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LET'S GET ETHICAL, A LOOK AT THE NEW ETHICS  
REFORM IN THE COMMONWEALTH OF VIRGINIA

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## I. INTRODUCTION

In April of 2015, the Virginia General Assembly returned to Richmond for its annual veto session, with the main focus on putting the finishing touches on ethics reform.<sup>1</sup> After lengthy debate and a number of amendments, the omnibus ethics bill passed the House and the Senate unanimously.<sup>2</sup> House and Senate Members from both political parties touted the accomplishment as a significant step forward, as did Governor McAuliffe who called the legislation a “victory for transparency and accountability.”<sup>3</sup> Delegate C. Todd Gilbert (R-Shenandoah), who authored the House version of the bill, proclaimed that the reforms “solved all major problems that the public wanted us to solve.”<sup>4</sup>

Many see these recent ethics reforms in Virginia as a long overdue solution to a pervasive ethics problem in Virginia. Most credit the highly publicized trial of former Governor Bob McDonnell with sparking the national criticism and debate that ultimately led to legislative reform.<sup>5</sup> While the goal of this Article is to survey the ethics reform legislation passed by the 2015 General Assembly, it is important to view these changes in the context of the two highly publicized federal prosecutions of Virginia elected officials which precipitated them. In the five years preceding these reforms, the U.S. Department of Justice successfully prosecuted two former Virginia elected officials, Delegate Phil Hamilton<sup>6</sup> and former Governor Bob McDonnell of bribery and extortion.<sup>7</sup>

Understanding these two cases is helpful for appreciating the legal and political climate in which the reforms were passed. More importantly, this Article will argue the cases provide a framework for analyzing whether the new statutory scheme is likely to prove effective in preventing undue influ-

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<sup>1</sup> Laura Vozzella, *Virginia Legislature Adopts Stricter Gift Standards for Public Officials*, WASH. POST (Apr. 17, 2015), [http://www.washingtonpost.com/local/virginia-politics/virginia-legislature-adopts-strict-gift-standards/2015/04/17/b400b6a0-e456-11e4-905f-cc896d379a32\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-legislature-adopts-strict-gift-standards/2015/04/17/b400b6a0-e456-11e4-905f-cc896d379a32_story.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Jim Nolan & Markus Schmidt, *Legislature Approves Ethics Bill with \$100 Aggregate Gift Cap*, RICHMOND TIMES-DISPATCH (Apr. 17, 2015), [http://www.richmond.com/news/virginia/government-politics/article\\_1d1225c8-3929-5099-8ce5-eace700186c9.html](http://www.richmond.com/news/virginia/government-politics/article_1d1225c8-3929-5099-8ce5-eace700186c9.html).

<sup>5</sup> *Id.*

<sup>6</sup> Rachel Weiner, *Phillip Hamilton, Ex-Virginia Delegate Jailed for Bribery, Denied New Trial*, WASH. POST (Dec. 23, 2014), [http://www.washingtonpost.com/local/virginia-politics/imprisoned-former-virginia-delegate-phillip-hamilton-denied-new-trial-by-appeals-court/2014/12/23/9530bb2e-8ad0-11e4-a085-34e9b9f09a58\\_story.html](http://www.washingtonpost.com/local/virginia-politics/imprisoned-former-virginia-delegate-phillip-hamilton-denied-new-trial-by-appeals-court/2014/12/23/9530bb2e-8ad0-11e4-a085-34e9b9f09a58_story.html).

<sup>7</sup> Trip Gabriel, *Former Governor in Virginia Guilty in Bribery Case*, N.Y. TIMES (Sept. 4, 2014), [http://www.nytimes.com/2014/09/05/us/bob-mcdonnell-maureen-mcdonnell-virginia-verdict.html?\\_r=0](http://www.nytimes.com/2014/09/05/us/bob-mcdonnell-maureen-mcdonnell-virginia-verdict.html?_r=0).

ence and corruption in state government. Part II outlines the cases of Delegate Hamilton and Governor McDonnell in detail. Part III discusses ethics reform in Virginia including legislation passed in the 2015 General Assembly session. Part IV concludes the article.

## II. THE PROSECUTIONS OF DELEGATE PHIL HAMILTON AND GOVERNOR BOB MCDONNELL

### A. United States v. Phillip A. Hamilton<sup>8</sup>

From 1988 until 2009, Phil Hamilton served as the Republican delegate for the 93<sup>rd</sup> House District, which includes James City County and Newport News.<sup>9</sup> On May 11, 2011, following an eight-day trial, a jury convicted Hamilton of bribery in violation of 18 U.S.C. § 666(a)(1)(B) and extortion under color of official right in violation of 18 U.S.C. § 1951.<sup>10</sup>

Prosecutors argued that beginning in 2006, then-Delegate Hamilton solicited Old Dominion University (“ODU”) in return for personal gain.<sup>11</sup> He introduced a bill in the House of Delegates that provided \$500,000 in state funding for ODU’s Center for Teacher Quality and Educational Leadership, and soon thereafter was made the center’s director with an annual salary of \$40,000.<sup>12</sup>

In response to allegations of misconduct, ODU began an internal audit on September 17, 2009.<sup>13</sup> The investigation revealed that during his two-year tenure with the Center, Hamilton had barely visited his office and that there were no indications of any services rendered, indicating that he had been on the school’s payroll without actually working for it.<sup>14</sup> The evidence against

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<sup>8</sup> United States v. Hamilton, 701 F.3d 404 (4th Cir. 2012).

