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ARTICLE

The Bribery Double Standard: Leveraging the Foreign–Domestic Divide

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Abstract. A double standard in bribery law has emerged. Over the past decade, the Supreme Court has broken with a century of progressive reforms by narrowly interpreting domestic bribery and other conflict-of-interest laws. This weak federal domestic bribery law now stands in stark contrast to the robust and expansive prosecutions of bribery under the Foreign Corrupt Practices Act (FCPA), which limits the ability of U.S. entities to bribe foreign public officials. As a result of this double standard, those who seek to improperly influence domestic public officials are often able to engage in behavior that looks and smells like bribery but is not bribery. Similar behavior in the foreign context, however, is punished by the FCPA.

The act of bribery, whether foreign or domestic, not only undermines the practice of good governance but also delegitimizes government institutions themselves. Federal bribery laws were traditionally designed and interpreted to address both of these concerns, evolving into powerful tools of public accountability. But the Supreme Court has restricted the interpretation of federal bribery laws in ways that have weakened the domestic antibribery regime. As a result, high-profile elected officials are able to avoid punishment for acts that would have, until recently, been considered illegal. In contrast, the FCPA has not only withstood legal challenges, but is widely recognized as a powerful tool for curbing corruption. This Article explores this divergence, argues that the domestic bribery law should be modified, and identifies two aspects of the FCPA as a model for domestic statutory reform.

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Introduction

On July 30, 2005, Congressman William Jefferson of Louisiana arrived at the Ritz-Carlton Hotel in Arlington, Virginia, and accepted a leather briefcase containing $100,000 in cash.[1] According to wired recordings made at the time, Jefferson accepted this briefcase with the understanding that he would use a portion of the money, as well as his position, to influence U.S. and Nigerian government officials to provide favorable treatment to iGate, a tech company based in Louisville, Kentucky.[2] Five days later, much of the $100,000 was recovered from Jefferson's freezer, with some of this money even hidden inside a piecrust box.[3] Based on a mountain of evidence—including photographs of Jefferson's freezer—Jefferson was convicted of "11 charged counts, including conspiracy to commit bribery, [to commit] honest services wire fraud and to violate the Foreign Corrupt Practices Act (FCPA), as well as substantive convictions of bribery, honest services by wire fraud and a violation of the Racketeer Influenced Corrupt Organization Act."[4] Jefferson's initial appeals were unsuccessful, and in 2012, he began serving a thirteen-year sentence, the longest ever given to a once-sitting member of Congress.[5]

But something curious happened to Jefferson's sentence in 2017. Jefferson argued that, although he sought to use his position to help iGate in exchange for money, his actions did not constitute bribery because he had not engaged in

1. Jake Tapper, *La. Congressman Indicted on Host of Corruption Charges*, ABC NEWS (Jun. 2, 2007, 10:44 AM), https://perma.cc/68PW-CXAZ; Allan Lengel, *FBI Says Jefferson Was Filmed Taking Cash: Affidavit Details Sting on Lawmaker*, WASH. POST (May 22, 2006), https://perma.cc/8F58-R9BP. For a recording of Jefferson taking the cash, see Associated Press, *FBI Video Shows Jefferson Accepting 100K*, YOUTUBE (Aug. 6, 2009), https://perma.cc/2L3W-4HHH.
2. *See* Lengel, *supra* note 1; *see also* Press Release, U.S. Dep't of Just., Congressman William Jefferson Indicted on Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges (June 4, 2007), https://perma.cc/T36C-KZH4.
3. *See Famous Cases & Criminals: William Jefferson*, FBI, https://perma.cc/W8SK-AU74 (archived Nov. 19. 2021); Press Release, U.S. Dep't of Just., *supra* note 2.
4. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Former Congressman William J. Jefferson Sentenced to 13 Years in Prison for Bribery and Other Charges (updated Sept. 15, 2014), https://perma.cc/2LSK-H7AW; *see Famous Cases & Criminals: William Jefferson*, *supra* note 3. Honest-services fraud occurs when there is a scheme or artifice "to deprive another of the intangible right of honest services." *See* 18 U.S.C. § 1346. The notion of honest services is closely related to bribery because almost any act of bribery can be considered a form of honest-services fraud. We trace the history of bribery and honest-services fraud throughout this Article, and particularly in Part I below.
5. John Bresnahan, *Jefferson Gets 13 Years in Prison*, POLITICO (Nov. 13, 2009, 5:55 PM EST), https://perma.cc/8PYV-ZJ9X. *See generally* United States v. Jefferson, 674 F.3d 332 (4th Cir.) (denying Jefferson's appeal at the circuit level), *cert. denied*, 568 U.S. 1041 (2012), *and vacated in part*, 289 F. Supp. 3d 717 (E.D. Va. 2017).

an "official act."[6] The federal judge agreed and threw out Jefferson's convictions for wire fraud, money laundering, and soliciting bribes.[7] Puzzlingly, the federal judge retained the charge related to violating the Foreign Corrupt Practices Act (FCPA) in planning to bribe Nigerian officials.[8] In other words, a private company could use money to influence Jefferson, a domestic public official. But Jefferson could not use the same money to influence foreign public officials. In essence, Jefferson encountered a legal double standard involving domestic versus foreign bribery laws.

What gave rise to this double standard? To be guilty of bribing a domestic official, one must seek to influence the commission of an "official act," which is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[9] Before 2016, courts interpreted the term "official act" to include a range of actions that an official would take in the ordinary course of her duties.[10] This interpretation was narrowed to the point of futility in 2016 with the Supreme Court's ruling in *McDonnell v. United States.*[11] As Virginia's governor, Robert McDonnell had accepted over $175,000 in gifts and loans from an associate, Jonnie Williams; in return, McDonnell introduced Williams to high-ranking government officials, implicitly encouraged his subordinates to conduct activities that would aid Williams's business, and promoted Williams's business during events at the Governor's Mansion.[12] At trial, a jury found that McDonnell had illegally accepted the

6. *Jefferson*, 289 F. Supp. 3d at 721-22 (quoting McDonnell v. United States, 136 S. Ct. 2355 (2016)).
7. *Id.* at 740, 744.
8. *Id.* at 735-36. Jefferson's sentence was reduced to time served. Additionally, Jefferson's initial $470,000 fine was reduced to $189,000. Matthew Barakat, *Ex-congressman Gets 13-Year Sentence Reduced to Time Served*, AP NEWS (Dec. 1, 2017), https://perma.cc/7W66-LMQS.
9. 18 U.S.C. § 201(a)(3), (b).
10. *See, e.g.*, United States v. McDonnell, 64 F. Supp. 3d 783, 788 (E.D. Va. 2014) ("[O]fficial action is conduct that is taken 'as part of a public official's position'—whether pursuant to an explicit duty or as a matter of 'clearly established settled practice.'" (quoting *Jefferson*, 674 F.3d at 353)), *aff'd*, 792 F.3d 478 (4th Cir. 2015), *rev'd*, 136 S. Ct. 2355 (2016). We note that this distinction of what constitutes an official act varies between higher-level public officials who are mostly involved in designing policy and lower-level public officials who are mostly involved in executing policy.
11. *See* 136 S. Ct. 2355, 2375 (2016).
12. *Id.* at 2362-64; Press Release, U.S. Att'y's Off. of the E. Dist. of Virginia, U.S. Dep't of Just., Former Virginia Governor and Former First Lady Indicted on Public Corruption and Related Charges (updated Mar. 25, 2015), https://perma.cc/NVC8-TYY5.

gifts as bribes.[13] On appeal, however, the Supreme Court disagreed with the jury and found that McDonnell's actions—like encouraging his subordinates to buy Williams's products, arranging meetings between Williams and senior government officials, and throwing events in government buildings to advertise Williams's company—were not "official acts."[14] The Supreme Court reasoned that an "official act" must not only involve a formal exercise of government power but also be something that is "specific and focused that is 'pending' or 'may by law be brought' before a public official."[15] McDonnell was released and prosecutors dropped the charges.[16] As a result of the newly pared-down definition of "official act," prosecutors struggled to prosecute several other high-profile bribery cases, including a 2017 case against U.S. Senator Robert Menendez of New Jersey.[17] Moreover, individuals who had previously been convicted of bribery successfully had their charges thrown out.[18] Among these individuals was William Jefferson.[19]

13. Amended Judgment in a Criminal Case at 1, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 14-cr-12), 2015 WL 398949.

14. *McDonnell*, 136 S. Ct. at 2371. In seeking to overturn his initial conviction by arguing that his actions did not amount to "official acts," McDonnell and his attorneys attempted a defense strategy that was unsuccessful with Jefferson. *See* C. Simon Davidson, *William Jefferson's Appeal Could Affect Bribery Law*, ROLL CALL (Jan. 15, 2012, 11:36 AM), https://perma.cc/A8KZ-QYP6. In *McDonnell*, the jury was instructed that "official acts" include, among other aspects, "actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law." Matthew Stephenson, *Why Bob McDonnell's Bribery Conviction Should Be Affirmed*, GLOB. ANTICORRUPTION BLOG (May 22, 2015), https://perma.cc/DC9Z-HGFJ; *see also* Davidson, *supra* (discussing similar jury instructions in Jefferson's trial). Jefferson claimed that the phrase "settled practice" was unconstitutionally vague, and his appeals failed. *See* Davidson, *supra*; *supra* notes 4-5 and accompanying text. In McDonnell's case, however, the Supreme Court decided that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit [the] definition of 'official act.'" *McDonnell*, 136 S. Ct. at 2372.

15. *McDonnell*, 136 S. Ct. at 2371-72.

16. Josh Gerstein, *Justice Department Dropping Corruption Case Against Bob McDonnell*, POLITICO (updated Sept. 8, 2016, 4:35 PM EDT), https://perma.cc/R494-5DZP.

17. Matt Friedman & Ryan Hutchins, *Justice Department Drops Corruption Case Against Menendez*, POLITICO (updated Jan. 31, 2018, 4:06 PM EST), https://perma.cc/284P-4ZV2. After a mistrial and a partial acquittal by the judge, the government decided to drop its case. *Id.*

18. *See, e.g.*, Matt Zapotosky, *The Bob McDonnell Effect: The Bar Is Getting Higher to Prosecute Public Corruption Cases*, WASH. POST (July 13, 2017), https://perma.cc/3TYU-C32K. For instance, bribery convictions against former New York Senate Majority Leader Dean Skelos were dropped. Matt Zapotosky, *Former N.Y. Senate Majority Leader's Conviction Overturned*, WASH. POST (Sept. 26, 2017), https://perma.cc/3PDJ-WHY9.

19. Barakat, *supra* note 8.

Jefferson was unable to escape the FCPA charge, however. Passed in 1977 in the wake of the Watergate scandal,[20] the FCPA is widely recognized as a powerful tool in the fight against venality. Among other provisions, the FCPA criminalizes attempts to influence foreign public officials to secure an "improper advantage."[21] This approach is distinct from, and broader than, the approach of the domestic bribery law, which focuses more narrowly on exchanges of influence for an "official act."[22] Like the domestic bribery law, or similar conflict-of-interest laws for that matter,[23] the FCPA nevertheless contains wording that could be interpreted in a number of different ways. The FCPA does not define what precisely constitutes "influence," nor does it delineate what should be considered an "improper advantage."[24] What makes the FCPA so much more potent than the domestic bribery law, however, is that the FCPA allows flexibility in defining these terms. Unlike the domestic bribery statute, which specifies what should be considered an "official act,"[25] the FCPA directs the Attorney General to issue guidance in the form of guidelines and opinions regarding its current enforcement policies, including what constitutes an "improper advantage."[26] Such guidance gives the law flexibility and specificity, thereby strengthening its enforcement.[27]

20. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.). The FCPA was first amended in 1988. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (codified as amended in scattered sections of 15 U.S.C.). The FCPA was amended a second time in 1998. International Anti-Bribery and Fair Competition Act of 1998 (FCPA Amendments of 1998), Pub. L. No 105-366, 112 Stat. 3302 (codified in scattered sections of 15 U.S.C.). This latter amendment expanded the statute in several important respects, most notably by broadening its scope to apply to any exchange in which an "improper advantage" is sought. *See id.* §§ 2-4, 112 Stat. at 3302-09 (codified at 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)).

21. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

22. *See* 18 U.S.C. § 201(b).

23. *See, e.g.*, 5 U.S.C. § 7353(b)(1) (authorizing each supervising ethics office—including the Office of Government Ethics, the Judicial Conference of the United States, the Committee on Standards of Official Conduct of the House of Representatives, and the Select Committee on Ethics of the Senate—to issue rules and regulations on gifts to federal employees). Hatch Act advisory opinions also limit how federal employees engage in political activity, delineating, among other things, what constitutes political activity, how certain federal employees are classified, and how federal employees can and cannot use social media. *See generally Hatch Act Advisory Opinions*, U.S. OFF. SPECIAL COUNS., https://perma.cc/L8LD-M2JE (archived Nov. 19, 2021).

24. *See* 15 U.S.C. § 78dd-3.

25. 18 U.S.C. § 201(a)(3).

26. 15 U.S.C. §§ 78dd-1(d) to (e), 78dd-2(e) to (f).

27. *See* Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global: Standards Tightening Up*, BUS. L. TODAY, July/August 1999, at 14, 15 (noting that the FCPA also requires publicly traded companies to actively manage their books and set up controls

footnote continued on next page

Much of the prior scholarship on bribery, corruption, and conflicts of interest focuses on how various terms should be defined, interpreted, and applied.[28] Based on these proposals, one can determine whether an actor like Jefferson or McDonnell should be considered guilty of bribery. We suggest, however, that the double standard between domestic and foreign bribery presents a deeper, more fundamental question: Should bribery laws be designed to narrowly define in their text what constitutes improper influence, or should bribery laws specify an executive actor who issues guidance as to how the law should be interpreted?

In this Article, we argue that the FCPA's approach of enabling the Attorney General to issue guidance produces a superior bribery law, one that is easier to interpret before the commission of an act and is easier to enforce once an act is committed. Moreover, such an approach does not remove Congress or the courts from the equation. If Congress wanted to add or clarify certain provisions in a bribery law that also offered guidance, it could amend the law; likewise, the courts could rule on the applicability of the law or the guidance itself. Our analysis of the differences between the domestic bribery statute and the FCPA offers concrete ways in which the domestic bribery law can be reformed.

Before continuing, it is worth underscoring the stakes involved in delineating bribery. Unlike many other criminal laws, confusion about what constitutes bribery can produce particularly destabilizing consequences for the United States. Consider the 2020 impeachment proceedings of then-President Donald Trump, in which the House Judiciary Committee sought to investigate whether Trump had engaged in bribery, an impeachable offense in line with treason, high crimes, and misdemeanors according to the U.S. Constitution.[29] During the proceedings, legal scholars hotly debated whether Trump's

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to prevent the improper use of corporate funds and assets); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1373-74 (2008) (explaining that the public bribery scheme does not require a showing of a specific harm and that the harm in bribery is the breach of fiduciary duty to the public). *Compare* 18 U.S.C. § 201, *with* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

28. *See, e.g.*, Daniel Brovman, Note, *Quid Pro No: When Rolexes, Ferraris, and Ball Gowns Are Not Political Currency*, 92 S. CAL. L. REV. 169, 204-07 (2018) (suggesting a broader definition of what constitutes "quo" in quid pro quo and proposing that the New York Public Trust Act could serve as a model for reform); Harvey S. James, Jr., *When Is a Bribe a Bribe? Teaching a Workable Definition of Bribery*, 6 TEACHING BUS. ETHICS 199, 209-11 (2002). For a discussion of the term "bribery," see JOHN T. NOONAN JR., BRIBES, at xi (1984).

29. U.S. CONST. art. II, § 4. For a historical discussion of the issue, see C.M. Ellis, *The Causes for Which a President Can Be Impeached*, ATLANTIC (Jan. 1867), https://perma.cc/VMS2-P2EJ. And for a contemporary example, see Jan Wolfe, *What Is Bribery? Trump Impeachment Hearing Highlights Democrats' Dilemma*, REUTERS (Dec. 4, 2019, 4:21 PM), https://perma.cc/4FCP-9QNG.

actions—withholding congressionally mandated aid to Ukraine[30]—amounted to a bribe.[31] Constitutional scholar Pamela Karlan argued that the Framers would have interpreted bribery broadly to include any act where "an official solicited, received, or offered a personal favor or benefit to influence official action—that is, putting his private welfare above the national interest."[32] Her counterpart, Jonathan Turley, disagreed. Turley maintained that delaying the release of congressionally mandated aid did not constitute an "official act."[33] Because the House of Representatives decided not to pursue bribery charges against Trump,[34] this debate was not settled. As it stands, the only way this debate will be resolved is if another official commits a similar action and Congress or the courts take up this matter again. If, instead, guidance could be issued beforehand, future officials would know whether their actions constitute bribery and would not have to wonder where the line is drawn.

This Article proceeds as follows. Part I reviews the history of bribery laws in the United States. These laws have traditionally been written or reformed reactively—usually following a major scandal—with lawmakers focusing on two objectives. First, lawmakers have sought to ban specific acts of undue influence from recurring. Second, lawmakers have expressed concern that bribery undermines the legitimacy of government, and they have purposely included broad language to capture unanticipated forms of undue influence. Recognizing this dual intent, courts have traditionally allowed for broad interpretations of bribery. Part II examines the current era of permission, discussing several recent Supreme Court decisions that have significantly

30. For a detailed timeline of the Ukraine incident and subsequent impeachment, see *Trump Impeachment: How Ukraine Story Unfolded*, BCC (Dec. 19, 2019), https://perma.cc/2EX6-X6PY.

