By Steven D. Grimberg and Carmelle Alipio

Hot Topics and Current Trends in Public Corruption Investigations

Investigating and charging public officials for corruption is not new, but the number of arrests, charges, and convictions of public officials has increased rapidly over the last few years. With an eye to what is prevalent, this article will explore three "hot topics" and current trends in the public corruption domain: (1) the recently clarified standard for what constitutes an "official act"; (2) the increase in prosecutorial requests for substantial prison sentences in public corruption cases; and (3) the rise of emoluments cases at the top.

What is the standard? A look at *McDonnell v. United States*, 136 S. Ct. 2355 (2016) and *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018)

The prosecution of former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, involved charges of honest services fraud and Hobbs Act extortion charges following their acceptance of loans, gifts and other benefits from Jonnie Williams, a prominent businessman and then CEO of Star Scientific. Star Scientific, a company based in Virginia, was seeking approval from the Food and Drug Administration for Anatabloc, a nutritional supplement marketed as an anti-inflammatory drug.

Between 2009 until May 2012, Williams provided the McDonnells with over $175,000 in gifts and loans. During that same time period, Governor McDonnell set up meetings and opportunities for Williams and Star Scientific to promote and discuss Anatabloc with state employees, including researchers at prominent Virginia universities.

To convict a public official of bribery, the burden of the prosecution is to show that the public official committed or agreed to commit an official act. At issue in *McDonnell v. United States* was whether the actions of Governor McDonnell fell under the meaning of "official act."

Chief Justice Roberts, writing on behalf of a unanimous Court, took a narrow reading of "official act" under 18 U.S.C. § 201(a)(3).[1] Relying on the interpretive canon *noscitur a sociis*, "a word is known by the

[1]"An 'official act' is defined 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."

company it keeps," along with the precedent set out in *United States v. Sun-Diamond Growers*,[2] the Court concluded that the definitional words used to describe "official act" did not intend to cover all types of actions broadly, but rather each action in the list was included for its specific meaning. The Court's holding in *Sun-Diamond* complemented this analysis because there the Court found that public officials coordinating or participating in activities involving constituents did not mean that each such activity constituted an "official act."

As such, in *McDonnell*, "setting up a meeting, calling another public official, or hosting an event, [did] not, standing alone, qualify as an official act."[3] In essence, an official act can include a formal or specific action done with the intention to pressure or influence another official into performing an official act in kind. Chief Justice Roberts wrote:

> [A]n official act is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official.[4]

This definition effectively removed the possibility that routine and ordinary acts could apply as official acts because of its restrictive language.

Applying the standard

Following the opinion in *McDonnell*, several cases related to public corruption were immediately impacted. In July 2017, the Second Circuit dismissed the conviction of Sheldon Silver, former Speaker of the New York State Assembly on the grounds that the jury instructions were conformed to a pre-*McDonnell* standard and could not be reconciled with the *McDonnell* ruling. Silver had been convicted in 2015 for extortion, fraud, and money-laundering. Prosecutors alleged that Silver, in exchange for millions of dollars, funneled state funds to a cancer researcher at Columbia University and helped two real estate development firms land deals. In September 2017, the Second Circuit overturned the corruption conviction of Dean Skelos, former majority leader in the New York State Senate on similar grounds.

Similarly, the standard in *McDonnell* was applied in *United States v. Menendez*.

The prosecution of U.S. Senator Robert Menendez and co-defendant Dr. Salomon Melgen involved charges of bribery, honest services fraud and other related offenses, including making false statements on federal financial disclosure forms. At the crux of this case was the relationship between Senator Menendez and Dr. Melgen, a wealthy Florida doctor who had frequently donated to Senator Menendez's campaign.

Following a hung jury and a declared mistrial, defendants moved for judgment of acquittal which Senior District Judge William H. Walls granted in part and denied in part. The prosecution then dismissed the charges citing the impact of Judge Walls' decision.[5] The decision most significantly, in the context of bribes, (1) clarified the difference between proving bribery through campaign contributions and favors and gifts, and (2) rejected defense arguments that were based on a narrow reading of the *McDonnell* decision.

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[2]526 U.S. 398, 407 (1999).

[3]136 S. Ct. 2355, 2369 (2016).

[4]136 S. Ct. at 2371–72.

[5]Nick Corasaniti, Justice Department Dismisses Corruption Case Against Menendez, NY Times (Jan. 31, 2018) https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html.