<sup>9</sup> Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Former Member of Virginia House of Delegates Sentenced to 114 Months in Prison for Bribery and Extortion (Aug. 12, 2011) *available at* <https://www.fbi.gov/richmond/press-releases/2011/former-member-of-virginia-house-of-delegates-sentenced-to-114-months-in-prison-for-bribery-and-extortion>.

<sup>10</sup> United States v. Hamilton, 701 F.3d 404, 407 (4th Cir. 2012); Bill Sizemore, *Ex-Del. Phil Hamilton Found Guilty of Bribery and Extortion*, THE VIRGINIAN-PILOT (May 12, 2011), <http://hamptonroads.com/2011/05/exdel-phil-hamilton-found-guilty-bribery-and-extortion>.

<sup>11</sup> Julian Walker, *Phil Hamilton Sentenced to 9 ½ Years for Bribery, Extortion*, THE VIRGINIAN-PILOT (Aug. 13, 2011), <http://hamptonroads.com/2011/08/phil-hamilton-sentenced-9%C2%BD-years-bribery-extortion#>.

<sup>12</sup> *Id.*

<sup>13</sup> Bill Sizemore et al., *Audit: ‘Little Documentation’ of Services by Hamilton to ODU*, THE VIRGINIAN-PILOT (Sept. 18, 2009), <http://hamptonroads.com/2009/09/audit-little-documentation-services-hamilton-odu>.

<sup>14</sup> *Id.*

Hamilton centered on emails sent from his workplace computer to his wife, in which he discussed his intent to bribe ODU in return for the paid position.<sup>15</sup> Despite Hamilton's claims that marital correspondences should not have been used, the trial court found his employers had a non-privacy expectation policy granting the court unrestricted access to his emails and therefore ruled the message admissible.<sup>16</sup> The Fourth Circuit Court of Appeals later upheld this ruling.<sup>17</sup>

Following the jury verdict, the U.S. Justice Department recommended a sentence of 12.5 to 15.5 years.<sup>18</sup> Attorney Neil McBride stated his belief that legislators should not be allowed to use their power for personal gain, arguing they are "sent to Richmond to do the people's business, not line their own pockets."<sup>19</sup> Hamilton's attorneys in turn cited his long history of accomplishments and public service.<sup>20</sup> On August 12, 2011, U.S. District Judge Henry E. Hudson sentenced him to 114 month's imprisonment.<sup>21</sup>

In both legal and political circles, the Hamilton case is considered a straightforward one. The former Delegate clearly broke the law and an obvious *quid pro quo* was exposed—additional state money was appropriated to ODU in return for employment. Hamilton was defeated in his re-election bid and convicted of federal bribery and extortion charges, but business carried on as usual in Richmond.<sup>22</sup> No major changes were made to ethics procedures as a result of Hamilton's corruption case. Perhaps little was done because the crime was so egregious and proving his guilt was seemingly obvious. Or perhaps public outcry was limited because he was a former member of the House of Delegates and the case did not generate widespread media attention outside Virginia. Delegate Hamilton's conviction has gained greater significance in the wake of the prosecution of Governor McDonnell. While commentators point to Delegate Hamilton's conviction to support the claim that Virginia's ethics laws were inadequate to protect

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<sup>15</sup> Frank Green, *Court Upholds Bribery Conviction of Former Del. Phillip Hamilton*, THE RICHMOND TIMES-DISPATCH (Dec. 13, 2012), [http://www.richmond.com/news/latest-news/article\\_fbf2f988-456a-11e2-abf2-001a4bcf6878.html](http://www.richmond.com/news/latest-news/article_fbf2f988-456a-11e2-abf2-001a4bcf6878.html).

<sup>16</sup> *Id.*

<sup>17</sup> *Hamilton*, 701 F.3d 404.

<sup>18</sup> Julian Walker, *Phil Hamilton Sentenced to 9 ½ Years for Bribery, Extortion*, THE VIRGINIAN-PILOT (Aug. 13, 2011), <http://hamptonroads.com/2011/08/phil-hamilton-sentenced-9%C2%BD-years-bribery-extortion#>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The Associated Press, *Democrats Lose Seats in VA House*, WHSV.COM (Nov. 4, 2009, 11:23 AM), <http://www.wHSV.com/home/headlines/69080397.html>.

against corruption, it is difficult to fit the facts of the case into the framework of most ethics reform proposals.

Delegate Hamilton had direct access to state funds. He sat at the intersection of two extremely powerful committees that made it easy for him to leverage his influence. Being Chairman of the powerful House Health, Welfare and Institutions Committee and Vice Chairman of the still more powerful House Appropriations Committee, as well as a member of the House Education Committee, gave him influence over state funds.<sup>23</sup> No lobbyist, liaison, or facilitator was needed to gain access to the Commonwealth's purse strings. Hamilton controlled the purse strings.

