Re-Examining the "*McDonnell* Problem": Federal Prosecutors' Ample Room to Prosecute State and Local Government Corruption

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Historically, states have relied on the federal government to prosecute corruption involving their public officials and employees. In McDonnell v. United States*, however, the Supreme Court purported to limit the definition of "official act" as used in the federal bribery, honest services fraud, and Hobbs Act extortion statutes—three of the Government's most potent tools against public corruption. Many observers concluded that the ruling would obstruct or all but end the federal prosecution of government corruption at the state and local levels. To test this claim, this Note presents and analyzes a novel dataset of hundreds of prosecutions in five federal districts in the six years before and after* McDonnell*. The data show that federal prosecutors in these districts have neither stopped charging nor convicting state and local government corruption. Together with an assessment of post-*McDonnell *case law, this Note concludes that claims of the so-called "*McDonnell *Problem" are overstated.*

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INTRODUCTION

Jonnie Williams was a natural-born salesman.[1] By twenty-four, he had become the top seller of cars and real estate in Fredericksburg, Virginia.[2] Over the next three decades, Williams expanded his sales empire to everything from contact lenses and discount cigarettes to medical training videos.[3] But in 2007, Williams found a product he couldn't sell: Anatabloc, a tobacco-derived supplement he claimed could treat diabetes, Alzheimer's, arthritis, and more.[4] The problem was he had no data to prove Anatabloc's efficacy.[5] Lacking the scientific evidence needed to rack up sales, Williams turned to politics.[6] In a bid to boost Anatabloc, he arranged a meeting with Virginia Governor Robert F. McDonnell.[7]

After the two men met in December 2009, Williams became a "virtual ATM" for the Governor's mansion.[8] He doled out everything from Ferraris, Rolexes, and ball gowns to cash for the Governor's beach house, his wife's shopping sprees in New York, and his daughter's wedding.[9] In return, Governor McDonnell arranged for Williams to meet with state officials to discuss the ways that Anatabloc could lower state healthcare costs, hosted events at the Governor's mansion designed to encourage state-funded researchers to study the supplement, and contacted other officials to persuade state universities to initiate those studies.[10] In January 2014, after tawdry details of Williams and McDonnell's

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1. *See* Kurt Eichenwald, *The Funny-Money Man Behind McDonnell's Fall*, NEWSWEEK (Jan. 23, 2014), https://www.newsweek.com/2014/01/24/funny-money-man-behind-mcdonnells-fall-245100.html [https://perma.cc/B939-H9AU].

2. Rosalind S. Helderman & Laura Vozzella, *Jonnie R. Williams, Key Witness Against McDonnells, Has a Complicated Past*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/local/virginia-politics/jonnie-r-williams-key-witness-against-mcdonnells-has-a-complicated-past/2014/02/03/8886cc36-8768-11e3-833c-33098f9e5267_story.html [https://perma.cc/5GLZ-XRC9].

3. *See* Eichenwald, *supra* note 1; Helderman & Vozzella, *supra* note 2.

4. *See* Eichenwald, *supra* note 1. Star Scientific, a Virginia-based company, developed Anatabloc; Williams was its CEO. McDonnell v. United States, 579 U.S. 550, 556 (2016).

5. Eichenwald, *supra* note 1.

6. *See* Eichenwald, *supra* note 1; Indictment at 7, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. Jan. 21, 2014) (No. 3:14-cr-12) [hereinafter "McDonnell Indictment"].

7. *See* Eichenwald, *supra* note 1; *McDonnell*, 579 U.S. at 556–57.

8. Eichenwald, *supra* note 1.

9. *See McDonnell*, 579 U.S. at 557–58, 559, 580.

10. *See id.* at 557, 559–60, 561; *see also id.* at 563–64 (outlining five "official acts" federal prosecutors alleged Governor McDonnell performed for Williams).

relationship began to make the press,[11] a grand jury indicted the (former) Governor on federal bribery charges.[12]

The saga of Jonnie Williams and Governor McDonnell ultimately touched off a multi-year court battle that culminated in *McDonnell v. United States*, one of the Supreme Court's most high-profile decisions on government corruption.[13] In a unanimous ruling, the Court limited 18 U.S.C. § 201's "official act" requirement,[14] remanded the Governor's case, and instructed the lower court to decide whether there was sufficient evidence of a requisite "official act" under the new *McDonnell* standard.[15]

Prosecutors, legal experts, and lay commentators reacted immediately, decrying *McDonnell* as a severe blow to the federal government's power to prosecute state and local corruption.[16] In

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11. The *Washington Post* is credited with breaking the story. *See* DAILYPRESS, *Williams and the McDonnells: A Timeline* (Sept. 4, 2014), https://www.dailypress.com/tidewater-review/dp-nws-mcdonnell-verdict-timeline-20140904-story.html [https://perma.cc/3Z83-836U] ("The *Washington Post* begins a series of stories about Williams' gifts to the McDonnell[s]" in March 2013.); Rosalind S. Helderman & Laura Vozzella, *Va. Gov. McDonnell on Two-Way Street with Chief Executive of Struggling Company*, WASH. POST (Mar. 30, 2013), https://www.washingtonpost.com/local/dc-politics/va-gov-mcdonnell-in-close-relationship-with-owner-of-struggling-company/2013/03/30/43f34fb8-97ea-11e2-814b-063623d80a60_story.html [https://perma.cc/P7AL-HSE5].

12. McDonnell Indictment, *supra* note 6.

13. For details on how the Governor's case reached the Supreme Court, see *infra* Part I.A.

14. *McDonnell*, 579 U.S. at 569 ("We conclude that a 'question' or 'matter' must be similar in nature to a 'cause, suit, proceeding or controversy.' 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).").

15. *Id.* at 580 ("If the court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial.").

16. *See* Gregory M. Gilchrist, *Corruption Law After* McDonnell: *Not Dead Yet*, 165 U. PA. L. REV. ONLINE 11, 12 (2016), https://www.pennlawreview.com/wp-content/uploads/2020/05/165-U-Pa-L-Rev-Online-11.pdf [https://perma.cc/CB86-EEQR] ("Predictably, the [*McDonnell*] decision has been received with some degree of panic. Corruption is never popular, and the ruling will make it more difficult to prosecute. But claims that federal corruption laws are dead are overstated."). *See, e.g.*, Randall D. Eliason, *Supreme Court Narrows Federal Bribery Law in a Win for Bob McDonnell*, SIDEBARS BLOG (June 27, 2016), https://sidebarsblog.com/supreme-court-narrows-federal-bribery-law-in-a-win-for-bob-mcdonnell/ [https://perma.cc/L8FG-LZNE] ("[*McDonnell*] dramatically limits the scope of federal anti-corruption statutes by adopting an artificially narrow interpretation of 'official action.'") (former federal prosecutor); John Pease III, MORGAN LEWIS, *Supreme Court's Interpretation of "Official Act" Poses New Challenge*, JDSUPRA (June 29, 2016), https://www.jdsupra.com/legalnews/supreme-court-s-interpretation-of-53069/ [https://perma.cc/4JE2-943A] ("[*McDonnell*] creates a higher hurdle for federal prosecutors.") (former federal prosecutor); Fred Wertheimer, *Symposium:* McDonnell *Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens*, SCOTUSBLOG (June 28, 2016), https://www.scotusblog.com/2016/06/symposium-

the years since, the legal community has largely stood by this view and has continued to regard *McDonnell* as a major hurdle for federal prosecutors interested in pursuing government corruption at the state and local levels.[17] Despite the prevalence of this perspective, this Note argues that *McDonnell* has not materially thwarted federal prosecutors' abilities to pursue corruption in state and local government.

This Note proceeds in four Parts: Part I details the Supreme Court's opinion in *McDonnell*, including its analysis of the critical language used in the trial court's jury instructions. This Part also identifies and explains the five key statutes in the federal prosecutor's "anticorruption toolbox." Part II defines the "*McDonnell* Problem," explains this Note's focus on corruption at the state and local levels, and explores the legal community's largely pessimistic attitudes toward *McDonnell* and its legacy. Part III presents and analyzes a collection of 623 federal cases involving the bribery of state and local officials in the six years before and after *McDonnell*. Finally, Part IV evaluates how the Courts of Appeals have applied *McDonnell* in state and local corruption cases through September 2022.

In short, the data analysis in Part III shows that the total number of defendants charged and convicted across the country's five most active judicial districts for state and local quid pro quo government corruption is virtually on par with—and in three districts exceeds—pre-*McDonnell* levels. The findings suggest that federal prosecutors have neither been deterred nor significantly hindered; rather, they have continued to prosecute corrupt defendants at roughly the same rates and in roughly the same numbers as in the pre-*McDonnell* era. The post-*McDonnell* case law discussed in Part IV helps to explain *how* federal prosecutors have continued to successfully prosecute state and local corruption—in part by rejecting claims that *McDonnell* raised the Government's evidentiary burden and eliminated valid bribery

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mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/ [https://perma.cc/3F5Z-2UVY] ("In [*McDonnell*], the Court has disarmed the ability of the American people to prevent similar kinds of corrupt practices in the future.") (legal expert); David G. Savage, *Supreme Court Makes it Harder to Prosecute Officials for Taking Bribes*, L.A. TIMES (June 27, 2016), https://www.latimes.com/nation/la-na-court-mcdonnell-corruption-20160627-snap-story.html [https://perma.cc/G3ZY-XFCX] ("[*McDonnell*] made it much harder to prosecute public officials for bribery. . . .").

17. For a detailed discussion of additional and more recent commentary on *McDonnell*'s impact, see *infra* Part II.

theories. Taken together, Parts III and IV provide evidence that the *McDonnell* doomsayers' fears are unwarranted. Given the evidence, this Note concludes that reports of the demise of the federal prosecution of state and local corruption are greatly exaggerated.

I. *MCDONNELL* AND THE FEDERAL ANTICORRUPTION TOOLBOX

In its simplest form, quid pro quo government corruption (hereinafter referred to as "bribery" or "corruption") is a payment to a public official (the *quid*) in exchange for the official's agreement (the *pro*), to take some qualified action (the *quo*)—literally, *this for that*.[18] The specific, corrupt intent to give or receive a quid in exchange for a quo distinguishes bribery from other forms of corruption, like embezzlement.[19] The words "bribe" or "bribery," however, have no uniform definition in the federal code.[20] Instead, in certain statutes banning bribery in particular contexts, Congress has defined the different quids and quos prohibited.[21] Importantly, not all of these statutes require an "official act" as the necessary quo.[22] For example, whereas 18 U.S.C. § 201 criminalizes giving a federal official "anything of value" (the quid) in exchange for "any official act" (the quo),[23] 18 U.S.C. § 666 criminalizes giving an agent of a federally funded program "any thing of value of $5,000 or more" (the quid), in exchange for any "influence[ ] . . . in connection with any business [or] transaction" of that program (the quo).[24]

Federal prosecutors currently use five statutes to charge bribery involving state and local officials: wire fraud, 18 U.S.C. § 1343; honest services fraud, 18 U.S.C. § 1346; Hobbs Act

18. *See* United States v. Burnette, No. 4:18cr76-RH-CAS, 2021 U.S. Dist. LEXIS 241702, at *12 (N.D. Fla. Dec. 18, 2021); *see also* United States v. Ng Lap Seng, 934 F.3d 110, 131 (2d Cir. 2019) (citing Perrin v. United States, 444 U.S. 37, 43–46 (1979) (tracing the meaning of "bribery")).

19. *See* United States v. Sun-Diamond Growers, 526 U.S. 398, 404 (1999) (explaining that bribery's "distinguishing feature" is the intent to give something in exchange for an action or decision).

20. *See* United States v. Zacher, 586 F.2d 912, 915 & n.7 (2d Cir. 1978) (concluding there is no "uniform definition of the term 'bribe' as used in the federal code").

21. *See Ng Lap Seng*, 934 F.3d at 132 (observing Congress has identified different quos in proscribing "bribery" in different contexts).

22. *See id.* ("[N]ot all federal bribery statutes identify 'official act,' much less official act as defined in § 201(a)(3), as the necessary quo for bribery.").

23. 18 U.S.C. § 201(b)(1)(A).

24. 18 U.S.C. § 666.

extortion, 18 U.S.C. § 1951; federal program bribery, 18 U.S.C. § 666; and the Travel Act, 18 U.S.C. § 1952.[25] Although *McDonnell* involved state corruption, the Court's opinion turned on Section 201, Congress' *federal* bribery ban.[26] That statute makes it a crime for a federal official to demand, seek, receive, accept, or agree to receive or accept "anything of value" in return for "the performance of any official act."[27] In 18 U.S.C. § 201(a)(3), Congress limited Section 201's quo requirement ("any official act") to a statutory definition.[28] Its specific language—notably absent from the honest services fraud and Hobbs Act extortion statutes—is the source of *McDonnell*'s "official act" standard.

The peculiar nature of the jury instructions at issue in *McDonnell* is fundamental to understanding the interplay between Section 201 and other federal bribery statutes since the Court's decision. To explain the critical nature of those instructions, Part I.A first explains how McDonnell's case made its way from a district court in Virginia to before the Supreme Court. It then details the *McDonnell* opinion and the key language undergirding the Court's unanimous decision. Part I.B summarizes the statutes federal prosecutors use to charge bribery in state and local governments in a non-*McDonnell* context in order to demonstrate the various tools federal prosecutors have available to tackle corruption at the state and local levels. This Part concludes by explaining *McDonnell*'s impact on these key statutes.

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25. Congress has passed other federal statutes prohibiting bribery in specific situations. *See, e.g.*, 19 U.S.C. § 186 (prohibiting certain payments in the labor relations context); 18 U.S.C. § 1347 (prohibiting certain payments and other forms of improper influence in health care benefit programs). These laws, which cover bribery in particular sectors, are outside the scope of this Note as they are not implicated by *McDonnell*'s "official act" standard.

26. *See* McDonnell v. United States, 579 U.S. 550, 562 (2016) (noting parties' agreement to define honest services fraud and Hobbs Act extortion in reference to the federal bribery statute, Section 201).

27. 18 U.S.C. § 201(b)(2).

28. 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." 18 U.S.C. § 201(a)(3).

A. THE MAKING OF *MCDONNELL*

With Jonnie Williams ready to act as its star witness at trial, the Government indicted Governor McDonnell on eleven separate corruption counts.[29] Federal prosecutors accused the Governor of accepting "things of value" from Williams in exchange for "performing official actions . . . as opportunities arose, to legitimize, promote, and obtain research studies for [Anatabloc]."[30] Specifically, they charged McDonnell with bribery in violation of the honest services wire fraud statute, 18 U.S.C. § 1346,[31] and extortion under color of official right, 18 U.S.C. § 1951 (Hobbs Act extortion).[32] The parties agreed that they would define honest services fraud and Hobbs Act extortion with reference to the federal bribery statute, Section 201.[33] The stipulation required prosecutors to prove that Governor McDonnell committed or agreed to commit "official acts" in exchange for the loans and gifts from Williams.[34] The parties did not agree, however, on what constituted an "official act."[35]

At trial, the district court first provided the statutory definition of "official act" in its jury instructions:

> Now, you've heard this term official action several times, and I will define it for you. The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity.[36]

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29. *See McDonnell*, 579 U.S. at 564 (noting prosecutors granted Williams an immunity agreement); McDonnell Indictment, *supra* note 6.

30. *McDonnell*, 579 U.S. at 561–62.

31. Honest services fraud may be charged under Section 1343 pursuant to the definition of "honest services" provided in 18 U.S.C. § 1346. According to the indictment, prosecutors charged the Governor with honest services wire fraud in violation of 18 U.S.C. § 1343 without reference to Section 1346. *See* McDonnell Indictment, *supra* note 6, at 36 (charging the "use of interstate wire communications to further scheme to defraud the citizens of Virginia of their right to honest services" in violation of Section 1343).

32. *McDonnell*, 579 U.S. at 562.

33. *Id.*

34. *Id.* at 563.

35. *See id*. at 555; *see also id.* at 565–66 (explaining parties' opposing definitions of "official act").

36. Trial Transcript at 6102, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. Sept. 3, 2014) (No. 3:14-cr-12), ECF No. 487.

Critically, the court then added: "[O]fficial actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description."[37]

Following these instructions, Virginian jurors convicted their former governor.[38] The Fourth Circuit affirmed, stressing the accuracy of the lower court's definition of "official act."[39] Governor McDonnell appealed his convictions to the Supreme Court.[40] The Court granted certiorari to clarify the meaning of Section 201's "official act" requirement.[41]

In *McDonnell*, the Court unanimously held that "official act" as used in Section 201—and by stipulation in this case, in the honest services fraud and Hobbs Act extortion counts—refers only to decisions involving "a formal exercise of government power."[42] The key to an "official act," it said, is that it "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official."[43] Applying this standard, the Court concluded that Governor McDonnell's actions were not direct evidence of sufficiently specific "official acts" and that the district court erred when it provided a broader interpretation of the term in its jury instructions.[44]

Specifically, Chief Justice Roberts wrote that while the evidence at trial proved an explicit quid,[45] and an explicit pro,[46] the

37. *Id.* at 6103.

38. *See* United States v. McDonnell, 792 F.3d 478, 519 (4th Cir. 2015).

