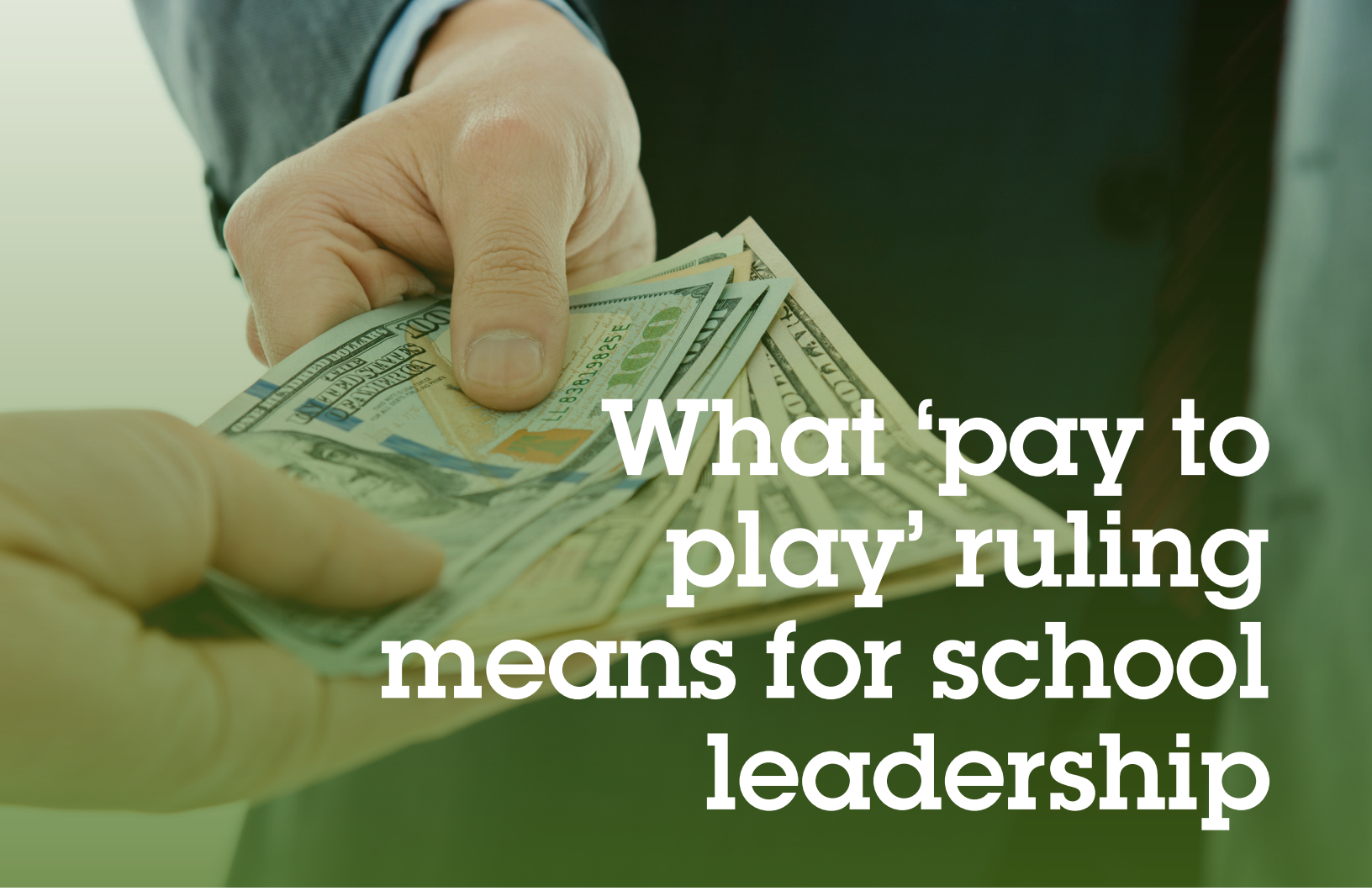

What 'pay to play' ruling means for school leadership

The Supreme Court ruling in McDonnell v. United States limited the quid pro quo element in Virginia law and has relevance to state and local anti-corruption statutes and ensuring pay-to-play politics does not pollute public school districts.

In an 8-0 decision, the United States Supreme Court threw out the bribery convictions of former Virginia Gov. Bob McDonnell, whom a trial court jury found performed official acts in exchange for gifts, or quid pro quo – "this for that."

The Supreme Court found that the jury was instructed on an overly broad definition of the "official act" element of federal anti-corruption statute. The court held an official act involves a formal exercise of government power and must also be something specific that is "pending" or "may by be brought" before a public official. The holding effectively limited the "quo" or "that" element of the statute.

The more conservative justices focused on a strict interpretation of the statutory language, while almost all justices expressed concern about the potential of politically motivated prosecutions. The justices' questioning demonstrated a healthy diversity in their life experiences, ideologies and temperament that theoretically would give rise to a well-reasoned decision.

