

ARTICLES

PUBLIC CORRUPTION PROSECUTIONS AS FINANCIAL CRIMES UNDER FEDERAL CRIMINAL LAW: TARGETING THE ILLICIT USE AND MISUSE OF PUBLIC ASSETS AND RESOURCES

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INTRODUCTION

Federal prosecutors have an extensive record of investigating and prosecuting public corruption at the state and local level. These prosecutions act as a check against the illicit use and misuse of public financial and economic assets and resources. In addition, these prosecutions maintain the integrity of the decision-making process relating to the use, disposition, or control of public financial and economic interests. Moreover, by holding individuals with power, access, and influence accountable for criminal misconduct, these prosecutions further the public's trust and confidence in the fundamental fairness of the criminal justice system. Therefore, these federal public corruption prosecutions serve the interest of justice in more ways than one.

The Supreme Court, however, has made it more difficult to bring traditional bribery and kickback prosecutions by narrowing the reach of the federal public corruption statutory scheme.¹ Federal prosecutors in New Jersey recently tried a new approach. Rather than a traditional bribery or kickback prosecution, where the government proves that the defendant received some benefit to influence an official act, prosecutors relied on evidence that the public officials obtained by fraud and intentionally misapplied public assets and resources.² The Third Circuit affirmed these convictions, and the Supreme Court has granted review.³

Part I of the Article outlines the federal public corruption statutory scheme and describes how the Supreme Court has limited these offenses to bribery and kickback schemes that implicate a clear official government decision or act. Part II of the Article undertakes a detailed analysis of the Third Circuit's decision in

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1. *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016) (limiting bribery and kickback schemes to conduct that specifically implicates state action or the conduct of government); *Skilling v. United States*, 561 U.S. 358, 404 (2010) (limiting intangible right prosecutions to bribery and kickback schemes).

2. *United States v. Baroni*, 909 F.3d 550, 560 (3d Cir. 2018), *cert. granted sub nom.*, *Kelly v. United States*, — U.S. —, 139 S. Ct. 2777 (2019).

3. *Id.* at 560, 588.

United States v. Baroni.⁴ Specifically, it focuses on the appellate court's ratification of the theory of prosecution centered on an allegation that the public official obtained by fraud and intentionally misapplied public assets and resources. Part III describes how the Third Circuit's decision in *Baroni* is consistent with an established record of the courts sustaining financial crimes prosecutions and the government's efforts to check the illicit use or misuse of public financial and economic interests. Finally, the Article concludes by explaining that any retreat by federal prosecutors from efforts to disrupt the illicit use and misuse of public financial and economic assets and resources will undermine public confidence in the criminal process.

BACKGROUND

Federal public corruption prosecutions are supported by the provisions of three federal criminal statutes: the "honest services" provision of the federal mail and wire fraud statute,⁵ the "corruptly influence" provision of the federal program funding statute,⁶ and the "under color of official right" provision of the federal extortion statute.⁷ While their ability to bring such cases may seem broad, courts have narrowed the federal government's reach in public corruption cases.

The courts have imposed three significant limitations on sustaining a conviction under these public corruption provisions. First, the public corruption provisions of all three statutes are limited to bribery and kickback schemes.⁸ As a practical matter, the significance of this limitation is to impose a rigorous standard of proof to sustain a conviction. To sustain a conviction under all three of these statutes, the government is required to prove a *quid pro quo* agreement—that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an "official act."⁹

Second, the Supreme Court has narrowed the conduct that falls within the definition of an "official act" to conduct that specifically implicates state action or the conduct of government.¹⁰ Therefore, to sustain a public corruption conviction

4. *Id.*

5. 18 U.S.C. § 1346 (2018).

6. 18 U.S.C. § 666(a)(1)(B) (2018).

7. 18 U.S.C. § 1951(b)(2) (2018).

8. *Skilling v. United States*, 561 U.S. 358, 404 (2010); *see also* *United States v. George*, 676 F.3d 249, 252 (1st Cir. 2012) (explaining that the Supreme Court "truncated the reach" of honest services fraud in *Skilling* by limiting it to bribery and kickback schemes); *United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010) (noting that *Skilling* "pared down" the reach of honest services fraud); *McCormick v. United States*, 500 U.S. 257, 273 (1991); *Sabri v. United States*, 541 U.S. 600, 605 (2004); *United States v. Bahel*, 662 F.3d 610, 628 (2d Cir. 2011).

9. *United States v. Suhl*, 885 F.3d 1106, 1114 (8th Cir. 2018) (identifying that conviction under honest services requires government to prove *quid pro quo*); *United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017) (explaining that conviction under federal program requires government to prove *quid pro quo*); *United States v. Silver*, 864 F.3d 102, 111 (2d Cir. 2017) (noting that conviction under extortion requires government to prove *quid pro quo*).

10. *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016).

under all three of these federal statutes, the government must prove a corrupt intent to influence a specific governmental decision.

Finally, the Supreme Court has called into question the legitimacy of allowing federal prosecutors to bring criminal cases against state and local public officials for acts of misconduct. The Court has expressed a concern that these prosecutions reflect an overreach by federal prosecutors to set standards of government conduct for local and state public officials.¹¹

Although not unreasonable constraints and concerns, these limitations impose a considerable litigation risk on what are inherently difficult prosecutions. These prosecutions are fact-intensive and require the government to unwind illicit relationships that have some legitimate component.¹² At the same time, these relationships are secretive by nature and intentionally structured to conceal participants and the source of any financial or economic gain.¹³

Consequently, prosecutors often encounter misleading and conflicting witness accounts about the nature of the relationships and sequence of events. In addition, documents are often altered, falsified, or destroyed. As a consequence, the government often must rely on circumstantial evidence to prove the illicit relationship and corrupt intent necessary to sustain a conviction. Moreover, proving this corrupt intent requires prosecutors to link a financial benefit to a public official and then connect that relationship to an official act.¹⁴ In sum, the Supreme Court has made it

11. *Id.* at 2373.; see also *McCormick*, 500 U.S. at 273 (requiring that government prove a *quid pro quo* to sustain Hobbs Act public corruption conviction); *Skilling*, 562 U.S. at 404 (requiring that government prove a *quid pro quo* to sustain mail and wire fraud public corruption conviction).

12. See, e.g., Farah Stockman, *Baltimore's Mayor, Catherine Pugh, Resigns Amid Children's Book Scandal*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/catherine-pugh-baltimore-resigns.html> (indicating that the mayor of Baltimore was one of nine members of the board of the University of Maryland Medical Systems who had profited personally from contracts with the hospital system, and that "other board members reaped far more from the hospital network, including Francis X. Kelly, who advocated the privatization of the hospital network as a state senator, and went on to obtain \$16 million in contracts through his insurance company, Kelly & Associates Insurance Group."); Timothy Williams, *A Children's Book Is Causing a Political Scandal in Baltimore. It's Quite a Tale*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/us/baltimore-mayor-catherine-pugh-book-scandal.html> (describing arrangement where former state senator and mayor of Baltimore received \$500,000 from the University of Maryland Medical System, the state's largest nonprofit health care company, for a self-published children's lifestyle book and where the mayor also was a member of the board and the book was never actually circulated).

13. See Marc Tracy and Tiffany Hsu, *Director of M.I.T.'s Media Lab Resigns After Taking Money From Jeffrey Epstein*, N.Y. TIMES (September 7, 2019), <https://www.nytimes.com/2019/09/07/business/mit-media-lab-jeffrey-epstein-joichi-ito.html> (describing efforts by research lab to conceal financial connection to Jeffrey Epstein); Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (August 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html> (defendant engaged in complex transactions to conceal payments from Ukrainian oligarchs); Andrew E. Frammer et al., *Secret Ledger in Ukraine List Cash for Donald Trump's Campaign Chief*, N.Y. TIMES (August 14, 2016), <https://www.nytimes.com/2016/08/15/us/politics/what-is-the-black-ledger.html> (describing discovery and examination of records of secret and illicit payments to corrupt network).

14. In *McDonnell*, the Court held that to sustain a public corruption conviction under the federal bribery statute, the government must prove that the conduct implicated a clear official government act or decision. 136 S. Ct. at 2365. For an example, see *United States v. Oaks*, 302 F. Supp. 3d 716 (D. Md. 2018) (holding that

more difficult to bring traditional bribery and kickback prosecutions by narrowing the reach of the federal public corruption statutory scheme.

Rather than withdraw from its obligation to hold state and local officials accountable for acts of misconduct, what may now be emerging is a new pattern and practice of public corruption prosecutions brought under federal criminal law. These prosecutions rely on the financial crime provisions rather than public corruption provisions of the mail and wire fraud statutes and the federal program funding statute to hold public officials accountable for official acts of misconduct that implicate public assets and resources.¹⁵

These prosecutions center on the cost of corruption¹⁶ and target the illicit use and misuse of public financial and economic interests. To sustain a conviction, the government is required to prove a scheme to defraud rather than a bribery or kickback offense. Therefore, it is not necessary for the government to prove a corrupt intent—a *quid pro quo*—that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an official act.¹⁷ These financial crime prosecutions, therefore, avoid the evidentiary and legal limitations recently imposed on prosecutions brought pursuant to the federal public corruption statutory scheme.

The limitation on bribery and kickback schemes does not apply to these financial crime prosecutions.¹⁸ Therefore, these prosecutions can go beyond bribery and

defendant's filing of a request with the Maryland Department of Legislative Services for the drafting of legislation in the form of a bond bill was an "official act" under *McDonnell*).

15. See *United States v. Hoffman*, 901 F.3d 523, 537 (5th Cir. 2018) (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. Appx 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *United States v. Hird*, 901 F.3d 196 (3rd Cir. 2018) (later amended and superseded on other grounds) (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

16. Because state and local government officials are primarily responsible for providing critical public services such as education, public safety, health, care and infrastructure (roads, bridges, and schools), the illicit allocation or reallocation of public financial and economic interests or assets at this level has a particularly corrosive and distorting impact on the quality of life in the community. Corruption at this level undermines economic growth and depresses investment by putting into place a culture that deters legitimate investment and commerce. The added cost of doing business of corruption deters individuals from starting new businesses and deters existing businesses from growing. See, e.g., Mary M. Chapman, *Former Mayor of Detroit Guilty in Corruption Case*, N.Y. TIMES (Mar. 11, 2013), <https://www.nytimes.com/2013/03/12/us/kwame-kilpatrick-ex-mayor-of-detroit-convicted-in-corruption-case.html> (describing conviction of former mayor of public corruption charges based on a pervasive practice of shakedowns, kickbacks, and bid-rigging schemes); Benjamin Weiser, *Sheldon Silver Is Convicted in 2nd Corruption Trial*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/nyregion/sheldon-silver-retrial-guilty.html> (explaining former speaker of the New York State Assembly was found guilty of federal corruption for obtaining illicit payments in return for taking actions that benefited a cancer researcher and real estate developers); Benjamin Weiser & Jesse McKinley, *Architect of Cuomo's Buffalo Billion Project Is Convicted in Bid-Rigging Scheme*, N.Y. TIMES (July. 12, 2018), <https://www.nytimes.com/2018/07/12/nyregion/kaloyeros-guilty-buffalo-billion-cuomo.html> (detailing bribery conviction of public official for fraud based on bid rigging scheme for economic redevelopment public contracts).

17. *United States v. Baroni*, 909 F.3d 550, 582 (3d Cir. 2018), cert. granted sub nom., *Kelly v. United States*, — U.S. —, 139 S. Ct. 2777 (2019).

18. *Id.* at 568.

kickback schemes. These prosecutions would capture undisclosed self-dealing, glaring conflicts of interest, breaches of trusts, and other forms of official acts of misconduct that directly implicate the illicit use or misuse of a public financial or economic interest or asset, but do not necessarily reflect a traditional *quid pro quo* agreement.

Second, even though these financial crimes prosecutions involve holding state and local government officials accountable for official acts of misconduct, the courts have declined to extend the requirement that prosecutors prove a connection to an “official act.”¹⁹ Courts have reasoned that an “official act” is not an element of an offense brought pursuant to these financial crimes provisions.²⁰ Therefore, to sustain a conviction under these financial crimes’ provisions, the government must prove that (1) the defendant engaged in a deceptive practice, (2) the deceptive practice implicated public “money or property”—a financial or economic interest or asset—and (3) the defendant knew or should have known that his conduct would implicate a public financial economic interest or asset.²¹ In sum, to sustain a conviction, the government must prove that public financial or economic assets or resources were obtained by fraud, were intentionally misapplied, or both.²²

Finally, federalism concerns implicated by the federal government’s efforts to hold state and local officials accountable for these financial crimes are not compelling. The core elements of each of these statutes set forth meaningful prosecutorial boundaries. The financial crimes provision of the mail and wire fraud statute is limited to schemes to defraud that implicate property interests.²³ The financial crimes provision of Section 666 sets forth an explicit statutory requirement that the government prove that the misappropriation or scheme to defraud implicated at least \$5,000.²⁴ Therefore, the purpose of these statutes is to address illicit conduct that implicates property interests, not to set standards of good government.²⁵

The Circuit Courts of Appeal have not only accepted the use of these financial crime provisions to hold public officials accountable for acts of misconduct, but have also resisted the effort to impose any limitations. The courts have declined the invitation to narrowly define the financial and economic interests that fall within the scope of these financial crimes provisions. Consistent with Supreme Court precedent, the Courts of Appeal have interpreted the federal financial crimes statutes broadly²⁶ by defining the scope of “money and property” to include any fraud and deceit that: (1) impacts a government spending program, (2) denies the

19. *United States v. Reed*, 908 F.3d 102, 110 (5th Cir. 2018); *Dimora v. United States*, No. 1:18CR387, 2018 WL 5255121, at *10 (N.D. Ohio Oct. 22, 2018).

20. *Reed*, 908 F.3d at 110; *Dimora*, 2018 WL 5255121, at *10.

21. *Baroni*, 909 F.3d at 574.

22. *Id.*

23. *McNally v. United States*, 483 U.S. 350, 358–60 (1987) (mail and wire fraud statutes are “limited in scope to the protection of property rights”); *Cleveland v. United States*, 531 U.S. 12, 19 (2000) (the mail fraud statute was intended to reflect common understanding that the words “to defraud” refer to implicating property rights).

24. 18 U.S.C. § 666 (a)(1)(A)(i); *Fisher v. United States*, 529 U.S. 667, 676 (2000).

