BRIBERY LAW: IS ANYTHING LEFT?

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INTRODUCTION

Bribery of government officials is as old as government itself.[1] Bribery plagued ancient Egypt and Israel.[2] In England, the Star Chamber bribery cases date back to the mid-1550s.[3] Edmund Burke denounced the corrupt influence on Britain's Parliament of the East India Company and its even greater corruption of local officials in India.[4] After the 1773 Tea Act granted the same East India Company a monopoly on sale of tea in America,[5] colonists in Boston refused to buy it, insisted the tea be sent back to England, and, when it was not, dumped the tea into Boston harbor.[6] Clearly, corruption of the British colonial administration was a significant factor motivating the American Revolution.[7]

Fighting bribery and other forms of corruption is vitally important to the survival of any form of government. Even authoritarian regimes combat corruption, as China is now doing on a massive scale.[8]

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1 *See generally* JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA (1984) (recording the history of bribery and efforts to combat it over two thousand years).

2 *See* Hassan El-Saady, *Considerations on Bribery in Ancient Egypt*, 25 STUDIEN ZUR ALTÄGYPTISCHEN KULTUR 295 (1998) (documenting examples of bribery and various punishments for bribery in Ancient Egypt based on the textual evidence from administration, biographies, and religious texts).; *Exodus 23:8* ("You must not take a bribe, for a bribe blinds the clear-sighted and corrupts the words of the righteous") (Christian Standard Bible).

3 NOONAN, *supra* note 1, at 315; *see also* Brian Smith, *Edmund Burke, the Warren Hastings Trial, and the Moral Dimension of Corruption*, 40 POLITY 70 (2008) (detailing Edmund Burke's long effort to hold Warren Hastings accountable for corruption in his impeachment trial and expose the corrupt activities of the British East India Company in India).

4 Edmund Burke, Mr. Burke's Speech, on the 1st December 1783: Upon the Question for the Speaker's Leaving the Chair, in Order for the House to Resolve Itself into a Committee on Mr. Fox's East India Bill (Dec. 1, 1783) (transcript available in the University of Michigan Library) (describing the East India Company's abuse of global monopoly powers bestowed on it by Parliament).

5 The Tea Act of 1773, 13 Geo. 3 c. 44.

6 *Boston, December 20*, BOSTON-GAZETTE, Dec. 20, 1773, at 3 ("On Tuesday last the body of the people . . . assembled at the old south meeting-house, to inquire the reason of the delay in sending the ship Dartmouth, with the East-India Tea back to London, and having found that the owner had not taken the necessary steps for that purpose . . . . A number of brave [and] resolute men, determined to do all in their power to save their country from the ruin which their enemies had plotted, in less than four hours, emptied every chest of tea on board the three ships commanded by captains Hall, Bruce, and Coffin, amounting to 342 chests, into the sea ! ! without the least damaged done to the ships or any other property.").

7 THOMAS PAINE, COMMON SENSE (3d ed., 1776) ("[B]ribery, corruption, and favouritism, are the standing vices of Kings . . . .").

8 Li Yang, Branko Milanovic & Yaoqi Lin, *Anti-Corruption Campaign in China: An Empirical Investigation*, 85 EUR. J. POL. ECON., Dec. 2024, at 1, 1 (providing a database of officials who have been found guilty of corruption by China between 2012 and 2021 and noting that "[b]y 2012 corruption became the most compelling challenge confronting the ruling power of the Communist Part[y] of China").

How well is the United States doing fighting bribery today? Not so well, as this Article will discuss. Indeed, legal remedies for bribery are fading under relentless pressure from the Supreme Court, which has narrowly construed federal corruption statutes, imposed constitutional constraints on Congress's power to regulate corruption, and bestowed broad immunity from criminal prosecution on the President.[9] The problem is magnified by the fact that the Supreme Court itself is facing a corruption crisis.[10]

Part I of this Article discusses the traditional understanding of bribery that existed at common law at the time of the Founding and presumably is embodied in the reference to bribery in the Impeachment Clause of the Constitution. Part I additionally discusses the Emoluments Clause of the Constitution, which prohibits holders of federal office from receiving gifts, offices, and emoluments from foreign governments without consent of Congress. Part II discusses recent judicial developments weakening the traditional notion of bribery. Specifically, Section II.A discusses how the Supreme Court has narrowed the definition of bribery in the federal criminal code. Section II.B discusses how the Supreme Court has immunized the President from prosecution for official capacity crimes and made prosecution of a President even for some personal capacity crimes, such as bribery, difficult. Section II.C discusses how the Supreme Court has made bribery via campaign finance almost impossible for Congress and the states to regulate. Section II.D discusses how the Supreme Court has made itself immune from anticorruption regulation such as an enforceable ethics code. Part III discusses more current developments under the second Trump Administration, including scaling back of enforcement of the Foreign Corrupt Practices Act and Foreign Agents Registration Act, as well as the Justice Department seeking dismissal of New York City Mayor Eric Adams bribery indictment on political grounds and the rise and potential threat of cryptocurrency in the context of bribery. Part IV discusses the implications of a weakened notion of bribery on representative democracy. This Article concludes that bribery and other forms of corruption are a serious risk to representative democracy in the United States and that voters and officeholders in all three branches of our government must prioritize reform.

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9 Trump v. United States, 603 U.S. 593 (2024) (holding that the President has absolute immunity from criminal prosecution for official acts within core constitutional powers, a presumption of immunity for other official acts, but no immunity for personal capacity acts).

10 Richard W. Painter, *SCOTUS House: Can a Supreme Court Ethics Lawyer and Inspector General Help Get This Fraternity Under Control?*, 37 GEO. J. LEGAL ETHICS 347 (2024).

I. HISTORY OF BRIBERY

A. *The Traditional Concept of Bribery*

Article II, Section 4 of the United States Constitution provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[11] But what is bribery for purposes of impeachment? The Constitution does not define bribery. The understanding of the common law meaning of the word "bribery" when the Constitution was ratified probably is the best guide to interpretation.[12]

At the time of the constitutional framing, bribery was understood to be defined more broadly than the federal criminal code enacted later. This concept of "bribery" at the time derived from English law, which understood bribery to be an officeholder's abuse of an office to obtain a private benefit rather than to serve the public interest.[13] William Hawkins's *A Treatise of the Pleas of the Crown*, published in 1716, for example, said:

> But Bribery in a large sense is sometimes taken for the receiving or offering of any undue Reward, by or to any Person whatsoever, whose ordinary Profession or Business relates to the Administration of public[] Justice in order to incline him to do a Thing against the known Rules of Honesty and Integrity . . . [This type of corruption] deserves the severest of Punishments.[14]

Such a definition of bribery encompasses favors that may influence a public official to act against their honesty and integrity. Similar definitions appear in other publications, such as *Russell on Crimes*, published in 1819.[15]

Dr. Samuel Johnson's 1773 dictionary defines a "bribe" broadly as "[a] reward given to pervert the judgment or corrupt the conduct."[16]

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11 U.S. CONST., art II, § 4. For an excellent discussion of the constitutional definition of bribery, compared with the definition in the federal criminal code, see Ben Berwick, Justin Florence & John Langford, *The Constitution Says 'Bribery' Is Impeachable. What Does That Mean?*, LAWFARE (Oct. 3, 2019, 8:00 AM), https://www.lawfaremedia.org/article/constitution-says-bribery-impeachable-what-does-mean [https://perma.cc/TPV4-EHTJ].

12 Berwick et al., *supra* note 11.

13 *Id.*

14 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (1716).

15 WILLIAM OLDNALL RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS (T & J.W. Johnson Law Booksellers, 1853) (1819).

16 *Bribe*, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1773) (reprinted 1978).

Johnson defined "bribery" as "[t]he crime of taking or giving rewards for bad practices."[17] Bribery in this definition is not premised on a particular official act exchanged for a particular reward, but rather consists of a reward that perverts judgment, corrupts conduct, or results in bad practices.

William Blackstone defined "bribery" as "the next species of offen[s]e against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavi[or] in his office."[18] This common law definition of bribery was most often used as the standard for the removal of public officials and preventing corrupt officials from holding future office.[19] Removal from office is also the focus of the Constitution's Impeachment Clause.[20] The threshold for removal to protect the public from corruption is understandably lower than that required for imposing imprisonment or another severe criminal penalty.

In the eighteenth and early nineteenth centuries in England, common law bribery was considered among "high misdemeanors"—"high" meaning that persons guilty of those crimes were barred from public office or public service.[21] The U.S. Constitution refers to bribery and also refers to "high crimes and misdemeanors" and then specifies that an impeached and removed public official can be tried separately in criminal court.[22] But the criminal case for bribery is a different proceeding; thus, different law applies.

A related offense is extortion. While there is considerable overlap between the two offenses,[23] extortion cases involve coercion by the public official abusing the power of his office to extract favors.

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17 *Bribery*, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1773) (reprinted 1978).

18 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1765).

19 *See, e.g.*, H. OF LORDS, GR. BRIT. PARLIAMENT, REPORT FROM THE LORDS COMMITTEES APPOINTED TO EXAMINE PRECEDENTS RELATIVE TO THE STATE OF THE IMPEACHMENT AGAINST WARREN HASTINGS ESQUIRE, BROUGHT UP FROM THE COMMONS AND PROCEEDED UPON IN THE LAST PARLIAMENT (1791) (compiling English precedent during an investigation of the charges against Warren Hastings).

20 U.S. CONST. art. II, § 4.

21 ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 110–11 (2016).

22 U.S. CONST., art. I, § 3, cl. 6–7 ("Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.").

23 James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1695–96 (1993).

The United States experienced extortion first-hand while trying to negotiate peace with France in the 1790s.[24] The Framers watched in horror as American diplomats were asked for bribes by officials associated with Charles Maurice de Talleyrand, the French Foreign Minister.[25] The American diplomats had traveled all the way to Paris only to be faced with demands for payment in exchange merely for getting "a public audience" with French government officials.[26] The French officials requesting these payments—referred to as "X," "Y" and "Z" in correspondence rather than by their actual names—did not promise a particular official act for the payments, but access to high-ranking officials who in turn would provide an opportunity to influence France's governing Directory.[27] This extortion scheme, known as the XYZ Affair, angered the Americans.[28]

Thomas Jefferson, who hoped to avoid war with France, was appalled at how corruption had undermined relations between the two countries.[29] He wrote to his nephew Peter Carr in 1798:

> As the instructions to our envoys [and] their communications have excited a great deal of curiosity, I [e]nclose you a copy. [Y]ou will perc[ei]ve that they have been assailed by swindlers whether with or without the participation of Taleyrand is not very apparent. [T]he known corruption of his character renders it very possible he may have intended to share largely in the 50,000 £. demanded.[30]

The American delegation came home from Paris, diplomatic negotiations failed, and there soon followed the Quasi-War between the United States and France in which the two nations attacked each other's ships on the seas.[31] Bribery and extortion have consequences at home and abroad.

In Great Britain, the most infamous bribery case of the era was the 1788 impeachment in the House of Lords of Warren Hastings, Governor

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24 For an account of the XYZ Affair, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 549–79 (1993).

25 *Id.* at 550.

26 *Id.* at 569.

27 *Id.* at 550, 571, 573.

28 *Id.* at 550.

29 Letter from Thomas Jefferson to Peter Carr (Apr. 12, 1798), https://founders.archives.gov/documents/Jefferson/01-30-02-0180 [perma.cc/JN35-9C9V].

30 *Id.*

31 ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797–1801 (1966).

