NOTES

QUID PRO NO? THE BRIBERY STATUTE'S FAILURE TO CAPTURE THE "OFFICIAL ACTS" OF HIGH-RANKING PUBLIC OFFICIALS

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INTRODUCTION

In current politics, an internet search of "quid pro quo" returns dozens of articles: "Dems are Making a Mistake Using Quid Pro Quo"[1] or "White House Doubles Down on 'No Quid Pro Quo.'"[2] Derived from Latin, "quid pro quo" translates to "something given or received for something else."[3] Lawmakers and the media use this term liberally; yet the criminal code conspicuously does not. This concept of "something given or received for something else" is criminalized in the general bribery statute, 18 U.S.C. § 201.[4] Originally written in the 1960s, this statute criminalizes public officials accepting things of value in exchange for performing an "official act." Under current law, the bribery statute enumerates an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[5]

Corruption cases of high-level public officials, like Governors, Senators and possibly even the President, capture the public's attention when they happen; yet these high-level offenders comprise just 2% of all bribery charges at the state and federal level.[6] Since 1974, there have been only "29 criminal

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1. Arick Wierson, *Dems Are Making a Mistake Using Quid Pro Quo*, CNN (Nov. 7, 2019), https://www.cnn.com/2019/11/06/opinions/quid-pro-quo-wierson/index.html.

2. Morgan Chalfant & Brett Samuels, *White House Doubles Down on "No Quid Pro Quo,"* HILL (Nov. 6, 2019), https://thehill.com/homenews/administration/469235-white-house-doubles-down-on-no-quid-pro-quo.

3. *Quid pro quo*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/quid%20pro%20quo (last visited Nov. 17, 2019).

4. 18 U.S.C. § 201 (1994); *see also* Valdes v. United States, 475 F.3d 1319, 1327 (D.C. Cir. 2007) ("[T]he bribery and gratuity provisions overlap in the sense that *one* type of predicate act covered by both provisions is an 'official act' as defined in § 201(a)(3).").

5. 18 U.S.C. § 201(a)(3) (1994).

6. *See* Adriana S. Cordis & Jeffrey Milyo, *Measuring Public Corruption in the United States: Evidence from Administrative Records of Federal Prosecutions*, 18 PUB. INTEGRITY 127, 137 (2016).

corruption scandals involving members of Congress."[7] In comparison, there have been "over 9,000 corruption convictions of federal employees since 1986."[8] And in the two instances where the Supreme Court heard a case involving bribery charges against a high-ranking public official, like the Secretary of Agriculture or the Governor of Virginia, the Court acquitted the official and narrowed the statute.[9] Lower courts wrestle with how to apply the Supreme Court's narrow reading of an "official act" in the bribery statute, signifying a need for comprehensive reform.[10]

To successfully convict under the bribery statute, the government must prove that a public official accepted a thing of value in exchange for an official act. This quid pro quo arrangement seems obviously illegal and easily prosecuted. Over the past twenty years, however, a series of court cases have made it more difficult for prosecutors to convict public officials.[11]

The Court's narrow definition of an "official act" may adequately capture lower ranking public official's actions since these individual's "official acts" are more discrete. Lower-ranking public official's "questions, matters, causes, suits, or proceedings" are more easily delineated in employee handbooks and job descriptions.[12] However, the judiciary's narrow and formalized reading of an "official act"[13] does not sufficiently capture the amorphous nature of a *high*-ranking official's influence and control in his or her public office.

This Note will analyze the judiciary's circumscribed definition of an "official act" and its effect on public corruption cases, revealing the need for reform.[14] Part I of this Note describes the judiciary's increasingly narrow

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7. *Id.* at 136–37.

8. *Id.*

9. *See* United States v. Sun-Diamond Growers of Ca., 526 U.S. 398 (1999) (finding that the Secretary of Agriculture did not engage in a bribe); *see also* McDonnell v. United States, 136 S. Ct. 2355 (2016) (finding that Governor of Virginia Bob McDonnell did not engage in a bribe).

10. *See, e.g.*, Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt?* McDonnell *Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2015 CATO SUP. CT. REV. 189, 189–90 (2015–2016).

11. *Can He Do That?*, *Pardon Me? And My Family? And Maybe My Lawyer?*, WASH. POST (Dec. 3, 2020), https://www.washingtonpost.com/podcasts/can-he-do-that/pardon-me-and-my-family-and-maybe-my-lawyer-2/.

12. For instance, every four years following a presidential election, the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Oversight and Reform release the *Plum Book*, a summary of all government policy and supporting positions. The publication lists over 9,000 jobs and provides information like necessary security clearances, pay grade, and location. *See* STAFF OF H. COMM. ON OVERSIGHT AND REFORM, 116TH CONG., POLICY AND SUPPORTING POSITIONS iii (Comm. Print Dec. 2020), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf. The State Department similarly provides descriptions for their lower-level positions. *See* U.S. DEP'T OF STATE, EXPANDED PROFESSIONAL ASSOCIATES PROGRAM, POSITION DESCRIPTIONS FOR PROFESSIONAL ASSOCIATES, https://www.state.gov/wp-content/uploads/2019/05/EPAP-Position-Descriptions-2019-cleared.pdf.

13. 18 U.S.C. § 201 (a)(3) (1994).

14. *See infra* Part II.

interpretation of an "official act" in the bribery statute.[15] Part II discusses the need for statutory reform.[16] Finally, Part III analyzes the Public Corruption Prosecution Improvements Act ("PCPIA") as a solution to the statute's narrowness.[17] To rectify the statute's narrowness, this Note proposes that Congress adopt the definition of an "official act" proposed by Senator Patrick Leahy in the PCPIA, with some modifications. In doing so, Congress would capture a broader range of illicit behavior committed by *high-ranking* public officials who have boundless influence in office. A bribery statute amended as such would more effectively punish and deter corruption amongst high-level public officials with broad authority.

I. BRIBERY STATUTE JURISPRUDENCE

Starting with *United States v. Sun-Diamond*, courts have eroded the bribery statute's impact.[18] In *Sun-Diamond*, the Supreme Court "severely restricted the application of the illegal gratuities statute,"[19] requiring a link between an official act and an illegal gratuity.[20] *Sun-Diamond* rejected the theory of "status gratuity," a payment made to a public official due to their official position, rather than a specific official act.[21] The Supreme Court held that "the government must prove a link between a thing of value conferred upon a federal official and a specific 'official act' for or because of which it was given."[22] Eight years later, in *Valdes v. United States*, the D.C. Circuit strengthened the nexus between a "decision or action" and "question, matter, cause, suit, proceeding or controversy" in the bribery statute.[23] And the court held that "official acts" are a formal "class of questions or matters whose answer or disposition is determined by the government."[24] Most recently, in 2016, the Supreme Court narrowed the definition of an "official act" even further in *McDonnell v. United States*.[25] Writing for a unanimous Court, Chief Justice Roberts described an "official act" as "any decision or action on a 'question,

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See* United States v. Sun-Diamond Growers of Ca., 526 U.S. 398 (1999); McDonnell v. United States, 136 S. Ct. 2355, 2355 (2016); Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007).

19. S. REP. NO. 110-239, at 6 (2007), https://www.govinfo.gov/content/pkg/CRPT-110srpt239/html/CRPT-110srpt239.htm.

20. *See Sun-Diamond*, 526 U.S. at 414.

21. *Id.*; Ctr. for the Advancement of Pub. Integrity, *A Guide to Commonly Used Federal Statutes in Public Corruption Cases: A Practitioner Toolkit* 5 (2017), https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/a_guide_to_commonly_used_federal_statutes_in_public_corruption_cases.pdf.

22. *Sun-Diamond*, 526 U.S. at 414.

23. *Valdes*, 475 F.3d at 1319.

24. *Id.* at 1324.

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

matter, cause, suit, proceeding or controversy.'"[26] This "question, matter, cause, suit, proceeding or controversy"[27] must involve a formal exercise of governmental power that is *similar* in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.[28] Additionally, *McDonnell* requires that official acts be something *specific* and *focused* that is "pending" or "may by law be brought" before a public official.[29] Thus, *McDonnell* demonstrates that providing a public official "things of value" for access through meetings or events—and nothing more—does not constitute bribery under the statute.

