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Expert Analysis

Public and Private Honest Services Fraud: Are They Diverging?

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In recent years, prosecutions of public corruption have often centered on whether a government official committed an "official act." The importance of that question derives from the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), in which the Supreme Court held that commission of an "official act" is required to sustain a conviction for honest services fraud and Hobbs Act violations. The Second Circuit has addressed the issue in several high-profile prosecutions of state officials. *See, e.g.*, *United States v. Silver*, 948 F.3d 538 (2d Cir. 2020).

The holding in *McDonnell* has led to the question of whether "official act" is an element of other crimes involving public and private corruption. The Second Circuit has thus far said no, holding that an "official act" need not be an element of bribery involving federal funds in violation of 18 U.S.C. §666, and foreign corrupt practices under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §78dd-1 *et seq*. *United States v. Ng Lap Seng*, 934 F.3d 110 (2d Cir. 2019); *see* Elkan Abramowitz and Jonathan Sack, Limiting the Reach of the Supreme Court's 'McDonnell' Decision, N.Y.L.J. (Oct. 1, 2019).

While honest services fraud is charged most prominently in cases of alleged public corruption, the charge is often leveled in prosecutions for dishonest conduct in corporate and other private settings, such as a purchasing manager secretly accepting bribes or kickbacks for steering business. In this light, *McDonnell* leads to additional questions: Is "official act" an element of a private as well as public honest services fraud charge? What would an "official act" mean when an individual puts her private interests ahead of the interests of her employer?

> Is 'official act' an element of a private as well as public honest services fraud charge?

In this article, after briefly summarizing the holding in *McDonnell,* we discuss cases that have begun to address whether "official act" is an element in a private honest services fraud prosecution. We focus on a recent decision by SDNY Chief Judge Colleen McMahon, *United States v. Kaufman*, 2020 WL 1446843 (S.D.N.Y. March 25, 2020), which held that "official act" is not an element of 18 U.S.C. §215, which prohibits bribery in connection with procuring loans from a financial institution. In reaching this conclusion, the court questioned whether the "official act" requirement applies at all to charges of private corruption.

'McDonnell' and Official Act

Former Virginia Governor Robert McDonnell was charged with arranging meetings and making introductions to state officials on behalf of a constituent in exchange for valuable gifts. Although the crimes with which McDonnell was charged—honest services fraud and Hobbs Act violations—do not refer to the commission of an "official act," which is found in

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the federal bribery statute, 18 U.S.C. §201, the government agreed with the defense that commission of an "official act" is an element of those crimes. The district court instructed the jury that an "official act" includes "'[a]cts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'" *McDonnell*, 136 S. Ct. at 2366 (quoting *United States v. McDonnell*, 792 F.3d 478, 513 (4th Cir. 2015)).

On appeal, the Supreme Court held that this instruction was too broad. Reading Section 201's "official act" definition narrowly, the court held that an official act involves a question or matter that (i) is "pending" or that "'may by law be brought' before a public official"; and (ii) involves "a formal exercise of governmental power." The court further held that, to be convicted, "the public official [must have made] a decision or [taken] an action *on* that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id.* at 2367-69 (citations and quotations omitted).

The court grounded its holding to a large extent in principles of federalism. The court wrote that "significant constitutional concerns" would arise if it adopted the government's more expansive interpretation of "official act." A broader definition would permit excessive involvement by federal prosecutors in state and local political affairs. *See id.* at 2373. Similar concerns were recently expressed by the Supreme Court in *Kelly v. United States*, 140 S. Ct. 1565 (2020), arising from the "Bridgegate" scandal, which held that the fraud convictions in that case rested on an overbroad theory of deprivation of public "property." The court sought to limit the ability of federal prosecutors to turn aggressive state and local political tactics into federal crimes. *See id.* at 1574.

Official Act in Private Honest Services Fraud Cases

Case law is sparse as to whether *McDonnell* applies to private honest services fraud. In *United States v. Lusk*, the district court considered the factual basis for a defendant's proposed guilty plea to an information which charged the defendant with honest-services fraud in connection with kickbacks he received from a company vendor. Accepting the proposed guilty plea, the court noted that proof of "official act" was not required because the elements of private honest services fraud differ from the elements of honest services fraud in the public sector. *See* 2017 WL 508589, at *11 n. 5 (S.D. W. Va. Feb. 7, 2017).

> The law seems to be revealing a divergence between private and public corruption charges.

Similarly, in *Elgawhary v. United States*, 2018 WL 398284, at *4 (D. Md. Jan. 11, 2018), the district court denied defendant's motion to vacate his guilty plea, which argued that, after *McDonnell*, the conduct to which the defendant had pled guilty (receiving bribes from potential subcontractors) no longer constituted a crime. The court held that because the charge involved violating a duty of honest services fraud to a private employer, the "official act" element of Section 201 did not come into play.

Reflecting continued uncertainty in the law, a judge in the Eastern District of New York, in the prosecution of corruption in professional soccer, instructed the jury that "official act" is an element of a private honest services fraud. *See United States v. Napout*, 332 F. Supp.3d 533, 549 (E.D.N.Y. 2018), *aff'd on other grounds*, *United States v. Napout*, No. 18-2750, 2020 WL 3406620 (2d Cir. June 22, 2020). The instruction used the definition of "official act" given by the Supreme Court in *McDonnell*. *Id.* at 565. Yet, it seems, following *McDonnell*, the government and defense agreed to include an "official act" instruction.