General of India.[32] This also was an extortion case.[33] Hastings was accused of using the power of his office to extract personal favors for himself and the East India Company from local officials in India.[34] Despite overwhelming evidence of corruption, Hastings was acquitted by the House of Lords after months of testimony.[35]

The Hastings trial illustrated a point that is still relevant today: Impeachment is premised on the constitutional concept of bribery, which is considerably broader than criminal bribery statutes that came later, but is still a political process. Obtaining a conviction is difficult. Warren Hastings faced overwhelming evidence of extortion and other cruelties in his administration of India,[36] yet his political and social connections in the House of Lords helped him escape conviction.[37] Over two centuries later, in 2020, a President of the United States, Donald Trump, availed himself of political support in the Senate to escape conviction on charges that he tried to extort favors from Ukraine in exchange for U.S. military aid.[38]

If impeachment will not work to combat bribery, criminal law perhaps should fill the gap. In criminal law, however, the operative legal definition of bribery is narrower.[39]

A federal bribery statute was not enacted until 1853.[40] Zephyr Teachout's *Corruption in America* explains that the statutory definition of bribery in the United States has become narrower since then.[41] Today, to be criminally prosecuted for bribery, a specific quid pro quo must be proven, though this standard only developed in the late twentieth century.[42] The current federal criminal code, specifically 18 U.S.C. § 201(b), provides that the crime of bribery occurs whenever anyone

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32 NOONAN, *supra* note 1, at 392–424, 764 n.49 (discussing the impeachment trial of Warren Hastings).

33 Lindgren, *supra* note 23, at 1695–96.

34 NOONAN, *supra* note 1, at 392–93.

35 *Id.* at 393.

36 For a more detailed account of the Warren Hastings impeachment charges, the evidence, and trial, see John T. Noonan, Jr., *The Bribery of Warren Hastings: The Setting of a Standard for Integrity in Administration*, 10 HOFSTRA L. REV. 1073 (1982).

37 *See* NOONAN, *supra* note 1, at 414–15.

38 H.R. Res. 755, 116th Cong. (2020) (introducing two articles of impeachment charging President Donald J. Trump); 166 CONG. REC. S936–39 (daily ed. Feb. 5, 2020) (finding President Donald J. Trump not guilty of the charges by a 47–53 Senate vote).

39 *See infra* text accompanying notes 40–44 (discussing the definition of bribery in the federal criminal code) and text accompanying notes 66–85 (discussing the Supreme Court's narrowing of the statutory definition of bribery).

40 Act to Prevent Frauds upon the Treasury of the United States, ch. 81, § 6, 10 Stat. 170, 171 (1853).

41 TEACHOUT, *supra* note 21.

42 *Id.*

"directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act . . . ."[43] Section 201(c), as interpreted by the Supreme Court, prohibits "gratuities," which is the acceptance of a reward after an official act even if there was no corrupt intent before the official act.[44]

Unlike the impeachment proceeding, which focuses only on the public official, the criminal bribery statute covers *both* the public official and the giver or offeror of the bribe. Both can be prosecuted if the elements of the criminal statute are met. For this reason, the statute is more precise and narrowly focused than the constitutional standard used only to remove a corrupt public official.

The phrase "anything of value" in the bribery statute is not defined.[45] It is not limited to cash contributions. Other special considerations or services given to an officeholder, or the officeholder's re-election campaign, could qualify.[46] But once again, the quid pro quo exchange of value related to a specific official act must be proven.

B. *The Emoluments Clauses: Where the Founders Drew the Line*

As discussed in the previous Section, the constitutional remedy for bribery is impeachment.[47] But as demonstrated by the impeachment trial of Warren Hastings in England in the 1780s, the Founders must have known that conviction and removal of an accused public officer could be difficult.[48]

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43 18 U.S.C. § 201(b).

44 *See* 18 U.S.C. § 201(c). While Section 201(c) does not explicitly use the phrase "gratuities," the Supreme Court recently explained the difference between a bribe and a gratuity under the statute in *Snyder v. United States*. 603 U.S. 1, 8 (2024) ("Importantly, because bribery can corrupt the official act, Congress treats bribery as a far more serious offense than gratuities. For example, if a federal official accepts a bribe, federal bribery law provides for a 15-year maximum prison sentence. By contrast, if a federal official accepts a prohibited gratuity, federal gratuities law sets a 2-year maximum prison sentence." (citations omitted) (citing 18 U.S.C. § 201(b), (c)). In *Snyder*, discussed later in this Article, the Court ruled that a separate federal criminal statute applicable to state and local officials, 18 U.S.C. § 666(a)(1)(B), only prohibits bribes and not gratuities, which are left to regulation under state laws. *Snyder*, 603 U.S. 1.

45 The phrase "anything of value" appears in Sections 201(b) and (c). 18 U.S.C. § 201(b)–(c).

46 *See* United States v. Singleton, 144 F.3d 1343, 1350 (10th Cir. 1998) (finding promise of reduced prison time "a thing of value" under the bribery statute), *rev'd on other grounds*, 165 F.3d 1297 (1999); United States v. Williams, 705 F.2d 603, 623 (2d Cir. 1983) (finding worthless stock that the defendant thought had value was "a thing of value" under the bribery and gratuity statutes).

47 *See supra* text accompany notes 11–22.

48 *See supra* notes 32–37.

The Founders were particularly worried about the corruption of United States officials by foreign powers.[49] The solution they saw was in the Constitution's Foreign Emoluments Clause, which prohibited federal officers from receiving profits and benefits from foreign governments. But the Framers omitted one thing: Other than impeachment, there is no specific mechanism in the Constitution for enforcement.

Article I, Section 9, Clause 8, provides: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[50] As defined in Dr. Samuel Johnson's 1773 dictionary, the word "emolument" means "profit" or "advantage."[51] Simply put, the Emoluments Clause prohibits a federal officer from accepting any profit or advantage from a foreign government, or any entity controlled by a foreign government.[52]

President Trump's compliance with the Emoluments Clause has been a source of controversy during both his terms in office. His sources of foreign government revenue included hotel rooms rented out to foreign diplomats, most famously at his Trump International Hotel a few blocks from the White House, condominiums in Trump buildings sold to foreign nationals, whose source of funding was unknown, and use of his name, with or without authorization.[53] The Trump Organization also wholly owns dozens of separately organized corporations and LLCs that borrow money from persons and entities unknown.[54] Very little about what goes on in the Trump Organization was disclosed on President Trump's annual public financial disclosure Form 278[55] (the same can be

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49 *See* THE FEDERALIST NO. 2 (John Jay); THE FEDERALIST NO. 22 (Alexander Hamilton) ("Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments.").

50 U.S. CONST. art. I, § 9, cl. 8.

51 *Emolument*, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1773) (reprinted 1978).

52 Norman L. Eisen, Richard Painter & Laurence H. Tribe, The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump 2 (2016) (unpublished manuscript), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [https://perma.cc/7874-QYLF].

53 JAMIE RASKIN, COMM. ON OVERSIGHT & ACCOUNTABILITY, WHITE HOUSE FOR SALE: HOW PRINCES, PRIME MINISTERS AND PREMIERS PAID OFF PRESIDENT TRUMP 26, 108 (2024).

54 *Id.*

55 *See, e.g.*, DONALD J. TRUMP, U.S. OFF. OF GOV'T ETHICS, EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (OGE FORM 278E) (July 31, 2020), https://www.documentcloud.org/documents/7012257-President-Donald-Trump-2020-financial-disclosure.html [https://perma.cc/V39D-8EQH].

said for his current disclosure form[56]) because revenue sources and liability of the hundreds of separate entities controlled by him do not have to be disclosed.[57]

On January 4, 2024, the House Oversight Committee Minority released a report documenting $7.8 million in payments from foreign governments paid to President Trump's hotel and apartment properties in Washington, D.C., Las Vegas, and New York City during his first term.[58] The House report said, "These countries spent—often lavishly—on apartments and hotel stays at Donald Trump's properties."[59] These payments were not only unsavory but also unconstitutional. Even if the payments did not go directly to Trump personally, they went to businesses privately owned and controlled by him, from which revenue flowed directly into his pocket—a violation of the Foreign Emoluments Clause of the Constitution.

A less serious problem, but still of concern, is the President using his position to extract financial benefits from the individual states or the federal government. Another emoluments provision of the Constitution, Article II, Section 1, Clause 7, prohibits the President from receiving emoluments from the United States or any of the individual states over a salary: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be [i]ncreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them."[60] For example, if a state government or the federal government were to patronize a business owned by the President and pay an excessive

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56 *See* DONALD J. TRUMP, U.S. OFF. OF GOV'T ETHICS, EXECUTIVE BRANCH PERSONNEL PUBLIC FINANCIAL DISCLOSURE REPORT (OGE FORM 278E) (Aug. 15, 2024), https://www.citizensforethics.org/reports-investigations/crew-reports/donald-trumps-2024-financial-disclosures [https://perma.cc/5M5W-JYUW, https://perma.cc/BG9J-FAK2, https://perma.cc/7R2E-NEMS, https://perma.cc/L6F2-UEHL, https://perma.cc/THR4-BX74, https://perma.cc/F8GG-9ML8]; *Legislative Proposals for Fostering Transparency Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 17–18 (2017) (statement of Richard W. Painter, Prof. Univ. of Minn. L. Sch.), https://www.congress.gov/115/chrg/CHRG-115hhrg26499/CHRG-115hhrg26499.pdf [https://perma.cc/T73E-NFFP] ("Unfortunately, the public financial disclosure form 278 filed by senior executive branch officials does not require disclosure of borrowing and other infusions of capital at the corporate level for entities owned in whole or in part by the public official.").

57 *See* U.S. OFF. OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE REPORT: INSTRUCTIONS FOR COMPLETING OGE FORM 278 4–6 (Sept. 2010), https://www.oge.gov/web/oge.nsf/0/A7FBDC0209B57819852585B6005A06C4/$FILE/8c47512231004e2d98b6966829afebfb4.pdf [https://perma.cc/XX9Q-6D5J] (requiring identification of the general type of business of each business entity owned by the filer but not specific sources of income for the entity or its liabilities).

58 RASKIN, supra note 53, at 3, 9.

59 *Id.* at 10, 15, 84.

60 U.S. CONST., art II, § 1, cl. 7.

price, that would likely be a violation of the Domestic Emoluments Clause just as such patronage from a foreign government would violate the Foreign Emoluments Clause.[61] That, of course, includes Secret Service agents paying exorbitant rates—up to $1,185 a night per room—to stay in Trump resorts at taxpayer expense.[62]

However, the Constitution is silent on how to enforce these provisions. There is no federal criminal statute prohibiting a federal official from receiving unconstitutional emoluments, although a large enough violation, particularly of the Foreign Emoluments Clause, could be a serious enough offense to justify impeachment.[63] Trump, however, was never impeached for his Emoluments Clause violations.

In 2017, three separate lawsuits were brought against President Trump by different groups of plaintiffs (public interest organizations, business competitors, state attorneys general, and members of Congress), alleging violations of the Foreign and Domestic Emoluments Clauses of the Constitution. Of these plaintiffs, only the Trump Organization's businesses, competitors, and some state attorneys general were found to have standing.[64]

The bottom line is that there is not an effective enforcement mechanism for the Emoluments Clause because Congress is not likely to impeach a President for an alleged violation and civil litigation takes far too long with relatively few plaintiffs having standing to sue.

Yet the Emoluments Clauses are in the Constitution for a reason: The Foreign Emoluments Clause is important to our national security.[65] It is not inconceivable that some of the same countries paying emoluments to Trump during his presidency are adversaries of the

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61 *See id.*; U.S. CONST. art. I, § 9, cl. 8.

62 Barbara Sprunt, *Trump Hotels Charged His Secret Service Protectors 'Exorbitant' Rates*, NPR (Oct. 17, 2022, 2:24 PM), https://www.npr.org/2022/10/17/1129491352/trump-hotels-overcharged-secret-service-agents [https://perma.cc/VWU9-4WKA] ("According to the documents, the Secret Service was charged as much as $1,185 per room per night, nearly five times the government rate, which is set by the General Services Administration.").

63 At the Virginia ratifying convention, Edmund Jennings Randolph stated that the President could not violate the Emoluments Clause and "[i]f discovered he may be impeached." DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 345 (2d ed. 1805) (1788).

64 Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178 (2d Cir. 2019), *cert. granted judgment vacated* 141 S. Ct. 1262 (2021) (mem.); *In re* Trump, 958 F.3d 274 (4th Cir. 2019), *cert. granted judgment vacated sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (2021) (mem.); Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020) *see* Richard Painter, *Good Governance Paper No. 15: Enforcing the Emoluments Clause*, JUST SEC. (Oct. 30, 2020), https://www.justsecurity.org/73148/good-governance-paper-no-15-enforcing-the-emoluments-clauses [https://perma.cc/47LA-XKQS] (discussing the procedural history of the emoluments cases in the Second, Fourth, and District of Columbia Circuits).

