ALM | LAW.COM

New York Law Journal

WHITE-COLLAR CRIME

Who Decides What Is an ‘Official Act’ In a Bribery Case?

By Elkan Abramowitz and Jonathan Sack

November 14, 2025

In *McDonnell v. United States*, 579 U.S. 550 (2016), the Supreme Court held that a public official must commit a corrupt “official act” in order to be guilty of bribery under the federal honest services fraud statute and the Hobbs Act.

The decision in *McDonnell* was relatively clear about what sort of conduct amounted to official action—dispositive decisions on matters within the official’s formal scope of authority—and what sort of conduct did not: making calls to set up meetings with other government officials. But that left a grey area for actions that fell short of official decision making.

That uncertainty has led to different approaches taken by trial and appellate courts when instructing juries on the official act element in federal public corruption trials.

In *United States v. Weiss*, 153 F.4th 574 (7th Cir. 2025), the Seventh Circuit held that a district court may instruct a jury as to whether the conduct at issue in a trial constitutes an “official act”; the issue is not necessarily one the jury must decide.


Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

In contrast, in *United States v. Lindberg*, 39 F.4th 151 (4th Cir. 2022), the Fourth Circuit held that the district court erred when it instructed the jury that the action at issue, the removal or replacement of an appointed official, would “constitute an official act” and reversed a conviction as a result.

In this article we discuss the *Weiss* and *Lindberg* decisions and conclude with observations on how the Second Circuit may deal with the issue. These decisions make clear that courts continue to wrestle with the official act element of bribery in public corruption cases.

Official Act

Under Section 201 of Title 18 of the U.S. Code, federal officials may be prosecuted for accepting a bribe in exchange for taking an "official act." In *McDonnell*, the court incorporated this "official act" requirement into honest services fraud and Hobbs Act prosecutions based on alleged *quid pro quo* bribery, and went further and construed "official act" more restrictively than courts had in the past.

That uncertainty has led to different approaches taken by trial and appellate courts when instructing juries on the official act element in federal public corruption trials

In that case, Virginia Governor Robert McDonnell had accepted substantial gifts from a state resident who was seeking state support for his business venture. The Supreme Court unanimously reversed McDonnell's conviction at trial, holding that the district court's jury instruction gave the jury too broad a definition of official act.

The court limited the scope of "official act" to conduct involving 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 provided examples of conduct that would qualify as an "official act," including "a decision or action to initiate a research study" or a public official's use of an 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."

The court also gave examples of conduct that would *not* qualify, such as "[s]etting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information." *McDonnell*, 579 U.S. at 572-73. The Court explained that "[i]t is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." *McDonnell*, 579 U.S. at 572.

United States v. Weiss

James Weiss was the owner of a company that manufactured sweepstakes machines. In 2018, the lawfulness of such machines was uncertain under Illinois law. According to the U.S. Attorney for the Northern District of Illinois, Weiss attempted to bribe Luis Arroyo, an Illinois State Representative, and Terrence Link, an Illinois State Senator, to support legislation that would clarify that sweepstakes machines were lawful.

In exchange for monthly payments to Arroyo's lobbying firm disguised to look like payment for legitimate consulting work, Arroyo became a very vocal proponent of passing sweepstakes legislation.

After Weiss and Arroyo met with Link and offered to pay him for his support, Link went to the FBI, and Weiss was charged with violations of 18 U.S.C. §§1341, 1343 and 1346 (honest services mail and wire fraud), 18 U.S.C. §666 (federal funds bribery), and 18 U.S.C. §1001 (false statements). Weiss was convicted after a trial.

On appeal, Weiss challenged the district court's instruction to the jury that *"[p]romoting the enactment of legislation related to the sweepstakes industry by the Illinois General Assembly is an official act"* for purposes of finding an honest services violation. *See*, Dkt. No. 320-1, *United States v. Arroyo*, 19-cr-805 (N.D. Ill. June 16, 2023) (emphasis added).

Weiss contended that the instruction erroneously directed the jury as a matter of law that the conduct in this case categorically constituted an official act, which took an element of the crime out of the hands of the jury in violation of his Fifth and Sixth Amendment rights.

Weiss contended that the instruction erroneously directed the jury as a matter of law that the conduct in this case categorically constituted an official act, which took an element of the crime out of the hands of the jury in violation of his Fifth and Sixth Amendment rights.

Although the court had held multiple jury instruction conferences during trial, defense counsel did not argue that the instruction inappropriately directed the jury on an element of the crime. Accordingly, on appeal the Seventh Circuit applied plain error review, which required Weiss to show actual error and that the error affected his substantial rights. In other words, he had to show that the verdict was probably a result of the error.

The Seventh Circuit found no plain error, relying on the fact that the Supreme Court in *McDonnell* "did not refrain from opining on what actions would constitute an 'official act' in McDonnell's case." The court interpreted these portions of the *McDonnell* decision as supporting the notion that whether the facts establish an official act may be a legal matter for a court to decide and not one for the jury.

The Seventh Circuit also looked to other appellate decisions which suggested that courts may decide whether the official act requirement has been proven. None of the cited cases, however, squarely addressed the question in *Weiss*.

One of the decisions noted by the Seventh Circuit was that of the Second Circuit in *United States v. Boyland*, 862 F.3d 279, 291-92 (2d Cir. 2017). In that case, also on plain error review, the Second Circuit addressed whether the instruction defining "official act" was overbroad after the decision in *McDonnell*, and if so, whether the conduct at issue nevertheless fit within the *McDonnell* framework.

