

Federal Political Corruption Cases After *McDonnell*

You Don't Have to Like Your Husband To Conspire With Him

Bob McDonnell was the Governor of Virginia and a rising star in the Republican Party until he was tried, convicted, and sentenced to two years in prison. A federal jury found that McDonnell and his wife had violated federal laws making it a felony to agree to take "official action" in exchange for money, campaign donations, or anything else of value when they took \$177,000 worth of loans, luxury goods and vacations in return for promoting the business interests of their friend, Jonnie Williams, Sr.

A large part of the couple's defense at trial was that by the time they received these items, the public image of their marriage and happy life in the governor's mansion was a sham, and they did not like each other enough or speak to each other enough to conspire to commit bribery. That defense did not work. What did work was their appeal. In *McDonnell v U.S.* 579 U.S. ____ (2016), the Supreme Court reversed the conviction of the couple. See "*Quid pro quo: what is the quid, where is the quo?*" (Grimes) *Trial Bar News*, Volume —, Issue —, May 2017.¹

Not All Self-Dealing Constitutes an "Official Act"

The primary basis of the appeal was whether the actions benefitting Williams constituted "official acts," as defined by the federal bribery statute. The defense argued that the promotion of Williams's business did not involve the "exercise of actual sovereign power" and thus did not constitute an "official act" under the bribery statute. The *McDonnell* Court referred to its previous decisions defining the *quid pro quo* element of bribery in cases including *Skilling v. United States*, 561 U.S. 358 (2010). See "*The Collapse of Enron and the Narrowing of 'Honest-Services Fraud'*" (Grimes) *Trial Bar News*, Volume 33, Issue 10, November 2010.

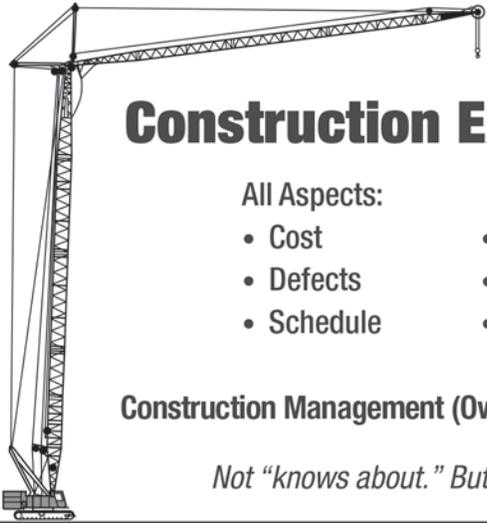
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¹ *Trial Bar News* archives are available online to CASD members at casd.org

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Justice Roberts wrote for the majority in *McDonnell*, stating, "Section 201 prohibits *quid pro quo* corruption – the exchange of a thing of value for an "official act". In the Government's view, nearly anything a public official accepts—from a campaign contribution to a lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*." Justice Roberts pointed out that the facts of the *McDonnell* case are far from the typical interaction between public officials and their constituents. However, the Court felt it necessary to set clear limits in the law (and the jury instructions) in this type of case.

Another defense argument on appeal was that the meetings and events McDonnell planned for Williams were nothing more than the "provision of mere access," and consequently were "constitutionally protected and an intrinsic part of our political system." In 2010, a 5-4 Supreme Court held in the highly

controversial *Citizens' United* decision², that "ingratiating and access" are not corruption. The *McDonnell* decision does not expressly refer to *Citizens United*, but the reasoning of the two cases is similar. McDonnell's defense also cited *McCutcheon v. Federal Election Commission*, 572 U.S. ____ (2014), which held certain campaign-finance laws unconstitutional under the First Amendment.³

However, while the Supreme Court accepted McDonnell's more narrow reading of "official act" and reversed on those grounds, the Court did *not* extend any First Amendment

2 558 U.S. 310 (2010): SCOTUS held (5-4) that the free speech clause of the First Amendment prohibits the government from restricting independent expenditures for communications by nonprofit corporations, for-profit corporations, labor unions, and other associations.

3 The decision held that Section 441 of the Federal Election Campaign Act (FECA), which imposed a limit on contributions an individual can make over a two-year period to national party and federal candidate committees, is unconstitutional.

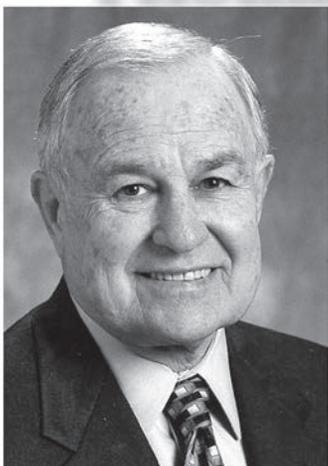
protection to McDonnell's conduct. Some of us find it heartening that the Supreme Court has not taken the logic of *Citizens United* so far as to declare the purchase of political access is a constitutional right.

How much of an impact will McDonnell have on prosecutions of corruption cases?

At first, it looked like the impact might be significant. Shortly after *McDonnell* was decided, a federal court of appeals reversed the guilty verdict of Sheldon Silver, the former speaker of the New York State Assembly, and then reversed the conviction of Dean Skelos, the former majority leader of the New York State Senate. Both cases were reversed because the trial court had instructed the jury with a definition of official acts that was unconstitutionally broad under *McDonnell*.

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The McDonnells were not retried after the reversal of their conviction. Silver and Skelos were both retried, and both were convicted, after the juries on their respective retrials were properly instructed on the more narrow definition of official acts. In 2018, the Office of the U.S. Attorney in the Southern District of New York secured a conviction of Joseph Percoco, who had been a top aide and long-time confidant of Governor Andrew Cuomo, on charges of soliciting and accepting \$300,000 in bribes from executives of companies that did business with the state of New York.

Political Corruption Prosecutions in the News

When someone wants to influence a public official without bribing him, they use PACs and lobbyists. Neither party in Congress wants to do much to control lobbying, but

sometimes lobbyists manage to get in trouble. The office of the special counsel stumbled across Manafort's misdeeds while investigating possible Russian influence in the 2016 Presidential Election. Manafort made \$60 million lobbying for a front group for Ukrainian President Yanukovich. In so doing, he failed to register as an agent for a foreign country, failed to disclose foreign bank accounts where he hid a lot of this money, and failed to pay taxes on more than \$16 million of that money. The fact that Manafort's crimes were discovered in such a random way should (but probably will not) cause Congress to enact laws creating more scrutiny of lobbyists.

Another type of prosecution of public officials is for the illegal use of campaign funds. This is what has been alleged against Representative Duncan Hunter. The Office of the U.S. Attorney in San Diego alleges that Hunter and his wife spent \$250,000 in

campaign funds on living expenses, travel, private school tuition, and other personal expenses.

Conclusion

Post-*McDonnell*, murky back-room dealings can still lead to successful corruption prosecutions, even under the more narrow definition of "official act". In a lot of countries, bribes taken by public officials in return for government contracts constitute a heavy tax on the citizens of those countries, diverting funds away from public works like schools and hospitals. These are important cases, and many federal prosecutors and defense attorneys would agree that it would be a very good thing if a few more federal resources are diverted to the prosecution of corruption at the highest levels, even if that means prosecuting a few less seasonal field workers for illegal entry. **TBN**

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