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The Hypocrisy of Prosecuting Domestic Political Corruption Cases Post McDonnell v. United States

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I. INTRODUCTION

Commenters have lamented the impact of the Supreme Court's decision in *McDonnell v. United States*.[1] Yet, absent from the discussion of *McDonnell*'s impact is acknowledgement of the potential hypocrisy such an opinion has created in the DOJ's effort to combat corruption both domestically and abroad. Through *McDonnell,* The United States Supreme Court has made it difficult to prosecute political corruption within this country.[2] In the meantime, our own legislature has made it relatively easy to prosecute Americans involved in similar corruption practices overseas through the Foreign Corrupt Practices Act.[3]

Now, thanks to the Supreme Court's ruling in *McDonnell,* some of the same conduct that is legal under *McDonnell* is illegal under the Foreign Corrupt Practices Act. This comment will compare the current state of domestic bribery law post-*McDonnell,* with the law governing FCPA prosecutions, eventually concluding that conduct potentially prosecutable that occurs abroad is deemed lawful when it occurs domestically. This enforcement gap is a largely ignored consequence of *McDonnell,* but one which threatens to undermine government efforts to discourage domestic bribery, while also prosecuting foreign bribery.

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[1] Alan Feur, *Why Are Corruption Cases Crumbling? Some Blame The Supreme Court*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/nyregion/menendez-seabrook-corruption-cases-crumbling-.html

[2] In *McDonnell v. United States*, the United States Supreme Court made it more difficult to prosecute domestic bribery through their narrow reading of the official act standard in 18 U.S.C. 201. Eric Lipton & Benjamin Weiser, *Supreme Court Complicates Corruption Cases From New York to Illinois*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/politics/supreme-court-complicates-corruption-cases-from-new-york-to-illinois.html

[3] Mike Koehler, FOREIGN CORRUPT PRACTICE ACT STATISTICS, THEORIES, POLICIES AND BEYOND, 65 Clev. St. L. Rev. 157 (2017).

Section II of this comment will explore 18 U.S.C. § 201, the Federal Bribery statute at issue in *McDonnell*. This section will examine the differences between 18 U.S.C. § 201's interpretation of the official act standard pre- and post-*McDonnell*. This analysis of the pre- and post-*McDonnell* landscape will show that the Supreme Court's ruling radically changed how prosecutors charge and convict those who engaged in bribery while in office.

Section III of this comment will discuss the application of *McDonnell*, particularly analyzing whether Courts have determined if the official act standard applies to the Foreign Corrupt Practices Act. In examining the application of *McDonnell* with regards to the FCPA, this comment will analyze the Second Circuit's *United States v. Seng* decision. In *Seng*, the Second Circuit concluded that *McDonnell* does not impact FCPA prosecutions.

With *Seng* considered, Part IV of this comment will explore instances where a politician's actions, which would now be considered lawful under *McDonnell*, could be illegal under the FCPA if they instead related to a foreign official, instead of an American politician. This comment will conclude by suggesting that the legislature re-draft the portion of 18 U.S.C § 201 that involves domestic bribery to conform with the Foreign Corrupt Practices Act so not to allow activity we deem illegal abroad to occur unchecked in the United States.

II. BACKGROUND

a. 18 U.S.C. § 201: A Federal Prosecutor's Roadmap to Proving Domestic Bribery of Public Officials

Section 201 of Title 18 is entitled "Bribery of Public Officials and Witnesses".[4] This statute criminalizes the receipt of bribes for those "acting for or on the behalf of the United States."[5]

[4] 18 U.S. Code § 201.
[5] *Id.*

Essentially, Section 201 makes it a crime for a public official to directly or indirectly demand, seek, receive, accept, or agree to receive or accept anything of value in exchange for being influenced in the performance of an official act.[6] Section 201 of Title 18 however is comprised of two distinct offenses, and in common parlance only the first of these is true "bribery".[7]

More specifically, the first offense, codified in section 201(b), prohibits the giving or accepting of anything of value to or by a public official, if the thing is given with the intent to influence an *official act*, or if it is received by the official in return for being influenced.[8] Similarly, Section 201(c) prohibits a public official from accepting the thing of value, if he does so for or because of any official act.[9]

An essential part of the statute is thus what constitutes an official act because an action violates the statute is if is given to influence the performance of an official act.[10] Within the statute an official act is defined 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."[11]

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[6] *Id*.
[7] The two offenses codified in 18 U.S. Code differ § 201 differ slightly. These differences converge on how close a connection there is between the giving (or receiving) of the thing of value, on the one hand, the doing of the official act, on the other. If the connection is direct (i.e. money was given to ensure an official act was committed) the crime is bribery and section 201(b)(1) and (2) were violated. On the other hand, if the connection was looser (i.e. money was given after an official act was taken as a thank you) the action is considered a gratuity, which is charged under section 201(c). This comment will focus on the bribery aspect of the statute. The United States Department of Justice Criminal Resources Manual, BRIBERY OF PUBLIC OFFICIALS (available at: https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials) (Last updated January 17, 2020).
[8] *Id*. The United States Department of Justice Criminal Resources Manual, BRIBERY OF PUBLIC OFFICIALS (available at: https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials)
[9] The United States Department of Justice Criminal Resources Manual, Bribery of Public Officials (available at: https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials)
[10] 18 U.S. Code § 201
[11] §201(a)(3).

Though prosecutors usually do not charge public officials under 18 U.S.C. § 201[12], all public corruption prosecutions involve proving that a public official performed an "official act," and courts turn to the official act definition in the bribery statute, § 201(a)(3), as discussed above. Therefore, to understand the full extent of 18 U.S.C. § 201 it becomes useful to know what the official act standard was before *McDonnell* because this standard greatly influenced what did and did not constitute an illegal bribe in domestic prosecutions. Understanding this change will show just how monumental the *McDonnell* decision was in the domestic bribery sphere.

b. The Pre-*McDonnell* Landscape: A Court That is Slowly Eroding Corruption Cases

In the last two decades, the United States Supreme Court has slowly eroded the country's body of corruption laws, through an endorsement of the criminalization of politics critique.[13] The criminalization of politics critique states that prosecuting state and local corruption has been assumed by United States Attorneys, who have at their disposal an array of broadly worded bribery statutes.[14] Proponents of the criminalization critique argue that this combination can become dangerous, leading to partisan prosecutions brought by politically motivated prosecutors.[15] The criminalization critique goes on that these very tools are being used against political practices that are essential to representative government.[16] Therefore, instead of improving the government these

[12] Section 201 criminalizes the receipt of bribes on the part of federal officials, but is limited to those "acting for or on behalf of the United States." In addition, 201 does not have the inherent "honest services" aspect so prosecutors will often charge those who are public officials under 18 U.S.C. § 1346. See Craig A. Raabe & Sean Johnston, *It's a Matter of Bribery*, BUS. L. TODAY, Mar.–Apr. 1999

[13] Deborah Hellman, A Theory of Bribery, 38 Cardozo L. Rev. 1947 (Aug. 2017). *See e.g.*, George Brown, MCDONNELL AND THE CRIMINALIZATION OF POLITICS, 5 Va. J. Crim. L. 2; McDonnell and the Criminalization of Politics, Matt Zapotosky, *The Bob McDonnell effect*, WASH. POST (July 3, 2017), https://www.washingtonpost.com/world/national-security/the-bob-mcdonnell-effect-the-bar-is-getting-higher-to-prosecute-public-corruption-cases/2017/07/13/5ac5745c-67e6-11e7-9928-22d00a47778f_story.html?utm_term=.4da363868d98 [https://perma.cc/M3PM-LF9Z] ("A federal appeals court's decision to overturn the convictions of former New York State Assembly speaker Sheldon Silver shows how public corruption cases have become much more difficult to substantiate in the wake of a Supreme Court decision narrowing what qualifies as corruption . . . .")

[14] Brown, *supra* note 13.

