

MCDONNELL V. UNITED STATES: LEGALIZED CORRUPTION AND THE NEED FOR STATUTORY REFORM

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ABSTRACT—In 2016, the Supreme Court granted certiorari to former Governor Bob McDonnell’s public corruption case. In 2014, a federal jury found McDonnell guilty of eleven counts of public corruption for accepting over \$175,000 worth of gifts and loans from Virginia businessman Jonnie Williams. The conviction was affirmed by the Fourth Circuit. In overturning the Fourth Circuit, the Supreme Court significantly narrowed the definition of an “official act” in the federal bribery statute, which is the controlling statute in most public corruption cases. This Comment argues that the Court’s decision unduly narrows the bribery statute’s scope to punish only the most egregious acts of public corruption. This Comment suggests drawing upon a hybrid between the agency and corporate duties of loyalty in private law to amend the federal bribery statute and provide a more practicable standard by which courts can distinguish between regular constituent services and unlawful public corruption.

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INTRODUCTION

Public corruption is not a new phenomenon in American politics, but it remains one that poses a fundamental threat to our institutions and way of life.¹ Widespread corruption degrades public office and can erode public faith in institutions.² Despite the severity of the public corruption threat, the Supreme Court has steadily confined its interpretation of the federal bribery statute,³ culminating in its highly controversial 2016 decision, *McDonnell v. United States*.⁴ In 2014, former Virginia Governor Bob McDonnell was convicted of eleven counts of public corruption⁵ for accepting over \$175,000 worth of gifts and loans from Virginia businessman Jonnie Williams.⁶ The Fourth Circuit upheld the conviction only to have the Supreme Court reverse and vacate the decision.⁷ The Supreme Court held that McDonnell’s actions of setting up meetings, talking to other officials, and organizing events for

¹ See *What We Investigate: Public Corruption*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/investigate/public-corruption> [<https://perma.cc/FKY3-A4L9>] (briefly explaining the types of federal public corruption the FBI investigates and why such corruption is a threat).

² See Matt Ford, *Has the Supreme Court Legalized Public Corruption?*, ATLANTIC (Oct. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/10/menendez-mcdonnell-supreme-court/543354/> [<https://perma.cc/NN2K-XN6J>] (arguing that Supreme Court rulings that recast public corruption as acceptable behavior for public officials “could imperil the public’s faith in democratic institutions”).

³ 18 U.S.C. § 201 (2012).

⁴ *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (vacating former Governor Bob McDonnell’s convictions under the federal bribery statute).

⁵ Rosalind S. Helderman & Matt Zapotosky, *Ex-Va. Governor Robert McDonnell Guilty of 11 Counts of Corruption*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/local/virginia-politics/mcdonnell-jury-in-third-day-of-deliberations/2014/09/04/0e01ff88-3435-11e4-9e92-0899b306bbea_story.html?utm_term=.9a41eafb0fa6 [<https://perma.cc/X3A7-4B35>].

⁶ *McDonnell*, 136 S. Ct. at 2362–65.

⁷ *United States v. McDonnell*, 792 F.3d 478, 520 (4th Cir. 2015), *cert. granted in part*, 136 S. Ct. 891 (2016), *vacated*, 136 S. Ct. 2355 (2016).

Williams did not fit the definition of “official act[s]”⁸ as specified in the federal bribery statute.

The Court’s decision characterized McDonnell’s actions as distasteful, but not corrupt, leading some lawyers to wonder if actions that had been previously denounced as corrupt were now deemed lawful behavior for public officials.⁹ In effect, the ruling legalized paying a public official for political access, so long as the Court is unable to identify an official act under the narrowed definition.¹⁰ While the Court’s opinion in *McDonnell* built on the Court’s precedent, it left many wondering why behavior as egregious as McDonnell’s should be allowed to fall through statutory cracks.¹¹ Given the Court’s apparent unwillingness to take a stronger stance on public corruption law, statutory amendment currently offers the best solution to fill these statutory cracks.

This Comment discusses the tension between the legal validity and ethical discomfort associated with the *McDonnell* decision and argues that the best way to reconcile these tensions is to incorporate a hybrid of the duty of loyalty inherent in private agency and corporate relationships into the federal bribery statute. In doing so, this Comment proceeds in four Parts. Part I provides the factual, procedural, and statutory background of the *McDonnell* case. Part II summarizes the prevailing competing theories underlying public corruption law. Part III introduces the concept of fiduciary duty of loyalty in the business context. Finally, Part IV proposes a hybrid standard of review for public corruption cases using the duties of loyalty in agency law and in corporate law and argues that this standard should be incorporated into future amendment of the federal bribery statute.

I. BACKGROUND

Virginia Governor Bob McDonnell’s convictions primarily concerned his relationship with Virginia businessman Jonnie Williams. Williams was the chief executive officer of Star Scientific, a Virginia-based company that developed a nutritional supplement called Anatabloc.¹² Williams was in the process of seeking research that would persuade the Food and Drug

⁸ *McDonnell*, 136 S. Ct. at 2372; *see also* 18 U.S.C. § 201(a)(3) (2012).

⁹ *See* Ford, *supra* note 2.

¹⁰ After the *McDonnell* decision came down, Randall Eliason, a George Washington University law professor and former federal prosecutor remarked, “[Y]ou can just pay for access as long as the official doesn’t actually agree to decide something for you, but can get you in the room with the other movers and shakers who are going to do it. Now that’s not considered corruption.” *Id.*

¹¹ *Id.* (“What *McDonnell* and other recent public-corruption rulings risk are institutions where cash and favors flow freely, where consequences are exceptional, and where public vice is made indistinguishable from civic virtue.”).

¹² *McDonnell*, 136 S. Ct. at 2362.

Administration (FDA) to classify Anatabloc as a pharmaceutical drug, which would significantly enhance its profitability.¹³ McDonnell first met Williams in 2009 when Williams offered McDonnell the use of his private airplane to assist with McDonnell's election campaign.¹⁴ After McDonnell was elected governor in 2010, Williams once again brought McDonnell on his private plane, at which point Williams mentioned that he could use the Governor's help with securing funding from a Virginia state agency for Anatabloc research at one of Virginia's public universities.¹⁵ McDonnell agreed to introduce Williams to Dr. William Hazel, Virginia's then-Secretary of Health and Human Resources.¹⁶ The following spring, McDonnell's wife, Maureen McDonnell, offered to seat Williams next to the Governor at a political rally.¹⁷ Before the rally, Williams took Mrs. McDonnell on a \$20,000 shopping spree.¹⁸

A few days after the rally, during a meeting at the governor's mansion, Mrs. McDonnell agreed to assist in marketing Anatabloc, and she asked Williams for a \$15,000 gift and \$50,000 in loans to help with her family's financial troubles.¹⁹ That summer, the McDonnells visited Williams's vacation home and the Governor borrowed Williams's Ferrari during the vacation. Shortly after the vacation, McDonnell asked Dr. Hazel to send a staff member to meet with Williams about Star Scientific.²⁰ In August 2011, McDonnell hosted a lunch at the governor's mansion during which Star Scientific gave out free samples of Anatabloc and distributed eight \$25,000 checks to researchers from Virginia's public universities for the preparation

¹³ *United States v. McDonnell*, 792 F.3d 478, 487 (4th Cir. 2015), *cert. granted in part*, 136 S. Ct. 891 (2016), *vacated*, 136 S. Ct. 2355 (2016); *see also Is It Really 'FDA Approved?'*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm047470.htm> [<https://perma.cc/7M6H-F3TR>] (“New drugs and certain biologics must be proven safe and effective to FDA’s satisfaction before companies can market them in interstate commerce.”).

