Public Corruption Prosecutions and Defenses Post-'McDonnell'

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On June 27, 2016 the U.S. Supreme Court issued its unanimous decision in *McDonnell v. United States*, holding that federal bribery statutes could not reach a politician who had agreed to provide only preferential access—and not actual governmental action—in return for bribes.[1] Although some feared (and others hoped) that *McDonnell* would sharply curtail future public corruption prosecutions, the reality is that *McDonnell* is of limited significance: It prevents prosecutors from bringing only the weakest of public corruption cases, those where the prosecution lacks even circumstantial evidence that a corrupt payoff was for something more than a chance to meet with the public official. In the prototypical public corruption case—where the prosecution can make a straight-faced claim that governmental action, and not just access, was the intended aim of the bribe—*McDonnell* defenses will have little impact on judges and still less on juries, who may fail to rally around the official who argues he was selling "only" access to an elected office. Moreover, a myopic focus on the *McDonnell* defense in cases where it will get little traction may obscure more viable and less exploited avenues of legal challenge to the reach of federal corruption laws.

Background

In 2014, former Virginia Governor Robert McDonnell (along with his wife) was indicted on federal corruption charges in connection with their acceptance of $175,000 in gifts and loans from a Virginia businessman, Jonnie Williams, who sought to have his company's tobacco-based "nutritional supplement" studied by Virginia's public universities. In return for designer clothing, a Rolex, and other inducements, McDonnell arranged multiple meetings for Williams with officials with oversight of public university research, hosted events for Williams's company at the Governor's Mansion, and contacted Virginia officials regarding studying the supplement.[2]

At McDonnell's trial, the parties agreed to define the charges for honest services fraud and Hobbs Act extortion by reference to the federal bribery statute, 18 U.S.C. § 201, which makes it a crime for "a public official … to receive or accept anything of value … in return for … being influenced in the performance of any official act."[3] The trial court instructed the jury that the "official act" could include any "acts that a public official customarily performs," rejecting a defense request for an instruction that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts'" because they "are not

decisions on matters pending before the government."[4] McDonnell was convicted; and the Fourth Circuit affirmed.[5]

The U.S. Supreme Court vacated the Fourth Circuit's judgment on the ground that the district court's jury instruction was overly broad. The court held that an "official act" under 18 U.S.C. §201 is a decision or action on a question or matter that "must involve a formal exercise of governmental power" and that "must also be something specific and focused that it is 'pending' or 'may by law be brought' before a public official."[6] The court concluded that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"[7] Because the instruction at McDonnell's trial would have improperly permitted conviction on this latter, legal conduct, the court ordered his conviction vacated and, without expressing a view on the merits, remanded for a determination as to whether the government had sufficient evidence to re-try McDonnell under the narrower definition.[8]

Effect of Decision

Though initially thought to be a watershed ruling in public corruption jurisprudence, the impact of *McDonnell* has been minimal to date. One obvious, but inherently limited impact will be on public corruptions trials that took place before the *McDonnell* decision, where appeals have not been exhausted. In these cases, appellate courts will have to grapple with whether the jury instructions would have, as was the case in *McDonnell*, in theory permitted the jury to convict for mere preferential access to the public official and, if so, the likelihood that the jury convicted for conduct that the Supreme Court had deemed lawful. Thus far, efforts to reverse cases on appeal on the grounds that the jury instructions did not precisely track language the Supreme Court subsequently blessed in *McDonnell* have been unsuccessful,[9] although the issue remains pending in other high profile cases.[10] And in any event, this impact from *McDonnell* is limited in time and import: For prosecutions not yet brought and trials not yet commenced, district courts will presumably now give instructions that track the Supreme Court's holding in *McDonnell* with respect to what qualifies as an official act.

Will *McDonnell* limit these new prosecutions? Not significantly. *McDonnell* should prevent the government from filing public corruption cases where the government's theory is that the public official agreed only to provide preferential access in return for something of value rather than any actual exercise of governmental power. But these are not cases prosecutors typically seek to bring; the argument that a public official who never agreed to do anything other than take a meeting should be jailed had as little jury appeal before *McDonnell* as it does now. Instead, prosecutors will, as they overwhelmingly have in the past, allege that the corrupt scheme involved the intended use of governmental power to benefit the person providing the payment, whether or not governmental power actually was used.[11] Simply making such an allegation will allow an indictment to survive a motion to dismiss,[12] and having at least some circumstantial evidence that governmental action was contemplated will enable the prosecution to bring this argument to a jury, which may well be inclined to believe that the alleged bribe payer wanted more than mere "access," particularly if the payments were large or secretive. Unsurprisingly, then, prosecutors have continued to bring aggressive public corruption cases following *McDonnell*, including the recent indictment against Joseph Percoco, a former top aide to New York Gov. Andrew Cuomo, and eight other defendants for bribery schemes regarding the award of state contracts.[13]