#### B. United States v. Robert F. McDonnell<sup>24</sup>

Robert F. McDonnell served as the 71<sup>st</sup> Governor of Virginia from 2010 to 2014.<sup>25</sup> On January 21, 2014 he and his wife, Maureen McDonnell, were indicted on federal corruption charges.<sup>26</sup> This was the culmination of months of speculation and media frenzy that had unfolded before the public in salacious detail. The prosecution accused the Governor and his wife of accepting \$165,000 worth of gifts and loans from Jonnie Williams, the CEO of Star Scientific, which at the time was developing a dietary supplement called Anatabloc.<sup>27</sup> Prosecutors claimed that in return for these gifts, Governor McDonnell and Mrs. McDonnell performed "official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products, including Anatabloc."<sup>28</sup>

From October 2010 through November 2012, McDonnell and his wife received personal financing from Williams, including one \$20,000 loan and two \$50,000 loans for their two beachfront rental properties which were proving to be problematic investments.<sup>29</sup> Williams provided \$15,000 for

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<sup>23</sup> Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Former Member of Virginia House of Delegates Sentenced to 114 Months in Prison for Bribery and Extortion (Aug. 12, 2011) *available at* <https://www.fbi.gov/richmond/press-releases/2011/former-member-of-virginia-house-of-delegates-sentenced-to-114-months-in-prison-for-bribery-and-extortion>.

<sup>24</sup> United States v. McDonnell, No. 15-4019, 2015 U.S. App. LEXIS 11889 (4th Cir. May 12, 2015).

<sup>25</sup> Andrew Cain, *List of Virginia Governors*, RICHMOND TIMES-DISPATCH (Jan. 13, 2014, 12:00 AM), [http://www.richmond.com/news/virginia/government-politics/article\\_67631b76-8a70-578f-8d0d-2bb11e01e515.html](http://www.richmond.com/news/virginia/government-politics/article_67631b76-8a70-578f-8d0d-2bb11e01e515.html).

<sup>26</sup> Catalina Camia & Brad Heath, *Ex-Va. Governor McDonnell: 'I did nothing illegal'*, USA TODAY (Jan. 21, 2014, 8:46 PM), <http://www.usatoday.com/story/news/politics/2014/01/21/bob-mcdonnell-gifts-virginia-governor-indicted/4723979/>.

<sup>27</sup> Indictment, United States v. McDonnell, No. 3:14-cr-00012-JRS (E.D. Va. January 21, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> United States v. McDonnell, No. 15-4019, 2015 U.S. App. LEXIS 11889, at \*9, 19 (4th Cir. May 12, 2015).

catering expenses for the McDonnell's daughter's wedding.<sup>30</sup> Additionally, Williams took Mrs. McDonnell on a \$20,000 shopping spree in New York<sup>31</sup> and later purchased a \$6,500 Rolex watch that Mrs. McDonnell gave to Governor McDonnell as a Christmas present in 2011.<sup>32</sup> Williams also took the couple to at least one dinner costing over \$1,000 and paid for McDonnell and his son to play golf at least three times.<sup>33</sup>

Williams discussed the drug Anatabloc with the McDonnells early in this chain of events.<sup>34</sup> During the trial, several interactions between Governor McDonnell's administration and Williams were discussed as official acts to demonstrate *quid pro quo*, including:

- In October 2010, McDonnell's staff sent a press release to Secretary of Health and Human Resources Bill Hazel discussing Anatabloc's use for treating Alzheimer's.<sup>35</sup>
- In August 2011, Williams and Maureen met with a senior Health Administration advisor, during which the CEO discussed attaining funding for a study on his drug from the Virginia Tobacco Indemnification and Community Revitalization Commission.<sup>36</sup>
- In 2011, an event was organized at Virginia's executive mansion to announce the launch of Star Scientific's Anatabloc.<sup>37</sup>
- In March 2012, McDonnell met with the Secretary of his Administration, proceeding to claim that he had been taking Anatabloc and that the product had been working for him.<sup>38</sup>

The government further alleged the McDonnells took steps to conceal their actions. During the investigation into the family's finances, Mrs. McDonnell claimed that the initial two loans (\$50,000 and \$15,000) were personal and lied about existing paperwork.<sup>39</sup> A few days later, Governor McDonnell sent an update to his bank listing the loans.<sup>40</sup>

After three days of deliberations, on September 4, 2014, the jury found the Governor guilty of eleven counts and Mrs. McDonnell guilty of eight

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<sup>30</sup> *Id.* at 10-11.

<sup>31</sup> *Id.* at 7-8.

<sup>32</sup> *Id.* at 14-15.

<sup>33</sup> *Id.* at 14-15, 17-18.

<sup>34</sup> *United States v. McDonnell*, No. 15-4019, 2015 U.S. App. LEXIS 11889, at \*6 (4th Cir. May 12, 2015).

<sup>35</sup> *Id.* at 6, 97.

<sup>36</sup> *Id.* at 89-90, 94.

<sup>37</sup> *Id.* at 94.

<sup>38</sup> *Id.* at 92-93, 95.

<sup>39</sup> *United States v. McDonnell*, No. 15-4019, 2015 U.S. App. LEXIS 11889, at \*44-45, 96 (4th Cir. May 12, 2015).

