Fordham Law Review

Volume 85 | Issue 4 Article 10

2017

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WHO PUT THE *QUO* IN QUID PRO QUO?: WHY COURTS SHOULD APPLY *MCDONNELL*'S "OFFICIAL ACT" DEFINITION NARROWLY

*Adam F. Minchew**

Federal prosecutors have several tools at their disposal to bring criminal charges against state and local officials for their engagement in corrupt activity. Section 666 federal funds bribery and § 1951 Hobbs Act extortion, two such statuary tools, have coexisted for the past thirty-six years, during which time § 666 has seen an increasing share of total prosecutions while the Hobbs Act's share of prosecutions has fallen commensurately.

In the summer of 2016, the U.S. Supreme Court decided McDonnell v. United States*—a decision that threatens to quicken the demise of Hobbs Act extortion in favor of § 666. If* McDonnell *is interpreted to apply to Hobbs Act extortion but not to § 666, we can expect the latter to become the unchallenged favorite of federal prosecutors as well as increased litigation over whether § 666 bribery contains a quid pro quo requirement. This is likely to occur given § 666's coverage of the same corrupt behavior, expansive jurisdictional hook, and, following* McDonnell*, lower difficulty of proving violations within some circuits. To avoid this eventuality, lower courts should distinguish* McDonnell *because of its unique procedural posture and continue to apply the existing quid pro quo framework. Before meaningful change to our federal bribery statutes can take place, the courts of appeals must first find consensus over whether and when § 666 requires the government to prove the existence of a quid pro quo.*

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INTRODUCTION

From 2009 to 2012, Virginia Governor Robert McDonnell accepted over $175,000 in gifts and loans from Jonnie Williams, the CEO of a Virginia-based nutritional supplement company.[1] At the same time, Williams sought state-sponsored research of a new product.[2] Federal prosecutors charged McDonnell, and a jury found him guilty of honest services fraud and Hobbs Act extortion under color of official right.[3] On June 27, 2016, however, a unanimous U.S. Supreme Court vacated McDonnell's conviction and remanded due to an erroneous jury instruction regarding the meaning of "official act"—the *quo* component of a quid pro quo.[4] On September 8, 2016, the U.S. Attorney's Office for the Eastern District of Virginia moved to dismiss the indictment with prejudice.[5]

In analyzing the district court's jury instruction, the Court in *McDonnell v. United States*[6] considered the elements of Hobbs Act extortion[7] and honest services fraud[8] with reference to the federal bribery statute's[9] definition of "official act."[10] It held that an official act must be a specific, formal exercise of government power rather than some undefined future benefit.[11]

Law-abiding, tax-paying citizens have long demanded that public officials be held to the same (or higher) standards as themselves. Indeed, among Congress's first acts after the founding was to outlaw bribery of customs officers and federal judges.[12]

Today, there exists a patchwork of federal bribery statutes with overlapping criminal conduct, applicable individuals, and jurisdictional elements.[13] Despite their differences, the primary purpose of these statutes is the same: to render unlawful certain self-interested behaviors by state, federal, and local public officials and private individuals who receive federal funding.[14] These statutes principally target the use of official government power for personal pecuniary gain, whether through bribery, kickbacks, extortion, or defrauding the public of honest services.[15] Determining the line between distasteful behavior and criminal behavior,

1. *See* McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016).
2. *See id.*
3. *See id.* at 2364–67.
4. *Id.* at 2375.
5. Unopposed Motion to Remand for Dismissal, McDonnell v. United States, No. 15-4019 (4th Cir. Sept. 8, 2016).
6. 136 S. Ct. 2355 (2016).
7. 18 U.S.C. § 1951 (2012).
8. *Id.* §§ 1343, 1346.
9. *Id.* § 201.
10. *See McDonnell*, 136 S. Ct at 2365.
11. *Id.* at 2372.
12. *See* PETER J. HENNING & LEE J. RADEK, THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES 3–4 (2011).
13. *See, e.g.*, 18 U.S.C. §§ 201, 1346, 1951–52.
14. *See id.*
15. *See* 18 U.S.C. §§ 666, 1346, 1951.

however, has confounded prosecutors, citizens, legislators, and the courts for years.[16]

This Note explores the possible effects that *McDonnell* will have on the quid pro quo standard for future federal prosecutions of state and local official corruption.[17] Quid pro quo, as interpreted and defined by the Supreme Court, generally means "a specific intent to give or receive something of value *in exchange* for an official act."[18] Stated simply, the *quid* is the thing of value, the *quo* is the official act, and the *pro* is the contemplated exchange.[19] A narrow construction of any component of the quid pro quo will limit the range of conduct criminalized by bribery statutes requiring such proof. This Note focuses almost exclusively on the nature of the *quo* (i.e., the official act) and differing standards of "official act" that courts have developed for specific statutes and circumstances.

Part I presents the two federal statutes that are the focus of this Note: § 666 federal funds bribery[20] and § 1951 Hobbs Act extortion under color of official right.[21] Although Congress enacted each statute independently, both criminalize virtually the same conduct.[22] Section 666 prohibits the corrupt solicitation, demand, acceptance, or agreement to accept anything valued $5,000 or greater while intending to be influenced or rewarded in connection with any business of a government body or agency that receives $10,000 or greater in federal funds.[23] Hobbs Act extortion under color of official right prohibits the receipt of a payment to which the recipient is not entitled in exchange for an agreement to perform an official act.[24] Although the criminalized conduct is substantially the same, the lower courts have developed divergent standards of proof, creating critical differences, which *McDonnell* brings into stark contrast.

Part II briefly describes the birth and early life of Hobbs Act extortion. This part also discusses the Supreme Court's establishment of "official acts" as the *quo* component of the quid pro quo framework developed in two early 1990s cases, *McCormick v. United States*[25] and *Evans v. United States*.[26] Part II.C then details the circuit court confusion over the quid pro quo requirement for Hobbs Act extortion following the Supreme Court's decisions in *McCormick* and *Evans*, specifically the "explicit" and "implicit" quid pro quo requirements and when each is appropriate.

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16. *See infra* Parts II.C, III.

17. The federal bribery statute, 18 U.S.C. § 201, is not the direct focus of this Note, because its quid pro quo standard is settled and its existence does not implicate the same federalism and vagueness concerns as § 1951 Hobbs Act extortion and § 666 federal funds bribery.

18. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).

19. *Id.* at 404.

20. 18 U.S.C. § 666.

21. *Id.* § 1951. Honest services wire fraud, the other theory of bribery that Governor McDonnell was alleged to have committed, falls outside the scope of this Note.

22. *See infra* Part I.C.

23. 18 U.S.C. § 666(a)(1)(B), (b).

24. *See id.* § 1951; Evans v. United States, 504 U.S. 255, 268 (1992).

25. 500 U.S. 257 (1991).

26. 504 U.S. 255 (1992).

Part III follows up the discussion of quid pro quo under Hobbs Act extortion with a discussion of quid pro quo as applied to prosecutions under § 666. Specifically, this part explores the current circuit split over whether the text of § 666 required proof of a quid pro quo at all. Although the prosecution did not charge McDonnell with violating § 666,[27] and the Court's opinion does not discuss it,[28] understanding how the courts of appeals interpret the quid pro quo requirement, or lack thereof, is crucial to understanding the potential reach of *McDonnell*.

With an understanding of the pre-*McDonnell* quid pro quo requirements for Hobbs Act extortion, Part IV introduces the underlying facts, procedural history, and analysis used by the Supreme Court in *McDonnell*.

In Part V, this Note presents the range of possible interpretations of *McDonnell* by the lower courts. On one end of the spectrum, *McDonnell* can read narrowly as applying only to § 201 federal bribery and not to Hobbs Act extortion.[29] Another reasonable interpretation is that *McDonnell*'s "official act" definition applies to Hobbs Act extortion but not to § 666.[30] On the other end of the spectrum, *McDonnell* can be read broadly as requiring a heightened definition of "official act" that applies equally to all federal antibribery statutes, including § 666.[31]

Finally, in Part VI, this Note takes the position that the lower courts should distinguish *McDonnell* on its facts and procedural history to give the Supreme Court time to clarify the quid pro quo standard, if any, applicable to § 666. Despite the Court's concerns that a weaker standard raises regarding fair notice, federalism, due process, and overzealous prosecution, the danger and likelihood that *McDonnell* is applied to Hobbs Act extortion but not to § 666 is a more pernicious long-term problem. Application of a specific official act requirement to Hobbs Act extortion but not to § 666 would result in two statutes that criminalize the same conduct but have substantively different required elements—a result that neither Congress nor the Supreme Court could have intended. Such a result would necessarily demote Hobbs Act extortion and promote § 666, as prosecutors would be given an obvious advantage in § 666 prosecutions.

I. STATUTORY BACKGROUND OF FEDERAL EXTORTION AND BRIBERY

To understand the impact of *McDonnell* on federal prosecution of state and local official corruption, it is necessary to understand the statutory underpinnings of § 1951 Hobbs Act extortion under color of official right[32] and § 666 federal funds bribery.[33]

27. *See generally* Indictment, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-00012-JRS), 2014 WL 223601.
28. *See generally* McDonnell v. United States, 136 S. Ct 2355 (2016).
29. *See infra* Part V.C.
30. *See infra* Part V.B.
31. *See infra* Part V.A.
32. 18 U.S.C. § 1951(a), (b)(2) (2012).
33. *Id.* § 666.

