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Two Mayer Brown attorneys discuss the recent ruling by the U.S. Supreme Court vacating the conviction of former Virginia Gov. Robert McDonnell. The authors examine how the McDonnell decision will alter the Justice Department's strategy in pursuing public corruption prosecutions, particularly where the public official is one step removed from the official action in question.

The Impact of *McDonnell* on the Government's Pursuit of Public Corruption

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In *McDonnell v. United States*, the U.S. Supreme Court clarified the scope of the ''official act'' requirement for honest services fraud and Hobbs Act extortion, two key statutes in the Justice Department's pursuit of public corruption. The Supreme Court looked past the government's ''tawdry tales of Ferraris, Rolexes, and ball gowns,'' making clear that, while the conduct at issue was ''distasteful,'' a conviction under the two statutes requires not just proof of the ''quid,'' but also a sufficiently defined and formal ''quo.'' While the Supreme Court left open the possibility that the DOJ could retry former Gov. Robert McDonnell, on Sept. 8, the DOJ informed the Fourth Circuit that it did not intend to seek a retrial. The DOJ's decision was likely based on its conclusion that evidence against McDonnell was insufficient to satisfy the new post-*McDonnell* standard. And by foregoing an attempt at a retrial, the DOJ avoided a potential adverse decision from the Fourth Circuit, which would have been anchored in the facts of McDonnell's case, as opposed to the Supreme Court's decision, which focused on the district court's jury instructions. So McDonnell and his wife avoided conviction.

But the impact of the *McDonnell* decision will not stop there. The Supreme Court's newly articulated standard has also impacted other current prosecutions and will undoubtedly affect others, as discussed below. Moving forward, *McDonnell* will alter the DOJ's strategy in pursuing public corruption prosecutions, particularly where the public official is one step removed from the official action in question. The DOJ's decision to walk away from a potential retrial of Governor McDonnell is a prime example.

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McDonnell v. United States

McDonnell v. United States, 136 S. Ct. 2355 (2016), involved charges of honest-services fraud (18 U.S.C. §§ 1343, 1349) and Hobbs Act extortion (18 U.SC. § 1951(a)) arising from loans, gifts and other benefits received by McDonnell and his wife, Maureen McDonnell. The McDonnells received these items from Jonnie Williams, chief executive officer of Star Scientific. Star Scientific had developed a nutritional supplement, Anatabloc, and hoped to obtain FDA approval of Anatabloc as an anti-inflammatory drug. An important step in

 ISSN 1559-3185

its efforts to obtain FDA approval was securing independent research on the health benefits of Anatabloc. Star Scientific wanted a Virginia public university to conduct such a study, potentially through a financial grant from Virginia's Tobacco Commission (Anatabloc is made from anatabine, a compound found in tobacco).

In an effort to obtain those public benefits—an independent university study and a financial grant for the study—Williams began courting both Governor and Mrs. McDonnell. Williams provided loans, gifts and other benefits totaling approximately $175,000 over a period of approximately three years. According to the government's allegations, in exchange for those benefits, Governor McDonnell committed at least five ''official acts'' as part of a *quid pro quo*, including:

(1) ''arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc'';

(2) ''hosting, and . . . attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients'';

(3) ''contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine'';

(4) ''promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion''; and

(5) ''recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs.''

In instructing the jury, the district court first quoted from the definition of ''official act'' set forth in 18 U.S.C. § 201, then went on to advise the jury that ''the term [official act] encompasse[s] 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.' '' Governor McDonnell requested the court further instruct the jury that the ''fact that an activity is a routine activity, or a 'settled practice,' of an office-holder does not alone make it an 'official act,' '' and that ''merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,' even if they are settled practices of the official,'' because they ''are not decisions on matters pending before the government.'' He also requested that the jury be instructed that an '' 'official act' must intend to or 'in fact influence a specific official decision the government actually makes – such as awarding a contract, hiring a government employee, issuing a license, passing a law, or implementing a regulation.' '' The district court rejected both proposed instructions.

McDonnell was convicted on both the honest-services fraud and Hobbs Act charges. On appeal, McDonnell argued, among other things, that the district court erred in its ''official act'' instruction, contending that it turned virtually any act by a public servant into an ''official'' one. The Fourth Circuit rejected McDonnell's argument and affirmed.

'Official Action' Instruction. The Supreme Court reversed, holding that the district court erred in its ''official act'' instruction. The Court noted that the government's view of the ''official act'' requirement ''encompasses nearly any activity by a public official.'' The Supreme Court rejected the government's expansive view, holding that ''setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.' ''

In reaching this conclusion, the Court identified two requirements for an ''official act,'' anchored in the text of 18 U.S.C. § 201. First, the ''Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official.'' Second, the ''Government must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.''