¹⁴ *McDonnell*, 136 S. Ct. at 2362.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Williams paid \$11,000 for clothes at Oscar de la Renta, spent \$5,685 at Louis Vuitton, and spent \$2,604 at Bergdorf Goodman during the shopping trip in New York City. Rosalind S. Helderma et al., *Former Va. Gov. and Wife Charged in Gifts Case*, WASH. POST (Jan. 21, 2014), https://www.washingtonpost.com/local/virginia-politics/former-va-gov-mcdonnell-and-wife-charged-in-gifts-case/2014/01/21/1ed704d2-82cb-11e3-9dd4-e7278db80d86_story.html?noredirect=on&utm_term=.96e1c27d51dc [<https://perma.cc/LUY5-WNBM>].

¹⁹ *McDonnell*, 136 S. Ct. at 2362–63. In December 2009, Maureen McDonnell emailed her husband and said, “We are broke, have an unconscionable amount in credit card debt already, and this Inaugural is killing us!” Further, “[t]wice, authorities said the McDonnells went to Williams for loans as they struggled to make payments on expensive beach houses they had bought in Virginia Beach with the intention of renting them to vacationers.” Helderma et al., *supra* note 18.

²⁰ *McDonnell*, 136 S. Ct. at 2363.

of grant proposals.²¹ Finally, Williams bought a Rolex watch for Mrs. McDonnell to gift to her husband as a Christmas present, loaned the McDonnell family an additional \$20,000, and gave the McDonnells' daughter a wedding gift of \$10,000.²²

Between 2009 and 2012, the McDonnells accepted over \$175,000 worth of gifts and loans from Williams while the Governor arranged meetings between Williams and state agency officials.²³ The investigation and trial that ensued captured the public's attention.²⁴ Although numerous elected officials nationwide have faced corruption charges,²⁵ the combination of McDonnell's defense—which highlighted his crumbling marriage as the basis for his misdeeds—and the scale of the financial exchanges between the McDonnells and Williams left many spectators intrigued, perplexed, and seeking answers.

A. *Anti-Corruption Law and the Federal Bribery Statute*

While it may seem apparent that McDonnell accepted extravagant gifts from Williams and provided him favors in return, the exchanges outlined above fail to meet the high bar for establishing bribery under federal law. It is helpful to distinguish between the social perception of public corruption and the current legal definition of corruption. What society and courts view as corrupt political conduct depends largely on social and political norms, which are difficult to codify into law.²⁶ Although U.S. federal public corruption statutes are not particularly consolidated or organized, the general

²¹ *Id.*

²² *Id.* at 2363–65.

²³ *Id.* at 2362–65.

²⁴ See, e.g., Trip Gabriel, *Former Governor in Virginia Guilty in Bribery Case*, N.Y. TIMES (Sept. 4, 2014), <https://www.nytimes.com/2014/09/05/us/bob-mcdonnell-maureen-mcdonnell-virginia-verdict.html> [<https://perma.cc/H3Y9-5RTB>]; Frank Green & Jim Nolan, *McDonnell Trial Judge: 'A Price Must be Paid'*, RICHMOND TIMES-DISPATCH (Jan. 7, 2015), http://www.richmond.com/news/virginia/government-politics/mcdonnell-trial-judge-a-price-must-be-paid/article_025024c5-5bbb-5ca3-8772-323a12f37e4b.html [<https://perma.cc/27AL-S492>]; Amy Davidson Sorkin, *The Supreme Court's Bribery-Blessing McDonnell Decision*, NEW YORKER (June 27, 2016), <https://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision> [<https://perma.cc/M655-688M>].

²⁵ See, e.g., Rebecca Davis O'Brien & Erica Orden, *Federal Prosecutors Launch Assault on Public Corruption in New York State*, WALL ST. J. (Mar. 6, 2015), <https://www.wsj.com/articles/federal-prosecutors-launch-assault-on-public-corruption-in-new-york-state-1423534577> [<https://perma.cc/6KSQ-DTBK>] (highlighting federal prosecutorial strategy on targeting corruption among Albany public officials).

²⁶ See, e.g., Mark Philp, *Conceptualizing Political Corruption*, in POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 41, 46 (Arnold J. Heidenheimer & Michael Johnston eds., 3d ed. 2002) (noting that rules cannot capture the sense of inappropriateness of behavior that underlies an accusation of corruption).

idea of *quid pro quo* bribery,²⁷ or trading government action for private enrichment, underpins the federal bribery statute and other statutes that incorporate the federal bribery statute's standard by reference.²⁸ A prototypical example of a *quid pro quo* is an elected official voting for a piece of legislation in return for a sum of cash from a constituent. While this type of *quid pro quo* behavior is obvious and egregious enough to be characterized as corrupt conduct, it can often be extremely difficult to prove all three necessary components: (1) the *quid* (thing given to the official), (2) the *pro* (in exchange for), and (3) the *quo* (official act).²⁹

Investigation into whether a specific fact pattern meets each part of the *quid pro quo* formula is the basis of public corruption law.³⁰ Unfortunately, most public corruption cases do not fit neatly within a prototypical *quid pro quo* scenario—they are usually far more ambiguous. For example, instead of voting for a piece of legislation, an elected official might simply speak favorably about a private interest group to the relevant congressional committee, still in return for cash. In that scenario, while the *quid* still exists, it may be more difficult to establish the *quo* element, since speaking favorably of an interest group would likely not qualify as an “official act” (the *quo*) under statute.³¹ Prosecutors thus face a high burden of proof when bringing federal corruption charges.³²

The language of the federal bribery statute explicitly makes it a crime for a public official to “receive or accept anything of value” in exchange for

²⁷ See *McDonnell*, 136 S. Ct. at 2372 (“Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an ‘official act.’”).

²⁸ Core statutes include 18 U.S.C. § 201 (2012) (criminalizing bribery and illegal receipt of gratuities); 18 U.S.C. § 666 (2012) (criminalizing bribery involving federal funds); 18 U.S.C. § 1951 (2012) (the Hobbs Act, criminalizing extortion in interstate commerce); 18 U.S.C. §§ 1341 (2012) (covering “[f]rauds and swindles”); and 18 U.S.C. § 1346 (2012) (the honest services statute, limited by *Skilling v. United States*, 561 U.S. 358 (2010), in which the Court interpreted the statute narrowly as an anti-bribery measure).

²⁹ Jacob Eisler, *McDonnell and Anti-Corruption's Last Stand*, 50 U.C.D. L. REV. 1619, 1629 (2017) (“Each element of *quid pro quo*—the *quid* the public official receives, the *quo* he performs for the private party, and the *pro* connecting them—can be variously parsed, producing shifting levels of obligation.”).

³⁰ *Id.* at 1627 (“In legal enforcement, corrupt acts are often characterized as *quid pro quo* bribery, wherein the official trades governmental action in exchange for private enrichment.”).