[15] See generally NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 167-71, 280-90 (6th ed. 2015).

[16] Brief for American Center for Law and Justice as Amicus Curiae Supporting

prosecutions are undermining it.[17] The criminalization of politics critique has gained traction over the years.[18] Through this shift, the bar has been raised when it comes to prosecuting politicians accused of dabbling in suspicious behavior.[19] In fact, the Court's actions in the past two decades lending credence to this critique have had real consequences, resulting in what now closely resembles a prosecutorial inability to challenge public corruption.[20]

Before *McDonnell*, the last time the Supreme Court addressed this bribery statute was in *United States v. Sun-Diamond Growers of California*.[21] In *Sun-Diamond*, the Court required the prosecution to prove a quid pro quo – that something of value was given in exchange for an official act.[22] In the case, Sun-Diamond was a trade association that engaged in marketing and lobbying activities on behalf of its members.[23] The government alleged Sun-Diamond gave the United States Secretary of Agriculture Michael Espy illegal gifts in violation of the federal gratuities statute.[24]

The Supreme Court considered the question of whether a conviction under the illegal gratuity statute required any showing beyond the fact that a gratuity was given because of the recipient's official position.[25] The Court held that in order to prove a violation under the statute, the Government needed to show a link between the thing of value conferred upon a public official and a specific 'official act' for or because of which it was given.[26] In essence, the Court found that

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Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).
[17] Brown, *supra* note 13.
[18] See, e.g., Edwin M. Yoder, THE PRESIDENCY AND THE CRIMINALIZATION OF POLITICS, 43 St. Louis U. L.J. 749 (1999) (discussing post-Watergate "reforms" that have led to the criminalization of normal political behavior)
[19] *Id*.
[20] See generally Harvey Silverglate and Emma Quinn-Judge, Tawdry or Corrupt? McDonnell Fails to Draw a Clear Line for Federal Prosecution of State Officials, 2016 Cato Sup. Ct. Rev. 189; Alan Feur, *Why Are Corruption Cases Crumbling? Some Blame The Supreme Court*, N.Y. Times (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/nyregion/menendez-seabrook-corruption-cases-crumbling-.html
[21] 526 U.S., 405 401 (1999).
[22] *Id*.
[23] The members of the Sun Diamond Trade Association were growers of raisins, figs, walnuts, prunes, and hazelnuts. *Id*.
[24] Among these gifts were tickets to the U.S. Open Tennis Tournament, luggage, meals, and other expensive gifts, totaling approximately $6,000 in illegal gratuities. *Id*.
[25] *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. at 401.
[26] *Id*. at 413.

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 under this statute.[27]

Sun Diamond was one of the first indicators of the criminalization of politics critique coming to life in the Court's dismantling of federal public corruption cases.[28] Now, prosecutors needed to show a link between the thing of value being given and an official act being performed.[29] After *Sun-Diamond* it was no longer enough for the prosecution to allege that the gift was given to build goodwill with a public official in hopes that he or she would remember that gift when voting on legislation or drafting prohibition.[30] It has been suggested that the Court made this determination because it was worried about setting a dangerous precedent in public corruption cases, once again highlighting the aforementioned criminalization of politics critique at the forefront of this movement.[31] In its articulation of this criminalization of politics critique, the Court worried that if these gifts could be criminalized, could all else token gifts also be criminalized as a result?[32]

In *Sun-Diamond*, the Court took away some of the government's ability to prosecute politicians for accepting minor gifts given to them by businesses, potentially signaling that there was more to come.[33] The Court did not, however, address what constitutes an official act under the statute, and this ambiguity became the primary issue in *McDonnell v. United States*.[34]

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[27] *Id*.
[28] Brown, *supra* note 13.
[29] *Sun-Diamond*, 526 U.S. at 414.
[30] Jacob Eisler, MCDONNELL AND ANTI-CORRUPTION'S LAST STAND, 50 U.C. Davis L. Rev. 1619, 1637 (2017).
[31] George D. Brown, Putting Watergate Behind Us - Salinas, Sun-Diamond, and Two Views of the Anticorruption Model, 74 Tul. L. Rev. 747, 751-56 (2000)
[32] *Id*. at 413.
[33] Professor Teachout regards Sun-Diamond as a significant case with extensive ramifications stating that it states that "it set the table for the Court" in many upcoming decisions. Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (2014) at 229.
[34] 136 S. Ct. 2355, 2365 (2016).

III. *MCDONNELL V. UNITED STATES*: NEW TERRAIN IN FEDERAL CORRUPTION LAW

McDonnell v. United States drastically changed the standard for prosecuting public officials engaged in domestic bribery.[35] In 2014, Governor Robert McDonnell of Virginia was indicted for accepting payments, loans, gifts, and other things of value from a wealthy Virginia businessman, Johnnie Williams ("Williams"), and his company ("Star Scientific") in exchange for acting on an as-needed basis, and as opportunities arose, to legitimate, promote and obtain research studies for Star Scientific's products.[36]

McDonnell was charged with Honest Services Fraud[37] and Hobbs Act Extortion[38] for accepting these lavish gifts from Williams.[39] As mentioned, the theory underlying both the honest services fraud and the Hobbs Act Extortion charges was that McDonnell accepted bribes from Williams in exchange for assisting Williams in promoting his company's products.[40] Though McDonnell was not being tried under 18 U.S.C. § 201, both parties to the action stipulated that the bribery at issue in the case needed to be defined by this statute.[41] Specifically, the stipulation meant that the jury would need to determine if McDonnell committed "official acts" as defined under 18 U.S.C. § 201(a)(3) in return for William's favors.[42] Therefore, in order to convict McDonnell, the

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[35] Chris Cillizza, *The Bob McDonnell Supreme Court Ruling Makes Convicting Politicians of Corruption Almost Impossible*, WASH. POST (June 27, 2016), https://www.washingtonpost. com/news/the-fix/wp/2016/06/27/the-bob-mcdonnell-scotus-ruling-proves-that-its-al most-impossible-to-convict-politicians-of-corruption/?utm term=.022989fcd793

[36] *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016). (quoting Supp. App. 46).

[37] To be guilty of violating the honest services fraud statute one must owe a duty of honest service to someone and have deprived that person, or that person's entity of the duty owed by accepting a bribe or kickback from another person. 18 U.S.C. § 1346. Add another sentence or two about this regularly being used to prosecute politicians and those bribing them.

[38] The Hobbs Act prohibits public officials from obtaining property "under color of official right" or using their position of authority to extort property. 18 U.S.C. § 1951.

[39] *McDonnell*, 136 S. Ct. at 2365.

[40] *Id.*

[41] *Id.*

[42] Though not referenced by the Court, 18 U.S.C. 666 also prohibits bribery of state officials. *Id.*

government needed to prove that the Governor committed, or agreed to commit, an official act in exchange for the loans and gifts he received from Williams.[43]

To prove its case, the government asserted the McDonnell violated 18 U.S.C. § 201(a)(3) when he accepted loans and gifts in exchange for various favors he did for Williams. Specifically the government alleged that McDonnell committed at least 5 official acts. These acts consisted of: 1) Arranging meetings for Williams with Virginia government officials, who were subordinates of the Governor, to discuss and promote one of the drugs Williams was trying to promote: Anatabloc; 2) Hosting events at the Governor's mansion designed to encourage Virginia university researchers to pursue Star Scientific's research; 3) Contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine; 4) Promoting star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's mansion and 5) Recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs.[44] The District Court gave the government's proposed jury instruction, which stated that an official act included "acts that a public official customarily performs including those acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end."[45] After deliberating, the jury convicted Governor McDonnell on Honest Services Fraud and Hobbs Act Extortion Counts.[46]

[43] *Id.*
[44] *Id.*
[45] *McDonnell*, 136 S. Ct. at 2366.
[46] *Id.* at 2367. This comment does not discuss the other elements of McDonnell's appeal rejected by the Fourth Circuit and not taken up by the Supreme Court.

