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NEWSLETTER

"I Want You to Show Me the Way": A Unanimous Court Rejects Gov. McDonnell's Bribery Conviction, Throws Doubt on Public Corruption Prosecutions, and Boosts the Art of the Introduction

July 2016

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Governors' Ethics Test (G.E.T.), Revised June 2016: Question 201. *As a public official, which of the following would be "official action" by you as covered by the federal bribery statute:*

A) Arranging meetings for a constituent businessman with other government officials to benefit the constituent's business (at a time when you are accepting, on an ongoing basis, over $150,000 in gifts and loans from the constituent);

B) Hosting a lunch event at your official residence for this same generous constituent's company. You invite to this event state university researchers whose research decisions your constituent is trying to influence;

C) Contacting other government officials concerning studies of your generous constituent's product;

D) None of the above

(Hint: This is not a trick question.)

If you answered "D"—and even if you didn't—you are living in the newly narrowed world of pubic corruption prosecution ushered in by the Supreme Court through its recent decision in *McDonnell v. United*

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States. On June 27, 2016, a unanimous Court overturned former Virginia Governor Bob McDonnell's conviction for public corruption, ruling that the interpretation of the term "official act" advocated by the government and used in jury instructions was overly broad.

In 2014, Governor McDonnell and his wife Maureen were both indicted on bribery charges based on allegations that they accepted over $175,000 in gifts and loans from Jonnie Williams, a constituent/businessman/donor trying to secure government support for his dietary supplement business. To succeed, the government had to show that the former governor and his wife committed (or agreed to commit) an "official act" in exchange for the gifts and loans. At trial, the government argued, and the District Court agreed, that the term "official act" was broad enough to include arranging meetings and hosting events for Williams. Using this inclusive definition, the McDonnells were convicted. The Fourth Circuit affirmed Governor McDonnell's conviction last year, and the Supreme Court granted certiorari.

In rejecting the government's broad interpretation of "official act," the Court embraced a more "bounded interpretation" of the term encompassing only "a decision or action on a question, matter, cause, suit, proceeding or controversy" involving a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. An official act is "something that is "specific and focused that is 'pending' or 'may be brought before a public official." The definition of "official act," the Court ruled, does not include an official's setting up meetings, calling other officials, or hosting an event, "without more"—even if that "more" is limited to exerting pressure on another official to perform an "official act."

The Court recognized that elected officials regularly undertake many activities that do not fall under the definition of an official act and stated that the government's preferred interpretation of the term would raise substantial constitutional concerns. For example, the Court observed that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include [constituents] in events all the time . . . [r]epresentative government assumes that public officials will hear from their constituents and act appropriately on their concerns." With that in mind, the Court reasoned that, if accepted, the government's expansive reading of the statute could potentially criminalize such routine, and often necessary, acts and could "cast a pall of potential prosecution over these relationships." As such, mere constituent relations activity will no longer support bribery charges under the current federal statute.

The *McDonnell* decision raises the bar substantially for the Department of Justice for prosecutions of public officials for bribery-related conduct. But the decision does not give public officials carte blanche to accept gifts from constituents and others seeking assistance. Indeed, the Court left open the possibility that Governor McDonnell may have committed crimes: the Court remanded the case to the Fourth Circuit Court of Appeals to determine if there is sufficient evidence on which a jury could convict Governor McDonnell under the now bounded definition of "official act." Further, federal, state, and local ethics regimes continue to restrict acceptance of gifts by public officials even where such acceptance is not linked to any specific official act.

It remains to be seen whether the government will attempt to retry the McDonnell case, and what effect, if any, this decision will have on pending prosecutions of other officials. DOJ's principal pending public corruption case against a federal official, for example, is its prosecution of Senator Bob Menendez (D-NJ) in connection with a bribery scheme in which Menendez allegedly accepted gifts from Salomon Melgen, a Florida ophthalmologist, in exchange for using the power of his Senate office in the following ways to benefit Melgen's financial and personal interests:

- Influencing the immigration visa proceedings of Melgen's foreign girlfriends;
- Pressuring the U.S. Department of State to influence the Government of the Dominican Republic to abide by Melgen's multi-million dollar contract to provide exclusive cargo screening services in Dominican ports;
- Stopping U.S. Customs and Border Protection from donating equipment to the Dominican Republican, a donation that would threaten Melgen's exclusive contract; and
- Influencing the outcome of the Centers for Medicare and Medicaid Services' administrative action seeking millions of dollars in Medicaid overbillings that Melgen owed to the federal government.

Sen. Menendez's attorneys will no doubt argue that the actions taken by the Senator on behalf of Mr. Melgen were basically common constituent service activities of the kind that, post-*McDonnell*, do not rise to the level of "officials acts" that can form the "*quo*" in a *quid pro quo* bribery scheme. But, on their face, the charged official actions central to the Menendez case appear to include an element lacking in the *McDonnell* case, or at least missing from the trial judge's charge to the jury on the meaning of "official acts": the attempt to influence other government officials, the attempt to exert pressure on other government decisions and actions. In this regard, Sen. Menendez's alleged actions appear to fall within the "bounded" definition of "official act," articulated by the *McDonnell* Court as including an official's "using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." If there are weaknesses to the government's case against Sen. Menendez, the "McDonnell problem"—failure to charge performance of specific and clear official actions—does not appear to be among them.

For future cases, however, *McDonnell* sends a strong message to government investigators and prosecutors: in investigating, charging, and trying public corruption cases, respect the boundaries of criminal statutes.