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## Criminalizing Politics

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ALEX WONG/GETTY IMAGES

Former Virginia governor Robert McDonnell (R) returns to court to hear the jury's verdict Thursday.

## Criminalizing politics

BY JEFFREY BELLIN

The guilty verdicts in the trial of former Virginia governor — and Republican sinking star — Robert McDonnell highlight an ugly tension between America's politics and its public corruption laws. Beyond the pricey gifts, unraveling marriage and throw-your-wife-under-the-bus defense that dominated the media coverage lies a more important story. The real stars of this drama were the vague public corruption statutes that took down the former governor and the elusive distinction they draw between "politics as usual" and criminality.

McDonnell was not charged with bribery. As is common in this context, federal prosecutors charged him with the easier-to-prove crimes of fraud and extortion. The fraud counts were based on a statute that prohibits devising a "scheme or artifice to defraud" through the "wire[s]." The extortion counts were based on a statute that prohibits obtaining property "under color of official right." Both offenses are punishable by up to 20 years in prison.

The fraud theory works like this: As governor, McDonnell was supposed to act on behalf of the people of Virginia. Instead, he solicited money from a private company to act as needed on its behalf, thus defrauding Virginians of a (small) portion of McDonnell's "honest services." The extortion theory is similar. McDonnell obtained private property that he was not entitled to in return for a promise to perform official acts or, in the language of the statute, obtained money under "color of official right."

These commonly invoked charges are powerful anti-corruption tools: so powerful, in fact, that they appear to criminalize wide swaths of U.S. politics. Companies, unions and individuals give generously to politicians and their surrogates every year. An industrious prosecutor could find boatloads of officials who benefited from these gifts and then took action on behalf of those entities. Is this also "honest services" fraud and extortion? Legally speaking, the answer is: "Who knows?" The distinction between a successful fundraiser and a diabolical crook is frighteningly subtle.

The Supreme Court insists that there is a clear distinction between the felony offenses that upended McDonnell and our tried-and-true system of allowing private entities and individuals to shower government officials with campaign

contributions and other gifts. That distinction comes down to the contents of the official's mind. To prove "honest services" fraud or political extortion, a prosecutor must show that someone like McDonnell accepted a particular donation with the understanding that he would perform official acts in return. This agreement to trade gifts for acts is all that separates "politics as usual" from felony corruption.

Critically, the corrupt agreement need not be documented, or even articulated. The prosecution's proof, as in the McDonnell case, normally takes the form of evidence that money went to a public servant and official acts followed. The jury can infer the requisite agreement from the circumstantial evidence. If a jury sees "knowing winks and nods" (the actual jury instruction) in the flow of money from donor to candidate, federal prison awaits.

Consistent with these principles, the McDonnell jury's 90-page instructions informed it that it could not convict the ex-governor for the things it likely found most distasteful: his soliciting personal gifts, exercising terrible judgment or prompting underlings to help a guy who paid for a family wedding. Rather, the verdict rested on whether, in all these perfectly legal actions, the jury perceived the knowing winks and nods that are all the law requires to turn donations into federal felonies. That should send chills down the spines of public officials across the country. Which, admittedly, might not be so bad.

It would be both wise (to avoid prison) and good policy for officials to discourage large donations, avoid decisions that benefit big donors and generally disengage from contributors. But until that happens, we are stuck with a system in which lots of public officials could be convicted of a felony but few are prosecuted.

That's not healthy for a democracy. It gives prosecutors vast discretion to choose targets, undermines the credibility of prosecutions that do occur and, ultimately, says something very unsettling about our government. Something has to give. We either need to strengthen our campaign finance laws or, if that's impossible, acknowledge that our public corruption laws are merely aspirational. A political system where any given federal, state or local official is just a wink, nod and a motivated prosecutor away from federal prosecution is untenable.

The writer is an associate professor at William & Mary Law School.