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Expert Analysis

Are We Criminalizing Politics as Usual? Case Against Former Virginia Governor

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From time immemorial political leaders have used gifts and favors—whatever had value in a given era—as a means of gaining and maintaining power. In turn, others who sought power or fortune reciprocated by giving something of value to political leaders.

Politics in our own era is no exception. Members of Congress, for example, routinely use their clout to help constituents secure government benefits, and votes and campaign contributions are expected in return for such efforts.[1] While some of these ministrations may seem distasteful, they follow logically from the expansion of federal programs, and few would consider them criminal—unless they crossed some hard-to-draw line between corruption and the ordinary trading of favors.

One of the principal battlegrounds where the line is drawn between ordinary politics and illegal graft is federal honest services law, used to prosecute corruption in the public and private sectors. In this article, we revisit honest services law,[2] particularly as it has been applied in the January 2014 indictment of former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell.[3]

The 14-count indictment charges conspiracy to commit honest services fraud and three substantive counts of honest services fraud. The case against the McDonnells raises questions not only about how honest services law should be used but, more broadly, whether the government is seeking to criminalize politics as usual.

Honest Services Fraud

Federal law prohibits the use of the mails and wires for the purpose of executing "any scheme or artifice to defraud."[4] Criminal liability premised on the theft of honest services was formulated by prosecutors and upheld by courts in the 1970s and 1980s. Shortly after rejection of such liability by the Supreme Court in 1987,[5] the theory was revived by Congress and codified in 18 U.S.C. §1346, which provides that a "scheme or artifice to defraud" includes a "scheme or artifice to deprive another of the intangible right of honest services." Though consistently affirmed by appellate courts, criminal liability premised on the theft of honest services gave rise to concern over its breadth and potential for abuse.[6]

In 2010, the Supreme Court rejected the broadest and most controversial application of Section 1346—criminal liability premised on undisclosed self-dealing and conflicts of interest. In *Skilling v. United States*,[7] the defendant, the former chief executive officer of Enron, was charged with engaging in a scheme to defraud shareholders and others by manipulating the company's publicly reported financial statements and making misleading public statements about the company's performance. Skilling was found guilty of engaging in an honest services fraud conspiracy.

On review, the Supreme Court effectively rewrote Section 1346 by limiting its reach to the giving and receiving of bribes and kickbacks, though that limitation was not explicit on the face of the statute.[8] The honest services fraud conviction against Skilling was reversed because the government had not alleged that Skilling solicited, accepted or offered payments to or from a third party in exchange for the charged improper actions.

Case Against the McDonnells

In the prosecution of the McDonnells, the government alleges that when McDonnell was running for governor, and during his tenure as the governor of Virginia, he and his wife received benefits from a campaign donor, Johnny Williams, the CEO of Virginia-based

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company, Star Scientific, a "technology-oriented company with a mission to promote maintenance of a healthy metabolism and lifestyle." According to the indictment, Williams gave the McDonnells loans and gifts of money, clothes, golf fees and equipment, trips and private plane rides totaling at least $165,000 in value. The indictment claims that these items were given 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."[9]

Specifically, the indictment alleges that Williams took Ms. McDonnell on a New York City shopping spree during which she spent almost $20,000 purchasing dresses and accessories for her daughter's wedding, made a loan of $50,000 to the couple after they complained of financial difficulties, and paid $15,000 to the caterer of the McDonnells' daughter's wedding. The indictment also alleges that Williams paid for McDonnell, his two sons and his future son-in-law to play golf at an exclusive golf club in Virginia, and that the McDonnell family vacationed at Williams' multimillion-dollar vacation home where they enjoyed exclusive use of Williams' Ferrari.

In exchange, according to the indictment, the McDonnells (i) arranged meetings for Williams to meet with government officials to promote Star Scientific's products; (ii) hosted and attended events designed to encourage Virginia state university researchers to initiate studies and promote the use of Star Scientific's products; (iii) contacted government officials as part of an effort to encourage Virginia state universities to initiate studies of Star Scientific's products; (iv) promoted Star Scientific's products at events in the governor's mansion where Williams' relationships with Virginia government officials were facilitated; and (v) recommended that senior government officials meet with Star Scientific executives to discuss ways that the company's products could lower health costs.[10] The indictment does not allege that Star Scientific or Williams received a contract or state funds as a result of the McDonnells' efforts, nor does it state that the McDonnells' efforts on behalf of Star Scientific were successful.

