

LUTTE CONTRE LA CORRUPTION

96 Corruption and Bribery of Public Officials in the United States



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Dans la décision *McDonnell*, la Cour suprême américaine freine les poursuites d'agents publics corrompus en imposant une définition limitée de l'acte officiel incriminé. Mais l'effet risque fort de n'être que temporaire, car la corruption et le trafic d'influence restent bien délictuels, et les procureurs et les tribunaux pénaux sauront s'accommoder à la nouvelle donne jurisprudentielle en ne poursuivant que les accusés qui ont bien vendu leurs actes officiels en contrepartie de pots-de-vin ou d'autres avantages personnels indus.

McDonnell v. United States, 136 S. Ct. 2355 (2016)
United States v. Sheldon Silver, 864 F.3d 102 (2d Cir. July 13, 2017)
United States v. Dean Skelos and Adam Skelos, Nos. 16-1618-cr, 16-1697-cr (2d Cir. Sept. 26, 2017)

The fight against political corruption in the United States has been hobbled recently by a 2016 decision of the United States Supreme Court that has imposed a narrow interpretation of the kinds of “official acts” that will subject public officials to federal criminal prosecution for bribery and related crimes. The setback is likely only temporary, however, because corruption among public officials remains a prosecutorial priority and the trial courts should have little difficulty in following the new rule.

Under U.S. federal law, it is a crime for a public official to receive, accept or agree to receive or accept anything of value “in return for being ‘influenced in the performance of any official act’”¹. The law defines an “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 (...)”².

1. *McDonnell v. United States*

In *McDonnell v. United States*, Governor Robert McDonnell of Virginia accepted \$175,000 in loans, gifts and other benefits from a Virginia businessman who sought the Governor’s assistance in convincing Virginia’s state universities to perform research studies on a nutritio-

nal supplement manufactured by his company. In exchange for these payments, the Governor arranged meetings for the businessman with Virginia public officials to discuss the product, hosted events for the company at the Governor’s Mansion, and contacted other government officials concerning the research studies.

McDonnell was convicted at a jury trial based on the prosecution’s contention that his arranging of meetings for the businessman with Virginia government officials, hosting events for the businessman and Virginia university officials at the state-owned Governor’s Mansion, and contacting other Virginia government officials constituted “official acts” that he performed in return for the loans, gifts and other benefits received from the businessman. Before the jury deliberated, *McDonnell* asked the trial judge to instruct the jury that merely arranging a meeting, attending or hosting an event or making a speech are not, standing alone, “official acts” within the meaning of the statute because they are not “decisions on matters pending before the government”. The trial judge refused to give this instruction, adopting instead the prosecution’s requested instruction that “official acts” includes “acts that a public official customarily performs”, including acts “in a series of steps to exercise influence or achieve an end”.

After an intermediate Court of Appeals affirmed the conviction, the Supreme Court accepted *McDonnell*’s appeal on the issue of the proper definition of “official act”. It held that “hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a ‘decision or action’ within the meaning of” the statute, “even if the event, meeting, or speech is related to a pending question or matter”. Such conduct, therefore, is insufficient to qualify as an “official act” within the meaning of the statute. “[S]omething more is required” to constitute the offense: “the public official must make a decision or take an action on the question or matter, or agree to do so”. Since *McDon-*

1 See 18 U.S.C. § 201(b)(2).

2 See 18 U.S.C. § 201(a)(3).

nell made no such decision and took no such action on a pending question or matter, the Supreme Court unanimously vacated his conviction.

2. *United States v. Sheldon Silver*

It did not take long for the effects of *McDonnell* to be felt. First came the conviction of the former Speaker of the New York State Assembly, Sheldon Silver, on charges of honest services fraud, extortion and money laundering for performing official acts in exchange for bribes and kickbacks, and then laundering the proceeds of his schemes through private investment vehicles. Silver was convicted before *McDonnell* was decided, but appealed to the U.S. Court of Appeals for the Second Circuit after *McDonnell* on the ground that the trial court's instructions to the jury as to the meaning of "official act" did not comply with the rule later announced by the Supreme Court in *McDonnell*.