Analyzing the status of public corruption statutes post-*McDonnell*, Jacob Eisler, in his article *McDonnell and Anti-Corruption's Last Stand*, observed: "The Court consistently hands down judgments that narrow the scope of anti-corruption legislation and raise standards for corruption prosecutions."[30] Given the Court's rigid and impractical definition of an "official act" under the federal bribery statute, prosecutors will likely use other statutes to prosecute bribery of *high-level* public officials whose power and influence cannot be confined to a formalized "question, matter, cause, suit, proceeding or controversy."[31]

Although other statutes exist to prosecute public corruption, the bribery statute criminalizes the most generic form of bribery and presents the lowest evidentiary burden for prosecutors.[32] Since 2016, nearly all public corruption cases involving a high-ranking public official cite *McDonnell*.[33] Only four

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26. *Id.* at 2365 (citing 18 U.S.C. § 201(a)(3)).

27. 18 U.S.C. § 201(a)(3) (1994).

28. *McDonnell*, 136 S. Ct. at 2368 ("The last four words in the list—'cause,' 'suit,' 'proceeding,' and 'controversy'—connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.").

29. *See id.* at 2369.

30. Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1637 (2017).

31. Randall Eliason, *Second Circuit Declines to Extend McDonnell in UN Bribery Case*, SIDEBARSBLOG.COM (Aug. 16, 2019), https://sidebarsblog.com/un-bribery-case-second-circuit-mcdonnell/ ("Many state and local corruption cases that might have been prosecuted as honest service fraud or Hobbs Act violations before *McDonnell* could also fit within [the FCPA statute]."); Vincent L. Bricetti, Amie Ely, Alexandra Shapiro & Dan Stein, *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 (2018).

32. *See* 18 U.S.C. § 1341 (2008) (criminalizes schemes to obtain money or property through fraud or false pretenses); 18 U.S.C. § 1343 (2008) (criminalizes fraudulent schemes involving wires, radio, or television); 18 U.S.C. § 1346 (1988) (criminalizes schemes to defraud others of honest services); 18 U.S.C. § 1951 (1994) (criminalizes extortion and threats of extortion); 18 U.S.C. § 666 (1994) (criminalizes bribery involving a state or local government official whose agency receives more than $10,000 in federal funding); 18 U.S.C. § 1952 (a)(3) (2002) (criminalizes interstate travel or use of mail with intent to further unlawful activity); and 15 U.S.C. § 78dd-1 (1998) (criminalizes payment to foreign government officials to assist in obtaining or retaining business).

33. *See* United States v. Fattah, 223 F. Supp. 3d 336 (E.D. Pa. 2016); United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018); United States v. Silver, 864 F.3d 102 (2d Cir. 2017).

years post-*McDonnell*, the full effect of the Court's narrowing of the statute remains to be seen. Yet, immediately following the Court's decision, commentators predicted that "[the] *McDonnell* Supreme Court ruling makes convicting politicians of corruption almost impossible."[34] Thus, Senator Leahy's PCPIA proposal to broaden the definition of an "official act" in the bribery statute is needed to hold *high-ranking* public officials accountable more easily.

A. Start of the Bribery Statute's Erosion: United States v. Sun-Diamond Growers

In *United States v. Sun-Diamond Growers*, the respondent, Sun-Diamond, was a trade association of approximately 5,000 large-scale raisin, fig, walnut, prune, and hazelnut growers.[35] As an association, Sun-Diamond lobbied the federal government on behalf of its members' interests. Sun-Diamond represented two of the largest participants in the Market Promotion Plan ("MPP"), the government's commodities grant program.[36] Administered by the Department of Agriculture, this program gave federal grants to participants that sold commodities abroad.[37] Participants in the grant program needed approval by the Secretary of Agriculture to receive such funding.[38] Congress instructed that Secretary of Agriculture Mike Espy promulgate regulations so these grants would go to small-sized rather than large-sized farmers like Sun-Diamond.[39] If Secretary Espy did not grant Sun-Diamond's member participants "small-sized" status, these large-scale growers were unlikely to receive further funding.[40]

Additionally, the Environmental Protection Agency ("EPA") in 1992 announced its plan to promulgate a federal rule banning low-cost pesticides like methyl bromide.[41] Sun-Diamond's members relied on these low-cost pesticides to yield their crops.[42] According to the indictment, Sun-Diamond sought assistance and influence from the Department of Agriculture to prevent the EPA

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34. 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-almost-impossible-to-convict-politicians-of-corruption/; *see also* Matt Zapotosky, *The Bob McDonnell Effect: The Bar Is Getting Higher to Prosecute Public Corruption Cases*, WASH. POST (July 13, 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.

35. United States v. Sun-Diamond Growers of Ca., 526 U.S. 398, 400–01 (1999).

36. *Id.* at 401.

37. *Id.*

38. *Id.*

39. *Id.* at 402.

40. *Id.*

41. *Id.*

42. *Id.*

from banning this useful pesticide.[43] The government alleged that throughout its relationship with Secretary Espy, Sun-Diamond gifted him tickets to the 1993 U.S. Open Tennis Tournament (worth $2,295), luggage ($2,427), meals ($665) and a framed print and crystal bowl ($524), all while the trade association lobbied against unfavorable regulations promulgated by Secretary Espy's agency.[44]

The indictment describes Sun-Diamond's two distinct interests before Secretary Espy. However, "the indictment did not allege a specific connection between either [interest]—or between any other action of the Secretary—and the gratuities conferred,"[45] meaning that the gratuity and alleged bribe were not sufficiently linked. Unanimously, the Supreme Court held that 18 U.S.C. § 201 requires a discrete link between a benefactor's gift and a public official's "official act."[46] Writing for the Court, Justice Scalia emphasized the Government's definition of an "official act" in the bribery statute, opining that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved."[47] Justice Scalia argued the Government's broad interpretation of an "official act" in *Sun-Diamond* would criminalize de minimis gifts, like sports jerseys given to the President when a sports team visits the White House.[48] Furthermore, when Congress criminalized gift-giving in other statutes, they have done so with specificity:

> [T]he numerous other regulations and statutes littering this field, demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.[49]

For the Court, Congress wrote 18 U.S.C. § 201 *narrowly*, requiring a discrete nexus between an official act and a gratuity. In *Sun-Diamond*, the Government's indictment failed to link the association's gift giving with a particular "official act." Thus, the Court held there was a "quid," but there was no discrete nexus to a "quo."

B. Further Narrowing of the Bribery Statute: Valdes v. United States

Eight years following *Sun-Diamond*, the D.C. Circuit further narrowed the bribery statute, and limited the meaning of "question, matter, cause, suit, or

43. *Id.*
44. *Id.* at 401.
45. *Id.* at 402.
46. *Id.* at 414.
47. *Id.* at 406.
48. *Id.* at 406–07.
49. *Id.* at 412.

proceeding"[50] in *Valdes v. United States*.[51] Nelson Valdes was a Metro Police Department officer charged under 18 U.S.C. § 201. As an officer, Valdes had access to the Washington Area Law Enforcement System ("WALES") which contained searchable police records.[52] As part of an FBI sting operation, an undercover agent asked Valdes to run a search through the WALES system for an individual's license plate numbers and contact information.[53] Anticipating Valdes' search, the FBI entered false information into the WALES system.[54] When Valdes performed the undercover's requested search, he returned the information the FBI inputted. After almost every search the undercover officer paid Valdes.[55] The Government alleged that Valdes's searches fell within 18 U.S.C. § 201's definition of an "official act."[56] According to the Government, disclosing information to undercover officers constituted plain "actions" on clear "questions"—such as to whom the license plate belongs and where those individuals live.[57]

At the district court, the jury instruction described an "official act" as any decision within the scope of the public official's authority.[58] This description of an "official act" included the decisions or actions generally expected of a public official such as a police officer.[59] The district court held that these decisions or actions need not be specifically described by law, rule, or job description to be considered an "official act."[60] The court of appeals rejected the broadness of the lower court's understanding of an "official act."[61] Rather than encompass "any decisions or action within the scope of the public official's authority" the term "official act" must have "some prospect in bringing about a government action."[62] Meaning, an "official act" must have a probability of leading to a formalized government action such as a "question, matter, cause, suit, proceeding or controversy."[63] In *Valdes*, the "official act" of the WALES search lacked this probability. The information Valdes derived from his WALES search was part of a sting operation and, thus, would not lead to any *real* government action.[64]