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Significantly, the McDonnells' receipt of things of value, though unseemly to be sure, did not violate state law. Virginia does not limit the value of gifts that an elected official can accept. While amounts over $50 must be disclosed annually, gifts to family members are expressly exempt from disclosure.

Critics of the prosecution insist that the McDonnells' actions are simply "good old politics 101."[11] After all, the essence of what McDonnell allegedly did for Star Scientific—promote the merits of a company in his home state and with state officials—is what governors do on a regular basis. According to McDonnell's defense lawyers, the government seeks to stretch anticorruption laws to cover "routine political courtesies."[12]

Issues Raised

The charges against the McDonnells raise important questions about the scope of honest services law: How closely must the official acts be linked to the things of value given to the public officials? What kinds of acts constitute a corrupt or dishonest use of official power? Though *Skilling* sought to limit the theft of honest services to its clearest manifestations—official acts done in exchange for bribes or kickbacks—significant questions remain as to just what conduct by politicians the law reaches.

As to how closely the alleged bribe or kickback must be linked to an official act, the McDonnells have asserted that a generalized expectation of favoritism is not enough. In their view, the government lacks evidence of an illicit agreement or corrupt intent. Citing the U.S. Court of Appeals for the Fourth Circuit in *United States v. Taylor*, the McDonnells write that "virtually every gift to an elected official is 'because of his office' or 'motivated by the public office involved.'" For this reason, the law requires proof that an official accepted a payment knowing it was made in return for "*specific* official acts."[13]

Opposing a defense motion for discovery, the government has argued that it need not prove a "specific this-for-that correlation between each particular thing of value given and each particular official action performed or contemplated"; in its view, it suffices that the payments were made with "the intent of securing a specific type of official action or favor in return."[14] This argument is supported by the Third Circuit's decision in *United States v. Bryant*, where the court held that a quid pro quo could take the form of a "stream of benefits" and that each corrupt payment did not have to be tied to a corresponding official act.[15]

The case against the McDonnells raises the additional important question of just what sort of actions by politicians or contemplated benefits to private persons are subject to criminal liability. At one end of the spectrum is the awarding of a contract or relief from an otherwise applicable penalty in return for something of value. At the other end is suggesting that state officials meet with a person, speaking highly of another person's character or business prospects or, generally, cheerleading for a local company. These latter activities not only take place routinely; they are openly touted by the politicians and private businesses engaged in them, without anyone thinking that an improper benefit is being conferred.

Contrast With Other Cases

Questions raised by the case against the McDonnells were not present in other leading honest services prosecu-

tions. While space does not permit a thorough canvassing of honest services fraud prosecutions, two prominent cases are exemplary.

In *McNally v. United States*,[16] the case in which the Supreme Court held that the fraud statutes do not embrace theft of honest services as a basis of liability, the linkage between the official act and tangible things of value was clear. In that case, the chairman of the Kentucky Democratic Party (Hunt) and a member of the Governor's cabinet (Gray) agreed with the vice president of Wombwell Insurance Agency to award the state's Workmen's Compensation insurance business to Wombwell. In return, Wombwell paid kickbacks to a company nominally owned and operated by McNally, who in turn passed the funds to Hunt and Gray.[17] The relationship between the secret payments and the official action was clear: in exchange for money, Hunt and Gray used their positions to ensure the state's insurance business was awarded to Wombwell.

In a leading honest services prosecution in the U.S. Court of Appeals for the Second Circuit, *United States v. Margiotta*,[18] the chairman of the Nassau County Republican Party was convicted of a municipal insurance kickback scheme by which he directed business to a New York insurance company in return for which the company was required to split substantial commissions with Republican politicians. Once again, specific public actions conferred a concrete benefit on a private person, and in exchange that person provided tangible benefit to the official actor.