39. *Id.* at 506. Recognizing that "official act" as used in Section 201 "does not encompass every action taken in one's official capacity," the Fourth Circuit held that the district court had adequately limited the term when it told jurors that it "covers only 'decision[s] or action[s] 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 public official's official capacity.'" *Id.* (citing trial record).

40. McDonnell v. United States, 577 U.S. 1099 (2016) (mem.) (granting certiorari).

41. McDonnell v. United States, 579 U.S. 556 (2016).

42. *Id.* at 574. Note that *McDonnell*'s "official act" standard includes using one's "official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Id.*

43. *Id.*

44. *Id.* at 577 ("[T]hose instructions lacked important qualifications, rendering them significantly overinclusive.").

45. *Id.* at 580–81 (referring to multiple loans, expensive getaways, shopping trips, and golf outings Williams gave to McDonnell and his family, in addition to "Ferraris, Rolexes, and ball gowns").

46. *Id.* at 555 (referring to McDonnell's agreement to provide Williams with his assistance to ensure "Virginia's public universities would perform research studies on [Anatabloc]"); *see id.* at 564 (noting Williams testified that he had given the loans and gifts to obtain McDonnell's "'help with the testing' of Anatabloc at Virginia's medical schools" and that McDonnell acknowledged he had "requested loans and accepted gifts from Williams").

Court could "express no view" on whether the evidence proved an explicit quo—that is, a properly defined "official act" taken or agreed to be taken by Governor McDonnell.[47] Notably, the Court rejected McDonnell's argument that his charges must be dismissed because the Government presented insufficient evidence of an "official act."[48] Rather, because the jury was not "correctly instructed" on the meaning of the term, there was a risk it reached an erroneous decision.[49] The Court vacated the Governor's convictions and remanded the case.[50]

B. THE FEDERAL ANTICORRUPTION TOOLS

In *McDonnell*, the Government agreed to define the quo requirements of honest services fraud and Hobbs Act extortion by reference to Section 201's "official act" provision.[51] Accordingly, *McDonnell* not only purported to limit Section 201's "official act" requirement, but also by stipulation, the quo requirements of Sections 1346 and 1951.[52] The interplay between Section 201's "official act" requirement and the quo requirements of other federal bribery statutes is critical to understanding the analyses in Parts III and IV. This section summarizes the various statutes federal prosecutors use to charge bribery in state and local government in a non-*McDonnell* context. It concludes by explaining *McDonnell*'s impact on these key statutes.

47. *Id.* at 580; *see id.* at 567 (concluding that under its "more bounded interpretation," "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act'").

48. *Id.* at 580 ("Because the parties have not had an opportunity to address that question in light of the interpretation of § 201(a)(3) adopted by this Court, we . . . express no view on that question.").

49. *Id.* at 579.

50. *Id.* at 580, 581.

51. *See id.* at 562.

52. *See* DANIEL C. RICHMAN ET AL., DEFINING FEDERAL CRIMES 377 (2d ed. 2019) ("Unless and until a lower court departs from the lawmaking-by-stipulation in *McDonnell*, the focus will be—in addition to determining whether a quid pro quo occurred—on sorting qualifying 'official acts' from non-qualifying actions.").

1. *The Fraud and Honest Services Fraud Statutes*

The general fraud statutes, 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud),[53] are two of the most flexible instruments in the federal government's anticorruption toolbox.[54] Covering "a wide variety of forms of dishonesty," the fraud statutes criminalize any scheme or effort to obtain property through material misrepresentations transmitted through the interstate mail or over interstate wires.[55] Accordingly, the general fraud statutes cover a broad array of corrupt conduct, including the payment or concealment of bribes.[56]

To convict a public official under the more specific honest services fraud statute, 18 U.S.C. § 1346, the Government must also prove that the defendant sought to carry out his fraud in order to deprive another of "the intangible right of honest services."[57] In *Skilling v. United States*, the Supreme Court limited the reach of

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53. Note that the mail fraud statute is nearly identical in its language and requirements, but prohibits frauds that utilize the postal system. Accordingly, courts interpret each statute in the same way, meaning case law regarding one statute is applicable to the other. Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("[We] construe[ ] identical language in the wire and mail fraud statutes *in pari materia*.").

54. *See* RICHMAN ET AL., *supra* note 52, at 181 (describing the mail and wire fraud statutes as "among the most flexible weapons in the federal prosecutorial arsenal"); ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL § 4.01, 59 (4th ed. 2009) (observing that the fraud statutes are "extensively used by federal prosecutors" because of their "breadth").

55. *See* RICHMAN ET AL., *supra* note 52, at 182. Note that the mail and wire fraud statutes criminalize only those schemes or artifices to defraud aimed at obtaining "property," meaning they do not extend to a citizen's intangible right to good government. McNally v. United States, 483 U.S. 350, 360 (1987); *see* Cleveland v. United States, 531 U.S. 12, 26 (2000) (following *McNally* to "conclude that § 1341 requires the object of the fraud to be 'property' in the victim's hands"); Kelly v. United States, 140 S. Ct. 1565, 1567 (2020) (following *McNally* to conclude Section 1343 requires the Government to show that "that an object of [the defendant's] fraud was money or property"). The definition of the statutory term "property" is hotly debated. For a review of what does (and should) constitute "property," see Luke Urbanczyk, *Misappropriation vs. Alteration: Post-*Kelly *Efforts to Criminalize Fraud Targeting Confidential Government Information*, 56 COLUM. J.L. & SOC. PROBS. 1 (2022).

56. *See* RICHMAN ET AL., *supra* note 52, at 182 (noting that federal prosecutors have used the general fraud statutes "to attack a wide variety of forms of dishonesty in . . . governmental settings"); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) (quoting federal prosecutors' long followed maxim: "When in doubt, charge mail fraud"). *See, e.g.*, United States v. Gatto, 986 F.3d 104 (2d Cir. 2021) (affirming defendants' wire fraud convictions for scheming to defraud universities of athletic-based financial aid when they paid secret cash bribes to college basketball recruits, which made the recruits ineligible to play for the universities).

57. *See* 18 U.S.C. §§ 1341, 1346.

Section 1346 to only two corrupt activities: bribes and kickbacks.[58] Under this standard, the Section's bribery prohibition is interpreted in line with other federal bribery-related statutes, including the federal bribery statute, Section 201, and the statute prohibiting bribery involving federal funds, 18 U.S.C. § 666.[59] That is, it requires a showing of a quid pro quo.

2. *Hobbs Act Extortion*

A public official may commit extortion through threats or violence, but also by obtaining property "under color of official right."[60] In *Evans v. United States*, the Supreme Court explained that Hobbs Act extortion is "the rough equivalent of . . . 'taking a bribe.'"[61] Specifically, the Court held that to convict a public official of "under color" extortion, the Government must show that the official "obtained a payment to which he was not entitled [the quid], knowing that the payment was made in return for *official acts* [the quo]."[62] Since *Evans*, bribery schemes charged under the Hobbs Act, like prosecutions under other bribery-related statutes, require proof of a quid pro quo.[63]

3. *Federal Program Bribery*

In 1983, Congress passed 18 U.S.C. § 666's bribery prohibition to "augment" the Government's ability "to vindicate significant acts of . . . bribery involving Federal monies that are disbursed to private organizations or state and local governments pursuant to a Federal program."[64] By providing for the federal prosecution of

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58. Skilling v. United States, 561 U.S. 358, 404 (2010) (narrowing Section 1346 to avoid constitutional issues).

59. *Id.* at 412–13.

60. The Hobbs Act defines "under color" extortion as "obtaining . . . property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2).

61. Evans v. United States, 504 U.S. 255, 260 (1992).

62. *Id.* at 268 (emphasis added). *Evans* also clarified that the official need not *demand* the bribe. *Id.* at 256. Rather, the coercive element on the part of the official and the fear element on the part of the bribe payer are implied from the official's position—so long as the motivation for the payment focuses on the recipient's office. *Id.* at 266, 268.

63. *Id.* at 268. Note that despite *Evans*' holding, several Justices have expressed doubt about whether the Hobbs Act covers bribery. *See id.* at 278 (Thomas, J., dissenting); Ocasio v. United States, 578 U.S. 282, 300–01 (2016) (Breyer, J., concurring); *id.* at 314 n.3 (Sotomayor, J., dissenting).

64. S. REP. NO. 98-225, at 369–70 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 351. For a more detailed history of Section 666, see George D. Brown, *Stealth Statute—Corruption, the*

corrupt state and local officials employed by agencies receiving federal funds, Section 666 filled regulatory gaps in the then-existent federal code—created by, for example, Section 201.[65]

Section 666's bribery prohibition makes it a crime for any agent of an "organization, government, or agency" receiving at least $10,000 in federal funding in any one-year period to solicit, demand, accept, or agree to accept "any thing of value of $5,000 or more" (the quid), with the corrupt intent "to influence or reward" that agent "in connection with any business, transaction, or series of transactions of" the federal funds recipient (the quo).[66] Section 666 does not require that federal funds be directly affected by the bribery scheme, giving the statute broad applicability.[67]

4. *Travel Act Bribery*

The Travel Act, 18 U.S.C. § 1952, specifically prohibits the use of interstate travel, mail, or facilities with the intent to carry out "bribery . . . in violation of the laws of the State in which committed or of the United States."[68] This means bribery in violation of the relevant state bribery law is a sufficient predicate crime under Section 1952.[69]

In *Perrin v. United States*, the Supreme Court held that the Travel Act criminalizes "the generic definition of bribery."[70] The Court explained that Travel Act bribery covers "all relations . . . recognized in a society as involving special trust," including

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Spending Power, and the Rise of 18 U.S.C. § 666, 73 NOTRE DAME L. REV. 247, 272–81 (1998).

65. *See* Sabri v. United States, 541 U.S. 600, 607 (2004) (observing Congress enacted Section 666 "only after other legislation had failed to protect federal interests" and with the intent to "extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds").

66. 18 U.S.C. § 666(a)(1)(B) & (a)(2).

67. *See* Salinas v. United States, 522 U.S. 52, 57 (1997). *See also id.* at 56 (concluding Section 666's "expansive, unqualified language . . . does not support the interpretation that federal funds must be affected"); *Sabri*, 541 U.S. at 605 (holding Section 666 does not require proof of connection with federal money).

68. 18 U.S.C. § 1952(a)(2)–(3); 18 U.S.C. § 1952(b).

69. *See, e.g.*, United States v. Ferriero, 866 F.3d 107, 113–14 (3d Cir. 2017) (affirming state official's Travel Act conviction where evidence was sufficient to prove a violation of state bribery law as the "predicate" offense).

70. Perrin v. United States, 444 U.S. 37, 49 (1979). In *Perrin*, the defendants were accused of using the facilities of interstate commerce for the purpose of promoting a commercial bribery scheme. *Id.* at 38–40. On appeal, they argued that the Travel Act criminalized only the bribery of public officials. *Id.* at 41. Affirming the convictions, the Court concluded that Travel Act bribery encompasses conduct in violation of federal and state bribery statutes, including the states' *commercial* bribery laws. *Id.* at 50.

individuals acting in a private capacity and state and local officials exercising governmental power.[71] Specifically, *Perrin* concluded that under the plain meaning of the Travel Act's bribery prohibition, Congress intended to include violations of federal and state bribery laws.[72] Under *Perrin*, to convict a defendant of Travel Act bribery, the Government is not required to prove an "official act"—at least not where the underlying federal or state bribery law does not use the term.[73]

As elaborated in Part IV, after *McDonnell*, defendants have argued that Sections 666 and 1952 require a quo conforming to *McDonnell*'s "official act" standard. As explained there, these arguments have led to mixed results. Nevertheless, the Courts of Appeals have generally made clear that *McDonnell* does not "delimit" the quo requirements of these other bribery statutes.[74] Sections 1346 and 1951, however, now appear to require an "official act," while Sections 666 and 1952 do not.

II. THE RISE OF THE "*MCDONNELL* PROBLEM"

This Part defines the "*McDonnell* Problem," explains the dominant view of the case today, and identifies the need for more precise, quantitative examination of this so-called problem.

A. THE "*MCDONNELL* PROBLEM"

First coined by Professor George D. Brown in 2017, the "*McDonnell* Problem" refers to the legal community's concern about *McDonnell*'s impact on the federal prosecution of state and local corruption.[75] Shortly after the decision, a growing coalition

71. *See id.* at 45 & n.11 (internal citations and quotation marks omitted).

72. *Id.* at 42 ("[I]t is clear beyond doubt that Congress intended to add a second layer of enforcement supplementing what it found to be inadequate state authority and state enforcement.").

73. *See id.* at 50 (observing Section 1952 reflects Congress' "clear and deliberate intent . . . to alter the federal-state balance in order to reinforce state law enforcement" and explaining that "[i]n defining an 'unlawful activity,' Congress has clearly stated its intention to include violations of state . . . law").

74. *See* United States v. Reed, 908 F.3d 102, 113 & n.32 (5th Cir. 2018) (observing the "[C]ircuits' reluctance to extend *McDonnell* beyond the context of honest services fraud and the bribery statute, even where prosecutions involved local or state government officials" (collecting cases)).

75. *See* George D. Brown, *The Federal Anti-Corruption Enterprise After* McDonnell-*Lessons from the Symposium*, 121 DICK. L. REV. 989, 991, 1004 (2017) (exploring the "view that *McDonnell* is highly significant . . . as a guidepost for federal prosecution of state and

of legal scholars concluded that *McDonnell* significantly impeded federal corruption prosecutions involving state and local officials.[76] This position has since crystallized into today's majority view: most law scholars and commentators affirm that *McDonnell* significantly hampered federal corruption prosecutions at the state and local levels.[77]

The current majority view appears to be based on three interrelated assumptions: (1) *McDonnell* limits federal authority in the prosecution of state and local corruption by raising the

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local officials for corruption"). Professor Brown observed a "relative lack of law review commentary on *McDonnell*" in 2017. *Id.* at 1004; *but see* Arlo Devlin-Brown & Erin Monju, *Public Corruption Prosecutions and Defenses Post-*'McDonnell,' N.Y.L.J. (Online) (Jan. 30, 2017) (noting that in 2017, *McDonnell*'s impact was, at that point, "limited in time and import"). Nevertheless, Professor Brown concluded that despite the legal community's contrary comments in the media, the view among those who presented at that year's Penn State Law Review Symposium, *Breach of the Public (Dis)Trust*, was that "*McDonnell* d[id] not portend a sea change, but [wa]s rather a lens through which many anticorruption issues can be viewed." Brown, *supra*, at 1012. The view shared among the attendees at this 2017 symposium would soon be drowned out by those attending a similarly-themed symposium one year later. *See infra* Part II.B.1.

76. *See, e.g.*, Adam F. Minchew, *Who Put The Quo In Quid Pro Quo?: Why Courts Should Apply* McDonnell*'s "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793 (2017) (exploring *McDonnell*'s possible impact on the quid pro quo standard for future federal prosecutions of state and local official corruption); 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-toprosecute-public-corruption-cases/2017/07/13/5ac5745c-67e6-11e7-9928-22d00a47778f_story.html [https://perma.cc/KC47-SPNJ] (reporting that legal analysts said the Second Circuit's decision in *Silver I*, detailed *infra* Part IV.A, demonstrates "how prosecutors will face significant challenges in bringing and winning public corruption cases" after *McDonnell*); *id.* ("It's the legacy of Bob McDonnell—making life easier for corrupt public officials everywhere." (quoting Professor Randall Eliason) (internal quotation marks omitted)); *id.* ("[P]rosecutors probably will now bring fewer public corruption cases, knowing the high bar they must meet." (citing defense attorney Kelly Kramer)).

77. *See, e.g.*, Amie Ely, *What* McDonnell v. United States *Means for State Corruption Prosecutors*, NAAG (May 28, 2018), https://www.naag.org/attorney-general-journal/what-mcdonnell-v-united-states-means-for-state-corruption-prosecutors/ [https://perma.cc/A4HS-YW58] ("*McDonnell* has undoubtedly affected federal prosecutors' abilities to charge the federal bribery statute in certain cases. Its federalism underpinnings may also mean that it applies more broadly to federal cases in which state and local officials are targets."); *id.* ("*McDonnell* has . . . created opportunities for state public integrity prosecutors to fill the void when federal prosecutors cannot or choose not to prosecute corrupt local and state officials."); Mimi Rocah et al., *Special Problems for Prosecutors in Public Corruption Prosecutions*, 38 PACE L. REV. 766, 774–75 (2018) ("*McDonnell* has opened up a gap for state prosecutors to fill."); Yael Levy, *Is New York Better Suited Than the Feds to Prosecute Public Corruption?*, N.Y.L.J. (July 6, 2020, 10:30 AM), https://www.law.com/newyorklawjournal/2020/07/06/is-new-york-better-suited-than-the-feds-to-prosecute-public-corruption/ [https://perma.cc/48VH-LBXT] (arguing that after *McDonnell* "New York prosecutors may now be in a better position than federal prosecutors to go after public corruption"). For a discussion of still more recent legal authority reaffirming this view, see *infra* Part II.B.

