

Local lawyers celebrate 'vindication' of former Virginia governor

By: Kris Olson ◉ September 22, 2016

On Sept. 8, the same day it filed an unopposed motion to remand for dismissal with the 4th U.S. Circuit Court of Appeals, the Department of Justice explained — barely — why it had decided not to retry former Virginia Gov. Robert F. McDonnell and his wife, Maureen, after the Supreme Court vacated their federal corruption convictions two-and-a-half months earlier.

"After carefully considering the Supreme Court's recent decision and the principles of federal prosecution, we have made the decision not to pursue the case further," the DOJ said in a pithy press release.

With that, Daniel I. Small and Christopher M. Iaquinto of Holland & Knight in Boston, along with their Washington, D.C.-based co-counsel from Jones Day, could exhale.

Holland & Knight's involvement with the former Republican rising star began with Small and Iaquinto's partner, John L. Brownlee, who served more than 10 years at the DOJ, both as the U.S. attorney for the Western District of Virginia and as an assistant U.S. attorney for the District of Columbia, Small says.

The team that was being assembled also hoped to benefit from Small's expertise with witness preparation, a subject he has presented CLE programs on and written about extensively.

Small even had some experience with representing a state's chief executive charged with corruption, having been counsel for former Louisiana Gov. Edwin Edwards in 2000.

Back in the summer of 2013, the McDonnells' lawyers hoped there was still time to dissuade the DOJ from bringing charges against the couple. Their argument then, as it would continue to be straight on through the Supreme Court, was that while the government could — and ultimately did — spin what Chief Justice John G. Roberts Jr. referred to in the court's opinion as "tawdry tales of Ferraris, Rolexes, and ball gowns," part of \$177,000 in gifts and loans from Virginia businessman Jonnie Williams Sr., it could not prove that McDonnell had put his office up for sale. Indeed, Small and Iaquinto note that McDonnell had reported many of the gifts, as required by state law.

In other words, there may have been plenty of "quid," but there was no "quo" to be found, at least not without stretching the concept of what constituted an "official act" under federal law beyond all recognition. To the extent McDonnell performed services for Williams — the businessman wanted Virginia's public universities to perform research studies on his tobacco-based nutritional supplement, and the governor's office helped set up meetings — those services were "standard courtesies given to any constituent," the defense argued.

"I think the challenge from the beginning was how to get beyond the gifts and the scandal-mongering aspect to the trial and focus on the law," Small says.

The prosecution didn't make it easy, repeatedly carting into the courtroom the gifts the family had turned over to the government so that the jury would be "bedazzled" by them, Small says. Lost, at least until the case reached the Supreme Court, was that McDonnell's efforts on Williams' behalf were in a sense following through on his mandate from Virginia voters to support local business and bring economic development to the state, Iaquinto says.

Small and Iaquinto attended the oral arguments at the Supreme Court, which for the McDonnells were handled by Noel J. Francisco of Jones Day. They agree that one of the more remarkable moments was when Roberts took to task veteran Deputy Solicitor General Michael R. Dreeben, suggesting that if the government could not provide a workable definition of "official act," perhaps the statute itself was unconstitutionally vague.

Iaquinto recalls Justice Stephen G. Breyer setting before Dreeben a hypothetical of a constituent buying lunch for a congressman who then gives the constituent a tour of the Capitol. Would the congressman have committed enough of an "official act" to satisfy the statute?

"The answer to that, based on the jury instruction in this case, is 'yes,'" Iaquinto says.

Dreeben had barely started his argument when Roberts interrupted him to refer to an "extraordinary document" the

court had received: an amicus brief supporting McDonnell's position submitted by several White House counsels and other high-ranking officials under both Democratic and Republican presidents, going back to the Reagan administration. Roberts remarked that he thought it "extraordinary that those people agree on anything."

While that brief got the most attention from Roberts and others, Iaquinto says McDonnell also benefited from one signed by 45 attorneys general, also from both sides of the political aisle.

While the court stopped short of ruling the statute unconstitutionally vague, it fashioned a definition of "official act" that put formal exercises of governmental power, "such as a lawsuit, hearing, or administrative determination," on one side of the ledger and "setting up a meeting, talking to another official or organizing an event" on the other.

The decision in McDonnell was unanimous.

That, says Small, shows that the "court is very concerned that the criminal law is being used as almost a legislative tool."

While the Supreme Court ruling got a lot of media play, the DOJ's decision not to retry the case under the court's new definition of "official act" perhaps deserves more attention, Small argues, given the vindication it represents for the governor and his family.

It's an issue to which Small and Iaquinto are particularly sensitive, having worked closely with the McDonnells and their children, who testified both before the grand jury and at trial.

Emotions ran high, according to Iaquinto.

"You can imagine, that creates a very different kind of atmosphere in the courtroom than you are used to dealing with," he says.

In addition to coping with the emotional environment, the Holland & Knight and Jones Day lawyers had to contend with the government turning over more than 5 million documents and a "long, long list of potential witnesses" in a case that was put on a fast track, Small says.

But whatever the lawyers endured, it paled in comparison to what the family went through, according to Small.

"It was an unbelievable ordeal for the family, and they are incredibly relieved to have been vindicated so completely," he says.

While states vary as to how they regulate graft — for Massachusetts public officials, the minefield is more with campaign contributions than outright gifts, say Small and Iaquinto — the McDonnell decision is likely to have far-reaching implications, given that the issue of what constitutes an official act tends to recur in prosecutions in this context.

"The government reached way too low, and as a result it has a decision it will have to deal with in cases across the country," Small says.

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