



Political Law Alert

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Supreme Court Vacates Corruption Conviction of Former Virginia Governor

On June 27, 2016, the United States Supreme Court unanimously vacated the conviction of former Virginia Gov. Bob McDonnell on corruption charges and remanded the case for retrial. As discussed below, the impact of the decision on most compliance programs is likely to be minimal.

Before the Jack Abramoff scandal in 2005, prosecutors generally pursued public corruption cases under the bribery or gratuity statutes, which require evidence of an express *quid-pro-quo*: an exchange of a thing of value for a government action, or a “thank you” payment. Starting with the Abramoff case, however, prosecutors started to shy away from relying on those statutes because of the high burden of proof required. Instead, by relying on fraud provisions such as honest services fraud, prosecutors have successfully obtained convictions in a series of cases based on the theory that such fraud provisions merely require a showing of linkage between the thing of value provided to an official and an official action.

The Supreme Court had the opportunity to limit the application of this “linkage theory” in the McDonnell case. However, as described below, the court focused almost exclusively on the meaning of “official action,” and did not address the linkage element. Thus, the holding is unlikely to affect most pay-to-play compliance programs, as it does not impact what sort of linkage is required between a gift/donation and an official action.

The original McDonnell conviction stemmed from more than \$175,000 in gifts and loans given to McDonnell — while he was in office — and his wife by the CEO of a Virginia nutritional supplement company that wanted to obtain university studies of his products. At that time, the gifts and loans were not prohibited under Virginia state gift law, though new laws have since been enacted. McDonnell was charged with, and convicted of, violating the federal honest services fraud provision, among other things. At trial, the jury was instructed that in order to convict McDonnell it must find that he agreed to accept a thing of value in exchange for an official act. At issue before the Supreme Court was the meaning of “official act” under the fraud provision.

In its unanimous opinion, the Supreme Court rejected the government’s interpretation of “official act” as encompassing any activity McDonnell engaged in as governor, and found that merely setting up a meeting, calling another public official or hosting an event does not, standing alone, constitute official acts. The court found that an official act requires a decision or action, or agreement to make a decision or action, regarding a

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concrete question or matter that “involve[s] 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.” While noting that the facts in this case by no means constitute normal political activity, the court expressed concern that the government’s broad interpretation of an official act

could chill the relationship between officials and constituents, and limit an official’s ability to act on constituent requests. Thus, the court vacated the conviction on the grounds that the jury was not properly instructed regarding the meaning of “official act.”

The case is *McDonnell v. United States*, No. 15-474.

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