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Justice Department

What Went Into the DOJ's Decision to Drop McDonnell's Case?

BY ROBERT WILHELM

A governor of a major state commits what the U.S. Supreme Court calls “tawdry” acts, and the high court leaves it up to the government whether to go forward with another prosecution.

But who decides if there is enough evidence for another trial? Do the prosecutors in the local U.S. Attorneys’ Offices decide? Or do the people in Washington at the Justice Department dictate?

Three former federal prosecutors who were involved in corruption cases in the past told Bloomberg BNA that what the public usually views as a political decision is often much more complex.

All three, who weren’t involved in the McDonnell case, agreed that Washington listens carefully to the local offices and seriously evaluates the recommendations and arguments of these offices. They also explained how future cases will require more elbow grease from prosecutors.

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ANDREW S. BOUTROS
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Unanimous Verdict. This issue came full center when the government Sept. 8 decided not to re-prosecute former Virginia Gov. Robert McDonnell (R) (11 WCR 771, 9/16/16).

McDonnell and his wife, Maureen, were found guilty in September 2014 of honest-services fraud, a statute used by prosecutors to convict former governors in Alabama and Illinois.

Prosecutors alleged that the McDonnells used the prestige of the governor’s office to help entrepreneur Jonnie Williams promote a dietary supplement, Anatabloc, in exchange for loans and gifts valued at \$177,000.

Although the U.S. Court of Appeals for the Fourth Circuit affirmed the former governor’s conviction, the U.S. Supreme Court, in a unanimous 8–0 decision, overturned the conviction. Chief Justice John G. Roberts Jr.

said the government’s definition of “official act” was too expansive and had to be narrowed for a conviction to be upheld (11 WCR 547, 7/8/16).

The justices remanded the case back to the lower courts to determine whether McDonnell could be retried and convicted under the narrower standard established by the ruling.

The DOJ made no public comment when it decided to drop the case against McDonnell.

‘Sacrosanct’ Process. The DOJ’s internal deliberative process on charging decisions is considered “sacrosanct” and that the DOJ guards this process “tremendously,” Andrew S. Boutros—a former federal prosecutor in the U.S. Attorney’s Office in Chicago, who is now a partner at Seyfarth Shaw LLP and the national co-chair of the firm’s White Collar, Internal Investigations and False Claims Practice—explained to Bloomberg BNA.

“To be sure, a public commentary explaining DOJ’s reasoning to move forward or decline a case might well serve a public interest,” Boutros said. “But, in this case, and given the Supreme Court’s decision, most legal observers are fairly confident that the decision not to prosecute had more to do with evidentiary challenges than anything else.”

Boutros told Bloomberg BNA that the DOJ’s decision, while not made public, was most likely a complex and deliberative process.

“After years of invested time, energy, and talent in investigating, prosecuting and trying a case—much less a high-profile case subject to intense public and media scrutiny—it is never easy for prosecutors to walk away from their cases,” Boutros said. “These cases represent years’ worth of their lives.”

Anthony Capozzolo, counsel at Lewis Baach PLLC in New York who spent six years as an Assistant U.S. Attorney for the Eastern District of New York primarily assigned to the Public Integrity Section, agreed. He told Bloomberg BNA that one of the biggest reasons the government didn’t go forward was because the Supreme Court’s decision “eviscerated” the government’s case.

The ruling made it “nearly impossible to prove attempts,” Capozzolo said.

Tougher Standard. For example, if a person bribes a politician but isn’t successful in getting the end result, then absent “blockbuster evidence, such as a recording,” the government can’t meet its burden of proof under the new standard, Capozzolo said.

In addition, Capozzolo stressed that these charging decisions are more likely than not based on practical reasons. For example, if the local U.S. Attorney’s Office took the lead on the prosecution, then typically the

prosecutors in that office will have more say in a charging decision. But if main DOJ in Washington was the lead, than that office will have more sway, he said.

He also pointed out that the personalities in room definitely affect decisions.

Boutros said that it isn't often that a criminal conviction in such a high-profile case is reversed, "and reversed by the Supreme Court no less.

"When that happens, prosecutors must reevaluate their case anew and decide whether they can prove their charges under a new, more limiting charging theory," Boutros said. "It is not unusual for prosecutors to drop a case under these circumstances—especially when fresh sets of eyes are brought to the charging-decision table. After all, the prosecutor's job is to do Justice, with a capital 'J.' "

T. Markus Funk, a former federal prosecutor in the U.S. Attorney's Office in Chicago who is now a Denver-based white collar partner at Perkins Coie, told Bloomberg BNA that the Supreme Court said that what McDonnell did—after receiving loans, gifts and other benefits from Williams, McDonnell set up meetings, talked to other officials, and organized events—didn't rise to the level of an illegal act.

"The court ruled unanimously that these actions, without more, were insufficient to prove that the former governor formally exercised the power of his office—or agreed to do so—on a pending (or impending) 'question, matter, cause, suit, proceeding or controversy,'" Funk said.

The court found that a "question" or "matter" might meet the statutory definition if it could be put on an agenda, tracked for progress, and then checked off as complete, Funk summarized.

"The court, based on what it described as constitutional, due process, and federalism concerns, reversed the conviction because it found that the federal anti-bribery statute's narrow definition was at odds with the trial court's more sweeping jury instructions," Funk said.

Reasoned Decision. According to Funk, the government's decision not to retry a case typically results from a number of reasoned—and often challenging—prosecutorial judgment-calls.

However, he noted that when the "high court rules that the evidence presented at a trial is legally insufficient to support a conviction—and unless the prosecution team is confident that it has evidence sufficient to overcome this declared deficit—the decision not to seek a retrial can become an easier one to make."

Funk said that in his view, the McDonnell decision won't dissuade federal prosecutors from leveling public

corruption charges in appropriate cases, but such a case will no doubt require stronger evidence.

Prosecution teams must now prove not only that there was a specific question or matter pending before the government official, but that the official also made a decision or took an action on that question or matter (or agreed to do so) that, in the court's words, "connoted formal exercise of governmental power," Funk explained.

"Sure, the investigative teams will have to dig a little deeper to prove their case. But proving up these elements in most worthy cases shouldn't pose an insurmountable burden," Funk told Bloomberg BNA.

Circumstantial Problem. Boutros agreed with Funk, noting that federal prosecutors will still bring important tough public corruption cases. However, he said that the government must now rely on more explicit, compelling evidence—often direct evidence.

"The days of circumstantial evidence carrying the day are not necessarily all gone, but they will certainly be far fewer," Boutros told Bloomberg BNA. "The types of public corruption cases that prosecutors bring in the future will leave little room for the imagination."

However, Capozzolo sees the McDonnell decision as having more of an impact.

The ruling dramatically affects how the government will prosecute quid-pro-quo cases and what standard of evidence is necessary to prosecute Capozzolo said. The Supreme Court has excluded a number of acts that were considered "official acts" that aren't now, he said, adding that honest-services fraud cases are going to be more difficult to prove.

"It's almost impossible to go forward with only circumstantial evidence now," he told Bloomberg BNA.

'Held Their Nose.' It's not very often you hear the Supreme Court call someone's conduct 'tawdry,' "Capozzolo said. "I think they held their nose in making this decision."

In a Sept. 8 written statement, the Washington-based non-profit legal watchdog group Citizens for Responsibility and Ethics in Washington (CREW) criticized the government's decision to drop the case.

Noah Bookbinder, CREW's executive director and a former federal corruption prosecutor, said in the statement that the U.S. Attorney's Office wanted to move forward, but the Department of Justice "passed."

The DOJ didn't respond to Bloomberg BNA's request for comment.

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