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What Does It Mean to 'Exert Pressure' Under *McDonnell*?

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Introduction

Just as the work week draws to an end, long-serving state Representative Huey Stark receives a phone call from a good friend, Bradley Business. Business needs legal assistance on some minor estate planning matters, and it just so happens that Rep. Stark, a licensed attorney, maintains a general practice that includes such work. Business offers to pay Rep. Stark $2,500 per month for the next year to handle any estate planning matters that arise.[1] Neither the volume nor the complexity of the expected work is demanding, and the fee is likely to exceed what Rep. Stark would make if he billed Business based on his standard rate for actual hours worked.

Business's offer quickly grows more complicated with his next request, however. As Rep. Stark is already aware, a bill pending in the state legislature would, if enacted, strengthen regulatory oversight of accounting firms in the state. Not coincidentally, Business operates one of the most successful accounting firms in the state.

Business explains that in addition to the requested legal work, he would like for Rep. Stark to help him "spread the word" about the negative aspects of the pending bill. To be sure, Business does not ask Rep. Stark to kill the bill or even take any formal legislative action against it, nor does he provide any details about what he would like to see done. But Business makes clear that he expects Rep. Stark will make it known to his colleagues in the legislature that he opposes the bill's passage.

Rep. Stark feels uneasy about the request. While he in fact believes the bill is unsound and would welcome the opportunity to earn a fee for relatively low impact legal work, he is concerned about running afoul of federal bribery laws. He knows it is illegal to agree to perform an "official act" in exchange for a "thing of value." He understands that if Business were offering to pay him the retainer fee in exchange for Rep. Stark personally taking some action against the bill, the law would be violated. In addition, because Rep. Stark has paid attention to the evolving standards that apply to bribery, he also knows that an "official act" not only can include his own actions but can also apply to those situations in which he "exerts pressure" on other officials to take some official action. But despite reading up on the law of bribery after the Supreme Court's decision in *McDonnell v. United States*,[2] Rep. Stark is uncertain about what conduct rises to that level.

Unfortunately for Rep. Stark, federal courts appear no more confident about the dividing line between a public official's legitimate performance of his duties and "exerting pressure" than he does. This article endeavors to resolve some of the existing ambiguity on the topic. Despite an approach that resembles

Justice Potter Stewart's famous "I know it when I see it" obscenity standard, courts interpreting whether certain behavior rises to the level of "exerting pressure" under *McDonnell* have in fact employed an ad hoc approach focused on four key factors: (1) the position and influence of the official accused of exerting pressure; (2) the effect of the pressure on the intended audience; (3) the quantity of the official's alleged pressure; and (4) the form and substance of the official's alleged pressure. These four factors — referred to herein as "position, perception, quantity, and quality" — have driven outcomes when the issue is litigated, and they will likely serve as the framework for whatever more concrete framework emerges going forward.

McDonnell and Its Aftermath

Federal bribery laws vary in scope and reach, but at their core, most criminalize corrupt payments intended to influence official action. Under 18 U.S.C. § 201, a crime occurs where "a public official … corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value … in return for … being influenced in the performance of any official act."[3] Section 201 has a relatively narrow jurisdictional reach, extending only to members of Congress and those acting on behalf of the United States.[4] As a result, some federal corruption cases — including those charging state officials — utilize separate provisions.[5] While the language of the various statutes differs, courts applying them typically distill their components to one basic concept: corrupt payments designed to influence official acts.[6]

Under § 201, an "official act" includes "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."[7] Despite the apparent simplicity of this principle, federal courts wrestled for years over just how broad a standard this statutory language provided in defining an official act.[8]

The *McDonnell* Court resolved some of that confusion by holding that an "official act" requires something more than a public official's mere expression of support for a proposed action or assistance in providing information about that proposed action to other public officials. The defendant, Robert McDonnell, was the governor of Virginia, who was elected on a platform of "promoting business in Virginia."[9] Between 2009 and 2012, he had numerous dealings with a Virginia businessman named Jonnie Williams.[10] During that period, Williams provided roughly $175,000 in loans, gifts, and other perks to McDonnell and his family.[11] Also, during that period, McDonnell aided Williams in his attempts to obtain state-conducted research studies of Anatabloc, a nutritional supplement developed and marketed by Williams's company.[12]

