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WHITE-COLLAR CRIME

Expert Analysis

Limiting the Reach of the Supreme Court's 'McDonnell' Decision

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The Department of Justice prosecutes public corruption under many different federal criminal laws. A public official's solicitation or receipt of a bribe, for example, may be prosecuted as honest services fraud under 18 U.S.C. §§1341, 1343 and 1346, and extortion under the Hobbs Act, 18 U.S.C. §1951. If the bribe involves a state or local government official whose agency receives more than $10,000 in federal funding, the bribe taker may be prosecuted under 18 U.S.C. §666. If the bribe is received by a federal government official, the conduct may also be charged under the general federal bribery statute, 18 U.S.C. §201. And if someone travels in interstate commerce to promote or facilitate bribery under state law, that is a violation of the Travel Act, 18 U.S.C. §1952(a)(3). Reaching even farther, the giver of a bribe to a foreign government official (though not the taker) can be prosecuted under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §78dd-1 et seq.

Courts continue to wrestle with the elements and boundaries of these crimes. At the heart of the criminal conduct is an improper quid pro quo: a public official's corrupt agreement to perform an act in exchange for something of value. But questions as to the scope of criminal liability remain. The issue that has received most attention in recent years is what constitutes an "official act": that is, what type of action must a corrupt public official perform, or contemplate performing, to give rise to criminal liability. Put succinctly, what must the "quo" be that is given in return for a "quid."

> These post-'McDonnell' cases suggest how fluid key aspects of anti-bribery law remain, and how likely it is that the law will be refined in the coming years.

The importance of the meaning of "official act" derives from the Supreme Court's decision in *United States v. McDonnell*, 136 S. Ct. 2355 (2016), which reversed the conviction of the former Governor of Virginia because of erroneous jury instructions as to "official act." Following the *McDonnell* decision, prosecutors and defense counsel have litigated strenuously over what types of official conduct amount to an "official act," and over how broadly the court's definition of "official act" applies beyond the specific statutes and circumstances present in the *McDonnell* case.

In this article, after describing the holding in *McDonnell*, we discuss recent Second Circuit decisions which declined to extend the reach of the "official act" requirement. Most recently, in August, in *United States v. Ng Lap Seng*, 934 F.3d 110 (2d Cir. 2019), the Second Circuit rejected a claim that the FCPA and §666 of Title 18 required proof of an "official act." These post-*McDonnell* cases suggest how fluid key aspects of anti-bribery law remain, and how likely it is that the law will be refined in the coming years.

'McDonnell' 'Official Act' Requirement

The prosecution of former Virginia Governor Bob McDonnell grew out of his and his wife's acceptance of money and other substantial gifts from a Virginia businessman, Jonnie Williams. In the period in which these gifts were received, McDonnell, as Governor, introduced Williams to state officials and encouraged the state officials to

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meet with him so that Williams could promote a product he was developing. McDonnell's defense was that his actions were innocuous forms of assistance routinely given by state officials to state businessmen—and not substantial, official actions improperly given in exchange for gifts. A jury convicted McDonnell of honest services fraud and Hobbs Act extortion.

To bolster his defense, McDonnell took the position—and the government agreed—that the elements of honest services fraud and Hobbs Act extortion include an element found in the general federal bribery statute, 18 U.S.C. §201—namely, that the defendant perform an "official act" in exchange for a bribe. Section 201 defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's capacity, or in such official's place of trust or profit." Id. §201(a)(3). The parties' focus on an element of the general federal bribery statute arguably makes sense in light of the Supreme Court's decision *Skilling v. United States*, 561 U.S. 358, 408-09 (2010), which held that the government must prove a bribe or kickback to sustain an honest services fraud charge.