31. 18 U.S.C. § 201(a)(3). The *McDonnell* decision "lays out a clear path for the Government to follow in proving that an accused has performed an 'official act.'" United States v. Fattah, 914 F.3d 112, 152 (3d Cir. 2019). This path involves a two-part inquiry: First, the Government must prove that there is an identified "question, matter, cause, suit, proceeding or controversy." McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016) (quoting 18 U.S.C. § 201(a)(3)). "Second, the Government must prove that the public official made a decision or took an action" on the identified question or matter. *Id.*

32. *The Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment: Hearing on H. Res. 798 Before the H. Comm. on the Judiciary*, 116th Cong. 33 (2020) [hereinafter *Impeachment Hearing*] (statement of Pamela Karlan, Professor, Stanford Law School).

33. *Id.* at 80-81 (statement of Jonathan Turley, Professor, George Washington University Law School); Alicia Parlapiano, *How the Constitution Defines Impeachable, Word by Word*, N.Y. TIMES (Dec. 8, 2019), https://perma.cc/8CQX-7CVG.

34. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019); Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (updated Feb. 10, 2021), https://perma.cc/K9UT-Z5RH.

curtailed the power of antibribery statutes. This series of decisions marks the first major divergence in the historically reform-oriented trajectory of the domestic antibribery regime.[35] Part III argues that this new interpretation of federal domestic bribery law is disconnected from popular perceptions of what bribery entails, creating a dangerous situation where high-profile public officials can be improperly influenced without consequence. Part IV contends that the federal domestic bribery law should be updated using two key features of the FCPA. Specifically, we propose that (1) the domestic bribery law should be designed to criminalize acts where an improper advantage is sought or secured; and (2) the Attorney General should be empowered to provide guidance and opinions on what constitutes bribery. Part V addresses several critiques to our proposition.

I. A Conceptual and Legal History of U.S. Bribery Laws

Since the founding of the United States, "bribery" has traditionally been conceptualized as one form of a conflict of interest.[36] This Part documents the evolution of bribery law and enforcement across four eras in U.S. history. This historical account illustrates how legislators have long struggled to define and redefine bribery in federal statutes. These attempts have mostly been reactive—in each era, efforts to control bribery and corruption came in the wake of major scandals.[37] This historical pattern of reactive reform suggests that the recent undoing of the domestic bribery regime, the subject of Part II, may ultimately be a window of opportunity for good-governance reform.

A. Bribery in the Early Years: 1787-1850

The U.S. Constitution was originally designed in large part to limit the influence of bribery and corruption. In *Federalist No. 22*, Hamilton argued that a republic is more vulnerable to bribery and corruption than a system of

35. The domestic antibribery regime includes the federal domestic bribery statute, related statutes like honest-services fraud, the interpretation of these statutes, and the mechanisms to enforce these statutes.

36. Even today, bribery is defined in part as the act of offering, giving, or promising anything of value to a public official to influence an official act. *See* 18 U.S.C. § 201(b)(1)(A).

37. *See* Mariano-Florentino Cuéllar & Matthew C. Stephenson, *Taming Systemic Corruption: The American Experience and Its Implications for Contemporary Debates* 19-34 (Harv. Pub. L. Working Paper, Paper No. 20-29, 2020), https://perma.cc/UR3S-8NXP. Cuéllar and Stephenson trace the history of anticorruption efforts in the United States. Although they recognize that anticorruption efforts have tended to be reactive rather than proactive, they also highlight that reforms have been adopted and implemented gradually. *See id.* at 36-38. The U.S. has not pursued a "big bang" model of reform—an approach that involves "pushing through a set of comprehensive, coordinated, and aggressive reforms, implemented over a relatively short time." *Id.* at 36.

hereditary monarchy, since the monarch "has so great a personal interest in the government and in the external glory of the nation, that it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the state."[38] The Founders regarded protection against bribery as a reason for developing strong federal power rather than maintaining a confederacy;[39] for requiring simple majority rather than supermajority decisions for certain acts in Congress (like declaring war);[40] for establishing a representative legislature;[41] and for removing the President from office.[42] The removal power includes the only mention of "bribery" in the Constitution: Article 2, Section 4 grants Congress the power to impeach and convict those who are found guilty of "Treason, Bribery, or other high Crimes and Misdemeanors."[43]

Although the Constitution specifies that bribery is grounds for impeachment, it does not define bribery. Congress passed the first federal laws against bribery in 1789 and 1790, laying out criminal punishments for customs officials and judges respectively.[44] Like the Constitution, these laws did not actually define what bribery entailed, only asserting that it was a crime to receive or offer a bribe. Consider the language of the Crimes Act of 1790, which made it illegal to

> give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation or security, for the payment or delivery of any money, present or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge or judges of the United States, in any suit, controversy, matter or cause [pending] before him or them.[45]

This judicial bribery statute treated a "bribe" as a form of improper influence that could include pecuniary as well as nonpecuniary benefits.[46]

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38. THE FEDERALIST NO. 22, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
39. *See* THE FEDERALIST NO. 18 (James Madison & Alexander Hamilton), *supra* note 38, at 124-26.
40. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 38, at 148-49.
41. *See* THE FEDERALIST NO. 57 (James Madison), *supra* note 38, at 354.
42. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 38, at 416.
43. U.S. CONST. art. II, § 4.
44. *See* Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46-47; Crimes Act of 1790, ch. 9, § 21, 2 Stat. 112, 117 (repealed 1909).
45. Crimes Act of 1790 § 21, 2 Stat. at 117. The judicial-bribery statute in the Crimes Act of 1790 was replaced by section 131 of the Criminal Code of 1909, ch. 321, 35 Stat. 1088, 1112, and later codified as amended at 18 U.S.C. § 206. But in 1962, this statute was replaced again by what is today 18 U.S.C. § 201. *See* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. §§ 201-218).
46. *Id.*; *see also Bribe*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a bribe as "[a] price, reward, gift or favor given or promised with a view to pervert the judgment of or influence the action of a person in a position of trust").

Politically appointed and elected officials who engaged in similar behavior, however, faced only the threat of impeachment; they did not face criminal punishment. It was not until the 1820s that several states adopted laws that criminalized bribery by politicians.[47] The state statutes exhibited varying definitions of what constituted bribery and corruption. State courts also interpreted the new antibribery laws differently.[48] For example, Maryland's courts ruled that accepting any gift above a certain value was impermissible under the state's law, whether or not the gift giver intended to influence policy.[49] Meanwhile, Massachusetts required an intent to influence acts or policy to be guilty of bribery.[50]

Nonjudicial public officials at the federal level finally faced criminal charges for actions related to bribery with the introduction of the Crimes Act of 1825. Officers of the United States, including Second Bank and U.S. Mint employees, also faced criminal punishments for engaging in extortion under cover of official office.[51] Similar to the contemporary understanding of extortion under color of official office, however, punishment applied to only the public official engaged in the act. The law specified no punishment for the bribe offeror or bribe giver, who could be a private actor.[52]

Federal bribery and corruption laws that existed during this time were thus problematic in that they did not punish bribe givers.[53] In addition, the laws that existed were rarely enforced despite a number of scandals.[54] In response to some of these scandals, Congress passed new laws.

Perhaps the most important development in bribery law followed the Galphin Affair of 1850. The scandal involved Secretary of War George Crawford, who allegedly used his influence among members of the Cabinet to

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47. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 114 (2014).

48. *See, e.g., id.* at 111-12 (citing the Supreme Court of Pennsylvania's interpretation of such a law in *Coates v. Wallace*, 17 Serg. & Rawle 75, 81 (Pa. 1827)).

49. *Id.* (citing Martin v. State, 1 H. & J. 721, 741 (Md. 1805) (argument of the state)).

50. *Id.*

51. *See* Crimes Act of 1825, ch. 65, § 12, 4 Stat. 115, 118 (adding an offense for extortion under color of office) (repealed 1909). This version of the extortion statute was repealed and replaced in 1909. *See* Criminal Code of 1909 §§ 85, 341, 35 Stat. at 1104, 1153 (codified as amended at 18 U.S.C. § 872).

52. *See id.*

53. To discourage private actors from giving bribes to its members, Congress can hold individuals in contempt. The first constitutional challenge to Congress's powers to hold a person in contempt stemmed from a situation involving an aggressive bribe giver. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 215 (1821). The Supreme Court ruled that Congress has the implied power of holding people in contempt. *Id.*

54. *See* TEACHOUT, *supra* note 47, at 121-23.

help settle a large land claim with the Galphin family.[55] Specifically, Crawford received money—50% of the claim in question—in return for pressing other Cabinet members to issue a decision favorable to the Galphins.[56] The media discovered this arrangement, which alarmed the House of Representatives.[57] President Zachary Taylor died a few weeks after the Galphin Affair was revealed, and his Cabinet, including George Crawford, resigned shortly thereafter.[58] Although Crawford faced no criminal charges, the scandal spurred new efforts to strengthen anticorruption laws.

B. The Spread of Bribery: 1850-1910s

In the wake of the Galphin Affair, Congress passed an antibribery statute in 1853.[59] For the first time, all federal officials—including members of Congress—were subject to criminal punishment for bribery and not only extortion under color of office.[60] Yet this federal criminal bribery law went mostly unused until the early decades of the twentieth century. This was not for lack of venal activity, as more than a dozen bribery scandals involving members of Congress and the Cabinet were revealed after the statute passed.[61] The Crédit Mobilier affair, one of the more notable Gilded Age scandals, involved directors of the Union Pacific Railroad distributing shares of Crédit Mobilier to several members of Congress to stop a congressional investigation.[62] The Whiskey Ring scandal saw distillers bribing tax officials to evade taxes.[63] One scandal forced William Belknap, who took kickbacks in

55. Wm. P. Brandon, *The Galphin Claim*, 15 GA. HIST. Q. 113, 126-30 (1931).

56. *Id.* at 121-22, 130.

57. *Id.* at 130-31.

58. THOMAS J. ROWLAND, MILLARD FILLMORE: THE LIMITS OF COMPROMISE 84-86 (2013).

59. Act of Feb. 26, 1853, ch. 81, 10 Stat. 170.

60. *Id.* The statute criminalized the offer or transfer of anything of value to a federal official "with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States be brought before him in his official capacity." *Id.* Like the earlier statutes, the law refrained from defining what a bribe entailed. *See id.*

61. For a complete history of the scandals that took place during the presidency of Ulysses S. Grant, see generally JEAN EDWARD SMITH, GRANT (2001). Perhaps the most infamous grifter in American history, William "Boss" Tweed of Tammany Hall, was active around this time period. He was eventually convicted by a state court for fraud, escaped from jail, and ultimately went to debtor's prison. *See* Andrew Glass, *"Boss" Tweed Escapes from Jail, Dec. 2, 1875*, POLITICO (Dec. 2, 2009, 5:02 AM EST), https://perma.cc/4U9C-R3T8.

62. SMITH, *supra* note 61, at 552-53.

63. *Id.* at 18, 590 ("While civil service reform was being tested, the Grant administration's pursuit of the Whiskey Ring continued full tilt. [Secretary of the Treasury] Bristow

footnote continued on next page

contracting out a trading post at Fort Sill, to resign from his position as Secretary of War.[64] Bribery scandals continued to emerge after the Grant Administration. Officials involved in bribery in the legislative and judicial branches frequently evaded prison time. Instead, they would be impeached, retire, or otherwise find loopholes. For example, from 1871 to 1913, Senate committees scrutinized sixteen senators for bribery involving their elections; most resigned before being removed from the Senate and none faced jail time.[65] Several other senators were investigated for other forms of bribery. In 1901, for instance, Charles Dietrich accepted a bribe shortly after being appointed to the Senate but before he was officially sworn in.[66] Because the existing law did not address bribery committed before being sworn in, the charges against Dietrich were dropped, and he became a senator.[67]

Only a handful of bribery scandals at the federal level resulted in criminal prosecution during this period. One such scandal was the 1904 Burton fiasco. During this time, Congress enabled the Postmaster General to refuse to deliver mail addressed to an entity engaging in fraud.[68] The Postmaster General suspected that the Rialto Grain and Securities Company was committing fraud through the mail and refused to continue postal services.[69] In response, Rialto hired then-Senator Joseph Burton to appear as counsel in proceedings before the Post Office Department to get Rialto's mail services reinstated. Burton's involvement went against a law that banned sitting senators from engaging in compensated representation in matters before a federal agency.[70] After a lengthy trial process—including two separate Supreme Court verdicts[71]—Burton was convicted and spent five months in prison.[72] Shortly thereafter, Senator John Mitchell of Oregon was also convicted for committing a similar

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found tentacles of the conspiracy penetrating deep into his own department, the Internal Revenue Service, and the White House.").

64. *Id.* at 593-95.

65. S. DOC. NO. 62-1036, at 1217 (1913) (listing the names of the sixteen senators); GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 127-37 (1938).

66. S. DOC. NO. 62-1036, at 987-92.

67. S. REP. NO. 97-682, at 685 (1983).

68. Burton v. United States, 202 U.S. 344, 358-59 (1906). Burton violated Rev. Stat. § 1782 (1902), which is similar to what is currently 18 U.S.C. § 203. *See* Burton v. United States, 196 U.S. 283, 284 n.1 (1905) (statement of the case); *Burton*, 202 U.S. at 359-60.

69. *Burton*, 196 U.S. at 285 (statement of the case).

70. ANNE M. BUTLER & WENDY WOLFF, U.S. SENATE HIST. OFF., UNITED STATES SENATE: ELECTION, EXPULSION AND CENSURE CASES, 1793-1990, S. DOC. NO. 103-33, at 275-76 (1995).

71. *See* sources cited *supra* note 68.

72. *Roosevelt Plotted to Ruin Me—Burton: Ex-senator Returns Home in Triumph and Attacks the President*, N.Y. TIMES, Mar. 24, 1907, at 16, https://perma.cc/Q8T7-NYAK.

offense to Burton over the Oregon land-fraud scandal but died before being sentenced and before the Senate could expel him.[73] Although neither one involved outright bribery, these two cases were perhaps the most notable federal prosecutions of conflicts of interest during this period.

C. The Era of Good Governance: 1920s-1970s

The 1920s through the 1970s saw far-reaching changes to the antibribery regime in the United States after major scandals and political mobilization against corruption. Revelations of large-scale corruption in the federal government led to new concerns that bribery would erode public confidence in government institutions. Attempts by some officials to make the case for "honest graft"[74]—arguing that having an improper advantage does not come at another individual's expense and should therefore not be punished—drew strong popular resistance. Resisting honest graft became a central focus of the Progressive Movement in the following decades, as journalists and politicians sought to galvanize the middle classes against waste, patronage, and corruption. With the Seventeenth Amendment added to the Constitution in 1913, members of both the House and Senate were now directly elected by their constituencies.[75] Promises to clean up government became central to electoral campaigns in both chambers, and there was a proliferation of new laws and enforcement mechanisms to deal with bribery. It was in this era that the FCPA was enacted to quash foreign corruption by U.S. actors and strengthen the country's image as a model of democratic governance.

The Teapot Dome scandal was one of the triggers for reform in the 1920s. From 1922 to 1923, Secretary of the Interior Albert Fall leased U.S. Navy petroleum reserve fields at Teapot Dome and other locations to private oil companies in return for bribes.[76] Fall's misconduct came out in a Senate committee investigation.[77] Following a long and drawn-out prosecution, Fall

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73. John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903-1910,* 35 PAC. HIST. REV. 35, 51-52, 56 (1966). Two other congressmen also faced charges related to the Oregon land-fraud scandal, but one congressman's case was discharged and the other's ended in a hung jury. *Id* at 57, 62.

74. Senator George Washington Plunkitt, Honest Graft and Dishonest Graft (1905), https://perma.cc/FR4H-A6TN (archived Oct. 6, 2021).

75. *See* U.S. CONST. amend. XVII.

76. *See generally* LATON MCCARTNEY, THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY 84-141 (2008) (detailing the role that Albert Fall and other members of President Harding's Cabinet had in the Teapot Dome scandal).

77. *Senate Investigates the "Teapot Dome" Scandal: April 15, 1922,* U.S. SENATE, https://perma.cc/MSM7-B54Q (archived Nov. 22, 2021); MCCARTNEY, *supra* note 76, at 160-63.

was ultimately convicted of bribery in 1929, resulting in a fine and imprisonment.[78] Additionally, two oil companies who were involved in giving bribes had to pay over $47 million in fines.[79]

The reforms in the wake of Teapot Dome laid the foundation for the architecture of the modern U.S. antibribery regime. They included new tools of investigation and enforcement, more powerful federal agencies, and more expansive legal interpretation of what constituted bribery and conflicts of interest. For example, in connection with investigations into the Teapot Dome scandal, the Supreme Court confirmed that Congress has the right to subpoena and call witnesses,[80] enabling congressional investigations of the executive branch.[81] The federal government's investigative apparatus was also profoundly altered in 1924, when the Bureau of Investigation was implicated in connection with the Teapot Dome scandal; J. Edgar Hoover was selected to replace the Bureau's director, and he transformed federal law enforcement through his 48-year tenure.[82]

The Bureau—later renamed the Federal Bureau of Investigation (FBI)—became the principal body for investigating all manners of federal crimes, including public corruption, which remains their "top criminal investigative priority."[83] In addition to new investigative capacity, prosecutors developed new legal techniques to tackle bribery. Perhaps the most prominent of these techniques was the application of the Federal Mail Fraud Act, which criminalized the use of the postal service for any "scheme or artifice to defraud."[84] Congress originally passed the Post Office Act in 1872 with little debate over the mail-fraud statute.[85] The 1952 wire-fraud statute extended the honest-services protection to newer communications technologies.[86]

78. MCCARTNEY, *supra* note 76, at 311-13.

79. *See* Cuéllar & Stephenson, *supra* note 37, at 29.