25. *Reed*, 908 F.3d at 112–13.

26. *McNally*, 483 U.S. at 356–57.

government revenue, (3) impacts the allocation of public money, or (4) impacts the control or allocation of a public financial or economic asset.²⁷ The scope of these financial crimes provisions also includes any fraud or deceit that compromises or corrupts decisions that impact the use, disposition, or control of public financial interests or economic assets and resources.²⁸

I. FEDERAL PUBLIC CORRUPTION STATUTORY SCHEME

Federal prosecutors extensively investigate and prosecute public corruption at the state and local level.²⁹ These prosecutions generally rely on three federal criminal statutes: the “honest services” provision of the federal mail and wire fraud statute,³⁰ the “corruptly influence” provision of the federal program funding statute,³¹ and the “under color of official right” provision of the federal extortion statute.³² Although the Supreme Court has narrowed the application of the public corruption statutory scheme, background on these provisions is relevant and will be discussed in I.A below. The Supreme Court has held that to prove a bribery or kickback scheme, the government must prove that the illicit conduct implicated a clear official government decision or act. This limitation will be discussed in Part I.B. Recently, federal prosecutors in New Jersey brought charges based on allegations that two public officials engaged in a scheme to defraud that implicated public assets and resources. The defendants were convicted, and their convictions were upheld by the Third Circuit Court of Appeals. Part II of the Article will undertake a detailed analysis of this theory of prosecution and the appellate decision affirming these convictions. Part III will examine how the Third Circuit’s decision is consistent with an established record of the courts sustaining schemes to defraud that implicate a property interest.

27. See *United States v. Hoffman*, 901 F.3d 523, 526 (5th Cir. 2018); *United States v. Hird*, 901 F.3d 196, 208 (3d Cir. 2018) (later amended and superseded on other grounds).

28. See *Hoffman*, 901 F.3d at 537 (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. Appx 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *Hird*, 901 F.3d at 196 (later amended and superseded on other grounds) (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

29. Richard Fausset, Monica Davey & Tim Arango, *It’s The Human Way: Corruption Scandals Play Out in Big Cities Across U.S.*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/us/fbi-corruption-investigations.html> (describing ongoing federal public corruption investigations in Los Angeles, Chicago, Atlanta, and Philadelphia and noting that “[t]he investigations raise questions . . . whether there can be any lasting cure for the chronic corruption problems that seem to dog big cities, so often dominated by a single party or political machine”); Vivian Wang & Benjamin Weiser, *Joseph Percoco, Ex-Cuomo Aide, Found Guilty in Corruption Trial*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/nyregion/percoco-corruption-bribery-trial-cuomo-guilty.html> (bribery conviction of state public official based on alleged illegal exchange of business for bribes to official’s wife); Weiser, *supra* note 16 (bribery conviction of state public official based on kickback payments in return for state grants and favorable legislation); Weiser & McKinley, *supra* note 16 (bribery conviction of public official for fraud based on bid rigging scheme for economic re-development public contracts).

30. 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), and 1346 (honest services) (2018).

31. 18 U.S.C. § 666 (a)(1)(B) (2018).

32. 18 U.S.C. § 1951(b)(2) (2018).

A. Public Corruption Provisions

1. Mail & Wire Fraud

The federal mail and wire fraud statutes contain a public corruption and financial crime provision. To sustain a mail or wire fraud conviction, the government must prove: (1) an intent to defraud, (2) a scheme to defraud, and (3) use of the mail or wire in interstate commerce in furtherance of the scheme to defraud.³³ A scheme to defraud includes any act of fraud or deceit intended to deceive another out of “money or property” (financial)³⁴ or the “intangible right to honest services” (public corruption).³⁵ The “honest services” or public corruption provision of the mail and wire fraud statute is limited to bribery and kickback schemes.³⁶ Therefore, to sustain a conviction, the government must prove a *quid pro quo* agreement—that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an “official act.”³⁷

2. Federal Extortion Statute

The federal extortion statute, the Hobbs Act, prohibits obstructing interstate commerce by extortion.³⁸ The statute is similar to the federal mail and wire fraud statute in that the term extortion contains both a public corruption provision and a

33. *United States v. Raza*, 876 F.3d 604, 617 (4th Cir. 2017) (noting that to sustain a fraud conviction targeting a government entity, the prosecution must prove that false representation was considered material by the government entity); *United States v. Johnson*, 874 F.3d 990, 998 (7th Cir. 2017); *United States v. Petlechkov*, 922 F.3d 762, 766 (6th Cir. 2019); *see also* *Pereira v. United States*, 347 U.S. 1, 8–9 (1954) (affirming mail fraud conviction and finding that “[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he causes the mails to be used.”) (internal quotation marks omitted).

34. *Raza*, 876 F.3d at 623 (noting that to sustain a mail or wire fraud conviction, the government must prove that defendant intended to deprive the victim of money or property). A scheme to deprive another of money and property includes the right to control the disposition of one owns assets. *United States v. Gray*, 495 F.3d 227, 234–35 (4th Cir. 2005).

35. A scheme to defraud includes fraudulent schemes to deprive another of honest services through bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 404 (2010).

36. In *Skilling*, the Supreme Court expressly narrowed the conduct that falls within the scope of the “honest services” provision of the mail and wire fraud statute to bribery and kickback schemes. *Id.* at 409–10. The Court specifically eliminated prosecutions for “undisclosed self-dealing,” or the failure to disclose conflict of interests. *Id.*; *see also* *United States v. Pinson*, 860 F.3d 152, 169 (4th Cir. 2017) (holding that after *Skilling*, honest services fraud does not include undisclosed self-dealing, or when a defendant takes an action that furthers his own undisclosed financial self-interest). Beyond limiting the subject matter of these prosecutions to bribery and kickback schemes, the significance of this limitation is to impose a substantial burden of proof on prosecutions under this public corruption provision.

37. *United States v. Suhl*, 885 F.3d 1106, 1114 (8th Cir. 2018) (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999)); *see also* *Johnson*, 874 F.3d at 999 (affirming conviction under public corruption provision of the mail and wire fraud statute and finding that the evidence was sufficient to find that the defendant accepted bribes and kickbacks from third-party partners in exchange for facilitating transfers of public land at below market prices).

38. 18 U.S.C. § 1951 (2018).

financial crimes provision.³⁹ The federal extortion statute makes it a crime for a person to commit extortion (obtaining property) either through (1) use of force, violence, or fear, or (2) “under color of official right.”⁴⁰

The public corruption, or “under color of official right,” provision is a bribery and kickback offense.⁴¹ Stated another way, the term “under color of official right” means that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an “official act.”⁴² To convict a defendant of extortion under the public corruption bribery provision, the government must prove that (1) a public official solicited or accepted a payment (“money or property”); (2) the payment was in connection with an official act; and (3) there was at least a minimal effect on interstate commerce.⁴³ Therefore, to sustain a conviction the government is required to prove the existence of a *quid pro quo* agreement in which the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an official act.⁴⁴

3. Federal Program Funding

Section 666⁴⁵ is intended to protect the financial integrity of state and local programs receiving federal funds.⁴⁶ Similar to the mail and wire fraud and extortion statute, § 666 contains both a public corruption⁴⁷ provision and a financial crimes

39. 18 U.S.C. § 1951(b)(2) defines the term “extortion” to include “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.”

40. 18 U.S.C. § 1951(b)(2) (2018).

41. *See Evans v. United States*, 504 U.S. 255, 268 (1992); *see also United States v. Silver*, 864 F.3d 102, 111 (2d Cir. 2017) (“To succeed on a bribery theory of honest services fraud and Hobbs Act extortion, the Government had to prove, beyond a reasonable doubt, the existence of a *quid pro quo* agreement—that the defendant received, or intended to receive, something of value in exchange for an official act.”); *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017) (holding a public official is guilty of extortion under the public corruption provision of the federal extortion statute if he receives payment in return for agreeing to perform official acts); *United States v. Halloran*, 821 F.3d 321, 343 (2d Cir. 2016) (affirming conviction under public corruption provision of the federal extortion statute because defendant accepted bribes in exchange for acting in an official capacity); *United States v. Blagojevich*, 794 F.3d 729, 735, 737 (7th Cir. 2015) (recognizing that government must prove a *quid pro quo* agreement to sustain conviction under extortion statute).

42. *Repak*, 852 F.3d at 253.

43. 18 U.S.C. § 1951; *Evans*, 504 U.S. at 261, 268.

44. *Silver*, 864 F.3d at 111–12.

45. 18 U.S.C. § 666 (2018).

46. *See Sabri v. United States*, 541 U.S. 600, 606–08 (2004) (“Congress was within its prerogative to protect spending objects from the menace of local administrators . . .”); *see also United States v. Baroni*, 909 F.3d 550, 575 (3d Cir. 2018) (stating that Congress enacted § 666 to bring state and local officials within the scope of the federal criminal theft law).

47. 18 U.S.C. § 666 (a)(1)(B). A state or local official violates the public corruption provision if she “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 . . .” *Id.*

provision.⁴⁸ The public corruption provision has three predicate jurisdictional elements. The fourth and core element is substantially similar to the mail and wire fraud public corruption provision. The public corruption provision of § 666 makes it a crime to “corruptly” provide or accept any payment or benefit with the intent to influence a public official in connection with a program receiving federal funding.⁴⁹ Stated another way, the phrase “in connection with any government business or transaction” means that the government must prove that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an “official act.”⁵⁰

To sustain a conviction under this public corruption provision, the government is required to prove that: (1) the defendant was an employee or agent of a state or local government agency; (2) the agency received in excess of \$10,000 in federal funding in any one year period; (3) the defendant solicited or accepted a bribe;⁵¹ and (4) the benefit was in connection with any business to transaction in excess of \$5,000.⁵² Similar to the honest services provision of the mail and wire fraud statute, to sustain a conviction under the “corruptly influenced” or public corruption bribery provisions of the federal program statute, the government must prove a *quid pro quo* agreement.⁵³

In sum, the public corruption provisions of the mail and wire fraud statute, the federal extortion statute, and the federal program funding statute align at the same point. Each of these public corruption provisions are bribery and kickback offenses that share a core common element: to sustain a conviction, the government must prove a *quid pro quo*—that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence a specific and formal exercise of state action or government conduct.⁵⁴

48. *Id.* § 666(a)(1)(A). A state or local official violates the financial crimes provision if she “embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property . . .” *Id.*

49. *See* *United States v. Pinson*, 860 F.3d 152, 164 (4th Cir. 2017) (stating that § 666 criminalizes corruptly influencing an agent of a government entity or private organization that receives over \$10,000 a year under a federal grant, contract, loan, guarantee, insurance or other form of federal assistance).

50. *See* *United States v. Suhl*, 885 F.3d 1106, 1115 (8th Cir. 2018).

51. 18 U.S.C. § 666(a)(1)(B).

52. *United States v. Jackson*, 688 F. App’x 685, 692 (11th Cir. 2017).

53. *United States v. Johnson*, 874 F.3d 990, 1001 (7th Cir. 2017) (holding that conviction under federal program requires prosecution to prove *quid pro quo*).

54. *See* *United States v. Skelos*, 707 F. App’x 733, 738 (2d Cir. 2017) (quoting *United States v. Bruno*, 661 F.3d 733, 744 (2d Cir. 2011)) (“The key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an official act has been proved beyond a reasonable doubt.”); *see also* *Johnson*, 874 F.3d at 1001 (affirming that a defendant can be found guilty of a bribery or kickback offense under § 666 if he acted “with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties”). To sustain a bribery conviction under the public corruption provision of § 666, the government is not required to prove a connection between a bribe and federal funds. *Salinas v. United States*, 522 U.S. 52, 59 (1997). In addition, § 666’s bribery prohibition is not confined to a business or transaction which affects federal funds. *Sabri v. United States*, 541 U.S. 600, 605–06 (2004).

B. *The McDonnell Limitation*

Recently, the Supreme Court further limited the federal public corruption statutory scheme by narrowly defining the scope of an “official act” to conduct that specifically implicates state action or government conduct. In *McDonnell v. United States*, the Supreme Court addressed what qualifies as an “official act” in an honest services and extortion bribery offense.⁵⁵ The case turned on whether the former governor of Virginia had performed “official acts” in exchange for various loans and gifts that he had received from an executive of a Virginia-based company.⁵⁶ The Court first acknowledged that both of these crimes were bribery and kickback offenses.⁵⁷

Therefore, to sustain a conviction under both of these public corruption provisions, the Court held that the government must prove a *quid pro quo* agreement—that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an official act.⁵⁸ Relying on the federal bribery statute,⁵⁹ the Court limited these public corruption offenses. The Court narrowly defined the “official acts” that fall within the scope of these public corruption provisions.⁶⁰ It declined to read the definition of an “official act” broadly and instead limited the scope of the prohibited conduct to a specific set of decisions or actions involving a formal exercise of governmental power.⁶¹ The Court then explained that a broad reading of the conduct that fell

55. 136 S. Ct. 2355 (2016).

56. *Id.* at 2357.

57. *Id.* at 2365.

58. *Id.*

59. 18 U.S.C. § 201 (2018). It is a crime for a federal public official to corruptly seek, receive, or accept anything of value in return for being influenced in the performance of an “official act.” *Id.* § 201(b)(2)(A); see also *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018). The court stated:

A public official is guilty of bribery when that person performs or agrees to perform an “official act” in exchange for something of value For a public official to be guilty of bribery, the jury must find that he “agreed to perform an ‘official act’ at the time of the alleged *quid pro quo*.” This agreement “need not be explicit and the public official need not specify the means that he will use to perform his end of the bargain.” It is sufficient if the public official “understands that he is expected, as a result of the payment, to exercise particular kind of influence or do certain things connected with his office as specific opportunities arise.” Consequently, a jury may find a *quid pro quo* if the [g]overnment shows “a course of conduct of favors and its flowing to a public official *in exchange for a pattern of official actions favorable to the donor.*”

Id. at 612–13 (citations omitted).

60. *McDonnell*, 136 S. Ct. at 2372–73.