³¹ *Id.* at 1629; see also 18 U.S.C. § 201(a)(3) (2012) (“[A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”).

³² See Nick Corasaniti, *Overtured Convictions Loom Over Menendez’s Corruption Trial*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/nyregion/overtured-convictions-loom-over-menendezs-corruption-trial.html> [<https://perma.cc/GTR7-4ZR2>] (noting that “prosecutors in Mr. Menendez’s case have a well-defined higher bar to clear” in the post *McDonnell* era, after the definition of *quid pro quo* was severely narrowed).

being “influenced in the performance of any official act.”³³ The statute defines “official act” as: “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”³⁴ The gravamen of the dispute in McDonnell’s case was whether his actions throughout his dealings with Williams qualified as “official act[s]” under the federal bribery statute.³⁵

Among the eleven counts brought against McDonnell, prosecutors argued that McDonnell accepted bribes and kickbacks in violation of the federal Hobbs Act³⁶ and honest services fraud statutes.³⁷ McDonnell and the government agreed that the Hobbs Act extortion and honest services fraud under which McDonnell was charged should be evaluated according to the federal bribery statute, since the charges were based on allegations of bribery.³⁸ Therefore, the case turned on each court’s interpretation of “official act” within the federal bribery statute. Unless a jury could find that McDonnell’s acts constituted “official acts” under the bribery statute, the former Governor could not be convicted.

B. McDonnell’s Path to the Supreme Court

After McDonnell was charged, his fate rested on each court’s determination of whether his favors to Williams met the definition of “official act.” In 2014, a federal jury convicted McDonnell and his wife of eleven counts of public corruption, rooted in the federal bribery statute.³⁹ The government’s proposed jury instruction, which the district court issued to the jury, included the statutory definition of “official act”⁴⁰ and defined the term

³³ 18 U.S.C. § 201(b)(2) (2012).

³⁴ § 201(a)(3).

³⁵ *McDonnell*, 136 S. Ct. at 2361.

³⁶ 18 U.S.C. § 1951(a) (2012).

³⁷ The honest services fraud statutes criminalize “fraudulent schemes to deprive another of honest services through bribes or kickbacks.” *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (citing *Skilling v. United States*, 561 U.S. 358, 404 (2010)). “The Hobbs Act prohibits obtaining property ‘under color of official right,’ 18 U.S.C. § 1951, and the Court has interpreted the statute to encompass ‘taking a bribe.’” *Federal Corruption Statutes—Bribery—Definition of Official Act—McDonnell v. United States*, 130 HARV. L. REV. 467, 468 n.22 (2016) (internal citations omitted). Therefore, the federal bribery statute’s definition of bribery is incorporated by reference into honest services fraud based on bribery and Hobbs Act extortion charges.

³⁸ *McDonnell*, 136 S. Ct. at 2365; *see also Skilling*, 561 U.S. at 358 (2010) (holding in part that the honest services statute covers only bribery and kickback schemes).

³⁹ *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014), *aff’d*, 792 F.3d 478 (4th Cir. 2015), *cert. granted in part*, 136 S. Ct. 891 (2016), *vacated*, 136 S. Ct. 2355; Helderman & Zapotosky, *supra* note 5.

⁴⁰ *See supra* Part I.A.

to encompass “actions that have been clearly established by settled practice as part of a public official’s position, even if the action was not taken pursuant to responsibilities explicitly assigned by law.”⁴¹ These instructions further stated that official actions may include acts “that a public official customarily performs,” “in furtherance of longer-term goals” or “in a series of steps to exercise influence or achieve an end.”⁴² After his conviction, McDonnell appealed the decision, arguing, in part, that the court had given the jury erroneous instructions about what could constitute an official act.⁴³

The Fourth Circuit heard the *McDonnell* case in July 2015. On appeal, McDonnell argued that the trial court’s jury instructions were overly broad and would render “virtually all of a public servant’s activities ‘official,’ no matter how minor or innocuous.”⁴⁴ McDonnell further argued that activities like the luncheons, meeting arrangements, and photographs in which he participated can never, in and of themselves, constitute official acts.⁴⁵ The Fourth Circuit rejected this argument, holding that “when prosecuting a bribe recipient, the Government need only prove that he or she solicited or accepted the bribe in return for performing, or being influenced in, some particular official act”—the official act does not need to be complete in order to convict.⁴⁶ The court further reasoned that to the extent that McDonnell “made any ‘decision’ or took any ‘action’ on these matters, the federal bribery laws would hold that decision or action to be ‘official.’”⁴⁷ The court concluded that the government had met its burden of showing that McDonnell made a corrupt agreement with Williams and had used the power of his office to influence governmental decisions about research into Anatabloc.⁴⁸

The Supreme Court reversed the Fourth Circuit, holding that the jury was erroneously instructed on the meaning of “official act” and that the error

⁴¹ See *McDonnell*, 792 F.3d at 505–06 (“The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official’s official capacity [O]fficial actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.”).

⁴² *McDonnell*, 136 S. Ct. at 2373.

⁴³ *Id.* at 2367.

⁴⁴ *McDonnell*, 792 F.3d at 506.

⁴⁵ *Id.*

⁴⁶ *Id.* at 510.

⁴⁷ *Id.* at 516 (citing 18 U.S.C. § 201(a)(3)).

⁴⁸ *Id.*

was not harmless beyond a reasonable doubt.⁴⁹ The Court agreed with the Fourth Circuit’s preliminary findings that the first prong of official action was met and that there were at least three pending questions or matters about Anatabloc upon which McDonnell could have taken official action.⁵⁰ These pending matters were: (1) whether researchers at Virginia’s state universities would initiate a study of Anatabloc; (2) whether Virginia’s Tobacco Commission would allocate grant money for studying anatabine; and (3) whether Virginia’s health plan for state employees would cover Anatabloc.⁵¹ However, the Court emphasized that in order for action to qualify as “official,” or an adequate *quo* in the quid pro quo framework, the public official “must make a decision or take an action *on* [the identified] question or matter, or agree to do so.”⁵² The Court concluded that McDonnell’s acts of setting up a meeting, hosting an event, and calling other officials about pending Anatabloc matters did not constitute “official action[s]” on the identified matters.⁵³

In vacating McDonnell’s conviction and remanding the case, the Supreme Court relied on its holding in *United States v. Sun-Diamond Growers of California*.⁵⁴ In *Sun-Diamond*, the Court addressed whether a corporation’s payment of gratuities to public officials violated the federal bribery statute. In holding that Sun-Diamond did not violate the statute, the Court declared that the “[g]overnment must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”⁵⁵ *Sun-Diamond* specifically listed examples that would not qualify as an official act, including the President hosting a sports team at the White House or the Secretary of Agriculture “deliver[ing] a speech to ‘farmers concerning various matters of USDA policy.’”⁵⁶ This interpretation narrowed the definition of “official act” substantially. Therefore, applying the definition of “official act” as limited by *Sun-Diamond*, the *McDonnell* Court stated that even if an event, meeting, or speech is related to a pending question or matter, the public official must do something more in order for his act to constitute a decision, action, or agreement to take action on that pending question or matter.⁵⁷

⁴⁹ *McDonnell*, 136 S. Ct. 2355, 2375 (2016).