80. McGrain v. Daugherty, 273 U.S. 135, 180 (1927).

81. Former President Trump asked that this decision be overturned. *See* Quinta Jurecic, *The Supreme Court Case That Could Destroy the Balance of Powers*, ATLANTIC (May 11, 2020), https://perma.cc/AEY4-UQZQ.

82. *The Rise of the FBI*, AM. EXPERIENCE, https://perma.cc/C9J2-RJ7A (archived Oct. 18, 2021). Hoover would also use the resources of the FBI to further his own political objectives. *See generally* CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 306-07 (1991).

83. *Public Corruption*, FBI, https://perma.cc/H26B-GPEN (archived Oct. 6, 2021).

84. Post Office Act, ch. 335, § 301, 17 Stat. 283, 323 (1872) (repealed 1909). This version of the mail-fraud statute was repealed by the Criminal Code of 1909, ch. 321, § 341, 35 Stat. 1088, 1153. But the Criminal Code also enacted a new Mail Fraud Act, § 215, 35 Stat. at 1130-31, which was later codified as amended at 18 U.S.C. § 1341.

85. *See* Barry L. Johnson, *Mail Fraud and Representation Statutes*, ENCLYCLOPEDIA.COM, https://perma.cc/Y5UZ-BTB4 (archived Nov. 19, 2020); *see also* Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?*, 109 PENN ST.

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Congress also took several other initiatives to stem bribery during this era. Beginning in the 1930s, Congress created a broad anti-extortion law that was meant to combat racketeering in labor–management disputes but could also be used to go after public officials who sought bribes in return for services performed "under color of official right."[87] This effort to combat labor racketeering eventually resulted in the passage of the Hobbs Act in 1946.[88] The Hobbs Act would be used to prosecute public officials who demand payment "under color of official right"—that is, by using the power of their office.[89]

Amid the proliferation of new conflict-of-interest and anticorruption laws Congress in 1962 created "a single comprehensive section of the criminal code for a number of existing statutes concerned with bribery."[90] Previous bribery statutes were repealed and replaced with 18 U.S.C. § 201, which includes two provisions. The first provision, 18 U.S.C. § 201(b), concerns bribery and states in relevant part:

> (b) Whoever—
>
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (A) to influence any official act . . .

L. REV. 1059, 1062 (2005) (describing the power of the Post Office Act's mail fraud statute).

86. Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 711, 722 (codified as amended at 18 U.S.C. § 1343).

87. This effort began with the Anti-Racketeering Act in 1934, which was struck down by the Supreme Court in 1942. Anti-Racketeering Act, ch. 569, 48 Stat. 979 (1934) (codified as amended at 18 U.S.C. § 1951); United States v. Local 807 of Int'l Bhd. of Teamsters, 315 U.S. 521 (1942). To address the constitutional shortcomings of the original bill, Congress passed the Hobbs Act in 1946. Hobbs Act, ch. 537, 60 Stat. 420 (1946) (codified as amended at 18 U.S.C. § 1951). The 1934 Act contained the "under color of official right" phrase but did not use the phrase in connection with extortion. *See* Anti-Racketeering Act § 2(b), 48 Stat. at 980. The Hobbs Act moved the phrase and used it in defining extortion. Hobbs Act, 60 Stat. at 420; *see* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1182-83 (1977); Laurel Gordon Sandler, Note, *Extortion "Under Color of Official Right": Federal Prosecution of Official Corruption Under the Hobbs Act*, 5 LOY. U. L.J. 513, 513-15, 520 (1974).

88. 18 U.S.C. § 1951; *see also supra* note 87.

89. *See* 18 U.S.C. § 1951(b)(2); Evans v. United States, 504 U.S. 255, 268 (1992).

90. Randy J. Curato, J. Daniel McCurrie, Kenneth F. Plifka, A. Joseph Relation & Stephen T. Toohill, Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1072 (1983) (quoting S. REP. NO. 87-2213, at 4 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3853).

> shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.[91]

This provision also has mirror language that punishes public officials from offering to perform official acts in return for anything of value.[92] The second provision, 18 U.S.C. § 201(c), addresses the related crime of illegal gratuities. Whereas the bribery provision requires corrupt intent, proof of a quid pro quo, and proof that a specific gift was meant to influence an official act, the illegal-gratuities provision requires only that an individual transferred something of value because of an official act.[93]

By the late 1960s, there was a strong set of laws and enforcement mechanisms to deal with acts of bribery. Mail-fraud and wire-fraud statutes were used to ensure that the public had a right to expect honest services from their public officials.[94] And the Hobbs Act and bribery statute, 18 U.S.C. § 201, could be used to go after many forms of bribery, provided that the interpretation of what amounted to an official act was not narrowed.[95] Apart from antibribery laws, private individuals and corporations faced campaign-finance laws as well as stronger disclosure requirements for political contributions.[96] This regime would only become stronger in response to major political events in the 1970s. In 1973, then–Vice President Spiro Agnew was implicated in a federal bribery investigation and was forced to resign. Agnew was the most senior U.S. public official to ever resign for bribery;[97] that is, until President's Nixon's resignation over the Watergate Scandal the following year.

D. The Solidification of the Antibribery Regime: 1970s-2010

The government's response to Watergate profoundly altered bribery law and discourse in the United States. If Teapot Dome set the foundation to build a

91. 18 U.S.C. § 201(b).

92. *See id.* § 201(b)(2).

93. *Compare* 18 U.S.C. § 201(c) (lacking an intent requirement), *with* 18 U.S.C. § 201(b) (requiring intent to influence an official act).

94. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980).

95. *See generally* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 817-28 (1988).

96. ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 130-31 (2014).

97. RACHEL MADDOW & MICHAEL YARVITZ, BAG MAN: THE WILD CRIMES, AUDACIOUS COVER-UP & SPECTACULAR DOWNFALL OF A BRAZEN CROOK IN THE WHITE HOUSE 17-19, 112-31 (2020). For a detailed account of the Spiro Agnew bribery scandal and Agnew's exit from public office, see generally *id.*

house, the legislative and judicial response to Watergate outlined plans for a skyscraper. The Galphin Affair and Teapot Dome scandal owed much of their notoriety to the staggering sums of money involved. But by the 1970s, the federal budget had grown substantially, to the point where individual cases of bribery would not have threatened the financial well-being of the federal government. Perhaps for this reason—and following the Watergate scandal—national concern over bribery seemed to shift away from monetary costs and towards corruption's corrosive effects on legitimacy and public trust in government. In *Buckley v. Valeo*, the first major decision on controlling campaign finance, the Supreme Court recognized a government interest in preventing corruption: specifically, that large contributions given to secure a "political quid pro quo from current and potential office holders" undermine "the integrity of our system of representative democracy."[98] The Court reaffirmed that avoiding the appearance of corruption, and the appearance of improper influence more broadly, is an important prerogative for maintaining the legitimacy of government.[99]

Administrative reforms funneled new resources toward addressing public corruption. In 1976, the Department of Justice created an independent Public Integrity Section that was tasked with combating political corruption at all levels of government.[100] Around this time, Congress also created special systems of appropriation for the FBI to enable undercover investigations, sometimes known as sting operations.[101] In the late 1970s and early 1980s, several politicians accepted payments from FBI agents (who were posing as representatives for wealthy Arab sheikhs) to help them bypass ordinary immigration procedures; as a result of this investigation, seven members of Congress were convicted.[102] Congressman Michael Myers, for example, was expelled from Congress and received a three-year prison sentence.[103] Around

98. Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam) (emphasis omitted), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

99. *See id.* at 27 (quoting U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) (reasoning that it was not only important that the government should avoid partisanship but "critical that they appear to the public to be avoiding it" to maintain confidence in the system of representative government)).

100. *About the Public Integrity Section*, U.S. DEP'T JUST., https://perma.cc/2U58-9DMY (last updated Nov. 18, 2020).

101. James Q. Wilson, *The Changing FBI—The Road to Abscam*, PUB. INT., Spring 1980, at 3, 10-12.

102. Bennett L. Gershman, Comment, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1571-75 (1982).

103. In 2020, Myers was again arrested for bribery, this time as a bribe giver for improperly influencing Philadelphia Judge of Election Domenick DeMuro. Jeremy Roebuck, *A Former Pa. Congressman Caught in 1970s Abscam Sting Has Been Indicted Again—This Time*
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the same time, more than 100 members of Congress were implicated in "Koreagate" for accepting money from South Korean government agents to ensure that U.S. troops would remain stationed in South Korea.[104] One member of Congress went to jail, and several were reprimanded.[105]

In addition to consolidating the domestic antibribery regime, Watergate also focused legislators' attention on corruption abroad. In the context of the Cold War, concerns over the integrity of democratic governance in the United States were especially salient. The passage of the FCPA in 1977 was a "direct response to evidence" uncovered in the Watergate investigations—that the illegal contributions to Nixon's campaign had in some cases been used as "channels for 'questionable or illegal foreign payments.'"[106] Public confidence and moral stature were important components in the passage of the FCPA. Senator William Proxmire of Wisconsin observed that American participation in foreign bribery "diminished the moral stature of the United Sates [sic] in the competition of the Cold War by 'eroding public confidence in our institutions.'"[107] Legislators also recognized that corruption could mar U.S. economic interests abroad, and a strong antibribery law could provide a shield against requests for improper payments.[108] The FCPA thus set out to quash foreign corruption and rebuild the image of the United States as a model of democratic governance. The law was modeled closely after the domestic bribery statute and was amended twice as international efforts to combat corruption grew more influential.[109] The latest amendments to the FCPA in 1998 were significant, in part because they offered a broader definition of bribery.[110]

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for Election Fraud, PHILA. INQUIRER (updated July 23, 2020), https://perma.cc/695T-NA8H.

104. 1 MARK GROSSMAN, POLITICAL CORRUPTION IN AMERICA: AN ENCYCLOPEDIA OF SCANDALS, POWER, AND GREED 340-41 (3d ed. 2017).

105. *Id.*

106. Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 498-99 (2012) (quoting SEC, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (Comm. Print 1976)).

107. Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, LAW & CONTEMP. PROBS., Autumn 2007, at 109, 112-13 (quoting Pat Towell & Barry M. Hagen, *Foreign Bribes: Stiff Penalties Proposed*, 35 CONG. Q. WKLY. REP. 929 (1977)).

108. *See* Low & Trenkle, *supra* note 27, at 15.

109. *See supra* note 20.

110. The FCPA Amendments of 1998 expanded the FCPA in several important respects, such as by broadening the scope of impermissible exchange to encompass any "improper advantage." *See supra* note 20.

Throughout the 1970s, concerns over the delegitimizing, destabilizing potential of bribery and corruption continued to dominate the discussion. Former officials who were convicted of bribery sought repeatedly—and unsuccessfully—to challenge 18 U.S.C. § 201 on the statute's "official act" language.[111] When the mail-fraud statute was challenged in 1987, the Supreme Court held that Congress had intended the statute to be limited to protecting property rights, not intangible rights.[112] Congress acted quickly and enacted a legislative solution the next year.[113] With strong statutes and professionally run, well-funded investigative mechanisms, antibribery and anticorruption laws remained strongly enforced well into the 2000s. Between 1976 and 2009, the fifteen judicial districts with the most federal public-corruption convictions reported a total of 12,557 convictions, or approximately 369 convictions per year.[114]

* * *

This robust antibribery regime held until 2010, when the first in a series of significant cracks in antibribery and conflict-of-interest laws emerged. In the next few years, judicial interpretation of both the honest-services-fraud statute and the bribery statute narrowed in scope. The Supreme Court has moved away from the expansive and reform-oriented interpretations that defined the evolution of modern domestic bribery statutes, and domestic protections against bribery have weakened to the point of being out of sync with common understandings of the term. At the same time, prosecutions of foreign bribery under the FCPA, which encompasses a more expansive view of bribery, hit an all-time high in 2010. In short, it has become easier to secure an improper advantage from a federal official than from a foreign official. The remainder of this Article discusses the recent weakening of the U.S. antibribery regime and the growing disconnect between regulation of domestic and foreign bribery.

111. *See, e.g.*, United States v. Carson, 464 F.2d 424, 430-34 (2d Cir. 1972); United States v. Evans, 572 F.2d 455, 479 (5th Cir. 1978); United States v. Arroyo, 581 F.2d 649, 653-55 (7th Cir. 1978). An exception to this line of cases was *United States v. Muntain*, 610 F.2d 964, 969-71 (D.C. Cir. 1979), which reversed a conviction under 18 U.S.C. § 201 because there was no evidence that the defendant had promoted automobile insurance in his official capacity. For a helpful discussion of cases from this time period that interpret the "official act" language, see Curato et al., *supra* note 90, at 1076-79.

112. McNally v. United States, 483 U.S. 350, 359-60 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346).

113. *See* Anti-Drug Abuse Act of 1988 § 7603(a), 102 Stat. at 4508 (codified at 18 U.S.C. § 1346).

114. DICK SIMPSON, THOMAS J. GRADEL, MARCO ROSAIRE ROSSI & KATHERINE TAYLOR, DEP'T OF POL. SCI., UNIV. OF ILL. AT CHI., CONTINUING CORRUPTION IN ILLINOIS: ANTI-CORRUPTION REPORT NUMBER 10, at 5 tbl.1 (2018), https://perma.cc/F5U8-QK29.

II. The Era of Permission: An Examination of Recent Cases

Part I demonstrated that the domestic antibribery regime followed an undulating trajectory from weak, ambiguously applied criminal bribery laws toward ever-stronger systems of accountability.[115] The evolution of the bribery statute through four eras—from its common law roots at the time of the drafting of the Constitution, to its slow expansion to cover all public officials at the state and federal levels (in name if not in practice), to its revival and transformation into a workhorse of criminal law—has suggested a steady march toward public accountability. Part II advances this history to the present day and identifies a significant divergence from this trajectory through recent jurisprudence. As the Court moves away from the traditionally expansive and reform-oriented interpretations, it becomes evident that 18 U.S.C. § 201 is no longer suited to the purpose for which it was enacted or envisioned.

The Supreme Court has historically maintained that conflicts of interest—like the act of bribery—undermine the process of governance. In addition, the Court has stated that the appearance of conflicts of interest weakens the legitimacy of the political system.[116] In recent years, however, several key Supreme Court decisions have diverged from this historical positioning. The Supreme Court has recently favored narrow, textual interpretations of statutes addressing conflicts of interest, and this approach has profound implications not just for bribery but also for the right to honest services and campaign finance.[117] Perhaps the most striking break with tradition came in *McDonnell v. United States*, where the Court declared that it was not concerned with "tawdry tales of Ferraris, Rolexes, and ball gowns,"[118] or their damaging implications for democracy and the accountability of elected public officials, but with

115. *See* Cuéllar & Stephenson, *supra* note 37, at 36 (noting that the reform process has been "incremental, uneven, and spread out over at least three generations").

116. *See* U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam), *superseded in other part by statute,* BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); McConnell v. FEC, 540 U.S. 93, 115 (2003) (noting that legislation such as the BCRA, conceived to "purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions," was created to "strik[e] at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government" (alteration in original) (quoting United States v. UAW, 352 U.S. 567, 571-72 (1957))), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010), *and* McCutcheon v. FEC, 572 U.S. 185 (2014).

117. *See* Skilling v. United States, 561 U.S. 358, 408-09 (2010); Citizens United v. FEC, 558 U.S. 310, 357-59 (2010).

118. 136 S. Ct. 2355, 2375 (2016).

overbroad legal interpretations.[119] Although the Court is still nominally concerned with the appearance of conflicts of interest, it is decommissioning the laws meant to discourage such conflicts by narrowing their range to prohibit only a set of behaviors the Court considers the "core" of the law. In one decade, the cases below have undermined a century of conflict-of-interest protections "to a disastrous extent."[120]

A. *Skilling v. United States*, 2010

In *Skilling v. United States*, the Court narrowed the scope of the honest-services-fraud statute, holding that it to applies only to instances of bribery and kickbacks and weakening the ecosystem of laws that counter fraudulent activities.

Jeffrey Skilling, the former CEO of Enron Corporation,[121] was convicted of conspiracy and securities fraud, among other violations.[122] On appeal to the Supreme Court, Skilling argued that the government prosecuted him under an invalid theory under the honest-services-fraud statute.[123] Specifically, he argued that 18 U.S.C. § 1346, which proscribes fraudulent deprivations of "the intangible right to honest services,"[124] was unconstitutionally vague and should be invalidated.[125] But rather than invalidate the statute for vagueness, the Court instead limited the scope of the statute to cover only bribery and kickback schemes.[126] Under this limited framing, because Skilling's alleged misconduct—misrepresenting the company's fiscal health and profiting from

119. *See id.* at 2368, 2372-73. In adopting a "more bounded interpretation" of "official act," the Court focused on concerns about overzealous prosecution and concerns about chilling communication between politicians and their constituents. *Id.* at 2368, 2372-73, 2375.

120. *Buckley*, 424 U.S. at 26-27 (quoting *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388-89 (2000) (quoting *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 565).

121. Enron was a conglomerate with operations in a wide range of energy-related industries, and it collapsed in 2001. *Skilling*, 561 U.S. at 368. Subsequent investigations revealed that its accountants and executives overstated the company's fiscal health to investors. *Id.* After Enron's fraud was uncovered, Jeffrey Skilling was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading. *Id.* at 369.

122. *Id.* at 437 (Sotomayor, J., concurring in part and dissenting in part).

123. *See id.* at 399 (majority opinion); *see also* United States v. Skilling, 554 F.3d 529, 534, 542 (5th Cir. 2009), *aff'd in part, vacated in part*, 561 U.S. 358.

124. In full, the honest-services statute states: "For the purposes of [the chapter of the United States Code that prohibits, among other things, mail fraud and wire fraud], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

125. *See Skilling*, 561 U.S. at 376.