61. *McDonnell*, 136 S. Ct. at 2358. The Supreme Court’s definition of “official act” is not the banner of clarity. The following is how the Second Circuit understood the definition of “official act” under *McDonnell*:

Relying on the federal bribery statute’s definition of “official act,” the Court held that “an ‘official act’ is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’” The Court set forth a two-part test to meet this definition. First, “[t]he ‘question, matter, cause suit, proceeding or controversy’ must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a

within the scope of these provisions would reflect overreach by federal prosecutors.⁶²

Moreover, it found that a broad reading would impermissibly obstruct a public official's ability to legitimately interact with their constituency.⁶³ The Court further held that the public corruption provisions of the mail and wire fraud statute and federal extortion statutes did not set forth meaningful limitations and refused to "construe a criminal statute on the assumption that the government will use it responsibly."⁶⁴ In sum, to sustain a conviction under the public corruption provision of the mail and wire fraud statute and the federal extortion statute, the government must prove a *quid pro quo*—a corrupt intent to influence *a specific and formal exercise of state action or government conduct*.⁶⁵

The *McDonnell* limitation expressly applies to the public corruption provision of the mail and wire fraud and federal extortion statutes. However, there is a conflict among the circuits as to whether this limiting principle reaches the bribery provision of the federal program funding statute.⁶⁶ Courts agree that all three statutes require the government to prove a *quid pro quo* agreement.⁶⁷ However, four appellate courts have drawn a distinction between these bribery provisions when it comes to applying *McDonnell*.⁶⁸ The distinction is not persuasive. Neither the

committee". . . . Second, "to qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit proceeding, or controversy,' or agree to do so."

United States v. Silver, 864 F.3d 102, 116–17 (2d Cir. 2017) (citations omitted). As a practical matter, there is a clear challenge in translating the *McDonnell* definition into an instruction that a jury can understand and apply to the facts at trial. This difficulty adds further litigation risk for the government to successfully bring a public corruption case against state and local public officials for official acts of misconduct because difficult to understand instructions typically lead to a jury's inability to reach a guilty verdict.

62. *McDonnell*, 136 S. Ct. at 2372.

63. *Id.* at 2373.

64. *Id.* at 2368.

65. *See id.* at 2371–72.

66. Compare United States v. Seng, 934 F.3d 110, 133 (2d Cir. 2019) (noting that *McDonnell* does not "necessarily delimit" bribery as proscribed by the federal program funding statute), with United States v. Skelos, 707 F. App'x 733, 738 (2d Cir. 2017) (holding that to sustain a bribery conviction under the federal program funding statute government was required to satisfy the standards for official acts as defined in *McDonnell*).

67. *See* United States v. Suhl, 885 F.3d 1106, 1114 (8th Cir. 2018) (conviction under honest services requires prosecution to prove *quid pro quo*); *Silver*, 864 F.3d at 111 (conviction under extortion requires prosecution to prove *quid pro quo*); United States v. Johnson, 874 F.3d 990, 1001 (7th Cir. 2017) (conviction under federal program requires prosecution to prove *quid pro quo*).

68. In United States v. Boyland, 862 F.3d 279 (2d Cir. 2017), the court held that *McDonnell* did not apply to a conviction under § 666. The court explained that § 666 "is more expansive than § 201, in which 'official acts' are limited to acts on pending 'questions matters causes, suits, proceedings, or controversies.'" *Id.* at 291. Section 666, by comparison, "prohibits individuals from soliciting anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of an organization, government, or agency." *Id.* (emphasis omitted). Accordingly, the appellate court held that the *McDonnell* standard did not apply. *Id.*; *see also* United States v. Reed, 908 F.3d 102, 112 (5th Cir. 2018) (declining to extend *McDonnell* beyond honest services fraud to § 666 bribery prosecutions even where the prosecution involved state and local government officials); United States v. Porter, 886 F.3d 562, 565 (6th Cir. 2018) (rejecting assertion federal program funding statute is a bribery offense requiring evidence of *quid pro quo* in connection with any "official act" as defined by *McDonnell*); United States v. Jackson, 688 F. App'x 685, 695 (11th Cir. 2017)

bribery provision of the mail and wire fraud statute nor the bribery provision of the federal extension statute use the term “official act.”⁶⁹

However, the parties in *Skilling* agreed that the bribery provisions of these statutes were *in pari materia* with the federal bribery statute.⁷⁰ Therefore, the bribery elements of these public corruption provisions are defined with reference to the federal bribery statute.⁷¹ The Court concluded that to sustain a conviction under these two bribery provisions, the government was required to prove an official act by showing that the bribe was paid to influence a specific state action or conduct of government.⁷²

What makes providing a benefit to a public official a crime under the federal program funding statute is the nexus between the benefit and official “business” or “transaction.”⁷³ In essence, a reading of the statute in a way that does not define “intending to be influenced” as requiring a link between the benefit and an official act would disregard the core legal element of the offense proscribed under § 666.⁷⁴ Therefore, it is difficult to discern a meaningful explanation that would support a conclusion that the bribery provision set forth in the federal program funding statute by its own terms (a corrupt intent to be influenced or rewarded in connection

(explaining that the public corruption provision of the federal program funding does not contain the same “official act” language found in the federal bribery statute). The Second Circuit reached a different conclusion in *Skelos*, 707 F. App’x at 739–40 (holding that to sustain a bribery conviction under the federal program funding statute, the government was required to satisfy the standards for official acts as defined in *McDonnell*). “[The Hobbs Act, honest service fraud, and federal program bribery] require[] proof of a *quid pro quo*, that is, a government official’s receipt of a benefit in exchange for an act he has performed or promised to perform, in the exercise of his official authority.” *Id.* at 738 (internal quotation marks and citations omitted).

69. The wire fraud statute provides as follows: “Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343. The mail fraud statute provides as follows: “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . .” 18 U.S.C. § 1341. Section 666 (a)(1)(B) provides as follows: (a)Whoever . . . (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof . . . (B) 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; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State . . . , 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”

70. See *Skilling v. United States*, 561 U.S. 358, 404 (2010).

71. *Id.* The federal bribery statute makes it a crime for a federal public official to “corruptly” demand or receive anything of value in return for being “influenced in the performance of an official act.” 18 U.S.C. § 201(b)(2)(A) (2018).

72. See *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016).

73. See *Salinas v. United States*, 522 U.S. 52, 52, 58 (1997) (“As this chronology and the statutory language demonstrate, § 666(a)(1)(B) was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds.”).

74. See *id.* at 57.

with any government business or transaction)⁷⁵ does not require the government to prove an official act as defined by *McDonnell*.

In addition, it is doubtful that the Court intended to trust the government to define the outer bounds of *this* public corruption provision but felt compelled to place limitations on the federal mail and wire fraud and extortion statutes. Therefore, if the *McDonnell* ruling does not reach the bribery provision of the federal program funding statute, what meaningful limitation required by the Court *does* apply to limit prosecutorial discretion? Otherwise, the term “in connection with any government business transaction” would be vulnerable to “boundless interpretation” by federal prosecutors.⁷⁶

Applying the legal standard in *McDonnell*, lower courts have identified what constitutes an “official act” under these statutes. In *United States v. Silver*, the defendant, former Speaker of the New York State Assembly, was charged with honest services fraud and the bribery provision of federal extortion statute.⁷⁷ At trial, the government introduced evidence that the defendant received bribes and kickbacks in the form of referral fees from third-party law firms in exchange for state grants for medical research, an anti-domestic violence non-profit, and favorable state legislation.⁷⁸ The district court instructed the jury that an “official act” is “any action taken or to be taken under color of official authority.”⁷⁹ The defendant was convicted and appealed.⁸⁰

The Second Circuit found that the evidence was sufficient to establish that the defendant engaged in the conduct for personal benefit or received some personal financial or economic gain in connection with a corrupt intent to influence an official act.⁸¹ However, the court found that the district court’s jury instruction on the definition of “official act” did not satisfy the standard defined by *McDonnell* and reversed the defendant’s conviction.⁸² The court explained that:

We are not persuaded that the terms “public duties,” “official influence,” and “official decisions” convey the requisite specificity that, to qualify as an “official act,” the given “question, matter, cause, suit, proceeding or controversy” must involve the *formal exercise* of governmental power; nor do these terms specify that the “question, matter, cause, suit, proceeding or controversy”

75. See *United States v. Jennings*, 160 F.3d 1006, 1012–15 (4th Cir. 1998).

76. *McDonnell*, 136 S. Ct. at 2375 (“There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute.”).

77. 864 F.3d 102, 110 (2d Cir. 2017).

78. *Id.* at 107–10.

79. *Id.* at 111 (emphasis omitted).

80. *Id.* at 112.

81. *Id.* at 114.

82. *Id.* at 118.

must be specific and focused like a hearing or lawsuit.⁸³

In *United States v. Suhl*, the defendant, a businessman, was charged under the public corruption provisions of the mail and wire fraud statute and federal program funding statute.⁸⁴ At trial, the government introduced evidence that the defendant operated health care companies that provided treatment to juvenile Medicaid recipients.⁸⁵ The evidence indicated that the defendant paid bribes to a state legislator to increase his mental health care referrals.⁸⁶ The defendant was convicted and he appealed.⁸⁷

On appeal, the defendant contended that the district court misinterpreted the two bribery statutes.⁸⁸ He claimed that *McDonnell* applied to both public corruption offenses and that *McDonnell* required the government to prove a specific *quid pro quo*.⁸⁹ The court held that, even assuming that *McDonnell's* definition of “official act” applied to both honest services fraud and federal program bribery, the indictment identified official acts that defendant sought to influence that fell within the definition of *McDonnell*.⁹⁰ The court further held that decisions involving the oversight and reimbursement of medical care funded by the state involve the type of formal exercise of governmental action required to sustain a bribery conviction after *McDonnell*.⁹¹

83. *Id.* at 119. One year after his conviction was overturned by the Second Circuit, the defendant was convicted in a second trial:

The first trial of Sheldon Silver, the former State Assembly speaker, lasted five weeks; his retrial took only two weeks, with jurors in both cases arriving at the same guilty verdict . . . Mr. Silver was convicted in 2015 on charges related to nearly \$4 million he obtained in illicit payments in return for taking actions that benefited a cancer researcher at Columbia University and two real estate developers in New York. The case was among a number of political corruption cases that were overturned after the United States Supreme Court in 2016 narrowed the activity that could constitute corruption.

Weiser, *supra* note 16.

84. 885 F.3d 1106, 1109–10 (8th Cir. 2018).

85. *See id.* at 1109–12.

86. *Id.* at 1110–11.

87. *Id.*

88. *Id.* at 1111.

89. *Id.* at 1112–13.

90. *Id.* at 1114.

91. *Id.* The court also found that that, although both the honest services fraud provision and bribery provision of the federal program statute required the government to prove an intent to influence or *quid pro quo* agreement (a specific intent to give something of value in exchange for an official act), *McDonnell* did not require the government to link the benefit to a specific official act. The court found that the two public corruption statutes only require the government to prove “intent to influence any official act,” stating:

Neither of these statutes, nor *McDonnell*, imposes a universal requirement that bribe payers and payees have a meeting of the minds about an official act. A payor defendant completes the crime of honest-services and federal-funds bribery as soon as he gives or offers payment in exchange for an official act, even if the payee does nothing

. . . .

We have explained that it is “not necessary for the government to link any particular payment to any particular action undertaken by” the government agent, and the bribe “may be paid with the intent to influence a general course of conduct.”

Id. at 1112–15 (citing *United States v. Redzic*, 627 F.3d 683, 692 (8th Cir. 2010)).

In *United States v. Fattah*, the defendant, a public official, was charged with honest services fraud.⁹² At trial, the government introduced evidence that the defendant accepted a substantial, undisclosed loan to support his unsuccessful campaign for the Mayor of Philadelphia and then engaged in an elaborate scheme to conceal the illicit payment.⁹³ As part of the deception, the defendant misappropriated federal grant money and federal appropriations.⁹⁴ The defendant was convicted and he appealed.⁹⁵

After the defendant was convicted, the Supreme Court issued its opinion in *McDonnell*. On appeal, the defendant argued that his conviction should be reversed in light of *McDonnell*.⁹⁶ The Third Circuit agreed and remanded the case for retrial on the honest services counts.⁹⁷ The Third Circuit found that *McDonnell* established a framework for the government to follow in proving that a defendant has performed an “official act.”⁹⁸ The court explained that the government must first specifically identify a “question, matter, cause, suit, proceeding, or controversy.”⁹⁹ Second, the issue or matter must be pending before a public official or agency for “a decision” or “an action.”¹⁰⁰ At trial, the government introduced evidence that the defendant accepted bribes in exchange for setting up a meeting with a public official, efforts to secure a nomination to be an ambassador and an attempt to secure a government job.¹⁰¹ The court found that setting up the meeting was not an official act.¹⁰² The effort to secure a nomination was potentially an official act and the effort to secure a government position was clearly an official act.¹⁰³ The Court in *McDonnell* continued to express its concern about the potential “boundless interpretation” of the federal public corruption statutory scheme and imposed a limitation on the exercise of prosecutorial discretion.¹⁰⁴ Therefore, to sustain a conviction, the government must prove that the conduct implicated a clear official government decision or act.

C. Federalism Concerns

The Supreme Court has expressed unease with the lack of meaningful boundaries for the unchecked exercise of prosecutorial discretion and federal criminal

92. 914 F.3d 112, 139 (3d Cir. 2019).

93. *Id.* at 127–34.

94. *Id.* at 127.

95. *Id.* at 145–46.

96. *Id.* at 152–54.

97. *Id.* at 159.

98. *Id.* at 152–54.

99. *Id.* at 152.

100. *Id.*

101. *Id.* at 154–56.

102. *Id.* at 154.

103. *Id.*; see also *United States v. Repak*, 852 F.3d 230, 253–254 (holding that the awarding of government contracts and grant money falls within *McDonnell*'s narrow definition of official act).

104. *McDonnell*, 136 S. Ct. at 2375.

liability under the public corruption statutory scheme. In particular, the Court has expressed some concern that the use of these public corruption provisions reflects an overreach by federal prosecutors to set standards of government conduct for local and state officials. These concerns were at the core of the Court's decision in *McDonnell*.¹⁰⁵ They also have been expressed by Justice Thomas in dissent in another recent public corruption decision, *United States v. Ocasio*,¹⁰⁶ in which the Court affirmed a bribery conviction under the conspiracy provision of the federal extortion statute. Justice Thomas expressed his concern with the "stunning" and "unwarranted" expansion of federal criminal jurisdiction "into a field traditionally policed by state and local laws—acts of public corruption by state and local officials."¹⁰⁷ Justice Thomas wrote:

Today the Court again broadens the Hobbs Act's reach to enable federal prosecutors to punish for conspiracy all participants in a public-official bribery scheme. The invasion of state sovereign functions is again substantial. The Federal Government can now more expansively charge state and local officials. And it can now more easily obtain pleas and convictions from these officials: Because the Government can prosecute bribe-payors with sweeping conspiracy charges, it will be easier to induce those payors to plead out and testify against state and local officials. The Court thus further wrenches from States the presumptive control that they should have over their own officials' wrongdoing.¹⁰⁸

105. *Id.* at 2372–73. The Court noted that:

[T]he Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will "use it responsibly" . . . The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of "official act" is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials."

