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# Something More: Official Action After McDONNELL v. UNITED STATES

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# SOMETHING MORE: OFFICIAL ACTION AFTER *McDONNELL v. UNITED STATES*

Matthew T. Ciulla\*

## INTRODUCTION

Public corruption cases often feature “tawdry tales” of government officials receiving lavish gifts, over-the-top luxury vacations, and even cash in exchange for conveying a perceived official benefit to the gift-giver.<sup>1</sup> One such case, *McDonnell v. United States*, featured scintillating tales of a governor receiving Ferraris, Rolexes, and ball gowns while hosting extravagant parties for his benefactors.<sup>2</sup>

No matter how dazzling the facts, however, the technical aspects of these cases also showcase issues with our federal criminal justice system. Resolving these issues is important, as a wide array of public corruption statutes are available to federal prosecutors, but these statutes have been narrowed by the judiciary on numerous grounds.<sup>3</sup>

*McDonnell* highlighted one such issue: the ill-defined “official act” requirement in the federal bribery statute.<sup>4</sup> In the case, the Supreme Court ultimately held that a public official arranging a meeting in exchange for a thing of value, “without more,” does not constitute an official act for bribery purposes.<sup>5</sup> This holding alarmed some commentators, who focused on the tawdry nature of the case.<sup>6</sup> For example, one commentator wrote that “the Court set a new standard for

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1. See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (“But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns.”); Andrew Lopez, *Ex-Moreno Valley Councilman to Plead Guilty in \$2.3M Bribery Case*, NBC4 LOS ANGELES (Nov. 5, 2013, 1:03 PM), <http://www.nbclosangeles.com/news/local/Moreno-Valley-Corruption-Bribery-Councilman-IRS—230703501.html> (councilman accepting \$2.3 million bribe).

2. See, e.g., Amy Davidson Sorkin, *The Supreme Court’s Bribery-Blessing McDonnell Decision*, NEW YORKER, Jun. 27, 2016, <http://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision>; see also *McDonnell*, 136 S. Ct. at 2375.

3. See generally John S. Gaway, Note, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 417–18 (2011).

4. See 18 U.S.C. § 201(a)(3) (2006) (defining “official act”); see generally *McDonnell*, 136 S. Ct. at 2367–71.

5. *McDonnell*, 136 S. Ct. at 2371–72.

6. See, e.g., Sorkin, *supra* note 2; see also *McDonnell*, 136 S. Ct. at 2375.

official-bribery cases that is so absurdly narrow that it will likely be almost impossible to convict any but the most bumbling politicians.”<sup>7</sup>

Is this commentator right? Has the Supreme Court rendered federal prosecutors helpless against public corruption? Can the rich now indiscriminately “purchase office-holders” without fear?<sup>8</sup>

In a word, no. The Supreme Court did not “legalize corruption.”<sup>9</sup> Rather, the Court consciously—and unanimously—sought to limit how far the definition of “official act” extended in the public corruption statutes.<sup>10</sup> The Court asserted that it left “ample room for prosecuting corruption,” and indeed it did.<sup>11</sup>

This Article first looks at two pre-*McDonnell* interpretations of the phrase “official act” in the federal bribery statute, 18 U.S.C. § 201. These two cases, *Sun-Diamond* and *Valdes*, limited the government’s broad interpretations of the phrase. Next, this Article details the factual background of *McDonnell*, followed by an analysis of the Supreme Court’s decision. The Article then lays out three post-*McDonnell* example cases. Finally, this Article synthesizes the case law and concludes that *McDonnell*’s main impact on public corruption prosecutions will be seen in new jury instructions and in prosecutors’ searching for “something more” in their case theories.

## II. THE DEFINITION OF “OFFICIAL ACT” PRE-*McDONNELL*

Many public corruption prosecutions involve proving that a public official performed an “official act,” and courts often turn to the official act definition in the bribery statute, § 201(a)(3).<sup>12</sup> This statute defines bribery as:

[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

7. Sorkin, *supra* note 2.

8. See Jeffrey Toobin, *The Supreme Court Gets Ready to Legalize Corruption*, NEW YORKER, May 4, 2016, <http://www.newyorker.com/news/daily-comment/the-supreme-court-gets-ready-to-legalize-corruption>; see also Sorkin, *supra* note 2 (quoting same).

9. See Toobin, *supra* note 8 (asserting that the Supreme Court “legalize[d] corruption”).

10. *McDonnell*, 136 S. Ct. at 2375 (“[Our concern is] with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute.”).

11. *Id.*

12. For example, in Governor McDonnell’s case, both honest services fraud, see 18 U.S.C. §§ 1343, 1346 (2006), and Hobbs Act extortion, see 18 U.S.C. § 1951 (2006), required showing that he had accepted bribes. *McDonnell*, 136 S. Ct. at 2365 (honest services fraud “forbid[s] ‘fraudulent schemes to deprive another of honest services through bribes or kickbacks’” and Hobbs Act extortion “include[s] ‘taking a bribe’” (citations omitted) (first quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010), and then quoting *Evans v. United States*, 504 U.S. 255, 260, 268–69 (1992))).

other person or entity, in return for . . . being influenced in the performance of any official act.<sup>13</sup>

The statute, in turn, defines “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.”<sup>14</sup>

Before *McDonnell*, the Supreme Court and lower courts decided several cases interpreting this definition of official act. This Section details two such cases: *Sun-Diamond* and *Valdes*.

A. *Sun-Diamond: Thing of Value Given Must Be Linked to a Specific Official Act—Not Just General Goodwill*

In *United States v. Sun-Diamond Growers of California*, the Supreme Court considered the question of whether “conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient’s official position.”<sup>15</sup> *Sun-Diamond* was a “trade association that engaged in marketing and lobbying activities on behalf of its member cooperatives,” who were growers of raisins, figs, walnuts, prunes, and hazelnuts.<sup>16</sup> The United States alleged *Sun-Diamond* gave Secretary of Agriculture Michael Epsy illegal gifts in violation of the federal gratuities statute.<sup>17</sup> The trade organization allegedly gave Epsy “approximately \$5,900 in illegal gratuities: tickets to the 1993 U.S. Open Tennis Tournament (worth \$2,295), luggage (\$2,427), meals (\$665), and a framed print and crystal bowl (\$524).”<sup>18</sup>

However, the gratuities statute does not simply prohibit giving gifts to public officials. Instead, the accused must have given or have promised to give “anything of value” to a “public official, former public official, or person selected to be a public official *for or because of any official act* performed or to be performed by such [person].”<sup>19</sup> The United States alleged that *Sun-Diamond* gave the gifts “for or because of” two matters before Secretary Epsy:

First, [Sun-Diamond’s members] participated in the Market Promotion Plan (MPP), a grant program administered by the Department of Agriculture to promote the sale of U.S. farm commodities in for-

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13. 18 U.S.C. § 201(b)(2)(A) (2006).

14. 18 U.S.C. § 201(a)(3) (2006).

15. 526 U.S. 398, 400 (1999).

16. *Id.* at 400–01.

17. *Id.*

18. *Id.* at 401.

19. 18 U.S.C. § 201(c)(1)(A) (2006) (emphasis added); *Sun-Diamond*, 526 U.S. at 401.

eign countries. . . . If their plans were approved by the Secretary of Agriculture, the trade organizations received funds to be used in defraying the foreign marketing expenses of their constituents. [Because] [e]ach of [Sun-Diamond's] member cooperatives was the largest member of its respective trade organization . . . , [it] was understandably concerned, then, when Congress in 1993 instructed the Secretary to promulgate regulations giving small-sized entities preference in obtaining MPP funds. . . . If the Secretary did not deem respondent's member cooperatives to be small-sized entities, there was a good chance they would no longer receive MPP grants. . . .

