REMEMBER ME, "PART C"?: HONEST SERVICES FRAUD SCHEMES INVOLVING BRIBERY UNDER "PART C" OF THE FEDERAL BRIBERY STATUTE POST-MCDONNELL

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In 1988, Congress added a new type of mail or wire fraud offense to federal prosecutors' arsenal: 18 U.S.C. § 1346, commonly known as "honest services fraud."[1] Section 1346 applies to both private individuals and public officials on the federal, state, and local level; however, this article focuses solely on its application to public officials. Because public officials owe citizens their honest services, honest services fraud offenses involve use of the mails or wires to further activity that, by its very nature, deprives citizens of the honest services owed to them.[2] To secure an honest services fraud conviction, the government must prove that a public official failed to disclose his or her breach of the duty to provide honest services as it is the non-disclosure that implicates the fraudulent aspect of the crime.[3]

Initially, honest services fraud occurred when public officials failed to disclose conflicts of interest, self-dealing, or participation in bribe or kickback schemes. Seven years ago, however, the Supreme Court narrowed the scope of the honest services fraud statute in *Skilling v. United States*.[4] Although seminal in its decision to limit honest services frauds to only those schemes involving bribes and kickbacks,[5] *Skilling* left unanswered an important question: what constitutes bribery for the purposes of honest services fraud prosecutions?[6]

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[1] Crimes and Criminal Procedure Act of 1948, 18 U.S.C. § 1346 (2012).

[2] *Id.*

[3] *See* United States v. Siegel, 717 F.2d 9, 14 (2d Cir. 1983).

[4] 561 U.S. 358 (2010).

[5] *Id.* at 408–10.

[6] *See* Amanda Bronstad, *The* 'Skilling' *Anticlimax: Landmark Criminal Precedent Hasn't Mattered Much in Practice*, NAT'L L. J. (July 15, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id_1202610680637&The_Skilling_Anticlimax&slreturn_20130911200753 ("One of the open questions *Skilling* left was: What are the contours of bribery and kickbacks?"); Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY'S L. J. 645, 707–708 (2011) ("With respect to post-*Skilling* honest services prosecutions alleging a scheme involving bribes or kickbacks, the definition of "bribery" and "kickbacks" may not be as straightforward as one might initially conclude."); Thomas M. DiBiagio, *Federal Public Corruption Statutes Targeting State and Local Officials: Understanding the Core Legal Element and the*

Whereas the definitions of bribery contained in the federal bribery statue—18 U.S.C. § 201[7]—emerged as obvious reference points for defining bribery under § 1346, lack of clear direction from the Supreme Court and other incorporation issues resulted in a lack of uniformity among the lower courts. Amidst this confusion, the Supreme Court finally weighed in on the matter in deciding *McDonnell v. United States*, a case involving bribery-variety honest services fraud charges brought against a state official.[8] Accordingly, this article focuses on the state of the law in the wake of *McDonnell.* Ultimately, this article predicts that because the *McDonnell* Court limited the realm of acts satisfying the definition of bribery contained in the more-commonly-charged provisions of the federal bribery statute, federal prosecutors will now attempt to make more use of the lesser-charged, broader sections of the statute in prosecuting public officials for engaging in honest services fraud schemes involving bribery.

I. HONEST SERVICES FRAUD AND *SKILLING V. UNITED STATES*

Prosecutors have long used the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively, to punish individuals for engaging in schemes to defraud or deprive victims of money or property. Recognizing their amorphous nature, however, prosecutors stretched these statutes to reach beyond money and property crimes to get at "corrupt" activity by public officials that deprives citizens of their intangible right to "honest services."[9] Corrupt activity initially charged under the theory ranged from self-dealing, such as use of a public official's authority to secure personal benefits like employment for a relative, to personal pecuniary gain through failures to disclose conflicts of interest.[10] Congress officially sanctioned the honest services fraud theory with the enactment of 18 U.S.C. §1346, which explicitly made deprivation of honest services its own independent grounds for prosecution outside of the property and money context inherent in §1341

Government's Burden of Proving a Corrupt Intent After McDonnell, UNIV. DENV. CRIM. L. REV. 47, 47–48 (2017) ("Because the three public corruption statutes do not use the terms "bribery" or 'kickback," the courts have often struggled to correctly define the critical element of the offense and then to correctly translate this element into an evidentiary burden of proof.").