Id. (citations omitted).

106. 136 S. Ct. 1423 (2016).

107. *Id.* at 1439 (internal quotation marks omitted).

108. *Id.*; see also *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to read mail and wire fraud statute in a way that would change the balance of federal-state power in the prosecutions of crimes without a clear statement by Congress); *United States v. Berroa*, 856 F.3d 141, 150 (1st Cir. 2017) (finding government's theory that false statement in an application for medical license could constitute a federal crime would "impermissibly infringe on states' distinctively sovereign authority to impose criminal penalties for violations" of licensing schemes) (citations omitted). In *United States v. Tavares*, the First Circuit noted:

[N]ot all unappealing conduct is criminal. As sovereigns, states have "the prerogative to regulate the permissible scope of interactions between state officials and their constituents," and the Supreme Court has warned against interpreting federal laws "'in a manner that . . . involves the Federal Government in setting standards' of 'good government for local and state officials.'"

844 F.3d 46, 54 (1st Cir. 2016) (citations omitted).

The concern over expanding federal criminal jurisdiction and the unchecked exercise of prosecutorial discretion is legitimate and well founded. However, these concerns rarely have been expressed in response to the government's efforts to check the illicit use or misuse of public financial and economic interests.

II. *UNITED STATES V. BARONI*

The Supreme Court has made it more difficult to bring traditional bribery prosecutions by narrowing the reach of the federal public corruption statutory scheme.¹⁰⁹ Federal prosecutors in New Jersey recently tried a new approach. Rather than a traditional bribery or kickback prosecution, prosecutors relied on federal financial crimes provisions and evidence that the public officials obtained by fraud or intentionally misapplied public assets and resources.¹¹⁰ The Third Circuit affirmed these convictions and the Supreme Court has granted review.¹¹¹

In *United States v. Baroni*, the defendants, two state political appointees, were charged under the financial crimes provision of the wire fraud and federal program funding statutes.¹¹² The government introduced evidence that over a four-day period, the defendants engaged in a scheme to impose traffic gridlock on the George Washington Bridge in an effort to retaliate against a New Jersey mayor who declined to endorse then-Governor Chris Christie's reelection campaign.¹¹³ To carry out the scheme, the defendants represented that lanes on the bridge needed to be closed in order to conduct a "traffic study."¹¹⁴ The traffic study was a complete fiction and the scheme caused vehicles to back up from the bridge into Fort Lee, creating intense traffic jams.¹¹⁵ The basis for the wire fraud charge was a single email, which put into place the scheme and stated: "Time for some traffic problems in Fort Lee."¹¹⁶ Extensive media coverage followed, and the incident became known as "Bridgegate."¹¹⁷

The government charged the defendants with financial fraud but did not allege, and there was no evidence indicating, that the defendants engaged in the conduct for some personal benefit or received any personal financial or economic gain from the conduct.¹¹⁸ However, officials from the Port Authority testified and described the significant costs that were incurred as a result of the decision to close the lanes

109. *McDonnell*, 136 S. Ct. at 2367–68 (2016) (limiting bribery and kickback schemes to conduct that specifically implicates state action or the conduct of government); *Skilling v. United States*, 561 U.S. 358, 404 (2010) (limiting intangible right prosecutions to bribery and kickback schemes).

110. *United States v. Baroni*, 909 F.3d 550, 560 (3d Cir. 2018), *cert. granted sub nom.*, *Kelly v. United States*, — U.S. —, 139 S. Ct. 2777 (2019).

111. *Id.* at 588.

112. *Id.* at 556.

113. *Id.* at 556–57.

114. *Id.* at 557–58.

115. *Id.* at 559.

116. *Id.* at 557.

117. *Id.* at 555.

118. *See id.* at 560.

on the bridge.¹¹⁹ The evidence indicated that the defendants were aware that the lane closures would cause the Port Authority to incur substantial costs.¹²⁰ The defendants were also aware that the “traffic study” would incur the cost of public employee time.¹²¹ To support the financial fraud charges, the government identified the “money” as “the salaries of each of the employees who wasted their time in furtherance of the defendants’ scheme,” including “the salary paid to the overtime toll booth collectors,” and money paid to other public employees “who wasted time” working on the “traffic study.”¹²² The government also identified “the money paid to [the defendants] themselves while they . . . [were] wasting their time in furtherance of this conspiracy.”¹²³ According to the government, the primary evidence of the scheme to defraud consisted of the defendants’ false claim that they were conducting a traffic study, which allowed them to carry out the lane reductions.¹²⁴ A jury convicted the defendants on all counts, and they appealed.¹²⁵ The Third Circuit Court of Appeals rejected the defendants’ assertions and confirmed their financial crimes convictions.¹²⁶

On appeal, the defendants raised numerous claims. They first challenged their fraud conviction by claiming that there was no scheme to defraud because

119. *Id.* at 565–66.

120. *Id.* at 565.

121. *Id.*

122. *Id.* at 561.

123. *Id.*

124. *Id.*

125. *Id.* at 560; see Kate Zernike, *2 Ex-Christie Allies Are Convicted in George Washington Bridge Case*, N.Y. TIMES (Nov. 4, 2016), <https://www.nytimes.com/2016/11/05/nyregion/bridgegate-conviction.html>:

A federal jury convicted two former allies of Gov. Chris Christie on Friday of all charges stemming from a bizarre scheme to close access lanes at the George Washington Bridge to punish a New Jersey mayor who declined to endorse the governor’s re-election. Though only the two defendants, Bridget Anne Kelly and Bill Baroni, were tried in the so-called Bridgegate case, the scandal surrounding the lane closings in September 2013 left Mr. Christie deeply wounded . . . Testimony at the trial indicated that Mr. Christie knew about the lane closings as they were causing major traffic jams in Fort Lee, N.J., over five days, and that he was deeply involved in covering up the plot even as he continued to insist — as he did again after the verdict was announced — that he knew nothing about it until months after it was over . . . Mr. Christie’s aides began to use government resources to secure political endorsements in 2010, the year he entered office, with an eye toward winning not just a broad re-election victory, but also a presidential race six years away. The governor’s loyalists preyed on grief over the Sept. 11 terrorist attacks and misused hundreds of millions in taxpayer dollars from what they called “a goody bag” to get support from Democrats as Mr. Christie, a Republican, tried to build a case that he had the wide appeal needed to win the White House . . . The controversy over the lane closings is the biggest political corruption case in New Jersey in years, riveting a state with a long history of official malfeasance.

126. The Third Circuit did, however, reverse the defendants’ civil rights conspiracy conviction. *Baroni*, 909 F.3d at 588. The government had alleged that the defendants interfered with the localized travel rights of the residents of Fort Lee. *Id.* at 560. The court found that the right to localized travel on public roadways was not clearly established and, thus could not form the basis of a civil rights criminal conspiracy. *Id.* at 588. The court reasoned that the defendants were not put on notice that they were violating a constitutional right and, therefore not put on notice of the criminal nature of their conduct. *Id.*

defendant Baroni had the political authority and discretion to control traffic patterns at Port Authority facilities and to marshal the public resources necessary to implement this decision.¹²⁷ The court disagreed.¹²⁸ The court found that whether there was authority to control the traffic patterns was a question of fact for the jury.¹²⁹ It further found that the government had presented sufficient evidence at trial from which the jury could reasonably have found that there was no authority to change the lane configurations.¹³⁰ In addition, the court found that the defendants had repeatedly “lied” about the reasons for implementing the lane reductions and that this deceptive conduct undermined the argument:

[T]he evidence refutes the notion [that the defendant] possessed ‘unilateral’ authority to realign the bridge’s lanes. To the contrary, it reveals [defendants] would not have been able to realign the lanes had [they] provided the actual reason or no reason at all. They had to create the traffic study cover story in order to get Port Authority employees to implement the realignment.¹³¹

Moreover, the court found that the district court’s jury instructions foreclosed the possibility that the jury could have convicted the defendants of fraud without finding that they lacked authority to realign the lanes.¹³² The court explained that the defendants could not deprive the Port Authority of a financial or economic interest if defendant Baroni had the discretion to allocate these resources.¹³³ The appellate court emphasized that the jury was required to find that that the purpose of the lane closure reduction was not a legitimate traffic study.¹³⁴ The court reasoned that in

127. *Id.* at 562.

128. *Id.* at 562–63.

129. *Id.* at 563 (“The record contains overwhelming evidence from which a rational juror could have reached these conclusions. Indeed, it is difficult to see how any rational juror could have concluded otherwise.”).

130. *Id.* (“The record contains overwhelming evidence from which a rational juror could have reached these conclusions. Indeed, it is difficult to see how any rational juror could have concluded otherwise.”).

131. *Id.* at 562.

132. The district court’s jury instruction provided as follows:

In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving the Port Authority money and property. An organization is deprived of money or property when the organization is deprived of the right to control that money or property. And one way the organization is deprived of the right to control that money and property is when the organization receives false or fraudulent statements that affect its ability to make discretionary economic decisions about what to do with that money or property.

Id. at 563.

133. *Id.*

134. *Id.* at 582–83. Moreover, at sentencing, the district court applied the enhancement for obstruction of justice under the Sentencing Guidelines and found that defendant Baroni committed perjury at trial when he testified that the purpose of the lane closure was a legitimate traffic study. *Id.* at 558 n.3. The court found that calling it a traffic study was merely a “cover story” for the true purpose of changing and realigning the traffic pattern at the bridge. *Id.*

finding the existence of a scheme to defraud, the jury necessarily concluded that the defendants lacked authority to order the realignment.¹³⁵

The Third Circuit next rejected the defendants' argument that they did not deprive the Port Authority of any "money or property." The court held that public employee labor is property for the purpose of the wire fraud statute. Moreover, the loss here was not merely incidental. The court found that the prosecution had introduced extensive evidence indicating that the defendants had knowingly defrauded the Port Authority of public employee labor in furtherance of the scheme.¹³⁶ The appellate court found that these public employees spent a substantial amount of time doing work that was unnecessary and furthered no legitimate Port Authority business.¹³⁷ These costs would not have been incurred but for the fraudulent scheme.¹³⁸ Moreover, the defendants were *aware* that these costs would be incurred as a result of the fraudulent scheme.¹³⁹ In addition, the Third Circuit found that defendant Baroni and his co-conspirator (chief of staff David Wildstein) had accepted compensation from the Port Authority for time spent conspiring to defraud the organization, and that this compensation was "plainly 'money'" for the purpose of the wire fraud statute.¹⁴⁰

The defendants next pointed to the Supreme Court's decision in *Skilling* limiting the public corruption provision of the mail and wire fraud statute to bribes and

135. The court noted that:

[The district court's jury] instruction forecloses the possibility the jury convicted [d]efendants of fraud without finding [that the defendant] lacked authority to realign the lanes. For [the defendant] could not deprive the Port Authority of money and property he was authorized to use for any purpose. Nor could he deprive the Port Authority of its right to control its money or property of its right to control its money or property if that right to control were committed to his unilateral discretion.

Id. at 563.

136. *Id.* at 565. The court held that "[t]heir time and wages, in which the Port Authority maintains a financial interest, is a form of intangible property." *Id.* at 565. In particular, the Third Circuit found that the value of the public employee labor attributable to the scheme to defraud consisted of \$3,696.09 spent for overtime toll booth collectors for the one remaining lane that was accessible to Fort Lee and the time spent on the traffic study plus the \$4,205 for the time spent by the two Port Authority employees (defendant Baroni and his chief of staff) in furtherance of the scheme to defraud for a total of \$7,991.09. *Id.* at 577.

137. *Id.* at 571.

138. *Id.* at 565–66.

139. *Id.* at 565.

140. *Id.* at 566. The court also acknowledged that the "right to control" theory supported the defendant's convictions:

[W]e recognize this traditional concept of property provides an alternative basis upon which to conclude Defendants defrauded the Port Authority . . . The Port Authority's physical property—the bridge's lanes and toll booths—are revenue-generating assets. The Port Authority has an unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving. Defendants invented a sham traffic study to usurp that exclusive interest, reallocating the flow of traffic and commandeering public employee time in a manner that made no economic or practical sense. Indeed, the realignment—intended to limit access to the bridge and gridlock an entire town—was impractical by design.

Id. at 567.

kickbacks schemes.¹⁴¹ They asserted that the government was precluded from working around this limitation by recasting the prosecution as a financial crime. Defendants argued that “it cannot be a crime for a public official to take official action based on concealed political interests.”¹⁴² And that “[t]he government’s theory—that acting with a concealed political interest nonetheless becomes mail or wire fraud so long as the public official uses *any* government resources to make or effectuate the decision—would render the Supreme Court’s carefully considered limitation [on honest services fraud] a nullity.”¹⁴³ According to the defendants:

[i]t cannot be the case that the Supreme Court has pointedly and repeatedly rebuffed the government’s attempts to prosecute public officials for the deprivation of the public’s intangible right to honest services or honest government if, all along, the inevitable use of at least a peppercorn of public money or property made every instance of such conduct prosecutable as money or property fraud.¹⁴⁴

The Third Circuit rejected the defendants’ argument and correctly pointed out that the Supreme Court’s decision in *Skilling* was not applicable to prosecutions for simple money and property fraud.¹⁴⁵ The court noted that the defendants were not charged pursuant to any intangible right to honest services.¹⁴⁶ It affirmed the distinction between a case brought pursuant to the public corruption and financial crime provision of the mail and wire fraud statutes:

It is hard to see, under [d]efendants’ theory, how a public official could ever be charged with simple mail or wire fraud. They appear to suggest that, as public officials, any fraud case against them necessarily entails intangible right to honest services [requiring the government to prove a *quid pro quo* agreement- that the defendant engaged in the conduct for some benefit or received some financial or economic gain in connection with a corrupt intent to influence an “official act.”]. That is not so. As we have explained, [d]efendants were charged with defrauding the Port Authority of its money and property—not the intangible right to their honest services.¹⁴⁷

The court noted that the jury found that the defendants had engaged in a scheme to defraud and cause a traffic blockage in Fort Lee by conducting a sham traffic study.¹⁴⁸ Therefore, the prosecution was not precluded by the Supreme Court’s decision in *Skilling*.¹⁴⁹ The court further explained why the prosecution was not

141. *Id.* at 567–68.