Second, respondent had an interest in the Federal Government's regulation of methyl bromide, a low-cost pesticide used by many individual growers in respondent's member cooperatives. In 1992, the Environmental Protection Agency announced plans to promulgate a rule to phase out the use of methyl bromide in the United States. The indictment alleged that respondent sought the Department of Agriculture's assistance in persuading the EPA to abandon its proposed rule altogether, or at least to mitigate its impact.<sup>20</sup>

Importantly, the United States "did *not* allege a specific connection between" either of these two matters, or any other matter before the Secretary, and the gratuities that Sun-Diamond gave to the Secretary.<sup>21</sup> Thus, the question before the Court was "whether conviction under the illegal gratuity statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position."<sup>22</sup>

The district court in *Sun-Diamond* held that gifts given to a public official "simply because he held public office" were illegal gratuities, and that the "government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all."<sup>23</sup> This holding would have criminalized "token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits," "a high school principal's gift of a school baseball cap to the Secretary of Education," and "providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy."<sup>24</sup> In short, it would have criminalized essentially any gift—token or not—to a federal government official.

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20. *Sun-Diamond*, 526 U.S. at 401–02.

21. *Id.* at 402 (emphasis added).

22. *Id.* at 400.

23. *Id.* at 403 (quoting *United States v. Sun-Diamond Growers of Cal.*, 941 F. Supp. 1262, 1268 (D.C. Cir. 1996)).

24. *Id.* at 406–07.

Recognizing this “peculiar resul[t],” and noting that Congress surely had a reason for including the “official act” requirement in the statute, the Supreme Court rejected this broad interpretation. The Court held that in order to prove a violation of the gratuities statute, “the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”<sup>25</sup> In essence, the Court found that merely giving gifts to a public official to “build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts” would not support a gratuities conviction.<sup>26</sup>

*Sun-Diamond* stands for the proposition that prosecutors must show a specific link between the thing of value given and an official act to be performed. It is not enough for the prosecution to allege that the gift given was merely trying to build up goodwill with the official, or else all token gifts could be criminalized—an absurd result. Courts applying the public corruption statutes frequently cite *Sun-Diamond*’s analysis in deciding matters of first impression.

*B. Valdes: “Official Act” Must Include an Actual Decision or Action, or a Promise to Actually Decide or Act*

After *Sun-Diamond*, the D.C. Circuit decided *Valdes*, a case that read the “official act” definition narrowly.<sup>27</sup> Nelson Valdes was a detective in the D.C. Metropolitan Police Department with access to police databases.<sup>28</sup> An undercover FBI informant named William Blake, posing as a judge, met Valdes at a nightclub.<sup>29</sup> At the club, Valdes “gave Blake his business card with his cell phone number, ‘just in case [Blake] ever needed a favor.’”<sup>30</sup> Thereafter, the FBI “instructed Blake to see if Valdes would provide him with police information,” and then “entered the names of five fictitious individuals, along with fictitious addresses and license plate numbers, into state computer databases.”<sup>31</sup>

Blake then asked Valdes to “look up some license plate numbers, ostensibly to get contact information on individuals who owed him money.”<sup>32</sup> He repeated this several times and gave Valdes various

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25. *Id.* at 407, 414.

26. *Sun-Diamond*, 526 U.S. at 405, 413.

27. *Valdes v. United States*, 475 F.3d 1324, 1324–25 (D.C. Cir. 2007) (en banc).

28. *Id.* at 1320.

29. *Id.* at 1321.

30. *Id.* (alteration in original).

31. *Id.*

32. *Id.*

cash payments ranging from \$50 to \$200.<sup>33</sup> In exchange, Valdes searched the names in the state police database and also ran a warrants check at Blake's request.<sup>34</sup> Valdes was eventually indicted on three counts of bribery.<sup>35</sup>

A jury found Valdes guilty of "three counts of the lesser-included offense of receipt of an illegal gratuity."<sup>36</sup> On appeal, the panel decision focused on the statutory definition of "official act:"

The government's concept of "official act" is striking in its complete failure to address the statutory clause modifying "decision or action," namely, "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." The words are far from self-defining, but they suggest at least a rudimentary degree of formality, such as would be associated with a decision or action directly related to an adjudication, a license issuance (or withdrawal or modification), an investigation, a procurement, or a policy adoption.<sup>37</sup>

Relying on the Supreme Court's earlier decision in *Sun-Diamond*, the panel found that Detective Valdes's computer searches did not fall into the category of "official acts."<sup>38</sup> Rather, the panel found, criminalizing the searches would bring the statute into the realm of "absurdity" noted by the Court in *Sun-Diamond*.<sup>39</sup> The panel wrote:

Valdes's [computer] queries would appear to fit within the range of activities excluded from coverage by *Sun-Diamond*'s examples. All the officials' acts (the [computer] queries, ceremony, visit, or speech) have in common that none is a "decision or action" that directly affects any formal government decision made in fulfillment of government's public responsibilities. . . . While one or more of Valdes's disclosures may have been unethical, sanctionable, or even criminal independently of § 201, and while disclosure of an outstanding arrest warrant might have an indirect effect on its execution, none of these disclosures constituted a "decision or action on any question, matter [etc.]" in the usual sense of those words.<sup>40</sup>

Thus, the panel rejected the government's broad reading of "official act" and required that the government show the defendant took or promised to take an "action" or "decision" on a pending "question, matter, cause, suit, proceeding or controversy."<sup>41</sup>

33. *Valdes*, 475 F.3d at 1321–22.

34. *Id.*

35. *Id.* at 1322.

36. *Id.*

37. *United States v. Valdes*, 437 F.3d 1276, 1279 (D.C. Cir. 2006), *aff'd on reh'g en banc*, 475 F.3d 1319 (D.C. Cir. 2007).

38. *Id.* at 1280.

39. *Id.*; *see also Sun-Diamond*, 526 U.S. at 406–08.

40. *Valdes*, 437 F.3d at 1280 (fourth alteration in original).

41. *Id.* at 1280–81; *see also* 18 U.S.C. § 201(a)(3) (2006).

On rehearing en banc, the D.C. Circuit rejected the government's wide-ranging view of "official act."<sup>42</sup> Again citing *Sun-Diamond*, the en banc court noted that "*Sun-Diamond's* interpretive gloss, like the rule of lenity . . . works to protect a citizen from punishment under a statute that gives at best dubious notice that it has criminalized his conduct."<sup>43</sup> The court also noted that a narrow definition of "official act" was appropriate, as there are other anti-corruption statutes that criminalize the behavior at issue in *Valdes*.

[B]oth our precedent and the language of the statute make clear that § 201 is not about officials' moonlighting, or their misuse of government resources, or the two in combination. . . . [N]umerous other regulations and statutes prohibit these activities. . . . And though the likelihood that Valdes violated these other statutes implies nothing direct about his culpability under § 201, their existence underscores an observation in *Sun-Diamond*: "Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits. . . . Not only does the text here not require that result; its more natural reading forbids it."<sup>44</sup>

The *Valdes* en banc court held that the government must show "inappropriate influence on decisions that the government actually makes."<sup>45</sup> Accordingly, official actions are properly characterized as answering questions such as "Should this person receive a contract or disability benefit, and for how much?," "Should this person be prosecuted?," or "What firm should supply submarines for the Navy?," but not questions such as "'Where do you live?' and 'What kind of car do you drive?'"<sup>46</sup>

Thus, *Valdes*, when read in conjunction with *Sun-Diamond*, stands for the proposition that there must be (1) either an actual decision or action, or a promise to actually decide or act, on "any question, matter, cause, suit, proceeding or controversy" before the public official and (2) a link between the action and the thing of value given to the public official.<sup>47</sup>

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42. *Valdes*, 475 F.3d at 1322–23.

43. *Id.* at 1323.

44. *Id.* at 1324–25 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999)) (fifth and sixth alterations in original) (internal citations omitted).

45. *Id.* at 1325.

46. *Id.* at 1323–25.

47. *Sun-Diamond*, 526 U.S. at 406, 414; *Valdes*, 475 F.3d at 1324–25; 18 U.S.C. § 201(a)(3) (2006).



III. THE SUPREME COURT DECIDES *McDONNELL*

With the backdrop of cases such as *Sun-Diamond* and *Valdes*, the Supreme Court decided *McDonnell* in June 2016. This Section first details the factual background of the case, and then provides an overview of the Supreme Court's opinion.

