

NOTE

The Need for a Clear Statement After “Bridgegate”: Combatting SCOTUS’s Narrowing View of Corruption with an “Abuse of Functions” Offense

Sloan Renfro*

INTRODUCTION	198
I. PUBLIC CRIMINAL OFFENSES: BENCHMARKING THE U.S. LEGAL REGIME AGAINST THE UNITED NATIONS CONVENTION AGAINST CORRUPTION	199
A. <i>Benchmarking Bribery</i>	201
1. UNCAC Article 15: Domestic Bribery	201
2. UNCAC Article 16: Foreign Bribery	203
B. <i>Benchmarking Embezzlement</i>	204
C. <i>Benchmarking Abuses of Power</i>	205
II. JUDICIAL INTERPRETATIONS: A NARROWING EXERCISE CREATING A GLARING GAP IN CURRENT U.S. APPROACHES TO COMBATTING PUBLIC CORRUPTION.	209
A. <i>The Court’s Two Overarching Concerns in Broad Corruption Constructions</i>	210
B. <i>Judicial Interpretations in Key Corruption Cases</i>	211
1. <i>McNally v. United States</i> (1987)	212
2. <i>Cleveland v. United States</i> (2000)	213
3. <i>Skilling v. United States</i> (2010)	214
4. <i>McDonnell v. United States</i> (2016)	214
5. <i>Kelly v. United States</i> (2020)	215
C. <i>The Glaring Gap in Current U.S. Approaches</i>	216
III. PROPOSED SOLUTION: A CLEAR STATEMENT FROM CONGRESS IN THE FORM OF AN “ABUSE OF FUNCTIONS” FEDERAL CRIMINAL OFFENSE	220
A. <i>Statement of Purpose: Broadening the U.S. Criminal Legal Definition of Corruption</i>	221
B. <i>“Abuse of Functions” Offense</i>	222
1. Proposed Elements of Offense	224
2. Preemption	228
C. <i>Application of “Abuse of Functions” to Recent Corruption Cases</i>	229
CONCLUSION	230

* Thank you to Professor Sean Hagan for his invaluable input, guidance, and support throughout writing this Note. © 2022, Sloan Renfro.

INTRODUCTION

Consider the following:

A wealthy businessman looking to develop an experimental health product pays over \$175,000 in gifts to his state's highest-ranking official in exchange for meetings and social gatherings with other high-ranking officials about acquiring coveted research studies for his product.

High-ranking officials of a state probation agency conspire to cater to hiring requests from members of the state legislature with the hope of obtaining favorable legislation for their agency. They do so by circumventing state hiring protocols and using an elaborate scheme to inflate candidate ranking scores to secure positions in the agency for pre-selected candidates.

A senior state official's right-hand aid coordinates with the local transportation agency to inflict retribution on a political foe by denying the foe's constituents access to a key bridge for several days under the guise of a government program. It causes complete chaos, as people get stuck in traffic gridlock for hours on their way to work and school.

What do these public scandals have in common? They all occurred in the United States, and none of them resulted in criminal convictions for corruption.¹

Over the past forty years, the Supreme Court has consistently narrowed the federal judicial interpretation of criminal corruption, in direct conflict with the broadened understanding of the term in the international legal community, the U.S. Congress, and the general public.² The Court's latest decision in this area, *Kelly v. United States*, which involves an event commonly known as "Bridgegate,"³ reaffirms its narrow view of what constitutes public corruption and lets evidently corrupt public officials off the hook for abuses of their power and official functions.⁴

Public corruption is traditionally defined as "the abuse of an entrusted power for private gain."⁵ Over the past several years, anti-corruption scholars have debated whether recent federal court decisions, as well as current U.S. federal laws in combination with state laws, provide effective legal tools to combat public corruption at federal, state, and local levels.⁶ This Note contributes to

1. See (in order of appearance above) *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *United States v. Tavares*, 844 F.3d 46 (1st Cir. 2016); *Kelly v. United States*, 140 S. Ct. 1565 (2020) (involving the event known as "Bridgegate").

2. See detailed discussion of the Court's anti-corruption jurisprudence *infra* Part II.B.

3. See discussion of this case *infra* Part II.B.

4. *Kelly*, 140 S. Ct. at 1568–69 (2020).

5. SUSAN ROSE-ACKERMAN & BONNIE PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 9 (2nd ed. 2016) (citing Transparency International's definition of corruption).

6. See, e.g., George D. Brown, *Defending Bridgegate*, 77 WASH. & LEE L. REV. ONLINE 141 (2020); Nicole M. Argentieri & Matt Cowan, *Federal Public Corruption Prosecution After 'Bridgegate'*, N.Y.L.J. (June 16, 2020), <https://www.law.com/newyorklawjournal/2020/06/16/federal-public-corruption-prosecution-after-bridgegate/?slreturn=20201009181827>.

this debate by arguing that—because of the Court’s narrow interpretation of criminal corruption offenses—current U.S. laws, when benchmarked against international standards, do not sufficiently guard against certain internationally recognized forms of public corruption that Congress has intended to criminalize. Specifically, this Note contends that the Court has made it nearly impossible to prosecute officials who abuse their power without *quid pro quo* bribery, theft, or a fraudulent scheme to obtain money or property for personal advantage.⁷ It further argues that a new abuse of functions federal criminal offense is required to address the gap in U.S. anti-corruption laws created by the Court’s jurisprudence, which currently fails to punish many of the more sophisticated forms of political corruption witnessed today.⁸

Part I of this Note defines public corruption and identifies internationally recognized public criminal offenses under the United Nations Convention Against Corruption (“UNCAC”). The Note then benchmarks the several U.S. criminal offenses against the UNCAC criminal offenses, revealing that because Congress has not recognized an “abuse of functions” offense, a legal gap could emerge, allowing conduct the UNCAC seeks to criminalize to go unpunished in the United States. Part II argues that in narrowly construing these federal corruption statutes, the Court turned the risk of a legal gap into reality, hindering U.S. efforts to criminalize public corruption, particularly political corruption, at the state and local levels. It then details this gap’s problematic impact on the broader political process. Part III proposes that the United States remedy this gap in the form of an abuse of functions federal criminal offense. It does so by considering the emerging standard reflected in the principles of UNCAC Article 19, the United Kingdom’s recent Law Commission (“Law Commission”) proposal to establish a new statutory offense of corruption in public office, and certain U.S. state laws. Part IV concludes.

I. PUBLIC CRIMINAL OFFENSES: BENCHMARKING THE U.S. LEGAL REGIME AGAINST THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

This Part identifies the internationally agreed-upon understandings of corruption reflected in the UNCAC. It discusses the UNCAC’s broad understanding of public corruption and benchmarks U.S. federal statutes against the UNCAC’s model corruption legislation. This benchmarking reveals that the United States’ complex approach to criminalizing public corruption creates the possibility of a legal gap in combatting behavior the UNCAC intends to address—specifically abuses of functions for undue political advantage on the state and local levels.⁹

7. See, e.g., Leah Litman, *Prosecuting political corruption cases like Bridgegate is nearly impossible*; WASH. POST (May 8, 2020), <https://perma.cc/HU79-EXD9>.

8. See discussion *infra* Part II.

9. See discussion *infra* Part I.C.

The UNCAC is the only legally binding,¹⁰ international anti-corruption tool ratified by the vast majority of United Nations Member States (“Member States”), including the United States.¹¹ Its mandatory nature makes it a unique tool for developing a global response to corruption.¹² This Note focuses on UNCAC Chapter Three, which highlights intentional acts that Member States either must criminalize or must consider criminalizing under national legislation or other measures.¹³ It generally recognizes three types of public corruption: bribery, embezzlement, and abuse of power.¹⁴ Although this Note focuses on the public sector, the UNCAC also criminalizes private corruption.¹⁵

When ratifying the UNCAC, the United States “reserved the right to assume obligations under the [UNCAC] in a manner consistent with its fundamental principles of federalism.”¹⁶ Therefore, both federal and state criminal laws must be considered in relation to the conduct addressed in the UNCAC. Although the United States does not have a general federal corruption statute, several federal statutes criminalize corrupt acts in both the public and private sectors.¹⁷ Many of these statutes reach state and local corruption through jurisdictional hooks created by Constitutional provisions,¹⁸ as discussed further below. The states also have corruption laws, though these vary greatly in their interpretations and scope.¹⁹ Nevertheless, benchmarking the U.S. federal statutes against the UNCAC Articles reveals that this federal-state statutory regime leaves open the possibility for gaps in prosecuting public officials’ abuses of power, particularly in the political sphere.

10. This Note uses the word “binding” because the United States has ratified this multilateral treaty; it therefore has become part of federal and international law and is binding between nation parties. See *About Treaties*, SENATE.GOV, <https://www.senate.gov/about/powers-procedures/treaties.htm>.

11. U.N. Convention Against Corruption, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005); United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, <https://www.unodc.org/unodc/en/treaties/CAC/> (noting the UNCAC’s mandatory nature for those countries that have ratified the treaty).

12. U.N. Convention Against Corruption, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005). The UNCAC addresses five main areas: preventative measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.

13. *Id.* at Ch. III.

14. *Id.*

15. See *id.* at arts. 21–23.

16. U.N. Office on Drugs and Crime, *Country Review Report of the United States of America: Review by Sweden and the Former Yugoslav Republic of the implementation by the United States of America of Articles 15–42 of Chapter III. “Criminalization and law enforcement” and Articles 44–50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the Review Cycle 2010–2015*, at 4, 23 (Nov. 19, 2013) [hereinafter *UNCAC U.S. Country Review*], https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_11_19_USA_Final_Country_Report.pdf.

17. See discussion *infra* Parts I.A, I.B, I.C.

18. Brown, *supra* note 6, at 173–75 (internal citations omitted).

19. For a survey of state corruption statutes, see Mark Quiner, *Ethics and Public Corruption Laws: Penalties*, NAT’L CONF. OF ST. LEGISLATURES (Sept. 15, 2021), <https://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx>.

A. *Benchmarking Bribery*

UNCAC Articles 15 and 16 address bribery of national public officials, bribery of foreign public officials, and officials of public international organizations. Under Article 15, each Member State is required to adopt legislative and other measures as may be necessary to establish, as criminal offenses, when committed intentionally:

The promise, offering or giving, to a public official . . . [or] [t]he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.²⁰

Under Article 16, each Member State is required to adopt legal and other measures necessary to prevent the “promise, offering, or giving” to a foreign public official or an official of a public international organization:

[O]f an undue advantage . . . in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.²¹

In the United States, several federal statutes criminalize domestic and foreign bribery and kickbacks, as well as extortion, sufficiently covering the required elements of UNCAC Articles 15 and 16.²²

1. UNCAC Article 15: Domestic Bribery

In relation to Article 15, the federal bribery statute²³ states that whoever, “directly or indirectly, corruptly gives, offers, or promises anything of value to any public official . . . to influence any official act”; or “to influence such public official . . . to commit or aid in committing . . . any fraud”; or “to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or person” shall face fines or imprisonment or both.²⁴ It also prohibits an official from “directly or indirectly” corruptly demanding, seeking, receiving, or agreeing to receive or accept anything of value “personally or for any other person or entity” in return for influence or inducement in committing these acts.²⁵ The public contracts anti-kickback statute²⁶ criminalizes kickbacks in federal public

20. U.N. Convention Against Corruption art. 15, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

21. *Id.* at art. 16.