142. *Id.* at 569 (internal quotation marks omitted).

143. *Id.*

144. *Id.* at 568.

145. *Id.* at 568–69.

146. *Id.*

147. *Id.* at 569.

148. *Id.* at 563, 569.

149. *Id.* at 580.

precluded by the Supreme Court's decision in *McDonnell*. It found that the defendants' conduct clearly crossed the line from permissible political calculation to engaging in a criminal scheme to defraud:

We are mindful of the Supreme Court's honest services case law but do not believe it counsels a different result in this case. Defendants were charged with simple money and property fraud under Section 1343—not honest services fraud—and the grand jury alleged an actual money and property loss to the Port Authority. In any event, their conduct in this case can hardly be characterized as “official action” that was merely influenced by political considerations. Defendants invented a cover story about a traffic study for the sole purpose of reducing Fort Lee's access to the George Washington Bridge and creating gridlock in the Borough. Trial testimony established that everything about the way this “study” was executed contravened established Port Authority protocol and procedures. Indeed, witnesses testified that traffic studies are usually conducted by computer modeling, without the need to realign traffic patterns or disrupt actual traffic. When traffic disruptions are anticipated, the Port Authority gives advance public notice.¹⁵⁰

The defendants also set forth a separate but related challenge to their conviction under the financial crimes provision of the federal program funding statute.¹⁵¹ They claimed that it is not a crime under the federal funding statute to allocate or reallocate public resources based on political considerations—that is, to favor political supporters and punish political adversaries.¹⁵² In response, the court first stated that the fact that the defendants were politically motivated did not remove their intentional acts of misconduct from the federal criminal law.¹⁵³ The court dismissed the defendants' assertion that their conduct was simply part of the typical political game of rewarding friends and punishing enemies.¹⁵⁴ It also found that the defendants' conduct had nothing to do with politics and everything to do with fraud and that public resources were not allocated in good faith—meaning without fraud or deceit.¹⁵⁵ As the court stated, “[w]hat [d]efendants did here is hardly analogous to a situation where a mayor allows political considerations to influence her discretionary allocation of limited government resources in the normal course of municipal operations. There is no facially legitimate justification for [d]efendants'

150. *Id.* at 568 (emphasis added). The court also noted that the district court had “summarily rejected this argument, holding ‘[t]here is a difference . . . between intangible rights to honest services not covered by the wire fraud statute, and intangible property rights which are.’” Therefore, the court clearly found that the crimes under the public corruption provision and financial crimes provision are separate and distinct criminal offense. *Id.* at 567; see also *United States v. Hager*, 879 F.3d 550, 554–555 (5th Cir. 2018) (holding that *Skilling* does not apply to mail and wire fraud prosecutions brought pursuant to the financial crimes provision)

151. *Baroni*, 909 F.3d at 570–71.

152. *Id.* at 571.

153. *Id.* at 571.

154. *Id.* at 574–76.

155. *Id.* at 575.

conduct here.”¹⁵⁶ Therefore, there was a clear finding that public financial and economic assets and resources were obtained by fraud and intentionally misapplied.¹⁵⁷ It further explained:

[The defendants] lied in order to obtain public employee labor from fourteen Port Authority employees. They forced the Port Authority to pay unnecessary overtime to toll workers and diverted well-paid professional away from legitimate Port Authority business [The defendants] were able to obtain these employees’ labor only by lying about the purpose of the realignment, claiming they were conducting a traffic study Their fraud is soundly within the scope of conduct sought to proscribe in Section 666.¹⁵⁸

The court also rejected the defendants’ assertion that to sustain a financial fraud conviction, the government was required to prove that they received some personal financial benefit.¹⁵⁹ It first held that a personal financial benefit or economic gain was not an element of the offense because “[t]he fact [d]efendants sought to benefit politically, not monetarily, does not alter the fact they forced the Port Authority to pay to workers overtime, and diverted the time of salaried professional staff, in furtherance of no legitimate purpose.”¹⁶⁰

The defendants also argued that the district court erred in failing to instruct the jury that to sustain a conviction under Section 666, the government needed to prove that the defendant knew of the specific property obtained by fraud or misappropriated and that that the value of the property met or exceeded the \$5,000 jurisdictional threshold.¹⁶¹ In part, the court agreed with the defendant.¹⁶² It found that to sustain a Section 666 conviction, the government is required to prove knowledge of the property obtained by fraud or misappropriated.¹⁶³ However, the government was not required to prove that the defendant knew that the value of this property exceeds \$5,000:

While the jury need not have found that Defendants knew the *value* of the property, it was error for the trial judge to instruct the jury ‘[t]he Government d[id] not have to prove that the Defendants knew of the specific property obtained by fraud, knowingly converted, or intentionally misapplied.’ Such an instruction runs the risk of negating the statute’s *mens rea* requirement and thus relieving the government of its burden of proof on an essential element of the crime. We do not believe, for example, one could intend to misapply

156. *Id.*

157. *Id.* at 572.

158. *Id.* at 574–75.

159. *Id.* at 575.

160. *Id.* at 575.

161. *Id.* at 581.

162. *Id.*

163. *Id.*

something one does not know exists; to instruct the jury otherwise would seemingly dispense with the intent requirement.¹⁶⁴

The court, however, found that the error was harmless because there was overwhelming evidence that the defendants were aware that public assets and resources were fraudulently obtained or intentionally misapplied, including the work of fourteen Port Authority subordinates.¹⁶⁵

The defendants also asserted that the district court erred in refusing to instruct the jury that in order to convict, they needed to find that the defendants intended to retaliate against and punish the mayor of Fort Lee.¹⁶⁶ They contended that motive is an essential element of proving an intent to defraud.¹⁶⁷ The Court of Appeals disagreed, holding that the reason why the defendants carried out the lane reduction scheme was not an element of the financial crime offenses.¹⁶⁸ The court recognized that the government had described a punitive motive in the indictment, but explained that motive was not an essential element of any of the criminal offenses charged.¹⁶⁹ It noted that intent to defraud is an element of a mail and wire fraud offense and requires the government to prove that the defendant acted intentionally and not by accident or mistake.¹⁷⁰ The court found that the evidence was sufficient to prove an intent to defraud.¹⁷¹ Therefore, the court held that the district court did not err in failing to give a motive instruction.¹⁷²

In sum, the Third Circuit's decision in *Baroni* is significant in that it affirms an emerging practice of holding public officials accountable for misconduct by proving a scheme to defraud rather than a *quid pro quo* bribery or kickback. More importantly, the decision articulates what the government needs to prove to sustain a conviction for official acts of misconduct that implicate a public financial or economic interest. *Baroni* outlined the core elements of these financial crime offenses, finding that to sustain a conviction, the government is required to prove that the public official obtained by fraud and intentionally misapplied public assets and

164. *Id.* at 582–83.

165. *Id.*

166. *Id.* at 583.

167. *Id.*

168. *Id.* at 583–84.

169. *Id.* at 585.

170. *Id.* at 583–85.

171. *Id.* at 585.

172. *Id.* The defendants also asserted that the jury was permitted to convict if it found that the lane reductions were “a bad idea.” The Third Circuit rejected this assertion. The court clarified that the jury instructions included the requirement that the public property be misapplied or obtained by fraud and that the property was obtained “for an unauthorized purpose.” The district court also instructed the jury that it had to be convinced beyond a reasonable doubt that the purpose of the lane reductions was *not* a legitimate traffic study and that the defendants’ good faith would be a complete defense to the charges. Accordingly, because the jury was instructed that the defendants could not be convicted if they believed in good faith that the reductions were part of a legitimate traffic study, the court held that a jury following its instructions could not have convicted the defendants based on its personal judgments about the wisdom and execution of the traffic study. *Id.* at 582–83.

resources.¹⁷³ As the court explained, this conduct goes well beyond the scope of the accepted practice of politics or the typical protocols and procedures of legitimate government conduct.¹⁷⁴ In this case, the Third Circuit repeatedly pointed to evidence that the traffic study was a lie and was intentionally used as a cover story to hide the true intentions of the traffic realignment directive.¹⁷⁵

III. FEDERAL FINANCIAL CRIMES STATUTORY SCHEME

In response to *McDonnell*, a new practice of public corruption prosecutions brought under federal criminal law is emerging. These prosecutions rely on the financial crime provisions rather than public corruption provisions of the mail and wire fraud statutes and the federal program funding statute.¹⁷⁶ These prosecutions are centered on the government proving a scheme to defraud rather than a *quid pro quo*. In particular, they rely on evidence that the public official fraudulently obtained or intentionally misapplied public assets and resources.¹⁷⁷ Such prosecutions, therefore, avoid the evidentiary and legal limitations that have been recently imposed on the public corruption statutory scheme. Accordingly, the Third Circuit's decision in *Baroni* is not an outlier and is consistent with this emerging theory of prosecution.

Due to the concern that the public corruption statutory scheme does not impose meaningful boundaries, the courts have imposed three limitations on these prosecutions and have narrowed the scope of what could be considered criminal corrupt behavior. Although not unreasonable, these limitations have significantly increased the considerable litigation risks of what are inherently difficult prosecutions. These prosecutions are fact-intensive and require the government to unwind illicit relationships that have some legitimate component and, at the same time, are secretive

173. *Id.* at 570.

174. *See id.* at 574–75.

175. *Id.* The court also held that the jury had a legal basis for finding that the compensation paid to the defendants attributable to the misconduct fell within the scope of the public financial or economic interest necessary to sustain a conviction. *Id.* at 578. In addition, the court required that the government prove that the defendants knew that their deceptive conduct would cause a public financial or economic injury. *Id.* at 581–83. Finally, in direct contrast to a public corruption prosecution, the court rejected the defendants' assertion that, to sustain a financial fraud conviction, the government was required to prove that a defendant engaged in the conduct for some personal benefit or received some financial or economic gain. *Id.* at 575.

176. To sustain a conviction under the financial crimes provision of the federal extortion statute, the government must prove that: (1) the defendant obtained "personal property" by "actual or threatened force" in such a way as to (2) even minimally affect interstate commerce . . . 18 U.S.C. § 1951 (2018). In contrast to the financial crimes provision of the mail and wire fraud statute and the federal program funding statute, the financial crimes provision of the federal extortion statute essentially sets forth a robbery provision and requires that the defendant act with actual or threatened force or violence, and therefore does not provide a practical vehicle to address official acts of misconduct. *Id.*

177. *See* *United States v Hoffman*, 901 F.3d 523, 537 (5th Cir. 2018) (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. App'x 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *United States v. Hird*, 901 F.3d 196 (3d Cir. 2018) (later amended and superseded on other grounds). (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

by nature and are intentionally structured to conceal participants and the source of any financial or economic gain. Consequently, prosecutors often encounter misleading and conflicting witness accounts about the nature of the relationships and sequence of events. In addition, documents are often altered, falsified, or destroyed.¹⁷⁸ As a result, the government is often called on to rely on circumstantial evidence to prove the illicit relationship and corrupt intent necessary to sustain a conviction. Moreover, proving this corrupt intent requires prosecutors to link a financial benefit to a public official¹⁷⁹ and then connect that relationship to an official act.¹⁸⁰ In sum, the Supreme Court has made it more difficult to bring traditional bribery and kickback prosecutions by narrowing the reach of the federal public corruption statutory scheme.¹⁸¹

The recent failed prosecution of New Jersey United States Senator Robert Menendez demonstrates the prosecution's litigation risks and underscores the high bar to sustain a traditional bribery or kickback scheme. This corruption trial ended in a mistrial after jurors were unable to reach a verdict.¹⁸²

One juror told reporters that 10 of the 12 jurors supported finding Mr. Menendez, a Democrat, not guilty, saying that prosecutors had not made the case that the favors and gifts exchanged between the senator and a wealthy eye doctor went beyond what good friends do for each other . . . One juror told reporters that the jury was never close to a consensus on the charges. "It was very tense. We were deadlocked right out of the gate," said the juror, . . . who said he believed the men were not guilty. "I just wish there was stronger evidence," he said. "I just didn't see a smoking gun. They just didn't prove it to us."¹⁸³

178. See Jack Ewing, *Inside VW's Campaign of Trickery*, N.Y. TIMES, (May 6, 2017) ("Volkswagen employees manipulated not only the engine software, but also generated reams of false or misleading data to hide the fact that millions of vehicles had been purposely engineered to deceive regulators and spew deadly gases into the air . . . As word spread inside Volkswagen that the regulators knew about the illegal software, employees began trying to cover their tracks. At an Aug. 31 meeting, an in-house lawyer suggested that engineers in attendance should check their documents. Several of those present interpreted the comment as a signal that they should delete anything related to the emissions issue in the United States. In the weeks that followed 40 employees at Volkswagen and the company's Audi division destroyed thousands of documents.").

179. *Skilling v. United States*, 561 U.S. 358, 404 (2010) (limiting intangible right prosecutions to bribery and kickback schemes)

180. *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016) (limiting bribery and kickback schemes to conduct that specifically implicates state action or the conduct of government).

181. See *United States v. Tavares*, 844 F.3d 46, 54–55 (1st Cir. 2016) (reversing public corruption conviction and finding the evidence insufficient to prove a link between benefit provided to a public official and an official act).

182. Nick Corasaniti & Nate Schweber, *Corruption Case Against Senator Menendez Ends in Mistrial*, N.Y. TIMES, (Nov. 16, 2017) <https://www.nytimes.com/2017/11/16/nyregion/senator-robert-menendez-corruption.html>.