50. 18 U.S.C. § 201(a)(3) (1994).
51. Valdes v. United States, 475 F.3d 1319, 1319 (D.C. Cir. 2007).
52. *Id.* at 1321.
53. *Id.*
54. *Id.* at 1321.
55. *Id.* at 1321–22.
56. *Id.* at 1322.
57. *Id.*
58. *Id.* at 1325.
59. *Id.* at 1325–26.
60. *Id.* at 1325 (citing 18 U.S.C. § 201(a)(3)).
61. *Id.*
62. *Id.* at 1326.
63. *Id.* at 1327.
64. *Id.*

Although Valdes, a police officer, monetized his access and use of government resources, for the D.C. Circuit, this conduct fell short of bribery: "[I]t cannot follow that every question-and-answer between an official and a citizen can be brought within the statute by simply characterizing it as an 'action on' a matter that 'may by law be brought' before a hypothetical FOIA official."[65] Narrowing the statute, the court not only extrapolated from *Sun-Diamond*, reiterating that an official action must be linked to an illegal gratuity, but also added the requirement that an "official act" be something a public official could feasibly act on.[66]

C. Most Recent Narrowing of the Bribery Statute: McDonnell v. United States

In 2016, the United States Supreme Court issued a unanimous decision, *McDonnell v. United States*, which precipitously narrowed the meaning of "official act" in the federal bribery and gratuities statutes.[67] The case involved petitioner, Governor Bob McDonnell of Virginia, and his curious relationship with Jonnie Williams, the CEO of a dietary supplement company, Star Scientific.[68] Governor McDonnell took office in January of 2010.[69] On his inauguration day, the Governor had $74,000 in personal credit card debt.[70] As his debt continued to rise, his new acquaintance, Jonnie Williams, alleviated this burden.

Williams' company developed Anatabloc, a tobacco-based dietary supplement.[71] Williams sought FDA approval for Anatabloc, which requires independent research studies often done through universities.[72] Given the Governor's control of state universities, for Williams, currying favor with the Governor through gifts and loans would bring him one step closer to FDA approval. "Star Scientific hoped Virginia's public universities would undertake such studies, pursuant to a grant from Virginia's Tobacco Commission."[73] Over the course of two years, a variety of nebulous favors and gifts were exchanged. In 2009, at an intimate dinner in New York City, Williams offered to buy the Governor's wife a designer dress to wear for the inauguration.[74] In October

65. *Id.* at 1329.

66. *See id.* at 1327 ("At the very least, we believe that a police officer's ascertainment of answers to questions cannot amount to a 'decision or action' on an investigation unless the ascertainment itself, or other activity in the real world, could have some prospect of bringing about . . . some sort of government investigation.").

67. McDonnell v. United States, 136 S. Ct. 2355, 2357 (2016).

68. *Id.*

69. United States v. McDonell, 792 F.3d 478, 486 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).

70. *Id*.

71. *Id.* at 487.

72. *Id.* at 491.

73. *McDonnell*, 136 S. Ct. at 2362.

74. *See id.*

2010, Williams offered McDonnell a trip on his private plane.[75] "During the flight, Williams told Governor McDonnell that he 'needed his help' moving forward on the research studies at Virginia's public universities, and he asked to be introduced to the person that he 'needed to talk to.'"[76] The Governor arranged to introduce Williams to Virginia's Secretary of Health and Human Resources.[77] Six months later, the Governor's wife seated Williams next to the Governor at a political rally.[78] Just prior to the event, Williams took Mrs. McDonnell on a $20,000 shopping spree in New York City.[79] Later, the McDonnells hosted Williams for dinner where they discussed research studies for Anatabloc.[80]

While the Governor and Williams grew closer, the Governor's personal finances became more distressed. Expenses from his daughter's wedding exceeded $15,000, while the value of his rental property in Virginia Beach rapidly declined.[81] The Governor's wife made Williams aware of their financial situation.[82] Williams went as far as to call the Governor and say, "I understand the financial problems and I'm willing to help."[83] A few days following this call, the Governor forwarded an article about Star Scientific to his Secretary of Health and Human Services. In July of 2011, the McDonnells visited the Williams's vacation house.[84] Shortly thereafter, the Governor asked his Secretary of Health and Human Services to send an aide to a meeting Williams was attending on research studies for Anatabloc.[85] A month later, the Governor hosted a lunch event for Williams's company in the Governor's Mansion.[86] The purpose of the event was to launch Star Scientific's new product, Anatabloc.[87] Guests included researchers from the University of Virginia and Virginia Commonwealth University.[88] Star Scientific gifted samples of its new product,

75. *See id.*

76. *Id.*

77. *See id.*

78. *Id.* at 2362.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2363.

84. *Id.*

85. *Id.* ("The aide later testified that she did not feel pressured by Governor or Mrs. McDonnell to do 'anything other than have a meeting,' and that Williams did not ask anything of her at the meeting.").

86. *See* Brief for Respondent at 7, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

87. *Id.* ("Like [the Governor's] predecessors, petitioner often hosted and attended events to promote Virginia business, including events at the Mansion. But it was unusual for those events to focus on a *single* company, and *unprecedented* to hold a product launch at the Mansion." (emphasis added)).

88. *Id.*

Anatabloc, along with $25,000 checks that the state university researchers could use while preparing grant proposals to study this product.[89]

At this same event, the Governor asked the researchers if Anatabloc was something that should be further studied.[90] The Governor added that such research would be something good for the Commonwealth, particularly as it related to the economy and job creation.[91] Some government employees claimed the Governor spoke to them specifically about Star Scientific.[92] Other employees who did not speak with the Governor about Star Scientific still felt pressured to work on the project, in fear that the Governor would retaliate against their university if they did not.[93] Meanwhile, over the course of two years, Johnnie Williams, the CEO of Star Scientific, provided the Governor with over $175,000 in gifts and loans.[94]

In January 2014, Governor McDonnell was indicted for accepting payments, loans, gifts, and other things of value from Williams in exchange for "performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products."[95] The Government needed to prove that McDonnell either committed or agreed to commit an "official act"[96] in exchange for loans and gifts from Williams. At the close of trial, the Government mistakenly "advised the jury that [an official act] encompassed 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'"[97] At the district court, the jury convicted the Governor under this expansive understanding of an official act. The Governor appealed his conviction on the grounds that the jury instructions "were legally erroneous since they . . . allowed the jury to convict [him] on an erroneous understanding of 'official act' . . . ."[98] Yet, the Fourth Circuit Court of Appeals affirmed his conviction. The Governor appealed to the Supreme Court.

Unanimously and controversially, the Supreme Court vacated the Governor's conviction, despite his "tawdry"[99] behavior, since he did not perform any "official act" as defined by statute.[100] In its decision, the Court limited its interpretation of an official act to the precise language of the

89. *Id.* at 8.
90. McDonnell v. United States, 136 S. Ct. at 2364.
91. *Id*.
92. *Id.* at 2364.
93. *Id.*
94. *Id.* at 2361–62.
95. *Id.* at 2365.
96. 18 U.S.C. § 201(a)(3).
97. *McDonnell*, 136 S. Ct. at 2366.
98. *Id.* at 2367.
99. *Id.* at 2375.
100. *See* 18 U.S.C. § 201(a)(3).

statute.[101] Critical of the lower court's broadened understanding of an "official act," the Court warned that such an expansive definition would "encompass[] nearly any activity by a public official."[102] Relying on the Court's precedent in *Sun-Diamond*, Chief Justice Roberts wrote in *McDonnell*:

> It is apparent from *Sun-Diamond* that hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action' within the meaning of §201(a)(3), even if the event, meeting, or speech is related to a pending question or matter. Instead, something more is required. . . .[103]

To determine an unlawful bribe, "[f]irst, the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official."[104] Then, "the Government must prove that the public official made a decision or took an action 'on' that 'question, matter, cause, suit, proceeding or controversy,' or agreed to do so."[105]

"The terms 'cause,' 'suit,' 'proceeding,' and 'controversy' connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination."[106] Using the interpretive tool of *noscitur a sociis*—a word's significance is based on the company it keeps[107]—the Court determined that "questions" and "matters" also signify a formal exercise of government power, since it immediately follows "suit," "cause," and "proceeding," three arguably formal terms.[108] For the Court, typical meetings, calls, or events arranged by a public official do not qualify as formal exercises of power and, thus, do not qualify under the statute.[109] Like *Valdes*, *McDonnell* also requires an explicit link, or quid pro quo, between an illegal gratuity and an "official act."[110] To violate the Court's interpretation of an "official act," Jonnie Williams would have needed to ask the Governor to perform a *formal* exercise of government power, more than arranging meetings or lunches, in exchange for a thing of value.

