

White-Collar Crime

Expert Analysis

Limits on the Scope Of Honest Services Fraud

Mail and wire fraud based on the deprivation of honest services is one of the most thorny concepts in white-collar criminal law. Since prosecutors advanced and federal courts accepted this theory of liability beginning in roughly the early 1970s, defense counsel and some commentators and courts have raised concerns about the vagueness and unclear boundaries of criminal responsibility. These concerns have related chiefly to, first, uncertainty as to when disloyalty to an organization or the public as a whole turns from civil breaches of fiduciary (or similar) duties into criminal behavior, and, second, the danger that a highly expansive theory of criminal liability could be misused to target individuals in a capricious or otherwise unfair manner.

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The U.S. Supreme Court has addressed honest services fraud in three cases, on each occasion seeking to articulate limits on the scope of criminal liability. In *McNally v. United States*, 483 U.S. 310 (1987), the Supreme Court held that a scheme to defraud under the mail and wire fraud statutes did not include a scheme to deprive someone of honest services, though Congress the next year adopted §1346 of Title 18 in effect to restore the theory of prosecution invalidated in *McNally*. In *Skilling v. United States*, 130 S.Ct. 2896 (2010), the Supreme Court held that fraud prosecutions for the deprivation of honest services were limited to schemes carried out through payment of bribes or kickbacks, rejecting liability based on less explicit forms of

hidden self-dealing. Most recently, in *McDonnell v. United States*, 136 S.Ct. 2355 (2016), the Supreme Court held that prosecutions of public corruption were limited to formal official governmental acts as opposed to a wider range of support and advocacy that public officials may give to constituents.

In this article, we discuss the recent *McDonnell* decision, particularly the effort of the

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Supreme Court to articulate limits on the reach of honest services fraud liability, and application of the decision in 2017 to several high-profile prosecutions of former high-ranking New York State politicians—including former Assembly Speaker Sheldon Silver and Senate Majority Leader Dean Skelos—in the Second Circuit.

Before turning to a discussion of the cases, it is worth noting that two of the three Supreme Court decisions that have addressed honest services fraud arose from federal prosecutions of state officials, likely reflecting a concern with federal intrusion into state political affairs. As a result, especially with the *McDonnell* decision's focus on "official acts," we may begin to see a divergence in the law as it applies to public and private sector fraud schemes.

The 'McDonnell' Decision

While governor, Robert McDonnell and his wife Maureen accepted \$175,000 in loans, gifts, and other benefits from Virginia businessman Johnnie Williams, who testified for the government that he gave the gifts and loans to secure McDonnell's assistance in obtaining research studies by Virginia public universities on a nutritional supplement developed by Williams' company, Star Scientific. Williams purchased designer clothing for Mrs. McDonnell, bailed out the McDonnells' failing beach rental properties, purchased a wedding dress for the McDonnells' daughter, lent the governor a Ferrari, and purchased a Rolex for the governor at his wife's request. In return, McDonnell arranged meetings for Williams with Virginia officials, hosted events promoting Star Scientific at the governor's mansion, and contacted other government officials about a nutritional

supplement developed by Star Scientific. McDonnell and his wife were charged with conspiracy to commit honest services fraud and extortion under the Hobbs Act.

At the close of the evidence, in what became a momentous strategic decision, the government agreed to a jury charge that defined honest services fraud by incorporating certain language

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from the federal bribery statute, 18 U.S.C. §201, which prohibits federal officials from demanding, seeking, or receiving, or agreeing to "accept anything of value" in exchange for being "influenced in the performance of any *official act*" (emphasis added). An "official act" is defined in §201(a)(3) as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." The jury convicted McDonnell and his wife on all counts.

The Supreme Court voided the honest services fraud and Hobbs

Act convictions on the ground that the district court's jury instruction defining an "official act" was too broad. The district court had defined "official act" to "encompass[] 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'" 136 S.Ct. at 2366. The court rejected what it viewed as an overly broad view in favor of a "more bounded interpretation" in which "a typical meeting, telephone call, or event arranged by a public official does not qualify." *Id.* at 2368.

Acknowledging that the McDonnells' behavior was "distasteful," the court nonetheless said that its concern was "not with tawdry tales of Ferraris, Rolexes, and ball gowns," but with "the broader legal implications of the Government's boundless interpretation of the federal bribery statute"—a comment that reflected the court's concern with imposing the categories of federal criminal law on a variety of actions that might be viewed as ordinary political behavior in the states. *Id.* at 2374; see Elkan Abramowitz and Jonathan S. Sack, "Are We Criminalizing Politics as Usual? Case Against Former Virginia Governor," *N.Y.L.J.* (March 5, 2014).

In recent Second Circuit decisions we can see the direct impact of the Supreme Court's reluctance to allow federal criminal law to

apply too broadly to state political activity.

Second Circuit's Application Of 'McDonnell'

The Second Circuit has dealt with the implications of *McDonnell* chiefly in three cases to date. In July 2017, in *United States v. Boyland*, 862 F.3d 279 (2d Cir. 2017), a case charging a former New York State Assemblyman with soliciting bribes in exchange for securing permits for a carnival to be held in his district and securing state grants for real estate investments, the court affirmed the conviction notwithstanding jury instructions that preceded and did not conform with the *McDonnell* decision. The court held under a plain error standard that, in light of the strength of the evidence of official acts by the defendant, the flawed jury instructions did not “affect[] the outcome of the case.” 862 F.3d at 292.