<sup>40</sup> *Id.* at 10-11.

counts of the indictment.<sup>41</sup> The verdict made McDonnell the first Virginia governor to be convicted of a crime.<sup>42</sup>

The U.S. Probation Office recommended a prison sentence ranging from ten years to twelve years and seven months for Governor McDonnell.<sup>43</sup> U.S. District Court Judge James R. Spencer agreed with the defense counsel that some of the gifts were overstated and reduced Governor McDonnell's sentence to two years with an additional two years of supervised release.<sup>44</sup> Mrs. McDonnell received twelve months imprisonment.<sup>45</sup> Throughout the process, Jonnie Williams testified against the McDonnell family which allowed him to gain legal immunity.<sup>46</sup>

McDonnell maintains that he is innocent, and his lawyers have argued that the conviction was based on an overly broad definition of an "official act" by a politician.<sup>47</sup> Additionally, the defense argued that arranging meetings with state officials and attending or hosting events are routine political courtesies, not an indication of *quid pro quo*.<sup>48</sup> Prosecutors have countered this by comparing McDonnell's actions to former Louisiana Representative William Jefferson's bribery case, which involved brokering business deals with African government leaders, and resulted in a thirteen year imprisonment.<sup>49</sup> On July 10, 2015 the U.S. Fourth Circuit Court of Appeals unanimously rejected Governor McDonnell's appeal and affirmed his conviction.<sup>50</sup> In October of 2015, Governor McDonnell appealed his convictions to the Supreme Court of the United States.<sup>51</sup>

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<sup>41</sup> Rosalind S. Helderman & Matt Zapotosky, *Ex-Va. Governor Robert McDonnell Guilty of 11 Counts of Corruption*, WASH. POST (Sept. 4, 2014), [http://www.washingtonpost.com/local/virginia-politics/mcdonnell-jury-in-third-day-of-deliberations/2014/09/04/0e01ff88-3435-11e4-9e92-0899b306bbea\\_story.html](http://www.washingtonpost.com/local/virginia-politics/mcdonnell-jury-in-third-day-of-deliberations/2014/09/04/0e01ff88-3435-11e4-9e92-0899b306bbea_story.html).

<sup>42</sup> *Id.*

<sup>43</sup> Frank Green, *Federal Probation Office Recommends 10-12 years for McDonnell*, RICHMOND TIMES-DISPATCH (Dec. 12, 2014), [http://www.richmond.com/news/virginia/government-politics/article\\_8f9047d6-d60b-5121-80a1-a00847e8f2be.html](http://www.richmond.com/news/virginia/government-politics/article_8f9047d6-d60b-5121-80a1-a00847e8f2be.html).

<sup>44</sup> Travis Fain, Robert Brauchle & Dave Ress, *Former Gov. Bob McDonnell Sentenced to Two Years in Prison*, DAILY PRESS (Jan. 6, 2015), <http://www.dailypress.com/news/politics/dp-mcdonnell-sentencing-today-20150106-story.html#page=1>.

<sup>45</sup> Kathy Heatt & Patrick Wilson, *Maureen McDonnell Sentenced to a Year in Prison*, THE VIRGINIAN-PILOT (Feb. 21, 2015), <http://hamptonroads.com/2015/02/maureen-mcdonnell-sentenced-year-prison>.

<sup>46</sup> Larry O'Dell, *Prosecutors: Evidence Supports ex-Va. Gov's Convictions*, AP NEWS (Mar. 27, 2015 12:30 AM), <http://bigstory.ap.org/article/70dfca49295b4cb0b4d634669d874d9e/prosecutors-evidence-supports-ex-va-govs-convictions>.

<sup>47</sup> *44 Former Attorneys General Back Ex-Va. Governor's Appeal*, CBS DC (Mar. 9, 2015, 2:44 PM), <http://washington.cbslocal.com/2015/03/09/44-former-attorneys-general-back-ex-va-governors-bob-mcdonnell-appeal/>.

<sup>48</sup> *Id.*

<sup>49</sup> O'Dell, *supra* note 46.

<sup>50</sup> Laura Geller, *Former Va. Gov's Corruption Conviction Upheld*, USA TODAY (July 10, 2015), <http://>

### III. ETHICS REFORM IN VIRGINIA

By 2014, Virginia's reputation was permanently scarred following the corruption conviction of former Governor Bob McDonnell. To some, the most damning indictment of the Commonwealth was that neither Hamilton nor McDonnell were found to have violated any Virginia campaign finance or ethics laws.

Prior to the 2015 reforms, Virginia was one of only ten states that allowed elected officials to accept personal gifts of unlimited value.<sup>52</sup> More surprisingly, the Commonwealth also lacked a statewide ethics commission.<sup>53</sup> The Code of Virginia required only that officials report gifts of more than fifty dollars.<sup>54</sup> However, even this statute only specifically applied to the elected official, leaving family members and friends open to receive gifts without disclosure.<sup>55</sup>

When these laws became the focus of national attention, many in the public were amazed by the lack of accountability required of Virginia's elected officials. John McGlennon, Chairman of the Government Department at the College of William & Mary, stated, "Virginia's ethics regulations are so loose, relatively few people have actually run afoul of them. They exempt so much, they don't impose limits or really restrict the source of either contributions or gifts."<sup>56</sup>

While outside observers and the media were critical of Virginia's ethics laws, those in Virginia's government and working closely with it, believed

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[www.usatoday.com/story/news/politics/2015/07/10/bob-mcdonnell-corruption-conviction/29957387/](http://www.usatoday.com/story/news/politics/2015/07/10/bob-mcdonnell-corruption-conviction/29957387/).