Further, Johnnie Williams's must have explicitly asked the Governor for this specific *formal* exercise of government power in direct exchange for a thing

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101. *McDonnell*, 136 S. Ct. at 2367 (citing 18 U.S.C. § 201(a)(3)).

102. *Id.*

103. *Id.* at 2370 (citing United States v. Sun-Diamond Growers of Ca., 526 U.S. 398 (1999)).

104. *Id.* at 2358 (citing 18 U.S.C. § 201(a)(3)).

105. *Id.*

106. *Id.*

107. *Id.* (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps.")).

108. *McDonnell*, 136 S. Ct. at 2369.

109. *Id.* at 2368 ("Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a 'question' or 'matter' under § 201(a)(3).") (citing 18 U.S.C. § 201(a)(3)).

110. *See generally McDonnell*, 136 S. Ct. at 2355.

of value. A "question, matter, cause, suit, proceeding or controversy"[111] must be more tailored and focused than a broad policy objective.[112] Likewise, this formal exercise of power must have an explicit nexus to a gratuity:[113]

> [T]he district court should have instructed the jury that the pertinent 'question, matter, cause, suit, proceeding or controversy' must be something specific and focused that is 'pending' or 'may by law be brought before any public official,' such as the question whether to initiate the research studies.[114]

For the Court, "official acts" require more than the mere exertion of influence. And "things of value," like Johnnie Williams' gifts and loans require a direct nexus to a specific and formal government action. Such *formal* actions must be more precise than a broad policy agenda like economic development or scientific research. As such, in *McDonnell* the Court controversially narrowed the bribery statute. Currying favor with employees under your influence and scheduling meetings with agencies and institutions you control on behalf of the man supplementing your personal finances did not constitute bribery under the law.[115]

II. NEED FOR AMENDMENT POST–MCDONNELL

Four years following *McDonnell*, the consequences of the Court's narrowing of the bribery statute remain unclear. "Even as more courts begin to apply *McDonnell*, the opinion's circumstances and novelty means that *several* fact-specific interpretations of the precedent are needed to fully understand its impact."[116] The Court's narrow definition of an "official act" coupled with the decision's few explanatory examples fails to provide public officials with notice as to what is criminalized under the statute.[117] A meeting, "without more" is

111. 18 U.S.C. § 201(a)(3).

112. *McDonnell*, 136 S. Ct. at 2374.

113. *See id.*; *but see* United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018) (holding that the stream of benefits theory remains valid following *McDonnell*); *see also* W. Warren Hamel et al., *Menendez Shocker? Not Exactly: Analysis of DOJ's Decision to Drop Charges in NJ Senator's Corruption Case*, VENABLE LLP (Feb. 5, 2018), https://www.venable.com/insights/publications/2018/02/menendez-shocker-not-exactly-analysis-of-dojs-deci ("The *Menendez* prosecution's demise was more a result of the weakness of the government's proof under the stream of benefits theory of bribery, which existed long before *McDonnell* and continues to exist today.").

114. *McDonnell*, 136 S. Ct. at 2374.

115. *Id.*

116. Jeffrey A. White, McDonnell*'s Misapprehension of the Role of Access in Politics and Public Corruption*, 96 N.C. L. REV. 1175, 1200 (2018).

117. *McDonnell*, 136 S. Ct. at 2367–72. The Court held that an official act must be something formal. Setting up "typical" meetings or calls is not as formal as something *like* a lawsuit, administrative determination or hearing before a committee. However, the Court does not provide any other examples of a *formal* official act aside from those three limited examples.

not an official act.[118] The Court defined an official act as "something *similar* in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[119] However, public officials engage in a plethora of conduct beyond this ambiguous and limited definition.

Concerned with statutory vagueness, the Court noted that the bribery statute is not sufficiently precise and fails to provide public officials with notice of criminal conduct.[120] In previous cases involving the bribery statute, the Court found that when Congress wanted to adopt "broadly prophylactic criminal prohibition[s]," it has done so explicitly.[121] Yet, when describing "official acts" under the bribery statute, Congress avoided such broad language.

When given the opportunity to clarify what actions would be illegal under the statute in *McDonnell*, the Court failed to do so. In *McDonnell*, the Court describes an official act as something "formal," "such as a lawsuit, hearing, or administrative determination."[122] Admitting the limits of its own explanation, the Court conceded "it may be difficult to define the precise reach of those terms."[123] Yet, a "typical meeting, telephone call, or event arranged by a public official does not qualify as a '[question, matter,] cause, suit, proceeding or controversy.'"[124] Critics argue that "[t]hese vague descriptions offer courts considerable flexibility when they apply the *McDonnell* precedent."[125] With an unclear definition of an official act, public officials lack notice as to what conduct is actually prohibited. And more problematically, the bribery statue will be erratically applied.

The *McDonnell* analysis turned on the fact that a "typical meeting" cannot constitute an official act.[126] Yet, the Supreme Court does not differentiate between a "typical" and "atypical" meeting: When does a typical meeting become atypical and, thus, criminal? Taken together, the examples and definitions provided by the Court will rarely mandate a clear outcome. Even though the Court narrowed the bribery statute, it failed to provide lower courts a comprehensive and practical framework to apply to public officials' illicit behavior. As a result, public officials lack sufficient notice as to what behavior may be unscrupulous but, nonetheless legal.

McDonnell exposes the tension between penalizing an appropriately broad range of conduct and preserving important relationships between government

118. *See McDonnell*, 136 S. Ct. at 2367.

119. *Id.* at 2372 (emphasis added).

120. *Id.* at 2373 (citing Skilling v. United States, 561 U.S. 358, 619 (2010)).

121. United States v. Sun-Diamond Growers of Ca., 526 U.S. 398, 408 (1999).

122. *McDonnell*, 136 S. Ct. at 2368.

123. *Id.*

124. *Id.* (citing 18 U.S.C. § 201(a)(3) (2012)).

125. White, *supra* note 116, at 1201 (citing Arlo Devlin-Brown & Erin Monju, *Public Corruption Prosecutions and Defenses Post*-McDonnell, N.Y. L.J. (Jan. 30, 2017), https://perma.cc/2546-DYP4 (link is a staff-uploaded archive).

126. *McDonnell*, 136 S. Ct. at 2368.

officials and their constituents.[127] In *McDonnell*, the Court feared criminalizing constituents meeting with public officials, a basic compact underlying representative government.[128] The Court's failure to articulate clear guidelines as to what constitutes an "official act" may have preserved constituents' access to their elected officials. Yet, in *McDonnell*, the Court winked at egregious conduct that "might be acceptable political practice."[129]

Some scholars argue that *McDonnell* encourages "political as usual" and "pay to play politics" allowing any person to provide their elected official with a "thing of value"[130] so long as that official fails to provide a formalized "quo" or "official act."[131] The narrowness of the Court's reading of an official act creates a gray area in which a variety of similarly "tawdry" behavior becomes legal. "Essentially, public officials can accept gifts and services in exchange for performing acts within the scope of their official authority, but escape prosecution if their actions do not meet the stringent standards for 'official acts.'"[132] The Court "[preserved] a space within which public officials may act to benefit anyone for any reason, including that the beneficiary is a constituent, a regionally important labor interest, a systemically important firm, or a rich

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127. Explaining the significance of constituent access to elected officials, despite the possibility of malfeasance, the Court explained:

> The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns . . . The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.

Id. at 2372. Notably, Jacob Eisler, and this Note, argues that the Court's idealistic vision of constituent access in *McDonnell* condones well connected constituents' "tawdry" relationships with their representatives. *See* Eisler, *supra* note 30 at 1624 ("This [Court decision] commits to a vision of politics as reciprocal power relationships between representatives and the citizens who support them, with government disproportionality favoring constituents who have ingratiated themselves with political leaders.").

128. *See McDonnell*, 136 S. Ct. at 2372.

129. *See* Eisler, *supra* note 30, at 1640.