Government's evidentiary burden to prove a requisite "official act" and by jeopardizing previously recognized bribery theories;[78] (2) this limit discourages some state and local corruption cases from being brought in the first place;[79] and therefore (3) *McDonnell* ultimately leaves much state and local corruption to the states (or their electorates) to rectify.[80] In short, as used in this Note, the "*McDonnell* Problem" refers to the substantial legal authority expressing concern that *McDonnell* imposes significant barriers to the federal prosecution of state and local corruption.

Evaluating *McDonnell*'s impact on the federal prosecution of state and local corruption is particularly important given the social interests at stake—most notably corruption's threat to "democracy itself."[81] First, and arguably the biggest concern, is that if federal prosecutors are unable to reach bribery involving state and local officials, state and local anticorruption enforcement falls on local prosecutors, who, historically, have not done a good job.[82] Indeed,

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78. *See* Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor's Graft Conviction*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html [https://perma.cc/4WZH-NWZV] (reporting "widespread agreement among prosecutors and defense lawyers . . . that the decision would make it harder for the government to prove corruption"). *See, e.g.*, Amy Davidson Sorkin, *The Supreme Court's Bribery-Blessing* McDonnell *Decision*, NEW YORKER (June 27, 2016), https://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision [https://perma.cc/T8FD-VHJ3] ("[T]he Court set a new standard for official-bribery cases that is so absurdly narrow that it will likely be almost impossible to convict any but the most bumbling politicians of the crime."); Emma Quinn-Judge & Harvey A. Silverglate, *Tawdry or Corrupt?* McDonnell *Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2016 CATO S. CT. REV. 189, 207 (2016) ("While *McDonnell* did not squarely address this issue, one fair reading of the decision is that it silently rejected the stream of benefits theory."); *id.* (offering reasons why the "stream of benefits" theory may no longer be viable).

79. *See* 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 [https://perma.cc/PD8A-5PAR] (reporting an "agreement among legal experts . . . that the ruling would make it harder for the government to win corruption convictions").

80. *See, e.g.*, Ely, *supra* note 77; Levy, *supra* note 77.

81. WHITE HOUSE, UNITED STATES STRATEGY ON COUNTERING CORRUPTION 4 (Dec. 2021) https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf [https://perma.cc/W58C-AGP3] ("President Biden established the fight against corruption as a core national security interest" because, among other reasons, "corruption threatens . . . democracy itself."); *see id.* at 6–7 (detailing corruption's impacts on society); FBI, *Public Corruption*, https://www.fbi.gov/investigate/public-corruption [https://perma.cc/UJL2-9D9L] ("[Corruption] poses a fundamental threat to our national security and way of life.").

82. *See* EDWARD D. FEIGENBAUM, HUDSON INST., EFFECTIVE STRATEGIES FOR THE PROSECUTION OF PUBLIC CORRUPTION 41–47, 51–55 (1991), https://www.ojp.gov/pdffiles1/Digitization/133965NCJRS.pdf [https://perma.cc/P4DX-A29C] (illustrating greater effectiveness of federal, as compared to state and local, prosecutions of state and local

state and local prosecutors are hampered for several reasons.[83] For one, state legislatures "are not exactly known for passing robust laws to regulate the way they interact with donors and lobbyists."[84] For another, elected prosecutors may face political pressure to not go after their political opponents, or corrupt politicians from their own parties for fear of political backlash.[85] Perhaps these dynamics explain why all but one of the high-profile corruption cases in New York have been brought by federal prosecutors since 2007.[86] Additionally, local prosecutors lack the jurisdiction to prosecute cases that span county lines.[87] Finally, state enforcers may lack the statutory tools, dedicated resources, and relative expertise to successfully prosecute state and local corruption on par with their federal counterparts.[88]

In sum, while *McDonnell* impacts the federal prosecution of *federal* corruption by limiting the "official acts" chargeable under Section 201, this Note focuses on *McDonnell*'s impact on the federal prosecution of state and local corruption—the "*McDonnell* Problem"—because it has received the most attention.[89]

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corruption); *see also* CTR. FOR ADVANC. OF PUB. INTEGRITY, OVERSIGHT AND ENFORCEMENT OF PUBLIC INTEGRITY: A STATE-BY-STATE STUDY – NEW YORK 5 (Jan. 2016, updated May 2018) ("As in other states, corruption offenses in New York State are typically prosecuted at the federal level.").

83. *See* FEIGENBAUM, *supra* note 82, at 31–32 (explaining some of the challenges faced by state and local corruption prosecutors).

84. Leah Litman, *Prosecuting Political Corruption Cases Like Bridgegate is Nearly Impossible*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/outlook/prosecuting-political-corruption-cases-like-bridgegate-is-nearly-impossible/2020/05/08/bb6f4828-912d-11ea-a9c0-73b93422d691_story.html [https://perma.cc/YH5Y-ZERT]; *see also* FEIGENBAUM, *supra* note 82, at 31 (describing inadequacy of state laws to combat corruption).

85. *See* FEIGENBAUM, *supra* note 82, at 31–32 (describing "invidious pressures" on state and local corruption prosecutors and investigators); Vincent L. Briccetti et al., *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, 715 (discussing political hurdles unique to corruption prosecutions).

86. Litman, *supra* note 84; *see* Rocah et al., *supra* note 77, at 777 ("Not one prosecutor in New York State prosecuted any high-level official for corruption. Why is that? . . . I think it's politics." (quoting Professor Bennett Gershman)); *id.* at 778–79 (explaining how "closeness" between local politicians and prosecutors leads to a lack of state corruption enforcement in upstate New York (quoting former New York prosecutor Carrie Cohen)).

87. *See* LEGAL INFO. INST., CORNELL L. SCH., *District Attorney (DA)*, https://www.law.cornell.edu/wex/district_attorney_(da) [https://perma.cc/SS9X-997W].

88. *See* FEIGENBAUM, *supra* note 82, at 43–47 (describing federal corruption prosecutors' relative advantages, such as greater resources, experience, and political independence; stronger laws and prioritization; and broader jurisdiction).

89. *See, e.g.*, Ely, *supra* note 77 ("A number of editorials, opinion pieces, and law review articles have examined *McDonnell*'s impact on the federal prosecution of local and state officials.").

B. THE "*MCDONNELL* PROBLEM" DEBATE

Immediately following *McDonnell*, most commentators concluded that the decision had introduced a meaningful, new hurdle to the federal prosecution of government corruption. The day *McDonnell* was handed down, for example, the *New York Times* reported that there was already "widespread agreement" among prosecutors, defense attorneys, and legal experts that *McDonnell* would "make it harder for the government to win corruption convictions" and "even discourage some cases from being brought in the first place."[90] This section details how this view, which most—but not all[91]—commentators held, still splits the legal community today. It concludes by explaining the importance of re-examining the "*McDonnell* Problem" now.

1. *The "*McDonnell *Problem" Split*

In March 2018, legal academics, alongside federal and state judges, prosecutors, and law enforcement officers, organized a symposium entitled "Public Corruption Prosecution After *McDonnell*."[92] Their main concern was that *McDonnell*'s federalism dimension "altered the legal landscape,"[93] in that it raised the Government's evidentiary burden and potentially voided previously valid bribery theories.[94] In short, they claimed that by reducing the power of federal prosecutors to act in state

90. Lipton & Weiser, *supra* note 79.

91. Initially, some scholars did push back on the idea that *McDonnell* foreshadowed a "sea change" in how state and local corruption is prosecuted. *See, e.g.*, Brown, *supra* note 75, at 1012 (arguing recent "cases represent . . . an accommodation with *McDonnell*, rather than a view of it as a radical change in the rules"). These scholars nevertheless explained that they were writing in response to "panic" that *McDonnell* markedly limited federal corruption authority. *See, e.g.*, Gilchrist, *supra* note 16; Quinn-Judge & Silverglate, *supra* note 78, at 204 ("While promptly described—and decried—as a decision that will drastically limit public corruption prosecutions, closer examination suggests that the constraints imposed by the Court are illusory or limited at best.").

92. *Symposium: Public Corruption Prosecution After* McDonnell, 38 PACE L. REV. 3 (2018), https://digitalcommons.pace.edu/plr/vol38/iss3/ [https://perma.cc/7SLN-HD64].

93. Mimi Rocah, *Introduction*, 38 PACE L. REV. 687, 687 (2018).

94. *See, e.g.*, Samantha Conway et al., *Primer*, 38 PACE L. REV. 688, 705 (2018) ("[*McDonnell*] just raises the standard of prosecution to a very, very high level." (quoting Jessica Tillipman, Assistant Dean, George Washington University Law School)); Briccetti et al., *supra* note 85, at 724–28 (predicting *McDonnell*'s "long-term" impact will be to discourage federal prosecutors from bringing state and local corruption cases because of a new evidentiary bar); David Yassky et al., *How Should Congress Respond to* McDonnell*?*, 38 PACE L. REV. 738, 749 (2018) (expressing concern that *McDonnell* may "do away with or is chipping away" at the "stream of benefits" theory).

and local corruption cases, *McDonnell* "opened up a gap for state prosecutors to fill."[95]

This view still held sway three years later when the National Association of Attorneys General (NAAG) published the similarly-themed *Anticorruption Manual* in June 2021.[96] The volume, which features contributions from former federal prosecutors, current assistant state attorneys general, law professors, and various other corruption experts, addresses the concern that federal prosecutors are roadblocked by a new evidentiary hurdle in *McDonnell*'s "official act" standard.[97] Consequently, the *Anticorruption Manual* guides state and local prosecutors on how to use existing tools to build cases against certain corrupt state and local officials, who, NAAG concludes, are no longer subject to federal prosecution.[98] The *Anticorruption Manual* and the positions of its contributing authors, therefore, further support the conclusion that legal academics and practitioners see *McDonnell* as a problem.[99]

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95. Rocah et al., *supra* note 77. *Cf.* Ely, *supra* note 77 (suggesting state prosecutors may "fill the void" created by *McDonnell*).

96. In introducing the *Anticorruption Manual* and explaining its importance, NAAG contends: "Given the limits the United States Supreme Court has imposed on the reach of federal statutes to prosecute local and state officials, local and state prosecutors are increasingly *the only* sheriffs in town with the authority to investigate and prosecute certain corrupt officials." Chris Toth, *Foreword: The Importance of Confronting & Prosecuting Corruption*, *in* ANTICORRUPTION MANUAL: A GUIDE FOR STATE PROSECUTORS xxxi (Amie N. Ely & Marissa G. Walker eds., 2021) [hereinafter "ANTICORRUPTION MANUAL"] (citing Kelly v. United States, 140 S. Ct. 1565, 1571 (2020); McDonnell v. United States, 579 U.S. 550, 576–77 (2016) (emphasis added)).

97. *See id.* The Manual goes on to cite *McDonnell* at 53–55, 60–62, 65, 249, 298, 299, 301–02, 309, 336, 477, 503–07—more than it cites any other case. *See Index C—Topics*, *in* ANTICORRUPTION MANUAL, *supra* note 96, at 657.

98. *See* Toth, *supra* note 96. *See also* Ely, *supra* note 77; THE ANTICORRUPTION MANUAL: A GUIDE FOR STATE PROSECUTORS, NAAG, https://www.naag.org/anticorruption-manual/ [https://perma.cc/Z478-8WP9] ("Given that the U.S. Supreme Court has interpreted federal fraud law as leaving much public corruption to the states to rectify, local and state prosecutors are increasingly the only actors with the authority to investigate and prosecute certain corrupt officials.").

99. *See, e.g.*, Howard S. Master, *Legislative Corruption*, *in* ANTICORRUPTION MANUAL, *supra* note 96, at 47, 53–56 (contending "*McDonnell* . . . changed the landscape of federal corruption prosecutions," and outlining new "*McDonnell* Challenges"); Peter J. Henning, *Defenses in Public Corruption Prosecutions*, *in* ANTICORRUPTION MANUAL, *supra* note 96, at 493, 503–05 (describing *McDonnell*'s impact as creating the new "official act" defense through which "defendants may use *McDonnell* to argue that the same reading of what constitutes an 'official act' should apply to narrow the concept of corruption, regardless of the particular language of a state or local bribery statute"); Robert Shapiro & Daniel Pietragallo, *Cooperation with Federal & Local Partners: Considerations for Attorney General Offices Investigating & Prosecuting Public Corruption*, *in* ANTICORRUPTION MANUAL, *supra* note 96, at 248, 249 (noting that unlike their state and local counterparts, federal prosecutors are subject to federalism concerns (citing *McDonnell*, 579 U.S. at 577)).

From the outset, however, a handful of commentators viewed *McDonnell* as a potentially minor opinion. Professor Matthew Stephenson, for example, proposed that the decision could be read narrowly: if the jury instructions in *McDonnell* were too broad, most corruption prosecutions could still proceed so long as the jury was properly instructed.[100] In addition, a few former federal prosecutors predicted that the new "official act" standard would fail to significantly impact the federal prosecution of state and local corruption in practice.[101] Explaining that most corruption cases involve quos that clearly fall within *McDonnell*'s "official act" standard, they pushed back on the notion that *McDonnell* raised the evidentiary bar.[102] They also expressed skepticism that judges and juries would be likely to "rally around" defendants who argue that they sold "only access" to their government offices.[103] Indeed, two recent cases seem to support this view.[104] Overall, however, comparatively little has been written in support of the minority

100. *See* Matthew Stephenson, *The Supreme Court's* McDonnell *Opinion: A Post-Mortem*, GLOB. ANTICORRUPTION BLOG (July 19, 2016), https://globalanticorruptionblog.com/2016/07/19/the-supreme-courts-mcdonnell-opinion-a-post-mortem/ [https://perma.cc/9N2B-4YMY] ("The problem, according to the [*McDonnell*] Court, was that the jury wasn't properly instructed.").

101. *See, e.g.*, Daniel C. Richman & Jennifer Rodgers, *Rewarding Subtlety*: McDonnell v. United States, N.Y.U.L. PROGRAM ON CORP. COMPLIANCE & ENF'T: COMPLIANCE & ENF'T BLOG (July 5, 2016), https://wp.nyu.edu/compliance_enforcement/2016/07/05/rewarding-subtlety-mcdonnell-v-united-states/ [https://perma.cc/YX2W-DV2W] ("[I]s *McDonnell* a game-changer for prosecutors . . . in corruption cases? We think probably not."); Devlin-Brown & Monju, *supra* note 75 ("Will *McDonnell* limit . . . new prosecutions? Not significantly.").

102. Richman & Rodgers, *supra* note 101 ("[T]he *McDonnell*s of the world . . . are likely to be few and far between."); *accord* Devlin-Brown & Monju, *supra* note 75 ("*McDonnell* is of limited significance: It prevents prosecutors from bringing only the weakest of public corruption cases. . . . In the prototypical public corruption case . . . the prosecution can make a straight-faced claim that governmental action, and not just access, was the intended aim of the bribe.").

103. Devlin-Brown & Monju, *supra* note 75. *Compare id. with* Henning, *supra* note 99 (predicting the rise of new "*McDonnell* defenses").

104. *See* Government's Memorandum in Support of a Downward Departure Pursuant to Section 5k1.1 of the U.S. Sentencing Guidelines & General Sentencing Memorandum at 11–22, United States v. Rechnitz, No. 16-cr-389 (S.D.N.Y. Oct. 16, 2019), ECF No. 70 (describing defendant's corrupt activities as involving a pay-to-play relationship with then-New York City Mayor Bill de Blasio and others in which he directed campaign donations to de Blasio in exchange for "access" to City Hall); Press Release, U.S. Att'y's Off., D.N.J., Newark City Council Members Admits Scheming to Obtain Bribes and Kickbacks and Subscribing to False Tax Return (Mar. 15, 2022), https://www.justice.gov/usao-nj/pr/newark-city-council-member-admits-scheming-obtain-bribes-and-kickbacks-and-subscribing [https://perma.cc/S3VL-4VCC] (describing conviction of City Councilman Joseph A. McCallum Jr. who schemed with his "associate" to receive bribes from entities seeking contracts and approvals related to city projects; specifically, the entities "were solicited by the associate to hire his consulting company for 'access' . . . to McCallum").

view, and the majority's broad conception of *McDonnell*'s impact appears to still hold sway in the academic and practical literature surrounding the case.[105]

2. *Evaluating Each Side of the "*McDonnell *Problem"*

Each side of the "*McDonnell* Problem" debate supports its position with limited authority and largely anecdotal evidence. Frequently, no legal authority is cited to support the majority view's claims. Professor Howard S. Master, for example, characterizes *McDonnell* as a "closely-watched ruling that changed the landscape of federal corruption prosecutions," yet does not cite authority, legal or otherwise, to support this proposition.[106] NAAG, for its part, concludes that "local and state prosecutors are increasingly the only sheriffs in town with the authority to investigate and prosecute certain corrupt officials," presumably relying on the opinions of the *Anticorruption Manual*'s contributing authors for support.[107]

On the other side of the "*McDonnell* Problem," a few commentators have attempted to measure the idea that *McDonnell*'s impact has been limited, but their analyses leave many unanswered questions. Professor Kristine Artello recently published an analysis of 108 lower court decisions citing *McDonnell* and involving at least one public official from 2016 to March 2019.[108] While Professor Artello reaches a conclusion similar to the one in this Note—that *McDonnell*'s impact is limited—her analysis focused solely on *McDonnell*'s application by the lower courts through March 2019.[109] Professor Artello did not measure *McDonnell*'s impact on prosecutors' willingness or ability

105. In fact, immediately prior to the publication of this Note, NAAG hosted its 2022 NAGTRI National Anticorruption Academy (October 24–28). Attendees received a copy of the *Anticorruption Manual*. NAAG, *2022 NAGTRI National Anticorruption Academy*, https://www.naag.org/event/2022-nagtri-national-anticorruption-academy/ [https://perma.cc/67S3-EZ2T].

