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Symposium

Introduction: The Shifting Sands of Public Corruption

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This Issue of the *Penn State Law Review* addresses a very special project, the Law Review's first symposium on public corruption.[1] It is a particularly apt moment for a symposium such as this. For one thing, the law of corruption is in a state of flux following the Supreme Court's 2016 decision in *McDonnell v. United States*.[2] For another, issues relating to public corruption are front of mind in the public consciousness. The 2016 presidential election helped bring corruption issues to the fore of public discourse, with partisans on both sides pointing to alleged conflicts of interest and public corruption concerns. And while particular causes may divide the public along partisan lines, there is a widespread belief that conflicts of interest and even outright

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1. Symposium, *Breach of the Public (Dis)Trust: Political Corruption and Government Ethics in 2017*, 121 PENN ST. L. REV. 979–1070 (2017).

2. McDonnell v. United States, 136 S. Ct. 2355 (2016).

corruption are present in our organs of government,[3] and a similarly widespread desire to "clean up" government.[4]

If there is consensus that public corruption must be addressed, the question becomes how best to do so. How far should criminal law reach to ensure that even the most creative variants of bribery are covered while "politics as usual"—warts and all—is not criminalized? What new laws should be proposed, or new regulations enacted? How, in sum, can public corruption best be addressed at this point given the legal and political landscapes? These are the questions the Symposium seeks to address, in multi-disciplinary fashion.

The Symposium brings together academics, good-government advocates, and practitioners with experience representing both the prosecution and the defense, to opine on the state of public corruption prosecutions in the United States. It is an opportunity to share insight, expertise, and experience from lawyers, reformists, and academics alike, providing a richer and more comprehensive understanding for both the audience and the contributors themselves. The *Penn State Law Review* and the sponsors of this Symposium have provided an ideal platform to look meaningfully at the legal framework that has developed in this field and to examine the real-world ramifications of practice and reform at every level of government.

I. SETTING THE STAGE: THE SUPREME COURT'S DECISION IN *MCDONNELL*

Looming large over the Symposium is the Supreme Court's decision last term in *McDonnell v. United States*. The *McDonnell* case is addressed by nearly every contributor to the Symposium, and some understanding of the case is crucial for the reader. It is therefore useful to provide a brief synopsis of the case and the Supreme Court's decision as a foundation.

In 2014, Virginia Governor Bob McDonnell was indicted under several federal criminal corruption statutes for accepting gifts and loans

3. *See, e.g.*, PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 72–82 (2015), http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf; *75% in U.S. See Widespread Government Corruption*, GALLUP (Sept. 19, 2015), http://www.gallup.com/poll/185759/widespread-government-corruption.aspx.

4. *See, e.g.*, Memorandum from Geoff Garin, Hart Research Assoc., Survey of Voters in 2018 Senate Battleground States 2–3 (Jan. 3, 2017), https://cdn.americanprogress.org/content/uploads/2017/01/03093550/ME-CAP-Senate-BG-Key-Findings.pdf; QUINNIPIAC UNIV., CORRUPTION IS VERY SERIOUS AND ALBANY WON'T FIX IT, NEW YORK STATE VOTERS TELL QUINNIPIAC UNIVERSITY POLL; EFFORT TO BOOST ECONOMY WILL FAIL, UPSTATE VOTERS SAY 1 (2016), https://poll.qu.edu/images/polling/ny/ny07202016_Nyg32rt.pdf.

totaling more than $175,000 from a Virginia businessman in exchange for "performing official actions . . . to legitimize, promote, and obtain research studies" for the businessman's nutritional supplements.[5] Prosecutors alleged that McDonnell and his wife accepted various gifts from the businessman, ranging from $20,000 in designer clothing to $15,000 to help pay for their daughter's wedding, as well as multiple loans to alleviate the couple's "financial problems."[6] In exchange, McDonnell allegedly arranged meetings for the businessman with Virginia officials, hosted events for his nutritional supplement business at the Governor's Mansion, and contacted other government officials about research studies of the supplement.[7] McDonnell was convicted by jury of honest services fraud and Hobbs Act extortion—both of which cover *quid pro quo* bribery schemes—and the Fourth Circuit Court of Appeals affirmed.[8]

