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Crooked Politicians: Elusive Criminal Punishments and Paths to Accountability

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CROOKED POLITICIANS: ELUSIVE CRIMINAL PUNISHMENTS AND PATHS TO ACCOUNTABILITY

Pedro Gerson*

In the past decade there have been numerous failed prosecutions of high-profile corruption cases. This record is problematic because it risks public institutions' legitimacy, potentially increasing corruption. The Supreme Court has borne much of the blame for this situation due to its decisions narrowing the construction of anti-corruption criminal statutes. Many have criticized the Court for having a myopic view of governance and allowing a misplaced fear of a democratic chilling effect get in the way of accountability. Others have called for substantive and/or procedural criminal law reform to enable law-enforcement authorities to secure convictions in cases of public wrongdoing. In this article, I argue that the Supreme Court's anti-corruption jurisprudence is not rooted in notions of democracy but in criminal law. In mostly unanimous decisions, the Court has repeatedly struck down or narrowed statutes relying on traditional doctrines of criminal law interpretation. Unanimity suggests that more than politics, the Court is doing law. I then suggest that contrary to public perceptions, data from the Department of Justice and an analysis of lower court decisions shows that corruption prosecutions are not in dire straits. Taking this conclusion and looking to international best-practices, I argue that rather than focusing on criminal law, reformers should look to preserve and promote impartial governance through administrative laws and institutions. I also suggest that the United States could follow other countries in implementing more robust administrative sanctions to ensure accountability in acts of public malfeasance that do not rise to the level of criminal offenses.

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INTRODUCTION

On April 1, 2015, the Department of Justice presented a sixty-eight page, twenty-two-count indictment against Senator Robert Menendez and his friend and associate Salomon Melgen.[1] The indictment tells a fairly scandalous story of public corruption.[2] In essence, the Government alleged that Melgen bribed Menendez with, among other things, "domestic and international flights on private jets, first-class domestic airfare, use of a Caribbean villa, access to an exclusive Dominican resort, a stay at a luxury hotel in Paris, expensive meals, golf outings," and political donations in the hundreds of thousands of dollars in between the years of 2006 and 2013.[3] In exchange, the indictment alleged, Menendez used his office to influence U.S. immigration officials to allow Mr. Melgen to bring his "foreign girlfriends"; to pressure the U.S. Department of State to interfere on behalf of Mr. Melgen's businesses in the Dominican Republic; to stop the U.S. Customs and Border Protection from donating surveillance equipment to the Dominican Republic because it would affect Mr. Melgen's business interests on the island; and to "influence the outcome of the Centers for Medicare and Medicaid Services's [sic] (CMS's) administrative action seeking millions of dollars in Medicare overbillings that [Mr. Melgen] owed."[4]

The case was a media bombshell.[5] It was not only that the case involved details seemingly made for tabloids: a then 60-year-old millionaire paying a United States senator to assist him in bringing to the United States his foreign-born girlfriends who were models in their 20s.[6] It was also that the Department of Justice presented what seemed

1. Indictment at 1, United States v. Menendez, 270 F. Supp. 3d 780 (D.N.J. 2017) (No. 15-cr-155), 2015 WL 1457957.

2. Given that instances of high-level public corruption in the U.S. are relatively rare, this case was very shocking nationally; to international observers of corruption, however, the particular allegations in the case against Senator Menendez and Mr. Melgen are not out of the ordinary.

3. Indictment, *supra* note 1, at 2–4.

4. *Id.* at 6.

5. *See, e.g.*, Alexandra Jaffee, *Menendez Indictment: 3 Girlfriends, 7 Lavish Trips*, *More Than $750,000*, CNN (Apr. 3, 2015, 8:55 AM), https://www.cnn.com/2015/04/02/politics/menendez-indictment-takeaways/index.html; Isabel Vincent & Melissa Klein, *How Menendez 'Conspired' to Import Rich Donor's Babes*, N.Y. POST (Apr. 18, 2015, 10:01 PM), https://nypost.com/2015/04/18/how-menendez-conspired-to-import-rich-donors-babes/; David Freedlander, *Robert Menendez Is Testing New Jersey's Tolerance for Sleaze*, N.Y. MAG. (Nov. 2, 2018), https://nymag.com/intelligencer/2018/11/robert-menendez-is-testing-new-jerseys-tolerance-for-sleaze.html.

6. *See* Vincent & Klein, *supra* note 5.

to be damning evidence that showed how the bribery conspiracy took place. The indictment, for example, included very specific details such as the fact that Mr. Melgen had given Senator Menendez 649,611 American Express Membership Rewards points to pay for a hotel suite in Paris[7] and detailed e-mail exchanges showing Senator Menendez's staff intervening with the State Department and Customs and Border Patrol in favor of Mr. Melgen.[8]

All of the evidence presented by the Department of Justice made it seem that the case was a sure win for the Government. There was enough of a paper trail detailing both the payments and gifts in kind made to Senator Menendez, and of the various governmental actions that the Senator took to help Mr. Melgen's business interests. However, after a months-long trial and two days of jury deliberations, on November 16, 2017, the case against Senator Menendez and Mr. Melgen ended in a mistrial.[9] The following year the Justice Department decided not to re-try the case and dismissed all the charges.[10] Later that year Senator Menendez was re-elected to the Senate.[11]

Many commentators attributed[12] the mistrial on a Supreme Court decision that came out in the years between the indictment and the

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7. Indictment, *supra* note 1, at 10.

8. *Id.* at 19, 33.

9. Amber Phillips, *Everything You Need to Know About Sen. Robert Menendez's Corruption Saga*, WASH. POST: THE FIX (Apr. 26, 2018, 2:28 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/09/05/everything-you-need-to-know-about-sen-bob-menendezs-corruption-trial/; *see* Laura Jarrett & Sarah Jorgensen, *Bob Menendez Trial Ends in Mistrial After Jury Deadlocks*, CNN (Nov. 16, 2017, 3:31 PM), https://www.cnn.com/2017/11/16/politics/bob-menendez-trial/index.html.

10. Phillips, *supra* note 9.

11. Ella Nilsen, *Sen. Bob Menendez Wins Reelection in New Jersey*, VOX (Nov. 7, 2018, 1:12 PM), https://www.vox.com/2018/11/6/18050622/new-jersey-election-results-bob-menendez-winner. Prior to the case against Sen. Menendez and Mr. Melgen ending in a mistrial, Mr. Melgen was convicted of various crimes related to Medicare fraud in the amount of $73 million dollars. *See* David J. Neal, *Eye Doctor Is Sentenced in $73 Million Medicare Fraud*, MIA. HERALD (Feb. 22, 2018, 4:18 PM), https://www.miamiherald.com/news/state/florida/article201585704.html. He was sentenced to seventeen years in prison. *Id.* The allegations in that case were unrelated to his trial with Sen. Menendez. *Id.*

12. *See, e.g.*, Alan Maimon & Devlin Barrett, *After Mistrial, Menendez Speaks of 'Resurrection,' but Joy May Be Short-Lived*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/world/national-security/menendez-jury-says-again-that-it-is-deadlocked/2017/11/16/c6ae9096-c951-11e7-aa96-54417592cf72_story.html (where Kelly Kramer, a white-collar defense attorney stated that "[t]his is the first major post-McDonnell trial, and it does suggest that public corruption offenses are going to be much tougher to prove"); *see also* Alan Feuer, *Why Are Corruption Cases Crumbling? Some Blame the Supreme Court*, N.Y.

trial: *McDonnell v. United States*.[13] In that case, former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, were indicted by the Federal Government on honest services fraud and Hobbs Act extortion after they accepted $175,000 in loans, vacations, and gifts (like a Rolex and a $20,000 shopping spree) from Jonnie Williams, a businessman.[14] In return, Mr. and Mrs. McDonnell hosted an event at the governor's mansion to promote a product produced by Mr. Williams, a supplement called Anatabloc, and encouraged public universities to do research on the product.[15]

As explored more fully in Part II, in *McDonnell* the Supreme Court narrowed the meaning of "official act" as used in the bribery statute.[16] The Court held that an "official act" "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."[17] In sum, the Court held that all the other ways a public official may influence a particular outcome, as long as they are not "official acts," are not subject to criminal liability under the federal bribery statute.[18]

McDonnell cast a shadow on the Government's case against Sen. Menendez and Mr. Melgen. Reading the indictment of that case, knowing the outcome of *McDonnell,* it is easy to see why the Justice Department was not able to convince a jury that Sen. Menendez was guilty of bribery. In the end, the 68-page indictment did not include any formal governmental action from Sen. Menendez or his office in favor of Mr. Melgen. He called public officials, held meetings with them, sent emails, yes, but none of those communications were of a different nature than the thousands of others sent in favor of legislator's constituents.[19] They were not, in sum, "official acts," so Sen. Menendez could not be convicted of the crime of bribery.

TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/nyregion/menendez-seabrook-corruption-cases-crumbling-.html (arguing that the Supreme Court's narrowing of criminal corruption statutes made cases like Senator Menendez's difficult to prosecute).

13. McDonnell v. United States, 136 S. Ct. 2355 (2016).

14. *Id.* at 2361–63.

15. *See id.* at 2363.

16. 18 U.S.C. § 201(a)(3) (2018).

17. *McDonnell*, 136 S. Ct. at 2371–72.

18. *Id.*

19. I am not arguing that there is not a *moral* difference between a legislator intervening forcefully in favor of an individual who is not a constituent and has given a public official money

The trajectory of the case against Sen. Menendez and Mr. Melgen is consistent with the United States Supreme Court's narrow readings of anti-corruption criminal statutes throughout the last twenty years. In that time period, the United States Supreme Court has looked at four cases of criminal corruption.[20] All four decisions have in some way circumscribed criminal anti-corruption statutes to very specific conduct. Furthermore, in all four cases, the Court has unanimously held in favor of the defendants. This has led to a flurry of criticism against the Court.[21] Some have argued that the Court is far too preoccupied with chilling contacts between constituents and politicians and has thereby erred far too much on the side of tolerating conduct that it should not.[22] As Lynn Adelman, a U.S. District Court judge in Wisconsin, said, "the court's concerns about inhibiting interactions between constituents and officials are enormously overblown."[23] Others have argued that the Court's reasoning in several of these cases is indicative of the Justices' obtuseness with regards to the political process.[24] Finally, some scholars have argued that the Court's views emanate from the justices political philosophy that is exclusively preoccupied with "the protection of individual rights over government intrusion," which has led to an interpretation of the

and gifts, and a legislator similarly interfering for a constituent who has not given her anything. The argument is that Sen. Menendez did not interfere in a different *way* than he would have in a less morally compromising situation. That is, my claim here is descriptive, not normative.

20. Kelly v. United States, 140 S. Ct. 1565 (2020); McDonnell v. United States, 136 S. Ct. 2355 (2016); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); Skilling v. United States, 561 U.S. 358 (2010). As mentioned in *infra* note 105, *Skilling* is a private corruption case that was decided with a companion public corruption case. Its impact on public corruption is therefore clear.

21. *See, e.g.*, Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 484 (2019) (arguing that the Roberts Court has been invested in narrowing the grounds for criminal and campaign finance corruption); Leah Litman, *Prosecuting Political Corruption Cases Like Bridgegate Is Nearly Impossible*, WASH. POST (May 8, 2020, 12:32 PM), https://www.washingtonpost.com/outlook/prosecuting-political-corruption-cases-like-bridgegate-is-nearly-impossible/2020/05/08/bb6f4828-912d-11ea-a9c0-73b93422d691_story.html; Ian Millhiser, *The Supreme Court's "Bridgegate" Decision Leaves a Big Hole in America's Anti-Corruption Laws*, VOX (May 7, 2020, 12:50 PM), https://www.vox.com/2020/5/7/21250580/supreme-court-bridgegate-us-kelly-chris-christie-corruption-new-jersey.

22. *See* Jacob Eisler, *The Unspoken Institutional Battle Over Anticorruption:* Citizens United*, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 365 (2011).

23. Lynn Adelman, *The Supreme Court and the Corruption of Democracy*, 38 RARITAN 9, 9 (2019).

24. Matthew Stephenson, *The Supreme Court's McDonnell Opinion: A Post-Mortem*, THE GLOB. ANTICORRUPTION BLOG (July 19, 2016), https://globalanticorruptionblog.com/2016/07/19/the-supreme-courts-mcdonnell-opinion-a-post-mortem/.

anticorruption regime as one that only "penalizes undesirable behavior through narrowly delineated rules."[25]

A more generous and, in my view, more plausible interpretation is that in these cases the Supreme Court is not analyzing statutes as anti-corruption criminal statutes specifically, but as criminal statutes generally. All of the Supreme Court criminal corruption decisions of the last thirty years have been decided unanimously and turned on basic doctrines of criminal law interpretation designed to protect defendants from a potentially overreaching State.[26] In the most recent decision, *Kelly v. United States*,[27] for example, the Court reversed a conviction of wire fraud and fraud on a federally funded program or entity[28] against two public officials.[29] Those crimes prohibit the use of fraudulent schemes to "obtain[] money or property."[30] In that case, the Federal Government prosecuted public officials of the Port Authority of New York and New Jersey for closing two traffic lanes in Fort Lee, New Jersey, in retaliation for Fort Lee's mayor's refusal for supporting then New Jersey Governor Chris Christie's re-election campaign.[31] The Court found that the Port Authority public officials had not schemed to obtain property or money.[32] Rather, they had schemed for "political payback."[33] Therefore, no crime had been committed. As Justice Kagan argued, the officials had acted in bad

25. Eisler, *supra* note 22, at 367.

26. This is different to the argument made by Eisler, *supra* note 22, in the sense that he views these outcomes as a product of a political philosophy or convictions about democracy, while I view it as an outcome based on commitments to how a particular body of law should be interested. Given the ideological difference among members of the Court, and therefore their diverse political philosophies, it is hard to see how the outcomes in these cases can be motivated exclusively by philosophical commitments when they have all been decided unanimously. It could very well be that some justices were motivated by ideological commitments, this is especially true of those, like Justices Thomas and Alito, that do not traditionally vote in favor of defendants. It could be that these Justices, as Eisler suggests, are acting in defense of their class, and simply voted in a unanimous court rationalizing the argument differently as a way to vote strategically in the long run. However, given that not all justices have shown similar proclivities to rule in favor of politicians or moneyed interests suggests that ideology is not driving these decisions.

27. 140 S. Ct. 1565 (2020).

28. 18 U.S.C. §§ 666(a)(1)(A), 1343 (2018).

29. *Kelly*, 140 S. Ct. at 1568–69.

30. 18 U.S.C. §§ 666(a)(1)(A), 1343, (similarly prohibiting the use of fraudulent schemes to "obtain[] money or property").

31. *Kelly*, 140 S. Ct. at 1569–71.

32. *Id.* at 1574.

33. *Id.*

faith and corruptly, but "not every corrupt act by state or local officials is a federal crime."[34]

Kelly v. United States was a fairly straight forward case about statutory interpretation. The statutes at issue do not criminalize corruption generally, but rather the use of fraud to obtain *property*.[35] The Supreme Court engaged in traditional analysis of the elements of a particular criminal statute and identified that one of those elements is that the accused gains money or property from the victim.[36] This element was not met, so the convictions were reversed.[37] As explored in Part II, *Kelly v. United States* is probably the most clear-cut case out of the most recent criminal anti-corruption Supreme Court decisions.[38] Nonetheless, it showcases that in these decisions the Court is not executing some naïve analysis, but rather carrying out formal interpretations of criminal statutes.