22. See *UNCAC U.S. Country Review*, *supra* note 16, at 37, 41–42 (indicating that the four required elements of Art. 15(a) are: “a public official; giving, offering, or promising anything of value; directly or indirectly; with intention; any other person or entity; to do or omit to do any act in violation of the lawful duty”).

23. Bribery of public officials and witnesses, 18 U.S.C. § 201.

24. 18 U.S.C. § 201(b).

25. *Id.*

26. Prohibited conduct, 41 U.S.C. § 8702 (formerly codified as 41 U.S.C. § 53).

contracting.²⁷ Finally, 18 U.S.C. §§ 872–73 and 875–77 address extortion by federal officials and various forms of blackmail.²⁸ All of these statutory offenses require evidence of a quid pro quo²⁹ or an intent to act for personal financial or proprietary gain.³⁰

Congress passed several additional federal statutes to reach state and local public corruption, including bribery and extortion, using constitutional provisions to establish jurisdiction. First, the wire, mail and honest services fraud statutes³¹ criminalize several forms of fraud, including bribery and kickbacks, as defined by the federal statutes. They do so by using the Commerce Clause to reach mail and wire or radio communications, which encompass almost all forms of interstate communication.³² To secure a mail or wire fraud conviction, prosecutors must prove four elements: (1) a scheme to defraud involving a material deception; (2) foreseeable use of the mail, a private commercial carrier, or a wire or radio communication in furtherance of said scheme; and (3) an intent to defraud another of (4) money, property, or the intangible right to honest services.³³ Congress added the “honest services” language to protect an individual’s intangible right to honest services from public officials, as discussed *infra* Part II, but the Court has since narrowed the federal government’s ability to prosecute this type of corrupt, fraudulent conduct.³⁴

Second, 18 U.S.C. § 666 reaches state and local corruption by criminalizing theft or bribery concerning programs receiving federal funds in excess of \$10,000 a year.³⁵ Specifically, it targets any “agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof” who:

27. *Id.*; Definitions, 41 U.S.C. § 8701 (defining the term “kickback” as “any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract”).

28. 18 U.S.C. §§ 872–73, 875–77.

29. Latin for “something for something.” An exchange of acts or things of approximately equal value. *Quid Pro Quo*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/quid_pro_quo (last visited Jan. 1, 2020).

30. *See, e.g.*, 18 U.S.C. § 873 (defining the standard for blackmail as “[w]hoever, under a threat of informing, or as consideration for not informing, against any violation of any law of the United States, *demands or receives any money or other valuable thing . . .*”) (emphasis added).

31. 18 U.S.C. §§ 1341, 1343, 1346.

32. *See* MICHAEL FOSTER, CONG. RSCH. SERV., R45479, BRIBERY, KICKBACKS, AND SELF-DEALING: AN OVERVIEW OF HONEST SERVICES FRAUD AND ISSUES FOR CONGRESS 2–3 (2020) (noting that because the two statutes essentially mirror each other (save for the medium used in connection with the offense), interpretations and analyses of one statute will typically apply to the other).

33. *Id.* at 3; *see* *United States v. Faulkenberry*, 614 F.3d 573, 581–84 (6th Cir. 2010) (discussing elements); *see also* *Pereira v. United States*, 347 U.S. 1, 8–9 (1954) (requiring that use of the mails be “reasonably . . . foreseen”); *Neder v. United States*, 527 U.S. 1, 25 (holding that materiality is an element).

34. *See* 18 U.S.C. § 1346; *McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346, *as recognized* in *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (citing *Skilling v. United States*, 561 U.S. 358 (2010)).

35. 18 U.S.C. § 666.

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that . . . is valued at \$5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) *corruptly solicits or demands* for the benefit of any person, or accepts or agrees to accept, *anything of value* from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.³⁶

This statute is therefore a powerful tool to reach state and local governments for financially focused public corruption.

Third, the Racketeer Influenced and Corrupt Organizations Act (“RICO Act”) uses the mail and wire fraud statutes as predicate crimes to penalize criminal organizations at federal, state, and local levels.³⁷

Fourth, 18 U.S.C. § 371 criminalizes conspiracy to commit an offense against or defraud the United States, which could include bribery.³⁸

Fifth, the Travel Act,³⁹ 18 U.S.C. § 1952, forbids the use of the U.S. mail, or interstate or foreign travel, for the purpose of engaging in certain criminal acts, including bribery and extortion.⁴⁰

Finally, the Hobbs Act, 18 U.S.C. § 1951, reaches extortion at federal, state, and local levels via the Commerce Clause by penalizing “[w]hoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do.”⁴¹

2. UNCAC Article 16: Foreign Bribery

The Foreign Corrupt Practices Act (“FCPA”) satisfies UNCAC Article 16 in that it incorporates the elements of foreign bribery by prohibiting giving anything of value for an improper advantage.⁴² It specifically prohibits:

[T]he willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or

36. *Id.* (emphasis added); see *Sabri v. United States*, 541 U.S. 600, 605–07 (2004) (indicating that statute prohibiting bribery intended to influence an organization that received federal funds in excess of \$10,000 in a one-year period was a law necessary and proper to execution of Congress’s spending power).

37. 18 U.S.C. § 1961; see generally Racketeer Influenced and Corrupt Organizations Act (“RICO Act”), 18 U.S.C. §§ 1961–68.

38. 18 U.S.C. § 371.

39. This refers to the statute titled, “Interstate and foreign travel or transportation in aid of racketeering enterprises.”

40. Interstate and foreign travel or transportation in aid of the racketeering enterprises, 18 U.S.C. § 1952.

41. Interference with commerce by threats or violence, 18 U.S.C. § 1951; see Timothy P. O’Toole, *The Honest-Services Surplus: Why There’s No Need (or Place) for a Federal Law Prohibiting “Criminal-esque” Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49, 61 (2010).

42. U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78(m), 78(dd-1), 78(ff).

authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.⁴³

Notably, the FCPA's "improper advantage" language can be used to capture foreign public corruption broadly, but the FCPA does not apply to domestic public corruption, creating the potential that certain behavior may be punishable if committed abroad but not punishable if committed domestically.⁴⁴

B. Benchmarking Embezzlement

UNCAC Article 17 addresses embezzlement, misappropriation, or other diversions of property by a public official.⁴⁵ It states that each Member State must adopt legislative and other measures to establish as criminal offenses, when committed intentionally, "the embezzlement, misappropriation, or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position."⁴⁶

U.S. laws sufficiently incorporate the prescribed elements of UNCAC Article 17. The main anti-embezzlement statute applicable to federal officials, 18 U.S.C. § 654, criminalizes embezzlement or wrongful conversion of property in the execution of their offices or employment, or under color or claim of the authority of their positions.⁴⁷ Other embezzlement statutes include 18 U.S.C. § 641 (embezzlement of public money, property, or records by any person),⁴⁸ 18 U.S.C. § 645

43. U.S. Dep't of Just., *Foreign Corrupt Practices Act: An Overview*, JUSTICE.GOV (last updated Feb. 3, 2017), <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

44. See *United States v. Seng*, 934 F.3d 110, 129–38 (2d Cir. 2019) (holding that the *McDonnell* holding narrowly defining an "official act" for bribery under 18 U.S.C. § 201(b)(1), the domestic bribery statute, does not define bribery as proscribed by the FCPA); see also David Bitkower, Nicholas Barnaby & Karthik Reddy, *Will the FCPA Be Used to Prosecute Domestic Bribery Cases*, THE ANTI-CORRUPTION REPORT 1–2 (Oct. 31, 2018), <https://perma.cc/73TV-5SFF>, ("[C]ourt watchers and commentators noted a tension between *McDonnell*'s restrictive approach to domestic bribery and the more expansive view of foreign bribery charged by federal prosecutors enforcing the FCPA or set forth in resolutions between DOJ and companies that are the subject of FCPA investigations . . . [T]here are signs that the DOJ is envisioning a shift . . . using the FCPA to more aggressively prosecute *domestic* bribery cases. If that maneuver . . . is successful, it could circumvent some of the limits that the Supreme Court has placed on prosecutions of domestic bribery, at least in cases involving public companies.").

45. U.N. Convention Against Corruption art. 17, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

46. *Id.*

47. U.S.C. § 654.

48. The statute criminalizes "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United

(embezzlement by federal court officers),⁴⁹ and 18 U.S.C. § 666 (theft or bribery concerning programs receiving federal funds).^{50, 51}

Like bribery, separate federal laws that incorporate embezzlement as an element or a predicate offense, as defined by these federal statutes, can be used to reach state and local embezzlement. These significantly overlap with those discussed in the bribery section above; they include the mail, wire, and honest services fraud statutes, 18 U.S.C. § 371, and the RICO Act, among many others.⁵²

C. Benchmarking Abuses of Power

UNCAC Article 19 addresses “abuse of functions,” criminalizing a broader range of behavior involving abuses of power. Member States are only required to “consider adopting” this provision.⁵³ Nevertheless, most Member States, through national legislation or, in rare cases, common law, have adopted a general criminal offense that contains the main elements of Article 19.⁵⁴ However, others have raised concerns about the feasibility of formulating a definitive, recognizable, abuse of functions general criminal offense.⁵⁵

Article 19 creates a broad offense intended to protect the integrity of public service by capturing abuses of power by public officials.⁵⁶ It states:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed

States or any department or agency thereof; or [w]hoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted” Public money, property or records, 18 U.S.C. § 641 (defining “value” as “face, par, or market value, or cost price, either wholesale or retail, whichever is greater”).

49. Court officers generally, 18 U.S.C. § 645 (“Whoever, being . . . [an] officer of a United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement.”).

50. 18 U.S.C. § 666 (Punishing “[w]hoever . . . being an agent of an organization, or of a State, local or Indian tribal government . . . embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property . . . [or] corruptly solicits or demands [or gives] for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions”).

51. *UNCAC U.S. Country Review*, *supra* note 16, at 50.

52. *See id.*; 18 U.S.C. § 1961.

53. U.N. Convention Against Corruption art. 18–19, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

54. U.N. Office on Drugs and Crime, *State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement, and International Cooperation, Second Edition*, at 48–49 (October 2017) [hereinafter *UNCAC State of Implementation*], https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf (noting that titles of these offenses include “abuse of power or authority,” “abuse of authority and failure to discharge official duties,” “abuse of public office,” “criminal breach of trust,” “abuse of official position,” or “misconduct in public office”).

55. *See* U.N. Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption*, at 192 n.5 (November 2010) [hereinafter *UNCAC Travaux*].

56. *UNCAC State of Implementation*, *supra* note 54, at 48–49.

intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.⁵⁷

The 2017 U.N. State of Implementation Report (“Implementation Report”) indicates that an act can be corrupt as a result of political interference, even if it does not result in financial gain for the public official.⁵⁸

To qualify as an “abuse of functions,” the act or refusal to act must be in order “to obtain an undue advantage” and “in violation of laws.”⁵⁹ In most jurisdictions implementing this provision, criminal liability can be established if the public official acts with the special purpose of “obtaining an undue advantage” for himself or herself or another—as contemplated by the UNCAC’s text—or with the purpose of causing harm to another person.⁶⁰ Consequently, an official who seeks to cause harm to another person can be held liable even if he or she did not seek to secure an undue advantage, or any advantage at all.⁶¹

An official is “in violation of laws” if he or she commits an unlawful act or fails to perform his or her prescribed duty, even if the specific evidentiary elements of a different, more particular criminal act, like bribery, may not be met.⁶² According to the Implementation Report, an official’s act can be unlawful when he or she uses legal power for an unauthorized, improper purpose (obstructing the implementation of a law, misappropriation, unlawful taking of interests,⁶³ favoritism, neglecting or refusing to act within a reasonable time, etc.), thereby breaching a legal duty to the public and failing to protect the integrity and impartiality of public service.⁶⁴ Accordingly, a key determinant in recognizing an abuse of functions is whether the public official’s decision is made for reasons other than those identified as relevant

57. U.N. Convention Against Corruption art. 19, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

58. *See UNCAC State of Implementation*, *supra* note 54, at 50–51; *see also* IMF, *Corruption: Costs and Mitigating Strategies* 3–4 (May 2016), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888>.

