

THE APPEARANCE AND THE REALITY OF QUID PRO QUO CORRUPTION: AN EMPIRICAL INVESTIGATION

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ABSTRACT

The Supreme Court says that campaign finance regulations are unconstitutional unless they target “quid pro quo” corruption or its appearance. To test those appearances, we fielded two studies. First, in a highly realistic simulation, three grand juries deliberated on charges that a campaign spender bribed a Congressperson. Second, 1271 representative online respondents considered whether to convict, with five variables manipulated randomly. In both studies, jurors found *quid pro quo* corruption for behaviors they believed to be common. This research suggests that Supreme Court decisions were wrongly decided, and that Congress and the states have greater authority to regulate campaign finance. Prosecutions for bribery raise serious problems for the First Amendment, due process, and separation of powers. Safe harbors may be a solution.

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1. INTRODUCTION

As the amount spent on the 2012 US elections—\$7B—exceeded the total number of people on Earth (Parti 2013), polls showed that public trust that government will “do what is right” reached an all-time low (Pew Research Center 2014). Although three-quarters of Americans had expressed such trust in the 1960s, only one quarter now do so (Pew Research Center 2014). There are concerns that this money allows benefactors to secure policy outcomes that serve private rather than public interests in virtually every domain of governmental policy, from the safety of drugs and the rationality of intellectual property rules to the stability of the financial system and the tax code (Lessig 2011). Empirical research finds that, “average citizens’ preferences . . . have essentially zero estimated impact upon policy change, while economic elites . . . have a very large . . . impact” (Gilens & Page 2014, pp. 564–581). Five out of every six Americans say that, “money has too much influence” in politics today (The New York Times 2015).

There are two perfectly-legal mechanisms by which money may yield policy outcomes. First, those with money may exploit a background heterogeneity to select candidates for office with the most agreeable policy preferences, and expend money to get them into positions of power (Milyo 2008). Second, campaign money may buy “ingratiation and access” (*Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 130 S. Ct. at 910 (2010)). Here, a contributor or her lobbyists ply an official with donations to persuade the official to take the time to meet and to hear about their special concerns for policy, interactions which will then increase the likelihood of the official forming favorable preferences (Hasen 2012b; Kalla & Broockman 2015).

In some cases, the lobbyists themselves serve as fund-raisers, which gives rise to a “concern[] about the leverage that lobbyists can acquire, and the unseemly appearances they create” (Brody 2015; Fried 2011, pp. 424, 426–427). Through these channels, former Member of Congress Leon Panetta has explained that, “‘Legalized bribery’ has become part of the culture of how this place operates . . . [Today’s members of the House and Senate] rarely legislate; they basically follow the money . . . they’re spending more and more time dialing for dollars The only place they have to turn is to lobbyists” (Kaiser 2009, p. 19; Levine & Johnston 2016, p. 283). In a similar vein, former member Chuck Hagel acknowledges that, “There’s no shame anymore We’ve blown past the ethical standards; we now play on the edge of legal standards” (Kaiser 2009, p. 19; Levine & Johnston 2016, p. 283).

The classic legal solution to these problems is prophylaxis—to simply proscribe certain relationships between officials and their benefactors that pose too

great a risk of distorting the policymaking process (Teachout 2014). This tactic has a long history in the USA, starting with the rules banning foreign gifts that the Framers wrote into the Constitution (U.S. Const. art I, § 9, cl. 8). Similarly, Congress and the States have placed limits on campaign donations and expenditures, and begun to regulate the revolving door between political offices and lobbying firms. For example, “at least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates” (*Citizens United*, 558 U.S. 310, 343 (2010)). Moreover, individuals were limited in the total amount of money they could contribute to candidates in an election cycle (*McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (striking down this restriction)). Like the Constitutional ban on gifts from “any King, Prince, or foreign State,” these prophylactic regulations identify specific categories of persons, specific amounts of money, and specific timeframes before elections. These “bright-line” rules say who can spend what when (*Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)).

