

# Prosecuting Public Corruption Post-McDonnell: The Sheldon Silver Update

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On May 11, 2018, following a two-week jury trial in federal district court in Manhattan, former New York State Assembly Speaker Sheldon Silver was found guilty – for a second time – on multiple charges of honest services mail and wire fraud, Hobbs Act extortion, and money laundering arising from his role in two criminal schemes to misuse his official position for personal financial gain. Silver’s retrial conviction – along with the July 17, 2018 convictions following a retrial of former New York State Senate Majority Leader Dean Skelos and his son Adam Skelos on federal charges of bribery, extortion, wire fraud, and conspiracy – demonstrates that, even after the Supreme Court narrowed the definition of “official action” in its *McDonnell* decision in 2016, federal prosecutors retain powerful tools to charge and combat public corruption.

Sheldon Silver was first found guilty by a jury on honest services fraud, extortion, and money laundering charges in November 2015 and was subsequently sentenced to 12 years in prison. In charging the jury at this first trial on the meaning of “official acts” – in exchange for the performance of which, as Speaker and member of the Assembly, Silver was alleged to have received roughly \$4 million in referral fees from third-party law firms – the district court trial judge adopted a broad definition of the term that essentially included *any* action taken by a government official under color of official authority. Although this definition was consistent with the Second Circuit’s precedent at the time the jury charge was given in 2015, in June 2016 the Supreme Court – in its landmark *McDonnell* decision – adopted a much narrower definition of “official act” in connection with bribery and other “quid pro quo” public corruption offenses, including honest services fraud and Hobbs Act extortion. In his appeal of his initial

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conviction, Silver argued that the trial court's charging language was inconsistent with the by-then controlling *McDonnell* case. In vacating the conviction and remanding the case to the district court, the Second Circuit Court of Appeals agreed with Silver.

At the time of the remand, Acting U.S. Attorney Joon H. Kim had said: "[W]e look forward to presenting to another jury the evidence of decades-long corruption by one of the most powerful politicians in New York State history. Although it will be delayed, we do not expect justice to be denied." In its remand decision, the Court of Appeals did *not* find that the evidence presented at the first trial was insufficient for a properly instructed jury to convict Silver. And the evidence presented by the government at the retrial – in accelerated fashion: the first trial took a month, the retrial less than two weeks – was essentially the same as the evidence presented at the first trial. What changed was the jury charge on the definition of "official act," delivered by trial Judge Valerie E. Caproni this time to conform with the *McDonnell* decision, under which "official act" encompasses only "a decision or action on a question, matter, cause, suit proceeding or controversy" involving a *formal* exercise of government power. As required by *McDonnell*, the jury charge at the Silver retrial did not allow room for a jury to improperly consider that "official act" might include such informal actions by a public official as merely setting up meetings, calling other officials, or hosting an event.

As this article "went to press," the jury in the *Skelos* retrial returned guilty verdicts on all counts against the former State Senate Majority Leader and his son. As in the *Silver* case, following initial convictions in 2015, the *Skelos* cases had been remanded for re-trial in light of the *McDonnell* decision. Dean Skelos had not testified at his initial trial, but he did take the stand in his own defense at his retrial. His unusual decision to testify was seen by some experts as an indication that, without at least some testimonial rebuttal, the government's evidence that Skelos "sold" official acts was powerful enough to obtain a conviction – regardless of how circumscribed the definition of "official act" may be post-*McDonnell*. As it turns out, the government's evidence was strong enough notwithstanding Skelos' personal testimony.

**\*The content of this article has been updated since its original publication.**