⁵⁰ *Id.* at 2369–70.

⁵¹ *Id.*

⁵² *Id.* at 2370.

⁵³ *Id.* at 2372.

⁵⁴ 526 U.S. 398 (1999).

⁵⁵ *Id.* at 414.

⁵⁶ *McDonnell*, 136 S. Ct. at 2370 (quoting *Sun-Diamond*, 526 U.S. at 407).

⁵⁷ *Id.*

The *McDonnell* Court mentioned additional actions that could qualify as official acts based on its prior decisions in *United States v. Birdsall*⁵⁸ and *Evans v. United States*.⁵⁹ In *Birdsall*, the Court held that using an official position to exert pressure on another official to perform an official act, or using an official position to “provide advice to another official, knowing or intending that such advice will form the basis for an ‘official act,’” can qualify as a decision or action under the federal bribery statute.⁶⁰ Applying *Birdsall* to McDonnell’s case, the Court determined, based on testimony from aides and agency officials, that McDonnell did not exert such pressure on another official.⁶¹ In *Evans*, the Court held that an agreement to perform an official act is sufficient for the conduct to fall under the bribery statute.⁶² Applying this reasoning to McDonnell, the Court held that although it was possible for the jury to find such agreement in McDonnell’s case, the official act prong would remain unsatisfied.⁶³ In explaining how McDonnell’s conduct should be analyzed under the federal bribery statute and its prior rulings, the Court appeared to be guiding the Fourth Circuit through its narrowed definition of “official act” for reference on remand of the case.

Ultimately, federal prosecutors asked the Fourth Circuit to remand the case to the district court so they could file a motion to dismiss. The Department of Justice (DOJ) issued the following statement: “After carefully considering the Supreme Court’s recent decision and the principles of federal prosecution, we have made the decision not to pursue the case further.”⁶⁴ McDonnell and his wife walked free after a two-year public ordeal, narrowly escaping prison time.⁶⁵

II. CRIMINALIZING POLITICS OR ENFORCING ACCOUNTABILITY?

The *McDonnell* decision carries hefty implications for the prosecution of public officials on bribery grounds.⁶⁶ Almost immediately, the decision

⁵⁸ 233 U.S. 223 (1914).

⁵⁹ 504 U.S. 255 (1992).

⁶⁰ *McDonnell*, 136 S. Ct. at 2370 (citing *Birdsall*, 233 U.S. at 234).

⁶¹ *Id.* at 2363.

⁶² *Evans*, 504 U.S. at 260–61 (construing Hobbs Act extortion to include “taking a bribe”).

⁶³ *McDonnell*, 136 S. Ct. at 2371.

⁶⁴ Press Release, U.S. Department of Justice Office of Public Affairs, Justice Department Moves to Dismiss McDonnell Charges (Sept. 8, 2016), <https://www.justice.gov/opa/pr/justice-department-moves-dismiss-mcdonnell-charges> [<https://perma.cc/S62D-AFFS>].

⁶⁵ See Josh Gerstein, *Supreme Court Overturns Bob McDonnell’s Corruption Convictions*, POLITICO (June 27, 2016), <https://www.politico.com/story/2016/06/supreme-court-overturns-bob-mcdonnells-corruption-convictions-224833> [<https://perma.cc/BL3G-BK7Y>] (reporting the Supreme Court’s decision to vacate the conviction).

⁶⁶ See, e.g., Corasaniti, *supra* note 32 (“The McDonnell ruling has ‘made it much more difficult for the government and it made it much more difficult to define actual acts that were taken,’ said Michael

fueled scholarly debate about the competing interests in functional representative government and public accountability.⁶⁷ On the one hand, it is important to strive to achieve a system of democratic representation in which elected officials may freely interact with a variety of constituents and interest groups while in office.⁶⁸ On the other hand, society seeks to deter public officials from behaving unethically or using public office for self-dealing.⁶⁹ Such self-serving behavior can undermine the functioning of the representative government. From these competing interests, two more competing interests emerge: (1) protecting routine political exchanges from criminalization (the “criminalization critique”), and (2) ensuring that public officials are held accountable for self-dealing while in office. This Part discusses each competing interest in turn.

A. *The Criminalization Critique*

There is a strong argument favoring a narrow interpretation of “official act” in the interest of enabling public officials to interact freely with their constituents without fear of criminalization.⁷⁰ Along these lines, the *McDonnell* Court rejected the government’s broad interpretation of the statute, because it could cause public officials to question whether they could “respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.”⁷¹ The Court worried that such a vague, expansive interpretation would fail to adequately define the crime and could result in arbitrary

Weinstein, a former trial attorney for the Department of Justice. “Not a setup, not a meeting, but a real action that the representative took. That’s a higher burden and a higher standard than had existed previously.”).

⁶⁷ Jennifer Ahearn, *A Way Forward for Congress on Bribery After McDonnell*, 21 PENN ST. L. REV. 1013, 1024–25 (2017) (advocating for clarification of the federal bribery statute using language in the existing federal financial conflicts of interest statute and related regulations promulgated by the Office of Government Ethics); Henry L. Chambers, Jr., *The McDonnell Case: A Clarification of Corruption Law or a Confusing Application of Corruption Law*, 50 U. RICH. L. REV. 237, 244–54 (2015) (discussing what official acts a public official must take to be guilty under the public corruption statutes the McDonnells were convicted of violating).

⁶⁸ See George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 13 (2017) (stating the “broader view of American politics and government as highly reciprocal and marked by interactions of all types.”).

⁶⁹ Eisler, *supra* note 29, at 1627 (“Corruption can be understood as deviation from political integrity . . . and a particular corrupt act can be understood as the violation of a political duty.”). Self-dealing is when one acts “out of self-interest when one should be acting in the interest of another.” William Statsky, WEST’S LEGAL THESAURUS/DICTIONARY 684 (1985).

⁷⁰ *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (“The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns The Government’s position could cast a pall of potential prosecution over these relationships This concern is substantial.”) (emphasis omitted).

⁷¹ *Id.*

enforcement against public officials, depriving them of their constitutionally guaranteed right to due process.⁷² Proponents of the criminalization critique are primarily concerned that a broad construction of the bribery statute would enable federal criminal authorities to bring charges against public officials for “everyday political practices essential to representative government.”⁷³ Some proponents⁷⁴ contend that McDonnell’s “favors” to Williams constituted routine political activities “essential to representative government.”⁷⁵ Assuming that is true, to convict McDonnell would be to criminalize politics.⁷⁶

The “criminalization of politics” critique is not new and has been part of American legal and political discourse for quite some time.⁷⁷ The critique has typically focused on issues of federalism, statutory vagueness, and abuse of prosecutorial discretion.⁷⁸ One particular facet of the critique that has dominated the discourse is that prosecutions of public officials have targeted political practices that are invariably part of representative democracy, and are frequently beneficial to the system.⁷⁹ Under this view, exchanges between public officials and constituents are integral to the political process and

⁷² *Id.* at 2373; *see also* *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (“To satisfy due process, ‘a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.’”) (citation omitted).

⁷³ Brown, *supra* note 68, at 4–5.

