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THE MCDONNELL CASE: A CLARIFICATION OF CORRUPTION LAW OR A CONFUSING APPLICATION OF CORRUPTION LAW

*Henry L. Chambers, Jr. **

INTRODUCTION

On September 4, 2014, Governor Robert F. McDonnell and his wife, Maureen G. McDonnell, were convicted in federal court of various crimes related to their relationship with Jonnie Williams, a Virginia businessman, and his company Star Scientific.¹ Earlier in the year, the McDonnells were charged in a fourteen-count indictment primarily consisting of public corruption charges.² Governor McDonnell faced one count of conspiracy to commit honest-services wire fraud, three counts of honest-services wire fraud, one count of conspiracy to obtain property under color of official right, six counts of obtaining property under color of official right, and two counts of providing false statements, one on a financial statement and one on a loan application.³ Governor McDonnell was convicted on all counts except the two false statement charges.⁴ Mrs. McDonnell faced the same charges as Governor McDon-

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1. Verdict, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14cr12-JRS), 2014 WL 4383056; see 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/2014/09/04/0e01ff88-3435-11e4-9e92-0899b306bba_story.html.

2. Indictment ¶¶ 108–23, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14cr12), 2014 WL 223601.

3. *Id.* Conspiracy to commit honest-services wire fraud is codified at 18 U.S.C. § 1349 (2012). Honest-services wire fraud is codified at 18 U.S.C. § 1343 (2012). See also 18 U.S.C. § 1346 (defining scheme to defraud under the mail and wire fraud statutes to include a scheme “to deprive another of the intangible right of honest services”). Conspiracy to obtain property under color of official rights and obtaining property under color of official right, also known as Hobbs Act violations, are codified at 18 U.S.C. § 1951 (2012). The false statements statute at issue is codified at 18 U.S.C. § 1014 (2012).

4. Verdict, *supra* note 1.

nell, except she faced only one of the two false statement charges and was also charged with obstructing an official proceeding.⁵ Mrs. McDonnell was convicted of conspiracy to commit honest-services fraud, two counts of committing honest-services fraud, conspiracy to obtain property under color of official right, four counts of obtaining property under color of official right, and obstruction of an official proceeding.⁶ She was acquitted of one count of honest-services wire fraud, two counts of obtaining property under color of official right, and the only false statement count with which she was charged.⁷ The trial judge, Judge James Spencer, vacated Mrs. McDonnell's obstruction conviction.⁸ Governor McDonnell was sentenced to two years in federal prison,⁹ and Mrs. McDonnell was sentenced to one year and one day in federal prison.¹⁰ The indictment and subsequent convictions sent shockwaves through the Virginia political establishment, with some claiming that the government had sought to criminalize politics as usual, and others claiming that the government had merely aggressively pursued corruption.¹¹

The indictment tells a story of corruption. It asserts that the former Governor traded official acts for money, goods, and services.¹² The indictment suggests the McDonnells received monetary gifts, loans, trips, and merchandise in exchange for help promoting Star Scientific products, specifically for encouraging state university researchers to study the products to increase

5. See Indictment, *supra* note 2, ¶¶ 108–23. The relevant obstruction charge is codified at 18 U.S.C. § 1512(c)(2) (2012).

6. See Verdict, *supra* note 1.

7. See *id.*

8. See United States v. McDonnell, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *14 (E.D. Va. Dec. 1, 2014) (noting insufficient evidence to sustain the conviction).

9. Amended Judgment in a Criminal Case, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14cr00012-001), 2015 WL 398949.

10. Judgment in a Criminal Case, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14cr00012-002), 2015 WL 1324853.

11. See, e.g., Travis Fain, *Top Story of 2014: The Conviction of Bob and Maureen McDonnell*, DAILY PRESS (Dec. 20, 2014, 4:42 PM), <http://www.dailypress.com/news/politics/dp-nws/mcdonnell-trial-top-story-20141220-story.html> (suggesting that following the announcement of the jury verdicts, “it was like the shocking finale of a summer-long soap opera”); Ruth Marcus, *McDonnell Case is Not Politics as Usual*, WASH. POST (Jan. 23, 2014), https://www.washingtonpost.com/opinions/ruth-marcus-mcdonnell-case-is-not-politics-as-usual/2014/01/23/0b6cc2b2-846d-11e3-9dd4-e7278db80d86_story.html (noting both sides of the argument).

12. See Indictment, *supra* note 2, ¶ 22.

their marketability as drugs and for attempting to help get Star Scientific products included for coverage by the state health insurance program.¹³ If the verdicts reflect the truth of the allegations in the indictment, the prosecution is merely the government's attempt to address corruption and influence peddling.

Conversely, the McDonnells suggest that no unlawful conduct occurred. Though Williams gave the Governor and his family gifts, loans, and goods, the defense argued that the Governor took no official acts for Williams's benefit.¹⁴ The defense asserted that Governor McDonnell merely engaged in behavior that governors routinely engage in, including arranging meetings that connect businesses with state government and attending receptions and luncheons.¹⁵ The defense suggests that the prosecution was a misguided attempt to criminalize legal behavior embedded in everyday politics.¹⁶

Both sides could be correct. It is possible the McDonnells violated laws that criminalize politics as usual. However, it is also possible the McDonnells are guilty of public corruption under laws that reasonably criminalize public corruption. Whether the laws at issue appropriately punish public corruption or merely criminalize politics as usual depends on the laws' scope. How that issue should be resolved depends on a core point of contention between the prosecution and defense: whether Governor McDonnell promised to take or took official action on behalf of Williams and Star Scientific. The trial court and Fourth Circuit have spoken in this case and found that Governor McDonnell did take official acts for Williams's benefit. This article considers how those courts addressed the issue.

This article discusses two additional issues the McDonnell case raises. The first issue is how much evidence is necessary to sustain a conviction for attempting to obstruct an official proceeding. Mrs. McDonnell was convicted of attempting to obstruct the grand jury in this case for sending a misleading note to Williams,

13. See *id.* ¶¶ 17, 22, 44, 48, 60, 74.

14. See *United States v. McDonnell*, 792 F.3d 478, 506 (4th Cir. 2015). Governor McDonnell argued that the trial court defined official acts so broadly as to incorrectly encompass all actions taken by a public official. See *id.* at 505.

15. *Id.* at 506.

16. See *id.*

but her actions were deemed insufficient to support her obstruction conviction.¹⁷ The other issue relates to the McDonnells' sentencing. The sentences they received were much shorter than the sentences calculated using the United States Sentencing Guidelines.¹⁸ This article considers the official act issue, the obstruction issue, and the sentencing issue. Part I describes the relationship between the McDonnells and Williams. Part II discusses what official acts a public official must take to be guilty under the public corruption statutes the McDonnells were convicted of violating. Part III discusses Mrs. McDonnell's obstruction charge. Part IV discusses issues surrounding the McDonnells' sentencing.

I. THE McDONNELL-WILLIAMS RELATIONSHIP

The indictment describes the relationship between the McDonnells and Jonnie Williams.¹⁹ It notes how the relationship began, what Williams wanted from the relationship, what actions the McDonnells took in favor of Williams and Star Scientific, and what gifts the McDonnells received from Williams.²⁰ The indictment suggests a relationship that began as an acquaintance, but soon transformed into an arrangement in which Williams gave the McDonnells what they wanted in return for helping, when necessary, to move Star Scientific's interests forward.²¹ It suggests a relationship that spawned public corruption.

The McDonnells did not know Williams before Governor McDonnell's gubernatorial campaign.²² Though Williams allowed Governor McDonnell to use his plane during the campaign,²³ Governor McDonnell and Williams were mere professional acquaintances, not personal friends, at the time.²⁴ However, Williams and the McDonnells became better acquainted soon after Governor

17. See *infra* notes 133–38, 153–66 and accompanying text.

18. See *infra* text accompanying notes 193–210.

19. The assertions made in the indictment were largely supported or confirmed by trial evidence. See *McDonnell*, 792 F.3d at 486–93.

20. Indictment, *supra* note 2, ¶ 22.

21. *Id.* ¶¶ 14, 22.

22. *Id.* ¶ 13.

23. *Id.*

24. *Id.* ¶ 14.

McDonnell's election.²⁵ During one discussion between Williams and Mrs. McDonnell, Williams offered to pay for Mrs. McDonnell's dress for the inauguration.²⁶ She declined the offer after being told that accepting it would be inappropriate.²⁷

In the first year of his term, Governor McDonnell increased his contact with Williams. In October 2010, Williams allowed Governor McDonnell to use Williams's plane to fly from Richmond, Virginia, to a political event in Sacramento, California.²⁸ On the return trip to Richmond, Williams discussed with Governor McDonnell the benefits of anatabine, a key ingredient in some of Star Scientific's products, and asked for help from the Virginia government to support and promote Star Scientific's products.²⁹ Through late 2010 and early 2011, Governor McDonnell worked to promote Star Scientific and its products. For example, Governor McDonnell's staff set up a meeting between Williams and the Virginia Secretary of Health in which Williams discussed the health benefits of Star Scientific's products.³⁰ In addition, in February 2011, the McDonnells attended a Star Scientific event at the Jefferson Hotel in Richmond, Virginia, where Governor McDonnell spoke in support of the company.³¹

The indictment also asserts that, in April 2011, the relationship morphed into a transactional one in which the McDonnells traded official actions for gifts and other material support from Williams.³² Specifically, Williams and Star Scientific needed research studies for Anatabloc, one of Star Scientific's products, so that its scientific value could be proven.³³ Governor McDonnell tried to help.³⁴ The indictment suggests that the Governor did so

25. *See id.* ¶ 15.