I do not mean to argue that the way the Supreme Court has interpretated anti-corruption criminal statutes is the only plausible reading of those laws. In *McDonnell*, the Court could have read the term "official act" in such a way that would have sustained the conviction against Governor McDonnell but avoided some of the Court's preoccupations about vague statutes or overzealous prosecutors. My argument here is not that the Court has always been right, but rather that the decisions reflect a criminal legal jurisprudence that is grounded on various principles of criminal law that exist to protect individuals from unjust prosecution.[39] Specifically, the Supreme Court's reasoning in these cases can be interpreted as extensions of rules that express the fact that criminal law must be especially attentive to fair-warning, determinacy, and due process,

34. *Id.*

35. These statutes are more a response to officials using their power to embezzle government funds or services and/or to extort citizens from their property, than to the abuse of power generally. They are, in other words, criminalizing the abuse of power for personal (pecuniary) gain. This is a play on the most common definition of corruption, Transparency International's: "the abuse of entrusted power for private gain." *See What Is Corruption?*, TRANSPARENCY INT'L, https://www.transparency.org/en/what-is-corruption (last visited Apr. 11, 2021).

36. *Kelly*, 140 S. Ct. at 1571.

37. *Id.* at 1572, 1574.

38. *See id.* at 1571–74.

39. We may believe that this grounding is politically motivated or that it gets special attention in anti-corruption cases only, that is a separate question. *Infra* Part I addresses the objections to the idea that the criminal law is actually constrained by these principles.

such as the principle of legality,[40] the void-for-vagueness doctrine,[41] and the rule of lenity.[42]

Many scholars have observed the various ways in which "these various principles are unfulfilled aspirations rather than actual constraints on the state's power to impose criminal sanctions."[43] This unfulfillment raises valid questions as to whether or not the U.S. Supreme Court feels actually limited by the procedural protections/doctrines of interpretation just outlined. First, certain Justices[44] that voted in favor of defendants in anti-corruption cases have a strong track record of not usually heeding to these considerations. More importantly, the Court has, doctrinally speaking, rubberstamped the constitutionality of most enforcement of criminal law even in circumstances that clearly evidence constitutional

40. Although there are many interpretations of the principle of legality (*nullem crimen sine lege*), there are at least two rules that seem to underline the principle: only the law can define a crime and prescribe a penalty, and retrospective criminal laws are precluded. For differing views of the principle see, e.g., Cian C. Murphy, *The Principle of Legality in Criminal Law Under the European Convention on Human Rights*, 2 EUR. HUM. RTS. L. REV. 192 *passim* (2010) (arguing that the European Court of Human Rights has also incorporated a prohibition on harsher penalties than those proscribed in law in its interpretation of the legality principle); *see also* Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 303 *passim* (2007) (arguing that the principle of legality could be redefined as "[n]o person shall be punished in the absence of a bad mind" and "[e]very person is presumed innocent until proven guilty").

41. Prohibiting laws that either (1) fail to give "a person of ordinary intelligence fair notice of what is prohibited" (the "fair notice" prong), or (2) is "so standardless that it authorizes or encourages seriously discriminatory enforcement" (the "arbitrary enforcement" prong). Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (citations omitted). Many observers have pointed out that the Supreme Court has not applied this doctrine uniformly. *See, e.g.*, John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 243 (2002) (paraphrasing Justice Stewart's famous "I know it when I see it" standard to describe the doctrine).

42. This doctrine articulates an old maxim from Roman Law: *in dubio pro reo*, which states that ambiguous criminal statutes will be interpreted in favor of the defendant. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INT'L L. 126 (2009). There are several critiques of this doctrine as well. Some have argued that the Rule of Lenity "appears occasionally as a supplemental justification for interpretations favored on other grounds; it never stands alone to compel narrow readings." Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004). For a different view, see, e.g., EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008) (explaining that the rule of lenity is used to favor defendants to balance their lack of power vis-à-vis the government).

43. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1657 (2020).

44. Justices Thomas and Alito, for example, routinely hold against defendants in cases involving criminal law.

violations.[45] It is therefore fair to ask why the Court is so willing to enforce the state's constitutional obligations when defendants are powerful, but not otherwise. However, why judges are deciding anti-corruption criminal cases differently than other criminal cases is beyond the scope of this paper.[46]

Rather than engaging in a critical or realist exploration of the *motivations* behind the Justices' decision-making, I try to understand the decisions doctrinally. Looking at them through this lens, it becomes clear that the outcomes in these cases are the result of reasonable conclusions of foundational[47] principles of criminal law and process. I am not arguing that the Court itself always protects defendants,[48] but it is not surprising that the Supreme Court does so in high profile cases. This is consistent with what Alexandra Natapoff has labeled the penal pyramid: "in which the law itself functions very differently at the elite top than it does at the sprawling bottom."[49] To the extent, therefore, that one wants to engage with a critical exploration of the Court's decision-making, Natapoff's argument serves against the knee-jerk reaction that anti-corruption jurisprudence is only driven by Justices' self-interest.

Many observers have been uncomfortable with the Supreme Court, perhaps uncritically, applying these principles to these cases because these doctrines serve, in theory, to address a power asymmetry between individuals and the State. However, in public

45. Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111, 112 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (arguing that through "three basic doctrinal moves . . . deference, presumption, and substitute question," the Supreme Court has created a mechanism through which lower courts can evade constitutional protections to validate state action).

46. There is a growing body of work showing and debating the extent that Supreme Court outcomes are ideologically motivated. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 22–25 (1998) (showing that ideology is a powerful predictor for judicial outcomes); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (applying a labor-market theory of behavior to understand judicial decision-making, which fares better in explaining judicial decisions across all of the judiciary than standard attitudinal or strategic-choice models).

47. Ristroph, *supra* note 43 (showing the extent to which criminal pedagogy is structured on a belief that the principle of legality and other limiting principles actually do constrain the enforcement of criminal law, despite all the evidence to the contrary).

48. *See, e.g.*, Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1049 (2020) (arguing that the Supreme Court has inconsistently applied the void-for-vagueness doctrine and that to better understand these decisions vagueness should be understood as impossibility to comply with the law).

49. Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

corruption cases this asymmetry is vanished, because on trial are individuals "privileged through access to governmental resources [abusing] their unique power."[50] It is not only that the defendants are sophisticated and informed, and can thus *ex-ante* develop schemes to avoid prosecution,[51] but that because of their position in government (or their closeness to government officials in the case of private actors) they are singularly situated to influence the prosecution in their favor. Protection for the defendants in these cases thus seems like a perpetuation of fundamental inequities in criminal law enforcement where wealthy and influential defendants skirt the law through legalese. While there is no doubt that this is a dynamic of criminal law in the United States, it is doubtful that the normative reaction to this problem is to eschew doctrinal and jurisprudential protections for powerful defendants, rather than demand that they be equally enforced for all.

The question about how to respond to these rulings is complicated by the fact that what we mean by corruption is easily muddled.[52] The most widely used definition of corruption is Transparency International's (TI): "abuse of entrusted power for private gain."[53] This definition is unsatisfactory because it ignores private conduct that can be corrupt.[54] Furthermore, it is not always clarifying; for example, are instances where a former public official leverages his previous government position for lucrative private contracts (known as the "revolving-door" problem) corrupt? Nonetheless, TI's definition serves as a starting point in identifying what acts are *certainly* corrupt. In other words, it may not help us define all the borders, but it lets us

50. Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1665 (2017).

51. This happens in many areas besides corruption. As Sheila Krumholz has argued in the campaign financing world, sophisticated actors are capable of arranging transactions that are legal in form but that violate the spirit of the law. *See* Sheila Krumholz, *Campaign Cash and Corruption: Money in Politics, Post*-Citizens United, 80 SOC. RSCH. 1119 (2013).

52. As Francis Fukuyama has argued, corruption lacks "conceptual precision." *See* Francis Fukuyama, *What Is Governance?*, 26 GOVERNANCE 347, 349 (2013).

53. *What is Corruption?*, *supra* note 35. The World Bank has adopted this definition. *See, e.g.*, Vinay Bhargava, *Curing the Cancer of Corruption*, *in* GLOBAL ISSUES FOR GLOBAL CITIZENS: AN INTRODUCTION TO KEY DEVELOPMENT CHALLENGES 341 (Vinay Bhargava ed., 2006) ("The World Bank defines corruption as the abuse of public office for private gain."); *see also* RAY FISMAN & MIRIAM A. GOLDEN, CORRUPTION: WHAT EVERYONE NEEDS TO KNOW 25 (2017).

54. Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT'L L. 1289, 1290 n.5 (2018) (arguing that TI's definition is problematic because "it focuses on the conduct of public officials and ignores the roles of private actors such as bribe payers and money launderers").

make out the core of what corruption is. Following TI's definition, it is clear that at least some of the exchanges between Sen. Menendez and Mr. Melgen were corrupt.[55]

Nonetheless, not every act that is corrupt is a crime.[56] This Article focuses on federal criminalized corruption.[57] Evidently, an analysis of corruption could be broader. For example, there are questions about whether campaign finance[58] and electoral politics[59] as they currently exist are corrupt. However, this Article does not address those issues and only looks to the status of anti-corruption criminal law and the possibilities for reform.

The responses to the Supreme Court's rulings in this area have often centered on widening the scope of criminalized conduct. Matthew Stephenson, for example, has suggested re-drafting federal laws to penalize the type of nefarious conduct at issue in *Kelly*.[60] In

55. Whether the political donations were corrupt is arguably unclear. On the one hand, they were clearly made as a way to push Sen. Menendez to act on Mr. Melgen's behalf. However, use of political donations as a way to influence politics has been cleared by the Supreme Court as consistent with democracy. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010). However, private stays in hotels, and trips to beaches for political favor are clearly acts within TI's definition.

56. Kelly v. United States, 140 S. Ct. 1565, 1574 (2020).

57. Commentators have observed that the Supreme Court has largely obviated or ignored Federalism concerns in anti-corruption cases. *See, e.g.*, George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After* Sabri, 54 CATH. U. L. REV. 403, 404 (2005) (arguing *Sabri v. United States* and *McConnell v. Federal Elections Commission* confirm "the high priority that the Court places on the National Government's authority to fight corruption at any level").

58. There are still campaign spending limits for campaign contributions; however, individuals can routinely bend these limitations. *See* Michael A. Rosenhouse, *Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases*, 19 A.L.R. FED. 2d 1, 1 (2007); Nicole L. Jones, Citizens United *Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Elections*, 93 DENV. L. REV. 749, 749 (2016); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 400 (2013). In fact, what is often misunderstood about *Citizens United* is that it did not alter this basic fact on campaign spending limits, but rather that it eliminated limits for independent expenditures. An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and which is not made in coordination with any candidate or his or her campaign or political party. *See Understanding Independent Expenditures*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/understanding-independent-expenditures/ (last visited Apr. 11, 2021).

59. Even if it had not, it is unlikely that it would have been found to be criminal under any of the criminal corruption statutes.

60. Matthew Stephenson, *Aggressive Criminal Law Enforcement Is Insufficient to Combat Systemic Corruption. But That Doesn't Mean It's Not Necessary*, THE GLOB. ANTICORRUPTION BLOG (Nov. 19, 2019), https://globalanticorruptionblog.com/2019/11/19/aggressive-criminal-law-enforcement-is-insufficient-to-combat-systemic-corruption-but-that-doesnt-mean-its-not-necessary/.

addition, some have suggested that states should do more to combat corruption locally.[61] While surely this is possible, as I argue in Part IV, the actual scope of conduct that can/should be criminalized is very limited. Broad criminal statutes will suffer the same fate that the current anti-corruption criminal statutes have, and—more normatively—criminal statutes should be very narrowly tailored. Another option, suggested by Jacob Eisler, is that anti-corruption criminal statutes should be broadly interpreted to "encourage public-mindedness in representative behavior."[62] However, as argued *infra*, given the already balkanized state of criminal law,[63] proposals such as these are terribly fraught. Furthermore, international examples of countries adjusting criminal procedure for anti-corruption criminal statutes have failed spectacularly.[64] Also, it is questionable that in a country with such a convoluted, confused, and overbearing criminal law system as the U.S., it would be wise to create a subset of crimes that get special procedural treatment.[65]

Beyond the political economy problems[66] of reforming federal and state anti-corruption criminal laws, there are reasons to believe

61. *See, e.g.*, Bob Hennelly, *Bridgegate Ruling Shows Our Over Reliance on Feds to Keep Lid on Corruption that Too Often Defines Us*, INSIDERNJ (May 10, 2020, 9:44 AM), https://www.insidernj.com/bridgegate-ruling-shows-reliance-feds-keep-lid-corruption-often-defines-us/. However, given the few incentives local legislators have of passing strong-anticorruption laws, we can be skeptical of relying on state legislators to do so.

62. Eisler, *supra* note 50, at 1666. Eisler argues that this jurisprudential shift would need to be "delica[te] and circumscri[bed]," but that this could be achieved through civic conceptions of governance from the Court. *Id.* at 1667. He points to Einer Elhauge who argues that the rule of lenity is often not applied in business cases, because the people on trial are not the usual *reo* that require these procedural protections. *See* ELHAUGE, *supra* note 42, at 13.

63. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 644–55 (2006) (arguing that the federal penal code is such "a national disgrace," with its various "vague, overbroad, or internally inconsistent laws" that it is actually impossible to efficiently and fairly administer criminal laws).

64. *See* Mariana Mota Prado & Marta Rodriguez Machado, *Using Criminal Law to Fight Corruption: The Potential, Risks and Limitations of Operation Car Wash (Lava Jato)*, 68 AM. J. COMPAR. L. (forthcoming 2021) (on file with author) (showing that Brazil is currently experiencing a drop in confidence in the rule of law which can be arguably traced back to bending criminal laws to forge ahead with criminal prosecutions).

65. As argued *supra* notes 41 and 42, the criminal law in this country is already impossible to administer in a consistent and just manner. Furthermore, it is questionable that the solution to problematic laws is not a replacement or amendment of those laws but more laws attacking the issue in a different way. *See* Saul Levmore, *Addictive Law* 10 (Aug. 20, 2019) (unpublished manuscript), https://ssrn.com/abstract=3441870.

66. Public officials don't have many incentives to further criminalize behavior that they are engaged in. The calculation would be different if there were no anti-bribery laws, or there were no prosecutions, but given that there are many laws and an active anti-corruption practice, there are

that the answer does not lie in criminal law. First, international anti-corruption best-practices teach us that the criminal law is not meant to be the main tool to fight corruption.[67] Rather, as Susan Rose-Ackerman has argued, criminal law serves a "back-up role . . . as an aid to deterrence."[68] This is because corruption is not a problem of crime, but rather a problem of public administration and institutions.[69] Therefore, much of the regulation needs to target the creation of systems that prevent corrupt acts and that promote integrity and accountability. Which is to say, for anti-corruption efforts to be effective, it is necessary that a country is able to hold individuals criminally liable for the most egregious acts of corruption,[70] but the majority of the gains are not made in the criminal realm.