⁷⁴ *E.g.*, Amicus Curiae Brief of the American Center for Law and Justice in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), at 11 (“The right to participate in democracy through political contributions is protected by the First Amendment.” (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014))); Amicus Brief of Former Virginia Attorneys General in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), at 16 (“The expansive interpretation of those statutes by the court of appeals will chill the exercise by citizens of their First Amendment rights to participate in the democratic process. Such a result, if not overturned by this Court, would wreak havoc on the public life of this nation.”).

⁷⁵ Brown, *supra* note 68, at 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at 11 (“The criminalization critique is thus not a new phenomenon in American political-legal discourse. It builds upon an extensive body of academic writing and judicial decisions.”); *see, e.g.*, Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-room Deals Can Strengthen American Democracy*, BROOKINGS INST., May 2015, at 2 (arguing that the democratic system cannot function without extensive interaction, deal-making, and compromise between officials and constituents, and that the war on corruption is counterproductive to strengthening our democracy); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 170 (1990) (arguing in part that prosecutors should develop guidelines delineating the criteria for federal intervention in the prosecution of governmental corruption). *See generally* George D. Brown, *Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177 (2015) (analyzing the extent to which the *Citizens United* outcome extends beyond the electoral context and what it means for the criminalization of politics).

⁷⁸ Brown, *supra* note 68, at 11.

⁷⁹ *Id.*

enhance the effectiveness of government. In his controversial piece entitled *The Value of Political Corruption*, Thomas Edsall argues that not all corruption is bad corruption, and that our system of representative government would suffer if the rules were not allowed to be bent or stretched to achieve productive ends.⁸⁰ Edsall cites prominent Democratic lawyer Bob Bauer, who described corruption as a “routine ingredient in the competent practice of politics.”⁸¹ What Edsall and Bauer allude to, though perhaps overstate, is the view that we live in a system of transactional politics, and that in order to be effective in such a system, politicians must engage in political exchanges among themselves and with their constituents.

The transactional view of politics tends to see mechanisms like logrolling, campaign contributions, and constituent favors as indicators of a healthy political system, capable of compromise and conflict resolution. This reflects the broader, and rather practical, view of American politics as an ecosystem that is highly reciprocal and demands that actors be willing to make political bargains to achieve their desired ends.⁸² The criminalization critique seeks to protect this system of productive political exchanges and views the *McDonnell* decision as a vindication for our current system of representative governance.

B. Public Accountability

In tension with the criminalization critique is an interest that places a higher premium on accountability. Proponents of prioritizing public accountability emphasize that, while the criminalization critique carries considerable force, virtually all exchanges in our system of transactional politics will be immunized from liability unless courts draw common law lines delineating rigorous ethical duties owed by public officials. In other words, in a world where the fear of criminalizing politics prevails over public accountability, the “everybody does it” defense⁸³ can always cleanse a corrupt arrangement. Problematically, this defense rests on the notion that any corrupt exchange can become a routine political exchange if enough

⁸⁰ See Thomas B. Edsall, Opinion, *The Value of Political Corruption*, N.Y. TIMES (Aug. 5, 2014), <https://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html> [<https://perma.cc/26WR-8NFW>] (arguing that the ban on earmarks and restrictions on campaign finance demonstrate a naïveté about the realities of governing).

⁸¹ *Id.*

⁸² Brown, *supra* note 68, at 13.

⁸³ *Id.* (citing Dahlia Lithwick, *The “Everybody Does It” Defense*, SLATE (Apr. 27, 2016), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/04/the_supreme_court_might_let_bob_mcdonnell_off_the_hook.html [<https://perma.cc/23EK-9RH3>] (critiquing the argument that because a behavior is endemic to the political system and many politicians partake in it, the conduct should be insulated from prosecution)).

people do it enough times. One view is that the *McDonnell* Court created a standard that immunizes conduct like meetings, luncheons, and rallies from prosecution simply because they are widespread.⁸⁴ It makes sense, then, that the *McDonnell* decision is viewed by some as a decision that weighs heavily in favor of the criminalization critique at the expense of public accountability.⁸⁵

Some anti-corruption advocates believe that public corruption law should not only serve to deter the most serious abuses of political power, but should also advance “public-mindedness.”⁸⁶ Professor Jacob Eisler asserts that, in its effort to thwart criminalization of political activities, the Court has disowned “the advancement of civic governance, specifically by asserting that officials have no obligation to act with neutrality or disinterest.”⁸⁷ Eisler goes so far as to argue that the Court’s interpretation of the federal bribery statute in *McDonnell* and the cases leading up to *McDonnell* have created a political ecosystem that nurtures self-interested behavior by public officials.⁸⁸ He explains that the Court’s lenient stance on bribery is reflective of the Court’s belief that representatives can advance special interests of those who have supported them financially, rather than pursuing the public good.⁸⁹

Some also believe that the Court’s steady dilution of public bribery statutes, culminating in the *McDonnell* holding, has all but encouraged the perpetuation of a system of pay-to-play politics.⁹⁰ One potent implication of *McDonnell* is that constituents can pay public officials to take action in their official position, so long as the *quo* is not an identifiable “official act” as defined by the *McDonnell* Court.⁹¹ After *McDonnell*, some public actions can be sold by public officials without violating the federal bribery statute.⁹²

⁸⁴ Brown, *supra* note 68, at 15.

⁸⁵ See, e.g., Eisler, *supra* note 29, at 1622 (“In a series of holdings, the Court has demonstrated surprising tolerance for sleazy political behavior and consistently overturned convictions of public servants charged with abusing their offices The Court’s tolerance for self-interested representative behavior reached a high-water mark this past term in the unanimous decision of *McDonnell v. United States*.”).

⁸⁶ *Id.* at 1632.

⁸⁷ *Id.* at 1641.

⁸⁸ *Id.* at 1642.

⁸⁹ *Id.* at 1641–42.

⁹⁰ See, e.g., Gregory M. Gilchrist, *Corruption Law After McDonnell: Not Dead Yet*, 165 U. PA. L. REV. ONLINE 11, 15 (2016) (“In *McDonnell*, the Supreme Court held that McDonnell’s acts were not [official acts]—thus preserving a space within which public officials may act to benefit anyone for any reason, including that the beneficiary is a constituent, a regionally important labor interest, a systemically important firm, or a rich friend.”).

⁹¹ *Id.*

⁹² *Id.*

Prior to the *McDonnell* decision, New York State Assembly Speaker Sheldon Silver was convicted of taking millions of dollars in bribes in exchange for kickbacks and favors, and was sentenced to twelve years in prison.⁹³ However, in light of *McDonnell*, the Second Circuit vacated the district court's decision, citing the new narrowed definition of "official act."⁹⁴ The concern among good governance advocates is that the *McDonnell* Court's distinction between corrupt acts and routine political exchanges will exempt far too many cases of self-dealing like Silver's in the future.

There is clear merit to both perspectives outlined in this Part. In fact, most scholars and advocates can agree that, while routine political transactions should not be criminalized, public officials still owe citizens a minimum duty of loyalty to use their time and resources principally in pursuit of the public interest. Ideally, the statute would identify a workable test for determining whether such exchanges cross the line from political maneuvering to corruption. The next Part will propose a way to do just that by drawing on fiduciary duties in agency and corporate law.