26. *Id.*

27. *Id.* ¶¶ 15, 16.

28. *Id.* ¶ 17.

29. *See id.*

30. *Id.* ¶ 19.

31. *Id.* ¶ 20.

32. *See id.* ¶ 22.

33. *See United States v. McDonnell*, 792 F.3d 478, 487 (4th Cir. 2015) (discussing studies that Williams and Star Scientific needed).

34. *See United States v. McDonnell*, 64 F. Supp. 3d 783, 790 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015) (discussing specific ways in which Governor McDonnell attempted to aid Williams and Star Scientific).

throughout the length of the transactional relationship, which continued until March 2013.³⁵

During this time, the McDonnells took a number of steps to help support and promote Star Scientific products, though Williams's desired studies never materialized.³⁶ In early June 2011, Mrs. McDonnell and her Chief of Staff (a Virginia government employee) visited the Roskamp Institute in Florida, an entity working with Star Scientific.³⁷ While there, Mrs. McDonnell offered the Virginia Governor's Mansion as the site for the product launch of Anatabloc.³⁸ Governor McDonnell had also planned to visit the Institute and had one of his staff members ask the Virginia Secretary of Health for input on the Institute, but ultimately he did not visit.³⁹ In late July 2011, Governor McDonnell asked the Virginia Secretary of Health to have a deputy meet with Mrs. McDonnell to discuss Anatabloc.⁴⁰ The deputy met with Mrs. McDonnell and Williams at the Governor's Mansion to discuss studies that Virginia researchers might conduct using Anatabloc.⁴¹ Williams indicated during the meeting that he had discussed funding for these studies with Governor McDonnell.⁴² In August 2011, the McDonnells hosted the product launch for Anatabloc at the Governor's Mansion.⁴³ In a March 2012 meeting with high-level government officials regarding the Virginia state employee health plan, Governor McDonnell endorsed the health

35. Indictment, *supra* note 2, ¶ 22.

36. *See id.* (describing in general terms the nature of the transactional relationship between the McDonnells and Williams); *id.* ¶ 65 (noting that University of Virginia administrators, who are Virginia government employees, did not agree to Star Scientific's request to grant funding applications for a scientific study of anatabine); *see also* Julie Zauzmer, *Anatabloc, Supplement at Center of McDonnell Trial, to Be Taken Off the Market*, WASH. POST (Aug. 11, 2014), http://www.washingtonpost.com/local/anatabloc-supplement-at-center-of-mcdonnell-trial-to-be-taken-off-the-market/2014/08/11/401f4ca0-21a7-11e4-958c-268a320a60ce_story.html (reporting that Rock Creek Pharmaceuticals, formerly known as Star Scientific, announced it would halt sales of Anatabloc, the dietary supplement promoted by Governor McDonnell, until it resolved issues with the Food and Drug Administration, as it has not been approved).

37. *See* Indictment, *supra* note 2, ¶ 40.

38. *Id.* ¶ 40.

39. *See id.* ¶¶ 29, 30.

40. *Id.* ¶ 48.

41. *Id.* ¶ 49.

42. *Id.*

43. *See id.* ¶¶ 40, 60.

benefits of Anatabloc and suggested that the state officials meet with Star Scientific officials about Anatabloc.⁴⁴

Throughout the transactional relationship, Williams provided various gifts, loans, and goods to the McDonnells and their family.⁴⁵ Counts six through eleven of the indictment focus on three checks and a wire transfer to the McDonnells or their business interests totaling \$135,000, and two instances of Williams paying for golf outings for Governor McDonnell or members of his family costing approximately \$3800.⁴⁶ These payments occurred from May 2011 through May 2012.⁴⁷ The indictment noted, but did not include in the charges, other gifts such as vacations the McDonnells took that were paid for by Williams.⁴⁸ The indictment also listed many additional goods that Williams gave the McDonnell family that were subject to forfeiture as proceeds of the scheme charged in the indictment.⁴⁹

In addition, the indictment states that the McDonnells attempted to conceal the nature and extent of their financial relationship with Williams.⁵⁰ Though some of the gifts and transactions between Williams and the McDonnells were disclosed,⁵¹ Governor McDonnell structured some transactions to avoid disclosing their nature.⁵² He also failed to fully disclose, intentionally or not, the extent of his financial relationship with Williams and Star Scientific.⁵³ Mrs. McDonnell also attempted to avoid disclosure of the extent of her financial dealings with Williams and

44. *Id.* ¶ 88.

45. *See id.* ¶ 68 (discussing the Rolex watch, purchased by Williams, that Mrs. McDonnell gave Governor McDonnell); Rosalind S. Helderman, Matt Zaptosky & Laura Vozzella, *Executive Gave Gifts to Virginia First Family 'Because They're Helping,'* WASH. POST (July 31, 2014), http://www.washingtonpost.com/local/virginia-politics/star-witness-it-was-wrong-to-give-rolex-to-va-governor/2014/07/31/b3807a72-18bd-11e4-9e3b-7f2f110c6265_story.html?hpid=z2&tid=ptv_rellink (discussing Williams's testimony regarding his \$50,000 loan to Governor McDonnell to help pay for properties Governor McDonnell and his sister owned in Virginia Beach).

46. Indictment, *supra* note 2, ¶ 117.

47. *Id.*

48. *Id.* ¶¶ 46, 94, 108–23.

49. *Id.* at Forfeiture Notice.

50. *Id.* ¶ 111.

51. *Id.* ¶¶ 70, 98.

52. *See id.* ¶¶ 83, 86.

53. *See id.* ¶¶ 102, 103.

Star Scientific.⁵⁴ She also falsely stated in an interview with law enforcement officers that Governor McDonnell and Williams first met well before his gubernatorial campaign.⁵⁵ In addition, she drafted and sent a misleading note to Williams that was apparently meant to suggest that certain gifts of clothing were merely loans of clothing.⁵⁶ That note was at the core of the obstruction charge against her.⁵⁷

The indictment summarizes the McDonnell-Williams relationship as such:

[F]rom in or about April 2011 through in or about March 2013, the defendants participated in a scheme to use Robert McDonnell's official position as the Governor of Virginia to enrich the defendants and their family members by soliciting and obtaining payments, loans, gifts, and other things of value from J[onnie] W[illiams] and Star Scientific in exchange for Robert McDonnell and the O[ffice of the] G[overnor of] V[irginia] performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products, including Anatabloc. And as also detailed below, the defendants took steps throughout that time to conceal the scheme.⁵⁸

Though this description appears to document various instances of public corruption and other crimes, the question remains precisely how the McDonnells actually violated the laws they were charged with breaking.

II. THE PUBLIC CORRUPTION CHARGES: HONEST-SERVICES WIRE FRAUD AND THE HOBBS ACT

The McDonnells were convicted of multiple public corruption crimes: honest-services wire fraud, Hobbs Act violations, and conspiracy to do both.⁵⁹ Colloquially, the McDonnells were convicted of bribery, e.g., trading money and goods for promises of official action or actual official action in favor of Jonnie Williams and

54. *See id.* ¶ 61.

55. *Id.* ¶ 104.

56. *See id.* ¶ 107; *see also* United States v. McDonnell, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *4, *6-8, *13-14 (E.D. Va. Dec. 1, 2014) (finding evidence to support that the note was a fabrication, even though the conviction for obstruction was vacated).

57. Indictment, *supra* note 2, ¶ 123.

58. *Id.* ¶ 22.

59. *See* Verdict, *supra* note 1.

Star Scientific.⁶⁰ There is no doubt that the McDonnells received money and goods from Williams.⁶¹ What is at issue is whether Governor McDonnell promised to engage in official action or actually engaged in official action for money and goods. Both the honest-services wire fraud and the Hobbs Act convictions depend on whether Governor McDonnell accepted or solicited bribes. That, in turn, depends on whether he engaged in, or promised to engage in, official acts.⁶²

A. *Honest-Services Wire Fraud and Hobbs Act Doctrine*

Honest-services wire fraud is of fairly recent vintage, though wire fraud has been unlawful for years.⁶³ Wire fraud is similar to mail fraud and occurs when a person engages in a scheme to defraud by using the wires in interstate or foreign commerce.⁶⁴ Honest-services wire fraud exists when a person plans a scheme to defraud which causes one party to violate a duty of loyalty or trust owed to another, but which does not cause direct financial harm to the party owed the duty of loyalty or trust.⁶⁵

The honest-services mail/wire fraud cause of action has had an uneven path. In *McNally v. United States*, the Court rejected the theory of honest-services wire fraud when the government attempted to expand the reach of wire and mail fraud to cover schemes in which the putative victim was not defrauded of prop-

60. See *United States v. McDonnell*, 792 F.3d 478, 504 (4th Cir. 2015) (focusing on bribery law and how it applies to honest-services wire fraud and the Hobbs Act).

61. See *id.* at 518–19.

62. *United States v. McDonnell*, 64 F. Supp. 3d 783, 788 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015).

63. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1346, 102 Stat. 4508 (current version at 18 U.S.C. § 1346 (2012)); Communications Act Amendments of 1952, Pub. L. No. 82-554, 66 Stat. 722 (current version at 18 U.S.C. § 1343 (2012)).