183. *Id.* The government elected not to retry the defendant. Nick Corasaniti, *No New Trial for Menendez in Graft Case*, N.Y. TIMES, Feb. 1, 2018, at A1 (explaining that the decision by the Department of Justice "underscores how [the *McDonnell* ruling] has significantly raised the bar for prosecutors to pursue corruption case against elected officials"); see also Editorial, *De Blasio May Want to Be President. What Do His Donors Want?* N.Y. TIMES, (May, 5 2019) <https://www.nytimes.com/2019/05/05/opinion/de-blasio-president.html?searchResultPosition=1> ("A donor to [New York City Mayor Bill de Blasio's] first mayoral campaign pleaded

The recent acquittal of a high-level New York City Police Department official on corruption charges also demonstrates the significant burden of proof to sustain a traditional bribery or kickback scheme. There, the jury found a former New York City deputy inspector not guilty on all charges.¹⁸⁴ The government presented evidence that a businessman had provided the high-ranking police official with numerous gifts that included all-expenses-paid trips on private jets, dinners, and access to prostitutes.¹⁸⁵ In addition, the evidence indicated that the police official had taken clear official action that benefited the businessman.¹⁸⁶ However, the jurors rejected the government's assertion that the favors were connected to any corrupt intent and accepted the assertion by the defense that the exchanges were simply part of a long-term friendship.¹⁸⁷

But prosecutions grounded on evidence that the public official fraudulently obtained or misapplied public assets or resources are not limited to bribery and kickback schemes under the more recent theory of prosecution.¹⁸⁸ These financial crimes cases, therefore, can capture undisclosed self-dealing, glaring conflicts of interest, breaches of trust, and other forms of illicit conduct by public officials without having to prove bribe or kickback.¹⁸⁹ In addition, because these prosecutions are straightforward financial fraud prosecutions, proving a connection to an "official act" is not an element of the offense.

The appellate courts have ratified this theory of prosecution and have resisted the effort to impose any limitations. The courts have declined to narrowly define the public assets or resources that fall within these financial crimes' provisions. Instead, Courts of Appeal have defined the scope of the financial crimes provision to include any fraud and deceit that: (1) impacts a government spending program, (2) denies the government revenue, (3) impacts the allocation of public money, or (4) impact the control or allocation of a public financial or economic asset.¹⁹⁰

guilty to bribing him to get favorable lease terms for a Queens restaurant. Federal prosecutors indicated that they didn't charge Mr. de Blasio because the Supreme Court narrowed the scope of what could be considered corruption.").

184. Jan Ransom, *N.Y. Police Official Who Took Las Vegas Trip and Gifts Is Acquitted of Corruption Charges*, N.Y. TIMES, (Jan. 2, 2019) <https://www.nytimes.com/2019/01/02/nyregion/nypd-bribes-trial-grant-reichberg.html>.

185. *Id.*

186. *Id.*

187. *Id.*

188. See *United States v Hoffman*, 901 F.3d 523, 537 (5th Cir. 2018) (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. App'x 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *United States v. Hird*, 901 F.3d 196 (3d Cir. 2018) (later amended and superseded on other grounds). (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

189. *United States v. Reed*, 908 F.3d 102, 111–13 (5th Cir. 2018); *Dimora v. United States*, No. 1:17-CV-1288, 2018 WL 5255121, at *8–10, (N.D. Ohio, 2018).

190. See *Hoffman*, 901 F.3d at 537 (object of scheme to defraud to obtain state tax credits); *Aldissi*, 758 F. App'x at 699 (object of scheme to defraud to obtain public grant funds); *Hird*, 901 F.3d at 196 (later amended and superseded on other grounds). (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

A. *Mail & Wire Fraud/Financial Crime Provision*

To sustain a conviction under the financial crimes provision of the mail and wire fraud statute, the government is required to prove a scheme to defraud by showing a material misrepresentation, or the omission or concealment of a material fact intended to deceive another out of “money or property.”¹⁹¹ The term “money and property” has been broadly defined and extends to most kinds of financial interest or economic asset.¹⁹² Recently, the Second Circuit explicitly held that the “right to control” assets and resources can serve as a basis for criminal liability under the mail and wire fraud statute.¹⁹³ This theory of prosecution expands the scope of “money and property” under the mail and wire fraud statute to include intangible interests such as the right to control the use and disposition of financial and economic interests.¹⁹⁴ Prosecution under this theory centers on the non-disclosure or misrepresentation of material information that implicate a decision relating to the use or control of financial or economic assets and resources.¹⁹⁵

This theory has the potential to further expand the financial and economic interests that fall within the scope of the financial crime provisions and the extent to which these provisions can be applied to hold state and local public officials accountable for official acts of misconduct.

In *United States v. Finazzo*, the defendant, a merchandising executive for a teen apparel retailer, was charged under the financial fraud provision of the mail and

191. 18 U.S.C. §§ 1341 (2018) (mail fraud) and 1343 (2018) (wire fraud); see *United States v. Sampson*, 898 F.3d 270, 277 n.5 (2d Cir. 2018) (“To act with the intent to defraud means to act willfully, and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.”) (internal quotation marks omitted); see also *Neder v. United States*, 527 U.S. 1, 25 (1999) (fraud requires a misrepresentation or concealment of material fact); *United States v. Berroa*, 856 F.3d 141, 152 (1st Cir. 2017) (mail and wire fraud statute requires that the fraudulent scheme seek to obtain money or property); *United States v. Aldissi*, 758 F. App’x 694, 700 (11th Cir. 2018) (“Although the wire fraud statute does not define the phrase ‘scheme to defraud,’ we have held that there must be ‘proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property.’”); *United States v. Raza*, 876 F.3d 604, 623 (4th Cir. 2017) (a scheme to defraud requires proof of misrepresentation or omission or concealment of a material fact calculated to deceive another out of money or property).

192. See *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005) (“The Supreme Court has made it clear that the federal fraud statutes should be ‘interpreted broadly insofar as property rights are concerned.’”) (quoting *McNally v. United States*, 483 U.S. 350, 356 (1978)). The money or property interests include both tangible and intangible property interests. See *Carpenter v. United States*, 484 U.S. 19, 25–26 (1987) (a newspaper’s interest in the confidentiality of the contents and timing of a news column counted as “property” for the purpose of mail and wire fraud statutes).

193. *United States v. Finazzo*, 850 F.3d 94, 96, 111 (2d Cir. 2017).

194. See *United States v. Wallach*, 935 F.2d 445, 463 (1991) (concluding that “the withholding . . . of information that could impact on economic decisions can provide the basis for a mail fraud prosecution”); see also *McNally*, 483 U.S. at 360 (suggesting that conviction may have been affirmed if jury had been “charged that to convict it must find that the Commonwealth [of Kentucky] was deprived of control over how its money was spent.”).

195. See *United States v. Johnson* 939 F.3d 82, 88 (2d Cir. 2019); *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019).

wire fraud statute.¹⁹⁶ The government introduced evidence that the defendant steered business to a particular supplier at higher-than-market rates in exchange for secret kickback payments.¹⁹⁷ The defendant was convicted for interfering with his employer's intangible right to control use of its assets and resources—not on the basis of depriving the company of money or property—and appealed.¹⁹⁸

On appeal, the defendant argued that the district court's "right to control" jury instructions were erroneous because they failed to require the government to prove and the jury to find that the property sought through the fraud was "obtainable."¹⁹⁹ The Second Circuit rejected the defendant's assertion. The court found that "money or property" under the financial crimes provision of the mail and wire fraud statute includes the intangible right to control the use of one's own assets and resources.²⁰⁰ The court held that to sustain a conviction under the "right to control" theory of prosecution, the government had to prove that some person or entity was deprived of potentially valuable economic information that caused or could cause tangible financial or economic harm.²⁰¹ Stated another way, the government must prove that a defendant withheld material information that did or could affect a financial or economic interest. The court held that the government was not required to prove that he actually obtained or sought to obtain property from the victim of the fraud, only that a defendant obtained money or property by means of fraud or deceit.²⁰² The court explained as follows:

The common thread of these decisions is that misrepresentations or non-disclosures of information cannot support a conviction under the "right to control" theory unless those misrepresentations or non-non-disclosures can or do result intangible economic harm. This economic harm can be manifested directly—such as by increasing the price the victim paid for a good—or indirectly—such as by providing the victim with lower quality goods than it otherwise could have received. The government had to establish that the omission caused (or was intended to cause) actual harm to the victim of a pecuniary nature or that the victim could have negotiate a better deal for itself if it had not been deceived. However, not every non-disclosure or misrepresentation that could affect someone's decision of how to use his or her assets is sufficient to support a mail and wire fraud conviction. The fraudulent scheme must implicate tangible economic harm.²⁰³

The court found that the district court's jury instruction required the jury to find that the employer was deprived of "potentially valuable economic

196. 850 F.3d 94 (2d Cir. 2017).

197. *Id.* at 98–102.

198. *Id.*

199. *Id.* at 105.

200. *Id.* at 111–12.

201. *Id.*

202. *Id.*

203. *Id.* at 111.

information.”²⁰⁴ The instruction did not adequately convey the requirement that the deprivation of the right to control assets and resources must be capable of creating tangible economic harm.²⁰⁵ The court also found that the evidence was sufficient to support the jury’s conclusion that the defendant intended to cause (and did cause) tangible economic harm to his employer through his fraudulent scheme regarding related third-party transactions.²⁰⁶ The evidence also showed that the defendant was engaged in self-dealing. The defendant used his control over his employer’s vendor selection and pricing decisions to steer contracts to a supplier that he had an undisclosed financial interest in. The prosecution also proved that the supplier provided inferior products and charged higher prices than other vendors.²⁰⁷ In sum, the government proved that the defendant used his position to steer a significant amount of business to the vendor in a manner that inflicted tangible economic harm on the company.²⁰⁸

B. *Federal Program Funding/Financial Crime Provision*

Similar to the mail and wire statute, to sustain a conviction under the federal program funding statute, the government must prove that a defendant obtained by fraud or intentionally misapplied assets and resources. Section 666 specifically targets schemes to defraud and misappropriations that implicate public assets and resources. To sustain a conviction under this financial crimes provision, the government must prove that: (1) the defendant was an employee or agent of a state or local government agency; (2) the agency must receive in excess of \$10,000 in federal funding in any one year period; (3) the government must prove that defendant fraudulently obtained, misappropriated public funds; and (4) the fraud must be in connection with any business to transaction in excess of \$5,000.²⁰⁹

204. *Id.* at 111–12.

205. *Id.* at 114–16.

206. *Id.*

207. *Id.*

208. *Id.* at 113; *see also* United States v. Gray, 495 F.3d 227, 234 (4th Cir. 2005) (mail and wire fraud statutes cover fraudulent schemes to deprive victims of their rights to control the disposition of their assets).

209. 18 U.S.C. § 666(a)(1)(A) (2018); United States v. Sampson, 898 F.3d 270, 273 (2d Cir. 2018) (reversing district court’s dismissal of embezzlement charges against state public official and stating that “[a]n individual commits ‘embezzlement’ [under Section 666’s financial crimes provision] when he: (1) with intent to defraud, (2) converts to his own use; (3) property belonging to another; in a situation where (4) the property initially lawfully came within his possession on or control”); *see also* United States v. Pinson, 860 F.3d 152, 164 (4th Cir. 2017) (to sustain a conviction under the financial crimes provision of the federal program funding statute the government must prove that the defendant fraudulently misapplied at least \$5000 in public property); United States v. Dunning, 743 F. App’x. 261 (11th Cir. 2018) (affirming conviction of chief executive who diverted funds from two federally-funded community health care centers).

C. Public “Money or Property”

1. *Pasquantino v. United States*

The Supreme Court has expressly extended financial frauds to schemes that deprive state and local governments of “money or property.” The fact that the victim is the government rather than a private individual or business does not alter the scope of “money and property” within the mail and wire fraud statute.²¹⁰ Applying that decision, the appellate courts have declined the invitation to narrowly define the financial and economic assets and resources that fall within the scope of “money or property” under these financial crimes provisions.²¹¹

The Supreme Court established that public assets and resources fall within the scope of the mail and wire fraud statute in considering whether a scheme to defraud Canada of excise tax revenue by smuggling liquor into the country was “money or property” within the mail and wire fraud statute. In *Pasquantino v. United States*,²¹² the defendants were convicted of financial fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States.²¹³ The defendants avoided paying taxes by routinely concealing liquor from Canadian customs officials.²¹⁴ The defendants were convicted and they appealed. They argued that Canada’s right to collect taxes from them was not “money or property” within the meaning of the mail and wire fraud statute.²¹⁵ The Supreme Court disagreed, holding that a scheme to defraud a foreign government of tax revenue violates the federal wire fraud statute.²¹⁶ The Court explained that by evading fees that would have been due had the liquor imports been declared, the defendant inflicted a “straightforward” economic injury similar to misappropriating funds from the Canadian treasury.²¹⁷

210. *United States v. Hoffman*, 909 F.3d 523, 526 (5th Cir. 2018); *see also United States v. Baroni*, 909 F.3d 550, 570 (3d Cir. 2018) (to sustain a conviction the government must prove that the defendant stole, embezzled, obtained by fraud, knowingly converted or intentionally misapplied public financial or economic assets or resources).

211. *See United States v. Hoffman*, 901 F.3d 523, 537 (5th Cir. 2018) (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. Appx 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *United States v. Hird*, 901 F.3d 196 (3d Cir. 2018) (later amended and superseded on other grounds) (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

212. 544 U.S. 349 (2005).

213. *Id.* at 353.

214. *Id.*

215. *Id.*

216. *Id.* at 354–55.

217. *Id.* at 357–58. In *Cleveland v. United States*, 531 U.S. 12, 21–22 (2000), the Supreme Court established the outer limit of the scope of the financial crimes provisions. The Court held that a scheme to defraud to obtain video poker license was not “property” within the mail and wire fraud statute because the public interest implicated was “purely regulatory” as opposed to proprietary. *Id.* at 22. The Court explained that the license did not create a financial or economic property interest while still in the hands of the state. 531 U.S. at 20–22; *see also United States v. Berroa*, 856 F.3d 141, 149 (1st Cir. 2017) (acknowledging that the holding in *Cleveland*

The Supreme Court's decision in *Pasquantino* has been aggressively applied to misconduct that directly implicates a public financial or economic interest. The Eleventh Circuit has held that "money and property" under the statute includes any fraud or deceit that directly implicates a decision to allocate public money to recipients such as individuals, businesses, and organizations that were not entitled.²¹⁸

In *United States v. Aldissi*, the defendants, two scientists, were charged under the financial fraud provision of the wire fraud statute.²¹⁹ The government introduced evidence that the defendants corrupted the decision to allocate public money by submitting fraudulent scientific research proposals in order to obtain federal funds.²²⁰ The source of the funds were federal set-aside programs that the federal government had designed to enable eligible small businesses to research new technology.²²¹ The evidence indicated that when applying for the government set-aside programs, the defendants lied about their capabilities.²²² In particular, the defendants misrepresented their facilities, equipment, subcontractors, employees, and eligibility.²²³ During a fourteen-year period, the defendants obtained approximately \$10.5 million in government contracts or grants.²²⁴ Both were convicted and they appealed.²²⁵

On appeal, the defendants argued that the evidence was insufficient to sustain the wire fraud conviction.²²⁶ The defendants admitted that they provided the government with false submissions.²²⁷ However, they claimed that because they intended to and did perform their research projects, they could not be found guilty of a financial crime.²²⁸ The court rejected the "no harm no foul" argument.²²⁹ The court first held that an actual financial or economic loss is not at the core of mail and wire fraud prosecutions.²³⁰ It then held that the defendants not only deprived the federal government of the money used to fund the program, but their fabricated proposals had corrupted the grant awarding the decision-making process and undermined the purpose of the grant program.²³¹ The court explained that:

would preclude the government from seeking mail fraud conviction on theory that defendant defrauded state out of some property interest in medical license).