With respect to the first prong, the Court rejected the proposition that setting up a meeting, calling another public official, or hosting an event could rise to the level of official action. In reaching this conclusion, the Court noted that the terms ''cause,'' ''suit,'' ''proceeding,'' and ''controversy'' in section 201 ''connote a formal exercise of governmental power, such as a lawsuit, hearing or administrative determination.'' The Court contrasted these activities with everyday meetings, calls, and events, which do not constitute formal government action.

The Court then turned to the question of whether arranging a meeting, contacting another official or hosting an event could qualify as a ''decision or action'' (the second prong of the two-prong test set forth above) on another ''question, matter, cause, suit, proceeding or controversy.'' In analyzing this question, the Court first discussed the scope of the terms ''question'' and ''matter'' in section 201, the least precise of the six types of action set forth in the statute. The Court rejected the district court's suggestion that the ''matter'' could be something ''at a much higher level of generality [such] as 'Virginia business and economic development,' '' a theory the government advanced at trial. Instead, the Court held that a ''question'' or ''matter'' must be something more formal and concrete. Specifically, the Court stated:

''Pending'' and ''may by law be brought'' suggest something that is relatively circumscribed – the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete. In particular, ''may *by law* be brought'' conveys something within the specific duties of an official's position – the function conferred by the authority of his office. The word ''any'' conveys that the matter may be pending either before the public official who is performing the official act, or before another public official.

With respect to the type of action that would satisfy this standard, the Supreme Court approved of the three questions or matters identified by the Fourth Circuit in its decision, which included:

(1) ''whether researchers at any of Virginia's state universities would initiate a study of Anatabloc'';

(2) ''whether the state-created Tobacco Indemnification and Community Revitalization Commission'' would ''allocate grant money for the study of anatabine''; and

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(3) ''whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug.''

'Decision or Action.' The Court then turned to the question of whether Governor McDonnell's conduct in setting up meetings, contacting other officials and hosting events could rise to the level of a ''decision or action'' on the questions or matters identified above. Initially, the Court noted that ''[a] public official may . . . make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy' by using his official position to exert pressure on *another* official to perform an 'official act.' '' Alternatively, according to the Court, ''if a public official uses 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, that too can qualify as a decision or action for purposes of § 201(a)(3).''

Thus, in post-*McDonnell* considerations of whether informal action like arranging a meeting or contacting another official gives rise to ''official action'' for purposes of section 201, the fact finder must first identify the ''question, matter, cause, suit, proceeding or controversy'' under the first prong of the *McDonnell* test. Under *McDonnell*, only the ''formal exercise of governmental power'' is sufficient, something akin to ''a lawsuit, hearing, or administrative determination.'' Second, the fact finder must determine whether the official ''made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.'' Where the public official has direct responsibility or involvement in the decision, this second inquiry will be straightforward. But for cases like *McDonnell*, where the public official is one (or more) steps removed from the ultimate decision to be made, the inquiry will become much more subtle and complex. The question will be whether the public official acted to ''exert pressure'' or ''provide advice,'' knowing or intending that such pressure or advice would form the basis for an ''official act.''

The *McDonnell* Case: Decision and Aftermath

Based on its new articulation of the ''official act'' requirement, the Supreme Court held that the jury instructions in McDonnell's case were erroneous. The Court identified several reasons for this conclusion. First, the Court held that the district court's instructions ''provided no assurance that the jury reached its verdict after finding th[e] questions or matters [identified by the Fourth Circuit].'' Instead, the jury could have found that the mere act of setting up a meeting, contacting another official or hosting an event constituted ''official action''—a proposition that the Supreme Court rejected. Second, the district court's instructions ''did not inform the jury that the 'question, matter, cause, suit, proceeding or controversy' must be more specific and focused than a broad policy objective.'' The Court noted that the government had argued to the jury that McDonnell's acts were official actions because they concerned business development in Virginia, which McDonnell had made a priority. Finally, the Supreme Court found the jury instructions failed to make clear that the jury ''had to find that [McDonnell] made a decision or took an action—or agreed to do so—on the identified 'question, matter, cause, suit, proceeding or controversy.' ''

