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Can A Private Citizen Perform An Official Act?

By Harry Sandick and George Fleming

Over the last several decades, the Supreme Court has taken steps to limit the reach of honest services fraud prosecutions. As far back as the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 360 (1987), in which the Supreme Court struck down the doctrine under the mail and wire fraud statutes, the Court has declined to construe those statutes "in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards … of good government for local and state officials." Even after Congress resurrected the doctrine by statute, the Court has continued to prevent the law from being used in a manner that deprives defendants of their right to due process. While it is understandable that prosecutors would seek to use whatever tools they have to punish "deception, corruption, abuse of power" and other forms of wrongdoing, "not every corrupt act by state or local officials is a federal crime." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020). In this article, we discuss the importance of the "official act" requirement established in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and how its logic should lead to a parallel requirement that private citizens should not be chargeable with the commission of official acts as part of a scheme to deprive the public of honest services.

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The 'Official Act' Requirement In *McDonnell*

McDonnell involved the federal prosecution of former Virginia Governor Robert McDonnell and his wife for honest services fraud and Hobbs Act extortion relating to their acceptance of gifts and loans from a Virginia businessman whose companies were attempting to persuade public universities in Virginia to perform research studies on a drug developed by those companies. 136 S. Ct. at 2361-63. At trial, the prosecutors and defense counsel all agreed that the court should define honest services fraud by reference to 18 U.S.C. §201, the federal bribery statute that makes it a crime to receive or accept anything of value in exchange for being "influenced in the performance of any official act." *Id*. at 2365. That statute defines an 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." *Id*. (quoting 18 U.S.C. §201(a)(3)). In this case, McDonnell's actions involved setting up a meeting for the businessman and talking to other state officials. The question for the Supreme Court was whether these were "official acts" under the federal bribery statute.

Based on a close reading of the relevant statute, the Court explained that an "official act" is narrowly defined and provided three examples. First, "an 'official act' is a decision or action on a "question, matter, cause, suit, proceeding or controversy'" that "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id*. at 2371-72. Second, a public official commits an official act when he "us[es] his official position to exert pressure on *another* official to perform an 'official act.'" *Id*. at 2370, 2372 (emphasis in original). Finally, "if a public official uses his official

position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official, that too can qualify" as an official act. *Id*. at 2370, 2372. Based on this definition, the Court vacated McDonnell's conviction, as "[s]etting up a meeting, talking to another official, or organizing an event … without more … does not fit [the] definition of 'official act.'" *Id*. at 2372, 2374-75.

The Court explained in detail its rationale for rejecting the broader interpretation of "official act" urged by the government. Much of its reasoning arose out of a policy concern: that the government's interpretation would criminalize a host of ordinary conduct by elected politicians, who often meet with constituents to discuss matters of concern. "In the government's view, nearly anything a public official accepts — from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event — counts as a *quo*." *Id*. at 2372. The Court was not inclined to defer to the government on the assumption that prosecutors would use their authority wisely. In addition, allowing federal prosecutors this type of latitude would "raise[] significant federalism concerns" by depriving States of the "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *Id*. at 2373.

The *Percoco* Decision

The reach of the "official act" definition set forth in *McDonnell* was implicated in a recent Second Circuit decision involving the prosecution of Joseph Percoco, a former close advisor and friend of now-former New York State Governor Andrew M. Cuomo. Percoco was charged with conspiracy to commit honest services fraud. *See, United States v. Percoco*, 13 F.4th 180 (2d Cir. 2021). At the time of the conduct alleged in the indictment, Percoco held no government office; he was working for Cuomo's re-election campaign. This made an aspect of Percoco's prosecution problematic: a core principle underlying honest services fraud is that public officials are entrusted with governmental authority, giving rise to a special duty of loyalty to the public they serve. Despite this, the district court instructed the trial jury that Percoco "did not need to have a formal employment relationship with the state in order to owe a duty of … honest services to the public," so long as he "owed the public a fiduciary duty." According to the district court's instructions, Percoco owed such a duty if he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." On this instruction, Percoco was convicted and his appeal has now been affirmed by the Second Circuit.

In its decision, the Circuit expanded the scope of honest services fraud to include acts by private citizens who exert a level of control over government decisions. To get there, the Court relied on *United States v. Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982), a Second Circuit case from almost 40 years ago and that has since been abrogated by the Supreme Court. In that case the Circuit held (over a forceful dissent by the late Judge Ralph K. Winter) that honest services fraud — under the mail fraud statute, 18 U.S.C. §1341 — did not require a formal employment contract between the defendant and the government, so long as the defendant exercised "domination" over government. In deciding *Margiotta*, the Circuit relied not on the statutory language of Section 1341 or on federal case law, but rather on agency principles of New York common law. The Supreme Court abrogated *Margiotta* in *McNally*, when it rejected the entire premise of honest services fraud on the ground that the federal wire fraud statute only covered tangible property. Congress, however, revived the doctrine when it enacted the honest services fraud statute, 18 U.S.C. §1346. With the doctrine reinstated, the Court found *Margiotta* instructive (though not precedential) on the question of who can be prosecuted for honest service fraud.