Prosecutors charged McDonnell with honest services fraud and Hobbs Act extortion, both of which required the government to show that the governor committed an "official act" in exchange for a thing of value from Williams.[13] The prosecution asserted that McDonnell committed at least five such "official acts" that together involved "arranging meetings, hosting events, and contacting other government officials" on matters related to the nutritional supplement promoted by Mr. Williams.[14] The jury convicted McDonnell.[15]

The Supreme Court reversed. Focusing on the definition of an "official act" under § 201(a)(3),[16] the Court identified two key requirements that the prosecution must meet. First, the prosecution must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official; and (b) involves "a formal exercise of governmental power" similar in nature to "a lawsuit, hearing, or administrative determination."[17] Second, the prosecution must show "that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so."[18]

In other words, allegations of official acts require proof of: (1) a formal matter on which an official may act formally; and (2) an action or decision (or agreement to take the same) *on* the matter by the official. With respect to the second prong — that the prosecution must show that the public official decided or acted *on* the pending matter — the Supreme Court noted that such decision or action could "include 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."[19] On the other hand, "[s]etting up a meeting, hosting an event, or calling an official (or agreeing to do so)," without more, are not official acts, although such actions "could serve as evidence of an agreement to take an official act."[20]

Applying those principles to McDonnell, the Supreme Court held that the district court erred because, among other reasons, it failed to instruct the jury that a conviction required a finding "that [McDonnell] made a decision or took an action — or agreed to do so — *on* the identified 'question, matter, cause, suit, proceeding or controversy,'" as the Court has construed that requirement.[21] Although the jury might have reached the same conclusion based on "evidence that Governor McDonnell agreed to *exert pressure* on those officials to initiate the research studies or add Anatabloc to the state health plan," the Court concluded that it was also possible that the jury had "convicted Governor McDonnell without finding that he agreed to make a decision or take an action on a properly defined 'question, matter, cause, suit, proceeding or controversy.'"[22]

The *McDonnell* decision has provided a small dose of clarity to the issue of "official acts" under federal anti-bribery law. After the Court's ruling, it is not enough for prosecutors to allege just any act by a public official. At the same time, however, the *McDonnell* Court also relaxed the manner in which allegations of official acts can be proven. *McDonnell* recognizes multiple alternative theories of prosecution in federal bribery cases, allowing conviction where the public official: (1) directly performed an official act; (2) exerted pressure on another official to perform an official act; (3) provided advice to another official, intending or knowing that this advice would form the basis for that official to perform an official act; or (4) agreed to take any of the above actions. Unfortunately, the decision left the boundaries of such alternative theories, such as "exerting pressure," almost entirely unaddressed.

What Does It Mean to 'Exert Pressure'?

The *McDonnell* Court indicated that "exerting pressure" requires something more than merely "expressing support," but, as one lower court attempting to apply that standard noted, the Court "did not provide guidance on how to make the proper distinction."[23] In the face of this

silence, other courts have combed through the *McDonnell* opinion for clues to the puzzle of what constitutes "exerting pressure." Unfortunately, this process has left the concept "look[ing] like a jigsaw puzzle with a couple of pieces gone."[24]

Admittedly, courts have found in the *McDonnell* opinion itself a few of the puzzle pieces necessary for defining what constitutes exerting pressure. For example, as the Court made clear, "exerting pressure is an official act only when the official uses his 'official position.'"[25] Moreover, unlike the alternative of "provid[ing] advice," the act of exerting pressure "does not require that the public official know or intend that the pressure 'form the basis' of the ultimate official act."[26] But these rules provide only the outer corners of the puzzle. The puzzle's central image — what constitutes the act of pressure itself — remains unclear.