The Supreme Court granted review and vacated McDonnell's conviction, holding that an overbroad definition of "official act" was provided to the jury. "Official act," an element of the honest services fraud and Hobbs Act extortion offenses brought against McDonnell, was defined (by agreement of the parties) as it appears in a different federal bribery statute, 18 U.S.C. § 201(a)(3): "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."[9] The trial court instructed the jury, over the objection of the defense, that "official actions" included "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," and "may include acts that a public official customarily performs" "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end."[10] Accordingly, the trial court's instruction permitted in theory the jury to convict even if it concluded that Governor McDonnell had provided official access and facilitated official meetings but had never intended or agreed to influence the outcome of any governmental decision in support of the businessman's interests.

The Supreme Court held that this broad definition of an "official act" was erroneous and would have permitted the jury to convict

5. *McDonnell*, 136 S. Ct. at 2365.
6. *Id.* at 2362–64.
7. *Id.* at 2361.
8. *Id.* at 2367.
9. 18 U.S.C. § 201(a)(3) (2012).
10. *McDonnell*, 136 S. Ct. at 2373.

Governor McDonnell for political conduct that, disagreeable or not, was not criminal.[11] In arriving at this conclusion, the Supreme Court found first that arranging a meeting, contacting another official, or hosting an event—without more—was not a "question, matter, cause, suit, proceeding or controversy," which the parties had agreed was required.[12] The Court interpreted "question" and "matter" narrowly to refer only to more formal exercises of power, as in lawsuits, hearings, or proceedings.[13] The Court then considered whether arranging a meeting, contacting another official, or hosting an event qualified as the "decision or action" taken on a different, suitable "question, matter, cause, suit, proceeding or controversy." The Court found that it did not; the law required something more, like exerting pressure on another public official to perform an "official act," or advising another public official while knowing or intending that this would spur an "official act" by that official.[14] The Court asserted that "conscientious public officials" arrange for meetings or events "all the time," and cited *amici*,[15] including White House counsel for a string of past presidents, who argued that an expansive interpretation of "official act" could "chill" interaction between representatives and their constituents.[16] The Court also pointed to due process, vagueness, and federalism concerns.[17] Because the instructions provided to McDonnell's jury did not include language correctly qualifying the expanse of "official act," the Court held that the jury "may have convicted Governor McDonnell for conduct that is not unlawful."[18] The Court vacated the conviction.[19]

The *McDonnell* ruling made waves, not only as a reversal of a high-profile conviction,[20] but as a potential inflection point in public

11. *See id.* at 2373–75.
12. *Id.* at 2368–69.
13. *Id.*
14. *Id.* at 2372.
15. *Id.* (citing Brief of Former Federal Officials as *Amici Curiae* in Support of Petitioner, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 878849, at *6; Amicus Brief of Former Virginia Attorneys General in Support of Petitioner, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 878861, at *1–2, *16; *Amici Curiae* Brief of 77 Former State Attorneys General (Non–Virginia) Supporting Petitioner Robert F. McDonnell, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 909266, at *1–2).
16. *Id.* (quoting Brief of Former Federal Officials as *Amici Curiae* in Support of Petitioner, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 878849, at *6).
17. *Id.* at 2373.
18. *Id.* at 2375.
19. *Id.*
20. The Department of Justice elected not to retry McDonnell, and the case was dismissed. *See* Order, United States v. McDonnell, No. 3:14-cr-00012 (E.D. Va. Sept. 23, 2016).

corruption jurisprudence. But the true significance and impact of that change is open to debate. It is indisputable, of course, that *McDonnell* changed the legal landscape: a public official could no longer be convicted under the existing federal criminal statutes for accepting a bribe in return *only* for official access as opposed to influencing an actual governmental decision. But how much more difficult will it now be to obtain a conviction of a public official? Will prosecutors be deterred from bringing certain cases, and should they be so deterred? Will *McDonnell* provide new ammunition to defense counsel in public corruption trials? Will the holding inspire new challenges—constitutional or otherwise—to other public corruption laws? And most fundamentally, did *McDonnell* appropriately reign in the reach of the federal corruption laws, and, in the post-*McDonnell* universe, what are the pathways to and prospects of governmental reform? These are not easy questions, and the commentators here have reached varying conclusions as they seek to understand and explain where the law and policy issues underlying public corruption now stand.