Silver was charged with two corrupt schemes. The first involved the agreement of a cancer researcher who was seeking state research grants to refer mesothelioma cases to a law firm with which Silver was associated (and which paid Silver substantial referral fees for each case he brought into the firm) in exchange for Silver's assistance in obtaining state grants to fund the researcher's work. Silver obtained two \$250,000 state grants for the researcher, as well as other benefits for the researcher's family, and the researcher continued to refer him cases. In all, Silver received about \$3 million in referral fees for the cases the researcher referred to his law firm.

The second scheme involved two major real estate developers whose business depended on favorable state tax and rent control legislation, as well as tax-exempt financing approved by a state agency. As Speaker of the State Assembly, Silver controlled this legislation. To enrich himself, Silver induced the developers to hire law firms that had agreed to kick back a significant percentage of their legal fees to Silver. In return, Silver voted to approve the developers' tax-exempt financing requests and in favor of the rent and tax abatement legislation they sought. Over the 18-year period of this real estate scheme, Silver received about \$835,000 in referral fees from these law firms based on the cases the developers referred to them at Silver's request.

On appeal, the Court of Appeals found, not surprisingly, that the evidence of Silver's guilt was sufficient to support his conviction. However, it also held that the trial judge's instructions to the jury about the definition of "official act" did not comply with the requirements of *McDonnell*. The trial court had defined "official act" as "any action taken or to be taken under color of official authority", which the Court of Appeals found to include conduct that was lawful under *McDonnell*, such as arranging meetings or hosting events with constituents, and to lack the limitation imposed by *McDonnell* that an "official act" must be "a decision or action on a matter involving the formal exercise of government power akin to a lawsuit, hearing, or agency determination". As a result, the Court of Appeals vacated Silver's conviction. He is scheduled to be retried in 2018.

3. *United States v. Dean Skelos and Adam Skelos*

A different panel of the same U.S. Court of Appeals for the Second Circuit vacated the bribery, extortion and other convictions of the

former Majority Leader of the New York State Senate and his son in late September 2017 for the same reasons as in *Silver*. Once again, the Court found that the evidence presented at the four-week jury trial was "more than sufficient" to sustain the conviction, but nevertheless vacated the conviction because the trial court's jury instruction on the meaning of "official act" permitted the jury to convict Senator Skelos and his son for "acts that a public official customarily performs" on behalf of constituents, "including arranging and attending meetings, expressing support for policies, and speaking with other officials" in violation of *McDonnell*. The error was exacerbated by the fact that the prosecution, in its closing argument to the jury, expressly urged the jury to convict based on the argument (now erroneous under *McDonnell*) that "setting up meetings or making calls" did in fact qualify as "official acts" within the meaning of the statute.

Nevertheless, the convictions in *Silver* and *Skelos* were only vacated, not reversed. This means that these cases can and will be retried. The evidence of wrongdoing by the defendant in each case is substantial, and convictions still are possible (and likely probable) after the trial judges instruct the trial juries in accordance with the more limited definition of "official act" established by *McDonnell*.

4. Conclusion

Notwithstanding *McDonnell*, the fact remains that American public officials who accept money and other things of value while assisting constituents or friends are on notice that they do so at their peril. An incumbent United States Senator from New Jersey, Robert Menendez, recently was tried in federal court based on allegations of such conduct. His defense was that he was merely helping a longtime friend with the friend's conflicts with various federal agencies, and that the benefits he received from the friend in the form of campaign contributions, airplane travel and luxury accommodations in the Dominican Republic and Paris were simply gifts that were unrelated to the assistance the Senator provided. The trial ended in a mistrial when the jury was unable to agree on an unanimous verdict.

In summary, though *McDonnell* may represent a limitation on prosecutions of corrupt public officials in the short run, once prosecutors and trial courts incorporate it into their analysis of the misconduct of public officials it should not make a lasting dent in future prosecutions of public corruption. The Supreme Court in *McDonnell*, speaking through Chief Justice John Roberts, made clear that it did not intend to immunize public officials who take bribes. In particular, the Court pointed out that it would be an "official act" for a public official, in exchange for money or other benefits, to "us[e] his official position to exert pressure on another official to perform an 'official act'" (emphasis in original), or to "us[e] his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official". Indeed, merely agreeing to do so in exchange for money or other benefits, even without actually following through on the agreement, is enough to establish the crime. This kind of official influence-peddling, which in France likely would constitute the crimes of "corruption" or "trafic d'influence", is and will remain illegal in the United States.