[7] 18 U.S.C. § 201 (2006).

[8] 136 S. Ct. 2355 (2016).

[9] *See* 561 U.S. 358, 400–04 (2010) (explaining the origin of the honest services doctrine).

[10] *See, e.g.*, United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) ("When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.").

and §1343.[11] Accordingly, honest services fraud defendants are charged with either §1341 or §1342 *and* §1346.

With the enactment of § 1364, the honest services fraud statute emerged as a powerful tool for prosecutors to wield in targeting corruption. It is a tool the courts have simultaneously struggled to find limiting principles for, as prosecutors took a broad view of the phrase "honest services." Nevertheless, when the statute came under attack as unconstitutionally vague,[12] the Supreme Court elected to save it from invalidation in *Skilling v. United States.*[13] It did so by limiting the statute's scope to only those cases involving "offenders who, in violation of a fiduciary duty, participated in *bribery* or *kickback* schemes."[14] As a result, conflict of interest cases could no longer be prosecuted under §1346.

This seemingly straightforward limitation aimed to create a "uniform national standard" for honest services prosecutions,[15] yet a significant ambiguity remained: the statute neither defines bribery nor makes any mention of the word bribe. Further, while *Skilling* held that §1346 prosecutions should "draw[] content not only from the [honest services fraud] case law, but also from federal statutes proscribing—and defining—similar crimes,"[16] it did not address the issue of the federal bribery statute's limited application to federal officials (as opposed to state and local officials). Lacking direction on this issue, both courts and litigants were left questioning how to define bribery for honest services fraud prosecutions.

II. "OFFICIAL ACTS" AND *MCDONNELL V. UNITED STATES*

The Supreme Court formally acknowledged the lack of uniformity regarding a proper definition of bribery in honest services fraud cases in *McDonnell v. United States*.[17] At trial, the government alleged that the

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[11] 18 U.S.C. §1346 ("For the purposes of this chapter, the term 'scheme or artifice to defraud' [as included in §§ 1341 and 1342] includes a scheme or artifice to deprive another of the intangible right of honest services.").
[12] In the period immediately following enactment of section 1346, the circuit courts grappled with questions such as when the duty to disclose the deprivation of honest services arises. *Compare* United States v. Murphy, 323 F.3d 102 (3d Cir. 2003) (finding state law determines the existence of a duty to disclose) *with* United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008) (holding that public officials always owe the public a duty to disclose).
[13] *Skilling*, 561 U.S. at 402–04. The defendant in *Skilling* argued the statute was so vague that it violated due process by failing to provide adequate notice as to what conduct it proscribed. *Id.*
[14] *Id.*
[15] *Id.* at 411.
[16] *Id.* at 412 (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2)).
[17] 135 S. Ct. 2355 (2016).

former governor of Virginia accepted $175,000 in loans, gifts, and other benefits from the CEO of a nutritional supplement company, Star Scientific, in exchange for the governor's influence in arranging research studies of the supplement at Virginia universities to secure Food and Drug Administration approval.[18] McDonnell was charged with both honest services fraud and extortion; however, because neither statute defines bribery, the parties agreed to define bribery using the "official act" requirement set forth in §§ 201(b)(1)(A) and (b)(2)(A) (hereinafter "Part A") of the federal bribery statute.[19] Under this definition, the government would have to show that the governor committed or promised to perform an "official act" in exchange for the loans or gifts.[20]

The parties did not agree, however, that the former governor's actions constituted "official acts," defined by the statute as "any decision or action on any question, matter, cause, suit, proceeding or controversy" currently pending or permissibly brought before a public official in his or her official capacity.[21] The government argued that this language should be viewed broadly to include "nearly any activity by a public official,"[22] including "arranging meetings" for the CEO with other Virginia officials to discuss the product, "hosting" events for Star Scientific at the Governor's Mansion, and "contacting other government officials" concerning the research studies.[23] The Court feared that the government's definition of "official acts" would constitute a "breathtaking expansion of public-corruption law [that] would likely chill . . . officials' interactions with the people they serve, thus damaging their ability to effectively perform their duties."[24] Instead, the Court adopted a more bounded interpretation of "official act" by providing answers to both questions inherent in the requirement: (1) what constitutes a 'question, matter, cause, suit, proceeding or controversy'? and (2) what must the public official promise to do on the 'question, matter, cause, suit, proceeding or controversy'? First, the Court held that a "'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is seminal in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.[25] It then held that public officials must promise to "make a decision or take an action" on the specific matter, either personally or by using his or her official position to exert pressure on