A. Hobbs Act Extortion: 18 U.S.C. § 1951

Congress enacted § 1951, colloquially known as the Hobbs Act[34] ("the Act") in honor of its sponsor, Alabama Senator Sam Hobbs, in 1946 in an effort to control racketeering.[35] As implied by its statutory title—"Interference with Commerce by Threats or Violence"—Congress passed the Hobbs Act to prohibit interference with interstate commerce by either robbery or extortion involving the use or threatened use of force.[36] As Senator Hobbs noted, the common law meaning of extortion was well understood at the time of the Act's passage; it had been "construed a thousand times by the courts."[37] Nevertheless, the Act specifically defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[38] The Act carries a statutory maximum twenty-year prison sentence.[39]

In the 1960s, prosecutors began trying to extend the Hobbs Act's definition of extortion not only to racketeering involving physical threats and violence but also to the solicitation and acceptance of bribes by public officials.[40] Courts initially rejected the notion that officials were guilty of extortion under color of official right when the payor's actions were willful and voluntary, as in traditional bribery.[41]

Beginning in 1972, however, coinciding with public outcry over official corruption in the aftermath of the Watergate scandal,[42] Hobbs Act extortion under color of official right went from being ignored to transforming into federal prosecutors' preferred tool for charging local officials with corruption.[43] Federal prosecutors in New Jersey successfully employed Hobbs Act extortion to prosecute public corruption for the first time in

34. Ch. 537, 60 Stat. 420 (1946) (codified as amended at 18 U.S.C. § 1951).

35. *See* Jeremy N. Gayed, *"Corruptly": Why Corrupt State of Mind Is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 NOTRE DAME L. REV. 1731, 1752 (2003); *see also* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 128–29 (2003); Francis N. MacDonald, *Federal Jurisdiction and the Hobbs Act:* United States v. Stillo *and the Depletion of Assets Theory*, 72 CHI.-KENT L. REV. 1389, 1393 (1997).

36. 18 U.S.C. § 1951.

37. MacDonald, *supra* note 35, at 1393 n.18.

38. 18 U.S.C. § 1951(b)(2).

39. *Id.* § 1951(a).

40. *See* McCormick v. United States, 500 U.S. 257, 277 (1991) (Scalia, J., concurring).

41. *See id.* at 277–78; *see also* United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Kubacki, 237 F. Supp. 638, 641 (E.D. Pa. 1965).

42. *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. LEGIS. 153, 164 n.40 (1994).

43. *See* Henning, *supra* note 35, at 130–31; *see also* Evans v. United States, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (arguing that the Hobbs Act serves "as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials"); Jan Hoth Uzzo, *Federal Prosecution of Local Political Corruption Under the Hobbs Act: The Second Circuit Attempts to Define Inducement*, 51 BROOK. L. REV. 734, 736 (1985).

United States v. Kenny.[44] The Third Circuit accepted the prosecution's theory of extortion under color of official right as "the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear."[45] The prosecution, district court, and Third Circuit on appeal relied on a disjunctive reading of the statute, in which "under color of official right" is construed as being disconnected from the preceding language—"force, violence, or fear."[46] At the time it was first used in *Kenny*, Hobbs Act extortion under color of official right had no specific quid pro quo requirement and carried a maximum penalty of twenty years.[47] Thus, the stage was set for the rise of a statute that, since 1984, has served as the lead charge in 1,629 federal prosecutions of state and local official corruption—more than 20 percent of all federal prosecutions of such conduct by state and local officials.[48]

B. Federal Funds Bribery: 18 U.S.C. § 666

Congress enacted the Federal Funds Bribery and Theft Act in 1984[49] in anticipation of a pending Supreme Court case addressing whether the then-existing federal bribery statute, 18 U.S.C. § 201, applied to state and local officials.[50] Unlike the Hobbs Act, which derives its federal jurisdiction from the Commerce Clause and the Necessary and Proper Clause of the Constitution,[51] federal jurisdiction under § 666 is grounded in the Spending Clause.[52] The statute sweeps broadly to cover all local officials whose departments receive $10,000 or more in federal funds;[53] the Supreme Court

44. 462 F.2d 1205 (3d Cir. 1972); *see also id.* at 1229; JOHN T. NOONAN, BRIBES 586 (1984) ("*Kenny* . . . amend[ed] the Hobbs Act and [brought] into existence a new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun.").

45. *Kenny*, 462 F.2d at 1229.

46. *Id.* (quoting 18 U.S.C. § 1951(b)(2) (1970)); *see also McCormick*, 500 U.S. at 266 & n.5. One commentator has described this as the moment where the federal bribery statute and Hobbs Act extortion under color of official right began to merge. *See* John S. Gawey, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 NOTRE DAME L. REV. 383, 398 (2011).

47. 18 U.S.C. § 1951 (2012); *see* Lee J. Radek, *Hobbs Act*, *in* PROSECUTION OF PUBLIC CORRUPTION CASES 413, 419–20 (1988), https://www.ncjrs.gov/pdffiles1/Digitization/110010-110033NCJRS.pdf (stating that Hobbs Act extortion "punishes activity with a 20-year maximum sentence which, if engaged in by Federal officials and prosecuted under 18 U.S.C. § 201, would be punishable by fifteen years for bribery or two years for gratuity") [https://perma.cc/U5QN-CJJL].

48. Adam Minchew, Corruption Prosecution Data Compilation from Tracfed.com (Nov. 2, 2016) (on file with the *Fordham Law Review*) (compiling all federal § 666 and Hobbs Act bribery prosecutions from 1986 to 2016).

49. Pub. L. No. 98-473, § 1104, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 666).

50. *See* Justin Weitz, *The Devil Is in the Details: 18 U.S.C. § 666 After* Skilling v. United States, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 805, 816 (2011).

51. *See supra* note 36 and accompanying text.

52. *See* Sabri v. United States, 541 U.S. 600, 605 (2004).

53. 18 U.S.C. § 666(b).

has held that "[n]o connection whatsoever between the corrupt transaction and the federal benefits need be shown."[54]

The statute's prohibitions reach any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof."[55] Moreover, § 666 expressly criminalizes both the offer and acceptance of a bribe.[56] The text of the statute contains no quid pro quo requirement nor does it contain the phrase "official act."[57] With respect to the recipient of a bribe, the statute provides:

> Whoever . . . corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; . . . shall be fined under this title, imprisoned not more than 10 years, or both.[58]

C. Contrasting § 666 and Hobbs Act Extortion

Whereas the courts developed the Hobbs Act theory of bribery over time based on policy and reference to the common law,[59] § 666 is unmistakably the will of Congress and is undergirded by a detailed statutory framework less subject to judicial interpretation.[60] Despite their differences, the two statutes criminalize substantially the same conduct.[61] Indeed, the Supreme Court in *Evans* noted that Hobbs Act extortion under color of official right is the "rough equivalent of what we would now describe as 'taking a bribe.'"[62] One commenter has added that the conduct criminalized by § 666 in 1984, at least with respect to public officials, was "more than adequately covered by official right extortion under the Hobbs Act."[63]

Until recently, an important difference between Hobbs Act extortion under color of official right and § 666 bribery was the ability of prosecutors to charge the bribe payor—in addition to the official accepting the bribe—under § 666 but not under the Hobbs Act. In the summer of 2016, the Supreme Court resolved a circuit split on this issue. Decided just months before *McDonnell*, the Court in *Ocasio v. United States*[64] reaffirmed that Hobbs Act extortion under color of official right embodies common law extortion and includes the "rough equivalent of what we would now

54. *Sabri*, 541 U.S. at 613.
55. 18 U.S.C. § 666(a)(1).
56. *Id.* § 666(a)(1)–(2).
57. *See id.*
58. *Id.* § 666(a)(1)(B).
59. *See* Gawey, *supra* note 46, at 405.
60. *See* 18 U.S.C. § 666.
61. *See* H. Marshall Jarrett, *Charging Decisions*, *in* PROSECUTION OF PUBLIC CORRUPTION CASES, *supra* note 47, at 209, 213 ("A violation of 18 U.S.C. § 666 can be charged in conjunction with the Hobbs Act if the jurisdictional requirement of receipt of a specified amount of Federal funds by the official's employer is met.").
62. Evans v. United States, 504 U.S. 255, 260 (1992).
63. *See* Gawey, *supra* note 46, at 410.
64. 136 S. Ct. 1423 (2016).

describe as 'taking a bribe.'"[65] The petitioner specifically argued that permitting conspiracy to commit Hobbs Act extortion is "tantamount to a charge of soliciting or accepting a bribe and that allowing such a charge undermines 18 U.S.C. § 666."[66] The Court, however, could find "no principled basis for precluding the prosecution of conspirac[y] to commit" Hobbs Act extortion while conspiracy to commit bribery under existing federal statutes was permitted.[67] It thus held that a civilian bribe payor—not just the bribed official—could be prosecuted under the Hobbs Act and convicted of conspiracy to commit extortion "under color of official right."[68]

Justice Thomas, however, alluded in his dissent that *Evans* was wrongly decided.[69] He asserted that the majority's opinion "blurr[ed] the distinction between bribery and extortion."[70] Thus, in holding that bribe payors are subject to prosecution under Hobbs Act extortion, *Ocasio* eroded a central distinction between Hobbs Act extortion and § 666 federal bribery.

The remaining difference between the two statutes is the difficulty of proving a violation. Whereas the Supreme Court has established and interpreted the quid pro quo framework for Hobbs Act extortion with a degree of clarity and consensus,[71] neither Congress nor the Supreme Court has explicitly addressed whether proof of a quid pro quo is necessary in § 666 prosecutions.[72] The required showing of a promised or performed "official act"[73] in the former and the "corrupt solicitation" of a "reward[] in connection with any business, transaction, or series of transactions"[74] in the latter is crucial. Because "official act" has taken on a very specific meaning, § 666's lack of the term is of unique importance.[75]

II. HOBBS ACT EXTORTION: QUID PRO QUO?

In the aftermath of *Kenny*, the courts of appeals largely adopted the Third Circuit's "wrongful taking" framework.[76] A majority of them, including

65. *Id.* at 1428 (quoting *Evans*, 504 U.S. at 260).
66. *Id.* at 1434.
67. *Id.*
68. *Id.* at 1436.
69. *Id.* at 1439 (Thomas, J., concurring) (arguing that the Court's interpretation has "wrenche[d] from the States the presumptive control that they should have over their own officials' wrongdoing").
70. *Id.*
71. *See infra* Part II.A–B.
72. *See infra* Part III.B–C.
73. *See infra* Part II.B.
74. 18 U.S.C. § 666(a)(1)(B) (2012).
75. Another important difference between the two statutes is their applicability. Whereas only those who hold public office can be prosecuted under Hobbs Act extortion, prosecutors can employ § 666 to charge private citizens if their organization or business receives the statutorily required $10,000 in federal funds. *See id.* § 666(b). For the purposes of this Note, which focuses on federal prosecution of state and local government corruption, however, this difference is of little importance.
76. *See* Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions?: The Ambiguous Prosecution of "Implicit" Quid Pro Quos Under the Federal Funds Bribery Statute*, 65 RUTGERS L. REV. 229, 234 n.35 (2012) (citing United States v. Jannotti, 673 F.2d

the Eleventh Circuit in *United States v. Evans*,[77] ruled that Hobbs Act extortion under color of official right is "consonant with the common law definition of extortion" and, therefore, "[t]he coercive element [of the crime] is supplied by the existence of the public office itself."[78] Thus, the Eleventh Circuit held that "passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation."[79] The Second Circuit, however, strayed from the majority position by reading the language of the Hobbs Act more narrowly to require "induce[ment] . . . under color of official right"—a criminal wrong "begin[ning] with the public official, not with the gratuitous actions of another."[80] Soon after, the Ninth Circuit employed a similar statutory construction and joined the Second Circuit in establishing a heightened inducement standard.[81] This conflict over inducement led to back-to-back decisions in the early 1990s, which redefined Hobbs Act extortion.