A. *Factual Background*

On January 21, 2014, the United States filed an indictment in the Eastern District of Virginia against former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell.<sup>48</sup> The indictment charged McDonnell with “one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement.”<sup>49</sup>

While governor, McDonnell had become entangled with the CEO of Star Scientific, Inc., a “technology-oriented company with a mission to promote maintenance of a healthy metabolism and lifestyle.”<sup>50</sup> The essential mission of the company was to “utilize[e] certain alkaloids in the tobacco plant, namely anatabine,” to create a smoking cessation product, as well as an anti-inflammatory product that would be used to help manage side effects from disorders “such as thyroiditis, diabetes, arthritis, Alzheimer’s disease, and multiple sclerosis.”<sup>51</sup>

Wishing to “overcome the difficulties in gaining consumer acceptance for its products,” Star Scientific’s CEO, Jonnie Williams, sought to “encourag[e] scientific studies of anatabine,” and then “present the results of those studies to physicians in the hope that the physicians would recommend Star Scientific’s dietary supplements to their patients.”<sup>52</sup> Williams hoped Virginia’s public universities would perform research studies on anatabine and wanted Governor McDonnell’s assistance in accomplishing this.<sup>53</sup>

Allegedly in order to obtain said assistance, Williams began offering the McDonnells various gifts and loans, including a \$19,000 luxury shopping trip in New York City,<sup>54</sup> a \$50,000 loan,<sup>55</sup> a \$15,000 gift to

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48. Indictment at 1–2, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 14CR00012), *aff’d*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).

49. *McDonnell*, 136 S. Ct. at 2365; *see also* Indictment, *supra* note 48, at 1.

50. Indictment, *supra* note 48, at 2–4.

51. *Id.* at 3.

52. *Id.* at 4; *see also McDonnell*, 136 S. Ct. at 2361.

53. *McDonnell*, 136 S. Ct. at 2361.

54. Indictment, *supra* note 48, at 8.

55. *Id.* at 8–9.

finance their daughter's wedding,<sup>56</sup> luxury golf outings,<sup>57</sup> a private vacation at Williams' multimillion-dollar vacation home including the use of a Ferrari and a boat,<sup>58</sup> an engraved Rolex watch,<sup>59</sup> an additional \$70,000 in loans,<sup>60</sup> and a Cape Cod luxury vacation.<sup>61</sup> The total value of these gifts and loans was approximately \$175,000.<sup>62</sup>

The government alleged that Williams gave these gifts and loans to the McDonnells in exchange for Governor McDonnell taking official action.<sup>63</sup> The government alleged that these official actions included:

- i. arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor to discuss and promote [anatabine];
- ii. hosting, and the [McDonnells] 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;
- iii. 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;
- iv. 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; and
- v. 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.<sup>64</sup>

Importantly, Governor McDonnell never took any overt action to further the research studies, beyond "arranging a meeting, contacting another public official, or hosting an event."<sup>65</sup>

In order to prove the bribery charges, the government was "required to prove that Governor McDonnell committed or agreed to commit an 'official act' in exchange for the loans and gifts from Williams."<sup>66</sup> Both parties agreed that the relevant definition was the "official act" definition in the federal bribery statute.<sup>67</sup> Thus,

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56. *Id.* at 9.

57. *Id.* at 11.

58. *Id.* at 14.

59. *Id.* at 15.

60. Indictment, *supra* note 48, at 26–27.

61. *Id.* at 27.

62. *McDonnell*, 136 S. Ct. at 2364.

63. Indictment, *supra* note 48, at 34–35.

64. *Id.*

65. *See McDonnell*, 136 S. Ct. at 2366–67.

66. *Id.* at 2365.

67. 18 U.S.C. § 201(a)(3) (2012); *McDonnell*, 136 S. Ct. at 2365.

McDonnell's conviction for the bribery-related charges wholly depended on the finding that an "official act" included "arranging a meeting, contacting another public official, or hosting an event—without more."<sup>68</sup>

First, quoting the statutory definition of "official act," the district judge elaborated on the definition in his jury instruction at the request of the government.<sup>69</sup> He instructed the jury:

Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. . . . In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.<sup>70</sup>

The district court did not, however, give the jury Governor McDonnell's proposed instruction, which would have noted:

[T]he fact that an activity is a routine activity, or a "settled practice," of an office-holder does not alone make it an "official act." Many settled practices of government officials are not official acts within the meaning of the statute. For example, merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, "official acts," even if they are settled practices of the official. A government official's decisions on who[m] to invite to lunch, whether to attend an event, or whether to attend a meeting or respond to a phone call are not decisions on matters pending before the government. That is because mere ingratiation and access are not corruption.<sup>71</sup>

The jury found Governor McDonnell guilty on the honest services fraud charges and the Hobbs Act extortion charges, and found him not guilty on the false statement charges.<sup>72</sup>

In moving for a new trial, Governor McDonnell focused his argument on the district court's rejection of his more narrowly-defined

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68. *McDonnell*, 136 S. Ct. at 2367–68.

69. *Id.* at 2366.

70. Transcript of Proceedings on September 2, 2014 at 31–32, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-12), ECF No. 487, *aff'd*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016); *see also McDonnell*, 136 S. Ct. at 2366.

71. *United States v. McDonnell*, 792 F.3d 478, 512–13 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016) (alterations in original) (quoting Robert F. McDonnell's Proposed Jury Instructions at 79, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-12), ECF No. 287).

72. Jury Verdict Form, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-12), ECF No. 495, *aff'd*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).

jury instructions.<sup>73</sup> McDonnell attacked the court’s instructions as based on “an erroneous understanding of ‘official act.’” He claimed the government’s argument that “anything Mr. McDonnell did in his official capacity as Governor involving Virginia business development was an official act” was “contrary not only to the statutory definition of ‘official act,’ but to all of the relevant precedents as well.”<sup>74</sup> Thus, under the government’s position, “merely arranging a meeting, emailing a subordinate, and hosting an event—without anything more—were official acts, provided that they have some relation to a ‘matter,’ however broadly defined.”<sup>75</sup>

The district court’s denial of McDonnell’s motion for a new trial<sup>76</sup> set the stage for appellate review of whether the district court erred in using the government’s broad meaning of “official act” when instructing the jury.

### B. *The Supreme Court’s McDonnell Opinion*

The Supreme Court in *McDonnell* began with the text of the statute, which defines “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.”<sup>77</sup> The Court parsed this definition into two distinct requirements: First, the Government must identify a “‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official,” and second, “the Government must prove that the public official made a decision or took an action ‘on’ that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.”<sup>78</sup> The Court then divided the issue presented into two alternative questions: First, “whether arranging a meeting, contacting another official, or hosting an event—without more—can be a ‘question, matter, cause, suit, proceeding or controversy,’” and, second, “if not, whether it can be a

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73. Memorandum in Support of Defendant Robert F. McDonnell’s Motion # 40 – Motion for New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure at 3, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-12), ECF No. 518, *aff’d*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016) [hereinafter Motion for New Trial].

74. *Id.* at 2–3.

75. *Id.*

76. Order Denying ECF 511 Motion for New Trial as to Robert F. McDonnell, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-12), ECF No. 568, *aff’d*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).

77. *McDonnell v. United States*, 136 S. Ct. 2355, 2367 (2016); *see also* 18 U.S.C. § 201(a)(3) (2012).

78. *McDonnell*, 136 S. Ct. at 2368 (quoting 18 U.S.C. § 201(a)(3)).

*decision or action* on a ‘question, matter, cause, suit, proceeding or controversy.’”<sup>79</sup>

Regarding the first question, the Court noted that the words “cause,” “suit,” “proceeding,” and “controversy” all indicate a “formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.”<sup>80</sup> Further, under the statutory interpretation canon of *noscitur a sociis*, the Court determined that “question” and “matter” must be similar in nature to the subsequent four words, and thus must be “of the same stripe as a lawsuit before a court.”<sup>81</sup> The Court then determined that “arranging a meeting, contacting another official, or hosting an event”—the purported official actions attributed to McDonnell—were not “questions” or “matters.”

