



The Supreme Court's 2016 decision in [*United States v. McDonnell*](#) raised questions about the constitutionality of expansive interpretations of federal bribery statutes.



However, the bribery statute at issue in *McDonnell*—quid pro quo corruption defined at [18 U.S.C. § 201\(a\)\(2\)](#)—is not the only bribery statute in federal prosecutors' toolbox. Since *McDonnell* was decided, federal prosecutors have increasingly relied on [18 U.S.C. § 666](#) to pursue bribery charges that might otherwise be precluded by *McDonnell*'s holding. Prosecutors relying on a broad reading of § 666 got a win on August 9, 2019, as the [Second Circuit upheld](#) the conviction of a defendant found guilty of paying bribes in violation of 18 U.S.C. § 666. The defendant—Ng Lap Seng—argued on appeal that *McDonnell* limited the scope of § 666 and that the government's bribery charges against him violated the limits established by *McDonnell*. Continuing a trend seen in other circuits, the Second Circuit rejected Seng's argument, paving the way for future bribery prosecutions under a broad reading of § 666. **No "official acts" needed in § 666 bribery** § 666 prohibits individuals from soliciting "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of an organization, government, or agency." It is distinct from the general definition of bribery under federal law which is limited to bribes given for "official acts" (defined as "any decision or action on any question...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."). § 666 bribery, in contrast to § 201, contains no reference to "official acts." The primary limitations on § 666 are financial in nature: the statute only applies to bribes exceeding \$5,000 involving an agent at an organization that receives over \$10,000 in annual federal assistance. **McDonnell's limits on federal bribery** In *McDonnell*, the Court unanimously vacated former Virginia Gov. Robert McDonnell's convictions for honest services fraud and Hobbs Act extortion. The government alleged that Gov. McDonnell received financial support and lucrative favors from businessman Jonnie Williams in exchange for then-Gov. McDonnell's help securing research studies for a drug made by Williams' company. The "official acts" McDonnell was alleged to have taken in that case consisted of arranging meetings for Williams with Virginia officials, contacting Virginia officials on Williams' behalf, and hosting events for Williams' company. Concerned that traditional political activities could be swept within the ambit of criminal liability by so broad a reading of "official acts," the Supreme Court interpreted the applicable statute so that bribery requires the government to show an official act that is specific and pending before a public official that involves the formal exercise of governmental power; it must be something "relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." Secondly, *McDonnell* requires that the government show that the official took or agreed to take a definite decision or action on that question or matter. Decisions about setting up a meeting or organizing an event do not constitute such decisions or actions. **Second Circuit's prior application of McDonnell to § 666 bribery** Ng Lap Seng was convicted for bribery under § 666. The Second Circuit had [previously](#) distinguished § 666 from the laws at issue in *McDonnell*, noting that § 666 does not incorporate the "official acts" limitation present in the definition of bribery underlying honest services fraud and Hobbs Act extortion. But in 2017's [United States v. Skelos](#), the Second Circuit summarily vacated a § 666 conviction due to the district court's failure to instruct the jury in a manner that comported with *McDonnell*. As a result, the limiting effect of *McDonnell* on § 666 prosecutions was in flux as Seng appealed his conviction. **United States v. Ng Lap Seng** In an opinion penned by Judge Raggi, the Second Circuit unanimously held that the official acts requirement established in *McDonnell* does not apply to § 666 bribery. The Court reasoned that *McDonnell*'s analysis was limited to the statutory definition of bribery it was interpreting—18 U.S.C. § 201(a)(3). The Second Circuit further found that the constitutional concerns that motivated *McDonnell*'s narrowed reading of § 201 did not apply with the same force to § 666. **A crack in the door** That said, the Second Circuit's reasoning in *Seng* leaves open the possibility of a *McDonnell*-based challenge to § 666. The court noted that Seng's argument that § 666 violates the "void for vagueness" doctrine was brought "as-applied" to his case rather than on the face of the statute. A "void for vagueness" argument claims that the defendant was not reasonably on notice of the unlawfulness of their conduct. This was a significant concern for the Court in *McDonnell* where Chief Justice Roberts openly worried that, under the broad interpretation of § 201, "nearly anything a public official accepts—from a campaign contribution to lunch—counts as quid; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as quo." The Second Circuit analyzed the particular facts of Seng's case to see if he may have lacked notice of the criminality of his conduct. Noting

the particular egregiousness of Seng's conduct (the jury found that he paid over \$1 million seeking help from U.N. ambassadors to procure a contract with the U.N.), the court rejected this argument. That does not mean, however, that in a case closer to Chief Justice Roberts' hypothetical § 666 would not be limited along the lines by which *McDonnell* cabined § 201. **Broad definition of bribery applies** For now, the Second Circuit has joined the the Third, Fifth, Sixth, and Eighth Circuits in holding that *McDonnell* is limited to bribery statutes with an "official act" element. The Supreme Court may yet decide to limit the scope of § 666 bribery, but until it does, practitioners should be wary of viewing *McDonnell* as outlining a safe harbor in the public corruption space.

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