The Fourth Circuit unanimously affirmed this judgment, rejecting McDonnell's central argument that the District Court's definition of "official act" was too broad.[47] In his appeal McDonnell argued that the trial court's jury instructions were overtly broad and would render "virtually all of a public servant's activities 'official,' no matter how minor or innocuous."[48] The Fourth Circuit rejected this argument holding that when "when prosecuting a bribe recipient, the Government need only prove that he or she solicited or accepted the bribe in return for performing, or being influenced in, some particular official act" the official act does not need to be completed in order to convict.[49] The court continued that to the extent McDonnell made "any decision or took any action on these matters, the federal bribery laws intended those decisions and actions to be official.[50] The court concluded that the government met its burden in showing that McDonnell made a dishonest agreement with Williams and used the power of his position to influence decisions about research into Williams's drug Anatabloc.[51]After the Fourth Circuit's decision affirming the District Court's broad definition of the official act standard, the Supreme Court granted certiorari, signaling to court watchers the Court may continue to limit the legal scope of what it considers public corruption.[52]

In a unanimous decision, the Supreme Court reversed the Fourth Circuit, and determined that McDonnell had not committed any official acts.[53] In doing so, the Court created a two-part test to determine if an action constituted an official act under 18 U.S.C. § 201, holding that in order

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[47] *McDonnell*, 792 F.3d, 478, 520 (4th Cir. 2015) (holding that the District Court's instruction of official act properly limited the illegal acts to the statutory definition).
[48] *Id* at 506.
[49] *Id* at 510.
[50] *Id*. at 516 (citing 18 U.S.C. § 201(a)(3)).
[51] *Id*.
[52] *United States v. McDonnell*, 792 F.3d 478, 487 (4th Cir. 2015), cert. granted in part, 136 S. Ct. 891 (2016), vacated, 136 S. Ct. 2355 (2016); *see also* Robert Barnes, *Supreme Court Will Review Corruption Conviction of Former Va. Governor Robert McDonnell*, WASH. POST (Jan. 15, 2016) (https://www.washingtonpost.com/politics/courts_law/supreme-court-will-review-corruption-conviction-of-former-va-governor-robert-mcdonnell/2016/01/15/e281ede0-b3_c8-11e5-a76a-0b5145e8679a_story.html)
[53] *McDonell*, 136 S. Ct. at 2367

to prove an official act the government must: 1) identify some "question, matter, cause, suit, proceeding or controversy" involving a formal exercise of governmental power" that is pending and may be brought before a government official; and 2) prove that the official made a decision or took action on that matter (or at least agreed to do so).[54] According to the unanimous Court, none of McDonnell's actions satisfied this two-part test.[55] The Court thus remanded the matter to the District Court for a retrial of McDonnell under this new, heightened standard.[56] Federal prosecutors in the Eastern District of Virginia chose not to retry the Governor.[57]

In creating this standard, the Supreme Court significantly narrowed the official act requirement to prove quid pro quo scenarios.[58] The Court found that "setting up a meeting, talking to another official, or organizing an event, without more, are not official acts in and of themselves".[59] Now, an official act became a much more difficult standard to meet. In coming to this ruling, the Court noted that if McDonnell's conviction stood, politicians across the country would live in a state of fear, worried they would go to prison for even the most commonplace requests for assistance.[60] The Court determined that conscientious public officials arrange meetings for constituents, as well as contact other public officials on their behalf, all the time.[61]

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[54] *Id*.
[55] I*d*.
[56] *Id*.
[57] Matt Zapototosky, Rachel Weiner, and Rosalind Helderman, *Prosecutors will drop cases against former Va. governor Robert McDonnell, wife* THE WASH. POST (Sept. 8, 2016) https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html
[58] SOMETHING MORE: OFFICIAL ACTION AFTER McDONNELL v. UNITED STATES, 67 DePaul L. Rev. 705; See e.g., Chris Cillizza, *The Bob McDonnell Supreme Court Ruling Makes Convicting Politicians of Corruption Almost Impossible*, WASH. POST (June 27, 2016), https://www.washingtonpost. com/news/the-fix/wp/2016/06/27/the-bob-mcdonnell-scotus-ruling-proves-that-its-al most-impossible-to-convict-politicians-of-corruption/?utm term=.022989fcd793.
[59] *McDonnell*, 136 S. Ct. at 2361.
[60] *Id* at 2365 (determining that "[f]or better or for worse, it puts at risk behavior that is common, particularly when the quid is a lunch or a basketball ticket, throughout this country).
[61] Tara Malloy, Sumposium: Is it Bribery or "The Basic Compact Underlying Representative Government"? SCTOUSblog (June 28, 2016, 4:03 PM), http://www.scotusblog.com/2016/06/symposium-is-it-bribery-or-the-basic-compact-underlyingrepresentative-government ("As all Hamilton fans know, it pays to be in "The Room Where It Happens.' Taken to its logical end, the Court's approach permits officials literally to put "access' up for sale … .") (analogizing how the concept of access approved or validated by the Court goes beyond a general access).

As the Chief Justice wrote on behalf of the Court: "[t]his case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."[62]

a. The Ramifications of *McDonnell v. United States:* The Impact on Prosecutions Moving Forward

It should be noted that before *McDonnell* was even decided by the Supreme Court, lay and legal observers were touting its importance.[63] One reason for its significance is that Americans on both sides of the aisle want to keep corruption out of politics.[64] In fact, in a poll commissioned by the Public Affairs Council, Americans were asked what they hated most about politicians; the number one answer was political corruption.[65] *McDonnell*'s holding which impacted this hot-button issue prompted a number of varying responses. Some commentators asserted that *McDonnell* opened the door to a corrupt 'pay to play' culture" and the "selling [of] political office for personal gain."[66] Others praised it, declaring that the Court finally rejected "novel prosecution theories that convert traditional constituent services into federal crimes."[67]

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[62] *Id* at 2375.
[63] See, e.g., Harvey Silverglate, *Op-Ed, Politics as Usual Often Isn't a Crime*, BOS. GLOBE, May 6, 2016, https://www.bostonglobe.com/opinion/2015/05/06/politics-usual-often-isn-crime/o2NyNsC0Fq5ZCq6H6pG51K/story.html; George Will, Virginia's Former Governor Faces Prison Over Politics, Wash. Post, Jan. 6, 2016, https://www.washingtonpost.com/opinions/viriginias-former-governor-faces-prison-over-politics/201601/06/2af3ff74-b3e6-11e5-9388-466021d971de_story.html?utm_term=.8d91fa343d74.
[64] John Domen, *Here's what Americans — regardless of party — hate most about politicians* WASHINGTON'S TOP NEWS (Oct. 13, 2019) https://wtop.com/politics/2019/10/new-poll-finds-what-americans-hate-the-most-about-politicians/ ("[N]o. 1 and No. 2 on the list was a lack of political courage and corruption. The scores among democrats and republicans were almost identical.")
[65] The scores among republicans and democrats were almost identical. *Id*.
[66] Fred Wertheimer, Symposium: McDonnell Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens, SCOTUSblog (June 28, 2016, 12:38 PM), http://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent- corruption-and-protect-citizens
[67] Jeffrey Green & Ivan Dominguez, Symposium: Federal Criminal Statutes Are Not Blank Checks for Prosecutors, SCOTUSblog (June 28, 2016, 11:44 AM), http://www.scotusblog.com/2016/06/symposium-federal-criminal-statutes-are-not-blank-checks-for-prosecutors/

For purposes of this comment, however, the most important criticism comes in the form of what prosecutions of those politicians engaged in *McDonnell-esq* behavior will look like moving forward.[68] It is hard to argue that *McDonnell* does not make prosecuting public figures for political corruption more difficult. Therefore, one of the most prevalent critiques of the ruling is that prosecutors will be reluctant to indict corrupt public figures, potentially resulting in more political corruption throughout the Federal Government.[69] With the adoption of *McDonnell*, when prosecutors want to prove someone engaged in domestic bribery, they have a higher hurdle to clear.[70] Many argue that post-*McDonnell* proving these corruption cases will be close to impossible because the formalism advocated by the Court ignores what actually occurs in the real world.[71]