'United States v. Kaufman'

In 2019, a grand jury in the Southern District of New York returned an indictment against Alan Kaufman, CEO of Melrose Credit Union ("Melrose"), and Tony Georgiton, a member and customer of Melrose, which charged violations of 18 U.S.C. §215. Section 215 prohibits giving or receiving commissions or gifts in connection with the procurement of loans from financial institutions. *See* 18 U.S.C. § 215(a)-(b).

The indictment alleged that Kaufman approved loans to Georgiton in exchange for substantial undisclosed gifts, including living rent-free in a house owned by Georgiton, and a gift (disguised as a loan) to Kaufman to help him buy the house. In exchange, Kaufman allegedly approved loans to Georgiton; approved favorable refinancing for over $60 million of Georgiton's pre-existing loans from Melrose; and arranged for Melrose to pay over $2 million to a company owned by Georgiton for naming rights to a ballroom in Queens. According to the indictment, Kaufman took these actions without disclosing the gifts he had been given.

In February 2020, Kaufman moved to dismiss the indictment on the ground that the allegations were insufficient in

light of the Second Circuit's decision in *Silver*. In that case, former Assembly Speaker Silver argued that the district court's jury instructions on the requirement of a quid pro quo—which included promises to act "for the benefit of the payor … as the opportunit[ies] arose"—did not comport with the "official act" requirement as set forth in *McDonnell*. The Second Circuit held that *McDonnell* did not preclude an "as opportunities arise theory" of liability, but clarified that after *McDonnell*, the government must prove the public official promised to "act *on* an identified 'question, matter, cause, suit proceeding, or controversy' at the time the official accepted the bribe." *Silver*, 948 F.3d at 556 (quoting *McDonnell*, 136 S. Ct. at 2368) (emphasis in original)).

Kaufman relied on *Silver* to argue that the allegations against him—namely, that he was influenced with respect to a "variety of credit union matters," none of which he contemplated when he first began living in the home owned by Georgiton—failed to allege a quid pro quo. According to Kaufman, "[n]one of the *quo* allegations in the Indictment [were] alleged to have been a particular matter that Mr. Kaufman corruptly promised to Mr. Georgiton, let alone understood, in 2010." *Kaufman*, 2020 WL 1446843, at *4 (internal quotation marks omitted).

Chief Judge McMahon denied Kaufman's motion to dismiss the indictment, rejecting Kaufman's "foundational premise" that either *McDonnell*, *Silver*, or Section 201's "official act" requirement had any bearing on charges brought under Section 215. *See Kaufman*, 2020 WL 1446832, at *7. The court said the question was "whether Kaufman, the agent of a private financial institution charged under 18 U.S.C. §215, may rely upon cases interpreting a statute that criminalizes the bribery of public officials, 18 U.S.C. §201." *Id.* at *5. Answering that question in the negative, the court held that it saw "*no reason to intermingle the independent bodies of law dealing with public and private corruption*." *Id.* (emphasis added.)

The court looked to the plain language of Section 215, which "says nothing about 'official acts.'" *Id.* at *6. Rather, the government must prove only that the defendant accepted something of benefit while "intending to be influenced or rewarded in connection with *any* business or transaction" of the financial institution. *Id.* (citing 18 U.S.C. §215(a)(2)) (emphasis in original). This reading of the law was supported by the Second Circuit's decision in *Ng Lap Seng*, in which the court "refused to apply the *McDonnell* interpretation of 'official acts'—which, by definition, may only be taken by public officials—in the context of private sector bribery." *Id.*; *see Ng Lap Seng*, 934 F.3d at 133.

More generally, the government would not be required to allege that Kaufman agreed to undertake any "official act" to benefit Georgiton "because Kaufman is a private citizen whose prosecution does not raise the same constitutional concerns that justif[ied] the outcomes in *McDonnell* and *Silver*." *Kaufman*, 2020 WL 1446832, at *6. The prosecutions of these two prominent public officials "raised the specter of federal prosecutors violating principles of federalism, which provide states with significant leeway to 'regulate the permissible scope of interactions between state officials and their constituents.'" *Id.* (quoting *McDonnell*, 136 S. Ct. at 2373).

In the court's view, requiring proof of an "official act" is needed to prevent a problem specific to public corruption cases—over-criminalization of "any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interest." In the case of public corruption, unlike dishonest services in the private sector, prosecutions might "interfere with the core operations of a representative democracy." *Id.* at *7. Criminalizing any action by a state official that benefits a particular constituent just because that constituent gave something of value to the official would undermine "[t]he basic compact underlying representative government [which] assumes that public officials will hear from their constituents and act appropriately on their concerns." *Id.* (quoting *McDonnell*, 136 S. Ct. at 2355) (quotation marks omitted). The court held that these concerns do not bear on a prosecution for corruption outside the public realm.

Conclusion

The relevance of "official act" to a private honest services fraud prosecution remains uncertain. But the law seems to be revealing a divergence between private and public corruption charges. "Official act" has been deemed essential in public corruption prosecutions to restrain overzealous federal prosecutors. The same logic has not been extended to cases of private corruption. This may be an example of courts filling in the spaces of broad, elastic white-collar criminal statutes. Future case law will no doubt clarify these issues further.