59. U.N. Convention Against Corruption art. 19, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

60. *UNCAC State of Implementation*, *supra* note 54, at 49–50.

61. *Id.* (noting that in some jurisdictions, the law goes even further—the perpetrator can be considered criminally liable independently of whether he or she acted for one of the above purposes, as long as he or she acted arbitrarily or violated his or her official duties).

62. *Id.* at 47–49.

63. *See id.* at 48 (indicating that one State party defined the action of “becoming interested” as “seeking a benefit different to the one established by the public service, that is to say, a benefit contrary to the proper performance of official duties” and noting that its provision did not require demonstrating damage to the State or the perpetrator’s personal gain; the perpetrator’s interest is enough to charge him or her with “abuse of functions”).

64. *Id.* at 50.

by the legal or administrative framework that the public official is responsible for administering.⁶⁵

As a result, this provision covers corruption potentially not covered by the other UNCAC criminal offenses in two ways: (1) it does not require proof that the official acted for personal financial reasons, (2) nor does it require evidentiary proof of *quid pro quo* bribery or theft.⁶⁶ It, therefore, plays an auxiliary role to other, narrower corruption offenses and may encompass a broader range of conduct.⁶⁷ Several Member States use it as an alternative to prosecution for offenses such as bribery or embezzlement when there is not sufficient evidence to meet all the necessary elements of those particular offenses.⁶⁸

Unlike most Member States, the United States has not established a general abuse of functions federal criminal act; rather, it reports that it has implemented this provision through other anti-corruption statutes criminalizing specific abuse of functions acts like bribery and embezzlement. Specifically, the United States has officially reported that the federal bribery statute;⁶⁹ the honest services, wire, and mail fraud statutes;⁷⁰ the federal program bribery statute;⁷¹ and the public contracts anti-kickback statute,⁷² among several others,⁷³ sufficiently cover the behavior Article 19 seeks to criminalize.⁷⁴ Yet, as will be shown in Part II, these statutes do not currently address all the behavior Article 19 intends to criminalize.

In contrast, some U.S. states have implemented general abuse of functions offenses that meet, or go further than, Article 19’s provisions, while other states have no such offenses.⁷⁵ For example, New Jersey, where “Bridgegate” occurred, has an “official misconduct” criminal offense that satisfies Article 19’s recommended provisions. The statute provides that a public official is guilty of “official misconduct” when he, to obtain a benefit or to harm another, (i) knowingly commits an act constituting an unauthorized exercise of his official functions, or (ii) knowingly refrains from performing a legal duty or a duty inherent in the nature of

65. See IMF, *Corruption: Costs and Mitigating Strategies* 3–4 (May 2016), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888>.

66. See *UNCAC State of Implementation*, *supra* note 54, at 55 (explaining that this optional requirement may encompass conduct such as improper disclosure of classified or privileged information by a public official).

67. *UNCAC State of Implementation*, *supra* note 54, at 55; *UNCAC Travaux*, *supra* note 55, at 194.

68. *UNCAC State of Implementation*, *supra* note 54, at 47–48.

69. Bribery of public officials and witnesses, 18 U.S.C. § 201.

70. 18 U.S.C. §§ 1341, 1343, 1346.

71. Theft or bribery concerning programs receiving federal funds, 18 U.S.C. § 666.

72. Prohibited conduct, 41 U.S.C. § 53.

73. See, e.g., Hobbs Act, 18 U.S.C. § 1951 (prohibiting extortion under color of official right by Federal, State, and local officials); 18 U.S.C. § 208 (addressing conflicts of interest for federal officials).

74. See *UNCAC U.S. Country Review*, *supra* note 16, at 55–56; S. EXEC. REP. NO. 109-18, COMM. ON FOREIGN RELATIONS, UNITED NATIONS CONVENTION AGAINST CORRUPTION (S. TREATY DOC. 109-6), at 53–54 (2006), <https://www.govinfo.gov/content/pkg/CRPT-109erpt18/html/CRPT-109erpt18.htm> (stating that “U.S. law criminalizes ‘abuse of functions’ in various ways”).

75. See, e.g., N.J. REV. STAT. § 2C:30-2 (2013); DEL. CODE ANN. tit. 11, § 1211 (2020); ARK. CODE ANN. § 5-52-107 (2017); LA. STAT. ANN. § 14:134.3 (2017).

his office.⁷⁶ Delaware has gone a step further: it has established an “official misconduct” offense that criminalizes several different types of official misconduct intended for personal gain or to cause harm to another, and unlike Article 19, it does not require that an official necessarily violate another law to establish liability.⁷⁷

While the current U.S. approach generally received high praise during the 2013 UNCAC review of the United States, the UNCAC review team raised questions about potential legal gaps in criminalizing certain conduct.⁷⁸ It observed that, depending on the construction and use of anti-corruption statutes, the structure of the federal and state system created the potential for legal gaps⁷⁹ in the UNCAC’s implementation at the state and local levels.⁸⁰

The team specifically raised questions about whether the federal statutes incorporate Article 19, and the U.S. authorities responded that “in all of these [existing] provisions, there are elements that could also be considered as abuse of power/functions by state officials.”⁸¹ The United States then cited the honest services statute as an example of such a provision, and the review team was satisfied at the time with this explanation.⁸² Nevertheless, the Implementation Report indicates that although other criminal offenses, such as those covering bribery and

76. N.J. REV. STAT. § 2C:30-2 (2013); see also discussion of U.S. state laws *infra* Part III.

77. See discussion of U.S. state laws *infra* Part III; DEL. CODE ANN. tit. 11, § 1211 (2020) states as follows:

“A public servant is guilty of official misconduct when, intending to obtain a personal benefit or to cause harm to another person:

- (1) The public servant commits an act constituting an unauthorized exercise of official functions, knowing that the act is unauthorized; *or*
- (2) The public servant knowingly refrains from performing a duty which is imposed by law or is clearly inherent in the nature of the office; *or*
- (3) The public servant performs official functions in a way intended to benefit the public servant’s own property or financial interests under circumstances in which the public servant’s actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions; *or*
- (4) The public servant knowingly performs official functions in a way intended to practice discrimination on the basis of race, creed, color, sex, age, handicapped status or national origin.”

(emphasis added to note the disjunctive nature of this statute compared to Article 19’s conjunctive nature requiring an “abuse of functions” and a “violation of laws”).

78. UNCAC U.S. Country Review, *supra* note 16, at 4, 23-24.

79. The reviewing experts concluded that there was no evidence of gaps, but that the complexity of the federal and state system may create the possibility for some criminal conduct not to be covered. UNCAC U.S. Country Review, *supra* note 16, at 4. In response, the United States asserted that there are no gaps, stating that “most corruption cases pursued by the Justice Department are against state and local officials.” *Id.* Specifically, the United States asserted that “[w]ith the U.S. [federalism] reservation and understanding . . . gaps arise only in provisions that are non-obligatory, e.g. . . . the entirety of Articles 18-22.” *Id.* at 24 (noting that “gaps arise only in provisions that are non-obligatory, e.g., portions of Articles 16, 27, 30-32, 37 and 39, as well as the entirety of Articles 18-22, 24, 33, and 41.”) *Id.*

80. UNCAC U.S. Country Review, *supra* note 16, at 4, 23-24.

81. *Id.* at 56 (citing the federal bribery statute, the honest services statute, and the public contracts anti-kickback statute).

82. *Id.*

embezzlement, “may indeed address to a certain extent the behaviour described in [A]rticle 19, they remain bound by significant limitations and cannot be considered as entirely satisfactory for the purposes of the Convention, which calls for a much wider offence protecting the integrity of public service.”⁸³ Therefore, as the UNCAC review team predicted, the existence of legal gaps, specifically in addressing abuses of functions, would depend on how the federal courts interpreted these existing anti-corruption statutes.

II. JUDICIAL INTERPRETATIONS: A NARROWING EXERCISE CREATING A GLARING GAP IN CURRENT U.S. APPROACHES TO COMBATTING PUBLIC CORRUPTION

Over the past forty years, the Supreme Court has exposed a legal gap in federal anti-corruption law that excuses from criminal liability certain types of public, often political, corruption. As evinced in Part I, Congress has passed several statutes aimed at broadly curtailing public corruption, indicating its desire to legislate in the area.⁸⁴ Nevertheless, the Court has consistently stymied legislative efforts to combat certain abuses of power by narrowing several federal offenses.⁸⁵

In multiple doctrinal spheres, the Court has indicated that it views a corrupt act narrowly.⁸⁶ Specifically, it recognizes a corrupt act as one that requires an explicit *quid pro quo* or a scheme for money or property.⁸⁷ In doing so, it does not capture the broader public corruption Article 19 intends to reach.⁸⁸ The Court bases its decisions on two chief concerns: (1) avoiding void-for-vagueness criminal statutes, and (2) respecting federalism in prosecuting state and local public corruption. This Note does not intend to challenge or disagree with the Court’s legal reasoning. Rather, it intends to show the effects of this reasoning on U.S. anti-corruption

83. *UNCAC State of Implementation*, *supra* note 54, at 49 (indicating that “[i]n one particular case, the national authorities argued (and the reviewing experts agreed with them) that the definition of the acts covered by article 19 was already largely covered under the forms of bribery to be made a punishable offence pursuant to article 15 [I]t was [also] argued that, under certain circumstances, the questionable behaviour falls within the scope of offences against property, such as embezzlement and theft”).

84. *See* FOSTER, CONG. RSCH. SERV., *supra* note 32, at 1 (“While Congress has manifested its intent that the mail and wire fraud statutes should broadly cover the self-interested actions of federal, state, local, and private-sector officials, the Supreme Court and lower federal courts have repeatedly limited the scope of 18 U.S.C. § 1346”) (citing H.R. 1, 116th Cong. (2019) (proposing various ethics and conflict-of-interest reforms for federal officials)).

85. *See* cases discussed *infra* Part II.B.

86. *See generally* *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (finding that although the jury heard evidence of corruption and abuse of power, federal fraud statutes do not criminalize all such conduct); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361 (2010) (recognizing that when officials succumb to improper influence, there is cause for concern, but nevertheless emphasizing that banning corporate political speech is not a permissible remedy). This Note does not address, in detail, the campaign finance jurisprudence as it relates to constitutional law doctrine rather than criminal law doctrine.

87. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 408–09 (2010) (limiting 18 U.S.C. § 1346 to “bribe-and-kickback” offenses); *Citizens United*, 558 U.S. at 361 (stating that in enacting 2 U.S.C. § 441(b) and the Bipartisan Campaign Reform Act of 2002, Congress created “categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption”).

88. *See* discussion *supra* Part I.C.

efforts. It argues that this narrow construction of federal corruption statutes excuses from criminal liability many of the more sophisticated forms of political corruption witnessed in politics today, such as the corruption at issue in “Bridgegate.”