Americans are now left wondering exactly what would count as criminal corruption Post-*McDonnell*.[72] If lower courts extend the *McDonnell* standard to the other bribery and corruption statutes it is perhaps true that *McDonnell* was "one of the best decisions handed down in a long time for corruption defendants."[73] So, in understanding the impact of *McDonnell* it is important to

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[68] Supra Note 65; Brent Kendall, SUPREME COURT'S BOB MCDONNELL RULING COULD AFFECT OTHER CORRUPTION CASES, Wall St. J. (June 27, 2016), https://www.wsj.com/articles/supreme-courts-bob-mcdonnell-ruling-could-affect-other-corruption-cases-1467042298

[69] Almost 7 out of 10 people believe the government is failing to fight corruption, up from half in 2016. TRANSPARENCY INTERNATIONAL (Dec. 12, 2017) https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes; Fred Wertheimer, Symposium: McDonnell Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens, SCOTUSblog (June 28, 2016, 12:38 PM), http://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens

[70] PANELS: How Has McDonnell Affected Prosecutors' Ability to Police Public Corruption? What Are Politicians And Lobbyists Allowed To Do, And What Are Prosecutors Able To Prosecute? 38 Pace L. Rev. 707

[71] As discussed, the test of whether something is a bribable official act is whether it is the kind of the activity that can be put on an agenda, tracked for progress and then checked off as complete. The few politicians who prosecutors may be able to convict under the official act standard will likely not be careless enough to put together "corruption to do lists." Daniel Brovman, QUID PRO NO: WHEN ROLEXES, FERRARIS AND BALL GOWNS ARE NOT POLITICAL CURRENCY, 92 S. Cal. L. Rev. 170, 184 (November 2018);

[72] After McDonnell it is likely that Federal prosecutors will now bring fewer public corruption cases, knowing a higher bar must be met. The Court through McDonnell made life easier for corrupt officials everywhere. https://www.washingtonpost.com/world/national-security/the-bob-mcdonnell-effect-the-bar-is-getting-higher-to-prosecute-public-corruption-cases/2017/07/13/5ac5745c-67e6-11e7-9928-22d00a47778f_story.html (quoting Randall Eliason, GW Law Professor and Former Federal Prosecutor)

[73] Jimmy Vielkind, *Silver retrial will test court's notion of 'official act'* POLITICO (April 30, 2018) (available at: https://www.politico.com/states/new-york/albany/story/2018/04/30/silver-retrial-will-test-courts-notion-of-official-act-39117)

consider whether lower courts prescribe the official act standard to other bribery laws and continue to rebrand corruption.[74] These courts' reading of *McDonnell* will thus impact how prosecutors are able to combat domestic bribery both domestically and abroad.[75]

IV. THE APPLICATION OF THE *MCDONNELL* STANDARD

As of April 4, 2018, *McDonnell* has been cited 102 times in federal decisions, including by every federal circuit court, and in nine state court decisions across seven states.[76] Since its enactment, the Third[77], Fifth[78], Sixth[79] and Eighth Circuits[80] all needed to determine if the official act standard applied to other corruption statutes. All of these courts interpreted the *McDonnell* official act standard narrowly.[81] In answering these important questions, which will undoubtedly shape *McDonnell's* legacy, the Circuits notably declined to extend the official act standard to other anti-corruption statutes.[82]

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[74] Ciara Torres-Spelliscy, DEREGULATING CORRUPTION, 13 Harvard L. & Pol'y Rev. 471 (2019).
[75] The broad reading of McDonnell would mean that the decision is highly significant as both a guidepost for federal prosecution of state and local officials for corruption and as a broader statement about the nature of representative governance. See generally Jacob Eisler, McDonnell and Anti-Corruption's Last Stand, 50 U.C. Davis L. Rev. 1619 (2017).
[76] Several state decisions, and some federal decisions, cite McDonnell for unremarkable principles of statutory construction. Other cases have applied the new "official act" definition to reverse federal prosecutions where courts instructed jurors using a pre-McDonnell official act definition. Amie Ely, WHAT MCDONNELL V. UNITED STATES MEANS FOR STATE CORRUPTION PROSECUTORS The National Association of Attorneys General https://www.naag.org/publications/nagtri-journal/volume-3-number-2/what-mcdonnell-v.-united-states-means-for-state-corruption-prosecutors.php
[77] *United States v. Ferriero*, 866 F.3d 107, 12728 (3d Cir. 2017) (declining to apply McDonnell standard derived from § 201 to state bribery), cert.denied, 138 S. Ct. 1031 (2018).
[78] *United States v. Reed*, 908 F.3d 102, 111 113 (5th Cir. 2018) (declining to apply McDonnell to wire fraud conviction because troublesome concept of an 'official act' was not an element of that crime, and further observing fellow circuits' reluctance to extend McDonnell beyond the context of honest services fraud and the [general] bribery statute).
[79] *United States v. Porter*, 886 F.3d 562, 565 (6 Cir. 2018) ((In McDonnell, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here [i.e., § 666].)
[80] *United States v. Maggio*, 862 F.3d 642, 646 n.8 (8th Cir. 2017) (declining to revisit precedent holding that § 666 requires no nexus between charged bribe and federal funding, explaining McDonnell had nothing to do with § 666)
[81] *Effect of McDonnell v. U.S. Definition of "Official Act" upon Bribery Prosecution Involving Public Official Under 18 U.S.C.A. § 20132* A.L.R. Fed. 3d. 6.
[82] *Id*.

In fact, there has not been a Circuit Court that *has* extended the *McDonnell* official act standard to another corruption statute outside of 18 U.S.C. § 201, despite the many United States statutes that require the official act standard.[83] Most recently, the Second Circuit was faced with this very question, only now implicating a new federal corruption statute, one that is likely the most similar to 18 U.S.C. § 201, but involves foreign actors, rather than United States citizens.[84] This statute is the Foreign Corrupt Practices Act ("FCPA").[85]

a. The Foreign Corrupt Practices Act: Prosecuting Bribery Occurring Abroad

For bribery occurring outside of the United States, to convict someone engaged in illegal activity, the Department of Justice uses the FCPA.[86] The FCPA was passed by Congress in 1977 as the first law in the world that governed domestic business conduct with foreign government officials in foreign markets.[87] The Department of Justice prosecutes corruption outside of the United States because given the global nature of the economy. The Department understands that corruption abroad poses a serious threat to American citizens and companies that are trying to compete in a fair and transparent marketplace.[88]

The FCPA is remarkably similar to 18 U.S.C. § 201.[89] First, the two statutes have similar purposes. The FCPA was enacted for the purpose of making it unlawful for certain classes of people to make payments to foreign government officials to assist in obtaining or retaining

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[83] *Id*.
[84] "We also note that the text of 18 U.S.C. § 201(b) is higher similar to that part of the FCPA that follows the term 'corruptly.'" *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Phillippe S.E. Schreiber*, 327 F.3d 173 (2d Cir. 2003).
[85] 15 U.S.C. §§ 78dd-2(a)(1), 78dd-3(a)(1).
[86] A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (Nov. 14, 2012) (available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf)
[87] Mike Koehler, THE STORY OF THE FOREIGN CORRUPT PRACTICES ACT, 79 Ohio St. L.J. 929, 938 (2012).
[88] Supra note 84.
[89] Amy Deen Westbrook, ENTHUSIASTIC ENFORCEMENT, INFORMAL LEGISLATION: THE UNRULY EXPANSION OF THE FOREIGN CORRUPT PRACTICES ACT, 45 Ga. L. Rev. 489 (2011); Andrea Dahms & Nicolas Mitchell, FOREIGN CORRUPT PRACTICES ACT, 44 Am. Crim. L. Rev. 605 (2007); Tor Krever, CURBING CORRUPTION? THE EFFICACY OF THE FOREIGN CORRUPT PRACTICES ACT, 33 N.C. J. Int'l L. & Com. Reg. 83 (2007).

business.[90] Like 18 U.S.C. § 201, the primary objective of the FCPA is to reduce or eliminate illicit bribes made by U.S. citizens to foreign officials in order to induce unlawful action.[91] Next, the FCPA is also similar to 18 U.S.C. § 201 because the anti-bribery provisions of the FCPA prohibit individuals from offering or making corrupt payments to foreign government officials for the purpose of influencing the official in his or her official duties or securing an improper advantage in order to obtain or retain business.[92] This language is remarkably similar to that of 18 U.S.C. § 201, which prohibits almost identical behavior towards United States public officials.