<sup>51</sup> Associated Press, *Former Virginia Gov. Bob McDonnell asks Supreme Court to Review Convictions*, THE WALL STREET JOURNAL (Oct. 14, 2015), <http://www.wsj.com/articles/former-virginia-gov-bob-mcdonnell-asks-supreme-court-to-review-convictions-1444838840?tesla=y>.

<sup>52</sup> Laura Vozzella, *Virginia has One of Nation's Most Lax Ethics Laws for Politicians*, THE WASHINGTON POST (Apr. 27, 2013), [http://www.washingtonpost.com/local/va-politics/virginia-has-one-of-nations-most-lax-ethics-laws-for-politicians/2013/04/27/8f1e1218-a774-11e2-a8e2-5b98cb59187f\\_story.html](http://www.washingtonpost.com/local/va-politics/virginia-has-one-of-nations-most-lax-ethics-laws-for-politicians/2013/04/27/8f1e1218-a774-11e2-a8e2-5b98cb59187f_story.html);

see also Laura Vozzella & Tom Jackman, *McAuliffe Vows to Amend Ethics Bills to Close Loopholes*, THE WASHINGTON POST (Mar. 27, 2015), [http://www.washingtonpost.com/local/virginia-politics/mcauliffe-vows-to-amend-ethics-bills-to-close-loopholes/2015/03/27/2e87b766-d48f-11e4-8fce-3941fc548f1c\\_story.html](http://www.washingtonpost.com/local/virginia-politics/mcauliffe-vows-to-amend-ethics-bills-to-close-loopholes/2015/03/27/2e87b766-d48f-11e4-8fce-3941fc548f1c_story.html).

<sup>53</sup> Editorial Board, *Get Serious About Ethics in Va.*, THE WASHINGTON POST (Aug. 1, 2013), [http://www.washingtonpost.com/opinions/get-serious-about-ethics-in-va/2013/08/01/339cea3e-fabe-11e2-a369-d1954abc7e3\\_story.html](http://www.washingtonpost.com/opinions/get-serious-about-ethics-in-va/2013/08/01/339cea3e-fabe-11e2-a369-d1954abc7e3_story.html).

<sup>54</sup> VA. CODE ANN. § 30-111 (2004).

<sup>55</sup> *Id.*

<sup>56</sup> Nicholas Kusnetz, *Controversy Ensnaing Governor Raises New Questions About Virginia Laws*, THE CENTER FOR PUBLIC INTEGRITY (May 8, 2013), <http://www.publicintegrity.org/2013/05/08/12635/controversy-ensnaing-governor-raises-new-questions-about-virginia-laws>.



the value of these laws was vested in the philosophy of transparency. For decades, Virginia's ethics laws remained a combination of the openness in the process and the responsibility of the public to scrutinize their public officials. It remains unknown whether this combination of respect, morality, and civic mindedness served as an effective stalwart against dishonesty until now, or whether the technology of today better illuminated a corruption which has always existed. Following Phil Hamilton's scandal and Bob McDonnell's "Giftgate," the need for statutory ethics reform quickly became evident. Due to these recent events, the General Assembly and Governor Terry McAuliffe dedicated their efforts to win back the public's confidence in the Commonwealth through reform of Virginia's Ethics Code.

#### A. Governor's Commission on Integrity and Public Confidence in State Government

The national attention highlighted perceived flaws in Virginia's Ethics Code and prompted Governor Terry McAuliffe to assemble a commission charged with reforming the porous laws.<sup>57</sup> On September 25, 2014, the Governor signed Executive Order No. 28, which established the Governor's Commission on Integrity and Public Confidence in State Government ("Commission").<sup>58</sup> The Governor assigned former Lieutenant Governor, Bill Bolling, a Republican, and former U.S. Representative Rick Boucher, a Democrat, to lead the bipartisan commission.<sup>59</sup>

The Governor directed the Commission to address a number of potential ethics reform topics, including: (1) caps and bans on tangible and intangible gifts; (2) rules regarding personal loans, or any loans other than those from commercial financial institutions at rate available to the general public, to legislators and their family members from personal friends or business associates; (3) rules regarding grants, deliberations, or decisions by members of public boards and commissions that could provide a direct financial benefit to such members, members' family, personal friends, or close business associates; (4) rules regarding post-government employment and an appropriate waiting period prior to beginning such employment; and (5) policies regarding lawyer-legislators representing clients before state agen-

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<sup>57</sup> Michael Martz, *McAuliffe taps Bolling, Boucher to Lead Ethics Reform Push*, THE RICHMOND TIMES-DISPATCH (Sept. 25, 2014), [http://www.richmond.com/news/virginia/article\\_ffef13b04-05cf-5f7a-8e40-650f6f56d935.html](http://www.richmond.com/news/virginia/article_ffef13b04-05cf-5f7a-8e40-650f6f56d935.html).

