

How DC Circ. Ruling Permits Playacting Bribery Defense

By **Liz Aloï** (October 22, 2026, 2:20 PM EDT)

When is a bribe not a bribe?

When the official who takes it has their fingers crossed behind their back.

That may be the consequence of the U.S. Court of Appeals for the D.C. Circuit's Sept. 18 U.S. v. Burke decision, which begs the question: Can an official who knowingly agrees to accept payment for an official act, but never meant to deliver on that agreement, be guilty of bribery at all?



Liz Aloï

The D.C. Circuit's Burke Decision

Robert Burke, a retired four-star admiral and chief ethics officer in the U.S. Navy, was convicted in 2025 of conspiracy, bribery, a conflict-of-interest offense and concealment. The government proved he directed his staff to award a \$355,000 Navy contract to U.S. Department of Defense contractor Next Jump while negotiating a postretirement job at the company with a \$500,000 annual salary and an ownership stake.

On Sept. 18, the D.C. Circuit affirmed Burke's conviction but found a legal error in the jury instructions. Bribery requires both the bribe payor and the bribe recipient to act corruptly. The U.S. District Court for the District of Columbia had instructed the jury that a public official — here, Burke — "acts corruptly if [he] agrees to accept something of value," understanding "that, in exchange, [he] is expected to be influenced in the performance of an official act."

The court found that "mere knowledge that another person expects him to be influenced is insufficient; the public official must intend to be influenced." [1] Because the legal error "was invited by the defense" — they had proposed the instruction with the government — the conviction was not disturbed.

The Road to Burke

The bribery statute has long been a tortured subject of judicial attention. Title 18 of the U.S. Code, Section 201(b)(2), prohibits public officials from "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value ... in return for ... being influenced in the performance of any official act."

The statute's focus is the corrupt exchange. Congress was concerned with the bargain, not with what

the official later did, and it is settled law that the public official need not take the official act for which they were being corruptly paid.

The U.S. Supreme Court significantly narrowed the conduct the bribery statute reaches in its 2016 decision in *McDonnell v. U.S.*^[2] That case arose from the prosecution of former Virginia Gov. Bob McDonnell, who was convicted of honest services fraud and Hobbs Act extortion after he and his wife accepted roughly \$175,000 in gifts and loans from businessman Jonnie Williams.

The honest services fraud charge required the government to prove that McDonnell obtained items of value in exchange for taking official acts. The government's theory was that McDonnell arranged meetings and events and contacted other officials for the donor.

A unanimous court vacated the convictions because the jury had been given an overly broad definition of "official act." It held that an official act requires a specific, focused matter involving "a formal exercise of government power," such as a lawsuit or agency determination, and that the official must decide it or use their position to pressure or advise another official to act. Setting up meetings or hosting events is not enough by itself.

The court's concern was that a broader reading would criminalize ordinary constituent service and chill the contact between officials and the public.

The court protected constituent services, but the real question was never whether public officials may provide constituent services — it was whether they may be paid to do so. The opinion drew a line to shield routine contact, then applied that protection to a case about gifts and loans.

On intent, McDonnell mostly left the corrupt mental state alone, reflecting that a "jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return."^[3]

The Burke court disagreed. It addressed McDonnell in a footnote, rejecting the idea that cash given with the expectation that the official would perform an official act was sufficient to establish a corrupt state of mind.

The D.C. Circuit acknowledged that the "expectation" wording in the flawed Burke instruction traces to McDonnell and a model jury instruction. But it read this McDonnell passage as describing what evidence can support an inference of an agreement, not setting forth a "test for establishing [the] corrupt state of mind" required for bribery. McDonnell, the panel said, "does not purport to replace bribery's longstanding intent requirement with a lower knowledge-like mens rea."

A Circuit Split?

Perhaps because the government did not brief this issue, the Burke decision does not note that other circuit courts of appeals have reviewed it — and rejected the defense argument. This appears to create a circuit split on whether playacting — or fingers crossed — is a permissible defense.