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[18] *Id.* at 2357.
[19] *Id.* at 2365.
[20] 18 U.S.C. § 201(b)(2)(A).
[21] 18 U.S.C. § 201(a)(3).
[22] *McDonnell*, 135 S. Ct. at 2367–68 (quoting the government's brief).
[23] *Id.* at 2365.
[24] *Id.* at 2372 (quoting brief for former federal officials).
[25] *Id.* at 2368.

another official to do so.[26] Proceeding with this definition, the Court then remanded the case with the instruction that merely "setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit [this] definition of 'official act.'"[27]

While reactions to *McDonnell* have been mixed, with some denouncing it as a decision that will drastically limit public corruption prosecutions[28] and others arguing that the constraints imposed are "illusory or limited at best,"[29] the decision does appear on its face to limit prosecutors' ability to reach *certain types* of bribery. First, this narrower definition of official acts more definitively excludes bribes given for the purposes of currying favor or generating goodwill, as these types of return promises do not involve a formal exercise of government power.[30] Second, the decision will likely prohibit honest services fraud charges premised on "stream of benefits" or "as opportunities arise" theories of bribery, which involve giving or offering bribes in exchange for influence on matters that might come up in the future. Seeing as the parties to an illegal bribe under Part A must intend for the public official to take a *specific* action (or lean on someone else to do so) in regard to a *specific* matter, giving or offering bribes for influence on things that might arise in the future is likely not specific enough to fall within the definition of "official act" post-*McDonnell.*[31]

III. Turning to "Part C" for Honest Services Fraud Prosecutions

As was the case in *McDonnell*, most honest services fraud schemes involving bribes are brought with reference to the definition of bribery contained in Part A of the federal bribery statute.[32] As discussed, Part A

[26] *Id.* at 2370.
[27] *Id.* (rejecting the government's definition of official act).
[28] *See, e.g.,* Lyle Denniston, *Opinion Analysis: New Barrier to Public Corruption Cases*, SCOTUSBLOG (June 27, 2016), http://www.scotusblog.com/2016/06/opinion-analysis-new-barrier-to-public-corruption-cases; Amy Davidson, *The Supreme Court's Bribery-Blessing McDonnell Decision*, NEW YORKER (June 27, 2016), http://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision.
[29] Harvey Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt? McDonnell Fails to Draw a Clear Line For Federal Prosecution of State Officials*, 2016 CATO SUP. CT. REV. 189, 204 (2016).
[30] *See* United States v. Sun-Diamond Growers of America, 526 U.S. 398, 405–06 (1999) (denouncing making gratuities given to "build a reservoir of goodwill" illegal as too restrictive).
[31] Additionally, *McDonnell* does not cite to any of the "stream of benefits" theory cases that were favorably cited in *Skilling*. *See* Silverglate & Quinn-Judge, *supra* note 29, at 207.
[32] 18 U.S.C. § 201(b)(1)(A), (b)(2)(A).

prohibits illegal agreements to perform an "official act,"[33] and acts constituting "official acts" are more limited post-*McDonnell.* However, the federal bribery statute contains an alternative definition of bribery: §§ 201(b)(1)(C) and (b)(2)(C) (hereinafter "Part C.").[34] Devoid of the term "official act," these lesser-charged sections of the statute prohibit illegal agreements to perform "act[s] in violation of the lawful duty of such official or person,"[35] broader language that seems to encompass misdeeds that would not fall under Part A's definition of "official act" in the wake of *McDonnell.*

Bribery offenses involving Part C's "violations of lawful duty" have rarely been prosecuted.[36] This is surprising considering this language seems to be broader than that contained in its "official act" counterpart. In fact, some have argued that Congress specifically included Part C to catch misdeeds that would not fall under Part A's definition of official act.[37] Of those bribery prosecutions that have been brought under Part C, the courts have uniformly interpreted the scope of an official's lawful duties broadly; the duties need not be explicitly set by statute but rather encompass those duties traditionally associated with the job.[38] Additionally, whereas mere violations of indefinite moral or ethical codes do not constitute violations of an official's lawful duty,[39] public officials have been convicted of bribery for failing to comply with

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[33] *Id.*

[34] 18 U.S.C. § 201(b)(1)(C), (b)(2)(C); *see also* United States v. Young, 651 Fed. Appx. 202, 203 (2016) ("We need not decide whether [defendant's] actions . . . qualify as 'official acts' under § 201(b)(1)(A) because the Government presented ample evidence that [defendant] violated §201(b)(1)(C).").