In contrast, the indictment of the McDonnells does not allege that particular gifts or financial assistance were given by Williams in exchange for specific acts that directly benefited Williams. Nor does the government allege that the benefits conferred by the McDonnells were concrete or otherwise led to a tangible financial benefit to Williams or Star Scientific. The indictment can be read to say that the former governor received gifts from a friend and supporter, and the governor in turn sought to help the supporter, the owner of a local business, in his dealings with state officials. Though such relations can readily be made to sound corrupt, they can also reflect the sort of favors given to supporters that are not unusual in our political system—ambassadorships bestowed on large fundraisers being a prominent example.[19] In the context of campaign contributions, the Supreme Court has made it clear that it is not a crime for politicians to help campaign supporters absent proof of a specific quid pro quo, for to hold otherwise would criminalize conduct that is "unavoidable" in our political system.[20]

Where the line is drawn is important. If drawn too narrowly, we risk selective criminal prosecutions of political adversaries—worsening an already harsh and exceedingly partisan public life. If drawn too broadly, we risk tolerance of corruption—worsening the already low regard in which our public servants are held.

Conclusion

The law recognizes that politicians need support to run for office and govern, and will in turn try to help their supporters and constituents. The law also contemplates that some exchanges cross the line from politics as usual to criminality. Where the line is drawn is important. If drawn too narrowly, we risk selective criminal prosecutions of political adversaries—worsening an already harsh and exceedingly partisan public life. If drawn too broadly, we risk tolerance of corruption—worsening the already low regard in which our public servants are held. In the prosecution of the McDonnells, the government has drawn a line. The court and possibly a jury will draw their own. In our view, much is at stake.

1. See, e.g., Rachel Weiner, "Solyndra, Explained," The Washington Post (June 1, 2012) (noting efforts made by politicians on behalf of energy company Solyndra, which obtained $535 million conditional loan guarantee from government to build solar panels).

2. Elkan Abramowitz and Barry A. Bohrer, "Overcriminalization and the Fallout from 'Skilling,'" NYLJ (Jan. 4, 2011); Honest Services Restoration Act, S. 3854, 111th Cong. (2010).

3. Press Release, "Former Virginia Governor and Former First Lady Indicted on Public Corruption and Related Charges," Department of Justice (Jan. 21, 2014).

4. 18 U.S.C. §§1341, 1343.

5. *McNally v. United States,* 483 U.S. 350 (1987).

6. See, e.g., *Sorich v. United States*, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from denial of certiorari) ("Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.").

7. 130 S. Ct. 2896 (2010).

8. Id. at 2935 (Scalia, J., concurring).

9. Indictment, *United States v. McDonnell,* No. 3:14cr12 at p. 7 (E.D.Va. Jan. 21, 2014).

10. Id. at pp. 34-35.

11. See, e.g., Harvey Silverglate, "Justice Goes After the GOP," The Wall Street Journal (Jan. 30, 2014); Frank Green, "Bob McDonnell Case Could Hinge on His Intent," Richmond Times-Dispatch (Feb. 5, 2014).

12. Jada F. Smith and Trip Gabriel, "Ex-Governor of Virginia and Wife Plead Not Guilty to Corruption," The New York Times (Jan. 24, 2014).

13. Defendant Robert F. McDonnell's Motion #1 Motion for Discovery of Selected Recordings of Communications Between Prosecutors and Members of the Grand Jury, *United States v. McDonnell*, 3:14cr12 at pp. 14-15 (E.D. Va. Jan. 21, 2014) (emphasis in original) (citing *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993)).

14. Government's Response to Defendant's Motions for Discovery of Selected Recordings of Communications Between Prosecutors and Members of the Grand Jury, *United States v. McDonnell*, 3:14cr12 at p. 7 (E.D.Va. Feb. 3, 2014).

15. 655 F.3d 232 (3d Cir. 2011).

16. 483 U.S. 350 (1987).

17. Hunt was deemed a public official.

18. 688 F.2d 108, 130 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983).

19. As suggested by recent congressional hearings, the selection of new ambassadors does not always reflect a nominee's qualifications and experience. See, e.g., Juliet Eilperin, "Obama Ambassador Nominees Prompt an Uproar with Bungled Answers, Lack of Ties," The Washington Post (Feb. 14, 2014).

20. *McCormick v. United States*, 500 U.S. 257, 272-73 (1991) (interpreting the Hobbs Act); see also *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 407-408 (1999) (interpreting the federal bribery statute).