To fill this gap, some loose standards have emerged from post-*McDonnell* decisions to define what constitutes "pressure," such as where an official "work[s] hard to persuade" other officials to take an official act or where an official "express[es] strong support for a matter."[27] Unsurprisingly, courts have noted that the direct act of "requesting that another official approve of" a matter can prove sufficient to constitute pressure.[28] But such standards, even when recognized, provide precious little guidance for cases falling between the extremes.

The ambiguity left in *McDonnell's* wake means that criminal defense lawyers will be responsible for waging the fight to clarify the boundaries of corruption prosecutions.

As noted above, the four key factors — "position, perception, quantity, and quality" — have emerged. To be sure, courts have not adopted any specific formula for applying these factors, whether in terms of weight or specific requirements. Indeed, these factors have been applied differently from case to case.

For example, by which standard should one consider the alleged pressure's effect on the intended audience? Sometimes, courts apply this factor in an objective manner, considering whether the pressure resulted in action.[29] But other courts apply this factor subjectively, taking into account whether the intended audience *felt* pressured to act in response.[30] No clear rule exists as to whether this factor is objective, subjective, or both.

The analysis is further complicated when assessing what combination of the factors pushes the public official's innocent expressions of support over the line into the dangerous territory of exerting pressure. The district court's decision in *United States v. Jefferson*[31] provides an excellent demonstration of how each of the factors may come into play. The defendant in *Jefferson* was a nine-term congressman from Louisiana. He was convicted of numerous acts of bribery and corruption based on his conduct in connection with several congressional committees and his political ties with several African countries. Following the Supreme Court's decision in *McDonnell*, Jefferson sought collateral review of his conviction, claiming that, under the principles announced in *McDonnell*, insufficient evidence supported his convictions.[32]

The court reevaluated in light of *McDonnell* Jefferson's effort to convince State Department officials at the U.S. Embassy in London to grant a travel visa to an individual named Kachikwu.[33] At trial, the prosecution established that "Jefferson wrote a letter on congressional letterhead in support of Kachikwu's visa application and made a phone call to individuals at the London embassy."[34] The evidence presented at trial regarding this matter was scarce, and the court noted a lack of clarity as to the contents of the letter and phone call.[35] Nevertheless, the court found that there was "no indication that Jefferson exerted pressure as required to make his actions official."[36]

Indeed, although "a call from a congressman would seem *ipso facto* to be some sort of 'pressure'" to the general public, the court likened Jefferson's efforts to the *McDonnell* defendant's permissible act of arranging meetings.[37] Based on that comparison, the

court characterized Jefferson's efforts as "[s]imply expressing support" for the visa application; insufficient to support conviction.[38]

But the *Jefferson* court reached a different conclusion on the question of whether Jefferson exerted pressure on other officials to award a grant to fund a feasibility study for a corporation's proposed fertilizer plant in Nigeria. Trial testimony from a United States Trade Development Agency (USTDA) employee revealed the "pattern of influence" that Jefferson exercised with respect to the project.[39] The employee testified that Jefferson "inquired repeatedly about the project," and, although Jefferson did not expressly request that the USTDA approve the project, the employee's impression was that Jefferson "had expressed a clear interest in seeing the project move forward."[40] The employee's testimony further indicated that Jefferson's "extensive and ongoing involvement in the funding approval process and his pressure on the USTDA officials were clearly integral" in the plant's progress, despite the existence of problems that "would have killed any other deal."[41] Moreover, the employee further testified to having felt "nervous" at a meeting with Jefferson "because members of Congress 'hold a certain sway' over executive decision making."[42]

The *Jefferson* court concluded that sufficient evidence supported a finding that Jefferson had "exerted pressure" with respect to the plant's approval, explaining that "if 'exerting pressure' is to have any force, it must at least include repeated actions by a public official to push and promote a project, encouraging other officials to find ways to keep the project going even after similar projects would fail."[43] Accordingly, the court found that any error in the jury instructions in light of *McDonnell* was harmless with respect to the plant proposal.