Given all the complications with criminal reform just outlined, and the relatively meager benefits of doing so, U.S. legislators and advocates should focus on strengthening non-penal controls for corruption. Currently, these systems have shown themselves to be completely inadequate to confront the various corrupt acts of self-dealing and conflicts of interest in the Trump administration. President Trump has repeatedly circumvented, overstepped, and/or avoided consequences for violating governance norms and constitutional conventions, calling into question the robustness of the American public integrity system.[71] Problematic as this may be, it serves to chart

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strong reasons to believe congresses will stall on this type of legislation. The fact that federal anti-corruption bills such as Senator Leahy's, discussed *infra* note 288, have stalled for almost 10 years and states have not passed bills in this arena is evidence of these dynamics.

67. Stephenson, *supra* note 60.

68. Susan Rose-Ackerman, *Corruption and the Criminal Law*, 2 F. ON CRIME & SOC'Y 3, 4 (2002).

69. As I discuss in Part I, this was also one of the intellectual motivations for many of the institutions set-up at the time of the founding. Also, this type of institutional approach has the benefits of being able to address the problem of corruption more generally than only the "bright-line" or criminal corruption.

70. This need not mean that we need the current system of criminal liability to have strong anti-corruption programs. One could imagine a system of accountability within an abolitionist framework. The point rather is that whatever and however that system penalizes, there needs to be room for certain corrupt acts—namely bribery and embezzlement—to be punished. For a discussion of the abolitionist framework, see Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1239 (2015).

71. S*ee e.g.*, Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 177–78 (2018) (describing some of the ways President Trump has violated political norms and constitutional conventions, and the implications this has on the American political system as a whole); David A. Graham, *The Last Constraint on Trump*, THE ATLANTIC (Apr. 16, 2019), http://www.theatlantic.com/ideas/archive/2019/04/law-only-constraint

a path forward for anti-corruption reform. Focusing on administrative and civil sanctions for acts of corruption, and of leveraging current institutions used to prosecute criminal corruptions to also seek other types of sanctions, would potentially be substantively better and easier because these changes are not only more politically palatable, but they also fall in line with international anti-corruption best practices. In plain English, the wheel would not need to be reinvented.

This Article proceeds as follows; in the first part I give a brief account of anti-corruption history in the United States. This part is important to establish the parameters of my object of study and to show that in fact an emphasis on criminal law as both a prophylactic and cure is relatively recent. Part II explores the Supreme Court's most recent criminal anti-corruption cases. I analyze cases going back to *McNally v. United States*[72] to explain the doctrines developed around the bribery and honest-services statutes, and the Hobbs Act. In the next part, I explore the consequences of these cases, making an argument that much of the criticism against the Supreme Court has been misguided and that in fact we have evidence that law enforcement can (and does) still carry out successfully corruption prosecutions. Finally, this Article makes the case that the solution to the risk of rising corruption can and should be addressed through institutional and administrative reform, rather than criminal reform.

I. A (VERY) BRIEF HISTORY OF ANTICORRUPTION IN AMERICA

We have evidence of corruption as a public issue dating back at least to the Roman Empire.[73] As Carlo Brioschi put it, "[i]n antiquity, greasing the wheels was a custom every bit as widespread as it is today."[74] Prosecutions of corruption have been just as long. The most famous prosecution from Roman antiquity is probably that of Gaius

-trump/587266/ (arguing that the president's aides disobeying his wishes have proven to be the best protection for the Rule of Law in the U.S.).

72. 483 U.S. 350 (1987).

73. It may in fact be older. Plato in *The Republic*, for example, suggests that "public officials" (or guardians of the state) should never deal with money, that way it "will be kept safe, and they will keep the city safe." PLATO, THE REPUBLIC 110 (G. R. F. Ferrari ed. & Tom Griffith trans., 2000).

74. CARLO ALBERTO BRIOSCHI, CORRUPTION: A SHORT HISTORY 22 (Antony Shugaar trans., Brookings Institution Press 2017) (2010).

Verres, the governor and proprietor of Sicily from 73 to 70 BCE[75] (its fame has more to do with the fact that the case was led by Cicero than with the actual facts). It is estimated that Verres stole more than 40 million sesterces[76] during his administration.[77] However, even then winning corruption cases was hard. Despite having a mountain of evidence and strong oratorial skills, Cicero would have likely lost the case had Verres paid his jurors enough in bribes.[78]

Nowadays, in the U.S. at least, prosecutions of corruption do not fail because those on trial are engaging in corruption (i.e., bribing the jurors or judges) in order to get away with it. Nonetheless, prosecuting corruption cases can be notoriously difficult for a number of reasons. First, the detection rate of cases is relatively low because there is often a dearth of whistleblowers or informed individuals with reliable information.[79] Also, prosecuting corruption cases requires expertise in areas that most law enforcement agencies lack, "such as forensic accounting, public funds, or insider trading."[80] Another obstacle is that they types of parties involved—high ranking public officials and wealthy private sector actors—can employ sophisticated mechanisms to avoid detection or ensure impunity. Finally, and relatedly, these actors can be influential in government and can use that leverage to shield themselves from accountability.[81]

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75. For more details of this case see Douglas O. Linder, *The Trial of Gaius (or Caius) Verres: An Account*, 3, 8 (2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305177.

76. A legionary earned around 900 sesterces a year at the time. M. Alexander Speidel, *Roman Army Pay Scales*, 82 J. ROMAN STUD. 87, 92 (1992).

77. Linder, *supra* note 75, at 9.

78. Verres was eventually found guilty, but he escaped to live in exile in Marseille. *See id.* at 10.

79. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, EFFECTIVE PROSECUTION OF CORRUPTION 7–8 (2007).

80. *Id.* at ix.

81. Many social scientists have described these sorts of issues as features of corruption as a principal agent-problem. This can take one of two meanings: citizens are the principals and bureaucrats/politicians are the agents, or politicians are principals and bureaucrats are their agencies. In most accounts of corruption, the former interpretation is the one that has most traction because it implies that the aggrieved party is the regular citizen. The principal-agent model emphasizes that the problem of corruption boils down to information asymmetries between agents and principals (these asymmetries are described in the paragraph above). For example, citizens do not want their officials to take bribes, but they have no way of knowing if they do, so officials take them. *See, e.g.*, Nico Groendendijk, *A Principal-Agent Model of Corruption*, 27 CRIME L. & SOC. CHANGE 207, 207 (1997) (offering a more detailed account of corruption as a principal-agent problem); *see also* Heather Marquette & Caryn Peiffer, *Corruption and Collective Action*, DEVELOPMENTAL LEADERSHIP PROGRAM (2015), https://www.cmi.no/publications/file/5544-

The difficulty in prosecuting criminal corruption is one of the reasons experts argue that the issue is best tackled through a holistic agenda in which criminal law-enforcement plays only a small part. Several proponents of anti-corruption reform speak of the necessity of implanting "anti-corruption toolkits" (i.e., a set of legal reforms that if implemented together can help reduce corruption). These toolkits consist of changes that reduce the information asymmetry between public officials and citizens, that allow for more competition within government, and that professionalizes government capacities.[82]

The history of anti-corruption efforts in the U.S. shows that the framers understood this intuition. In the early years of the American republic, corruption was rarely associated with crime. Some of that was of course due to the much more limited role that criminal law generally played in society at the time.[83] But it was also because people at the time recognized that corruption "encompassed lawful abuses of power, not merely unlawful abuses or usurpations."[84] Which is to say, the framers understood that corruption is not only a problem of crime, but rather a problem of governance generally.[85]

This is why the framers were concerned with establishing institutions that prevented corruption from even arising. The

corruption-and-collective-action.pdf (arguing that corruption is both a collective action and principal-agent problem).

82. Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 453 (2013) (summarizing the toolkits this way: reforms that look "in particular, to 'close the loopholes for corruption' . . . , the international community prescribes a 'holistic anticorruption strategy,' targeted at reducing discretion of public officials through privatization, deregulation, and meritocratic recruitment; reducing monopoly by promoting political and economic competition; increasing accountability by supporting democratization and increased public awareness (for political accountability) and bureaucratization (for administrative accountability); improving salaries of public officials, thereby increasing the opportunity cost of corruption if detected; improving the rule of law so that corrupt bureaucrats and politicians can be prosecuted and punished; and encouraging greater transparency of government decision making through deepening decentralization, increased public oversight through parliament, an independent media, as well as through the creation and encouragement of civil society watchdogs").

83. *See generally* KRISTOFER ALLERFELDT, CRIME AND THE RISE OF MODERN AMERICA: A HISTORY FROM 1865–1941, at 164 (2011) (discussing the role and understanding of corruption in American history).

84. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 50 (2014).

85. The reforms that I propose in Part IV, and much of what is included in Senator Warren's Public Integrity Act for example, are driven in part by this realization.

Emoluments clause (Art. I § 9),[86] the parceling of appointments power between the executive and legislative branches,[87] and long residency requirements to be eligible for senate,[88] were among the many choices of institutional design that sought to quell corruption while at the same time preserving administrative and governmental efficiency.[89]

At the founding, the emphasis on anti-corruption as a project of institution building was so great that there was no criminal bribery enacted. In an early case, *United States v. Worrall*,[90] the District Court of Pennsylvania threw out a corruption prosecution because there was "no proof that the criminal letter was written."[91] Overtime states began doing the work that the Federal Government was not, criminalizing both extortion and bribery. Zephyr Teachout explains that in this period there was great variance in what was punished in each state. For example, in Maryland and Pennsylvania there was strict liability for just taking any money beyond one's salary as a public official, while North Carolina and Massachusetts required a mens rea of intent.[92]

Eventually, in 1853 the first federal U.S. bribery law was passed. However, as mentioned above, the criminal law did not play the central role in governance in *general* as it does today, and we thus saw relatively few prosecutions. In general, for its first 140 years, the U.S. did not convict any high-level officials of bribery.[93] This was not for a want of scandals, but rather because the idea of using criminal law to punish high-level officials was anathema.[94]

By the turn of the twentieth century, things started to change with the prosecutions of Senator John Mitchell of Oregon[95] in 1903 and the

86. In Zephyr Teachout's book on corruption, she cites Edmund Randolph, a Virginian attendee to the Constitutional Convention who explained that "this restriction was provided to prevent corruption." TEACHOUT, *supra* note 84, at 27.

87. There was a concern that public office would be sought only to get a lucrative appointment as an ambassador or to give his friends or family some benefits. A way to ensure that this wouldn't happen was to allow the legislature to intervene in the appointments process. *Id.* at 65.

88. *Id.* at 75.

89. Teachout argues that "the Constitutional Convention had defined the republic as a nation preoccupied with corruption." *Id.* at 82.

90. 2 U.S. 384 (C.C.D. Pa. 1798).

91. *Id.* at 388.

92. TEACHOUT, *supra* note 84, at 112–13.

93. JOHN T. NOONAN, JR., BRIBES 565 (1984).

94. *Id.*

95. Senator Mitchell was indicted in the Oregon land fraud scandal which involved public officials in Oregon illegally selling Federal Government land grants meant for settlement to timber developers. *Id.* at 602.

Teapot Dome scandal of 1921.[96] Eventually prosecutors began using different types of statutes to prosecute corruption cases. One often used statute, further discussed *infra* because it was the target of various recent Supreme Court decisions, the Hobbs Act was an antiracketeering law that targeted extortion "under color of official right."[97] Eventually courts begun accepting the argument that extortion was the same as bribery and "under color of official right" meant that a public official could be guilty thereof. The courts agreed with this, and until *McNally v. United States,* many anticorruption prosecutions were brought under this statute.

Teachout has outlined this period as one in which attitudes about the contours of bribery were very blurry:

> State courts allowed prosecutions for bribes that were offered but not accepted, . . . that did not clarify the precise official action that the briber wanted done, [an official could be guilty of bribery] even if he had no intent to change his behavior, . . . [or] being influenced on actions over which she had no authority.[98]

Why courts accepted more and more wide-ranging interpretations of anti-corruption criminal law statutes is unclear. Perhaps it was part of a broader change where criminal law began to take a more central role in social control. However, the timeline of the change does not neatly line up with that explanation; after all, the punitive turn in American politics was not until the 1970s, and the changes in anti-corruption prosecutions began much earlier.[99] Another potential explanation could simply be that attitudes about who could be prosecuted changed as the United States enfranchised more people.[100] At the beginning of the American Republic—and through its first century—public officials, judges, prosecutors and electors were

96. In which President Warren G. Harding's Secretary of the Interior Albert Bacon Fall became the first ever presidential cabinet member to be sentenced to prison after being convicted of bribery for leasing Navy oil reserves to private oil companies without a competitive bidding process in exchange for a personal no-interest loan and numerous valuable gifts. *Id.* at 565.

97. 18 U.S.C. § 1951(b)(2) (2018).

98. TEACHOUT, *supra* note 84, at 200.

99. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 234 (2017) (explaining the various factors influencing the growth in prison population in the United States).

100. Despite the democratic commitments at the founding, a large swath of the population was disenfranchised for at least the first 140 years of the republic (Black people and women, to name two very large groups).

largely of the same social class, race, and cohort, which could explain why prosecutions were relatively rare. As the electorate grew however, prosecutors and judges begun having a self-interest in charging and convicting corrupt public officials.

Whatever the reason, by the 1980s bribery and other anti-corruption criminal statutes were being used liberally. However, as we will see in the subsequent part, slowly but surely the Supreme Court chipped away at the expansive use of these statutes. Zephyr Teachout has argued that this move was carried out following the same logic with which the Court started rubberstamping a no-holds approach to campaign finance. In essence, Teachout argues the Court has a myopic view of corruption that impedes it from enforcing laws in a way that eliminates both "bright-line" (criminal) and systemic corruption.

In the following part, I articulate a different explanation for the outcomes in the anti-corruption criminal cases. As I explain *infra*, the fact that, in contrast to the campaign finance cases, most of the anti-corruption criminal cases have been decided unanimously and none have gone 5-4, tells us that the members of the court are distinguishing these cases from the campaign finance ones. In the following part I argue that in fact these decisions are more easily interpreted as opinions about criminal law specifically, not about corruption, generally.[101]

II. THE SUPREME COURT'S ANTI-CORRUPTION JURISPRUDENCE AND THE "TRADITIONAL CRIMINAL LAW INTERPRETATION"

Focusing only on criminal anti-corruption cases narrows the scope of analysis to a very particular subset of acts of corruption[102] and only a few cases. In the last ten years the Supreme Court has decided two important criminal anti-corruption cases: *Kelly v. United States*,[103] in 2020, *McDonnell v. United States*[104] in 2016. It also looked at three different cases in June 2010 which had major

101. Evidently some Justices could be motivated by their views on corruption, especially given their criminal law jurisprudence. However, as a Court, the outcomes have relied on arguments about the criminal law specifically.

102. Some writers make the distinction between general and specific corruption, general being in line with TI's definition, while specific is tied to the crimes of bribery or embezzlement. *See* FISMAN & GOLDEN, *supra* note 53, at 23–26 (explaining the reasons some authors rely on broader or narrower definitions of corruption).

103. 140 S. Ct. 1565 (2020).

104. 136 S. Ct. 2355 (2016).

consequences for public anti-corruption prosecutions[105]: *Skilling v. United States,*[106] *Weyhrauch v. United States*,[107] and *Black v. United States*.[108] Looking further back, there have been a few more cases that have been crucial to understanding how the Court has analyzed criminal anti-corruption statutes.[109] These cases deal with wire and honest-services fraud, bribery, and embezzlement.