65 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., 1911).

United States or its allies. While this was not the only constitutional violation during the course of Trump's presidencies, nor was it the most serious, it was the first.

II. RECENT JUDICIAL DEVELOPMENTS

A. *The Supreme Court Redefines Bribery and Related Crimes*

The Supreme Court, several of whose Justices have had ethics scandals of their own,[66] has considerably narrowed the reach of bribery laws and other anticorruption statutes.

Public officials and private individuals are treated differently under the law but *Skilling*'s narrowing of the scope of honest services fraud to bribes and kickbacks has implications in both contexts. In the criminal prosecution of Enron Corporation Chief Financial Officer Jeffrey Skilling, the Court in 2010 limited the reach of the federal theft of honest services statute[67] to criminalize only bribery and kickback schemes, not other types of self-dealing and conflicts of interest.[68] The Court said the language of the criminal statute otherwise would be unconstitutionally vague.[69] Skilling had been convicted on other criminal counts, including securities fraud,[70] but he could not be convicted for depriving Enron and its shareholders of honest services even though his services to Enron and its shareholders were indeed dishonest.[71]

Skilling, of course, was not a public official, rather, he was a senior officer of a corporation,[72] but the ramifications of this holding are broad. The theft of honest services statute cannot now be used to prosecute conduct other than that already covered by bribery statutes.

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66 Painter, *supra* note 10, at 376–89.

67 *See* 18 U.S.C. § 1343 (imposing criminal penalties on anyone who has "devised or intend[ed] to devise any scheme or artifice to defraud"); 18 U.S.C. § 1346 ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

68 Skilling v. United States, 561 U.S. 358, 367–68 (2010) ("Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes.").

69 *Id.* at 412.

70 *Closed Criminal Division Cases: United States v. Jeffrey K. Skilling, Court Docket Number: H-04-025-SS*, U.S. DEP'T JUST. (Sept. 27, 2023), https://www.justice.gov/criminal/criminal-vns/case/united-states-v-jeffrey-k-skilling [https://perma.cc/7C87-DE3S] (stating that after the Supreme Court rendered its opinion, Skilling was "resentenced to 168 months in prison on conspiracy, securities fraud, and other charges related to the collapse of Enron Corporation").

71 *See Skilling*, 561 U.S. at 368.

72 *Id.* at 367.

More troubling is the Supreme Court's unanimous holding in *McDonnell v. United States*, which states that selling access to a public official for cash or other consideration is not a bribe.[73] When the then-Governor of Virginia, Robert McDonnell, was convicted of exchanging official meetings for gifts to himself and his wife, the Court in 2016 held that an "official act" for purposes of the federal bribery statute is an action that "involve[s] a formal exercise of governmental power."[74] Agreeing to a meeting in exchange for a gift or contacting another official on behalf of the gift giver is not an "official act" under the bribery statute.[75] Buying access to a public official thus is permitted so long as the public official does not promise to do a specific official act in exchange for the bribe.

McDonnell was premised on statutory construction, not the intent of the Framers of the Constitution. Nonetheless, recall the disgust of Thomas Jefferson and other Founders over the XYZ Affair, where cronies of French Foreign Minister Charles Maurice de Talleyrand demanded payments from American diplomats just to get an audience with their French counterparts.[76] Two centuries later, the Court would rule that public officials, including the former Governor of Jefferson's home state of Virginia, could do the same thing.[77]

Next came the problem of "gratuities"—payments made to a public official after the performance of an official act to thank him for it.[78] Restaurant servers, bartenders, and others providing services expect "gratuities" or "tips" for good service, but we do not "tip" public officials for doing what we want them to do. The problem is that some jurisdictions prohibit gratuities, and some do not.[79]

In 2024, the Court ruled in favor of James Snyder, the former mayor of Portage, Indiana, who had been convicted for receiving a large payment from a city contractor after he approved a contract.[80] The Court distinguished bribery, which is criminalized in every jurisdiction, from a

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73 579 U.S. 550, 579–81 (2016).

74 *Id.* at 555, 574.

75 *Id.* at 574.

76 *See* ELKINS & MCKITRICK, *supra* note 24, at 550.

77 *McDonnell*, 579 U.S. 550.

78 The federal statute, 18 U.S.C. § 201, does not use the word "gratuity," but that is a term generally used to describe "any official act performed" within the meaning of § 201(c) when the act has already been performed before the payment as opposed to a future act "to be performed," which is also covered in § 201(c). *See* Snyder v. United States, 603 U.S. 1, 5–6 (2024) ("As a general matter, bribes are payments made or agreed to *before* an official act in order to influence the official with respect to that future official act. American law generally treats bribes as inherently corrupt and unlawful. . . . Gratuities are typically payments made to an official *after* an official act as a token of appreciation.").

79 *Snyder*, 603 U.S. at 6–7.

80 *Id.* at 9–10.

gratuity (i.e., a "thank you" gift to a public official after an official act), which is a lesser crime in some jurisdictions and is not a crime at all in others.[81] The current federal criminal code, 18 U.S.C. § 201(b), provides that the crime of bribery occurs whenever anyone "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act."[82] By contrast, 18 U.S.C. § 201(c), prohibits "gratuities," which is the acceptance of a reward after an official act even if there was no corrupt intent before the official act, but is considered a lesser crime. But those statutes do not apply directly to state and local government officials. The Court in *Snyder v. United States* ruled that a separate federal criminal statute that does apply to state and local officials, 18 U.S.C. § 666(a)(1)(B), only prohibits bribes and not gratuities, which are left to regulation under state laws.[83] Some states do not prohibit gratuities, but instead use noncriminal gift rules to prohibit some, but not all gifts to public officials whether or not they are tied to a particular official act.[84]

Does the United States want to return to the days of the Grant administration when many of the President's appointees were allegedly on the take?[85] If the Court interprets anticorruption laws as narrowly as possible, we could end up back there or worse.

B. *The Supreme Court Immunizes the President*

Then there is the President. Criminal prosecution of a President for corruption is now exceedingly difficult. In 2024, the Supreme Court, in *Trump v. United States*, ruled that a President is absolutely immune from prosecution for acts within the core constitutional powers of the President and that there is a presumption of presidential immunity for

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81 *Id.* at 5–7; 18 U.S.C. § 201.

82 18 U.S.C. § 201(b).

83 *Snyder*, 603 U.S. at 8 ("Importantly, because bribery can corrupt the official act, Congress treats bribery as a far more serious offense than gratuities. For example, if a federal official accepts a bribe, federal bribery law provides for a 15-year maximum prison sentence. By contrast, if a federal official accepts a prohibited gratuity, federal gratuities law sets a 2-year maximum prison sentence." (citations omitted) (citing 18 U.S.C. § 201(b), (c)). In *Snyder*, the Court ruled that a separate federal criminal statute applicable to state and local officials, 18 U.S.C. § 666(a)(1)(B), only prohibits bribes and not gratuities, which are left to regulation under state laws.

84 *Snyder*, 603 U.S. at 6–7.

85 RON CHERNOW, GRANT 545–838 (2017) (describing President Grant after the Civil War as an honest politician and President who was surrounded by corrupt officials and whose administration saw a great many scandals).

other official acts.[86] The Court remanded the case to the trial court to determine which acts of President Trump charged in his federal indictment fell into one of the following three categories: (1) core constitutional responsibilities where he enjoys absolute immunity from prosecution, (2) official acts falling outside a core constitutional responsibility where the President is at least entitled to a presumption of immunity, or (3) personal capacity conduct.[87]

With respect to the first category, the core constitutional powers of the President, the Court explained:

> Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress––either a specific one targeted at the President or a generally applicable one––may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.[88]

This category of core constitutional authority includes the President's pardon power, the power to remove federal officers appointed by the President in the executive branch, "[t]he power 'to control recognition determinations'" of foreign nations,[89] and "commanding the Armed Forces of the United States."[90] The second category, other official acts of the President, is where the President shares power with Congress, and here the President is entitled to a presumption of immunity from criminal prosecution.[91] The third and final category is personal capacity

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86 603 U.S. 593, 606 (2024) ("We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of this core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute or instead whether a presumptive immunity is sufficient.").

87 *Id.* at 606, 642.

88 *Id.* at 609.

89 *Id.* at 608–09 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 139–41 (1872) (pardon power); Seila Law LLC. v. CFPB, 591 U.S. 197, 204 (2020) (removal power); Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015) (power to recognize foreign nations)).

90 *Trump*, 603 U.S. at 607 (citing U.S. CONST. art. II, § 2).

91 *Id.* at 609–10, 614–15 ("The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress. . . . [W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from

conduct.[92] In this category, only the President is not entitled to any presumption of immunity.[93]

The impact of this case on the prosecution of corruption and other crimes is profound. As Justice Sonia Sotomayor, in her dissent, observed:

> Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. . . . The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.[94]

Arguably, a presidential bribe could still be prosecuted because taking something of value—a bribe—in exchange for an official act is personal capacity conduct where there is no immunity. The Court in *Trump v. United States* also, however, ruled that evidence of the motivation behind an official act of a President is inadmissible even in a criminal trial of the President for personal capacity crimes.[95] Justice Amy Coney Barrett departed from the majority on this point in her concurring opinion.[96] Without admissible evidence of motive, that an official act was in exchange for the bribe, the prosecution will almost certainly fail.

The majority opinion in a footnote tries to save the prosecution of a bribery case under its ruling:

> Justice Barrett disagrees, arguing that in a bribery prosecution, for instance, excluding "any mention" of the official act associated with the bribe "would hamstring the prosecution." But of course[,] the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced

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criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. . . . At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to the act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'").

92 *Id.* at 609–10.

93 *Id.* at 629.

94 *Id.* at 684–85. (Sotomayor, J., dissenting.)

95 *Id.* at 630–31.

96 *Id.* at 655–57 (Barrett, J, concurring in part).

> in the performance of the act. What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety. As we have explained, such inspection would be "highly intrusive" and would "seriously cripple" the President's exercise of his official duties. And such second-guessing would "threaten the independence or effectiveness of the Executive."[97]

The majority ignores what should be obvious: If the President did take a bribe, the real reason for the President's official act is not likely to be stated in the public record, which is prepared in the executive branch by officials who report to the President. This, in turn, makes it very difficult to prove a necessary element of bribery, quid pro quo—i.e., that the official act was done in exchange for the bribe instead of for some other reason. That supposedly legitimate reason for the official act would likely be stated in the public record, the only evidence of motive the Court says is admissible. Excluding "testimony or private records of the President or his advisers probing the official act itself" thus would probably doom the prosecution of a bribery case even if a President were to agree to perform an official act in exchange for receiving a thing of value.[98]

Even worse, this evidentiary ruling might doom the prosecution not only of the President for bribery but of advisors who, in exchange for a bribe, influence an official act of the President. The majority ruled that the motivations for an official act of the President are off limits in a criminal trial, presumably any criminal trial. If the prosecution in a bribery case cannot introduce evidence of what was said to the President about an official act and by whom, the President's senior advisors also might have de facto immunity from prosecution.

C. *The Supreme Court Immunizes Campaign Finance*

The greatest damage the Supreme Court has done to the fight against corruption is to open the floodgates of campaign finance.

A campaign contribution or electioneering expenditure will not meet the criminal definition of bribery unless there is an express quid pro quo arrangement in which a contribution or expenditure is made in exchange for an official act, circumstances usually difficult to prove.[99] In

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97 *Id.* at 632 n.3 (citation omitted) (citing 18 U.S.C. § 201(b)(2)).

98 *Id.*

99 *See infra* text accompanying notes 107–113.

the case of a member of Congress, prosecution for bribery is further complicated by the Speech or Debate Clause of the Constitution, which bars inquiry into the legislative process by any branch of government other than Congress.[100] This means that a bribery prosecution of a member may include the act of taking the money, which is not an official act, and may include promises of official action made at the time of the payment but cannot rely on evidence of what the member actually does in Congress or the motivations therefor.[101] Without evidence of motive for official acts, criminal prosecution is nearly impossible unless it can be proven that the member made explicit promises in exchange for the political expenditure.[102]

The broader common law concept of bribery, however, is still important. As discussed in Part I of this Article, bribery is defined more broadly when referenced in the Impeachment Clause of the Constitution.[103] The Constitution, in a separate provision, gives each house of Congress the power to expel a member for "disorderly [b]ehavi[or]," which surely must encompass bribery and other forms of corruption.[104] However, as a practical matter, it is doubtful that members of Congress would expel a fellow member for reciprocal relationships with campaign supporters when they themselves can also be accused of the same.

