



MUDDIED WATERS:

WHEN DOES A STREAM OF BENEFITS
BECOME A RIVER OF BRIBES?

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and William Hunt



While U.S. Senator Robert Menendez's criminal trial drew public interest for its potential political ramifications, it was a federal judge's mid-trial ruling that should cause pause for those in government office and those working with government officials. The outcome, a mistrial declared when the jury was unable to reach a verdict, underscores the unsettled state of the law, and the uncertainties presented in defending and prosecuting bribery and honest services fraud cases.

Menendez was charged, along with his long-time friend Salomon Melgen, with public corruption offenses, including bribery and honest services fraud. Federal prosecutors framed the pair's relationship as one built on bribes. Melgen showered Menendez with gifts of private air transportation, exotic vacations, and campaign contributions. In exchange, Menendez was on "retainer" for whenever Melgen needed the senator's influence in government transactions. Indeed, when Melgen needed Menendez's influence to pressure federal officials to secure visas for Melgen's friends, to resolve a port dispute involving one of Melgen's businesses, and to intervene in a Medicare reimbursement dispute, Menendez acquiesced. Menendez and Melgen, on the other hand, described the relationship as one of mutual friendship that frequently involved lavish gifts with no expectation of repayment. At worst, Menendez was simply helping a close friend, with his actions rooted in friendship rather than financial gain.

Lavishness aside, the pair's story is similar to what transpires across the country on a daily basis. Local business executives contribute to a mayoral candidate's campaign because once elected, the mayor is in a position to act in the executives' interest. Advocacy groups invest thousands in state and federal election campaigns to ensure access to elected officials when impactful decisions loom. A private citizen might walk in a parade to support a friend

running for office and then call on that friend for help navigating government red tape. While each of these scenarios certainly seems innocuous, courts have struggled to answer the question: When does supporting an elected official's candidacy or performance in office — a protected right and the bedrock of American democracy — convert into criminal behavior?

Generally speaking, federal bribery statutes criminalize actions built on a "quid pro quo" ("this for that") exchange, that is, one person offers something of value (the "quid") in exchange for the government official taking official action (the "quo"). In a rather straightforward example, consider the case of former Moreno Valley, Calif., City Councilman Marcelo Co. Co accepted a multi-million-dollar bribe from an undercover federal agent (the "quid") in exchange for Co's promise to convince the City Council to rezone land within the City (the "quo") — a move that would likely cause property values to skyrocket and benefit the suspected real estate broker. Clearly, a government official who takes a position solely because of the cash offered to him has converted his power of public office into personal gain by trading cash for votes. Co pleaded guilty to bribery and was sentenced to five years in federal prison.¹

The more difficult situation arises when no specific government action is part of the agreement, but rather benefits are conferred upon the public official to retain the official's services on an "as needed" basis.² Consider the case of former Virginia governor Robert McDonnell, who accepted gifts ranging from private air travel, to designer clothing, to personal loans from a Virginia executive. That executive recognized McDonnell's potential influence once elected, and later sought McDonnell's assistance in setting up meetings and providing access to state officials to help advance the executive's company. Although McDonnell accepted many of these benefits without explicitly

agreeing to perform certain actions, questions arose whether the executive bought access to the governor's power through a stream of gifts and benefits.

McDonnell, who was naturally appreciative of the executive's support, acquiesced when the executive sought the governor's help to advance the company's nutritional supplement. At what point, however, does a constituent's campaign contributions and personal gifts to an elected official become a bribe when those contributions may not come with the explicit request to act in a specific way? Courts have long recognized that such a conferral over time represents a "stream of benefits" intended to "retain the [government official's] services on an 'as needed' basis[.]"³ Those benefits become corrupt when that "retainer" is paid with "the understanding that when the payor comes calling, the government official will do whatever is asked."⁴ In other words, although an official's actions are certainly corrupt when they are premised on someone else's payment, as was the case with Co, corruption also results when the official intervenes in reaction to the implied debt owed to his benefactor.

A federal jury convicted McDonnell of bribery, but the Supreme Court vacated the conviction in what many saw as a significant blow to federal prosecutors' ability to bring charges against public officials. In *McDonnell v. United States*⁵, the Supreme Court clarified that the requisite "official act" (the "quo") for bribery must be "a decision or action on a 'question, matter, cause, suit, proceeding or controversy'" that "involve[s] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."⁶ Furthermore, that official act must be something "specific and focused" that is "pending or 'may by law be brought' before a public official."⁷ Many commentators saw this "specific and focused" requirement to mean that the

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stream of benefits theory was no longer viable, in part because the requisite *quid* in the *quid pro quo* exchange must be identifiable, specific, and contemplated during the exchange of benefit. Since the *quid* had to be tied to a specific *quo*, an implied understanding that an official would intervene “as needed” later on some unknown matter was no longer sufficient.

Menendez and Melgen seized on the *McDonnell* decision. The heart of the prosecution’s case was that Melgen showered Menendez with a lavish lifestyle — a lifestyle Menendez likely could not afford himself — and in exchange, Menendez could intervene later in issues as necessary. The problem is that at the time these gifts were conferred, there was no “specific and focused” government action that was “pending” or “may be brought” before a public official,” as the defendants argued *McDonnell* now required.⁸ In many respects, the pair would have no idea that Melgen may need assistance with a contract, Medicare, or visa applications when the various gifts were exchanged. Therefore, *McDonnell*’s requirement for specific action no longer validated a theory of “stream of benefits,” which at its core, contemplates only a potential for some intervention later rather than any specific intervention at all.

