

## Has the Supreme Court Made it Harder Than Ever to Prosecute Public Officials for Corruption?

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Has the Supreme Court made it harder than ever to prosecute public officials for corruption? The answer may lie in the Supreme Court's 2016 decision to overturn the conviction of Robert McDonnell, former governor of Virginia, in *McDonnell v. United States*.<sup>1</sup> In 2014, Robert McDonnell was found guilty of eleven counts of public corruption for accepting gifts and loans from Jonnie Williams, a Virginia businessman<sup>2</sup> and CEO of Star Scientific.<sup>3</sup> McDonnell and his wife, owing over \$80,000 in credit card debt, needed help to alleviate this debt and turned to Williams.<sup>4</sup> Williams promised to alleviate this debt and in return, McDonnell helped Williams get FDA approval for his dietary supplement, Anatabloc, by attempting to persuade Virginia universities to do the necessary research so that Williams's company would not have to pay for it.<sup>5</sup> As a result of this arrangement, McDonnell and his wife received over \$175,000 in loans and gifts from Williams,<sup>6</sup> while McDonnell facilitated meetings between Williams and state agency officials.<sup>7</sup>

The federal bribery statute makes it a crime “for a public official to receive or accept anything of value in exchange for being influenced in the performance of any *official act*,”<sup>8</sup> and

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<sup>1</sup> *McDonnell v. United States*, 579 U.S. 550 (2016).

<sup>2</sup> Khadija Lalani, *McDonnell v. United States: Legalized Corruption and the Need for Statutory Reform*, 113 NW. U. L. REV. 29, 30 (2018).

<sup>3</sup> Joanie Vasiliadis & Peggy Fox, *FBI Agent: McDonnell's Credit Card Debt Topped \$90K*, USA TODAY (Aug. 13, 2014), <https://www.usatoday.com/story/news/politics/2014/08/13/bob-mcdonnell-corruption-trial/14000857/>.

<sup>4</sup> Daniel Hensel, *Everything You Need to Know About McDonnell v. United States*, ISSUE ONE (June 18, 2016), <https://issueone.org/articles/everything-need-know-mcdonnell-v-united-states/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Lalani, *supra* note 2, at 33.

<sup>8</sup> *Id.* at 34-35 (emphasis added).

does not allow trading government action for private enrichment.<sup>9</sup> The statute defines “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 official capacity, or in such official’s place of trust or profit.”<sup>10</sup> The prosecution listed five “official acts” which McDonnell performed in return for private enrichment to plead their case: (1) asked the Virginia Secretary of Health to have an aide meet with Williams to discuss clinical trials at Virginia universities; (2) attended a lunch arranged by his wife at the Executive Mansion at which Star Scientific gave \$200,000 to Virginia universities to prepare research proposals; (3) discussed with his attorney issues related to the universities’ involvement with Star Scientific; (4) introduced one of Williams’s associates, a doctor, to leaders in healthcare at the Executive Mansion; and (5) during an official meeting regarding Virginia state employees’ health plan, McDonnell consumed Williams’s supplement and noted that the supplement had been working well for him, thereby implying that it should be covered by Virginia state health insurance plans.<sup>11</sup>

The Supreme Court rejected the prosecution’s argument that McDonnell’s actions constituted bribery under the federal bribery statute, concluding that McDonnell’s actions did not meet the definition of “official acts.”<sup>12</sup> The Court ruled that the acts of McDonnell in question, such as setting up meetings, meeting with officials and organizing networking events, did not meet the definition of “official acts.”<sup>13</sup> The Court’s ruling ultimately narrowed the definition of

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<sup>9</sup> *Id.*

<sup>10</sup> 18 U.S.C. § 201(a)(3).

<sup>11</sup> Hensel, *supra* note 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

what kind of conduct can serve as the basis of a corruption prosecution.<sup>14</sup> Justice Roberts wrote that only formal government actions, such as filing a lawsuit or making an administrative determination, could be considered “official acts.”<sup>15</sup> He went on to say that political courtesies such as “arranging meetings or urging underlings to consider a matter” generally do not constitute official acts, even if the public official receives gifts or money in exchange.<sup>16</sup> The Court conceded that, although McDonnell’s conduct is “distasteful,” the Court characterized this behavior as a type of “condoned politicking,” which demonstrates a tolerance for this type of political behavior.<sup>17</sup>

As a result of this decision, the media seems to be in agreement that this narrow definition of “official acts” will make it harder to prove corruption cases against politicians<sup>18</sup> and imposes higher standards for federal prosecutors who bring charges against public officials for wrongdoing.<sup>19</sup> Anna Scholl, the executive director of Progress Virginia, expressed her disappointment in the Court’s decision, and stated that it “essentially gives elected officials a blank check to trade gifts for access and ‘unofficial favors.’”<sup>20</sup> Steve Vladeck, professor at American University Washington College of Law and CNN contributor, believes that this ruling will dramatically narrow the federal anti-corruption statutory protections and could lead to

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<sup>14</sup> Adam Liptak, *Supreme Court Vacates Ex-Virginia Governor’s Graft Conviction*, N.Y. TIMES (June 27, 2016), <https://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1622 (2017).

<sup>18</sup> See Josh Gerstein, *Supreme Court Overturns Bob McDonnell’s Corruption Convictions*, POLITICO (June 27, 2016), <https://www.politico.com/story/2016/06/supreme-court-overturns-bob-mcdonnells-corruption-convictions-224833>; see also Liptak, *supra* note 14.