64. Compare 18 U.S.C. § 1341 (2012) (criminalizing “any scheme or artifice to defraud” that uses the mail “for the purpose of executing such scheme . . . or attempting so to do . . .”), with 18 U.S.C. § 1343 (2012) (criminalizing “any scheme or artifice to defraud” that uses the wires “in interstate or foreign commerce . . . for the purpose of executing such scheme . . .”).

65. See, e.g., *United States v. Nayak*, 769 F.3d 978, 979 (7th Cir. 2014). In *Nayak*, the defendant pled guilty to mail fraud for bribing physicians to refer patients to outpatient surgery centers. *Id.* The government admitted that the schemes did not cause physical or monetary harm to the patients but prevailed when the court found that tangible harm is not required to support an honest-services mail fraud conviction. *Id.* at 984.

erty.⁶⁶ *McNally* involved an insurance scheme in which defendants chose the insurance agents who were to secure workmen's compensation insurance for the Commonwealth of Kentucky, then forced the agents to share some of the commissions with other insurance agencies the defendants designated.⁶⁷ The defendants then funneled money to friends and insurance agencies in which they had a financial interest.⁶⁸ Ostensibly, no one was defrauded by the scheme.⁶⁹ The insurance provider was not defrauded of money because the commissions were regular commissions that the insurance company expected to pay to an agent.⁷⁰ Kentucky was not defrauded of money because the commissions were part of the fair premium Kentucky expected to pay.⁷¹ The agents who were forced to share the commissions may have been hurt by being required to share commissions they arguably had earned, but they were not tricked or defrauded.⁷²

The federal government prosecuted the case under the theory that the defendants had defrauded Kentucky and its citizens of honest services and "the right to have the Commonwealth's affairs conducted honestly."⁷³ The Supreme Court rejected that theory, finding that the mail/wire fraud statute protected money and property rights, but not "the intangible right of the citizenry to good government."⁷⁴ In response to *McNally*, Congress quickly expanded the mail and wire fraud statutes to cover "the intangible right to honest services."⁷⁵

Despite Congress's expansion of this statute to include honest-services wire fraud, its scope was not clarified because Congress

66. See 483 U.S. 350, 360 (1987).

67. See *id.* at 352, 360.

68. See *id.* at 352–53.

69. See *id.* at 360.

70. See *id.*

71. See *id.* at 360 (noting that Kentucky had not been defrauded).

72. See *id.* at 360–61 (noting "the premium for insurance would have been paid to some agency" and that the defendants merely "assert[ed] control" over the commissions paid to the designated insurance agents).

73. *Id.* at 352.

74. *Id.* at 356, 360.

75. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (current version at 18 U.S.C. § 1346 (2012)) ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."); see also *Skilling v. United States*, 561 U.S. 358, 364, 401–02 (2010).

did not provide a definition of the intangible right to honest services.⁷⁶ However, in *Skilling v. United States*, the Court clarified the boundaries of honest-services wire/mail fraud by narrowing it to apply only to schemes involving bribery and kickbacks.⁷⁷ Consequently, for all its seeming uncertainty, the application of the honest-services fraud claim to the McDonnell case is simple: if the wires were used to facilitate a bribery or kickback scheme, honest-services fraud applies.⁷⁸

Similarly, for the Hobbs Act to apply in this context, Governor McDonnell must have knowingly accepted a bribe.⁷⁹ The Hobbs Act bars persons from affecting commerce through extortion.⁸⁰ Its definition of extortion includes obtaining property from another “under color of official right,”⁸¹ which historically was considered the equivalent of taking a bribe.⁸² Though the definition of extortion under color of official right under the Hobbs Act has been broadened under the Hobbs Act, taking or soliciting a bribe still forms its essence.⁸³

B. *Bribery and Official Acts*

Bribery in the public arena requires that a public official promise to take, or actually take, official action in exchange for gifts or other things of value.⁸⁴ Though the McDonnells were not charged

76. See *Skilling*, 561 U.S. at 416.

77. *Id.* at 368, 409.

78. See *id.* at 368 (deeming honest-services fraud to encompass bribery and kickback schemes).

79. See 18 U.S.C. § 1951(a) (2012); *Evans v. United States*, 504 U.S. 255, 258–59, 268 (1992).

80. See 18 U.S.C. § 1951(a) (2012) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.”).

81. 18 U.S.C. § 1951(b)(2) (2012) (“The term ‘extortion’ means 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.”).

82. See *Evans*, 504 U.S. at 260.

83. See 18 U.S.C. § 1951(b)(2) (2012); *Evans*, 504 U.S. at 260–63.

84. See 18 U.S.C. § 201(b)(2) (2012).

with violating the federal bribery statute,⁸⁵ it informs honest-services wire fraud and the Hobbs Act.⁸⁶ Indeed, the Supreme Court has noted that a public official violates the Hobbs Act when that official “has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”⁸⁷ However, what constitutes an official act, an issue at the heart of the McDonnell case, is a live one.⁸⁸

The federal bribery statute defines an 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.”⁸⁹ This definition leaves the scope of an official act somewhat unclear. Under the definition, an official act could be thought to be limited to the duties that an official is required to discharge. Conversely, an official act could be thought to extend to every action an official takes in the official’s official capacity.⁹⁰ Governor McDonnell argued that an official act should be defined relatively narrowly and sought a definition of an official act that focused on the governor’s official duties and functions.⁹¹

In *United States v. McDonnell*, the Fourth Circuit explained that official acts are not narrowly limited to an official’s official duties.⁹² Rather, official acts can include not only actions that a public official must discharge, but also can “encompass the customary and settled practices of an office”⁹³ If the acts at issue are activities that a public official routinely engages in while in the official’s official capacity, the activity can qualify as an official

85. See Indictment, *supra* note 2 ¶¶ 108–23.

86. See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 918–19 (2005).

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

88. See *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166390, at *5 (E.D. Va. Dec. 1, 2014); Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 39 (2012).

89. 18 U.S.C. § 201(a)(3) (2012).

90. See *United States v. McDonnell*, 792 F. 3d 478, 505 (4th Cir. 2015).

91. See *id.* at 506 (noting Governor McDonnell’s argument that the scope of official act as defined by district court was too broad).

92. *Id.* at 506–07.

93. *Id.* at 509.

act.⁹⁴ The key is not whether the act is required by law or is significant in scope, but whether the act is related to “influenc[ing] a ‘question, matter, cause, suit, proceeding or controversy’ that may be brought before the government.”⁹⁵ Almost any action taken by a public official can be an official act if it relates to an official issue that can be brought or has been brought before the government.⁹⁶

The Fourth Circuit’s decision was not surprising, as it flowed directly from United States Supreme Court and Fourth Circuit precedent. In *United States v. Birdsall*, the Court considered what constituted official action in the context of the precursor statute to the federal bribery statute.⁹⁷ There, the Court determined that actions not required by law, but established by settled practice, could constitute official action.⁹⁸ In *United States v. Sun-Diamond Growers of California*, the Supreme Court took a similar position regarding what constitutes an official act under the current federal bribery statute.⁹⁹ In *Sun-Diamond*, the Court noted that many acts that were not a part of an official’s official duty could constitute official acts when they were undertaken in relation to a matter before the government.¹⁰⁰

In addition, the Fourth Circuit recently discussed the nature of an official act in *Jefferson v. United States*, a 2012 honest-services wire fraud and bribery case involving Congressman William Jefferson.¹⁰¹ In *Jefferson*, the Fourth Circuit found that acts that Jefferson was not required to take by law, but did undertake in his

94. *See id.* at 507, 509.

95. *Id.* at 509.

96. *Cf.* at 506.

97. 233 U.S. 223, 230–31, 235–36 (1914); Act of Mar. 4, 1909, Pub. L. No. 60-350, § 117, 35 Stat. 1088, 1109–10.

98. *Cf. Birdsall*, 233 U.S. at 235. In *Birdsall*, the government alleged that “federal officers responsible for suppressing liquor traffic in Indian communities” were bribed “to advise the Commissioner of Indian Affairs to recommend leniency for individuals convicted of liquor trafficking offenses involving Indians.” *McDonnell*, 792 F.3d at 506–07 (citing *Birdsall*, 233 U.S. at 227, 229–30). The recommendations at issue were outside their official duties, but were considered official acts covered by the applicable bribery statute. *Birdsall*, 233 U.S. at 231.

99. 526 U.S. 398, 407 (1999).

100. *See id.* at 407–08.

101. 674 F.3d 332, 335 (4th Cir. 2012).

role as a congressman, could qualify as official acts.¹⁰² Jefferson's core criminal conduct involved helping to arrange deals between American companies and African entities on the condition that money would be directed to businesses owned by Jefferson's family members.¹⁰³ Jefferson argued that the actions he took did not amount to official acts under the relevant statutes and that there was no exchange of money for acts as the statutes required.¹⁰⁴ Jefferson urged a narrow definition, arguing that an official act had to be related to a legislative or governmental function or process.¹⁰⁵ The court rejected that position, deeming official acts to include those activities in which an official in the defendant's position customarily engages in.¹⁰⁶ Though the official act must be related to a government decision or action, it need not relate to voting on, or introducing, legislation.¹⁰⁷ The court ruled that Jefferson's use of his position to help facilitate the success of various business ventures of people paying him to do so constituted official acts supporting Jefferson's convictions.¹⁰⁸ Given the *Jefferson* decision, Governor McDonnell's argument regarding the scope of official acts was nearly certain to be rejected by the Fourth Circuit.