A. McCormick v. United States*: Is Proof of a Quid Pro Quo Necessary for Hobbs Act Extortion Convictions?*

In the 1991 case of *McCormick v. United States*,[82] the Supreme Court issued its first major opinion concerning Hobbs Act extortion under color of official right. Although the Court declined to resolve the circuit split regarding whether a federal prosecutor must prove some affirmative act of inducement by an official,[83] it did resolve the threshold question of whether and when proof of a quid pro quo is a required element of Hobbs Act extortion.[84]

Robert McCormick, a West Virginia state legislator, sponsored a bill permitting doctors with foreign medical degrees to temporarily practice

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578, 595 (3d Cir. 1982) (en banc); United States v. French, 628 F.2d 1069, 1074 (8th Cir. 1980); United States v. Williams, 621 F.2d 123, 124 (5th Cir. 1980); United States v. Butler, 618 F.2d 411, 418 (6th Cir. 1980); United States v. Hall, 536 F.2d 313, 320–21 (10th Cir. 1976); United States v. Hathaway, 534 F.2d 386, 393 (1st Cir. 1976)).

77. 910 F.2d 790 (11th Cir. 1990), *aff'd*, 504 U.S. 255 (1992).

78. *Id.* at 796 (quoting *Williams*, 621 F.2d at 124); *see also* United States v. Garner, 837 F.2d 1404, 1423 (7th Cir. 1987); United States v. Spitler, 800 F.2d 1267, 1274–75 (4th Cir. 1986).

79. *Evans*, 910 F.2d at 796 (stating that the official must know "that he is being offered the payment in exchange for a specific requested exercise of his official power . . . [and] need not take any specific action to induce the offering of the benefit").

80. United States v. O'Grady, 742 F.2d 682, 686–87, 691 (2d Cir. 1984) (en banc) ("The conduct proscribed by the Hobbs Act is the wrongful use of public office, not merely the acceptance of benefits.").

81. *See* United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc).

82. 500 U.S. 257 (1991).

83. *Id.* at 266 n.5 ("The conflict on this issue is clear, but this case is not the occasion to resolve it."). The district court instructed the jury that

> inducement can be in the overt form of a demand, or in a more subtle form such as custom or expectation. . . . Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the official.

Id. at 261 n.4.

84. *Id.* at 273.

medicine in the state.[85] While campaigning for reelection in 1984, McCormick explained to the doctors' representative that "his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything from the foreign doctors."[86] Shortly thereafter, McCormick received the first of five cash payments totaling several thousand dollars, none of which he disclosed as campaign contributions as required by West Virginia law.[87]

Although the Fourth Circuit ultimately upheld McCormick's conviction, including his violation of the Hobbs Act, it noted the difficulty inherent in "articulating a standard" to distinguish legitimate campaign contributions from extorted money.[88] Nevertheless, the circuit court articulated seven factors relevant to determining the legitimacy of campaign contributions.[89] Based on these factors, it found that there was sufficient evidence that the payments were extorted and, thus, that an explicit quid pro quo was not required for a conviction under the Hobbs Act in the campaign contribution context.[90]

The Supreme Court rebuked the Fourth Circuit and reversed McCormick's conviction.[91] It held that Hobbs Act extortion under color of official right in the campaign contribution context requires a specific quid pro quo—a payment "made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act."[92] In reaching this decision, the Supreme Court reflected on the unique role of elections in a democracy: "to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents . . . shortly before or after

85. *Id.* at 259–60.

86. *Id.* at 260.

87. *Id.*

88. United States v. McCormick, 896 F.2d 61, 65 (4th Cir. 1990), *rev'd*, 500 U.S. 257. The difficultly of the decision was due in part to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that campaign contributions are a legitimate and necessary part of democracy. *See id.* at 21; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 217 (2014) ("Creating laws that deter bribery of legislators, but do not deter democratic organizing, has been among the most vexing problems of the American political experiment.").

89. *McCormick*, 896 F.2d at 66 ("Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.").

90. *Id.* ("[I]f payments to elected officials are not treated as legitimate campaign contributions by either the payor or the official, then a jury may reasonably infer that these payments are also induced by the official's office in violation of the Hobbs Act. Otherwise, unless there was an explicit *quid pro quo* promise, elected officials could avoid the Hobbs Act merely by calling the money 'campaign contributions.'").

91. *McCormick*, 500 U.S. at 269 ("[T]he Court of Appeals' opinion did not examine or mention the instructions given by the trial court.").

92. *Id.* at 273 (emphasis added).

campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant" when it codified Hobbs Act extortion.[93]

In his dissent, Justice John Paul Stevens attacked the "explicit promise" requirement handed down by the majority.[94] He argued, "Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require."[95]

Notably, the Court punted on two sources of circuit splits concerning the Act: First, whether and how proof of a quid pro quo applies outside of the campaign contribution context.[96] Second, whether or not inducement on the part of the official is a necessary element of Hobbs Act extortion under color of official right.[97]

B. Evans v. United States*: Clarifying the Quid Pro Quo Standard?*

Less than two weeks after it decided *McCormick*, the Supreme Court was given a proverbial "second bite at the apple." It swiftly granted certiorari to clarify the circuit split over whether prosecutors must prove some affirmative act of inducement, beyond holding an official office, to be found guilty of Hobbs Act extortion—an issue it left unresolved in *McCormick*.[98]

Petitioner John Evans was elected to the Board of Commissioners of DeKalb County, Georgia.[99] As part of an investigation into public corruption, the FBI initiated conversations with Evans in which agents requested that he assist in the acquisition of favorable zoning decisions.[100] Evans accepted some $7,000 in cash and a $1,000 check, payable to his campaign, from an undercover FBI agent.[101] He reported the check in his campaign finance disclosure but failed to disclose the $7,000 in cash.[102]

On the inducement issue, the Supreme Court sided with the majority of circuits, holding that Hobbs Act extortion under color of official right does not require inducement by the public official;[103] the coercive element is

93. *Id.* at 272 (writing that "so long as election campaigns are financed by private contributions," any other interpretation of the Hobbs Act is untenable).

94. *Id.* at 282 (Stevens, J., dissenting).

95. *Id.*

96. *Id.* at 268 (majority opinion) "McCormick does not challenge any rulings of the courts below with respect to the application of the Hobbs Act to payments made . . . to elected officials that are properly determined not to be campaign contributions." *Id.* "[W]e do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receiv[ed] gifts, meals, travel expenses, or other items of value." *Id.* at 274 n.10.

97. *Id.* at 266 n.5.

98. *See supra* note 83 and accompanying text.

99. Evans v. United States, 504 U.S. 255, 257 (1992).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 265 ("The statute merely requires of the public official that he obtain 'property from another, with his consent, . . . under color of official right.'"); *see also* Linda

provided by the existence of the public office itself.[104] In so holding, the Court both imbued Hobbs Act extortion with common law extortion[105] and likened Hobbs Act extortion to bribery.[106]

But the Court went further than just deciding the narrow issue of inducement; the *Evans* decision's lack of clarity on the quid pro quo requirement for Hobbs Act extortion would prove critical, as it provided fodder for disunity in the courts of appeals.[107] The majority held that Hobbs Act extortion occurs when "the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense."[108] In the same paragraph, however, the Court rephrased its holding, critically omitting the adjective "specific" used earlier to describe the "official act": the Court held that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[109]

Justice Kennedy's concurrence muddies the quid pro quo waters by embracing, or at least lending support for, the majority's nonspecific holding regarding official acts. Critically, Justice Kennedy wrote that the official and the payor "need not state the *quid pro quo* in *express* terms, for otherwise the law's effect could be frustrated by knowing winks and nods."[110] In addition, Justice Kennedy makes clear something that the majority did not: that "the rationale underlying the Court's holding [that quid pro quo is an element of Hobbs Act extortion] applies not only in campaign contribution cases, but in all § 1951 prosecutions."[111] This statement would be clearer if the majority, concurrence, or dissent had overtly discussed the case's unique mix of personal and campaign contributions.[112] Because none of the opinions discussed the implications of this mix, the extent to which the decision is applicable to situations not involving campaign contributions is murky.[113] The language and concerns

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Greenhouse, *Court Upholds Widened Use of U.S. Extortion Law*, N.Y. TIMES (May 27, 1992), http://www.nytimes.com/1992/05/27/us/court-upholds-widened-use-of-us-extortion-law.html [https://perma.cc/L8AG-FX4N].

104. *Evans*, 504 U.S. at 265.

105. *Id.* at 263 ("Although the present statutory text is much broader than the common-law definition of extortion because it encompasses conduct by a private individual as well as conduct by a public official, the portion of the statute that refers to official misconduct continues to mirror the common-law definition.").

106. *Id.* at 260 (describing Hobbs Act extortion under color of official right as the "rough equivalent of what we would now describe as 'taking a bribe'").

107. *See infra* Part II.C.

108. *Evans*, 504 U.S. at 268.

109. *Id.*

110. *Id.* at 274 (second emphasis added) ("The inducement from the official is criminal if it is express *or* if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." (emphasis added)).

