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A Way Forward for Congress on Bribery After McDonnell

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ABSTRACT

When the Supreme Court unanimously struck down the bribery conviction of Virginia Governor Robert McDonnell, it did so on statutory grounds, but its opinion included ominous language about "constitutional concerns" the Court had with a broader interpretation of the statute. If Congress wants to amend the bribery statute so that the *McDonnell* decision does not result in an excessively narrow interpretation of the statute in the future, it would be wise to do so bearing in mind the constitutional issues the *McDonnell* court raised.

This article proposes that Congress could account for these concerns by taking, as a starting point, language in the existing federal financial conflicts of interest statute and related regulations promulgated by the Office of Government Ethics, which are appropriately broad and contain detail that would be helpful to public officials and others seeking to conform their conduct to the law.

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I. INTRODUCTION

On the last day of the 2015–16 term, the Supreme Court unanimously struck down the bribery conviction of former Virginia

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governor Robert McDonnell.[1] The Court concluded that, although McDonnell had taken certain actions in exchange for loans, cash, luxury goods, and travel he received from a local businessman, the actions McDonnell took were not "official acts" under the federal bribery statute,[2] and therefore his selling them was not illegal under that statute.[3]

A natural question that arises when a court issues a ruling narrowing the interpretation of a statute is whether the legislature should respond to the ruling by changing the statute to clarify its intent, and if so, how it should do that. In the case of the *McDonnell* decision, that question may be complicated by the fact that, in the opinion, the Supreme Court laid out a set of "constitutional concerns" about a broader reading of the statute.[4] Although the Court was expressing those concerns about a specific, broader interpretation of the statute—the one advanced by the government in the case—it stands to reason that the Court might have similar concerns about a new, broader statute if Congress were to pass one.

One way Congress could account for these concerns while clarifying the federal bribery statute would be to take as a starting point language in the existing federal financial conflicts of interest statute and related regulations promulgated by the Office of Government Ethics. These statutes and regulations reflect significant expertise not otherwise easily available to courts in *how* public officials do their work, and they provide sufficient detail to help government officials and others conform their conduct to the law.

II. THE PROBLEM IDENTIFIED IN *MCDONNELL*

As Governor of Virginia, Robert McDonnell freely admitted that he solicited and received more than $175,000 in gifts, including loans, cash, luxury goods, and travel, from Jonnie Williams Sr., a local businessman.[5] Williams was not just any local businessman, however; his company was seeking to persuade the state of Virginia to effectively subsidize it by undertaking (and thus funding) studies into one of its products at a state medical school.[6] These studies were needed for the business to seek federal regulatory approval for its product; if the state conducted them, the business would not have to pay for a private lab to do so.[7] Williams approached the governor for his help in executing this plan, and

1. McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016).
2. 18 U.S.C § 201(b) (2012).
3. *Id.*
4. *Id.* at 2372–73.
5. *McDonnell*, 136 S. Ct. at 2364–66.
6. *Id.* at 2366.
7. *Id.*

McDonnell agreed.[8] The gifts from Williams to McDonnell continued, but despite McDonnell's help, the studies never occurred.[9] The relationship was uncovered, and a jury convicted McDonnell of bribery.[10] Ultimately, the Supreme Court held unanimously that McDonnell's conduct, however "tawdry" the Court might have found it, did not violate the federal bribery statute because the help McDonnell provided—the *quid* in the *quid pro quo*—was not significant enough.[11] While it is impossible to say with certainty how *much* the Court's opinion in *McDonnell* will prove to have narrowed the federal bribery statute, it is reasonable to think that a unanimous Supreme Court decision striking down a particular reading of the statute could have a chilling effect on future prosecutions. The Court's holding identified a statutory, not a constitutional, deficiency with McDonnell's conviction, although, as will be discussed below, the Court did express "constitutional concerns" with an alternate reading of the statute. These circumstances (a likely narrowing of the statute, but on statutory interpretation grounds) naturally raise the question: should Congress respond by amending the federal bribery statute in light of the Court's interpretation in *McDonnell*? If so, how?

A brief word on the lurking specter of *Citizens United v. FEC*:[12] much of the commentary on *McDonnell* arises from the question, ably framed and discussed by Professor Brown even before *McDonnell* was decided, of whether and how the Supreme Court's campaign finance jurisprudence and its interpretation of public corruption statutes impact each other.[13] Although that is an important question, in my view it is separate from the arguably more immediate concern facing those of us who believe in the importance of strong and appropriately enforced public corruption laws, including the federal bribery statute. The question we must ask is whether the federal bribery statute, as it is written, appropriately prevents, deters, and punishes this form of corruption. It is true that the bribery statute is only one part of the country's larger anti-corruption regime, but it is a critical part.