Given how the Supreme Court and other courts have defined official acts, the Fourth Circuit's decision that the actions Governor McDonnell promised to, and actually did, take to help Williams and Star Scientific were official acts is no surprise.¹⁰⁹ Gov-

102. *See id.* at 357.

103. *See id.* at 356.

104. *Id.* at 336 (noting that Jefferson had argued for narrower definition of official act that limited such acts to "activities involving questions pending or brought before Congress, such as voting on proposed legislation or conducting committee work").

105. *See id.* at 336, 338.

106. *See id.* at 357 (approving jury instruction that "explained to the jury that an official act need not be prescribed by statute, but rather may include acts that a congressman customarily performs, even if the act falls outside the formal legislative process").

107. *See id.* at 337.

108. *See id.* at 356 (noting that Jefferson's acts included "corresponding with and visiting with foreign officials," "[s]cheduling and conducting meetings with Army officials and representatives, at which he promoted [various businesses]," and vouching for business owners to help them secure contracts in foreign countries).

109. *See United States v. Salahuddin*, 765 F.3d 329, 334–35 (3d Cir. 2014) (ruling that a public official seeking to influence the granting of city demolition contracts could be convicted of conspiracy under the Hobbs Act because of informal influence over process, despite no official power to award demolition contracts). *See generally United States v. Bencivengo*, 749 F.3d 205 (3d Cir. 2014) (ruling that a mayor had violated the Hobbs Act

ernor McDonnell directed staff to set up meetings with high-ranking government officials to discuss Anatabloc.¹¹⁰ He used his official position to get Star Scientific products significant exposure that those products would not have otherwise gotten, including holding a product launch at the Governor's Mansion for Anatabloc.¹¹¹ He attempted to facilitate and encourage state university researchers to research Star Scientific products.¹¹² He suggested that government officials consider having Star Scientific products covered under the state's health plan.¹¹³ Each of these activities could be considered official action.¹¹⁴

Governor McDonnell's claim that his actions should not be deemed official acts is ironic. Had the Virginia Secretary of Health pushed to treat Star Scientific products as pharmaceuticals or had other administration officials moved to get Star Scientific products covered by the state employee health plan, Governor McDonnell's actions would have been integral to those actions. He could have then reasonably claimed credit for bringing Star Scientific products, economic development, and additional jobs to Virginia. The suggestion that Governor McDonnell was merely doing what a governor is supposed to do is precisely the point. The actions that governors traditionally take on matters of interest to the state may constitute official action even if they are not required by law to be taken.¹¹⁵

Once the court decided that official acts had occurred, the dispute shifted to whether Governor McDonnell took goods *in exchange* for performing, or promising to perform, these official acts.¹¹⁶ Once the Fourth Circuit found that official acts had occurred and money changed hands, it was nearly obligated to allow the jury to decide whether Governor McDonnell traded money for official acts.¹¹⁷ Ample evidence was presented to support this

when he exchanged favors for money).

110. *United States v. McDonnell*, 792 F.3d 478, 516 (4th Cir. 2015).

111. *Id.*

112. *Id.* at 517.

113. *Id.*

114. *Id.*

115. *Cf. United States v. Jefferson*, 674 F.3d 352, 357 (4th Cir. 2012).

116. *See McDonnell*, 792 F.3d at 518.

117. *See, e.g., id.* at 519; *United States v. Hamilton*, 701 F.3d 404, 409 (4th Cir. 2012) (indicating it is the jury's role to make factual inferences).

claim,¹¹⁸ and the jury ultimately found that Governor McDonnell traded money and goods for official action.¹¹⁹

C. *The Line Between Bribery and Politics As Usual*

Those who are concerned that the line between bribery and politics as usual has not been sufficiently defined or that Governor McDonnell's acts were not quite serious enough to constitute bribery should consider the full breadth of the federal bribery statute. Its first part relates to bribery; its second part relates to illegal gratuities.¹²⁰ Bribery focuses on paying or offering to pay an official to influence an official act, or requesting or receiving payment in order to influence or take an official action.¹²¹ It suggests a purchase of official action. Illegal gratuities focus on offering payment or paying a public official because of an official act already performed or that was to be performed.¹²² It is akin to a thank you for a job well done. The illegal gratuities law can be violated even if the public official was planning to perform, would have performed, or actually did perform the official action without any expectation of payment.¹²³

In *United States v. Sun-Diamond Growers of California*, the dispute focused on illegal gratuities and considered whether giving an official a gift merely because of the recipient's position violated the illegal gratuities law.¹²⁴ The district court had determined that the illegal gratuities statute is violated whenever a gift is given to a covered public official by virtue of his position.¹²⁵ The defense argued that such a gift had to be given in relation to specific official acts taken or to be taken regarding business in front of the official.¹²⁶ The Court determined that gifts given mere-

118. See *McDonnell*, 792 F.3d at 518–19.

119. See *id.* at 519 n.23 (indicating that the “jury found the necessary corrupt intent”).

120. See 18 U.S.C. § 201(b) (2012) (barring bribery); 18 U.S.C. § 201(c) (2012) (barring illegal gratuities).

121. See 18 U.S.C. § 201(b) (2012).

122. *Id.*

123. See *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999).

124. *Id.* at 400.

125. See *id.* at 402–03.

126. See *id.* To be clear, the money must be provided because of official action, including a general course of action that includes a number of acts. However, the money need

ly by virtue of the official's position did not violate the law when there was no specific official action that could be linked to the gift.¹²⁷

Bribery and illegal gratuities are both illegal, though they are treated very differently under the statute. Bribery is punishable by up to fifteen years in prison, while an illegal gratuities conviction is punishable by up to two years in prison.¹²⁸ Though the potential punishments may be quite different, the United States Sentencing Guidelines (the "Guidelines") do not treat public sector bribery and illegal gratuities nearly as differently as 18 U.S.C. § 201 suggests.¹²⁹ Consequently, even if the McDonnells were passive participants in this matter—the indictment claims they were not—accepting payment knowing that the payment was for official acts taken or to be taken is unlawful and is serious.

The McDonnell case clarifies bribery, honest-services wire fraud, and the Hobbs Act's under-color-of-official-right extortion. Those crimes entail three questions: Was money offered or paid to a public official, did the public official engage in or promise to engage in official acts, and was the money offered tied to the promise to engage in official acts?¹³⁰ Whether money was offered or paid should be an easy question. Whether official acts were promised may be a difficult fact question in some cases, but what constitutes an official act has been clarified.¹³¹ The Fourth Circuit has determined that almost any act a public official takes in the official's official capacity can be an official act.¹³²

not be tied directly to a specific act. *See* United States v. Jefferson, 674 F.3d 332, 358–59 (4th Cir. 2012).

127. *See Sun-Diamond*, 526 U.S. at 414.

128. 18 U.S.C. § 201(b)–(c) (2012).

129. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (U.S. SENTENCING COMM'N 2014) (indicating an initial base offense level of 14 for a public official convicted of bribery), *with* U.S. SENTENCING GUIDELINES MANUAL § 2C1.2 (U.S. SENTENCING COMM'N 2014) (indicating an initial base offense level of 11 for a public official convicted of accepting illegal gratuities). Other parts of the Guidelines explain how to determine the base offense level and the appropriate sentence. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. n.1 (U.S. SENTENCING COMM'N 2014).

130. *See generally* 18 U.S.C. § 201 (2012) (detailing the bribery statute); 18 U.S.C. § 1343 (2012) (detailing the honest-services wire fraud statute); 18 U.S.C. § 1951 (2012) (detailing the Hobbs Act).

131. *See* United States v. McDonnell, 792 F.3d 478, 505–06 (4th Cir. 2015).

132. *See id.*

Given this clarification, the focus should be on whether the act taken is tied to official business in front of the official or the government. Whether the money was tied to the promise to engage in official acts is a quintessential fact question that should be left to the jury to decide. The McDonnell case may not have been an easy case, but it should make future cases easier to decide assuming the Supreme Court allows it to stand. The rules are relatively simple; officials are not supposed to get paid by citizens or businesses to do their jobs, and officials are not to be thanked monetarily for doing their jobs. If that criminalizes politics as usual, then politics as usual will need to change.

III. MRS. McDONNELL'S OBSTRUCTION CHARGE

Though the jury convicted Mrs. McDonnell of attempting to obstruct a grand jury proceeding,¹³³ Judge Spencer found insufficient evidence to support the conviction and granted Mrs. McDonnell's post-trial Motion for Judgment of Acquittal on that conviction.¹³⁴ The indictment asserted that Mrs. McDonnell attempted to obstruct the grand jury proceeding by sending Jonnie Williams a box of clothing with a misleading note suggesting that the clothing was merely lent to her, rather than given to her as a gift.¹³⁵ In his opinion vacating the conviction, Judge Spencer noted that "obstruction of justice requires more than just a misleading note."¹³⁶ However, given that the court did not dismiss the obstruction charge before trial, a misleading note presumably could be considered part of a larger plan constituting an attempt to obstruct justice.¹³⁷ Unfortunately, the court did not clarify precisely

133. See 18 U.S.C. § 1512(c)(2) (2012) ("Whoever corruptly . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."); *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *3 (E.D. Va. Dec. 1, 2014).