In *McDonnell*, the court held that proof of an "official act" has two parts. First, the government "must identify a 'question, matter, cause, suit, proceeding or controversy'" that (a) is "pending" or that "'may by law be brought' before a public official"; and (b) involves "a formal exercise of governmental power" akin to "a lawsuit, hearing, or administrative determination." 136 S. Ct. at 2368 (quoting 18 U.S.C. §201(a)(3)). Second, the government "must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." Id. (quoting §201(a)(3)). The court's definition turned out to be considerably more restrictive than what the government had expected based on its proposed jury instructions. See Gov't Instr. No. 43, No. 14-cr-00012-JRS, ECF No. 289 at 54 (E.D. Va. July 14, 2014).

Applying its two-part test, the court reversed Governor McDonnell's conviction, holding that the district court's jury instructions regarding "official act" did not adequately state the requirements of §201, and, accordingly, the jury may have convicted the Governor based on routine conduct, such as holding meetings, taking calls, and hosting events, that did not rise to the level of formal exercises of power contemplated by §201. 136 S. Ct. at 2372, 2375. Following the Supreme Court decision, the government decided not to retry McDonnell.

The government's strategic decision of accepting the relevance of §201's definition of "official act" had significant consequences. It led not only to a reversal of McDonnell's conviction, but also to introduction of a limiting principle, not previously articulated, into the law of honest services fraud and Hobbs Act extortion, and possibly other anti-bribery provisions.

'Official Act' Requirement In the Second Circuit

The Second Circuit has resisted extension of *McDonnell*'s "official act" standard. The court has applied *McDonnell* in the contexts of honest services fraud and Hobbs Act extortion—see *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017); *United States v. Boyland*, 862 F.3d 279 (2d Cir. 2017)—but no farther.

In 2017, the Second Circuit held that the *McDonnell* standard does not apply to federal funds bribery charges under §666. *Boyland*, 862 F.3d at 279. In *Boyland*, in which a New York State Assembly member was found guilty of taking bribes, the court rejected the defendant's argument that *McDonnell* should apply to the counts against him under §666, which the court held is "more expansive than §201." Id. at 291. The court reasoned that whereas §201 limits "official acts" to "acts on pending 'question[s], matter[s], cause[s], suit[s], proceeding[s], or controvers[ies]," §666 broadly prohibits individuals from "'solicit[ing] … anything of value from any person, *intending to be influenced* or rewarded *in connection with any* business, transaction, or series of transactions of [an] organization, government, or agency.'" Id. (alterations and emphases in original) (quoting 18 U.S.C. §§201(a)(3), 666).

The Second Circuit further resisted extension of the *McDonnell* standard in *United States v. Thiam*, 934 F.3d 89 (2d Cir. 2019), in which a former minister of the Republic of Guinea was charged with accepting an $8.5 million bribe from a Chinese entity that invested in mining projects in Guinea. Thiam was convicted of money laundering and conducting transactions in criminally derived property in violation of 18 U.S.C. §§1956 and 1957. Under both statutory provisions, the government is required to prove a predicate "offense against a foreign nation involving … bribery of a public official" in violation of the laws of that foreign nation. 18 U.S.C. §§1956(c)(7)(B)(iv), 1957(f)(3). At Thiam's trial, the government proved violations of Articles 192 and 194 of the Guinea Penal Code, which criminalize payment and receipt of bribes by public officials.

On appeal, Thiam argued that the district court's jury instructions were erroneous because they did not include the *McDonnell* definition of "official act." According to the defense, Articles 192 and 194 were sufficiently similar to the

text of §201 to warrant application of *McDonnell* in his case. The Second Circuit disagreed, holding that Articles 192 and 194 "plainly cover more than official acts," and explained that nothing in *McDonnell* compelled application of the "official act" standard to other, broader criminal statutes. 934 F.3d at 94-95.