111. *Id.* at 278.

112. *See id.* at 257–58 (stating that the defendant was given $7,000 in cash and a $1,000 campaign contribution by check).

113. *See, e.g.*, United States v. Giles, 246 F.3d 966, 971–72 (7th Cir. 2001) (discussing whether *Evans* applies outside the campaign contribution context); United States v. Hairston,

expressed in Justice Kennedy's concurring opinion have had a lasting effect on quid pro quo standards and have led to a battle of interpretations by the lower courts over which "holding" in the majority opinion should be applied.[114]

In the twenty-page dissent—three pages longer than the majority opinion itself—Justice Thomas, joined by Justices William Rehnquist and Antonin Scalia, argued that Congress did not intend to codify common law extortion "under color of official right" when it passed the Hobbs Act in 1946.[115] Justice Thomas also expressed serious federalism concerns[116] and reiterated that *McCormick*'s holding was "expressly limited" to the campaign contribution context.[117]

Thus, disagreement within the courts of appeals on Hobbs Act extortion's quid pro quo requirement could be predicted from the *Evans* opinion itself. The majority's position—embracing both "official acts" and "specific official acts"—lacked clarity.[118] Justice Kennedy's concurrence declared that a quid pro quo must be proven in all Hobbs Act extortion cases but that the promise to perform need not be "express."[119] And Justice Thomas's dissent suggested the majority extended *McCormick*'s specific quid pro quo requirement to all cases of Hobbs Act extortion.[120]

C. Circuit Confusion over the Hobbs Act's Extortion Quid Pro Quo Requirement After Evans v. United States*: What Does "Official Act" Mean?*

Due to the uncertain scope of the Supreme Court's decision in *McCormick* and its fractured opinion in *Evans*, confusion over whether and when Hobbs Act extortion requires *specific* official acts was inevitable. Two issues developed: (1) whether *Evans* requires a quid pro quo as an element of Hobbs Act extortion outside of the campaign contribution context and (2) assuming it does, whether *McCormick*'s requirement that the quid pro quo be specific applies only in the campaign contribution context.

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46 F.3d 361, 365 (4th Cir. 1995) (noting that *Evans* "required proof of a quid pro quo *because* it involved campaign contributions" (emphasis added)).

114. *See infra* Part II.C.

115. *Evans*, 504 U.S. at 281 ("[T]he critical inquiry for our purposes is the American understanding of the crime at the time the Hobbs Act was passed in 1946.").

116. *Id.* at 290.

117. *Id.* at 287 ("[W]e do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." (quoting McCormick v. United States, 500 U.S. 257, 274 n.10 (1991))).

118. *See supra* notes 107–09 and accompanying text.

119. *Evans*, 504 U.S. at 274.

120. *Id.* at 287 (Thomas, J., dissenting) ("Today's extension of *McCormick*'s . . . *quid pro quo* limitation to *all* cases of official extortion is both unexplained and inexplicable . . . .").

1. Is a Quid Pro Quo Showing Required in All Hobbs Act Extortion Prosecutions?

Immediately following *Evans*, a number of courts of appeals questioned whether any quid pro quo showing was necessary to prove Hobbs Act extortion outside the campaign contribution context. As recently as 2001, for example, the Third Circuit held that Supreme Court precedent "does not require a *quid pro quo* for extortion outside the context of campaign contributions."[121]

In *United States v. Blandford*,[122] Judge David Nelson of the Sixth Circuit, in a concurring opinion, struggled to understand the effect of *McCormick* and *Evans* outside the campaign context.[123] After surveying the cases, he concluded that "[e]ven outside the campaign contribution context . . . the *quid pro quo* requirements can be satisfied only where the payment has been accepted in exchange for a 'specific' official act or a 'specific' requested exercise of official power."[124] In reaching this conclusion, Judge Nelson noted that there was "no reason to doubt that the 'official acts' referred to in the last sentence [of *Evans*] were the 'specific official acts' referred to earlier."[125] Thus, it was unclear from the beginning how these cases should be interpreted and applied in various situations.[126]

2. Most Courts of Appeals Adopt a Two-Tiered Approach to the Quid Pro Quo Requirement

Over time, the courts of appeals relied on Justice Kennedy's "winks and nods" concurrence as sufficient authority to find that *Evans* established a relaxed standard outside the campaign contribution context, even though

121. United States v. Antico, 275 F.3d 245, 258 (3d Cir. 2001); *see also* Jarrett, *supra* note 61, at 213 ("One advantage of the Hobbs Act is that the prosecution need not prove that the public official performed an official act as a quid pro quo for the property given to the public official.").

122. 33 F.3d 685 (6th Cir. 1994).

123. *Id.* at 713 (Nelson, J., concurring).

124. *Id.*

125. *Id.*

126. *See id.*; *see also* United States v. Tucker, 133 F.3d 1208, 1215 (9th Cir. 1998) (holding that the Supreme Court had not decided the quid pro quo question outside of the campaign context, and assuming without deciding that a quid pro quo was required in all Hobbs Act extortion prosecutions); United States v. Hairston, 46 F.3d 361, 365 (4th Cir. 1995) (holding that although the Supreme Court's decisions did not resolve the issue, a quid pro quo must be proven in all Hobbs Act extortion cases); United States v. Davis, 30 F.3d 108, 109 (11th Cir. 1994) (reiterating that "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion"); United States v. Martinez, 14 F.3d 543, 552–54 (11th Cir. 1994) (reversing Hobbs Act extortion conviction where trial court erroneously interpreted *Evans* and *McCormick* as requiring a quid pro quo jury instruction only in "instances of extortion under color of official right involving campaign contributions").

proof of a quid pro quo is always necessary.[127] In *United States v. Garcia*,[128] the Second Circuit described this view succinctly:

> Although the *McCormick* Court has ruled that extortion under color of official right in circumstances involving campaign contributions occurs "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," *Evans* modified this standard in non-campaign contribution cases by requiring that the government show only "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[129]

Using this analysis, most courts of appeals have developed standards of implicit quid pro quo outside the campaign context.[130] Known as the "stream of benefits" or "as opportunities arise" theory, this implicit standard does not require the contemplation of a specific official action at the time the agreement is made.[131] For this reason, the stream of benefits theory has been criticized for "invit[ing] slippage" from a quid pro quo standard to a "'one hand washes the other' or 'favoritism' standard."[132]

The Second Circuit detailed the approach in *United States v. Ganim*.[133] In an opinion written by then-Judge Sotomayor, the court upheld the conviction of the former Mayor of Bridgeport, Connecticut, who accepted payment in return for an agreement to secure the payor a government contract.[134] Ganim challenged the jury instruction, which provided that "[t]he government does not have to prove an explicit promise to perform a particular act made at the time of payment."[135] Instead, the district court instructed that "*it is sufficient if the defendant understood he was expected as a result of the payment to exercise particular kinds of influence . . . as specific opportunities arose*."[136] The court reiterated that such a standard is the "natural corollary of *Evans*' pronouncement that the government need not prove the existence of an explicit agreement at the time a payment is received."[137] Indeed, the court found that the defendant's proposed definition of "official act"—something "identified and directly linked to a benefit at the time the benefit is received"—went too far.[138] Critically, the

127. United States v. Garcia, 992 F.2d 409, 414 (2d Cir. 1993); *see also* United States v. Giles, 246 F.3d 966, 971–72 (7th Cir. 2001); United States v. Taylor, 993 F.2d 382, 385 (4th Cir. 1993).

128. 992 F.2d 409 (2d Cir. 1993).

129. *Id.* at 414 (first quoting McCormick v. United States, 500 U.S. 257, 273 (1991); then quoting Evans v. United States, 504 U.S. 255, 268 (1992)).

130. *See* George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 218–19 (2015).

131. *Id.* at 217.

132. Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 481 (2015).

133. 510 F.3d 134 (2d Cir. 2007).

134. *Id.* at 137–38.

135. *Id.* at 144 (quoting United States v. Coyne, 4 F.3d 100, 114 (2d Cir. 1993)).

136. *Id.* (quoting *Coyne*, 4 F.3d at 114).

137. *Id.* at 145 (citing Evans v. United States, 504 U.S. 255, 268 (1992)).

138. *Id.*

court understood the term "official act" to mean "an act taken under color of official authority, not necessarily as the term is used and statutorily defined in . . . § 201 or elsewhere."[139] The Fourth Circuit, in *United States v. Jefferson*,[140] relied on *Ganim* in holding that bribery, including Hobbs Act extortion, "can be accomplished through an ongoing course of conduct."[141]

In *United States v. Abbey*,[142] the Sixth Circuit noted that "not all *quid pro quos* are made of the same stuff" and thus, outside of the campaign contribution context, "the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement."[143] The court justified this implicit quid pro quo standard by noting that "there is no reason to impose a judicial requirement . . . that would make it lawful under the Hobbs Act to pay a public official to exert his influence in your favor, so long as it is premature for the agreement to contemplate specific acts."[144] Thus, the court held that "it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf *as opportunities arose*."[145]

Lastly, the Ninth Circuit has held a conviction for extortion under color of official right, whether in the campaign or noncampaign contribution context, requires that the government prove a quid pro quo.[146] In the noncampaign contribution context, however, "[a]n explicit *quid pro quo* is not required; an agreement implied from the official's words and actions is sufficient to satisfy this element."[147]

As these cases demonstrate, despite the confusion surrounding the meaning of *Evans* and *McCormick*, a majority of the courts of appeals have coalesced around a two-tiered quid pro quo standard in which the *quo* component of the quid pro quo is relaxed outside the campaign contribution context.

III. SECTION 666: QUID PRO QUO?

While the preceding discussion helps to explain how courts understand bribery and quid pro quo as they relate to Hobbs Act extortion, a brief

139. *Id.* at 142 n.4. In so doing, the court rejected the defendant's argument that the Supreme Court's holding in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), should apply to Hobbs Act extortion or federal funds bribery. For a more thorough discussion of these cases distinguishing § 666 from the Court's analysis in *Sun-Diamond*, see Jared W. Olen, *The Devil's in the Intent: Does 18 U.S.C. § 666 Require Proof of Quid-Pro-Quo Intent?*, 42 SW. L. REV. 229, 251–54 (2012).