Most of these cases have been decided in the defendants' favor.[110] Also, practically all of the cases were decided unanimously and those that were not had wide majorities. These patterns are evidently not conclusive of anything, but they do force us to look closely at the decisions to understand this seeming non-partisanship. After all, it is seldom that the Supreme Court is on such a degree of agreement even on cases that revolve around one particular area of law. Furthermore, as outlined in the introduction, after each of these decisions, the Supreme Court has been attacked in the popular press and in some legal commentary about its apparent tolerance of corruption.[111]

Kelly, *Skilling*, and *McNally* all revolve around the "honest services" doctrine. To understand that doctrine, we must first look at a 1909 amendment of the 1872 mail-fraud statute to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[112] The "honest-services" doctrine arose out of the fact that there was not (and is not) a federal statute that can lead to the prosecution of state and local political corruption.[113] So, prosecutors used (and courts validated) the mail-fraud statute from 1909 to prosecute cases of local corruption, including schemes that lead to no pecuniary harm but instead deprived people of the "honest services"

105. Although out of the cases decided in 2010 only *Weyhrauch* involved public corruption, the Supreme Court remanded that case to be decided in light of *Skilling*. On remand, the Ninth Circuit dismissed the case against a local public official in Alaska in light of the outcome of *Skilling*, which was a private, not public, honest services case.

106. 561 U.S. 358 (2010).

107. 561 U.S. 476 (2010).

108. 561 U.S. 465 (2010).

109. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); Sabri v. United States, 541 U.S. 600 (2004); Evans v. United States, 504 U.S. 255 (1992); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987).

110. All the defendants were accused of engaging in public corruption.

111. *See, e.g.*, Torres-Spelliscy, *supra* note 21; Litman, *supra* note 21; Millhiser, *supra* note 21.

112. 18 U.S.C. § 1341 (2018).

113. O'Sullivan, *supra* note 63, at 660–61.

of a person or group.[114] This doctrine allowed the Federal Government to prosecute corruption cases where "the betrayed party suffered no deprivation of money or property . . . . For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss."[115] However, note that there is no "fraud" necessarily in public corruption.[116] "The gravamen of an honest services case was not the corruption; it was the 'fraud' of failing to tell the citizenry about the corruption or allegedly improper conduct. (If the public official did disclose his alleged wrongdoing, there was no case.)."[117]

In 1987, the Supreme Court put a stop to the increasingly expanding use of the honest services doctrine in *McNally v. United States*.[118] The case centered around allegations against public officials in Kentucky that had set up a scheme whereby the insurance agent chosen to provide insurance for the state was to share its commissions with other insurance agencies, including one in which the public officials setting up the scheme had property interests.[119] Crucially, it was not alleged that under the scheme Kentucky was paying more than it would have otherwise paid for insurance, or that because of it the state lost money or property. Reviewing 18 U.S.C. section 1341, the Court held that the mail fraud statute was meant to prevent only the use of mails in furtherance of schemes seeking to deprive someone of their property rights.[120] And so, if no property rights were lost then there was no crime. Adding that "[i]f Congress desires to go further, it must speak more clearly than it has."[121] The public officials' convictions in that case were thus thrown out.

114. *Id.*

115. Skilling v. United States, 561 U.S. 358, 400 (2010).

116. In the sense that not every act of corruption is meant "to induce another to act to his or her detriment." *See Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019).

117. O'Sullivan, *supra* note 63, at 660 (emphasis omitted).

118. McNally v. United States, 483 U.S. 350 (1987).

119. *Id.* at 352–53.

120. *Id.* at 360.

121. *Id.*

In a somewhat confusing passage, without saying it explicitly, the Court justified its interpretation of section 1341 on the rule of lenity.[122] The Court explained that it was looking to "construe the statute in a manner that leaves its outer boundaries ambiguous,"[123] and that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."[124] Here, section 1341 could be read as protecting only property rights or to also protect "an intangible right . . . to good government."[125] Following the limiting principle then, the Court decided in favor of the more restrictive interpretation.[126] *McNally* was the first in the line of cases that relied on traditional canons of criminal law interpretation to tighten the statutes used to prosecute criminal corruption.

Congress responded to McNally by enacting 18 U.S.C. § 1346 clarifying the "term 'scheme or artifice to defraud'" found in sections 1341 and 1343.[127] Section 1346 codifies the honest services doctrine stating: "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[128] This provision not only criminalizes public theft of "honest services" but also "private cases," where private entities are prosecuted for impeding the employers from enjoying the right to their honest services. The doctrine has been much maligned in the private sphere. Julie O'Sullivan, for example, argued that section 1346 "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . [and] authorize[s] and even encourage[s] arbitrary and discriminatory enforcement."[129]

122. This is a canonical tool of interpretation of criminal law. It states that ambiguous criminal statutes will be interpreted "in favor of the more lenient punishment." *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

123. *McNally*, 483 U.S. at 360.

124. *Id.* at 359–60.

125. *Id.* at 356.

126. *Id.* at 360.

127. The swiftness of the reversal speaks to the fact that Congress was signaling their strong disagreement with *McNally* and their desire to equip prosecutors with better anti-corruption tools. 18 U.S.C. § 1346 (2018).

128. *Id.*

129. Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 24 (2010) (quoting City of Chicago v. Morales, 527 U.S. 41, 56 (1999)) (arguing that fair-notice concerns are present because of the varying and disparate case-law interpreting the honest-services doctrine, that the statute is extremely vague in that it does not specify what standard of conduct an individual should comply with).

Nonetheless, after the enactment of section 1346, the doctrine was tremendously influential in prosecuting public and private corruption.[130]

In 2010, in *Skilling v. United States*,[131] the Court reviewed section 1346 in the case against Jeffrey Skilling, one of Enron's leading executives.[132] In that case, among other things, Mr. Skilling was charged with honest-services wire fraud,[133] for depriving Enron and its shareholders of its honest-services by manipulating publicly reported financial reports and making false statements.[134] Skilling argued that section 1346 was unconstitutionally vague.[135] The Court did not agree with Skilling, and preserved the statute.[136] However, in a unanimous decision,[137] it held that section 1346 only encompasses "bribery and kickback schemes."[138] The Court did not support the Government's position that section 1346 proscribed "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed

130. *See, e.g.*, Petition for Writ of Certiorari, Rybicki v. United States, 543 U.S. 809 (2004) (No. 03-1375) (noting that section 1346 has been considered in more than 270 federal decisions between 1988 and March 2004).

131. *Skilling* is a private case. Skilling v. United States, 561 U.S. 358, 367 (2010). However, it was decided with two companion cases, one of which involved charges of public corruption: *Weyhrauch.* The holding in *Skilling* led to the reversal of a conviction in *Weyhrauch*. This shows that the limiting principle articulated by the Court in *Skilling* is equally applicable in public or private honest-services cases. Weyhrauch v. United States, 561 U.S. 476 (2010).

132. Enron was an energy, services, and commodities company that went bankrupt in 2001 (at the time it was the largest bankruptcy in history). *Skilling*, 561 U.S. at 367–68. The fallout led to a number of investigations that uncovered extensive accounting fraud and corruption. *Id.* at 368. Jeffrey Skilling was one of the top executives implicated in the scandal. *See id.* at 368–69.

133. 18 U.S.C. §§ 1341, 1343 (2018).

134. *Skilling*, 561 U.S. at 369.

135. *Id.* at 376. Because the penal statute did not "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

136. *Skilling*, 561 U.S. at 412. By the time the Supreme Court took on *Skilling*, perhaps because of its extensive use by the Justice Department, the honest-services doctrine had come under attack from many practitioners and scholars. Capturing a general sentiment, Julie O'Sullivan previewed the Court's decision and argued that "if any statute is unconstitutionally vague, it is 18 U.S.C. § 1346." *See* O'Sullivan, *supra* note 129, at 23.

137. *Skilling*, 561 U.S. at 366. Justice Sotomayor filed a concurrence, joined in part by Justices Breyer and Stevens, that did not object to the Court's conclusions on the honest-services statute, but rather objected to the finding that Skilling had received a fair trial. Justice Scalia, joined by Justices Thomas and Kennedy, meanwhile argued that section 1346 should have been struck wholesale. To put it another way, there was no disagreement at all that the statute at issue was problematic.

138. *Id.* at 368.

financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[139] The Court viewed this as a compromise; a limiting principle that preserved the statute but did not allow its extension to any number of conducts.

Explaining why the Court did not hold the statute unconstitutional, the Court stated that it was their practice, "before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."[140] The limiting construction in this case was the result of an examination of how the honest-services doctrine was used pre-*McNally* and pre-section 1346.[141] The Government argued against this construction saying that the language in section 1346 and its legislative history indicated that the statute meant to punish the "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[142] The Court, however, found that most prosecutions, including the one in *McNally*, were for kickbacks and/or bribes, not for failing to disclose conflicts of interest.[143] Moreover, it cited the rule of lenity in favor of its more restrictive construction.[144]

Reading over *Skilling* now that the outrage of the scandal has faded from memory, it is hard to see how the decision was controversial. Section 1346 presents many problems of ambiguity, and the Court engaged in a fairly simple analysis using the traditional tools of criminal law to resolve the issue. The case serves to illustrate what the Court once again underlined in the recent case of *Kelly v. United States*: "not every corrupt act . . . is a federal crime."[145] In *Kelly*, the Court reversed a conviction of wire fraud and fraud on a federally funded program or entity against two public officials.[146] In that case, the Federal Government prosecuted public officials of the Port Authority of New York and New Jersey for closing two traffic lanes

139. *Id.* at 409–10.
140. *Id.* at 405.
141. *Id.* at 407–08.
142. *Id.* at 409.
143. *Id.* at 410.
144. *Id.* ("Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (citing Cleveland v. United States, 531 U.S. 12, 25 (2000)).
145. Kelly v. United States, 140 S. Ct. 1565, 1574 (2020).
146. *Id.*

in Fort Lee, New Jersey in retaliation for Fort Lee's mayor's refusal for supporting then New Jersey Governor Chris Christie's re-election campaign.[147]

At issue were 18 U.S.C. § 1343[148] and § 666(a)(1)(A)[149] which criminalized the same thing: the use of fraudulent schemes to obtain money or property. In a short and unanimous decision, the Court threw out the convictions.[150] This decision did not even involve the use of any limiting principle to construe the statute, rather it relied on a close inspection of the elements of the crime. The Court found that the both section 1343 and section 666(a)(1)(A) require that the fraud is used to obtain *property*.[151] Furthermore, it cannot be that some property or money could be gained incidentally to the scheme, but rather the property "must play more than some bit part in a scheme: [i]t must be an 'object of the fraud.'"[152] The public officials in *Kelly* had not schemed to obtain property or money.[153] Rather, they had schemed for "political payback."[154] The case solicited much outrage because the Port Authority officials had clearly behaved in a morally reprehensible and corrupt manner; however, the Supreme Court simply articulated what every 1L learns: not all bad acts are crimes.

The Supreme Court's jurisprudence surrounding the bribery statute has been more controversial (and maligned) than the honest-service cases. In *United States v. Sun-Diamond Growers of California*,[155] the Court looked at a case where a trade association of growers of raisins, figs, walnuts, prunes, and hazelnuts, Sun-Diamond, had given a number of gifts totaling over $5,000 in value to the then

147. *Id.* at 1568.

148. 18 U.S.C. § 1343 (2012) (criminalizing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . by means of wire [or] radio . . . communications").

149. 18 U.S.C. § 666 (a)(1)(A) (2018) (criminalizing when a public official "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property").

150. *Kelly*, 140 S. Ct. at 1568.

151. *Id.* at 1572.

152. *Id.* at 1573. If the statute also covered incidental losses such as the lost-hours of state employees that closed the traffic lanes then "even a practical joke" could be criminalized. *Id.* at 1573 n.2. Furthermore, it would be inconsistent with the Court's holdings in *Cleveland v. United States* and *McNally*, which established that "Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'" *Kelly*, 140 S. Ct. at 1574 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

153. *Id.*

154. *Id.*

155. 526 U.S. 398 (1999).

Secretary of Agriculture, Mike Espy.[156] Espy was prosecuted under 18 U.S.C. § 201(c)(1)(A), the gratuity subsection of the statute, which forbids gifts, "for or because of any official act performed or to be performed."[157] The basis of the prosecution was that Espy had received the gifts at the time he was considering two policies that would impact Sun-Diamond.[158] The Court held that for a gift to be a criminal gratuity, there needs to be a connection between the gift and the official act performed.[159]

In that case, the debate was about whether the gratuity statute precluded "any effort to buy favor or . . . goodwill from an official,"[160] or whether the payment had to be linked to a particular act by the public official. The Government contended that it was the former.[161] The Court, unanimously, disagreed.[162] Relying on the "for or because of any official act" language, the Court found that the statute only included gifts tied to particular acts.[163] Furthermore, it argued, the contrary meaning would criminalize "token gifts."[164] Finally, the Court found the Government's broad interpretation inconsistent with other provisions of both criminal and administrative law that regulate gift-giving.[165] This opinion could be read as another one based on close textual interpretation of a criminal statute to avoid issues of overbreadth. As Justice Scalia wrote, "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."[166]

In a more recent, and more famous, case, the Court once again reviewed the scope of the bribery statute. In *McDonnell v. United*

156. *Id.* at 400–01.

157. *Id.* at 401.

158. *Id.* One was a plan to provide federal funds to fray international marketing costs for companies like the ones represented by Sun Diamond; the other was a regulation of methyl bromide, a pesticide. *Id.* at 401–02.

159. *Id.* at 405.

160. *Id.*

161. *Id.*

162. *Id.* at 406.

163. *Id.*

164. *Id.* at 406–07.

165. In particular, the Court identified other criminal statutes that indicated more clearly that they meant to preclude gift giving more broadly, such as 18 U.S.C. § 209(a), which criminalizes broadly supplementing an executive public official's salary, without regard to the purpose of the payment. *Id.* at 408–09. It also pointed to administrative regulations, such as 5 C.F.R. § 2635.202 which precluded gifts from "prohibited sources" but then has many exceptions to this prohibition, exceptions that would limit the gratuity statute as interpreted by the Government. *Id.* at 411.

166. *Id.* at 412.

States, the main issue was what constitutes an "official act," as used in 18 U.S.C. § 201 (a)(3).[167] In that case, former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, were indicted by the Federal Government on honest services fraud and Hobbs Act extortion after they accepted $175,000 in loans, vacations, and gifts (like a Rolex and a $20,000 shopping spree) from Jonnie Williams, a businessman.[168] In return, Mr. and Mrs. McDonnell hosted an event at the governor's mansion to promote a product produced by Mr. Williams, a supplement called Anatabloc, and encouraged public universities to do research on the product.[169]

The bribery statute prohibits intending to influence or being influenced in an official act. "In other words, for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act."[170] In *McDonnell*, the Court adopted a "bounded interpretation of 'official act,'"[171] holding that the term refers to a "decision or action on a 'question, matter, cause, suit, proceeding or controversy.'"[172] The "'question, matter, cause, suit, proceeding or controversy' 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."[173] This definition is not so narrow as to require that only actions deriving from formal legal powers constitute legal acts. After all, the Court found that pressuring another official to do an "official act" was enough to violate the statute.[174] Whether the things that McDonnell did on Mr. Williams' behalf, like hosting events for him, expressing support for his product, and having subordinates meet with him, were "official acts" is a question the Court said could be reviewed in a new trial with jury instructions reflecting the new "official act" definition.[175]

Much of the public debate about *McDonnell* has had to do with whether or not payment for access was corrupt. As the non-profit

167. McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016).
168. *Id.* at 2362–64.
169. *Id.* at 2363.
170. *Sun-Diamond Growers,* 526 U.S. at 404–05 (emphasis omitted).
171. *McDonnell*, 136 S. Ct. at 2368.
172. *Id.* at 2371.
173. *Id.* at 2371–72.
174. *Id.* at 2370.
175. *Id.* at 2375. Ultimately the Government decided to not retry the case, however.