106. Master, *supra* note 99, at 53.

107. Toth, *supra* note 96.

108. Kristine Artello, *Is Public Corruption Still a Crime? The Effect of* McDonnell *Narrowing Test*, 5 J. CRIM. JUST. & L. 43, 47 (June 30, 2022), https://jcjl.pubpub.org/pub/v5i2wy9wpm2q/release/1 [https://perma.cc/H5CY-8V5D] (examining courts' application of *McDonnell*'s "official act" standard "to ascertain whether prior illegal actions have become legal and to discover how the court[s] characterize[ ] these behaviors").

109. *Id.* at 56 ("The legacy of the *McDonnell* ruling does not appear to be as dire as some of the critics suggested. . . . [B]ribery is illegal and can still be prosecuted successfully when an explicit quid pro quo is present.").

to successfully prosecute state and local corruption on the one hand, or its treatment by the Circuits through September 2022, on the other.

Additionally, two blog posts rely on a handful of cases to support those authors' conclusions that *McDonnell* has had little impact on federal prosecutors' charging decisions and overall success in state and local corruption cases. In one November 2019 post, a law student relied on seven cases to conclude that "*McDonnell* has not turned out to be as much of an impediment to federal corruption prosecutions as some critics feared."[110] A second post from attorneys Stephen Anthony and Patricio Llompart in December 2020 relied on prosecutions arising from two bribery schemes to conclude that federal prosecutors have "not given up on prosecuting state-government corruption after all."[111] From these prosecutions, Anthony and Llompart also observed that the Government may be turning to other statutes to charge state and local corruption, namely Section 666.[112] The analyses in these posts are highly limited, however, and provide mostly anecdotal evidence for the conclusion that *McDonnell*'s impact on the federal prosecution of state and local corruption has been minimal. Nevertheless, both posts provide a useful starting point for the more comprehensive analyses in Parts III and IV.[113]

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110. Jacques Singer-Emery, *Despite Predictions of Doom,* McDonnell v. United States *Has Not Derailed U.S. Anticorruption Prosecutions*, GLOB. ANTICORRUPTION BLOG (Nov. 25, 2019), https://globalanticorruptionblog.com/2019/11/25/despite-predictions-of-doom-mcdonnell-v-united-states-has-not-derailed-u-s-anticorruption-prosecutions/ [https://perma.cc/48EF-ENQA] ("[I]t appears that most federal courts have interpreted *McDonnell* narrowly . . . and, as a result, prosecutors are still able to pursue public corruption cases vigorously and often successfully.").

111. Stephen Anthony & Patricio Martinez Llompart, *New Trends in DOJ's Approach to Domestic Corruption*, LAW360, 1 (Dec. 16, 2020), https://www.cov.com/-/media/files/corporate/publications/2020/12/new-trends-in-dojs-approach-to-domestic-corruption.pdf [https://perma.cc/6K24-P7PB]. *See also id.* at 4 ("Despite case law limiting some of its statutory tools, the DOJ is unready to leave political corruption prosecution to state officials and has recently taken aggressive enforcement steps . . . .").

112. *Id.* at 1; *see also id.* at 2–3 (observing that in adjusting their approach to prosecuting state and local corruption, "federal prosecutors are emphasizing different statutes" and "[r]ecent cases hint that the DOJ may be placing increased emphasis on . . . Section 666"); *but see id.* (predicting defendants "will argue that the federalism and lenity concerns underlying *McDonnell* should motivate courts to limit the reach of Section 666").

113. Anthony and Llompart's prediction that federal prosecutors will increasingly charge Section 666, "instead of the old stand-by mail and wire fraud statutes," *id.* at 4, is analyzed *infra* Part III.B.4.

C. AVAILABLE DATASETS CANNOT MEANINGFULLY CAPTURE *MCDONNELL*'S IMPACT

Two available datasets provide a nationwide count of federal "corruption" prosecutions.[114] The datasets—compiled by Syracuse University's Transactional Records Access Clearing House (TRAC) and the U.S. Department of Justice's Public Integrity Section (DOJ-PIN)—appear to suggest that federal prosecutions of state and local corruption are down after *McDonnell*.[115] TRAC published a report in 2021 which shows that these prosecutions have declined steadily since 2010.[116] DOJ-PIN annually reports to Congress on its operations and activities pursuant to the Ethics in Government Act of 1978.[117] DOJ-PIN's 2020 report, which also provides national statistics on federal "corruption" prosecutions for the previous two decades, shows that federal prosecutions of corrupt state and local officials have declined steadily since 2013.[118]

Commentators have used both the TRAC report and the DOJ-PIN report to conclude that the number of federal corruption cases against state and local officials are down and that *McDonnell* has either contributed to the decline,[119] or likely will aggravate the

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114. The use of scare quotes around "corruption" in this section refers to the broad meaning of the term as used in both the TRAC and DOJ-PIN reports described *infra*.

115. TRAC is an independent, nonpartisan data gathering, research, and distribution organization at Syracuse University. TRAC, https://trac.syr.edu/aboutTRACgeneral.html [https://perma.cc/ZAA6-V3AN]. DOJ-PIN is a unit of the U.S. Department of Justice Criminal Division that oversees the "investigation and prosecution of all federal crimes affecting government integrity, including bribery of public officials, election crimes, and other related offenses." PUB. INTEGRITY SECTION (PIN), U.S. DEP'T OF JUST., https://www.justice.gov/criminal-pin [https://perma.cc/JPB6-3E3X].

116. TRAC, *Official Corruption Prosecutions Have Increased* (May 4, 2021), https://trac.syr.edu/tracreports/crim/646/ [https://perma.cc/9NE9-P67K] [hereinafter "2021 TRAC Report"] (analyzing "[i]nternal case-by-case information recorded by federal prosecutors and obtained by TRAC").

117. *See* PUB. INTEGRITY SECTION, U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2020, https://www.justice.gov/criminal-pin/file/1479131/download [https://perma.cc/3BVV-JYYK] [hereinafter "DOJ-PIN REPORT"].

118. *See id*. at Table 2.

119. Writing for South Carolina's *Post & Courier*, journalist Tony Bartelme focused on the decline in federal prosecutions of corrupt state and local officials (especially in South Carolina) as reported in the 2021 TRAC Report. To help explain the decline, Bartelme interviewed current and former prosecutors. From those interviews, Bartelme concluded, in part, that "[j]udges have made it more difficult to prosecute corrupt officials." He quoted then-acting U.S. Attorney for the District of South Carolina M. Rhett DeHart, who said that in "narrow[ing] the scope of what constitutes corruption under federal laws," *McDonnell* "complicated public corruption cases." "As a result," DeHart told Bartelme, "we often charge traditional wire fraud or mail fraud instead in these cases." Bartelme primarily argues,

downward trend.[120] These commentators are not wrong to conclude that based on these reports, federal "corruption" cases have decreased in recent years. Neither report can be used, however, to effectively evaluate *McDonnell*'s impact on the Government's state and local corruption cases because the reports are simultaneously too broad and too limited.

In the context of the "*McDonnell* Problem," both reports rely on datasets that are overinclusive—that is, the datasets define "corruption" too broadly. TRAC's dataset includes cases involving public officials charged with violating any of dozens of statutes—the substantial majority of which do not require proof of a quid pro quo.[121] DOJ-PIN's dataset, for its part, also includes cases far afield of the "*McDonell* Problem" in which no quid pro quo must be proven.[122] For these reasons, both datasets are not precise enough

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however, that the reported decline reflects the U.S. Department of Justice's "shifting priorities." Tony Bartelme, *Federal Corruption Prosecutions Are Way Down Across the Country and in SC. Why?*, POST & COURIER (Nov. 6, 2021), https://www.postandcourier.com/uncovered/federal-corruption-prosecutions-are-way-down-across-the-nation-and-in-sc-why/article_edb57e42-e4dd-11eb-9ffa-d7a8c8b5d7ad.html [https://perma.cc/X4F2-HZ9R] (observing that the number of federal corruption cases varies across administrations).

120. In a 2020 "Perspective" for the *Washington Post*, Professor Leah Litman relied on an earlier DOJ-PIN report to conclude that "[o]ver the past decade, public-corruption prosecutions and convictions of government officials have dropped by roughly a third." Professor Litman outlines "several reasons" for this decline and cites *McDonnell* as a potential impediment to future cases. Litman, *supra* note 84 (warning that through cases like *McDonnell*, the Supreme Court is "making it harder for willing prosecutors to target corrupt public officials" by "chip[ping] away at the laws Congress has passed"). Note that Professor Litman relied on the 2017 DOJ-PIN report, PUB. INTEGRITY SECTION, U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2017, https://www.justice.gov/criminal/file/1096306/download [https://perma.cc/UJ77-YZV3].

121. The 2021 TRAC Report includes cases in which the Government charged "bribery, graft, conflicts of interest, and other violations" of federal law. 2021 TRAC Report, *supra* note 116. In a more recent report, TRAC provides a table of the top charges "recorded in the prosecutions of official corruption matters filed in U.S. District Court during June 2022." TRAC, *Official Corruption Prosecutions for June 2022* (Aug. 3, 2022), https://trac.syr.edu/tracreports/bulletins/corruption/monthlyjun22/fil/ [https://perma.cc/EPS5-XDWE]. Table 2 of this 2022 report shows that TRAC includes in its definition of "corruption," cases in which a public official or employee is charged with refusing to testify before or produce papers to Congress (2 U.S.C. § 192), making false statements to federal officials (18 U.S.C. § 1001), and transporting minors to engage in criminal or illicit sexual activity (18 U.S.C. § 2423), among other federal offenses, which do not require a quid pro quo element. Presumably, the statutes identified in the 2022 report were also captured by the 2021 TRAC Report, *supra* note 116.

122. While the DOJ-PIN reports do not provide a list of statutes charged in each case, Part II provides examples of noteworthy cases involving state and local corruption. *See* DOJ-PIN REPORT, *supra* note 117, at 16–18. In addition to state and local corruption cases involving bribery, the DOJ-PIN report also highlights cases involving state and local officials charged with obstruction, embezzlement, and drug offenses. *See, e.g.*, *id.* at 17–18 (describing the conviction of a former state judge related to his obstruction, in violation of

to effectively measure *McDonnell*'s impact on federal corruption cases against state and local officials.

In this context, the reports are also underinclusive in that they do not reflect the number of private citizens charged for their involvement in state or local official corruption schemes. The TRAC dataset only counts cases against defendant public officials.[123] Private bribe payers, however, are just as culpable and can also be prosecuted under the federal anticorruption statutes. The DOJ-PIN dataset is similarly limited because it counts private citizens as a separate category (distinct from federal or state-local officials).[124] It is not possible to parse the dataset to determine whether the private citizens were involved in corruption at the state and local level or at the federal level. Finally, the reports do not provide information about the underlying facts of, or a breakdown of the statutes charged in, each "corruption" case. These omissions mean the reports cannot be used to evaluate the "*McDonnell* Problem."[125]

In sum, the available datasets (which were not designed to capture *McDonnell*'s impact) are unable to explain the way *McDonnell*'s "official act" standard has directly impacted the use of the honest services fraud and Hobbs Act extortion statutes in the first instance, or the deployment of other federal anticorruption statutes, in the second. To fill this gap, Part III provides an alternative dataset by which to examine the "*McDonnell* Problem." In contrast to the datasets described above, the dataset in Part III is exclusively focused on the federal prosecution of quid pro quo state and local government corruption charged in violation of both Sections 1346 and 1951 (the statutes at issue in *McDonnell*), as well as Sections 666, 1343, and 1952 (the other federal anticorruption statutes), in the six years before and after *McDonnell*. Accordingly, through Part III, this Note provides more insight into *McDonnell*'s impact on the federal prosecution of state and local corruption than any available study.

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18 U.S.C. § 1505, of a federal investigation into a drug trafficking organization in northern Colorado).

123. 2021 TRAC Report, *supra* note 116.

124. *See* DOJ-PIN REPORT, *supra* note 117, at 23–25.

125. To be clear, both reports may only be used to analyze the number of state and local officials charged with "corruption" as each report has broadly defined the term.

III. RE-EXAMINING THE "*MCDONNELL* PROBLEM"

As discussed in Part I, *McDonnell* purported to limit the scope of Sections 1346 and 1951 by limiting these statutes' quo requirements to a more narrow "official act" standard.[126] In turn, this reading of the case led the majority of legal commentators to promote the idea of the "*McDonnell* Problem." Yet there has been no targeted attempt to comprehensively analyze the extent to which *McDonnell* has impacted the number and nature of federal prosecutions of state and local corruption in practice. This Part provides the first attempt. It lays out and analyzes a dataset of 623 federal prosecutions from five judicial districts from June 28, 2010 through June 27, 2022. The following analysis provides an informative picture of the federal prosecution of state and local corruption in the six years before and after *McDonnell*. The data show a consistent, uninterrupted trend of corruption charges and convictions across the five districts. Despite enduring predictions to the contrary, federal prosecutors in these districts have continued to charge and successfully convict corrupt state and local officials.

A. METHODOLOGY

1. *Hypotheses*

According to the majority view, *McDonnell* has led federal prosecutors to (1) charge fewer defendants for bribery involving state and local officials, (2) win a lower percentage of these cases, and (3) maintain a lower percentage of these convictions on appeal. To evaluate these claims, this Note tests four hypotheses.

If the majority view is correct:

1) Federal prosecutors across the Central District of California, Northern District of Illinois, District of New Jersey, Southern District of Florida, and Southern District of New York (together, the "five districts") will have charged fewer defendants for their engagement in allegedly impermissible quid pro quos with state- or local-level public officials in violation of the wire fraud, honest services fraud, Hobbs Act extortion, federal program bribery, and Travel Act bribery statutes (together, the "five

126. *See* RICHMAN ET AL., *supra* note 52 and accompanying text.

statutes") in the six years after *McDonnell* (June 28, 2016 to June 27, 2022) relative to the six years before *McDonnell* (June 28, 2010 to June 27, 2016). (Hypothesis 1).

2) Federal prosecutors across the five districts will have won a lower percentage of these cases after *McDonnell* as compared to before *McDonnell*. (Hypothesis 2).

3) Federal prosecutors across the five districts will have sustained a lower percentage of these convictions on appeal after *McDonnell* as compared to before *McDonnell*. (Hypothesis 3).

And if Anthony and Llompart are correct:

4) Federal prosecutors across the five districts will have charged more defendants with Section 666, and charged fewer defendants with Sections 1343 and 1346, after *McDonnell* as compared to before *McDonnell*. (Hypothesis 4).

Hypotheses 1, 2, and 3 are derived from the majority's view that *McDonnell* changed the landscape of the Government's prosecution of state and local corruption by (1) discouraging cases from being brought in the first place,[127] (2) making it harder for federal prosecutors obtain convictions,[128] and (3) making it more difficult to maintain convictions on appeal.[129] Hypothesis 4 is derived from Anthony and Llompart's observation that federal prosecutors may be increasingly charging Section 666, instead of the general fraud statutes, in these cases.[130]

2. *Scope of Cases Considered*

Throughout this Note, "corruption" has referred to impermissible quid pro quo transactions involving public officials at the state and local levels. Accordingly, the following analysis is limited to federal prosecutions stemming from bribery schemes in which state or local officials solicited, received, agreed to accept,

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127. Lipton & Weiser, *supra* note 79.

128. *Id.*; *see also* Liptak, *supra* note 78; Alan Feuer, *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?module=inline [https://perma.cc/9VMM-BD8P].

129. Feuer, *supra* note 128.

130. Anthony & Llompart, *supra* note 111, at 4. *See also* Briccetti et al., *supra* note 85, at 724–25 (predicting *McDonnell*'s long-term impact will be to encourage prosecutors to move away from honest services prosecutions); Bartelme, *supra* note 119 ("As a result [of *McDonnell*], we often charge traditional wire fraud or mail fraud instead . . . ." (quoting then-acting U.S. Attorney DeHart)).

accepted bribes, or conspired to do any of the former.[131] In other words, the analysis is strictly limited to the kind of conduct at issue in *McDonnell*—that is, the federal enforcement of federal law against state or local defendants engaged in local, allegedly impermissible, quid pro quo arrangements involving state or local officials.[132]

3. *Data Sources*

To conduct the analysis, the author selected the top five judicial districts for corruption as identified by the U.S. Sentencing Commission (USSC),[133] and supported by the U.S. Department of Justice's annual list of the most corrupt judicial districts.[134] These districts are the Central District of California, the Northern District of Illinois, the District of New Jersey, the Southern District of Florida, and the Southern District of New York (hereinafter, for simplicity, California, Illinois, New Jersey, Florida, and New York).[135] Given the selection criterion, these districts also provided the best opportunity to acquire a sample size large enough from which to draw statistical inferences. Indeed, the five districts are particularly suited to this analysis because they include some of the country's most populous cities with the greatest number of public officials and employees.

