'Official acts' and *McDonnell v. United States*

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In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), a unanimous U.S. Supreme Court reversed the conviction of former Virginia Gov. Robert McDonnell and held that "[s]etting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act'" necessary to convict a public official for bribery under the federal bribery statute, 18 U.S.C.A. § 201; the "honest services fraud" statute, 18 U.S.C.A. § 1343; or the Hobbs Act, 18 U.S.C.A. § 1951.

> The court was particularly persuaded by briefs submitted by bipartisan groups of former federal officials and former attorneys general.

The *McDonnell* decision is in keeping with recent Supreme Court decisions in white-collar cases. Those decisions have narrowly interpreted seemingly broad statutory language to limit potential overreaching by prosecutors while giving more concrete shape to otherwise vague criminal statutes.

The court in *McDonnell* was also concerned about the practical implications of the government's expansive interpretation of "official acts" in a world where, for better or for worse, it is common for politicians to make phone calls and set up meetings on behalf of constituents and donors. It remains to be seen, however, how much practical impact the *McDonnell* decision will have.

BACKGROUND

The government charged McDonnell with accepting personal gifts and loans in a quid pro quo exchange for official acts under the honest-services-fraud statute and the Hobbs Act. (McDonnell was acquitted on a charge of making false statements in violation of 18 U.S.C.A. § 1014.)

At trial, the government offered evidence that, starting shortly after McDonnell's election as Virginia governor in 2009, Jonnie Williams, the CEO of dietary supplement company Star Scientific, provided McDonnell and his wife with personal gifts and loans totaling $175,000.

Williams testified that he provided these gifts and loans with the expectation that McDonnell would help Star Scientific, and specifically with Williams' efforts to get a Virginia public university to conduct a study of Anataboc, a supplement the company was developing. The government offered evidence that McDonnell directed state officials to attend meetings regarding Anatabloc, contacted state officials to encourage the state's universities to initiate a study of Anatabloc, and hosted events related to Star Scientific at the governor's mansion.

The parties agreed that bribery under the honest-services-fraud statute is defined by the federal bribery statute, 18 U.S.C.A. § 201(b)(2)(A), which makes it a crime for a

Former Virginia Gov. Robert McDonnell REUTERS/Jay Westcott

"a public official ... corruptly [to] ... seek[], receive[], accept[], or agree[] to receive or accept anything of value ... in return for being influenced in the performance of any official act."

Section 201(a)(3) defines "official act" to mean "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."

The parties likewise agreed that the Hobbs Act requires the defendant to have obtained a thing of value "knowing that [it] was given in return for official action" and agreed that the definition of "official act" in Section 201 would define "official action" for the purposes of the Hobbs Act.

The parties disagreed, however, about the U.S. District Court for the Eastern District of Virginia's definition of "official action" in its instructions to the jury. In addition to quoting the statutory definition found in Section 201(a)(3), the District Court instructed the jury that that "a public official need not have actual or final authority over the end result sought by a bribe payor"; that "official action can include actions taken in furtherance of longer-term goals"; and that "an official action is no less official because it is one in a series of steps to exercise influence or achieve an end."

McDonnell objected that this instruction was overinclusive and would render almost any action taken by a public official an "official act." He also requested, but was denied, an instruction that "merely arranging a meeting,

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attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts.'"

McDonnell was convicted on the wire fraud and Hobbs Act counts, and the 4th U.S. Circuit Court of Appeals affirmed his conviction. *United States v. McDonnell*, 792 F.3d 478, 519 (4th Cir. 2015). The appeals court upheld the District Court's "official act" instructions as a "fair and accurate statement of the law."

THE SUPREME COURT'S DECISION

In a unanimous opinion written by Chief Justice John Roberts, the Supreme Court vacated McDonnell's conviction.

The issue before the high court was the proper interpretation of the term "official act" defined in 18 U.S.C.A. § 201(a)(3). To address this question, the court analyzed each of the component parts of the statutory definition.