[35] 18 U.S.C. § 201(b)(1)(C), (b)(2)(C).

[36] Alexander Sanyshyn, *Public Corruption*, 54 AM. CRIM. L. REV. 1673, n.16 (2010) ("This [survey of public corruption law] will not address bribery offenses involving fraud or violations of lawful duty as these offenses are rarely prosecuted."). It is unclear why prosecutors have relied very little on Part C. One possible explanation is a mere lack of need to rely on Part C when courts embraced a broad definition of official acts under Part A.

[37] *See* George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?*, 52 WAYNE L. REV. 1371, 1384 (2006); U.S. ATTYS. OFFICE, CRIM. RESOURCE MANUAL 2000–2500, § 2044 Particular Elements, Bribery of Public Officials ("If . . . it has been held that the "official act" component is lacking . . . [s]uch a case could nonetheless be charged as an effort to induce a public official to commit a fraud on the United States or to do an act in violation of official duty.").

[38] *See* United States v. Birdsall, 233 U.S. 223, 231 (1914) (reading federal bribery statute to cover duties "not completely defined by written rules [but] clearly established by settled practice"); United States v. Kidd, 734 F.2d 409, 412 (9th Cir. 1984) (Army private bribed to provide false identification cards, though duties regarding cards were not set by statute); *see also* United States v. Fedorovsky, No. TDC-16-0437, at *2 (D. Md. May 18, 2017) (defendant guilty of bribing undercover officer posing as a DOE contract specialist even though officer could not actually award or facilitate award of a DOE contract).

[39] *See* United States v. Morlang, 531 F.2d 183, 192 (4th Cir. 1975).

governmental ethics codes laying out duties as broad as "[avoid] engag[ing] in criminal conduct" or "uphold the laws of all governments within the United States."[40]

Faced with a narrower range of conduct constituting "official acts," federal prosecutors may start to give Part C of the federal bribery statute more attention in pursuing both stand-alone bribery and honest services fraud convictions involving bribery. First, reliance on a broader definition of bribery is pressing in light of the shortcomings of the alternative statutes federal prosecutors rely on to reach *state* and *local* officials for acting corruptly.[41] Second, the quest for alternative theories to support mail and wire fraud charges against public officials is commonplace among federal prosecutors. A notable example of this trend lies in the line of cases demonstrating prosecutors attempts to re-define conflict of interest cases traditionally brought under §1346 pre-*Skilling* as traditional money or property fraud schemes using a "right to control" theory, which argues that victims have been deprived of their *intangible* property "right to control."[42] Although the theory has enjoyed success among the circuit courts, it is worth noting that the Supreme Court has yet to expressly endorse it. In fact, one could argue that in interpreting the federal extortion statute, the line of Supreme Court cases placing emphasis on the term "obtaining"[43] represents the Court's

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[40] United States v. Gjieli, 717 F.2d 968, 977 (6th Cir. 1983).

[41] One such alternative is the federal funds bribery statute, 18 U.S.C. § 666(a)(2), which makes it a crime for state and local officials to accept bribes in connection with the receipt of federal funds. Although attractive in its lack of an explicit quid pro quo requirement, the statute encompasses only those bribes given in connection with any "business" or "transaction" that meet the threshold amount of $5,000. Also, as Justice Ginsburg made clear, "[Section] 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished." Skilling v. United States, 561 U.S. 358, 412 n.45 (2010).

[42] *See* United States v. Wallach, 935 F.2d 445, 463-64 (2d Cir. 1991) (concealing potentially valuable economic information from shareholder defendants deprived them of their "right to control" how the corporation's money was spent); United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998) (defendant sheriff deprived public of their right to control how the county sheriff's department used its funds); *see also* Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After* Skilling, 112 COLUM. L. REV. 359, 390–95 (2012).