Thus, the Court moved on to the second question: whether McDonnell’s activities could be construed as decisions or actions on a question or matter, which required the Court to determine if there were any “questions” or “matters” present in the case.<sup>82</sup> The Court first rejected the government’s assertion that a vague concept such as “economic development” could be a question or matter; because a question or matter must be capable of being “pending,” it must be “the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete.”<sup>83</sup> The Court did accept three questions or matters as “focused and concrete” enough: (1) whether to initiate a study of anatabine, (2) whether to allocate grant money for the study of anatabine, and (3) whether Virginia’s state employee health plan would cover anatabine as a drug.<sup>84</sup>

But did McDonnell take an action or make a decision on one of these questions or matters? Citing *Sun-Diamond*, the Court determined McDonnell had not, as “hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a ‘decision or action’ within the meaning” of the statute.<sup>85</sup> Rather, “something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so.”<sup>86</sup> Here, there was not “something more,” and thus,

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79. *Id.* (emphasis added).

80. *Id.*

81. *Id.* at 2368–69.

82. *Id.* at 2369.

83. *Id.*

84. *McDonnell*, 136 S. Ct. at 2370.

85. *Id.*

86. *Id.*

McDonnell had not performed an official act in hosting the event or setting up the meetings.<sup>87</sup>

The Court also expressly considered policy concerns in its decision.<sup>88</sup> For example, it noted that the government's expansive interpretation of the statute would include nearly anything a public official does as an official act.<sup>89</sup> This, the Court reasoned, runs counter to our tradition of representative government in which public officials appropriately hear and address the concerns of their constituents.<sup>90</sup> Such an interpretation, the Court posited, would likely have a chilling effect on federal officials.<sup>91</sup> The Court also noted the federalism concerns inherent in allowing the federal government to regulate the "permissible scope of interactions between state officials and their constituents."<sup>92</sup>

In sum, the Court held that setting up a meeting, talking to another official, or organizing an event, without more, is not an "official act."<sup>93</sup> Although the Court found McDonnell's actions "distasteful," or perhaps "worse than that," it found that this was not a case about "tawdry tales of Ferraris, Rolexes, and ball gowns."<sup>94</sup> Rather, it was a case about the "broader legal implications of the Government's boundless interpretation of the federal bribery statute."<sup>95</sup> Contrary to the government's position, § 201 requires "something more."

#### IV. CASES POST *McDONNELL*

Some commentators believed that the Supreme Court's *McDonnell* decision would lead to immense challenges for prosecutors attempting to combat public corruption.<sup>96</sup> This Section describes three post-*McDonnell* challenges, and outlines the impact that *McDonnell* had on these prosecutions—namely, in requiring "something more."

##### A. *United States v. Halloran*

*United States v. Halloran* was one of the first cases to consider *McDonnell*'s holding, as it was already briefed in the Second Circuit by

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87. *Id.* at 2371–72.

88. *Id.* at 2372.

89. *Id.*

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

91. *Id.*

92. *Id.* at 2373.

93. *Id.* at 2372.

94. *Id.* at 2375.

95. *Id.*

96. See, e.g., Toobin, *supra* note 8 (asserting that the Supreme Court would "legalize corruption").

the time *McDonnell* came down from the Supreme Court.<sup>97</sup> In *Halloran*, defendant Malcolm A. Smith was a New York State Senator considering a run for mayor of New York City.<sup>98</sup> Smith sought to avoid a crowded field as a Democrat and instead attempted to run as a Republican.<sup>99</sup> However, for Smith to run as a Republican he needed to obtain written authorization from three of the five New York City Republican Party county chairmen, obtaining from each of the three what is known as a “Wilson-Pakula certificate.”<sup>100</sup>

The United States alleged Smith attempted to obtain the Wilson-Pakula certificates by bribing Republican party officials.<sup>101</sup> Smith attempted to do so by meeting with Mark Stern, who was purportedly a politically active member of the community with significant real estate interests.<sup>102</sup> In reality, however, Stern was an FBI informant, who also had assistance from an undercover FBI agent, Raj.<sup>103</sup> Smith allegedly instructed the pair to work to secure the certificates from the Republican Party Chairs, noting that “this was a ‘big thing’ worth ‘going to the bank’ to achieve, indicating that Raj would ‘own’ Smith if Raj succeeded in obtaining the Wilson-Pakulas.”<sup>104</sup>

The government alleged that in exchange for Raj and Stern’s assistance and bribe money (to be paid to the Republican Party officials), Smith agreed to “to use his position to help obtain New York State funds to benefit a real estate project supposedly developed by Raj and Stern.”<sup>105</sup> Smith allegedly agreed to help the pair obtain \$500,000 in state transportation funding in order to widen a road near Raj and

97. *United States v. Halloran*, 664 F. App’x 23 (2d Cir. 2016); *see also* Minute Entry for ECF No. BL-100, *Halloran*, 664 F. App’x 23 (No. 15-2351(L)) (appellant’s brief served on Feb. 2, 2016); Minute Entry for ECF No. BL-118, *Halloran*, 664 F. App’x 23 (No. 15-2351(L)) (appellee’s brief served on Apr. 21, 2016).

98. Brief for the United States of America at 3, *Halloran*, 664 F. App’x 23 (No. 15-2351(L)), ECF No. BL-118.

99. *Id.* at 3.

100. Indictment at 1, *United States v. Smith*, 985 F. Supp. 2d 547 (S.D.N.Y. 2014) (No. 13-CR-297-KMK), ECF No. 42; *see* N.Y. ELEC. LAW § 6-120(1) (McKinney 2016) (“A petition . . . , for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to.”); *Id.* at § 6-120(3) (“The members of the party committee . . . may, by a majority vote . . . , authorize the designation or nomination of a person . . . who is not enrolled as a member of such party as provided in this section.”).

101. Brief for the United States of America, *supra* note 98, at 4.

102. *Id.* at 4.

103. *Id.* at 4; *see* Indictment, *supra* note 100, at 12–13; *see also* *Halloran*, 664 F. App’x at 28.

104. Brief for the United States of America, *supra* note 98, at 4–5.

105. *Id.* at 44.

Stern's purported real estate development.<sup>106</sup> Accordingly, Smith set up a meeting between Stern and State Senator Carlucci.<sup>107</sup>

For their part of the bargain, Raj and Stern—apparently without Smith's direct assistance—identified Republican Party officials who were susceptible to bribery.<sup>108</sup> They had various meetings with the officials at New York City restaurants and discovered that some were open to the idea of accepting a bribe.<sup>109</sup> They also set up a “cover” job for an official in case there were repercussions for supporting Smith,<sup>110</sup> and took steps to avoid creating a paper trail.<sup>111</sup> Cash changed hands<sup>112</sup> and the plan to get the certificates was underway. Eventually Smith “complained that the party leaders had not yet followed through on their promises to get him Wilson-Pakula certificates,” and issued various vague threats.<sup>113</sup>

Smith was indicted on several charges, including conspiracy,<sup>114</sup> honest services wire fraud and attempted honest services wire fraud,<sup>115</sup> violations of the Travel Act,<sup>116</sup> and Hobbs Act extortion.<sup>117</sup> The jury

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106. *Id.*; see also Indictment, *supra* note 100, at 19.

107. Brief for the United States of America, *supra* note 98, at 47–48; see also Brief for Defendant-Appellant Malcolm Smith at 75–76, *United States v. Halloran*, 664 F. App'x 23 (2d Cir. 2016) (Nos. 15-2351(L)), ECF No. BL-100.

108. Brief for the United States of America, *supra* note 98, at 5 (noting that the team “worked to secure enough Wilson-Pakulas to enable Smith to seek the Republican nomination” and that they “quickly identified” Vince Tabone, as it was “all about the bottom line for him . . . [Y]ou can buy him off tomorrow” (alterations in original)).

109. *Id.* at 6 (“Tabone suggested that Savino was ‘very approachable,’ Raj and Stern could ‘talk business’ with him, and that Savino would expect ‘parity’ with whatever the other county chairmen received.”); *Id.* (“Halloran . . . told them that, in exchange for a Wilson-Pakula, Tabone wanted \$150,000, with \$50,000 as an ‘above board’ donation to his party, and \$100,000 as a personal payment in ‘the other direction.’”).

110. *Id.* at 6.

111. *Id.* at 7 (“Smith and Raj also discussed creating a cover story for the payments as retainers to the bribe recipients, while simultaneously avoiding a paper trail that could show the payments were actually to acquire Wilson-Pakula certificates.”).