Specifically, The FCPA makes it a crime to corruptly give a foreign official anything of value for the purposes of: 1) influencing any act or decision of such foreign official in his official capacity; 2) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official; 3) securing any improper advantage or inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.[93] The FCPA requires each of these quos to serve a particular purpose, meaning they assist the giver in "obtaining," "retaining," or "directing" business.[94]

For the purposes of this comment, it is important to note the business purpose test portion of the FCPA. The business purpose test states that the FCPA applies to payments intended to induce or influence a foreign official to use his position to assist in obtaining or retaining business for or with, or directing any business to, any person.[95] This provision is broadly interpreted to

[90] Dahms & Mitchell supra note 87.
[91] Dahms & Mitchell supra note 87.
[92] Andrea Dahms & Nicolas Mitchell, Foreign Corrupt Practices Act, 44 Am. Crim. L. Rev. 605 (2007); Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C. J. Int'l L. & Com. Reg. 83 (2007);
[93] 15 U.S.C. §§ 78dd-2(a)(1), 78dd-3(a)(1).
[94] *Id*.
[95] The United States Department of Justice Criminal Resources Manual, BRIBERY OF PUBLIC OFFICIALS (available at: https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials); see also United States v. Kay 513 F.3d 432 (5th Cir. 2007)

include: (a) winning a contract; (b) influencing the procurement process; (c) circumventing the rules for importation of products; (d) gaining access to non-public bid tender information; (e) evading taxes or penalties; (f) influencing the adjudication of lawsuits or enforcement actions; (g) obtaining exceptions to regulation; and (h) avoiding contract termination.[96] For example bribe payments made to secure favorable tax treatment to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test.[97]

In 2004, the U.S. Court of Appeals for the Fifth Circuit addressed the business purpose test in *United States v. Kay*.[98] In *Kay*, the court held that bribes paid to obtain favorable tax treatment – which reduced a company's customs duties and sales taxes on imports could constitute payments made to obtain or retain business within the meaning of the FCPA.[99] As stated, the congressional target of the FCPA was to eliminate bribery that was paid to improve the business opportunities of the payor or his beneficiary. But, like the federal corruption statutes in the United States, some view bribes as a necessary expense to succeed in a foreign country's environment, thus criticizing the business purpose test explained in *Kay*. These critics argue that the FCPA should not cover such bribes and the scope of the business purpose test should be construed narrowly if Americans want to actively compete in another country.[100]

[96] Supra note 93.
[97] Supra note 93.
[98] *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004)
[99] *Id*. at 741.
[100] Bribes are a "way of life" in developing countries. See, e.g., James Surowiecki, *Invisible Hand, Greased Palm*, THE NEW YORKER, May 14, 2012, available at http://www.newyorker.com/talk/financial/2012/05/14/120514ta--talk--surowiecki ("[F]ear of potential prosecution effectively raises the cost of doing business in high-corruption countries" and makes it difficult to enter a country's market.).

Despite these criticisms, enforcement of FCPA violations has been at an all-time high.[101] The FCPA now occupies center stage in the federal government's war on white-collar crime.[102] In fact, the Department of Justice has increased the number of its FCPA investigations sevenfold during the last three years.[103] That, experts believe, is just the beginning.[104] The DOJ has publicly announced its intention to vigorously enforce the FCPA and has hired an army of new prosecutors to handle only these types of cases.[105] Businesses are mindful of this shift in prosecutorial behavior towards FCPA violations and have tightened their own internal anticorruption policies in response.[106]

While FCPA enforcement is at an all-time high, *McDonnell* has made it more difficult than ever to prosecute politicians who are engaged in corrupt practices in our own country. This dichotomy thus begs the question, will the new vigor in prosecuting FCPA violations be quelled by *McDonnell*'s high bar of the official act standard? The Second Circuit was the first court to answer this question in *Seng v. United States*. [107]

b. *Seng v. United States*: Narrowing the *McDonnell* standard

[101] Andrea Dahms & Nicolas Mitchell, FOREIGN CORRUPT PRACTICES ACT, 44 Am. Crim. L. Rev. 605 (2007); Tor Krever, Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act, 33 N.C. J. Int'l L. & Com. Reg. 83 (2007)
[102] *2nd Circ.'s Seminal Rejection of FCPA Conviction Challenge*, Law360 Expert Analysis (August 28, 2019).
[103] Justin F. Marceau, A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act, 12 Fordham J. Corp. & Fin. L. 285 (2007);
[104] Michael Bixby, THE LION AWAKENS: THE FOREIGN CORRUPT PRACTICES ACT – 1955 TO 2010, 12 San Siego Int'l L.J. 89 (2010)
[105] In an October 2006 speech to the American Bar Association's FCPA Institute, Alice Fisher, then head of the DOJ's Criminal Division, announced an expanded doctrine of FCPA enforcement to "root out global corruption." She was quoted as saying "I want to send a clear message today that if a foreign company trades on U.S. exchanges and benefits from U.S. capital markets, it is subject to our laws." Alice Fisher, Assistant Attorney General, speech to the American Bar Association's Foreign Corrupt Practices Act Institute (Oct. 16, 2006) available at www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.
[106] 2nd Circ.'s Seminal Rejection of FCPA Conviction Challenge
[107] United States v. Seng, 934 F.3d 110, 117 (2d Cir. 2019).

The Second Circuit recently interpreted the *McDonnell* official act standard to determine if it extended to the official act needed in FCPA prosecutions. In *United States of America v. NG Lap Seng* the government alleged that the defendant ("Seng") paid two United Nations officials as part of a scheme to have the U.N. designate his real estate complex as the permanent site for its annual convention.[108] Specifically, Seng, a Chinese national, sought to develop his already extensive real estate portfolio into a multi-billion-dollar complex that would include hotels, luxury apartment buildings and a world-class convention center.[109]

Seng understood an annual U.N. conference would have broad attendance throughout both the private and public sectors and if he hosted this conference at his convention center it would enhance the use and value of the real estate in his new complex. [110] Thus, Seng engaged in a sustained effort over five years to bribe two U.N. officials: Francis Lorenzo, a U.S. Citizen serving as the Dominican Republic's Deputy Ambassador to the U.N. and, John Ashe, who, for the time during the bribery scheme, was serving as the President of the U.N.'s General Assembly.[111] The bribing began when Seng and Lorenzo met in March 2009. Soon after meeting, Seng named Lorenzo President of South-South News, a media organization he owned.[112] Lorenzo would be paid $20,000 a month to serve as President of South-South News.[113] Lorenzo testified at Seng's trial that he understood a portion of his salary, as well as many other payments from Seng, were bribes to secure a commitment for the UN's use of Seng's new convention center.[114] In short,

[108] *United States v. Seng*, 934 F.3d 110, 117 (2d Cir. 2019).
[109] *Id*.
[110] *Id*.
[111] The President of the General Assembly is the second-ranking position within the U.N. *Id*.
[112] *Id*.
[113] *Id*.
[114] *United States v. Seng*, 934 F.3d at 118.