III. A THIRD WAY: THE DUTY OF LOYALTY

The *McDonnell* Court drew a line in what had historically been an unclear area of the law by interpreting "official act" very narrowly.⁹⁵ The question that remains is: did they get it right? Where exactly should the line between "politics as usual" and public corruption be drawn? Arriving at a middle ground between the criminalization critique and public accountability is unlikely, given that the narrow *McDonnell* standard currently applies, and there is no indication of the Supreme Court overruling its decision any time soon.⁹⁶ However, statutory amendment remains a viable

⁹³ *United States v. Silver*, 184 F. Supp. 3d 33 (S.D.N.Y. 2016), *aff'd in part*, 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018).

⁹⁴ Matt Zapposky, *The Bob McDonnell Effect: The Bar is Getting Higher to Prosecute Public Corruption Cases*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/world/national-security/the-bob-mcdonnell-effect-the-bar-is-getting-higher-to-prosecute-public-corruption-cases/2017/07/13/5ac5745c-67e6-11e7-9928-22d00a47778f_story.html?utm_term=.27ff81b207fc [<https://perma.cc/3SX4-NBLU>] (describing how the narrowed definition of "official act" must be specific and involve a formal exercise of governmental power).

⁹⁵ *McDonnell v. United States*, 136 S. Ct. 2355, 2359 (2016).

⁹⁶ *But see* Alan Feuer, *Silver May Start 'Parade of Horribles' Out of McDonnell Case, Critics Say*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/nyregion/sheldon-silver-bob-mcdonnell.html> [<https://perma.cc/MR5X-MMCC>] (explaining how former New York state assemblyman Sheldon Silver's corruption conviction was overturned as a result of the *McDonnell* decision). While there is no indication that the Supreme Court intends to overrule *McDonnell* any time soon, it is possible that the undesirable consequences of the decision, which have already enabled several politicians like Silver to escape charges for egregious acts, could lead the Court to reconsider its decision in the future.

way to clarify the statute to create a less arbitrary and more calculated standard of conduct for public officials.

This Part argues that public officials should be judged according to a hybrid between the fiduciary duty of loyalty inherent in agency law and corporate law. This Part suggests that, while neither agency nor corporate fiduciary standards are alone sufficient to supplant the federal bribery statute, using duty of loyalty standards in these two areas of law as models should guide future efforts at amendment. The approach outlined below balances the concerns of both the proponents of the criminalization critique and those more concerned with public accountability. This approach is not entirely new: scholars have long turned to private fiduciary standards to explain authority of public officials and institutions.⁹⁷ However, this analysis uniquely endeavors to draw upon two different private fiduciary principles—agency law and corporate law—to guide future amendment of the federal bribery statute in the post *McDonnell* world.

Prior to understanding how fiduciary duty can inform efforts to reform public corruption law, it is important to understand the underlying theories of fiduciary duty and agency in both the private and public contexts. Fiduciary duty consists of two components: the duty of care and the duty of loyalty.⁹⁸ This Part focuses on the latter, which implicates self-dealing cases like *McDonnell*'s. Section A summarizes the duties of loyalty in both agency and corporate law, and Section B explains how the agency model has already been applied in the public context.

A. *Duty of Loyalty: Agency and Corporate Law*

In agency law, “[a]gency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests or otherwise consents so to act.”⁹⁹ The relationship between an employer and an employee is a prototypical agency relationship.¹⁰⁰ The term “agent” is often used more generally to refer to “any relationship in which one person engages another to perform a service under

⁹⁷ See generally Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 YALE L.J. F. 192 (Oct. 26, 2016), <http://www.yalelawjournal.org/forum/keeping-the-promise-of-public-fiduciary-theory-a-reply-to-lieb-and-galoob> [<https://perma.cc/S3CH-W559>] (broadly advocating for the application of fiduciary norms to public cases); see also D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) (arguing that political representatives are fiduciaries “subject to a duty of loyalty”).

⁹⁸ See Constance Frisby Fain, *Corporate Director and Officer Liability*, 18 UALR L. J. 417, 419–20 (1996) (noting the two duties).

⁹⁹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

¹⁰⁰ *Id.* § 7.07(3)(a) (“[A]n employee is an agent . . .”).

circumstances that involve delegating some discretion over decision-making to the service-performer.”¹⁰¹ In agency law, one common way by which an agent may breach the agent’s duty of loyalty is “by obtaining a material benefit in connection with a transaction undertaken on behalf of the principal or otherwise through the agent’s use of position.”¹⁰² Accordingly, any personal material benefit the agent derives from the agency relationship without the principal’s consent constitutes a breach of the duty of loyalty.¹⁰³ The agency duty of loyalty strictly requires an agent to “act solely for the benefit of the principal in all matters connected with his agency.”¹⁰⁴ Under agency law, the “usual remedy when the fiduciary appropriates part of the value of the principal’s asset is disgorgement.”¹⁰⁵ The purpose of disgorgement is to deprive the fiduciary of personal benefits that resulted from wrongful conduct.¹⁰⁶ It is an equitable remedy that results in the fiduciary giving up any ill-gotten gains and leaves the fiduciary no better and no worse off than if she had not committed any wrongdoing at all.¹⁰⁷

In corporate law, a corporation’s directors do not have a common law agency relationship with the corporation’s shareholders.¹⁰⁸ The duty of loyalty owed by directors to shareholders is therefore less strict and more flexible depending on the particular facts surrounding a board or director’s decision. Unlike agents in agency law, corporate directors can exercise discretion in making business decisions, and are ordinarily protected by the presumption of good faith known as the business judgment rule.¹⁰⁹ Broadly,

¹⁰¹ Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1050–51 (2007).

¹⁰² *Id.* at 1054.

¹⁰³ *See id.* at 1052 (“A principal may consent to conduct by the agent that would otherwise breach a duty of loyalty, but in obtaining the principal’s consent, the agent must act in good faith and fully disclose material information to the principal.”).

¹⁰⁴ RESTATEMENT (SECOND) OF AGENCY § 387 (AM. LAW INST. 1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006) (stating that an agent has “a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship”).

¹⁰⁵ Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1051 (1991).

¹⁰⁶ *Id.* at 1051 n.14.

¹⁰⁷ Robert Cooter & Bradley J. Freedman, *An Economic Model of the Fiduciary’s Duty of Loyalty*, 10 TEL AVIV U. STUD. L. 297, 304 (1990) (“Perfect disgorgement can be defined as a sanction that restores the wrongdoer to the same position that he would have been in but for the wrong. Perfect disgorgement thus leaves the injurer no better or worse off than if he had done no wrong.”).

¹⁰⁸ DeMott, *supra* note 101, at 1051.