<sup>58</sup> Va. Exec. Order No. 28 (Sept. 25, 2014); *see* VA. CODE ANN. §§ 2.2-134, 2.2-135 (2015) (giving the Governor the power to create commissions by executive order).

<sup>59</sup> Va. Exec. Order No. 28 (Sept. 25, 2014).

cies during their term in office.<sup>60</sup> Many of these proposals seem clearly aimed at the types of misconduct alleged in the Hamilton and McDonnell prosecutions.

Additionally, the Governor asked the Commission to consider new campaign finance reforms, in particular, limits on the amounts of contributions to campaigns by individuals, corporations, political Action Committees (PACs) and lobbyists and rules regarding the personal use of candidate campaign funds.<sup>61</sup> Finally, the Governor asked the Commission to consider other proposals such as amending Virginia law to permit a second consecutive term for Virginia's governor, improving procedures for selecting judges and other candidates for public service, and considering new procedures for legislative and congressional redistricting.<sup>62</sup>

Recommendations from the Commission alongside public pressure ultimately ended with the 2015 General Assembly passing sweeping changes to the Code in the form of Chapter 777.<sup>63</sup>

#### B. Legislative Enactments

When the General Assembly convened in January members from both parties and in both chambers introduced ethics legislation. As session moved forward, these bills were consolidated into House and Senate versions of an omnibus ethics reform package. In the House of Delegates, HB 1598, HB 1667, HB 1689, HB 1919, and HB 1947 were rolled into HB 2070, carried by Delegate Todd Gilbert (R-Shenandoah).<sup>64</sup> House Bill 2070 was identical to Senate Bill 1424, which was carried by Senate Majority Leader Thomas K. Norment (R-James City County) and incorporated SB 735, SB 752, SB 812, SB 1267, SB 1278, and SB 1289.<sup>65</sup> Both HB 2070 and SB 1424 passed their respective chambers and ultimately passed into law as Chapter 777 of the 2015 Acts of the Assembly.<sup>66</sup>

Chapter 777 adds three new sections to the Code of Virginia while amending thirty different others relating to the definition of gifts and the filing of disclosure statements by lobbyists, legislators, state and local offi-

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Michael Martz, *McAuliffe taps Bolling, Boucher to Lead Ethics Reform Push*, RICHMOND TIMES-DISPATCH (Sept. 25, 2014), [http://www.richmond.com/news/virginia/article\\_ffef13b04-05cf-5f7a-8e40-650f6f56d935.html](http://www.richmond.com/news/virginia/article_ffef13b04-05cf-5f7a-8e40-650f6f56d935.html).

<sup>63</sup> 2015 Va. Acts 1 (citing Chapter 777).

<sup>64</sup> H.B. 2070, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>65</sup> S.B. 1424, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>66</sup> 2015 Va. Acts 1 (citing Chapter 777); S.B. 1424, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

cials, and certain candidates for office.<sup>67</sup> Chapter 777 makes several small changes, such as eliminating the statutory distinction between tangible and intangible gifts, lowering the aggregate annual gift cap from \$250 to \$100, doubling the registration fee for lobbyists from \$50 to \$100 for each principal for whom he or she will act, requiring disclosure forms to be filed electronically, and requiring officials to report gifts and entertainment with a combined value of more than \$50 (reduced from the current \$100), as well as payments for talks, meetings or publications exceeding \$100 (reduced from the current \$200).<sup>68</sup>

In the wake of the McDonnell trial, one of the most obvious agenda items for many lawmakers was enacting stricter limits on gifts to elected officials and their families. One member of the House of Delegates referred to the omnibus bill as an attempt to resolve “the Jonnie Williams problem.”<sup>69</sup> Unsurprisingly, the bulk of the ethics reforms dealt with defining and regulating the giving of gifts.

Previously, Virginia law defined a gift simply as “anything of value to the extent that a consideration of equal or greater value is not received.”<sup>70</sup> Virginia law now defines a gift as “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.”<sup>71</sup> A gift “includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred.”<sup>72</sup>

### 1. \$100 Cap on Gifts

Chapter 777 lowers the dollar limit on gifts an elected official may receive within a calendar year to \$100.<sup>73</sup> This provision applies to all legislators or candidates for the General Assembly who are required to file a disclosure form prescribed under Code of Virginia § 30-111, as well as any member of their immediate family.<sup>74</sup> However, the aggregate count increases only if the elected official or a member of his immediate family

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<sup>67</sup> 2015 Va. Acts 1 (citing Chapter 777).

<sup>68</sup> *Id.* at 6, 8, 14, 22, 25.

<sup>69</sup> Max Smith, *Virginia General Assembly Passes new “Gift” laws in response to McDonnell scandal*, WTOP (Feb. 28, 2015, 1:10 PM), <http://wtop.com/virginia/2015/02/virginia-general-assembly-passes-to-ugh-new-gift-laws-in-response-to-mcdonnell-scandal/>.

<sup>70</sup> 2015 Va. Acts 6 (citing Chapter 777).

<sup>71</sup> VA. CODE ANN. § 30-101 (2015) (effective Jan. 1, 2016).

<sup>72</sup> *Id.*

<sup>73</sup> VA. CODE ANN. § 30-103.1(B) (2015) (effective Jan. 1, 2016).