Lorenzo understood that Mr. Seng was paying him in order to procure an official document from the United Nations which stated that the convention would be held at his convention center.[115]

To prove their case before a Southern District of New York jury, the prosecution argued that the *quid pro quo* elements of a Foreign Corrupt Practices violation are not limited to official acts, as construed by the Supreme Court in *McDonnell*.[116] The government argued that in order to be guilty of bribery, the U.N. Officials did not need to commit an official act as explained in *McDonnell*.[117] In fact, all the District Court said the government needed to prove was that Seng influenced or intended to influence these foreign officials, a standard similar to that of the pre-*McDonnell* era.

Once the District Court made clear that the government did not need to prove Seng engaged in bribery that led to an official act as under *McDonnell* the government put on a five-week trial producing evidence to show that Seng did indeed violate the FCPA.[118] The jury convicted Seng of, among other things, paying and conspiring to pay bribes and gratuities in violation of the FCPA.[119] On appeal, Seng argued that FCPA bribery required proof of an official act to satisfy the *McDonnell* standard.[120] Seng argued that his jury instructions regarding the FCPA conviction should have included the official act language described by the Court in *McDonnell*.[121]

The Second Circuit declined to extend McDonnell's "official act" requirement under Section 201 to the FCPA.[122] The court explained that while every bribery statute requires a q*uid pro quo*, Congress intentionally defined the particular *quids* and *quos* differently for each bribery

[115] Trial Tr. At 652; 671.
[116] *United States v. Ng Lap Seng*, 2018 U.S. Dist. LEXIS 83441 (S.D.N.Y. May 9, 2018).
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *United States v. Seng*, 934 F.3d 110, 117 (2d Cir. 2019).
[122] *Seng*, 934 F.3d at 120.

statute. Congress defined the *quids* and *quos* under the FCPA differently than they did under 18 U.S.C. 201.[123] The court determined that it did not need to supplement those Congressionally codified quos by adding the official act requirement proscribed by *McDonnell.* [124] In coming to this decision, the Seng court followed the precedent in *United States v. Boyland*.[125] Similar to the case at hand, in *Boyland*, the Court held that the *McDonnell* standard did not apply to another corruption statute because this statute was "more expansive than § 201."[126]

With the *Boyland* principle established, the Second Circuit in *Seng* continued along a similar statutory construction argument and held that the FCPA also does not require an official act to be proven under the *McDonnell* standard.[127] As mentioned, in the FCPA the Second Circuit found that Congress identifies four specified quos that it wanted criminalized under the FCPA.[128] The first FCPA *quo* references an "act or decision" of a "foreign official in his official capacity." [129] The court leaves open the possibility that while this may be understood as an official act, the FCPA does not force official capacity acts or decisions to a definitional list akin to that for official acts in 201(a)(3), as interpreted by *McDonnell.*[130] In 18 U.S.C. § 201, for example, the term "official act" is explicitly defined as a "controversy which may at any time be pending, or which may be by law brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[131] In the FCPA, an official act is only states that one violates the statute when "influencing any act or decision of such foreign official in his official capacity."[132]

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[123] *Id*.
[124] *Id*.
[125] *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017).
[126] *Id*.
[127] Seng at 118.
[128] *Id*.
[129] Gregory A Brower, Thomas Krysa, *Element of FCPA's Anti-Bribery Provision*, WASHINGTON LEGAL FOUNDATION LEGAL PULSE (Aug. 19, 2019) https://www.wlf.org/2019/08/19/wlf-legal-pulse/second-circuit-clarifies-quo-element-of-fcpas-anti-bribery-provision/
[130] *Id*.
[131] 18 U.S.C. § 201 (a)(3)
[132] 15 U.S. Code § 78dd–1(a)(1)(A).

Under *Seng*, the court determined that as long as the government has evidence that a party intended to influence an act or decision of a public official, or to secure an improper advantage for the party's company, the Second Circuit determined the prosecution can move forward. There is no need to prove that the bribee committed an official act, as in *McDonnell*.[133] The implications of *Seng* are important. This ruling signals that the government will likely continue to aggressively pursue FCPA prosecutions, even without evidence that the parties' conduct influenced official action.[134]

V. ARGUMENT: THE GAP

It is unsurprising that the defendant in *Seng* argued the more rigid, heightened standard of *McDonnell* on appeal, as it seems likely that under the official act standard, Seng would not be convicted.[135] As mentioned, *McDonnell*'s two-part test requires that the matter before the public official be a "question, matter, cause, suit, proceeding or controversy."[136] Merely hosting an event, meeting with other officials or speaking with interested parties is not an official act.[137] In *Seng*, the official act standard would likely not convict Seng, as the U.N. officials' actions were not "official enough" to meet the heightened standard.[138] The officials merely expressed strong public support for Seng and set up several meetings for him to move his process forward. All of these activities the Court in *McDonnell* held did not constitute an official act.[139]

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[133] Michael Volkov, *Second Circuit Affirms FCPA Conviction of Ng Lap Send and Rejects Application of Supreme Court's McDonnell Decision to FCPA* Volkov LLP (Sept. 3, 2019) https://blog.volkovlaw.com/2019/09/second-circuit-affirms-fcpa-conviction-of-ng-lap-seng-and-rejects-application-of-supreme-courts-mcdonnell-decision-to-fcpa/

[134] Matthew Sloan & Matthew Tako, *Second Circuit Declines To Extend McDonnell's 'Official Acts' Standard to FCPA Prosecutions* SKADDEN, ARPS LLP (Sept. 27, 2019), (available at: https://www.jdsupra.com/legalnews/second-circuit-declines-to-extend-97897/)

[135] *United States v. NG Lap Seng*, APPELLANT'S BRIEF, 2018 WL 4830223.

[136] *McDonnell*, 136 S. Ct. at 2369.

[137] *Id*.

[138] *United States v. NG Lap Seng*, Appellant's Brief

[139] *Id*.

So under *McDonnell,* a governor can demand that you pay him to promote a drug company's newest product.[140] But, on the other hand, after *Seng*, under the FCPA it seems that any American who engages in such practices abroad would likely be convicted, if charged.[141] The discrepancy is hard to ignore and seems to be a largely ignored consequence of the heightened *McDonnell* standard. Therefore, to further prove that this sort of corruption that occurs abroad is legal in our own country, the comment will conclude by exploring actions and real-world examples that are likely to be deemed acceptable under *McDonnell,* while potentially exposing the actors to liability under the FCPA, like the actions stated above in *Seng*.

a. Methodology

To determine if the FCPA prohibits more conduct abroad than the laws which govern our own politicians, this comment explores a small sampling of cases in which charges were dropped or lessened thanks to the heighted *McDonnell* standard. This comment will address three cases it will use as case studies. In each case, it will analyze only the precise charges that are likely not to fulfil the *McDonnell* official act standard. Only these charges are considered because pre-*McDonnell* these same public officials could have been convicted or changed for their actions. Now, such activities are suddenly deemed acceptable because they do not constitute an official act. Therefore, once those charges are determined, this comment will analyze each unique action, asking if the activity would constitute a crime under the FCPA, if it had involved a foreign official.