¹⁰⁹ *See* Fain, *supra* note 98, at 422 (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)) (“The business judgment rule is a judicially-created presumption that ‘in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’”). In order to receive the benefit of the business judgment rule, the following conditions must be met: (1) a decision must have been made by the director; (2) the director must not have stood to gain personally from the subject matter of the decision; and (3) the director must have exercised informed judgment in making the decision. *Id.* at 424.

the corporate duty of loyalty “obligates the director and officer to ‘act at all times in the best interests of the corporation and its shareholders and not engage in self-dealing.’”¹¹⁰ A director can be held in breach of the duty of loyalty by engaging in self-dealing, bad faith, or fraud.¹¹¹

A self-interested transaction eliminates the presumption of good faith provided by the business judgment rule and instead imposes the rule of undivided loyalty.¹¹² In self-dealing cases, where the rule of undivided loyalty applies, Delaware law¹¹³ requires a showing that the interested transaction was fair to the corporation.¹¹⁴ This standard of review is known as the “entire fairness standard”¹¹⁵ and can overcome a duty of loyalty challenge based on self-dealing. To succeed on entire fairness review, a defendant must show that the self-interested transaction was the product of fair dealing and fair price.¹¹⁶ Thus, courts will examine both the process and substance of the transaction in making a fairness determination.¹¹⁷ When a plaintiff challenges a director’s personal transaction with the corporation, the transaction must be examined “with the most scrupulous care.”¹¹⁸ If there is any “evidence of improvidence or oppression, any indication of unfairness or undue advantage, the transaction will be voided.”¹¹⁹ Analysis of fairness in any particular case tends to turn on the specific facts of the case and

¹¹⁰ *Id.* at 421 (citing Kirsten L. Thompson, *Liability of Professionals, Officers, and Directors: Annual Survey*, 28 TORT & INS. L.J. 376, 385 (1993)).

¹¹¹ *Id.* at 421–22.

¹¹² *Bayer v. Beran*, 49 N.Y.S.2d 2, 7 (N.Y. Sup. Ct. 1944) (“The law has set its face firmly against undermining ‘the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions.’”) (internal citations omitted). Undivided loyalty demands that there be no conflict between duty to the corporation and self-interest. *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993) (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

¹¹³ DEL. CODE tit. 8, § 144(a) (2018) (providing that a conflicted interest transaction shall not be void or voidable solely because of a director’s conflict or solely because the director is present or participates in the meeting that authorizes the contract provided that the transaction: (1) was approved by a majority of disinterested directors after disclosure of material facts, (2) was approved by good faith vote of shareholders following disclosure, or (3) was fair to the corporation at the time it is authorized by the board or the shareholders).

¹¹⁴ *Id.* at § 144(a)(3).

¹¹⁵ Lyman Johnson, *Unsettledness Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 415 (2013) (“[The business judgment rule] was then more or less suppressed for controlling shareholders in the 1990s in favor of uniformly using an entire fairness standard where self-dealing is involved.”).

¹¹⁶ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

¹¹⁷ *See generally id.* (establishing the entire fairness test in which courts will examine transactions that were made by a majority of directors who were self-interested, or where a majority stockholder stands on both sides of the transaction by evaluating fairness of price and fairness of process).

¹¹⁸ *Bayer v. Beran*, 49 N.Y.S.2d 2, 7 (N.Y. Sup. Ct. 1944).

¹¹⁹ *Id.*

whether the defendant can meet the burden of proving entire fairness.¹²⁰ In the corporate context, the remedy for a breach of the duty of loyalty is either the invalidation of the conflicted transaction or the payment of damages to the corporation for the monetary injury sustained as a result of the conflicted decision.¹²¹

B. The Public Context: A Parallel Scenario

The principal-agent relationship under agency law is not dissimilar from the agency view of politics.¹²² Under the agency view, elected officials act on the citizen's behalf as agents through official decisions and are subject to the citizen's control through elections. Importantly, when the general interests of an official's constituency conflict with the official's personal opinion, agency theory holds that as the principal, the constituency's interests must prevail over the elected official's personal interests.¹²³

The parallels between public and private agency relationships are substantial. In both cases, the agent decides how to advance the principal's interests, and has ultimate discretion in acting to pursue the principal's objectives. Like employee agents who are hired to perform specific duties on behalf of an employer, public officials are elected to perform specific duties on behalf of citizens. Like corporate directors, who are elected by shareholders to establish policies for corporate management and oversight that maximize shareholder value, public officials are elected to positions of power to make and endorse public policies for the benefit of constituents. While constituent interests are typically more numerous and diverse than one principal's interest under agency law, an elected official is nevertheless responsible for identifying and advocating for policies that are generally favorable to her constituency. The clear parallels between the agency relationship between constituents and elected officials and agency

¹²⁰ Instead of applying a standard formula, Delaware courts tend to analyze the specific facts unique to each case to determine whether or not the facts support a claim of self-dealing. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 751 (Del. Ch. 2005) (“The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders.”).

¹²¹ If a court finds that a director's or board's conflicted transaction does not meet one of the safe harbor provisions in the Delaware Code, the court can determine the appropriate remedy, including invalidation of the conflicted transaction. DEL. CODE tit. 8, § 144 (2018).

¹²² The agency view of politics views voters as the principal and the elected official as the agent. *See* TIMOTHY BESLEY, *PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT* 114 (2006) (“US governors correspond fairly well to the standard agency model—a single agent being held accountable for their actions with well defined election dates and rules.”).

¹²³ *See* MICHAEL L. MEZEY, *REPRESENTATIVE DEMOCRACY: LEGISLATORS AND THEIR CONSTITUENTS* 25–26 (2008) (applying agency theory to dynamics and relationships between constituents and representatives in a representative democracy).

relationships in the private or corporate context illustrate why drawing on private law fiduciary principles can help clarify the federal bribery statute.

IV. APPLYING THE DUTY OF LOYALTY TO *MCDONNELL*

Incorporating some form of the fiduciary duty of loyalty into public corruption law is somewhat intuitive. Public officials, like agents (employees) and corporate directors, are selected to serve the interests of those who select them. However, the private law analogy is not a perfect one. Scholars who have argued for identical applications of the duty of loyalty in the corporate and public contexts have drawn valid criticism,¹²⁴ often because one particular variation of the duty of loyalty (e.g. the corporate director duty) cannot apply seamlessly in the public context. While an amended statute could establish a public duty of loyalty mirroring the agency duty and prohibit the official from reaping personal benefit from her office, this type of per se rule would tend to be unduly restrictive. For example, most elected officials dedicate some time to re-election activities. While they are already prohibited from using public resources in campaign activities,¹²⁵ dedicating time to election activities could violate the strict agency duty to act at the will and consent of the principal. Particularly where the principal is the entire constituency with conflicting interests, enforcing a strict agency duty of loyalty could prove to be problematic. Applying the corporate duty of loyalty and incorporating an equivalent of the business judgment rule and the entire fairness standard is promising, but the remedy of invalidating a transaction could prove to be problematic in the public context, where it may not be possible to undo a meeting or invalidate a legislative vote.

In attempting to draw on agency and corporate duties of loyalty, the same challenge that arose in *McDonnell* of drawing the line between routine political transactions and self-dealing and balancing the legitimate concerns of criminalization critique and public accountability emerges once again. However, a potential solution emerges in response. Combining the corporate business judgment rule and entire fairness test as judicial standards of review with the agency law remedy of disgorgement provides a hybrid solution that can help clarify where the line between routine exchanges and political corruption lies.

¹²⁴ See, e.g., Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 94 (2013) (“Throughout most of *Politicians as Fiduciaries*, however, Rave simply analogizes the legislator to a corporate director and proceeds to a straightforward application of the duty of loyalty as interpreted in the corporate context. But political relationships and corporate relationships are sufficiently different that one should be wary of seamless application from one context to the other.”).