The court in *Menendez* rejected the defendants’ argument recognizing that Supreme Court opinions should not be interpreted to overturn well-established legal precedent unless those opinions explicitly say so.⁹ Several circuits and the Supreme Court have

either recognized the stream of benefits theory or referenced it,¹⁰ and the Court’s lack of reference to the theory in *McDonnell* should allow the theory to remain. Moreover, the *McDonnell* opinion focused on the types of alleged government actions (the “quos”) comprising the bribery accusations rather than theories of proving an agreement between parties.

The issue here is much larger than Menendez, Melgen, and McDonnell. Elected officials depend on support from their constituents to reach public office, and constituents are often motivated to support candidates for office to advance the constituents’ own private interest. Chief Justice John Roberts recognized this relationship in writing the *McDonnell* opinion: “conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.”¹¹ “The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns.”¹² By criminalizing an elected official acting on his constituent’s request, “[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.”¹³ Until additional courts have an opportunity to interpret and apply *McDonnell*, there remains an open question about when, and to what extent, conferring benefits on some public official becomes criminal when the payor later calls on that official for support.

Although the reach of federal bribery laws and the specificity (if any) required in the *quid pro quo* exchange is an evolving area of law, one thing is certain: federal prosecutions for bribery and corruption are by no means going away. The nation’s concern for integrity in government dates back to its creation. The Constitution, for example, recognized the potential for bribery by enumerating the offense as a trigger for impeachment in Article II Section 4. The Framers expressed concerns for local and state judges having a bias toward their local electorates in cases against citizens of other states, and the initial proposal for the Constitution included an escape to federal court to avoid that bias.¹⁴ Hundreds of federal, state, and local officials have been convicted of some form of corruption, with hundreds of private citizens convicted along with them for their part in influencing government decisions.¹⁵ Indeed, a special “Public Integrity Section” within the Department of Justice was established to “consolidate in one unit of the Criminal Division of the Department’s oversight with respect to the prosecution of criminal abuses of the public trust by government officials.”¹⁶ Officials at all levels of government — from federal law enforcement officials¹⁷, to state court judges¹⁸, to a former state governor¹⁹, to local mayors²⁰ — have been held accountable. The problem, of course, is with the evolving nature of federal bribery law. Does an uncertain standard permit prosecutors to cast too wide a net and will undeserving individuals face criminal prosecution before the criminal standard is finally sorted out?

Dinsmore & Shohl LLP has a team of former federal prosecutors, including a former U.S. Attorney, acting U.S. Attorney, and Assistant U.S. attorneys, former state special prosecutors, former law clerks to federal judges, and experienced litigators to assist clients in navigating this developing area. The group focuses on counseling

and representing clients in white-collar criminal cases, related civil cases, and administrative and regulatory proceedings, and if a matter could jeopardize one's freedom, subsequent sentencing proceedings as well. Whether charged with bribery or simply navigating whether legal liability could attach, Dinsmore's white-collar defense team is ready to counsel and defend in what clearly appears to be an area of unsettled law. 🇺🇸

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Endnotes

¹ Press Release: Former Member of Moreno Valley City Council Sentenced to Five Years in Federal Prison for Taking \$2.3 Million in Cash Bribe, Department of Justice, available at <https://www.justice.gov/usao-cdca/pr/former-member-moreno-valley-city-council-sentenced-five-years-federal-prison-taking-23> (last accessed Oct. 18, 2017).

² See, e.g., *United States v. Bryant*, 655 F.3d 232, 241 (3d Cir. 2011) (“It is enough for the [G]overnment to present evidence that shows a *course of conduct* of favors and gifts flowing to a public official in exchange for a *pattern of official actions* favorable to the donor. Thus, payments may be made with the intent to retain the official’s services on an “as needed” basis, so that whenever the opportunity presents itself the official will take specific action on the payor’s behalf.” (emphasis and alteration in original) (quotation omitted)).

³ *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007).

⁴ *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009).

⁵ 136 S. Ct. 2355 (2016).

⁶ *Id.* at 2371–372.

⁷ *Id.*

⁸ *U.S. v. Menendez*, Case No. 2-15-cr-155, (D.N.J. July 18, 2017), Doc. No. 177-1.

⁹ See *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”).

¹⁰ *Skilling v. United States*, 561 U.S. 358, 412–13 (2010) (citing cases from the Second, Third, and Fifth Circuits addressing stream of benefit theories).

¹¹ *McDonnell*, 136 S. Ct. at 3272.

¹² *Id.* (emphasis supplied).

¹³ *Id.*

¹⁴ The “Virginia Plan,” which was essentially the foundation for the Constitution, provided for invoking federal jurisdiction similar to today’s diversity jurisdiction provisions. Scott R. Haiber, Article: Removing the Bias Against Removal, 53 Cath. U.L. Rev. 609, 613–16 (2004).

¹⁵ See Report to Congress on the Activities & Operations of the Public Integrity Section for 2015, available at <https://www.justice.gov/criminal/file/891961/download> (last accessed Oct. 18, 2017).

¹⁶ *Id.*

¹⁷ *Id.* at 15 (former Drug Enforcement Agency special agent pleaded guilty to extortion, money laundering, and obstruction of justice while working as undercover agent while investigating company).

¹⁸ *United States v. Maggio*, 862 F.3d 642 (8th Cir. 2017) (affirming conviction of state court judge for accepting campaign contributions in exchange for remitting jury verdict under federal program bribery, 18 U.S.C. § 666).

¹⁹ *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002) (convictions for former governor of Louisiana, his son, and several associates affirmed for several offenses, including Hobbs Act extortion).

²⁰ *United States v. Tucker*, 133 F.3d 1208 (9th Cir. 1998) (City of Compton, California mayor, among other things, convicted of Hobbs Act violations for trading monetary payments in exchange for his support on projects, intervention if city council opposed, and a vote on conditional use permits).