II. THE SYMPOSIUM'S CONTRIBUTORS

In this Symposium, we will hear from a wide range of contributors, including legal scholars, government reformers, and practitioners from both the prosecution and defense. Together they will examine not only *McDonnell* but also the future of public corruption law enforcement and law reform as a whole.

From the world of academia, Professor George Brown of Boston College Law School and Professor Kathleen Clark of Washington University School of Law offer distinct perspectives. Professor Brown addresses how *McDonnell* responded to those—some of whom filed *amici* briefs in the case—who criticize the criminalization of what they believe to be ordinary practice between constituents and officials that is essential to any functioning representative government.[21] Professor Brown argues that *McDonnell* can't be read as more than a partial victory for those critics if construed strictly as a statutory interpretation case, but considers whether other aspects of the opinion, such as the Supreme Court's discussion of constitutional concerns, could indicate broader significance for the case.[22] Meanwhile, Professor Clark discusses how the *McDonnell* decision fits with what she describes as an on-going trend in the judiciary to distort anticorruption laws with unduly narrow

21. *See generally* George D. Brown, *The Federal Anti-Corruption Enterprise After* McDonnell – *Lessons from the Symposium*, 121 PENN ST. L. REV. 989 (2017).

22. *Id.* at 998–1004.

interpretations.[23] These narrow readings may serve some purpose in the campaign context, Professor Clark argues, by permitting practices that, while troubling, may be a necessary evil of fundraising, but *McDonnell* takes it a step further by applying a narrow reading to outright gift giving, which does not serve any legitimate policy purpose.[24]

From the government reform community, the Symposium provides contributions from two authors from Citizens for Responsibility and Ethics in Washington ("CREW"), a nonprofit organization dedicated to reducing the influence of money in politics and increasing accountability for violators of campaign finance, ethics, or tax rules.[25] Stuart McPhail, who serves as Litigation Counsel, examines how transparency (e.g., disclosure) serves as one of the Supreme Court's core answers to concerns about corruption.[26] To the extent that *McDonnell* narrows the reach of criminal corruption laws, transparency will become arguably even more important. However, McPhail contends, corporations are attempting to use First Amendment freedom of speech and assembly precedent dating back to the Civil Rights Movement to avoid campaign finance disclosures.[27] Jennifer Ahearn, Policy Counsel for CREW, examines the statute at the center of *McDonnell*—the federal bribery statute[28]—and offers potential fixes to "plug the hole" identified by the Court's holding.[29] Ahearn navigates the constitutional complications and draws from other current federal legislation and regulations to identify potential paths forward.[30]

And finally, from the cadre of practitioners in this field, we have two contributors who share with the Symposium (in presentations that are not presented in written form in the Law Review) their experiences both as prosecutor and as defense counsel in high profile public corruption trials. Arlo Devlin-Brown, a partner at Covington & Burling LLP and one of the co-authors of this Introduction, addresses the recent prosecutions of former New York State Assembly Speaker Sheldon Silver and former New York State Senate majority leader Dean Skelos,

23. Kathleen Clark, Professor, Wash. Univ. School of Law, Narrowing and Distorting Our Anticorruption Laws at the Penn State Law Review Symposium: Breach of the Public (Dis)Trust: Political Corruption and Government Ethics in 2017 (Mar. 17, 2017).

24. *Id.*

25. *About Us*, CITIZENS FOR RESP. AND ETHICS IN WASH., http://www.citizensforethics.org/who-we-are (last visited Feb. 23, 2017).

26. *See generally* Stuart McPhail, *Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 PENN ST. L. REV. 1049 (2017).

27. *See generally id.*

28. 18 U.S.C. § 201 (2012).

29. *See generally* Jennifer Ahearn, *A Way Forward for Congress on Bribery After* McDonnell, 121 PENN ST. L. REV. 1013 (2017).

