instructions will have had his day in court. As prosecutors begin to focus on evidence that proves the existence of a corrupt agreement and the intent to exert pressure, those public officials who are corrupt will once again be

221. U.S. CONST. art. II, § 4.

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convicted on retrial. Only time will tell if the repercussions of *McDonnell* will be mostly positive or not, but either way, the new standard set forth in the 9-0 unanimous decision is here to stay. To the extent our Country is committed to stomping out corruption, there are alternative solutions outside overturning *McDonnell* that warrant serious consideration.