The Second Circuit held that the definition of "official act" in the jury instructions was too broad, but the error did not affect the defendant's substantial rights.

Regardless of any error in the jury instruction, the Seventh Circuit held the instruction could not have affected the outcome of the trial. Weiss still could have argued, and he did, that his actions did not constitute inducing a public official to promote the passage of legislation, or that Arroyo's support for legislation did not rise to the level of "official act" as defined in the instructions. That gave the jury an opportunity to decide for itself whether Weiss requested an "official act."

The court found that in the “broader context” of the trial – the testimony, arguments, and subsequent instructions—the jury could have either acquitted Weiss or convicted him based on what was presented, so the one challenged sentence did not affect his “substantial rights.”

United States v. Lindberg

Greg Lindberg was the chairman of a company that owned diverse businesses, including several insurance companies subject to regulation by the Department of Insurance in North Carolina. The Insurance Department was authorized to impose limits on the percentage of investments that could be made in companies with common ownership.

A senior official in the Department expressed concern about the substantial investments that Lindberg’s insurance companies made in other Lindberg-affiliated companies. In 2016, when the new Commissioner of Insurance made this official his Senior Deputy, Lindberg made donations to the Commissioner’s campaign and urged him to hire someone else for that position.

The Commissioner went to the FBI and recorded conversations with Lindberg, who was eventually charged with conspiracy to commit honest services fraud and federal funds bribery. He went to trial and was convicted in early 2020.

On appeal, Lindberg contended that the district court erred by instructing the jury that “the removal or replacement of a [S]enior [D]eputy [C]ommissioner by the [C]ommissioner would constitute an official act.”

The Fourth Circuit agreed and relied on a portion of the *McDonnell* decision not discussed in *Weiss.* In *McDonnell*, the Supreme Court stated that the district court should have instructed the jury that it must identify a “question, matter, cause, suit, proceeding or controversy” involving the formal exercise of governmental power that is “more specific and focused than a broad policy objective.”

The Fourth Circuit in *Lindberg* concluded that the Supreme Court “clearly envisioned that it was the role of the jury to determine whether conduct constitutes an official act” by providing a “detailed framework for jury instructions” on the meaning of “official act.”

Consequently, the Fourth Circuit held that the jury instruction “impermissibly took an element of the crime out of the hands of the jury” in violation of Lindberg’s Fifth and Sixth Amendment rights. *Lindberg*, 39 F.4th at 159 (citing *United States v. Gaudin*, 515 U.S. 506 (1995) (holding jury must decide *all* elements of crime, including mixed questions of fact and law)). The error was not harmless because Lindberg was effectively prevented from arguing the disputed element or presenting evidence on the matter.

On retrial, the court relied on the framework set out in *McDonnell*, instructing the jury that “a decision or action on a qualifying step” for a pending matter before a public official, or a public official exerting pressure on another official to perform an official act” would be an “official act,” but setting up a meeting or hosting an event would not. Dkt. No. 450, *United States v. Lindberg*, 5:19-cr-22, 1017:12-25 (W.D. N.C. June 18, 2024). The second jury convicted Lindberg of conspiracy to commit honest services wire fraud and federal funds bribery.

The defendant in *Weiss* relied heavily on the *Lindberg* decision. The *Weiss* panel went to great lengths to distinguish the case, acknowledging that the instructions in both cases "look quite similar." The Seventh Circuit, however, found the instructions to "differ in their granularity," explaining that the official act at issue in *Lindberg* leaves "little room for debate" since an individual is either formally removed and replaced, or not. Further, the act is generally not conduct "at the epicenter of an official's duties."

Promoting legislation, as in *Weiss*, is more "capacious," allowing the jury room to deliberate whether Weiss's efforts to get Arroyo to promote legislation constituted an official act for purposes of federal bribery. Most importantly, the court found, Lindberg was prohibited from arguing at trial that his action was not an official act.

Weiss, on the other hand, had the opportunity to argue that his actions did not constitute inducing a public official to promote the enactment of legislation and that the "promotion" was no more than "set[ting] up a meeting, host[ing] an event, or call[ing] or talk[ing] to another public official," which the instructions in his case specified were not "official acts."

Conclusion

In some jurisdictions, such as New York state, judges may properly be called upon to determine whether a public official's conduct amounts to an "official act," particularly when inspecting grand jury minutes on a motion to dismiss an indictment. More commonly, particularly in federal cases, the issue of what constitutes an official act will either be resolved by a guilty plea or be left to be decided at trial, as in *Weiss* and *Lindberg*.

The Second Circuit has yet to address the specific issue in *Weiss* and *Lindberg*. But, generally, the Second Circuit is very reluctant to take issues away from the jury in criminal cases.

In the context of alleged securities fraud, the court stated that in some circumstances a "statement's materiality may present a question of law resolvable by an appellate court… [,but] the jury must pass on the materiality of a [criminal] defendant's misrepresentations" because a "criminal defendant is entitled to have a jury determine his guilt on every element of his alleged crime." *United States v. Rigas*, 490 F.3d 208, 231 n.29 (2d Cir. 2007).

The meaning of "official act" in bribery cases will likely continue to vex prosecutors and defense counsel, and in the Second Circuit it will likely continue to be left to juries to sort out.

Elkan Abramowitz *and* **Jonathan S. Sack** *are members of Morvillo Abramowitz Grand Iason & Anello.* **Emily Smit**, *an associate at the firm, assisted in the preparation of this column.*