Citizens for Responsibility and Ethics in Washington argued in its brief in support of the Government, "[t]his is not a case where McDonnell provided access as an extension of his 'favor [for] certain policies' and thus his 'favor [for] the voters and contributors who support those policies.'"[176] Many commentators have interpreted *McDonell* to mean that the Court rejected this argument, pointing to this passage: "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns."[177] Notice, however, that the Court does not say in fact that access can never be a sign of corruption. As Chief Justice Roberts wrote:

> this is not to say that setting up a meeting, hosting an event, or making a phone call is always an innocent act, or is irrelevant, in cases like this one. If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act.[178]

Given the facts of *McDonnell*, it is hard to think that what happened was not bribery. The Court, in fact, did not conclude that it was not; it remanded the case for a jury to decide.[179] It was the Department of Justice that decided it was not by choosing not to prosecute it again. The Court acknowledges that this case is not about a "normal political interaction between public officials and their constituents . . . . [b]ut the Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"[180] This tells us that the Court recognized that what happened in McDonnell's case was wrong but concluded that adopting a broad understanding of the statute that goes against the canons of criminal statutory construction as well as its own

176. Brief of Amicus Curiae for Citizens for Responsibility and Ethics in Washington in Support of Respondent at 8, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1445327 (citations omitted) (alterations in original).

177. *McDonnell*, 136 S. Ct. at 2372.

178. *Id.* at 2371.

179. *Id.* at 2375.

180. *Id.* at 2372–73 (citing United States v. Stevens, 559 U.S. 460, 480, (2010)).

precedent was unwarranted.[181] Again, the issue is not if these acts were corrupt (the opinion indicates that the Court believes they were) but rather if they were criminal.

McDonnell is a progeny of *Sun-Diamond* of sorts.[182] Like in that case, in *McDonnell* the Court adopted a narrow interpretation of the bribery statute: only decisions or actions based on a pending issue or controversy are "official acts" subject to criminal liability under section 201.[183] Many have argued that the Court's reasoning is illusory as there is no clear line dividing "formal exercise[s] of governmental power"[184] from informal ones.[185] Nonetheless, the Court was precisely concerned with vagueness when creating this test, and in its view, it provides more clarity than simply saying that any act can be official.[186]

The Supreme Court's interpretation of the Hobbs Act has been somewhat more confused than those of the other anti-corruption criminal statutes analyzed.[187] This statute makes it a crime for a public official to receive a payment in exchange for a "specific requested exercise of his or her official power."[188] In *McCormick v. United*

181. The Court argued that it was concerned with "cast[ing] a pall of potential prosecution" over politics as usual. *Id.* at 2372. After all, adopting a broad interpretation of official act, Chief Justice Roberts argued, could criminalize routine political activity such as "arrang[ing] meetings for constituents, contact[ing] other officials on their behalf, and includ[ing] them in events all the time." *Id.* Much of the criticism around *McDonnell* centered on this conception of politics. If buying access was not bribery, then what was? *See* Eisler, *supra* note 50 *passim* (describing this narrowing interpretation as a reflection of the Court's agonist politics).

182. George Brown, for example, argues that the decision seems to follow *Sun-Diamond*'s admonition that "[b]ecause . . . an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions, *a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter*." George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 22 n.115 (2017) (quoting United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 399 (1999)) (emphasis added).

183. *McDonnell*, 136 S. Ct. at 2368.

184. *Id.*

185. The case attracted intense media interest and commentary, most of it negative. For a look at how the case was seen before the decision, see, e.g., George F. Will, *Virginia's Former Governor Faces Prison Over Politics*, WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/opinions/virginias-former-governor-faces-prison-over-politics/2016/01/06/2af3ff74-b3e6-11e5-9388-466021d971de_story.html; *see also* Stephenson, *supra* note 24 (arguing that "the Court's opinion both bespeaks an unrealistic view of how senior politicians exert influence over policy, and places undue weight on concerns about chilling (allegedly) desirable conduct").

186. *McDonnell*, 136 S. Ct. at 2361.

187. 18 U.S.C. § 1951.

188. Evans v. United States, 504 U.S. 255, 258 (1992) (citations omitted). The opinion further clarifies that the meaning of extortion in this statute should be interpreted as it was in common law,

States,[189] in a 6-3 opinion, the Court threw out a conviction against a state representative under the Hobbs Act because the jury was told that they did not have to find a quid pro quo existed to convict.[190] The Court held that the Hobbs Act *did* require a quid pro quo.[191] So, for a conviction under the Hobbs Act, the Government must show that a payment was made with the expectation that it would lead to a specific benefit.[192] This decision, curtailing Hobbs Act prosecutions to quid pro quos, is in line with the trend that I have outlined in this chapter.

In *Evans v. United States*,[193] however, once again a divided court held in favor of the Government in a prosecution of a public official from Georgia.[194] In that case the Court once again analyzed the elements of the crime of extortion under the Hobbs Act.[195] The issue was whether, to commit the crime of extortion, a public official had to induce the payment or if passive acceptance was enough.[196] The Court concluded that, once a quid pro quo was established, passive acceptance was enough to find a conviction.[197] This meant that the official did not have to ask for the bribe, but simply take it.[198] This decision is one of the few anti-corruption decisions that have gone in the way of the Government. It is also unclear why the Court held this way; after all, as Justice Thomas argues in his dissent, there must be a difference between bribery and extortion.[199] For him, that difference is that extortion contains the element "under color of office," which means that "[t]he money or thing received must have been claimed, or accepted, in right of office, and the person paying must have been yielding to official authority."[200] In sum, inducement is a necessary

finding that "[e]xtortion by the public official was the rough equivalent of what we would now describe as 'taking a bribe.'" *Id.* at 260.

189. 500 U.S. 257 (1991).

190. *Id.* at 274.

191. *Id.*

192. *Id.*

193. *Evans*, 504 U.S. at 255.

194. *Id.* at 256–57. The outcome was 6–3, but both Justice O'Connor and Kennedy filed separate concurring opinions. *Id.*

195. *Id.* Justice Thomas expressed misgivings about this statute in his dissent, stating that "[o]ver the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials." *Id.* at 290 (Thomas, J., dissenting).

196. *Id.* at 256.

197. *Id.*

198. *Id.* at 266.

199. *Id.* at 280 n.2.

200. *Id.* at 281.

element of the crime. This was obviously not the view of the Court, and it complicates the narrative that for the past three decades the Court has been rubberstamping public acts of malfeasance under the notion of politics as usual.[201]

Another anti-corruption case that the Government won is *Sabri v. United States*.[202] In that case, the Court examined 18 U.S.C. § 666(a)(2), which proscribes state and local bribery in entities that receive $10,000 in federal funds.[203] The issue was, can the Federal Government extend its jurisdictional hook to prosecute the crime at the local level, even if the federal funds that the local government receives are not used in the bribery scheme.[204] A unanimous court held that Congress could enact § 666 under the Necessary and Proper Clause of Article I, § 8.[205] This case was therefore not strictly about the contours of the statute, but about what Congress could constitutionally criminalize. It was a big win for the Department of Justice because it allowed the Federal Government to prosecute strictly local conduct. However, this case was not really about what the court considers to be criminal corruption. Prosecutors going after state and local conduct will still be bound by all the other anti-corruption jurisprudence.

Despite these two cases, as has been laid out, the majority of the opinions, and all the most recent ones, have been both unanimous and pro-defendant.[206] It is clear that the Supreme Court's analyses in the majority of the anti-corruption cases shows that the Justices are preoccupied with the potential over-inclusivity of criminal law statutes or, in the words of Chief Justice Roberts, "overzealous prosecut[ions]."[207] There may be questions as to why practically all Justices in thirty years of reviewing these particular statutes have only been consistently preoccupied with these kinds of defendants.[208] As

201. *See* Eisler, *supra* note 50, at 1633 n.40.
202. 541 U.S. 600 (2004).
203. 18 U.S.C. § 666(a)–(b) (2018).
204. *Sabri*, 541 U.S. at 602–04.
205. *Id.* at 607.
206. *See supra* text accompanying notes 85–141.
207. McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016).
208. While some conservative Justices like Scalia generally wrote and voted in consistently pro-defendant opinions, others like Alito and Thomas have not always done so. However, in these corruption cases, when the defendants have been white, educated, and powerful, these Justices have voted in their favor. As mentioned in the introduction, there are important questions about the

Stevens wrote in his dissent in *McNally*, about the outcome leaving "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision."[209] Nonetheless, that there may be ideological or political[210] factors driving each vote is a fact of every case that reaches the Court.[211]

I do not mean to suggest that the Court's jurisprudence has clarified all the boundaries of anticorruption criminal statutes. For example, though *McDonnell* makes certain lines about what is an official act, it still leaves room for disagreement. Is sending an email expressing a preference that a contract be awarded to a certain provider, but not mandating that it be, a formal exercise of power? One can probably come up with scenarios in which that act would be an official one and in which it could not. However, demanding total clarity in these types of cases may be far-fetched. After all, we do not even really know what a quid pro quo is, for each element of a quid pro quo can be subject to interpretation. Is a job recommendation a *quo*? Is booking the politician's daughter's restaurant a *quid*? Does the passage of time obviate the *pro*? As the Sixth Circuit put it: "not all . . . quid pro quos are made of the same stuff."[212]

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motivations behind many of the Justices' votes; however, a strictly political interpretation does not fit the outcome of anti-corruption prosecutions. If that were the case, then we would expect a divided court with liberals voting with the Government. Another explanation is that regardless of politics, Justices vote to protect their peers. Perhaps. However, trying to divine the motivations behind each Justice's vote is an unlikely to be fruitful path for research.

209. McNally v. United States, 483 U.S. 350, 377 (1987).

210. Eisler, *supra* note 22, has argued that this interpretation belies a particular view of politics. Judge Lynn Adelman, meanwhile, says that these decisions show a concern only for those defendants of the same milieu as the Justices thereby reflecting personal concerns more than solely jurisprudential ones. Adelman, *supra* note 23, at 13–14.

211. *See supra* note 23 and accompanying text.

212. United States v. Abbey, 560 F.3d 513, 517 (6th Cir. 2009). The court in that case held that the quo need not be a specific act but the understanding that the official would curry favor for the bribe-giver when the opportunity arose. *Id.* at 521. In that particular case, the court was looking at extortion under the Hobbs Act, which the court defined as a public official knowingly receiving a bribe. *Id.* at 518. The Supreme Court denied certiorari but given the arguments in *McDonnell* and *Skilling,* discussed *infra*, it is questionable whether the Court would have upheld the Sixth Circuit's reasoning. Abbey v. United States, 558 U.S. 1051 (2009). The Sixth Circuit ignored *Sun-Diamond*, discussed *infra*, relying on statutory differences between the Hobbs Act and 18 U.S.C. § 201 (2018). *Abbey*, 560 F.3d at 521. While those differences are there, the discussion *infra* shows that more than statutory construction, the Supreme Court has been preoccupied with limiting prosecutions to a very discrete set of behaviors: actually giving/promising bribes for actions. The holding that criminal law prohibits the buying of indeterminate influence sits uneasy in the wake of *Skilling*, *McDonnell*, and even *Citizens United* (also discussed *infra*).

As scholars of corruption have indicated, that criminal anticorruption statutes are to a large extent indeterminate is inevitable.[213] This is because there is no bright line between corrupt and non-corrupt conduct. Of course, there is behavior that is clearly in one camp and not the other, but a lot of it falls in between. The Supreme Court's jurisprudence just explored suggests that the Court is aware of this and is reserving the criminal liability only for conduct that is outside of that gray area. There may be concerns that this interpretation is underinclusive;[214] however, in criminal law we tend to be more preoccupied when the statutes are overinclusive.[215]

There is a question as to whether this formal or legalistic interpretation has actually curtailed the Federal Government's ability to prosecute corruption. As seen in Part I, the U.S. has historically not turned to criminal law for curbing corruption, and—furthermore—international experience shows that indeed criminal law is not meant to be the primary tool for corruption control.[216] Unfortunately, we do not have information about the prosecutions or investigations that were abandoned because officials believed that as the law is interpreted there would be no chance of convictions. However, we do have evidence that indicates that the narrowing of criminal anti-corruption statutes has not proved to be fatal to the Department of Justice's Public Integrity Section. On the other hand, we have also seen major cases—such as Senator Menendez's outlined in the introduction—where prosecutors have lost seemingly because of how the Supreme Court has interpreted criminal corruption laws. The next part turns to this debate.

III. THE EFFECTS OF THE SUPREME COURT'S JURISPRUDENCE

Reading the Court's anti-corruption jurisprudence may lead one to conclude that the Department of Justice must have an impossible job prosecuting corruption.[217] Whether or not it does, however, is an

213. Susan Rose-Ackerman, *Corruption and the Criminal Law*, 2 FORUM ON CRIME & SOC'Y 3, 6 (2002); FISMAN & GOLDEN, *supra* note 53, at 26–30.

214. TEACHOUT, *supra* note 84, at 50.

215. *See* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 484–85 (2015) (making the case that broad interpretations of anti-corruption statutes create a risk of too much prosecution).

216. *See supra* Part I.

217. This is despite there being a specialized unit, the Public Integrity Section ("PIN"), within DOJ handling these cases, as well as the Federal Bureau of Investigation's Public Corruption Unit

empirical question. One (limited)[218] way to assess this is to look at the number of cases the DOJ prosecuted and the number of convictions or pleas it secures. The DOJ[219] publishes yearly reports to Congress detailing its activities.[220] In its last report (from 2018), the Department published a table of cases charged and convicted per year between 1999 and 2019.[221] The table is not perfect because the litigations are lengthy, so many (if not most) of the convictions coming in any given year are from older cases. For example, in 2018 there were 479 cases still awaiting resolution.[222] Nonetheless, the table shows a fairly impressive conviction rate of around 90.6% in total.[223] The yearly average conviction rate is similar at 91%.[224] And in fact, if anything that number has been improving since *Skilling* was decided. From 1999 to 2010 the U.S. secured convictions in 88% of the cases tried by the Department, and since 2011 it has won in 95% of cases.[225]

At the outset it is important to be clear about the kinds of cases brought by the DOJ and reported by the PIN. As the Section details in its report to Congress, the PIN's priorities are "election crimes,"

and the Office of the Inspector General, which provide technical and investigative assistance. *See Landscape Assessment: Survey of the Practitioners, Offices, and Agencies Charged with Upholding Public Integrity Across the United States*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (2016), https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/341201645-landscape-assessment.pdf. I point to this because such specialized institutions in anti-corruption law enforcement are rare worldwide.

