

Attorneys React To High Court's Political Bribery Ruling

Law360, New York (June 27, 2016, 7:42 PM ET) -- The U.S. Supreme Court on Monday established a new standard for bribery charges against politicians, overturning the corruption conviction of former Virginia Gov. Bob McDonnell and rejecting the government's broad definition of an "official act" that can support a bribery charge. Here, attorneys tell Law360 why the decision in *McDonnell v. U.S.* is significant.

Philip J. Bezanson, Bracewell LLP

"The McDonnell decision is an important reminder to prosecutors that distasteful conduct, on its own, should not be enough to seek an indictment or to sustain a conviction. The court made it pretty clear that political corruption prosecutions ought to present concrete facts to demonstrate an improper 'official act' rather than ambiguous 'meetings' and 'introductions.'"

Andrew S. Boutros, Seyfarth Shaw LLP

"The implications of this decision are far reaching and extend well beyond McDonnell's conviction. Other politicians who have recently been convicted and who still have their cases pending at the trial or appellate level or even under review in habeas proceedings, will surely seek to take advantage of the Supreme Court's new — and far narrower — interpretation of 'official action' under the federal corruption laws. And, moving forward, every federal prosecutor will analyze McDonnell before penning an indictment or asking a grand jury to return a true bill on public corruption charges. McDonnell is an instantaneous game changer."

William A. Burck, Quinn Emanuel Urquhart & Sullivan LLP

"We are extremely gratified by the Supreme Court's unanimous decision vacating the conviction of former Gov. Bob McDonnell. This decision applies no less to our client Maureen McDonnell and requires that her conviction immediately be tossed out as well, which we are confident the prosecutors must agree with. Mrs. McDonnell, like her husband, was wrongfully convicted. We thank the Supreme Court for unanimously bringing justice back into the picture for the McDonnells."

Anthony Capozzolo, Lewis Baach PLLC

"In a unanimous opinion, the Supreme Court provided a setback to prosecutors of McDonnell and raised the bar for convicting other high-level officials. While it upheld the sometimes controversial honest services law, the court narrowed the underlying definitions to meet constitutional standards. Significantly, the court held that a quid pro quo exchange for merely arranging meetings between interested parties and government officials, without more, cannot qualify as an 'official action' by a

public official because to do so would potentially criminalize too many normal political relationships. This may hamper the prosecution of other high-level elected officials, like governors, who often act through other lower-level officials in executive and legislative processes. Today's decision is a victory for those who sometimes label such prosecutions as the 'criminalization of politics.'"

Barak Cohen, Perkins Coie LLP

"What is remarkable about the Supreme Court's decision is that it is so unremarkable. To be sure, it is an important decision, particularly for former Gov. McDonnell and his wife, but it is not a radical shift. It merely reflects the crystallization of analysis in bribery caselaw that has long strained to define 'official acts' — a core requirement for a bribery conviction — while acknowledging the roles of money and access in our democracy. And now we have that definition, more or less: If an official is to be convicted for having committed federal bribery, she must have been bribed in exchange for some sort of decisive act that represents an actual exercise of her powers of office."

Craig Engle, Arent Fox LLP

"This is an amazing unanimous decision by the Supreme Court thoroughly rejecting the Justice Department's continued attempts to prosecute conscientious public officials who are just doing their jobs. The court was crystal clear that there must be an 'formal official act' on a 'pending matter' in exchange for personal payments for corruption to be alleged — no looser or vague standards will do. Hopefully this long string of DOJ losses to bring down honest, hard-working public servants will come to an end."

Don Falk, Mayer Brown LLP

"The court's unanimous decision today reflects its continued concern with reining in federal prosecutors who rely on overbroad interpretations of federal criminal statutes. The government's interpretation here would criminalize a broad range of everyday constituent relations activity, as amicus briefs by several bipartisan groups of former government officials pointed out. Drawing on statutory language and context, the court imposed objective limits. The basic dividing line is between arranging a meeting or initiating a contact with a government decisionmaker, and pressuring the decisionmaker to take a particular action such as awarding a contract or providing another government benefit."

Edward (Ted) Kang, Alston & Bird LLP

"Under the theory that the government used to convict Gov. McDonnell, prosecutors enjoyed boundless discretion in deciding what to prosecute as an 'official act,' which cast a 'pall of potential prosecution' over routine political activities. The court rejected that theory and interpreted the federal anti-corruption statutes to reach only formal government action taken on a specific matter in exchange for money. The court's opinion provides greater clarity to public officials, lobbyists, and those who counsel them on the line between legality and illegality."

Thomas H. Lee, Fordham Law School

"The Supreme Court, in a unanimous opinion by Chief Justice [John] Roberts, vacated the corruption conviction of former Gov. McDonnell. The court's basic point was that the trial court had wrongly refused to instruct the jury that McDonnell had to have committed — or agreed to commit — an 'official act' for a loan or gift, and things like making phone calls or setting up get-to-know-you lunches or meetings with other state officials to help the gift-giver aren't 'official acts' as defined by the statute. The federal prosecutors will have to decide whether to reattempt a prosecution with the narrower

definition of ‘official act.’ My guess is that they will not, because the way that Roberts’ opinion goes over the facts suggests McDonnell and his staff was very cagey about not actually delivering a quid pro quo. In bigger, societal terms, the decision reflects the influence of bipartisan arguments made by a number of high-level Democratic and Republican government officials that prosecutions of this sort would severely impact the political process. It also reaffirms the unchallenged primacy of the narrow ‘quid pro quo’ definition of corruption as a legal concept in the criminal prosecution context, despite its controversiality in the campaign contribution context after Citizens United.”

