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Expert Analysis

Potential Impact of Supreme Court's Upcoming Political Quid Pro Quo Case

By **Robert J. Anello**

And **Richard F. Albert**

The inherent tension between the regulation of political corruption and the right to spend money to influence politicians and election outcomes has played out repeatedly in Supreme Court jurisprudence over the past 40 years. Older decisions justified limitations on financial contributions to politicians to prevent even the appearance of influence. More recently, however, the court has made clear that corruption is limited to those cases in which the government establishes a quid pro quo sale of "official action"—payments being made in return for an explicit promise or undertaking by the official to perform an official action.[1]

In granting certiorari in the case of former Virginia Governor Robert McDonnell, the Supreme Court has again ventured into the quagmire of defining what constitutes an illegal quid pro quo arrangement. In *McDonnell*, the issue centers upon the meaning of "official action" under the federal criminal corruption laws. The prosecution of McDonnell and his wife for receiving gifts and loans valued at $177,000 from a campaign donor drew criticism in some quarters for criminalizing politics as usual.[2] The McDonnells insist that they took no "official action" in exchange for what were customary gifts—gratuities that were not even illegal under Virginia state law. The Supreme Court's decision in *McDonnell* as to what constitutes a corrupt act almost certainly will have an impact on the business of politics, as well prosecutions under other criminal statutes containing a quid pro quo requirement.

Whether a quid pro quo agreement existed was in issue in the recent political corruption trials of Sheldon Silver, former New York State Assembly speaker, and Dean Skelos, former New York State Senate leader.[3] Both men were found guilty and likely will seek review of the sufficiency of the evidence on the element of a quid pro quo on appeal.

The contours of a quid pro quo agreement have been a moving target in the courts.[4] Cases in which a politician directs a government contract to a company or individual in exchange for money is a relatively clear-cut example of an illegal quid pro quo. The illegality is less clear in cases where a politician accepts a series of benefits, but stops short of directly bestowing a benefit on the donor. The government asserts that in such cases an implicit agreement exists—by accepting the gifts (the quid) the politician is agreeing to perform official acts at some point (the quo) and that illegal activity has occurred even if no action is ever taken by the politician.[5] This is the notion that McDonnell has challenged.

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Because private funding of campaigns is the norm in America, the Supreme Court's ruling on what "official action" an elected official can take vis-à-vis a donor, without being labeled a criminal, will be particularly significant, and likely will affect the courts' construction of the various federal laws relied on by the government to prosecute political corruption, including the federal bribery statute,[6] Hobbs Act extortion,[7] bribery-based honest services fraud,[8] and federal program bribery.[9]

The court's ruling also is likely to have an impact beyond the political arena. For instance, the Anti-Kickback Enforcement Act[10] prohibits the knowing and willful offer, payment, solicitation, or receipt of any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. To constitute a violation of the statute, a clear correlation must be established between the payment and the desired conduct—a quid pro quo. Defendants "cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration."[11] Similarly, the anti-bribery provisions of the Foreign Corrupt Practices Act requires proof of a quid pro quo, "that is, an intent on the part of the public official to perform acts on his payor's behalf," as opposed to an illegal gratuity, which does not require an intent to influence or be influenced and is not illegal under the FCPA.[12]

The Case Against McDonnell

Robert McDonnell and his wife Maureen had a relationship with Johnny Williams, the CEO of Virginia-based company, Star Scientific, a technology company that claimed as its mission to "promote maintenance of a healthy metabolism and lifestyle." Star Scientific was in the process of trying to launch a product called Anatabloc to be marketed to treat chronic inflammation, but needed funding for outside research in order to have Anatabloc recognized by the Food and Drug Administration.

The indictment filed in the case alleged that Williams gave the McDonnells money and gifts in exchange for the performance of official actions "on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products" at Virginia state universities.[13] McDonnell's defense team acknowledged receipt of the gifts—all were lawful under Virginia state law—but denied that the governor and his wife took any official action as a result.