The *Jefferson* decision thus highlights two potential outcomes based on the relevant factors. On the one hand, exertion of pressure may not arise if only one factor is present. In particular, the least important factor arguably is the official's status and position of power. To be sure, courts often consider the authority exercised by the official in combination with other factors, but no court in the wake of *McDonnell* has found that an official's acts constituted an exertion of pressure purely by virtue of the official's status. Indeed, were it otherwise, the *McDonnell* Court would not have concluded that "[s]imply expressing support" for a position "at a meeting, event, or call" fails to qualify as an official act absent an *intent* to exert pressure or provide advice.[44]

On the other hand, *Jefferson* illustrates that a court will more likely find an exertion of pressure when two or more of the relevant factors are present. And indeed, *Jefferson* provides what appears to be a rare example in which *all* of the relevant factors (position, perception, quantity, and quality) were present and warranted a finding that an official exerted pressure under *McDonnell*. First, the relevant evidence highlighted that, as a congressman, Jefferson "h[eld] a certain sway" over the decisions to fund the project in Nigeria. Second, and relatedly, the court noted that the government employee with whom Mr. Jefferson met felt "nervous" about the meeting, suggesting a subjective perception of pressure. Moreover, the evidence showed that Jefferson engaged in *repeated* actions to promote the project, even once it became clear that the project would otherwise fail. And finally, although he did not expressly request that the project proceed, Jefferson expressed a "clear interest" in the project's continued progress, indicating expression of "strong support."

It bears noting that the *Jefferson* decision does *not* represent a minimum threshold for a finding of pressure. The district court itself concluded only that the phrase *exerting pressure* must "at least" include the facts of the case.[45] Not all of the relevant factors (position, perception, quantity, and quality) must be present for an official's actions to cross the line from expressing support to exerting pressure.

Facts Sufficient for an Indictment Alleging an Exertion of Pressure

Defendants charged under the "exerting pressure" theory have moved to dismiss indictments on the grounds that such allegations fall short of the showing required under *McDonnell*. To date, however, none of those challenges have succeeded.

In *United States v. Lee*,[46] the defendant was a member of her local county council who interacted frequently with a local businessman who provided her with money and free wares.[47] Lee was convicted of honest services fraud and Hobbs Act extortion for assisting the local businessman in obtaining favorable outcomes in judicial and administrative proceedings, and she argued on appeal that the indictment should have been dismissed under *McDonnell* because "an official can only 'exert pressure' on a second official if the first official has 'leverage or power' over the second official."[48]

The Sixth Circuit disagreed, explaining that (1) this proposed standard for "pressuring" had no support in case law, and (2) "an indictment need not specifically state each factor of a charge that must be proven, as long as the facts alleged, taken together, support the elements of the charge."[49] Examining the indictment itself, the court found it included sufficient facts to support its allegations that the defendant engaged in official acts to assist the businessman "achieve favorable outcomes in judicial and administrative proceedings."[50] In particular, the court noted that the indictment included a transcript of a conversation between the defendant and a local prosecutor in which the defendant questioned why, when charging the businessman's nephews following a violent altercation, the prosecutors had not

also charged another party to that altercation.[51] The Sixth Circuit explained that, "at a minimum" the indictment's allegations and supporting facts "support[ed] an inference that Defendant had agreed to perform an official act or pressure or advise other officials to perform official acts" in exchange for gifts or loans from the businessman.[52]

In *United States v. Dougherty*,[53] the government charged eight defendants in a "wide-ranging scheme" led by John Dougherty, the business manager of a local union. The defendants challenged the indictment on the grounds that it insufficiently alleged that a member of the Philadelphia City Council had pressured employees of another public agency, the Philadelphia Department of Licenses and Inspection (L&I), in order to discourage the use of non-union labor. Specifically, the indictment alleged that Dougherty, upon learning of the use of non-union labor in a city hospital, instructed another union employee to contact Robert Henon, a councilmember, to lodge a complaint.[54] The indictment further alleged that L&I employees subsequently took official action "in response to a complaint to L&I by … Henon."[55] Based on these allegations, the court found that the indictment sufficiently alleged that Henon had "exerted pressure on L&I employees to perform an 'official act.'"[56] Notably, the court rejected the argument that merely making a complaint to L&I, without more, could not have constituted pressure to take an official act, reasoning that "[a]n indictment need not allege everything *McDonnell* requires in jury instructions."[57]

Cases such as *Lee* and *Dougherty* demonstrate the uphill battle that public officials face in challenging allegations of pressure at the dismissal stage. And even if an indictment does not clearly show pressure, prosecutors at least in theory have other means of establishing the requisite official act.