First, the court noted the requirement in Section 201(a)(3) that the government prove the existence of a "question, matter, cause, suit, proceeding or controversy" and considered whether making phone a call or hosting an event could itself meet this requirement.

While noting the breadth of the terms "question" and "matter," the court applied the interpretative canon noscitur a sociis — "a word is known by the company it keeps" — to interpret the terms narrowly. In doing so, it held that to establish an "official act" the government must prove the existence of 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."

Second, the court considered Section 201(a)(3)'s requirement that the "question" or "matter" must be "pending" or "may by law be brought before any public official." This language, the court noted, suggests "something that is relatively circumscribed" as opposed to a broad policy objective such as economic development.

Applying this element of Section 201(a)(3), the court held that the government must prove that the requisite "question, matter, cause, suit, proceeding, or controversy" is "also be something specific and focused that is 'pending' or 'may by law be brought' before a public official."

Third, the court evaluated whether "setting up a meeting, hosting an event, or calling another official" qualified as a required "decision or action" under Section 201(a)(3). As to this question, the court relied on its opinion in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) for its holding that it is not enough for a public official's decision or action to relate to a pending question or matter.

Rather, the court held, "something more is required: Section 201(a)(3) specifies that the public official must make a decision or take an action on that question or matter, or agreed to do so."

Interpreting Section 201(a)(3), the court held that the jury at McDonnell's trial was not properly instructed. Therefore, it vacated the convictions and remanded the case.

> The court did not appear to credit the concerns of the government and amici curiae such as Citizens for Responsibility and Ethics in Washington.

The court's narrow interpretation of the seemingly broad language of Section 201(a)(3) is consistent with its statutory interpretation in white-collar cases over the last several years.

For example, last term in *Yates v. United States*, 135 S. Ct. 1074 (2015), the court reversed the conviction of a commercial fisherman who was convicted of violating 18 U.S.C.A. § 1519, the provision of the Sarbanes-Oxley Act that makes it a crime to destroy or alter "any record, document or tangible object" with the aim of obstructing a federal investigation. The fisherman was convicted on the basis that he had ordered a crew member to throw undersized red grouper overboard to avoid a fine.

In a plurality opinion, the court rejected the government's argument that the phrase "tangible object" should be given its plain meaning and read broadly to cover any physical object.

Writing for the plurality, Justice Ruth Bader Ginsburg acknowledged that a "fish is no doubt an object that is tangible," but, applying tools of statutory interpretation, including the canon of noscitur a sociis relied upon by the court in *McDonnell*, interpreted the term "tangible object" in the statute to apply only to objects "used to record or preserve information."

The court's effort to limit the reach of Section 201 as applied in the context of 18 U.S.C.A. § 1343, the honest-services-fraud statute, is also consistent with the concerns it articulated in *Skilling v. United States*, 561 U.S. 358 (2010). In limiting Section 1343's application to bribery and kickback schemes, the *Skilling* court noted that the limits it imposed were necessary to avoid a "vagueness shoal."

Likewise, the court in *McDonnell* noted that, "under the government's interpretation, the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited.'"

While the court grounded its holding in *McDonnell* in canons of statutory interpretation and precedent, it is apparent that the court was also highly concerned about the practical effect of holding that Section 201 reaches public officials' acts such as setting up meetings for constituents and making phone calls on behalf of donors. The court wrote that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time."

Under the government's expansive interpretation of Section 201, the court wrote, "Officials might wonder whether they could respond to even the most commonplace request for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."

In this regard, the court was particularly persuaded by briefs submitted by bipartisan groups of former federal officials, former Virginia attorneys general and former attorneys general from other states. Citing these briefs, the court found a "substantial" concern about the practical effect of the government's broad interpretation.

On the other hand, the court did not appear to credit the concerns of the government and amici curiae, such as Citizens for

Responsibility and Ethics in Washington, or CREW, about the effect of a narrow reading of Section 201.