126. *Id.* at 404.

the artificially inflated stock prices—did not involve a bribe or kickback, it did not fall under § 1346.[127]

The concept of honest-services fraud originated from prosecutions involving bribery allegations,[128] although it was sometimes applied to other types of fraud that were seen to impede the public's intangible right to receive honest services.[129] In *McNally v. United States*, the Court held that the mail-fraud statute did not extend to "schemes to defraud citizens of their intangible rights to honest and impartial government" and that it was "limited in scope to the protection of property rights."[130] With this decision, the Court thus precluded the application of the honest-services-fraud statute to several other types of fraud which had previously been subsumed by the mail-fraud and wire-fraud statutes.

Immediately following the ruling in *McNally*, Congress passed 18 U.S.C. § 1346, which provided for an intangible right to honest services.[131] From 1988 to 2010, the honest-services-fraud statute was regularly used to target a variety of fraudulent acts,[132] as the mail-fraud and wire-fraud statutes had before *McNally*.[133] By limiting the honest-services-fraud statute to only bribes and kickbacks, the Court was able to, as it said, capture the "core" or "vast majority" of fraudulent behavior that the statute was intended to address,[134] but it nonetheless left out many acts that, before *McNally*, also fell under the definition of honest-services fraud.

Skilling demonstrates the Court's willingness to narrowly construe a statute rather than invalidate it for vagueness.[135] But the construction is a narrow one and in effect redefines what acts are criminal. Although the Court's decision might render the law less vague, it also releases from liability perpetrators of fraud that does not fit a tight definition. *Skilling* did not address the bribery statute, but the Court's decision to save, but narrow, the honest-

127. *Id.* at 413.

128. *Id.* at 408. Courts of appeals considered bribery and kickback schemes as "core . . . honest services fraud precedents" or "core misconduct covered by the statute." *Id.* (alteration in original) (first quoting United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997); and then quoting United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008)).

129. *See id.* at 401 & n.35.

130. 483 U.S. 350, 355, 360 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346).

131. *Skilling*, 561 U.S. at 402 (quoting 18 U.S.C. § 1346).

132. *See id.* at 402, 406-09.

133. *Id.* at 401 & n.35. Before *McNally*, the courts had developed an intangible-rights doctrine, embracing the idea of an honest-services theory of fraud. *Id.*

134. *Id.* at 407-08 (quoting United States v. Runnels, 833 F.2d 1183, 1187 (6th Cir. 1987), *rev'd and vacated en banc*, 877 F.2d 481 (6th Cir. 1989)).

135. *Id.* at 404.

services-fraud statute set the stage for *McDonnell,* where the Court took on the bribery statute itself.[136]

B. *Citizens United v. FEC,* 2010

In the same year it narrowed the scope of the honest-services-fraud statute in *Skilling,* the Supreme Court in *Citizens United v. FEC*[137] struck down a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA),[138] commonly known as the McCain–Feingold Act.[139] The Court's decision weakened campaign finance controls and laid the foundation for the Court's new hands-off approach to conflicts of interest, including bribery.[140] In separating the act of corporate speech in politics from its effects, the Court created the first significant crack in the anticorruption reforms that had, more or less, been the standard since *Buckley.*[141]

At issue was whether the Federal Election Commission (FEC) properly blocked nonprofit Citizens United from sponsoring a film that portrayed presidential candidate Hillary Clinton unfavorably, as a form of "electioneering communication" in violation of section 203 of the BCRA.[142] The Court specifically held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of

136. *See* McDonnell v. United States, 136 S. Ct. 2355 (2016); *infra* Part II.D.

137. 558 U.S. 310 (2010).

138. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. code), *invalidated in part by* McConnell v. FEC, 540 U.S. 93 (2003), Davis v. FEC, 554 U.S. 724 (2008), *and Citizens United,* 558 U.S. 310.

139. *Citizens United,* 558 U.S. at 372.

140. *See generally* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (arguing that the presence of money in politics undermines our confidence in government); TEACHOUT, TEACHOUT, *supra* note 47, at 232 ("The opinion comprehensibly redefined corruption, and in so doing, redefined the rules governing political life in the United States.").

141. The Supreme Court's role in shaping and limiting the Federal Election Campaign Act (FECA) extends back to the statute's introduction in 1971. The FECA was amended in 1974 and again in 1976 following the Supreme Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 6, 143 (1976) (per curiam), *superseded in other part by statute,* BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code) (creating the Federal Election Commission (FEC) and placing limits on campaign contributions and expenditures, among other things), *invalidated in part by Buckley,* 424 U.S. 1; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of the U.S. Code) (amending the structure of the FEC and limits on campaign expenditures, among other things).

142. *See Citizens United,* 558 U.S. at 318-21 (quoting 2 U.S.C. § 441b(b)(2) (2006)).

corruption."[143] The Court further held that just because "speakers may have influence over or access to elected officials does not mean that those officials are corrupt" and that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[144] In reaching this decision, the majority assumed that corporations' spending disclosures would be transparent, which would in turn "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages,"[145] and that the electorate would benefit from corporations' "valuable expertise" rather than be disheartened by it.[146] The decision reversed course on decades, if not a century, of cases concerned with corruption and corporate power.[147]

The decision and language of *Citizens United* has had far-reaching implications. The Court's holding—that independent political spending from corporations and other groups "do[es] not give rise to corruption"[148] and that limiting their expenditures violates the First Amendment's right to free speech[149]—effectively opened the door for those groups to spend unlimited money on elections.[150] Specifically, corporations could now spend unlimited funds on campaign advertising so long as they were not formally coordinating with a candidate or political party.[151] Soon after *Citizens United*, outside

143. *Id.* at 357.

144. *Id.* at 359-60.

145. *See id.* at 370-71 (noting that the internet allows for "prompt disclosure of expenditures [which] can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters").

146. *See id.* at 360, 364. *But see id.* at 447-64 (Stevens, J., concurring in part and dissenting in part) (noting, in an opinion joined by Justices Ginsburg, Breyer, and Sotomayor, that the Court did not fully take concerns about corruption into account in its decision).

147. *See supra* Part I.

148. *Citizens United*, 558 U.S. at 357.

149. *See id.* at 339-41.

150. Jon Schwarz, *John Paul Stevens Was Right: Citizens United Opened the Door to Foreign Money in U.S. Elections*, INTERCEPT (July 18, 2019, 12:53 PM), https://perma.cc/AZ8A-FF88 ("After Citizens United and related decisions, corporations could contribute unlimited amounts to super PACs that supported federal candidates, as long as the super PACs weren't formally coordinating with their campaign."). Following the decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the FEC issued advisory opinions approving political committees that would make only independent expenditures—i.e., super political action committees (PACs). Press Release, FEC, FEC Approves Two Advisory Opinions on Independent Expenditure-Only Political Committees (July 22, 2010), https://perma.cc/F8X3-4DH6.

151. A super PAC—also known as an independent expenditure-only committee—may raise and spend unlimited amounts to advocate for political candidates. But "[u]nlike traditional PACs, super PACs are prohibited from donating money directly to political candidates, and their spending must not be coordinated with that of the candidates they benefit." *Super PACs*, OPENSECRETS, https://perma.cc/8HV2-WJW2 (archived Oct. 12,

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spending exploded as super political action committees (PACs)[152] and "dark money"[153] began to play a greater role in U.S. elections.[154] The ruling ushered in large increases in political spending from wealthy corporations and special-interest groups, further expanding these groups' political influence.[155] That influence reinforced wealth inequality and the sense that "our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value."[156] The ruling also served, albeit indirectly, to hobble efforts to reduce racial bias: An election system skewed toward the wealthy "sustains racial bias and reinforces the racial wealth gap."[157]

Citizens United expanded the role of corporate influence in politics, effectively legalizing forms of influence that were previously considered "quid pro quo corruption"[158] and "undue"[159] for their tendency to corrupt—or to appear to corrupt—the integrity of government.[160]

2021); *see also* R. SAM GARRETT, CONG. RSCH. SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 1-2 (2016) (discussing what constitutes an independent expenditure).

152. A PAC is a 527 organization, a type of organization that is tax exempt under 26 U.S.C. § 527, created primarily to influence elections of political candidates. 26 U.S.C. § 527(a), (e)(1)-(2). For the distinction between traditional and super PACs, see note 151 above.

153. Political contributions from nonprofits that do not disclose their donors are referred to as "dark money." Andrew Prokop, *The Citizens United Era of Money in Politics, Explained*, VOX (updated July 15, 2015, 11:39 PM EDT), https://perma.cc/M877-ZDZN. These types of groups, which are "registered under a part of the tax code for 'social welfare' or 'business league' organizations, had spent some money in campaigns before the [*Citizens United*] decision." *Id.* Following *Citizens United*, there was a dramatic uptick in dark-money spending. *See id.*

154. *Id.*

155. Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), https://perma.cc/M52D-UFUC.

156. *See* DANIEL I. WEINER, BRENNAN CTR. FOR JUST., *CITIZENS UNITED* FIVE YEARS LATER 1 (2015).

157. Lau, *supra* note 155.

158. *See* Citizens United v. FEC, 558 U.S. 310, 356-57 (2010) (emphasis omitted).

159. *Id.* at 447 (Stevens, J., concurring in part and dissenting in part) (quoting McConnell v. FEC, 540 U.S. 93, 150 (2003), *overruled by Citizens United*, 558 U.S. 310, *and* McCutcheon v. FEC, 572 U.S. 185 (2014)).

160. Although the influence of for-profit corporations in campaigns has increased as a result of super PACs, perhaps the "most visible beneficiaries" have been wealthy individuals who can now contribute unlimited funds to campaigns. WEINER, *supra* note 156, at 1. The Brennan Center reports that "an elite club of wealthy mega-donors . . . [of] fewer than 200 people and their spouses . . . ha[s] bankrolled nearly 60 percent of all super PAC spending since 2010." *Id.*

C. *McCutcheon v. FEC,* 2014

The Supreme Court struck down yet another key provision of the BCRA in *McCutcheon v. FEC.*[161] Following close on the heels of *Citizens United,* the *McCutcheon* decision further narrowed the scope of what was previously understood as quid pro quo corruption and bribery in the context of aggregate campaign contributions.[162]

Appellant Shaun McCutcheon contributed to a number of political candidates in compliance with the base and aggregate limits set by the BCRA.[163] McCutcheon argued, however, that although he sought to contribute to a number of additional political candidates in compliance with the base limits, he was prevented from doing so by the aggregate contribution limits.[164] The question before the Court was whether aggregate limits on campaign contributions properly served an anticorruption function or if they were unconstitutional under the First Amendment.[165]

The Supreme Court held that aggregate limits on campaign contributions violated the First Amendment, just as it struck down limits on independent expenditures in *Citizens United.*[166] Aggregate limits were intended to prevent donors from circumventing the base limits and thereby prevent violations of campaign financing laws.[167] The Court found that aggregate limits did little to combat corruption while seriously restricting participation in the democratic process.[168] In doing so, the Court overturned *Buckley*'s approval of aggregate contribution limits[169] and drew a line between general influence and quid pro quo corruption.[170] The Court held that the government only has a "strong

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161. 572 U.S. 185 (2014).
162. *See id.* at 192-93 (plurality opinion).
163. *Id.* at 193-94.
164. *Id.*
165. *Id.* at 192-93.
166. *See id.* at 193; Citizens United v. FEC, 558 U.S. 310, 372 (2010).
167. *McCutcheon,* 572 U.S. at 192-93 (plurality opinion).
168. *Id.*
169. In *Buckley,* the Court had stated that

> [t]he overall $25,000 ceiling . . . serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

Buckley v. Valeo, 424 U.S. 1, 38 (1976) (per curiam), *superseded in other part by statute,* BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

170. *See McCutcheon,* 572 U.S. at 208-09 (plurality opinion).

interest" in combating "quid pro quo corruption" and in preventing the appearance thereof, not in lessening the appearance of corruption in all forms of influence and access.[171] Specifically, because "the Government's interest in preventing the appearance of corruption [was] equally confined to the appearance of quid pro quo corruption, the Government [could] not seek to limit the appearance of mere influence or access."[172] The risk of quid pro quo corruption applied, the Court found, to only a "narrow category of money gifts that are directed, in some manner, to a candidate or office holder."[173]

Prior to *McCutcheon*, the Court had developed a broad understanding of corruption that included preventing the appearance of corruption and extended beyond a quid pro quo exchange. A series of cases starting with *Buckley* and culminating in *McConnell* acknowledge that "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."[174] In *McCutcheon*, however, the Court strayed from this understanding and the objective of limiting the appearance of all forms of corruption. Instead, the Court limited the government's interest specifically to fighting quid pro quo corruption so that it could prevent limitations on political contributions that might restrict the First Amendment right to participate in democracy.[175] In effect, the Court narrowed the conception of corruption in two ways. First, the Court held that an individual is not engaging in quid pro quo corruption when he contributes large sums of money to an election, unless he clearly tries to control or direct the exercise of an official's duties. Second, even if the same individual spends large sums of money in connection with an election and garners "influence over or access to" elected officials or political parties, this influence does not amount to quid pro quo corruption.[176] As the dissent pointed out, the majority

171. *Id.* at 227 (emphasis omitted). The Court noted that while the distinction between quid pro quo corruption and general influence can be vague, the line is necessary to safeguard basic First Amendment rights. *Id.* at 209.

172. *Id.* at 208 (emphasis omitted) (citing Citizens United v. FEC, 558 U.S. 310, 360 (2010)).

173. *Id.* at 211 (quoting McConnell v. FEC, 540 U.S. 93, 310 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II), *overruled by Citizens United*, 558 U.S. 310, *and McCutcheon*, 572 U.S. 185).

174. *McConnell*, 540 U.S. at 143 (alterations in original) (emphasis omitted) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)).

175. *McCutcheon*, 572 U.S. at 227 (plurality opinion). Interestingly, the Court itself acknowledged the vagueness in its decision but erred on the side of protecting, rather than suppressing, political speech. *Id.* at 209 ("The line between quid pro quo corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." (emphasis omitted)).

176. *Id.* at 208 (quoting *Citizens United*, 558 U.S. at 359).

relied on a narrow definition of corruption that excluded "efforts to obtain 'influence over or access to' elected officials or political parties."[177]

McCutcheon compounded the effects of *Citizens United* by narrowing the scope of quid pro quo corruption. First, *McCutcheon* made it increasingly difficult to argue that the variety of loopholes through which donors could make massive campaign contributions amounted to legalized bribery.[178] Second, it minimized "the importance of protecting the political integrity of our government institutions."[179]

D. *McDonnell v. United States*, 2016

Most recently, the Court further undermined conflict-of-interest laws by hollowing out the federal bribery statute in *McDonnell v. United States*.[180] While serving as governor of Virginia, Robert McDonnell and his wife received $175,000 in gifts and loans from businessman Jonnie Williams, the CEO of Star Scientific.[181] In return, McDonnell used his position to promote the businessman's interests by arranging meetings between his subordinates and Williams, giving speeches promoting Star Scientific, and encouraging researchers at the state's public universities to study Star Scientific's products, among other things.[182] The issue for the Court turned on whether McDonnell engaged in an "official act" to advance those interests.[183] Even though the Court recognized that McDonnell had used his position in an unseemly manner, it decided that none of McDonnell's attempts to promote the

177. *Id.* at 234 (Breyer, J., dissenting) (quoting *Citizens United*, 558 U.S. at 359).

178. *Id.* at 235-36 (highlighting the dangers of the majority's having defined corruption too narrowly); *see also* Fred Wertheimer, *Legalized Bribery*, POLITICO (Jan. 19, 2014), https://perma.cc/6DXG-N9SM (arguing that striking down aggregate contribution limits, which the Court ultimately did in *McCutcheon*, would "institute a system of legalized bribery").

179. *McCutcheon*, 572 U.S. at 233 (Breyer, J., dissenting). The dissent noted that by sidelining the fear raised in *Buckley*—that an individual might contribute massive amounts of money to candidates through unearmarked contributions—as speculative and as a reason to strike down aggregate limits, the majority created a loophole. *Id.*

180. 136 S. Ct. 2355 (2016).

181. *Id.* at 2362-64; *see also supra* note 12 and accompanying text.

182. Press Release, U.S. Att'y's Off. of the E. Dist. of Virginia, *supra* note 12; *see McDonnell*, 136 S. Ct. at 2362-64.

183. *McDonnell*, 136 S. Ct. at 2367. McDonnell was not charged with violating 18 U.S.C. § 201 but instead with honest-services wire fraud, conspiracy to commit honest-services wire fraud, obtaining property under color of official right, conspiracy to obtain property under color of official right, making false statements to a financial institution, and making false statements to a federal credit union. *See* Press Release, U.S. Att'y's Off. of the E. Dist. of Virginia, *supra* note 12.

businessman's and Star Scientific's interests—through meetings arranged with subordinates, speeches, or other actions—constituted "official acts."[184]

Under the federal bribery statute, bribery takes place whenever someone "corruptly gives, offers or promises anything of value" to a public official to influence an "official act."[185] Courts have historically provided latitude regarding what constitutes an "official act."[186] In *McDonnell,* however, the Court established a narrow, restrictive interpretation of what an "official act" entails by holding that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"[187] The Court explained that its concern was with the broader legal implications of a "boundless interpretation of the federal bribery statute."[188] The Court's decision to narrowly interpret the statute's text and precedent, the Court stated, would still leave "ample room for prosecuting corruption."[189]

In reality, this narrow definition of "official act" rejects both legislative intent at the time the statute was passed as well as precedent.[190] When the statute was enacted in 1962, a Senate Report stated the legislature's intent that "official act" be defined broadly.[191] The report notes that "[t]he term 'official act' is defined to include any decision or action taken by a public official in his capacity as such."[192] Case law also described "official act" as including duties set

184. *McDonnell,* 136 S. Ct. at 2371-72.