To prove that a public official is guilty of bribery, the prosecution must prove that the public official "agreed to perform an 'official act' at the time of the alleged *quid pro quo.*"[6] The agreement to perform "need not be explicit"[7] nor does the public official need to "specify the means that he will use to perform his end of the bargain."[8] To show a *quid pro quo* then is to show that the public official "understands that he is expected. . .to exercise particular kinds of influence or do certain things connected with his office as specific opportunities arise."[9] Evidence of *a quid pro quo* includes a showing of a history of "favors and gifts flowing to a public official in exchange" for a history of "official actions favorable to the donor."[10]

First Amendment concerns can arise in the context of campaign contributions.[11] However, neither the First Amendment nor relevant case law bar bribery prosecutions.[12] For campaign contributions, unlike favors and gifts which can be used to prove bribery through circumstance, an explicit showing of a *quid pro quo* by the prosecution is required to prove a bribery charge.[13] The prosecution must "connect[] the *quid* and the *quo*."[14] In connecting the *quid* and the *quo*, prosecutors cannot rely on "chronology alone" or evidence grounded "solely on a temporal relationship between the political contributions and official acts."[15] An explicit quid pro quo may be proved with a chronology and additional evidence.[16]

Judge Walls rejected two defense arguments based on a narrow interpretation of *McDonnell*. These arguments include that the prosecution's "stream of benefits" theory was invalidated by *McDonnell* and that Senator Menendez's actions did not meet the requirements of *McDonnell*.

The "stream of benefits" theory permits the prosecution to establish a *quid pro quo* by showing that bribes were given to an official on an as-needed basis, without having to link each *quid* to each *quo*. The defense focused on specific language in the *McDonnell* ruling, that "the Government must prove that 'the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*.'"[17] Judge Walls rejected this argument, stating that "*McDonnell* neither abolished the "stream of benefits" theory nor held that an official act. . .must be identified at the time the agreement is made" and that the *McDonnell* case "merely narrowed the definition of 'official act.'"[18]

The defense argument that Senator Menendez's actions did not meet the requirements of 'official act' as clarified in *McDonnell* was also rejected by Judge Walls. Judge Walls found that "there [was] evidence. . .that Menendez sought to 'exert pressure on' or 'advise' other government officials to take official actions for Melgen's benefit"[19] and that "exerting pressure is an official act. . .when the official uses his 'official position.'"[20]

The result of *Menendez*, dismissal by the prosecution following acquittal on a few counts, demonstrates the challenges for the government to successfully prosecute public officials for bribery and corruption in the post-*McDonnell* landscape.

Substantially longer prison sentences

One step that prosecutors have taken in an effort to deter public corruption is to request longer prison sentences. A substantial sentence, argued by prosecutors from the Southern District of New York,

[6]291 F. Supp. 3d 606, 612 (emphasis in original) (quoting *McDonnell*, 136 S.Ct. at 2371).
[7]*Id.* at 613.
[8]*Id.*
[9]*Id.* (citing *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017)).
[10]*Id.* (quoting *United States v. Kemp,* 500 F.3d 257, 282 (3d Cir. 2007)).
[11]291 F. Supp. 3d at 614.
[12]*See id.* at 621.
[13]*See id. See also McCormick v. United States*, 500 U.S. 257, 273 (1991).
[14]*Id.* at 629.
[15]*Id.* at 623.
[16]*See id.* at 624.
[17]*McDonnell*, 136 S. Ct. at 2371. (Emphasis in original.)
[18]291 F. Supp. 3d at 615-616.
[19]*Id.* at 618.
[20]*Id.* at 619.

would "communicate that [public corruption is a] violation[] of the public trust" and that "in particular, when committed by a high-level official, will be met with significant sentences."[21]

Substantially long prison sentences have been the go-to punishment for public corruption cases. In *United States v. Smith*,[22] the suggested sentence for a state senator convicted of various public corruption offenses was between eight to ten years; he was sentenced to seven years. In *United States v. Skelos*, following the first jury trial, the suggested sentence for former state senate Majority Leader Dean Skelos was thirteen to fifteen years and his son and co-conspirator's suggested sentence was ten to twelve years; they received five and six and a half years, respectively.[23] The *Skelos* case has since been through an appeal resulting in a vacated judgment, and a second trial which ended in convictions in July 2018. Given the long history and extent of bribery with which both defendants have been charged, it is likely that prosecutors will seek similarly substantial prison sentences.