¹²⁵ *General Prohibition Against Using Official Resources for Campaign or Political Purposes*, H. Comm. on Ethics, 115th Cong. (2018), <https://ethics.house.gov/general-prohibition-against-using-official-resources-campaign-or-political-purposes> [https://perma.cc/M2R6-F85Z].

This Comment proposes using a hybrid of the agency and corporate duties of loyalty to amend the federal bribery statute and draw a line that balances interests in flexibility and accountability. Applying a combination of the underlying principles of agency law, a public-oriented version of the entire fairness test, and the disgorgement remedy associated with agency law would lead to balanced assessment of each case and would lead to prudent outcomes in a wide range of public corruption cases. A standard that adopts the corporate entire fairness test and the agency remedy of disgorgement would give public officials the opportunity to prove the fairness of their transactions and would simultaneously require disgorgement if the public official is found guilty. In McDonnell's case, the price of connecting Williams to state agency officials was over \$175,000 and the process of their exchanges involved only McDonnell, his family, and Williams, with no disclosure to his constituents. In order to prevail, McDonnell would need to prove that his transactions with Williams were fair, given the duty of loyalty he owed Virginia constituents. Applying this framework would advance the criminalization critics' interest in preserving officials' ability to freely interact with constituents and would also hold officials like McDonnell accountable when they use their public office to engage in unreasonable self-dealing with constituents.

Former Governor Bob McDonnell engaged in a conflicted transaction with a constituent from which he materially benefitted. He used public resources, including the governor's mansion, to secure personal benefits from Jonnie Williams in excess of \$175,000.¹²⁶ Under the duty of loyalty framework proposed in this Comment, McDonnell would have had the opportunity to defend himself in a public corruption case using the entire fairness standard. To do so, he would have had to prove that his dealings with Williams were fair¹²⁷ to his constituents, and that Williams paid him a fair price¹²⁸ of \$175,000 for constituent services. Applying this proposed

¹²⁶ McDonnell v. United States, 136 S. Ct. 2355, 2362–64 (2016).

¹²⁷ The Court could define “fair dealing” as falling within what we consider to be an acceptable political exchange. As in the corporate context, this would involve a review of “process, including how the transaction is timed, initiated, structured, negotiated.” Shant H. Chalian & Kristen M. Bandura, *The Business Judgment Rule and the Entire Fairness Doctrine*, ROBINSON & COLE LLP (accessed Aug. 25, 2018), <http://www.rc.com/documents/Primer%20on%20Business%20Judgment%20Rule.pdf> [<https://perma.cc/S64N-F4F2>].

¹²⁸ The Court could define “fair price” by incorporating the cap imposed by state law on gifts to public officials. Shortly after the McDonnell scandal, Virginia enacted a “\$100 annual aggregate cap on gifts that public officials can receive from people seeking influence with the state.” Laura Vozzella, *Virginia Legislature Adopts Stricter Gift Standards for Public Officials*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/local/virginia-politics/virginia-legislature-adopts-stricter-gift-standards/2015/04/17/b400b6a0-e456-11e4-905f-cc896d379a32_story.html?utm_term=.eecb1bd52927 [<https://perma.cc/A3GL-XLX7>] (quoting Governor Terry McAuliffe).

standard would have likely resulted in the conclusions that McDonnell's dealings with Williams were not fair to all constituents to whom he owed a duty of loyalty, and that the price of \$175,000 was far in excess of a reasonable "price" for constituent services. Under this test, the Court likely would have found that McDonnell violated his duty of loyalty and that his actions resulted in measurable damages.

We can easily calculate damages in the *McDonnell* case using disgorgement as a civil remedy in addition to any criminal liability found.¹²⁹ In this case, McDonnell would owe \$175,000 in ill-gotten gains to the state. By drawing on both agency and corporate law duties of loyalty, reformers can envision the contours of a new statutory standard of conduct that is more practicable and less arbitrary than allowing the verdict of a massive self-dealing scheme to turn on the highly subjective definition of "official act."

CONCLUSION

The Court's continual narrowing of the scope of the federal bribery statute has culminated in the *McDonnell* decision. The Court's new definition of "official act" only condemns the most amateur and poorly executed acts of corruption. It rewards the obfuscation of political dealings and encourages widespread participation in corrupt practices that are viewed as merely routine political transactions and are thus immunized from scrutiny. Society strives to uphold a representative system in which public officials are sufficiently constrained by law to act in the public interest but are simultaneously given enough leeway to engage in transactional politics when necessary. The *McDonnell* decision fails to achieve such a balance, and instead narrows the scope of "official act" so severely that it essentially provides public officials with a blank check to sell their public offices in return for "unofficial" favors.¹³⁰

The possibility of statutory amendment remains viable, and this possibility is becoming increasingly urgent in light of similar issues surrounding public corruption cases since *McDonnell*.¹³¹ The duty of loyalty

¹²⁹ The federal bribery statute is a criminal statute with criminal remedies. This Comment focuses narrowly on developing a more effective standard of review for public corruption cases but does not address how to reconcile and enforce criminal and civil liability under the federal bribery statute. This is an area that, while outside the scope of this Comment, merits further research and analysis.

¹³⁰ Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor's Graft Conviction*, N.Y. TIMES (June 27, 2016), <https://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html> [<https://perma.cc/5FBL-KLM9>] (quoting Anna Scholl, the executive director of Progress Virginia).

¹³¹ See, e.g., 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> [<https://perma.cc/RHS2-2XWC>] (describing Senator Robert Menendez's

embedded in the law of agency and in corporate law are useful models to examine when amending the federal bribery statute. A hybrid of the agency duty of loyalty and the corporate duty of loyalty would address the concerns of proponents of both the criminalization critique and of public accountability. Further, drawing on both standards by balancing agency law's per se rule with corporate law's entire fairness standard ameliorates difficulties associated with simply transplanting pure agency law or pure corporate law into the public context. Incorporating this framework as an amendment to the federal bribery statute has the potential to effectively deter and punish officials who engage in public corruption in the future.

November 2017 public corruption case in which a judge had to declare a mistrial because the jurors were deadlocked despite nine weeks of testimony). Senator Menendez and his friend Dr. Salomon Melgen were charged in an eighteen-count indictment including charges for bribery and honest services fraud in 2015. *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015). In January 2018, the DOJ dismissed the case, which some say was due in part to how *McDonnell* "significantly raised the bar for prosecutors who try to pursue corruption cases against elected officials." Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html> [<https://perma.cc/RE4U-RHEK>]; see also *United States v. Silver*, 184 F. Supp. 3d 33 (S.D.N.Y. 2016), *aff'd in part*, 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018) (New York State Assembly Speaker Sheldon Silver was convicted of taking millions of dollars in bribes in exchange for kickbacks and favors, and was sentenced to twelve years in prison, but his conviction was vacated following the *McDonnell* ruling); William K. Rashbaum, *No Charges, but Harsh Criticism for de Blasio's Fund-Raising*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/nyregion/mayor-bill-de-blasio-investigation-no-criminal-charges.html> [<https://perma.cc/6KRR-JGDD>] (Federal prosecutors decided not to bring charges against New York Mayor Bill de Blasio citing, in part, changes in the law, which was interpreted by many to mean the *McDonnell* ruling).