112. *Id.* at 7–8 (“Raj handed Tabone two envelopes containing a total of \$25,000 in cash. Like Tabone, Savino also . . . accepted \$15,000 in cash with another \$15,000 to be paid after he formally approved Smith's appearance on the 2013 Republican ballot line.” (citations omitted)).

113. *Id.* at 8 (“[W]hen you screw somebody over money like that . . . , you know, that's the worst . . . you're looking over your shoulder all the rest of your life . . . . You're looking over your shoulder . . . , because, not only that, this world is too small.” (second, third, and fourth alterations in original)).

114. Indictment, *supra* note 100, at 21; see also 18 U.S.C. § 371 (2012).

115. Indictment, *supra* note 100, at 21; see also 18 U.S.C. §§ 1343, 1346, 1349, 2 (2012).

116. Indictment, *supra* note 100, at 24; see also 18 U.S.C. § 1952 (2012).

117. Indictment, *supra* note 100, at 24; see also 18 U.S.C. § 1951 (2012).



found Smith guilty on all counts<sup>118</sup> and Smith appealed to the Second Circuit.<sup>119</sup>

The issue on appeal, as framed by Smith, squarely confronted the question at issue in *McDonnell*.<sup>120</sup> Smith characterized the issue as “whether Smith agreed to take official action when he agreed to ask Carlucci to meet with Stern.”<sup>121</sup> In Smith’s view, this question was dispositive, as “the critical inquiry [was] not whether a public official agreed to *assist* a person seeking to confer a benefit upon him, but whether the official promised to take *official action* on the person’s behalf.”<sup>122</sup> Smith argued that he never “advise[d] Carlucci to allocate \$500,000 in discretionary funds to widen Rte. 45 in connection with Stern’s real estate project.”<sup>123</sup>

The government took significant issue with Smith’s argument. First, the government argued that Second Circuit precedent “ma[de] clear that an official who uses his position to arrange for benefactors to meet other officials about public business is engaged in official action.”<sup>124</sup> The government therefore broadly read “official action,” and criticized Smith for not doing the same:

Smith ignores these cases [that define “official action” as including arranging a meeting], instead hoping that the Supreme Court will change the law in his favor when deciding *McDonnell v. United States*. . . . But even if the Supreme Court does so, that would not ultimately aid Smith, because Smith’s conviction does not turn on whether arranging a meeting constitutes official action.<sup>125</sup>

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118. See Minute Entry of Feb. 5, 2015, *United States v. Smith*, 985 F. Supp. 2d 547 (S.D.N.Y. 2014) (No. 13-CR-297-KMK) (“Jury Verdict as to Malcolm A. Smith (1) Guilty on Count 1s, 2s, 3s, 4s.”).

119. See generally *United States v. Halloran*, 664 F. App’x 23 (2d Cir. 2016).

120. Brief for Defendant-Appellant Malcolm Smith, *supra* note 107, at 75 (“At issue is whether Smith agreed to take official action when he agreed to ask Carlucci to meet with Stern.”); see also Brief for the United States of America, *supra* note 98, at 47 (“Smith, however, characterizes his actions as arranging a meeting between State Senator Carlucci and Stern, then argues that this does not qualify as an ‘official act.’”). Note, however, that the case was briefed before *McDonnell* was decided. Compare Minute Entry for ECF No. BL-100, *Halloran*, 664 F. App’x 23 (No. 15-2351(L)) (appellant’s brief served on Feb. 2, 2016), with *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (case decided on June 27, 2016). The parties did seem to be aware of *McDonnell* and its potential impact on the case. See Brief for the United States of America, *supra* note 98, at 48 n.12 (“Smith . . . instead hop[es] that the Supreme Court will change the law in his favor when deciding *McDonnell v. United States*.”).

121. Brief for Defendant-Appellant Malcolm Smith, *supra* note 107, at 75.

122. *Id.* at 75–76 (emphasis omitted).

123. *Id.*

124. Brief for the United States of America, *supra* note 98, at 47.

125. *Id.* at 48 n.12 (internal citation omitted).

Thus, the government also contested Smith's characterization that his actions were merely arranging a meeting.<sup>126</sup> Instead, the government argued the "indictment did not charge Smith with arranging meetings in return for the Wilson-Pakula bribes; it charged that he agreed to help allocate state funds in return for these bribes."<sup>127</sup> Accordingly, as the government had other evidence of Smith's agreement to obtain the \$500,000 of funding for Raj and Stern,<sup>128</sup> the question of whether or not a meeting constituted "official action" did not matter in upholding Smith's conviction.<sup>129</sup>

It is clear that the government's first argument does not comport with *McDonnell*. The government argued that any time a public official "uses his position to arrange for benefactors to meet other officials about public business," he is necessarily "engaged in official action."<sup>130</sup> However, after *McDonnell*, this surely cannot be the case, as the Court held that setting up a meeting, talking to another official, or organizing an event, without more, is not an official act.<sup>131</sup>

The government's second argument, however, remains valid after *McDonnell*: there was sufficient evidence to convict Smith *regardless* of whether or not the meeting constituted an official action.<sup>132</sup> The *McDonnell* Court noted that setting up a meeting, hosting an event, or making a phone call is not always innocent or irrelevant.<sup>133</sup> Rather, setting up a meeting could "serve as evidence of an agreement to take an official act," such as "attempting to pressure or advise another official on a pending matter."<sup>134</sup> If there was voluminous additional evi-

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126. Cf. Brief for Defendant-Appellant Malcolm Smith, *supra* note 107, at 75 ("At issue is whether Smith agreed to take official action when he agreed to ask Carlucci to meet with Stern."); *Id.* at 78 ("Simply put, Smith did not seek to 'influence' Carlucci in any decision or action to award state transportation funds.").

127. Brief for the United States of America, *supra* note 98, at 48.

128. *Id.* at 49–50 (noting that other evidence included that "Smith had sent a letter to the Mayor of Spring Valley, in which Smith lied to help obtain city approval for the [real estate] project," that "Smith told Raj and Stern that he (Smith) had found a source from which the desired funds could be allocated," that "Smith did not describe the meeting [with Carlucci] as an end goal, but rather as a step toward accomplishing the planned official action," that Smith agreed to "'work with' Carlucci to 'show him where in the budget, how to get it and all that stuff,'" and that Smith told Raj and Stern that getting the money did not necessarily have to be through Carlucci, and was obtainable through other means, such as going directly "'to the agency' that would implement the project'").

129. *Id.* at 48–50.

130. *Id.* at 47.

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

132. Brief for the United States of America, *supra* note 98, at 48–50.

133. *McDonnell*, 136 S. Ct. at 2371.

134. *Id.*

dence as the government asserted, Smith's conviction would survive a *McDonnell* challenge.<sup>135</sup>

The Second Circuit, applying *McDonnell*, agreed with the government's second argument.<sup>136</sup> Noting that "merely setting up a meeting—without more—does not qualify as an official act," the court acknowledged that such action can "serve as evidence of an agreement to take an official act."<sup>137</sup> As such, because there was sufficient evidence of Smith's agreement to help allocate state funds for Raj's and Stern's benefit in exchange for the bribe payments, even aside from the meeting, the court rejected Smith's argument. The Second Circuit affirmed because the "jury could properly conclude that this evidenced an agreement to take official action in exchange for payment of Wilson-Pakula bribes."<sup>138</sup>

Thus, the Second Circuit rejected the government's first argument that Smith took official action by setting up the meeting between Carlucci, Stern, and Raj. Rather, the court agreed with the government's second argument and necessarily rejected Smith's argument that the meeting was the only possible official action taken by Smith. Although Smith arranging the meeting, by itself, was not enough to constitute official action, it served as one piece in a mosaic of evidence of Smith's agreement to take official action in exchange for the Wilson-Pakula bribes.<sup>139</sup> The government had shown "something more," and thus the prosecution survived *McDonnell*.