Section A highlights the Court’s overarching concerns with broad federal anti-corruption law: vagueness and federalism. Section B then details the handful of key Supreme Court decisions that created significant gaps in the federal government’s ability to combat public corruption on both federal and state levels. Section C describes the problematic gaps these decisions have created in prosecuting public corruption, particularly political corruption.

A. The Court’s Two Overarching Concerns in Broad Corruption Constructions

In its several opinions, discussed below, the Court has echoed two overarching concerns with broadly interpreting federal corruption statutes. First, the Court consistently expresses concern that broader criminal anti-corruption statutes would be too vague and therefore unconstitutional.⁸⁹ This concern stems from the Court’s long-standing desire to interpret criminal laws narrowly to provide citizens clear, defined boundaries between lawful and unlawful conduct and to prevent over-prosecution.⁹⁰ The concern raises particular flags in the corruption arena, as the Court does not want to give overzealous prosecutors the ability to prosecute or punish political opponents for differing views in order to meet political objectives.⁹¹ Additionally, crimes of corruption and fraud are difficult to define in specific terms, as corrupt practices evolve regularly to avoid regulation and detection.⁹² The Court fears a slippery-slope scenario in which federal prosecutors or courts use broadly-construed statutory language to capture a whole array of governmental conduct, such as mere underperformance, negligence, or ethically questionable behavior, that does not fall within the orbit of criminal behavior.⁹³

Second, the Court wants to preserve the states’ abilities to exercise their police powers. Again, general constitutional principles of federalism long-recognized by

89. *See, e.g., id.* (“Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.”).

90. *See, e.g.,* *McNally v. United States*, 483 U.S. 350, 359–60 (1987), *superseded by statute*, 18 U.S.C. § 1346, *as recognized in* *Kelly*, 140 S. Ct. at 1571.

91. *See* *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (“[The Court] cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly’ [T]he Court . . . declined to rely on ‘the Government’s discretion’ to protect against overzealous prosecutions . . . , concluding instead that ‘a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.’”) (first citing *United States v. Stevens*, 559 U.S. 460, 480 (2010); and then citing *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 298, 408, 412 (1999)).

92. *See generally* *Skilling*, 561 U.S. at 415–24 (2010) (Scalia, J. concurring in part) (lamenting the indeterminacy in “honest services” case law in which courts struggled to define the duties central to the “fraud” offense or the “ascertainable standards of guilt”).

93. *See id.* at 411.

the Court intend to respect the divide in powers between the federal and state governments.⁹⁴ Traditionally, police powers, including the power to criminalize certain acts, have been left to the states.⁹⁵ To establish a federal crime, Congress must clearly state its interest in criminalizing an act under federal law, and it must possess jurisdiction to prosecute such behavior under one of its constitutionally enumerated powers.⁹⁶ Because the Court believes Congress has only clearly articulated its desire to criminalize certain types of public corruption, such as bribery, the Court has indicated that it will not broaden existing statutes to capture “public corruption” generally, as doing so would significantly reconfigure the states’ police powers in this area of criminal law.⁹⁷ But in reality, the Court has not only refused to broaden the statutes; it has also effectively narrowed the statutes to exclude conduct Congress intended to criminalize.

As explained in Part III, any federal solution to enhance the United States’ ability to fight abuses of power must address these two overarching judicial concerns. In its anti-corruption jurisprudence, discussed below, the Court has clearly and consistently indicated that it will not be the institution to expand the scope of anti-corruption law.⁹⁸

B. Judicial Interpretations in Key Corruption Cases

In the several decisions discussed below, the Court has created significant gaps in the federal government’s ability to combat public corruption on federal, state, and local levels. The first four cases do not directly involve public, political corruption. Nevertheless, they reveal how the Court’s previous interpretations of federal corruption laws led to sophisticated political corruption going unpunished in the Court’s two most recent cases, *McDonnell v. United States* and *Kelly v. United States*, commonly known as the “Bridgegate” case.

94. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 24–25 (2000) (stating that “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes”) (internal citations and quotations omitted).

95. Cf. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of . . . crime and vindication of its victims.”).

96. See U.S. CONST., art. I, § 8.

97. See, e.g., *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (explaining that by interpreting the property fraud statutes more broadly, “the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking”).

98. See Richard Messick, *Where the Real Blame for Letting Bridgegate Defendants Off Lies: Part II – The Congress*, GLOBAL ANTICORRUPTION BLOG (June 3, 2020), [hereinafter Messick, *Blame Part II*], <https://perma.cc/J2L2-TQPG>; Richard Messick, *Where the Real Blame for Letting Bridgegate Defendants Off Lies: Part I*, GLOBAL ANTICORRUPTION BLOG (May 3, 2020), [hereinafter Messick, *Blame Part I*], <https://perma.cc/26VV-ULK7>.

1. *McNally v. United States* (1987)

In *McNally v. United States*,⁹⁹ the Court held that the mail and wire fraud statutes are limited to the protection of money or property rights; they do not extend to the protection of citizens' intangible right to honest and impartial government, or "honest services."¹⁰⁰ The Court looked to the statute's legislative history, asserting that Congress had explicitly recognized the meaning of "to defraud" to refer "to wronging one in his property rights by dishonest methods or schemes," and as "usually signif[ying] the deprivation of something of value by trick, deceit, chicanery, or overreaching."¹⁰¹ Because Congress had not explicitly expressed its desire for the mail fraud statute to cover other fraudulent schemes beyond those related to property rights, the Court chose not to interpret the statute more broadly.¹⁰²

The Court explained that when there are two rational readings of a criminal statute, one harsher than the other, it should only choose the harsher one when Congress has spoken in clear and definite language.¹⁰³ Accordingly, it would rather construe the statute narrowly than construe it in a manner that leaves the outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials, thus upsetting the balance of power that federalism seeks to achieve.¹⁰⁴

In response to the decision, Congress acted a year later, passing 18 U.S.C. § 1346, which includes "honest services" fraud as fraudulent conduct criminalized by the mail and wire fraud statutes.¹⁰⁵ It states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of their intangible right of honest services."¹⁰⁶ Therefore, Congress clearly indicated its intent to criminalize a broader range of public corruption,¹⁰⁷ specifically

99. *McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C. § 1346, *as recognized in Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). In this case, petitioner Gray, a former public official of Kentucky, and petitioner McNally, a private individual, along with Hunt, the chairman of the Kentucky Democratic Party, created a self-patronage scheme to award the state's insurance business to one specific insurance agency in exchange for kickbacks directed to other insurance companies in which Hunt and Gray had financial interests. *Id.* at 352–54.

100. *Id.* at 356.

101. *Id.* at 357–59 (discussing Congress's 1909 codification of *Durland v. United States*, 161 U.S. 306 (1896) and quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

102. *Id.*

103. *Id.* at 359–60 (internal citations omitted).

104. *Id.*

105. 18 U.S.C. § 1346.

106. *Id.*

107. Most of the "honest services" cases pre-*McNally* involved public officials who "made governmental decisions with the objective of benefitting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens with their loyal service and honest government." FOSTER, CONG. RSCH. SERV., *supra* note 32, at 6 (citing *McNally v. United States*, 483 U.S. 350, 362–63 (1987) (Stevens, J., dissenting), *superseded by statute*, 18 U.S.C. § 1346, *as recognized in Kelly v. United States*, 140 S. Ct. 1565 (2020)). "Regardless of whether the betrayed party (the citizenry) was or would be financially harmed, under this theory, the violation lay in the deprivation of that party's intangible right to the official's 'honest services.'" *Id.*

corruption dealing with undisclosed self-interest as exemplified in *McNally*.¹⁰⁸ Nevertheless, the Court narrowed the honest services statute’s ability to combat this type of corruption in the years to come.

2. *Cleveland v. United States* (2000)

In *Cleveland v. United States*,¹⁰⁹ the Court again limited the mail fraud statute’s scope, this time to exclude regulatory fraud, holding that the object of the fraud must be “property” in the victim’s hands.¹¹⁰ Accordingly, state and municipal licenses do not constitute “property” under § 1341 when possessed by the official licensor.¹¹¹ Reversing the lower court’s decision, the Court defined the state government’s interest in state-issued licenses as regulatory rather than proprietary, emphasizing that the state’s video poker licensing statute established a typical regulatory program long characterized as an exercise of state police powers.¹¹²

The Court rejected the Government’s argument that the licenses were property in the state’s hands before their issuance,¹¹³ believing that that the Government was inviting it “to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.”¹¹⁴ It also noted that in expanding the mail and wire fraud statutes after *McNally*, Congress only criminalized honest services fraud even though federal courts had, under *McNally*, dismissed other forms of public corruption, including licensing fraud.¹¹⁵ Therefore, to the extent that the word “property” in § 1341 was ambiguous, the Court resolved this ambiguity narrowly and in favor of lenity.¹¹⁶

108. See *Id.* at 8 (indicating that Congress responded to the Court’s invitation to speak by passing legislation to overturn the *McNally* decision to re-instate the broader pre-*McNally* case law, at least in part, possibly in full) (citing 134 CONG. REC. H11, 108-01 (daily ed. Oct. 21, 1988)).

109. 531 U.S. 12 (2000). In this case, petitioners made false statements in their applications for state video poker licenses to fraudulently conceal their ownership interests in their video poker truck stop business. *Id.* at 15–17. According to the Government, they concealed their interests because they had tax and financial problems that could have undermined their eligibility for a video poker license. *Id.* at 16–17.

110. *Id.* at 15.

111. *Id.* at 20–21, 26.

112. *Id.* at 21, 27 (explaining that the program licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization).

113. The Government offered two reasons why the state had a proprietary interest in the video poker licenses: 1) the state received a substantial sum of money in exchange for each license and continued to receive payments from the licensee as long as the license remained in effect; and 2) the state had significant control over issuing, renewing, suspending, and revoking licenses. The Court rejected both of these justifications. *Id.* at 21–26.

114. *Id.* at 24.

115. *Id.* at 19–20.

116. *Id.* at 25, 27 (reiterating that, absent a clear statement from Congress, the Court will not read the mail fraud statute to “place under federal superintendence” a vast array of conduct traditionally policed by the states) (internal citation omitted).

3. *Skilling v. United States* (2010)

In *Skilling v. United States*,¹¹⁷ the Court significantly limited the federal government's ability to prosecute honest services fraud by holding that 18 U.S.C. § 1346 only criminalizes "bribery and kickback schemes" involving a quid pro quo.¹¹⁸ The Court expressed significant concerns about the statute's vagueness, noting that the case law was in "considerable disarray" as to the kinds of schemes that would qualify as honest services fraud.¹¹⁹ However, rather than striking down the statute as unconstitutionally vague, the Court interpreted it narrowly to apply only to traditional bribery and kickbacks.¹²⁰ This decision's effect was widespread: "[it] withdrew from the reach of Section 1346 a significant category of cases that had been prosecuted as honest services fraud up to that point: cases involving more general financial self-dealing or conflicts of interest, where no bribes or kickbacks are given."¹²¹

4. *McDonnell v. United States* (2016)

In *McDonnell v. United States*, the Court again significantly narrowed both the federal bribery statute and the honest services fraud statute when it held that arranging a meeting with a fellow public official, speaking to another public official, or organizing an event on public property, without more, does not fit the definition of an "official act" under the federal bribery statute.¹²² Petitioner, former Virginia Governor Robert McDonnell, and his wife, Maureen McDonnell, were federally indicted on honest services fraud charges and Hobbs Act extortion charges related to their acceptance of \$175,000 in loans, gifts, and other benefits from Jonnie Williams while McDonnell was in office.¹²³ Williams' business had developed a nutritional supplement, and he hoped that with McDonnell's help, Virginia's public universities would perform research on it.¹²⁴

McDonnell and his wife accepted transportation on a private plane, over \$20,000 in designer clothing, and a Rolex from Williams.¹²⁵ They also asked for and received a \$50,000 loan for their rental properties and a \$15,000 gift for their

117. 561 U.S. 358 (2010). Petitioner Jeffrey Skilling, the former CEO of Enron, faced charges for, among other things, defrauding Enron and its shareholders of the intangible right of honest services as a fiduciary of Enron by manipulating financial reports, engaging in securities fraud, and making false representations. *Id.* at 369.

