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Expert Analysis

Defining the Scope Of 'McDonnell v. United States'

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The U.S. Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016) has had a profound impact on public corruption cases throughout the country, particularly in the Second Circuit, where several high profile convictions have been vacated for failing to comply with *McDonnell's* new requirements on how juries must be charged on various elements of public corruption crimes.

In *United States v. Skelos*, — Fed. App'x —, 2017 WL 4250021 (2d Cir. Sept. 26, 2017), its latest decision interpreting *McDonnell*, the Second Circuit made it clear that if official acts form the basis of public corruption charges, then they must meet the *McDonnell* standard no matter what corruption statute is charged. The decision helped explain an earlier decision by a different panel in *United States v. Boyland*, which had declined to apply the *McDonnell* standard to federal program bribery charges brought under 18 U.S.C. §666. 862 F.3d 279 (2d Cir. 2017). The *Skelos* panel unequivocally limited *Boyland* to cases that are *not* charged in terms of official acts, thereby rejecting any formalistic application of *McDonnell* that might turn entirely on the statute involved. By focusing on the charged *conduct* rather than the statute charged, *Skelos* helpfully resolved confusion over when corruption cases touch on the constitutional concerns that trigger the heightened *McDonnell* standard.

Background

The law governing public corruption is notoriously muddled. The government often prosecutes individuals under multiple statutes for the same underlying conduct. The key statutes typically invoked include 18 U.S.C. §§201 (bribery of federal officials); 1951 (the Hobbs Act, which criminalizes "extortion under color of official right"); 1346 (honest services fraud); and 666 (federal program bribery, which does not include an "official act" as an element).

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The law governing these statutes has largely converged, with courts defining Hobbs Act bribery and honest services fraud by reference to the federal bribery statute and treating their precedents as interchangeable. See, e.g., *McDonnell*, 136 S. Ct. at 2365 ("The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C. §201.").

With respect to federal program bribery, however, courts and litigants continue to struggle to discern what does (or does not) distinguish it from the other vehicles for prosecuting public corruption.

The difficulties begin with the statutory language itself. The lack of explicit language concerning bribery in the text of the Hobbs Act or the honest services statute naturally and perhaps necessarily leads courts to look to 18 U.S.C. §201 to define the elements of the offenses. See, e.g., id. Section 201 "makes it a crime for 'a public official or person selected to be a public official, directly or indirectly, corruptly' to demand, seek, receive, accept, or agree 'to receive or accept anything of value' in return for being 'influenced in the performance of any official act.'" Id. (quoting 18 U.S.C. §201(b)(2)). Federal program bribery is ostensibly broader, and criminalizes "corruptly" giving "anything of value to any person" with the "intent to influence or reward" an agent of any state or local government "in connection with a business, transaction or series of transactions" with a value of $5,000 or more, so long as the state or local government has received at least $10,000 in federal benefits. 18 U.S.C. §666.

The language of §666 is different enough that courts cannot even agree on whether federal program bribery requires the government to prove the existence of a quid pro quo, as it must under every other corruption statute. *See United States v. Beldini*, 443 F. App'x 709, 717 (3d Cir. 2011) (noting the circuit split). The Second Circuit is among the courts holding that all the corruption statutes, including federal program bribery, require a quid pro quo element. *See United States v. Ganim*, 510 F.3d 134, 141 (2d Cir. 2007) (Sotomayor, J.).

Recently, *McDonnell v. United States* reshaped public corruption prosecutions by narrowly limiting what may constitute an "official act" sufficient to sustain a conviction. In reversing the Hobbs Act and honest services fraud convictions of former Virginia Gov. Bob McDonnell, the Supreme Court explained that an "official act" must involve a "formal exercise of governmental power" and be something "specific and focused" that is pending or could be brought before a public official. *McDonnell*, 136 S. Ct. at 2371-72. The *McDonnell* court grounded its statutory interpretation of "official acts" in a discussion of constitutional concerns related to the First Amendment, due process, and federalism.

The *McDonnell* prosecution did not, however, involve federal program bribery charges brought under 18 U.S.C. §666. As a result, courts have been confronted with the question of whether, and to what extent, *McDonnell* might apply to federal program bribery prosecutions.

'United States v. Boyland'

In *United States v. Boyland*, the Second Circuit appeared to exempt §666 prosecutions from the *McDonnell* standard entirely. In *Boyland*, a former New York Assemblyman was convicted on multiple corruption charges, including honest services fraud, Hobbs Act bribery, and federal program bribery. 862 F.3d at 281. On appeal, the defendant challenged the jury instructions in light of *McDonnell*. Judge Kearse, joined by Judges Walker and Hall, upheld all the convictions. The panel found that while the jury instructions on honest services fraud and the Hobbs Act were erroneous under *McDonnell*, they did not meet the

plain error standard necessary for vacating the convictions. In contrast, the Court upheld the federal program bribery convictions because there was "no basis for reversal." Id. at 282. The Court reasoned that 18 U.S.C. §666 is "more expansive than §201 [the bribery definition at issue in *McDonnell*]" In light of the differences in the statutory language, the Court did "not see the *McDonnell* standard applied to these counts." Id. at 291.

'Skelos v. United States'

Just a few months later, the Second Circuit clarified the reach of its holding in *Boyland*. In *Skelos*, a panel consisting of Judges Ralph K. Winter, Reena Raggi, and Alvin K. Hellerstein issued a non-precedential summary order overturning the convictions of Dean Skelos, the former New York Senate Majority Leader, and his son, Adam Skelos. Dean and Adam Skelos had been convicted on numerous corruption charges, including Hobbs Act bribery, honest services fraud, and federal program bribery. With respect to the federal program bribery convictions, the panel found that *Boyland* was not controlling because it had not squarely confronted *McDonnell's* application to §666 prosecutions premised on "official acts." The court explained that *McDonnell* had been inapplicable in *Boyland* because "the §666 counts were not charged in terms of official acts" and there was nothing more than a "stray reference" to "official acts" in the jury instructions. *Skelos*, 2017 WL 4250021 at *6.

The panel found that, in contrast, the *Skelos* "jury was charged, at the government's request, on a §666 theory based on 'official acts,' the definition of which is cabined by the constitutional concerns identified in *McDonnell*." Id. Accordingly, the court held that the deficient pre-*McDonnell* instructions required vacating the §666 convictions alongside the Hobbs Act and honest services convictions that were more obviously controlled by *McDonnell*.

Conclusion

Exempting §666 from *McDonnell* would have inevitably resulted in anomalous outcomes and diminished the predictability that due process requires of criminal prosecutions. By instead linking the *McDonnell* standard to the actual conduct charged, as well as to the government's theory of the crime, the panel foreclosed the potential constitutional questions raised by *Boyland*.

The Second Circuit's rejection of an overly formalistic application of *McDonnell* also makes intuitive sense. When §666 is charged in the same terms as 18 U.S.C. §§201, 1951, and 1346, it likely touches on the same constitutional concerns. At the same time, *Skelos* avoided collapsing federal program bribery into the other corruption statutes, and continued to give effect to the broader sweep of its statutory language. Ultimately, *Skelos* ensured that prosecutors will not easily skirt *McDonnell's* heightened standard, but also avoided insulating corrupt transactions that bear little resemblance to the "normal political interaction" driving the Supreme Court's constitutional concerns in *McDonnell*. 136 S. Ct. at 2372.

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