140. 674 F.3d 332 (4th Cir. 2012).

141. *Id.* (quoting *Ganim*, 510 F.3d at 149). After Governor McDonnell's trial, the district court relied on *Jefferson* in upholding the jury instruction. United States v. McDonnell, 64 F. Supp. 3d 783, 793 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).

142. 560 F.3d 513 (6th Cir. 2009).

143. *Id.* at 517–18.

144. *Id.* at 518.

145. *Id.* (emphasis added).

146. *See* United States v. Kincaid-Chauncey, 556 F.3d 923, 937 (9th Cir. 2009).

147. *Id.*

detour into the text and judicial construction of § 201 bribery is necessary before we can make sense of the § 666 case law.[148] Part III.A discusses the relevant background on § 201. Next, Part III.B explores those courts that have found § 666 to require proof of a quid pro quo. Then, Part III.C discusses those courts that have held that § 666 requires no quid pro quo showing.

A. A Brief Detour into the Federal Bribery Statute: § 201

As previously stated, Hobbs Act extortion's quid pro quo requirement has been defined by the Supreme Court with reference to the term "official act,"[149] whereas § 666 makes no mention of "official act" or of a quid pro quo requirement more generally.[150] Because § 201 provides a detailed statutory scheme, has had the benefit of time and several Supreme Court interpretations, and encompasses bribery just like § 666, cases interpreting § 201 are used by litigants and the courts to help understand both § 666 and Hobbs Act extortion.[151]

Section 201 criminalizes the receipt of bribes for those "acting for or on the behalf of the United States."[152] Thus, unlike § 666, § 201 is not applicable to state and local officials. The statute defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[153]

Relying on the Supreme Court's decisions in *Evans* and *McCormick* and the implicit quid pro quo standard for Hobbs Act extortion that followed, some courts in the 1990s construed § 201 as requiring only a weak quid pro quo that could be satisfied "so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor.'"[154] The Supreme Court put this interpretation to rest in *United States v. Sun-Diamond Growers of California*.[155] In a decision that mentioned neither *Evans* nor *McCormick*,

148. One commentator has noted that "the Hobbs Act . . . and § 666 have swallowed § 201" and thus, they should require the same state of mind. Gawey, *supra* note 46, at 419. As this Note explores, this statement may oversimplify a complex issue. *See infra* Part V.

149. *See supra* notes 108–09 and accompanying text.

150. *See supra* note 58.

151. *See e.g.*, United States v. Ganim, 510 F.3d 134, 146 (2d Cir. 2007) (noting that *Sun-Diamond* should be limited to § 201 because that statute's specific text—"'for or because of *any official act*'—led the Court to conclude that a direct nexus was required to sustain a conviction under § 201" (quoting United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 406 (1999))); United States v. Ford, 435 F.3d 204, 210 & n.2 (2d Cir. 2006) (noting that § 666 and § 201 "differ[] in significant respects," including that "Section 201 lacks an explicit intent requirement as to recipients of alleged bribes while Section 666 contains one").

152. 18 U.S.C. § 201(a)(1) (2012).

153. *Id.* § 201(a)(3).

154. United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998) (quoting United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976)); *see* Garcia, *supra* note 76, at 239–43.

155. 526 U.S. 398 (1999).

Sun-Diamond primarily resolved a question regarding § 201's treatment of bribery and gratuities.[156] The lower court instructed the jury that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all."[157]

Writing for the majority, Justice Scalia analyzed § 201's definition of "official act."[158] The Court concluded that "for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."[159] Thus, the Court held that within the meaning of § 201, an "official act" requires "that some particular official act be identified and proved."[160] While potentially applicable to all antibribery statutes,[161] the decision can also be read more narrowly to apply only to § 201.[162]

After *Sun-Diamond*, defendants argued with success in some circuits that a quid pro quo requirement should apply in § 666 cases as well.

B. Circuits Requiring a Quid Pro Quo in § 666 Prosecutions

The Second,[163] Fourth,[164] Eighth[165], and Eleventh[166] Circuits have found that § 666 requires at least an implicit "stream of benefits" quid pro quo.[167] In *United States v. Jennings*,[168] the Fourth Circuit analyzed the "corrupt intent" requirement under § 666 by referring to § 201.[169] Invoking the Supreme Court's differentiation between illegal bribes and illegal gratuities in *Sun-Diamond*, the Fourth Circuit held that a bribe under § 666 requires proof of payment made in exchange for an official act.[170] It concluded that the "corrupt" element in § 666 requires the government to prove a "relatively specific quid pro quo"[171] but stated that the "quid pro quo

156. *See id.* at 404.
157. *Id.* at 413–14.
158. *Id.* at 404.
159. *Id.* at 404–05.
160. *Id.* at 406.
161. *See* Gawey, *supra* note 46, at 415 & n.208.
162. *See Sun-Diamond*, 526 U.S. at 414 ("We hold that, in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), [the gratuity provision,] the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."). Courts have held "that *Sun-Diamond* [does not] require[] us to define the crime of bribery narrowly [because it] says nothing about bribery." United States v. Alfisi, 308 F.3d 144, 151 n.4 (2d Cir. 2002).
163. United States v. Ganim, 510 F.3d 134 (2d Cir. 2007).
164. United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998).
165. United States v. Redzic, 627 F.3d 683, 692 (8th Cir. 2010) (relying on *Ganim* and *Jennings*, and upholding a § 666 conviction because "an illegal bribe may be paid with the intent to influence a general course of conduct" and the government need not "link any particular payment to any particular action").
166. United States v. Siegelman, 640 F.3d 1159, 1171 (11th Cir. 2011) (applying *Evans* and *McCormick* to § 666 and holding that an "official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666").
167. *See supra* Part II.B.2.
168. 160 F.3d 1006 (4th Cir. 1998).
169. *Id.* at 1012–13.
170. *Id.* at 1013.
171. *Id.* at 1020 n.5.

requirement is satisfied so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor'" and "the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'"[172]

In *Ganim*, the Second Circuit similarly held that § 666 bribery requires a quid pro quo[173] but found that, like Hobbs Act extortion, it "can be accomplished through an ongoing course of conduct, so long as evidence shows that the 'favors and gifts flowing to a public official [are] *in exchange for* a pattern of official acts favorable to the donor.'"[174]

C. Circuits with No Quid Pro Quo Requirement

At present, a number of courts of appeals do not require proof of a quid pro quo to be convicted of § 666 federal bribery.[175] In *United States v. Abbey*,[176] the Sixth Circuit examined the text of § 666 and determined that it "says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise."[177] In doing so, the court approved of the Second Circuit's analysis in *Ganim*, to the extent that "*Sun-Diamond*'s heightened [(i.e., explicit)] quid pro quo standard is inapplicable to . . . § 666 [because it is a] markedly different statute[]."[178]

In *United States v. Garrido*,[179] the Ninth Circuit agreed that the need for a limiting principle—which drove the Supreme Court's analysis in *Sun-Diamond* with respect to § 201—is not present with respect to § 666, "because § 666 contains both a corrupt intent requirement and a requirement that the illegal gift or bribe be worth over $5,000."[180] Moreover, unlike § 201, the plain text of § 666 "makes no mention of an 'official act' or a requirement that anything be given in exchange or return for an official act."[181] Thus, because § 666 "does not define or even use the term 'official act,'"[182] it "does not require a jury to find a specific *quid pro quo*."[183]

In *United States v. McNair*,[184] the Eleventh Circuit similarly discovered that "nothing in the plain language of [§ 666] requires that a specific

172. *Id.* at 1014 (quoting United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976)).
173. United States v. Ganim, 510 F.3d 134, 151–52 (2d Cir. 2007).
174. *Id.* at 149 (quoting *Jennings*, 160 F.3d at 1014); *see also* United States v. Rosen, 716 F.3d 691, 699–700 (2d Cir. 2013).
175. *See* Olen, *supra* note 139, at 244–45 (arguing that the plain language of § 666 impliedly requires proof of a quid pro quo).
176. 560 F.3d 513 (6th Cir. 2009).
177. *Id.* at 520 ("By its terms, [§ 666] does not require the government to prove that Abbey contemplated a specific act when he received the bribe.").
178. *Id.*
179. 713 F.3d 985 (9th Cir. 2013).
180. *Id.* at 1001.
181. *Id.*
182. *Id.*
183. *Id.* at 996; *see also* United States v. Gee, 432 F.3d 713, 714–15 (7th Cir. 2005) (holding that while proof of a quid pro quo is sufficient to prove a violation of § 666, it is not necessary).
184. 605 F.3d 1152 (11th Cir. 2010).

payment be solicited, received, or given in exchange for a specific official act."[185] The court held that § 666 does not require "that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*."[186] Therefore, the government need only prove that the recipient had "an intent to corruptly influence or to be influenced 'in connection with any business' or 'transaction'" of the applicable government or agency.[187]

Thus, the division between the circuit courts on the issue of whether the text of § 666 requires prosecutors to prove a quid pro quo, including an "official act," is apparent. Whether, and to what extent, *McDonnell* will impact future Hobbs Act extortion and § 666 prosecutions requires an analysis of that case, its facts, and its procedural posture.

IV. *MCDONNELL*: CLARITY ON HOBBS ACT EXTORTION QUID PRO QUO REQUIREMENT?

Having discussed the trajectory of the Court's interpretation of Hobbs Act extortion and § 666 quid pro quo requirements, the importance of the central issue in McDonnell's prosecution—the meaning and reach of "official act" as applied to the former governor's Hobbs Act extortion conviction—is clear.

