


NAVIGATING DIFFERENCES IN DOMESTIC PUBLIC BRIBERY LAWS IN THE USA, THE UK, BRAZIL AND FRANCE

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Recent public corruption scandals have highlighted the differences in public corruption laws around the world at a time when activities of this sort are more and more frequently investigated across global jurisdictional lines. This article analyses public corruption laws in the US, the UK, Brazil and France, with a specific emphasis on what sorts of activities a public official must undertake (or agree to undertake) to be guilty of public corruption in those jurisdictions.

THE US

Federal public corruption prosecutions in the US are brought under one or more of a handful of statutes. The statutes vary in their particulars, but by and large they prohibit an illicit exchange of private goods for public acts – that is, a corrupt quid pro quo. Recently, in a unanimous decision vacating the conviction of the former governor of Virginia, Robert McDonnell, the US Supreme Court clarified what sorts of actions by a public official qualify as an "official act" (the quo).

McDonnell was indicted in 2014 and charged in part with honest services fraud, Hobbs Act extortion and conspiracy to commit each of the same based on his and his wife's dealings with Virginia businessman Jonnie Williams. Although those crimes do not themselves reference the federal bribery statute, codified at 18 USC section 201, the parties in *McDonnell* agreed to define both honest services fraud and Hobbs Act extortion with reference to the federal bribery statute. (Since McDonnell was a state official, rather than a federal official, he could not be charged directly under 18 USC section 201.) The federal bribery statute prohibits a public official from corruptly receiving anything of value in return for being "influenced in the performance of any official act". The statue defines "official act" 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.*

> *Looking ahead, the principal question for prosecutors, defence lawyers, judges, and juries may be: what is the line between non-criminal "influence" (say, advocating for a constituent) and criminal "pressure" or "advice"?*

The US Supreme Court held that "setting up a meeting, calling another public official or hosting an event does not, standing alone, qualify as an 'official act'." That is so because a public official's decision to meet, call or host does not of itself qualify as an "action or decision" on a "question, matter, cause, suit, proceeding or controversy" within the meaning of the federal bribery statute – even if those meetings, calls and events relate to some pending official matter. However, the Supreme Court explained that an official act can occur if a public official either "exerts pressure on another official to perform an 'official act'" or "provides advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." Because the jury that convicted the McDonnells had not been instructed accordingly, their convictions had to be vacated.

The effect of *McDonnell* is still playing out. Certain practical consequences necessarily followed. Most immediately, prosecutors declined to retry the McDonnells following the Supreme Court's vacatur. And other high-profile public corruption convictions in New York obtained before *McDonnell* was

decided – those against former Assembly speaker Sheldon Silver and former Senate majority leader Dean Skelos – were also vacated on appeal in *McDonnell*'s wake owing to incorrect jury instructions. Unlike in *McDonnell*, however, prosecutors opted to retry both Silver and Skelos. In retrials with modified jury instructions, Silver and Skelos were again convicted.

Perhaps most notable is what courts have understood *McDonnell* to have not disturbed. Most significantly, courts have rejected defence arguments that *McDonnell* invalidated the "stream of benefits" or "as opportunities arise" theory of bribery. Under this theory, bribery encompasses paying a public official the equivalent of a "retainer" with the expectation that he will perform a not-yet-specified official act later on. In cases against Silver, Skelos and US senator Robert Menendez (whose trial resulted in a hung jury and who was not thereafter retried), courts have reasoned that so long as the action that the official ultimately takes, or agrees to take, qualifies as an official act under *McDonnell*, the "as opportunities arise" theory of bribery remains viable.

Looking ahead, the principal question for prosecutors, defence lawyers, judges and juries may be: what is the line between non-criminal "influence" (say, advocating for a constituent) and criminal "pressure" or "advice"? The line may become clearer as courts – and juries – offer answers in particular cases.

THE UK

The UK Bribery Act 2010 (the Bribery Act) came into force on 1 July 2010 and codified the previously fragmented laws on bribery. The Bribery Act introduced a strict anti-bribery regime, which applies to private entities and individuals, and to domestic and foreign public officials. The regime establishes the offences of giving or receiving bribes, and a separate offence of bribery of foreign public officials. The Bribery Act also introduced a new corporate offence of failure to prevent bribery, which applies to commercial organisations unless they can establish a defence by proving that the business had adequate procedures in place designed to prevent associated persons from undertaking such conduct.

Under the Bribery Act, the offences of giving and receiving bribes apply equally to public and private functions and are applicable to all functions of a public nature. The relevant threshold is that in the performance of the relevant function or activity there is an expectation that the function will be carried out in good faith, or impartially, or that the person performing it is in a position of trust. The Bribery Act has lowered the threshold that applies to public officials receiving advantages, and differs from the *McDonnell* standard as it does not require any formal exercise of governmental power and applies to a broader range of functions of a public nature.