Significantly, the Supreme Court did not address whether the government's evidence at trial was insufficient to convict McDonnell under its new framework. Instead, the Court remanded to the Fourth Circuit to make that determination. Yet after two stays of briefing on that question and despite the U.S. Attorney's office in the Eastern District of Virginia's recommendation that McDonnell be retried, the DOJ dropped its case against both the former governor and his wife on Sept. 8. The DOJ almost certainly did so in order to avoid a further adverse decision by the Fourth Circuit anchored in the particular facts of McDonnell's case (as opposed to the Supreme Court's decision, which—while significant—was limited to the erroneous jury instructions). The Supreme Court's decision was bad enough for the DOJ, but a Fourth Circuit decision based on the government's evidence against McDonnell could have been worse. The DOJ's decision to forego a retrial demonstrates how the Supreme Court's newly-articulated standard will impact the DOJ's strategy in public corruption prosecutions moving forward—particularly where the public official is one or more steps removed from the government action in question, as in *McDonnell*.

McDonnell's Impact on Current Cases

That *McDonnell* is already reverberating in cases nationwide is an understatement. Multiple criminal defendants have attempted to employ *McDonnell* in various ways. For example, soon after *McDonnell* came down, the Second Circuit rejected the appeal of a former New York State Assemblyman, who argued that his actions in exchange for bribes were not ''official'' under *McDonnell*. *United States v. Stevenson*, No. 14-1862-cr, 2016 WL 4384860, at *3 n.1 (2d Cir. Aug. 17, 2016). The court quickly swatted down this argument, considering that ''[n]o reasonable jury could fail to find that the action here at issue—proposing legislation—was an 'official act' as clarified by *McDonnell*.'' *See also United States v. Halloran*, 821 F.3d 321, 340 n.13 (2d Cir. 2016) (refusing to hold appeal in abeyance pending *McDonnell* because defendant's act of disbursing public funds was unquestionably a public act); *United States v. Pomrenke*, No. 1:15-cr-00033, 2016 WL 4074116 (W.D. Va. Aug. 1, 2016) (rejecting utility board official's motion for acquittal based on McDonnell, finding that award of contract and other utility business fell ''squarely within *McDonnell*'s limited construction of the term 'official action' '').

The Case of Dean Skelos

While the DOJ succeeded in fending off challenges based on *McDonnell* in *Stevenson*, *Halloran* and *Pomrenke*, the government faces significant risk in the appeals of Dean Skelos, a former Majority Leader of the New York State Senate, and Sheldon Silver, former Speaker of New York's State Assembly. *See United States v. Skelos*, No. 1:15-cr-317 (S.D.N.Y.). Skelos was indicted along with his son in May 2015 for three separate bribery schemes, involving three separate companies: Glenwood Management (''Glenwood''), AbTech Industries (''AbTech''), and Physicians Reciprocal Insurers (''PRI''). With respect to Glenwood, the government presented evidence that Skelos solicited payments from Glenwood, a real estate development firm, in ex-

change for his support for legislation beneficial to Glenwood (''Glenwood scheme''). The government's evidence of ''official acts'' performed by Skelos included:

(1) sponsoring legislation favorable to Glenwood;

(2) making changes to rent regulation laws favored by Glenwood; and

(3) actively opposing campaign finance reform, which Glenwood opposed because it would have curtailed Glenwood's ability to influence politicians.

With respect to AbTech, the government presented evidence that AbTech hired Skelos's son and provided him additional compensation in exchange for Skelos using his official influence to expedite a county's award of a contract to AbTech (''AbTech scheme''). Based on the government's evidence, Skelos had ''enormous official power'' over the county officials with authority over the contract. The government also presented evidence that Skelos advocated for state legislation to authorize and allocate budget funds to certain projects that would benefit AbTech.

Finally, with respect to PRI, a medical malpractice insurer, the government presented evidence that PRI employed Skelos's son based on its fear that Skelos would halt support for legislation critical to PRI's business (''PRI scheme''). Ultimately, Skelos voted multiple times to extend the legislation favored by PRI.

At the Skeloses' trial in late 2015, the district court offered the following instruction to the jury regarding ''official acts'' as charged against Dean Skelos:

The term 'official act' includes any act taken under color of official authority. These decisions or actions do not need to be specifically described in any law, rule, or job description, but may also include acts customarily performed by a public official with a particular position. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.

The jury convicted Skelos and his son on counts relating to the three schemes. Skelos was sentenced to 60 months and his son to 78 months.