The rational solution to this problem is to remove the opportunity to corrupt, for example with statutes that prohibit or limit monetary contributions to political campaigns and expenditures on electioneering

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100 U.S. CONST. art. 1, § 6, cl. 1 ("Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

101 *See* United States v. Johnson, 383 U.S. 169, 184–85 (1966) (holding that the Speech or Debate Clause precludes judicial inquiry into the motivation for a member of Congress's speech, and prevents such a speech from being made the basis of a criminal charge against a member of Congress); *see also* United States v. Brewster, 408 U.S. 501, 524–25 (1972) (holding that the Speech or Debate Clause protects members of Congress from inquiry into legislative acts or the motivation for performance of such acts, but does not protect all conduct relating to the legislative process such as taking a bribe in exchange for a promise of legislative action).

102 As noted earlier in this Article, in 2024, the Supreme Court in *Trump v. United States* bestowed similar immunity from prosecution on the President even though there is no "Speech and Debate Clause" for Presidents, and presidential immunity appears nowhere in the text of the Constitution. *Trump*, 603 U.S. at 637. The Court in *Trump* also excluded from criminal trial evidence of the President's motives for official action. *Id.* at 618; *see supra* text accompanying notes 86–100.

103 *See supra* text accompanying notes 11–46 (comparing the constitutional concept of bribery with the statutory definition in the federal code).

104 U.S. CONST. art. 1, § 5, cl. 2 ("Each House [of Congress] may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

communications. In 1907, Congress passed the Tillman Act, which prohibits donations from corporate treasuries to political campaigns.[105] After the Tillman Act, corporations, trade associations, and similar organizations found various ways to get around the law, and as discussed below, this was facilitated by the Supreme Court.

The Supreme Court began striking down federal regulation of campaign finance in the 1970s, ruling in *Buckley v. Valeo* that restrictions on campaign spending are unconstitutional, while upholding limits on campaign contributions.[106] But then, in 2010, the Court in *Citizens United v. FEC*, struck down an act of Congress that limited expenditures from corporate treasuries on independent electioneering communications.[107] The Court found that corporations, like billionaires, are people too and have the constitutional right to spend as much money as they want to influence elections.[108] The Court held that, in general, there was insufficient evidence of quid pro quo between political spending and politicians benefitting from such largess to show a compelling state interest in regulating this form of "speech."[109] Subsequent U.S. Court of Appeals decisions have used similar reasoning to invalidate restrictions on expenditures by Super PACs.[110]

This Article is not the place to dissect the logic or illogic of the *Citizens United* decision.[111] But the Court's reasoning in *Citizens United* is based on the premise that a quid pro quo relationship must be shown

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105 The Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 52 U.S.C. § 30118).

106 424 U.S. 1, 143–45 (1976) (holding that dollar limitations on contributions by individuals to campaigns do not violate the First Amendment but that limitations on spending by political campaigns do violate the First Amendment).

107 558 U.S. 310, 372 (2010).

108 *Id.* at 353.

109 *Id.* at 357 ("Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question."); *id.* at 367–72.

110 *See* Lieu v. FEC, No. 19-5072, 2019 WL 5394632, at *1 (D.C. Cir. 2019), (dismissing the suit brought against the FEC by Representative Ted Lieu, Representative Walter Jones, Senator Jeff Merkley, State Senator John Howe, Zephyr Teachout, and Michael Wager asking the Circuit Court to overturn its decision in *SpeechNow.org v. FEC*); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (interpreting the *Citizens United* holding to allow unlimited spending on Super PACs), *cert. denied*, 562 U.S. 1003 (2010).

111 *See generally* RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIENCE AND CAMPAIGN FINANCE REFORM (2016); *Richard Painter–Taxation Only with Representation: The Conservative Conscience and Campaign Finance Reform*, EDMOND & LILY SAFRA CTR. FOR LEGAL ETHICS, https://ethics.harvard.edu/richard-painter-taxation-only-representation-conservative-conscience-and-campaign [https://web.archive.org/web/20240802064431/https://ethics.harvard.edu/richard-painter-taxation-only-representation-conservative-conscience-and-campaign].

to justify federal campaign finance regulation.[112] Quid pro quo must be proven, not assumed, even to allow regulation designed to prevent corruption in the first place.[113] This is an extremely high bar to meet, making it virtually impossible to regulate the corruption of elected officials with political spending.

The Supreme Court has not struck down the Tillman Act prohibition on direct corporate contributions to political campaigns, but it might as well have done so because corporations now can accomplish the same purpose after the Court bestowed First Amendment protection on corporate-funded independent civic organizations,[114] PACs, and Super PACs.[115] While some restrictions exist on direct contributions to campaigns and political parties,[116] spending by outside organizations and Super PACs is unlimited.

Campaign finance law—what is left of it—is constantly under pressure from strategies to get around the law. Like manipulators who exploit loopholes to get around taxes, election lawyers combine legal but dubious law avoidance with illegal law evasion—a practice known as law "avoision."[117] For example, an independent organization can be funded with unlimited amounts of corporate money but is not allowed to coordinate with actual campaigns, which are still subject to contribution limits.[118] But as with so many tax shelters and other loopholes, the substance of what's happening differs from the form. Behind the scenes, coordination is going on, and campaign officials and independent organizations that do it know that when they cross legal lines, they are very unlikely to get caught.

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112 *Citizens United*, 558 U.S. at 359 ("When *Buckley* [*v. Valeo*, 424, U.S. 1 (1976)] identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *id.* at 447–52 (Stevens, J., concurring in part) (disagreeing with the majority's "myopic focus on *quid pro quo* scenarios").

113 *Id.* at 357.

114 Many of these organizations, like Citizens United itself, are established under Section 501(c)(4) of the Internal Revenue Code. *See* I.R.C. § 501(c)(4)(A) (providing tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . [and] devoted exclusively to charitable, educational, or recreational purposes").

115 *Buckley*, 424 U.S. at 143–44.

116 McConnell v. FEC, 540 U.S. 93, 122–26 (2003) (upholding limits on soft money contributions used to register voters and increase attendance at the polls); McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (striking down aggregate limits on donor contributions to multiple candidates).

117 This term was introduced by London School of Economics professors in a 1979 book. *See* ALFRED ROMAN ILERSIC & ARTHUR SELDON, TAX AVOISION: THE ECONOMIC, LEGAL, AND MORAL INTER-RELATIONSHIPS BETWEEN AVOIDANCE AND EVASION (1979). "Tax Avoision" is now common usage.

118 *See* 11 C.F.R. § 109.21(b) (2025) (defining when coordination with a campaign is considered an in-kind contribution that must be reported).

As Justices Sandra Day O'Connor and John Paul Stevens famously wrote in *McConnell v. FEC*, one of the few cases upholding campaign finance laws, "[m]oney, like water, will always find an outlet."[119]

The amount of money spent on politics continues to escalate. In 2020, the federal election cost almost $14 billion, double the previous presidential election cycle. $6.6 billion was spent on the presidential race alone and $7.2 billion for the House and Senate races combined.[120] After all this spending every four years, a victor emerges in each contest. But who really chooses the President and members of Congress, and where do their true loyalties lie?

And it gets worse when foreign interests, including foreign governments, get involved.

In *Bluman* v. *FEC*, Justice Brett Kavanaugh, sitting for the federal district court in Washington, D.C. before he joined the Supreme Court, held that foreign nationals are not entitled to the First Amendment protections in *Citizens United* insofar as they have no constitutional right to spend money on U.S. elections.[121] The Supreme Court affirmed this ruling without an opinion.[122] This means electioneering expenditures by entities controlled by foreign nationals can be regulated.[123] Yet Justice Kavanaugh's ruling in *Bluman* that American corporate money is constitutionally protected in U.S. elections, but foreign money is not, draws a distinction that is unusual in First Amendment jurisprudence, which generally covers foreigners within U.S. borders.[124] In any event, this distinction is largely unenforceable.

Enforcing the laws and FEC regulations prohibiting foreign-funded electioneering expenditures is difficult against the backdrop of economic and often contractual ties between American and foreign corporations and other businesses. If a foreign oligarch or foreign government doing business with an American corporation tells the corporation that a certain U.S. elected official needs to be defeated, the American corporation knows how to do that. Foreign nationals thus can influence U.S. nationals that are funding electioneering communications. The

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119 *McConnell*, 540 U.S. at 224.

120 Ciara Torres-Spelliscy, *The Most Expensive Election Ever*, BRENNAN CTR. FOR JUST. (Nov. 11, 2020), https://www.brennancenter.org/our-work/analysis-opinion/most-expensive-election-ever [https://perma.cc/9ZYJ-9VKX].

121 Bluman v. FEC, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011).

122 *See* Bluman v. FEC, 565 U.S. 1104 (2012) (affirming the decision to grant the Commission's Motion to Dismiss and to deny the plaintiffs' Motion for Summary Judgment by simply stating "Judgment affirmed.").

123 *See id.*

124 In other contexts, the Supreme Court has ruled that "resident aliens have First Amendment rights." United States v. Verdugo-Urquidez, 494 U.S. 259, 270–71 (1990) (describing Bridges v. Wixon, 326 U.S. 135, 148 (1945)).

money may even originate from abroad, but if an American entity spends it, it appears to be constitutionally protected speech.

"Straw donor" arrangements can be prosecuted for contributions to campaigns, but are virtually impossible to police in the secret world of dark money electioneering expenditures.[125] Whether funneling money through U.S. business joint venturers, wholly owned corporate subsidiaries, consultants, lobbyists, or even lawyers, foreign entities will find a way to influence electioneering expenditures made under the First Amendment protection bestowed by the Supreme Court.[126]

In the end, we are left with a campaign finance system where Members of Congress and even Presidents may be beholden not just to American corporate interests but to foreign powers. And we return to the question of where their true loyalties lie.

D. *The Supreme Court Immunizes Itself*

As discussed in earlier parts of this Article, the Supreme Court Justices have narrowed anticorruption laws in cases in three areas: construction of federal bribery statutes, prosecution of the President, and campaign finance.[127] In the past few years, it has become increasingly obvious that the Court has its own problem with gifts that tread uncomfortably close to the common law understanding of bribery.[128]

This author, as chief White House ethics lawyer under President Bush, worked on the confirmation of two Supreme Court Justices: Chief Justice John Roberts and Justice Samuel Alito. A credible commitment to adhere to judicial ethics rules has never been obtained by any President from any nominee to the Court. Once a Justice is on the Court with lifetime tenure, the Justice, save for impeachment, is beyond the reach of Congress and is beyond the reach of the executive branch except for the

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125 *See, e.g.*, Indictment, Dinesh D'Souza, No. 14-cr-34 (S.D.N.Y. Jan. 23, 2014), ECF No. 1 (alleging straw donor scheme to exceed donor limits in the U.S. Senate campaign against Hillary Clinton). D'Souza was convicted, sentenced to probation, but later pardoned. *See* Executive Grant of Clemency, signed by President Donald Trump (May 31, 2018), https://www.justice.gov/pardon/page/file/1067776/download [https://perma.cc/V5EN-UYA2] (pardoning D'Souza "for his conviction in the United States District Court for the Southern District of New York on an indictment . . . charging violation of Sections 441f and 437g(d)(l)(D) . . . [of the] United States Code").

126 This author has discussed this problem in detail, see PAINTER, *supra* note 111, at 106–20.

127 *See supra* Sections II.A–C.

128 *See* Painter, *supra* note 10, at 357–62.

extremely unlikely event of prosecution for a crime.[129] The Justices in many ways are above the law.

