

# Ortiz Successor Faces Uphill Climb In Mass. Corruption Cases

Law360, Boston (December 22, 2016, 10:34 PM EST) -- It has been a momentous week for allegedly corrupt Massachusetts public officials and the prosecutors who love to pursue them: Just two days after an appeals court in Boston reversed one of U.S. Attorney Carmen Ortiz's signature victories, Ortiz announced that she was stepping down.

The First Circuit has given her successor much to think about.

The appellate court's [decision Monday](#) in the case of three Massachusetts Probation Department officials who allegedly traded jobs for political favors should, like the [U.S. Supreme Court's](#) McDonnell decision that it prominently cites, give prosecutors pause about getting too creative with federal criminal laws, local defense attorneys say.

Ruling in the case of disgraced Probation Commissioner Jack O'Brien and two of his top deputies, the First Circuit strongly embraced the high court's [June decision](#) in McDonnell v. U.S. overturning the corruption conviction of former Virginia Gov. Robert McDonnell.

The First Circuit panel in the O'Brien case not only articulated a higher bar for so-called gratuities violations, but also pulled back on the ever-expanding criteria for mailings that can count as mail fraud.

And the U.S. attorney's office, regardless of who leads it in 2017, will face this tough new landscape right away: It's prosecuting two Boston city officials who stand accused under the federal Hobbs Act of extorting a concert series by withholding permits until it hired union labor. Lawyers for those officials, like the probation officials' lawyers before them, say the prosecution is impossible to square with the McDonnell decision.

The probation officials' acquittal on appeal will give the Boston officials new ammunition for dismissal motions and post-verdict arguments. Expect to see the name O'Brien in those documents for years to come.

Joseph F. Savage Jr., a [Goodwin Procter LLP](#) attorney who previously served as the chief of the public corruption unit in the U.S. attorney's office, said O'Brien and McDonnell are part of a string of cases putting prosecutors on notice.

"They're all sending the same message," Savage said. "It's something that every U.S. attorney around the country needs to keep in mind."

The mail fraud portion of the O'Brien decision, while overlooked in the immediate aftermath, could be the most immediately relevant, Savage said. Courts have been reluctant to impose limits on what counts as furthering a mail fraud scheme.

But in the present case, the panel ruled that prosecutors had failed to show that the mailings — rejection letters to unsuccessful candidates — were anything other than routine, vague platitudes to the disappointed lot.

Like Savage, white collar defense attorney Joshua Levy of [Ropes & Gray LLP](#) said that the mail fraud portion of the O'Brien decision was among the most significant. It will make the crime more difficult for prosecutors to prove — and potentially make them more wary of bringing charges in the first place.

“That’s been a very loose standard over the years,” Levy said. “That was a big part of that decision. It’s going to affect more than just public corruption cases.”

Ortiz’s office declined to comment on the O'Brien case. An Obama appointee, she was expected to step down given the election of Republican Donald Trump, and while her announcement came after the O'Brien decision was released, she submitted her resignation to the [U.S. Department of Justice](#) beforehand. Her permanent replacement has not been announced.

Whoever is chosen will enter a legal landscape much different from the one Ortiz faced when she took office in 2009. Ortiz quickly gained a reputation as a tough prosecutor unafraid to take on high-profile cases, but 2016 has battered her legacy.

Savage listed a handful of recent high-profile prosecutions in Massachusetts that have failed, including a case against his own client, former [Warner Chilcott](#) president Carl Reichel, who in June was quickly acquitted of bribing doctors. Meanwhile, in July, two former Acclarent Inc. executives were acquitted of felony fraud charges, convicted only on misdemeanors instead. And three people were acquitted in April in an alleged scheme to hide a man’s ownership in land that [Wynn Resorts](#) bought to develop a casino — Ropes & Gray's Levy represented one of the defendants in the Wynn case.

“Jurors are sending the office a message that maybe you ought to relook at whether you’ve actually got evidence for what you feel strongly about,” Savage said. “That’s a lot in one year. The responsible people in that office will take that to heart.”

Levy similarly said 2016 saw an unusual number of losses for prosecutors and he expected it would give them reason to scrutinize their decisions.

Martin Weinberg, an attorney for O'Brien co-defendant Elizabeth Tavares, said the O'Brien decision will

send a signal, like McDonnell before it.

"I think the overall takeaway from the synergy of these two cases, McDonnell and Tavares, is that when prosecutors construct a theory that goes outside the very core of federal statutes, courts are going to scrutinize whether or not the evidence matches the purposes of the federal criminal law," Weinberg said.

Thomas Kiley of [Cosgrove Eisenberg & Kiley PC](#), an attorney for one of the Boston city officials in the extortion case, declined to talk about that case specifically. But he said that the kind of patronage alleged in the O'Brien case has been an American tradition since the age of Lincoln. Another American tradition, Kiley said: Prosecutors who overstep their bounds and are brushed back by the courts.

"When the federal government stretches these elastic statutes like the Hobbs Act, like RICO, when the federal government prosecutors stretch the law too far, and intrude too greatly in areas that are traditional state police power, there is the occasional snap back," Kiley said.

The O'Brien case is U.S. v. Tavares et al., case numbers 14-2313, 14-2314 and 14-2315, in the U.S. Court of Appeals for the First Circuit.

--Editing by Mark Lebetkin and Jill Coffey.