134. See *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *13-14 (E.D. Va. Dec. 1, 2014).

135. Indictment, *supra* note 2, ¶ 123 (suggesting that the note "falsely attempted to make it appear that she and J[onnie] W[illiams] had previously discussed and agreed that the defendant would return certain designer luxury goods rather than keep them permanently"); see also *id.* ¶ 107.

136. *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *8.

137. See *id.* at *6-7. Mrs. McDonnell had moved to dismiss the obstruction charge before trial. See Memorandum in Support of Maureen G. McDonnell's Motion #11—Motion to Dismiss, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-cr-12-

how much additional evidence would have been sufficient to convict Mrs. McDonnell, though the court was under no obligation to do so.¹³⁸

A. *Doctrine of Obstruction*

The statute Mrs. McDonnell was convicted of violating—18 U.S.C. § 1512(c)(2)—criminalizes “corruptly . . . obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so.”¹³⁹ In this case, the official proceeding is the grand jury proceeding that triggered the indictment.¹⁴⁰ Though the official proceeding need not have been pending or imminent at the time of the attempt to obstruct it,¹⁴¹ the proceeding must have been foreseeable at the time the defendant took the action that constitutes obstruction.¹⁴² In addition, a defendant must have taken an action that could have the natural and probable effect of influencing the grand jury proceeding.¹⁴³ A defendant who is unaware that his or her actions will likely affect a grand jury proceeding cannot be proven to have had the intent necessary to obstruct such a grand jury proceeding.¹⁴⁴ Though a defendant who merely sends a misleading note to a friend does not obstruct a grand jury proceeding, a defendant who creates a misleading document to present to a grand jury in an attempt to influence the grand jury arguably has attempted to obstruct an official proceeding.¹⁴⁵ The attempt to obstruct need not be successful to trigger guilt.¹⁴⁶

JRS), 2014 U.S. Dist. Ct. Motions LEXIS 16084.

138. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *7–8.

139. 18 U.S.C. § 1512(c)(2) (2012); *McDonnell*, 2014 U.S. Dist. LEXIS, at *7.

140. See *id.* § 1515(a)(1)(A); see also *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *4.

141. See § 18 U.S.C. 1512(f)(1) (“[A]n official proceeding need not be pending or about to be instituted at the time of the offense . . .”).

142. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (noting that the required link between the obstructing actions and the obstructed proceeding suggests that the proceeding must be foreseen for defendant to be deemed to have attempted to obstruct it).

143. See *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

144. *Id.*

145. See *id.* at 601 n.2 (noting that false statements made to or documents supplied to a grand jury can qualify as obstruction of the grand jury).

146. See *id.* at 601 (“Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant’s version of the story, the defendant has endeavored to obstruct, but has not ac-

B. *Proof of Obstruction*

The prosecution appeared to suggest through the indictment that Mrs. McDonnell did more than merely send a misleading note; it suggested that the note was a part of a broader plan to mislead the grand jury.¹⁴⁷ The indictment indicated that law enforcement officers interviewed Mrs. McDonnell about her relationship with Williams in mid-February 2013.¹⁴⁸ During the interview, Mrs. McDonnell falsely claimed that she was making payments on one of the loans that Williams had provided to the McDonnells and that she falsely stated that Governor McDonnell and Williams had met years before they actually met.¹⁴⁹ Soon after the interview, the McDonnells engaged in multiple attempts to recast the nature of some of their dealings with Williams.¹⁵⁰ Similarly, after the interview, Mrs. McDonnell sent the misleading note to Williams.¹⁵¹ Mrs. McDonnell appeared to draft the misleading note to create the impression that the clothing had merely been lent to her rather than given to her.¹⁵² Presumably, the misleading note could have been part of a plan to influence a grand jury that might eventually see the note and might consider whether the clothing was lent or given to Mrs. McDonnell relevant to whether she or others had committed a crime.

The defense claimed that the note was insufficient proof of an attempt to obstruct an official proceeding.¹⁵³ According to the defense, the note was not literally false and, therefore, could not support Mrs. McDonnell's conviction.¹⁵⁴ In addition, the defense claimed that the note was unconnected to the grand jury proceed-

tually obstructed, justice. Under our approach, a jury could find such defendant guilty.”).

147. See *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *8 (E.D. Va. Dec. 1, 2014).

148. Indictment, *supra* note 2, ¶ 104.

149. *Id.*

150. See *id.* ¶ 105 (describing attempts to clarify loan applications to reflect that money provided to the McDonnells should be considered loans rather than omitted from the McDonnells' liabilities).

151. See *id.* ¶ 107.

152. See *id.* ¶ 123.

153. See Memorandum in Support of Maureen G. McDonnell's Motion #11—Motion to Dismiss, *supra* note 137, at 11–12.

154. *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *7 (E.D. Va. Dec. 1, 2014).

ing.¹⁵⁵ If Mrs. McDonnell did not know about the grand jury proceeding, the defense argued, Mrs. McDonnell could not have intended to obstruct it, and her conviction should be vacated.¹⁵⁶ The court largely agreed with the defense.¹⁵⁷

If the misleading note was the only evidence against Mrs. McDonnell supporting the obstruction conviction, vacating the conviction was necessary. Though the court found Mrs. McDonnell's note sufficiently misleading to potentially obstruct the grand jury proceeding, it also found that the note was insufficiently connected to the grand jury proceeding to serve as sufficient proof of an attempt to obstruct the grand jury proceeding.¹⁵⁸ In order to intend to obstruct the grand jury proceeding, Mrs. McDonnell had to know or foresee that the grand jury proceeding would occur.¹⁵⁹ The prosecution failed to prove that Mrs. McDonnell knew or believed that a federal grand jury proceeding would ever occur.¹⁶⁰ Indeed, at the time the misleading note was sent, based on the evidence presented at trial, she knew only of the federal securities investigation of Williams and of a state investigation.¹⁶¹

The court also found that even had Mrs. McDonnell foreseen or known of the grand jury's existence, insufficient evidence of Mrs. McDonnell's intent to obstruct had been presented.¹⁶² The intent to obstruct requires that the obstructing actions have the natural and probable effect of interfering with the due administration of justice.¹⁶³ Creating and sending a misleading note that the drafter

155. See Memorandum in Support of Maureen G. McDonnell's Motion #11—Motion to Dismiss, *supra* note 137, at 11.

156. See *id.*

157. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *13–14.

158. See *id.* at *7–8, *13.

159. See *id.* at *9 (suggesting that a defendant's conduct cannot have the natural and probable effect of obstructing a proceeding if the defendant cannot foresee the proceeding); cf. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005) (“It is, however, one thing to say that a proceeding ‘need not be pending or about to be instituted at the time of the offense,’ and quite another to say a proceeding need not even be foreseen.”).

160. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *13–14 (“And Mrs. McDonnell was even affirmatively told by her then-counsel Emmet Flood that there was no federal grand jury proceeding.”).

161. *Id.* at *13 n.5.

162. See *id.* at *11–14.

163. See *United States v. Aguilar*, 515 U.S. 593, 601 (1995) (discussing 18 U.S.C. § 1503 in the context of a prosecution for obstructing a grand jury).

had no reason to believe would be presented to a grand jury does not have the natural and probable effect of interfering with the due administration of justice.¹⁶⁴ In this case, the note was sent to Williams, who Mrs. McDonnell may not have thought would be a grand jury witness.¹⁶⁵ Without evidence to prove that Mrs. McDonnell believed that the note would be presented to a grand jury, there was insufficient evidence to support the claim that the drafting and sending of the note would qualify as an attempt to obstruct an official proceeding.¹⁶⁶

C. *Sufficiency of the Evidence*

Though the court may have been correct that insufficient evidence was presented to support the conviction, it did not indicate how much evidence would have been sufficient to support a conviction for obstructing a grand jury proceeding.¹⁶⁷ That issue is important because, in the context of this case, it appeared Mrs. McDonnell intended to do more than merely send a misleading note.¹⁶⁸ The misleading note that Mrs. McDonnell sent was not sent in a vacuum.¹⁶⁹ It was sent after she was interviewed by law enforcement officers about matters related to Williams and money he had provided to the McDonnells.¹⁷⁰ Importantly, the note was sent to Williams, who knew that the clothes were gifts to Mrs. McDonnell that he did not expect to be returned.¹⁷¹ Indeed, the clothes were returned nearly two years after they were purchased.¹⁷² Presumably, Mrs. McDonnell intended to mislead any-

164. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *13 (“Although Mrs. McDonnell may have hoped that the misleading note would be provided to the future grand jury, there is insufficient evidence to enable a rational trier of fact to conclude that Mrs. McDonnell knew this would happen.”).

165. Cf. *Aguilar*, 515 U.S. at 601 (noting that a statement to an FBI agent who may or may not testify in front of a grand jury “cannot be said to have the ‘natural and probable effect’ of interfering with the due administration of justice”).

166. See *Aguilar*, 515 U.S. at 599 (“[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.”).

167. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383 (E.D. Va. Dec. 1, 2014).