218. Although I engage in this analysis in this part, it is important to recognize its limitations. As I mention *infra*, a problem with this approach is that we do not have a good approximation of the real total number of cases investigated because we only have the ones were the DOJ pushed forward. In other words, our denominator is limited, and we do not know if the limitation is a product of prosecutors abandoning unfruitful investigations or letting go of cases due to political or extra-legal pressures. By looking at conviction rates alone, we cannot assess how the Department is responding to the narrowing of the anti-corruption laws. Nonetheless it does provide an important first approximation. In subsequent projects I intend to tackle the question with a more qualitative approach.

219. The PIN is the one that publishes the reports; however, these contain prosecutions carried out by them and/or U.S. Attorney Offices. *See Public Integrity Section (PIN)*, DEP'T OF JUST., https://www.justice.gov/criminal-pin (last visited Apr. 11, 2021).

220. *Id.*

221. The following analysis takes only the list between 1999 and 2018 as that was the last year available at the time of writing. Since then, one more year has been published. U.S. DEP'T OF JUST., REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2018 23–24 (Apr. 26, 2018).

222. *Id.*

223. *Id.* This was calculated dividing the total cases charged by total convictions between 1999 and 2018. It ignores the many cases still pending.

224. *Id.*

225. *See id.* All of these numbers come out of calculating percentages from the 2018 PIN report to Congress. *Id.*

"conflict of interest crimes," and public corruption cases.[226] It is this latter category that has been most impacted by the Supreme Court's jurisprudence reviewed in the previous part. The Court's focus (and that of most scholars) has been on the bribery and the honest-services statutes, but as the PIN report shows the Government has many more tools at its disposal than what we have just discussed.[227] It's important to highlight that the Section specializes in more than just the types of cases we have discussed so far because it contextualizes any of the numbers that the Section reports; a 95% conviction rate does not mean that the Department wins 95% of bribery cases, but rather that it wins 95% of a variety of cases that it broadly categorizes as corruption/public trust cases. With that caveat in mind, I now turn to look at the numbers.

The 95% conviction rate suggests that, despite the uproar, the DOJ has been undeterred by the Supreme Court anticorruption jurisprudence. However, there are a couple of factors that complicate the puzzle. First, since *Skilling*, the number of prosecutions carried out by the DOJ has fallen. The Department prosecuted 13.5% fewer cases between 2011 and 2018 than it did between 1999 and 2010.[228] This is true across all kinds of prosecutions, from federal to private ones.[229] In fact, the ones that have decreased the least are federal ones (dropping by 19% in the observed periods).[230] An explanation for this drop is that it is now harder to prosecute cases because of the way the Supreme Court has ruled. Another option is that the DOJ is bringing fewer but better cases, which would account for their greater success rate.

Second, an important issue with these statistics is that they obscure the relevant denominator, which is not the cases charged, but the number of cases that would have been prosecuted but-for a legal analysis concluding that under current case law a conviction is not possible or likely. In other words, we do not know how many cases the Department investigated and dropped because it felt that it would not secure a conviction given the current standards. Without this

226. *Id.* at ii.

227. This is important because it widens the scope of what we consider anti-corruption criminal prosecution.

228. *See id.* at 23–24.

229. *Id.*

230. *See id.*

number, we do not know how constrained public officials are (or feel) by the Court.

Nonetheless, at a bare minimum, the large number of successful prosecutions implies that prosecutors are far from powerless. We may not know the "true" rate of conviction, but we do know that in the last nineteen years the Department has won convictions in over 19,000 anti-corruption cases, 7,515 of them occurring after *Skilling* was decided.[231] This is not an insignificant success rate. Arguing that the Supreme Court really has hampered the Department requires showing that but for these decisions the DOJ would have brought thousands of cases that it chose not to bring. After all, for the "true" conviction rate to drop to 50%, for example, the DOJ would have needed to drop around 21,000 cases in nineteen years.[232] Given the sheer volume of cases, a drop this numerous is highly unlikely.[233]

Furthermore, beyond the numbers reported, the actual cases described in the Department's yearly congressional reports suggests that the DOJ is not powerless.[234] First, the reports show that, like in much of the criminal justice system, most of the convictions secured by the Department are the result of guilty pleas.[235] This shows, at a minimum, that defendants in public corruption cases are not persuaded that the Supreme Court's jurisprudence shields them from the reach of

231. *See id.*

232. *See id.*

233. The numbers presented by the DOJ are not disaggregated by race, gender, socioeconomic status, or title/role of the individual being prosecuted. As such, more fine-grained analysis as to the actual power dynamics at play between prosecutors and defendants cannot be ascertained. It could be that the DOJ chooses mostly "weak" defendants (low ranking officials for example) to secure most convictions, which they then do. However, as discussed *infra*, when they prosecute high-profile cases their success rate is much lower, reinforcing their use of discretion in favor of easier to convict cases. Such a use of discretion is not inconceivable; in fact, it would be consistent with how many prosecutors decide which cases to take. Without more data we cannot know for sure. This is an area of important future research. Even noting this big caveat, however, I believe that the large number of successful prosecutions forces proponents of the position that the Supreme Court has weakened the DOJ tremendously to, at a bare minimum, show how this is so beyond the few high-profile losses discussed in this article.

234. U.S. DEP'T OF JUST., *supra* note 221, at 10–20. How much should be read into these reports is questionable. After all, these reports are written with a particular audience: congressional oversight committees. To that extent, these reports will often paint a self-serving and congratulatory picture. Nonetheless, with that caveat in mind, we cannot ignore the fact that the reports showcase actual convictions, regardless of the story-telling methods employed in the reports.

235. This has been true for a long time. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1,1 (1979); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 857 (2000).

the State.[236] The other thing that stands out from the reports is that the Department has been successful in prosecuting various kinds of public officials and private citizens: from former Federal agents,[237] to state representatives,[238] and both non-profit[239] and for-profit[240] high ranking employees or business owners.

It is not only the report that suggests that the reach of the Court's anti-corruption jurisprudence has not been as impactful as much of the commentary outlined in the introduction suggested. Several lower courts have upheld convictions even under the shadow cast by *McDonnell* and/or *Skilling*. For example, in *United States v. Lee*,[241] the Sixth Circuit looked into whether or not a local public official had carried out an "official act" in furtherance of Hobbs Act extortion when she helped a private individual who had paid her a lot of money[242] to "achieve favorable outcomes in judicial and administrative proceedings."[243] The defendant in *Lee* argued that even if under *McDonnell* a "public official did not actually have to perform

236. Much of the plea-bargaining literature discusses the relative power-asymmetry between prosecutors and defense, and the sword of Damocles effect of sentencing post-trial versus in a guilty-plea are very influential in securing guilty pleas even in circumstances where individuals are not guilty. *See* Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 *passim* (2017). The extent to which this is happening in these types of cases depends on whether the people being prosecutors are mostly individuals that have the resources to not be coerced into guilty pleas by the fear of potentially high sentences. Nonetheless, my claim is not that individuals fighting these cases are always powerful, wealthy, or well-connected, but rather that regardless of who they are and how connected they are, the fact that there are still mostly guilty pleas suggests that the Supreme Court's anti-corruption criminal law hasn't served as a shield to the Department's sword.

237. *See, e.g.*, Information, United States v. King, No. 18-cr-00318 (D.D.C. Oct. 22, 2018) (where a former U.S. Department of Veteran's affairs pleaded guilty to honest services and property wire fraud, bribery, and falsifying records to obstruct an administrative investigation); Information, United States v. Sanchez, No. 18-cr-00040 (W.D. Wash. Feb. 12, 2018) (where a former ICE attorney pleaded guilty to wire fraud and aggravated identity theft).

238. *See, e.g.*, United States v. Woods, 978 F.3d 554, 557, 563 (2020) (where former Arkansas State Senator Jonathan Woods was convicted of conspiracy to commit honest services mail and wire fraud, honest services mail and wire fraud, and money laundering).

239. *See, e.g.*, United States v. Oksuz, No. 18-cr-00088 (D.D.C. Feb. 13, 2019) (where a former president of an NGO pled guilty to devising a scheme to falsify, conceal, and cover up material facts from the U.S. House of Representatives Committee on Ethics).

240. *See, e.g.*, Verdict Form, United States v. Lundergan, No. 18-CR-00106-GFVT, 2013 WL 12458169 (E.D. Ky. Sept. 12, 2013); United States v. Lundergan, No. 18-CR-00106-GFVT, 2020 WL 3895771, at *1 (E.D. Ky. July 10, 2020).

241. 919 F.3d 340 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 895 (2020).

242. In that case, an Ohio County Council member was charged with various counts of honest-services mail and wire fraud and Hobbs Act extortion after she helped a private citizen (who had paid her large amounts of money a number of times) try to secure more favorable outcomes for criminal matters involving his family members and also with the IRS. *Id.* at 342–43.

243. *Id.* at 354.

an official act herself,"[244] there was a tacit requirement that the person carrying out the act have either an "advisory role" or "leverage or power" over the second official for her conduct to be an official act in furtherance of Hobbs Act extortion.[245] The Sixth Circuit disagreed, finding that "nowhere in *McDonnell* did the Supreme Court state that it was creating such a rule."[246]

United States v. Lee serves to highlight two propositions. First, circuit courts will not go further than *McDonnell*. What the defense was asking was further circumscribing "official act" to only certain acts depending on the relationship with certain public officials.[247] There is no need for such specificity in a criminal statute, and the court quickly saw through this argument and dismissed it.[248] Secondly, and more significantly perhaps, this case shows that even under *McDonnell* convictions are possible.[249] The Sixth Circuit concluded that there was enough evidence for a reasonable trier of fact to "conclude beyond a reasonable doubt that Defendant agreed to perform [an official act] in exchange for bribes."[250] Crucially, for a conviction, the Government did not need to prove that official acts, advice, or pressure were taken—but simply that there was an agreement that they would be.[251] On first blush it seems that this is a distinction without a difference, but it is not. By allowing prosecutions to be centered around agreements rather than only affirmative acts, the Sixth Circuit is giving the Department a wider prosecution net. This decision obviously does not carry the force of the Supreme Court precedent, but it does offer a path for future prosecutions to craft

244. *Id.* at 351.
245. *Id.* at 352.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 359. It may be argued that *Lee* only shows that low-level public officials will be successfully prosecuted. The defendant in that case was only a local council member in Ohio, after all. *Id.* at 343. Meanwhile, as discussed *infra* high-ranking officials have been protected thanks to *McDonnell* and other cases. It may be that the relative position of the officials is affecting the outcomes of the cases; however, the issue is whether the Supreme Court is devising rules that make it impossible to prosecute certain cases. *Lee* suggests that it is not. Perhaps more needs to be done when a particular kind of defendant is facing prosecution, but that need not necessarily be expanding the law to more conduct. After all, that could only lead to even more low-level prosecutions as opposed to high-level ones. *See* note 190 and accompanying text.
250. *Lee*, 919 F.3d at 356.
251. *Id.* at 350.

successful case strategies even under the *McDonnell* construction of bribery.

In another important recent decision, *United States v. Ng Lap Seng*,[252] the Second Circuit refused to extend the definition of "official act" from 18 U.S.C. § 201 (at issue in *McDonnell*) to 18 U.S.C. § 666, a bribery and embezzlement statute, and the Foreign Corrupt Practices Act (FCPA).[253] The case involved a Chinese real estate developer, Ng, who bribed two U.N. officials so the U.N would host a convention in one of his hotels in Macau.[254] Sections 666 and 201 are worded differently but proscribe the same conduct: bribing a public official with the intent to influence a public decision, soliciting bribes for the same thing (or attempting either).[255] Both of the statutes therefore address explicit quid pro quos, nothing more. The Second Circuit found that the statutes differed in that *McDonnell*'s "official act" standard for the quo component of bribery as proscribed by section 201 does not apply to the "more expansive" language of section 666 or the FCPA.[256]

This ruling shows that the Department of Justice is not as constrained by *McDonnell* like many claim it is. After all, it could simply choose to charge a different crime to avoid the pitfalls it ran into in *McDonnell*. In fact, *Ng Lap Seng* suggests that, had the Department retried Governor McDonnell charging a violation of section 666, it could have won. Remember that at issue in *McDonnell* were payments and gifts upwards of $170,000 from a private actor to secure lucrative government contracts for his companies.[257] This conduct would have clearly been proscribed by section 666, which prohibits "accept[ing] . . . anything of value . . . intending to be influenced or rewarded in connection with any . . . transactions of such . . . government."[258] The problem for the Supreme Court was that McDonnell never did anything more than calling subordinates to arrange meetings, which is not an "official act."[259] However, calling

252. United States v. Ng Lap Seng, 934 F.3d 110 (2d Cir. 2019).

253. *Id.* at 146.

254. *Id.* at 116–17.

255. *Compare* 18 U.S.C. § 201(b), *with* 18 U.S.C. § 666(a).

256. *Ng Lap Seng*, 934 F.3d at 133. They also differ in that the maximum penalty for violating section 201 is a fifteen-year prison sentence and for section 666 is ten years. *Compare* 18 U.S.C. § 666(a), *with* 18 U.S.C. § 201(b).

257. McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016).

258. 18 U.S.C. § 666(a)(1)(B).

259. *McDonnell*, 136 S. Ct. at 2373–74.

subordinates to arrange meetings—with all the other factual evidence in that case—could be a violation of section 666.

Carrying out a similar analysis as the Second Circuit in *Ng Lap Seng,* other lower court[260] cases have sustained prosecutions after an analysis of *Skilling*[261] and *Sun-Diamond*,[262] two cases that have been oft-criticized as harbingers of rampant corruption.[263] My aim here is not to highlight every single case that has gone favorably for the Government.[264] Rather, I point to these cases to suggest that courts have found limiting principles and/or prosecutors have deftly argued that criminal elements are met even under the Supreme Court's constraining jurisprudence. That is, for all the harbingers of impunity announced, there are still a number of examples of law enforcement securing convictions for crimes of corruption.

On the other hand, to point to these cases and the above-mentioned DOJ reports as proof that the Department is unaffected by the Supreme Court anticorruption jurisprudence is to ignore the many

260. There have been more courts sustaining convictions under *McDonnell*. *See, e.g.*, United States v. Oaks, 302 F. Supp. 3d 716, 728 (D. Md. 2018) (finding that the "allegations [were] within the range of conduct proscribed by federal law after *McDonnell*").

261. *See, e.g.*, United States v. Langford, 647 F.3d 1309, 1322–23 n.9 (11th Cir. 2011) (sustaining a conviction for honest services mail and wire fraud) ("Here, however, in sharp contrast, there is no doubt that the government charged Langford with accepting bribes as a public official—classic honest services fraud that existed before, and after, *Skilling.*").

262. *See, e.g.*, United States v. McNair, 605 F.3d 1152, 1190 (11th Cir. 2010) (where the Eleventh Circuit followed a similar analysis as the second in *Lang*, distinguishing section 201 and section 666 to sustain a conviction against private contractors for bribery after it had been challenged on grounds that *Sun-Diamond* precluded only actions in connection to an official act); *see also* United States v. Ganim, 510 F.3d 134, 146 (2d Cir. 2007) (sustaining corruption convictions by refusing to extend the interpretation of section 201 in *Sun-Diamond* to "neither the Hobbs Act provision under which Ganim was convicted, 18 U.S.C. § 1951, nor any other of the bribery-related statutes at issue").