130. A "quid" in the "quid pro quo" analysis.

131. *See* Gregory M. Gilchrist, *Corruption Law After* McDonnell: *Not Dead Yet*, 165 U. PA. L. REV. ONLINE 11, 13 (2016–2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1169&context=penn_law_review_online; *see also* Devlin-Brown & Monju, *supra* note 125. As of the spring of 2017, Robert Drinan, a law professor at Boston College Law School commented: "For a case of potentially great significance, the relative lack of law review commentary on *McDonnell* is surprising." George D. Brown, *The Federal Anti-Corruption Enterprise After* McDonnell*—Lessons from the Symposium*, 121 PENN ST. L. REV. 989, 1004 (2017).

132. J. Gerald Herbert, *Legal Analysis of the Public Corruption Prosecutions Act*, CAMPAIGN LEGAL CTR. (Mar. 1, 2009), https://campaignlegal.org/press-releases/legal-analysis-public-corruption-prosecution-improvements-act.

friend."[133] While recognizing the importance of constituent-representative relationships in *McDonnell*, the Court eroded the effectiveness of the bribery statute.

The narrow reading of an "official act" has overturned two high-ranking public officials' bribery convictions since 2016. Congressman Chaka Fattah was convicted of bribery in 2016, prior to *McDonnell*. In part due to his status as a senior congressmember on the powerful House Appropriations Committee, Congressman Fattah accepted gifts from wealthy benefactor Herbert Vederman: cash payments for his children, tuition for his au pair, and $18,000 for a vacation home.[134] In exchange, Congressman Fattah performed several acts which included setting up meetings for Vederman with the U.S. Trade Representative. The Congressman also attempted to secure Vederman a U.S. ambassadorship. Following *McDonnell*, the U.S. Court of Appeals for the Third Circuit vacated Congressman Fattah's charges since the jury had been instructed under a broader definition of an official act—not the narrow "official act" as defined by *McDonnell*.[135] Due to the new narrow definition of an "official act," the Government will not retry the disgraced congressman.[136]

Congressman Fattah's vacated charges may be only the beginning. Similarly, disgraced Speaker of the New York Assembly Sheldon Silver benefitted from *McDonnell's* narrowness when his bribery charges were also vacated following *McDonnell*.[137] In the Speaker's case, one of his schemes defrauded the New York State Department of Health, who would award $500,000 grants to researcher Dr. Robert N. Taub. In exchange, Dr. Taub would refer patients with potential legal claims to the law firm Weitz & Luxemburg, which would give the Assemblyman a portion of its fees.[138] The Government alleged that Silver used his position to engage in an illegal quid pro quo. The jury returned a guilty verdict on all twelve counts, but following *McDonnell*, the U.S. Court of Appeals for the Second Circuit vacated the lower court's

133. Gilchrist, *supra* note 131 at 15.

134. Jeremy Roebuck, *Ex-U.S. Rep. Chaka Fattah Sentenced Again to 10 Years in Prison*, PHILA. INQUIRER (July 12, 2019), https://www.inquirer.com/news/chaka-fattah-sentencing-appeal-mcdonnell-third-circuit-harvey-bartle-20190712.html; *see also* Indictment at 1, United States v. Fattah, 223 F. Supp. 3d 336 (E.D. Pa. 2016) (No. 2:15CR00346).

135. *See* United States v. Fattah, 914 F.3d 112, 146–47 (3d Cir. 2019).

136. *See* Jeremy Roebuck, *Feds Won't Retry Former U.S. Rep. Chaka Fattah on Bribery Counts, but He Likely Won't Get out of Prison Any Sooner*, PHILA. INQUIRER (May 1, 2019), https://www.inquirer.com/news/chaka-fattah-retrial-bribery-philly-herbert-vederman-corruption-20190501.html.

137. *See* Benjamin Weiser, *Sheldon Silver's 2015 Corruption Conviction is Overturned*, N.Y. TIMES (July 2017), https://www.nytimes.com/2017/07/13/nyregion/sheldon-silvers-conviction-is-overturned.html?searchResultPosition=1.

138. *See* Benjamin Weiser, *Sheldon Silver Appeal Looks to New Definition of Corruption*, N.Y. TIMES (Mar. 2017), https://www.nytimes.com/2017/03/16/nyregion/sheldon-silver-appeal.html?searchResultPosition=1.

holding due to the district court's "overbroad" instruction on an "official act."[139] Reiterating the scholarly sentiment for reform, following the Silver acquittal, former U.S. Attorney for the Northern District of New York Rick Hartunian warned that without legislative action, public officials will continue to be acquitted under *McDonnell*.[140]

III. A PROPOSED SOLUTION: THE PUBLIC CORRUPTION PROSECUTION ACT

Nine years before *McDonnell* exposed the need for comprehensive reform, Senator Patrick Leahy introduced the Public Corruption Prosecution Improvements Act ("PCPIA") to "clarif[y] the law and . . . clos[e] existing loopholes that thwart congressional intent" in the bribery statute.[141] As noted in *McDonnell*, the Court interpreted an "official act" in the bribery statute as a formal exercise of power, *more* than just setting up a meeting or making a public statement of support.[142] This circumscribed definition, however, does not encompass modern politics where high-ranking politicians have amorphous influence. The PCPIA appropriately expands the definition of "official act" to read:

> [A]ny action *within the range of official duty*, and any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be brought before any public official, in such public official's official capacity or in such official's place of trust or profit. *An official act can be a single act, more than one act, or a course of conduct*.[143]

The definition of "official act" requires broad language in part because those who use their public office for personal gain already recognize and exploit ambiguities in existing law created by these unexpected court decisions.[144] The PCPIA's language modernizes the bribery statute to better reflect the current political environment in which a public official and corporate benefactors often develop symbiotic and "tawdry" relationships. Further, this amendment, with a slight modification, would capture a broader range of behavior addressing the statute's deficits following *McDonnell.* However, without a provision requiring increased campaign finance enforcement, the PCPIA may create a "back

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139. *See* Jimmy Vieklind, *As Silver's Conviction Falls, Reformers Shudder*, POLITCO (July 13, 2017), https://www.politico.com/states/new-york/albany/story/2017/07/13/silvers-conviction-falls-and-reformers-113383.

140. *Id.*

141. S. REP. NO. 110-239, *supra* note 19, at 5.

142. *See* United States v. Menendez, 291 F. Supp. 3d 606, 618 (D.N.J. 2018) (citing McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016)) ("An official does not take an 'official act' by '[s]imply expressing support [for an official act] . . . as long as the public official does not intend to exert pressure on another official . . .'").

143. S. REP. NO. 110-239, *supra* note 19, at 14–15 (emphasis added).

144. *Id.* at 4.

channel" where benefactors engage in bribery-esque conduct through campaign donations, rather than personal gratuities.[145]

Passed in 1962, the bribery statute was the product of a study conducted by the Special Committee on Federal Conflict of Interest Laws of the Association of the Bar of the City of New York.[146] Concentrating on conflicts of interest, the statute was passed "to prevent situations of temptation from arising" for public officials.[147] At the time, the current laws were insufficient to "protect the Government against the manifold forms of modern conflicts of interest."[148] These "manifold forms" of conflicts of interest that existed in the 1950s and 1960s greatly contrast the conflicts of interest rampant in current politics. During that era, the corporate lobby was "clumsy" and "ineffective."[149] A study from three political scientists published one year after the bribery statute passed considered the business lobby to have limited opportunities to influence and mediocre staff.[150] For lobbying organizations at the time, the largest problem was not finding public officials to influence, but having clients that wanted such influence.[151]

Today, corporations employ hundreds of lobbyists to represent their interest and curry favor with public officials.[152] Almost 80% of Americans polled in 2018 considered "reducing the influence of special interest and corruption in Washington" as the single most or a very important factor in their midterm election vote.[153] "One has to go back to the Gilded Age to find business in such a dominant political position in American politics."[154] The public officials who passed the bribery statute in 1962 could have never anticipated the close and at times "tawdry" relationship between the corporate and political

145. Jan Wolfe, *U.S. Prosecutors Investigating Potential White House 'Bribery-for-Pardon' Scheme*, REUTERS (Dec. 1, 2020), https://www.reuters.com/article/us-usa-election-trump-pardon/u-s-prosecutors-investigating-potential-white-house-bribery-for-pardon-scheme-idUSKBN28C00H ("[F]ederal prosecutors in Washington said they had obtained evidence of a bribery scheme in which someone 'would offer a substantial political contribution in exchange for a presidential pardon or reprieve of sentence.'").