In *United States v. Silver*, 864 F.3d 102 (2d. Cir. 2017), decided several days after *Boyland*, and in *United States v. Skelos*, 2017 WL 4250021 (2d. Cir. Sept. 26, 2017), the defendants (unlike *Boyland*) had objected to the jury instructions regarding “official act,” and the Second Circuit vacated the convictions. The decisions illustrate the potential significance of the Supreme Court’s “more bounded interpretation” of “official act.” In each case, the government

has said that it intends to retry the defendants.

In *Silver*, the government charged Silver with two unlawful schemes. In the first scheme, Silver performed favors for Dr. Robert Taub in exchange for the referral of patients to Silver’s personal injury law firm. These favors included securing two \$250,000 state grants to support Taub’s research. The Second Circuit held that securing the grants constituted “official acts,” but the grants fell outside the five-year statute of limitations. The only acts that fell within the statute of limitation were (1) obtaining a New York State Assembly resolution honoring Dr. Taub; (2) agreeing to assist Dr. Taub with securing permits to hold a charity race; and (3) helping Dr. Taub’s son get a job with a not-for-profit organization that received state funding. The Second Circuit concluded that, of these three acts, only obtaining the Assembly resolution “clearly remains an ‘official act’” under *McDonnell*, but it was not clear whether the jury convicted Silver on the basis of the Assembly resolution or other acts that may not be regarded as “official” after *McDonnell*. 864 F.3d at 120. Further, the Second Circuit noted that because the evidence at trial established that securing such resolutions and proclamations were “routine, *pro forma* exercises rubber stamped by Assembly members,” and the Assembly

passed hundreds each year, “[a] rational jury could ... conclude that, though certainly ‘official,’ the prolific and perfunctory nature of these resolutions make them *de minimis quos* unworthy of a *quid*.” *Id*.

In the second scheme, Silver was charged with performing favors for real estate developers who hired a law firm, at Silver’s request, that paid referral fees to Silver. The “official acts” argued at trial included Silver (1) voting repeatedly through a proxy as a member of the Public Authorities Control Board (PACB) to approve a developer’s request for tax-exempt financing; (2) approving and voting for rent and tax abatement legislation sought by a developer; (3) meeting with a developer’s lobbyists to ensure that they were satisfied with legislation that he subsequently voted to approve; and (4) publicly opposing the relocation of a methadone clinic near one of a developer’s rental buildings in Silver’s district.

The Second Circuit concluded that, of the four possible “official acts” supporting Silver’s guilt on this second scheme, all but the PACB votes fell short of *McDonnell*’s definition of an “official act.” For example, a 2011 meeting was the only link between Silver’s passage of legislation beneficial to the developer and the legal referrals. Taking a public position on an issue such as the

placement of a methadone clinic, by itself, also was not a formal exercise of governmental power, and *McDonnell* made clear that arranging a meeting alone could not constitute an “official act.” As to the PACB votes, they arguably constituted “official acts,” but the court concluded that they may not have been enough for a properly instructed jury to find a quid pro quo because PACB approvals, which were routinely granted, were “too perfunctory” to be a quo. *Id.* at 122-24.

In *Skelos*, in a September 2017 summary order, the Second Circuit vacated the Hobbs Act conspiracy, honest services wire fraud conspiracy, and federal program bribery convictions of former New York State Senate Majority Leader Dean Skelos and his son Adam. The jury instructions, as in *Silver*, did not have a definition of “official act” consistent with *McDonnell*.

The government presented evidence of acts that would be “official” under *McDonnell*, but the court determined, as in *Silver*, that the defendants may have been convicted for conduct that would not have been viewed as unlawful by a correctly instructed jury. The government argued at trial that Skelos’s participation in meetings was circumstantial evidence of a quid pro quo but also argued that the meetings themselves constituted official acts, including that “meetings with

lobbyists are always taken in the senator’s official capacity,” and “it was an official action for Senator Skelos to have that meeting set up.” 2017 WL 4250021 at *2. The court held that because the jury could have mistakenly concluded that a meeting sufficed to establish an official act, the court could not conclude that the charging error was harmless and would vacate the convictions and remand for a new trial.

As this article was being completed, the question of what actions constitute “official acts” was still playing out in the prosecution of Sen. Robert Menendez and Salomon Melgen in New Jersey, in which the Senator was accused of a range of acts as Senator to help Melgen in return for gifts from Melgen, a long-time friend. The defendants moved for a judgment of acquittal at the end of the government’s case, which was denied, and the parties were delivering their closing arguments when this article went to press.

Conclusion

In *McDonnell*, the Supreme Court sought to pare back an expansive theory of criminal fraud. The court was concerned over, among other things, the federal criminalization of state political activity, notwithstanding what the court acknowledged to be “distasteful” behavior—interestingly, virtually the same word used by the Second Circuit

(“distaste”) in referring to how people generally viewed Sheldon Silver’s conduct. The *McDonnell* decision has had the immediate effect of requiring reversal of two high-profile convictions in New York but will almost certainly have the additional effect of focusing the government’s attention on establishing the formal actions of government officials that can pass muster under *McDonnell*. The *Silver* and *Skelos* decisions make clear that reliance on routine advocacy and support for constituents, in themselves, will not suffice to constitute an “official act.”

In time, the government may choose to pursue different theories of liability, or to develop creative ways of circumventing the hurdle now imposed by *McDonnell*, for example, by arguing that actions that are not in themselves “official acts” may as part of a wider scheme or conspiracy be sufficient if they have the reasonably foreseeable objective of accomplishing an “official act.” Whatever future prosecutions and case law hold, it is clear that the judicial and executive branches will continue to go through their regular exercise of seeking to balance the goals of effective law enforcement with fairness to defendants and appropriate federal-state relations.