In *United States v. Gilbert*,[58] for example, a district court denied a motion to dismiss an indictment alleging bribery based on allegations indicating that a public official might have engaged in either exerting pressure or giving advice to another public official. The scheme itself involved bribing a state legislator, Oliver Robinson, to take actions in opposition to a proposal by the Environmental Protection Agency (EPA) to expand a Superfund Site.[59] In exchange for monthly payments of $7,000 to his charitable organization, Robinson agreed to assist in the scheme.[60]

That assistance covered several acts, including: (1) delivering a letter ghostwritten by the defendants but printed on Robinson's official Alabama House of Representatives letterhead to the chair of the Alabama Environmental Management Commission (AEMC), "requesting permission to appear before the agency to air his concerns with the EPA's proposal"; (2) appearing before the AEMC and the Alabama Department of Environmental Management (ADEM) to express concerns about the proposed site and "request[ing] that AEMC try to convince the EPA to narrow the list of potentially responsible parties" with respect to the Superfund Site; and (3) following up two weeks later with another ghostwritten letter on his official letterhead, "requesting information about the Site from the ADEM Director and AEMC members."[61]

Based on this purported conduct, the district court found that the indictment sufficiently alleged an official act under *McDonnell*.[62] In reaching this conclusion, the court distinguished the *Jefferson* decision based on the repetitive and serious nature of Robinson's advocacy, explaining that "[t]he indictment here alleges far more than a single letter or phone call expressing support for an action."[63] Moreover, the court further found *Jefferson*, a case dealing with exerting pressure, to be inapposite because "the indictment sufficiently alleges that the Defendants intended for Robinson to 'advise' the agencies" and that such advice would "form the basis" for official conduct by the agencies.[64]

Importantly for public officials, however, the *Gilbert* decision treated the "advising" theory of official acts as an *alternative* to "exerting pressure," rather than a catch-all theory. The latter would all but obviate any consideration of whether a public official "exerted pressure," yet neither *Gilbert* nor any other case appears to have skipped that aspect of the *McDonnell* analysis. Accordingly, although the "advising" theory may apply even when proof of "exerting pressure" is absent, the latter remains a relevant, separate theory of proving an official act.

Facts Sufficient for a Reasonable Jury to Find an Exertion of Pressure

The results for federal bribery defendants challenging jury convictions have proven mixed. Such challenges fall into two categories: (1) cases in which a jury convicted based on an erroneous instruction under *McDonnell*; and (2) cases in which a properly instructed jury voted to convict. Only in the first category have appellants had success.

The first category includes *United States v. Fattah*,[65] involving the prosecution and conviction of former Pennsylvania Congressman Chaka Fattah, Sr., as well as several others, on charges relating to racketeering and public corruption. The government alleged that Fattah, in exchange for the paying down of his campaign debt, had "made a focused effort to secure an ambassadorship" for Herbert Vederman, a donor.[66] The jury returned a verdict of guilty against Fattah on all counts, including bribery, just under a week before the Supreme Court issued its opinion in *McDonnell*.[67]

Fattah and several of his co-defendants appealed their convictions, arguing that, in light of *McDonnell*, the trial court had improperly instructed the jury as to what constitutes an official act.[68] The district court agreed that its instructions fell short under *McDonnell* but nevertheless found the error to be harmless in light of overwhelming evidence of Fattah's "persistent quest for an ambassadorship for Vederman."[69] As the court recounted, Fattah's campaign on behalf of Vederman included: (1) writing a letter to U.S. Senator Bob Casey, "strongly recommend[ing]" Vederman for the position; (2) using his political connections to "set up a difficult-to-obtain telephone conference" with the president's deputy chief of staff; (3) hand-delivering a recommendation letter to former President Barack Obama; and (4) "follow[ing] up with emails to the White House" after delivering the recommendation letter to the president.[70]