<sup>74</sup> *Id.*

knows or has reason to know the gift comes from a registered lobbyist or a lobbyist's principal.<sup>75</sup> Furthermore, gifts valued less than \$20 are not subject to aggregation for the purposes of this prohibition.<sup>76</sup>

Chapter 777 also expands the scope of disclosure requirements and persons subject to gift restrictions.<sup>77</sup> The reach of the Code's gift restrictions and disclosure requirements now cover not only the legislators and public officials, but also certain candidates for office and their immediate families.<sup>78</sup> The immediate family prohibition restricts the quantity of gifts received by spouses and any other person who lives in the same household as the official or candidate.<sup>79</sup> Previously, it only referred to spouses and dependent children living within the official's household.<sup>80</sup> This change in the ethics laws is in direct response to the receipt of gifts not only by Governor McDonnell, but by his immediate family—his wife and children. Furthermore, the candidates for state or local office must now comply with the gift restrictions and disclosure requirements if they have qualified to have their name placed on the ballot.<sup>81</sup>

The aggregate gift cap recently passed, is also lowered by Chapter 777.<sup>82</sup> It imposes a \$100 gift limitation on any single gift or on any combination of gifts given by a specific lobbyist or person seeking to do business with the state to a specific public official within a calendar year, rather than the previous limit of \$250.<sup>83</sup> However, gifts independently worth less than \$20 are not subject to aggregation for the purposes of this prohibition.<sup>84</sup>

## 2. Exceptions

The ethics reform legislation creates five exceptions to the statutory gift cap: (1) gifts from "relatives or personal friends," (2) gifts received at "widely attended events," (3) gifts related to a filer's performance of official duties, (4) gifts from foreign dignitaries, and (5) certain travel-related

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See generally 2015 Va. Acts 777.

<sup>78</sup> VA. CODE ANN. § 2.2-3103.1(B) (2015) (effective Jan. 1, 2016).

<sup>79</sup> *Id.*

<sup>80</sup> VA. CODE ANN. § 2.2-3103.1(B) (2014); see VA CODE ANN. § 2.2-3117 (2014).

<sup>81</sup> VA. CODE ANN. § 2.2-3103.1(B) (2015) (effective Jan. 1, 2016).

<sup>82</sup> 2015 Va. Acts 777.

<sup>83</sup> VA. CODE ANN. § 2.2-3103.1(B) (2015) (effective Jan. 1, 2016).

<sup>84</sup> *Id.*

expenses subject to the Virginia Conflict of Interest and Ethics Advisory Council's approval.<sup>85</sup>

a. Gifts from Relatives or Personal Friends

Under the “relatives” exception to the gift cap, gifts received from first cousins, step-parents, step-grandparents, step-siblings, and step-grandchildren are no longer subject to the gift cap or disclosure requirements of the *Code*.<sup>86</sup> Chapter 777 also states that the following factors shall be considered in determining whether a donor may be considered a personal friend: (i) the circumstances under which the gift was offered, (ii) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them, (iii) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift, and (iv) whether the donor has given the same or similar gifts to other persons required to make disclosures.<sup>87</sup>

A legislator, candidate, or members of his family may accept gifts in excess of \$100 from personal friends.<sup>88</sup> The statute does not bar a lobbyist from being considered a personal friend; however, in determining whether a lobbyist should be considered a “personal friend,” the following factors must be considered: (i) the circumstances under which the gift was offered; (ii) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (iii) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (iv) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in § 2.2-3117 or 30-111.<sup>89</sup>

b. Gifts Received at Widely Attended Events

A “widely attended event” is defined as an event at which at least twenty-five persons have been invited to attend or there is a reasonable expectation that at least twenty-five persons will attend the event and the event is open to individuals (i) who share a common interest, (ii) who are

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<sup>85</sup> VA. CODE ANN. § 2.2-3103.1(D-G) (2015) (effective Jan. 1, 2016).

<sup>86</sup> VA. CODE ANN. § 2.2-3101 (2015) (effective Jan. 1, 2016).

<sup>87</sup> VA. CODE ANN. § 2.2-3103.1(D-G) (2015) (effective Jan. 1, 2016).

<sup>88</sup> VA. CODE ANN. § 30-103.1(E) (2015) (effective Jan. 1, 2016).

<sup>89</sup> *Id.*

members of a public, civic, charitable, or professional organization, (iii) who are from a particular industry or profession, or (iv) who represent persons interested in a particular issue.<sup>90</sup> As outlined, gifts received at such event are not subject to the \$100 annual aggregate gift cap, but are still subject to disclosure pursuant to Va. Code § 2.2-3117.<sup>91</sup>

c. Gifts Related to a Filer's Performance of Official Duties

The Chapter also excludes food, beverages, and attendance fees incurred while attending an event at which the filer is speaking or performing official duties related to his public service, unsolicited awards of appreciation in the form of plaques, trophies, or mementos, and lastly, travel provided to facilitate a legislator's attendance at an official meeting of the Commonwealth or its political subdivisions from the gift cap restrictions.<sup>92</sup>

