

Menendez Prosecution Continues Post-*McDonnell*

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On October 6, 2016, a federal grand jury in New Jersey returned a superseding indictment in the U.S. Department of Justice's prosecution of U.S. Senator Robert Menendez (D-NJ) and Florida ophthalmologist Salomon Melgen. The new indictment cures defects in the original 22-count, 68-page indictment, returned on April 1, 2015, which led to U.S. District Judge William H. Walls' dismissal of four counts charging federal bribery based on contributions by Melgen to The Fund to Uphold the Constitution. The cured indictment restores two of the four dismissed bribery allegations to the indictment.

Sen. Menendez and Salomon Melgen are charged in a bribery scheme in which, as alleged in the indictment, Sen. Menendez, in exchange for official actions, solicited and accepted from Melgen "domestic and international flights on private jets, first-class domestic airfare, use of a Caribbean villa, access to an exclusive Dominican resort, a stay at a luxury hotel in Paris, expensive meals, golf outings, and tens of thousands of dollars in contributions to a legal defense fund." On September 28, 2015, Judge Walls dismissed the four counts in the original indictment charging bribery based on Melgen's contributions to The Fund to Uphold the Constitution. Two of the dismissed counts related to a \$20,000 payment to The Fund made on May 16, 2012, and two related to a payment to The Fund made on September 21, 2011. As reasoned by Judge Walls in the Opinion accompanying his order dismissing the four counts, because contributions to The Fund to Uphold the Constitution—a legal defense trust fund that benefitted Sen. Menendez—were campaign contributions, any bribery charge based on contributions to that fund would have to meet the strict evidentiary burden imposed by controlling rulings by the Supreme Court in two pivotal public

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corruption cases from the early 1990s. The Court's rulings in *McCormick v. United States*, 500 U.S. 257 (1991) and *Evans v. United States*, 504 U.S. 255 (1992), require an explicit (not just an implied) *quid pro quo* agreement when a bribery charge is predicated on a campaign contribution. In his ruling dismissing the four counts from the original Menendez indictment, Judge Walls stated that the counts could not stand because they failed to specify that the payments to The Fund were "made in return for an explicit promise or undertaking ... to perform or not perform an official act."

In the superseding indictment, the charging language relating to the payment to The Fund to Uphold the Constitution on May 16, 2012, now tracks the language of other bribery-related counts left undisturbed by Judge Walls previous dismissal order. The allegations relating to this payment to The Fund are now incorporated in the two counts in the indictment also relating to a May 16, 2012 payment of \$40,000 by Melgen to the New Jersey Democratic State Committee Victory Federal Account. One of these two counts specifically alleges the payments were made "in return for Menendez's advocacy to the State Department on behalf of Melgen in his contract dispute with the Government of the Dominican Republic"; the other count specifically alleges payments made "in return for Menendez's advocacy at the highest levels of CMS and HHS on behalf of Melgen in his Medicare billing dispute." The superseding indictment does not reference Melgen's September 21, 2011, payment to The Fund.

In September 2016, the U.S. Court of Appeals for the Third Circuit rejected a request by Sen. Menendez's legal team, headed by Abbe Lowell, for an *en banc* rehearing of the claim that the federal charges against the Senator implicate his immunity under the Speech or Debate Clause of the U.S. Constitution and should be dismissed. A three-judge panel of the Court of Appeals had rejected these Speech or Debate Clause arguments in July 2016. The case is now pending the filing on behalf of Sen. Menendez of a petition for certiorari to the Supreme Court on these constitutional claims.