185. 18 U.S.C. § 201(b)(1)(A).

186. *See, e.g.,* United States v. Birdsall, 233 U.S. 223, 230-31 (1914) (clarifying that "official act" also includes duties customarily associated with a particular job); United States v. Carson, 464 F.2d 424, 434 (2d Cir. 1972) (holding that conspiring to accept a bribe, in return for an unlawful exertion of the influence inherent in one's official position as a staff member to a public official, constitutes an "official act"); United States v. Muntain, 610 F.2d 964, 967 n.3 (D.C. Cir. 1979) (citing *Birdsall* for the fact that "official act" extends to customary duties, but finding no evidence in the case to associate the defendant's actions with his official or customary duties).

187. *McDonnell,* 136 S. Ct. at 2372; *see, e.g.,* United States v. McDonnell, 64 F. Supp. 3d 783, 789-92 (E.D. Va. 2014) (rejecting McDonnell's motion to vacate the jury verdict which found that McDonnell had performed "official acts"), *aff'd,* 792 F.3d 478 (4th Cir. 2015) (affirming the jury verdict), *rev'd,* 136 S. Ct. 2355.

188. *McDonnell,* 136 S. Ct. at 2375.

189. *Id.*

190. *See* Curato et al., *supra* note 90, at 1077-79.

191. *Id.*; *see also* S. REP. NO. 87-2213, at 4 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3853 (explaining that the purpose of the statute was to consolidate existing conflict-of-interest and bribery laws but that the consolidation "would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts").

192. *See* S. REP. NO. 87-2213, at 8, *as reprinted in* 1962 U.S.C.C.A.N. at 3856. Except for some minor changes, the definition of "official act" in the 1962 statute is identical to the

footnote continued on next page

forth in a job description, as well as duties customarily associated with a particular job.[193] The Court's narrower, textual interpretation in *McDonnell* of what is an "official act" leaves out behavior that would have previously constituted bribery, similar to the Court's narrow interpretation of the honest-services-fraud statute in *Skilling*.[194]

In *McDonnell*, Chief Justice Roberts also indicated that when interpreting bribery laws, courts should not be concerned with the potential appearance of a conflict of interest.[195] This approach further blunts the edge of a previously sharp weapon to combat public corruption.[196]

* * *

The above cases highlight the curtailed reach of the bribery statute. And they are emblematic of a shift away from anticorruption reform and toward a permissive, hands-off approach to corruption. This permissive interpretation extends to anyone who breaks a conflict-of-interest law that references bribery or depends on the definition of bribery. Although bribery is a felony crime in every state and under federal law, the term itself lacks a consistent legal

definition today. *Compare* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. §§ 201-218), *with* 18 U.S.C. § 201(a)(3). The current definition of an official act is "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

193. *See* sources cited *supra* note 186. Our intention is not to relitigate *McDonnell*, but we note that Congress intended the statute to be broadly interpreted. *See* S. REP. NO. 87-2213, at 4, *as reprinted in* 1962 U.S.C.C.A.N. at 3853.

194. *See supra* Part II.A. We do note that the resulting definition "still encompasses pressuring others to take an official action, taking initial steps toward an official action, and giving advice that will form the basis of an official action." *The Supreme Court, 2015 Term—Leading Cases: Federal Corruption Statutes—Bribery—Definition of "Official Act"*—McDonnell v. United States, 130 HARV. L. REV. 467, 467 (2016) [hereinafter *Federal Corruption Statutes*] (discussing the Court's approach to statutory interpretation in *McDonnell*).

195. *See* McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016). The Court failed to consider the "existing limitations on federal anticorruption laws and the decision's potential to further undermine participation in the democratic process by facilitating the appearance of corruption." *Federal Corruption Statutes*, *supra* note 194, at 467.

196. *See Federal Corruption Statutes*, *supra* note 194, at 476 (noting that prosecutors and lower courts "retain the power to reframe prosecutions based on theories of access and influence" as cases in which officials used their offices to "pressure subordinates, offer advice, or take initial steps somewhat attenuated from the ultimate official action"); *see also* Curato et al., *supra* note 90, at 1072. *Compare* Matt Zapotosky, *U.S. Attorney's Office Recommends Putting Robert McDonnell on Trial Again*, WASH. POST (Sept. 2, 2016), https://perma.cc/2262-UFAM, *with* Alan Blinder, *U.S. Ends Corruption Case Against Former Virginia Governor*, N.Y. TIMES (Sept. 8, 2016), https://perma.cc/6BL7-RQ9S.

definition across statutes.[197] As such, 18 U.S.C. § 201, the "principal federal bribery statute,"[198] often provides the unofficial definition of bribery for other criminal statutes that reference or require a showing of bribery but do not define the term.[199] In this regard, the Court's narrow interpretation of bribery has a ripple effect throughout the broader conflict-of-interest regime. For instance, the legal definition of bribery determines whether a federal official has committed an impeachable offense,[200] whether an official has committed honest-services fraud,[201] and whether an official is guilty of extortion under the Hobbs Act.[202]

Across the cases discussed above, several rationales for the Court's recent permissiveness emerge. These include concerns about constraining First Amendment rights to free speech, concerns about chilling interactions between politicians and constituents, concerns about vague statutes and the need for clear guidelines that outline what behavior is corrupt, and concerns of prosecutorial overreach.[203] Daniel Brovman summarizes these together as the

197. *U.S. Anti-corruption Oversight: A State-by-State Survey*, COLUM. L. SCH., https://perma.cc/5MKH-R2SN (archived Oct. 13, 2021); *see also* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786-87 (1985) (noting the difficulty of distinguishing what is bribery and what is not).

198. Skilling v. United States, 561 U.S. 358, 413 n.45 (2010).

199. *See, e.g.*, 18 U.S.C. § 1346; *see also Skilling*, 561 U.S. at 411-12 (requiring a showing of bribery or kickbacks to convict a defendant under 18 U.S.C. § 1346).

200. U.S. CONST. art. II, § 4; *see also supra* notes 29, 31 and accompanying text.

201. In *Skilling*, the Court limited violations of honest-services fraud to bribes and kickbacks. 561 U.S. at 411-12. The Court stated that the prohibition on bribes and kickbacks "draws . . . from federal statutes proscribing—and defining—similar crimes." *Id.* at 412-13 (citing 18 U.S.C. § 201(b); 18 U.S.C. § 666(a)(2) (providing a similar definition to that in 18 U.S.C. § 201); and United States v. Ganim, 510 F.3d 134, 147-49, 147 n.7 (2d Cir. 2007) (reviewing an honest-services conviction involving bribery in light of elements of bribery in other federal statutes)). While *Skilling* was decided before *McDonnell*, future cases involving honest-services fraud will also look to the definition in 18 U.S.C. § 201 for guidance as to whether bribery occurred. *See, e.g.*, *infra* note 202.

202. Extortion under color of right is the "rough equivalent of . . . 'taking a bribe.'" Evans v. United States, 504 U.S. 255, 260 (1992). Governor McDonnell was not convicted of violating 18 U.S.C. § 201 but of honest-services wire fraud, Hobbs Act extortion, and conspiracy to commit both of those crimes. McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016). The parties agreed to define honest-services fraud with reference to 18 U.S.C. § 201. *McDonnell*, 136 S. Ct. at 2365. Thus, the strength of the antibribery regime depends, in part, on that of the bribery statute. In this way, a weakened bribery statute is not only situated within a broader trend toward relaxing conflict-of-interest laws but also perpetuates the trend.

203. For a discussion of the Court's motivating rationales in *McDonnell*, see Brovman, *supra* note 28, at 180-83. Zephyr Teachout provides a detailed critique of how the Court prioritizes the First Amendment right to free speech for corporations over concerns about corruption. *See* Zephyr Teachout, *The Anti-corruption Principle*, 94 CORNELL L. REV. 341, 400, 405-06 (2009).

Court's "democracy-reinforcing" rationales.[204] With these rationales in mind, we argue that the present divergence in jurisprudence, instead of protecting democracy, carries serious negative implications by separating the domestic bribery law from a commonsense understanding of bribery.

III. The Domestic Bribery Statute: Disconnected from Popular Perception

The Supreme Court has weakened the domestic bribery statute specifically—and the conflict-of-interest regime more generally—by favoring a narrow, textual interpretation and by eschewing the idea that the appearance of conflicts of interest has any weighty constitutional footing. As a result of the Court's recent permissive interpretation, a double standard in bribery law has emerged. In terms of the domestic antibribery regime, currently one may, without consequence, secure a personal advantage from a public official, even pay directly for it, so long as it does not involve a narrowly circumscribed set of official actions.[205] In contrast, securing a personal advantage from foreign public officials is subject to a far more robust punishment under the FCPA, which regulates the conduct of American entities abroad.[206] The FCPA uses a conception of bribery that better captures a commonsense understanding of the term.[207] A person violates the FCPA if she corruptly offers, pays, or authorizes giving anything of value to any foreign official for purposes of securing "any improper advantage."[208] Today, the language of the FCPA suggests that it is almost always wrong to use a foreign official's public office to gain a personal benefit. The difference in how the FCPA and domestic bribery statutes approach the question of influence over public officials could be summarized as follows: The FCPA prohibits most behavior but creates exceptions, whereas the domestic statute prohibits only a limited range of acts and permits the rest.

By weakening the federal domestic bribery law to a point of functional futility, the Court permits behavior that many in the public would consider illegal. A 2012 study revealed that lay respondents "sought to criminalize both commercial bribery and payments accepted by an office-holder in return for

204. Brovman, *supra* note 28, at 183.

205. *See supra* notes 180-84 and accompanying text.

206. Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359, 1361-63 (2021) ("No other country matches the scope and severity of U.S. prosecutions of these businesses [under the FCPA] . . . .").

207. *See infra* note 209 and accompanying text.

208. 15 U.S.C. §§ 78dd-1(a)(1)(A)(iii), 78dd-2(a)(1)(A)(iii), 78dd-3(a)(1)(A)(iii). For the history of the statute, see note 20 above.

performing a non-official act, despite the fact that neither form of conduct is a crime under current American federal law."[209] Importantly, officials seem to know when their own actions are illicit: for example, Jefferson was hiding some of his money in his freezer, and Menendez did not disclose the payments he received.[210] It seems, then, that the moral intuitions of the lay public are aligned with at least those of officials, but not with the law.

Despite a relatively straightforward moral intuition as to what constitutes bribery, the legal definition of what should constitute bribery is not obvious. There is thus a disconnect between the commonsense conception of bribery among the public and the legal standard of bribery that the Court applies to elected representatives and officials.[211] In the context of impeachment, consider the extensive reporting around whether then-President Donald Trump committed bribery.[212] The many articles written to explain to the public how bribery law operates, in addition to the debate among legal scholars as to whether President Trump's actions constituted bribery[213] and the results of public polling on the matter,[214] suggest that the general public's conception of bribery does not necessarily align with the legal definition. Although contemporaneous reporting could be seen as regular journalism for the purpose of informing the public, studies also suggest that the concept of bribery is far from obvious, and that the public's conception of what bribery is does not match the legal reality.[215] A weakened definition of bribery increases the disconnect between the law and the general moral intuition of what is right and wrong.

209. Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS., no. 2, 2012, at 33, 34.

210. *See supra* note 3 and accompanying text; Letter from U.S. Senate Select Comm. on Ethics Members to Sen. Robert Menendez 1 (Apr. 26, 2018), https://perma.cc/9X37-D6JF.

211. *See supra* note 209 and accompanying text.

212. Numerous articles about bribery as well as the concept and definition of quid pro quo were published during the first impeachment of President Trump. *See, e.g.*, Carissa Byrne Hessick, *Bribery Is Right There in the Constitution*, ATLANTIC (Nov. 21, 2019), https://perma.cc/3XKT-AH4C.

213. *See supra* text accompanying notes 31-33. *Compare Impeachment Hearing*, *supra* note 32, at 33 (statement of Pamela Karlan, Professor, Stanford Law School), *with id.* at 80-81 (statement of Jonathan Turley, Professor, George Washington University Law School).

214. A Pew Research Center study found that a 46% plurality of U.S. adults believed "Trump did something wrong [regarding Ukraine] and it justified his removal [from office]." *Nearly Half of U.S. Adults Say Trump's Actions on Ukraine Justified His Removal from Office*, PEW RSCH. CTR. (Mar. 17, 2020), https://perma.cc/QZE4-A4FB.

215. *See supra* note 209 and accompanying text.

This disconnect potentially weakens the integrity and legitimacy of government. An immediate repercussion of weakened domestic protections against bribery is that officials who are found to have put their personal interests above the public interest are able to escape liability and, in some cases, return to public service. By minimizing this concern, the Court potentially discredits the value of the public's moral intuition and shines a spotlight on its own unwillingness to play a role in seriously tackling the problem of money in politics. Following *McDonnell*, several individuals previously found guilty of bribery had their convictions overturned.[216] And in light of the new, narrower definition of "official acts," prosecutors chose not to retry Senator Bob Menendez.[217] In Menendez's case, after prosecutors dropped the charges against him, he was reelected to public office.[218] The Court's decisions from *Citizens United* to *McDonnell* have created a permissive culture where conflicts of interest have become politics as usual when, in fact, this culture was one of the things the Founders feared most.[219] In characterizing McDonnell's acts as politics as usual, the Court relied heavily on the opinions of the amici supporting McDonnell—comprised primarily of politicians, administrative officials, and public servants—rather than on opinions representing a broader swath of the American public.[220] By prioritizing the opinions of the amici, those who would be "most affected" by the law,[221] the Court took the narrow view that its interpretation of the bribery statute would impact only those

216. *See supra* text accompanying notes 15-19.

217. In 2017, prosecutors had their first major opportunity to test the new definition of bribery against Menendez, who had asked State Department officials to pressure the Dominican Republic's government into enforcing a contract that would benefit his friend, including providing visas to his friend's girlfriends, in return for political donations and personal perks. Press Release, U.S. Dep't of Just., Senator Robert Menendez and Salomon Melgen Indicted for Conspiracy, Bribery and Honest Services Fraud (Apr. 1, 2015), https://perma.cc/DEA9-PPSQ. The case first ended in a mistrial and partial acquittal by the judge, and the government subsequently decided to drop the charges. *See* Friedman & Hutchins, *supra* note 17.

218. Elizabeth Rosner & Kate Sheehy, *Sen. Menendez Wins Re-election amid Corruption Allegations*, N.Y. POST (updated Nov. 6, 2018, 8:34 PM), https://perma.cc/FT58-3DG7.

219. *See Impeachment Hearing*, *supra* note 32, at 32-33 (statement of Pamela Karlan, Professor, Stanford Law School).

220. *See* Brovman, *supra* note 28, at 179 & n.51, 183-84, 190, 191 nn.117-18.

221. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 785 (2000). Kearney and Merrill hypothesize that when the Justices attempt to gather information on public opinion, they sometimes look to amicus briefs as a barometer of opinions on both sides of the issue. The authors argue that in so doing, the Justices may conflate the opinions of influential interest groups—those that often intervene in legal proceedings through amicus briefs—with broader public views. *See id.* at 785-86.

directly affected and that the Court's concern should not extend further.[222] This position ignores the many voices of the public—in other words, of those who are *indirectly* affected by the authorization of behavior that would be considered bribery by commonsense standards.

Beginning with *Citizens United*, several Justices have diverged from the decades of jurisprudence affirming that the appearance of corruption affects the public's confidence in representative government. In his majority opinion, Justice Kennedy wrote that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[223] In *McDonnell*, Chief Justice Roberts suggested that concerns about how the public might perceive McDonnell's admittedly "distasteful" behavior were subordinate to reining in the bribery statute.[224]

By using a textual interpretation of bribery law that departs from the public's intuitions, the Court has diminished its regard for how the appearance of conflicts of interest erodes confidence in representative government. Despite Justice Kennedy's and Chief Justice Roberts's pronouncements in *Citizens United* and *McDonnell*, it is widely recognized that appearances do still matter and that a stated disregard for the practical, real-life impacts of judicial pronouncements has significant consequences. Scholars and the courts have traditionally been concerned with how bribery and conflicts of interest broadly might undermine popular confidence in government.[225] In *Buckley v.*

222. In Chief Justice Roberts's final lines of the *McDonnell* opinion, he seems to outright reject the idea that the Court needs to consider appearances. *See* McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016). But it is possible that the Court may simply have mistaken "interest group opinion" for "public opinion." *See* Kearney & Merrill, *supra* note 221, at 785.

223. Citizens United v. FEC, 558 U.S. 310, 360. (2010). Lessig dissects this argument, explaining that Justice Kennedy relied on no evidence for thishis assertion and that his reasoning falls victim to a logic gap. LESSIG, *supra* note 140, at 243-45.

224. *McDonnell*, 136 S. Ct. at 2375 ("There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns.").