Satisfying *McDonnell*. Less than two months later, the Supreme Court decided *McDonnell*. Relying heavily on *McDonnell*, the Skeloses moved to continue bail and stay financial penalties pending appeal. In their motion, defendants argued the ''official acts'' jury instruction from their trial presented a ''substantial question of law or fact likely to result in'' reversal or a new trial that justified bond pending appeal under 18 U.S.C. § 3143(b)(1)(B). (In the Second Circuit, a ''substantial question'' for purposes of § 3143 ''is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way.'' *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985))). In particular, defendants contended the ''official acts'' instruction was ''nearly identical to'' that in *McDonnell*, considering that several very similar phrases (*e.g.*, ''acts customarily performed,'' ''in furtherance of longer-term goals'') appeared in both cases. Second, defendants argued that each of the three corruption schemes alleged by the government included at least one category of conduct that could not constitute an ''official act'' under *McDonnell*, such as setting up meetings and making phone calls. Finally, defendants highlighted prosecution arguments to the jury focused on conduct that would not satisfy *McDonnell*. For example, during closing arguments, the government argued, ''So the defense wants you to think that things like setting up meetings . . . don't really count as official actions. It's just wrong. Flat wrong.'' At another point, in connection with the Glenwood scheme, the government argued, ''[Y]ou heard that one of the things that senators do in their official capacity is meet with lobbyists, and you also heard Senator Skelos met with Glenwood's lobbyists regularly during this time period. . . . Every time the senator met with one of them on a lobbying meeting for Glenwood, that's official action.''

In its response, the government conceded the ''official acts'' instruction was similar to that in *McDonnell*, but argued that, based on other instructions, when viewed as a whole, the jury instructions aligned with *McDonnell*. For example, the government pointed out that the jury was instructed that proof of Hobbs Act extortion required proof that Skelos ''would exercise official influence'' for the extorted party and that the government had to show Skelos intended to be rewarded ''with respect to a transaction of the State of New York.'' The jury was also instructed that ''[t]he official action can either be actually performing an act himself, or exerting influence over an act performed by another person,'' which the government argued was similar to *McDonnell*'s guidance that ''an official act includes ''exert[ing] pressure on another official to perform an official act.'' The government also argued harmless error, contending that for all three schemes, Skelos engaged in conduct that was indisputably ''official action'' under *McDonnell*, such as voting on legislation and pressuring officials to take official action. The government also demonstrated that while isolated excerpts of its jury arguments may been inconsistent with *McDonnell* (as highlighted by defendants, and noted above), the government's arguments to the jury properly focused the jury on legislative and other official acts of Skelos, as opposed to suggesting that meetings and other informal acts constituted the ''quo'' in the *quid pro quo*.

Ultimately, the district court sided with the defendants and entered a brief order continuing bond pending appeal on August 4, 2016. Without setting out its reasoning, the court stated that ''defendants have shown that their appeals present a substantial question regarding whether this Court's jury instructions were erroneous in light of'' *McDonnell*.

The Case of Sheldon Silver

McDonnell is also in play in the case of Sheldon Silver, former Speaker of New York's State Assembly, who recently succeeded in continuing bond pending appeal based on *McDonnell*. *See United States v. Silver*, No. 1:15-cr-93, 2016 WL 4472929 (S.D.N.Y. Aug. 25, 2016). Silver was convicted in November 2015 for his alleged participation in two schemes involving trading official action for referral fees from law firms in which Silver was associated. The first alleged scheme involved purported favors by Silver for a doctor who sent leads to Silver at his firm for mesothelioma patients who sought legal representation (''mesothelioma scheme''). The government presented evidence and argued to the jury several categories of ''official action,'' including:

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(1) approval of state grants for the doctor;

(2) honoring the doctor in a legislative proclamation;

(3) assisting the doctor with securing permits for a charity event; and

(4) assisting the doctor's children in obtaining jobs with a state judge and a non-profit organization heavily dependent upon Silver for state funding.

In the second alleged scheme, Silver purportedly received attorney referral fees from real estate developers on behalf of whom Silver took official actions that benefited them financially (''real estate scheme''). The ''official acts'' argued by the government included:

(1) approving a request for financing the developers' real estate projects;

(2) signing off on rent/tax abatement legislation favorable to the developers; and

(3) opposing state approvals necessary for relocation of a methadone clinic in Silver's district near one developer's building.

At Silver's trial, the ''official acts'' instruction was far shorter than that in *McDonnell* or *Skelos*: it stated only that ''[o]fficial action includes any action taken or to be taken under color of official authority.''

In a post-trial motion prior to the *McDonnell* decision, Silver argued that his acts with regard to the mesothelioma scheme were merely ''routine personal courtesies'' and not official acts. He also contended with regard to the real estate scheme that, for example, his opposition to the methadone clinic in his district was just that—opposition, not actual action. The district court denied Silver's motion for acquittal, simply stating that the charged actions were ''official actions,'' including Silver's help for the doctor's son in getting a job at the non-profit (which the court noted had received state funding), and meeting privately with one of the developers and its lobbyist. The court added that the jury could have found that this meeting showed that ''Silver, in his official capacity, made sure that the legislation was satisfactory to a large real estate developer that was paying him bribes.'' The district court sentenced Silver to 12 years in prison.