The data were limited to corruption incidents first identified from each respective U.S. Attorney's Office website,[136] and then

131. *See* "Underlying Data" [on file with *Columbia Journal of Law & Social Problems*] (providing one-line summaries of all cases included in Part III's analysis).

132. This analysis includes neither offenses that lack a quid pro quo element (such as embezzlement), nor offenses committed by federal, rather than state or local, officials.

133. The USSC is an independent agency in the federal judiciary. ABOUT THE COMMISSION, USSC, https://www.ussc.gov/ [https://perma.cc/7RHB-6C9C]. The author averaged the top five districts for corruption from 2011 through 2020, pursuant to § 2C1.1, which applies to the bribery of public officials, Hobbs Act extortion, honest services fraud, and conspiracy to do any of the former. U.S. SENT'G GUIDELINES MANUAL § 2C1.1 (USSC 2021). The author relied on data released by the USSC. *See, e.g.*, *Quick Facts: Bribery Offenses*, USSC (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Bribery_FY20.pdf [https://perma.cc/6CF3-KA6G] (listing the top five districts for public bribery offenders in fiscal year 2020).

134. Note that this annual list is compiled by the University of Illinois at Chicago. *Anti-Corruption Reports*, U. ILL. CHI., https://pols.uic.edu/chicago-politics/anti-corruption-reports/ [https://perma.cc/8VUN-PGL7].

135. Each of the five districts do not represent the state as a whole, but for readers' ease, the author refers to each district as the state in which it sits.

136. Press Releases, U.S. Dep't of Just., C.D. Cal., https://www.justice.gov/usao-cdca/pr [https://perma.cc/4LYN-36FG]; Press Releases, U.S. Dep't of Just., N.D. Ill., https://www.justice.gov/usao-ndil/pr [https://perma.cc/YNP3-KRFR]; Press Releases, U.S.

verified and validated via LexisNexis' CourtLink docket entry system.[137] The data include only those schemes originally charged under the five statutes.[138] These two steps resulted in 623 corruption "cases" involving 1,659 corruption "incidents."[139] Bribery schemes charged under other federal criminal statutes (e.g., as drug offenses) were excluded because they would not accurately capture *McDonnell*'s impact on the charging theories underlying the five statutes. For example, when state and local police officers accept bribes in exchange for smuggling drugs into prison facilities,[140] or for providing police protection for drug traffickers,[141] they are often charged with narcotics-related

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Dep't of Just., D.N.J., https://www.justice.gov/usao-nj/pr [https://perma.cc/XJ7G-M64K]; Press Releases, U.S. Dep't of Just., S.D. Fla., https://www.justice.gov/usao-sdfl/pr [https://perma.cc/5GHZ-B5FU]; Press Releases, U.S. Dep't of Just., S.D.N.Y, https://www.justice.gov/usao-sdny/pr [https://perma.cc/7QPF-KLJY].

137. CourtLink (Dockets), LEXISNEXIS, https://advance.lexis.com/courtlinkhome?crid=76adf94e-ab7a-43c1-8465-6f6e92e793be [https://perma.cc/HG4L-DGFT]. The author first reviewed each of the district's press releases from June 28, 2010, to June 27, 2022, to identify individuals charged or convicted in the requisite quid pro quo scheme. The author then cross-referenced each of the named defendants in CourtLink to identify the statute used by federal prosecutors to charge the alleged conduct in the first instance. Finally, the author used CourtLink to confirm, validate, document, and compile the procedural history and final disposition in each case. The compilation of these cases can be found in the "Underlying Data," *supra* note 131.

138. Those statutes are 18 U.S.C. §§ 1343, 1346, 1951, 666, and 1952.

139. For details on the facts, procedural history, and final disposition in each case, see "Underlying Data," *supra* note 131.

140. *See, e.g.*, Press Release, U.S. Att'y's Off., S.D.N.Y., Manhattan U.S. Attorney Announces the Arrests of Two Rikers Island Correction Officers for Marijuana Dealing (June 7, 2013), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-arrests-two-rikers-island-correction-officers-marijuana [https://perma.cc/AY3E-ZA8S] (charging narcotics, not bribery offenses, where corrections officers allegedly smuggled drugs, scalpels, and other contraband into city jails for cash) (note that one officer was later charged with bribery in violation of Section 1346, while the other was not). *See also* Press Release, U.S. Att'y's Off., D.N.J., Miami-Dade, Fla. Police Officer Charged in Cocaine Trafficking Conspiracy (Apr. 8, 2014), https://www.justice.gov/usao-nj/pr/miami-dade-fla-police-officer-charged-cocaine-trafficking-conspiracy [https://perma.cc/8QW6-7MGX] (charging narcotics, not bribery, offenses where former police officer allegedly "helped to transport narcotics proceeds" for a drug trafficking organization "in exchange for thousands of dollars in cash and a Rolex").

141. *See, e.g.*, Press Release, U.S. Att'y's Off., S.D. Fla., Criminal Complaint Charges Three City of Miami Police Department Officers with Federal Drug Trafficking Charges (Oct. 23, 2018), https://www.justice.gov/usao-sdfl/pr/criminal-complaint-charges-three-city-miami-police-department-officers-federal-drug [https://perma.cc/M5HW-CCM6] (charging narcotics, not bribery, offenses where police officers "provided protection to the transportation and distribution of purported cocaine, opioids and drug proceeds, in exchange for cash (bribe) payments"). *But see* Press Release, U.S. Att'y's Off., C.D. Cal., Ex-Montebello Police Officer Pleads Guilty to Bribery Charge (Sept. 7, 2021), https://www.justice.gov/usao-cdca/pr/ex-montebello-police-officer-pleads-guilty-bribery-charge [https://perma.cc/K95Y-M9YM] ("A former Montebello Police officer pleaded guilty today to a federal bribery charge [Section 666] for accepting at least $14,000 in cash from a

offenses that do not require proof of a quid pro quo and are unaffected by *McDonnell*'s "official act" standard.

4. *Measures*

Each "case" is identified by an individual defendant—either an official bribe recipient or a private bribe payer.[142] Accordingly, the analysis is concerned only with the ultimate disposition of any one individual defendant's case where the defendant was originally charged for participating in a quid pro quo state or local corruption scheme in violation of at least one of the five statutes. A corruption "incident" refers to a notable development in each case: charge, conviction (by guilty plea or jury verdict), acquittal (by jury), dismissal (on a district court's legal determination or by the Government's motion to drop charges), or outcome on appeal (reverse and remand, affirm, or, rarely, acquit).[143] This means that if a particular defendant was originally charged before *McDonnell* and subsequently charged (via a superseding charging document) for the same quid pro quo scheme after *McDonnell*, that defendant appears as "charged" only once in the analysis—before *McDonnell*.

5. *Limitations*

This analysis is imperfect in several respects. First, the cases are limited to the country's five most active districts for public corruption. This selection method, though practical, means that the five districts may not necessarily reflect national trends. Second, and relatedly, the analysis does not account for confounding variables, such as the actual extent of official corruption, the exercise of prosecutorial discretion, or the influence

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drug trafficker in exchange for escorting narcotics shipments and searching a police database to supply the trafficker information on people suspected of cooperating with law enforcement.").

142. Corporations are included in the term "individual defendant" pursuant to the corporate personhood doctrine.

143. Under federal law, if a convicted defendant dies while his direct appeal is pending, his death "abates" all the proceedings leading up to that appeal. *See* United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017) ("[E]verything associated with the case is extinguished, leaving the defendant as if he had never been indicted or convicted."); *id.* (noting this rule is followed "almost unanimously"). For the purposes of this analysis, however, these proceedings are directly relevant to examining the "*McDonnell* Problem." Consequently, while the proceedings may "abate *ab initio*" as a matter of law, the underlying proceedings are included in the analysis where the defendant died with his direct appeal pending. *See* "Underlying Data," *supra* note 131 (noting these deaths).

of each administration's policies on the priorities of each district's U.S. Attorney.[144]

Finally, the results are undoubtedly impacted by the COVID-19 pandemic, which impeded the work of investigators, prosecutors, and the courts.[145] Across the country, prosecutions at every level have suffered as the pandemic has resulted in an unprecedented number of court closures, trial continuances, and other pandemic-related delays—notably, during the post-*McDonnell* time-frame.[146] Indeed, TRAC reported that new criminal prosecutions dropped 80% during the initial COVID-19 lockdown measures between February and April 2020.[147] In 2021, the USSC reported that because of the pandemic, the total number of cases of all types in 2020 represented a 15.6% decrease from 2019.[148] The DOJ-PIN report also noted that its nationwide effort against public corruption was impacted by "limitations associated with the COVID-19 pandemic."[149] Given the negative impact of COVID-19 on federal prosecutions in general, and DOJ-PIN's anticorruption efforts in particular, one would expect that the number of defendants charged and convicted for state and local

144. *See* 2021 TRAC Report, *supra* note 116 ("[T]here are no reliable figures on the true extent of public corruption . . . ."); *id.* (noting federal prosecutors exercise a "great deal of discretion" on which matters they charge); *id.* ("[D]uring the Trump years, [criminal] prosecutions reached their lowest levels.").

145. *See id*. ("Criminal investigations and prosecutions of all types dropped sharply immediately after the pandemic hit and federal offices closed . . . ."); TRAC, *How Is Covid-19 Impacting Federal Criminal Enforcement?* (May 20, 2020), https://trac.syr.edu/tracreports/crim/608/ [https://perma.cc/SBM3-G37K] ("Law enforcement agencies across the country have been referring fewer criminal cases to federal prosecutors since [COVID-19] began."); TRAC, *Federal Criminal Prosecutions Plummet in the Wake of COVID-19* (May 28, 2020), https://trac.syr.edu/tracreports/crim/609/; USSC, FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES 2 (2020) ("The number of cases reported to the Commission in fiscal year 2020 reflects the impact of the COVID-19 pandemic on the work of the courts.").

146. *See* COURT ORDERS AND UPDATES DURING COVID-19 PANDEMIC, U.S. COURTS (Aug. 30, 2022), https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic [https://perma.cc/B53E-RWWN] (collecting information about court operations throughout the COVID-19 pandemic); *see also* "Underlying Data," *supra* note 131 (noting COVID-related hearing delays and trial continuances relevant to cases analyzed in Part III).

147. TRAC, *Federal Criminal Prosecutions Plummet in the Wake of COVID-19*, *supra* note 145.

148. *See* USSC, FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES, *supra* note 145, at 2.

149. DOJ-PIN REPORT, *supra* note 117, at 10. For example, while DOJ-PIN reported that it had tried and convicted ten defendants in 2017, the Section reported that it had tried and convicted just three defendants in 2020. *See* PUB. INTEGRITY SECTION, U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2017, *supra* note 120; DOJ-PIN REPORT, *supra* note 117, at 10.

corruption across the five districts would also reflect these more general national declines. The data, however, tell a different story.

B. RESULTS

This section focuses on how the number and nature of corruption incidents in the six years after *McDonnell* compare to the number and nature of those incidents in the six years before *McDonnell*. Contrary to Hypotheses 1, 2, and 3, the data show that after *McDonnell* federal prosecutors across the five districts have (1) charged more defendants for their engagement in allegedly impermissible quid pro quos with state or local officials, (2) won a greater percentage of these cases, and (3) sustained a greater percentage of these convictions on appeal. Furthermore, when compared to the six years before *McDonnell*, the data reflect that in some jurisdictions, federal prosecutors more frequently charged corruption under a different statute after *McDonnell*. Contrary to Hypothesis 4, however, the alternative statute is Section 1952.[150]

1. *After* McDonnell*, the Number of Defendants Charged with State and Local Corruption Did Not Decrease*

To test Hypothesis 1, the author compared the number of defendants charged with federal bribery offenses (in violation of at least one of the five statutes) for their participation in allegedly impermissible state or local quid pro quo transactions in the six years before *McDonnell* with the number of defendants charged in the six years after *McDonnell*. This count includes all defendants charged regardless of the final disposition in each case, meaning a defendant is counted here regardless of whether that defendant was ultimately convicted or acquitted (by a jury or on appeal) or whether the charges were ultimately dismissed.[151]

Figure 1 shows the number of defendants charged with corruption in violation of at least one of the five statutes in each of the five districts and the average number of defendants charged across the five districts from June 28, 2010 to June 27, 2022.

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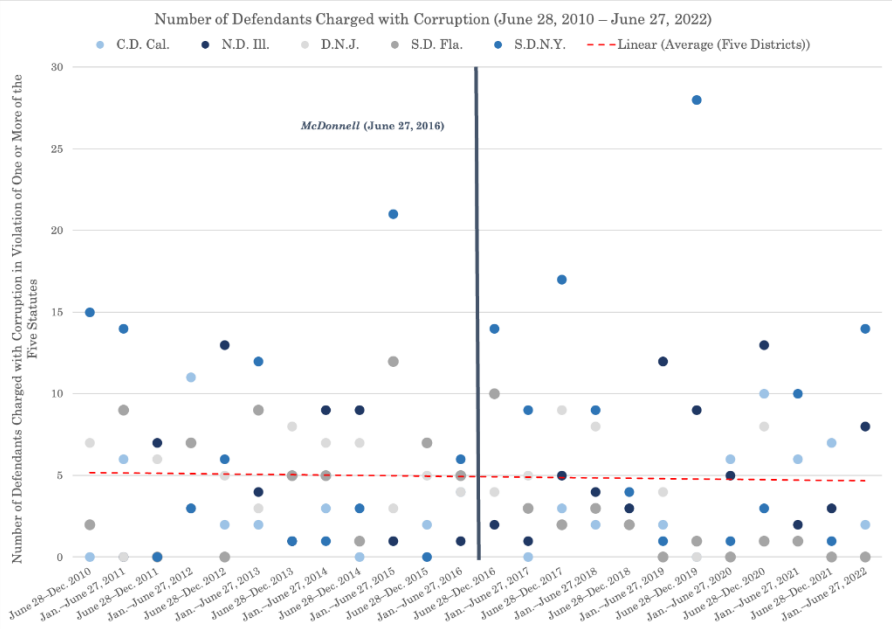
150. *Contra* Anthony & Llompart, *supra* note 111, at 2–3 ("[T]he DOJ may be placing increased emphasis on . . . Section 666.").

151. The final disposition of these charges is analyzed *infra* Parts III.B.2 & 3.

FIGURE 1



Across the five districts, the total number of defendants charged slightly increased after *McDonnell*: whereas federal prosecutors charged 291 defendants in the six years before *McDonnell*, they charged 299 defendants in the six years after *McDonnell*. Notably, the greatest number of defendants charged across the five districts during any six-month period occurred in the six months immediately after the Court's ruling. Between June 28, 2016 and December 31, 2016, federal prosecutors charged 44 defendants. This immediate response suggests that even directly after the "closely-watched ruling," federal prosecutors remained unwilling to leave corruption prosecutions to state officials.[152]

Federal prosecutors in three of the five districts recorded positive increases in the number of defendants charged for their participation in state and local corruption schemes after *McDonnell*. In Illinois, the number of defendants charged increased 17.5%: 57 defendants were charged with federal corruption crimes pre-*McDonnell* and 67 defendants were charged

152. *Contra* Master, *supra* note 99, at 53 ("[This] closely-watched ruling . . . changed the landscape of federal corruption prosecutions.").

post-*McDonnell*. In New York, the number of defendants charged increased 35.4%: whereas 82 defendants were charged with federal bribery offenses pre-*McDonnell*, 111 defendants were charged post-*McDonnell*. And in California, the number of defendants charged increased 71.9%: 32 defendants were charged with federal bribery crimes pre-*McDonnell*, while 55 defendants were charged post-*McDonnell*.

Despite the increases in defendants charged across these three districts post-*McDonnell*, the number of defendants charged decreased 62.9% in Florida and 25.9% in New Jersey.[153] The relative decrease in the number of defendants charged in these two districts is potentially explained by the historic anticorruption efforts by federal prosecutors in both Florida and New Jersey in the early 2010s. Importantly, these efforts led to an unprecedented number of arrests and convictions in these two districts during the pre-*McDonnell* analysis.[154] Nevertheless, across the five districts, the total and average number of defendants charged after *McDonnell* outnumbered the total and average number of defendants charged before *McDonnell*.[155]

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153. Part III.B.4 provides one possible explanation for the declines in Florida and New Jersey: while federal prosecutors in New York and California increasingly charged Section 1952 in corruption cases after *McDonnell*, federal prosecutors in Florida and New Jersey did not.