218. *United States v. Aldissi*, 758 F. App'x 694 (11th Cir. 2018).

219. *Id.* at 697–98.

220. *Id.* at 698–99.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 698.

225. *Id.*

226. *Id.* at 699–700.

227. *Id.* at 701.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 702.

[T]he deception deprived the United States not only of the money that should have been awarded to other researchers, but also of what it was actually paying for—the chance for eligible small businesses to commercialize their research and bring an actual product or service to the market. . . To be sure, the deception occurred the moment the [the defendants] submitted false applications for the grants to which they were not entitled.²³²

The Third Circuit's decision in *Aldissi* reflects the government's efforts to check the illicit use or misuse of public financial and economic interests, including any fraud or deceit that directly implicates a decision to allocate public assets and resources.

Similarly, the Fifth Circuit has declined to define "money and property" narrowly when dealing with public funds. In *United States v. Hoffman*, defendants were charged under the financial fraud provision of the wire fraud statute.²³³ At trial, the government introduced evidence that the defendants submitted fraudulent claims for film infrastructure tax credits to the state.²³⁴ Specifically, the evidence indicated that the scheme to defraud included submitting false invoices for construction work and film equipment and using complicated transactions to make it appear that transfers of money between bank accounts were connected to the movie production business.²³⁵ The defendants were convicted and they appealed. On appeal, they argued that the state credits were not "money or property" within the meaning of the financial crimes provision of the mail and wire fraud statute.²³⁶

The Fifth Circuit rejected the defendant's contention and declined to narrowly define "money and property" when dealing with public funds. The court held that because tax revenue is property under the fraud statute, it follows that schemes to defraud that implicate a state's tax credit program also fall within the scope of the mail and wire fraud statute.²³⁷

As tax credits reduce the dollars otherwise owed to the state, lying to obtain them has the same effect as lying to evade taxes: the state collects less money . . . Fraud in connection with obtaining those tax credits can affect the state's books as much as fraud used to evade paying Louisiana income taxes. Either situation implicates the state's interest in taxes owed that *Pasquantino* recognizes as property.²³⁸

The court went further and found that schemes to defraud a government spending program fell within the scope of the financial fraud provision of the mail and wire

232. *Id.* at 702.

233. 901 F.3d 523 (5th Cir. 2018).

234. *Id.* at 531.

235. *Id.*

236. *Id.*

237. *Id.* at 537.

238. *Id.*

fraud statute.²³⁹ State tax credits were then found to be the functional equivalent of a government spending program.²⁴⁰ The court explained that:

[F]raud in connection with obtaining a state government grant is undoubtedly subject to wire fraud prosecution. Because there is no bottom-line difference between a government spending program and a tax credit, there is no economic rationale for treating the former as property but not the latter. When it comes to depriving the government of revenue—property under *Pasquantino*—there thus is no meaningful distinction between fraudulently claiming a tax credit, fraudulently obtaining a public grant, or fraudulently failing to report income.²⁴¹

The court also rejected the defendants' argument that the application of the mail and wire fraud statutes to a state film tax credit program raised federalism concerns. It found that there were no federalism concerns implicated by a federal prosecutor's efforts to hold individuals accountable for financial fraud.²⁴²

2. Public Financial and Economic Assets and Resources

The Supreme Court's decision in *Pasquantino* has been extended to official acts of misconduct by state and local government officials that directly implicate a public financial or economic interest.²⁴³ In *United States v. Hird*, a public official and private citizen were charged with conspiracy to violate the mail and wire fraud statute.²⁴⁴ The indictment alleged that the defendants engaged in a traffic ticket fixing scheme intended to deprive the Commonwealth of Pennsylvania and the City of Philadelphia of criminal fines and costs.²⁴⁵ The defendants agreed to plead guilty but preserved their right to appeal based on whether the indictment sufficiently alleged that they engaged in a scheme to defraud within the scope of the financial crime provisions of the mail and wire fraud statute.²⁴⁶ The indictment alleged that the defendants operated a ticket-fixing scheme in the Philadelphia Traffic Court.²⁴⁷

According to the indictment, defendants gave preferential treatment to a select group of individuals with political and social connections who had been cited for traffic offenses.²⁴⁸ The indictment detailed an extensive inventory of preferential treatment, including dismissing tickets, finding individuals not guilty, adjudicating tickets in a manner to reduce fines, and avoiding assignment of points to a driver's

239. *Id.* at 538.

240. *Id.*

241. *Id.*

242. *Id.* at 540.

243. *Id.* at 537.

244. 901 F.3d 196, 200 (3d Cir. 2018). This case was later amended and superseded on other grounds.

245. *Id.* at 201–02.

246. *Id.* at 202.

247. *Id.* at 200, 203.

248. *Id.* at 201–03.

record.²⁴⁹ As a result of the misconduct, the indictment alleged that the City of Philadelphia and Commonwealth of Pennsylvania were deprived of money in the form of criminal monetary penalties.²⁵⁰

On appeal, defendants argued that criminal monetary penalties in the form of traffic fines and costs cannot be regarded as “money or property” to sustain a mail and wire fraud conviction.²⁵¹ They asserted that the fines and costs were simply administrative fees and had no intrinsic economic value.²⁵² The Third Circuit disagreed and held that criminal fines determined by the judicial process are a recognized property interest sufficient to support a mail and wire conviction.²⁵³ The court explained that the indictment alleged that the traffic fines and cost were determined through the judicial process and the defendants’ scheme to defraud intended to compromise these judgments.²⁵⁴ As a result, judgments of guilt were compromised and criminal fines and costs were eliminated or reduced.²⁵⁵

Defendants also asserted that the government did not have a property interest in the fines and costs because any “property right” was “uncertain[.]” and did not attach until there was a final adjudication.²⁵⁶ The court rejected this assertion, finding that the defendants could not use the object of the scheme to defraud—compromising judgments of guilt and reducing and eliminating and fines and costs—as an affirmative defense.²⁵⁷ The court explained that the intent of the scheme to defraud controlled, not the actual influence on a property right.²⁵⁸ Therefore, the indictment clearly alleged that the intent of the scheme to defraud was to reduce or eliminate the traffic fines and costs.²⁵⁹ The court concluded that a scheme to corrupt judgments imposing fines effectively “prevent[s] the government from holding and collecting on such judgments imposes an economic injury that is the equivalent of unlawfully taking money from fines paid out of the government’s accounts.”²⁶⁰

It is clear that proving an official act is not an element of financial crimes offenses and that the *McDonnell* limitation does not apply to these prosecutions. In *Dimora v. United States*, the defendant, a public official, was charged with both the public corruption (bribery and kickback) provision and financial crimes provision of the mail and wire fraud statute.²⁶¹ After *McDonnell*, the defendant sought collateral review of his conviction. The district court found that the defendants’

249. *Id.* at 201.

250. *Id.* at 202–03.

251. *Id.*

252. *Id.* at 207.

253. *Id.* at 208.

254. *Id.* at 204–05.

255. *Id.*

256. *Id.* at 206, 208.

257. *Id.* at 206–07.

258. *Id.* at 207.

259. *Id.*

260. *Id.* at 208.

261. No. 1:17-CV-1288, 2018 WL 5255121, at *1–2, (N.D. Ohio, 2018).

conduct satisfied the official act definition set forth by *McDonnell* and denied the defendants' motion.²⁶² As a part of the decision, the district court distinguished the public corruption provision and the financial crimes provision of the mail and wire fraud statute.²⁶³ The court found that to sustain the traditional bribery count convictions, the government was required to prove a specific link to state action or the conduct of government.²⁶⁴ However, with respect to traditional money or property fraud, the jury was only required to find that the defendant conspired to defraud and to obtain money and property by means of a false statement or material omission.²⁶⁵

D. Federalism Concerns

The Supreme Court has an extensive record of sustaining financial crimes prosecutions and the government's efforts to check the illicit use or misuse of public financial and economic interests.²⁶⁶

Therefore, any federalism concerns implicated by the federal government's efforts to hold state and local officials accountable for fraud or the misapplication of public assets and resources are not sufficient to undermine these prosecutions. This is so because these criminal provisions set forth meaningful boundaries and the purpose of these statutes is to address financial crimes, not to set standards of good government. These financial crimes cases center on the prosecution proving a scheme to defraud rather than a *quid pro quo*.

In *Baroni*, the defendants raised federalism concerns in connection with their challenges to both their mail and wire fraud and federal program funding convictions.²⁶⁷ The defendants argued that the government was improperly attempting "to police state and local officials in the conduct of their official duties."²⁶⁸ The court disagreed and pointed out the diminished federalism concerns that were implicated when federal prosecutors move to hold public officials accountable for fraud and intentionally misapplying public assets and resources.²⁶⁹

The Fifth Circuit has also recognized that the federalism concerns expressed in *McDonnell* are not strongly implicated when prosecutors seek to hold state and local official accountable for official acts of misconduct that implicate public

262. *Id.* at *26.

263. *Id.* at *9–10.

264. *Id.* at *9.

265. *Id.*

266. See *McNally v. United States*, 483 U.S. 350, 356 (1987) (defendant's mail fraud conviction most likely would have been affirmed had the jury been "charged that to convict it must find that the Commonwealth [of Kentucky] was deprived of control over how its money was spent"); *Carpenter v. United States*, 484 U.S. 19, 25–26 (1987) (property within the mail and wire fraud statute includes confidential business information); *Pasquantino v. United States*, 544 U.S. 349, 357–58 (2005) (property within the mail and wire fraud statute includes foreign tax revenue).

267. *United States v. Baroni*, 909 F.3d 550, 569, 575–76 (3d Cir. 2018).

268. *Id.* at 575.

269. *Id.* at 575–76.

financial or economic interests. In *United States v. Reed*, the defendants, a state district attorney and his son, were charged with the financial fraud provision of the federal wire fraud statute.²⁷⁰ At trial, the government introduced evidence that the defendants diverted campaign funds for personal expenses.²⁷¹ The defendants were convicted and appealed. On appeal, defendants contended that the federalism concerns expressed in *McDonnell* applied and that the prosecution impermissibly intruded on the state regulation of government activity.²⁷² Because the charges were brought pursuant to the financial crimes provision and not the public corruption provision, the federalism concerns outlined in *McDonnell* were not implicated.²⁷³ The court found that the allegations were not governed by *McDonnell*. It reasoned that the government's reliance on state campaign finance law was limited and "it did so only to prove non-honest-service wire fraud and related offenses, a different context from *McDonnell*."²⁷⁴ The government charged that the defendants committed "simple wire fraud" by defrauding their donors.²⁷⁵ Therefore, the court concluded that the prosecution was not required to prove that the defendants violated state campaign finance law, "in contrast to *McDonnell*, where the troublesome concept of an 'official act' was agreed to be an element of the honest service fraud and Hobbs Act changes."²⁷⁶ The Fifth Circuit, therefore, declined to extend the federalism concerns expressed in *McDonnell* beyond the charges brought pursuant to the public corruption provisions even where the prosecution involved the conduct of state and local government officials.²⁷⁷ The court explained that "[w]hile state governments certainly have 'the prerogative to regulate the permissible scope of interactions between state officials and their constituencies,' those state officials simultaneously must comply with the federal fraud statutes."²⁷⁸

270. 908 F.3d 102, 107 (5th Cir. 2018).

271. *Id.* at 108–09.

272. *Id.* at 110.

273. *Id.* at 110–12.

274. *Id.* at 111.

275. *Id.*

276. *Id.* at 111–12.

277. *Id.* at 113.

278. *Id.* at 112 (footnote omitted) (quoting *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016)). The defendants suggested that the prosecution impermissibly introduced honest services fraud in to the case. *Id.* at 110, n.16. The court disagreed and found that the government's "evidence spoke to *mens rea* and donor expectations—not to the further question of whether [the defendants] violated campaign finance law or committed honest services fraud." *Id.* at 110–11, n.16. The government's witnesses testified that they had expected their donations be used for campaign activities and used towards typical political campaign expenditures. *Id.* at 113, n.31. The evidence indicated that the donors contributed money to the campaign to support the reelection and that they expected that the money be spent on the campaign. *Id.* at 111. The government did not have to prove violations of state law; instead the jury was charged with finding elements that included terms like misrepresentation and property that have "deep roots" in criminal law. *Id.* at 112. (quoting *United States v. Hoffman*, 901 F.3d 523, 540–41 (5th Cir. 2018)).

IV. PUBLIC CONFIDENCE IN THE CRIMINAL PROCESS

Federal prosecutors have an extensive record of investigating and prosecuting public corruption at the state and local level. These prosecutions act as a check against the illicit use and misuse of public financial and economic assets and resources. In addition, these prosecutions maintain the integrity of the decision-making process relating to the use, disposition, or control of public financial and economic interests. Moreover, by holding individuals with power, access, and influence accountable for criminal misconduct, these prosecutions further the public's trust and confidence in the fundamental fairness criminal justice system. Therefore, these federal public corruption prosecutions serve the interest of justice by holding state and local public official accountable for the illicit use and misuse of public assets and resources and further public confidence in the criminal process.