Bond Motion. Silver moved for bond pending appeal in May 2016, but the district court stayed briefing on the motion until after the Supreme Court decided *McDonnell*. In briefing after *McDonnell*, Silver argued again that the ''official acts'' charged against him did not constitute actual exercises of government authority as required in *McDonnell*. For example, Silver contended that recommending the doctor's son for a job at a non-profit organization was just that—a recommendation, and not governmental action. As for the alleged real estate scheme, Silver argued that he was charged in part based on ''private, confidential meetings'' he had with the developers and their lobbyists in his office, which was exactly the conduct *McDonnell* declared was not an official act. And even if some of the charged acts passed muster under *McDonnell*, Silver argued, the instruction in question required a new trial because the Second Circuit requires that it be ''clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,'' *see United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005), *i.e.*, that the jury convicted based on an official act that satisfied the *McDonnell* test, rather than actions on the part of Silver that would not qualify post-*McDonnell*.

As in *Skelos*, the government responded to Silver's motion by arguing that charged activities involved in both schemes *did* fit under *McDonnell*, such as supporting legislation for the developers in the real estate scheme and approving state funding for the doctor in the mesothelioma scheme. The government also argued (again) that the jury instructions as a whole effectively gave the jury a *McDonnell*-proof definition of ''official act,'' considering that other instructions contained phrases such as ''the performance of his public duties'' and ''exercise official influence or make official decisions.'' And, repeating one more argument from its *Skelos* briefing, the government contended that any error in the instruction was harmless because there ''simply is no possibility'' that the verdict ''could have been based on acts that fall short'' of *McDonnell*, as proof of Silver's misdeeds ''was overwhelming.''

The district court ultimately sided with Silver in an order dated Aug. 25, 2016. The court noted that although Silver's case ''is factually almost nothing like *McDonnell*,'' there was still a ''substantial question'' as to whether the jury instructions were erroneous in light of *McDonnell*. Although the ''under color of official authority'' instruction for ''official act'' ''did not contradict *McDonnell*,'' the court reasoned, it nevertheless ''did not include key language from *McDonnell's* definition of official action.'' The court stated that it ''did not explicitly tell the jury that there had to be a formal exercise of governmental power on an identified question, matter, cause, suit, proceeding or controversy, which had to be specific and pending or might by law be brought before the public official.''

Further, on harmless error, although most of the acts charged against Silver were ''undoubtedly'' official, the government ''introduced evidence of actions taken by Silver in exchange for money that may not qualify as official acts under *McDonnell* but were argued to the jury—consistent with pre-*McDonnell* law—as official acts.'' For example, Silver's efforts to get the doctor's daughter an internship ''is less obviously an official act,'' and the same was true of Silver's bringing of a ''pro forma'' legislative proclamation in favor of the doctor. While the district court ''tend[ed] to agree with the Government that any error was harmless'' with respect to the mesothelioma scheme, the court nevertheless found a substantial question sufficient to support bond pending appeal. Similarly, with regard to Silver's real estate scheme, the court found that any error in the instruction was ''almost certain to be harmless,'' yet nonetheless found there was a substantial question for appeal given that one of the charged acts was simply a meeting, albeit a meeting relating to a bill that Silver ultimately permitted to be brought to the Assembly floor where he voted in favor of it. But because the government had argued that ''the meeting was official action in and of itself'' (impermissible under *McDonnell*)—in addition to arguing that the meeting was evidence of a *quid pro quo* relating to Silver's later vote in favor of the bill (permissible under *McDonnell*) – the district court concluded that a substantial question existed sufficient to support bond pending appeal.

Silver and Skelos: What Happens Next?