154. In 2009, federal prosecutors in New Jersey broke open "the biggest federal corruption sting" in state history. Known as "Operation Bid Rig," the three-year government sting operation resulted in more than forty arrests. *See generally* Ted Sherman, *2 Years Later, Legacy of Operation Bid Rig Corruption Sting Lives On*, NJ.COM (July 22, 2011), https://www.nj.com/news/2011/07/as_nj_corruption_cases_wind_do.html [https://perma.cc/326H-UBKN]. By July 2013, the vast majority of those arrests led to guilty pleas or jury convictions. *See* "Underlying Data," *supra* note 131 (describing cases arising from Operation Bid Rig); *see also* Darryl Isherwood, *Operation Bid Rig III: Four Years Later*, OBSERVER (July 23, 2013), https://observer.com/2013/07/operation-bid-rig-iii-four-years-later/ [https://perma.cc/6JM7-V7BA]. Similarly, in 2012, an undercover federal operation in Florida tackled corruption involving bribery and extortion among Miami Beach firefighters and code compliance officers. *See generally* Steve Litz & Brian Hamacher, *Multiple Arrests Made in Miami Beach Extortion and Drug Investigations*, NBC MIAMI (Apr. 11, 2012), https://www.nbcmiami.com/news/local/multiple-arrests-made-in-miami-beach-extortion-and-drug-investigations/1920326/ [https://perma.cc/AZP6-WQXH]. The subsequent arrests led to protests at City Hall demanding a crackdown on "rampant corruption within the city's government." Steve Litz & Brian Hamacher, *Residents Protest Alleged Corruption in Miami Beach*, NBC MIAMI (Apr. 26, 2012), https://www.nbcmiami.com/news/local/residents-protest-corruption-in-miami-beach/2036650/ [https://perma.cc/KN7V-H2NY].

155. Across the five districts, the average number of defendants charged per six months pre-*McDonnell* was 4.9 defendants. The post-*McDonnell* average was 5.0.

2. *After* McDonnell*, Federal Prosecutors Have a Slightly Higher Conviction "Win Rate"*

To test Hypothesis 2, the author calculated federal prosecutors' conviction "win rate" in and across the five districts. The conviction win rate was calculated by dividing the number of conviction "wins"—that is, the total number of defendants convicted pursuant to a guilty plea or jury verdict—by the total number of corruption incidents at initial resolution, meaning the number of wins plus the number of "losses," i.e., the number of defendants whose charges were dismissed or whose jury trials led to a mistrial (hung jury) or acquittal.[156]

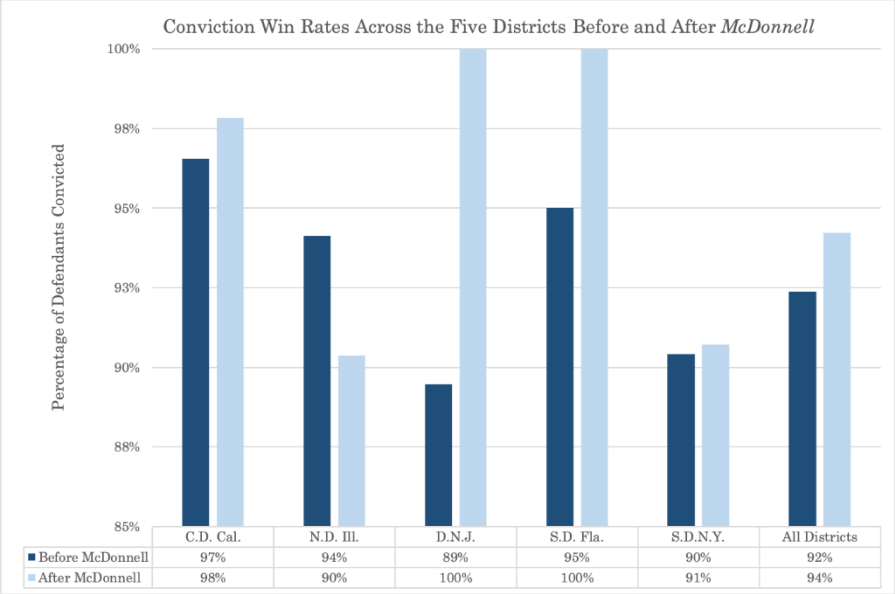
conviction win rate =
(# *convictions*) / (# *convictions* + # *dismissals* + # *mistrials* + # *acquittals by jury*)

The calculation includes defendants regardless of their cases' outcomes on appeal, where applicable.[157]

In the six years before *McDonnell*, federal prosecutors across the five districts convicted 267 defendants and dismissed charges against 13 defendants. During this same period, federal juries acquitted 8 defendants. In the six years after *McDonnell*, 245 defendants were convicted; 8 saw their charges dismissed; 3 of their trials resulted in hung juries (these defendants were subsequently re-charged and convicted);[158] and 4 defendants were acquitted after jury trial. These relative wins and losses translate to a 92.4% conviction win rate in the six years before *McDonnell*, compared with a 94.2% conviction win rate post-*McDonnell*—that is, a 1.8% increase in conviction win rate across the five districts. *Figure 2* shows each district's relative conviction win rates, as well as the conviction win rates across the five districts, before and after *McDonnell*.

156. For the breakdown of defendants convicted by guilty plea and by jury, see Appendix *infra* at Table 1.
157. The disposition of those appeals is discussed and analyzed *infra* Part III.B.3.
158. Accordingly, the defendants' ultimate convictions are counted in the 245 number.

FIGURE 2



During the twelve-year analysis, some districts had greater success in state and local corruption cases than others. Although federal prosecutors' conviction win rate in Illinois fell from 94.1% in the six years before *McDonnell* to 90.4% in the six years after *McDonnell*, federal prosecutors in the other four districts had either virtually equivalent or noticeably greater conviction win rates after *McDonnell*. In New York, federal prosecutors maintained more or less the same conviction win rate: federal prosecutors had a 90.4% conviction win rate before *McDonnell* and they had a 90.7% conviction win rate after *McDonnell*. In California, where the total number of defendants convicted after *McDonnell* nearly doubled, federal prosecutors' conviction win rate increased from 96.6% to 97.8%, with the Government securing a conviction in every post-*McDonnell* jury trial. Notably, in both Florida and New Jersey, federal prosecutors boasted 100% conviction win rates after *McDonnell*—up from Florida's 95.0% and New Jersey's 89.5% conviction win rates before *McDonnell*.[159]

159. Jessie Eisinger argues that numbers like these show that the justice system is broken: afraid to lose, the Government has avoided the biggest cases as its prosecutors have "lost the will and indeed the ability" to go after the highest-ranking wrongdoers. JESSIE EISINGER, THE CHICKENSHIT CLUB xvii (Simon & Schuster, eds. 2017).

3. *After* McDonnell*, Federal Prosecutors Have a Higher Appeals "Win Rate"*

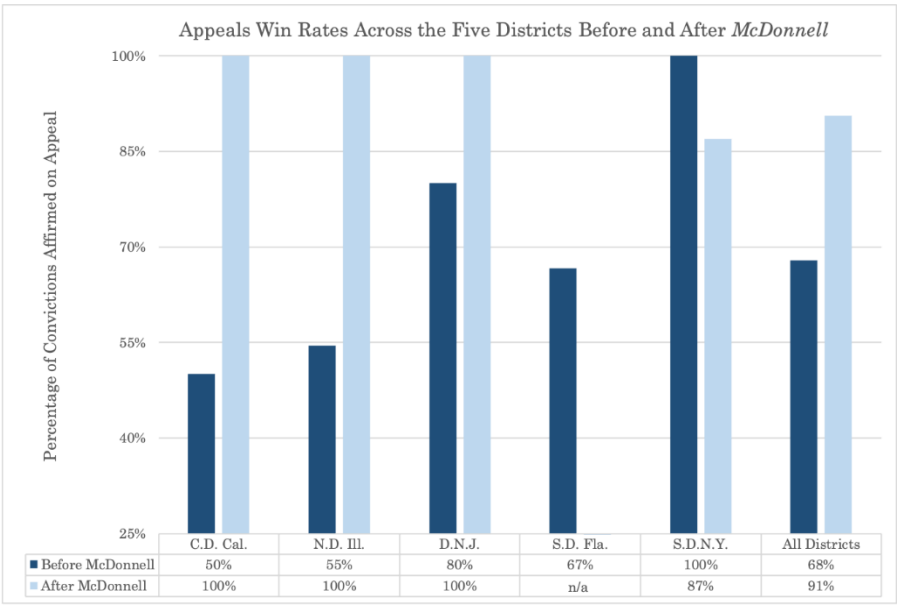
To evaluate Hypothesis 3, the author compared outcomes on appeal in the six years before and after *McDonnell*. These appeals were necessarily limited to those in which defendants argued either that the record presented insufficient evidence of a properly defined quid pro quo, or that the district court's jury instructions as to the quid pro quo element were not properly limited.[160] To test Hypothesis 3, the author calculated the appeals "win rate" by dividing the number of appeals "wins"—that is, the number of defendants whose convictions were affirmed on appeal—by the total number of defendants who raised due challenges on appeal:

appeals win rate =
(# *affirmed*) / (# *affirmed* + # *reversed and remanded* + # *acquitted*)

In the six years before *McDonnell*, the Courts of Appeals affirmed 19 convictions, reversed and remanded 3 convictions, and acquitted 6 defendants. In the six years after *McDonnell*, these courts affirmed 29 convictions, reversed and remanded 3 convictions, and acquitted zero defendants. These relative wins and losses translated to a 67.9% appeals win rate in the six years before *McDonnell*, compared with a 90.6% appeals win rate after *McDonnell*. *Figure 3* shows each district's relative appeals win rates, as well as the appeals win rates across the five districts, before and after *McDonnell*.

160. To be clear, appeals in which defendants challenged their sentence lengths or other procedural errors, such as wrongful evidentiary decisions, and appeals filed as a matter of course, were excluded.

FIGURE 3



Notably, while the total number of defendants to appeal their convictions increased after *McDonnell*, the courts increasingly affirmed their convictions.[161] In fact, federal prosecutors in California, Illinois, and New Jersey boasted 100% appeals win rates after *McDonnell*. Remarkably, not one post-*McDonnell* appeal resulted in an acquittal.[162]

4. *After* McDonnell*, Federal Prosecutors Have Increasingly Charged the Travel Act*

To test Hypothesis 4, the author identified the statutes charged in each case pursuant to each defendant's original charging document.[163] *Figure 4* shows the relative proportion of defendants

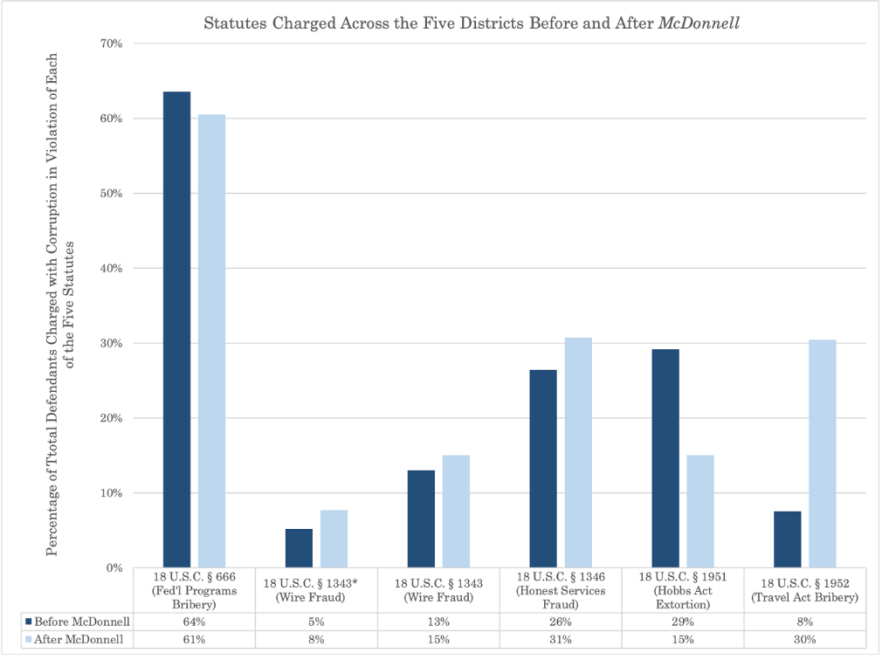
161. In Florida, no defendant duly challenged his conviction in the six years after *McDonnell*. *See* Appendix *infra* at Table 1.

162. The three defendants whose convictions were reversed and remanded after *McDonnell*, were retried and reconvicted; all three reconvictions were upheld on appeal. *See* United States v. Skelos, 988 F.3d 645, 649–50 (2d Cir. 2021) (affirming Dean and Adam Skelos' bribery convictions over defendants' *McDonnell* challenges on re-appeal). Sheldon Silver's case is detailed *infra* Part IV.A.

163. For all charging documents, both originally and subsequently filed, see "Underlying Data," *supra* note 131. The author assumes that the original charges fairly reflect each defendant's participation in the alleged corruption scheme and the prosecutors' theory of

charged with corruption in violation of each of the five statutes across the five districts in the six years before and after *McDonnell*.[164]

FIGURE 4



*Proportion of defendants charged for participating in quid pro quo with state or local official in violation of only 18 U.S.C. §§ 1343 or 1341.

In the six years before *McDonnell*, federal prosecutors across the five districts originally charged 26.5% of corruption defendants with Section 1346. In contrast, these prosecutors originally charged 30.8% of similarly-situated defendants with Section 1346 in the six years after *McDonnell*. And while federal prosecutors originally charged 29.2% of defendants with Section 1951 before

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the case. Pursuant to the Justice Manual, the original charges (in contrast to subsequent, "superseding" charges), represent prosecutors' initial theory of the case. *See* U.S. Dep't of Just., Just. Manual § 9-27.300 (2018) (advising prosecutors they should only bring charges if they believe that "the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction"). In general, an original charging document is filed before negotiations between the parties, which may compromise subsequent charges.

164. For the underlying data used to compose this chart, see Appendix *infra* at Table 2.

McDonnell, they originally charged 15.1% of defendants with Section 1951 after *McDonnell*.

During the twelve-year analysis, federal prosecutors charged most defendants with Section 666: 63.6% of the defendants charged in the six years before *McDonnell*, and 60.5% of defendants charged in the six years after *McDonnell*, were charged with Section 666. Whereas federal prosecutors charged Section 1952 in 7.6% of state and local corruption cases in the six years before *McDonnell*; in the six years after *McDonnell*, they charged Section 1952 in 30.4% of cases—a striking 302.5% increase. This enormous growth was driven by the increased usage of Section 1952 in California, Illinois, New Jersey, and New York.[165] The proportion of defendants charged with Sections 1951 and 1952 suggest a shift in the Government's approach to the prosecution of state and local corruption: across the five districts, Section 1951's relative use nearly halved while Section 1952's use more than tripled.

Across the five districts, the general fraud statutes, Sections 1341 and 1343, made up the smallest percentage of corruption charges originally filed. In the six years before *McDonnell*, 13.1% of all defendants accused of participating in a state or local bribery scheme were charged with Section 1343. In the six years after *McDonnell*, 15.1% of similarly situated defendants were so charged. Pursuant to federal prosecutors' long-followed maxim "when in doubt, charge mail fraud,"[166] the analysis further breaks down the proportion of defendants charged for their participation in a quid pro quo with state or local officials in violation of *only* Sections 1341 or 1343.[167] The proportion of corruption defendants

165. In contrast, federal prosecutors in Florida did not charge Section 1952 in a single corruption case during the twelve-year analysis.

166. *See* Coffee, *supra* note 56; *see also* Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after* Skilling, 112 COLUM. L. REV. 359, 359 (2012) (noting the maxim "is well known to federal prosecutors").

167. Of the 590 defendants charged during the twelve-year analysis, 38 were charged with general fraud. Fifteen defendants were charged with Section 1343 for their participation in allegedly impermissible quid pro quos in the six years before *McDonnell*. These defendants include, for example, a former city council candidate indicted for "defrauding her campaign fund" when she accepted payments "in exchange for her future official assistance . . . in obtaining development approvals," and a tow truck operator, indicted for paying bribes to a Chicago police officer in a six-year bribery investigation known as "Operation Tow Scam." *See* Indictment, United States v. Webb-Washington, No. 2:11-cr-261 (D.N.J. Sept. 7, 2011); Indictment, United States v. Chandler, No. 1:13-cr-28 (N.D. Ill. Jan. 10, 2013). Twenty-three defendants were charged in violation of Section 1343 for their participation in allegedly impermissible bribery schemes in the six years after

charged with only general fraud across the five districts accounted for 5.2% of all defendants in the six years before *McDonnell* and 7.7% of all defendants in the six years after *McDonnell*.[168]

C. DISCUSSION

The results show that across the five districts, federal prosecutors have charged more corruption defendants, won a greater percentage of corruption convictions, and sustained more corruption convictions on appeal. Because one cannot know the actual extent of corruption, this Note must contend with the possibility that corruption increased while enforcement was hindered. Given the roughly flat line of enforcement across the twelve years, there are several possible explanations for the results. In one scenario, state and local officials saw *McDonnell* as de-criminalizing bribery and responded by "doing more bribes." Other potential causes for the hypothetical increase in corruption (and concomitant hindrance of federal enforcement) could include the influence of the Trump administration's enforcement priorities, local political dynamics, or other contributing factors known and unknown.[169] In any event, this explanation is based on classic economic models that assume if enforcement of a certain prohibited activity ends or is impeded in some way, more people will engage in that activity.[170] Therefore, it is possible that *McDonnell* hindered federal prosecutors' ability to go after bribery,

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McDonnell. These defendants include, for example, a former county employee charged in connection with a $5 million fraud scheme in which he accepted bribes and kickbacks to secure county contracts for light fixtures, and a developer charged after six years' cooperation in a federal bribery investigation into a Chicago alderman who solicited "everything from campaign donations to erectile dysfunction medication" from the developer. *See* Information, United States v. Bustillo, No. 1:16-cr-20719 (S.D. Fla. Sept. 23, 2016); Information, United States v. See Y. Wong, No. 1:20-cr-00149 (Mar. 11, 2020). For the complete list of defendants and details on the disposition of each case, see "Underlying Data," *supra* note 131.