Since foreign officials are generally not able to be prosecuted in the United States,[142] for argument's sake this comment will hypothetically place the convicted politician as the foreign

[140] *McDonnell*, 136 S. Ct. at 2370.
[141] Bixby supra note 102.
[142] AD HOC COMMITTEE ON FOREIGN PAYMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Report on Questionable Foreign payments by Corporations: The Problem and Approaches to a Solution (1977) (recognizing Congress' broad jurisdiction over U.S. citizens abroad and noting that the FCPA would punish those who paid bribes but not the foreign officials who received them).

official who is receiving bribes. Similarly, the issuer of the bribe would be the American citizen who is attempting to advance his cause abroad. While not perfect, the overall hypothesis remains the same: conduct in the United States that is deemed legal is criminalized for being committed abroad. This section therefore looks to address whether someone could engage in conduct with a politician in the United States, and not get convicted under *McDonnell*, but then engage in the same conduct with a foreign official in another country and be convicted under the FCPA.[143] It seems that the answer is a resounding yes.

b. Case Study No. 1: Actions Similar to those that Occurred in *McDonnell v. United States*

First, there the activity at issue in *McDonnell*. As discussed previously and in *McDonnell*, Governor McDonnell received approximately $175,000 in loans, gifts and other benefits from a wealthy Virginia-businessman who was attempting to launch his new business, and wanted the then-Governor to help him.[144] Specifically, Williams, asked McDonnell for help attaining research to show his drug's health benefits.[145] But, Virginia's public universities could only perform the requested testing if they received state grants, which were controlled by McDonnell.[146] So, in exchange for lavish gifts, McDonnell agreed to introduce Williams to Virginia's Secretary of Health and Human Resources. A few months later, McDonnell's wife suggested Williams sit next to her husband at a rally, in which Williams bought her $20,000 worth of designer clothing as a thank you.[147] Williams then gave the McDonnells $65,000, in return for which the Governor set up more meetings for Williams to interact with state agencies in hopes that one of these agencies

[143] This comment does not consider the FCPA affirmative defenses listed at 15 USCS § 78dd-1(c).
[144] *McDonnell*, 136 S. Ct. at 2365.
[145] *Id*.
[146] *Id* at 2362.
[147] See *Id*.

would agree to do the research Williams was looking for.[148] At Mrs. McDonnell's suggestion, Williams also purchased the governor a Rolex watch.[149]

Finally, in August 2011, Governor McDonnell held a lunch at the Governor's mansion with university researchers to help launch William's new drug.[150] After this lunch, the McDonnells asked for another $50,000 loan.[151] Before giving the loan, however, Williams complained about the lack of progress in getting the necessary research. Taking matters into her own hands, Mrs. McDonnell emailed the Governor's counsel to express her husband's desire to "get this thing going" and Governor McDonnell held yet another reception for researchers.[152]

While the Supreme Court's decision suggested these acts might not be prosecutable, similar conduct would very likely raise red flags under the FCPA. Hypothetically, if McDonnell were a foreign actor and Williams were a U.S. citizen, Williams could have been charged with violating the FCPA. Under the FCPA, Williams could have been indicted for paying McDonnell in exchange for trying to get McDonnell to use his status as a politician to help get his company launched.

To prove a violation of the FCPA the government must prove intent.[153] The FCPA's anti-bribery provisions criminalize the transfer of money or other gifts to foreign officials and political actors with the intent to influence or obtain or retain business.[154] Therefore, to violate the FCPA, a defendant must possess the requisite mens rea, which is satisfied when acts are "knowing[ly],"

[148] *Id*.
[149] *McDonnell*, 136 S. Ct. at 2363.
[150] *Id*.
[151] *Id*.
[152] *Id*. McDonnell spoke to the researchers about the "scientific validity" of the supplement, "whether or not there was any reason to explore this further," and if it might "be something good for the Commonwealth."
[153] Intent is one of the more difficult elements of an FCPA violation to prove, because proving one's state of mind is often challenging.
[154] §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

"corruptly," or "willfully," committed.[155] The FCPA defines a "knowing" state of mind as one in which the person is aware that he is engaging in illegal conduct, or is aware or has a firm belief that an illegal circumstance or result exists or is "substantially certain to occur."[156] The intent is proven in Williams' trial testimony where he testified that the only reason he showered the first couple of Virginia with gifts was because he believed it would pay dividends to his company Star Scientific.[157]

Additionally, William's conduct would satisfy the other elements of the anti-bribery provisions under the FCPA. As mentioned, the business purpose test states that the FCPA applies to payments intended to induce or influence a foreign official to use his position to assist in obtaining or retaining business for or with, or directing any business to, any person.[158] The payments from Williams were just that, intended to induce or influence McDonnell [in this case, a foreign official] to use his position in order to assist Williams in obtaining or retaining business for or with any person. In this the researchers the governor had access to would the business Williams was looking to gain by bribing the governor. Further proving that Williams could have potentially been indicted for such behavior under the FCPA, the business purpose test is interpreted broadly.

c. Case Study No. 2: Actions Similar to those in the United States v. Jefferson – "Talking to other officials"

[155] Although the FCPA does not define the term "corruptly," the Senate Report for the statute states that "[t]he word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." S. REP. NO. 95-114, at 10 (1977); 15 U.S.C § 78dd-1(a), (g)(1) (2012) (for issuers)
[156] 15 U.S.C. § 78dd-1(f)(2)(A) (for issuers)
[157] "I expected what had already happened, that he would continue to help me move this product forward in Virginia." IV.JA.2355.
[158] The United States Department of Justice Criminal Resources Manual, BRIBERY OF PUBLIC OFFICIALS (available at: https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials)

Another example of conduct that would likely be deemed acceptable under *McDonnell* but would be potentially criminal under the FCPA are those actions described in *Jefferson v. United States*.[159] William Jefferson was a nine-time Democratic congressman from Louisiana who was convicted on 16 charges related to business dealings in Africa.[160] In *Jefferson*, among other dealings, Jefferson famously hid $90K in his freezer for the vice president of Nigeria.[161] Jefferson was sentenced to 13 years in prison after a jury convicted him of corruption charges in 2009.[162] However, soon after *McDonnell*, a judge ruled that in light of the Supreme Court's *McDonnell* decision, not all of Jefferson's behavior rose to the level of public corruption defined by the high court.[163] The court in *Jefferson* held that much of the evidence presented at trial did not support a finding that Jefferson engaged in official acts that rose to the level necessary to be convicted under the heightened *McDonnell* standard.[164] In fact, the Court held that his conviction for seven of the counts were erroneous under the new *McDonnell* standard.[165] These dropped convictions, however, are troubling and violate the FCPA had they involved a foreign official rather than a United States Congressman.

For example, in the longest running scheme, the "iGATE Technology scheme", Jefferson solicited money from the President of this technology company in exchange for his promotion of iGATE's technology to the Army and various West African countries.[166] iGATE Technology was a company that was looking to break into the military market, as well as several countries in West

[159] *United States v. Jefferson*, 289 F. Supp 3d 717 (E.D. Va. 2017).
[160] *Id* at 721.
[161] The Associated Press, *Ex-Congressman William Jefferson sentenced to 13 years in freezer cash bribe case in Louisiana*, THE DAILY NEWS (Nov. 13, 2009) https://www.nydailynews.com/news/national/ex-congressman-william-jefferson-sentenced-13-years-freezer-cash-bribe-case-louisiana-article-1.414600
[162] United States v. Jefferson, 289 F. Supp 3d 717 (E.D. Va. 2017)
[163] United States v. Jefferson, 88 F.3d 240 (3d Cir. 1996); Rachel Weiner, *Judge lets former Louisiana congressman William Jefferson out of prison*, Wash. Post (Oct. 5, 2017) https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html
[164] *Jefferson*, 88 F. Supp at 721.
[165] *Id*.
[166] *Id*. at 722.