To overcome substantial prison sentence recommendations by prosecutors, defense attorneys have suggested creative proposals to offset the time in prison. Following the public corruption prosecution and conviction of Sheldon Silver, former speaker of the New York State Assembly, his attorneys suggested that Silver be "ordered to perform 'rigorous' community service, like running a special help desk."[24] This would allow New Yorkers to take advantage of Silver's knowledge and experience of New York state bureaucracy and allow them to "maximize their chances of receiving benefits to which they may be entitled."[25] This type of sentence would decrease the number of years Silver would spend in prison, where federal prosecutors sought a sentence substantially in excess of 10 years.

Luckily for Silver, his sentence, handed down in July 2018, was not over ten years. Unluckily for Silver, his sentence was not the special help desk his attorneys had requested. He was sentenced to seven years in prison.[26] His sentence is the first to be handed down out of the "men in the room," also known as the political posse of Governor Andrew Cuomo, which includes Alain E. Kaloyeros, an architect, and Joseph Percoco, a former top adviser. Like Silver, it is likely that each defendant will be made to be an example to deter corruption and be sentenced to substantially long prison sentences.

Emoluments cases

Emoluments cases are on the rise and lie in the same domain as public corruption cases. An emolument is a profit, gain, advantage or benefit arising from office or employment.[27] The Constitution explicitly prohibits all federal officials from receiving emoluments from foreign and domestic governments without the prior consent of Congress.[28] Recently, the Attorney Generals of Maryland and the District of Columbia have brought a suit against President Trump, seeking injunctions against his continued actions of doing business with foreign and state governments through Trump International Hotel in Washington D.C. and Trump Organization.[29]

This case has already been given the green light to go forward by U.S. District Judge Peter J. Messitte, who rejected the President's motion to dismiss in July 2018. Judge Messitte found that the term

[21] *United States v. Percoco,* Case No. 16-00776 (VEC), *Government's Sentencing Mem.* 22, Jul. 18, 2018, ECF No. 788.
[22] *See* Case No. 13-CR-00297 (KMK) *Minute Entry,* Jul. 1, 2015.
[23] *See* Case No. 15-CR-00317 (KMW) *Judgment*, May 12, 2016, ECF No. 196.
[24] Benjamin Weiser, What Sentence Should Sheldon Silver Get? His Lawyers Get Creative, NY Times (July 20, 2018), https://www.nytimes.com/2018/07/20/nyregion/sheldon-silver-sentencing.html.
[25] *Id.*
[26] Benjamin Weiser, Sheldon Silver, Ex-New York Assembly Speaker, Gets 7-Year Prison Sentence, NY Times (July 27, 2018), https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-corruption.html.
[27] "emolument," Merriam-Webster Dictionary (2016 ed.).
[28] *See* U.S. CONST. art. I, § 9, cl. 8. ("[N]o Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."). *See also* U.S. CONST. art. I, § 9, cl. 7. ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.").
[29] *See District of Columbia v. Trump,* Case No. 17-cv-01596, *Compl.*, June 12, 2017, ECF No. 1.

"emolument" in the Foreign and Domestic Emoluments Clauses covers and bans the President from receiving "anything more than *de minimis* profit, gain, or advantage" in his private capacity.[30] Where the *McDonnell* and *Menendez* opinions have focused in on narrow language, Judge Messitte found that the term was intended to be read broadly. A narrow interpretation of "emolument" would "reduce the Clauses to little more than a prohibition of bribery which,. . . is. . . a very difficult crime to prove."[31]

Judge Messitte also compared this case to the "official act" requirements in the *McDonnell* case. Following *McDonnell*, if "merely 'setting up a meeting, talking to another official, or organizing an event' is not sufficient"[32] to constitute an official act, then it would be even more difficult to "demonstrate which payments made to the President. . .were being offered to him in an official capacity."[33] Since this case will be moving forward, it is likely that President Trump and his defense team will continue to challenge the definition and scope of emoluments charges, which could further clarify the standard necessary for proving public corruption more generally.

Conclusion

Although public corruption is as pervasive as ever, both the government and defense have had difficulties navigating these cases and the constantly evolving standards, as illustrated by the *McDonnell* and *Menendez* decisions. As the challenge grows for successful prosecutions in the public corruption arena, so too do the requests for longer prison sentences as a means of deterrence. And with the increased intersection of public officials and business interests, emoluments cases are on the rise and will likely expand the arena of public corruption prosecutions in the days ahead.

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[30] *Id., Order 39,* July 25, 2018, ECF No. 123.

[31] *Id.* at 36.

[32] *Id.*

[33] *Id.*

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