168. See *id.* at *7–8.

169. See *id.* at *8.

170. Indictment, *supra* note 2, ¶¶ 104, 107.

171. See *McDonnell*, 2014 U.S. Dist. LEXIS 166383, at *6–8.

172. See *id.* (“In March of 2013, Mrs. McDonnell delivered to Williams’ brother, Donnie Williams, a box which contained clothing that Williams had purchased for Mrs. McDonnell

one who saw the note into believing that the clothes were not expensive gifts from Williams or to create a trail that suggested the clothes were not gifts. Misleading someone other than Williams is not the same as attempting to obstruct an official proceeding. However, the note could have been an attempt to mislead law enforcement officers who might investigate the clothing or a misguided attempt to provide Williams with evidence suggesting that gifts had not been given. Such an attempt is not necessarily sufficient to support an obstruction charge.¹⁷³ However, it is more than merely sending a misleading note.

Had Mrs. McDonnell drafted the note and given it to Williams in an effort to have him present a story to a foreseeable grand jury, the obstruction charge would have been viable.¹⁷⁴ The indictment did not allege that.¹⁷⁵ However, the indictment did suggest that Mrs. McDonnell did more than merely send a misleading note.¹⁷⁶ The note was merely one piece in a process. Assuming the allegations from the indictment were proven at trial, just how close the indictment came to sufficiently supporting its claim is an interesting question that this case leaves open.

IV. SENTENCING

How the McDonnells were sentenced may be the most interesting aspect of this case. The McDonnells were convicted of serious crimes, and the federal Guidelines, which apply to their crimes, appear to recommend significant sentences.¹⁷⁷ Nonetheless, Judge

in April 2011, along with a handwritten note.”).

173. See *United States v. Aguilar*, 515 U.S. 593, 600 (“We do not believe that uttering false statements to an investigating agent . . . who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.”).

174. *Cf. id.* at 601 (suggesting that providing false records directly to grand jury could sustain obstruction charge).

175. See *Indictment*, *supra* note 2, ¶¶ 107, 123.

176. See *id.* ¶ 123.

177. The Presentence Report calculated Governor McDonnell’s sentencing range as 121–151 months. Sentencing Position of the United States at 1, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14cr12), 2014 WL 7405778. The United States Probation Office calculated Mrs. McDonnell’s sentencing range as sixty-three to seventy-eight months. Matt Zapotsky, *Maureen McDonnell Sentencing Guidelines Call for 5 to 6 ½ Years in Prison*, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/local/virginia-politics/maureen-mcdonnell-sentencing-guidelines-call-for-5-to-6-and-12-years-in-prison/2015/01/20/58a76486-a0bb-11e4-903f-9f2faf7cd9fe_story.html.

Spencer sentenced Governor McDonnell to twenty-four months in prison and sentenced Mrs. McDonnell to one year and one day in prison.¹⁷⁸ Brief explanations of why the Guidelines exist and how guideline sentences are calculated are important to understanding what Judge Spencer did and why the sentencing is particularly interesting.

A. *Sentencing Guidelines*

Before the Guidelines were promulgated, federal judges were given broad discretion to determine criminal sentences.¹⁷⁹ Crimes had statutory maximum and minimum sentences, but inside those limits sentences were largely unregulated.¹⁸⁰ This latitude led to widely divergent sentences for similar crimes.¹⁸¹ The United States Sentencing Commission (the "Commission") was formed to bring uniformity to sentencing.¹⁸² The Commission created the Guidelines, in part, by examining the factors that judges historically considered when sentencing defendants.¹⁸³ Though the Guidelines were informed by historical data from judicial sentencing, the Commission's opinions have affected the Guidelines over time.¹⁸⁴

The Guidelines standardize sentences by attempting to treat criminal conduct of like severity in like fashion and to treat criminal conduct of differing severity differently.¹⁸⁵ The Guidelines calculate an offense level based on the defendant's criminal conduct and combines that offense level with the defendant's crimi-

178. See *supra* notes 9–10; see also Jim Nolan, Bill McKelway & Graham Moomaw, *Maureen McDonnell Sentenced to 12 Months and a Day*, RICH. TIMES-DISPATCH (Feb. 20, 2015, 9:44 PM), http://www.richmond.com/news/virginia/government-politics/article_b2edb38e-af38-5c98-9144-d5b263c5b604.html; Zapotosky, *supra* note 177.

179. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941 (1988); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

180. See Stith & Koh, *supra* note 179, at 225–26.

181. See Ogletree, *supra* note 179, at 1944 (noting sentencing disparities).

182. See 28 U.S.C. § 991(b)(1)(B) (2012) (noting that the Commission's purpose included ending "unwarranted sentencing disparities"); Ogletree, *supra* note 179, at 1945–46.

183. See Ogletree, *supra* note 179, at 1948.

184. See *id.* at 1944–46 (noting that Commission's expertise was supposed to affect the Guidelines through policy statements in the Guidelines).

185. See *id.* at 1938–39.

nal history to determine a guideline sentence range.¹⁸⁶ Before *United States v. Booker*, judges were required to give a sentence inside of the guideline sentencing range, subject to pre-approved grounds for departure from that range.¹⁸⁷ Some departures were based on grounds explicitly approved by the Commission;¹⁸⁸ other departures could be based on grounds relevant to sentencing that the Commission had not considered.¹⁸⁹ Now, the Guidelines are advisory.¹⁹⁰ A judge can determine a defendant's sentence based on the guideline sentence range and whatever factors the judge deems relevant to punishment.¹⁹¹ The judge can do so regardless of whether such factors are considered grounds for departure under the Guidelines, as long as the sentence is inside the relevant statutory maximum and minimum of the subject crimes and is consistent with the factors noted in 18 U.S.C. § 3553(a).¹⁹²

B. Calculating Sentences

Guideline sentences can be calculated relatively simply, though the calculation can become somewhat complicated in any particular case. The first step is to find the crime the defendant was convicted of in the Sentencing Guidelines Manual (the "Manual").¹⁹³ Each federal crime and its offense level can be found in the Manual or can be correlated to a section in the Manual.¹⁹⁴ Every crime has a base offense level based on the seriousness of the crime.¹⁹⁵

186. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2014).

187. See 18 U.S.C. § 3553(b) (2012); *United States v. Booker*, 543 U.S. 220, 259 (2005).

188. See U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K2.0 (U.S. SENTENCING COMM'N 2014). For example, a judge can depart upward or downward from the guideline sentence if the Commission states specific grounds for departure, such as "substantial assistance to authorities" or if the case involved good reasons that the sentencing commission had not considered. See *id.* However, certain factors such as race, sex, or national origin cannot be considered as a reason for departure. See *id.* § 5H1.10.

189. See *id.* § 5K2.0.

190. See *Booker*, 543 U.S. at 245–46.

191. See *id.* at 259–60.

192. See 18 U.S.C. § 3553(a) (2012); *Booker*, 543 U.S. at 259–60 (discussing sentencing under advisory guidelines regime).

193. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (U.S. SENTENCING COMM'N 2014).

194. See *id.*

195. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (U.S. SENTENCING COMM'N 2014) (providing base offense level for bribery, Hobbs Act, and honest-services

The base offense level is then adjusted based on the defendant's conduct.¹⁹⁶ For example, if the defendant's course of conduct involved multiple acts of deceit, the offense level of the crime might be adjusted upward to reflect the fact that a course of conduct involving multiple bad acts is more culpable than one involving a single bad act.¹⁹⁷ Similarly, when a crime involves fraud, the size of the defendant's gain or the victim's loss is a factor that affects the offense level.¹⁹⁸ The offense level may also be adjusted depending on the victim's characteristics, the scope of the defendant's role in the criminal conduct, and whether the defendant attempted to obstruct justice, even if the obstruction was not charged.¹⁹⁹ After all factors listed in the Guidelines are considered, the crime yields an offense level.²⁰⁰

The process is repeated for each crime of which the defendant was convicted.²⁰¹ The crimes and offense levels are then combined so that a single offense level for the defendant's criminal conduct can be found.²⁰² The sentencing rules that determine how criminal counts are grouped effectively lessen the effect of a prosecutor's charging decisions.²⁰³ For example, if a prosecutor is faced with two identical courses of conduct, the prosecutor ought not be able to increase a guideline sentence merely by charging the courses of conduct differently, such as by breaking up one course of conduct into multiple counts, so that the defendant is convicted of more overall counts.

fraud violations); Ogletree, *supra* note 179, at 1946.

196. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(c)-(e) (U.S. SENTENCING COMM'N 2014).

197. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(b)(1) (U.S. SENTENCING COMM'N 2014) (providing a higher offense level for cases involving multiple bribes as opposed to single bribes).

198. See *id.* § 2B1.1 (providing a higher offense level based on the amount of loss to victim).

199. See U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(c), 3C1.1(c) (U.S. SENTENCING COMM'N 2014). Characteristics considered may include factors relevant to conduct that has not been charged or that was dismissed. See *id.* § 5K2.21.

200. See *id.* § 1B1.1(g).

201. *Id.* § 1B1.1(a)(4).

