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What is an Official Act? A Skeptical Court in McDonnell Looks for Limits. Is Honest Services Fraud in the Crosshairs?

May 2016

By Robert L. Walker

"What I think we're looking for is some limiting principle." In the April 27, 2016, oral argument before the Supreme Court in *McDonnell v. United States*, Justice Samuel Alito so summarized his—and, apparently, a majority of his fellow Justices'—concern over how expansively the Department of Justice has urged the Court to construe the term "official act" as used in the federal bribery statute, 18 U.S.C. Section 201.

As a former state official, former Virginia Governor Bob McDonnell was not directly charged with violation of this statute, which applies only to federal officials. But, as Deputy Solicitor General Michael Dreeben put it in his argument to the Court, the McDonnell "case has been litigated on the submission that Section 201 informed the [meaning] of 'official action' for purposes of the Hobbs Act and honest services" fraud bribery, two federal crimes with which the former governor was charged and on which he was convicted by a federal district court jury in 2014. Justice Anthony Kennedy expressed the Court's concern, and apparent frustration, with the government's broad approach to defining "official action" when—with a sharp rhetorical question—he cut off the Deputy Solicitor General's argument that it would be "absolutely stunning" for the Court to narrow the scope of federal bribery: "Would it be absolutely stunning to say the government has given us no workable standard?"

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Whether the Court will find it workable or not, Noel Francisco, counsel for Governor McDonnell, did offer a clear standard to limit the scope of "official action" in federal bribery prosecutions. In his opening gambit, Francisco argued: "In order to engage in 'official action,' an official must either make a government decision or urge someone else to do so. The line is between access to decision-makers on the one hand and trying to influence those decisions on the other." Of course, in Governor McDonnell's appeal his counsel have maintained that, throughout his dealings with lavish gift-giver and favor-seeker Johnnie Williams, the former governor stayed on the right side of this bright line, that he
was—to put it in the general terms used by attorney Francisco at the oral argument—"simply setting up a meeting so that somebody can appeal to the independent judgment of an independent decision-maker."

But even this asserted bright line between providing access to decision-making officials and trying to influence the decision of those officials soon smudged and dimmed. Chief Justice John Roberts—who through other exchanges with counsel at the argument showed himself to be significantly troubled by how broadly and inclusively the government would read the meaning of "official act"—asked if "arranging a meeting could be official government action, if that were your job." Petitioner's counsel Francisco conceded the hypothetical: "I think that's possible, Chief Justice. Of course, in this case we don't have anything like that. We simply have referrals to meetings with other officials . . .."

Justice Stephen Breyer, in his comments and questions from the bench, captured the concern with what has been called the "criminalization of politics" that many fear would result if the Court were to endorse the government's proposed broad definition of "official act." Justice Breyer expressed appreciation for the government's help in trying to find "what the right words are" to define the scope and meaning of "official act," but he continued: "I'll tell you right now if those words are going to say when a person has lunch [with a constituent] and then writes over to the antitrust division and says, I'd like you to meet with my constituent who has just been evicted from her house, you know, if that's going to criminalize that behavior, I'm not buying into that, I don't think." Justice Breyer emphasized that he is not "in favor of dishonest behavior," but saw "two serious problems" in taking the criminal law as far as the government urged: "one, political figures will not know what they're supposed to do and what they're not supposed to, and that's a general vagueness problem"; and, second, "a separation of powers problem. The Department of Justice in the Executive Branch becomes the ultimate arbiter of how public officials are behaving in the United States, state, local, and national."

Through her questions and comments suggesting that the basic flaw with the McDonnell prosecution might have been the piece-meal way in which the conduct was charged, Justice Elena Kagan appeared to indicate essential agreement with the approach to defining "official act" urged by the McDonnell legal team. In an exchange with the government, Justice Kagan noted: "This might have been perfectly chargeable and instructable, but . . . I'm troubled by these particular charges and instructions, which seem to make every piece of evidence that you had an 'official act,' rather than just saying the 'official act' was the . . . attempt to get the University of Virginia to do something they wouldn't have done otherwise."

If the Court reverses the convictions in *McDonnell*, the ramifications for the Department of Justice could go far beyond the loss of a high profile case. As noted at the outset of this article, one of the principle charges on which former Governor McDonnell was convicted at trial was honest services fraud. This criminal statute remains a tool widely used by DOJ to prosecute official corruption at the federal, state, and local levels, even after the Supreme Court in *Skilling v. United States* (2010)—to preserve the constitutionality of the statute—narrowed the scope of its application to cases involving allegations of actual bribes or kickbacks. But *McDonnell* could provide the Court with the motive, means, and opportunity to revisit and reject the compromise reasoning of *Skilling*. Of the honest services fraud statute and the *Skilling* case, the Chief Justice observed during the oral argument in *McDonnell*: "I mean, there were, what, three votes to find it [the honest services fraud statute] unconstitutional? And the others say, well, no, because you can narrow it in this way to the core definition of bribery. And now maybe—the experience we've had here, and the difficulty of coming up with clear enough instructions suggests that the caution the Court showed at that point was ill-advised."