The court drew a sharp contrast between these extensive efforts and the less culpable alternative of "simply sign[ing] routine or pro forma letters of support … and then let[ting] the matter rest."[71] Indeed, in light of these extensive efforts, as well as Fattah's role as "a longtime member of the House of Representatives and its powerful Appropriations Committee," the court found that Fattah "was without question exerting pressure on … the president and Senator Casey."[72] Because the evidence adduced at trial also supported the other elements for bribery, the court therefore denied the motions for judgment of acquittal or for a new trial as to those related counts.[73]

The Third Circuit rejected the notion that the improper jury instruction constituted harmless error, and it remanded the case to be considered by a properly instructed jury.[74] Notably, citing a sparse record on appeal, the Third Circuit explained that it could not "determine whether Fattah's efforts to secure Vederman an ambassadorship crossed the line" into improper attempts "to pressure or advise."[75] In dicta, however, the Third Circuit speculated that the jury might find that certain of Fattah's acts, such as providing a "hand-delivered letter to the president of the United States," went beyond permissible expressions of support.[76] Furthermore, the Third Circuit also speculated that a properly instructed jury "might find that in the aggregate, three emails, two letters, and a phone call crossed the line and therefore constituted a 'decision or action' on the identified matter of appointment."[77]

As *Fattah* illustrates, the first category of challenges turns as much on the erroneous nature of the jury instruction as it does the evidence itself. In *Fattah*, the Third Circuit did not reverse based on a lack of evidence sufficient to convict; rather, in light of the erroneous jury instruction under *McDonnell*, it merely concluded that the evidence of official pressure was not so overwhelming as to foreclose an acquittal by the jury. Unfortunately for public officials, that distinction is of vital importance.

In contrast to that first category of challenges, if a jury has been properly instructed under *McDonnell*, the chances of a court overturning the jury's guilty verdict are slim at best. For example, in *United States v. Menendez*,[78] sufficient evidence existed for a reasonable jury to find that a U.S. senator had used his influence to assist a donor with a Medicare billing dispute. Specifically, the court recounted evidence that the defendant senator had "sought to pressure or advise such officials … by making personal phone calls to officials in the Department of Health and Human Services … and meeting with the then-secretary of that agency in August 2012."[79] The court also noted that there was sufficient evidence "from which a rational juror could conclude that the meeting was not regarding general policy matters, but was in reality about securing a favorable ruling or decision for [the donor], who was the only doctor seeking to change that particular policy, and who had $8.9 million at stake."[80]

Challenges to verdicts by correctly instructed juries regularly fail, in no small part, because of the murky nature of what constitutes official pressure or advice. Recall that the Supreme Court has indicated that routine actions such as "[s]etting up a meeting, hosting an event, or calling an official … merely to talk" about a pending matter may fall short of an official act.[81] However, the Court has also clarified that such routine actions "could serve as evidence of an agreement to take an official act," and a jury could even find, based on such evidence, "that the official was attempting to pressure or advise another official on a pending matter."[82] That juries may rely on such routine actions as evidence of exerting pressure, when coupled with all of the factors that courts find relevant to the question of official pressure, make it enormously difficult for public officials to predict whether their expressions of support will cross a legal line.

Conclusion

In light of the foregoing, one could forgive Rep. Stark for his uncertainty about what constitutes an official act under federal bribery law. After all, the Supreme Court decided *McDonnell* in 2016, and the federal courts have since failed repeatedly to clearly delineate what constitutes "exerting pressure" on another official to act. In this environment, individuals like Rep. Stark can have little confidence that action taken in support of a matter will fall below the threshold of "exerting pressure."

