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PERSPECTIVE

A tale of two Virginia Governors

By Gregory Rolen

Earlier this summer, the U.S. Supreme Court vacated the corruption conviction of former Virginia Gov. Robert McDonnell. *McDonnell v. United States*, 2016 DJDAR 6444 (June 27, 2016). A month later, Hillary Clinton selected another former Virginia governor, Tim Kaine, to be her running mate. The former governors have more in common than just an office — they have each been criticized for receiving gifts. In character, Donald Trump tweeted, "Is it the same Kaine that took hundreds of thousands of dollars in gifts while Governor of Virginia and didn't get indicted while Bob M did?" While not quite *Bush v. Gore*, this represents another confluence of presidential politics for the Supreme Court. Why were the governors treated differently? Can the law distinguish between "ingratiation" and corruption? What message is it sending? Fair questions all, but did *McDonnell* answer them?

The *McDonnell* jury found that he performed official acts for gifts; otherwise known as, "quid pro quo." The Supreme Court found that the jury instructions were overly expansive on the "official act" element of the federal bribery statute, holding that an "official act" must involve a formal exercise of government power on a matter "pending" before a public official. However, the opinion's aftermath may cause a sinister cancer on the body politic to metastasize. With the highest court limiting what constitutes an "official act," they may condone the influence-peddling that has so repulsed the electorate. With trust in government at a historic low, is it prudent to characterize dishonest acts as, "a basic compact underlying representative government?" Or, as Chief Justice John Roberts opines, will the "more bounded" interpretation "leave ample room for prosecuting corruption?" The *McDonnell* decision will resonate from the high court to every local government.

Access v. Excess

Roberts acknowledged McDonnell's activities were "dishonest" and "distasteful." McDonnell admitted that a businessman, Jonnie Williams, gave his family approximately $177,000 in "gifts" to obtain his "help" to receive state studies to classify his supplement as a pharmaceutical. By contrast, Kaine received similar gifts from several donors over an eight-year period and disclosed the gifts.

McDonnell acted on Williams's behalf. He asked his health secretary to meet with Williams regarding university studies. His wife arranged a lunch where Williams distributed grants to university doctors. He invited Williams to a health reception and publicly recommended the supplement for Virginia employees. He explained he had done similar things "literally thousands of times." Kaine also interacted with several donors; however, there was no suggestion of trading official favors.

While both men complied with the Virginia's ethics rules, Mc- Donnell was prosecuted under the Hobbs Act which criminalizes "public officials … receiving, accepting or agreeing to accept anything of "value" in for being "influenced in the performance of any official act." An "official act" is "any decision or action on any question, matter, cause, suit, proceeding or controversy." which may be brought before any public official.

The trial court instructed the jury that to convict it must find agreement "to accept a thing of value in exchange for official action." McDonnell sought but did not receive an instruction that an "official act" must intend to, or actually influence a specific government decision. His defense was that he did not exercise sovereign power. He was convicted of 11 bribery counts.

Did They Say What They Mean, or Mean What They Say?

The primary issue involved the blurred line between ingratiation and corruption; whether arranging meetings, contacting officials, hosting events or promoting a product were "official acts." The chief justice displayed his preternatural brilliance deconstructing statutes. He reasoned that the words "question, matter, cause, suit, proceeding or controversy" connote a formal exercise of governmental power. He opined that the word "pending" connotes a thing that can be placed on an agenda, tracked and completed. Though the interpretation of "official act" began excruciatingly narrow, it was broadened by *United States v. Birdsall,* 233 U.S. 223, 234 (1914). *Birdsall* held that an official may act by agreeing to use their position to pressure or advise another official to perform an "official act." Thus, an official can request money and agree to advocate so long as they do not "exert pressure" and government does not formally act.

Is that really what the court meant to tell the American people? The answer is *yes*. Despite their unanimity, the justices' backgrounds greatly influenced their different understandings of *McDonnell*'s policy implications. Roberts gained prominence as a solicitor general and litigator, and successfully asserted procedural doctrines to prevail. Roberts' reverence for the written law focused him on the statute and jury instruction. By contrast, Justice Stephen Breyer has more political experience. He was chief counsel to the Senate Judiciary Committee and his father was the San Francisco School Board's counsel. He knew the message they were sending by acknowledging that narrowing "official acts" will "leave some dishonest conduct unprosecuted." But he continued, "I'm not in the business of sending messages in a case like this." Two different experiences, but same outcome. They knew what they were doing.

New York Times

Robert McDonnell, left, and Tim Kaine.

The Court's Response to Trump's Tweet

McDonnell is another intersection of law, money and politics in the tradition of **Citizens United**. The Supreme Court's eternal search for a "bright line" test appears elusive in the area of political speech. The justices must reconcile that money is political speech, while gifts can corrupt the political process. In *McDonnell*, the court adroitly balanced these competing interests, and in so doing unwittingly answered Trump's question. Both governors' rewards were consistent with Virginia law and First Amendment precedent. While Kaine passively met with his contributors, McDonnell affirmatively acted for a businessman seeking favors. But did he commit bribery? Some criticized the court for failing to take a righteous stand against "pay to play" politics. But we must work to restore public trust in government, those seeking access, and those providing it. McDonnell's lesson is meet with your constituents, but split the tab.

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