Decades ago, in its 1982 decision in *U.S. v. Myers*, the U.S. Court of Appeals for the Second Circuit rejected former Rep. Michael "Ozzie" Myer's defense to his conviction in the FBI's Abscam investigation that he was "playacting" and thus could not be convicted under Section 201(b)(2).^[4]

Relying on the legislative history of Section 201, the Second Circuit determined that "'being influenced' does not describe the [official's] true intent, it describes the intention he conveys to the briber in exchange for the bribe." [5]

The U.S. Courts of Appeals for the Fifth, Seventh and Eleventh Circuit later followed the Second. [6]

Burke Decision Had Immediate Effect

Regardless, Burke is law in Washington, D.C. — and it had an almost immediate effect.

Trayon White Sr., a D.C. Council member, was tried last month in the District of Columbia on a single bribery count. U.S. District Judge Rudolph Contreras declared a mistrial in U.S. v. White after the jury was unable to reach a decision.

Prosecutors said he accepted \$35,000 in cash and agreed to accept \$156,000 in kickbacks from a city contractor who became a confidential FBI informant, in exchange for helping secure violence-interruption contracts for the informant's company. Much of the case rested on recorded meetings and a handwritten document prosecutors called a "bribery contract."

The defense did not dispute that White took the money, but argued there was no quid pro quo — in other words, that there was no corrupt agreement that accompanied the pocketing of the cash.

The government originally proposed that the court instruct the jury that, "in order to satisfy the elements of bribery ... the public official need not actually perform an official act, or even intend to do so, or have control over the outcome of the question or matter." Following the Burke decision, the court struck "or even intend to do so" from this language.

A note from the jury during deliberations suggests that the jury was hung up on this language. The second of five notes to the judge states:

[i]n the D.C. Council Code of Conduct (Exhibit 1), receiving money in exchange for an official act appears to be a violation of gift restrictions, regardless of whether the defendant intended to follow through. Does this constitute a violation of official duty? Is it bribery if the defendant received money to perform an official act, but had no intention of fulfilling the agreement?

Reportedly, the judge told jury the answer to both questions was no, and that a defendant can only be convicted if they find he acted corruptly, which means he intended to be influenced or induced. [7]

What Now?

Can an official who takes money to act, knows exactly what the payor wants, and secretly never plans to deliver be guilty of bribery? After Burke, the answer is uncertain. And in our nation's capital, the answer may be no.

That would be a strange result. Section 201(b)(2) reaches an official who agrees to be influenced, and it is settled that they need not follow through. The statute targets the corrupt bargain. If the crime now turns on what the official privately planned, the government must prove a state of mind that only the official knows and that he has every reason to deny.

Consider an official who tells a business owner that a permit will be "taken care of" for a cash payment. The official takes the money. He never intended to intervene, perhaps because he lacked the authority or because he meant to pocket the cash. If bribery requires that he intended to be influenced, a defense that he never planned to act is at least plausible. The official has still sold his office, and the only open question is what was in his head.

That scenario is not far from White. There, no payor's intent was in play, and jurors asked the judge directly about an official who took money but never meant to deliver. It would be a mistake to read too much into the deadlock, since juries hang for many reasons. But the note shows how squarely the question was considered by the jury.

Extortion as an Alternative?

The Hobbs Act — Title 18 of the U.S. Code, Section 1951 — criminalizes extortion "under color of official right," and the Supreme Court has read it differently from bribery.

In *Evans v. U.S.*, the court held in 1992 that the government must show that an "official has obtained a payment to which [they were] not entitled, knowing that [it] was made in return for official acts." [8]

The formulation turns on the official's knowledge, not on their intent to be influenced. Passive acceptance is enough, and the government need not prove that the official induced the payment. That is close to the knowledge-based standard Burke rejected for bribery.

The Hobbs Act also carries a 20-year maximum, compared to 15 years for Section 201(b).