225. There is ample research demonstrating that the appearance of corruption can impact one's views of government and public officials. In one opinion, Justice Souter relied heavily on this research from the time of *Buckley* up to *Citizens United*. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 507, 522 (2007) (Souter, J., dissenting) (defining political integrity broadly as "the capacity of this democracy to represent its constituents and the confidence of the citizens in their capacity to govern themselves" and explaining that "outright bribery or discrete quid pro quo" is but one source of corrupting influence that "def[ies] public confidence in its institutions" (emphasis omitted)); *see also* LESSIG, *supra* note 140, at 7 (arguing that the blatant presence of money in politics has "normalized a process that draws our democracy away from the will of the people"). For examples of important Supreme Court decisions discussing the importance of minimizing the appearance of corruption, see *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (stating that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded

footnote continued on next page

Valeo, the Court recognized a governmental interest in preventing corruption and found that quid pro quo exchanges involving public officials undermine the integrity of democracy.[226] In addition to its concern with quid pro quo arrangements, the Court reaffirmed that avoiding the appearance of corruption, and of improper influence more broadly, is important for maintaining the legitimacy of the government.[227] Adding further weight to this precedent, ethics scholar Dennis Thompson argues that an appearance of a wrong itself is a distinct wrong "no less serious than the wrong of which it is an appearance."[228]

If the federal domestic bribery statute was enacted to prevent officials' self-interest from triumphing over the public's interest and to "maintain[] high ethical standards of behavior in the Government" (as the Senate stated in 1962[229]) then it is no longer working. High-profile public officials can skirt domestic bribery punishments today primarily because of how the Supreme Court has recently interpreted the federal domestic bribery statute. Under the statute, a person is guilty of bribery if he or she "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . to influence any official act."[230] The cast of the law is shallow and focuses on whether the misuse of public office is an "official act." Following *McDonnell,* the Supreme Court has taken a restrictive view on what should count as an

to a disastrous extent" (quoting U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973))), *superseded in other part by statute,* BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n.26 (1978) (recognizing the possibility that permitting corporate speech might erode confidence in the system, and distinguishing the right of a corporation to "speak on issues of general public interest" from the right to participate in the "quite different context" of political campaign speech); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 391 (2000) ("[T]he suspicion that large contributions are corrupt [is] neither novel nor implausible."); and *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 441 (2001) (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment" and "the appearance of such influence"). *But see Citizens United v. FEC,* 558 U.S. at 357-58 (citing *Bellotti,* 435 U.S. at 788 n.26) ("A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. . . . [W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." (citation omitted)).

226. *Buckley,* 424 U.S. at 26-27.

227. *See id.* at 27 (reasoning that it was not only important that the government should avoid partisanship but also critical that it avoid the "appearance of improper influence").

228. DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 124 (1995).

229. *See* S. REP. NO. 87-2213, at 4-5 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 3852, 3853.

230. 18 U.S.C. § 201(b)(1).

"official act," to the point where many activities considered fundamental to a public official's job are being deemed unofficial acts.[231] Although we disagree with this interpretation of the statute, we do not contest it. Instead, we believe that the federal domestic bribery statute should be rewritten to focus on what is truly concerning. By asking whether an "official act" was influenced, the Court's current approach focuses on the *nature* of the misuse of public office—rather than focusing on *whether* there was a misuse of public office in the first place. The FCPA, by contrast, adopts a conception of bribery that is more closely aligned with a commonsense understanding of the term: A person violates the FCPA if she corruptly offers, pays, or authorizes anything of value to any foreign official for purposes of securing "any improper advantage."[232]

These differing conceptions have created a two-tiered system for tackling domestic and foreign bribery. The different legal standards for how to treat equivalent actions is confusing and not in line with commonsense understandings of bribery. They can also yield the bizarre result that identical behavior is legal at home while illegal abroad. And this double standard benefits public officials. For instance, if a corporation or bureaucrat seeks to pay a bribe to a foreign official, the FCPA is strong. But if they seek to pay a bribe to a domestic public official, the domestic law is weak. In effect, the bribery law is strong against everyone but those who created the law itself.

Over the course of the last two centuries, however, politicians have shown that they are willing to draft and pass more stringent domestic bribery laws, particularly after a scandal or crisis. The Galphin Affair, Teapot Dome scandal, and Watergate all resulted in congressional action to strengthen bribery laws and enhance good governance among public officials.[233] This history shows that when there is a "low point" involving scandal or crisis, the political appetite for reform gains traction, and reforms sometimes follow. We suggest that we are currently in such a low point and that the opportunity for reform is approaching.

The U.S. domestic antibribery regime has regressed to the point where bribe givers and bribe takers are often able to escape punishment.[234] Because

231. *See supra* notes 187-89 and accompanying text.

232. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). When it drafted the FCPA, Congress intended to cast a "wide net" over foreign bribery and prohibit illicit payments intended to influence "non-trivial official foreign action." *See* United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).

233. *See supra* Part I.

234. See notes 13-19 and accompanying text above for a discussion on the impact of the *McDonnell* decision on the cases of Representative William Jefferson, whose bribery conviction was overturned; Senator Robert Menendez, whose bribery case was dropped by prosecutors; and Governor Robert McDonnell himself, who escaped prosecution for behavior that a jury had found to constitute bribery when the Supreme Court narrowly interpreted the term "official act."

the public still perceives their behavior as illegal,[235] few believe that public officials are faithfully committed to acting in the national interest.

In response to this trend, Donald Trump focused his 2016 presidential campaign on a promise to stem corruption—to "drain the swamp."[236] Over the next four years, however, the Trump presidency came to be characterized by the promotion of self-interest over national interest.[237] House Democrats responded to growing public disaffection by introducing a good-governance bill, the For the People Act of 2019, as House Bill 1 in the 116th Congress.[238] For over a year, the effort at reform was largely symbolic. The Presidential Conflicts of Interest Act of 2019, a parallel bill aiming to address presidential and vice-presidential financial conflicts of interest, was also introduced in the Senate but never received a vote.[239] The tumultuous final days of the Trump presidency, however, renewed momentum in Congress to bolster ethics and conflict-of-interest laws.[240] The proposed bills involve, in part, formalizing longstanding norms regarding ethics and conflicts of interest into law—a rebuke of the Supreme Court's recent jurisprudential turn and an affirmation that stronger, not weaker, laws are needed to ensure the integrity of democracy.[241]

It is time for the federal domestic bribery statute to continue evolving, as it has since the 1700s. And its evolution both in form and function should, at a minimum, reflect public conceptions of the crime. The many justifications for strong bribery laws center around similar themes. James Lindgren emphasizes that bribery laws were created to prevent "the exploitation of public power for

235. *See* Green & Kugler, *supra* note 209, at 34.

236. Editorial, *Trump Shattered His Promise to "Drain the Swamp." The Self-Dealing Would Be Epic in a Second Term.*, WASH. POST (Sept. 16, 2020), https://perma.cc/SY49-4XV2.

237. *Id.*

238. For the People Act of 2019, H.R. 1, 116th Cong. (2019); *H.R.1—For the People Act of 2019*, CONGRESS.GOV, https://perma.cc/B2T5-UB7V (archived Oct. 15, 2021).

239. Presidential Conflicts of Interest Act of 2019, S. 882, 116th Congress (2019); *see also S.882—Presidential Conflicts of Interest Act of 2019*, CONGRESS.GOV, https://perma.cc/SUF7-STHH (archived Oct. 15, 2021).

240. In January 2021, Democrats reintroduced the For the People Act. *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021); *H.R.1—For the People Act of 2021*, CONGRESS.GOV, https://perma.cc/V7JG-ZR92 (archived Oct. 15, 2021). The Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020), and the For the People Act aimed to be the "main vehicles to address the sweep of questionable practices in the Trump era." Elizabeth Williamson, *Beyond Impeachment, a Push for Ethics Laws that Do Not Depend on Shame*, N.Y. TIMES (updated Jan. 16, 2021), https://perma.cc/9VQM-LUAW. The Protecting Our Democracy Act was also reintroduced in September 2021. H.R. 5314, 117th Cong. (2021).

241. *See* Williamson, *supra* note 240.

personal gain."[242] For Judge John Noonan, bribery laws help to preserve fidelity in office:

> The notion of fidelity in office, as old as Cicero, is inextricably bound to the concept of public interest distinct from private advantage. It is beyond debate that officials of the government are relied upon to act for the public interest not their own enrichment. . . . When government officials act to enrich themselves they act against the fabric on which they depend, for what else does government rest upon except the expectation that those chosen to act for the public welfare will serve that welfare?[243]

The legal definition of bribery has not changed in any significant way since 1962,[244] but the judicial interpretation of bribery has shifted. In the past, courts relied on common usage and public conceptions of bribery in their decisionmaking.[245] They looked to everyday usage of the words "bribe" or "bribery" to determine their meaning and seemed to emphasize that the terms were familiar to the public. For instance, around the time that the Supreme Court decided *Buckley v. Valeo*, the Third Circuit explained that the terms "bribes," "kickbacks," and "payoffs" were used commonly in the media and "are not terms of art, [and] they are words of common currency which form part of the vocabulary of almost any American in his teens or older."[246] Just two years later, the Second Circuit recognized that some courts have looked to "everyday rather than legal usage" when seeking the meaning of the term "bribe" and that courts consistently look to whether there has been "corruption and breach of trust or duty."[247] And in interpreting the word "bribery" in Title IX of the Organized Crime Control Act of 1970, a court deemed the term "familiar in common speech. Its basic feature is the prostitution of a public trust for private gain."[248] Moreover, courts took a broad view of bribery that comported with "what our society deems" right or wrong.[249] The Second Circuit explained:

> [W]hether they view it as a term of art or a term of common usage, courts have consistently understood the word "bribe" to encompass acts that are *malum in se* because they entail either a breach of trust or duty or the corrupt selling of what our society deems not to be legitimately for sale—the Senator's vote, the citizen's ballot, the labor leader's negotiating position or the employee's actions taken on

242. James Lindgren, *The Theory, History, and Practice of the Bribery–Extortion Distinction*, 141 U. PA. L. REV. 1695, 1705 (1993).
243. NOONAN, *supra* note 28, at 704.
244. *See supra* note 192.
245. *See infra* text accompanying notes 247-50.
246. United States v. Long, 534 F.2d 1097, 1100 (3d Cir. 1976).
247. United States v. Zacher, 586 F.2d 912, 915 (2d Cir. 1978).
248. *Id.* at 915 (quoting United States v. Forsythe, 429 F. Supp. 715, 721 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977)).
249. *See id.* at 916.

> behalf of an employer. It is this element of corruption that distinguishes a bribe from a legitimate payment for services.[250]

These circuit courts not only considered the common understanding of bribery but also took great pains to explain that, at its core, bribery was about not just a specific act—it was a breach of duty. Rather than focusing on specific terms such as "official act," as the Supreme Court does today, courts used the commonsense understanding of bribery based on moral intuition as to what is right and wrong. They considered not just the wrongfulness of a given act but also its direct and indirect effects.

In our view, the true focus of the domestic bribery statute encompasses both the acts of bribery and their effects. In *United States v. Zacher*, the Second Circuit recognized this focus, stating that "[t]he evil sought to be prevented by the deterrent effect of [antibribery statutes] is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty."[251] In other words, the Second Circuit recognized that bribery is unique from many other crimes because bribery carries the potential to undermine the public's trust in government. To prevent the distortion that Judge Noonan described,[252] violations of the public's trust should be viewed broadly. We propose that the federal domestic bribery statute be amended accordingly.

IV. Proposed Reforms

Parts II and III demonstrated that the federal domestic bribery law is broken, while the FCPA generally works as intended. Because of recent interpretations by the Supreme Court, the federal domestic bribery law needs revision. This Part contends that there should be greater alignment in the public bribery regime across the domestic–foreign divide and proposes that two aspects of the FCPA serve as a model for reform.

First, we propose that the domestic bribery law should adopt language from the FCPA. As described in Part II, what constitutes an "official act" is now too narrow for the domestic bribery statute to be effective. Rather than attempting to redefine what should be considered an "official act," we propose a statute in which bribery takes place if any "improper advantage" is promised, offered, or secured. We contend that the federal domestic bribery law, along with other conflict-of-interest laws, should prevent the trade of "improper

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250. *Id.*

251. *See id.* at 915 (quoting United States v. Jacobs, 431 F.2d 754, 759 (2d Cir. 1970)).

252. *See supra* text accompanying note 243 (stating that making a public official susceptible to bribery opens the possibility of the official prioritizing her self-interest over her official responsibilities).

advantages."[253] Public officials should not perform acts that confer improper advantages in any form. Equally important, this term seems to be legally robust because it comes from the FCPA[254] and the term within the FCPA has not yet faced a serious challenge in the courts. Furthermore, by incorporating this term, the domestic bribery law and the FCPA would come into alignment. If the courts or legal thinkers wish to debate what precisely constitutes an "improper advantage," they could do so in a way that makes conflicts of interest consistent domestically and internationally.

Second, we propose the amended statutes should empower the Attorney General to issue guidelines and opinions as to the scope of what is legal or illegal. The statute currently takes a reactive approach, relying solely on the courts to interpret whether an act that has already taken place was indeed an act of bribery.[255] A proactive approach based on an Attorney General's guidelines and opinions would provide the public with clarity as to what legal standards apply to public officials, as well as with assurance that conflicts of interest are taken seriously. When officials like Menendez, Jefferson, or McDonnell escape prosecution, even though they engaged in acts that appear criminal, public confidence in government is diminished. Deterring bribery and related conflicts of interest is of paramount importance in legal systems in which legitimacy is closely tied to the appearance of (and actual) honest government.[256]

Through this Article's proposed reforms—(1) criminalizing exchanges that confer an improper advantage; and (2) allowing the Attorney General to issue guidance and opinions on what acts she considers bribery—the United States can better align popular conceptions of bribery with legal reality. Together, these proposed reforms strengthen the broader conflict-of-interest regime, offer clarity to actors as to what is legal or illegal, instill public confidence in government, and protect democratic values. Moreover, a strong conflict-of-interest regime would improve consistency across various conflict-of-interest laws—in particular, between domestic and foreign bribery laws. We discuss these proposed reforms in greater detail below.

253. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

254. *Id.*; *see also supra* note 20 (discussing the history of the "improper advantage" language in the FCPA).

255. *See* 18 U.S.C. § 201.

256. *See supra* Part III.

A. The Foreign Corrupt Practices Act as a Practical Model for Facilitating Sought-After Reform

As we discussed in Part I, Congress and the Court took a series of proactive and complementary steps to address bribery and corruption in the 1970s. In 1972, Congress passed the Federal Election Campaign Act (FECA) to regulate the role of money in political campaigns.[257] In 1976, in *Buckley v. Valeo,* the Supreme Court confirmed the importance of tackling corruption and the appearance thereof.[258] And in 1977, responding to concerns about American companies engaging in foreign bribery and foreign money impacting the U.S. government and U.S. economic interests, Congress passed the FCPA.[259]

The FCPA would eventually become "the premier statute in the United States to address the nefarious conduct of corrupt payments to foreign officials, foreign political parties, or candidates for political office in order to influence any act of that foreign official and to secure any improper advantage in order to obtain business."[260] Specifically, the FCPA criminalizes bribery of foreign public officials for the purpose of gaining business.[261] Publicly traded companies are also required to keep accurate books and enact controls to prevent improper use of corporate funds and diversion of assets.[262] The FCPA was enacted in "direct response to evidence uncovered in the course of investigations sparked by the Watergate scandal."[263] These investigations revealed that U.S. corporations had made illegal campaign contributions to then-President Nixon and other political figures; according to SEC reports,

257. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of the U.S. Code); 52 U.S.C. § 30101.

258. *See* 424 U.S. 1, 27 (1976) (per curiam), *superseded in other part by statute*, BCRA, Pub. L. No. 107-155, 116 Stat. 18 (codified as amended in scattered sections of the U.S. Code).

259. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.); *see supra* text accompanying notes 106-08.

260. Heidi Frostestad Kuehl, *The "Fight Song" of International Anti-bribery Norms and Enforcement: The OECD Convention Implementation's Recent Triumphs and Tragedies*, 40 U. PA. J. INT'L L. 465, 468 (2019). Jurisdiction over FCPA enforcement is divided: The SEC exercises civil and administrative authority over issuers of securities and the Department of Justice exercises civil and criminal authority over all other "domestic concerns" and covered individuals or their agents. MICHAEL V. SEITZINGER, CONG. RSCH. SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT, IN BRIEF 6 (2016), https://perma.cc/5B55-R48C; 15 U.S.C. §§ 78dd-2(d) to (g), 78dd-3(d).

261. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

262. Low & Trenkle, *supra* note 27, at 15; *see* Foreign Corrupt Practices Act of 1977 § 102, 91 Stat. at 1494 (codified as amended at 15 U.S.C. § 78m).

263. Davis, *supra* note 106, at 498.

dozens of corporations had made millions dollars of "questionable or illegal foreign payments."[264]

In its early years, the FCPA was weak. In drafting the statute, Congress was conscientious about the difficulty of translating everyday understandings of bribery into statutory language "that would not be damaging to some legitimate things that happen on the periphery."[265] Many provisions of the original text of the FCPA borrowed directly from federal domestic bribery law.[266] The original text of the FCPA contained the following basic elements of an offense:

- [The] use of mails or other instrumentality of U.S. interstate commerce in furtherance of
- a payment of—or an offer or promise to pay—money or anything of value
- made by an issuer or domestic concern
- to:
  - (1) any "foreign official;"
  - (2) any foreign political party or party official;
  - (3) any candidate for foreign political office; or
  - (4) any other person (such as an agent, partner or intermediary) while "knowing" that the payment or promise to pay will be passed on to one of the above
- made "corruptly"
- for the purpose of:
  - (1) influencing an official act or decision of that person;
  - (2) inducing that person to do or omit to do any act in violation of his or her lawful duty; or

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264. *Id.* at 498 (quoting SEC, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 3 (Comm. Print 1976)).

265. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 976 (2012) (quoting *Foreign and Corporate Bribes: Hearings on S. 3133 Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 94th Cong. 107 (1976) (statement of William Simon, Secretary of the Treasury)).

266. Like the domestic bribery statute, 18 U.S.C. § 201, the FCPA prohibits giving, offering, or promising "anything of value." 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The FCPA does not define "anything of value." *See id.* But under the domestic bribery statute, courts have defined "anything of value" broadly to include both tangible and intangible benefits. *See, e.g.*, United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (affirming that "the term 'thing of value' unambiguously covers intangible considerations"), *abrogated in other part by* McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016); United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986) (finding loans and promises of future employment to be "things of value under the broad subjective definition" of 18 U.S.C. § 201); United States v. Williams, 705 F.2d 603, 622-23 (2d Cir. 1983) (rejecting the argument that "anything of value" is an objective determination and finding that stock that has no commercial value could nevertheless be a thing of value under § 201 if the defendant believed it had value). In addition, the FCPA does not explicitly define "corruptly," but in drafting the statute Congress intended to adopt the meaning ascribed to the same term in the domestic bribery statute, 18 U.S.C. § 201(b). *See* H.R. REP. NO. 95-640, at 8 (1977).