Although the evidence showed that the governor arranged meetings for Williams to meet state university leaders and Virginia's Secretary of Health and Human Resources and that the governor directed staffers to gather information on Anatabloc, the defense maintained that they took no actions that resulted in Williams or his company actually receiving state funds or any other state benefit. In fact, no state or university studies of Anatabloc ever occurred.

The jury found McDonnell guilty on 11 corruption counts. Specifically, the former governor was found guilty of six counts of violating the extortion provision of the Hobbs Act by obtaining property to which he was not entitled from another under "color of official right" and three counts of violating the honest services fraud statute by using interstate wire communications to further schemes to defraud the citizens of Virginia of their right to honest services by accepting bribes. He also

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello P.C.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

was found guilty of two counts of conspiracy to violate these statutes.[14] He was sentenced to two years in prison.

All of the statutes pursuant to which McDonnell was convicted require that the defendant agree to an "official act" in exchange for money, campaign contributions, or any other thing of value. On appeal, McDonnell challenged the trial court's jury instruction on the definition of "official action" as overbroad "to the point that it would seem to encompass virtually any action a public official might take while in office."[15] The U.S. Court of Appeals for the Fourth Circuit rejected this argument and further found sufficient evidence of an "official act" by McDonnell to affirm the conviction.

Noting first that prosecutors needed only to show an expectation that some type of official action would be taken, the Fourth Circuit concluded that the government had exceeded its burden by offering evidence that McDonnell in fact used the power of his office to influence government decisions regarding whether state university researchers would initiate a study of Anatabloc, whether state grants would be allocated for the study of Anatabloc, and whether the health insurance plan for state employees would include Anatabloc as a covered drug. McDonnell's conviction was affirmed.

Certiorari Petition

In August 2015, the Supreme Court ruled that McDonnell could remain free on bail pending the resolution of his certiorari petition. McDonnell filed his petition in October 2015.[16] The court granted certiorari on the question of "whether 'official action' is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional."

After his trial, McDonnell requested that the court instruct the jury that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts.'" He further requested that the jury be told that it must decide whether his conduct "was intended to or did in fact influence a specific official decision the government actually makes" and that "mere ingratiation and access are not corruption."[17]

The trial judge refused, relying instead on the definition of "official act" as set forth in the federal bribery statute.[18] The court instructed the jury that "official actions" included both those actions clearly defined as part of an official's job and those actions customarily performed by the official even if they are not explicitly set forth in law or a job description. Finally, the court told the jury that a "public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes the public official" had the requisite power to influence and that "official action can include actions taken in furtherance of longer-term goals."

McDonnell argues that the district court's "unbounded construction" of the term allowed the jury to infer a criminal quid pro quo whenever an official arranges a staff meeting for a donor or asks a staff member to attend a briefing "in an attempt" to gather information—something that officials "reflexively do all the time."[19] McDonnell takes issue with both the Fourth Circuit's specific interpretation of the law that construes an "official act" as "divorced from any exercise of governmental power" and the circuit court's general approach in adopting a broad and vague interpretation of the federal corruption statutes. McDonnell argues that the Fourth Circuit's holding contradicts Supreme Court jurisprudence and decisions from other circuit courts.

In its response to McDonnell's petition, the government takes issue with the former governor's characterization of his actions, arguing that the evidence demonstrated that McDonnell accepted gifts from Williams "not to obtain the sort of general 'access' commonly provided to campaign donors, but rather in exchange for [McDonnell's] agreement to use his position to influence state officials to dispose of government matters in a manner favorable to Williams."[20] According to the government, this is exactly the type of unlawful quid pro quo arrangement the laws prohibit.