However, the decision's aftermath may cause a sinister cancer on the American body politic to metastasize. With the highest court in the land adopting a limited interpretation of what constitutes an official act, the court may unwittingly condone or encourage the type of influence peddling that has repulsed the electorate.

Does the opinion ignore the practicalities of local politics or endorse them? With trust in government at a historic low, is it practical to characterize otherwise dishonest or distasteful acts as "a basic compact underlying representative government?" Or, as Chief Justice John Roberts said, will the "more bounded" interpretation leave sufficient room for prosecuting corruption? Certainly, the impact of the McDonnell v. United States decision will resonate from the halls of the Supreme Court all the way to the modest closed session meeting rooms of California public schools.

This article will analyze the McDonnell case, the decision's true meaning and how

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the justices' respective backgrounds shaped their viewpoints on this far-reaching issue. The article will further analyze McDonnell v. United States' relevance to California's anti-corruption statutes.

Finally, the court's reasoning will be applied not to the lavish extravagances of a powerful governor, but instead to the statutory obligations and the workaday functions of California school board trustees. In so doing, we will seek to determine what official acts actually are, and what is necessary to ensure pay-to-play politics does not pollute public school districts.

Access or excess?

As Justice Roberts acknowledged, McDonnell's activities were "dishonest" and "distasteful." The governor and his wife, Maureen, became involved with businessman Jonnie Williams, who testified that he provided the McDonnell family with approximately $177,000 in "gifts," including the use of vacation properties and a $50,000 loan to obtain the governor's "help" to gain state-sponsored scientific studies to classify his tobacco-based dietary supplement as a pharmaceutical. The governor admitted that he requested the $50,000 loan and accepted gifts from Williams. That is the "quid."

In return, McDonnell provided five separate services. First, he asked his secretary of health to meet with Williams regarding clinical trials at Virginia universities. Second, Maureen McDonnell arranged a lunch with her husband at which Williams distributed grants to university doctors.

Third, after becoming aware that university doctors were nonresponsive to Williams, Gov. McDonnell sent an email to his counsel requesting a meeting to discuss university research studies. Fourth, the governor invited Williams to a "health care leaders" reception at his residence. And fifth, at a Virginia employee health plan meeting, McDonnell publicly commented that the supplement was working well for him and that it "would be good for state employees."

Again, the governor admitted performing those services for Williams, but explained he had done similar things for others "literally thousands of times." That was the "quo."

McDonnell was prosecuted under the federal Hobbs Act, which makes it a crime for "a public official… directly or indirectly, to demand, seek, receive, accept or agree to receive or accept anything of value" in return for being "influenced in the performance of any official act."

A bounded definition of 'official act' can still allow room for prosecuting corruption, while at the same time some dishonest behavior may not be prosecuted.

An official act is defined as, "any decision or action on any question, matter, cause, suit, proceeding or controversy… which may be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." Thus, prosecutors needed to prove that a public official performed an official act in exchange for loans or gifts.

At the trial, the district court instructed jurors that to convict McDonnell, they must find that he agreed "to accept a thing of value in exchange for official action." The governor requested, and did not receive, an instruction that an official act must try to or "in fact influence a specific official decision that the government actually makes."

McDonnell's defense was that promoting Williams' business did not involve the exercise of actual sovereign power, so it was not an official act. The jury convicted McDonnell on 11 counts of bribery.

Supreme Court reasoning

The primary issue before the Supreme Court was whether arranging meetings, contacting public officials, hosting an event or publicly promoting a product were official acts. As usual, Justice Roberts displayed his preternatural brilliance at deconstructing statutes.

Roberts reasoned that since the Hobbs Act refers to a "question, matter, cause, suit, proceeding or controversy…," those words connote a formal exercise of governmental power, such as a lawsuit, hearing or administrative determination. Employing like reasoning, he reasoned requiring questions to be "pending" or "may be brought" before any public official means a thing that can be put on an agenda, tracked for progress, and then checked off as complete.

Roberts' narrow interpretation was broadened by previous Supreme Court decisions. United States v. Birdsall, 233 U.S. 223, 234 (1914), found that a public official may act by using his or her position to exert pressure on another official to perform an official act. An official can also act by using their position to provide advice to another official, knowing or intending that such advice will form the

basis for an official act.

A public official need not actually perform the act; it is enough that they agreed to do so. So an official can request money and expressly agree to provide access and/or advocacy, so long as the official does not "exert pressure" and government does not formally act.

Really? Is that really what the Supreme Court meant to tell public officials and the American people? The answer is an unequivocal, "Yes!" However, despite the justices' unanimity, their respective backgrounds influenced their very different understandings of what the McDonnell decision really meant.