### B. *United States v. Greenhut*

In *United States v. Greenhut*, defendant Ivan Greenhut was the owner of two California companies; each sold office supplies, furniture, and electronic equipment.<sup>140</sup> After obtaining a GSA contract, Greenhut began selling this equipment to the United States government.<sup>141</sup> Eventually, in an apparent effort to increase sales, Greenhut agreed to give his customers, including United States contracting officers, gifts based on the amount of supplies they purchased from his company.<sup>142</sup> He created a rewards program for purchasers in which

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135. See *supra* note 128.

136. *United States v. Halloran*, 664 F. App'x 23, 28 (2d Cir. 2016).

137. *Id.* (quoting *McDonnell*, 136 S. Ct. at 2371–72).

138. *Id.*

139. *Id.*; see also Brief for the United States of America, *supra* note 98, at 48–50; Brief for Defendant-Appellant Malcolm Smith, *supra* note 107, at 75–78.

140. See generally Indictment at 1–3, *United States v. Greenhut*, No. 2:15-CR-477-CAS, 2016 WL 6652681 (C.D. Cal. Nov. 8, 2016), ECF No. 1.

141. *Id.* at 3.

142. *Id.*

they could accumulate points after purchases and redeem them for gifts.<sup>143</sup> These gifts “included gift cards, Apple iPods, Apple iPads, computers, video game consoles, grocery gift cards, DVD players, cellular phones, plasma televisions, and cash.”<sup>144</sup> In total, the value of gifts conferred upon the government officials reached \$42,590 and the amount the government purchased from Greenhut’s company reached approximately \$3 million.<sup>145</sup> The government purchased these items in a streamlined manner, as Greenhut’s company “had a contract with the United States General Services Administration . . . , which delineated pre-negotiated pricing terms and conditions.”<sup>146</sup>

The government charged Greenhut with conspiracy,<sup>147</sup> witness tampering,<sup>148</sup> and payment of gratuities.<sup>149</sup> The specific gratuities offense alleged was giving “a one-hundred dollar Safeway gift certificate, to a public official . . . acting for and on behalf of the United States Army, for and because of an official act . . . , namely, ordering office supplies” from Greenhut’s company.<sup>150</sup> Greenhut was tried by jury in 2015 and found guilty on the conspiracy and gratuities charges.<sup>151</sup>

After the Supreme Court decided *McDonnell* in June 2016, Greenhut moved for a judgment of acquittal or, alternatively, for a new trial.<sup>152</sup> The thrust of Greenhut’s argument was that “the ‘micropurchase’ of office supplies does not constitute an ‘official act’ as construed by *McDonnell*.”<sup>153</sup> Invoking *Sun-Diamond*,<sup>154</sup> *McDonnell*,<sup>155</sup> and *Valdes*,<sup>156</sup> Greenhut argued that courts have read “official

143. See Memorandum in Support of Motion for a Judgment of Acquittal as to Counts I and III; Exhibits at 8, *United States v. Greenhut*, 2016 WL 6652681 (No. 2:15-CR-477-CAS), ECF No. 164.

144. Indictment, *supra* note 140, at 3.

145. *Id.* at 3–5; see also *Greenhut*, 2016 WL 6652681, at \*1.

146. *Greenhut*, 2016 WL 6652681, at \*1.

147. Indictment, *supra* note 140, at 1; see also 18 U.S.C. § 371 (2012).

148. Indictment, *supra* note 140, at 7; see also 18 U.S.C. § 1512(b)(3) (2012).

149. Indictment, *supra* note 140, at 8; see also 18 U.S.C. § 201(c)(1)(A) (2012).

150. Indictment, *supra* note 140, at 8.

151. See Minute Entry for ECF No. 130, *Greenhut*, 2016 WL 6652681 (No. 2:15-CR-477-CAS).

152. See Memorandum in Support of Motion for a Judgment of Acquittal as to Counts I and III; Exhibits, *supra* note 143; Notice of Motion; Motion for a New Trial; Memorandum of Points and Authorities; Exhibits, *Greenhut*, 2016 WL 6652681 (No. 2:15-CR-477-CAS), ECF No. 166; see also *McDonnell*, 136 S. Ct. at 2372 (2016).

153. Memorandum in Support of Motion for a Judgment of Acquittal as to Counts I and III; Exhibits, *supra* note 143, at 4.

154. *Id.* at 4 (“The term ‘official act’ is a ‘precisely targeted prohibition’ which the Court has determined must ‘linguistically be interpreted[ ] to be . . . a scalpel,’ not a ‘meat axe.’” (second alteration in original) (quoting *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999))).

155. *Id.* (citing *McDonnell* and stating that the *McDonnell* court was “endorsing [*Sun-Diamond*’s] proposition to adopt a ‘constrained interpretation’ of ‘official act’ and declining to rely on government ‘discretion’ to protect against ‘overzealous prosecutions’ under the statute”).

act” quite narrowly in an effort to avoid vagueness and due process challenges.<sup>157</sup>

Greenhut’s argument focused on *McDonnell*’s first requirement for an “official act”: “the Government must identify a ‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official.”<sup>158</sup> The *McDonnell* Court described this as requiring something akin to a “formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.”<sup>159</sup> Greenhut sought to separate the “micropurchases” of office supplies by low-level government employees from the government’s award of the GSA contract to his company.<sup>160</sup>

In essence, Greenhut argued that the “question” or “matter” before the government official was related to the award of the GSA contract instead of the individual “micropurchases” of office supplies.<sup>161</sup> Greenhut noted that the micropurchases were done “*without* contracts, pursuant to a streamlined process which limits and oversees the controlled decisions of low-level government functionaries,” and that the micropurchase program is designed to “*dispense* with the formality and discretion of the contracting process.”<sup>162</sup> Further, he asserted that the government supply technicians had a lack of autonomy and instead were rigidly confined to “a protocol to procure the specified item in the most ‘efficient’ and ‘cost-effective’ manner,” including an inventory search and use of only GSA approved vendors in most circumstances.<sup>163</sup> He also argued that all technicians were still “required to demonstrate to [their] supervisor that Mr. Greenhut’s company in fact gave [them] the best prices,” and that the technicians purchased through Greenhut’s company because it gave them the best price, good service, and fast shipping.<sup>164</sup>

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156. *Id.* at 5 (“Like the ‘rule of lenity,’ the Court’s ‘interpretive gloss’ in *Sun-Diamond* and now *McDonnell* works to protect a citizen from punishment ‘under a statute that gives at best dubious notice that it has criminalized his conduct.’” (citing *Valdes v. United States*, 475 F.3d 1319, 1323 (2007))).

157. *Id.* at 4–5.

158. *McDonnell*, 136 S. Ct. at 2368; see also Memorandum in Support of Motion for a Judgment of Acquittal as to Counts I and III; Exhibits, *supra* note 143, at 5.

159. *McDonnell*, 136 S. Ct. at 2368–69.

160. Memorandum in Support of Motion for a Judgment of Acquittal as to Counts I and III; Exhibits, *supra* note 143, at 7.

161. *Id.* (“While the latter—the award of a government contract—may be the type of ‘question’ or ‘matter’ that falls within *McDonnell*’s definition of ‘official act,’ the ‘micropurchase’ of ‘simple’ office supplies on the facts here is not.”).

162. *Id.*

163. *Id.* at 7–8.

164. *Id.* at 8.

Thus, in Greenhut's view, a micropurchase was necessarily not an official act for *McDonnell* purposes, as it is "the opposite of government formality" and, while it is technically a "decision," it is not a "decision" on a "question or matter," as required by the statute.<sup>165</sup>

The government took the opposite view of "official action," arguing that "the expenditure of government funds in accordance with federal acquisition regulations is . . . a formal exercise of government power."<sup>166</sup> The government noted that "government purchase cardholders were acting within their delegated authority when making 'micropurchases,' including the purchase of office supplies," and that, as a part of this authority, the "cardholders decide how and, importantly, where to spend government funds."<sup>167</sup>

Turning Greenhut's argument on its head, the government further argued that the government officers' obligation to follow a strict protocol "underscore[s] the formality in the exercise of government authority inherent in the expenditure of government funds."<sup>168</sup> In essence, the government argued that the purchasing agents were still performing official acts through the micropurchases and Greenhut's argument that micropurchases were "not important enough to constitute official acts" was erroneous because the purchasing agents answered the question of "where" to purchase the office supplies.<sup>169</sup>

The district court agreed with the government and denied Greenhut's motions.<sup>170</sup> The court noted that "[n]othing in the Anti-Gratuity Statute or the Supreme Court's decision in *McDonnell* limits the meaning of 'formal exercise of government power' to the *magnitude* of the official's decision or the contract."<sup>171</sup> Rather, because deciding who does business with the government is a formal exercise of power and the government purchase agents retained the power to decide how and where to purchase supplies, the government's interpretation of "official action" prevailed.<sup>172</sup> The court held that a decision on the purchase of office supplies could be "something more:" a jury could find that it "constitutes a 'question' or 'matter' that is 'pending' before

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165. *Id.* at 9.