d. Gifts from Foreign Dignitaries

Gifts from a foreign dignitary valued in excess of \$100 for which the fair market value or a gift of equal or greater value has not been provided or exchanged may only be accepted on behalf of the Commonwealth or a locality and archived in accordance with guidelines established by the Library of Virginia.<sup>93</sup> The gift shall be disclosed as having been accepted on behalf of the Commonwealth or a locality, though the value of the gift need not be disclosed.<sup>94</sup>

e. Certain Travel Expenses

Chapter 777 gives special provision to the acceptance or receipt of travel expenses, including lodging, hospitality, food or beverages, or other gifts of value.<sup>95</sup> The statute does not prohibit the acceptance of travel expenses from lobbyists or principals in excess of \$100 provided the legislator or candidate submits a request and receives approval from the Virginia Conflict of Interest and Ethics Advisory Council ("Council").<sup>96</sup> However, even with approval, such gifts must be reported and disclosed as prescribed in Code § 30-11.<sup>97</sup>

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<sup>90</sup> VA. CODE ANN. § 2.2-3103.1(A) (2015) (effective Jan. 1, 2016).

<sup>91</sup> *Id.*

<sup>92</sup> VA. CODE ANN. § 2.2-3101 (2015) (effective Jan. 1, 2016).

<sup>93</sup> VA. CODE ANN. § 2.2-3103.1(E) (2015) (effective Jan. 1, 2016).

<sup>94</sup> *Id.*

<sup>95</sup> VA. CODE ANN. § 30-103.1(F) (2015) (effective Jan. 1, 2016).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Additional gifts of travel, including but not limited to travel-related transportation, lodging, hospitality, food or beverages, with a value greater than \$100 may be accepted, but only after the official has requested approval of such travel by the Council and received such approval pursuant to Va. Code § 30-356.1; yet, these gifts are still subject to disclosure under Va. Code § 2.2-3117.<sup>98</sup> The Council will approve any request for travel that bears a reasonable relationship to the official duties of the requester, including any meeting, conference, or other event (i) composed primarily of public officials, (ii) at which public policy related to the duties of the requester will be discussed in a substantial manner, (iii) reasonably expected to educate the requester on issues relevant to his official duties, or (iv) at which the requester has been invited to speak regarding matters reasonably related to the requester's official duties.<sup>99</sup>

### 3. Safe Harbor Provision

The chapter also provides a “safe harbor provision.”<sup>100</sup> In the event an official accepts a gift with a value greater than \$100, he/she will not be in violation of the gift restrictions if (i) the gift is not used, the gift or its equivalent in money is returned to the donor, and it is not claimed as a charitable contribution for tax purposes, or (ii) consideration is given by the recipient to the donor such that it reduces the value of the gift to less than \$100.<sup>101</sup>

### 4. Additional Limits on Contributions to Governor

Lastly, Chapter 777 prohibits contributions over \$100 to the Governor, his Political Action Committee, or any committee established on his behalf from any person or entity which has a pending application for an award from the Commonwealth's Opportunity Development Fund or is within one-year of receiving such an award.<sup>102</sup> The intent of this provision is to mitigate the temptation of the executive branch to provide preferential treatment to those persons or entities eager to contribute political donations for special consideration. Ultimately, the change is an attempt by the General Assembly to eliminate political influence from the decision-making process of the Commonwealth's Opportunity Development Fund.

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<sup>98</sup> VA. CODE ANN. § 2.2-3103.1(G) (2015) (effective Jan. 1, 2016).

<sup>99</sup> VA. CODE ANN. § 30-356.1(B) (2015) (effective Jan. 1, 2016).

<sup>100</sup> VA. CODE ANN. § 2.2-419 (2015) (effective Jan. 1, 2016).

<sup>101</sup> *Id.*

<sup>102</sup> VA. CODE ANN. § 2.2-115(I) (2015) (effective Jan. 1, 2016).

#### IV. CONCLUSION

Governor McDonnell's corruption trial generated a great deal of legal debate around political ethics, but in the end the ethics conversation turned to the practice of lobbying, not influential business men. Many have been led to believe through this case that the lobbying profession was to blame; however, others argue that if Jonnie Williams had retained a lobbyist, the proper ethical channels would have been followed. A lobbyist would have known that his plan of action could be construed as illegal and would have facilitated the necessary meetings with elected officials while still following ethical procedures. Much like lawyers, lobbyists are saddled with the unfair stigma that what they do is unethical because the idea of gaining favor through relationships is seen as tawdry. To the American public "lobbyist" has become a four letter word. However, lobbying provides a mechanism for education and influence in a transparent system through legally required registrations and disclosures, instead of the public perception of backroom dealings behind closed doors and smoke-filled rooms. Virginia law should encourage this process of disclosures and transparency to shed light on the practice of influencing our elected officials.

Politicians will always be subject to influence, as we cannot expect an elected official to be an expert on every subject matter coming before them. To be effective leaders, politicians should take into account the effects and impacts of their legislation on citizens and the industries of Virginia. The job of a lobbyist is to convey those potential impacts and unintended consequences to our elected officials. While influence is necessary, keeping the voting electorate informed of who is influencing our elected officials will help make a transparent system. The solution to the ethics dilemma is not the elimination of influence, but ensuring that our elected officials remain accountable to an informed electorate. Those gaming the system will not be rewarded but will be voted out by the citizens of Virginia.