As more courts apply *McDonnell*, prosecutors can be expected to contend that the "exerting pressure" theory effectively lightens the burden in corruption cases. Such a reading would be fundamentally inconsistent with the holding of both *McDonnell* and other recent Supreme Court precedent on the topic, however.[83] But holding the line against this claim will require that defense counsel do more than merely point out that inconsistency. In addition, counsel must bring challenges mindful of how courts have applied the position, perception, quantity, and quality factors to establish a framework that aligns with *McDonnell* and basic constitutional protections. Whether by challenging ambiguous or thinly supported indictments proceeding on this theory, pushing for jury instructions that specify what may and may not suffice, or preserving and pressing those arguments on appeal, counsel must recognize that the ambiguity left in *McDonnell*'s wake means that they will be the ones responsible for waging the fight to clarify the boundaries of corruption prosecutions.

Notes

1. This type of arrangement is typically referred to as a "general retainer," which is defined as:

> an agreement pursuant to which the client agrees to pay the attorney a fixed sum in exchange for the attorney's promise to be available to perform, at an agreed price, any legal services that arise during a specified period.

Wong v. Michael Kennedy P.C., 853 F. Supp. 73, 79–80 (E.D.N.Y. 1994).

2. 579 U.S. 550 (2016).

3. 18 U.S.C. § 201(b)(2)(A).

4. 18 U.S.C. § 201(a)(1).

5. *See, e.g.*, 18 U.S.C. § 1346 (honest services fraud); 18 U.S.C. § 1951(a) (Hobbs Act extortion).

6. *See, e.g.*, *United States v. Silver*, 864 F.3d 102, 111 (2d Cir. 2017) ("To succeed on a bribery theory of honest services fraud and Hobbs Act extortion, the government had to prove, beyond a reasonable doubt, the existence of a *quid pro quo* agreement — that the defendant received, or intended to receive, something of value in exchange for an official act."). Not all federal corruption laws necessarily turn on the presence of an official act, however. The circuits are split regarding the question of whether the federal funds bribery statute, 18 U.S.C. § 666(a)(2), criminalizes both bribery and illegal gratuities; i.e., that it contains an "official act" element. *Compare United States v. Lindberg*, 39 F.4th 151, 166–69 (4th Cir. 2022) (relying on the language, structure, and legislative history of § 666 to conclude that federal funds bribery does not require proof of an official act), *and United States v. Roberson*, 998 F.3d 1237, 1247 (11th Cir. 2021) (joining other circuit courts of appeal that "have not imported an 'official act' requirement into Section 666"), *with United States v. Hamilton*, 46 F.4th 389, 397–98 (5th Cir. 2022) (concluding that § 666(a) "cover[s] only *quid pro quo* bribery"), *and United States v. Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013) (ruling that § 666(a) criminalizes only a *quid pro quo* and not mere gratuities).

7. 18 U.S.C. § 201(a)(3).

8. *Compare Valdes v. United States*, 475 F.3d 1319, 1325–26 (D.C. Cir. 2007) (holding that police detective who ran searches on

state police computer database in exchange for cash payments did not commit an "official act" because his database searches were not connected to any active or incipient police investigation), *with United States v. Moore*, 525 F.3d 1033, 1040–41 (11th Cir. 2008) (rejecting rationale of *Valdes* and holding that evidence of low-level actions taken by two male corrections officers charged in sex-for-contraband scheme, including switching unit assignments and permitting inmate to leave her unit to meet with another officer, was sufficient to satisfy "official act" requirement), *abrogated by McDonnell*, 579 U.S. at 550.