A. Virginia Governor Received More Than $175,000 from Pharmaceutical CEO

Former Governor Bob McDonnell began his political career in Virginia's House of Delegates, where he served for nearly fifteen years.[188] Beginning in 2006, McDonnell served as the state's attorney general.[189] Following a successful tenure in that position, McDonnell was elected governor of Virginia in 2009.[190] McDonnell's campaign for governor focused on economic development and stressed the theme "Bob's for jobs."[191]

185. *Id.* at 1187–88.
186. *Id.* at 1188.
187. *Id.*
188. Kristi Oloffson, *2-Minute Bio: Virginia Governor-Elect Bob McDonnell*, TIME (Nov. 4, 2009), http://content.time.com/time/politics/article/0,8599,1934361,00.html [https://perma.cc/R5HD-LLHC].
189. *Id.*
190. *Id.*
191. Editorial, *McDonnell Speech: Bob's for Jobs*, RICH. TIMES-DISPATCH (Aug. 30, 2012, 1:00 AM), http://www.richmond.com/news/article_4c9ab80a-f434-5710-8856-7ac46818ea93.html [https://perma.cc/AV7S-U7TK]. McDonnell's first act as governor was to sign an executive order establishing a commission on job creation. This executive order broke with thirty years of tradition in which the governor's first act had been to issue an executive order banning discrimination in state employment. *See* Rosalind S. Helderman, *Virginia Governor's Anti-Bias Order Removes Language Regarding Sexual Orientation*, WASH. POST (Feb. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020903739.html [https://perma.cc/D8FB-3YY5].

During his campaign for governor, McDonnell used the private plane of Jonnie Williams, the CEO of Star Scientific, Inc.[192] Star Scientific was evaluating the efficacy of a drug—anatabine—that it "wanted the Food and Drug Administration to classify . . . as a pharmaceutical."[193] After his election, Governor McDonnell met Williams for dinner to thank him for his generosity during the campaign.[194] At dinner, Williams ordered a $5,000 bottle of cognac and offered to purchase Mrs. McDonnell a custom Oscar de la Renta dress for the inauguration.[195] Williams proceeded to purchase her $20,000 in clothes and continued to allow them use of his jet.[196]

In May of 2011, Williams loaned the McDonnells $65,000 to service their debt and to help pay for their daughter's wedding reception.[197] The next day, Williams covered a $2,380.24 bill incurred by Governor McDonnell, his sons, and his future son-in-law at a Virginia golf club.[198] In June, Williams sent a letter to McDonnell in which he "suggest[ed] that [McDonnell] use the attached protocol to initiate the 'Virginia study'" of Star Scientific's new drug at the Medical College of Virginia and the University of Virginia—both state universities.[199]

Over the course of the summer, Williams bought the governor a new set of golf clubs and allowed the governor's family use of his vacation home, Range Rover, and Ferrari.[200] Shortly after the vacation, McDonnell "directed" the Commonwealth's Secretary of Health to have his deputy attend a meeting about Star Scientific's new drug at the governor's mansion.[201] Later that month, Williams purchased a $6,000 Rolex watch that he gave to the governor.[202] The pattern of meetings, loans, and gifts continued through 2012, by which time Williams had spent more than $175,000 on Governor McDonnell and his family.[203]

B. Criminal Prosecution

On January 21, 2014, the governor and his wife were indicted on fourteen counts, including charges of honest services fraud and Hobbs Act extortion under color of official right.[204] At trial, McDonnell's Hobbs Act extortion conviction hinged on the meaning of "official act" (i.e., whether the governor took money that was not due to him for the performance of his

192. United States v. McDonnell, 792 F.3d 478, 487 (4th Cir. 2015), *vacated*, 136 S. Ct. 2355 (2016).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 488.
197. *Id.*
198. *Id.* at 489.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 490.
203. *McDonnell*, 136 S. Ct. at 2364.
204. Indictment, *supra* note 27, at 33–41.

official duties).[205] In accordance with Fourth Circuit precedent, which allows for "stream of benefits" implicit quid pro quo,[206] the district court instructed the jury that "an official action is no less official because it is one in a series of steps to exercise influence or achieve an end."[207] The trial court proceeded to define "official action" as applicable to the Hobbs Act extortion charge.[208] The jury instruction drew heavily from § 201.[209]

McDonnell challenged the jury instruction.[210] In denying McDonnell's renewed motion for judgment of acquittal, the district court found that the "most basic definition" of "official act" is found with reference to § 201, the federal bribery statute.[211] The court proceeded to reference *Jennings*, a § 666 case that held that the quid pro quo requirement is satisfied "so long as the evidence shows a course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor."[212] Thus, although the trial court accepted the parties' agreement that "official act" should be understood with reference to § 201's definition, the court reiterated that "all that must be shown is that payments were made with the intent of securing a specific *type* of official action or favor in return."[213]

The district court acknowledged, however, the concern that "mere '[i]ngratiation and access' may not alone create a quid pro quo agreement."[214] The distinction, the court found, is in the defendant's subjective intent.[215] The court pointed to five specific actions taken by McDonnell on behalf of Star Scientific on an "as opportunities ar[i]se" basis to support the *quo* component of the implicit quid pro quo standard[216]: (1) "arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote

205. *See* United States v. McDonnell, 64 F. Supp. 3d 783, 788 (E.D. Va. 2014), *aff'd*, 792 F.3d 478, *vacated*, 136 S. Ct. 2355.

206. *See supra* note 141 and accompanying text.

207. *McDonnell*, 792 F.3d at 506.

208. *Id.* (noting that the trial court defined "official action" for purposes of honest services fraud, which "appl[ies] equally to the definition of official action for the purposes of" Hobbs Act extortion).

209. *Id.* at 505–06 ("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. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. . . . In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.").

210. *McDonnell*, 64 F. Supp. 3d at 787.

211. *Id.* at 788.

212. *Id.* at 789 (quoting United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998)); *see supra* notes 168–74 and accompanying text.

213. *McDonnell*, 64 F. Supp. 3d at 789.

214. *Id.* (alteration in original) (quoting Citizens United v. FEC, 558 U.S. 310, 360 (2010)).

215. *Id.*

216. *Id.* at 791.

Anatabloc"; (2) "hosting, and the defendants attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients"; (3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine"; (4) "promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion; and" (5) "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs."[217]

C. McDonnell Appeals His Conviction to the Fourth Circuit

On appeal, the Fourth Circuit began by reviewing *United States v. Birdsall*[218] and *Sun-Diamond*, two Supreme Court cases involving the definition of "official act."[219] *Birdsall*, the court explained, "stand[s] for the proposition that an 'official act' 'may include acts that a [public servant] customarily performs, even if the act falls outside the formal legislative process.'"[220] The Fourth Circuit read *Sun-Diamond* as dictating merely that "job functions of a strictly ceremonial or educational nature will rarely, if ever, fall within" § 201's definition of "official act"—it "did not rule that receptions, public appearances, and speeches can never constitute 'official acts' within the meaning of § 201(a)(3)."[221] Thus, the court found that § 201's definition of official acts "is broad enough to encompass the customary and settled practices of an office, but only insofar as a purpose or effect of those practices is to influence a 'question, matter, cause, suit, proceeding or controversy' that may be brought before the government."[222] Thus, the stage was set for McDonnell's appeal to the Supreme Court over whether the district court and Fourth Circuit had faithfully applied Supreme Court precedent and properly analyzed the official acts jury instruction.

D. The Supreme Court's Opinion

The Supreme Court began its analysis by noting that the theory underlying both the honest services wire fraud charge and the Hobbs Act extortion charge "was that Governor McDonnell had accepted bribes from Williams."[223] Critically, the Court also acknowledged that the jury instruction given for "official action" was made with reference to § 201's definition as had been *agreed* upon by the parties in the early stages of the

217. Indictment, *supra* note 27, at 34–35.
218. 233 U.S. 223 (1914).
219. *McDonnell*, 792 F.3d at 506–09.
220. *Id.* at 507 (alteration in original) (quoting United States v. Jefferson, 674 F.3d 332, 356 (4th Cir. 2012)).
221. *Id.* at 508.
222. *Id.* at 509.
223. *McDonnell*, 136 S. Ct. at 2365.

litigation.[224] As such, the Court dove into the statutory construction of § 201.[225]

The Court stated that § 201's "official act" requirement has two components: the government must (1) "identify a 'question, matter, cause, suit, proceeding or controversy' that . . . 'may by law be brought' before a public official" and (2) "prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so."[226] Applying *noscitur a sociis*,[227] the rule against superfluity,[228] and its decision in *Sun-Diamond*, the Court found that although "merely setting up a meeting, hosting an event, or calling another official"[229] does not qualify as an official action, such action "could serve as evidence of an agreement to take an official act."[230] While the action "must . . . be something specific and focused," the official "need not specify the means that he will use to perform his end of the bargain," "[n]or must [he] in fact intend to perform the 'official act,' so long as he agree[d] to do so."[231] Finally, the Court held, the action "may include using his official position to exert pressure on another official to perform an 'official act.'"[232]

The Court bolstered its analysis by discussing three constitutional concerns weighing in favor of a more "bounded interpretation of 'official act'"[233]: (1) too broad a reading could improperly intrude on legitimate relationships between elected officials and their constituents,[234] (2) a broad reading raises fair notice and due process concerns,[235] and (3) a broad reading raises federalism concerns over the extent to which federal prosecutors should police the conduct of state and local officials.[236] These constitutional concerns are in tension with Congress's power to regulate, and the Supreme Court's acknowledgement that preventing quid pro quo corruption, as well as the appearance of such corruption, is a compelling government interest.[237]

224. *Id.*
225. *Id.* at 2368.
226. *Id.*
227. *Id.* ("[A] word is known by the company it keeps" (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961))).
228. *Id.* at 2369 ("If 'question' and 'matter' were as unlimited in scope as the Government argues, the terms 'cause, suit, proceeding or controversy' would serve no role in the statute.").
229. *Id.* at 2370.
230. *Id.* at 2371.
231. *Id.*
232. *Id.* at 2372.
233. *Id.* at 2368.
234. *Id.* at 2372.
235. *Id.* at 2373.
236. *Id.*
237. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014); Buckley v. Valeo, 424 U.S. 1, 27 (1976).

