



Supreme Court's corruption decision could affect Mass. cases

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Former Virginia Governor Bob McDonnell exited the US Supreme Court in April.

By [Shelley Murphy](#) | GLOBE STAFF JULY 21, 2016

A Supreme Court ruling that has made it more difficult to prosecute public officials for corruption could affect a wide range of cases in Massachusetts, including the ongoing investigation into state senator Brian A. Joyce, the indictment of Boston City Hall officials, and the convictions of state probation

The June 27 decision that overturned the conviction of former Virginia governor Robert McDonnell, who accepted \$175,000 in gifts and loans from a businessman, set new limits on the type of conduct required to prove official wrongdoing in exchange for a gift or bribe.

Legal experts said the decision could have a broad impact on public corruption cases even when no money changed hands. They predicted it will invite challenges in cases encompassing a variety of federal fraud, bribery, and extortion statutes because the ruling raises concerns about overreaching prosecutions that target normal interaction between public officials and constituents, as well as conduct that may be “distasteful” but not necessarily illegal.

Already, lawyers for former state probation commissioner John “Jack” O’Brien and his deputies Elizabeth Tavares and William Burke III cited the McDonnell case in briefs filed last week urging a federal appeals court to overturn their 2014 convictions. The case is slated for argument next Monday before the US First Circuit Court of Appeals.

There are several other high-profile cases brought by US Attorney Carmen Ortiz’s office which are pending in court or under investigation. They include the recent extortion indictment of two high-ranking officials in Mayor Martin J. Walsh’s administration; an investigation into whether developers have been illegally pressured to hire union labor on projects around Greater Boston; and an investigation into allegations that Joyce used his political position to advance his legal practice.

The Supreme Court declined to review the 2011 corruption convictions of former House speaker Salvatore F. DiMasi and lobbyist Richard W. McDonough two years ago, but both have filed new petitions seeking to vacate their convictions in federal court.

The McDonnell ruling “could have an impact on Sal DiMasi’s case,” said attorney William Cintolo, who previously represented DiMasi, adding that the charges in his case were similar to those in McDonnell’s.

A spokeswoman for Ortiz’s office declined to comment on the potential impact of the McDonnell ruling.

JOHN BLANDING/GLOBE STAFF

Ken Brissette (left), left the federal courthouse in Boston in May.

The mail fraud and racketeering case against O’Brien and his deputies, who were found guilty of rigging the probation department’s hiring process to favor politically connected candidates, is much different than McDonnell’s case. An appeal, based on numerous grounds, was pending before the McDonnell decision.

The McDonnell decision “warned against federal involvement ‘in setting standards’ of ‘good government for local and state officials,’ ” attorneys Martin G. Weinberg and Kimberly Homan, who represent Tavares, wrote in a July 12 brief to the US First Circuit Court of Appeals. “The government’s prosecution of the defendants in this case crossed that line.”

Former US attorney Michael J. Sullivan, Ortiz’s predecessor, said US attorneys throughout the country will have to review pending public corruption cases to make sure they comply with the higher standards set in the McDonnell decision.

“I don’t think there will likely be fewer public corruption cases investigated and pursued by federal authorities,” said Sullivan, but he said the decision sets new limits. “It demonstrates the type of evidence they must develop and have to prove beyond a reasonable doubt.”

The Supreme Court ruled unanimously that prosecutors had to prove that McDonnell performed a formal, concrete, and official act in exchange for the gifts he received from a businessman who wanted state universities to perform clinical tests on a dietary supplement his company developed.

The court found that jurors were given improper instructions, based on the government’s erroneous position that routine political courtesies such as arranging meetings or phone calls constituted “an official act.”

“Conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time,” Chief Justice John G. Roberts Jr. wrote in the court’s opinion.

JIM DAVIS/GLOBE STAFF

Timothy Sullivan left the federal courthouse in Boston in June.

The court referred to McDonnell's conduct as "tawdry" and "distasteful," but said its greater concern was with the broader, legal implications of the government's "boundless interpretation" of the federal bribery statute. It overturned McDonnell's conviction for honest services fraud and Hobbs Act extortion based on bribery and sent the case to an appeals court to determine whether there was sufficient evidence for a retrial.

"One takeaway from the McDonnell decision is the notion it's OK to advocate on behalf of constituents," said Nancy Gertner, a retired federal judge and Harvard Law School professor. "The question is what is legitimate constituent advocacy and what is not."

She accused prosecutors of using a novel interpretation of the federal extortion law to indict two Boston officials for allegedly threatening to withhold city permits from organizers of a popular music festival unless they hired union workers for their concert at City Hall Plaza.

“Union advocacy is part of constituent services,” Gertner said. “These two individuals got nothing in exchange. They got the goodwill of the union, but that’s American politics and Boston politics.”

The indictment against Timothy Sullivan, the city’s acting director of intergovernmental relations, was returned the day after the McDonnell decision, adding him to an extortion indictment returned in May against Kenneth Brissette, the city’s tourism director.

The pair, who pleaded not guilty, are accused of causing economic harm to the Boston Calling festival by forcing the company to hire nine members of the International Alliance of Theatrical Stage Employees, Local 11.

Sullivan’s attorney, Thomas R. Kiley, said the concerns raised in the McDonnell case about constituents apply to his client’s case.

“There isn’t a day in the United States of America where a mayor isn’t advocating for residents . . . where a city councilor isn’t saying let’s hire minorities and women, or somebody somewhere isn’t advocating for union labor and encouraging people to use union labor,” Kiley said. “When you prosecute it, it’s very dangerous for society.”

In the Massachusetts probation case, Weinberg and Homan argue in their appeals court brief that patronage hiring was “business as usual” for decades in the court system and the prosecution of O’Brien, Tavares and Burke was an attempt to criminalize normal interplay between politicians and constituents.

Shelley Murphy can be reached at shelley.murphy@globe.com.