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Even Though the Supremes Vacated Former Governor McDonnell's Bribery Conviction, Don't Even Think of Ditching Your Ethics Compliance Program

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The Supreme Court of the United States voted unanimously on June 27, 2016, to vacate former Virginia Governor Robert McDonnell's conviction under the federal honest services and extortion statutes.¹ In doing so, the eight Justices narrowed the definition of an "official act" for which public officials can be convicted for honest services fraud.² The decision continues the high court's approach to public corruption cases—the Court similarly vacated a federal bribery conviction of a company in 1999 for providing illegal gratuities to President Clinton's former Secretary of Agriculture, Michael Espy, based upon an overly expansive interpretation of the statute by the government.³ This Alert describes the McDonnell decision and identifies some of the broader issues that may be implicated relating to political ethics concerns.

Importantly, we would note that while the Court ruled in favor of McDonnell, organizations still should ensure appropriate compliance programs are in place for engaging with public officials.

Case Summary

Background

Chief Justice John Roberts described the underlying facts as "distasteful" or worse in the Court's opinion. Governor McDonnell and his wife accepted loans, gifts, and other benefits that totaled \$175,000 from Jonnie Williams, a businessman hoping to receive help from the governor to get his product, a nutritional supplement called Anatabloc, made the subject of research at one of Virginia's universities. The government charged McDonnell and his wife with honest services fraud and other corruption-related offenses. In order to convict the McDonnells, the government had to prove that they committed, or agreed to commit, an official act in exchange for the \$175,000 in benefits from Williams.

The government used evidence gleaned from the couple's e-mails, testimony from former aides and from Williams himself, and details of meetings and events that the Governor set up for Williams, to prove that McDonnell and his wife committed at least five "official acts" in

¹ *McDonnell v. United States*, 579 U.S. ____ (2016).

² 18 U.S.C. § 201(a)(3).

³ *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398 (1999).

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return for the loans and gifts.⁴ Following his conviction, McDonnell appealed to the Fourth Circuit, which affirmed the conviction.

The Decision

At issue in the case was the government’s interpretation of what constituted official action taken by McDonnell.⁵ The Court rejected the government’s position that nearly any act performed by a government official—setting up a meeting, calling another public official, or hosting an event—qualifies as an official act. The Court reached this conclusion using both its interpretation of the statutory definition and prior decisions of the Court.

First, the Court applied the classic statutory interpretation canon *noscitur a sociis* (a word is known by the company it keeps) to rule that “question” and “matter,” two terms in 18 U.S.C. §201(a)(3) susceptible to varying meanings, take on the meanings attributable to “cause, suit, proceeding or controversy,” terms also used in the same provision that indicate more circumscribed and formal exercise of governmental power. To find otherwise, the Court suggested, would render the inclusion of the more formal terms superfluous. A meeting, call, or event not focused on reaching a specific decision or action would not fall within the narrower definition of question or matter. However, the Court found that the questions or matters at issue in this case—whether any Virginia state university would conduct a study of anatabine, whether the Tobacco Indemnification and Community Revitalization Commission would provide money for that study, and whether the Virginia state-based health insurance plan would cover Anatabloc—were in fact concrete and focused enough to be considered questions or matters for purposes of the statute.

Second, because of this finding, the Court had to then determine whether McDonnell took, or agreed to take, official action on the above questions or matters, that is, whether setting up meetings, calling other public officials, and hosting events centered around those questions or matters qualified as decisions or actions on them. The Court noted that precedent suggested otherwise, citing its ruling in *United States v. Sun-Diamond Growers of California* as standing for the proposition that the acts listed above, taken alone, do not rise to the level of decision or action required by 18 U.S.C. §201(a)(3).

Thus, the Court reasoned, a public official accused in a case such as this must be found to have actually made a decision or to have taken an action on a particular, narrowly defined question or matter at issue, or agreed to do so. The Court explained that exerting pressure on another official to perform an official act could qualify under this narrower definition, as would providing advice to another official with the knowledge that such advice would support that official’s decision to take action on a question or matter. Additionally, agreeing to do either, without ultimately doing either, would qualify under the narrower definition as well.

⁴ The five official acts were alleged to be (1) arranging meetings with Virginia government officials to discuss and promote Anatabloc; (2) hosting and attending events in the Executive Mansion to promote Anatabloc; (3) contacting other officials in the Governor’s office as part of an effort to encourage research studies of anatabine, the key ingredient in Anatabloc; (4) promoting Williams’ products to Virginia government officials by allowing Williams to invite certain individuals to the Executive Mansion; and (5) recommending that senior Virginia government officials meet with Williams and others to discuss benefits of his company’s products.

⁵ The parties had agreed that the definition of official act found in the federal bribery statute, 18 U.S.C. § 201(a)(3), was the relevant definition of official action. It 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 capacity, or in such official’s place of trust or profit.”

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However, in the Court's eyes, McDonnell did not make a decision or take an action on the questions and matters at issue by simply expressing support for a study at a meeting event with another official, or calling another official to talk about a study, or gathering further information. Nor was there evidence that any of McDonnell's subordinates felt pressure to take an official act following any of the meetings, calls, or events that McDonnell set up.

Larger Implications for Ethics Compliance

The *McDonnell* case represents a tightening of the boundaries within which prosecutors can prove public corruption cases. In rejecting the expansive interpretation of official action advanced by the government, the Court also expressed concerns about the "pall of potential prosecution" that could hang over normal and necessary relationships between public officials and their constituents if the government's interpretation of the federal bribery statute in §201 carried the day. The essential fabric of a representative government would be ruined, the Court argued, if basic aspects of elected official-constituent relations (such as the acts that McDonnell took to assist Williams) could be prosecuted as *quid pro quo* when no corrupt intent existed.

The Court did not, however, close the window on any prosecution of public corruption in this case. In remanding the case, the Court noted that if there was evidence that McDonnell pressured one of the public officials to whom he referred Williams's case into giving Williams some sort of priority over other research study applicants, the Court would likely have determined that McDonnell committed the necessary official act under its narrower reading of §201.

The lesson to take from the *McDonnell* ruling is not to loosen normal ethical precautions when it comes to engaging with public officials. The Court has given neither public officials nor those in government relations a pass. We counsel our clients to consider *The Washington Post* standard—would you want to read about specific contemplated activities on the front page of *The Washington Post*—in making decisions about complying with both the spirit and the letter of the law. By that standard, both McDonnell's and Williams' reputations have taken significant hits. Given the sometimes high-stakes nature of government relations activities, it is more important than ever to employ a cautious and conservative compliance program for engaging with public officials.

Finally, it should be noted that applicable Virginia laws at the time of the events that were the subject of the McDonnell case prohibited none of the gifts received by the McDonnells. Such gifts, loans, or benefits to public officials, even without any corrupt intent, are, however, strictly prohibited by most other states, and the federal government. In addition, non-criminal ethical restrictions, e.g. gift rules, can add a level of complexity to the picture that only underscores the need for caution and care.

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