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McDonnell Decision Indicates Supreme Court's Desire To Limit Application Of The Honest Services Fraud Statute

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On June 28, the Supreme Court issued its opinion in *McDonnell v. United States*, one of the most anticipated opinions of the October 2015 term for white collar practitioners. In the unanimous ruling in favor of former Virginia Gov. Bob McDonnell, the Court again limited application of the "honest services fraud" statute (18 U.S.C. § 1346), as applied through the federal bribery statute (18 U.S.C. § 201), making it harder to prosecute public officials on corruption charges. The decision holds that an "official act" sufficient for a bribery conviction requires more than "setting up a meeting, hosting an event, or calling an official." At trial and on appeal, prosecutors had successfully argued that an "official act" included "nearly any activity by a public official." In ruling in favor of McDonnell, the Court yet again indicated that it will not permit prosecutorial overreach that has a tendency to make an individual criminally liable for actions that were never intended to be criminalized under statute or common practice. McDonnell and his wife were indicted in the Eastern District of Virginia on honest services fraud and Hobbs Act extortion charges as a result of their receipt of $175,000 in loans, gifts and other benefits from Jonnie Williams, a Virginia businessman, while McDonnell was governor of Virginia. The government alleged that Williams, who was the CEO of a nutritional supplement company, wanted McDonnell's assistance in encouraging Virginia's public universities to perform studies on a supplement Williams' company had developed. According to the government, in exchange for Williams' gifts, McDonnell arranged meetings for Williams with Virginia officials, hosted events for Williams' company, and contacted government officials regarding the research studies. The case against McDonnell and his wife turned on whether such actions constituted "official acts" under federal law. The Court vacated McDonnell's conviction, holding that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" In doing so, the Court rejected the government's contention that Congress had used "intentionally broad language" in 18 U.S.C. § 201 to embrace *any* decision or action by a public official, finding that such an interpretation "encompasses nearly any activity by a public official." In the opinion, Chief Justice Roberts

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admitted the case was “distasteful,” but wrote that the case was not about “tawdry tales of Ferraris, Rolexes, and ball gowns” but about the Court’s concern “with the broader legal implications of the government’s boundless interpretation of the federal bribery statute.” The *McDonnell* decision is consistent with the Court’s prior ruling in *Skilling v. United States* (2010), in which the Court held that the honest services fraud statute covers only straightforward bribery and kickback schemes, and not undisclosed self-dealing or conflicts of interest. Reading the law as covering anything but bribes and kickbacks, the *Skilling* Court ruled, would raise constitutional questions about enacting a vague law that did not give individuals clear warning of what was forbidden. McDonnell’s lawyers relied on *Skilling*, as well as the *Citizens United* decision from the same year (in which the Court concluded that “ingratiation and access” are not akin to corruption), as support for their argument that “vague corruption laws” required “a narrow, cautious reading of these criminal statutes” to avoid constitutional concerns. The Court plainly found these arguments compelling; during oral argument, Justice Breyer noted that the government’s interpretation “puts at risk behavior that is common,” which he deemed “a recipe for giving the Justice Department and prosecutors enormous power over elected officials.” While the *McDonnell* decision is limited to alleged honest services fraud involving public officials, it has important implications for cases involving private citizens in which the same concerns about vagueness are present. Chief Justice Roberts noted at oral argument in *McDonnell* that Justices Kennedy and Thomas and former Justice Scalia all would have gone further in the *Skilling* case and ruled that the honest services fraud statute was unconstitutionally vague. He hinted that in hindsight, it may have been “ill-advised” for the Court not to strike the statute down in 2010. While the Court again refrained in *McDonnell* from finding the honest services fraud statute unconstitutionally vague on its face, it has taken another step in that direction.