

Gov't Use Of Travel Act To Charge Corruption Might Backfire

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In the last several years, the U.S. Supreme Court has drastically reduced the ability of prosecutors to use federal corruption statutes in a broad manner. Its decisions, first limiting the scope of honest services fraud in *Skilling v. U.S.* to only include bribery and kickbacks, and then restricting the types of “official acts” that can be part of a quid pro quo arrangement in *McDonnell v. U.S.*, has upended convictions of high-ranking public officials across the country. Prosecutors are now limited in their ability to use federal extortion, bribery and fraud statutes to investigate and charge what used to be run-of-the mill corruption cases. Because the Supreme Court has raised issues with the constitutionality of the federal statutes if they were interpreted more broadly, a legislative fix may be unlikely without more clarity from the court.



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While federal prosecutors adjusted to *Skilling* by charging a narrower set of cases, they are now using state corruption laws as a hook to bring federal charges because of the great impact of *McDonnell*. That’s possible with the Travel Act, 18 U.S.C. § 1952, which allows federal prosecutors to charge activities that violate state bribery laws so long the activities have any interstate nexus, such as an email, text message or telephone call that happens to occur across state lines. As such, the relevant bribery definition under the Travel Act is the underlying state statute, rather than the federal bribery statute. Recent examples of this tactic are the criminal allegations involving NCAA basketball coaches. Federal prosecutors may be hoping that Travel Act charges avoid the Supreme Court’s narrowing of federal corruption statutes. But by using state corruption laws in these cases, federal prosecutors risk having *McDonnell* extend to state crimes and crippling local corruption prosecutions everywhere.



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A question remains as to whether *McDonnell* extends to all state bribery statutes, or if prosecutors are able to use these local crimes to charge corruption under the Travel Act. The answer may depend on how restrictive each state’s legislature wrote its statute. And the more restrictive the statute, the less of a benefit it is to prosecutors.

The federal corruption statutes at issue in *McDonnell* did not define what an “official act” was. The Supreme Court expressed “concern ... that ... the term ‘official act’ is not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does

not encourage arbitrary and discriminatory enforcement.” The Supreme Court therefore expressed concerns with both the vagueness of the federal corruption statutes and the selective prosecution of these statutes.

While the Supreme Court focused on definition of “official act,” not every federal corruption statute even used the term. The Supreme Court instead added the necessity to prove an “official act” into each federal corruption statute based on its concerns the statutes would be unconstitutionally vague and arbitrarily and selectively applied otherwise. It then looked to a different federal corruption statute — one that was not charged in McDonnell and is only applicable to federal officials — because it used the term “official act” and defined the term in a narrow way. The Supreme Court then required prosecutors to use this narrow definition of “official act” even with those federal corruption laws that did not contain the term in the statute. In other words, the Supreme Court decided that adding the requirement to prove an “official act” and using a restrictive definition of the term was better than living with the consequences of statutes and jury instructions that did not require official acts or define the term.

The viability of using the Travel Act to charge corruption cases can be best analyzed, then, based on the language of state laws that are used as the “hook.” If the state statutes provide officials with notice of what violates the law and limits the risk of arbitrary and discriminatory enforcement of the statutes, McDonnell should not apply. On the other hand, the state laws may be unconstitutionally vague or subject to McDonnell’s limitations if the statutes are too broad and do not explicitly state which acts violate them.

To take one state as an example, California prohibits bribes given to a public official with intent to “influence him in respect to any action, decision, vote, opinion, or other proceeding as such officer.” Although the penal code does not use the term “official act,” it explicitly states what violates the law: (1) actions, (2) decisions, (3) votes, (4) opinions, or (5) other proceeding as such officer. California’s law therefore is somewhat clearer and more precise than the federal statutes at issue in McDonnell. A public official in California is on notice that taking money in exchange for influencing a decision, vote, opinion, or “proceeding” violates the law. Accordingly, four of the five acts under the penal code might still be crimes after McDonnell. The California statute’s use of the term “any action,” however, may be too broad and vulnerable to a vagueness challenge under McDonnell.

The federal Travel Act charge against University of Southern California basketball coach Tony Bland might be even more vulnerable to a vagueness challenge because federal prosecutors used a different California penal code — commercial bribery — as their “hook.” That California law criminalizes an employee “using or agreeing to use” his position “for the benefit of that other person” in exchange for money. The statute might not be specific enough to put employees on notice of what actions, taken in exchange for money, could violate the law. Under McDonnell, California’s commercial bribery law may also be unconstitutionally vague because it is subject to prosecutorial abuses.

As another example, Illinois criminalizes bribery of a public official that is committed “[w]ith intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness.” This statute does not restrict the act to be performed and is therefore similar to the federal corruption statutes narrowed by McDonnell. Illinois’ terminology including “any act related to the employment or function” might on its face criminalize the type of activities the Supreme Court decided were not criminal: hosting events, talking to other public officials, or setting up meetings. If used as a hook for federal charges under the Travel Act, this state law would likely be narrowed based on McDonnell to a small set of acts or deemed unconstitutionally vague.

During the McDonnell oral argument and in its opinion, the Supreme Court expressed concern with statutory vagueness and overzealous prosecutors. These issues are not limited to federal statutes and courts. Federal prosecutors' use of the Travel Act, however, may cause the underlying state crimes to be tested under McDonnell more quickly than what might otherwise happen. If federal courts base their decisions on the McDonnell reasoning, some state laws will be restricted or declared unconstitutional. Others that are narrow and more explicit might be upheld. But narrow statutes are not what federal prosecutors are looking for — they already have them thanks to McDonnell. Accordingly, while the Travel Act might give prosecutors marginal benefits, using state statutes as underlying charges will not bring prosecutors back to their glory days of having corruption laws of broad applicability.

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