As for the ultimate effect of *McDonnell* on the appeals of the Skeloses and Silver, the government faces significant risk of appellate reversal of some counts, particularly in *Silver*. Focusing first on *Skelos*, the ''official acts'' instruction contained specific passages that were near-carbon copies of passages from the rejected instruction in *McDonnell*. Further, the *McDonnell* Court outlined multiple aspects of an ''official acts'' instruction that the court in *Skelos* did not include. These included instructing the jury ''that the pertinent 'question, matter, cause, suit, proceeding or controversy' must be something specific and focused that is 'pending' or 'may by law be brought before any public official,' '' and ''that merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter.'' The fact that *Skelos* included language the Supreme Court expressly rejected – coupled with the absence of sufficient guidance in other instructions—will present a significant challenge for the government. While the government has persuasive arguments that the instructions, as a whole, adequately conveyed the key precepts outlined in *McDonnell* for the honest services and Hobbs Act extortion counts, the Second Circuit will likely find that the instructions were erroneous, focusing on the inclusion of language *McDonnell* expressly rejected—*e.g.*, ''actions taken in furtherance of longer-term goals'' and acts constituting ''a series of steps to exercise influence or achieve an end''—which heightened the risk the jury convicted on something less than ''specific and focused'' official action, as required under *McDonnell*.

Harmless Error. That said, while it is difficult to predict, it appears more likely than not that the government will succeed based on harmless error. For the Glenwood scheme, while the government did argue that meetings, standing alone, constituted ''official action'' – which runs contrary to *McDonnell*—the meetings were connected to subsequent conduct on the part of Skelos that constituted clear official action, *e.g.*, sponsoring legislation favorable to Glenwood. As the government pointed out in opposing Skelos's request for bond pending appeal, it never argued before the jury that the meetings were the ''quo'' part of the *quid pro quo*, but instead pointed to Skelos's conduct directly relating to legislation, changes to rent regulation and campaign finance reform. Further, in addition to the honest services and Hobbs Act extortion counts (which were also at issue in *McDonnell*), the Skeloses were also charged under 18 U.S.C. § 666 (not present in *McDonnell*), commonly known as the federal program bribery statute. Under Section 666, the government was required to prove some ''business, transaction, or series of transactions . . . involving any thing of value of $5,000 or more''—and the jury was properly instructed on this requirement. For purposes of the federal program count, the government did not point to the value of the meetings with Skelos, but instead pointed to the value of the legislation Skelos voted on. Based on this, the government will almost certainly argue on appeal that the Section 666 evidence and instructions—coupled with the government's arguments focused on Section 666—properly focused the jury on ''official action'' sufficient to satisfy *McDonnell*. While it is difficult to predict, the Second Circuit could certainly find this argument persuasive, particularly with respect to the Section 666 charges but potentially with respect to the honest services and Hobbs Act counts too. The Second Circuit's analysis of the AbTech and PRI schemes may follow along the same lines—likely focusing on the fact that, for both schemes, Skelos engaged in clear ''official action'' (pressuring county officials to award a contract and voting on legislation), coupled with the presence of Section 666 charges, where the evidence, instructions and jury arguments arguably focused the jury on official action sufficient to satisfy *McDonnell*.

Tasks on Appeal. Silver will face these same tasks on appeal. The ''official acts'' instruction at his trial was far shorter than that in *Skelos*. This could cut either way on appeal. On the one hand, it might not be sufficiently clear to a typical juror what ''any action taken or to be taken under color of official authority'' means, particularly given the increased precision required post-*McDonnell*. And, as in *Skelos*, the *Silver* instruction certainly lacked the additions the Supreme Court suggested were necessary in *McDonnell*. On the other hand, the Silver instruction did not contain the fatal broad-reaching language in *McDonnell* (also present in *Skelos*) such as ''official actions may include acts that a public official customarily performs,'' which include ''actions taken in furtherance of longer-term goals'' and acts constituting ''a series of steps to exercise influence or achieve an end.'' Further, the district court in *Silver* provided an instruction (similar to one rejected by the district court in *McDonnell*), which provided: ''If you find that [the defendant] understood that the benefits were provided solely to cultivate goodwill or to nurture a relationship with the person or entity who provided the benefit, and not in exchange for any official action, then this element will not have been proven.'' Without question, the instructions in *Silver* were less problematic than those in *Skelos*. That said, given the precision suggested by Chief Justice Roberts's opinion, Silver has a solid chance of convincing the Second Circuit that the instructions ran afoul of *McDonnell*.

That said, consistent with the view expressed by the district court, the Second Circuit may well find that any error was harmless – particularly with respect to the real estate scheme. For the real estate scheme, as noted above, the government argued that a meeting between Silver and a developer, standing alone, constituted an ''official act''—which *McDonnell* clearly prohibits. But as in *Skelos*, that meeting preceded Silver's later vote on a bill that was the subject of the meeting and Silver's vote clearly constitutes an ''official act.'' Further, the government also argued that the meeting – which occurred the night before the Assembly vote—was evidence of Silver's intent and the *quid pro quo* arrangement, making it less likely that the jury convicted Silver based on the meeting alone.

