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How the Supreme Court can change politics as usual

By Jeffrey Bellin January 21

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The Supreme Court does not take many cases, but it was right to agree last week to review the public-corruption convictions of former Virginia governor [Robert F. McDonnell](#). While the conduct that led to the case against McDonnell was shameful, its criminality remains unclear. And since it is difficult as a legal matter to distinguish McDonnell's actions from those routinely engaged in by American politicians, guidance is sorely needed.

That doesn't mean the justices should let McDonnell off the hook. When it hands down its decision, the court should make clear that McDonnell's behavior was both politics as usual (as he claims) and a federal felony (as the government contends). That ruling would give proper deference to Congress's authority to criminalize public corruption and mitigate the damage caused by the court's recent decisions deregulating campaign finance.

In McDonnell's case, the prosecution [convinced a jury](#) that the former governor accepted money from a businessman in exchange for access to officials, including McDonnell himself, who could act on the businessman's behalf. There is no reason Congress cannot make that type of conduct unlawful. Wealthy people should not be able to buy access to the government. Indeed, the court has always recognized that one thing that clearly can be prohibited in the realm of politics is "quid pro quo corruption." The Latin phrase easily fits McDonnell's crime. The problem is that in its campaign finance rulings, the Supreme Court has muddled this basic anti-corruption principle, giving hope to countless politicians who see nothing wrong with an exchange of money (usually in the form of campaign contributions) for access and other favors.

Outside the criminal context, the Supreme Court's decisions have not only condoned but celebrated the role of money in politics, equating political donations with constitutionally protected First Amendment speech. In its [2014 decision](#) in *McCutcheon v. FEC*, the court went so far as to say that providing money to politicians for "ingratiation and access" is "not corruption," but instead constitutes "[a central feature of democracy](#)."

Not surprisingly, that line is the centerpiece of [McDonnell's legal filings](#). Pointing to the above-quoted language, the former governor's argument is as simple as it is unsettling. His lawyers explain, "In other words, paying for 'access' — the ability to get a call answered or a meeting scheduled — is constitutionally protected and an intrinsic part of our political system."

Whatever you think about his legal claims, McDonnell is right about one thing: U.S. politicians routinely accept contributions with an understanding, at least implicit, that preferential treatment will follow. How else can we explain the routine practice of companies donating to competing candidates in the same election? Scenarios in which contributions appear to pay off handsomely for private parties are so common, they hardly warrant raised eyebrows. Ambassadorships are a good example. As a [2014 NPR piece](#) reported, “The big political donor who becomes an ambassador to a relatively small country is something of a Washington punch line and also a tradition.”

But you don’t need to be a law professor to know that “everybody’s doing it” is not a legal defense. In fact, it’s just the kind of problem you might look to federal law to solve. That law criminalizes quid pro quo corruption. Now it’s up to the court to clarify once and for all what should be obvious: Quid pro quo corruption embraces an exchange of money for access — including “the ability to get a call answered or a meeting scheduled.”

Whether the court is willing to take that step is unclear. In fact, the tea leaves look good for McDonnell so far. But once they realize just how far McDonnell is asking them to go, the justices cannot help but blink. They need not follow McDonnell down the road to the absurd conclusion that corruption is a “central feature” of American democracy. Paying for access to government officials is not constitutionally protected activity. McDonnell’s case gives the Supreme Court a chance, perhaps a final opportunity, to make that clear.

McDonnell may be right that exchanging money for access is politics as usual, but it does not have to be that way. Nothing has a better chance of changing the pay-to-play U.S. political culture than the highest court in the land pointing out that the routine practices of local, state and federal politicians are federal felonies — for both the contributors and the recipients. It is a safe bet that when politicians can no longer risk providing access in exchange for the direct and indirect contributions they receive, the big money will dry up.

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