Even though these provisions governing domestic bribery have changed little over the course of the years, the cases are, as always, fact-driven and generate substantial debate before the courts

While there have been no cases regarding domestic public officials under the Bribery Act, the UK is also a party to the Criminal Law Convention on Corruption (the Convention), which came into force on 1 April 2004. The Convention requires signatory states to criminalise both active and passive bribery of domestic public officials. Passive bribery has a broad scope and includes direct or indirect intentional requests or receipts of any undue advantages. The Convention also covers the acceptance of an offer, or a promise of an advantage, to act or refrain from acting in the exercise of the public official's functions. The key issue here is whether the person offering the bribe (or another third person) is being placed in a better position, where they are not entitled to the benefit. There does not need to be an explicit breach of duty, and the person carrying out the act does not need any discretion to act as requested.

BRAZIL

In Brazil, Operation Car Wash – a long-running criminal investigation into corruption at state-owned oil company Petrobras – has yielded dozens of convictions of public officials and corporate executives. Brazil has pursued individual public corruption convictions under its criminal laws, and in 2014 it codified a new law that holds entities civilly liable for public corruption.

The two main public bribery provisions of the Brazilian Criminal Code, articles 317 and 333, cover "passive corruption" (the receipt of bribes by public officials) and "active corruption" (the payment of bribes to public officials). The two provisions operate in tandem to criminalise the quid and quo aspects of public bribery.

Passive corruption prohibits a public official from:

> *requesting or receiving on his or her own account, directly or indirectly, even where outside the function or before taking it on, but on account of it, any improper advantage, or accepting the promise of such advantage.*

Active corruption is defined as "offer[ing] or promis[ing] undue advantage to an official in order to convince him to act, fail to act, or hold back an official act." Both active and passive corruption are punishable by up to 12 years of imprisonment, and penalties can increase by one-third if, as a result of the bribe, the public official performs, neglects or delays an official act. Where a public official violates his or her functional duty but receives no undue advantage, the penalty is significantly lower (detention of three months to one year or a fine).

Brazil has also significantly expanded its public corruption laws in recent years. In January 2014, Brazil enacted the Clean Company Act (CCA), under which companies are subject to strict administrative and civil liability if their employees or agents engage in certain prohibited conduct that benefited the company. Among the CCA's prohibited conduct is the bribing of public officials and the improper interference with public tenders or contracts.

FRANCE

French law provisions regarding corruption of national public officials have not been substantially amended in recent years (though those governing corruption of foreign officials have been reinforced through a December 2016 law, known as "Sapin II"). With regards to officials (French or foreign), corruption is defined in essence as the conferring of an undue advantage in exchange for an official to carry out or to abstain from carrying out "an act relating to his function, duty or mandate, or facilitated by his function, duty or mandate." Article 432-11, 1° of the French Penal Code deals with "passive corruption" (ie, the liability that attaches to the public official receiving the undue advantage), and article 433-1, 1° deals with "active corruption" (ie, the liability that attaches to the person who confers the undue advantage to the public official).

The expression "official" is not used

by the French Penal Code, which instead enumerates categories of persons whose corruption is prohibited. These include:

- persons who "hold public authority" (for example, agents of an administration);
- persons who "discharge a public service" (for example, employees of companies discharging a public service);
- persons who "hold a public electoral mandate" and;
- judges and others involved in judicial proceedings.

Separate provisions govern corruption of private individuals.

As previously mentioned, corruption is committed not only when a public official carries out an "official act" per se (for example, awards a permit in exchange for a kickback) but also when they undertake an act which is merely facilitated by their official functions. A case involving an employee of the French state-owned energy company Électricité de France SA (EDF) is illustrative. The EDF employee had communicated information concerning procurement contracts under consideration by EDF in exchange for free repair works The French Supreme Court held that, although the communication of such information was not part of the employee's functions, it was facilitated by them, which was enough to secure a conviction.

In addition, the French Penal Code distinguishes between corruption and "influence peddling", the latter being defined as the abuse by a person, including a public official, of his or her "real or supposed influence in order to obtain [a favorable decision] from an authority or public administration" in exchange for an undue advantage. Article 432-11, 2° of the French Penal Code prohibits passive influence peddling, and article 433-1, 2° prohibits active influence peddling. Under French law, it is therefore a prohibited use of one's influence to "act as an intermediary for the obtaining of a favorable decision" from an authority or public administration in exchange for an undue advantage.

Even though these provisions governing domestic bribery have changed little over the course of the years, the cases are, as always, fact-driven and generate substantial debate before the courts. French law governing international corruption, by contrast, has undergone a sea change in recent years, particularly with the enactment of Sapin II, which allows for French-style deferred prosecution agreements and, in certain circumstances, for the prosecution of non-French nationals.

There are potentially subtle differences between the domestic bribery laws of one country and those of another – differences that merit careful consideration in matters that may be investigated across multiple jurisdictions. The same applies (though lies beyond the scope of this article) to multi-jurisdictional investigations of bribery of foreign officials.

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