Moreover, if federal prosecutors do not bring these cases, corrupt public officials will be free to act with impunity. The reason for this is because state and local prosecutors do not have the experience or resources to bring these cases.²⁷⁹ Simply put, financial crimes and the illicit use and misuse of public financial and economic assets and resources is not a "field traditionally policed" by state and local officials. State and local prosecutors typically do not have the experience or investigative resources or leverage to unwind these illicit relationships and complicated financial transactions.²⁸⁰ Violent crime, not financial crime, is the

279. See *United States v. Panarella*, 277 F.3d 678, 694 (3d Cir. 2002) abrogated on other grounds by *Skilling v. United States*, 561 U.S. 358, 410 (2010):

In particular, federal prosecution of state and local public officials can play a beneficial role where state prosecutors are reluctant to bring charges against political allies or superiors. See *United States v. Schermerhorn*, 713 F. Supp. 88, 92 n.4 (S.D.N.Y. 1989) ("[O]ur own experiences in this court have taught us that numerous illegal kickback, election, and like schemes involving state and local officials are, for whatever reasons, often not prosecuted by state law enforcers. It is empirically clear to us, therefore, that in the absence of federal intervention many of these political crimes would go unpunished, and perhaps worse, unnoticed or undiscovered."); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. Cal. L.Rev. 367, 377 (1989) ("For a variety of reasons, not all of them venal or corrupt, local prosecutors have generally been unable to prosecute local corruption consistently and effectively.").

Id.

280. In particular, federal prosecutors have the advantage of an inventory of meaningful obstruction of justice, witness tampering and false statement statutes that can be used as dramatic wedges to further financial crimes and public corruption investigations. Federal law makes it a crime to corruptly intend to influence, obstruct or impede a federal judicial or grand jury proceeding, 18 U.S.C. § 1503(a) (2018), to knowingly intimidate, threaten or corruptly persuade a witness both as to providing testimony and documents, *id.* at § 1512, and to make a false statement to federal law enforcement agents, *id.* at § 1001. See *United States v. Sampson*, 898 F.3d 270, 294 (2d Cir. 2018) (affirming obstruction of justice, witness tampering and false state convictions of state public official); see also Larry Buchanan & Karen Yourish, *Mueller Report: Who and What the Special Counsel Investigated*, N.Y. TIMES (last updated April 17, 2019), <https://www.nytimes.com/interactive/2019/03/20/us/politics/mueller-investigation-people-events.html> (describing several obstruction of justice convictions arising out of the Special

priority for state and local prosecutors.²⁸¹

State and local prosecutors, therefore, rarely have the resources to pursue long-term investigations or the opportunities to develop the skill and experience that is critical to understanding how all the pieces come together in a complex financial investigation. Moreover, state prosecutors are themselves members of the same insular political community. As a consequence, state and local prosecutors and the targets of a public corruption probe are typically the product of the same political and business network of connections.²⁸² This proximately may make it difficult for a state prosecutor to objectively recognize local public corruption and move aggressively to address it. Therefore, if federal prosecutors retreat from these efforts to disrupt the illicit use and misuse of public financial and economic assets and resources,²⁸³ the void will be filled by a culture of impunity, an un-arrested downward spiral of corruption, and a sense that the criminal justice system is weighted in favor of powerful interests.²⁸⁴

Counsel Investigation: Michael Flynn, Mr. Trump's former national security adviser pleaded guilty to lying to the F.B.I. about conversations he had with the Russian ambassador during the presidential transition, Michael D. Cohen, Mr. Trump's former lawyer pleaded guilty to lying to Congress about negotiations to develop a Trump Tower in Moscow during the campaign; George Papadopolis, a former Trump campaign adviser who had multiple contacts with Russians and repeatedly told campaign officials about them, pleaded guilty to lying to the F.B.I. about his contacts and Alex van Zwann, a lawyer who worked with Paul Manafort and Robert Gates, pleaded guilty to lying to investigators about conversations he had with Mr. Gates over work they did together for a pro-Russian Ukrainian political party).

281. See Los Angeles County District Attorney's Office, Office Overview, <http://da.co.la.ca.us/about/office-overview> ("The Los Angeles County District Attorney's Office is the largest local prosecutorial office in the United States . . . The office's top priority is the prosecution of violent and dangerous criminals—murderers, rapists, gang members, child abusers and robbers among them"); Cook County State's Attorney, Office Priorities, <https://www.cookcountystatesattorney.org/about/policy-priorities> ("[T]he Cook County State's Attorney's Office top priorities are . . . [d]eveloping smart strategies to prevent and address violent crime . . .").

282. Jon Hurdle, *Philadelphia District Attorney Pleads Guilty to Bribery and Resigns*, N.Y. TIMES, (June 29, 2017) <https://www.nytimes.com/2017/06/29/us/philadelphia-district-attorney-seth-williams-bribery-guilty-plea.html> (reporting on local prosecutor who accepted bribes in exchange for influencing cases).

283. There is a legitimate expectation that federal prosecutors will exercise their discretion with restraint and avoid the appearance of acting in a punitive or partisan manner. However, by increasing the litigation risk of bringing these public corruption prosecutions, a debilitating feedback loop is sure to develop. As fewer cases are pursued, there will be an irretrievable erosion of the skill and experience necessary to make the judgments to pursue legitimate avenues of inquiry. This will, in turn, result in fewer prosecutions regardless of how heavily evidenced the cases may be. Cf. Katie Benner, *No U.S. Charge Against Officer In Garner Case*, N.Y. TIMES, (July 17, 2019) <https://www.nytimes.com/2019/07/17/todayspaper/quotation-of-the-day-no-us-charge-against-officer-in-garner-case.html> (detailing declination of civil rights prosecution and noting that last time the Justice Department brought a deadly force case against a New York police officer was over twenty years ago).

284. As fewer cases against privileged and well-connected politicians and business people are pursued, a perception will mature that the criminal justice system is fundamentally unfair and disproportionately applied against targets without power, access and influence. Compare Al Watkins, *In Fight Against Violent Crime, Justice Dept. Targets Low-Level Gun Offenders*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/jeff-sessions-gun-charges.html> ("Urged by Attorney General Jeff Sessions to punish offenders as harshly and as quickly as possible, federal prosecutors have increasingly pursued low-level gun possession cases . . ."), with Ben Protess et al., *Trump Administration Sparing Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (November 3, 2018), <https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html> ("Across the corporate landscape, the Trump administration has presided over a sharp decline in financial

CONCLUSION

Financial crimes are undertaken to generate illicit financial benefits or economic gains.²⁸⁵ Stripped to its essential element, public corruption shares the venality of financial crimes and has as its fundamental core the illicit use, management, allocation, acquisition, or disbursement of public financial or economic interests.²⁸⁶

Whether it is public infrastructure contracts, public employment, or the purchase or sale of public real property, government officials have a fiduciary duty to manage public assets and resources in way that is in the public's interest. Federal prosecutors have a legitimate responsibility to act as a countervailing force to hold state and local public official accountable for acts of misconduct and malfeasance that implicate public financial and economic interests.

What may now be emerging is a new pattern and practice of public corruption prosecutions brought under federal criminal law that are centered on the illicit use or misuse of public assets and resources rather than traditional bribery or kickback

penalties against banks and big companies accused of malfeasance . . . The approach mirrors the administration's aggressive deregulatory agenda . . . The decline in corporate penalties from the Justice Department may partly reflect the Trump administration's heavier emphasis on immigration, violent crime and drugs.") and Jesse Eisinger, *How Trump's Political Appointees Overruled Tougher Settlements With Big Banks*, PROPUBLICA (Aug. 2, 2019), <https://www.propublica.org/article/trump-political-appointees-overruled-settlements-with-barclays-royal-bank-of-scotland> (describing how senior Justice Department officials undermined efforts by career federal prosecutors to seek meaningful penalties against two major financial institutions: "[i]n the case of RBC [Royal Bank of Scotland], then Deputy Attorney General Rod Rosenstein decided that the charges should not be pursued as a criminal case, as the prosecutorial team advocated, but rather as a less serious civil one . . . In March 2018, the DOJ settled with Barclays for \$2 billion, a sum dictated by Trump appointees that was far below what staff prosecutors in the Eastern District of New York in Brooklyn had sought . . . After Rosenstein downgraded the case from criminal to civil . . .") and Jesse Eisinger, *Why Manafort and Cohen Thought They'd Get Away With It*, N.Y. TIMES, (August 26, 2018) <https://www.nytimes.com/2018/08/24/sunday-review/manafort-cohen-mueller-white-collar-crime.html> ("The Trump administration is moving in the opposite direction. Its law enforcement agencies are engaged in something of a regulatory strike, especially when it comes to white-collar enforcement. Regulators are not policing companies or industries and are not referring cases to the Justice Department. The number of white-collar cases filed against individuals is lower than at any time more than 20 years . . . During Mr. Trump's first year in office, the Justice Department's fines against companies fell 90 percent from what they were in Mr. Obama's last year in office . . .").

285. See Gabrielle Emanuel & Katie Thomas, *Top Executives of Insys, an Opioid Company, Are Found Guilty of Racketeering*, N.Y. TIMES, (May 2, 2019) <https://www.nytimes.com/2019/05/02/health/insys-trial-verdict-kapoor.html?searchResultPosition=1> (five executives convicted of conspiring to fuel sales of highly addictive fentanyl-based painkiller by not only bribing doctors to prescribe their product but also by misleading insurers about patients' needs for the drug in order to generate \$300 million in annual sales).

286. See *United States v. Cordaro* 933 F.3d 232 (3d Cir. 2019) (affirming public corruption conviction based on steering of public contracts by county commissioner); see also Robert Snell, *Feds: Detroit Airport Manager Took Bribes, Ate Evidence*, THE DETROIT NEWS (May 23, 2018), <https://www.detroitnews.com/story/news/local/wayne-county/2018/05/23/detroit-metro-jim-warner-airport-bribery-indicted-feds/636871002/federal-indictment-alleging-that-public-official-received-bribes-from-contractors-in-exchange-for-18-million-in-contracts-related-to-airport/>. The potential profit that can be obtained by controlling the use and distribution of these public assets and resources explains the sustained growth in the influence industry and the constant collusion between lobbyist, lawyers and consultants with connections to public officials. See Cecilia King and Kenneth P. Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES, (June 5, 2019) (describing how Amazon, Apple, Facebook and Google spent a combined \$55 million on lobbying in 2018).

schemes. Critical to understanding these financial crimes prosecutions is the appreciation that these prosecutions are centered on the government proving that the public officials obtained by fraud or intentionally misapplied public assets and resources rather than proving a *quid pro quo* bribery or kickback scheme that implicates an official act.²⁸⁷ Therefore, federal criminal liability for these offenses are clearly articulated. In addition, these offenses can capture undisclosed self-dealing, glaring conflicts of interest, breach of trust, and other forms of illicit conduct by public officials.

The Circuit Courts of Appeal have resisted any effort to limit the scope of public assets or resources that fall within these financial crimes provisions.²⁸⁸ The scope of these economic and financial interests includes any fraud or misapplication that implicates a government spending program; denies the government revenue; impacts the allocation of public money or any municipal investment, contract, subsidy, loan, guarantee, insurance, or other form of financial transaction; affects any fines determined by the judicial process; and impinges on any right to confidential information.²⁸⁹ These financial crimes provisions also include any fraud or deceit that compromises or corrupts decisions that impact the public financial or economic interest. Federal prosecutors in New Jersey recently tried this new approach. Rather than a traditional bribery or kickback prosecution, prosecutors relied on evidence that the public officials obtained by fraud and intentionally misapplied public assets and resources.²⁹⁰ The Third Circuit affirmed these convictions and the Supreme Court has granted review.²⁹¹

287. The critical element to sustaining a conviction under these financial crimes provisions is proving fraud and deceit. For example, it was the strong and substantial evidence that the public officials in Baroni lied (the “invented sham traffic study”) and that these lies implicated public assets and resources (Port Authority labor costs) that exposed them to criminal liability and resulted in their conviction. It was not the use of government resources of “hundreds of millions in taxpayer dollars from what they called ‘a goody bag’” to secure political support for Christie, Zermike *supra* note 126, that exposed the officials to criminal prosecution. But for this traffic study, it is doubtful that the conduct would have crossed over from political calculation to criminal malfeasance, or “the performance by a public official of an act that is legally unjustified, harmful or contrary to the law.” *Malfeasance*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 2019).

288. It is not unusual for federal prosecutors to manage litigation risk by seeking alternative prosecution path. See Mathew Goldstein et al., *How a National Security Investigation of Huawei Set Off an International Incident*, N.Y. TIMES (December 14, 2018), <https://www.nytimes.com/2018/12/14/business/huawei-meng-hsbc-canada.html> (The investigation of Huawei’s business practices began with a national security investigation and then shifted to whether Huawei deceived HSBC and other banks into facilitating business with Iran in violation of U.S. sanctions. The fraud charges against the CFO “proved to be a better line of attack than trying to build a case on national security grounds.”).

289. See, e.g., *United States v Hoffman*, 901 F.3d 523, 537 (5th Cir. 2018) (object of scheme to defraud to obtain state tax credits); *United States v. Aldissi*, 758 F. Appx 694, 699 (11th Cir. 2018) (object of scheme to defraud to obtain public grant funds); *United States v. Hird*, 901 F.3d 196 (3rd Cir. 2018) (later amended and superseded on other grounds). (object of scheme to defraud to obtain favorable judicial determinations and evade criminal monetary penalties).

290. *United States v. Baroni*, 909 F.3d 550, 560 (3d Cir. 2018), *cert. granted sub nom.*, *Kelly v. United States*, — U.S. —, 139 S. Ct. 2777 (2019).

291. *Id.* at 588.

The Supreme Court's expression of concern about the unchecked exercise of prosecutorial discretion has been clearly articulated in *Skilling* and *McDonnell*.²⁹² Therefore, there is an expectation that the Third Circuit's decision in *Baroni* will be closely scrutinized. However, the Supreme Court and the Circuit Courts of Appeal have an extensive record of upholding convictions based on schemes to defraud that implicate a financial interest. The fact that the defendant in these prosecutions may be a public official should not undermine these convictions.²⁹³

292. See also *Marinello v. United States*, 138 S.Ct 1101, 1108–09 (2018):

Neither can we rely upon prosecutorial discretion to narrow the statute's [obstruction of justice] scope. . . . [T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing "policemen, prosecutors, and juries to pursue their personal predilections," *Smith v. Goguen*, 415 U. S. 566, 575 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (quoting *United States v. Stevens*, 559 U. S. 460, 480 (2010)). And it is why "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute." *Aguilar, supra*, at 600.

293. These financial prosecutions do not interfere with or disrupt the "normal political interaction between public officials and their constituents." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); see *McNally v. United States*, 483 U.S. 350, 360–61 (1987).