Indeed, a misplaced focus on the "*McDonnell* defense" may distract from more meaningful legal and factual vulnerabilities in particular cases. Specifically, each of the federal corruption statutes requires the prosecution to establish three legs of a stool: a "quid" (the thing of value provided to the public official), a "quo" (an official action), and a "pro" (that the one thing was in exchange for the other). When any one of these legs is weak (when it looks, for example, like politics as usual), the other two must bear additional weight, and the prosecution's case will be vulnerable. In *McDonnell*, the meetings and dinner party invitations constituting the "quo" of official action were not the stuff of moral outrage, making legal and factual challenges geared to this aspect of the case most viable. With regard to the "quid," the more the thing of value provided to the politician resembles legally protected campaign contributions or other facially valid payments, the more that aspect of the case will be vulnerable to attack.[14] Finally, in cases with little evidence of a corrupt deal between payer and official, courts are likely to scrutinize whether the conduct is truly a "paradigmatic" bribe or, instead, simply represents self-dealing on the part of a public official seeking to profit from a conflict of interest, which the Supreme Court has declared beyond the reach of the criminal honest services fraud statutes.[15]

Conversely, the more compelling the proof on one leg of the quid pro quo, the more jurors are likely to draw inferences that support the others, and the less likely courts are to worry about overreach. Thus cases involving an elected official hiding $90,000 in his freezer,[16] or accepting cash in a darkened car outside of a steakhouse famous for mob hits (and on Valentine's Day, no less),[17] are those where jurors will have little trouble finding the inherently suspicious quid was for something more than mere access, and where courts are far less likely to worry that prosecutors are seeking to criminalize "politics as usual."

At bottom, the further any one of the legs of the quid pro quo is from the heartland of political corruption, and the closer it is to the typical functioning of representative government, the less likely a jury will be to convict and the less likely a court will be to uphold a conviction. When the prosecution has little evidence of official acts beyond mere access, a *McDonnell* defense may be the most attractive. In other cases, arguments targeted at the other legs of the alleged quid pro quo may gain the most traction.

Endnotes:

1. *McDonnell v. United States , 136 S. Ct. 2355* (2016).

2. Id. at 2361-64.

3. 18 U.S.C. §201(b)(2)(A); see *McDonnell*, 136 S. Ct. at 2365.

4. *McDonnell*, 136 S. Ct. at 2366.

5. Id. at 2366-67.

6. Id. at 2371-72 (quoting 18 U.S.C. §201(a)(3)).

7. Id. at 2372.

8. Id. at 2375. The government elected not to retry McDonnell.

9. See, e.g., *United States v. Halloran*, No. 15-2351, 2016 WL 6128039, at *4-5 (2d Cir. Oct. 20, 2016).

10. See Brief for Defendant-Appellant Dean Skelos, *United States v. Skelos*, No. 16-1697, at 35-51 (2d Cir. Oct. 7, 2016); Brief for Defendant-Appellant Sheldon Silver, *United States v. Silver*, No. 16-1615, at 32-45 (2d Cir. Aug. 31, 2016).

11. Indeed, a wide range of conduct has already been held to fall within McDonnell 's definition of "official act"—including purchasing office supplies, United States v. Greenhut , No. 15 Cr. 477, 2016 WL 6652681, at *5 (C.D. Cal. Nov. 8, 2016); assisting with a bid, United States v. Bills , No. 14 Cr. 135, 2016 WL 4528075, *2-3 (N.D. Ill. Aug. 29, 2016); and promising government funds, *United States v. Halloran*, 2016 WL 6128039, at *5—and it is arguable even McDonnell's conduct would have satisfied the definition, with a more circumscribed instruction.

12. See United States v. Lee , No. 15 Cr. 445, 2016 WL 7336529, at *4 (N.D. Ohio Dec. 19, 2016); *United States v. Jones , 15 Cr. 324, 2016* WL 5108013, at *5 (E.D.N.C. Sept. 19, 2016).

13. See Complaint, *United States v. Percoco et al.*, No. 16 Mag. 6005 (S.D.N.Y. Sept. 20, 2016).

14. Thus, when the alleged quid is a campaign contribution, the Supreme Court has held that an explicit quid pro quo must be proven, McKormick v. United States , 500 U.S. 257, 273-74 (1991), whereas "winks and nods" have been found sufficient to prove a corrupt agreement when the payment is a cash bribe, Evans v. United States , 504 U.S. 255, 256 (1992) (Kennedy, J. concurring).

15. See Skilling v. United States , 561 U.S. 358, 409 (2010) (holding that the honest services fraud statute "criminalizes only the bribe-and-kickback core" of its potential statutory reach).

16. See David Stout, "Ex-Rep. Jefferson Convicted in Bribery Scheme," NEW YORK TIMES, at A14 (Aug. 6, 2009).

17. See Complaint, *United States v. Smith et al.*, No. 13 Mag. 852 (S.D.N.Y. March 29, 2013); Michael Wilson and William K. Rashbaum, "Lawmakers in New York Tied to Bribery Plot in Mayor Race," NEW YORK TIMES, at A1 (April 3, 2009).