

Roundtable Discussion

“The Bob McDonnell Case and the Trump Administration: Implications for the Prosecution of Corruption in the US, the UK and the Rest of the World”

Friday 21 April 2017

Duke University School of Law, Durham, North Carolina

Final Program

Overview

1. The US Supreme Court overturned in June 2016 a corruption conviction for former Virginia Governor Bob McDonnell, who stands accused of receiving gifts and loans from a private sector corporation. Specifically, the Supreme Court had to rule on when a public servant actually performs an ‘official act’ and what constitutes an official act.¹ In justifying its decisions, the Court also noted that people must have fair notice of what conduct is criminal and what is lawful (which is in line with the principle of *legal certainty*).² The Department of Justice on September 8 announced that it is not going to retry the former Governor and his wife.
2. There is consensus that the decision of the Supreme Court will likely make the prosecution of corruption harder to achieve by questioning what constitutes public sector corruption. But this case also casts doubts over how it could affect use of the FCPA to prosecute corruption overseas. Will this new definition limit the theories of foreign corruption put forward by the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC)? Will more corporate defendants be willing to go to trial on corruption charges and thereby lead to more judicial interpretation of the statute?
3. There are also a number of questions relating to what a Trump administration mean for the future of anti-corruption, and for enforcement of anti-bribery laws in the US and internationally. During the campaign, Trump claimed that the FCPA is a "horrible law and it should be changed" and that it puts American businesses at a "huge disadvantage".³
4. So, there is some uncertainty over the extent to which the new administration will change government policy in this area. Can enforcement of the FCPA be above politics, and what is the role of politics in changing FCPA enforcement policy? If changes are to be expected, what

¹ See for example A. Liptak, 27 June 2016, *Supreme Court Vacates Ex-Virginia Governor's Graft Conviction*, New York Times, <http://www.nytimes.com/2016/06/28/us/politics/supreme-court-bob-mcdonnell-virginia.html? r=3>

² Tim Lynch, 27 June 2016. McDonnell Ruling is a victory for Constitutional Due Process, Cato Institute, <http://www.cato.org/blog/mcdonnell-ruling-victory-constitutional-due-process>

³ <http://fcpaprofessor.com/donald-trump-the-fcpa-is-a-horrible-law-and-it-should-be-changed/>

would this mean for jurisdictions like the United Kingdom? Will the UK become a new leader in the international prosecution of corruption if the FCPA is weakened or even repealed?⁴ If the US is to repeal/weaken the FCPA, what is the likely effect on Deferred Prosecution Agreements? Will it change the standard approach/defence of multinational corporations? Will the possibility for global settlements be undermined if the US does not cooperate with international jurisdictions like the UK? Likewise, what will the US' relation with foreign jurisdictions look like? What would the US' attitude towards international conventions such as the OECD Bribery Convention be, and can it dissociate from obligations that result from such conventions?

5. This roundtable discussion, convened by the Global Rule of Law Exchange (www.ruleoflawexchange.org) at the Bingham Centre for the Rule of Law (United Kingdom), and the Centre for International & Comparative Law at Duke Law, and with the support of Jones Day, intends to discuss the significance of both the Bob McDonnell case and the Trump administration for the future of anti-corruption in the US and internationally.
6. The Roundtable will be organized at Duke University School of Law in Durham (North Carolina) on **Friday 21 April 2017**. The event will be held under Chatham House rules to allow for frank discussions. A background note will be produced to summarize the outcome of the discussion. An op-ed or article may be published, ideally both in the US and the UK, to summarize the outcomes of the discussion and highlight the relevance of both McDonnell and Trump for the US and the UK.

⁴ The UK has been accused of failing to live up to its anti-corruption commitments, for example on the creation of beneficial ownership information, or country-by-country reporting. See: <https://www.theguardian.com/global-development/2017/jan/17/uk-government-accused-of-falling-short-on-pledges-to-fight-corruption>

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<p>10.00-10.20</p>	<p>Welcome & Introduction</p> <ul style="list-style-type: none"> • Bingham Centre/Jones Day • Duke Law School
<p>10.20-11.50</p>	<p>Session 1 – The Bob McDonnell Case: A Game Changer?</p> <p>Why is this case important? How does it change our understanding of corruption? What are the due process implications of this case? And will it affect how corruption is prosecuted under the FCPA? Does this alter the DoJ and SEC’s relationships with foreign prosecutors that bring corruption cases?</p> <p><u>Speakers</u></p> <ul style="list-style-type: none"> • Hank Asbill, Partner, Jones Day • Charlotte Taylor, Associate, Jones Day • Karen Popp, Partner, Sidley Austin <p><u>Chair</u></p> <ul style="list-style-type: none"> • John Coyle, Associate Professor of Law, UNC-CH Law School
<p>11.50-13.00</p>	<p>LUNCH</p>
<p>13.00-14.30</p>	<p>Session 2 – Domestic and International Prosecution of Corruption Under President Trump</p> <p>There is much uncertainty over what Trump’s administration will mean for the future of anti-corruption and anti-bribery enforcement specifically in the US and the world. Will the Trump administration radically change US policy in this area? What leverage does the Executive have to change anti-corruption policies? If so, what will these changes look like, and what will the impact be on foreign jurisdictions? Whilst US anti-corruption policies (enforcement of the FCPA, DoJ Sanctions) have been criticised for putting US interests first, how would these criticisms fare under a Trump administration? Would the prosecution of bribery under Trump become a foreign policy tool?</p> <p><u>Speakers</u></p> <ul style="list-style-type: none"> • Eric Snyder, Partner, Jones Day • Sara Sun Beale, Professor, Duke Law School • David Bitkower, Formerly Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice <p><u>Chair</u></p> <ul style="list-style-type: none"> • Matthew Stephenson, Professor, Harvard Law School
<p>14.30-14.45</p>	<p>COFFEE BREAK</p>
<p>14.45-16.15</p>	<p>Session 3 – Making Sense of the Changes: International Implications and Responses to the McDonnell Case and Trump’s Administration</p> <p>This session will conclude the roundtable by discussing the international implications of the McDonnell case and the likely changes of Trump’s administration. What will the international response for jurisdictions like the UK, Germany, Switzerland, and Australia be? Does Trump’s administration mean that</p>

	<p>another jurisdiction should step forward in leading the fight against corruption? How will Trump collaborate with UK counterparts, and what position does it leave the UK in? Can the US be stopped from rolling back the FCPA? And does Trump's distaste for the FCPA also jeopardize the US' relation vis-à-vis the OECD Anti-Bribery Convention?</p> <p><i>Speakers</i></p> <ul style="list-style-type: none"> • Glyn Powell, Partner, Jones Day • Frank Vogl, Co-Founder, Transparency International • Elizabeth Spahn, Professor Emeritus, New England Law School • Rahul Rose, Senior Researcher, Corruption Watch UK <p><i>Chair</i></p> <ul style="list-style-type: none"> • Paul Lomas, External Fellow, Bingham Centre for the Rule of Law
<p>16.15-16.30</p>	<p>Closing</p> <ul style="list-style-type: none"> • Bingham Centre • Duke Law School