More Significant Challenge. The mesothelioma scheme presents a much more significant challenge for the government, made all the more difficult based on a statute-of-limitations issue overlaying the various categories of ''official action'' argued by the government. The mesothelioma scheme involved various acts that clearly satisfy *McDonnell* – *e.g.*, approving state grants – but some of those actions occurred outside the statute-of-limitations period, which presents a risk that the jury might have ignored those acts and instead focused on

   ISSN 1559-3185

the alleged official acts occurring within the five-year statute-of-limitations period. Further, in addressing the mesothelioma scheme and the alleged official acts occurring within the statute of limitations, the Second Circuit will have to address questions unanswered by *McDonnell*. For example, the Second Circuit will have to decide whether Silver's pressure on a non-governmental entity to hire the doctor's son constitutes ''official action'' under *McDonnell*. As the district court observed, ''it is not clear whether the Court in *McDonnell* intended to exclude from the realm of 'official acts' the use of official power to pressure a non-governmental entity or person to take action. *McDonnell* holds that exerting pressure on or advising another official to act is official action, but it is silent regarding whether using official power to pressure a non-public actor is official action.''

In addition, the Second Circuit will have to consider and weigh the conflicting inferences the jury could have drawn from the evidence relating to Silver's assistance to the doctor in securing permits. As the district court noted, ''a rational jury could have interpreted Silver's offer to help as an offer to advise [the doctor] as to the steps [the doctor] would need to take to secure the permits, which would not be official action under *McDonnell*,'' or the jury could have found that ''Silver agreed to help [the doctor] by having his own office assist in securing the permits, which might have entailed exerting pressure on another official to perform an official act under *McDonnell*.'' These issues make it less likely the Second Circuit will find any error in the jury instructions was harmless.

Heightening the government's appellate risk in *Silver*, the alleged official actions in *Skelos* (even those that might not qualify post-*McDonnell*) were much more connected in time and purpose and to ultimate conduct by the defendant that would clearly satisfy *McDonnell* (*e.g.*, a meeting followed by a subsequent vote on legislation)—making it easier for the Second Circuit to find harmless error. In *Silver*, by contrast, the challenged acts involved in the mesothelioma scheme extended over eight years and were such that the jury could have viewed them as isolated and/or unconnected in purpose, therefore falling outside the government's alleged scheme. In other words, the government argued a scheme that involved four categories of conduct—A, B, C and D—but the jury could have found a scheme that included only category D. And because some of those categories may not qualify as ''official action'' post-*McDonnell* —*e.g.*, assisting the doctor's son with getting a non-profit job—there is an increased risk to the government that the Second Circuit will reject its harmless error arguments.

The Case of Robert Menendez

Aside from the *Skelos* and *Silver* appeals, *McDonnell* is also lurking in the currently pending case against Senator Robert Menendez and his friend, Dr. Salomon Melgen. *See United States v. Menendez*, No. 2:15-cr-00155 (D.N.J.). In *Menendez*, the government alleges that Menendez took official actions in exchange for bribes and other benefits from Melgen. Before *McDonnell* was decided, Menendez and Melgen moved in July 2015 to dismiss the indictment arguing that the acts alleged against Menendez were not ''official'' under Section 201. Specifically, they argued that Menendez's attempts to advocate to other government officials, particularly those in the executive branch, were not official acts. The government responded that Section 201 ''defines the term 'official act' broadly,'' and argued that ''Menendez's calls and meetings with a U.S. Ambassador, the Secretary of Health and Human Services, and other high-level officials, as well as other letters, emails, and phone calls from members of defendant Menendez's staff to influence Executive Branch officials on defendant Melgen's behalf . . . fall squarely within the parameters of what courts have considered to be 'official acts' under Section 201.'' In making this argument, the government relied on the Fourth Circuit's (now-vacated) decision in *McDonnell* as support for its argument.

The district court denied the motion to dismiss, appearing to find it significant that Menendez's advocacy ''stretched across four different Executive Branch departments and agencies, and reached as high as a cabinet secretary.'' Further, the court noted Menendez's ''formal legislative power'' over the subject of his advocacy, along with his purported threats to call hearings and compel testimony to achieve benefits for his friend Melgen. After the court denied his various motions to dismiss, Menendez appealed to the Third Circuit on Speech or Debate Clause grounds and lost. *See United States v. Menendez*, No. 15-3459, 2016 WL 4056037 (3d Cir. July 29, 2016). It seems likely, especially considering the government's extensive reliance on the Fourth Circuit's *McDonnell* decision in earlier briefing, that Menendez will file a renewed motion to dismiss the indictment using the Supreme Court's *McDonnell* decision as a cudgel. And even if Menendez loses his motion to dismiss again, one thing is fairly certain: the district court will have a new and explicit guide on how to fashion its ''official acts'' jury instruction based on the Chief Justice's extensive analysis in *McDonnell*. It will be up to a jury to decide whether the government's evidence meets this heightened test.