Rules restricting gifts and conflicts of interest all too often are ignored, as are rules requiring financial disclosure and recusal from cases in which a Justice's impartiality might reasonably be questioned.[130] When the Justices decide what the law is for themselves, they do not even make their ethics decisions collectively by issuing rulings on Supreme Court ethics, rather they decide individually.[131] Each Justice is allowed to decide what the law is for themselves, with nobody saying "no" if they get it wrong, even egregiously wrong.

It is not just the parties to a case who are affected. A ruling favoring one coal company likely helps all coal companies; a ruling favoring one bank often helps all similar banks. On the losing side may be public safety, public health, the environment, and similar interests. Supreme Court Justices presumably would want to protect the integrity of the Court by freeing themselves of financial relationships with people and organizations with interests affected by their rulings. But some Justices do not see it that way.

For more than twenty years, Justice Clarence Thomas accepted regular gifts of private jet travel, yacht excursions, and other luxury vacations from billionaire and Republican megadonor Harlan Crow without disclosing these gifts on his annual financial disclosure reports.[132] Justice Thomas sold his interest in three Savannah, Georgia, properties to Crow in 2014 for $133,363 without reporting the sales on his financial disclosure report.[133] Justice Thomas also failed to disclose tuition payments by Crow for Thomas's nephew whom Thomas, under his powers as legal guardian of a minor, enrolled in two private schools where guardians presumably were contractually required to pay tuition.[134]

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129 *See, e.g.*, Chandler v. Jud. Council of the Tenth Circuit, 398 U.S. 74, 140 (1970) (Douglas, J., dissenting) ("Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.").

130 *See* Painter, *supra* note 10, at 357–62.

131 *Id.*

132 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 7, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/L8CL-C3AS].

133 Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/EPF9-JDXA].

134 Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/73S3-N58H].

Crow is not Justice Thomas's only generous friend. Healthcare industry executive Tony Welters assisted Justice Thomas with a $267,000 loan to purchase a recreational vehicle—a Prevost Le Mirage—in 1998.[135] Justice Thomas made very few payments on this "loan" and Welters ultimately forgave $253,000 in interest and principal in 2008.[136] Welters was the founder of AmeriChoice, the predecessor to United Health Group.[137] Justice Thomas has not recused himself from healthcare-related cases on the Supreme Court on account of this loan or his friendship with Welters.[138] This includes the 2012 case, *National Federation of Independent Business v. Sebelius*, in which Justice Thomas and three other Justices dissented from a majority opinion upholding the individual insurance mandate in the Affordable Care Act of 2010.[139]

It recently came to light that "Justice Alito failed to disclose a 2008 fishing trip with billionaire and GOP donor Paul Singer."[140] Justice Alito flew at Singer's expense in a private plane to Alaska.[141] Singer's hedge fund had cases before the Court from which Alito never recused.[142] In one case Singer's hedge fund sued Argentina for payment for the full value of debt this fund had bought at a deep discount on speculation.[143] The Court, with Justice Alito joining the majority, sided with Singer's hedge fund even though Alito should have recused himself from this case.[144]

Justice Alito, however, insists that the trip was proper, need not have been disclosed, and did not create a conflict of interest.[145]

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135 Jo Becker, *Justice's Luxury R.V. Loan Was Forgiven, Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html [https://perma.cc/483B-TMBN].

136 *Id.*

137 *See* Painter, *supra* note 10.

138 *Id.*

139 567 U.S. 519, 646, 707 (2012).

140 *See* Painter, *supra* note 10, at 360.

141 Justin Elliott Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/MV9P-385E].

142 *Id.*

143 Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014).

144 *See id.*; 28 U.S.C. § 455 (discussing recusal requirements for judges and Justices). This was a 7–1 decision of the Justices, with Justice Ruth Bader Ginsburg dissenting and Justice Sotomayor taking no part, so it is unlikely that Justice Alito's interactions with Paul Singer influenced the outcome. *Id.* at 146. Still, we have no way of knowing how deliberations proceeded, and the appearance of conflict remains regardless of the votes of the other Justices.

145 Samuel A. Alito, Jr., *Justice Samuel Alito: ProPublica Misleads Its Readers*, WALL ST. J. (June 20, 2023, 6:25 PM), https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-

It is possible that billionaires who fly Justices on jets to the Caribbean or to fishing trips in Alaska only want to enjoy downtime with a Justice talking about the weather, fishing, sports, or anything except the work of the Court. It is possible that a Justice might prefer the company of billionaires and other successful people even if the Justice were to pay their own way. It is possible, but not likely. The billionaires are doing this for a reason and the Justices surely must know what that reason is. At a minimum these gifts buy "access" to the Justices. Even if the Justices (conveniently for themselves, it turns out) held in *McDonnell v. United States* that exchanging a gift in return for access to an official is not bribery under the federal bribery statute, this practice is still corrupt.[146]

Are these Supreme Court Justices accepting extravagant travel, other gifts, and taking bribes? No investigation to date has unearthed evidence of a quid pro quo sufficient to prosecute a Justice under federal bribery statutes. Does the conduct of some Justices come within the concept of bribery contemplated in the Constitution as grounds for removal from office? Perhaps. Recall in Part I of this Article the discussion of the common law definitions of bribery: "[T]he receiving or offering of any undue reward, by or to any Person whatsoever, whose ordinary profession or business relates to the administration of public[] justice in order to incline him to do a Thing against the known Rules of Honesty and Integrity."[147] A lot of these previously undisclosed gifts to Justices at least appear to be aimed at inclining them to decide cases the way their benefactors would like them to decide, although that also has not been proven.

Broader structural reforms of the Court have floundered. There is little support in Congress or the White House to implement major changes.[148] Impeachment and removal of a Justice is close to impossible.

Unfortunately, the political debate over Supreme Court ethics is often partisan; Republicans today defend the Court or are silent about Supreme Court ethics, but only a decade ago they were castigating the Court when it handed down liberal rulings during the Obama Administration. For example, Senator Chuck Grassley (a Republican

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disclosure-alaska-singer-23b51eda [https://web.archive.org/web/20250328002011/https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda] (arguing that *ProPublica* leveled false charges about Supreme Court recusal, financial disclosures, and a 2008 fishing trip).

146 579 U.S. 550 (2016).

147 HAWKINS, *supra* note 14.

148 *See generally* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/4Y9K-65ZQ] (avoiding endorsement of major changes to the Court, including its expansion, but proposing an "advisory code of conduct" for the Court).

from Iowa) in 2015 introduced a bill that would install an inspector general at the Supreme Court.[149] He is silent on that topic today.

In 2023, in a United States Senate hearing on the corruption of Congress and political spending by the fossil fuel industry, Senator John Kennedy (a Republican from Louisiana) veered far off course during the five minutes he was allotted to question the author of this Article, a witness at the hearing.[150] Senator Kennedy attacked an earlier statement, one of many, made by this author about corruption on the Supreme Court, and demanded an answer to the question: "[W]hich one of the justices is bought?"[151] As is typical, this author was not given time to supply a meaningful answer before the Senator proceeded to his next question.[152] But had sufficient time been allowed to discuss the Court's corruption problem, the answer to Senator Kennedy's question would have turned on what one means by "bought." The broader common law concept of bribery contemplated by the Constitution—and presumably sufficient grounds for impeachment—or the narrower definition of bribery in federal criminal statutes which requires a showing of quid pro quo—an exchange of a specific official act for a thing of value? By the former definition, one could say that Justices who receive extravagant vacations and yacht excursions, among other undue rewards, from billionaires—and others with interests before the Court—are "bought." Under the constitutional concept of bribery, these Justices arguably should be removed.

Meanwhile, public opinion of the Court is at an all-time low.[153] Whether or not corruption impacts the Court's adjudication of a

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149 *See* Judicial Transparency and Ethics Enhancement Act, S. 1418, 114th Cong. (2015) (proposing the establishment of an inspector general's office for the judiciary, including the Supreme Court); 161 CONG. REC. 7731–32 (statement of Sen. Grassley) (explaining the need for an inspector general for the Supreme Court).

150 *See Dollars and Degrees: Investigating Fossil Fuel Dark Money's Systemic Threats to Climate and the Federal Budget*, 118th Cong. 23–26 (2023) (statement of Sen. Kennedy).

151 *See id.* For one of many public statements this author has made about the appearance of corruption on the Supreme Court, see Richard W. Painter, *How the Supreme Court Can Get its House in Order*, MSNBC (May 2, 2023, 11:48 AM), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-can-finally-get-house-order-rcna82293 [https://perma.cc/823B-4JBE] (proposing installation of an ethics lawyer and an inspector general at the Supreme Court).

152 Senator Kennedy's subsequent questions were even less relevant to the subject of the hearing, the corruption of Congress by the fossil fuel industry. These questions covered such topics as this author's reaction on social media to Senator Lindsey Graham's repeated efforts to suppress the investigation into Russian interference in the 2016 election and even a dispute this author had with another professor who had made racially insensitive blog and Twitter posts.

153 *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/2DP6-VXCT] (reporting that only "[t]wenty-five percent of U.S. adults

particular case, the appearance of corruption is enough to undermine the credibility of the Court as an institution and ultimately public confidence in our entire system of government.

In November 2023, the Supreme Court promulgated a Code of Conduct.[154] But the ethics code has no enforcement mechanism.[155] The Justices also said that the Code of Conduct "largely represents a codification of principles that we have long regarded as governing our conduct."[156] In other words, no change is needed.[157] Recall the Court's April 2023 statement that they were already complying with ethics rules.[158]

Congress has considered reforming Supreme Court ethics. The Supreme Court Ethics, Recusal, and Transparency Act of 2022 would have required Supreme Court Justices to follow a code of ethics, allowed ethics issues to be reviewed by appellate court judges, codified recusal standards, and required the Court to disclose lobbying interests appearing before it.[159] Companion bills were introduced in the House and Senate.[160] Other proposed legislation required

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say they have 'a great deal' or 'quite a lot' of confidence in the U.S. Supreme Court"); Devan Cole, *Supreme Court Approval Rating Declines Amid Controversy over Ethics and Transparency: Marquette Poll*, CNN (May 24, 2023, 5:01 AM), https://www.cnn.com/2023/05/24/politics/supreme-court-approval-rating-poll-ethics-marquette/index.html [https://perma.cc/D57D-W8PW].

154 *Statement of the Court* of CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

155 *See* Painter, *supra* note 10.

156 *Statement of the Court* of CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. 2023).

157 The Code itself reiterates that the Justices have been complying with financial disclosure laws binding on other federal judges. *Id.* at 8 ("For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment."). As discussed previously in this Article, there have been multiple instances in which some of the Justices' financial disclosure filings have been inaccurate. *See supra* Section II.D.

158 *See* Letter from Chief Justice John Roberts, Supreme Court, to Senator Richard J. Durbin, Chairman of the Senate Judiciary Committee 1 (Aug. 3, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/VPP8-72K9] ("The undersigned Justices today reaffirm and restate foundational ethics principles and practices to which they subscribe in carrying out their responsibilities as Members of the Supreme Court of the United States. . . . In 1991, Members of the Court voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations. Since then[,] Justices have followed the financial disclosure requirements and limitations on gifts, outside earned income, outside employment, and honoraria. . . . In regard to recusal, the Justices follow the same general principles and statutory standards as other federal judges, but the application of those principles can differ due to the unique institutional setting of the Court.").

159 Supreme Court Ethics, Recusal, and Transparency Act, H.R. 7647, 117th Cong. (2022).

160 Supreme Court Ethics, Recusal, and Transparency Act, S. 359, 118th Cong. (2023).

disclosure of funding of amicus briefs.[161] None of this legislation passed.[162]

Furthermore, the ethics lapses on the Court are part of a broader problem of people and organizations with massive amounts of money influencing all three branches of our government.[163] Expenditures that the Court protects as free speech, as seen in cases such as *Citizens United v. FEC*, come from some of the same people and organizations that seek to influence the Court itself with everything from amicus briefs to fishing trips and yacht excursions for Justices.[164]

Public confidence in the Court ultimately depends upon the Justices being perceived to be ethical, and there is only so much the public will overlook in ethics lapses simply because some people agree with the Court's rulings. Without ethics reform, other political actors, including Presidents, members of Congress, and governors, will increasingly attack the Court not only for its rulings but for the character of its Justices. We could reach a point where separation of powers—a doctrine now embraced with vigor by the Court in its jurisprudence—is interpreted by state or federal actors to mean they can ignore the Court's rulings. In other words, if the Justices can do whatever they want, other state actors may presume that they can do so as well.

