

ALERT

# Supreme Court Unanimously Rejects DOJ Overreach: *McDonnell v. United States*

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This week a unanimous Supreme Court overturned former Virginia Governor Bob McDonnell's conviction for public corruption, ruling that the interpretation of the term "official act" advocated by the government and used in jury instructions was overly broad.

In 2014, Governor McDonnell and his wife Maureen were both indicted on bribery charges based on allegations that they accepted over \$175,000 in gifts and loans from a constituent businessman trying to secure government support for his dietary supplement business. To succeed, the government had to show that the former governor and his wife committed (or agreed to commit) an "official act" in exchange for the gifts and loans. At trial, the government argued, and the District Court agreed, that the term "official act" was broad enough to include arranging meetings and hosting events for a donor. Using the government's preferred interpretation, the McDonnells were convicted. The Fourth Circuit affirmed Governor McDonnell's conviction last year, and the Supreme Court granted cert.

In rejecting the government's broad interpretation of "official act," the Court embraced a more "bounded interpretation" of the term encompassing only "a decision or action on 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. An official act is "something specific and focused that is 'pending' or 'may be brought before a public official.'" The definition of "official act," the Court ruled, does not include an official's setting up meetings, calling other officials, or hosting an event, "without more" – even if that "more" is limited to exerting pressure on another official to perform an "official act."

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The Court recognized that elected officials regularly undertake many activities that do not fall under the definition of an official act, and the government's preferred interpretation of the term would raise substantial constitutional concerns. For example, the Court observed that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include [constituents] in events all the time . . . [r]epresentative government assumes that public officials will hear from their constituents and act appropriately on their concerns." With that in mind, the Court reasoned that, if accepted, the government's expansive reading of the statute could potentially criminalize such routine, and often necessary, acts and could "cast a pall of potential prosecution over these relationships." As such, mere constituent relations activity will not support bribery charges under the current federal statute.

Even though this decision seems to raise the bar for prosecution related to interactions with public officials, it clearly does not give public officials carte blanche to accept gifts from constituents and others seeking assistance. Indeed, the Court left open the possibility that Governor McDonnell may have committed crimes: the Court remanded the case to the Fourth Circuit Court of Appeals to determine if there is sufficient evidence based on which a jury could convict Governor McDonnell under the now bounded definition of "official act." Further, federal, state, and local ethics regimes continue to restrict acceptance of gifts by public officials, even where such acceptance is not linked to any specific official act. To that end, all potential gift donors must continue to exercise the utmost caution when giving gifts and seeking favors.

It remains to be seen whether the government will retry the McDonnell case, and what effect, if any, this decision will have on the pending prosecutions of other politicians. What is clear is that this decision sends a strong message to prosecutors: respect the boundaries of criminal statutes.