In making reference to *Evans*, the *McDonnell* Court conspicuously chose to embrace the "specific official acts" language,[238] rather than the broader "official acts" language relied on by many circuit courts in establishing the implicit quid pro quo standard outside the campaign contribution context. The Court also reiterated that Hobbs Act extortion includes "taking a bribe."[239]

Thus, notwithstanding that the case revolved around construction of § 201 and can be read not to apply in cases where § 201's definition is not invoked, *McDonnell* provides that to fulfill the quid pro quo requirement, the quo (i.e., the official act) need not be explicit, but it must be "specific and focused."[240] Moreover, the prosecuted official need not specify the "means that he will use to perform" the official act, nor must he actually fulfill the official act so long as he agrees to do so.[241] This raises the question: Does the implicit quid pro quo standard of "stream of benefits" or "as opportunities arise" survive the decision? And if so, does *McDonnell* sound the end of the implicit quid pro quo standard in all bribery prosecutions or only Hobbs Act extortion and honest services wire fraud—the two statutes at issue in the case?

V. POSSIBLE INTERPRETATIONS OF *MCDONNELL* BY THE LOWER COURTS AND THEIR EFFECT ON FUTURE FEDERAL PROSECUTIONS OF STATE AND LOCAL CORRUPTION

Prior to *McDonnell*, the following framework was in place: § 666 federal bribery could, in some circuits, be proven without a quid pro quo showing;[242] Hobbs Act extortion could, in most circuits, be proven with an implicit "stream of benefits" quid pro quo if the alleged bribe was not received in the course of a campaign;[243] and § 201 bribery always required an explicit quid pro quo.[244] There are three plausible judicial interpretations of *McDonnell* that can help shed light on how the decision will affect the existing framework going forward.

A. Courts May Interpret McDonnell *Broadly to Apply to All Federal Antibribery Statutes, Including Both Hobbs Act Extortion and § 666 Bribery*

To avoid the constitutional concerns raised in *McDonnell*, lower courts may err on the side of caution and read the language in *McDonnell* as broadly requiring a specific quid pro quo for all theories of bribery, including § 666 and Hobbs Act extortion. In *United States v. Pomrenke*,[245]

238. *McDonnell*, 136 S. Ct. at 2365 (citing Evans v. United States, 504 U.S. 255, 268 (1992)).
239. *Id.*
240. *Id.* at 2372.
241. *Id.* at 2371.
242. *See supra* Part III.C.
243. *See supra* Part II.C.2.
244. *See supra* notes 159–60 and accompanying text.
245. No. 1:15CR00033, 2016 WL 4074116 (W.D. Va. Aug. 1, 2016).

the District Court for the Western District of Virginia denied defendant's motion for a judgment of acquittal based on the *McDonnell* decision.[246] Despite the fact that "[t]he issue in the *McDonnell* decision was 'the proper interpretation of the term "official act" as used in 18 U.S.C. § 201,'"[247] the court applied the *McDonnell* definition in upholding defendant's § 666 conviction.[248]

But this view is constrained to those circuits, like the Fourth Circuit in which the Western District of Virginia resides (and in which McDonnell's prosecution took place), that require a quid pro quo in § 666 prosecutions and define the *quo* component as an "official action."[249] Absent that link, the Supreme Court's analysis of the meaning of "official act" in *Sun-Diamond* and *McDonnell* is less obviously applicable to § 666. Those courts of appeals that do not require a quid pro quo showing in § 666 prosecutions[250] would have to overturn existing circuit precedent and hold that the language of § 666 does require proof of a quid pro quo—including an official act—despite the absence of such express requirements in the text of § 666 and *McDonnell*'s silence regarding § 666.

This interpretation has the advantage of uniformity but is unlikely to be widely adopted in the absence of a more express statement by the Supreme Court.

B. Courts May Interpret McDonnell *as Requiring a Specific Quid Pro Quo in Hobbs Act Extortion Prosecutions but Not in § 666 Prosecutions*

The trial courts may reasonably apply the *McDonnell* definition of "official act" to Hobbs Act extortion prosecutions but not to § 666 prosecutions. Congress knows how to require quid pro quo, and it knows how to define "official act." One commentator has noted that "[e]quating the language of § 666 with that in § 201(b) . . . ignores the textual differences" that exist between the statutes.[251] Section 666 covers those who "influence or reward,"[252] while § 201(b) covers only those transactions intended to "influence . . . official acts."[253] Applying § 201's quid pro quo standard to § 666 without the textual support to do so flies in the face of the rule against superfluous language.[254] Moreover, as then-Judge Sotomayor

246. *Id.* at *46.
247. *Id.* at *44 (quoting McDonnell v. United States, 136 U.S. 2355, 2367 (2016)).
248. *Id.*
249. *See* United States v. Rosen, 716 F.3d 691, 700 (2d Cir. 2013); United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998); *supra* Part III.C.
250. *See supra* Part III.C.
251. Mark S. Gaioni, *Federal Anticorruption Law in the State and Local Context: Defining the Scope of 18 U.S.C. § 666*, 46 COLUM. J.L. & SOC. PROBS. 207, 235 (2012).
252. *Id.* (quoting 18 U.S.C. § 666 (2006)).
253. *Id.* (quoting 18 U.S.C. § 201(b)).
254. *See id. But see* Stephanie G. VanHorn, *Taming the Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 to Criminalize Gratuities*, 119 PENN ST. L. REV. 301, 324 (2014) (noting that the current version of § 666 more closely mirrors § 201, and, therefore, the same meaning should be applied to both statutes).

noted in *Ganim*, to define "official act" in the context of Hobbs Act extortion and § 666 as something "identified and directly linked to a benefit at the time the benefit is received" goes too far.[255]

An additional argument in favor of the view that the *McDonnell* Court's construction of § 201 "official act" should not be read into the text of § 666 is that § 201 itself contains two statutory alternatives to the official act requirement.[256] By its terms, § 201 does not require the prosecuted official to have corruptly received something of value in return for an official act to be guilty of § 201 bribery.[257] In the alternative, a federal officer may be charged with corruptly receiving something of value in return for "being influenced to commit . . . any fraud . . . on the United States"[258] or "being induced to do or omit to do any act in violation of [his or her] official duty."[259] If *McDonnell* is found to apply to all future Hobbs Act extortion and § 666 cases, the courts should consider these alternatives, which appear to undercut the force of the reasoning in *McDonnell*.

Because of the facial textual differences, the existing circuit precedent distinguishing § 666 from § 201, and the lack of specificity by the Court in terms of the opinion's applicability, this is the likely construction of *McDonnell*, particularly in those circuits that do not require a quid pro quo showing in § 666 prosecutions.

C. Courts May Treat the McDonnell *Decision Like* Sun-Diamond *and Decline to Apply the Court's Statutory Interpretation of § 201 "Official Acts" to Hobbs Act Extortion or § 666 Bribery*

The lower courts could decline to apply *McDonnell* to future Hobbs Act extortion prosecutions on the grounds that the opinion is distinguishable on its facts and procedural history. As discussed, the parties agreed to define "official acts" with reference to § 201—a decision that the Court accepted but did not hold is necessary in future prosecutions.[260] This interpretation would mark a continuation of the position taken by several courts of appeals in declining to extend the *Sun-Diamond* clarification of § 201 "official acts" to § 666.[261] The position is especially strong with respect to § 666 because that statute was not at issue in the case and the Court did not mention it. Viewed in this light, *McDonnell* may prove to be little more than a reiteration of past precedent.

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255. United States v. Ganim, 510 F.3d 134, 145 (2d Cir. 2007).
256. *See* 18 U.S.C. § 201(b)(2)(B)–(C) (2012).
257. *Id.*
258. *Id.* § 201(b)(2)(B).
259. *Id.* § 201(b)(2)(C).
260. *See supra* note 224 and accompanying text.
261. *See e.g.*, United States v. Garrido, 713 F.3d 985, 1001 (9th Cir. 2013) (noting that § 666 "sweeps more broadly" than § 201 and that "[b]ecause the plain language of § 666 does not use the term 'official act,' we must not insert that term into our reading of the statute"); United States v. Abbey, 560 F.3d 513, 521 (6th Cir. 2009) ("*Sun-Diamond*'s heightened quid pro quo standard is inapplicable to both the Hobbs Act and [§ 666]" because *Sun-Diamond* "concerned a markedly different statute" than either the Hobbs Act or § 666).

Shortly after the Supreme Court decided *McDonnell*, Sheldon Silver, the former Speaker of the New York State Assembly, applied to have the Southern District of New York grant him bail while his case was on appeal.[262] Silver was found guilty of, among other things, committing honest services fraud and Hobbs Act extortion under color of official right.[263] Although the court granted Silver's request, it noted that *McDonnell* "did not hold that section 201(a)(3) . . . necessarily had to be the source for the definition of official action . . . in the quid pro quo requirements of . . . extortion under color of official right."[264] The court went on to explain that "[i]n beginning its analysis, the [Supreme] Court incorporated the federal bribery statute's definition of official act into the bribery requirement for . . . [Hobbs Act] extortion without explaining why it was doing so."[265] Thus, while § 201's "official act" definition was sufficient to pass constitutional muster, "the [Supreme] Court did not address whether a different definition . . . could likewise allay the Court's constitutional concerns."[266]

If this rationale is accepted by the Second Circuit on appeal, it seems likely that prosecutors will continue to "exercise [their] prerogative to prosecute [Hobbs Act extortion and honest services fraud] without any reference to Section 201's now-narrow definition of 'official acts.'"[267] In an opinion without precedential effect, however, the Second Circuit has hinted that it may apply *McDonnell*'s requirement of a specific quid pro quo to all Hobbs Act extortion and honest services wire fraud prosecutions but was silent as to § 666 because the defendant was not charged with that crime.[268]

Thus, there are three possible interpretations of the opinion, each with its own set of advantages and drawbacks. As discussed below, courts should adopt a bounded interpretation of *McDonnell* to avoid creating unnecessary and polarizing division between Hobbs Act extortion and § 666.

VI. IN DEFENSE OF A BOUNDED INTERPRETATION OF *MCDONNELL*

A broad interpretation of *McDonnell*, consisting of its application of a specific official act in all Hobbs Act and § 666 bribery cases, is appealing in many ways. Because § 666 criminalizes virtually the same behavior as Hobbs Act extortion, the same governance, federalism, and due process concerns that motivated the Court in *McDonnell* should apply equally to

262. *See* United States v. Silver, No. 15-CR-093 (VEC), 2016 WL 4472929 (S.D.N.Y. Aug. 25, 2016).
263. *Id.* at *1.
264. *Id.* at *6 n.8.
265. *Id.*
266. *Id.*
267. *See* Eli J. Richardson, *Attorneys React to High Court's Political Bribery Ruling*, LAW360 (June 27, 2016), https://www.law360.com/articles/811259/attorneys-react-to-high-court-s-political-bribery-ruling [https://perma.cc/XHA9-YJLT].
268. *See* United States v. Halloran, No. 15-2351(L), 2016 WL 6128039, at *4 (2d Cir. Oct. 20, 2016) (applying *McDonnell*'s "official act" standard to uphold Hobbs Act extortion conviction).

