

The Second Circuit Clarifies Corruption Standards Following Supreme Court's *McDonnell* Decision

July 20, 2017

Last week, the Second Circuit issued decisions in two public corruption cases involving the convictions of former Speaker of the New York State Assembly Sheldon Silver and former New York State Assemblyman William Boyland. The decisions are among the first to apply the Supreme Court's decision last year in *United States v. McDonnell*, which narrowed the scope of what constitutes an "official act" under the federal honest services and Hobbs Act extortion statutes.¹ Following *McDonnell*, Silver and Boyland challenged their convictions on the grounds that the jury instructions in their respective cases were overly broad under the Supreme Court's new "official act" definition.

Applying the newly narrowed interpretation of "official act," the Second Circuit reached different results in the two cases, which involved materially different facts and standards of review. The Second Circuit vacated Silver's convictions for honest services fraud and Hobbs Act extortion under *McDonnell*, while it upheld Boyland's convictions despite the same error in the jury charge. Notably, in *Boyland*, the Court also declined to extend the reasoning of *McDonnell* to 18 U.S.C. § 666, a separate federal statute prohibiting bribery in connection with federal programs, which was charged against Boyland but not against either McDonnell or Silver. As discussed below, this result likely signals that, at least within the Second Circuit, courts are unlikely to export the heightened *McDonnell* standard to other corruption statutes, such as the Foreign Corrupt Practices Act ("FCPA").

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any of the partners and counsel listed under [Litigation and Arbitration](#) or [White Collar Defense and Investigations](#) in the "Our Practice" section of our website.

Applying the newly narrowed interpretation of "official act," the Second Circuit reached different results in the two cases, which involved materially different facts and standards of review. The Second Circuit vacated Silver's convictions for honest services fraud and Hobbs Act extortion under *McDonnell*, while it upheld Boyland's convictions despite the same error in the jury charge. Notably, in *Boyland*, the Court also declined to extend the reasoning of *McDonnell* to 18 U.S.C. § 666, a separate federal statute prohibiting bribery in connection with federal programs, which was charged against Boyland but not against either McDonnell or Silver. As discussed below, this result likely signals that, at least within the Second Circuit, courts are unlikely to export the heightened *McDonnell* standard to other corruption statutes, such as the Foreign Corrupt Practices Act ("FCPA").

¹ See *Skilling v. United States*, 561 U.S. 358, 408 (2010) (holding that federal honest services statute, 18 U.S.C. § 1346, prohibits bribery and kickbacks); see also 18 U.S.C. § 1951 (defining extortion as, *inter alia*, "the obtaining of property from another . . . under color of official right").



Background of *McDonnell*

United States v. McDonnell involved charges of honest services fraud and Hobbs Act extortion against the former Governor of Virginia, who was alleged to have received over \$175,000 in lavish gifts and money from a Virginia businessman in exchange for the state's assistance in promoting a tobacco-based dietary supplement.² Federal prosecutors alleged that, in exchange for the various benefits, Governor McDonnell performed various official acts, including attempting to set up a meeting for the businessman with the state Department of Health and hosting a marketing event for the business at the Governor's mansion. Federal corruption statutes require that the prosecutors prove a *quid pro quo*, meaning an exchange of benefits for official acts. On appeal of McDonnell's convictions, the Supreme Court took up the question of whether McDonnell's conduct assisting the businessman constituted "official acts" under the federal honest services and Hobbs Act extortion statutes.

Citing concerns of prosecutorial overreach and separation of powers, the Court took a narrow view of the term "official acts" and vacated McDonnell's convictions. The Court held that the term required a "formal exercise of governmental power" akin to a lawsuit, agency determination or committee hearing that is pending or may legally be brought. The Court further held that an "official act" necessitated a decision or action on that exercise of power, or alternatively an agreement, exertion of pressure or advice to another official to do so. In a departure from lower court jurisprudence, including in the Second Circuit,³ the Court held that arranging a meeting, talking to another public official or organizing an event, without more, did not qualify as an "official act."⁴ The Supreme Court took no position on whether McDonnell could be retried under the new standard, but the Department of Justice

("DOJ") subsequently declined to continue the prosecution.

The Second Circuit's Decisions

The *McDonnell* decision potentially stands to have its largest impact in the Second Circuit, which had previously taken a broad view of official acts, and has seen numerous federal public corruption prosecutions in the last several years—including the convictions of 14 New York State legislators in the past 10 years alone.