9. *Id.* at 556.
10. *Id.* at 556–61.
11. *Id.* at 561.
12. *Id.* at 556–61.
13. *Id.* at 561–62.
14. *Id.* at 563–64.
15. *Id.*
16. The parties did not dispute that the charged offenses, honest services fraud and Hobbs Act conspiracy, each required proof of an official act that could be defined in reference to the federal bribery statute, 18 U.S.C. § 201. *Id.* at 562–63.
17. *Id.* at 567–68.
18. *Id.* at 567.
19. *Id.* at 574.
20. *Id.* at 573.
21. *Id.* at 579.
22. *Id.* (emphasis added).
23. *United States v. Jefferson*, 289 F. Supp. 3d 717, 743 (E.D. Va. 2017).
24. *See* Jim Croce, *Bad, Bad, Leroy Brown, on* Life and Times (ABC 1973).
25. *United States v. Menendez*, 291 F. Supp. 3d 606, 619 (D.N.J. 2018) (citing *McDonnell*, 579 U.S. at 572).
26. *Id.* at 618 (quoting *McDonnell*, 579 U.S. at 572).
27. *See Miserendino v. United States*, 307 F. Supp. 3d 480, 492 (E.D. Va. 2018).
28. *Id.*
29. *See, e.g.*, *United States v. Percoco*, No. 16-CR-776(VEC), 2019 WL 493962, at *26 (S.D.N.Y. Feb. 8, 2019) (finding state agency's compliance with directive from defendant state official to be relevant in determining whether the directive itself constituted an attempt to pressure rather than a mere expression of support).
30. *See, e.g.*, *United States v. Pawlowski*, 351 F. Supp. 3d 840, 859 (E.D. Pa. 2018) (noting in prosecution of public official for bribery that evidence showed that target of public official's alleged pressure "testified that she felt her job was 'in jeopardy' as a result of" not acting on the alleged pressure).
31. 289 F. Supp. 3d 717 (E.D. Va. 2017).
32. *Id.* at 721.
33. *Id.* at 738.
34. *Id.* at 739.
35. *Id.*
36. *Id.*
37. *Id.* at 739 n.23.
38. *Id.* at 739 (quoting *McDonnell*, 579 U.S. at 573).
39. *Id.* at 742.
40. *Id.*
41. *Id.*
42. *Id.* at 743.
43. *Id.*
44. *McDonnell*, 579 U.S. at 573.
45. *Jefferson*, 289 F. Supp. 3d at 743.
46. 919 F.3d 340 (6th Cir. 2019).
47. *Id.*
48. *Id.* at 352.
49. *Id.* at 352–54.
50. *Id.* at 354.
51. *Id.* (quoting the defendant as stating: "I'm not trying to influence you; you can't say I'm trying to influence you. I'm trying to make you think. That's all I'm trying to do; just trying to make you think.").
52. *Id.*
53. No. 19-64, 2020 WL 5231684 (E.D. Pa. Sept. 1, 2020).
54. *Id.* at *10.
55. *Id.* at *11.
56. *Id.*
57. *Id.*
58. No. 2:17-cr-00419-AKK-TMP, 2018 WL 2095853 (N.D. Ala. May 4, 2018).
59. *Id.* at *2.
60. *Id.*
61. *Id.*
62. *Id.* at *5.
63. *Id.*
64. *Id.*
65. 223 F. Supp. 3d 336 (E.D. Pa. 2016), *rev'd in part*, 914 F.3d 112 (3d Cir. 2019).
66. *Id.* at 346.
67. *Id.* at 359–60.
68. *See id.*
69. *Id.* at 362.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 367.
74. *United States v. Fattah*, 914 F.3d 112, 146 (3d Cir. 2019).
75. *Id.* at 156 ("Determining, for example, just how forceful a strongly worded letter of recommendation must be before it becomes impermissible 'pressure or advice' is a fact-intensive inquiry that falls within the domain of a properly instructed jury.").
76. *Id.* at 159 n.17.
77. *Id.*
78. 291 F. Supp. 3d 606 (D.N.J. 2018).
79. *Id.* at 617.
80. *Id.*
81. *See McDonnell*, 579 U.S. at 573.
82. *Id.*
83. *See, e.g., McDonnell*, 579 U.S. at 576 ("Under the 'standardless sweep' of the government's reading, public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." (internal citation omitted)); *Skilling v. United States*, 561 U.S. 358, 412 (2010) (narrowing the honest services fraud doctrine to core bribery and kickback schemes and noting that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)); *cf. Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (vacating "Bridgegate" convictions where the government failed to prove an effort to obtain money or property; "not every corrupt act by state or local officials is a federal crime"). ■

About the Authors

Bill Athanas represents companies and individuals in all facets of government investigations, including grand jury investigations and other government enforcement actions.

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