118. *Skilling*, 561 U.S. at 358, 408–09.

119. *Id.* at 405.

120. *Id.*

121. FOSTER, CONG. RSCH. SERV., *supra* note 32, at summary.

122. *McDonnell v. United States*, 136 S. Ct. 2355, 2367–72 (2016).

123. *Id.* at 2357.

124. *Id.* at 2361.

125. *Id.* at 2362–63 (noting that the McDonnells also vacationed with Williams at his vacation home, where McDonnell borrowed Williams's Ferrari); Erin Dooley & Arlette Saenz, *The Lavish Life and Broken Marriage That Put Bob McDonnell and His Wife In Court*, ABC NEWS (July 30, 2014), <https://abcnews.go.com/Politics/lavish-life-broken-marriage-put-bob-mcdonnell-wife/story?id=24776455>.

daughter’s wedding from Williams while they were experiencing “severe financial difficulties” as a family.¹²⁶ In exchange, on at least five occasions, McDonnell arranged meetings between Williams and Virginia public officials, hosted events for Williams’ company at the governor’s mansion, and contacted other government officials concerning the research studies.¹²⁷

Nevertheless, Chief Justice Roberts, writing for a unanimous Court, determined that these types of acts did not fall under the narrow statutory definition of an “official act,” or a decision or an action on a “question, matter, cause, suit, proceeding or controversy,” under the federal bribery statute.¹²⁸ Again, in refusing to construe the statute more broadly, the Court raised concerns about vagueness and federalism.¹²⁹ The Court reversed and remanded the lower court’s decision, resulting in McDonnell’s eventual acquittal.¹³⁰

5. *Kelly v. United States* (2020)

Finally, in its latest public corruption case, the Court unanimously held that the mail and wire fraud statutes did not apply to the petitioners’ scheme to realign Fort Lee, New Jersey’s access lanes to the George Washington Bridge because it did not involve taking property of the Port Authority.¹³¹ In 2013, Bridget Anne Kelly, deputy chief of staff to former New Jersey Governor Chris Christie, and her co-defendant, Bill Baroni, a Port Authority of New York and New Jersey official, wanted to punish Fort Lee’s mayor for refusing to endorse Christie’s reelection bid.¹³² To do so, they schemed to impose traffic gridlock on Fort Lee by limiting its access lanes to the George Washington Bridge, the world’s busiest bridge.¹³³ They were able to disguise this political retribution with a cover story: they were conducting a traffic study.¹³⁴ For four days, traffic was at a standstill. School buses stood in place for hours, an ambulance struggled to reach the victim of a heart attack, and police struggled to respond to a report of a missing child.¹³⁵

The defendants faced charges for wire fraud, fraud on a federally funded program, and conspiracy.¹³⁶ The prosecutors had to prove that they engaged in deception and that the object of their fraud was money or property.¹³⁷ When arguing the case, one defense attorney said the federal fraud statutes “do not prohibit lying to

126. *McDonnell*, 136 S. Ct. at 2362–64; Dooley & Saenz, *supra* note 125.

127. *McDonnell*, 136 S. Ct. at 2357.

128. *Id.* at 2374–75 (citing the statutory definition for an “official act” under 18 U.S.C. § 201(a)(3)).

129. *Id.* at 2372–73.

130. *Id.* at 2375.

131. *Kelly v. United States*, 140 S. Ct. 1565, 1572 (2020).

132. *Id.* at 1569

133. *Id.* at 1569–70.

134. *Id.*

135. *Id.* at 1570 (noting that the city mayor tried to reach Baroni by phone, leaving a message that his call was about an “urgent matter of public safety”—Baroni never called back).

136. *Id.* at 1571.

137. *See id.*

take unauthorized state action. They prohibit lying to obtain property. And that simply is not what occurred in this case.”¹³⁸ He was right.

Although the Court acknowledged that this case involved “an abuse of power,” it held that realignment of the city’s access lanes to the bridge did not involve taking the property of the Port Authority, which administered the bridge, and thus could not support the defendants’ fraud convictions.¹³⁹ Rather, the defendants’ conduct was purely an exercise of regulatory authority.¹⁴⁰ Rejecting the lower courts’ broader interpretations of the bribery and fraud statutes,¹⁴¹ the Court again expressed its concern that expanding the federal criminal fraud laws to set standards of disclosure and good governance for local and state officials would interfere with state and local policymaking.¹⁴²

This concern did have some merit: New Jersey has a state statute¹⁴³ that broadly defines abuse of powers to include instances when an official knowingly commits an unauthorized exercise of official functions to harm another.¹⁴⁴ The defendants would have likely been convicted under this statute by local prosecutors for using their regulatory power to improperly enact political revenge, harming an entire city.¹⁴⁵ However, it is possible that federal prosecutors pressured state prosecutors to give the case to them.¹⁴⁶ Nevertheless, the defendants were acquitted and walked free.¹⁴⁷ The behavior exhibited in this case is precisely what UNCAC Article 19, as interpreted by Member States, intends to criminalize: a public official’s abuse of functions for an improper purpose, in violation of laws detailing the official’s authorized powers, that does not involve achieving a personal financial benefit or evidence of quid pro quo or theft.

C. *The Glaring Gap in Current U.S. Approaches*

By narrowing statutory provisions intended to combat public corruption, the Court has created a glaring gap in U.S. efforts to fight domestic public corruption, particularly in the political sphere at the state and local levels. Specifically, unlike

138. Transcript of Oral Argument at 4–5, 20, *Kelly v. United States*, 139 S. Ct. 2777 (2019) (No. 18-1059) (noting another defense attorney stated: “[A] public official who is acting politically and not for personal gain does not commit fraud by lying about his reason for an official decision if the decision was generally within his authority”).

139. *Kelly*, 140 S. Ct. at 1574.

140. *Id.* at 1572–73.

141. See *Brown*, *supra* note 6, at 152–53 (discussing the lower courts’ broad interpretations of the bribery and fraud statutes).

142. *Kelly*, 140 S. Ct. at 1574.

143. See discussion *supra* Part I.C.

144. NJ REV. STAT. § 2C:30–2 (2013).

145. Messick, *Blame Part I*, *supra* note 98.

146. See *id.*

147. *Id.*

UNCAC Article 19, the current corruption statutes fail to criminalize behavior that does not involve an act for personal financial benefit or evidence of a quid pro quo or theft. This Section explores the several problems created by this gap, showing that Congress needs to use federal law to fill it.

First, the Court’s construction diminishes both the federal and state governments’ abilities to prosecute sophisticated forms of public, often political, corruption.¹⁴⁸ By narrowing the scope of existing federal corruption laws to focus solely on direct quid pro quos or fraudulent acts involving money or property, the Court created the opportunity for public officials to improperly wield power and influence using sophisticated, indirect schemes.¹⁴⁹ Indeed, politicians have used the Court’s recent decisions to their advantage: in multiple cases charging politicians with crimes like bribery and fraud, defendants’ legal briefs cite *Skilling* and *McDonnell* to defend against the charges.¹⁵⁰ Lower courts have heeded the Court’s message, vacating several criminal convictions of politicians.¹⁵¹

Defenders of *Kelly*,¹⁵² highlighting the strength of federalism, assert that those criticizing the Court’s approach overstate the decision’s effects on combatting

148. See, e.g., Fred Wertheimer, *Symposium: McDonnell Decision Substantially Weakens the Government’s Ability to Prevent Corruption and Protect Citizens*, SCOTUSBLOG (June 28, 2016), <https://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/>; see also Nicholas C. Johnson, *Legal Public Corruption: How and Why Congress Needs to Reinstate Honest Services Fraud*, 13 APPALACHIAN J.L. 105, 106, 121 (2013) (arguing that *Skilling* hampered the federal government’s “ability to effectively prosecute state and local officials” and urging Congress to pass legislation that “would not fail the void-for-vagueness test”); Nicole M. Argentieri & Matt Cowan, *Federal Public Corruption Prosecution After ‘Bridgegate’*, LAW.COM (June 16, 2020, 10:30AM), <https://www.law.com/newyorklawjournal/2020/06/16/federal-public-corruption-prosecution-after-bridgegate/?slreturn=20201009181827>; Litman, *supra* note 7.

149. See, e.g., Jesse McKinley, *Bruno, Ex-State Senate Chief, Is Acquitted of Fraud in Retrial*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/17/nyregion/joseph-bruno-former-state-senate-leader-is-acquitted.html> (explaining that a federal court vacated ex-New York State Senate majority leader Joseph L. Bruno’s fraud convictions after *Skilling*; he was later found not guilty at retrial).

150. Ciara Torres-Spelliscy, *Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1695–96, 1696 n.38 (2020) (“For example, in 2013, ex-Illinois Governor, Rod Blagojevich, appealed his convictions. At points, he cited *Citizens United* in support of his argument: ‘Blagojevich’s decision to ask [a particular individual] to help fundraise . . . did not make it a crime.’ In 2017, Blagojevich’s cert. petition cited to *McDonnell* and *McCutcheon*.” (internal citations omitted)).

151. See *id.* at 1695–96; see also *United States v. Silver*, 864 F.3d 102, 105–06 (2d Cir. 2017) (vacating and remanding a conviction of the former Speaker of the New York Assembly for honest services fraud, Hobbs Act extortion, and money laundering after a nearly one-month jury trial because “the District Court’s instructions on honest services fraud and extortion do not comport with *McDonnell*”); *United States v. Bruno*, 661 F.3d 733, 739–40 (2d Cir. 2013) (vacating former New York State Senator’s convictions of honest services mail fraud for his failure to disclose conflicts of interest “in light of *Skilling*”); Grace Segers, *Percoco Verdict Proves Corruption Won’t Go Unpunished, After All*, CITY & STATE N.Y. (Mar. 13, 2018), www.cityandstateny.com/articles/politics/new-york-state/percoco-found-guilty-corruption-charges.html (noting that charges against former New York state officials for conspiracy to commit honest services fraud and solicitation of bribes and gratuities were vacated based on *McDonnell v. United States*).