III. EXECUTIVE POWER AND RELAXED ENFORCEMENT

A. *Reduced Enforcement of the Foreign Corrupt Practices Act and Foreign Agents Registration Act*

Foreign Corrupt Practices Act (FCPA)[165] enforcement has been scaled back by the Trump Administration. In February 2025, Attorney General Pam Bondi wrote Department staff a memo stating that "[t]he Criminal Division's Foreign Corrupt Practices Act Unit shall prioritize investigations related to foreign bribery that facilitates the criminal operations of [drug] Cartels and TCO's [(Transnational Criminal

161 *Id.*

162 *Id.*

163 *See supra* Section II.C (discussing the corrupting influence of campaign finance on the legislative and executive branches).

164 558 U.S. 310, 365–66 (2010).

165 15 U.S.C. § 78dd-1.

Organizations)] and shift focus away from investigations and cases that do not involve such a connection."[166]

Although drug cartels and transnational organized crime should be a law enforcement priority, that was not the purpose of FCPA. FCPA makes it a criminal offense for a U.S. based company, or any company listed on a U.S. securities exchange, to bribe foreign officials.[167] The statute was passed in the 1970s in response to scandals in which Lockheed Martin was caught paying millions of dollars in bribes to foreign government officials to get defense contracts.[168] The law has always been controversial because it arguably puts American businesses at a competitive disadvantage when they cannot pay bribes abroad.[169]

Yet, corrupt conduct abroad also harms American diplomatic relations and fosters mistrust of American business. For close to fifty years prior to 2025, the Department of Justice and other federal agencies, including the Securities Exchange Commission, took FCPA enforcement seriously.[170] American companies in some instances may have been disadvantaged because foreign competitors had more latitude to bribe foreign officials, but the FCPA also reduced the public perception that American corporations buy access to defense contracts, consumer markets, and supply chains for produce and raw materials by bribing foreign officials.

On February 10, 2025, President Trump issued an executive order stating that "overexpansive and unpredictable FCPA enforcement against American citizens and businesses—by our own Government—for routine business practices in other nations not only wastes limited prosecutorial resources that could be dedicated to preserving American freedoms, but actively harms American economic competitiveness and,

166 Memorandum from the Attorney General for All Department Employees Re: Total Elimination of Cartels and Transnational Criminal Organizations (Feb. 5, 2025), https://www.justice.gov/ag/media/1388546/dl?inline [https://perma.cc/QPZ7-WBPP].

167 15 U.S.C. § 78dd-1; *see* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012); *id.* at 934 (highlighting concern about alleged corrupt practices by Mobil Oil and Ashland Oil); *id.* at 949 (discussing hope that the FCPA would enhance the reputation of U.S. businesses abroad).

168 Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 112–13 (2007).

169 *Id.* at 115 ("Because the FCPA was unique to the United States, it was a continuing source of unrest among American businessmen whose ability to compete in many markets was threatened by a reluctance to engage in corruption. It was alleged that contracts with foreign governments worth billions of dollars were not made because of the inability of American firms to match the bribes offered by their foreign competitors.").

170 This also has been controversial. *See* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093 (2012).

therefore, national security."[171] It is not clear what the President meant by "routine business practices in other nations" but the executive order's implication is that if bribery is "routine" in other nations, American companies should not be disadvantaged by a law that criminalizes bribery abroad. President Trump's executive order put a hold on new FCPA investigations during a 180-day review period in which enforcement priorities would be reassessed, an indication that there could be reduced FCPA enforcement for the duration of the Trump Administration.[172]

Foreign Agents Registration Act (FARA)[173] enforcement may also be on the chopping block. FARA is not an anticorruption statute, although some foreign agents may be involved in bribery, illegal campaign contributions and other corrupt activities in the United States. The law was passed in 1938 to require disclosure of agents inside the United States engaged in political activity on behalf of Nazi Germany, Italy, Japan, the Soviet Union, and other countries.[174] Much of this political activity is protected by the First Amendment, but registration of agents working for foreign principals can be required and FARA does just that.[175]

Unregistered foreign agents violating FARA also may be inclined to engage in other illegal acts to further the interests of foreign principals. Relaxing enforcement of FARA thus may invite other abuses including illegal foreign campaign contributions, and bribes by foreign agents.

But the Trump administration has been hostile to FARA enforcement, perhaps because it ensnared Trump's campaign chairman and other allies during his first administration.[176] Attorney General Bondi in February 2025 disbanded the Justice Department's Foreign Influence Task Force and ordered that "[r]ecourse to criminal charges under the Foreign Agents Registration Act (FARA) and 18 U.S.C. Section 951 shall be limited to instances of alleged conduct similar to more traditional espionage by foreign government actors."[177]

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171 Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

172 *Id.*

173 22 U.S.C. §§ 611–21.

174 S. REP. NO. 1783, at 2 (1938); H.R. REP. NO. 153, at 1–3, 9–10, 13 (1935); 79 CONG. REC. 2668–69, 2671–73 (1935).

175 22 U.S.C. § 612.

176 David Laufman, *Paul Manafort Guilty Plea Highlights Increased Enforcement of Foreign Agents Registration Act*, LAWFARE (Sept. 14, 2018, 1:58 PM), https://www.lawfaremedia.org/article/paul-manafort-guilty-plea-highlights-increased-enforcement-foreign-agents-registration-act [https://perma.cc/KC35-SVTQ] ("The guilty plea former Trump campaign chairman Paul Manafort entered Friday marks a milestone in the Department of Justice's efforts to enforce the Foreign Agents Registration Act (FARA) more vigorously.").

177 Memorandum from the Attorney General for All Department Employees Re: General Policy Regarding Charging, Plea Negotiations, and Sentencing (Feb. 5, 2025), https://www.justice.gov/ag/media/1388541/dl?inline [https://perma.cc/TE96-MUWX].

FARA was never intended as an espionage statute (other criminal statutes address espionage[178]). The objective of FARA was to require agents working for foreign principals, both governments and private entities, to register with the Justice Department so their activities could be closely watched.[179] Espionage is only one of the risks involved with reduced FARA enforcement, and corruption of U.S. government officials may be another.

B. *Dropped Bribery Indictments*

Finally, in some instances even domestic bribery laws sometimes may not be enforced. In February 2025, the Justice Department moved to drop a 2024 bribery indictment against New York City Mayor Eric Adams,[180] after Adams signaled willingness to deploy New York City law enforcement resources to assist in the Trump administration's immigration crackdown.[181] If such a corrupt bargain[182] was agreed to—official action by Mayor Adams in return for a personal benefit in

178 *See, e.g.*, 18 U.S.C. § 793 ("[g]athering, transmitting, or losing defense information"); *id.* § 794 ("[g]athering or delivering defense information to aid a foreign government"); *id.* § 795 ("[p]hotographing and sketching defense installations"); *id.* § 796 ("[u]s[ing] aircraft for photographing defense installations"); *id.* § 797 ("publish[ing] and sell[ing] photographs of defense installations"); *id.* § 798 ("disclos[ing] classified information").

179 22 U.S.C. § 612.

180 *See* Press Release, U.S. Dep't of Just., New York City Mayor Eric Adams Charged with Bribery and Campaign Finance Offenses (Sept. 26, 2024), https://www.justice.gov/usao-sdny/pr/new-york-city-mayor-eric-adams-charged-bribery-and-campaign-finance-offenses [https://perma.cc/8ZKX-RQ78]; Nolle Prosequi, United States v. Adams, No. 24-cr-556 (S.D.N.Y. Feb. 14, 2025).

181 Memorandum from U.S. Dep't of Just. Off. of the Deputy Att'y Gen. to Acting U.S. Att'y for the S.D.N.Y, Re: Dismissal Without Prejudice of Prosecution of Mayor Eric Adams (Feb. 10, 2025), https://www.washingtonpost.com/documents/7e89a255-4fb3-44c4-a912-aaadd74c2473.pdf [https://perma.cc/3KF5-DJMD] ("You are directed, as authorized by the Attorney General, to dismiss the pending charges in United States v. Adams, No. 24 Cr. 556 (SDNY) as soon as is practicable . . . .").

182 *See* Letter from United States Attorney Danielle Sassoon to Attorney General Bondi 2 (Feb. 12, 2025), https://static01.nyt.com/newsgraphics/documenttools/24535586a908999e/3801d435-full.pdf [https://perma.cc/T4BF-4DTA] ("[Deputy Attorney General] Bove proposes dismissing the charges against Adams in return for his assistance in enforcing the federal immigration laws, analogizing to the prisoner exchange in which the United States freed notorious Russian arms dealer Victor Bout in return for an American prisoner in Russia. Such an exchange with Adams violates commonsense beliefs in the equal administration of justice, the Justice Manual, and the Rules of Professional Conduct."); *see also* Kaia Hubbard, *Raskin Says DOJ Made Deeply Corrupt Bargain in Move to Drop Charges Against NYC Mayor*, CBS NEWS (Feb. 16, 2025, 1:21 PM), https://www.cbsnews.com/news/jamie-raskin-justice-department-eric-adams-face-the-nation [https://perma.cc/K7YB-823S] ("Rep. Jamie Raskin, a Maryland Democrat, said Sunday that the Justice Department made a 'deeply corrupt bargain' with its move to drop charges against New York City Mayor Eric Adams.").

dismissal of his criminal case—it would arguably meet the common law definition of bribery described earlier in this Article, even if it would not be a violation of the federal bribery statute.[183]

C. *The Rise of Cryptocurrency*

Finally, cryptocurrency, an ideal vehicle for money laundering and payment of bribes,[184] is rapidly expanding in market capitalization on unregulated trading platforms with elected officials receiving campaign contributions from the industry instead of regulating it.[185] The FTX scandal during the Biden administration—and the Justice Department's decision to drop campaign finance charges against Sam Bankman-Fried[186]—was a warning sign of how bad things can get when campaign finance and cryptocurrency trading are intertwined. Bankman-Fried is seeking a pardon from President Trump.[187] The President has embraced cryptocurrency[188] and has introduced his own meme coin.[189] The World

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183 *See supra* Section I.A (comparing the common law definition of bribery at the time of the Founding with the statutory definition in 18 U.S.C. § 201).

184 TRANSPARENCY INT'L, CRYPTOCURRENCIES, CORRUPTION AND ORGANISED CRIME: IMPLICATIONS OF THE GROWING USE OF CRYPTOCURRENCIES IN ENABLING ILLICIT FINANCE AND CORRUPTION 6–12 (2023), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Cryptocurrencies-corruption-and-organised-crime_PR_28.03.2023.pdf [https://perma.cc/NFJ3-B56K].

185 *See* Jesse Hamilton, *Crypto Cash Fueled 53 Members of the Next U.S. Congress: The Fairshake PAC Flooded Money into Political Campaigns—In One Case $40 Million—And the New Faces Join an Already Hefty Group of Lawmaker Allies*, COINDESK (Dec. 3, 2024, 2:37 PM), https://www.coindesk.com/news-analysis/2024/12/02/crypto-cash-fueled-53-members-of-the-next-u-s-congress [https://web.archive.org/web/20250225133310/https://www.coindesk.com/news-analysis/2024/12/02/crypto-cash-fueled-53-members-of-the-next-u-s-congress].

186 Luc Cohen, *Bankman-Fried Campaign Finance Charge Dropped, Lessening Trial's Political Focus*, REUTERS (July 27, 2023, 3:13 PM), https://www.reuters.com/legal/bankman-fried-campaign-finance-charge-dropped-lessening-trials-political-focus-2023-07-27 (last visited Mar. 20, 2025).

187 Ben Weiss, *Sam Bankman-Fried Cozies up to Trump and Elon Musk as FTX Cofounder Reportedly Looks for Pardon: 'I Don't Think Anyone Was Guilty,'* FORTUNE (Feb. 20, 2025, 5:06 PM), https://fortune.com/crypto/2025/02/20/ftx-sam-bankman-fried-donald-trump-elon-musk-pardon [https://perma.cc/Y3GB-CC5P].