[43] The Hobbs Act, 18 U.S.C. § 1951 (1946), which prohibits extortion, defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §1951(b)(2). The Supreme Court has interpreted the statute's term "obtaining of property from another" narrowly.
See, e.g., Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402, 405 (2003) (merely interfering with or depriving someone of property does not constitute "obtaining" it; rather, defendants needed to have "received 'something of value from' respondents that they could exercise, transfer, or sell").

rejection of the theory. Should that be the case, increased reliance on Part C might become even more attractive to federal prosecutors.

Less than two years out from the *McDonnell* decision, there is little case law indicating a rise in honest services fraud prosecutions involving bribery brought with reference to Part C of the federal bribery statute. However, a comparison of a sampling of pre-and post-*McDonnell* indictments brought against public officials for engaging in similar conduct suggests federal prosecutors have begun realizing Part C's prosecutorial potential. More specifically, between the years of 2007–2014, some prosecutors brought charges under both Part A and, *alternatively*, Part C of the federal bribery statute in their indictments of public officials for soliciting or accepting bribes in exchange for influence on the award of certain government contracts.[44] In 2016 and 2017, however, a number of indictments alleging the same general behavior (bribes in exchange for influence on the award of government contracts) were brought *solely* under Part C—bribes in exchange for inducing the public official to "violate [their] lawful duty."[45] Moreover, the bribes alleged in these recent indictments seemingly constitute the very type of "stream of benefits" arrangements rejected by *McDonnell* in that they involve exchanges of money for favorable treatment of future contract opportunities, as they arise. As such, rather than refrain from prosecuting these theories of bribery, these indictments reflect prosecutors' attempts to charge such exchanges under Part C instead.

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[44] *See* Porter Indict. ¶ 2, September 30, 2014, ECF No. 8, https://www.justice.gov/criminal-fraud/file/898661/download; Bebus Indict. ¶ 2, September 26, 2014, ECF No. 9, https://www.justice.gov/criminal-fraud/file/844631/download; West Indict. ¶ 68, June 18, 2009, ECF No. 201, https://www.justice.gov/atr/case-document/file/516441/download; Cobos Indict. ¶ 21, May 6, 2009, ECF No. 24, https://www.justice.gov/atr/case-document/file/492101/download; Cockerham Indict. ¶ 49, August 22, 2007, https://www.justice.gov/atr/case-document/file/492111/download.

[45] *See* Press Release, DOJ, Owner Of Defense Contracting Firm Sentenced To 5 Years In Prison For Paying Bribes To Civilian Employee At Aberdeen Proving Ground (Nov. 8, 2017), https://www.justice.gov/usao-md/pr/owner-defense-contracting-firm-sentenced-5-years-prison-paying-bribes-civilian-employee (stating that defendant "solicit[ed] and accept[ed] a stream of benefits, worth approximately $33,000 . . . in exchange for [] ***favorable treatment of [bribee's] business interests*** in contracting with the United States, ***as opportunities arose,*** in relation to [the government contract] in violation of [defendant's] *lawful duty* to the U.S. Army Public Health Command."); Press Release, DOJ, Private Contractor Pleads Guilty to Bribing Former U.S. Postal Service Contracting Official (Feb. 10, 2016), https://www.justice.gov/usao-md/pr/private-contractor-pleads-guilty-bribing-former-us-postal-service-contracting-official (stating that "[defendant] admitted that she gave [] benefits in exchange for [public official's] ***favorable treatment*** of her companies ***when contracting opportunities with the USPS arose***, in violation of [public official's] *lawful duty* to the USPS.").

CONCLUSION

In ruling that parties to an illegal bribe under Part A of the federal bribery statute must intend for the public official to take a *specific* action (or lean on someone else to do so) on a *specific* matter, the *McDonnell* Court limited the realm of actions constituting a public official's "official actions"[46]—the *quo* in Part A's requisite *quid pro quo* determination.[47] This narrowing of Part A's definition of bribery restricts federal prosecutors' ability to prosecute honest services fraud schemes involving bribes for the purpose of currying favor or in exchange for influence on things that "might arise" in the future (the "stream of benefits" theory). Fortunately for prosecutors, the federal bribery statute includes an alternative provision containing broader language and seemingly sweeping up a wider range of illegal bribe agreements: "Part C" of the statute. Faced with imitations on the scope of permissible honest services fraud charges brought in relation to Part A, federal prosecutors may now attempt to make more use of Part C of the federal bribery statute in prosecuting public officials for honest services

[46] 18 U.S.C. § 201(b)(1)(A), (b)(2)(A).
[47] *Id.*