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The Supreme Court Redraws the Lines for Corruption Prosecutions

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Election and Political Law

The Ferrari carrying former Virginia Governor Bob McDonnell appears to have made a U-turn this week on its way to the federal penitentiary. In a unanimous decision, the Supreme Court set a new standard for federal corruption cases as it vacated Governor McDonnell's conviction. *McDonnell v. United States*, 579 U.S. ___ (June 27, 2016). The court held that a public official does not violate federal law simply by taking a benefit in exchange for arranging a meeting with or providing access to public officials and employees, or asking those employees to consider an issue. Instead, the official must take action or make a decision—or agree to do so—on a specific and focused matter that involves a formal exercise of government power, including advising or pressuring others to take an action or make a decision. But, as described below, the consequences of *McDonnell* should not be exaggerated.

The More Narrow "Official Act" Standard

At trial, the jury found McDonnell guilty of violating and conspiring to violate the federal honest services fraud statute, 18 U.S.C. §§ 1343, 1349, and the anti-extortion provisions of the Hobbs Act, 18 U.S.C. § 1951. Conviction under both statutes requires that the official accept something of value in exchange for an "official act," which is defined in the bribery statute governing federal officials, 18 U.S.C. § 201. *McDonnell*, slip op. at 9. That law 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." 18 U.S.C. § 201(a)(3).

The government argued that "official acts" encompasses nearly all activity of a government official, including "arranging meetings" for a supporter with Virginia officials, "hosting events" for the supporter at the Governor's mansion, and "contacting other government officials" in Virginia about the donor's company. *McDonnell*, slip op. at 1-2 (internal quotations omitted).

The court disagreed. It held that an "official act" has two necessary elements: there must be a "question, matter, cause, suit, proceeding or controversy" and there must be a decision or action *on* that "question, matter, cause, suit, proceeding or controversy." *Id.* at 14. A "question, matter, cause, suit, proceeding or controversy" "must involve a formal exercise of government power" in the "same stripe" as a lawsuit, agency determination, or committee hearing. *Id.* at 14-16, 21. Broad issues like developing the Virginia economy and routine acts like setting up a meeting or referring a constituent to another official are not "a question or matter;" instead, the issue before the official must be "more focused and concrete." *Id.* at 16-18.

With respect to whether there was a decision or action "on" the question or matter, the Court held that even where a proper "question" or "matter" is identified—such as a decision about whether to issue a grant or to initiate a study—the act of setting up a meeting, hosting an event, or talking to another official is not a decision or action "on" that question or matter. *Id.* at 18-21. Note that the Court's interpretation impacts not only honest services fraud and the Hobbs Act, but also the laws against bribing and providing an illegal gratuity to federal officials.

Why Companies Shouldn't Read Too Much into McDonnell

The decision is not as narrow as some might read it. A bribe is still a bribe. While the court narrowed the types of acts that can be "official acts" to support a bribery conviction, it did not restrict the types of gifts or items that can be bribes when provided in exchange for an official act. Trading a political contribution in exchange for advancing legislation out of committee is still illegal. While it did reject the government's argument that "nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*," the court did not take issue with the government's characterization that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid.*" *Id.* at 22.

The court left in place tools for prosecutors to use when pursuing corruption cases. It made clear that a corruption conviction only requires an agreement by the official to take the official act, not actually completing the act. *Id.* at 19. In addition, an official can violate the statute by acting through his staff, if he "exert[s] pressure" on another official to perform an official act, or if he provides advice to another official or employee, knowing it will form the basis of that second person's own official act. *Id.* Finally, the court noted that setting up a call or meeting can still be evidence of agreement to take an official act, even if the meeting itself is not illegal. *Id.* at 20.

One aspect of the decision likely to generate future litigation is when an official "exerts pressure" on another official or "provides advice" such that it becomes an official act. There may be disputes as to when an official's request that his or her subordinate take a meeting with a benefactor becomes pressure to approve the benefactor's request. Legislatures may also respond to this decision. It is worth recalling that Virginia had no restrictions on gifts to the Governor when these actions occurred. Statutory restrictions on the size or frequency of gifts are a more precise alternative to achieve the same end as some corruption laws. Congress could also seek to tighten federal anti-corruption statues with this week's decision in mind.

Finally, the decision underscores this court's concern with criminalizing the political process. The part of the opinion finding certain acts of public officials to be part of the political system that falls outside the realm of regulation is reminiscent of the court's widely-discussed campaign finance opinions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. ___ (2014), both of which emphasized the court's belief that "ingratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. While the *McDonnell* decision does not focus on campaign finance or mention *Citizens United*, the court's decision is in keeping with these prior conclusions that some parts of the political process can be influenced by money without running afoul of anti-corruption laws.

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