146. S. REP. NO. 2213, at 4 (1962).

147. 107 Cong. Rec. 11, 14779 (1961).

148. *See id.* at 14777.

149. *See* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

150. *See id.* (citing Raymond A. Bauer et al., AM. BUS. & PUB. POLICY: THE POLITICS OF FOREIGN TRADE (1963)).

151. *See id.*

152. *Id.* ("Today the biggest companies have upwards of 100 lobbyists representing them, allowing them to be everywhere, all the time.").

153. Tom Udall, *The Super-Wealthy Have Outsize Influence in Politics. Here's How We Can Change That*, TIME (Aug. 14, 2019), https://time.com/5651417/constitutional-amendment-campaign-finance/.

154. Drutman, *supra* note 148 (describing the increased sophistication and engagement of the corporate lobby in American politics since the 1950s).

worlds. The PCPIA modernizes the definition of an "official act" to better capture illicit relationships between public officials and their corporate benefactors in this new political environment.

A. Statutory and Notice Concerns in the PCPIA

Senator Leahy originally introduced the PCPIA following the D.C. Circuit's opinion in *Valdes*, which suggested that "official acts" must be "formal" government actions as defined by the statute.[155] The amendment was introduced in 2007 and was never voted on.[156] But, following *McDonnell*, passage of an amended PCPIA is even more necessary. The PCPIA broadens the definition of an "official act" to include "any action within the range of official duty."[157] The proposal to amend the bribery statute as such responds to the D.C. Circuit language in *Valdes*.[158] "The phrase in the bills, 'any act within the range of official duty,' is designed to overcome the *Valdes* interpretation of 'official act,' and 'to ensure that the bribery statute applies to all conduct of a public official within the range of the official's duties.'"[159]

Despite the language's connection to the D.C. Circuit's jurisprudence, Congress has never used such language in public corruption statutes.[160] Rather, in other public corruption statutes like the Hobbs Act, Congress uses the term "under color of official right" when referring to a public official's broader duties.[161]

Public corruption charges often involve violations of both the bribery statute and the Hobbs Act.[162] The "Hobbs Act extortion under color of official right occurs when a 'public official has obtained a payment to which he is not entitled, knowing that the payment was made in return for official acts.'"[163]

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155. *See* Drutman, *supra* note 148.

156. The bill had been subsequently introduced, but never reached a formal floor vote. *See* Public Corruption Prosecution Improvements Act, GOVTRACK, http://govtrack.us (follow "Search Title & Full Text" hyperlink; then search "Public Corruption Prosecution Improvements Act").

157. S. REP. NO. 110-239, *supra* note 19, at 5.

158. *See* S. REP. NO. 110-239, *supra* note 19, at 8 ("The D.C. Circuit's hyper-technical reading of the 'official acts' standard unnecessarily disrupts uniformity in the law, and undermines fair notice to public officials that they may not legally accept secret benefits from private interests in return for any action within the range of their official duties.").

159. CHARLES DOYLE, CONG. RESEARCH SERV., R42015, PROSECUTION OF PUBLIC CORRUPTION: AN ABRIDGED OVERVIEW OF AMENDMENTS UNDER H.R. 2572 AND S. 2038, at 4 (2012).

160. *See* 18 U.S.C. § 201; 18 U.S.C. § 666; 18 U.S.C. § 1951; 18 U.S.C. § 1346.

161. *See* 18 U.S.C. § 1951.

162. *See* McDonnell v. United States, 136 S. Ct. 2355 (2016); *see also* Complaint at 1, United States v. Fattah, 223 F. Supp. 3d 336 (E.D. Pa. Oct. 2016).

163. CHARLES DOYLE, CONG. RESEARCH SERV., R45395, ROBBERY, EXTORTION, AND BRIBERY IN ONE PLACE: A LEGAL OVERVIEW OF THE HOBBS ACT 12 (2018) (citing Ocasio v. United States, 136 S. Ct. 1423, 1428 (2016); Evans v. United States, 504 U.S. 255, 268 (1992); United States v. Buffis, 867 F.3d 230, 234 (1st Cir. 2017); United States v. Silver, 864 F.3d 102, 111 (2d Cir. 2017); United States v. Kalb, 750 F.3d 1001, 1004 (8th Cir. 2014); United States v.

Meaning, "[t]he Hobbs Act does not define the term 'official act,' but the bribery statute does."[164] The terminology may seem similar enough—"under color of official right" versus "any action within the range of duty." However, the PCPIA's broad phrasing is ripe for a constitutional vagueness challenge: This language has never been used before and is inconsistent with the language in accompanying statutes. Instead, the PCPIA should use the same language as the Hobbs Act, "under color of official right." This consistent language, rather than the proposed language,[165] promotes consistent statutory interpretation. "Under color of official right" "has an historically recognized and accepted meaning."[166] And such phrase "'is not a question of fact, but one of law . . . (and) is . . . a legal term of art.'"[167]

Further, consistent statutory interpretation between the Hobbs Act and the bribery statute facilitates the statute's use. And, more importantly, this consistency provides adequate notice to the public officials it regulates.[168] "Generally, identical words used in different parts of the same statute are presumed to have the same meaning."[169] Conversely, "a material variation in terms suggests a variation in meaning."[170] Divergent language in both statutes would suggest that "official acts" under the bribery statute have a different scope than "official acts" under the Hobbs Act. The bribery statute, however, provides the definition of an "official act" for the Hobbs Act.[171] In the amendment's current form, to sustain a bribery conviction, prosecutors would need to prove "any action within the range" of an official act, which given the presumption of constituent usage, would have a different connotation than an "official act" under the Hobbs Act.[172] Such a result would be inconsistent with how the Department of Justice prosecutes Hobbs Act and bribery violations[173] and may lead to further litigation.

Dimora, 750 F.3d 619, 625 (6th Cir. 2014); United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011); *see also* United States v. Margiotta, 688 F.2d 108, 130 (2d. Cir. 1982) ("Extortion 'under color of official right' is committed when a public official makes wrongful use of his office to obtain money not due to him or his office.").

164. DOYLE, *supra* note 161, at 12.

165. The proposed language is "any action within the range of official duty." S. REP. NO. 110–239, *supra* note 19, at 14–15 (emphasis added).

166. United States v. Trotta, 525 F.2d 1096, 1099 (2d. Cir. 1975) (interpreting the meaning of "under color of official right" in the Hobbs Act).

167. *Id.* at 1099 (analogizing between the court's interpretation of the word "obscene" in a statute and "color of official right") (citing Hamling v. United States, 418 U.S. 87 (1974)).

168. *Id.* at 1096 (finding there was adequate notice under "color of official right").

169. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 5 (2012); *see also* IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).

170. *Id.*

171. *See* DOYLE, *supra* note 161, at 12.

172. *See* S. REP. NO. 110-239, *supra* note 19, at 8.

173. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIM. RES. MANUAL § 2404, https://www.justice.gov/jm/criminal-resource-manual-2404-hobbs-act-under-color-official-right.

B. PCPIA's Application to Less Formalized "Questions, Matters, Causes, Suits or Proceedings"

McDonnell turned on the fact that a meeting, no matter who arranged it, is not an official act, since it is not a formalized "question, matter, cause, suit or proceeding."[174] Leaving little framework for lower courts to decipher, the Court in *McDonnell* noted that litigation, or the vote on a bill, are formal official acts.[175] Public officials can only be convicted under the bribery statute for accepting a "thing of value" in exchange for an "official act" which has a formal connotation. Yet, the inclusion of "under color of official right" in the statute would criminalize a broader range of conduct, like a public official using his public office or public stature to cause the giving of benefits.[176] Public officials in high-ranking positions like state-wide elected officials or powerful members of Congress exert their influence beyond *McDonnell's* particularized "questions, matters, causes or proceedings." *McDonnell*'s reliance on formalized "official acts" ignores the political reality in which high-ranking public officials use their amorphous "color of official right" to influence lower ranking politician's "official acts." The *McDonnell* interpretation of the bribery statute requires an explicit nexus between a thing of value and a formalized official act. However, deficits in public integrity are not easily correlated with particular acts or failures of a particular public office.[177]

The following hypothetical demonstrates this dilemma. Hypothetically, the CEO of Mercedes-Benz could personally gift Speaker of the House Nancy Pelosi a car in hopes of influencing her vote on an emissions bill. Upon receiving the car, if Speaker Pelosi coordinated a meeting for the CEO, held a press conference, or issued a tweet or press release against the emissions bill, none of these actions would qualify as "official acts" following *McDonnell*.[178] Yet, such action would likely signal other Democrats to "vote no" on the emissions bill, given Speaker Pelosi's influence in the party. Thus, Speaker Pelosi would influence other public officials' "official acts."[179] But, to violate

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The "color of official right" does not extend beyond the parameters of crimes of bribery and gratuities in relation to federal officials that are described in 18 U.S.C. § 201 (a)(3).