166. See Government's Omnibus Opposition to Defendant's Motion for a Judgement of Acquittal and Motion for a New Trial; Declaration of Christopher C. Kendall; Exhibits at 5–6, *United States v. Greenhut*, No. 2:15-CR-477-CAS, 2016 WL 6652681 (C.D. Cal. Nov. 8, 2016), ECF No. 171.

167. *Id.* at 7.

168. *Id.* at 8.

169. *Id.* at 6–8.

170. *Greenhut*, 2016 WL 6652681, at \*5–6.

171. *Id.* at \*5.

172. *Id.*

a public official and that a public official made a decision or took an action ‘on’ that question or matter,” satisfying *McDonnell*’s requirements for official action.<sup>173</sup>

### C. *United States v. Silver*

In *United States v. Silver*, Sheldon Silver, the former Speaker of the New York State Assembly, faced prosecution for allegedly performing official acts in exchange for kickbacks in the form of a physician’s referral fees directed toward his private law practice.<sup>174</sup> Silver took three purportedly official acts<sup>175</sup> in exchange for these referral fees: he secured an Assembly resolution honoring the physician, agreed to assist the physician with acquiring permits for a charity race, and helped the physician “secure a job with a non-profit receiving state funding.”<sup>176</sup>

The government charged Silver with honest services fraud, extortion, and money laundering.<sup>177</sup> At trial, the parties disagreed on the proper “official act” jury instruction. Silver’s proposed instruction focused on the “exercise of actual governmental power,” while the government’s instruction sought to include “*any action* taken or to be taken under color of official authority.”<sup>178</sup> The district court ultimately adopted the government’s broad instruction<sup>179</sup> and the jury found Silver guilty on four counts of honest services fraud, two counts of extortion, and a count of monetary transactions involving crime proceeds.<sup>180</sup> The district court sentenced Silver to twelve years of imprisonment, a \$1.75 million fine, and \$5.4 million in forfeiture.<sup>181</sup>

Silver appealed, and within two months of his district court verdict, the Supreme Court decided *McDonnell*.<sup>182</sup> Silver argued that the district court’s jury instruction—that “*any action* taken or to be taken under color of official authority” constituted an official act—was overbroad under *McDonnell*.<sup>183</sup> Applying the definition of official act

173. *Id.*; see generally *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

174. 864 F.3d 102, 105–06 (2d Cir. 2017).

175. The government’s theory of the case included additional acts, but they fell outside of the statute of limitations. *Id.* at 119–20.

176. *Id.*

177. See Criminal Complaint, *United States v. Silver*, 184 F. Supp. 3d 33 (S.D.N.Y. 2016) (No. 1:15-CR-93), ECF No. 1, *rev’d*, 864 F.3d 102 (2d Cir. 2017).

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

179. *Id.*

180. See Verdict Sheet, *United States v. Silver*, 184 F. Supp. 3d 33 (No. 1:15-CR-93), ECF No. 137.

181. *Silver*, 864 F.3d at 112–13.

182. *Id.*

183. *Id.* at 118.

given in *McDonnell*, the Second Circuit found that the district court's instruction was indeed too broad, and the jury thus "could not have received a correct interpretation of the law."<sup>184</sup>

Beyond finding error in the jury instructions, the Second Circuit also declined to hold that this error was harmless.<sup>185</sup> Because only one of three actions on which the government made a showing "clearly remain[ed] an 'official act' under *McDonnell*," the jury "may have convicted Silver by relying on acts . . . that are no longer 'official' under *McDonnell*."<sup>186</sup> For example, Silver's offer to help the physician "navigate the process" of obtaining a permit for a charity race may not have satisfied the requirements for an official act under *McDonnell*, as it may have been a mere offer of general assistance without any exertion of pressure on governmental officials.<sup>187</sup> Additionally, Silver's assistance of the physician in obtaining a job did not become an official act merely because it was done using official government letterhead.<sup>188</sup>

Silver's only remaining act, the resolution and proclamation honoring the physician, did involve the formal exercise of governmental power and thus was an official act under *McDonnell*.<sup>189</sup> However, the Second Circuit found, "it is not clear beyond a reasonable doubt that a rational jury would have found Silver guilty based on the resolution alone."<sup>190</sup> Emphasizing the *pro forma* nature of the state's honorary resolutions, the court held that a rational jury could have found these actions to be *de minimis*.<sup>191</sup> Thus, the court found that the error could not have been harmless.<sup>192</sup>

Accordingly, the Second Circuit vacated Silver's conviction under *McDonnell*.<sup>193</sup> Although the same court in *Halloran* rejected a *McDonnell* challenge,<sup>194</sup> the two opinions can be read in harmony. While the material challenged under *McDonnell* in *Halloran* merely served to bolster the government's case, leaving ample evidence sufficient to convict, the *McDonnell* challenge in *Silver* left only a bare official action—an honorary state senate resolution—that a jury could have

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184. *Id.*

185. *Id.* at 119.

186. *Silver*, 864 F.3d at 119.

187. *Id.* at 120.

188. *Id.*

189. *Id.* at 121.

190. *Id.*

191. *Silver*, 864 F.3d at 121.

192. *Id.* at 119–21.

193. *Id.* at 124.

194. See *supra* notes 97–139 and accompanying text.



found *de minimis*. The court was unwilling to affirm a conviction based solely on such a showing—the government had not shown the “something more” that *McDonnell* required.

### V. *McDONNELL*'S IMPACT

The preceding three examples show typical *McDonnell* challenges.<sup>195</sup> As illustrated, even *McDonnell* challenges to pre-*McDonnell* jury instructions are not sure to be successful—if the government can point to the “something more” to which the Supreme Court alluded, reviewing courts are less inclined to overturn a conviction. This Section will review the likely impact that *McDonnell* will have on future public corruption prosecutions.

One crucial step in determining this impact is identifying what constitutes an official act after *McDonnell*. *McDonnell* explicitly gave three such scenarios:

[1.] [A] decision or action to initiate a research study—or a decision or action on a qualifying step, such as narrowing down the list of potential research topics—would qualify as an “official act.”

[2.] 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.” . . .

[3.] [I]f 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).<sup>196</sup>

Could Governor McDonnell have been re-prosecuted under one of these surviving definitions of “official act”? Although officials within the United States Attorney’s Office for the Eastern District of Virginia reportedly recommended a new trial for Governor McDonnell

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195. See, e.g., *United States v. Jones*, 207 F. Supp. 3d 576 (E.D.N.C. 2016) (official act question included “whether to use official law enforcement authority to cause Verizon to produce text messages belonging to Defendant’s wife,” and “whether to use official law enforcement authority and discretion to disclose Defendant’s wife’s text messages to Defendant in his capacity as a private citizen”); *United States v. Pomrenke*, 198 F. Supp. 3d 648, 701 (W.D. Va. 2016) (agreement “to purchase products and services” from a company constitutes a “formal exercise of governmental power” and thus qualifies as an official act); *United States v. Bills*, No. 14-CR-135-1, 2016 WL 4528075, at \*2 (N.D. Ill. Aug. 29, 2019) (influencing government committee members how to vote, and “exemplify[ing]” company’s strengths, *inter alia*, constituted official action).