Roberts is a product of unmitigated success. He graduated Harvard summa cum laude in three years and attended Harvard Law. Roberts gained prominence as a successful solicitor general and litigator who used legal technicalities to win cases. He has a reverence for the letter of the law, so he focused on the wording of the statute and jury instruction.

By contrast, Justice Stephen Breyer, while possessing similar academic credentials, is experienced in the practicalities of partisan politics. Breyer was chief counsel to the Senate Judiciary Committee, and his father, Irving Breyer, spent decades as a lawyer for the San Francisco school board.

Knowing how politics works, Breyer knew the message the court was sending. During oral argument he acknowledged their decision may "leave some dishonest conduct unprosecuted" and "will fail to catch some crooks." But at the same time Breyer stated, "I'm not in the business of sending messages in a case like this." Two very different experiences, but the same outcome. Clearly, the court understood the ramifications of its decision.

California bribery law

The California equivalent to the Hobbs Act is Penal Code Section 68, which reads, "Every officer, employee, or appointee… who asks, receives or agrees to receive any bribe, upon any agreement… that his or her vote, opinion or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby, is punishable by imprisonment in state prison."

The elements of the crime are virtually identical to the McDonnell case. California law forbids the agreement to accept a "bribe" – anything of value or that offers an advantage – for an agreement to perform an official "action" on any "pending" matter.

In light of McDonnell v. United States, this raises an interesting question; what is an "official act" for a California school board trustee?

Education Code Section 35163 provides, "Every official action taken by the governing board … shall be affirmed by a formal vote…" EC 35164 provides, "The … board shall act by majority vote… " Finally, Government Code Section 54954.2(a) (1-2) mandates that a board may only act at a meeting on matters posted on an agenda.

As a matter of strict statutory interpretation individual trustees have limited authority to commit official acts, since they can only exercise actual authority by majority vote at a public meeting. But we all know that does not reflect practical reality.

Trustees exercise influence in many ways. They "provide direction" on matters concerning school policy, finances, personnel, contracts, and let us not forget the bully pulpit of the dais. Trustees control the careers of most school administrators. Does McDonnell v. United States insulate them from committing bribery in their less formal exercise of power?

Let's analyze this issue by looking at an all too common scenario.

Assume for the sake of argument, a trustee accepts lunches and cocktails from a person, "Ms. X," wanting a senior administrator fired. Further assume the trustee agrees to, "do what they can."

The trustee arranges a lunch between Ms. X and another trustee. Then, the trustee requests a meeting with the superintendent to discuss termination procedures. The trustee questions the administrator's competence at a local PTA meeting, then disparages the administrator at a board meeting. At this point, there is clearly an agreement to accept something of value, food and drink, for the exercise of influence. However, under McDonnell, there is arguably no "quo" because

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there is no government act.

Justices Roberts and Breyer would both likely find the conduct distasteful, but not criminal.

However, further assume that the trustee informs the superintendent that the administrator has credit debt and that could reflect poorly on the district. Then the superintendent includes the administrator on the next closed session agenda, and the board votes 3-2 to place the administrator on paid administrative leave.

Regardless of whether the administrator is in fact suffering financial woes, the attempt to influence other public officials coupled with the formal vote creates an "official act." Now, there is acceptance of something of value and agreement to perform an official act… quid pro quo, or as Justice Breyer put it, a "crook."

Although not nearly as extravagant as McDonnell, the trustee's conduct is arguably more criminal. Certainly, given the finely nuanced distinctions of the McDonnell case and prosecutorial resources, the trustee may not be prosecuted. But there is a colorable violation.

Apparently, Justices Roberts and Breyer were both right. A bounded definition of official act can still allow room for prosecuting corruption, while at the same time some dishonest behavior may not be prosecuted.

Law, money and politics

The McDonnell decision is yet another inevitable intersection of law, money and politics. The ironic byproduct of the decision is that one's political success appears directly related to criminal culpability.

Our hypothetical trustee effectively initiated personnel action against the administrator. Yet McDonnell did not deliver the university studies Mr. Williams wanted; had he done so, he would have committed an official act.

The likely scenario is that when McDonnell committed the third official act alleged, and spoke with his counsel regarding "research studies," he was advised that there were fine lines he should not cross; so he didn't. McDonnell will probably not go to jail, but he has become yet another symbol for public corruption. Hopefully, California board trustees receive similar advice.

Trustees intermittently receive ethics training on "conflict of interest" but not on bribery. As opposed to campaign contributions, personal gifts provided either before or after government action are almost presumed to be "pro" or "for" the value provided. Meeting with constituents may be conscientious public service, but it can be fraught with peril when constituents give the official something of value.

The Supreme Court was criticized for not taking a more righteous stance against pay-to-play politics. But we all have a responsibility to restore the public's trust in government – both those seeking access and those who provide it. The real lesson of McDonnell is to meet with your constituents, but split the tab.

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