



Supreme Court Unanimously Reverses McDonnell Conviction

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Earlier this week the United States Supreme Court handed former Virginia Governor Bob McDonnell a big victory by reversing his 2014 conviction for “accepting payments, loans, gifts, and other things of value from [Johnnie] Williams and [his company] Star Scientific in exchange for ‘performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific’s products.’” *McDonnell v. United States*, No. 15-474, slip opinion at 8 (quoting the Government’s Indictment).^[1] The decision is a key development in public corruption law because it narrows the definition of “official act” under the bribery statutes and it limits an oft-used tool long relied upon by the United States Justice Department.^[2]

By now the facts of the McDonnell case are well known. Governor McDonnell and his wife Maureen accepted more than \$175,000 in loans, gifts and benefits from Virginia businessman Johnnie Williams while McDonnell served as the 71st Governor of the Commonwealth of Virginia. Williams, who did not know the McDonnells prior to the Governor’s campaign for office, was the CEO of Star Scientific, a Virginia-based company that produced and marketed a nutritional supplement called Anatabloc, which is made from a compound found in tobacco. Williams wanted Virginia universities to conduct clinical trials of the product in preparation for seeking approval of the supplement by the Food and Drug Administration and he looked to the McDonnells to help him in that effort. The Governor and his wife provided assistance in at least five ways:

“(1) ‘arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc’;

(2) ‘hosting, and . . . attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients’;

(3) ‘contacting other government officials in the [Governor’s Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine’;

(4) ‘promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s Mansion’; and

(5) ‘recommending that senior government officials in the [Governor’s Office] meet with Star Scientific executives to discuss ways that the company’s products could lower healthcare costs.’”

Id. at 10 (quoting the McDonnell Indictment). The evidence presented at trial did not show that Governor McDonnell possessed any type of formal or final decision-making authority over the issues important to Williams; and, staff members generally did not take action favorable to Williams as the result of the Governor's efforts. In the end, Williams did not achieve the results he was seeking.

Prosecutors argued that the Governor's willingness and availability to promote Star Scientific and its product, when juxtaposed with the extravagant gifts provided by Williams to the McDonnells, constituted bribery of the Governor. The Governor, on the other hand, argued that the effort he made on behalf of Williams and Star Scientific did not differ from that made on behalf of many other Virginia constituents, particularly those aiding his very public effort to develop business in his State.

To convict McDonnell at trial the Government had to prove that he committed, or agreed to commit, an "official act" in return for the loans and gifts that he received from Williams and his company. That term is defined in 18 U.S.C. § 201 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 officials' place of trust or profit." In its briefing before the Supreme Court prosecutors argued that the wording of the definition was intentionally broad and designed to cover "any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." Id. at 13 (quoting the Brief for the United States at 20-21) (emphasis in original). Building on this view of the meaning of the statute, prosecutors argued that "official act" could specifically include arranging meetings, contacting other public officials or hosting an event concerning any subject, including a broad policy initiative such as economic development. Id.

McDonnell argued at trial and to the Supreme Court that both the context and a real-world understanding of the role of a public official requires a more narrow reading of the definition of "official act" to cover only those acts which "direct[] a particular resolution of a specific government decision." To hold otherwise, the Governor argued, would raise serious Constitutional concerns by placing public officials at the hands of vague anti-corruption laws and the discretionary interpretations of prosecutors.

The Supreme Court sided, unanimously and unequivocally, with Governor McDonnell. The Court adopted a "more bounded interpretation" of the statute, and held that "setting up a meeting, calling another public official, or hosting an event does not, standing alone^[3], qualify as an 'official act'" under the bribery statute. Id. at 14.

The Court spent several pages of its opinion on a definitional and contextual analysis of the terms used by Congress in section 201. It looked at the meanings of the words "question, matter, cause, suit, proceeding or controversy" and concluded that all must in this context be read to include only those things which most closely resemble "a lawsuit before a court, a determination before an agency, or a hearing before a committee." Id. at 16. The Court limited "official action" to these more formal exercises of governmental power.

The Court also analyzed the requirement that the question or matter must be "pending" or "may by law be brought" before "any public official" for the matter to fall within the definition of "official action." Rejecting issues as general as "Virginia business and economic development," the Court held that these terms require the type of matter that can be "put on an agenda, tracked for progress, and then checked off as complete" and must fall within the "specific duties of an official's position." Id. at 17.