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2373–75.
12. Citizens United v. FEC, 558 U.S. 310 (2010).
13. *See generally* George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177 (2015). Prof. Brown also contributed his most recent thoughts on the significance of *McDonnell* to this Symposium. *See* George D. Brown, *The Federal Anti-Corruption Enterprise After* McDonnell *– Lessons from the Symposium*, 121 PENN ST. L. REV. 989 (2017).

The federal bribery statute provides that a government official may not receive anything of value in exchange for "being influenced in the performance of any official act."[14] The statute defines the term "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."[15] The definition of "official act," then, operates to define what constitutes a *quid* in a *quid pro quo* that violates the federal bribery statute. As such, an "official act" was a necessary element of McDonnell's bribery conviction, and the Supreme Court concluded that the official acts found by the jury in McDonnell's case did not meet this definition; thus, the Court vacated the conviction.[16] Therefore, a more specific version of the question "does the federal bribery statute appropriately prevent, deter and punish corruption?" in light of the *McDonnell* decision would be "does the 'official act' definition in the federal bribery statute appropriately define which acts it should be a crime for a government official to sell?" This is where Congress can, and should, step in.

Congress could take a number of different approaches to amending the bribery statute to clarify what acts should give rise to criminal liability as "official acts" under the bribery statute, within constitutional limits. In the view of some legislators, broad action may be needed.[17] But, given the inherent difficulties of achieving congressional action of any kind, a modest change might be an attractive approach. Any change should also give due consideration to the "constitutional concerns" that the Court expressed in *McDonnell*.[18] Generally, the Court indicated its concern that a broad reading of the "official act" definition would unduly chill relationships between government officials and the citizens they serve by raising the fear of criminal prosecution, and noted that these relationships are protected by the Constitution.[19] Although these "concerns" do not necessarily mean that the "official act" definition may not be any broader than it currently is, given that these are the expressed

14. 18 U.S.C. § 201(b)(2)(A) (2012).

15. *Id.* § 201(a)(3).

16. *McDonnell*, 136 S. Ct. at 2375.

17. *See, e.g.*, the Public Corruption Prosecution Improvements Act, S. 1946, 110th Cong. (2007). This act addressed a variety of issues in addition to the official act definition, including statutes of limitation, venue, evidentiary, and sentencing provisions related to a range of federal criminal public corruption statutes, including mail and wire fraud, embezzlement, honest services fraud and federal program bribery. *See generally id.* It was introduced on a bipartisan basis in several congresses and ultimately passed the Senate in 2012 as part of the STOCK Act, Pub. L. No. 112–105, 126 Stat. 291 (2012), but was removed in conference before that bill became Public Law No. 112–105.

18. *McDonnell*, 136 S. Ct. at 2372–73.

19. *Id.* at 2371–72.

concerns of the unanimous (albeit eight-member) Supreme Court, as a practical matter they should carry significant weight in any amendment of the statute. Finally, a good solution would ideally provide added clarity for well-intentioned government officials who seek to comply with the law.

One approach that would have all three advantages—appropriately broadening the definition, accounting for the government official/citizen relationship, and providing clarity—would use existing federal statutory language and concepts in the federal conflict of financial interest statute.[20] The borrowed language from the conflict of financial interest statute has the advantage of being accompanied by an existing set of regulatory interpretations, promulgated by the Office of Government Ethics, and existing case law generally affirming the constitutionality of the provision against a vagueness challenge.

III. CURRENT STATUS OF THE FEDERAL BRIBERY STATUTE

As noted above, the federal bribery statute currently prevents, among other things, giving an official a thing of value in exchange for an official act.[21] As to what an official act is, the statute provides:

> [T]he term "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 brought before any public official, in such official's official capacity, or in such official's place of trust or profit.[22]

In *McDonnell*, the Supreme Court interpreted this provision, rejecting a broad construction advanced by the government.[23] The Court concluded:

> In sum, an "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or

20. 18 U.S.C. § 208 (2012). This federal conflict of interest statute generally prohibits employees of the executive branch from participating in matters in which they have a financial interest. *Id.*

21. *See* 18 U.S.C. § 201.

22. *Id.* § 201(a)(3).

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

> controversy," or agree to do so. That 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. 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."*[24]

As noted above, the *McDonnell* Court also expressed "constitutional concerns" with a broad construction of the "official act" definition.[25] Although these concerns were, the Court said, alleviated by its narrower construction of the official acts provision in this case,[26] presumably the existing provision, with the Court's narrow reading, is not the only possible provision that would comply with the Constitution. The proposed amendment described below seeks to account for the Court's concerns while ensuring that an appropriately broad range of conduct is covered.