Further, the government argues that whether McDonnell actually sought to influence any action on behalf of Williams and his company is irrelevant because the crimes of honest-services fraud and Hobbs Act extortion are complete upon receipt of the payment; "fulfillment of the quid pro quo is not an element of the offense." The government maintains all that is required is enough to show that Williams' arrangement with McDonnell carried an expectation that McDonnell would take "official action" to influence government matters.[21]

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Finally, the government rejects McDonnell's analysis of legal precedent from the Supreme Court and other federal circuits. Speaking to the Supreme Court's campaign-finance decisions, the government argues that the court has distinguished between a sort of "general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford" and "specific quid pro quo arrangements." According to the government, "[t]he existence of a quid pro quo is thus the key to distinguishing between lawful campaign contributions and unlawful bribes."[22]

Eleven amicus briefs were filed in the case in support of McDonnell's petition by groups spanning the political spectrum including law professors, politicians, former attorneys general, the National Association of Criminal Defense Lawyers, and the Republican Governors Public Policy Committee. These briefs argue that the Fourth Circuit's application of the criminal statutes in the McDonnell case violated key principles that restrain the expansive interpretation of broad criminal statutes. Amici further argue that the decision threatens legitimate political activity and "would wreak havoc on the public life."[23]

Conclusion

Perhaps the only thing that is clear from the McDonnell case is that the line between illegal quid pro quo arrangements and lawful contributions and support is a fuzzy one. The lack of clarity gives federal prosecutors wide-ranging power to target almost any type of conduct by a politician. The criminal law should not be so malleable. In 2012, journalist George F. Will wrote: "Until the court clarifies what constitutes quid pro quo political corruption, Americans engage in politics at their peril because prosecutors have dangerous discretion to criminalize politics…if bribery can be discerned in a somehow implicit connection between a contribution and an official action, prosecutorial discretion will be vast."[24] Hopefully, the Supreme Court's decision in *McDonnell* will provide some much-needed clarity.

1. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) ("Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption."); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) ("favoritism and influence are not…avoidable in representative politics").
2. Elkan Abramowitz and Jonathan Sack, "Are We Criminalizing Politics as Usual? Case Against Former Virginia Governor," New York Law Journal (March 5, 2014).
3. Benjamin Weiser, "Sheldon Silver's Lawyers Are Likely to Argue U.S. Failed to Prove Quid Pro Quo," The New York Times (Dec. 2, 2015); William K. Rashbaum and Susanne Craig, "Defense Lawyers Point Out 'Holes' in Case Against Dean Skelos and Son," The New York Times (Dec. 9, 2015).
4. See Jordan May, "'Are We Corrupt Enough Yet?' The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions," 54 Washburn L.J. 357 (Spring 2015).
5. *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015).
6. 18 U.S.C. §201(b).
7. 18 U.S.C. §1951.
8. 18 U.S.C. §1346.
9. 18 U.S.C. §666.
10. 42 U.S.C. §§1320a-1327(b).
11. *United States v. McClatchey*, 217 F.3d 823, 834 (10th Cir. 2000) (internal citations omitted).
12. See *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012).
13. Indictment, *United States v. McDonnell*, No. 3:14cr12 at p. 7 (E.D.Va. Jan 21, 2014).
14. The McDonnells also were charged but acquitted of charges of false statements and obstruction of official proceedings.
15. *McDonnell*, 792 F.3d at 505.
16. Maureen McDonnell was sentenced to a year and a day in prison after trial and currently has an appeal pending in a lower court.
17. Petition for a Writ of Certiorari, *United States v. McDonnell*, No. 15-474, at 4.
18. 18 U.S.C. §201(b)(2).
19. Petition for Certiorari at 11.
20. Brief for the United States in Opposition, *United States v. McDonnell*, No. 15-474, at 12.
21. Id. at 14-15.
22. Id. at 26.
23. Amicus Brief of Former Attorneys General in Support of Petitioner, *McDonnell v. United States*, No. 15-474 (Nov. 16, 2015).
24. George F. Will, Washington Post (Feb. 12, 2012).