<sup>19</sup> Robert Barnes, *Supreme Court Overturns Corruption Conviction of Former Virginia Governor McDonnell*, WASHINGTON POST (June 27, 2016), [https://www.washingtonpost.com/politics/supreme-court-rules-unanimously-in-favor-of-former-va-robert-f-mcdonnell-in-corruption-case/2016/06/27/38526a94-3c75-11e6-a66f-aa6c1883b6b1\\_story.html](https://www.washingtonpost.com/politics/supreme-court-rules-unanimously-in-favor-of-former-va-robert-f-mcdonnell-in-corruption-case/2016/06/27/38526a94-3c75-11e6-a66f-aa6c1883b6b1_story.html).

<sup>20</sup> Liptak, *supra* note 14.

challenges from other former public officials who were convicted under anti-corruption laws.<sup>21</sup> Even Justice Breyer believes the federal government's anti-corruption laws are vague and allow politicians to get away with dishonest behavior.<sup>22</sup>

The outcome of this case and the media reaction poses an important question: does this decision really make it that much easier for our elected (and unelected) officials to accept bribes in exchange for not-so-official acts which serve their own best interests (as opposed to their constituents) without fear of prosecution or conviction? So far, it appears that the answer is, well, yes. For example, prior to the Court's decision in *McDonnell*, New York State Assembly Speaker Sheldon Silver was convicted of accepting millions of dollars in bribes in exchange for favors and was sentenced to more than 10 years in prison.<sup>23</sup> However, after *McDonnell*, the Second Circuit vacated the district court's decision, relying on the narrowed definition of "official acts" as articulated in *McDonnell*.<sup>24</sup>

In more recent news, this year New Jersey senator Bob Menendez has been the target of prosecutors pursuing a corruption case against him for accepting gold bars and hundreds of thousands of dollars in exchange for using his office and influence to interfere with law enforcement investigations of certain New Jersey businessmen and to aid the Egyptian government.<sup>25</sup> The 2023 charges leveled against Bob Menendez are not the first time that he has been accused of corruption. In 2015, Bob Menendez faced an earlier federal corruption case in which federal prosecutors accused Menendez of using his influence to help his friend in

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<sup>21</sup> Tal Kopan & Ariane de Vogue, *Supreme Court Vacates Former Virginia Gov. Bob McDonnell's Conviction*, CNN (June 27, 2016), <https://www.cnn.com/2016/06/27/politics/bob-mcdonnell-supreme-court/index.html>.

<sup>22</sup> Hensel, *supra* note 11.

<sup>23</sup> Lalani, *supra* note 2, at 43.

<sup>24</sup> *Id.*

<sup>25</sup> Nate Raymond, *US Senator Bob Menendez Charged with Acting as Unregistered Agent of Egypt*, REUTERS (Oct. 12, 2023), <https://www.reuters.com/world/us/us-files-superseding-indictment-against-senator-bob-menendez-2023-10-12/>.

exchange for gifts and campaign contributions.<sup>26</sup> New Jersey Federal Judge William Walls dismissed seven of the eighteen charges Menendez faced, stating that he was guided by the Supreme Court’s ruling in *McDonnell* which narrowed the definition of an “official act.”<sup>27</sup> The prosecutors pursuing the new corruption charges have stated that they are aware of the obstacles they face in light of the *McDonnell* decision and have planned their legal strategy accordingly.<sup>28</sup>

Our elected officials are not the only ones dabbling in corruption and evading punishment. Even Supreme Court Justices find themselves entangled with corruption allegations. Justice Thomas has been under scrutiny recently for accepting luxury vacations worth hundreds of thousands of dollars, the payment of his grandnephew’s private school tuition, and other personally beneficial deals.<sup>29</sup> Justice Thomas, and other Supreme Court Justices, have obviously been on the forefront of shaping the law and defining what corruption is, as demonstrated in the *McDonnell* case. The Supreme Court Justices have heard several cases over the last twenty or so years relating to corruption and have continually narrowed the definition of acts and behaviors which would be actionable under corruption law.<sup>30</sup>

With the Supreme Court’s track record, and in light of *McDonnell*, it would appear that future anticorruption cases and the standards to which our official representatives will be held will be narrowly construed. Over the last two decades Supreme Court Justices have decided issues on corruption cases against public officials and have consistently narrowed the scope of

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<sup>26</sup> Priscilla DeGregory, *Same Legal Obstacle that Got Sen. Bob Menendez off the Hook in 2015 Factors Into New Indictment*, N.Y. POST (Sept. 22, 2023), <https://nypost.com/2023/09/22/prosecutors-face-legal-obstacle-in-new-sen-bob-menendez-case/>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Cristina Spano, *Why the Supreme Court Is Blind to Its Own Corruption*, N.Y. TIMES (May 18, 2023), <https://www.nytimes.com/2023/05/18/opinion/supreme-court-clarence-thomas-corruption.html>.

<sup>30</sup> *Id.*

this area of the law.<sup>31</sup> What is more, some of the Supreme Court Justices who have played a role in shaping this area of law have been accused of corrupt actions as well.

If the law is not the most effective way to hold public officials accountable, what is? Are there any scenarios where it would be acceptable for a public official to use their position of power for personal gain? I do not claim to know what the solution to this problem may be, but I suggest the citizens of the United States take notice of who we elect to public office and demand that our elected officials focus on amending the legislation concerning federal corruption laws so that our interests, needs, and liberties are protected and represented to the greatest extent possible.

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<sup>31</sup> *See Id.*