(3) inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision

• in order to obtain, retain or direct business to any person.[267]

Although the initial version of the FCPA was weak, it forced U.S. companies to worry about domestic prosecution for committing bribery in other parts of the world. The American business community was concerned that this would cause U.S. entities to become less competitive in relation to foreign companies, and therefore lobbied for reciprocity.[268] But the United States was unable to convince other countries to adopt extraterritorial anticorruption laws.

In response to this pressure, Congress amended the FCPA in 1988.[269] The 1988 amendments dropped a provision attaching liability if one had "reason to know" that payments to third parties might be used in ways that violated the FCPA.[270] The amendments also clarified that the exception for payments for routine governmental actions, so-called "grease" payments, applied to "any foreign official," not only to certain categories of low-level clerks or administrators.[271] The 1988 amendments also formalized a review procedure set up in 1980 by the Department of Justice under which the Department agreed to issue opinions about its enforcement intentions under the FCPA in certain circumstances.[272] This review process was seen as being particularly beneficial where a transaction was of a public nature and likely to come to the attention of authorities.[273] The 1988 amendments thus established procedures under which the Attorney General is required to issue guidelines and opinions to provide further clarification as to what activities conform to the Department's enforcement policy, establish general "precautionary

267. Low & Trenkle, *supra* note 27, at 16-17; *see* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

268. *See* Low & Trenkle, *supra* note 27, at 15-16; Koehler, *supra* note 265, at 975.

269. *See* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (codified as amended in scattered sections of 15 U.S.C.). When revising the antibribery provision of the FCPA as to what constituted "influencing any act or decision" of a foreign official, FCPA Amendments of 1988 § 5003(a), (c), 102 Stat. at 1416, 1420, Congress used language that seems to mirror the domestic bribery statute, *see* 18 U.S.C. § 201(b). *See also* Adam Fremantle & Sherman Katz, Recent Developments, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755, 763 (1989). The amendments also provided for two affirmative defenses. *See* Fremantle & Katz, *supra*, at 762-63 (citing FCPA Amendments of 1988 § 5003(c), 102 Stat. at 1420-21); *see also infra* note 292.

270. *See* Fremantle & Katz, *supra* note 269, at 758, 760-61.

271. *Id.* at 761-62; *see* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

272. *See* Fremantle & Katz, *supra* note 269, at 763-64.

273. *Id.*

procedures," and issue timely opinions to requests on a case-by-case basis.[274] Although the 1988 amendments also increased penalties and strengthened the law while responding to concerns from the business community, prosecution for violations remained sparse despite, as Paul D. Carrington put it, "a world amply supplied with offenders."[275]

By the 1990s, corruption had become a cause for global concern, as transnational bribery became more widespread.[276] In 1996, the President of the World Bank, James Wolfensohn, underscored that the "cancer of corruption" was a major threat to the economic development of poor countries.[277] This recognition shifted thinking in the field of international development, and international organizations targeted anticorruption initiatives.[278] During this period, a series of multilateral anticorruption treaties were signed.[279] The most important of these to U.S. companies was the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), signed in 1997.[280] The OECD Convention was facially

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274. These provisions are reflected in the current statute. 15 U.S.C. §§ 78dd-1(d) to (e), 78dd-2(e) to (f).

275. Carrington, *supra* note 107, at 116-17.

276. For a discussion of the harms of transnational bribery, see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 274-79 (1999).

277. James D. Wolfensohn, President, World Bank Grp., Opening Address at the 1996 Annual Meeting of the Boards of Governors (Oct. 1, 1996), *in* World Bank Grp. [WBG], *1996 Annual Meetings of the Boards of Governors: Summary Proceedings (English)*, at 18, WBG Rep. 53431 (Oct. 3, 1996), https://perma.cc/6TBM-D98C.

278. *See* FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 81-83 (2014).

279. *See* Low & Trenkle, *supra* note 27, at 15-16. The multilateral treaties and nonbinding agreements passed in the 1990s include: Inter-American Convention Against Corruption, *opened for signature* Mar. 29, 1996, S. TREATY DOC. NO. 105-39 (1998); Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD Doc. C(96)27/FINAL (Apr. 11, 1996), https://perma.cc/5UQS-WWPJ (recommending that member countries deny the tax deductibility of bribes to foreign public officials); Convention Drawn Up on the Basis of Article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, 1997 O.J. (C195) 2; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. 105-43 (1998) [hereinafter OECD Convention]; Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173.

280. *See* OECD Convention, *supra* note 279. The OECD Convention came into effect in early 1999. *See* OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 48 (2011), https://perma.cc/P98H-972P. It focuses specifically on bribery of foreign public officials and is the multilateral corollary of the FCPA. But the scope of the OECD

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broader in scope than the FCPA. For instance, the OECD Convention defines "bribery of a foreign public official" as

> intentionally . . . offer[ing], promis[ing] or giv[ing] any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[281]

In particular, the OECD Convention included a provision that criminalized payments seeking "any improper advantage," which the 1977 and 1988 versions of the FCPA lacked.[282] The FCPA was amended again in 1998 to come in line with the OECD Convention.[283]

The 1998 amendments expanded the FCPA in several important respects. They broadened the antibribery provisions of the FCPA as to the persons who are covered and the range of activities that are prohibited.[284] Specifically, they expanded the "quos" to include the more encompassing "securing any improper advantage" standard.[285] This addition is a key difference between the current

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Convention is more sweeping than the FCPA. *See* OECD Convention, *supra* note 279, at v-vi.

281. OECD Convention, *supra* note 279, at 3.

282. *See* Low & Trenkle, *supra* note 27, at 15, 17. *Compare* OECD Convention, *supra* note 279, at 3 (referencing "improper advantage"), *with* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.) (lacking reference to "improper advantage"), *and* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (codified as amended in scattered sections of 15 U.S.C.) (same).

283. *See* FCPA Amendments of 1998, Pub. L. No 105-366, 112 Stat. 3302 (codified in scattered sections of the U.S. Code); S. REP. NO. 105-277, at 2-3 (1998) (describing amendments to "the FCPA to conform it to the requirements of and to implement the OECD Convention").

284. FCPA Amendments of 1998 §§ 2(b), 3(c), 4, 112 Stat. at 3302-03, 3305, 3308-09 (codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3). The amendments sought to:

> • broaden the jurisdictional reach of the act over non-U.S. persons acting within the United States;
> • broaden the jurisdictional reach over U.S. persons acting outside the United States;
> • expand the FCPA to cover payments made to secure "any improper advantage," incorporating a broader definition of business activities covered by the FCPA;
> • expand the definition of "foreign officials;" and
> • eliminate the exemption of certain non-U.S. nationals from criminal penalties.

Low & Trenkle, *supra* note 27, at 17.

285. *See* FCPA Amendments of 1998 §§ 2(a), 3(a), 4, 112 Stat. at 3302, 3304, 3306 (codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3). The current text of the FCPA prohibits giving anything of value to a foreign official for the purposes of

> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

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FCPA and the U.S. domestic bribery statute. Under the 1998 amendments, a covered person violates the FCPA by bribing to obtain any improper advantage.[286] An act "in furtherance of" such a bribe[287] could include even "making a personal introduction, meeting with a lawyer, or arranging a future meeting."[288]

The robust antibribery provisions of the FPCA today stand in contrast with federal domestic bribery law.[289] The FCPA casts a wide net, with a starting point that considers any form of influence to be undue and illegal: A person who gives "anything of value" with the intent of "securing any improper advantage" violates the FCPA.[290] The statute then carves out exceptions for what is allowed as *due* influence.[291] For example, it recognizes an exception for payments for routine governmental action (often referred to as facilitation payments).[292] It also allows the Attorney General to issue further

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> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1).

286. *See* note 285 and accompanying text.

287. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

288. Low & Trenkle, *supra* note 27, at 18.

289. As discussed in the Introduction, the two statutes have evolved to follow different standards. We observe a growing global consensus to deter public bribery, and the FCPA appears to be in line with other countries' recently revised bribery statutes. For example, the United Kingdom enacted the Bribery Act 2010, c. 23 (U.K.), which is "arguably the most comprehensive piece of anti-bribery legislation in the world, and the legislation criminalizes a broad range of corruption, including domestic and transnational private bribery." *See* Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 680, 688 (2014).

290. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

291. *See* OFF. OF INV. EDUC. & ADVOC., SEC, INVESTOR BULLETIN: THE FOREIGN CORRUPT PRACTICES ACT—PROHIBITION OF THE PAYMENT OF BRIBES TO FOREIGN OFFICIALS 1-2 (2011), https://perma.cc/FW4M-E8ZK.

292. The FCPA does not prohibit "facilitating or expediting payment[s]," and this provision is known as the "routine governmental action" exception. It provides that the law "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The statute also provides for two affirmative defenses. It is a defense if:

> (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
>
> (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
>
> (A) the promotion, demonstration, or explanation of products or services; or

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guidelines regarding enforcement, and it allows companies to seek an opinion from the Attorney General as to what behavior conforms with the Department of Justice's present enforcement policies.[293] The domestic statute, on the other hand, does not clarify what is undue and what areas of influence count as "official acts," leaving both public officials and prosecutors to guess what behavior crosses the line and what does not.[294]

B. Proposed Amendments

We propose to improve the federal domestic bribery statute by incorporating two aspects of the FCPA.

1. Improper-advantage provision

Currently, the federal domestic statute is interpreted to punish official acts, a term that is defined narrowly.[295] This statute focuses squarely on the nature of the act. By contrast, the structure of the FCPA sends the message that bribery is illegal, subject only to a few exceptions.[296] A person violates the FCPA if she offers, pays, or authorizes the payment of anything of value to any foreign official for purposes of "securing any improper advantage."[297] It does not matter whether the improper advantage derives from an official or an unofficial act: What matters is what a bribe giver receives (or attempts to receive) in return. The phrase "improper advantage" is expansive—and rightly so. For this reason, it is adaptable to many scenarios that the domestic bribery statute does not currently address. An improper-advantage provision would not take away from the current statute in any way; rather, it would strengthen it by expanding limitations on behavior.

Nonetheless, courts could interpret "improper advantage" narrowly, just as the Supreme Court has done with "official act." Brovman shared a similar concern. Like us, he proposed that the statute be amended to more closely reflect public beliefs about bribery.[298] But our proposal builds in a second feature that would change the way we deal with corruption: empowering the Attorney General to issue opinions on the legality or scope of statutory terms.

> (B) the execution or performance of a contract with a foreign government or agency thereof.

15 U.S.C. § 78dd-1(c), 78dd-2(c), 78dd-3(c).

293. 15 U.S.C. §§ 78dd-1(d) to (e), 78dd-2(e) to (f).

294. *See* 18 U.S.C. § 201.

295. 18 U.S.C. § 201(a)(3); *see also* McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (narrowing the scope of "official act").

296. *See supra* notes 290-92 and accompanying text.

297. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

298. *See* Brovman, *supra* note 28, at 204-06.

2. Attorney General provision for guidelines and opinions

The FCPA also requires the Attorney General to issue opinions that "state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section."[299] For instance, in November 2019, an investment advisor based in the United States sought guidance as to whether its payment of a $237,500 transaction fee, associated with an asset purchase of nearly $48 million from a foreign state-owned bank's affiliate, would trigger an FCPA enforcement action.[300] On August 14, 2020, the Department of Justice issued an advisory opinion concluding that the payment was not a foreign-bribery violation because there was no evidence that the investment advisor intended to "corruptly influence" a foreign official through paying the transaction fee.[301] Moreover, the fee was paid for "bona fide services rendered during the transaction" and was directed not to an individual but to a foreign government agency, the investment bank's subsidiary affiliate.[302] Although advisory opinions do not have precedential value,[303] they are nevertheless an insight into the Department's interpretation of the law.

Department of Justice guidance letters additionally provide insight into the circumstances in which the Department would decline to prosecute an FCPA violation: for instance, where the violator voluntarily disclosed misconduct or undertook remedial efforts like disgorgement.[304] The Department of Justice relies on a set of factors set out in the Corporate Enforcement Policy (CEP)[305] and the Principles of Federal Prosecution of Business Organizations[306] to guide its prosecutorial discretion.[307] In a 2019

299. 15 U.S.C. §§ 78dd-1(e), 78dd-2(f).

300. Brian F. McEvoy, Emil R. Infante, Melissa S. Ho, Grace W. Zoller & Andrew T. Fox, Polsinelli PC, *A Long Time Coming: DOJ Issues First FCPA Advisory Opinion in Six Years*, NAT'L L. REV. (Aug. 18, 2020), https://perma.cc/2F3R-XL3J.

301. *Id.*

302. *Id.*

303. Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 147 (2010).

304. *See* Letter from Daniel S. Kahn, Deputy Chief, Fraud Section, U.S. Dep't of Just., to Matthew Reinhard, Att'y, Miller & Chevalier Chartered 1 (Aug. 20, 2018), https://perma.cc/P2PD-5V65; Letter from Richard P. Donoghue, U.S. Att'y, E. Dist. of New York & Sandra L. Moser, Acting Chief, Fraud Section, U.S. Dep't of Just., to Adam B. Siegel, Att'y, Freshfields Bruckhaus Deringer US LLP 1-2 (Aug. 23, 2018), https://perma.cc/ARD9-YMVR.

305. U.S. Dep't of Just., Just. Manual § 9-47.120 (2019), https://perma.cc/3LKY-JT43.

306. U.S. Dep't of Just., Just. Manual § 9-28.300 (2020), https://perma.cc/ZJ26-4TXY.

307. *See* Letter from Craig Carpenito, U.S. Att'y, Dist. of New Jersey & Robert Zink, Acting Chief, Fraud Section, U.S. Dep't of Just., to Karl H. Buch, Att'y, DLA Piper LLP,
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guidance letter, the Department of Justice declined to prosecute Cognizant Technology Solutions Corporation because it largely complied with the factors outlined in the CEP and the Principles of Federal Prosecution of Business Organizations, including timely voluntary disclosure, payment of a civil penalty, and disgorgement of more than $19 million, which represented all profits attributable to the bribery conduct.[308] The Department of Justice also took into account the company's lack of prior misconduct.[309] If the Department of Justice or the SEC later brings an enforcement action, courts can always reject the Attorney General's opinion,[310] and the law can always be amended by further acts of Congress.

Still, enabling the Attorney General to provide opinions as to whether or not given conduct is lawful can potentially resolve conflicts of interest well before they arise. Why does this matter? As Part I showed, over the course of U.S. history, legislators have struggled to come up with statutory language that adequately addresses bribery. Their attempts have mostly been reactionary, usually following bribery scandals that have threatened the stability of the country. Similarly, courts can only decide on matters reactively, once an act that may or may not be bribery has already been committed.

We propose to amend 18 U.S.C. § 201 to provide for advisory guidelines and opinions in the same manner as the FCPA does. Congress can empower an Attorney General to issue such advice. In this way, the statute would serve to deter bribery on multiple fronts. First, empowering the Attorney General to give interpretive opinions would give the statute a more proactive role in preventing bribery. Second, courts would continue to interpret the statute in their more reactive role.

Grayson D. Stratton, Att'y, DLA Piper LLP, Kathryn H. Ruemmler, Att'y, Latham & Watkins LLP & Douglas L. Greenburg, Att'y, Latham & Watkins LLP 2 (Feb. 13, 2019), https://perma.cc/B5QY-9XKX.

308. *Id.*

309. *Id.*

310. If the Attorney General declines enforcement but the Department of Justice later brings an action, the FCPA provides for a rebuttable presumption that the conduct conformed with the law:

> In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern [or an issuer] and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence.

15 U.S.C. §§ 78dd-1(e), 78dd-2(f).

C. Proposed Statutory Language

Using the FCPA as a model, we propose the following language for a revised domestic bribery statute. The statute should be amended to add the italicized and underlined text.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; *or*

(D) to secure any improper advantage.

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act; *or*[311]

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person; *or*

(D) to secure any improper advantage.

We would also amend 18 U.S.C. § 201 to provide for guidelines and opinions in the same manner as the FCPA does under the subsections Guidelines by Attorney General and Opinions of Attorney General.[312]

We note that the FCPA and the domestic bribery statute serve somewhat different purposes, even though both address public bribery. The domestic statute's central focus is on upholding the integrity of government by

311. The text of 18 U.S.C. § 201(b)(2)(A) does not include the word "or." Interestingly, § 201(b)(1)(A) does include the word "or." *See* 18 U.S.C. § 201(b).

312. 15 U.S.C. §§ 78dd-1(d) to (e), 78dd-2(e) to (f). Other statutes related to conflicts of interest also provide for guidance from a supervisory or ethics committee. For instance, the statute regulating gifts to federal employees under 5 U.S.C. § 7353 provides for a supervising ethics office to issue rules and regulations. 5 U.S.C. § 7353(b)(1).

preventing bribery of public officials. The domestic statute criminalizes both the individual or entity that gives a bribe and the official who accepts a bribe—a critical and important feature of the law. In contrast, the FCPA only applies criminal charges to bribe givers who have business operations in the United States. Foreign officials who accept bribes do not violate the FCPA; unlike U.S. public officials, foreign officials do not answer to the American public and are not subject to U.S. jurisdiction Because the United States must also ensure that its businesses are competitive in the global marketplace, the FCPA includes exceptions for what might be considered tolerable forms of influence. These exceptions include payments that are legal under foreign law to facilitate business operations, "grease payments" for routine government action, and exceptions that are based on a recognition of the diversity of business practices, customs, and standards that may vary between U.S. and foreign jurisdictions.[313] For the purposes of this Article, we do not address whether legislators should consider exceptions like these in designing a new domestic bribery statute.