The Court's constitutional concerns fall into two general categories: one including perceived risks to relationships between government officials and their constituents, including from a vague statute that would violate due process, and a second including federalism concerns relating to federal prosecution of state and local-government officials.[27] It is worth reviewing the *McDonnell* Court's discussion of these issues at some length:

> The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. 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 . . . .
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> A related concern is that, under the Government's interpretation, the term "official act" is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory

24. *Id.* at 2371–72 (emphasis added).
25. *See id.* at 2372–73.
26. *See id.*
27. *See id.*

> enforcement." *Skilling*, 561 U.S., at 402–403 (internal quotation marks omitted). Under the "'standardless sweep'" of the Government's reading, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. "Invoking so shapeless a provision to condemn someone to prison" for up to 15 years raises the serious concern that the provision "does not comport with the Constitution's guarantee of due process." *Johnson v. United States*, 576 U.S. ___, ___ (2015) (slip op., at 10). Our more constrained interpretation of §201(a)(3) avoids this "vagueness shoal." *Skilling*, 561 U.S., at 368.
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> The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of "official act" is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); see also *United States v. Enmons*, 410 U.S. 396, 410–411 (1973) (rejecting a "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States").[28]

The Court thus invokes several constitutional provisions, including the Due Process Clause and structural constitutional principles such as representative democracy and federalism. A proposed amendment to the bribery statute, then, would do well to ensure that it protects appropriate relationships between (i) constituents and their representatives and (ii) the federal and state and local governments.

IV. SOURCES OF A PROPOSED AMENDMENT

With the *McDonnell* Court's criticisms, both statutory and constitutional, of the government's interpretation of the existing "official act" provision in mind, a proposed amendment is drawn from the federal conflict of financial interest statute and its accompanying regulations. The federal conflict of financial interest statute prohibits certain federal employees from taking certain actions as part of their job if they have a

28. *Id.*

financial interest related to the action.[29] The statute provides, in relevant part:

> . . . [W]hoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, *participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise*, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—
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> Shall be subject to the penalties set forth in section 216 of this title.[30]

The statute then lists certain exclusions from this general rule that act as "safe harbors" for conduct that might otherwise violate the statute; these exclusions include a provision delegating to the United States Office of Government Ethics ("OGE") authority to promulgate regulations exempting from the statute certain conflicts of interest that are "too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies."[31] As a result of this provision, OGE has issued detailed regulations that explain when a particular action relates sufficiently to an employee's financial interest that he or she should not be allowed to take the action—and, conversely, when the relationship is not close enough that it should prevent the employee from taking the action.[32]

In addition to the safe harbor regulation, OGE regulations also contain further explication of the terms used in the conflict of interest statute, for guiding agency officials and others in applying its provisions outside the criminal context, such as in considering recusals and counseling individual employees. As such, these regulations also help define when a relationship between an employee's work and their financial interest should prevent them from doing that part of their job; in

29. *See* 18 U.S.C. § 208 (2012).
30. *Id.* § 208(a) (emphasis added).
31. *Id.* § 208(b)(2).
32. *See, e.g.*, 5 C.F.R. § 2640.201–06 (2017).

turn, part of that is defining what types of actions would be prohibited. This is analogous to the issue identified in *McDonnell*: when is something a government official does an "official act" that the official should not be allowed to sell? The conflict of interest statute prohibits employees with financial conflicts from participating "personally and substantially" in a matter related to their conflict.[33] The OGE regulations explain what it means to participate "personally and substantially":

> To participate "personally" means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate "substantially" means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.[34]

V. FORMS OF A POSSIBLE AMENDMENT

One possible way to amend the federal bribery statute consistently with *McDonnell* would be to borrow language directly from the neighboring federal conflict of interest statute. A brief comparison of the language in the financial conflict of interest statute with the *McDonnell* Court's discussion of "official acts" makes the point. The *McDonnell* court said:

> That 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. 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."[35]

33. 18 U.S.C. § 208(a).
34. 5 C.F.R. § 2640.103(a)(2).
35. McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016).

The financial conflict of interest statute limits what a government official may do in the presence of a financial conflict of interest; therefore, it contains a provision that performs a similar function to the definition of "official act" in the bribery statute. The actions that are not permitted under this statute when certain financial conflicts of interest are present include "decision, approval, disapproval, recommendation, the rendering of advice, investigation."[36] One version of the proposed approach to amending the bribery statute would insert this language from the conflict of interest statute more or less directly into the bribery statute's "official acts" definition. The amended statute would read as follows:

> (3) the term "official act" means any decision, action, *approval, disapproval, recommendation, rendering of advice, or investigation* 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.

Another possible version of this approach—using language from the financial conflict of interest regulatory scheme to amend the bribery statute—would be to take language from a different part of the federal conflict of interest statute. In addition to the provision described above that discusses the types of acts that are prohibited in the presence of a financial conflict of interest, the statute says that an official may not undertake these acts through "personal[] and substantial[]" participation.[37] An amended version of the bribery statute using this version of the approach could read:

> The term "official act" means any decision or action on, *or personal and substantial participation in*, 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.