Africa. The President of iGATE knew that Jefferson would be exposed to these officials because he was a Congressman. Therefore, the President of iGATE capitalized on this opportunity and decided to pay Jefferson to help him promote his business.[167] First, Jefferson met with several generals at his office to discuss the possible testing of iGATE technology at different military bases.[168] It should be noted that Jefferson arranged this meeting only after the President of iGATE reached out and asked for his assistance because at the time, iGATE was paying Jefferson to use his position to promote the technology.[169] Similarly, Jefferson met with a number of high ranking West African government officials and business people in hopes of promoting this iGATE technology he was being paid to indorse.[170] During all of these meetings, Jefferson made several encouraging statements about iGATE's technology, encouraging the military personnel and West African leaders to purchase it.[171]

But the District Court found that these trips did not constitute official acts.[172] The District Court held that because the government did not prove Jefferson did more to exert pressure on those he was securing the meetings up, no official act was committed. The court stated that "[a]greeing to set up meetings to provide constituents with information and expressing support for a project are not official acts and do not amount to the requisite "pressure" for criminal liability under *McDonnell*."[173] In addition, the court determined that while the decision to lead a private trade delegation did require Jefferson to disclose his activities to the House Ethics Committee and he did travel in capacity as Congressman, "leading a private trade delegation appears to be closer to

[167] *Id*.
[168] *Id*.
[169] *United States v. Jefferson*, 562 F. Supp 2d 687, 692 (Ed. Va. 2005).
[170] *Id*.
[171] *Id*.
[172] *United States v. Jefferson*, 289 F. Supp. 3d 717, 741 (E.D. Va. 2017).
[173] *Id*.

holding a dinner at the Governor's mansion as occurred in McDonnell than 'something in the nature of a lawsuit.'"[174]

The District Court made clear that much of what Jefferson was originally accused of did not meet the official act standard proscribed under *McDonnell* yet this very same conduct could violate the FCPA. h

d. Case Study No. 3: Actions Similar to those in *United States v. Silver* – Setting Up an Event

In 2015, the Government indicted Sheldon Silver on charges of honest services fraud, Hobbs Act extortion and money laundering.[175] In *Silver*, the government accused Silver, who was serving as speaker of the New York Assembly, of trading favors for legal fees.[176] In particular, the Government alleged that Silver abused his public position by engaging in two quid pro quo schemes in which he performed official acts in exchange for bribes and kickbacks.[177] Each scheme had the same premise: in exchange for Silver's actions as speaker he would receive bribes and kickbacks in the form of referral fees from third-party law firms.[178]

In the first scheme, Silver became "of counsel" for a law firm, which maintained an active personal injury practice.[179] Despite not doing any actual legal work, Silver received a salary and any referral fees for any cases he brought into the Firm.[180] Silver asked an acquittance of his, Dr. Robert Taub, to begin referring patients to him for legal representation.[181] Taub was hoping to

[174] *Id* at 738.
[175] *United States v. Silver*, 864 F.3d 102, 105 (2d Cir. 2017).
[176] Speaker of the Assembly was one of the most powerful public officials in the state of New York. *United States v. Silver*, 864 F.3d 102 (2d Cir 2017).
[177] *Id*.
[178] *Id*.
[179] *United States v. Silver*, 117 F. Supp 3d 461 (S.D.N.Y 2015).
[180] *Id*.
[181] *Id* at 463.

secure a relationship with Silver that would help him receive researching funding.[182] Although unaware of the specifics of the financial arrangement between Silver and the law firm, Dr. Taub testified that he believed Silver would benefit personally from the referrals he would send and he kept sending those referrals in hopes that Silver would help him attain research funding.[183] After receiving several referrals and several referral fees from Taub, Silver soon invited Dr. Taub to attend the State of the State ceremony at the New York State capitol.[184] He then put Dr. Taub in touch with one his staffers to discuss the status of Dr. Taub's grant request.[185] Eventually Silver secured two $250,000 state grants to support Dr. Taub's research.[186]

The second scheme the government alleged Silver took part in involved two New York real estate developers, both of whom depended heavily on favorable state legislation. As Speaker, Silver had considerable control over legislation. Silver convinced the developers to move their tax work to another law firm Silver worked with and received referral fees from.[187] Both developers testified that they gave their tax work to the firm Silver requested because they wanted to influence Silver's legislative work concerning real estate.[188] In total, over a period of about 18 years Silver received approximately $835,000 in fees from each law firm from his referral of the developers.[189]

In return for the kickbacks, Silver took a number of actions, both official and not, to benefit the developers. For example, Silver repeatedly voted as one of three members to approve the developers' requests for tax-exempt financing for many of its projects.[190] He also publicly opposed

[182] *Id*.
[183] *Id*.
[184] *Id* at 464.
[185] *United States v. Silver*, 117 F. Supp. 3d. 461, 464.
[186] *United States v. Silver*, 948 F. 3d 538, 562 (2d. Cir. 2020).
[187] *Id*.
[188] *Id* at 564.
[189] *Id*.
[190] *Id*.

the relocation of a methadone clinic that would be located near one of the developer's rental buildings.[191]

Unsurprisingly, a jury found Silver guilty on all counts.[192] He was sentenced to twelve years in prison.[193] After he was convicted, however, the Supreme Court issued its decision in *McDonnell*.[194] Silver then appealed his judgment of conviction and argued that the District Court's jury instructions are erroneous under *McDonnell*.[195] The Second Circuit agreed with Silver and held that the District Court's instructions did not comport with the new *McDonnell* standard.[196]

Particularly, the Second Circuit determined that what prosecutors said counted as an official act in the jury trial was too broad.[197] They determined that while the Government certainly did present evidence of acts that remain "official" under *McDonnell* the jury may have convicted Silver for conduct that also does not constitute an official act and is thus lawful.[198] The Second Circuit broke down what would and would not be an official act under the new *McDonnell* standard, creating a road-map for what prosecutors should attempt to convict Silver of in the new trial. For example, as discussed, after Silver started receiving referrals from Dr. Taub, Silver invited Dr. Taub to attend the State of the State ceremony at the New York State Capitol where he then put Dr. Taub in touch with one of his staffers to discuss the status of the doctor's grant request. The Second Circuit determined that this conduct would not be considered an official act because Silver was merely setting up meetings, which *McDonnell* explicitly allowed.[199] Therefore, the

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[191] *Id*.
[192] United States v. Silver, 184 F.Supp. 3d 33, 37 (S.D.N.Y. 2016)
[193] *Id*.
[194] *McDonnell*, 136 S. Ct. at 2365.
[195] *Silver*, 184 F. Supp at 39.
[196] Id.
[197] *Id*. The Second Circuit appealed to the Supreme Court, but it refused to hear the case which means that they likely agreed with the outcome that the instructions were too narrow, and the official act standard was properly applied. *United States v. Silver*, 864 F.3d 102, 105-106 (2d. Cir. 2017), cert. denied, 138 S. Ct. 738 (2018).
[198] *Silver*, 864 F.3d at 119.
[199] *Id*.

prosecutors chose not to retry it. This same conduct would, however, be likely problematic under the FCPA because Dr. Taub was using Silver to get into important rooms and then was put in touch about his grant request.[200] These invitations and introductions only occurred after Taub made it clear he would send Silver referrals and would likely satisfy the FCPA's business purpose test. This conduct would satisfy the business purpose test because Taub recognized the only reason he sent these referrals to Silver's firm was because he wanted Silver to act in his official capacity.

In addition, the court concluded that Silver's opposition to a methadone clinic may not have been an official act. While a rational jury could have found that this opposition was an official act, it seems unlikely. The only action Silver took regarding the clinic was to draft a letter to be distributed publicly that expressed his strong opposition to the clinic. The Court in *McDonnell* held that taking a public position on an issue, by itself, is not a formal exercise of governmental power, and is therefore not an official act under *McDonnell*.[201] However, if Silver was a foreign official and American businessmen in his country were giving him payments to write letters on official letterhead, it seems almost certain that these businessmen could be prosecutable under the FCPA because they were bribing an official to use his position for an improper purpose.

VI. CONCLUSION

To say the least, it is concerning that actions our own Supreme Court have deemed legal in the United States could lead to criminal liability if committed on foreign soil. Had the Second Circuit extended *McDonnell* to the FCPA however, prosecuting corruption abroad, would be just as difficult, if not more difficult than it is domestically now thanks to the Supreme Court's ruling in

[200] Id at 125.
[201] *McDonnell*,136 S. Ct. at 2336.

McDonnell. To address this gap, the legislature should re-draft 18 U.S.C. § 201, to conform it with the standards of the Foreign Corrupt Practices Act.