Notably, the Supreme Court never endorsed the rule announced in *Margiotta*. Nor did Congress when it enacted Section 1346, although it certainly could have clarified the issue. Curiously, the *Percoco* Court reasoned that Congress implicitly "reinstated the *Margiotta*-theory cases," relying on a statement by then-Senator Joseph Biden. The reliance on a stray comment in the congressional record is not in keeping with the Supreme Court's disdain for legislative history. While reasonable minds could disagree on that point, other circuit courts of appeals have rejected the Second Circuit's approach, something with which the Second Circuit does not grapple. *See, e.g.*, *United States v. Murphy*, 323 F.3d 102, 104 (3d Cir. 2003), *as amended* (June 4, 2003) (opining that "*Margiotta* extends the mail fraud statute beyond any reasonable bounds"); *United States v. Holzer*, 840 F.2d 1343, 1348 (7th Cir. 1988) (characterizing *Margiotta* as "represent[ing]

the worst abuses of the mail fraud statute" because a defendant could be "convicted for conduct not even wrongful under state law").

The Second Circuit in *Percoco* also rejected the argument that its decision was incompatible with *McDonnell*'s official-act requirement. The panel pointed out first that *McDonnell* never expressly held that only public officials could violate the honest-services statute by performing official acts; it only defined the term "official act." The panel also turned to the language of Section 201, which defines a "public official" to include a person who acts "under or by authority" of a department, agency or branch of government. The Court interpreted this language to include individuals, like Percoco, who exercised influence by virtue of their informal connections to state government.

There Should Be An 'Official Position' Requirement

Given both the holding and the rationale of the Supreme Court's decision in *McDonnell*, it is hard to see how private citizens can be held responsible for the commission of an official act. The Second Circuit in *Percoco* dismissed the Supreme Court's use of the term "official position" in *McDonnell* as merely a "passing reference." But the *McDonnell* Court uses the term three times, in the precise section of the decision in which it defines an "official act." From the context, the Supreme Court's choice of words here does not seem inadvertent.

McDonnell also stressed the policy implications arising out of a broad definition of the "official act" requirement. The Court was concerned about the possibility of deterring appropriate advocacy to the government on matters of public concern and it declined to rely on the wise exercise of discretion by the government "to protect against overzealous prosecutions" under a broadly written statute. Many of the same concerns are implicated by the decision to rule that a private citizen can commit an official act, a decision with potentially sweeping implications. While the approach may make sense for true shadow government officials — think William M. Tweed effectively controlling the city and state government in New York through Tammany Hall — it becomes a harder call when applied more broadly to those who are legitimately engaged to lobby the government.

For better or worse, many private entities exert various degrees of "control" over the government. According to an analysis by Bloomberg, private individuals and companies spent approximately $3.5 billion lobbying the government in 2019 — no doubt because they expect their efforts to affect or even control government decisions. Beyond business lobbying, a wide array of interest groups, political action committees, and think tanks play a role in government decisions. Even public officials' families and friends may have influence over that official's thinking and decision making. People like Percoco — a friend of the former governor — certainly do not have a monopoly on influencing government decisions. Could honest services fraud extend to cover alleged breach of fiduciary duties by influential oil industry lobbyists (*see*, https://nyti.ms/3ppny4F) or religious institutions (*see*, https://bit.ly/3B49rEj)? It is a thin line between seeking to influence government and seeking control over the decision of government. Under the Second Circuit's expansive view of honest services fraud, it is not inconceivable that these organizations could be charged with owing honest services to the public, and therefore with the commission of official acts.

As in *McDonnell* and *Kelly*, the particular conduct prosecuted by the government in *Percoco* is easy to criticize. It also cannot be denied that there is a crisis of public confidence in the integrity of our public officials and institutions. Even so, the solution is not over-criminalization or allowing prosecutors to decide how to interpret federal statutes. Where the breadth of particular statutes "risk[s] the lack of fair warning and related kinds of unfairness," the Supreme Court has declined to "rely upon prosecutorial discretion to narrow [a] statute's scope." *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018). Here, an over-broad interpretation also creates the risk of diminishing public participation in government in ways that are likely not intended. Given these issues and the existence of a Circuit split, this issue is ripe for review by the Supreme Court.

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