30. *See id.* at 1019–24.

which he supervised in his role at the time as Chief of the Public Corruption Unit of the U.S. Attorney's Office for the Southern District of New York. From the perspective of an accomplished defense lawyer, John Brownlee, a partner at Holland & Knight LLP, provides a first-hand account of the *McDonnell* trial. Brownlee served as trial counsel for Governor McDonnell and sheds light on the case from the defense's perspective.

III. CLOSING THOUGHTS FROM THE CO-AUTHORS

Having set the stage and previewed the work of the Symposium's contributors, we offer some of our own thoughts on what *McDonnell* means for the future of public corruption prosecutions and defenses. While some commentators have feared (and others hoped) that *McDonnell* would sharply alter the ability of prosecutors to bring most public corruption cases, that is unlikely to be the reality. In fact, the impact of *McDonnell* has been very limited to date. Obviously it has impacted those prosecutions with trials that took place before the decision came down and where appeals have not yet been exhausted. In those cases, the courts will have to examine the evidence and jury instructions, both to determine whether the instructions would have permitted the jury in theory to convict for something less than an "official act," and whether any such instructional error was likely dispositive to the outcome.[31] But this impact is limited to a defined set of cases over a particular period of time. By and large, prosecutors have continued to bring aggressive public corruption cases. Prosecutors have brought corruption cases just in recent months against a former top aide to New York Governor Andrew Cuomo;[32] a former mayor of Palm Springs, California;[33] a Michigan town trustee;[34] a New York county executive;[35] and a New York town supervisor[36]—just to name a few.

So why has *McDonnell* not deterred prosecutors from bringing cases? The reality is that *McDonnell* only precludes prosecutions where the government's theory is that the public official agreed to provide

31. *See, e.g.*, United States v. Stevenson, 660 Fed. App'x. 4, 7 n.1 (2d Cir. 2016); United States v. Tavares, 844 F.3d 46, 56–57 (1st Cir. 2016); United States v. Fattah, No. 15-346, 2016 WL 7839022, at *14 (E.D. Pa. Oct. 20, 2016) (appeal filed); United States v. Bills, No. 1:14-cr-00135, 2016 WL 4528075, at *2–3 (N.D. Ill. Aug. 29, 2016).

32. Complaint, United States v. Percoco, No. 1:16-mj-06005-UA (S.D.N.Y. Sept. 20, 2016).

33. Felony Complaint, People v. Pougnet, No. RIF1700618 (Cal. Sup. Ct. Feb. 16, 2017).

34. Complaint, United States v. Reynolds, No. 16-20732 (E.D. Mich. Oct. 12, 2016).

35. Indictment, United States v. Mangano, No.16-cr-540(SJF) (E.D.N.Y. Oct. 18, 2016).

36. *Id.*

preferential access rather than an actual exercise of governmental power. However, prosecutors do not usually bring cases alleging that mere official access was the only goal of the corrupt scheme. Instead, prosecutors allege that the corrupt scheme involved at least the *intended* exercise of governmental power to benefit the briber payer, regardless of whether the scheme was ultimately successful. Such an allegation will survive a motion to dismiss,[37] and the existence of circumstantial evidence will get the case before a jury which may very well be inclined to find that the object of the alleged scheme consisted of something more than an effort to get a few meetings.

In fact, too much focus on the particular lesson of *McDonnell* could distract practitioners from potentially more viable defenses to public corruption cases. One practical way to analyze public corruption cases is to conceptualize the *quid pro quo* as three legs of a stool.[38] The *quid* is the thing of value provided to the public official; the *quo* is the "official action" by the public official; and the *pro* is the intention that one thing was in exchange for the other. If one leg is weak, then the other two legs will need to bear additional weight. For example, if there is little evidence of a deal between the payer and the public official (the *pro* is weak), then the prosecution will want to show that the thing of value was a "paradigmatic" bribe and that the public official performed a clear exercise of governmental power which benefited the payer.[39] Similarly, if there is minimal evidence that the payer provided something of value to the public official or, for example, what he provided too closely resembles a legal campaign contribution (the *quid* is weak), then the prosecutor would be pressed to show that the public official took obvious official action and there was a clear deal between the public official and the payer that the public official would do this in exchange for something from the payer.[40]

37. *See* United States v. Lee, No. 1:15CR445, 2016 WL 7336529, at *4 (N.D. Ohio Dec. 19, 2016); United States v. Jones, No. 5-15-CR-324-F-1, 2016 WL 5108013, at *5 (E.D.N.C. Sept. 19, 2016).