168. *See* Appendix *infra* at Table 2.

169. *See* 2021 TRAC Report, *supra* note 116 ("[T]here are no reliable figures on the true extent of public corruption. . . . [O]fficial corruption prosecution trends are believed to largely reflect the relative emphasis placed on these types of cases by investigative agencies and by federal prosecutors at any point in time rather than actual trends in crime rates."); *id.* (observing that state and local corruption cases fell "starting towards the end of the Obama administration and continuing through the Trump administration").

170. *See* Alex Raskolnikov, *Criminal Deterrence: A Review of Missing Literature*, 28 SUP. CT. ECON. REV. 1, 32 (2020) (explaining the "core prediction" of the classic economic model of criminal deterrence "is that expected sanctions deter future violations, and higher expected sanctions deter more").

but that there were also significantly more bribes to prosecute; hence, the number of corruption incidents in the six years after *McDonnell* essentially counterbalanced the significant rise in the actual rate of corruption after 2016. In another scenario, the actual extent of corruption has remained more or less the same—but so too has federal corruption enforcement.[171] The plausibility of this scenario is bolstered by the decidedly mixed results of research analyzing the effect of enforcement activity on crime rates.[172]

Regardless, the fact that the number of defendants charged remains essentially flat across the six years before and the six years after *McDonnell* indicates that even if *McDonnell* has potentially hindered federal prosecution of state and local officials, it has not made it extremely difficult for federal prosecutors to go after state and local corruption.

D. CONCLUSIONS

Part III provides the most direct statistical analysis of the federal prosecution of state and local quid pro quo government corruption in the post-*McDonnell* era. It shows that in the six years after *McDonnell*, federal prosecutors in and across the five districts have continued to charge, prosecute, and convict state and local corruption. It also shows that after *McDonnell*, federal prosecutors across the five districts have maintained corruption convictions on appeal.

Furthermore, the analysis shows that after *McDonnell*, federal prosecutors across the five districts have, in contrast to predictions made by previous commentators, increasingly charged the Travel

171. *Cf.* 2021 TRAC Report, *supra* note 116 ("The increase in prosecutions does not necessarily imply that the actual extent of public corruption is on the rise.").

172. *See, e.g.*, Raskolnikov, *supra* note 170, at 34 ("Human decision making is complicated, and it would be foolish to assume that a simple model perfectly describes every aspect of it. . . . [A]t the basic level, human beings do take expected punishment into account among other considerations."); *see also* BERNARD E. HARCOURT, LANGUAGE OF THE GUN: YOUTH, CRIME, AND PUBLIC POLICY 225 (2006) (debunking arguments around any negative association between punitiveness and crime); Amanda Y. Agan et al., *Misdemeanor Prosecution* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2022), https://www.nber.org/papers/w28600 [https://perma.cc/62DX-NHQU] (finding that the decline-to-prosecute policies of the Suffolk County (Massachusetts) District Attorney's Office did not increase the related nonviolent misdemeanor crimes reported by the Boston Police Department).

Act in corruption cases, rather than Section 666.[173] Similarly, after *McDonnell*, federal prosecutors across the five districts charged more corruption defendants with honest services fraud.[174]

Fundamentally, the fact that the post-*McDonnell* trends are not noticeably different from the pre-*McDonnell* trends is all the more striking given the undeniable impact of COVID-19 on federal criminal prosecutions in general. At bottom, the findings suggest that where there is state and local corruption, federal prosecutors remain capable and willing to prosecute it—and do so successfully.

IV. EVALUATING THE POST-*MCDONNELL* CASE LAW

The statistical analysis in Part III shows that there was almost no change in the number of federal corruption prosecutions after *McDonnell*. This finding suggests that *McDonnell* did not have as significant an impact as many commentators had predicted. The post-*McDonnell* case law further supports the idea that federal prosecutors have not been significantly hindered by *McDonnell*'s "official act" standard. In the words of the Second Circuit, *McDonnell* "does not signal a change in the law."[175]

Part IV.A uses *United States v. Silver* as its starting point to first argue that *McDonnell* has not raised the evidentiary bar.[176] This section then argues that bribery theories that existed before *McDonnell*, such as the "as opportunities arise" theory, remain viable in its aftermath.[177] Part IV.B then shows that the Courts of

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173. *Contra* Anthony & Llompart, *supra* note 111, at 2–3 ("[T]he DOJ may be placing increased emphasis on . . . Section 666.").

174. *Contra* Briccetti et al., *supra* note 85, at 724–25 (predicting *McDonnell*'s long-term impact will be to encourage prosecutors to move away from honest services prosecutions); Bartelme, *supra* note 119 ("As a result [of *McDonnell*], we often charge traditional wire fraud or mail fraud instead . . . ." (quoting then-acting U.S. Attorney DeHart)).

175. United States v. Silver (Silver II), 948 F.3d 538, 557 (2d Cir. 2020).

176. *See id.*

177. The "as opportunities arise" or "stream of benefits" theory was first recognized by the Second Circuit in United States v. Ganim, 510 F.3d 134 (2d Cir. 2007). *Ganim* involved a former mayor's appeal of his Sections 1951, 1341, 1346, and 666 corruption convictions. *Id.* at 136. At trial, the mayor acknowledged that the bribe payers did give him "things of value," but he claimed they did so "out of friendship or legitimate lobbying activity;" he specifically "denied receiving any gifts in exchange for official acts." *Id.* at 140. On appeal, the mayor argued that in order to prove his guilt, the Government was required to link each benefit he received to a specific "official act" he performed. *Id.* at 136–7. The Second Circuit disagreed. Writing for the majority, then-Judge Sotomayor explained that the requisite quid pro quo could be satisfied upon a showing that the defendant "received a benefit in exchange for his promise to perform official acts or to perform such acts *as the opportunities arose*." *Id.* at 142 (emphasis added).

Appeals have generally refused to import *McDonnell*'s "official act" requirement to Sections 666 and 1952—thereby keeping the way clear for federal prosecutors to charge these statutes in state and local corruption cases.

A. THE *SILVER* BULLET

The "*McDonnell* Problem" got its first high-profile test when former New York State Assembly Speaker Sheldon Silver appealed his 2015 federal bribery convictions.[178] At trial, the Government argued that Silver used his private work at the law firm Weitz & Luxenberg as a vehicle to exploit his official position for unlawful personal gain.[179] Federal prosecutors alleged that Silver accepted bribes, nearly $4 million in referral fees, in exchange for "official acts" such as providing a researcher with state funding, encouraging a state judge to hire the researcher's daughter, and voting to approve tax-exempt financing for a particular company's real estate ventures, among others.[180] In November 2015, a jury convicted Silver on all bribery counts.[181] Seven months later, the Supreme Court decided *McDonnell*. Relying on *McDonnell*, Silver appealed his conviction, arguing that the decision rendered the "official act" jury instructions in his case overinclusive.[182] Similar to the district court's jury instructions in *McDonnell*, the U.S. District Court for the Southern District of New York had instructed jurors that an "official act" "includes any action taken or to be taken under color of official authority."[183] On appeal, the Second Circuit concluded that it was "required" to reverse and remand.[184] Although the Government had provided sufficient evidence to prove Silver's guilt, the jury had received erroneous instructions that were not harmless error.[185]

178. United States v. Silver (Silver I), 864 F.3d 102 (2d Cir. 2017); *see also* Benjamin Weiser, *Sheldon Silver is Convicted in 2nd Corruption Trial*, N.Y. TIMES (May 11, 2018), https://www.nytimes.com/2018/05/11/nyregion/sheldon-silver-retrial-guilty.html [https://perma.cc/F8AF-MFQP] ("Silver's retrial was widely watched as a test of the government's ability to prosecute official corruption under the narrower definition [of 'official act'].").

179. *See Silver I*, 864 F.3d at 105.

180. *Id.* at 106–10.

181. *Id.* at 112.

182. *Id.* at 113.

183. *Id.* at 112.

184. *Id.* at 105.

185. *Id.* ("Though we reject Silver's sufficiency challenges, we hold that the District Court's instructions on honest services fraud and extortion do not comport with

In 2018, the Government retried Silver's case.[186] Again, federal prosecutors accused Silver of accepting bribes in exchange for "official acts" under the "as opportunities arise" theory.[187] Again, the jury convicted Silver on all counts.[188] Again, Silver appealed.[189] This time, the Second Circuit affirmed his conviction.[190] The court confirmed that in *Silver I*, it only took issue with the district court's jury instructions—not the sufficiency of the Government's evidence or the "as opportunities arise" theory of the Government's case.[191] Rather than altering the legal landscape, the court found that *McDonnell* provided a mere "narrowing gloss" on what constitutes bribery.[192] Silver's case both represents the post-*McDonnell* case law and illustrates two main takeaways.

1. *The Evidentiary Bar Remains Level*

First, the post-*McDonnell* case law disproves predictions that the decision substantively changed the definition of "official act" in practice, thereby raising the Government's evidentiary burden. To the contrary, *McDonnell*'s supposed "narrowing" of the term parroted a distinction previously made across the Courts of Appeals.[193]

Additionally, the post-*McDonnell* case law establishes that circumstantial evidence remains sufficient to prove an "official act"

McDonnell."). *See also* Press Release, U.S. Att'y's Off., S.D.N.Y., Statement of Acting U.S. Attorney Joon H. Kim on Second Circuit Decision in United States v. Sheldon Silver (July 13, 2017), https://www.justice.gov/usao-sdny/pr/statement-acting-us-attorney-joon-h-kim-second-circuit-decision-united-states-v-sheldon [https://perma.cc/65J2-RVZV] ("[T]he Second Circuit . . . held that the evidence presented at the trial was sufficient to prove all the crimes charged against Silver, even under the new legal standard.").

186. Silver II, 948 F.3d 538, 547 (2d Cir. 2020).

187. *Id.* at 562.

188. *Id.* at 545.

189. *Id.*

190. *Id.* (affirming Silver's convictions on three of the six bribery counts).

191. *See id.* at 545; *id.* at 552–58 (explaining the "as [ ] opportunities arise" theory remains valid).

192. *Id.* at 558. *Contra, e.g.*, Master, *supra* note 99, at 53 ("[*McDonnell*] changed the landscape of federal corruption prosecutions."); Rocah, *supra* note 93 ("[*McDonnell*] altered the legal landscape . . .").

193. *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 731 n.15 (1st Cir. 1996) (concluding "the desire to gain access, by itself," does not amount "to an intent to influence improperly the . . . exercise of official duties"); Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (developing an analysis strikingly similar to the Court's later interpretation of "official act" in *McDonnell*); United States v. Kincaid-Chauncey, 556 F.3d 923, 942 (9th Cir. 2009) ("[A] public official's willingness to take a . . . call or give . . . greater access to his appointment schedule, are not sufficient to [prove guilt].").

after *McDonnell*. In *Silver II*, for example, the Second Circuit said that it did not "suspect [*McDonnell*] will affect the prosecution of bribery in most cases because . . . [c]ircumstantial evidence . . . will often be sufficient for the Government to identify a properly focused and concrete question or matter."[194] The analysis in Part III *supra*, which showed that across the five districts not one federal appeals court overturned a bribery conviction for insufficient evidence to prove an "official act," further supports the conclusion that the Government's evidentiary bar remains level. Indeed, while the number of defendants who appealed their convictions increased in the six years after *McDonnell*, the courts' rulings in those cases ended with the convictions affirmed on their *first* appeal.[195] Accordingly, both the analysis in Part III and the post-*McDonnell* case law indicate that *McDonnell* has made it impossible neither to convict where convictions are warranted nor to sustain convictions on appeal.[196] Across the Circuits, examples abound.[197]

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194. Silver II, 948 F.3d 538, 557–58 (2d Cir. 2020); *see also id.* at n.10 ("Past experience shows that the Government will be able to introduce . . . circumstantial . . . evidence that the payor and official understood the quid pro quo to center on an exchange of a thing of value for official acts related to some sufficiently defined and concrete question or matter."); Richman & Rodgers, *supra* note 101 ("[T]he *McDonnell*s of the world . . . are likely to be few and far between."); Devlin-Brown & Monju, *supra* note 75 ("*McDonnell* is of limited significance: . . . In the prototypical public corruption case . . . the prosecution can make a straight-faced claim that governmental action, and not just access, was the intended aim of the bribe.").

195. *See, e.g.*, United States v. Halloran, 664 F. App'x 23, 28 (2d Cir. 2016) (affirming state senator's Section 1951 conviction over his argument that "facilitating a meeting . . . was not an 'official act'" because there was sufficient evidence of his agreement to help allocate state funds for the bribe-payers' benefit in exchange for bribes); *id.* at 28–29 (rejecting *McDonnell* challenge to jury instructions because "given the strength of the evidence . . . there is no 'reasonable probability that the [asserted] error affected the outcome of the trial'"); United States v. Reichberg, 5 F.4th 233, 237 (2d Cir. 2021) (affirming private bribe-payers' Section 1346 convictions for running "a business selling favorable outcomes to encounters with the New York Police Department (NYPD), which he secured by bribing NYPD officers," over *McDonnell* challenges to jury instructions and sufficiency of evidence). For the complete list of these appeals and the courts' treatment of various *McDonnell* challenges, see "Underlying Data," *supra* note 131.

196. *Cf.* Artello, *supra* note 108, at 56 (reviewing post-*McDonnell* case law through March 2019 to conclude that "bribery is illegal and can still be prosecuted successfully when an explicit quid pro quo is present").

197. *See, e.g.*, United States v. Stevenson, 660 F. App'x 4, 7 & n.1 (2d Cir. 2016) (affirming Sections 1346, 666, and 1951 convictions after finding sufficient evidence over *McDonnell* challenges); United States v. Repak, 852 F.3d 230, 256 (3d Cir. 2017) (affirming Section 666 and 1951 convictions because after *McDonnell* "facilitating the award of [government] contracts" is still an "official act"); United States v. Lee, 919 F.3d 340 (6th Cir. 2019) (affirming Sections 1346 and 1951 convictions because evidence was sufficient to conclude that the defendant agreed to perform "official acts" in exchange for gifts); United

2. *Opportunities May Still Arise*

Second, the post-*McDonnell* case law disproves the predictions that the decision would invalidate the "as opportunities arise" theory of bribery, also referred to as the "stream of benefits" theory.[198] On his second appeal, Silver argued that the theory did not survive *McDonnell* because its "official act" standard "require[d] identification of the particular *act* to be performed."[199] The Second Circuit held, however, that the doctrine remains alive and well.[200] The court read *McDonnell* to mean that an official must "promise to take official action on a particular *question or matter* as the opportunity to influence that same question or matter arises."[201] Pursuant to this reading, the Second Circuit determined that *McDonnell* "fits comfortably" with the "as opportunities arise" theory.[202] Notably, every appeals court to consider the issue in a state or local corruption case after *McDonnell* has upheld the theory.[203] These rulings further

States v. Vaughn, 815 F. App'x 721, 731 (4th Cir. 2020) (noting *McDonnell* "factored into [defendant]'s decision to go to trial," and affirming his Section 666 conviction).

198. Technically, the two theories have slight differences. The "as opportunities arise" theory focuses on the quo (i.e., "official acts" taken or agreed to be taken "as the opportunities arise"). In contrast, the "stream of benefits" theory appears to focus on both the quids and quos (i.e., a "steady stream" of quids going to an official in exchange for a "steady stream" of quos taken by the official for the bribe-payer's benefit). Nevertheless, the federal courts appear to treat the two theories as the same. *See, e.g.*, United States v. Roberson, 998 F.3d 1237, 1246 & n.10 (11th Cir. 2021) (affirming Section 666 conviction under the "'as opportunities arise,' or 'stream of benefits' theory of bribery"), *cert. denied*, 142 S. Ct. 1109 (2022).

199. Silver II, 948 F.3d 538, 545 (2d Cir. 2020) (emphasis added).

200. *See id.* at 548 (upholding "as opportunities arise" theory); *accord* United States v. Percoco, 13 F.4th 180, 189 (2d Cir. 2021) ("In *Silver*, . . . we rejected the argument that *McDonnell* 'eliminated' this theory of bribery.").

201. *Silver II*, 948 F.3d at 552–53 (emphasis in original).

202. *Id.* at 558 (observing *Ganim* "similarly require[d] an anticipated exchange of payment[s] for 'particular kinds of influence'").