174. *See generally* McDonnell v. United States, 136 S. Ct. 2355 (2016).

175. *Id.* at 2368 ("A 'question' may also be interpreted more narrowly, however, as 'a subject or point of debate or a proposition being or to be voted on in a meeting,' such as a question 'before the senate.' Similarly, a 'matter' may be limited to a 'topic under active and usually serious or practical consideration,' such as a matter that 'will come before the committee.'") (citations omitted).

176. *See* United States v. Margiotta, 688 F.2d 108 (2d. Cir. 1982) (interpreting the color of official right in the extortion context).

177. *See* Eisler, *supra* note 30, at 1629.

178. *See, e.g.*, United States v. Menendez, 291 F. Supp. 3d 606, 618 (D.N.J. 2018) ("An official does not take an 'official act' by '[s]imply expressing support [for an official act] . . . as long as the public official does not intend to exert pressure on another official . . . .'") (citing *McDonnell*, 136 S. Ct. at 2371).

179. *See McDonnell*, 136 S. Ct. at 2368 (determining that a vote in a legislative body constitutes an official act).

the bribery statute as it currently reads, Speaker Pelosi would have needed to make a public statement with the intent of influencing such official actions. Further, the CEO of Mercedes would have needed to explicitly gift the Speaker the car in exchange for a particular, formalized, official act. This intent of both the briber and the bribed becomes nearly impossible to prove.[180]

Further, in today's media environment, public officials are influenced by the media's reporting of other public official's statements.[181] As a result, officials like Speaker Pelosi, influence other congressmember's "official acts" through public comments alone.[182] Including "under color of official right" in the bribery statute would cover a broader range of activity outside of "questions, matters, causes, suits or proceedings." Doing so would capture the corrupt behavior described in the above hypothetical. A statute amended as such would allow the government to more easily prosecute a public official's using their "place of trust or profit" to gain things of value.[183]

C. Risk of a First Amendment and Campaign Finance Back Channel

Although the PCPIA resolves *McDonnell*'s narrowing of the bribery statute, the amendment does not address donors' use of campaign contributions to facilitate "official acts" or gain influence. If an amended bribery statute closes front door illegal gratuities, that conduct will likely move to backdoor campaign contributions. Recent unsealed court documents from the District Court in the District of Columbia reveal an alleged "bribery for pardon scheme" which validates this concern.[184] Allegedly, an unnamed, incarcerated individual and his attorney devised a bribery conspiracy where the attorney "would offer a substantial political contribution in exchange for a presidential pardon or reprieve of sentence" through the White House Counsel's office.[185]

Contributions to political action committees and campaign committees are arguably "things of value" under the bribery statute.[186] Yet, the PCPIA creates a safe harbor for gifts and campaign contributions permitted by ethics rules and

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180. S. REP. NO. 110-239, *supra* note 19, at 4.

181. *See* Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 403 (1994) ("According to a survey of senior federal policy-makers, ninety-six percent said the media have an effect on federal policy, and over half considered the influence to be substantial.").

182. *Id.*

183. 18 U.S.C. § 201(a)(3).

184. In the Matter of Search of Information Associated with the Premises Known as the Office of [Redacted] and the Offices [Redacted], No. 20-gj-35 (BAH), 2020 WL 7042616, at *1 (D.D.C. Dec. 1, 2020).

185. *Id.*

186. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIM. RES. MANUAL § 2044, https://www.justice.gov/archives/jm/criminal-resource-manual-2044-particular-elements, ("The term 'thing of value' . . . includes intangible as well as tangible things [and] has been broadly construed to focus on the worth attached to the bribe by the defendant, rather than its commercial value.") (citing United States v. Williams, 704 F.2d 603, 622–23 (2d Cir. 1983), *cert. denied*, 464 U.S. 1007 (1983)).

campaign finance laws.[187] Early committee reports accompanying the PCPIA noted lawmakers assumption that existing campaign finance laws would prohibit illegal quid pro quos between donors and public officials.[188] Unlike items given to a public official in a personal capacity, campaign finance laws prohibit public officials' personal use of campaign funds. The law requires campaign contributions be used for particular expenditures like advertising or travel—not personal use by an elected official.[189] Despite existing campaign finance regulations, the PCPIA's failure to regulate campaign contributions condones a back channel in which campaign contributors facilitate access and influence.[190] Assuming arguendo, that this unnamed incarcerated individual's campaign contribution complied with all relevant federal election laws, even a bribery statute broadened by the PCPIA would not capture his illicit conduct.

Campaign finance laws struggle to balance individual's First Amendment rights with benefactors' and donors' insatiable appetite for influence. According to the Supreme Court, the First Amendment insulates the flow of "things of value" from donors to public officials.[191] In *McCormick v. United States*, the Supreme Court issued one of its first opinions condoning campaign

187. S. REP. NO. 110-239, *supra* note 19, at 7.

188. *See* CHARLES DOYLE, CONG. RESEARCH SERV., PROSECUTION OF PUBLIC CORRUPTION: AN OVERVIEW OF AMENDMENTS UNDER H.R. 2572 AND TITLE II OF THE STOCK ACT 8–9 (2012)

> They would amend the gratuities offense to create a safe harbor for gifts and campaign contributions permitted by rule or regulation, a term which the bills would define for both bribery and illegal gratuities purposes. The earlier committee report noted that in any event most campaign contributions would not be implicated by the gratuities prohibition . . . . Yet the report may have introduced a hint of ambiguity in the exception when it suggested that rules or regulations would rest beyond the pale, if they left the particulars of an exception to individual Member or agency discretion.

Id.

189. *See, e.g.*, *Personal Use,* FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/ (last visited Feb. 6, 2021); *Making Disbursements*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements/ (last visited Feb. 6, 2021).

190. The uncovering of an alleged bribery-for-pardon scheme between the Trump White House and a potential donor in December of 2020 demonstrates the emergence of a bribery back channel where "official acts" are exchanged for campaign contributions rather than gratuities:

> [P]oliticians, in general, with campaign contributions and all contributions, like to say that people are not buying outcomes or official actions. They're buying access. In this case, the assumption is not just you're getting access to get a phone call or a meeting, you're getting a pardon. That is a definition of a quid pro quo. What makes this case so difficult to prove is, you need to show intent. So it's one thing to say, "[w]e'd like to request your review of executive grant of clemency or a pardon for in behalf of this individual. He's very deserving." It's another thing to say, "[a]nd then we will give you $500,000 or $10 million dollars."

See *Can He Do That?*, *supra* note 11.

191. *See* Buckley v. Valeo, 424 U.S. 1 (1975) (holding that campaign contributions and expenditures are speech protected by the First Amendment).

contributions between influential donors and public officials.[192] The Court held that generalized campaign contributions from individuals with interests before public officials were not illegal.[193] However, donations made in return for an explicit promise to perform or not perform an official act would be illegal.[194] Nineteen years later, in *Citizens United v. FEC*, the Court further insulated the relationship between wealthy donors and their representatives. In *Citizens United*, the Supreme Court noted that a campaign donor's influences or access to a public official *alone* does not make his or her contribution corrupt.[195] Most recently in *McCutcheon v. FEC*, "Chief Justice Roberts concluded that the line between quid pro quo corruption and general influence must be respected in order to safeguard basic First Amendment rights, and the Court must 'err on the side of protecting political speech rather than suppressing it.'"[196] Donors and benefactors consistently seek generalized influence over public officials, sometimes in exchange for precise official acts, like pardons, but most often for less formalized acts.[197]

In such a regulatory environment, even with the passage of the PCPIA, "tawdry" relationships like those in *McDonnell* and *Sun-Diamond* could exist through campaign contributions. Economist Lawrence Lessig describes exchanges between elected officials and donors as the emergence a "gift economy" in which public officials develop personal obligations to their donors, shifting loyalties form their constituents to their private benefactors and patrons.[198] Other political scientists have noted an "obvious correlation" between campaign donations and donors' appointment to ambassadorships.[199] This phenomenon applies to both sides of the political aisle. For instance, President Obama appointed campaign bundler George Tsunis as ambassador to Norway, despite the fact that Tsunis could not name basic Norwegian political parties at his Senate confirmation.[200] President Trump appointed campaign donor and Mar-A-Lago member Lana Marks to an ambassadorship in South

192. *See generally* McCormick v. United States, 500 U.S. 257 (1991).