38. Arlo Devlin-Brown & Erin Monju, *Public Corruption Prosecutions and Defenses Post-'McDonnell'*, N.Y.L.J. (Jan. 30, 2017), http://www.newyorklawjournal.com/id=1202777763569/Public-Corruption-Prosecutions-and-Defenses-PostMcDonnell.

39. *See* Skilling v. United States, 561 U.S. 358, 411 (2010).

40. *Compare* McCormick v. United States, 500 U.S. 257, 273–74 (1991) (requiring an explicit *quid pro quo* for case involving campaign contributions), *with* Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) (indicating that "winks and nods" constituted mutual intent for case involving cash bribes); *see also* Transcript of Jury Trial Proceedings, United States v. Ireland, No. 1:16-cr-00203-JEJ, at 4, 9 (M.D. Pa. Mar. 27, 2017) (requiring an explicit *quid pro quo* in a campaign contribution case, while acknowledging that an implicit *quid pro quo* would suffice for non-campaign contribution cases).

McDonnell's outcome fits neatly into this analysis because the preferential access that the governor provided was not exactly morally opprobrious and looked more like "politics as usual" (the *quo* was weak). This meant that much greater weight fell on the other two legs of the stool if the prosecution hoped to withstand challenge, and they could not support it, at least not to the Court's satisfaction. There was no damning testimony about a "backroom deal" between McDonnell and the businessman, for instance, which could have compensated for the fact that the official acts McDonnell actually provided were open to doubt. And the fancy gifts, while distasteful, were not as paradigmatically a bribe as cash hidden in a suitcase; indeed, under Virginia law, the gifts arguably might not even need to be disclosed.[41] The weakness in the one leg of the stool (and the lack of overwhelming strength of any other one) was ultimately fatal to the case. What likely looked and felt like corruption to the jury may have been too close to politics as usual (in particular, the *lawful* preferential access provided to campaign donors) to a Supreme Court wary of far-reaching statutes and increasingly distrustful of prosecutorial discretion.

Indeed, it is *McDonnell*'s fundamentally cynical view of the culture of our political system that may be most significant. Read alongside the Court's campaign finance decisions, a picture is presented of a political reality in which money for access is normal and even an essential feature of a political system in which donations to political campaigns are protected speech. Against this rather dark view of what is to be expected in a representative democracy, the Supreme Court's unanimous expression against criminalizing the distasteful but fundamental is understandable.[42] This signals to Congress that, if the goal is to revise what politics as usual entails, the onus is on the legislative branch to expand the reach of the corruption law further into the political arena. And in the face of legislative disinterest, the onus is on the citizenry to push for desired reforms. Ultimately, in a healthy democracy, it always is.

And that leads us here. At a time when trust in public officials is empirically low and we hear slogans like "Drain the Swamp,"[43] a

41. *See* VA. CODE ANN. § 2.2-3114 (West 2016) (outlining the framework and procedures for disclosure); VA. CODE ANN. § 2.2-3117 (West 2017) (governing disclosure forms).

42. The Court only went so far as to acknowledge that "this case is distasteful" and that "it may be worse than that." McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016). It concluded that it was instead concerned with "boundless interpretation of the federal bribery statute" rather than "tawdry tales." *Id.*

43. Press Release, Donald J. Trump for President, Inc., Trump Pledges to Drain the Swamp and Impose Congressional Term Limits (Oct. 18, 2016), https://www.donaldjtrump.com/press-releases/trump-pledges-to-drain-the-swamp.

Symposium like this is critical to helping us understand, first, where we are; second, where we ought go; and third, how best to get there.