Had prosecutors charged White under the Hobbs Act instead of Section 201, the result may have been different. Extortion under color of official right requires that a public official obtain property they were not owed, knowing it was paid in return for official acts. [9] It would seem to fit a fact pattern like that in White, in which an elected council member accepted cash from an informant. [10]

Recorded meetings and the bribery contract point to whether the official knew the payments were for help with the informant's contracts. Under *Evans*, the offense is complete when the official accepts payment in return for his agreement to act, and later performance is not an element, so a defendant's argument that he never intended to follow through would carry less weight.

The government would still have to prove that the agreed-upon act qualifies as an official act under *McDonnell* and that the payments affected interstate commerce. The conviction under extortion would turn on the defendant's knowledge, not on whether he meant to be influenced.

Uncrossing the Fingers

It is hard to look at these cases and not perceive a gap between what appears to be corrupt conduct and what the law can reach. The law now asks the government to prove not just that the public official at issue made a corrupt agreement to influence their official acts — but also that the official further intended to follow through for the bribe-payor.

Congress wrote Section 201 in 1962 to strengthen the bribery laws, and it has stepped in before when the Supreme Court read corruption law too narrowly, most notably by enacting the honest-services statute in 1988 after the court's 1987 decision in *McNally v. U.S.* [11] It can act again — Burke was a

decision based on statutory interpretation, not constitutional limitations on the power of Congress to proscribe bribery.

Lawmakers could amend Section 201(b)(2) to say that an official who corruptly agrees to be influenced is guilty, whether or not they privately meant to follow through, and that proof of the payor's expectation and the official's acceptance may establish that agreement. That fix would leave McDonnell's limits on official acts untouched while closing the gap Burke and White expose.

Until Congress acts, prosecutors, defense lawyers and compliance officers will keep litigating what an official meant in his own head, and public officials may escape punishment for corrupt behavior.

Liz Aloï is of counsel at Morrison Foerster LLP. She previously served as chief of the Public Corruption and Civil Rights Unit at the U.S. Attorney's Office for the District of Columbia.

Disclosure: During her tenure at the U.S. Attorney's Office for the District of Columbia, Aloï supervised U.S. v. Burke and U.S. v. White prior to trial.

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[1] United States v. Burke, No. 25-3104, slip op. at 22 (D.C. Cir. Sept. 18, 2026).

[2] McDonnell v. United States, 579 U.S. 550 (2016).

[3] McDonnell v. United States, 579 U.S. 550, 572 (2016).

[4] United States v. Myers, 692 F.2d 823 (2d Cir. 1982).

[5] *Id.* at 841.

[6] See United States v. Shah, 981 F.3d 920, 926 (11th Cir. 2020) (same; "the statute extended to [public official-defendant's] false promises because '[t]he phrase "in return for" brings into play the purpose of the bribe,' not the defendant's motivation for accepting it," citing Myers); United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016) ("a conviction for bribery under § 201(b)(2) does not require proof that the official intended to be influenced in his official actions"), citing United States v. Valle, 538 F.3d 341, 347 (5th Cir. 2008) (reviewing legislative history of Section 201; holding that "an official may be convicted under § 201(b)(2), if he has corruptly entered into a quid pro quo, knowing that the purpose behind the payment that he has received, or agreed to receive, is to induce or influence him in an official act, even if he has no intention of actually fulfilling his end of the bargain"); United States v. Peleti, 576 F.3d 377, 382 (7th Cir. 2009) ("An officer can act corruptly without intending to be influenced; the officer need only solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act.") (citation, internal quotation omitted).

[7] "Jury dismissed on Day 2 of deliberations in Trayon White federal bribery trial," WJLA (7News) (Sept. 2026), <https://wjla.com/news/local/jury-resumes-deliberations-trayon-white-federal-bribery-trial-washington-verdict-judge-law-crime-bribes-money-steer-city-congrats-fbi-informant-conviction-council-ward-8-community>.

[8] Evans v. United States, 504 U.S. 255 (1992).

[9] Evans v. United States, 504 U.S. 255 (1992).

[10] White was an elected council member, and he accepted \$35,000 in cash from an informant in the summer of 2024, which the defense did not dispute.

[11] McNally v. United States, 483 U.S. 350 (1987).