193. *Id.* at 273.

194. *Id*. at 257–58.

195. *See id.* at 314.

196. *First Amendment: Political Speech and Campaign Finance*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/supct/cert/supreme_court_2013-2014_term_highlights/first_amendment_political_speech_and_campaign_finance (last visited Feb. 5, 2020).

197. *See Can He Do That?*, *supra* note 11.

198. Lynda W. Powell, *The Influence of Campaign Contributions on the Legislative Process*, 9 DUKE J. CONST. L. & PUB. POL'Y 75, 82 (2014) (citing LAWRENCE LESSIG, REPUBLIC LOST (2011)).

199. *See, e.g*., Max Fisher, *This Very Telling Map Shows Which U.S. Ambassadors Were Campaign Bundlers*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/02/10/this-very-telling-map-shows-which-u-s-ambassadors-were-campaign-bundlers/; Evie Fordham, *Gordon Sondland One of Three Million-Dollar Trump Donors to Become an Ambassador*, FOX BUS. (Nov. 21, 2019), https://www.foxbusiness.com/money/trump-million-dollar-donors-ambassador-gordon-sondland.

200. Fisher, *supra* note 197.

Africa, despite the fact that Marks' only professional experience involved designing luxury handbags.[201] Yet, despite the scholarly sentiment and frequent critique of "pay to play politics,"[202] the PCPIA fails to regulate these relationships. The lofty amendment relies on existing campaign finance laws to regulate this emerging backchannel between benefactors and public officials.

However, Court decisions like *Citizens* and *McCutchen* allow private interest dollars to fund public officials' campaigns at disproportionate rates when compared to ordinary citizens: a 2010 study found that 0.26% of the population—approximately 800,000 people—donated more than $200 to congressional campaigns.[203] This class of donors "provided more than two-thirds of all donations to those [congressional]" campaigns, giving them disproportionate influence over the remaining third of donors.[204] The Kellogg School of Management determined that corporate leaders individually gave 19% of the total dollar amount recorded by the Federal Election Commission ("FEC") between 1999 and 2018.[205] And while less than 1% of Americans donated during this time period, over 40% of corporate executives did.[206] Demonstrating their appetite for access, corporate executives' donations to particular congressmembers "increased by eleven percent when that legislator received a committee assignment making him or her 'policy relevant' to the donor's company."[207]

Despite the myriad studies suggesting that campaign contributors seek to influence policy makers through their donations, the PCPIA remains too narrow in scope to regulate this issue. Instead, the PCPIA would resolve the narrow issue in the bribery statute created by case law—that official acts are limited to formal exercises of government power.[208] The limited nature of PCPIA amendment may make prosecuting "quid pro quos" between wealthy donors and public officials easier. However, a bribery statute amended as such would

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201. Shane Croucher, *Who is Lana Marks? Trump Names Handbag Designer and Mar-a-Lago Club Member as South Africa Ambassador*, NEWSWEEK (Nov. 15, 2018), https://www.newsweek.com/who-lana-marks-trump-names-handbag-designer-and-mar-lago-club-member-south-1216521.

202. *See generally* Mike Tanglis, *Pay-to-Play on Display: 19 of the 30 Companies with the Most Complaints in the CFPB Database Contributed to Mick Mulvaney*, PUB. CITIZEN (May 8, 2018), https://www.citizen.org/news/pay-to-play-on-display/ (quoting Mick Mulvaney, "We had a hierarchy in my office in Congress," Mulvaney said. "If you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you").

203. Andrew Prokop, *40 Charts That Explain Money in Politics*, VOX (Jul. 30, 2014), https://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain.

204. *Id.*

205. Edoardo Teso, *When Executives Donate to Politicians, How Much Are They Keeping Their Companies' Interests in Mind?*, KELLOGG INSIGHT (Oct. 5, 2020), https://insight.kellogg.northwestern.edu/article/executives-campaign-donations.

206. *Id.*

207. *Id.*

208. *See* S. REP. NO. 110-239, *supra* note 19, at 7–8. The PCPIA was also introduced prior to the *McDonnell* decision.

likely incentivize wealthy individuals, like the unnamed incarcerated individual seeking a presidential pardon, to provide "things of value" to a public official's campaign instead.

The PCPIA although laudable, may simply shift the problem from bribery to campaign finance violations. Such a shift reduces mega-donors' threat of prosecution, due to the FEC's "toothless"[209] enforcement regime. Under the bribery statute, both the public official and the private party are often charged with bribery.[210] Yet, the FEC often only punishes "insurgent" or "grassroots" donors since politically appointed commissioners hesitate to punish Congress's patrons.[211] As a result, the FEC over-emphasizes minor technical violations by smaller donors.[212] Additionally, the FEC dismisses almost one-third of all campaign finance violations.[213] When the FEC does enforce a campaign finance violation, the "sanctions themselves were so low-level that it is hard to believe that they could seriously deter violators."[214] To prevent would-be bribery offenders from taking advantage of the FEC's lack of enforcement, the PCPIA should propose stricter campaign finance violation enforcement. In doing so, it would prevent unlawful conduct from shifting from the bribery statute to campaign finance violations. Such language would also reduce the "gift economy"[215] that emerges between wealthy donors and elected officials, eroding officials' loyalty to their constituents. A revised PCPIA would also work towards the proposal's larger goals of enhancing transparency and the ethical accountability for members of Congress.[216]

CONCLUSION

Over the last twenty years, the judiciary has increasingly limited the breadth of the bribery statute. As a result, the statute no longer protects against the "manifold modern forms of conflicts of interest"[217] that its writers intended to prohibit. More strikingly, since *McDonnell*, the judiciary's circumscribed

209. Amanda S. La Forge, Note, *The Toothless Tiger – Structural, Political, and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L. J. AM. U. 351, 351 n.1 (1996) ("The phrase 'toothless tiger' in reference to the FEC was coined by Sen. Harry Reid (D-Nev.), a supporter of campaign finance reform.").

210. *See* McDonnell v. United States, 136 S. Ct. 2355 (2016); *see also* United States v. Sun-Diamond Growers of Ca., 526 U.S. 398 (1999).

211. *See* Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 128 n.155 (2017).

212. *See id.*

213. *See id.*

214. Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 640 (2000).

215. Powell, *supra* note 196, at 82.

216. S. REP. NO. 110-239, *supra* note 19, at 2.

217. *Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) Before the H. Comm. on the Judiciary*, 86th Cong. 460 (1960), https://babel.hathitrust.org/cgi/pt?id=uc1.a0000135517&view=1up&seq=468.

conception of an "official act" has vacated bribery charges against high-ranking public officials. Federal circuits have declined to extend this impractical definition to other statutes with bribery at their core.[218] During the 2019 House Impeachment hearings, even ranking members of Congress mischaracterized an "official act."[219] This context crystalizes the need for reform. The bribery statute was devised in part to hold public officials accountable; yet in order to do so, the statute must appropriately define the "official acts" they commit.

The PCPIA, although imperfect in its current form, provides a solution to the Court's definition of an "official act" which fails to capture the amorphous influence of high-ranking public officials. Passage of the PCPIA, with some textual modifications and a provision to enforce campaign finance violations, would appropriately modernize the bribery statute to capture the "official acts" of high-ranking public officials.

218. *See* Eliason, *supra* note 31 ("[T]he U.S. Court of Appeals for the Second Circuit declined to extend McDonnell to two other statutes that have bribery at their core, the Foreign Corrupt Practices Act and Federal program bribery (18 U.S.C. § 666).").

219. *See* Press Release, U.S. House of Representatives Permanent Select Comm. on Intelligence, Chairman Schiff Releases Opening Statement for First Open Hearing (Nov. 13, 2019) (on file with Rep. Adam Schiff) ("Whether President Trump sought to condition official acts, such as a White House meeting . . ."). *McDonnell* and *Sun-Diamond* both held that arranging a meeting is not an "official act."