188 Exec. Order No. 14,178, 90 Fed. Reg. 8647 (Jan. 23, 2025) (stating that it is "the policy of my Administration to support the responsible growth and use of digital assets, blockchain technology, and related technologies across all sectors of the economy").

189 Lex Harvey, Auzinea Bacon & Matt Egan, *Donald and Melania Trump Launch a Pair of Meme Coins Ahead of Inauguration, Raising Serious Ethics Concerns*, CNN (Jan. 20, 2025, 8:27, AM), https://www.cnn.com/2025/01/20/tech/meme-coins-donald-trump-intl-hnk/index.html ("I believe it is very dangerous to have the people who are supposed to oversee regulating financial instruments investing in them at the same time,' Richard Painter, a law professor at the University of Minnesota, told CNN. 'There's no precedent for a head of state to launch a personal cryptocurrency.")

Liberty Financial crypto project is backed by the Trump family and one of its biggest investors, Justin Sun, a 34-year-old Chinese businessman, had SEC charges against him dropped in 2025.[190]

IV. WHY SHOULD WE CARE ABOUT BRIBERY?

Why does bribery matter? As observed in the introduction of this Article, bribery is pervasive across history and across modern societies. The United States—the largest economy in the world—has a bribery problem.

Most voters care about the economy, so we can start with that. There are two theories about how corruption impacts economic growth. The "grease the wheels" hypothesis suggests that corruption increases growth by allowing economic actors to circumvent inefficient government regulations, so bribing politicians and bureaucrats increases economic activity.[191] The opposing "sand the wheels" hypothesis suggests that corruption decreases economic growth by preventing efficient production and innovation.[192] Most empirical studies comparing different levels of corruption and economic growth in different countries support the latter hypothesis—that corruption slows long term economic growth.[193]

But there is more at stake than the economy. This Part briefly examines two areas where there is potentially dramatic social impact from corruption: climate change and war.

Climate change is a global problem. Solutions will require the world's largest economic powers, countries, such as the United States, China, Japan, and India, and economic groups of countries, such as the European Union, to cooperate in reducing carbon emissions.[194]

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190 Press Release, Sec. & Exch. Comm'n, SEC Announces Dismissal of Civil Enforcement Action Against Coinbase (Feb. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-47; Allison Morrow, *A Crypto Mogul Who Invested Millions into Trump Coins Is Getting a Reprieve on Civil Fraud Charges*, CNN (Feb. 28, 2025, 5:30 AM), https://www.cnn.com/2025/02/28/business/crypto-mogul-trump-coins-civil-fraud-charges/index.html [https://perma.cc/4TMK-ZN6Q].

191 Klaus Gründler and Niklas Potrafke, *Corruption and Economic Growth: New Empirical Evidence*, 60 EUR. J. POL. ECON. (2019) (describing these two theories and discussing data showing that real per capita GDP decreased by around 17% when the reversed perception of corruption index increased by one standard deviation).

192 *Id.*

193 *Id.* at 2; *see also* Jia Shao, Plamen Ch. Ivanov, Borids Podobnik & H. Eugene Stanley, *Quantitative Relations Between Corruption and Economic Factors*, 56 EUR. PHYSICAL J. B 157 (2007) (observing a negative correlation between level of corruption and long-term economic growth).

194 *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 U.N.T.S. 107.

Decreasing government corruption and the disproportionate political influence of the fossil fuel industry in one country will not solve the problem by itself but addressing these problems in a country with a large economy, particularly the world's largest economy in the United States, would help.

Fossil fuel companies spend massive amounts of money on American political campaigns and elections. In June 2023, the United States Senate Budget Committee convened a hearing on the problem in which the author of this Article provided oral and written testimony.[195]

According to Open Secrets, the fossil fuel industry spent $151,134,335 on federal lobbying in 2024.[196] In the 2024 election cycle alone many companies in the oil and gas industry spent tens of millions of dollars each on political campaigns. A single company, Koch Industries, spent $47,793,350 between 2023 and 2024.[197] Next, after Koch Industries, comes Crownquest Operating at $35,752,512, then Energy Transfer LP at $10,867,545, Chevron Corp. at $9,625,014, Energy Transfer Partners at $8,359,090, Occidental Petroleum at $7,588,349, American Petroleum Institute at $6,898,902, Continental Resources at $6,081,600, and so on.[198]

In addition to greasing the skids of politics, many companies excel at window dressing or "greenwashing," spending a small portion of their profits on green energy initiatives. Conoco Phillips even appointed as one of its directors—for more than $350,000 a year—a law professor who founded Harvard Law School's environmental law center.[199] The fossil

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195 *Dollars and Degrees: Investigating Fossil Fuel Dark Money's Systemic Threats to Climate and the Federal Budget: Hearing Before the S. Comm. on the Budget*, 118th Cong. 23–26 (2023), https://www.congress.gov/event/118th-congress/senate-event/334338/text [https://perma.cc/Q5PR-HDAD] (statements of Richard W. Painter & S. Walter Richey Professor of Corp. L., Univ. Minn. L. Sch.); *Testimony of Richard W. Painter Before the United States Senate*, COMM. ON BUDGET (June 21, 2023), https://www.budget.senate.gov/imo/media/doc/Mr.%20Richard%20Painter%20-%20Testimony%20-%20Senate%20Budget%20Committee1.pdf [https://perma.cc/LJ5Y-QFEC] (written statement of Richard W. Painter & S. Walter Richey Professor of Corp. L., Univ. Minn. L. Sch.).

196 *Industry Profile: Oil & Gas*, OPEN SECRETS, https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2024&id=e01 [https://perma.cc/4A3N-BD89].

197 *Oil & Gas Summary*, OPEN SECRETS, https://www.opensecrets.org/industries/indus.php?ind=e01 [https://perma.cc/AA27-GCG3] (showing data for the 2023–2024 election cycle).

198 *Id.*

199 Steven Mufson, *Fallout from Willow Oil Project Lands Hard on Harvard Climate Expert*, WASH. POST (Apr. 22, 2023), https://www.washingtonpost.com/climate-environment/2023/04/22/willow-oil-alaska-conocophillips-harvard [https://web.archive.org/web/20250508212339/https://www.washingtonpost.com/climate-environment/2023/04/22/willow-oil-alaska-conocophillips-harvard/].

fuel industry has also provided more than $675,000,000 in funding to twenty-seven top research universities.[200]

Law enforcement is not immune from industry influence, particularly in many states where attorneys general, and often judges, are elected not appointed. As law professor Eli Savit pointed out in 2017, the fossil fuel industry pours "unprecedented sums of money into AG races throughout the country. That spending has apparently paid off. . . . This regulatory capture of many AGs seems likely to impede environmental regulation for years to come."[201]

This Article will not seek to prove causal nexus—that this political spending impacts specific legislation, regulation, and enforcement actions. However, the industry has been spending a lot of money on elections and lobbying for a long time, and it probably would not do so if there was not a positive return on investment. Money in politics could be destroying our planet as well as our democracy.

A second policy area where corruption has a harmful impact on the quality of human life is war, or at least one contributing factor to war: the foreign arms trade.

The United States is by far the largest arms exporter in the world, followed by France and Russia.[202] Perhaps weapons manufacturers do not care who buys weapons so long as they pay. However, our government should care unless we assume that countries that can afford to spend billions of dollars on weapons are somehow morally superior because of their wealth and are likely to use those weapons for a good purpose. Almost nobody comes out and says it that way as a moral, philosophical proposition;[203] because it so obviously is not so. Such an argument—that

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200 BELLA KUMAR, DATA FOR PROGRESS, ACCOUNTABLE ALLIES: THE UNDUE INFLUENCE OF FOSSIL FUEL MONEY IN ACADEMIA (2023), https://www.filesforprogress.org/memos/accountable-allies-fossil-fuels.pdf [https://perma.cc/HM7V-LM33]. This data was assembled by a progressive research group, with which many Americans may disagree on substantive political issues, but the data appears to be accurate, and in any event, the influence of the fossil fuel industry in academia is common knowledge.

201 Eli Savit, *The New Front in the Clean Air Wars: Fossil-Fuel Influence over State Attorneys General—And How It Might Be Checked*, 115 MICH. L. REV. 839, 864 (2017).

202 PIETER D. WEZEMAN, KATARINA DJOKIC, MATHEW GEORGE, ZAIN HUSSAIN & SIEMON T. WEZEMAN, STOCKHOLM INT'L PEACE RSCH. INST., TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2023 (2024), https://www.sipri.org/sites/default/files/2024-03/fs_2403_at_2023.pdf [https://perma.cc/LS9J-5KP8] (reporting that the United States had 42% of global arms exports and France and Russia each 11%).

203 *But see* Duncan MacIntosh, *The Sniper and the Psychopath: A Parable in Defense of the Weapons Industry*, *in* ETHICAL DILEMMAS IN THE GLOBAL DEFENSE INDUSTRY 47, 47–48 (Daniel Schoeni & Tobias Vestner eds. 2023). Lockheed Martin did not fund any part of this published volum,e although Lockheed Martin supported a 2015 conference connected to the volume, and a Lockheed Martin executive wrote a short essay at the beginning of the volume. The author of this

a nation's wealth translates into moral superiority—is absurd and contradicted by history (consider the arms buildup in Germany and Japan in the 1930s). Yet defense contractors still will argue to the public and the U.S. government that countries paying for their weapons use them for good.

The defense industry also spends millions of dollars on campaign finance and lobbying to convince Congress and the Executive Branch not only to buy more weapons for our own arsenal but also to allow and facilitate arms sales abroad.[204] The defense sector contributed roughly $50,000,000 to political candidates and committees during the 2020 campaign cycle.[205] Lockheed Martin alone spent $4,470,698 in political contributions from 2023 through 2024, split relatively evenly between the two major political parties.[206]

On top of this is bribery of foreign governments. In the 1970s, Lockheed Martin was caught paying millions of dollars in bribes to politicians, princes, and other influential persons in Holland, Japan, Italy, Hong Kong, and Saudi Arabia, among others.[207] The Lockheed bribery scandal played a key role in Congress passing the Foreign Corrupt Practices Act of 1977,[208] which prohibits American corporations—as well as foreign corporations whose shares are publicly traded in the United States—from bribing foreign government officials and similar corrupt practices. Enforcement is complex, particularly in the defense industry where contractors in multiple countries may be involved. U.S. defense contracts often include a provision that binds not only the U.S.-based party but also any non-U.S. contractor to the FCPA, theoretically

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Article also contributed an essay to the volume, critical of defense contractor ethics. *See* Richard W. Painter, *Fiduciary Duties of Officers and Directors of Military Contactors: Shareholder Primacy or Loyalty to the United States?*, *in* ETHICAL DILEMMAS IN THE GLOBAL DEFENSE INDUSTRY, *supra*, at 79. Other essays in the volume were also critical of the defense industry. MacIntosh's essay, however, is wrong in its assertions about the moral superiority of wealthy arms-buying nations, and he did not mention specific examples that contradict his proposition, such as Saudi Arabia and other arms buyers in the Middle East.

204 Dan Auble, *Capitalizing on Conflict: How Defense Contractors and Foreign Nations Lobby for Arms Sales*, OPEN SECRETS (Feb. 25, 2021), https://www.opensecrets.org/news/reports/capitalizing-on-conflict/defense-contractors [https://web.archive.org/web/20240515144807/https://www.opensecrets.org/news/reports/capitalizing-on-conflict/defense-contractors].

205 *Defense Sector Summary*, OPEN SECRETS, https://www.opensecrets.org/industries/indus?cycle=2020&ind=D [https://perma.cc/3HQM-FSM2] (showing data for the 2020 election cycle).

206 *Id.*

207 Frank Badua, *Laying Down the Law on Lockheed: How an Aviation and Defense Giant Inspired the Promulgation of the Foreign Corrupt Practices Act of 1977*, 42 ACCT. HISTORIANS J. 105 (2015).

208 15 U.S.C. § 78dd-1 (1977).

facilitating enforcement of the FCPA in extraterritorial contexts.[209] Actual enforcement can be difficult, however, because federal prosecutors may have limited access to information about transactions outside the United States.