'United States v. Ng' Decision

The Second Circuit's decision in *United States v. Ng* should be viewed against the backdrop of the rulings in *Boyland* and *Thiam*. In *Ng*, the defendant, a Chinese real estate developer, was charged with paying two ambassadors of the United Nations more than $1 million to secure a commitment to use his Macau real estate development as the site for a United Nations conference. Ng was convicted of, among other things, federal funds bribery under §666 and violations of the anti-bribery provisions of the FCPA. As in *Thiam*, Ng argued that the district court erred by not instructing the jury on *McDonnell*'s "official act" standard, which Ng argued applies to bribery under §666 and the FCPA.

The Second Circuit rejected Ng's position, holding that "the *McDonnell* 'official act' standard, derived from the quo component of bribery as defined by §201(a)(3), does not necessarily delimit the quo components of other bribery statutes, such as §666 or the FCPA." 934 F.3d at 132-33. Citing *Boyland*, the court held that the *McDonnell* standard does not apply to §666, which does not even "mention 'official acts.'" Id. at 133.

The court reached the same conclusion as to the FCPA. Although the FCPA addresses efforts to influence an "act or decision" of a "foreign official in his official capacity," the court noted that "the FCPA does not cabin 'official capacity' acts or decisions to a definitional list akin to that for official acts in §201(a)(3)." Id. at 134 (citing 15 U.S.C. §§78dd-2(a)(1)(A)(i), 78dd-3(a)(1)(A)(i)). The court also recognized "reluctance" among other federal circuit courts "to extend *McDonnell* beyond the context of honest services fraud and the [general] bribery statute." Id. (alteration in original) (collecting cases and quoting *United States v. Reed*, 908 F.3d 102, 113 (5th Cir. 2018)).

Notwithstanding the clarity of the Second Circuit's holdings in *Boyland*, *Thiam* and *Ng*, anomalous decisions remain given the fluidity of public corruption law. In *United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017), for example, former New York State Senator Dean Skelos was convicted of honest services fraud conspiracy, Hobbs Act extortion, and §666 bribery for soliciting bribes and "no-show" consulting work for his son. On appeal, Skelos argued that the district court gave an erroneous jury instruction by defining "official act" inconsistently with the standard required by *McDonnell*. The Second Circuit agreed and, in a non-precedential decision, vacated Skelos's convictions as to §666 bribery as well as the fraud and Hobbs act charges.

What constitutes an "official act," and when an "official act" must be proven, will likely remain important questions in bribery and other public corruption cases for the foreseeable future.

The government argued that the Second Circuit's opinion in *Boyland* foreclosed application of *McDonnell* to §666, but the Second Circuit rejected that argument, noting that in *Boyland* the §666 counts "were not charged in terms of official acts." Id. at 737-38. In *Skelos*, by comparison, the "jury was charged, *at the government's request*, on a §666 theory based on 'official acts,' the definition of which is cabined by … *McDonnell*." Id. at 738 (emphasis added). Thus, while §666 does not require proof of an "official act" as defined by *McDonnell*, once the government itself chooses to take on that added burden of proof, it could not reasonably claim that it should not be called upon to meet that burden.

Conclusion

What constitutes an "official act," and when an "official act" must be proven, will likely remain important questions in bribery and other public corruption cases for the foreseeable future. This is because, at least in part, "[n]o uniform definition applies to the word 'bribe' as proscribed in the federal code," as the Second Circuit recently observed. *Ng*, 934 F.3d at 131.

Two high-profile prosecutions illustrate the continued uncertainty. In one case, Joseph Percoco, a former aide to New York Governor Andrew Cuomo, is arguing on appeal that the district court erred in charging the jury that it could convict him of §666 violations based on an exchange of payments for official acts taken "as opportunities arise." In another case, arising out of "Bridgegate," Bridget Kelly, a former aide to New Jersey Governor Chris Christie, argued in her petition for certiorari (granted by the Supreme Court) that the government's theory of honest services fraud and §666 violations amounted to an improper end-run around *McDonnell*'s "official act" requirement.

We can expect the circuit courts, and in all likelihood the Supreme Court, to be addressing these and related issues in the coming years.