152. See Brown, *supra* note 6, at 142–45 (discussing a new “anti-corruption” federalism re-aligning the allocation of responsibilities between the two levels of governments in fighting state and local corruption); see also Randall D. Eliason, *On ‘Bridgegate,’ the Supreme Court Got It Right*, WASH. POST (May 7, 2020, 8:54 PM),

public corruption.¹⁵³ But their argument fails to account for practical realities. Historically, state and local prosecution of corruption has seen mixed success.¹⁵⁴ Although states have generally strengthened their anti-corruption efforts, they still vary greatly in their abilities to effectively monitor and prosecute public corruption, as local politics and limited enforcement tools stymie efforts to root out corruption close to home.¹⁵⁵ This leads to inconsistent enforcement across the country:¹⁵⁶ when officials abuse their functions in states without laws criminalizing this abuse, the official misconduct often cannot be prosecuted. Moreover, the Court has potentially erected barriers to state-court interpretations of certain state criminal statutes to reach “abuse of functions” corruption because the same constitutional vagueness concerns that plague federal anti-corruption statutes would equally apply to state statutes of similar scope.¹⁵⁷ While more data certainly needs to be gathered to assess state and local enforcement efforts,¹⁵⁸ the present circumstances point to the need for a uniform, federal approach that still respects the federalist balance.

Second, the Court’s interpretation of current domestic anti-corruption statutes creates inconsistent approaches in the United States’ efforts to address domestic and foreign corruption via criminal law. On the one hand, anti-corruption advocates praise the United States¹⁵⁹ as one of the most progressive actors in combating foreign public corruption and private sector corruption due to the FCPA’s broad extraterritorial reach.¹⁶⁰ On the other hand, the United States struggles to

<https://perma.cc/RR4V-MS8S>. *But see* Corinne Ramey, *Was ‘Bridgegate’ Criminal, or Just Dirty Politics?*, WALL ST. J. (June 30, 2019), <https://perma.cc/4BPS-PPPC>.

153. *See, e.g.*, Richard Messick, *Law Profs: Stop the Overheated Rhetoric About Bridgegate*, GLOBAL ANTICORRUPTION BLOG (May 13, 2020), <https://perma.cc/H9WQ-PGY7> (noting that Professor Litman’s claim that the Court’s corruption jurisprudence makes it “almost impossible” to put a crooked politician in jail is “plain nonsense”) (quoting Litman, *supra* note 7).

154. Argentieri & Cowan, *supra* note 6.

155. *Id.*; Litman, *supra* note 7 (noting that state and local prosecutors may be elected or appointed by party officials dependent on party apparatuses; indicating that this is the case in New York, where federal prosecutors brought all but one of the cases against high-profile state legislators since 2007).

156. *See* Argentieri & Cowan, *supra* note 6.

157. *See* Litman, *supra* note 7.

158. *See* Messick, *Blame Part II*, *supra* note 98 (calling for Congress to collect data on state-level prosecutions to determine whether local prosecutors “are falling down on the job”).

159. According to the OECD:

The United States has further increased its strong enforcement of the U.S. Foreign Corrupt Practices Act (FCPA), maintaining its prominent role in the fight against transnational corruption. This outstanding achievement results from a combination of enhanced expertise and resources to investigate and prosecute foreign bribery, the enforcement of a broad range of offences in foreign bribery cases, the effective use of non-trial resolution mechanisms, and the development of published policies to incentivize companies’ cooperation with law enforcement agencies.

OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report—United States 7* (Oct. 16, 2020).

160. *See Foreign Corrupt Practices Act: An Overview*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last updated Feb. 3, 2017).

combat domestic public corruption consistently on federal and state levels due, in large part, to an institutional commitment to narrowly defining corrupt acts. This narrow interpretation deviates from the internationally recognized “abuse of functions” concept in the UNCAC and other national legal systems recognizing that public corruption exists beyond quid pro quos and schemes to obtain money or property.¹⁶¹

Third, the gap created by the Court’s construction contributes to the sense that sophisticated political corruption pervades many American systems, and such public corruption—or even the appearance that corruption exists and goes unpunished—can cause large-scale deleterious effects on U.S. political, economic, and social systems.¹⁶² In recent years, this sort of public political corruption has led the United States to a precarious place: As of 2017, in a survey conducted by Transparency International, seven out of ten people indicated their belief that the U.S. government is failing to fight corruption.¹⁶³ In the past five years, two former state governors involved in plainly unethical state action have avoided any legal punishment.¹⁶⁴ Most recently, in 2020, the United States earned its lowest, most “corrupt,” score in the Corruption Perceptions Index since 2012, which ranks countries by their perceived levels of public corruption according to experts and businesspeople.¹⁶⁵

Although it is recognized that public sector corruption on federal and state levels has widespread negative impacts on society,¹⁶⁶ political corruption, at both grand¹⁶⁷ and petty levels,¹⁶⁸ can significantly affect American governance. Specifically, if unchecked, it can affect core government functions by creating a

161. See *UNCAC State of Implementation*, *supra* note 54, at 47–49.

162. See, e.g., IMF, *supra* note 58, at III.

163. *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT’L (Dec. 12, 2017), <https://www.transparency.org/en/news/corruption-in-the-usa-the-difference-a-year-makes#>.

164. See *Kelly v. United States*, 140 S. Ct. 1565 (2020) (recognizing that N.J. Governor Chris Christie’s chief of staff did not commit mail fraud when she created an elaborate political retribution scheme that intentionally caused stand-still traffic in the world’s busiest bridge for four days); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (indicating that former Virginia Governor Robert McDonnell did not commit fraud when he received over \$175,000 in gifts from a Virginia businessman in exchange for setting up a meeting with public officials and hosting events for his business in the Governor’s mansion).

165. *Corruption Perceptions Index*, TRANSPARENCY INT’L (2020), <https://www.transparency.org/en/cpi/2020/index/usa> (using a scale of zero to 100 to rank countries, where zero is highly corrupt and 100 is very clean).

166. ROSE-ACKERMAN & PALIFKA, *supra* note 5, at 51–92; IMF, *supra* note 58, at 5 (reporting that public corruption hinders economic and social investment by creating additional social costs and unequal distributional consequences).

167. *Grand Corruption*, TRANSPARENCY INT’L, <https://www.transparency.org/en/corruptionary/grand-corruption> (last visited Oct. 28, 2021) (“The abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It often goes unpunished.”).

168. “Everyday abuse of entrusted power by public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.” *Petty Corruption*, TRANSPARENCY INT’L, <https://www.transparency.org/en/corruptionary/petty-corruption> (last visited Oct. 28, 2021).

“pay-to-play” culture,¹⁶⁹ and it sparks political instability and conflict by creating a sense that the electoral process is “rigged” and delegitimized.¹⁷⁰

Given recent developments in the United States and the Court’s recent decision in *Kelly*, the time is right to reevaluate America’s approach to combatting public corruption, particularly in the political sphere. Therefore, in Part III, this Note proposes a legislative solution that addresses public officials’ abuses of functions to close the current gap in U.S. anti-corruption law.

III. PROPOSED SOLUTION: A CLEAR STATEMENT FROM CONGRESS IN THE FORM OF AN “ABUSE OF FUNCTIONS” FEDERAL CRIMINAL OFFENSE

Since *McNally*, the Court has repeatedly stated that “[i]f Congress desires to go further, it must speak more clearly than it has.”¹⁷¹ In light of the Court’s consistent narrowing of existing federal anti-corruption law, combatting sophisticated forms of public corruption by attempting to expand legal interpretations of the existing laws appears futile. Instead, this Note proposes that Congress consider adopting a new criminal statute that more broadly captures public officials’ abuses of functions while in office and that conforms with the emerging international standard of a general “abuse of functions” criminal offense.

Section A recommends that Congress first create a Statement of Purpose for this new statutory offense that adopts a broader definition of criminal corruption within the U.S. legal regime. Section B proposes draft language and elements of the new offense using the emerging legal standard exhibited in UNCAC Article 19, the Law Commission’s recent proposal to create a new statutory offense of corruption in public office, and U.S. state law. To address the Court’s vagueness and federalism concerns, it considers definitive language, potential jurisdictional hooks, and

169. See, e.g., Cynthia Canary & Ed. Wojcicki, *Dollarocracy: Pay-to-play culture still has a chokehold on Illinois politics*, ILL. ISSUES (May 2007), <https://web.archive.org/web/20080512081832/http://illinoisissues.uis.edu/features/2007may/dollar.html>.

170. Matthew Stephenson explains these concerns as follows:

I do worry that one potential consequence of repeatedly declaring that the all of U.S. politics is corrupt, that corporations and billionaires buy both policy and politicians, that both parties are in the pocket of the wealthy, that the system is “rigged,” etc., is to make people feel like their votes don’t really matter, or that which candidate or party wins the election won’t make much difference to public policy outcomes. (I worry especially that young people who buy into the everybody-is-corrupt view of politics will be more inclined to affect a kind of fashionable cynicism that passes in some circles for worldly sophistication, and that as a result they will be more likely to disengage from the political process, or to vote for no-hoper third party candidates.) And even more worrisome, a belief that the whole process is irretrievably broken may increase the appeal of radical candidates who don’t have much interest in or respect for ordinary approaches to governance. After all, what’s the point of working within a system that’s entirely, systemically corrupt?

Matthew Stephenson, *Is the U.S. Political System Characterized by “Legalized Corruption”? Some Tentative Concerns About a Common Rhetorical Strategy*, GLOBAL ANTICORRUPTION BLOG (Nov. 6, 2018), <https://perma.cc/22ZC-NAXA>.

171. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (citing *McNally v. United States*, 483 U.S. 350, 360 (1987), *superseded by statute*, 18 U.S.C. § 1346, *as recognized in Kelly v. United States*, 140 S. Ct. 1565 (2020)).

preemption issues in relation to state and local prosecution. Section C then explains how this new proposed offense would apply in the three cases detailed in the Introduction, including *McDonnell* and *Kelly*.

*A. Statement of Purpose: Broadening the U.S. Criminal Legal
Definition of Corruption*

To establish an effective criminal offense for abuse of functions, Congress should first consider adopting a broader definition of criminal corruption within a statutory Statement of Purpose. Because Congress has never explicitly defined its legal understanding of public corruption,¹⁷² the Court has used its own interpretative tools to formulate a narrow understanding that Congress should now reformulate.¹⁷³

Scholars have defined and redefined corruption over the years to sufficiently capture behavior recognized as “corrupt” within our public and private systems. Traditional scholarship recognizes corruption as “the abuse of an entrusted power for private gain.”¹⁷⁴ Applying that definition to public officials, corruption is the use of public office for personal gain.¹⁷⁵ In the legal context, this definition has focused on a transactional view of corruption, in which one person seeks to influence another’s actions and uses an agreed-upon exchange of money or property to do so.¹⁷⁶ Under this approach, “political hardball,” or “pay-to-play politics,” in which politicians use their influential positions and power to gain political, rather than personal financial or proprietary, advantage, does not qualify as corruption.¹⁷⁷ This narrow understanding of corruption has significantly influenced the way the Court interprets corruption-related criminal law.¹⁷⁸

However, several scholars have recently discussed broader definitions of corruption that capture more sophisticated behavior, such as political corruption and misuse of public office—behavior that many commonly recognize as corrupt.¹⁷⁹ Jacob Eisler argues for a broader corruption framework, stating that

[c]orruption is . . . intimately related to positive duties of government. Corruption can be understood as deviation from political integrity (itself informed by deep concepts such as sovereign legitimacy and the right to use

172. See Brown, *supra* note 6, at 148 (noting that there is no general code of anti-corruption law governing state and local officials).