202. See *id.* at ch. 3, pt. D, introductory cmt.

203. See *id.*

Once the overall offense level has been calculated, the defendant's criminal history is assessed.²⁰⁴ The more severe the defendant's criminal history, the longer the guideline sentence range will be.²⁰⁵ A defendant with a more serious criminal history is presumed to deserve a longer punishment than a defendant with a less serious criminal history who engages in the same criminal conduct.²⁰⁶ The offense level and the defendant's criminal history are plotted on a sentencing grid, with the offense level on the vertical axis and the defendant's criminal history on the horizontal axis.²⁰⁷ The guideline sentence range for months of imprisonment is listed where the offense level intersects with the defendant's criminal history.²⁰⁸ Although it is no longer mandatory to follow the Guidelines, a sentence inside of the sentencing range will be deemed presumptively valid.²⁰⁹ The judge may then sentence however the judge deems appropriate consistent with statutory maximums and minimums and 18 U.S.C. § 3553(a).²¹⁰

C. *The Guidelines and the McDonnells*

The calculation of the guideline sentence in the McDonnell case was fairly complex. However, rather than discuss the entire sentencing calculation, this section considers a simplified calculation based on the general nature of the charges of which the McDonnells were convicted. At base, Governor McDonnell was convicted of taking bribes; Mrs. McDonnell was convicted of participating in the scheme to take bribes.²¹¹ In addition, Mrs. McDonnell was convicted of obstructing an official proceeding, though that conviction was vacated.²¹² The indictment suggests that Governor

204. *Id.* § 1B1.1(a)(6).

205. *See id.* § 4A1.1; *see id.* ch. 5, pt. A.

206. *See id.* § 4A1.1; *see id.* ch. 5, pt. A, introductory cmt.

207. *Id.* at ch. 5, pt. A, cmt. n.1.

208. *Id.*

209. *See Rita v. United States*, 551 U.S. 338, 341, 354 (2007).

210. *See id.* at 347–48, 353.

211. *See Verdict*, *supra* note 1.

212. *See United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166383, at *3, *13–14 (E.D. Va. Dec. 1, 2014). Obstruction of the due administration of justice, whether charged or not, can increase a defendant's offense level or provide grounds for an upward departure from a guideline sentence. *See U.S. SENTENCING GUIDELINES MANUAL* § 3C1.1 (U.S. SENTENCING COMM'N 2014) (increasing offense level based on obstruction); *id.* § 5K2.21 (allowing upward departure based on dismissed or uncharged conduct).

McDonnell attempted to cover up some of his financial dealings with Williams and Star Scientific, but he was acquitted of the false statement charges brought based on that evidence.²¹³

A simplified sentencing calculation of Governor McDonnell's offenses proceeds as follows. The base offense level for a Hobbs Act/wire fraud violation of this type is 14 because Governor McDonnell is a public official.²¹⁴ The offense level increases by four because the offense involved an elected official.²¹⁵ The offense level then increases by two if more than one bribe was deemed to be involved.²¹⁶ The offense level further increases by six if the bribes were valued between \$30,000 and \$70,000, or by ten if the bribes were valued between \$120,000 and \$200,000.²¹⁷ There is a dispute regarding the value of Williams's gifts.²¹⁸ The face value of the money and gifts provided by Williams under counts six through eleven total just under \$140,000.²¹⁹ However, the McDonnells claim that much of the value of the putative bribes constitute loans that the McDonnells were prepared to repay with interest.²²⁰ If that is so, calculating the bribe as the face value of the loans may not seem appropriate. Excluding the loans, the value of the gifts listed in counts six through eleven total just under \$19,000.²²¹ If one counts the \$120,000 in loans as having a relatively low value to the McDonnells, such as 10% of the face

213. See Indictment, *supra* note 2, ¶ 119; Verdict, *supra* note 1. Acquitted conduct can be considered in sentencing. *United States v. Watts*, 519 U.S. 148, 157 (1997).

214. See U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(a) (U.S. SENTENCING COMM'N 2014) (stating that the base offense level is 12 if the defendant is not a public official).

215. *Id.* § 2C1.1(b)(3).

216. *Id.* § 2C1.1(b)(1). There is a dispute about this. Governor McDonnell claims that only one bribe existed given that the indictment suggested a general open-ended scheme rather than particular payments for particular acts. See Defendant Robert F. McDonnell's Objections to the Presentence Investigation Report at 26, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:12-CR-12), 2014 WL 7405777. However, the specific payments alleged are not installment payments for a single bribe. They appear to be separate unrelated payments over the course of the scheme.

217. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM'N 2014).

218. See Defendant Robert F. McDonnell's Reply on Sentencing Position at 4–6, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-cr-00012), 2015 WL 65503.

219. See Indictment, *supra* note 2, ¶ 117.

220. See Defendant Robert F. McDonnell's Objections to the Presentence Investigation Report, *supra* note 216, at 8.

221. See Indictment, *supra* note 2, ¶ 117.

value of the loans, the gifts plus the value of the loans would be just over \$30,000, and the offense level would increase by six.²²²

However, it is important to note that the gain/loss calculation above does not include the value of the gifts Williams gave to the McDonnell family that were deemed subject to forfeiture, but were not subjects of specific counts, in the indictment.²²³ These gifts include vacations the McDonnells took which were paid for by Williams, a Rolex watch Mrs. McDonnell asked Williams to purchase for Governor McDonnell, and other gifts given to the McDonnells and their family members.²²⁴

Governor McDonnell's guideline sentence would depend on how his criminal conduct is characterized. If Governor McDonnell accepted a single bribe that involved just over \$30,000, his offense level would be 24.²²⁵ With the lowest criminal history category, his guideline sentence would be fifty-one to sixty-three months in prison.²²⁶ If Governor McDonnell accepted multiple bribes that involved just over \$30,000, his offense level would be 26 and his guideline sentence would be sixty-three to seventy-eight months in prison.²²⁷ If Governor McDonnell accepted multiple bribes that involved nearly \$140,000, his offense level would be 30 and his

222. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM'N 2014). Treating the loans as having a value of 10% of the amount lent is not meant to be a precise valuation of the loans. It merely recognizes that the loans had some value to the McDonnells, but arguably should not be valued as if the loan was a gift that was not going to be repaid. The key issue is that the loans can be valued in a way that places the value of the gifts/bribes somewhere between \$30,000 and \$140,000 for sentencing purposes.

223. See Indictment, *supra* note 2, ¶ 117, Forfeiture Notice (showing more property and gifts to be forfeited than were used for specific counts in the indictment).

224. See *id.* ¶¶ 46, 94, 117, Forfeiture Notice.

225. See U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1)(D), 2C1.1(a)(1), 2C1.1(b)(2)–(3) (U.S. SENTENCING COMM'N 2014).

226. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2014) (using the sentencing table for a level 24 offense).

227. See *id.* §§ 2B1.1(b)(1)(D), 2C1.1(a)(1), 2C1.1(b)(1)–(3); see *id.* ch. 5, pt. A.

guideline sentence would be 97 to 121 months in prison.²²⁸ Governor McDonnell was sentenced to twenty-four months in prison.²²⁹

Mrs. McDonnell's sentence calculation is similar. Her base offense level for a Hobbs Act/honest-services violation is 12 because she is not a public official.²³⁰ Her offense level increases by four because the offense involved an elected official.²³¹ If multiple bribes were involved, her offense level increases by two.²³² The issue of the value of the gifts is slightly different for Mrs. McDonnell because she was acquitted of counts nine and eleven of the indictment.²³³ If 10% of the face value of the loans, rather than the full face value of the loans is added to the value of gifts for the counts of which she was convicted, the result would yield just over \$27,000 and a four-level increase to her offense level.²³⁶ If the full face value of the loans is counted, the result would be just over \$117,000, but less than \$120,000 in money and goods received.²³⁷ Based on that amount, her offense level would rise by eight.²³⁸ As with the calculation above regarding Governor McDonnell, Mrs. McDonnell's value calculation does not include other gifts provided to her and her family as a result of the scheme.²³⁹

Mrs. McDonnell's guideline sentence would depend on how her conduct is characterized. If Mrs. McDonnell accepted a single bribe that involved just over \$27,000, her offense level would be 20.²⁴⁰ With the lowest criminal history, her guideline sentence

228. *See id.* The analysis above excludes factors that could increase the Governor's guideline sentencing range, including a 2-level increase in offense level for obstruction of justice. *See id.* § 3C1.1. The Presentence Report calculated a guideline sentence of 121–151 months based in part on a two-level sentence enhancement for obstruction of justice. Sentencing Position of the United States, *supra* note 177, at Part I.C.

229. Amended Judgment in a Criminal Case, *supra* note 9, at 3.

230. *See* U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(a)(2) (U.S. SENTENCING COMM'N 2014).

231. *See id.* § 2C1.1(b)(3).

232. *See id.* § 2C1.1(b)(1).

233. *See* Verdict, *supra* note 1.

236. *See id.* § 2B1.1(b)(1)(C).

237. *See* Indictment, *supra* note 2, ¶ 117.

238. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(E) (U.S. SENTENCING COMM'N 2014).

239. *See* Indictment, *supra* note 2, ¶ 117, Forfeiture Notice.

240. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1)(C), 2C1.1(a)(2), 2C1.1(b)(2)–(3) (U.S. SENTENCING COMM'N 2014).

would be thirty-three to forty-one months in prison.²⁴¹ If Mrs. McDonnell accepted multiple bribes that involved just over \$27,000, her offense level would be 22 and her guideline sentence would be forty-one to fifty-one months in prison.²⁴² If Mrs. McDonnell accepted multiple bribes that involved nearly \$140,000, her offense level would be 28 and her guideline sentence would be seventy-eight to ninety-seven months in prison.²⁴³ Mrs. McDonnell was sentenced to one year and one day in prison.²⁴⁴

D. *Sentencing the McDonnells*

Judge Spencer departed from the guideline sentencing ranges for both Governor and Mrs. McDonnell. Whether his departures are qualitatively large or small may depend on how one views the McDonnells' course of conduct. Whether the departures are appropriate depends on how one views the goals of the Guidelines and Judge Spencer's explanation for departing from them. The Guidelines are supposed to operationalize fairness and justice by providing consistent sentences based in part on factors that judges historically considered when sentencing and by providing limited discretion for judges to depart from sentences when necessary or appropriate.²⁴⁵ However, if one views "justice" as meting out individualized, fair sentences on a case-by-case basis or believes that no guidelines can have sufficient nuance to create fair guideline sentences, a departure from a guideline sentence range is the quintessence of rendering justice.

Judge Spencer provided his general thoughts on sentencing, the Guidelines, and the case in the statement he made before sentencing Governor McDonnell.²⁴⁶ He noted that he did not like mandatory sentencing guidelines, but used the Guidelines as a

241. See *id.* at ch. 5, pt. A.

242. See *id.* §§ 2B1.1(b)(1)(C), 2C1.1(a)(2), 2C1.1(b)(1)–(3); see *id.* ch. 5, pt. A.

243. See *id.*

244. Judgment in a Criminal Case, *supra* note 10, at 3.

245. See Ogletree, *supra* note 179, at 1945–47.

246. Frank Green, *Transcript: Judge Explains His Sentencing of McDonnell*, RICH. TIMES-DISPATCH (Jan. 7, 2015, 12:15 PM), http://www.richmond.com/news/virginia/government-politics/article_71ba6906-8951-5c3a-86e7-75dfbc12666b.html?

starting point.²⁴⁷ He stated that when the Guidelines were mandatory, he could not consider various factors important to sentencing and was not allowed to grant “grace or mercy.”²⁴⁸ He indicated that it would have been ridiculous for him to have been required to give Governor McDonnell “seven or eight years in prison” for what he did.²⁴⁹ However, he did note that he must consider factors listed in 18 U.S.C. § 3553(a) to find a sentence that is fair and appropriate.²⁵⁰

Judge Spencer appears to have given Governor McDonnell credit for being a good person and doing good public service.²⁵¹ He also appears to have given Governor McDonnell credit for his military service.²⁵² However, he also noted the severity of the crime at issue and the jury’s verdict finding that the Governor had intended to defraud.²⁵³ Thus, Judge Spencer felt compelled to sentence Governor McDonnell to prison time to reflect the seriousness of the crimes.²⁵⁴ Judge Spencer then gave Governor McDonnell a relatively short sentence of twenty-four months, followed a few weeks later with a relatively short sentence of twelve months and one day for Mrs. McDonnell.²⁵⁵ Judge Spencer’s sentences could be considered a large or fairly small departure from the guideline sentencing range.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*; see also 28 U.S.C. § 991(b)(1)(A) (2012) (noting that the Guidelines are supposed to be consistent with 18 U.S.C § 3553(a)(2)).

251. See Green, *supra* note 246. The Guidelines do not ordinarily approve of a departure on those bases. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2014) (“Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”).

252. Green, *supra* note 246. The Guidelines approve of a departure on that basis under certain circumstances. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2014) (“Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”).

253. Green, *supra* note 246.

254. See *id.*

255. See *id.*; Nolan, McKelway & Moomaw, *supra* note 178.

The Guidelines are supposed to focus on a defendant's criminal conduct.²⁵⁶ If Judge Spencer viewed the McDonnells' conduct as being somewhat less serious than their convictions suggest, a downward departure from the sentencing range calculated under the Guidelines may reflect how he believed the McDonnells should have been charged and punished. For example, if Judge Spencer believed that the McDonnells essentially engaged in a gifts scandal that involved a \$15,000 payment in the form of a wedding gift, a few below-market-rate loans, and a number of gifts that were better thought of as ingratiation payments rather than as bribes, the value of the bribes paid would drop along with the McDonnells' offense level.²⁵⁷ If Governor McDonnell were considered to have taken a single bribe or started the course of payments with a single agreement to help Williams and gained between \$10,000 and \$30,000 as a result, his offense level would fall to 22 and yield a guideline sentencing range of forty-one to fifty-one months.²⁵⁸ Likewise, Mrs. McDonnell's offense level would fall to 20 and yield a guideline sentencing range of thirty-three to forty-one months.²⁵⁹

If the McDonnells' conduct were conceived in this way, Judge Spencer's departure from the Guidelines sentencing range may not have been particularly dramatic. Governor McDonnell would have dropped from a minimum of forty-one months to twenty-four months.²⁶⁰ Considering Judge Spencer's willingness to credit the Governor's military service, that departure may not be deemed much of a departure at all. Similarly, Mrs. McDonnell would have dropped from a minimum of thirty-three months to twelve months.²⁶¹ Of course, Judge Spencer could simply ignore the calculation and give Mrs. McDonnell half of the prison time than Governor McDonnell's sentence because she is not a public official. Under that approach, the departure may not be considered

256. See 28 U.S.C. § 991(b)(1)(B) (2012).

257. See *United States v. McDonnell*, 64 F. Supp. 3d 783, 789 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015) (explaining that ingratiation payments may not be enough to trigger bribery charges).

258. See U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1)(C), 2C1.1(a)(1), 2C1.1(b)(2)–(3) (U.S. SENTENCING COMM'N 2014); see *id.* ch. 5, pt. A.

259. *Id.* §§ 2B1.1(b)(1)(6), 2C1.1(a)(2).

260. *Id.*

261. *Id.*

particularly large. However, minimizing the McDonnells' course of conduct in the manner suggested is problematic. Their conduct did not indicate a one-time mistake; rather, the conduct lasted for almost two years.²⁶² Though the scheme only involved one person, it involved a significant amount of money.²⁶³

In contrast, one could take the middle-ground sentence calculation from the simplified vision of the McDonnells' crimes from Section C above. Under that approach, Governor McDonnell could be deemed to have accepted multiple bribes that involved just over \$30,000, in which case his offense level would be 26 and his guideline sentence would be sixty-three to seventy-eight months in prison.²⁶⁴ Mrs. McDonnell could be deemed to have accepted multiple bribes that involved just over \$27,000, in which case her offense level would be 22 and her guideline sentence would be forty-one to fifty-one months in prison.²⁶⁵ However, even with a departure that takes into consideration Governor McDonnell's military service, bribery is a breach of public trust and lowering a sixty-three-month minimum sentence to a twenty-four months seems substantial. Similarly, lowering Mrs. McDonnell's forty-one-month minimum sentence to twelve months seems significant as well.

Though a significant departure from the Guidelines may be justifiable, the departure may merely suggest a judicial preference for wide discretion in sentencing. Judge Spencer clearly did not believe the McDonnells engaged in behavior that warranted the sentence calculated under the Guidelines, but it is unclear

262. See Indictment, *supra* note 2, ¶ 22.

263. For those who believe that this case is more akin to illegal gratuities than bribery, the Guidelines do not provide much comfort. Illegal gratuities are punished relatively similar to bribery. Compare Hobbs Act, 18 U.S.C. § 1951 (2012), and U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (U.S. SENTENCING COMM'N 2014), with 18 U.S.C. § 201 (2012), and U.S. SENTENCING GUIDELINES MANUAL § 2C1.2 (U.S. SENTENCING COMM'N 2014). However, the illegal gratuities crime has a maximum penalty of two years. See U.S. SENTENCING GUIDELINES MANUAL § 2C1.2 (U.S. SENTENCING COMM'N 2014); see *id.* ch. 5, pt. A. If the McDonnells are thought to have essentially engaged in an illegal gratuities scheme—accepting payments for official acts that Governor McDonnell would have undertaken without the gratuities—a two-year sentence with all counts running concurrently could match Governor McDonnell's sentence precisely. *Id.* Of course, the convictions in this case suggest that the scheme involved actual bribery.

264. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(C) (U.S. SENTENCING COMM'N 2014); see *id.* ch. 5, pt. A.

265. See *id.*

why. The McDonnells were convicted of public corruption crimes which involved a significant amount of money and goods. Although they may be good people, the Guidelines suggest a significant sentence for this style of crime. Many factors that would trigger a lesser sentence, other than the judge's sense of fairness, are already considered by the Guidelines.²⁶⁶ Of course, the Guidelines may be deficient in equilibrating sentences, and a judge's bare sense of justice may be an appropriate basis for a moderate departure from a guideline sentence. However, it is unclear that a judge's sense of justice justifies such a substantial departure from a guideline sentence as arguably occurred in the McDonnells' case.

CONCLUSION

The McDonnell case is tragic and sad, but the fundamental question of whether it involved politics as usual or public corruption appears to have been resolved. The jury found that Governor McDonnell traded official acts for significant gifts and goods, and the Fourth Circuit has somewhat clarified the definition of "official acts" for now.

However, two interesting questions remain open. First, how much evidence would have been required to sustain Mrs. McDonnell's conviction for obstructing an official proceeding? Second, are Judge Spencer's departures from the guideline sentences just? That question may be unanswerable. Where one stands on the issue may depend largely on what crimes one believes the McDonnells committed, as opposed to the crimes for which they were actually convicted.

266. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM'N 2014); Green, *supra* note 246 (indicating that Governor McDonnell "receive[d] credit" for his military service).