United States v. Silver. One such individual was Silver, who was widely considered the most powerful state politician over the last 20 years until he was charged by federal prosecutors in January 2015. Silver was prosecuted under the same statutes as McDonnell for his involvement in two schemes under which he allegedly received bribes and kickbacks in the form of referral fees from third-party law firms in exchange for official favors provided to a doctor and two real estate developers.⁵ At the government's request, and over Silver's objection, the district court's jury instructions defined "official act" as "any action taken or to be taken under color of official authority," which was the law of the Second Circuit prior to *McDonnell*. After Silver's trial, the Supreme Court decided *McDonnell*, which the Second Circuit held required overturning Silver's conviction because the jury instructions were erroneous under the new standard. Applying a harmless error standard, the Court determined that a jury could have convicted Silver based on acts that are no longer official under *McDonnell*, including taking a meeting with a lobbyist and writing a letter in support of a constituent.⁶ The Second Circuit held that Silver could be retried under the new standard, since there was other official act evidence presented that Silver supported legislation and steered grants as part of the schemes, and federal

² 579 U.S. ___, 136 S. Ct. 2355 (2016).

³ See *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013) ("official act" includes "any act taken 'under color of official authority'"); *United States v. Ganim*, 510 F.3d 134, 142 n.4 (2d Cir. 2007) (Sotomayor, J.) (same).

⁴ See *McDonnell*, 136 S. Ct. at 2372.

⁵ See *United States v. Silver*, No. 16-1615-CR, 2017 WL 2978386 (2d Cir. July 13, 2017).

⁶ *Id.* at *13-*16.

prosecutors immediately announced that they would retry the case.

United States v. Boyland. In *Boyland*, the Second Circuit similarly held that district court jury instructions defining “official act” were erroneous under *McDonnell*, but upheld Boyland’s conviction for honest services fraud and extortion as well as for violation of 18 U.S.C. § 666 (“Section 666”).⁷ Boyland allegedly solicited and accepted bribes in exchange for granting permits to hold a carnival in his district and for his assistance with a real estate project. The jury instructions were even broader than in *Silver*, defining “official act” to include “the decisions or actions generally expected of a public official, including but not limited to contacting or lobbying other governmental agencies, and advocating for his constituents.” The Second Circuit held that the jury instructions were flawed; however, applying a plain error standard (because Boyland failed to object to the instructions at trial), the Court determined there was no reasonable possibility in light of the factual record that the flaw in the instructions affected the outcome of the case, noting that Boyland’s actions necessarily involved concrete matters and required focused governmental decisions satisfying *McDonnell*.⁸

Unlike *Silver* and *McDonnell*, Boyland was also charged with federal program bribery under Section 666, which 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.”⁹ In upholding Boyland’s Section 666 convictions, the Second Circuit declined to extend the *McDonnell* standard to that statute, noting that Section 666’s language is more

expansive than the statutory “official act” definition applicable to honest services and the Hobbs Act.¹⁰

Takeaways

In *Silver* and *Boyland*, the Second Circuit carefully reviewed the facts and precise jury instructions given in each case in reaching opposite conclusions on whether the convictions survived *McDonnell*. The longest term legal impact of the decisions is likely to be the Second Circuit’s decision that *McDonnell* does not necessarily apply to corruption statutes that were not at issue in that case, such as Section 666 in *Boyland*.

The other major federal corruption statute, the FCPA, was not addressed in either decision, but the Second Circuit’s reasoning is highly instructive. The FCPA prohibits, among other things, corruptly giving “anything of value to any foreign official” in order to “influence[] any act or decision of such foreign official in his official capacity.”¹¹ Given the language is at least as broad as Section 666, and in light of *Boyland*’s holding, the government is likely to have a leg up in the argument that *McDonnell* does not apply to the FCPA. Thus, acts by foreign officials such as setting up a meeting or writing a supportive letter may qualify as corrupt acts under the FCPA notwithstanding *McDonnell*.

⁷ See *United States v. Boyland*, No. 15-3118, 2017 WL 2918840 (2d Cir. July 10, 2017).

⁸ *Id.* at *10.

⁹ 18 U.S.C. § 666(a)(1)(B).

¹⁰ See 18 U.S.C. § 201 (defining the term “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 official capacity, or in such official’s place of trust or profit”).

¹¹ See 15 U.S.C. § 78dd-1 (emphasis added).

The new heads of the DOJ and SEC have both indicated that the agencies will continue to vigorously enforce the FCPA.¹² Companies subject to the statute should keep in mind that prosecutors' reach under the FCPA likely remains as broad as ever, notwithstanding the recent developments limiting the application of federal bribery statutes in the domestic context.

...

CLEARY GOTTLIB

¹² See Att'y Gen. Jeff Sessions, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017) ("We will continue to strongly enforce the FCPA and other anti-corruption laws."); Senate Comm. on Banking, Housing, and Urban Affairs, Nomination of Jay Clayton, Mar. 23, 2017, Response to Questions, at 8-9 ("Bribery and

corruption have no place in society. . . U.S. authorities, including the SEC, other financial regulators, and law enforcement agencies, both at home and abroad, play an important role in combating government corruption. I believe the FCPA can be a powerful and effective means to effect this objective.").