Outside the DOJ's pursuit of public corruption, *McDonnell* has also impacted at least one high-profile state prosecution. In Utah, state prosecutors recently decided to dismiss charges against former Utah Attorney General Mark Shurtleff based in part on *McDonnell*. The prosecutor cited *McDonnell*'s ''significant narrowing of the chargeable elements and conduct'' of bribery charges, which the prosecutor had to ''accept and adhere to in interpreting and applying analogous provisions in the Utah code.''

McDonnell's Impact On DOJ Moving Forward

The *McDonnell* decision will impact the DOJ's prosecution of public corruption in at least two ways. First, the DOJ will have to be more precise in identifying and proving the ''official action'' in question. Arguments like those in *Skelos* – where the DOJ made such arguments as ''[e]very time the senator met with'' a lobbyist, ''that's official action''—are now clearly out of bounds. Instead, the government will have to put forward evidence of a formal exercise of governmental authority in order to satisfy the first prong of the *McDonnell* test. This aspect of *McDonnell* will limit the instances in which the government can proceed with criminal charges, even if—as in *McDonnell*—there is

clear evidence of benefits (or the ''*quid*'' side of the *quid pro quo* requirement) flowing to a public official. As Chief Justice Roberts suggested in *McDonnell*, ''tawdry tales of Ferraris, Rolexes, and ball gowns,'' standing alone, will not suffice.

It remains to be seen how lower courts will interpret and apply *McDonnell*'s mandate that the ''pertinent 'question, matter, cause, suit or controversy' . . . be something specific and focused that is 'pending' or 'may by law be brought before any public official.' '' To illustrate the resulting uncertainty, the district court in *Silver* posed the following hypothetical: ''[I]f a state legislator told a constituent, 'If you pay me $10,000 per month, I will make sure that any legislation that affects your business is to your liking,' would that be sufficiently 'specific and focused' to satisfy *McDonnell* even though there was no specific item of legislation identified?'' Pre-*McDonnell*, the answer was clearly yes. But post-*McDonnell*, both the DOJ and lower courts will have to decide how to approach cases like the district court's hypothetical, which would arguably be in tension with the ''specific and focused'' language in *McDonnell*.

Second, as alluded to above, *McDonnell* will also impact those cases in which – although there is formal governmental action sufficient to satisfy *McDonnell*'s first prong – the public official who received the alleged improper benefit is one or more steps removed from the governmental action in question. In these cases, the government will have to come forward with evidence of the public official's intent to exert pressure or provide advice in order to influence another public official with actual authority over the question or matter at issue. And the government will have to deal with a jury instruction expressly advising the jury of this requirement, which will, without question, make it more difficult for the government to prevail. Such an instruction will give the defense another foothold to argue against the government's evidence of intent (as McDonnell's defense team had tried to do before the district court).

An example of the challenges this might present to the government is the permits aspect of the government's mesothelioma scheme in *Silver*. As the district court noted, ''a rational jury could have interpreted Silver's offer to help as an offer to advise [the doctor] as to the steps [the doctor] would need to take to secure the permits, which would not be official action under *McDonnell*,'' or the jury could have found that ''Silver agreed to help [the doctor] by having his own office assist in securing the permits, which might have entailed exerting pressure on another official to perform an official act under *McDonnell*.'' Such conflicting plausible inferences make it easier for a defendant to argue reasonable doubt.

In addition, lower courts will have to determine whether other attempts to influence – beyond ''pressure'' or ''advice''—qualify post-*McDonnell*. Did the Supreme Court intend to limit ''official action'' to cases involving the exertion of pressure of providing advice (in addition to direct involvement)? Or were those just two non-limiting examples of a public official attempting to influence the actions of another public official? Time will tell.

Conclusion

The Supreme Court's decision *McDonnell* has changed the landscape of the DOJ's pursuit of public corruption. Moving forward, the DOJ will have to contend with *McDonnell* in the appeals in Skelos and Silver and in the upcoming trial of Senator Menendez. With respect to new cases, the government will have to focus its cases on formal exercises of governmental authority. Meetings, calls and other informal exercises, even if in a public servant's ''official'' capacity, will not be enough. And again, in cases where the official is one step removed from the governmental action in question, the government will have to satisfy a heightened burden with respect to the public official's intent.

  WCR ISSN 1559-3185