This option may present drafting challenges (for example, whether it makes sense to say someone "participat[es] in" a "question"), but may cover a more appropriately broad range of conduct and ultimately provide more guidance to officials seeking to conform their conduct to the law. In part, this is because including this language could allow officials (and courts) to rely on OGE's detailed regulations interpreting the terms "personal and substantial participation" for purposes of

36. 18 U.S.C. § 208(a).
37. *Id.*

employees in the executive branch of the federal government.[38] These regulations address a number of questions that might arise upon a first reading of "personal and substantial," such as whether this includes supervising a subordinate who makes a decision (per the regulations, it does).[39]

A combination of these two versions is also possible. For example, an amended statute could read:

> The term "official act" means any decision or action on, or personal and substantial participation through, for example, approval, disapproval, recommendation, rendering of advice on, or investigation of 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.

This approach, or something like it, would arguably have the advantage of incorporating the "personal and substantial" language, and perhaps by implication the OGE regulations that interpret it, while also providing more concrete examples (approval, disapproval, recommendation, rendering of advice, and investigation). However, it is also true that the less directly the provision mirrors the existing language, especially if it changes the relationship between the two provisions, the more possibility there is for confusion.

One natural question is to ask whether the new language would have changed the result in *McDonnell* itself. Obviously, it is impossible to say with certainty whether McDonnell's conduct would have qualified under any of these alternatives, since they were not presented to the jury. For instance, would McDonnell's statements to relevant decision-makers that he had used the product in question and experienced favorable results be considered a "recommendation" or "rendering of advice" that the decision-makers should undertake a study as to the product's efficacy? The answer would, of course, depend on the jury's view of the facts surrounding those statements, but it seems a reasonable possibility. Another way to look at the question of breadth is to compare the new language with the Court's description of what would fall within the existing language; the Court used as examples exerting pressure on another official or advising another official to take an act.[40] Each of the amended statutes described above would cover a somewhat broader range of conduct than what the *McDonnell* Court described—

38. 5 C.F.R. 2460.103(a)(2).
39. *Id.*
40. *McDonnell*, 136 S. Ct. at 2370.

acknowledging the reality that government officials can influence each other in a variety of ways.

It may also be worth noting that the federal conflict of interest statute has been held to be constitutional against a vagueness challenge by every federal appeals court to address the issue.[41]

Thoughtful readers will undoubtedly identify possible shortcomings in each version of this proposal. For some, that list may start and end with the fact that each version cedes some of the ground that the government strongly argued in *McDonnell* (with amicus support, including from CREW[42]): that the sale of *access* to government officials can and should be subject to the restrictions of the federal bribery statute. Others may object that the proposals do not address federalism concerns directly. However, it is important to acknowledge the role that Congress can and should play in clarifying this area of the law—particularly this area, where Congress, through the legislative process, is well-positioned to explore and understand the ramifications of a particular rule on the day-to-day work of the broad set of public officials whose conduct the rule governs in a way that courts, even the Supreme Court, are not.

VI. CONCLUSION

The Supreme Court's opinion in *McDonnell* exposed a number of difficulties in constructing a bribery statute that covers an appropriately broad range of conduct, preserves the important relationship between government officials and the citizens they serve, and provides clear rules for government officials who seek to comport their conduct with the law. In many cases, the current federal bribery statute may achieve these goals; however, *McDonnell* demonstrated that, in some cases, it does not. Given the importance of the bribery statute as part of the nation's larger anti-corruption legal regime, Congress should act to ensure that the statute is adequate to prevent, deter, and punish bribery. One approach to improving the statute would use existing federal statutory language

41. United States v. Nevers, 7 F.3d 59, 61–62 (5th Cir. 1993); United States v. Hedges, 912 F.2d 1397, 1403 (11th Cir. 1990); *see also* United States v. Lund, 853 F.2d 242, 246 (4th Cir. 1988) ("In sum, we think the legislative history and purpose of 208(a) fully support giving its unambiguous terms the full breadth of their ordinary meaning").

42. Brief for Citizens for Responsibility and Ethics in Washington as Amicus Curiae Supporting Respondent at 13–17, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474); *see also* Brief for Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Respondent at 4–6, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Campaign Legal Center as Amicus Curiae Supporting Respondent at 9–13, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474); and Brief for Public Citizen, Inc. and Democracy 21 as Amici Curiae Supporting Respondent at 9–15, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

and concepts in the federal conflict of financial interest statute, 18 U.S.C. § 208. The approach has the advantage of being accompanied by an existing set of regulatory interpretations, promulgated by the Office of Government Ethics, and existing case law. Those of us who believe in the importance of strong and appropriately enforced anti-corruption laws should also want good laws; it is my hope that the possibilities discussed in this essay contribute to a fruitful discussion of what that means.

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