Criminalizing Politics

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The guilty verdict in the trial of former Virginia governor Robert McDonnell (R) returns to court to hear the jury verdict Thursday.

Criminalizing politics

BY JEFFREY BAGLI

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 primary gifts, showering merce and three-year-plus under-the-table defenses that dominated the media coverage lies a more important story: The real sin of this drama was the vague public corruption statutes that took down the former governor and the elusive distinction they draw between money under color of official right and money that is otherwise misappropriated.

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 solicitation. The fraud 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 a flim-flam front in behalf of McDonnell’s wife’s cancer drugs. Whatever its legal sufficiency, the fraud theory is tenuous. McDonnell obtained personal 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 common convicted charges are powerful anti-corruption tools as 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 indigent prosecutor could find beneficiaries of official who benefited from these gifts and then take 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 "scheme to deprive" and an "extortion" is often murky. The distinction between a fraud and a theft is often murky. The prosecution’s proof, the jury’s verdict, both are murky. The distinction between a fraud and a theft is often murky. The prosecution’s proof, the jury’s verdict, both are murky. The prosecution’s proof, the jury’s verdict, both are murky.

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 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. But until that happens, we are stuck with a system in which every given federal, state or local official is just a wink, a nod and a motivated prosecutor away from federal corruption. For a democracy, it’s not healthy. 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 that would unsettle almost everyone.

If so, McDonnell was not charged with fraud or political extortion, a prosecutor must show that someone like McDonnell accepted a particular donation with the understanding that he would perform an official act in return. This agreement to trade gifts for acts is easier to prove than honest services. 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 an official act in return. This agreement to trade gifts for acts is easier to prove than honest services. 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 an official act in return. This agreement to trade gifts for acts is easier to prove than honest services.

Critically, the corrupt agreement need not be documentary, 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. But until that happens, we are stuck with a system in which every official is just a wink, a nod and a motivated prosecutor away from federal corruption. For a democracy, it’s not healthy. 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 that would unsettle almost everyone.

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