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Bob McDonnell Ruling Will Not Legalize Corruption

Richard L. Hasen, The National Law Journal

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You don't have to be a lover of the U.S. Supreme Court's noxious *Citizens United v. Federal Election Commission* case to be troubled by the corruption prosecution of Virginia Gov. Bob McDonnell. And if the Supreme Court rules in his favor in his appeal, it's not likely to open the door up to "legalized corruption."

Instead, a ruling for McDonnell can be an important step to avoid the unfortunate criminalization of ordinary politics and prevent what appears to be unjustified prosecutions of John Edwards, Tom DeLay, former Alabama Gov. Don Siegelman and others. We need to use other levers to stop politicians from selling access to the highest bidder.

Even taking the facts surrounding his recent corruption case in the best light, McDonnell's conduct is troubling and should be illegal. He took thousands of dollars in gifts from Jonnie Williams Sr., a businessman with interests before the state, including funding for his daughter's wedding and a Rolex watch. In exchange, McDonnell secured access for Williams to meet with government employees, but he said he did not seek to influence those officials to do anything in Williams' favor.

If McDonnell were a federal official or an elected official in many states, he would have been prohibited from taking these large gifts or supplementing his public salary with these private goodies. Virginia has since tightened up its gift and ethics rules, though surely it should do more. There's no reason to allow a government official to be able to take cash, goods or services from those currying favor with the government. Further, campaign finance laws should be tightened so that it is harder to buy access to elected officials through large contributions.

But McDonnell was not prosecuted by federal officials for violating a gift rule or a campaign finance law—and indeed the goodies Williams gave McDonnell went right into his pocket or on his wrist rather than to his campaign coffers. He was prosecuted on federal corruption charges, and the question is whether the access he provided to state officers should count as the kind of "official act" that bribery laws are meant to prevent.

At the recent Supreme Court oral argument in the case, Justice Stephen Breyer (a dissenter in the *Citizens United* case) was deeply troubled by the McDonnell prosecution and conviction for two reasons. First, the law under which McDonnell was prosecuted was vague. Elected officials need to know the line between what is business as usual (such as making a call for a constituent who

needs government help after that constituent takes you to lunch) and what is corruption.

More importantly, Breyer worried about overzealous prosecutors using vague anti-corruption laws to go after politicians for questionable conduct. One danger, of course, is that a prosecutor targets political enemies. But it goes further than that. Even putting aside partisan motivations, prosecutors gain stature and publicity by going after politicians for corruption, and if corruption is in the eye of the beholder, then only some prosecutors will go after some politicians some of the time.

Just ask Siegelman. The government's case against the Alabama politician seems no stronger than that against McDonnell, yet he sits in jail, and [now apparently in solitary confinement](#), for raising funds on a political documentary about his case. Even politicians lucky enough to win in front of a jury, like Edwards, or who win on appeal, such as DeLay, are forever thought of as criminals for engaging in conduct that often looks like business as usual.

A court ruling for McDonnell will not legalize corruption, as [Jeffrey Toobin](#) and [Zephyr Teachout](#) have both charged. McDonnell's conduct could easily be made illegal by Virginia and should be (if it is not now already illegal). A Supreme Court ruling that the federal law under which McDonnell was prosecuted is unconstitutionally vague would not open the floodgates of corruption. It would still be a crime to exchange a Rolex or something else of value for an attempt to influence a government decision. If the government can prove that McDonnell actually pressured Virginia officials to do something for Williams or his company in exchange for the gifts McDonnell received, that would still count as bribery.

And how then to deal with the problem of the sale of access? Would a ruling in McDonnell's favor allow for politicians to set a price for access to such officials?

Aside from having strong gift bans and ethics rules, we need tighter campaign finance rules. The court needs to go back and visit *Citizens United* itself. In that case, Justice Anthony Kennedy wrote for a conservative Supreme Court majority that ingratiation and access are not corruption. Even if Kennedy is right that the sale of access itself is not corruption, it can still facilitate corruption, and sensible limits on money in politics are a less Draconian way than throwing people in jail to deal with the problem.

McDonnell's conduct is odious. But if we threw all politicians who do odious things in jail we'd need to build more jails. Let's save the jails for politicians who cross a clear line by using their power to influence government decision-making.

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