263. *See, e.g.*, Torres-Spelliscy, *supra* note 21, at 496; Eisler, *supra* note 50, at 1636. This is in keeping with many holdings by U.S. courts that have been more pro-government in these types of cases than the Supreme Court. *See, e.g.*, United States v. Arena, 180 F.3d 380, 392–94 (2d. Cir. 1999) (a case abrogated on other grounds where the Second Circuit analyzed Hobbs Act extortion—18 U.S.C. § 1951—and recognized that the term "property," as opposed to "anything of value" found elsewhere in the statute, is "expansive," encompassing "in a broad sense, any valuable right considered as a source or element of wealth, including a right to solicit business"); *see also* United States v. Re, 401 F.3d 828, 834–35 (7th Cir. 2005) (broadly interpreting the extent to which interstate commerce needs to be affected for the Hobbs Act to apply, finding that the Government need only demonstrate a *de minimis* effect on commerce); United States v. Peterson, 236 F.3d 848, 851–52 (7th Cir. 2001) (there need only be a "realistic probability of an effect . . . on interstate commerce" for Hobbs Act extortion).

264. Not only would that be an endless task, but also lower courts have equally used *McDonnell* and other cases to find for defendants. *See* United States v. Jefferson, 289 F. Supp. 3d 717, 736 (E.D. Va. 2017) (reversing a conviction on the grounds that "[t]he evidence presented at trial d[id] not support a finding that Jefferson (the defendant) took 'official acts'").

high-profile cases, like the one of Senator Menendez, that suggest otherwise. In the past decade, besides *Kelly*, *McDonnell*, and the failed prosecution of Senator Menendez, there have been at least two other major cases that have been directly affected by the Supreme Court's jurisprudence.

In 2017, a district judge vacated seven of ten corruption charges against former congressman William Jefferson, who had been convicted of using his congressional office as a criminal enterprise to enrich himself, soliciting and accepting hundreds of thousands of dollars in bribes to support his business ventures in Africa.[265] The court found that much of the behavior at issue did not rise to the "official act" standard articulated in *McDonnell*.[266] Then, following a similar trajectory, the Second Circuit overturned corruption convictions against former New York State Assembly Speaker Sheldon Silver.[267] The court, again citing the "official acts" standard in *McDonnell*, found that the Government had not proved with enough specificity that Mr. Silver had taken or intended to take any acts in return for a bribe.[268] Note, however, that even in those two cases, the Government was able to secure convictions for some of the charges in the indictment, even if they failed on their bribery theories.[269]

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265. *Id.* at 721, 744. The case involved a scheme to use his office to pressure the U.S. Trade and Development Agency to fund a project in Nigeria in exchange for bribes. *Id.* at 741. It also involved numerous other efforts to bribe African officials for various business ventures there. *Id.* at 721–22. In a famous aspect of the case, $90,000 dollars were found in Mr. Jefferson's freezer for bribes in Nigeria. *Id.* at 723–24.

266. *Id.* at 740.

267. United States v. Silver, 948 F.3d 538, 546, 577 (2d Cir. 2020) (stating that the Government accused Silver of having "orchestrated two separate bribery schemes in which he received referral fees from law firms in exchange for taking official actions"). The Second Circuit did not overturn all of the convictions, only the ones relating to Hobbs Act extortion. *Id.* at 577.

268. *Id.* at 574–75.

269. *Jefferson*, 289 F. Supp. 3d at 755; *Silver*, 948 F.3d at 577. Although there is lack of clarity around the term, many have pointed out the problematic nature of "over-charging" defendants in criminal proceedings. *See, e.g.*, Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259 *passim* (2011) (discussing a proposed ABA Criminal Justice Standard for charging practices to see whether it removes much of the problematic discretion in charging practices); *see also* Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 226 (1993) (taking overcharging as fact and arguing that for sophisticated defense attorneys and defendants, this culture of overcharging means that the charges don't really mean what they say but merely constitute a first bargaining position: "Experienced defense counsel recognize bargaining as a poker game of bluff and intimidation."). One could read my analysis to suggest that I am tacitly arguing that in these cases perhaps the Government ought to over-charge so that something sticks. That however need not be the reading. The Government should only charge bribery if it thinks it can

Nevertheless, the fact remains that, in a number of high-profile cases, the Department of Justice has lost. Making matters worse for the Government is that the impact on anti-corruption efforts of losing those cases is arguably greater than that of winning all the other smaller ones. This is because, in issues of corruption, "the fish rots from the head down."[270] According to the political scientist Bo Rothstein, because of their visibility, high-ranking public officials getting away with corruption can be hugely detrimental to anti-corruption efforts, because they cement perceptions that corruption is happening, thereby spreading corruption.[271] Therefore, the fact that a number of political scandals—"Bridgegate" and Governor McDonnell's and Senator Menendez's clear acts of malfeasance—are met with impunity can undo many of the Department of Justice's anti-corruption litigation achievements.

The question is, therefore, are the losses enough to make us worried? On the one hand, it is true that the DOJ has suffered a number of high-profile and impactful losses; however, it is also true that its own conviction rate and the outcomes in several district courts suggest that the Federal Government still has mechanisms to successfully prosecute these cases. Unfortunately, whether the impunity is enough to create high levels of corruption from becoming the norm is an admittedly empirical question that we do not currently have tools to answer.

Determining the necessity for criminal law reform will thus necessarily be normative. In the next part, I argue that the focus for reform in anticorruption should not be the criminal law.[272] This part has shown that prosecutions in this area are difficult, but not

win, but just because it may not be able to win under section 201 does not mean it cannot win under section 666 and should therefore charge that crime.

270. Bo Rothstein, *Corruption and Social Trust: Why the Fish Rots from the Head Down*, 80 SOC. RSCH.: INT'L Q. 1009, 1009 (2013).

271. *Id.* at 1021–22. According to the standard equilibrium model of how corruption works, perceptions of corruption have the power of increasing or decreasing corruption because people engage in the behavior according to how frequent they believe that behavior to be. *Id.* This is why high-visibility impunity is so problematic. *See* Pedro Gerson, *Return of the King: Corruption Backsliding in America*, CARDOZO 3 INT'L COMPAR., POL'Y & ETHICS L. REV. 985, 1045–46 (2020).

272. I will not engage with all the possible normative analyses for this question. We could engage in a very lengthy discussion of what is necessary to achieve justice from a retributivist standpoint or a restorative justice standpoint. Those questions, however, are beyond the scope of this paper.

impossible.[273] The fact that winning is complicated, however, is in line not only with the many procedural protections of criminal law but also does not alter the basic framework of the purpose of criminal law in anti-corruption efforts. Experts agree that the way to foster good, impartial, and non-corrupt governance is not through criminal law that punishes corrupt acts, but through institutions that prevent them.[274]

It is undeniable that the more recent high visibility losses are not occurring in a vacuum. We have seen how various violations of governance and constitutional norms from the executive have gone unpunished.[275] In this context, some may believe it is necessary to reform criminal laws. However, as many criminal law scholars have argued for other types of conduct, the fact that we have a problem does not mean that criminalizing it more is a solution.[276] That is an argument usually reserved to protect vulnerable, not powerful, members of society from the reach of criminal law. However, this is not about protecting the powerful but recognizing that the criminal law, albeit imperfectly, is already serving its intended purpose, and that demanding it do more may become too costly. This is not only because the efficient level of impunity is not zero,[277] but also because

273. This is the reality of criminal anti-corruption prosecutions all around the world. *See* Gerson, *supra* note 271, at 1031–32. Winning those cases is notoriously difficult because most defendants are typically well-connected and sophisticated, and information is hard to come by; after all we are talking about prosecuting high-ranking public officials and/or well-resourced private actors. These cases tend to drag on and, as explained through this Article, will often be narrowly decided. A final case to discuss that shows this point is that of Norman Seabrook, the former leader of New York City's correction officers union. United States v. Seabrook, 467 F. Supp. 3d 171, 172 (S.D.N.Y. 2020). In 2018 a judge declared a mistrial after a jury had not been able to decide whether to convict Mr. Seabrook for allegedly establishing a kickback scheme where he received $60,000 for channeling union money to a hedge fund. *Id.* at 171–72. The following year, federal prosecutors were able to convince a jury that Mr. Seabrook was guilty of honest services wire fraud. *Id.* at 175 n.3. Mr. Seabrook subsequently appealed, arguing that the district court erred in admitting certain evidence, made statements in open court that constituted "plain error," and "abused its discretion in denying his motion for a new trial." United States v. Seabrook, 814 F. App'x 661, 662–63 (2d Cir. 2020). The Second Circuit rejected Mr. Seabrook's evidentiary arguments and affirmed the lower court's decision. *Id.* at 662–64.

274. *See* Rose-Ackerman, *supra* note 68, at 3; FISMAN & GOLDEN, *supra* note 53, at 3; TEACHOUT, *supra* 84, at 27 (arguing that much of the constitutional structure of checks and balances, as well as rules promoting transparency and oversight, were explicitly created as a way to prevent corruption).

275. *See* Gerson, *supra* note 271, at 994–95 (arguing that repeated norms violations from the executive, repeated acts of impunity for criminal corruption, and free-wheeling campaign finance create the risk of corruption increasing in the U.S.).

276. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008).

277. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191 (1968).

it will be difficult to draft more stringent laws that do not create a chilling effect on socially valuable conduct. In the following part, I start with a brief discussion of the problems with reforming criminal laws, and then I outline what I believe should be the focus for anti-corruption efforts in the U.S.

IV. ENFORCING ANTI-CORRUPTION BEYOND CRIMINAL LAW: A WAY FORWARD

There have been various proposals to attend to the problem of corruption in the United States. Most recently, for example, Senator Elizabeth Warren introduced the Public Integrity Act.[278] This proposal, notably, has very little to say on changes to criminal law.[279] Most of the measures in the bill have more to do with recognizing that corruption is about integrity in government generally, which is more than the crimes of bribery, embezzlement, and conflict of interest.[280] As a result, the bill seeks to constrain the relationships between public officials and private actors,[281] lobbyists in particular; establish administrative procedures that adequately block corporate involvement in rulemaking;[282] increase transparency of public officials;[283] and reduce the potential for conflicts of interest to affect public policymaking.[284] In terms of the criminal law, Senator Warren has proposed a package that reforms the institutions prosecuting corruption crimes by creating an independent U.S. Office of Public Integrity that will be better protected from political interference and be more equipped (both in resources and know-how) to prosecute corruption cases.[285] Notably, the bill does not focus very much on changing criminal law, only broadening the definition of bribery in 18 U.S.C. § 201(a), and clearly prohibiting undisclosed self-dealing by public officials in 18 U.S.C. § 1346.[286] In this part I argue that this is

278. Press Release, Elizabeth Warren, Senator, U.S. Senate, *Warren and Jayapal Reintroduce the Anti-Corruption & Public Integrity Act* (Dec. 18, 2020), https://www.warren.senate.gov/newsroom/press-releases/warren-and-jayapal-reintroduce-the-anti-corruption-and-public-integrity-act.

279. *See* Anti-Corruption and Public Integrity Act, S. 5070, 116th Cong. (2020).

280. *Id.*

281. *Id.* at § 102.

282. *Id.* at § 309.

283. *Id.* at § 131.

284. *Id.* at § 301.

285. *Id.* at § 511.

286. *Id.* at §§ 121–122.

the correct approach to take because it is not clear that broader anti-corruption criminal laws will be effective in overcoming the Supreme Court's anticorruption jurisprudence while at the same time carrying a risk of criminalizing socially beneficial conduct. I then propose that, beyond the measures sought by Senator Warren, there are other tools that could be implemented that could achieve better accountability without the risks of over-criminalization.

Throughout this Article, I have discussed three groups of statutes in particular: the bribery statute (18 U.S.C. § 201 (a) and (b)), the honest services statutes (18 U.S.C. §§ 1341, 1343, and 1346), and the theft or bribery of federal programs (18 U.S.C. § 666). As mentioned in the introduction, there is a broader range of conduct that is penalized, going from false statements and perjury to violations of the Travel Act that could be considered anti-corruption tools, depending on the context. However, following Kevin Davis's definition of corruption,[287] when discussing anti-corruption criminal law reform, I am referring to the three groups of statutes just mentioned.

A good way to think about how these statutes could be reformed is to think backwards from the losses at the Supreme Court discussed *supra* in Part II.[288] From those cases we see that the highest barriers for successful prosecutions are the bribery and honest services statutes (incidentally, both were charged in Senator Menendez's indictment). To recap, the limiting constraint as regards to section 201, articulated in *McDonnell*, is that the acts carried out by officials need to be

287. Davis, *supra* note 54, at 1290 n.5.

288. In 2011, Senator Patrick Leahy introduced the Public Corruption Prosecution Improvements Act that would do just that. *See* Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (2011). Alongside substantive changes to the bribery, gratuity, and mail and wire fraud statutes, the bill included a number of procedural measures to aid prosecutors. *Id.* As discussed *infra*, I do not object in principle to any of these—mainly procedural—changes. Because the bill is now almost ten years old it is somewhat dated. Notably, its expansion of the definition of "official act" would not have been enough to overcome the constraining analysis in *McDonnell*. Furthermore, its reform of the mail and wire fraud is problematic constitutionally and arguably does not actually affect the Supreme Court's ruling in *Skilling*. This proposal focuses on expanding fraud to "anything of value," from money or property. However, post *McNally,* Congress enacted section 1346 to widen the scope of what is considered a mail or wire fraud to include theft of honest services. *Skilling* agreed with that but interpreted the statute as saying that honest services violations exist only when there is a kickback scheme; that is, section 1346 does not criminalize undisclosed self-dealing or nondisclosure of financial interest. Skilling v. United States, 561 U.S. 358, 409–10 (2010). Senator Leahy's proposal does not address this holding. It simply expands the kickback scheme to incorporate more than money, but it does not do more to criminalize undisclosed self-dealing.

"official acts."[289] The limiting constraint for the honest-services statute is, as articulated in *Skilling*, that the an individual can only be prosecuted for honest-services theft when there is a "bribery or kickback scheme."[290] This implies that there needs to be a quid pro quo (or an agreement thereof) but not necessarily that the quo involves an "official act" to successfully prosecute an honest services case.[291]

Substantive anti-corruption criminal law reform, therefore, will likely focus on addressing the constraints the Court articulated in these two sets of statutes. For bribery, Congress could enact a law that would expand the meaning of "official act" (or do away with it entirely as it has in section 666). This change would mean that a *quo* under U.S. law could be more than something a pending or to-be-brought "question, matter, cause, suit, proceeding or controversy."[292] Meanwhile, amending the mail and wire fraud statutes would be focused on criminalizing undisclosed self-dealing or nondisclosure of financial interest.

At first blush, both of these reforms seem necessary and commendable. After all, they would allow the DOJ to successfully prosecute cases like *McDonnell* or the one against Senator Menendez. However, the problem with either of these measures is not that they help capture bad acts, but that their net is far too wide. The constraints currently articulated in the Supreme Court's jurisprudence may lead to failed corruption prosecutions, but these measures have the risk of criminalizing conduct that is a natural by-product of the U.S. political process.[293]

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289. The Supreme Court in *McDonnell* identified a two-part test for an official act: "[f]irst, the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or may by law be brought before a public official. Second, the Government must prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016).

290. *Skilling*, 561 U.S. at 407–08.