203. The First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits have all upheld the theory after *McDonnell*. *See* United States v. Martínez, 994 F.3d 1, 9 (1st Cir. 2021) (finding evidence permitted a reasonable inference of an agreement to provide the bribe payer with favorable treatment in state contracts as opportunities arose); United States v. Lopez-Cotto, 884 F.3d 1, 8 n.5 (1st Cir. 2018) (observing the "stream of benefits" theory is applicable in cases involving Sections 666 and 1346 after *McDonnell*); Woodward v. United States, 905 F.3d 40, 48 (1st Cir. 2018) ("[The] 'stream of benefits' theory . . . remains valid today."); United States v. Reichberg, 5 F.4th 233, 247 (2d Cir. 2021) ("[T]he 'as opportunities arise' theory . . . remains good law following *McDonnell*."); United States v. Davis, 841 F. App'x 375, 380 (3d Cir. 2021) ("[A] bribe may come in the form of a 'stream of benefits.'"); United States v. Repak, 852 F.3d 230, 251 (3d Cir. 2017) ("[To convict under Section 1951,] it is sufficient if the public official understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise."); United States v. Higgins, No. 6:18-cr-10,

undermine the majority's view that *McDonnell* "altered the legal landscape" by voiding once-valid bribery theories.[204]

B. *MCDONNELL*'S IMPACT ON SECTIONS 666 AND 1952

As demonstrated, *McDonnell* has neither raised the evidentiary bar nor invalidated the "as opportunities arise" bribery theory in state and local corruption cases. Additionally, most Courts of Appeals have refused to import *McDonnell*'s "official act" standard to other statutes—namely, Sections 666 and 1952. Accordingly, federal prosecutors maintain alternate routes to successfully pursue state and local corruption.

1. *No "Official Act" Requirement for Section 666?*

In May 2021, the Eleventh Circuit observed that the only courts to directly consider the issue post-*McDonnell* (the Second and Sixth Circuits) did not import an "official act" requirement into Section 666.[205] More recently, however, a split has emerged. On one side, the Second, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits have rejected defendants' efforts to require an "official act" quo, and held that neither Section 201's "official act" requirement nor *McDonnell*'s "official act" standard apply to Section 666

2021 U.S. Dist. LEXIS 17940, at *50 (W.D. Va. Jan. 31, 2021) (convicting of Section 1346 pursuant to the "as opportunities arise" theory), *aff'd sub nom.*, United States v. Hassler, 992 F.3d 243, 248 (4th Cir. 2021); United States v. Hills, 27 F.4th 1155, 1179 (6th Cir. 2022) ("It is sufficient if the official promises to make a decision or take action on a particular question or matter 'as the opportunity . . . arises.'"); United States v. Solomon, 892 F.3d 273, 276–77 (7th Cir. 2018) (determining Section 1346 "reaches schemes that involve a 'stream of benefits'" and holding "the district court did not have to find an explicit agreement to exchange payment for awarding [a] contract" because "[i]t was enough to find sufficient evidence of an ongoing agreement to compensate [the official] for sending contracts to [the bribe payer]"); United States v. Roberson, 998 F.3d 1237, 1246 & n.10 (11th Cir. 2021) (affirming Section 666 conviction under "'as opportunities arise,' or 'stream of benefits' theory of bribery"). Although the Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have not yet weighed in on the issue, given the Circuits' agreement and these Circuits' pre-*McDonnell* precedent, it is unlikely that they will overrule the theory without explicit direction from the Supreme Court.

204. *Contra, e.g.*, Rocah, *supra* note 93; Master, *supra* note 99, at 53; Quinn-Judge & Silverglate, *supra* note 78, at 207–08; Taylor Williams, *Criminal Law—A Formal Exercise of Governmental Corruption: Applying the "Stream of Benefits" Theory to the Federal Bribery Statute*, 40 U. ARK. LITTLE ROCK L. REV. 161 (2017).

205. *Roberson*, 998 F.3d at 1247; *see also* United States v. Lindberg, 39 F.4th 151, 166–69 (4th Cir. 2022) (observing no Circuit to consider the issue after *McDonnell* has read Section 201's "official act" requirement into Section 666).

prosecutions.[206] On the other side, the First and Fifth Circuits have appeared to require that the Government allege and prove an "official act" in Section 666 cases.[207]

The Circuit split is further complicated by the Third Circuit's intentional avoidance of answering whether an "official act" is required in Section 666 prosecutions.[208] Indeed, one recent case suggests that prosecutors in the Circuit's U.S. Attorney's Offices have begun to assume that Section 666 requires an "official act," agreeing by stipulation that they must "prove that the defendant intended to influence an 'official act' per *McDonnell*."[209] Federal prosecutors' interpretation of the Third Circuit's indecision on this issue may partially explain the relatively low number of defendants charged in state and local corruption cases in New Jersey after *McDonnell*.[210]

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206. *See* United States v. Boyland, 862 F.3d 279, 291 (2d Cir. 2017) (holding *McDonnell*'s "official act" standard does not apply to Section 666, which "is more expansive than § 201"); United States v. Ng Lap Seng, 934 F.3d 110, 134 (2d Cir. 2019) ("*McDonnell*'s 'official act' standard does not pertain to bribery as proscribed by § 666."); *Lindberg*, 39 F.4th at 169 ("[U]nlike § 201 bribery, § 666 . . . [does] not [require], as defendants argued, an 'official act.'"); United States v. Porter, 886 F.3d 562, 565–66 (6th Cir. 2018) ("[Defendant's] *McDonnell*-based argument [to require an "official act"] is without merit."); United States v. Maggio, 862 F.3d 642, 646 n.8 (8th Cir. 2017) (declining to apply *McDonnell*'s "official act" standard to Section 666); United States v. Suhl, 885 F.3d 1106, 1112–4 (8th Cir. 2018) (declining to "decide whether the . . . official act element applies to § 666," and implying, nevertheless, that it does not because Section 666 "does not include the term 'official act'"); United States v. Robles, 698 F. App'x 905, 906 (9th Cir. 2017) (upholding pre-*McDonnell* doctrine not requiring an "official act" in Section 666 cases because it "is not clearly irreconcilable with" *McDonnell*); United States v. Roberson, 998 F.3d 1237, 1246 (11th Cir. 2021) ("[Section] 666 has no such ['official act'] requirement and is distinguishable . . . .").

207. *See* United States v. Martínez, 994 F.3d 1, 6–7 (1st Cir. 2021) ("To convict López . . . for federal programs bribery . . ., the government was required to prove . . . that López accepted a thing of value while 'intending to be influenced' by it to perform an official act."); United States v. Hamilton, No. 21-11157, 2022 U.S. App. LEXIS 23648, at *8–9, *10 (5th Cir. Aug. 23, 2022) (holding Section 666 requires a quid pro quo, and vacating convictions because the jury instructions implied "that neither a quid-pro-quo exchange nor any 'official act' by the councilmembers was required"); United States v. Delgado, 984 F.3d 435, 449–50 (5th Cir. 2021) (affirming Section 666 conviction where there was "more than sufficient evidence for a rational juror to conclude that the $5,500 cash payment was a bribe and that Delgado accepted the payment intending to be influenced in his decision to grant Garza a PR bond").

208. *See* United States v. Allinson, 27 F.4th 913, 920 (3d Cir. 2022) ("[We] assume, but do not decide, that the Government had to show Allinson bought official acts."); *see also* United States v. Willis, 844 F.3d 155, 164 (3d Cir. 2016) ("[E]ven if we were to require . . . a quid pro quo to establish a § 666 bribery offense—which we decline to do here—we conclude that it was adequately alleged.").

209. *See Allinson*, 27 F.4th at 920 ("The parties agreed prior to trial that the Government needed to prove that Allinson intended to influence an 'official act' per *McDonnell*.").

210. *See supra* at Part III.B.1.

2. *No "Official Act" Requirement for Travel Act Bribery*

Federal courts are wary of importing federal standards into state law and to federal laws predicated on state offenses.[211] Both the Second and Third Circuits have used this rationale to reject defendants' arguments that *McDonnell*'s "official act" standard is now an element of Travel Act bribery. In *United States v. Smilowitz*, the Second Circuit reaffirmed its pre-*McDonnell* precedent that the Travel Act criminalizes a generic form of bribery that does not require an "official act" quo.[212] Considering a similar challenge in *United States v. Ferriero*, the Third Circuit held that where a Travel Act conviction is predicated on a state bribery law that does not statutorily require an "official act," neither Section 201's "official act" requirement nor *McDonnell*'s "official act" standard apply.[213] The Fifth and Ninth Circuits have also appeared not to require *McDonnell*'s "official act" standard in Travel Act bribery cases.[214] While other Circuits have not yet weighed in on the issue, district courts have likewise refused to import *McDonnell*'s "official act" standard to federal bribery prosecutions under the Travel Act.[215]

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211. *See, e.g.*, United States v. Ferriero, 866 F.3d 107, 128 (3d Cir. 2017) ("Though this case applies a federal statute [the Travel Act] to a nonfederal, local party official, it applies a standard from a New Jersey statute written by New Jersey legislators. It simply does not involve the Federal Government in setting standards of good government for local and state officials." (internal citations and alterations omitted)).

212. United States v. Smilowitz, 974 F.3d 155, 163 (2d Cir. 2020) (upholding Travel Act bribery conviction because defendant's payment to influence voter conduct fit within the generic definition of bribery).

213. *Ferriero*, 866 F.3d at 128 (rejecting defendant's attempt to analogize the state law's phrase "on a public issue" to Section 201's "official act," which, he said, "should limit [the state] bribery provision to pending agenda items before a town council"). *Compare id.* at 125–28 (explaining that because the statutes of conviction in *McDonnell* were Sections 1346 and 1951, its analysis was irrelevant in a case that turns on Section 1952), *with* United States v. Defreitas, 29 F.4th 135, 147 & n.14 (3d Cir. 2022) (holding that where a state or territory's bribery law requires an "official act" and that law is the predicate of a Travel Act violation, the Government must prove an "official act" and a district court must define that "official act" in its jury instructions).

214. *See* United States v. Delgado, 984 F.3d 435, 452 (5th Cir. 2021) (affirming Travel Act conviction predicated on Section 666 because "[t]he same evidence that was sufficient for the jury to conclude that that incident was an act of bribery provides the context to conclude that Delgado used his phone to facilitate an unlawful activity"); United States v. Chi, No. 17-50358, 2019 U.S. App. LEXIS 38881, at *2–3 (9th Cir. Aug. 30, 2019) (holding as is true of Section 1952, "'bribery of a public official' in § 1956 . . . is not constrained by 18 U.S.C. § 201, a statute to which § 1956 makes no reference").

215. *See, e.g.*, United States v. Burke, No. 19-cr-322, 2022 U.S. Dist. LEXIS 100432, at *194–95 (N.D. Ill. June 6, 2022) (finding *McDonnell*'s "official act" standard is not required in Travel Act bribery prosecutions where predicate statutes "do not necessarily require an official act"); United States v. Gross, 370 F. Supp. 3d 1139, 1149 (C.D. Cal. 2019) (order

C. CONCLUSIONS

Two takeaways emerge from the post-*McDonnell* case law: First, the Courts of Appeals have read *McDonnell* narrowly, as primarily concerning jury instructions. In faithful adherence to *McDonnell*'s text, the lower courts have ensured that *McDonnell*'s "official act" standard neither raises the evidentiary bar nor kills off previously valid bribery theories. Second, the courts' refusals to require *McDonnell*'s "official act" standard in Sections 666 and 1952 prosecutions has cleared the way for federal prosecutors to charge defendants with these statutes and thereby avoid the risk of mistrial due to erroneous "official act" jury instructions. As Part III shows, juries convict just as often after *McDonnell* as they did before. In sum, *McDonnell* is more a signal to district courts instructing jurors than it is to federal prosecutors litigating state and local corruption.

CONCLUSION

Through statistical analysis and an evaluation of the post-*McDonnell* case law, this Note provides a rigorous re-examination of the "*McDonnell* Problem." Despite predictions and affirmations to the contrary, this Note shows that *McDonnell* has not substantially changed the landscape of the federal prosecution of state and local corruption to the degree commentators feared—at least across California, Florida, Illinois, New Jersey, and New York. Rather, federal prosecutors remain willing to vigorously pursue state and local corruption cases after *McDonnell* and do so successfully.

As one anticorruption expert has repeatedly affirmed, one never knows what a case stands for immediately; rather, a case's true meaning comes to bear only after subsequent courts have had the opportunity to interpret and apply the new standard.[216] In the case of *McDonnell*, this Note suggests that the immediate focus may have been misplaced. Instead, the focus might have more appropriately been on the final sentence of the Chief Justice's opinion: "A more limited interpretation of the term 'official act'

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denying defendant's motion to dismiss counts of the indictment) (concluding *McDonnell*'s "official act" standard does not apply to bribery prosecutions under the Travel Act).

216. *See* Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Colum. L. Sch., Lectures in Legislation & Regulation Course (Fall 2021).

leaves ample room for prosecuting corruption."[217] This Note not only provides evidence that this ample room exists, but also that federal prosecutors have taken advantage of the space.

* * *

Following the Supreme Court's decision in *McDonnell*, federal prosecutors declined to retry the case. The irony is, they probably would have won.

217. McDonnell v. United States, 579 U.S. 550, 581 (2016).

APPENDIX

TABLE 1: NUMBER OF CORRUPTION INCIDENTS ACROSS THE FIVE DISTRICTS (JUNE 28, 2010–JUNE 27, 2022)

Time Period	Charged	Dismissed	Pled Guilty	Convicted by Jury	Acquitted by Jury	Affirmed	Reversed	Acquitted
June 28–Dec. 2010	26	2	11	4	1	0	2	0
Jan.–June 27, 2011	29	2	19	1	0	0	0	1
June 28–Dec. 2011	13	1	6	7	3	2	0	0
Jan.–June 27, 2012	27	3	28	5	0	0	0	0
June 28–Dec. 2012	26	0	20	1	1	2	1	0
Jan.–June 27, 2013	30	0	16	4	0	3	0	0
June 28–Dec. 2013	16	0	21	9	1	0	0	0
Jan.–June 27, 2014	25	1	21	4	1	1	0	0
June 28–Dec. 2014	20	0	9	2	1	0	0	0
Jan.–June 27, 2015	38	0	15	4	0	4	0	3
June 28–Dec. 2015	21	3	21	3	0	6	0	2
Jan.–June 27, 2016	20	1	35	1	0	1	0	0
Pre-*McDonnell* Total	**291**	**13**	**222**	**45**	**8**	**19**	**3**	**6**
June 28–Dec. 2016	44	0	31	0	0	5	0	0
Jan.–June 27, 2017	18	1	28	0	0	1	0	0
June 28–Dec. 2017	36	0	17	2	0	1	3	0
Jan.–June 27, 2018	26	4	19	5	1	3	0	0
June 28–Dec. 2018	16	0	11	10	0	0	0	0
Jan.–June 27, 2019	19	0	15	9	2	1	0	0
June 28–Dec. 2019	38	0	8	3	0	0	0	0
Jan.–June 27, 2020	12	1	5	1	0	2	0	0
June 28–Dec. 2020	35	0	20	0	0	1	0	0
Jan.–June 27, 2021	20	0	14	1	0	3	0	0
June 28–Dec. 2021	11	0	28	0	0	11	0	0
Jan.–June 27, 2022	24	2	14	4	1	1	0	0
Post-*McDonnell* Total	**299**	**8**	**210**	**35**	**4**	**29**	**3**	**0**

TABLE 2: NUMBER OF DEFENDANTS ORIGINALLY CHARGED IN VIOLATION OF EACH OF THE FIVE STATUTES ACROSS THE FIVE DISTRICTS (JUNE 28, 2010–JUNE 27, 2022)

Time Period	**§ 666**	**§ 1343***	**§ 1343****	**§ 1346**	**§ 1951**	**§ 1952**
June 28–Dec. 2010	20	0	5	7	5	3
Jan.–June 27, 2011	18	0	4	12	3	5
June 28–Dec. 2011	5	1	0	5	6	1
Jan.–June 27, 2012	18	1	0	0	9	0
June 28–Dec. 2012	19	0	3	2	8	0
Jan.–June 27, 2013	17	1	6	12	17	6
June 28–Dec. 2013	6	0	0	4	8	1
Jan.–June 27, 2014	20	2	4	4	6	2
June 28–Dec. 2014	9	0	0	4	11	2
Jan.–June 27, 2015	24	7	1	12	7	1
June 28–Dec. 2015	17	0	0	10	3	0
Jan.–June 27, 2016	12	3	0	5	2	1
Pre-*McDonnell* Total	**185**	**15**	**23**	**77**	**85**	**22**
June 28–Dec. 2016	32	4	6	8	6	15
Jan.–June 27, 2017	12	0	3	4	8	2
June 28–Dec. 2017	28	6	5	14	2	6
Jan.–June 27, 2018	15	3	1	8	9	6
June 28–Dec. 2018	9	2	3	5	4	7
Jan.–June 27, 2019	8	0	0	1	7	27
June 28–Dec. 2019	21	2	0	7	1	3
Jan.–June 27, 2020	5	1	0	4	3	9
June 28–Dec. 2020	24	1	4	18	0	1
Jan.–June 27, 2021	12	0	0	17	2	2
June 28–Dec. 2021	8	1	0	3	0	13
Jan.–June 27, 2022	7	3	0	3	3	15
Post-*McDonnell* Total	**181**	**23**	**22**	**92**	**45**	**91**

*Number of defendants charged for corruption in violation of Section 1343 (or 1341) only.

**Number of defendants charged for corruption in violation of Section 1343 (or 1341) *and* one or more of the other five statutes.