173. See discussion *supra* Part II.

174. ROSE-ACKERMAN & PALIFKA, *supra* note 5, at 9 (citing Transparency International’s definition of corruption).

175. Brown, *supra* note 6, at 147.

176. See Stephenson, *supra* note 170.

177. See Brown, *supra* note 6, at 148.

178. See discussion *supra* Part II.

179. See, e.g., Ian Millhiser, *The Supreme Court’s “Bridgagate” Decision Leaves a Big Hole in America’s Anti-Corruption Laws*, VOX (May 7, 2020, 12:50 PM), <https://perma.cc/T5LZ-NZJJ?type=image> (stating that “*Kelly* could open the door to widespread corruption” because there is no federal ban on officials using their power to punish political opponents or potentially reward political supporters).

the collective power of the state), and a particular corrupt act can be understood as the violation of a political duty.¹⁸⁰

Similarly, although discussing the definition of corruption in the context of constitutional, rather than criminal, law, Professor Zephyr Teachout understands corruption in the American tradition as something that “does not just include blatant bribes and theft from the public till, but encompasses many situations where politicians and public institutions serve private interests at the public’s expense.”¹⁸¹

Both scholars adopt a broader understanding of corruption, termed “institutional corruption.”¹⁸² Institutional corruption occurs “where the duties of public officials are abused not for explicitly private gain, but in order to yield political benefit (which does not accrue to the official’s personal welfare).”¹⁸³ While effective at reconceptualizing the definition of corruption, this broader understanding has yet to work its way into the U.S. legal regime. Therefore, Congress should state clearly, in a Statement of Purpose, its intention to combat the harmful societal effects of abuses of functions by incorporating an institutional definition of corruption and an explanation as to why this broader form of corruption should be penalized.

B. “Abuse of Functions” Offense

Congress should then create a criminal offense for a public official’s “abuse of functions” to fill the gap in current U.S. corruption law. This Section looks to three principal sources to identify an emerging legal standard for this new offense: UNCAC Article 19, the Law Commission’s 2020 Misconduct in Public Office Report, and the select U.S. state laws discussed in Part I. It then proposes elements for the new federal offense in light of this standard and the Court’s doctrinal concerns.

First, as noted in Part I, UNCAC Article 19 establishes an international “abuse of functions” standard: a public official commits a criminal offense of abuse of functions when he or she intentionally performs or fails to perform an act, in violation of laws, in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity, or to cause harm to another.¹⁸⁴ Under this approach, an official must violate another law, legal duty, or regulation to be found guilty.¹⁸⁵

180. Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1627 (2017).

181. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 2 (Harvard Univ. Press 2014).

182. See Eisler, *supra* note 180, at 1630–31 (discussing theories of Dennis Thompson).

183. *Id.* at 1630; see also Brown, *supra* note 6, at 147 (noting that practices such as logrolling and patronage are examples of other conduct that fit within this broader context); Stephenson, *supra* note 170 (discussing the limitations of the transactional model of corruption).

184. U.N. Convention Against Corruption Art. 19, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005); U.N. OFF. ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: SECOND REVISED EDITION 2012, ¶ 291 (2012).

185. See discussion *supra* Part I.C.

Second, the Law Commission’s recent proposal for a “corruption in public office” statutory criminal offense serves as a useful template. The Law Commission recently undertook an extensive review of the United Kingdom’s “misconduct in public office” common law offense after its rise in usage in recent years.¹⁸⁶ To remedy broad concerns about the common law offense’s vagueness, the Law Commission recommended that the common law offense be replaced with two new statutory offenses: corruption in public office and breach of a duty in public office.¹⁸⁷ This Note considers the first statutory proposal, corruption in public office, as a guide for creating a similar offense in the United States. Given the similarities between the legal concerns identified by the Law Commission and those of the U.S. Supreme Court, and between the United Kingdom’s and the United States’ legal traditions, the Law Commission’s recommendations are particularly useful for proposing reforms to the U.S. legal regime.

The Law Commission’s proposed offense of “corruption in public office” goes further than UNCAC Article 19 in that it does not require that a public official violate another existing law or regulation to be found guilty of this offense.¹⁸⁸ It proposes the following draft language for the offense:

- (1) It is an offence for a public office holder to use, or fail to use, a power or position of his or her public office for the purpose of achieving a benefit for himself or herself, or a benefit or detriment for another person, if: (a) a reasonable person would consider the use or failure seriously improper, and (b) the public office holder knew that a reasonable person would consider the use or failure seriously improper.
- (2) It is a defence if the public office holder can prove that the conduct was, in all the circumstances, in the public interest.¹⁸⁹

Assuming that a “seriously improper” use or failure includes a violation of laws, this proposed approach satisfies the UNCAC Article 19 provisions. But it goes further: it reaches additional lawful conduct that is deemed objectively seriously improper based on the reasonable person standard.

Third, multiple U.S. states have passed varying abuse of functions criminal offenses that either meet or exceed the constituent elements of UNCAC Article 19.¹⁹⁰ For example, the New Jersey “official misconduct” offense requires that with “purpose to obtain a benefit for himself or another or to injure or to deprive

186. L. COMM’N, MISCONDUCT IN PUBLIC OFFICE: SUMMARY 2 (2020) [hereinafter U.K. MISCONDUCT SUMMARY], <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/MIPO-final-summary.pdf>.

187. *Misconduct in Public Office*, L. COMM’N, <https://www.lawcom.gov.uk/project/misconduct-in-public-office/>; U.K. MISCONDUCT SUMMARY, *supra* note 186, at 2, 4, 10 (indicating that the “breach of a duty in public office” refers to when a public office holder is subject to a duty to prevent death or serious injury).

188. *See* U.K. MISCONDUCT SUMMARY, *supra* note 186, at 7.

189. *Id.* at 7.

190. *See supra* Part I.C.

another of a benefit,” a public servant commit an act related to his office constituting an “unauthorized exercise of his official functions” or “knowingly refrain[] from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”¹⁹¹ This statute therefore requires the violation of a law, regulation, or legal duty in order to punish the conduct. On the other hand, the Delaware “official misconduct” offense *does not* require that an official violate existing laws: it captures several different types of conduct, including when a public official, intending to obtain a personal benefit or harm another, (i) acts in an unauthorized exercise of government official functions, (ii) refrains from legal duties, (iii) performs official functions to serve the official’s own property or financial interests that would not be reasonably justified, or (iv) performs official functions in a way intended to practice discrimination.¹⁹²

These three approaches reveal an emerging “abuse of functions” legal standard that protects the integrity of public office by capturing corrupt behavior beyond acts for a personal benefit involving *quid pro quo* bribery, theft, or fraud for personal financial or proprietary gain. Under this standard, the public official must intentionally act or refrain from acting, using his or her position or power, to achieve undue advantage or cause undue disadvantage. Some approaches implement the UNCAC element requiring that the official violate existing laws, while others have further broadened the offense to simply require that the official’s conduct be objectively unreasonable based on the circumstances. The United States should recognize the emerging legal standard by implementing a general abuse of functions criminal offense at the federal level, closing the legal gap created by the Court’s interpretations of existing federal corruption statutes.

1. Proposed Elements of Offense

Based on the emerging standard described above, this Note proposes that the abuse of functions offense should contain five elements,¹⁹³ discussed in detail below: (1) The defendant is, and knows he or she is, a public officeholder; (2) the defendant uses or fails to use his or her public position or power; (3) for the purposes of achieving a benefit for himself or herself or another or a detriment for another; (4) in an unlawful or unauthorized manner, or in a way that a reasonable person would consider the use or failure seriously improper in the circumstances; and (5) the defendant used the U.S. mail, a private commercial carrier, a wire or radio communication, or affected interstate or foreign commerce in any way or degree.¹⁹⁴ The Note then addresses federal preemption, arguing that this statute

191. N.J. STAT. ANN. § 2C:30-2 (West 2013).

192. DEL. CODE ANN. tit. 11, § 1211 (West 2020).

193. This Note does not address whether this proposed offense would be a misdemeanor or felony, or its potential criminal punishments. However, it generally recommends that Congress consider fines, restitution, and short periods of incarceration rather than lengthier prison sentences.

194. See Hobbs Act, 18 U.S.C. § 1951 (using the Commerce Clause as a jurisdictional hook).

can and should reach state and local corruption while also respecting federalism concerns related to state police powers.

Under Element One, a “public office holder” should be defined by providing a statutory list of positions that would qualify.¹⁹⁵ Depending on how broadly Congress wishes to draft the statute, Congress could choose any number of delimitations to define a “public office holder” in this context. If it wanted to focus on criminalizing sophisticated forms of political corruption, the focus of this Note, this definition could be limited to publicly elected federal, state, and local officials and their political appointees and staff. However, if Congress desired to go further, it could create a statutory list of roles encapsulated in this element. Creating a list of qualifying positions will help Congress avoid any judicial vagueness concerns. Additionally, by limiting this statute to public officials, rather than also including those individuals in private positions of power, as it did with the honest services statute, it will provide courts with a more defined, narrower context to assess public impropriety.¹⁹⁶

Element Two, that a defendant “uses or fails to use his or her public position or power,” recognizes that corrupt conduct can occur by positive acts and by omissions.¹⁹⁷ This language is designed to ensure that the statute targets corruption *in* public office, rather than any kind of misconduct by someone who happens to have been elected or appointed to public office.¹⁹⁸ Additionally, concerning the phrase “position or power,”¹⁹⁹ Congress can further define the powers it intends to address using a non-exhaustive list of typical public powers common to those public officials covered in Element One. To capture powers excluded by the Court’s current interpretations of public corruption in *Cleveland* and *Kelly*, Congress could specify that the statute applies to public officials’ regulatory and licensing powers. By striking a balance between a broad definition and specific tailoring, Congress may enhance its ability to combat corruption and avoid vagueness concerns.

Element Three, “for the purposes of a benefit or detriment,” is a broad phrase directed at the defendant’s intent rather than the consequences of the action.²⁰⁰ The

195. See U.K. LAW COMMISSION, MISCONDUCT IN PUBLIC OFFICE: REPORT, § 5.48 (2020) [hereinafter U.K. MISCONDUCT RECOMMENDATION], <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/Misconduct-in-public-office-WEB11.pdf>.

196. See *Skilling v. United States*, 561 U.S. 358, 416–22 (2010) (Scalia, J. concurring in part) (discussing how the Court is unable to pull out a definitive standard to assess the duty of “honest services” as applied to both public officials and private persons).

197. See U.K. MISCONDUCT RECOMMENDATION, *supra* note 195, § 5.64.

198. See *id.* §§ 5.53, 5.60 (detailing that in developing this recommended language, the Law Commission looked at approaches in comparable common law jurisdictions that encompass conduct committed in the course of one’s public office, including Hong Kong, Canada, Australia, Ireland, and New Zealand (exact language included in the Report)).

199. The Law Commission recommended language to capture misconduct that goes beyond the mere exercise of a public power by recognizing that an office holder may, by abusing something other than “power” in the formal legal sense, act with criminal purpose in a seriously inappropriate way. It notes that this is in line with the broad language of UNCAC Article 19, which proscribes “abuse of functions or position.” *Id.* §§ 5.61–5.63.

200. See *id.* § 5.70; *UNCAC State of Implementation*, *supra* note 54, at 50.

Law Commission notes that this language is meant to address the UNCAC's "undue advantage" language, in addition to inflictions of detriment and conflicts of interest.²⁰¹ Congress can then define, in a non-exhaustive list, what constitutes a "benefit or detriment." The Law Commission provides several examples, including "financial gain and loss," "physical benefits and harm," "reputational benefits and harm," "relationship benefits and harm," "political benefits," and "sexual benefits."²⁰² Given the Court's federalism concerns, to avoid encroaching on the states' police powers by creating a statute that could be seen to broadly condemn all sorts of behavior, Congress should consider focusing this statute predominantly on financial, physical, and political benefits and harms. This should sufficiently address a broader range of conduct, including that exhibited in *McDonnell* and "Bridgegate," without too much federal interference with state and local prosecutions.