At oral argument, Deputy Solicitor General Michael Dreeben argued for the government that "the line that [McDonnell] has urged is … a recipe for corruption" and that "it would send a terrible message to citizens."

"[I]f this court put its imprimatur on a scheme of government in which public officials were not committing bribery when all they did was arrange meeting with other governmental officials, without putting … a thumb on the scale of the ultimate decision," Dreeben said.

Likewise, CREW argued, "Permitting government officials to sell … access undercuts fundamental principles of our democracy."

While the court did not specifically address these concerns, it seemingly took pains to articulate the limits of its decision. It noted, for instance, that an action such as setting up a meeting or making a phone call related to a matter pending before another government official is not "always an innocent act," and may be "evidence of an agreement to take an official act."

Likewise, the court noted that "[a] public official may also make a decision or take an action … by using his official position to exert pressure on another official to perform an 'official act'" or by "provid[ing] advice to another official knowing or intending that such advice will form the basis for an 'official act.'"

These caveats should provide prosecutors with a road map for building bribery cases built on allegations of improper access, where, for example, there is evidence that the public official made phone calls or set up meetings with the intent to influence a pending matter.

Thus, regardless of the limits that *McDonnell* places on the scope of "official acts" under Section 201 — and on bribery cases brought under the honest-services-fraud statute and the Hobbs Act — and regardless of any message the *McDonnell* decision sends about the access provided to campaign donors or about our democracy more generally, the practical impact on public corruption cases may be limited. WJ

NONPROFIT/EMBEZZLEMENT

Cherokee Nation accuses former nonprofit exec of fraud

By Phyllis L. Skupien, Esq.

The Cherokee Nation has lodged criminal and civil charges against the former executive director of a nonprofit foundation that awards scholarships to tribal members, accusing the defendant of embezzlement and fraud.

Cherokee Nation v. Gilliland, No. CRM 2016-54, complaint and information filed (D.C. Cherokee Nation July 28, 2016).

Cherokee Nation Education Corp. dba Cherokee Nation Foundation v. Gilliland, No. 16-397, petition filed (D.C. Cherokee Nation July 27, 2016).

The criminal charges filed July 28 follow a two-year investigation into former Executive Director Kimberlie Gilliland's approval of money for her own salary and travel expenses, as well as the questionable awarding of scholarship funds.

"During this investigation, we uncovered fraud and corruption that cannot and will not be tolerated in our organization," Attorney General Todd Hembree of the District Court of the Cherokee Nation said in a statement.

On July 27 the Cherokee Nation Foundation, a nonprofit organization based in Oklahoma, also filed a civil suit against Gilliland, alleging breach of fiduciary duty, embezzlement of more than $230,000 and conversion.

According to the petition, the defendant was executive director of the foundation from 2009 until her departure in 2013.

An independent audit of the foundation's records conducted in 2014 showed that the defendant "exercised substantial control over all phases of the organization and was able to circumvent board authority on a number of issues," the petition says.

The suit alleges Gilliland overpaid herself during her tenure, used foundation funds for personal travel such as family vacations to Colorado and California, and improperly paid money to Cherokee Media, a business she owns with her husband.

The petition also alleges Gilliland used money to pay for her master's degree in nonprofit management without approval of the board of directors. She also allegedly gave money to students who did not meet the criteria for scholarships and often had not gone through the application process.

The foundation is seeking $232,000 in actual damages, $928,000 (four times actual damages) in punitive damages, plus attorney fees and costs.

The criminal charges each carry a prison term of up to one year, a $5,000 fine or both.

According to published reports, the defendant says the charges are baseless and politically motivated. WJ

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Related Court Documents:
Complaint and information: 2016 WL 4120744
Petition: 2016 WL 4164540

See Document Section A (P. 19) for the complaint and Document Section B (P. 24) for the petition.