196. *McDonnell*, 136 S. Ct. at 2370; see also *Federal Corruption Statutes—Bribery—Definition of “Official Act”*—*McDonnell v. United States*, 130 HARV. L. REV. 467, 475–76 (2016) (quoting same).

after the Supreme Court's decision, the Department of Justice ultimately declined to retry him.<sup>197</sup>

It seems unlikely that McDonnell, on the facts known, could have been successfully retried under one of these alternative definitions. The Supreme Court characterized McDonnell's purportedly official actions as essentially arranging meetings and hosting and attending parties.<sup>198</sup> After that unanimous opinion from the Supreme Court, the government would have to rethink its entire strategy and develop an almost completely different record from which to cull new official acts.

However, if we imagine a prosecution of a new defendant beginning wholly after the decision in *McDonnell*, we can paint a different picture—even with facts similar to McDonnell's. Prosecuting attorneys will have the new definition of “official act” in their minds from the beginning of the case and will be looking for “something more” from the outset. They can tailor their theory of the case to fit within one of the above surviving definitions. Prosecutors can attempt to reframe cases such as Governor McDonnell's—which was based on “theories of access and influence”—instead now prosecuting them as “cases in which officials used their offices to pressure subordinates, offer advice, or take initial steps somewhat attenuated from the ultimate official action.”<sup>199</sup> Such a case would likely survive a *McDonnell* challenge, as framing the case in this way would ensure the theory of the case fits into a surviving definition.

Moreover, cases like *Halloran* and *Greenhut* give us a certain degree of insight into how lower courts will handle *McDonnell* challenges. The *Halloran* court viewed a meeting as one part of a larger array of evidence showing official action.<sup>200</sup> The court also, however, seemed to accept that the meeting itself could be used as evidence tending to show a decision or action on a pending question or mat-

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197. See Matt Zapotosky, *U.S. Attorney's Office Recommends Putting Robert McDonnell on Trial Again*, WASH. POST (Sep. 2, 2016), <http://wpo.st/hieI2> (“[T]he U.S. attorney's office [for the Eastern District of Virginia] has recommended to Justice Department higher-ups that they endeavor to try him again . . . .”); see also Unopposed Motion to Remand for Dismissal, *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015), *rev'd*, 136 S. Ct. 2355 (2016) (No. 15-4019), ECF No. BL-156 (declining to prosecute McDonnell again); Ariane deVogue, *No New Trial for Ex-Virginia Gov. Bob McDonnell*, CNN (Sep. 8, 2016), <http://cnn.it/2cwSckV> (reporting same); see generally *Federal Corruption Statutes—Bribery—Definition of “Official Act”—McDonnell v. United States*, *supra* note 196, at 476 (same).

198. See *McDonnell*, 136 S. Ct. at 2365–66.

199. *Federal Corruption Statutes—Bribery—Definition of “Official Act”—McDonnell v. United States*, *supra* note 196, at 476.

200. *United States v. Halloran*, 664 F. App'x 23, 28 (2d Cir. 2016).

ter—it just could not be the *only* evidence of the decision or action.<sup>201</sup> Thus, the *Halloran* court took literally the Supreme Court’s statement in *McDonnell* that “setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—*without more*—does not fit that definition of ‘official act.’”<sup>202</sup> However, if the government can point to “something more,” a *McDonnell* challenge will be less likely to succeed.<sup>203</sup> Considering the government can even use a defendant’s arranging of a meeting as evidence of that “something more,”<sup>204</sup> it seems likely that as time goes by, prosecutors will frame their cases in a way that insulates them from *McDonnell*.<sup>205</sup>

The *Greenhut* decision further shows that lower courts may read *McDonnell* narrowly. Although the defense attorneys crafted a creative argument—contrasting the formality language of *McDonnell* with the purportedly informal nature of the federal government’s card purchasing structure—the court was not persuaded.<sup>206</sup> The court also appears to have held that a government actor’s decision on even the smallest minutiae could be a decision or action on a pending question or matter because “[d]eciding who does business with the government constitutes a formal exercise of power.”<sup>207</sup>

In short, the Supreme Court in *McDonnell* had the opportunity to circumscribe one aspect of the federal criminal scheme. Indeed, many commentators believed that this is exactly what the Supreme Court did, predicting that the decision “will erode the ability of prosecutors across the United States to make corruption cases stick in court.”<sup>208</sup> One commentator even stated that “the Court set a new standard for official-bribery cases that is so absurdly narrow that it will likely be

201. *See id.* (discussing the meeting in the context of the other, non-meeting, evidence).

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

203. *Halloran*, 664 F. App’x at 28.

204. *See, e.g., McDonnell*, 136 S. Ct. at 2371 (meeting perhaps “could serve as evidence of an agreement to take an official act”).

205. *McDonnell* challenges are even more likely to fail under plain error review. *See, e.g., United States v. Boyland*, 862 F.3d 279, 289–91 (2d Cir. 2017) (finding that although jury instructions given in the case violated *McDonnell*, they did not affect the defendant’s substantial rights and therefore did not warrant reversal); *United States v. Porter*, No. 7:15-22-DCR, 2017 WL 1095040, at \*2–3 (E.D. Ky. Mar. 22, 2017) (“[Defendant’s] actions . . . fall within the McDonnell’s definition, and any error that may exists for failing to provide that definition to the jury would not constitute plain error.”).

206. *United States v. Greenhut*, No. 2:15-CR-477-CAS, 2016 WL 6652681, at \*5 (C.D. Cal. Nov. 8, 2016).

207. *Id.*

208. *See, e.g., Alex Howard et al., Supreme Court Decision on McDonnell Opens Worrying New Horizons for Corruption*, SUNLIGHT FOUNDATION, Jun. 28, 2016, <https://sunlightfoundation.com/2016/06/28/supreme-court-decision-on-mcdonnell-opens-worrying-new-horizons-for-corruption/>.

almost impossible to convict any but the most bumbling politicians of this crime.”<sup>209</sup> However, we have already seen that this is not the case: *McDonnell* has not been some kind of “magic bullet” for defendants charged with bribery-type offenses. Instead, lower courts are applying the decision cautiously, and are looking for the “something more” beyond a simple meeting that rises to the level of an “official act.”

So what is *McDonnell*'s impact? Prosecutors will surely tailor their theory of a defendant's “official act” to fit within one of the three surviving definitions left open by the *McDonnell* Court.<sup>210</sup> From the onset of an investigation, prosecutors and investigators will be looking for “something more”—simply finding that a public official set up a meeting in exchange for a bribe will no longer suffice. Aside from this, *McDonnell* will affect pattern jury instructions—which will, in turn, further reinforce to prosecutors that their theories of the case must fit into one of the surviving definitions of “official act.”<sup>211</sup>

## VI. CONCLUSION

*McDonnell* is best understood as a decision that will force prosecutors to be more conscientious in shaping their cases. It does not seem to follow, however, that there will be fewer “official act” prosecutions—prosecutors still have several “official act” theories to choose from. *McDonnell* does not—despite fears to the contrary—eliminate the prosecution of bribery of government officials. Rather, it merely forces prosecutors to look for the “something more”—something (anything) beyond a simple meeting—when defining a government actor's official act in a bribery prosecution.

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209. Davidson, *supra* note 2. And, it seems as though this is, at least partially, what the Court itself thought it was doing. See *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (“[Our concern is] with the broader legal implications of the Government's boundless interpretation of the federal bribery statute.”).

210. See *supra* notes 196–199 and accompanying text; see also, e.g., *United States v. Williams*, No. 17-137, 2017 WL 2713404 (E.D. Pa. June 13, 2017) (reviewing and declining to dismiss a post-*McDonnell* superseding indictment under *McDonnell*'s test).

211. *Federal Corruption Statutes—Bribery—Definition of “Official Act”*—*McDonnell v. United States*, *supra* note 196, at 476 (“*McDonnell* may be best understood as revising jury instructions rather than rewriting what constitutes corruption itself.”). However, as shown, improper jury instructions are not always fatal to a prosecution. See, e.g., *United States v. Greenhut*, No. 2:15-CR-477-CAS, 2016 WL 6652681, at \*5 (C.D. Cal. Nov. 8, 2016) (“Accordingly, the Court concludes that the instructions provided to the jury satisfied the requirements of *McDonnell* and did not mislead or confuse, inadequately guide the jury's deliberations, or improperly intrude on the fact-finding process. Thus, the Court's instructions were not erroneous.”)