291. *See Ng Lap Seng*, discussed *supra* Section II, where the Second Circuit held that section 666 did not include the stronger "official act" standard that section 201 does. 934 F.3d 110 (2d Cir. 2019). Likewise, because sections 1341 and 1343 do not mention official acts, courts will likely not read the "official act" language into them. *See* 18 U.S.C. §§ 1341, 1343 (2018). This is notwithstanding the fact that the Supreme Court read a bribery and kickback scheme into the statute. After all, that reading was substantiated by a long history of how the statute was interpreted. *See Skilling*, 561 U.S. at 409–10. That same history does not support the added "official act" hurdle.

292. *McDonnell*, 136 S. Ct. at 2368.

293. Some may object to this qualification, because what is criminal should be criminal regardless of political realities. Bribery, after all, is *male in se*, arguably. However, given the

I am not only referring to campaign finance,[294] but rather to the fact that the U.S. political system fosters and promotes interaction between constituents and public officials. How government officials behave is in fact very much dependent on these interactions. The substantive criminal law reforms as articulated could mean that any responses to constituent demands could be criminalized. If, for example, a popular and influential anti-carceral nonprofit were to sponsor a trip to Germany and Norway with the intent to persuade a state official to push for bail reform legislation, and the local official knew the purpose and accepted the trip, then that could be interpreted as a quid pro quo. The trip could be, of course, a way to show the official how other countries address the pre-trial detention, but a broader statute would allow that exchange to be prosecuted. Of course, a prosecution like this is unlikely to happen; however, the criminal law should not be built upon the notion that prosecutors will always act in the public interest.[295]

Another way to say this is that we must understand statutes in context. In a world where money is part and parcel of the political process, broad criminal laws will include conduct that is not meant to be criminalized. The issue is that a quid pro quo is, to a certain degree, in the eye of the beholder. To understand whether an action is an abuse of power for personal gain, one needs a lot of contextual information. Unfortunately, this makes it hard to create abstract and definite

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distance between criminal law in practice and criminal law in theory, one should not discuss laws operating in a vacuum. Furthermore, as I suggest *infra* it is normatively preferable to address this problem by changing the operation of politics rather than criminalizing conduct that is somewhat inevitable in this system. Daniel Richman has discussed how politics has always been an integral part of law enforcement. *See* Daniel Richman, *Partisan Politics and Federal Law Enforcement: The Promise and Corruption of Reconstruction*, LAWFARE (July 22, 2019, 3:22 PM), https://www.lawfareblog.com/partisan-politics-and-federal-law-enforcement-promise-and-corruption-reconstruction.

294. As the Seventh Circuit articulated, "[t]o hold illegal an [official action] furthering the interests of some constituents shortly before or after campaign contributions are solicited and received 'would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable . . . .'" Empress Casino Joliet Corp. v. Johnston, 763 F.3d 723, 731 (7th Cir. 2014) (quoting McCormick v. United States, 500 U.S. 257, 272 (1991)).

295. Much of the recent literature in criminal law has shown the extent to which prosecutors in fact misuse prosecutorial discretion. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2016); Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump's DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195, 195 (2020) (arguing that the DOJ in the Trump administration has been an active force against criminal justice reform).

criminal laws that will not be over-inclusive. Simply put, corruption is a standard,[296] but criminal law requires rules.[297] The reality, as acknowledged by Senator Warren's proposal, is that problems of corruption are better addressed at the front-end.[298] The solution is therefore better to address the relationship between private funding and politics rather than reforming criminal law.

This need not mean that there is no role for criminal law reform whatsoever. In the Public Corruption Prosecution Act,[299] there are several mainly procedural[300] reforms that would aid prosecutors in pursuing crimes of corruption but that do not carry many of the risks that I have just outlined. For example, increasing the statute of limitations, lowering the financial threshold amounts for pursuing section 666 cases, changes in venue requirements to make it easier to prosecute these cases in any forum, and harsher sentences for these crimes. All of these amendments could strengthen the DOJ, but they do not involve expanding the scope of conduct that can be criminalized

296. And when the Court has gotten standards it has asked "Congress . . . to speak more clearly." McNally v. United States, 483 U.S. 350, 360 (1987).

297. Whether it is beneficial to draft a law as a rule or a standard will depend greatly on what kind of law it is and what the normative values and doctrinal principles guiding the proposal are. For criminal law, where issues of notice are paramount, and generally we are concerned with conduct that is frequent, it is worthwhile to bear the *ex ante* cost of drafting clear rules at the outset. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 *passim* (1992) (arguing that rules are preferable when the conduct at issue is frequent and when you want actors to know what the parameters of legal conduct are). While it is true that most times laws operate in between rules and standards, I am assuming that a binary is possible. *See* John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991, 1027 (2014) ("[I]n the real world, rules and standards rarely exist as perfect Platonic forms.").

298. As mentioned *supra*, most anti-corruption scholars believe that in terms of policy, anticorruption is best achieved through institutional and prophylactic measures, not through broader criminalization of politics. *See supra* note 194 and accompanying text.

299. Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (2011).

300. We should not understand procedural reforms as worthwhile and substantive ones as not. There have been procedural proposals that could be in fact quite detrimental. *See* Eisler, *supra* note 50, at 1666. Jacob Eisler has argued that anti-corruption criminal statutes should be broadly interpreted to "encourage public-mindedness in government behavior." Eisler argues that this jurisprudential shift would need to be "delica[te] and circumscri[bed]," but that this could be achieved through civic conceptions of governance from the Court. *Id.* at 1667. However, given the already balkanized state of criminal law, proposals such as these are terribly fraught. Furthermore, international examples of countries adjusting criminal procedure for anti-corruption criminal statutes, like Brazil, have failed spectacularly. *See* O'Sullivan, *supra* note 63, at 643, 655 (arguing that the federal penal code is such "a national disgrace," with it's various "vague, overbroad, or internally inconsistent laws" that it is actually impossible to efficiently and fairly administer criminal laws); *see also* Prado & Machado, *supra* note 64 (showing that Brazil is currently experiencing a drop in confidence on the rule of law which can be arguably traced back to bending criminal laws to forge ahead with criminal prosecutions).

in such a way that carries a risk of criminalizing behavior that is part and parcel of the U.S.[301] political process.

A more complicated set of reforms could be to improve and increase the mechanisms by which public officials can face administrative consequences for acts of corruption. There is already a robust institutional infrastructure that seeks to safeguard institutional accountability and non-corrupt governance across the Federal Government. The executive branch has offices like the General Accountability Office,[302] the Office of Government Ethics and the Federal Inspectors General.[303] The Legislature has the Senate Select and the House Committees on Ethics as well as the Office of Congressional Ethics, which can investigate and/or recommend administrative actions for violations of conduct codes or laws.[304] Finally, the judiciary has the circuit-level judicial councils, which investigate complaints against federal judges, and the Administrative Office of the United States Courts, which focuses on financial disclosure guidelines.[305] However, all of these institutions are seldom leveraged to act forcefully against acts of corruption.

The case of Senator Menendez is instructive. After the prosecution decided to drop the charges against Mr. Menendez, the Senate Ethics Committee looked at all the evidence gathered by the Department of Justice.[306] The Committee found that there was clear evidence that Sen. Menendez had accepted numerous gifts and acted in favor of Mr. Melgen, who had given him those gifts, in violation of

301. I make an emphasis on the U.S. because its system fosters a particular closeness between private and public actors.

302. The GAO carries out a number of cost-benefit analyses that necessarily lead to looking at whether any government program is being defrauded or there are signs of embezzlement. *What GAO Does*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/what-gao-does (last visited Apr. 11, 2021).

303. *See Landscape Assessment: Survey of the Practitioners, Offices, and Agencies Charged with Upholding Public Integrity Across the United States*, *supra* note 217 (discussing government oversight agencies including the Office of Government Ethics and federal inspectors general).

304. *About Us*, U.S. SENATE SELECT COMM. ON ETHICS, https://www.ethics.senate.gov/public/index.cfm/aboutus (last visited April 11, 2021); *About*, U.S. HOUSE OF REPRESENTATIVES COMM. ON ETHICS, https://ethics.house.gov/about (last visited Apr. 11, 2021).

305. *Governance & the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited April 11, 2021).

306. Letter from Select Comm. on Ethics, Public Letter of Admonition 1 (2018), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=49C12C75-7A26-4FE6-B070-19FCEF4D7532.

"Senate Rules, federal law, and applicable standards of conduct."[307] However, in the end, that resulted in only an obligation of repaying Mr. Melgen for the gifts and in a "severe admoni[tion]."[308] Senator Menendez was not even fined (he only had to reimburse the gifts), nor was he punished for clear and significant errors in his financial disclosure reports.[309]

If "accountability refers specifically to the requirement that offenders 'make amends' for their crimes by repaying or restoring losses to victims and the community,"[310] then the letter of admonition seems like a far cry from accountability to evidently corrupt conduct. After all, Senator Menendez did not apologize for his conduct, nor did he seek a way to repair the damage he had done to the Senate. In fact, even after an official finding of wrongdoing, Senator Menendez refused to admit that he had done anything other than accounting errors in disclosure reports.[311]

The United States could follow the example of other countries and push for non-criminal measures to ensure true accountability.[312] Both France and Mexico, for example, have created anti-corruption independent agencies or systems (conformed of numerous agencies) tasked with proposing new regulations for corruption control.[313]

307. Public Letter of Adminition from U.S. Senate Select Comm. on Ethics to the Honorable Robert Menendez, U.S. Senate 1 (2018), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=49C12C75-7A26-4FE6-B070-19FCEF4D7532.

308. *Id.* at 4.

309. *See id.*

310. Gordon Bazemore & Charles Washington, *Charting the Future of the Juvenile System: Reinventing Mission and Management*, 68 SPECTRUM: J. STATE GOV'T 51, 56 (1995).

311. *See* Mike DeBonis, *Democratic Sen. Robert Menendez Is 'Severely Admonished' by Ethics Committee, Ordered to Repay Gifts*, WASH. POST (Apr. 26, 2018, 4:13 PM), https://www-washingtonpost-com.etron.lls.edu/powerpost/democratic-sen-robert-menendez-is-severely-admonished-by-ethics-committee-ordered-to-repay-gifts/2018/04/26/post/democratic-sen-robert-menendez-is-severely-admonished-by-ethics-committee-ordered-to-repay-gifts/2018/04/26/2bff0dc6-4978-11e8-9072-f6d4bc32f223_story.html ("Marc Elias, a lawyer representing Menendez, said Thursday that the letter contained findings that were 'contradicted by the presiding judge and rejected by the jury' and said the trial 'clearly demonstrated there was no violation of any law.'").

312. Currently, the Senate Ethics Committee, for example, can only impose fines of under $10,000 for various ethics violations. *See* SELECT COMM. ON ETHICS, THE SENATE CODE OF OFFICIAL CONDUCT, 114th Cong., 1st Sess. 47 (2015).

313. Andrew M. Levine et al., *Anti-Corruption Enforcement in Mexico: A Possible Turning Point?*, COMPLIANCE & ENF'T (Aug. 12, 2019), https://wp.nyu.edu/compliance_enforcement/2019/08/12/anti-corruption-enforcement-in-mexico-a-possible-turning-point/; *French Anti-Corruption Agency Publishes Information Expected from Companies During Agency Inspections*, JONES DAY (Apr. 2018), https://www.jonesday.com/en/insights/2018/04/french-anticorruption-agency-publishes-information.

Furthermore, they have given these institutions the power to impose non-criminal penalties for acts of corruption.[314] In Mexico specifically, administrative liability can result in a prohibition on holding public or administrative office for any given number of years.[315] The United States could similarly increase the ability of its many institutions to fashion sanctions against public officials for violations of ethical conduct.[316]

Evidently, what kinds of sanctions would be permissible is a complicated question that merits further study. This is true of every country. In fact, in both France and Mexico, the anti-corruption agencies are tasked with studying what is allowed constitutionally and continually proposing amendments to improve anti-corruption efforts.[317] However, the point is that rather than focusing on criminal law, we should take advantage of the already robust institutional infrastructure to develop non-criminal mechanisms to ensure accountability.[318] There is quite a range of possibilities, from allowing and pushing for civil suits against public officials when there is no criminal liability, to allowing ethics committees and other bodies to

314. *Id.*; *French Anti-Corruption Agency Publishes Information Expected from Companies During Agency Inspections*, *supra* note 313; Eric Lasry et al., *Anti-Corruption in France*, GLOB. COMPLIANCE NEWS, https://globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-france/ (last visited Apr. 11, 2021).

315. Levine et al., *supra* note 313.

316. One particularly interesting idea is that in Mexico they have created administrative liability for conduct typified as a crime of corruption. The federal law regulating administrative sanctions has a chapter for bribery defining bribery as it is in the criminal code. Same for embezzlement, and undeclared conflict of interest, etc. Crucially, the same prosecutors can charge you in both criminal and administrative courts for the same conduct, allowing there to be a greater chance of a sanction. This is particularly useful because administrative liability, like civil liability, is not subject to the same procedural protections as criminal law (for example, the Government need only show liability by a preponderance of the evidence). This means that prosecutors have a greater chance of winning these administrative cases than the criminal ones. The administrative sanctions can be onerous: they can range from a public admonition to a prohibition on holding office for twenty years. *See* Ley General de Responsabilidades Administrativas [LGRA] arts. 51–63Bis, 78, Diario Oficial de la Federación [DOF] 18-07-2016, últimas reformas DOF 13-04-2020 (Mex.).

317. Levine et al., *supra* note 313; *French Anti-Corruption Agency Publishes Information Expected from Companies During Agency Inspections*, *supra* note 313; Lasry et al., *supra* note 314.

318. This would also allow for the development of jurisprudence incorporating traditional fiduciary duties as a way to create a "criterion of legitimacy" by ensuring that "state action . . . always be interpretable as action taken in the name of or on behalf of every agent subject to the state's power." *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 3, 99 (2016); *see also* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 *passim* (2013) (arguing that political representatives should be subject to a duty of loyalty).

impose fines and potentially preclude people from holding public office.

My goal at this moment is not precisely to suggest what laws need to be enacted, but rather to outline a general path forward that emphasizes that the control of corruption need not be penal. I have argued that there are two paths for institutional innovation. One, found in Senator Warren's anti-corruption proposal, described *supra*, is concerned with *ex-ante* arrangements that decrease the space for corruption to occur.[319] This is vital. The second is the creation of non-criminal (but still punitive) *ex-post* mechanisms that allow for public actors who engage in acts of corruption to face consequences. These *ex-post* mechanisms can be seen as complements to criminal law. Enacting these measures satisfies the need for sanctions when there are acts of wrongdoing that do not rise to the level of crimes, while not carrying the risk of enacting overly broad criminal laws.

CONCLUSION

Regulating corruption is an extremely complicated endeavor in a system where private influences structure the very operation of politics. Reformers can look to criminal law as a way to combat this influence, but at bottom, it would only be sewing a patch on a much larger problem. Furthermore, this measure, as I have argued, could endanger individuals who have not engaged in wrongdoing but simply operated within the system.

A systemic approach to corruption control is more in line with what the institutional design of the United States was at the time of the founding. As Zephyr Teachout writes, "[a]n *act* was corrupt when private power was used to influence public power for private ends. A *system* was corrupt when the public power was excessively used to serve private ends instead of the public good. A *person* was corrupt when they use public power for private ends."[320]

Criminal law is necessary to ensure that those corrupt acts and people are punished, but it is insufficient to protect the system from becoming corrupt.

319. *See supra* note 277.

320. TEACHOUT, *supra* note 84, at 38.