But even without defense contractors paying off foreign government officials (which may still be happening despite the FCPA), what about our corruption problem here at home? Defense industry political spending in the United States can be instrumental in getting the necessary approvals to get arms deals done. If it were not effective, the defense industry probably would not be spending so much money in this way. There are arguable policy reasons for foreign arms sales, besides money, but it is difficult to be confident that arms export decisions are made on the merits when there is so much money involved.

With a variety of arguments—for example, that an arms sale is important for the security of the United States and its allies—military contractors convince the U.S. government to approve the sale. Often this involves persuading both Congress and the Executive Branch, although Congress frequently delegates details of the approval process to the President.[210]

Now let us look at the specifics. During the Trump administration, Jared Kushner, the President's son-in-law, led the negotiation of this arms sale to Saudi Arabia, which included a missile defense system sold by Lockheed Martin.[211] Kushner personally lobbied the Chief Executive Officer of Lockheed Martin to lower the price for the Saudis, and Lockheed apparently agreed.[212]

After Trump left office, the Saudi sovereign wealth fund loaned Kushner family businesses two billion dollars in 2021, against the

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209 *See* Jaemin Lee & I.Y. Joesph Cho, *Contracting Out National Sovereignty?—FCPA Jurisdiction Clauses in Defense Contracts and a Proposal for a State-to-State Approach Alternative*, 53 CORNELL INT'L L.J. 643 (2020) (discussing the risks that these provisions usurp the jurisdictional sovereignty of the foreign states to which non-U.S. contractors belong, and proposed alternatives).

210 In 1936, the Supreme Court, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), ruled that Congress could delegate control over foreign arms sales to the President. The Curtiss-Wright Export Corporation sold fighter planes and bombers to Bolivia during the Chaco War with Paraguay and Bolivia in violation of a proclamation issued by President Franklin D. Roosevelt banning U.S. weapons manufacturers from aiding either side of the war. Curtiss-Wright argued that Congress had violated the nondelegation doctrine when it passed a law allowing the President to make this decision. But the Court ruled that in foreign affairs "the President alone has the power to speak or listen as a representative of the nation." *Id.* at 319. The delegation to the executive branch of the approval process for foreign arms sales was therefore proper. *Id.*

211 David Reid, *Kushner Reportedly Called Up Lockheed Martin CEO to Cut Cost of Saudi Arms Deal*, CNBC (May 19, 2017, 8:54 AM), https://www.cnbc.com/2017/05/19/kushner-called-up-lockheed-martin-ceo-over-saudi-arms-deal-says-report.html [https://perma.cc/5ZAU-BAK4].

212 *Id.*

recommendation of its financial advisors but at the urging of the Crown Prince.[213]

Yes, this investment looked like a kickback. But to prosecute anyone under the bribery statute, the government would have to establish a quid pro quo at the time of the arms deal or a gratuity afterward, that the two-billion-dollar investment was a reward for Kushner arranging the arms deal.[214] To date, evidence that would support a bribery prosecution has not come to light.

Was Lockheed Martin involved in Saudi Arabia rewarding Kushner after the fact? Probably not, but by acceding to Kushner's request for a price cut on the arms deal, Lockheed might have incentivized the Saudis to return the favor to Kushner a few years later after he had left the federal government.

Bribery is hard to prove. As discussed in an earlier Part of this Article, that is why the Constitution includes the Foreign Emoluments Clause to at least prevent foreign governments from buying off American officials.[215] Yet as also pointed out earlier, the Foreign Emoluments Clause is difficult to enforce, and in any event technically did not apply to Kushner's investment from the Saudi sovereign wealth fund because Kushner had left the White House by the time he got the money.[216] A clever workaround perhaps, but arguably the Saudi investment amounted to foreign emoluments paid to a former federal officer on the deferred compensation plan.

Other foreign arms sales are not only authorized by the U.S. government but also subsidized by the U.S. taxpayer.[217] The United States, for example, has provided military aid to both Ukraine and Israel, both presently at war after being attacked, Ukraine by Russia and Israel

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213 David D. Kirkpatrick & Kate Kelly, *Before Giving Billions to Jared Kushner, Saudi Investment Fund Had Big Doubts*, N.Y. TIMES (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/jared-kushner-saudi-investment-fund.html?smid=tw-share [https://web.archive.org/web/20250114222858/https://www.nytimes.com/2022/04/10/us/jared-kushner-saudi-investment-fund.html]. A panel of advisors to the Saudi sovereign wealth fund had recommended against the investment "[b]ut days later the full board of the $620 billion Public Investment Fund—led by Crown Prince Mohammed bin Salman, Saudi Arabia's de facto ruler and a beneficiary of Mr. Kushner's support when he worked as a White House adviser—overruled the panel." *Id.*

214 18 U.S.C. § 201 (providing that the crime of bribery occurs whenever anyone "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act").

215 *See supra* Section I.B (discussing the foreign Emoluments Clause).

216 The Emoluments Clause, U.S. CONST., art. I, § 9, cl. 8, only refers to persons currently holding federal office, not former officer holders.

217 SOFIA PLAGAKIS & WILLIAM F. BURKHART, CONG. RSCH. SERV. R48195, FACT SHEET: CONGRESSIONAL VOTES IN RESPONSE TO THE RUSSIA-UKRAINE WAR (2024); TRAVIS A. FERRELL & CLAYTON M. LEVY, CONG. RSCH. SERV. R48289, FACT SHEET: CONGRESSIONAL VOTES RELATING TO THE ISRAEL-HAMAS CONFLICT (2024).

by Hamas. It is problematic if the defense industry profits from these wars and has a louder voice because of political spending and lobbying.

Circling back to the defense contractors, why does not the Defense Department insist that defense contractors that do business with our government in their corporate charters and bylaws commit themselves to our national security, and to our long-term foreign policy goal of preserving the peace, as their business priority? Profits should come second.[218] But our government does not demand from defense contractors such undivided loyalty to the United States, nor commitment to moral principles other than the almighty dollar.[219] Why? That may have something to do with political spending by the defense industry that helps the Commander in Chief, and Members of Congress, obtain office in the first place.

CONCLUSION

This Article lays out the problem of bribery in America, not the solution. Solving this problem and restoring the Founders' understanding of what constitutes bribery is essential for our republic to succeed. Probably the most important reason we should care about bribery is that corruption undermines public confidence in our form of government, not just the people who run it. Voters who believe representative democracy is corrupt will be tempted to try something else which is likely to be far worse.

Possible reforms include: (1) a constitutional amendment providing that campaign contributions and expenditures on electioneering communications funded by corporations, unions, and other entities are subject to reasonable regulation by Congress (overturning *Citizens United v. FEC*[220]); (2) a constitutional amendment providing that no public official including the President is immune from prosecution for violating the criminal laws of the United States (overturning *Trump v. United States*[221]); (3) Congress amending corruption laws to explicitly prohibit a quid pro quo exchange of an official meeting for a thing of value (overturning *United States v. McDonnell*[222]); and prohibiting state and local officials from receiving gratuities as a reward for official acts

218 Richard W. Painter, *Fiduciary Duties Officers and Directors of Military Contractors: Shareholder Primacy or Loyalty to the United States?*, *in* ETHICAL DILEMMAS IN THE GLOBAL DEFENSE INDUSTRY, *supra* note 203.

219 *Id.*

220 558 U.S. 310 (2010).

221 603 U.S. 593 (2024).

222 579 U.S. 550 (2016).

(overturning *United States v. Snyder*[223]). Congress could also consider broadening the theft of honest services statute to include not just bribery, within the statutory definition, but broader concepts of corruption such as undisclosed conflicts of interest and self-dealing (overturning *United States v. Skilling*[224]); (4) Congress passing legislation to assure enforcement of the Emoluments Clause by among other things giving Members of Congress standing to sue for injunctive relief if the President, Vice President or official appointed by the President is violating it. If criminal prosecution of theft of honest services is too difficult or is impeded by constitutional issues of overbreadth as the *Skilling* Court feared, Congress should consider civil penalties for corruption technically falling outside the scope of the criminal bribery statute. Civil remedies, while not as much of a deterrent as criminal prosecution, are better than allowing corruption to go unaddressed.

Apart from prohibitions on corruption, another tool against bribery is financial disclosure. The financial disclosure provisions of the Ethics in Government Act of 1978[225] require the President, Vice President, and other senior executive branch officials to file a financial disclosure report every year.[226] Members of Congress are also required to file financial disclosure reports.[227] As we know, however, some filers, including Supreme Court Justices, sometimes omit important information that is required to be disclosed.[228] Intentional failure to disclose gifts and other information constitutes a false statement to the government and should be prosecuted as such.[229]

Another problem is that these financial disclosure reports are incomplete because the regulations do not require disclosure of transactions at the entity level even if an office holder owns all the stock of a corporation, LLC, or similar entity.[230] If someone with business before the federal government, or even a foreign government, pays money or loans money to an entity owned by a federal officer, that transaction does not show up on the financial disclosure report. It's impossible to know if the official is being paid off even if disclosure laws

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223 603 U.S. 1 (2024).

224 561 U.S. 358 (2010).

225 Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

226 5 U.S.C. § 101(f)(1)–(3).

227 5 U.S.C. § 101(f)(9)–(10).

228 *See supra* Section I.D (discussing Supreme Court Justices' failure to disclose some gifts); *see also* Painter, *supra* note 10, at 360 (discussing the same in more detail).

229 18 U.S.C. § 1001 (providing criminal penalties for knowing false statements to the federal government in the course of its official business).

230 *See supra* note 57 and accompanying text (discussing instructions for OGE Form 278, Schedule A, Assets and Liabilities).

and regulations are technically complied with. Congress should fix that gap in the disclosure regime.[231]

Finally, we confront the Supreme Court's impact on bribery law—as broadly defined at the time of constitutional framing. The Court has narrowed the reach of bribery statutes and other anticorruption laws, immunized the President from criminal prosecution for official acts, immunized the campaign finance system from regulation by Congress, and then immunized itself from ethics laws and other regulation by Congress.[232]

This author has addressed the broader problems with the Supreme Court elsewhere with proposed remedies including installing an inspector general at the Court.[233] Lifetime tenure for Justices makes accountability even more important than in other branches of government, and at present there appears to be no accountability short of the very unlikely remedy of impeachment. Justice Ketanji Brown Jackson has acknowledged the need for a binding and enforceable ethics code for the Court.[234]

A republic cannot survive over the long term if one branch of government, whether the Supreme Court or the executive, can do whatever it wants with no check from the other branches of government and no personal accountability.[235]

Returning to the opening theme of this Article, the fight against bribery is an ancient one. Many civilizations have undergone it, and indeed there may be none that has not. There also may be no such thing as winning this fight entirely, but at present, the United States appears to be losing ground. Americans who care about the future of our country should realize that fighting bribery—as broadly defined—is an urgent priority and act.

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231 *See Legislative Proposals for Fostering Transparency: Hearing Before the Comm. on Oversight and Gov't Reform*, *supra* note 56, at 17–18 (statement of Richard W. Painter); *Testimony of Richard W. Painter Before the Committee on Oversight and Government Reform*, U.S. H.R. (Mar. 23, 2017), https://oversight.house.gov/wp-content/uploads/2017/03/Painter-UMN-Statement-Legislative-Proposals-for-Transparency-3-23.pdf [https://perma.cc/4ZAR-TME6] (written statement of Richard W. Painter) (discussing failure of the financial disclosure rules to include disclosure of payments at the entity level).

232 *See supra* Sections II.B–D (discussing the Court's immunity decision in *Trump v. United States*, the Court's decisions on campaign finance, and the Court's approach to its own ethics rules).

233 Painter, *supra* note 10, at 398–97.

234 Melissa Quinn, *Justice Ketanji Brown Jackson Says She's Open to Enforceable Ethics Code for Supreme Court*, CBS NEWS (Sept. 1, 2024, 10:14 AM), https://www.cbsnews.com/news/ketanji-brown-jackson-supreme-court-ethics-code [https://perma.cc/2BK2-3UHQ].

235 *But see* Trump v. United States, 603 U.S. 593 (2024) (holding the President presumptively immune from criminal prosecution for official acts).