Echoing the concerns expressed by several Justices during oral argument in the case^[4], the Court also addressed the significant constitutional implications of the Government's interpretation of section 201. In a representative democracy there is a "basic compact" between public officials and their constituents, Chief Justice John Roberts wrote, in which constituents rely on their public officials to address their

concerns and intervene with other public officials on their behalf. Oftentimes this relationship - this compact - exists with campaign contributions or other types of relationships (financial, influential and otherwise) as a backdrop to those interactions. To allow the Government's interpretation of section 201 to prevail would, the Court found, interfere with this fundamental relationship between constituents and officials.

Because the jury in the case had been instructed incorrectly, reversal was required. The trial court instructed the jury using the Government's interpretation of the definition of "official act" and directed them that the term includes acts that a public official normally or customarily performs including those acts taken in aid of long term goals. *Id.* at 11-12. More importantly, the trial court rejected McDonnell's request that the jury be told that arranging a meeting, attending or participating in an event, hosting a reception, or making a speech are not, "standing alone", "official acts" because they are not decisions on matters pending before the government. *Id.* at 12. This instruction does not comport with the Supreme Court's "more bounded" interpretation of the statute, and the Court reversed and remanded the case to the United States Court of Appeals for the Fourth Circuit.

The impact of this decision will be far-reaching. First, its most direct impact is on the McDonnell case itself. The Fourth Circuit will be called upon to determine, in light of the Supreme Court's interpretation of section 201, whether sufficient evidence was presented to allow for a retrial. At the same time, the United States Department of Justice will have to determine whether it can or should retry Governor McDonnell under the newly refined definitions.

Second, we can anticipate motions to dismiss some or all of the charges in the prosecution of former New York State Assembly Speaker Sheldon Silver. Silver, who was tried in late 2015, raised similar arguments in response to his own federal indictment. His appeal is currently pending.

Likewise, the indictment facing New Jersey Senator Robert Menendez is based on a broad reading of the bribery statutes (including section 201) and the Senator is accused of accepting numerous and valuable gifts in exchange for the performance of "official acts" for a friend and a Florida doctor who sought significant interpretative changes in rules governing health care reimbursement by the Federal Government under the Medicare system.

This case requires a significant change in the manner in which the United States Department of Justice approaches the investigation and prosecution of public corruption matters. Looking at the range and scope of relationships between constituents and public officials, the Department has often employed a "stream of benefits" theory, which allowed it to investigate any action taken by an official if the relationship and the exchange of benefits left the appearance that the official had been paid to make or influence decisions on behalf of the paying constituent when and if the opportunity arose. The emphasis under this theory was on the benefit paid rather than on the official action to be taken in return for the benefit. The McDonnell decision changes the Department's focus and will certainly limit the types of cases in which federal prosecutors can bring bribery charges going forward.

One cautionary note is important here. The McDonnell decision, while representing an important refinement in federal public corruption law, also leads to a renewed importance of state gift and reporting laws applicable to public officials. Even though the definition of "official act" under Federal law is limited after McDonnell, state law will continue to regulate public officials' receipt of gifts from constituents (whether or not connected to official acts), and may contain strict disclosure requirements as well as criminal sanctions for violations. Notably, and as a direct result of the McDonnell investigation, Virginia tightened its gift restrictions in a new law which went into effect earlier this year.

[1] Governor McDonnell was charged with one count of conspiracy

to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement. See, 18 U.S.C. §§ 1343, 1349 (honest services fraud); § 1951 (a) (Hobbs Act extortion); § 1014 (false statement).

[2] The Supreme Court's full opinion may be found at http://www.supremecourt.gov/opinions/15pdf/15-474_ljgm.pdf.

[3] The Court did note that setting up a meeting, hosting an event or making a phone call can constitute evidence of an "official act" if the official intends to provide advice or exert pressure on a pending matter. The key phrase here in terms of the Court's analysis is the phrase "standing alone". Id. at 19-21.

[4] The transcripts of the oral argument may be found at http://www.supremecourt.gov/oral_arguments/argument_transcripts/15-474_19m1.pdf and the recording of those arguments may be accessed at http://www.supremecourt.gov/oral_arguments/audio/2015/15-474.

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