§ 666. Such a construction would provide uniformity in jury instructions and a common meaning of bribery that might help with constitutional notice and due process concerns. A broad interpretation would also ensure that whatever constitutional concerns exist over the infringement of states' rights by federal prosecutors are limited and clearly defined. A broad application of *McDonnell* also has the benefit of minimizing the federal government's intrusion into the relationships between state and local officials and their constituents.

Moreover, a broad application of *McDonnell* squares with the proposition that the Court is attempting to overcome the statutory differences and create uniformity.[269] In addition to *McDonnell* arguably creating a quid pro quo standard applicable to all federal bribery theories, the Court recently ruled in *Ocasio v. United States*[270] that a civilian bribe payor—not just the bribed official—could be prosecuted for and convicted of conspiracy to commit extortion "under color of official right."[271] This ruling dismantles a critical distinction that existed between § 666 and Hobbs Act extortion in some circuits. Despite these benefits, such an interpretation is untenable given the existing bribery framework.

A. The Problems Inherent in Applying McDonnell *to Hobbs Act Extortion but Not to § 666*

Limiting *McDonnell* to its facts and narrowly construing it to apply only to § 201 is preferable to creating a dichotomy between Hobbs Act extortion and § 666, in which the former requires a quid pro quo with a specific official act, and the latter (in some circuits) requires only corrupt intent with no quid pro quo requirement at all. Because of the unique procedural posture of the case, where the litigants "agreed" they would define the "official act" element of Hobbs Act extortion with reference to § 201,[272] distinguishing the case in much the same way as the *Ganim* Court distinguished Hobbs Act extortion from *Sun-Diamond*[273] should be relatively straightforward.

If courts are to take this position, they must adequately address the constitutional concerns raised by *McDonnell*. This can be accomplished short of requiring a specific quid pro quo in every Hobbs Act extortion and § 666 prosecution. By weighing the due process, federalism, and notice concerns expressed by the Court, lower courts can adopt jury instructions to ensure that prosecutions stay within constitutional bounds.

Before the lower courts read *McDonnell* to apply more broadly, the Supreme Court should first resolve the existing problematic circuit split

269. *See* Skilling v. United States, 561 U.S. 358, 411 (2010) (narrowing the range of criminal behavior subject to honest services wire fraud, in part, to "establish[] a uniform national standard").

270. 136 S. Ct. 1423 (2016).

271. *Id.* at 1436.

272. McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016).

273. *See* United States v. Ganim, 510 F.3d 134, 145 (2d Cir. 2007).

over whether § 666 requires proof of a quid pro quo.[274] Absent such clarification, a more onerous standard for proving Hobbs Act extortion will do very little because § 666 is more than capable of filling the void and effectively relegating Hobbs Act extortion to only the most clear-cut instances of state and local bribery.

In the interim, before the Court is able to resolve the § 666 circuit split, there are benefits of a lower quid pro quo standard worth considering. Corrupt public officials and those who corruptly provide them with things of value do not carry out their business in an open and explicit way: oftentimes there is an "I'll scratch your back if you scratch mine agreement," negotiated with so-called "winks and nods."[275]

Whatever the legitimate policy and constitutional concerns weighing against continuation of the implicit quid pro quo standard, it should be noted that soon after Governor McDonnell's conviction, the Virginia legislature amended its disclosure laws and lowered the threshold for accepting gifts from $250 to $100 to help solve the "Johnnie Williams problem."[276] In just the few months before that law went into effect, the number of lawmakers who reported accepting gifts in excess of fifty dollars dropped by 15 percent.[277]

B. The "Stream of Benefits" Quid Pro Quo Standard Is Worth Protecting Until the Supreme Court Issues a More Definitive Statement on Its Continued Existence

As Justice Stevens understood when he wrote his dissenting opinion in *McCormick*, subtle forms of extortion and bribery are "just as wrongful—and probably much more common—than the kind of express understanding" that *McDonnell* seems to envision.[278] This acknowledgement was repeated again a year later by Justice Kennedy, when he wrote in *Evans* about the inadequacy of an explicit quid pro quo standard to root out corruption facilitated by "knowing winks and nods."[279]

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274. *See* Gaioni, *supra* note 251, at 211 (noting that defining § 666 with reference to § 201 is "problematic").

275. *See* Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).

276. Davis C. Rennolds, *Let's Get Ethical, a Look at the New Ethics Reform in the Commonwealth of Virginia*, 19 RICH. J.L. & PUB. INT. 1, 11 (2015) (quoting Max Smith, *Virginia General Assembly Passes New "Gift" Laws in Response to McDonnell Scandal*, WTOP (Feb. 28, 2015, 1:10 PM), http://www.wtop.com/virginia/2015/02/virginia-general-assembly-passes-tough-new-gift-laws-in-response-to-mcdonnell-scandal/ [https://perma.cc/UN7E-DEKG]).

277. *See* Patrick Wilson, *Virginia State Lawmakers Accept Fewer Gifts Than a Year Ago*, VIRGINIAN-PILOT (Aug. 17, 2016), http://www.pilotonline.com/news/government/virginia/virginia-s-state-lawmakers-accept-fewer-gifts-than-a-year/article_f3111903-4378-598b-8a63-0802e60e9891.html ("Lawmakers acknowledge their behavior has changed following the indictment, trial and conviction of McDonnell in a scandal involving more than $170,000 in gifts and off-the-books loans from a businessman seeking state assistance.") [https://perma.cc/C5Q6-RK6C].

278. McCormick v. United States, 500 U.S. 257, 282 (1991) (Stevens, J., dissenting).

279. *Evans*, 504 U.S. at 274 (Kennedy, J., concurring).

Beyond clarifying the meaning of "official act" as codified in § 201 and applied in McDonnell's prosecution, the Court in *McDonnell* impliedly sanctioned the former governor's actions and laid a blueprint for would-be corrupt state and local politicians to sell their influence for personal pecuniary gain. Before the lower courts open the floodgates and allow such activity to occur unchecked by the federal government, they should interpret the *McDonnell* opinion holistically and seek to understand it in the context of the cases that have come before it.

Understanding *McDonnell* not to apply to § 666 is natural, especially in those courts of appeals with no § 666 quid pro quo requirement. Because applying *McDonnell* to Hobbs Act extortion is avoidable, the lower courts should take that course of action. To do otherwise would be to judicially repeal Hobbs Act extortion and render the very real and serious constitutional concerns raised in *McDonnell* meaningless. Section 666 would still persist, and Hobbs Act extortion prosecutions would, practically speaking, cease to exist.

C. An Illustration: What If McDonnell Was Re-charged with Committing § 666 Bribery Instead of Hobbs Act Extortion and Federal Funds Bribery?

As discussed in the introduction of this Note, the U.S. Attorney's Office for the Eastern District of Virginia declined to re-charge the former governor.[280] This result is unsurprising in light of the Fourth Circuit's *Jennings* decision.[281] Because that court interpreted § 666 with reference to § 201 and the Supreme Court's decision in *Sun-Diamond*, it held that a quid pro quo, including an official act, is required to prove § 666 federal bribery.[282]

Had McDonnell been charged in a state within the Sixth, Ninth, Seventh, or Eleventh Circuits, however, prosecutors would not be required to prove any official act to convict him of § 666 federal bribery.[283] The government and the courts would, therefore, have a strong basis on which to re-charge Governor McDonnell on the same facts without running afoul of the *McDonnell* decision because it made no mention of § 666. Of course, *McDonnell* could be interpreted broadly to require proof of a specific official act in all bribery cases, including § 666 cases. But because McDonnell was charged with committing honest services wire fraud and Hobbs Act extortion, the underlying assumption of the case was that "[t]o convict the McDonnells of bribery, the Government was required to show that Governor McDonnell committed (or agreed to commit) an 'official act' in exchange for the loans and gifts."[284] In those courts of appeals that do

280. *See supra* note 5 and accompanying text.
281. *See supra* Part III.B.
282. United States v. Jennings, 160 F.3d 1006, 1013 (4th Cir. 1998).
283. *See supra* Part III.C.
284. McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016).

not require proof or a quid pro quo in § 666 prosecutions, the analysis that follows from that assumption is largely inapplicable.

Instead, a court would merely have to satisfy itself that McDonnell had "an intent to corruptly influence or to be influenced 'in connection with any business' or 'transaction'"[285] related to the Virginia government and that such a showing does not run afoul of the broad constitutional concerns raised in *McDonnell*. In the Eleventh Circuit, for example, the court specifically held that although "many § 666 bribery cases will involve an identifiable and particularized official act, . . . [it] is not required to convict."[286] Thus, given the current framework of federal antibribery statutes, the disunity among the courts of appeals regarding the quid pro quo standard for bribery can be expected to grow if *McDonnell* is not limited to its facts and procedural posture.

CONCLUSION

A broad application of *McDonnell* as applied to future Hobbs Act extortion and § 666 prosecutions must be rejected in favor of a more limited reading that allows the courts and prosecutors to develop constitutionally acceptable alternatives to grafting § 201's "official act" definition onto the Hobbs Act and § 666. Doing so will not run afoul of the Constitution, because practical alternatives to the § 201 definition exist. Applying a more limited reading of *McDonnell* will also prevent further disunity among the circuits in prosecuting bribery by state and local officials. Moreover, failure to do so will likely result in the demise of the "stream of benefits" implicit quid pro quo standard, which was developed to prevent the most pernicious and undetectable forms of corruption undertaken by sophisticated parties to the detriment of the taxpaying public.

285. *See, e.g.*, United States v. McNair, 605 F.3d 1152, 1188 (11th Cir. 2010).
286. *Id.*