Robert Mintz, McCarter & English LLP

“The real message here is that the line between routine political courtesies and illegal payments in exchange for official government favors is not nearly as clear as prosecutors may have believed. This case brings into sharper focus what will be the critical distinction in future political corruption cases. Juries will have to decide if the defendant was merely providing access to government officials, which is permissible, or attempting to influence a government action in exchange for payments or accepting gifts, which is not.”

John O’Donnell, Herbert Smith Freehills

“The Supreme Court held in McDonnell v. United States, that the definition of an ‘official act’ in the federal bribery statute requires the government to prove that a defendant made a decision or took an action on a ‘question, matter, cause, suit, proceeding or controversy’ that involves ‘the formal exercise of governmental power’ and is ‘something specific and focused that is “pending” or “may by law be brought” before the official.’ The court specifically held that ‘setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) — without more — does not fit the definition of an “official act.”’ The court vacated Gov. McDonnell’s conviction because it found that the jury instructions did not use the correct definition of an ‘official act.’ Because the court requires the government to tie alleged bribes to formal government acts — as opposed to informal introductions and communications — today’s ruling will put other recent widely publicized public corruption convictions at risk, and will make it harder for the government to prove cases against public officials charged with taking bribes.”

Eli J. Richardson, Bass Berry & Sims PLC

“McDonnell’s effect upon the federal bribery statute, Section 201, is clear: McDonnell curtailed the statute’s scope by narrowing the definition of ‘official acts.’ However, McDonnell has not necessarily narrowed the scope of the statutes under which Gov. McDonnell actually was charged. He was charged not with federal bribery, but rather with Hobbs Acts violations and honest-services fraud. In McDonnell, the government agreed to define those two crimes in terms of Section 201(a)(3)’s definition of ‘official acts.’ Since that backfired, going forward the government likely will eschew any such agreement and instead exercise its prerogative to prosecute those crimes without any reference to Section 201’s now-narrow definition of ‘official acts.’”

Justin Roberts, Vorys Sater Seymour and Pease LLP

“The Supreme Court continues to provide sharp limits to the definition of corruption for purposes of federal criminal prosecution. In the Skilling decision several years ago, the court narrowed the definition of ‘honest services fraud’ and said that undisclosed but legal gifts or conflicts of interest would no longer be enough for a conviction. Today’s ruling limits the definition of ‘official act’ to something more than basic constituent service. In future prosecutions, the government will need to identify things like votes, grants or contract awards to demonstrate that otherwise legal gifts are actually part of a corrupt

bargain. This will place a premium on the government's development of evidence through consensual recordings and wiretaps where the purpose of a gift and an identifiable official act can be linked through the participants' own words."

Mark Schamel, Womble Carlyle Sandridge & Rice PLLC

"Today, the Supreme Court sent a very clear message to the Department of Justice regarding prosecutions of elected officials. The court's decision is a great step to reining in prosecutorial overreach. Requiring public officials to 'take an action' on something that is specific and pending, is a common sense reading that prosecutors have long sought to avoid. The court is finally injecting some practical common sense and plain reading of the statutory language back into political prosecutions and ending the 'boundless interpretation of the federal bribery statute.'"

Gary Schons, Best Best & Krieger LLP

"Public officials are breathing a collective sigh of relief in the wake of the court's decision that former Gov. McDonnell's acts did not constitute 'official acts' under the federal bribery statute, finding that merely 'setting up a meeting, talking to another official, or organizing an event' does not fit the definition of 'official act.' Chief Justice Roberts explained that, if such activity was swept into the federal bribery statute, it would 'cast a pall' on 'the basic compact underlying representative government' — that is to say, how business gets done in politics and government."

Harold Trimmer, Klinedinst PC

"The court's ruling isn't a surprise. Allowing constituents — and contributors — to petition their elected officials is central to our political system. Permitting access without a quid pro quo has never been a crime. The court's decision rightly recognizes that fact and reins in the federal government's ability to charge elected officials engaged in normal, everyday politics. As long as legislatures and the courts insist on transparency, then the remedy for unseemly payments for mere access can be found at the ballot box."

Daniel Wenner, Day Pitney LLP

"The McDonnell opinion is yet another occasion in which the Supreme Court interpreted a federal criminal statute narrowly to rein in apparently overzealous prosecutors. In each of *Yates v. United States*, prosecution under the Sarbanes-Oxley Act for discarding fish, and *Bond v. United States*, prosecution of jilted lover under the Chemical Weapons Convention Implementation Act, the Supreme Court vacated the convictions because the government's respective interpretations of the statutes stretched them to their breaking points. McDonnell sees the court again limiting a criminal statute to more precisely define its applicability."

--Editing by Emily Kokoll.