Creating consistency across the foreign–domestic divide would provide a clearer and more unified touchstone for how we conceive of, tolerate, and combat bribery and corruption within our own borders. By bringing the two laws in line, the new domestic bribery statute will help prosecutors ensure the integrity of public officials, thereby reinvigorating the popular perception that conflicts of interest will not be tolerated.

V. Responses to Critiques

The federal domestic bribery statute is difficult to interpret and enforce. Because this law establishes the standard for several other conflict-of-interest laws—including what constitutes grounds for impeachment—a glaring weakness has emerged in our system of criminal laws. Consequently, various high-profile public officials have been able to skirt domestic bribery charges.[314] Part IV proposed that two aspects of the FCPA serve as models for reform and argued for greater alignment in how U.S. law tackles public bribery across the foreign–domestic divide. This Part addresses three main critiques of our proposal. Two critiques question whether a stronger bribery law is needed, while the third questions whether the FCPA is an appropriate model for reform. We contend that each of these critiques, while facially valid, is ultimately hollow, and that our proposed reform will advance government integrity and democratic values.

313. *See supra* notes 291-92.

314. *See supra* notes 16-19 and accompanying text.

A. A Stronger Bribery Law Will Not Chill Democracy

We consider first whether reform is needed at all. The thesis of this Article is that reform is necessary, but this view is not shared by all. Albert Alschuler has recently provided a sweeping and cogent summary of the opposing argument.[315] Recognizing that definitions of bribery remain underinclusive in domestic law, Alschuler makes two arguments as to why the status quo is preferable to a stronger bribery law. First, Alschuler suggests that strong bribery laws could prevent forms of influence that we as a society think should be tolerated.[316] Alschuler presents a hypothetical situation in which Aristotle is resurrected and becomes the governor of New Jersey. Even if Aristotle's intentions are pure and he make decisions for the benefit of society, some of those decisions would inevitably benefit those who supported Aristotle politically. Thus, Alschuler concludes, even the great Greek philosopher could be convicted of bribery under broad bribery laws.[317] Mirroring these concerns, Chief Justice Roberts worried in *McDonnell* that a strong bribery law could result in a "pall" of potential prosecutorial overreach and threaten to "chill" legitimate interactions between public officials and their constituents.[318]

We are sympathetic to the concerns of Alschuler and Chief Justice Roberts, but we do not agree that the solution is to maintain a weak domestic federal bribery law. Instead, stronger language in the statute could be paired with access to proactive guidance from the Attorney General. The Attorney General could establish guidelines as to what constitutes an attempt to corruptly influence an official act or gain an improper advantage. Potential bribe givers and bribe takers would be discouraged from engaging in venality by a strong law; those who would otherwise be willing to toe the line of what would be legal could instead receive guidance from the Attorney General. As under the FCPA, if the Attorney General's guidance is challenged as too

315. *See generally* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 482-84 (2015).

316. *Id.* at 465-66, 484-87.

317. *Id.* at 483-84.

318. McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (quoting Brief for Former Federal Officials as Amici Curiae in Support of Petitioner at 6, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 878849). The Court was swayed by the various amicus briefs submitted in the case on behalf of McDonnell. *See* Brovman, *supra* note 28, at 190-93; *see also supra* notes 220-22 and accompanying text. With regard to the "pall of potential prosecution[s]" that might result from a broader reading of the bribery statute, the Court stated: "This concern is substantial. White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government's 'breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties.'" *McDonnell*, 136 S. Ct. at 2372 (quoting Brief for Former Federal Officials as Amici Curiae in Support of Petitioner, *supra*, at 6).

"chilling" or otherwise unconstitutional, courts could step in or new legislation could be adopted to clarify what actions are allowed. In practice, however, we would expect that the Attorney General's guidance would significantly lighten the load on the judiciary. We see this lightening of caseload as an important virtue in favor of reform.

B. A Stronger Bribery Law Would Bolster Integrity of Office

Alschuler voices a second concern, that a strong antibribery law might deter future Adlai Stevensons, individuals of unwavering integrity and solid character, from entering the political fray for fear of getting swept up in an overly aggressive enforcement mechanism.[319] This theory is difficult to test in the United States, although recent empirical studies of career selection in other countries suggest a contrary effect: More dishonest candidates are attracted to public sector jobs in countries that are known to have corruption, while more honest candidates are attracted to public sector jobs in countries with less corruption.[320] Equally concerning, the Adlai Stevensons might become corrupted as a consequence of working in an otherwise corrupt system.

Those who reject the view that the United States needs to adopt a stronger bribery law, however, ignore a related consideration. Crimes of bribery, like other crimes involving conflicts of interest, not only carry a direct cost in terms of how much money an act might cost the government but also carry an indirect cost in delegitimizing the operations of the government. The government's legitimacy is further hampered when a system is perceived to be incapable of punishing bribery and corruption.[321] When legitimacy is low, more venal actors are attracted to public service roles, other public officials

319. *See* Alschuler, *supra* note 315, at 489-90. Yet at least one state has opted for a broad definition of bribery. In revising New York State's bribery laws in 2014, legislators worded the new statute, the Public Trust Act, 2014 N.Y. Laws 109, broadly to comport with public opinion on corruption. Brovman, *supra* note 28, at 205-06. The statute, in relevant part, reads:

> A public servant is guilty of bribe receiving in the third degree when he or she solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his or her vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

N.Y. PENAL LAW § 200.10 (McKinney 2021).

320. *See, e.g.*, Rema Hanna & Shing-Yi Wang, *Dishonesty and Selection into Public Service: Evidence from India*, AM. ECON. J., Aug. 2017, at 262, 287-88 (finding that college students in India who cheat on simple tasks and those with lower prosocial preferences are likely to seek government jobs after graduating); *see also* Sebastian Barfort, Nikolaj A. Harmon, Frederik Hjorth & Asmus Leth Olsen, *Sustaining Honesty in Public Service: The Role of Selection*, AM. ECON. J., Nov. 2019, at 96, 98 (suggesting that this pattern has to do with payouts and that more dishonest candidates would join public service in countries with higher wages in the public sector).

321. *See* FUKUYAMA, *supra* note 278, at 82; *see also supra* notes 223-28 and accompanying text.

who would not have chosen to engage in bribery might be tempted to do so, and citizens begin to question their own social contracts with the state.

American leaders have long been concerned about legitimizing the government by maintaining the correct appearances: The appearance of being soft on bribery and corruption was a prominent concern of the Founders,[322] and this same concern has featured prominently as a justification for adopting new antibribery laws in the 1850s, in the 1960s, and in the 1970s.[323] The concern that the appearance of corruption damages government integrity was central to the Court's decision in *Buckley v. Valeo* and its progeny.[324] In breaking from this tradition, the Supreme Court no longer wishes to concern itself with appearances of bribery and corruption. Although the Court once understood perceptions of improper influence to be harmful and aimed to curtail their consequences, recent opinions offer complete reversals of the Court's position from *Buckley*. Forty years after *Buckley*, the Roberts Court appears to have put on its own blinders while expressing that appearances of corruption are but an ancillary concern.[325]

C. A Stronger Bribery Law Would Align Foreign and Domestic Definitions of Bribery

Even if one is convinced of the need for reform, some might disagree that the FCPA provides a good model for revising a domestic bribery statute. After all, the FCPA has its critics. Perhaps the most serious criticism of the statute is its unevenness: U.S. individuals and entities are unable to pay bribes but international competitors can still engage in such practices.[326] As a result, the FCPA creates an uneven playing field, fostering a short-term economic disadvantage for U.S. interests. But this critique would not apply to our proposal because our recommendation would equally punish all domestic entities who engage in bribery. No uneven playing field would emerge.

322. *See Impeachment Hearing*, *supra* note 32, at 32-33 (statement of Pamela Karlan, Professor, Stanford Law School); THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 38, at 148-49; THE FEDERALIST NO. 18 (James Madison & Alexander Hamilton), *supra* note 38, at 124-26; THE FEDERALIST NO. 57 (James Madison), *supra* note 38, at 354; THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 38, at 416.

323. *See supra* Part I.

324. *See* Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam), *superseded in other part by statute*, BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code); *supra* note 174 and accompanying text.

325. *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016).

326. *See* Low & Trenkle, *supra* note 27, at 15.

Critics of our proposal might also worry about overcriminalization or unfettered prosecutorial power.[327] Some have questioned whether the FCPA has been effective in combating bribery.[328] We are also mindful of the criticism that adopting the FCPA model for the domestic bribery statute may not result in the desired change in curbing corruption.

When the FCPA was amended in 1998, enforcement steadily increased.[329] There are a variety of possible reasons for this increase.[330] For example, external factors influenced the uptick in enforcement. During a Senate hearing on the FCPA in 2011, Greg Andres, then Deputy Assistant Attorney General, was asked, "Is the problem [of foreign bribery] bigger, or is the enforcement greater?"[331] Andres responded that the problem of bribery remains "substantial" and stated that, while a variety of factors have led to the increase in enforcement, there is overall more awareness of violations for two main

327. *See, e.g.*, Alschuler, *supra* note 315, at 482-84, 487-88. Justice Roberts paid particular attention to the concerns of those amici who warned that the government's "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve." *McDonnell*, 136 S. Ct. at 2372 (quoting Brief for Former Federal Officials as Amici Curiae in Support of Petitioner, *supra* note 318, at 6).

328. *See, e.g.*, Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REGUL. 83, 92 (2007) (arguing that there is "little evidence that the FCPA has had a particularly chilling effect on bribery by U.S. corporations"). Because corporations that continue to use corrupt practices are "unlikely to experience any impact on their business competitiveness in foreign markets," Krever also notes that there is no conclusive evidence that U.S. business interests have suffered. *Id.* at 92 & n.42.

329. The 1988 and 1998 amendments expanded the FCPA in both substance and jurisdiction, allowing the Department of Justice and the SEC to ramp up enforcement efforts exponentially. *See* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 450 (2010) (noting an overall trend toward expansion). Following the FCPA Amendments of 1998, FCPA enforcement actions by both the SEC and the Department of Justice spiked in 2007, 2010, 2013, 2016, and 2019. Foreign Corrupt Pracs. Act Clearinghouse, *DOJ and SEC Enforcement Actions Per Year*, STAN. L. SCH., https://perma.cc/DZ5T-5K84 (archived Oct. 17, 2021). From 1977 to 2000, the total number of cases per year never exceeded five, and that happened only once in 1989. *Id.* Whereas there were only three FCPA investigations initiated in 2000, there were forty-three investigations initiated in 2007, and cases peaked again in 2010 (56), 2016 (58), and 2019 (53). *Id.* Despite this increase, the FCPA has not seen complaints of overcriminalization.

330. From its inception in 1977 to the late 1990s, the FCPA was not widely used. Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 431 (2012); *see also* Thomas, *supra* note 329, at 448-49 (explaining that the Department of Justice initially required its attorneys to receive permission from Washington before pursuing FCPA charges because of fear that enforcement actions could damage relations with allies).

331. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 63 (2011) [hereinafter *FCPA Hearing*] (statement of Rep. Judy Chu, Member, H. Comm. on the Judiciary).

reasons.[332] First, the rise of email made communication with foreign law-enforcement partners easier than before.[333] Second, new laws, such as the Sarbanes–Oxley Act of 2002, which required corporate CEOs to verify financial disclosures, led to greater awareness of violations and corresponding disclosure obligations.[334] With companies complying with the Sarbanes–Oxley Act, the Department of Justice and the SEC could have greater "confidence as to the credibility of those financial statements" and detect problems with foreign bribery; moreover, "in many instances," CEOs were disclosing bribery to the Department of Justice.[335]

While a variety of circumstantial factors have contributed to greater levels of enforcement, the expansion of the scope of the FCPA to any "improper advantage" certainly seems to have had a key effect. This language structurally changed the scope of the FCPA, making it far more expansive.[336] When armed with a similarly robust domestic bribery statute and accompanying guidance from the Attorney General, agencies like the FBI and the Department of Justice's Public Integrity Section will be better situated to carry out its bribery investigations.

In short, none of these concerns above provide a compelling justification for why the discussed aspects of the FCPA could not be adapted to the domestic context. To the contrary, adapting the federal domestic bribery statute to have a similar standard as the FCPA would have several important benefits. As William Jefferson's debacle shows, it is easier for a U.S. citizen to bribe certain domestic officials than foreign officials. As we are seeing with increasing regularity, U.S. public officials who make decisions that come at the expense of the public interest do not seem to face legal consequences.[337] To the extent that the public perceives that bribery is a problem among public officials, this mismatch of definitions destabilizes the public's faith in government. Why not address domestic bribery with the same level of concern as foreign bribery?

Using the FCPA as a model for consistent and rigorous definitions and treatment of public bribery serves to bridge the foreign–domestic divide and remedy a clear deficiency in the law. Differing conceptions of bribery have created a two-tier system for tackling domestic and foreign bribery. Further,

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332. *Id.* (statement of Greg Andres, Deputy Assistant Att'y Gen., Criminal Division, United States Department of Justice).

333. *Id.*

334. *Id.*; *see* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

335. *FCPA Hearing*, *supra* note 331, at 63 (statement of Greg Andres, Deputy Assistant Att'y Gen., Criminal Division, United States Department of Justice).

336. *See supra* notes 284-89 and accompanying text.

337. *See, e.g.*, *supra* notes 15-17 and accompanying text.

given that bribery laws are ultimately designed to ensure popular faith in the integrity of the system of government, the law's understanding of bribery must be aligned with popular conceptions of wrongdoing. Otherwise, the law's ability to combat bribery will continue to face challenges.

Conclusion

Legal interpretations of what constitutes bribery currently vary depending on whether domestic or foreign public officials are involved. Furthermore, the federal domestic bribery law permits many forms of influence that go against a commonsense understanding of bribery. As a result, dangerous and improper influence on high-profile public officials goes unchecked. Such influence not only results in conflicts of interest in policymaking but could undermine the legitimacy of the government itself.

Bribery is a destabilizing force both inside and outside U.S. borders. As Susan Rose-Ackerman pointedly stated, bribery

> undermines the legitimacy of governments, especially democracies . . . . Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that government is substituting democratic values for decisions based on ability to pay. It can lead to coups by undemocratic leaders.[338]

We thus contend that domestic bribery should be treated with at least as much concern as acts of foreign bribery, if not more. We cannot see how Congress would have intended for its conflict-of-interest regime to allow behavior to be legal when domestic public officials are involved but the same behavior to be illegal when foreign officials are involved.

Building on the different conceptions of bribery in the federal domestic bribery statute and the FCPA, this Article recommends that the former statute be amended by incorporating two aspects of the latter.[339] First, the domestic federal bribery statute currently focuses on whether a payment influences an "official act."[340] In contrast, the FCPA focuses on whether something is offered or given to secure an "improper advantage."[341] If someone is seeking to buy an improper advantage from a domestic public official—or if a public official is willing to sell a service that would create an improper advantage—we contend that the domestic bribery statute should prohibit this type of exchange.

338. Nichols, *supra* note 276, at 279 (alteration in original) (quoting Susan Rose-Ackerman, *The Political Economy of Corruption, in* CORRUPTION AND THE GLOBAL ECONOMY 31, 45 (Kimberly Ann Elliott ed., 1997)).

339. *See supra* Parts IV.B-.C.

340. 18 U.S.C. § 201(b).

341. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

Second, the FCPA allows the Attorney General to issue opinions and coordinate guidance on how the law will be interpreted, in conjunction with the SEC and the Department of Justice.[342] For conflict-of-interest laws like antibribery statutes, we see special merit in proactively resolving potential ambiguities through such guidance. For example, committees on gifts and ethics exist to provide guidance to both houses of Congress.[343] By empowering the Attorney General to provide guidance in the domestic sphere, we expect proactive action rather than reliance on ex post punishment. Reforming the federal domestic bribery statute based upon these two FCPA provisions should not only provide law enforcement and prosecutors with the tools they need to combat bribery but also help well-intentioned public officials understand what is and is not legal.

The Founders, including James Madison, believed that safeguards were necessary to encourage public interest and minimize self-interest.[344] The federal domestic bribery statute should be a cornerstone of this architecture. A stronger federal domestic bribery law will not eliminate every instance of bribery, nor will it instantly restore faith in government. But without such reform, we may continue to see high-profile public officials abusing their positions with impunity. And the immediate and long-term consequence of a failing bribery regime could be the loss of the public's trust in our officials and in our democracy.

Paul Carrington writes that "[c]orrupt practices are by definition secret crimes that can be prevented or deterred only by vigorous investigation and forceful legal sanctions."[345] The FCPA's text and enforcement take this view seriously. We question, then: Why not treat bribery in the domestic context with the same solemnity? Our proposal, drawn from the FCPA, provides a promising example of how to restructure the domestic bribery statute to achieve the purpose that Congress initially envisioned.

342. 15 U.S.C. §§ 78dd-1(d) to (e), 78dd-2(e) to (f).

343. Both the Senate Select Committee on Ethics and the House Committee on Ethics answer questions and provide ethics trainings, conduct investigations of any alleged ethics violation, and review financial disclosure statements. *See About Us*, U.S. SENATE SELECT COMM. ON ETHICS, https://perma.cc/7NMS-PT6C (archived Oct. 17, 2021); *About*, U.S. HOUSE OF REPRESENTATIVES COMM. ON ETHICS, https://perma.cc/46AH-2HA5 (archived Oct. 17, 2021).

344. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 38, at 321-22.

345. *See* Carrington, *supra* note 107, at 121.