Element Four, "in an unlawful manner, or in a way that a reasonable person would consider the use or failure seriously improper in the circumstances," incorporates the UNCAC Article 19 "violation of laws" element, and, in the alternative, an objective reasonableness test derived from the Law Commission's recommendations and some U.S. state laws. This element provides courts and juries a clear, well-established legal standard to use when assessing this sort of conduct.²⁰³ At first glance, "seriously improper" appears to be fairly vague language. However, Congress should list factors to consider when assessing a defendant's behavior. These factors could include, among other things:

- the extent to which this conduct breaches existing criminal and non-criminal laws and regulations directed at official conduct;²⁰⁴
- the extent to which the behavior involved dishonesty or a conflict of interest;
- the extent to which it involved a breach of trust—particularly in relation to vulnerable individuals;
- the degree of any undue benefit that was conferred on the defendant or another person;
- the extent to which harm was caused to one or more affected individuals;
- the extent to which the conduct undermined public confidence in the institution to which the public office relates, or public institutions more generally;²⁰⁵ and
- the extent to which the public officeholder can show that the conduct was, in all the circumstances, in the public interest.²⁰⁶

201. U.K. MISCONDUCT RECOMMENDATION, *supra* note 195, § 5.70.

202. *Id.* (providing in each case a specific example of the kind of behavior that would constitute the offense).

203. *See id.* § 5.80; *see also* Hisham M. Ramadan, *Reconstructing Reasonableness in Criminal Law: Moderate Jury Instructions Proposal*, 29 J. LEGIS. 233, 233 (2003) ("The concept of reasonableness or 'reasonable person' has become one of the cornerstones in criminal law.").

204. *See, e.g.*, U.N. Convention Against Corruption Art. 19, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

205. *See* U.K. MISCONDUCT RECOMMENDATION, *supra* note 195, § 5.83.

206. *See* U.K. MISCONDUCT SUMMARY, *supra* note 186, at 7.

Although these factors do include individual phrases that may be difficult to define, such as “an undue benefit,” the factors, when taken together, provide a clear picture of the types of questions a factfinder or court should consider when applying the objective reasonableness test. In particular, by including the conduct’s potential effect on public confidence, this element incorporates a broader understanding of public corruption’s effect on the political process. Additionally, by including the term “seriously,” in addition to “improper,” this element intentionally sets a high bar that only captures the nature and gravity of corruption that should be considered criminal, not just improper.²⁰⁷ Last, instead of including a separate public interest defense, as recommended by the Law Commission,²⁰⁸ this Note includes a public interest factor under this element. Because Element Four includes an objective reasonableness test for the factfinder, the public interest factor should be included in the factors considered in weighing the conduct’s reasonableness.²⁰⁹

Finally, Element Five includes a necessary jurisdictional hook to reach state and local corruption: that the defendant used the U.S. mail, a private commercial carrier, a wire or radio communication, or affected interstate or foreign commerce in any way or degree. In recognizing the broader negative effects of public corruption, Congress must emphasize that its power to police such behavior on a state and local level stems from one of its constitutionally enumerated powers under Article I, Section 8. Congress should consider using the same powers it has relied on for its other anti-corruption statutes, including its power to regulate commerce²¹⁰ and its power to regulate the mail.²¹¹

207. See U.K. MISCONDUCT RECOMMENDATION, *supra* note 195, §§ 5.81–5.83.

208. See U.K. MISCONDUCT SUMMARY, *supra* note 186, at 7.

209. This Note recommends against including an additional element, the subjective reasonableness element, that the Law Commission includes in its proposed offense. The Law Commission suggests that to be found guilty of corruption in public office, it must also be found that “the defendant realised an ordinary decent person would regard the behaviour as seriously improper.” See U.K. MISCONDUCT RECOMMENDATION, *supra* note 195, § 5.84. This incorporates a subjective element, creating a two-stage objective then subjective test to assess the defendant’s conduct. See *id.* § 5.85. The two-stage test would be as follows: “(1) was the use, or failure to use the position or power such that an ordinary reasonable person would consider it to be seriously improper? (the objective test) If yes: (2) must the defendant have realised that their conduct was, by those standards, seriously improper? (the subjective test).” *Id.* The Law Commission recommends this approach because this corruption offense would potentially criminalize behavior that would not be criminal in other contexts, so it asserts that it is important to ensure that the official was aware that what he or she was doing would be recognized by a reasonable person to be wrong (although not necessarily criminal) before criminal liability is imposed. *Id.* § 5.93. However, providing fact-finders with a two-part objective-subjective reasonableness test will likely create confusion and uncertainty in assessing this offense, so Congress should seriously consider avoiding this approach. Given the Court’s repeated concerns about creating clearly defined criminal law, this hybrid test would likely face intense judicial scrutiny. Instead, an objective reasonableness test, incorporating a high standard to condemn not just improper behavior, but “seriously” improper behavior, should suffice in avoiding overcriminalization of smaller, less egregious acts.

210. U.S. CONST. art. I, § 8, cl. 3.

211. *Id.* cl. 7.

To justify expanding legislation in this area, the statute, perhaps in the Statement of Purpose, should include evidence of the potential impact of public corruption on the country's legal, economic, and social development. This will relate Congress's power to legislate in this area to one of its enumerated powers. In doing so, Congress should also include a justification as to why this power to prosecute should not be fully left to the states.²¹² Addressing the Court's federalism concerns head-on means the Court will likely have a much more difficult time claiming that Congress has failed to clearly state both its intent to preempt state police power in this area of criminal law and its justification for doing so.

2. Preemption

To respect the Court's federalism concerns, Congress should preserve some state prosecutorial power in this area. Therefore, as it has done in other federal legislative acts,²¹³ Congress should create a statutory floor²¹⁴ to protect state prosecution of local corruption. In cases where a state law contains a broader or roughly equal scope as the relevant federal act, state and local officials must be given a first right to prosecute the case.²¹⁵ Federal officials may then only pursue prosecution when: (1) state and local officials decline to prosecute under state laws that meet the statutory floor; or (2) no applicable state law meets the abuse of functions floor; or (3) the state has prosecuted on state criminal charges, and the federal government wants to pursue separate federal charges. This floor will preserve certain police powers for state governments²¹⁶ while standardizing a baseline effort to combat corruption that impacts the country on a national level.

212. See discussion *supra* Part II.C.

213. See, e.g., William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1567–68 (2007) (citing the Clean Water Act's anti-pollution standards as a "paradigmatic example[]" of regulatory floor-setting).

214. See *id.* at 1587–88 (defining a legal "floor" as the requirement that after a federal standard has been set, no one is permitted to adopt a less protective or lenient approach; this approach implies that state and local lawmakers, and common law regimes too, can impose requirements or create incentives for greater protection of risk); see also NAT'L POL'Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, *FUNDAMENTALS OF PREEMPTION* 3 (2010), <https://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-fundamentals-2010.pdf> ("[F]loor preemption could be desirable if it truly establishes a minimum statewide or federal standard and still leaves local governments to pursue even better . . . protections.").

215. Currently, the DOJ exercises discretion in deferring prosecution to another jurisdiction based on factors determined by the department. U.S. Dep't of Just., *Just. Manual* § 9-27.240 (2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>. Congress should therefore expressly include the states' first right to prosecute abuses of functions to formalize the federal-state balance.

216. This approach addresses federalism concerns echoed by several legal scholars in this area. See Joshua Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. UNIV. L. REV. 657, 690 n.173 (2018), citing: George D. Brown, *Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 187–88 (2015); Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L. J. 669, 700–01 (2000); Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 154 (2005) ("[T]he federal role in

C. Application of “Abuse of Functions” to Recent Corruption Cases

Depending on its construction, this new “abuse of functions” criminal offense would capture the conduct detailed in the Introduction’s three examples—conduct that is corrupt but does not necessarily involve an act for personal financial gain, or quid pro quo bribery, theft, or fraud. In Example One,²¹⁷ *McDonnell*, Governor McDonnell’s behavior would likely be an “abuse of functions,” even though all of the evidentiary elements of official bribery could not be met. Under the proposed offense, McDonnell’s behavior would constitute an unauthorized use of his power as Virginia governor or, alternatively, a seriously improper use under the circumstances, for the purposes of achieving a personal benefit of gifts worth \$175,000 in total. Because Virginia does not have a state-level abuse of functions offense, federal prosecutors would prosecute the case.

In Example Two,²¹⁸ *United States v. Tavares*,²¹⁹ the high-ranking Massachusetts probation officials and state legislators would likely be found guilty of “abuse of functions” for playing political favoritism in their hiring scheme that violated state hiring protocols. Although the officials did not act for personal financial benefit or commit an official *quid pro quo*, they acted for political benefit—to achieve favorable legislation for their agency and benefits for the legislatures’ preferred job candidates. Therefore, their conduct would likely be considered use of their public positions and power for the purposes of achieving benefits for themselves in an unauthorized, seriously, and objectively improper manner. Because Massachusetts does not have a state-level abuse of functions offense, the case would be prosecuted federally.

Finally, in Example Three,²²⁰ “Bridgegate,” the defendants’ politically corrupt conduct would be captured by the “abuse of functions” offense. As state officials, they used their regulatory power in an unauthorized way, or alternatively, in an objectively, seriously improper way, to punish, or cause political detriment, to a political foe. Even if the defendants argued that their actions did not violate any laws, a reasonable person would likely consider the behavior seriously improper in the circumstances based on several factors, including the harm caused and its potential to undermine public confidence. Nevertheless, because New Jersey has a

policing non-federal corruption should be strong but narrow — ideally, to shine the bright light of federal prosecutions on non-federal practices that are unquestionably corrupting because they are already condemned by state law. U.S. Attorneys have no special expertise on the wisdom of campaign finance reform or conflicts of interest.”); and Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1619–21 (1992). See also Eisler, *supra* note 180, at 1627 (“An immediate policy solution to enable civic anticorruption enforcement is state-led enforcement with federal cooperation, which would address federalism concerns and distance such prosecutions from federal judicial review.”).

217. See *supra* note 1 and accompanying text.

218. *Id.*

219. 844 F.3d 46 (1st Cir. 2016).

220. See *supra* note 1 and accompanying text.

similarly broad state-level abuse of functions offense, state prosecutors would legally have the first right to prosecute the case. Only if the state prosecutors declined would federal prosecutors then be able to bring charges under the proposed federal offense.

CONCLUSION

This Note has argued that because of the Court's narrow interpretation of federal criminal corruption offenses, current U.S. laws, when benchmarked against international standards, do not sufficiently capture certain internationally recognized forms of public corruption that Congress has intended to criminalize.²²¹ Specifically, it has made it nearly impossible to prosecute officials who abuse their power without *quid pro quo* bribery, theft, or a fraudulent scheme to obtain money or property for personal advantage. This gap in anti-corruption law has allowed for many of the more sophisticated forms of political corruption witnessed in the United States today. To remedy this, this Note has proposed a new abuse of functions federal criminal offense, derived from the emerging legal standard exhibited at international, national, and state levels, that would more broadly capture public officials' abuses of power.

221. See case discussions of *Cleveland v. United States*, 531 U.S. 12 (2000), and *Skilling v. United States*, 561 U.S. 358 (2010), among others, *supra* Part II.B.