In a series of decisions spanning recent decades—from *Buckley*, through *Citizens United*, to *McCutcheon*, the US Supreme Court has held that campaign spending is political speech, and that these regulations conflict with the First Amendment. While dismantling the prophylactic rules, the Supreme Court has conceded that money creates goodwill, ingratiation, and special access to politicians, which all undermine democratic equality. Still, the court insists that these are not legitimate targets of regulation (*Citizens United*, 558 U.S. 310, 359 (2010)). Instead, the Supreme Court has said that, in this context of political speech, the Government can regulate only “*quid pro quo* corruption,” or the appearance thereof (*McCutcheon*, 134 S. Ct. 1434, 1441 (2014)).

Scholars have criticized this narrow notion of corruption, and suggested more capacious alternatives (e.g. Lessig 2011; Teachout 2014; Hasen 2016). Some, such as former Justice John Paul Stevens (2014), have called for fundamental reform, even through constitutional amendment, if necessary (Ayres & Bulow 1998; Lessig 2011; Nagle 2000).

This article takes a different tack, suggesting a closer look at the Supreme Court’s own keystone notion of “*quid pro quo*” corruption as the sole legitimate basis for regulation. The meaning and scope of this criterion should not be taken for granted.

The Latin means “this for that,” and it is the essential idea at the core of bribery, turning on the exchange of something of value (*quid*) for (pro) official action (*quo*) (*U.S. vs. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1976)). The Supreme Court may be attracted to this concept because it would seem that cases of outright bribery are so obviously beyond the pale—like murder—that the law could easily identify and proscribe them as such.

However, the *quid pro quo* concept and its application in bribery are problematic in a way that has not yet been fully appreciated. Two of the three primary elements—*quids* and *quos*—exist everywhere. Self-interested citizens and corporations spend money that benefits elected officials. Elected officials introduce and vote upon bills that benefit those benefactors. Under the bribery statutes (e.g. 18 U.S.C. § 201), this is all perfectly legal, as long as it is not done with a corrupt state of mind—an agreement that these *quids* and *quos* are made in exchange for each other (the “*pro*”). Often these parties are in fact connected by lobbyists, whose very reason for existence is to inform each party about the precise interests of their counterparts. Such an exchange can be made implicitly—through the “knowing winks and nods” that Justice Kennedy has described (*United States v. Evans*, 504 U.S. 255, 274 (1992)). In the end, the existence of *quid pro quo* corruption depends on a factual finding about the state of mind of the parties (Morley 2016).

Importantly, the Supreme Court has recognized a compelling state interest in not just preventing *quid pro quo* corruption, but also ensuring that contemporary politics does not *appear* to be so corrupted (*McCutcheon*, 134 S. Ct. 1434, 1441 *Buckley*, 424 U.S. at 27). Appearances drive social trust, democratic legitimacy, and the constitutional stability of government (Gibson & Caldeira 2009; Ponnambalam 2013). Legitimacy also facilitates voluntary compliance with the laws made under a political regime (Tyler 2003). The question is whether it appears to be a government of oligarchy, or whether instead “[t]he people ... possess the absolute sovereignty” (*New York Times v. Sullivan*, 376 U.S. 274, 84 S. Ct. 710 (1964)).

Thus, the Constitutionality of regulation actually depends on empirical questions which can be answered through empirical investigation. Do the contemporary practices of everyday politics appear to be *quid pro quo* corruption? Does it matter if the campaign money is given directly, or instead given to an “independent” organization working to support the candidate? How explicit must any agreement between official and benefactor be to give rise to such appearances? If a lobbyist serves as an intermediary between officials who never even meet or communicate directly, does this fact reduce or exacerbate perceptions of *quid pro quo* corruption?

It is no easy task to conceive of a proper empirical test of these questions. A simple poll asking whether money has too much influence in politics, or whether politicians are now “corrupt,” will clearly not suffice, because the Supreme Court has insisted that “*quid pro quo*” corruption is a peculiar legal concept, to be distinguished from ingratiation, access, or other more capacious notions of corruption. Furthermore, it is not clear that a poll-respondent has sufficient information, the serious and earnest demeanor, and the opportunity to deliberate—all of which are required to give a meaningful

response on this question. Addressing both of these problems, this article's conceptual contribution is to operationalize the QPQ standard in the substance and procedure of American criminal law.

Specifically, the Federal law of bribery provides a sufficient condition for any case of *quid pro quo* corruption. The Federal crimes of bribery require proof of an exchange of a thing of value for an official act, given with a corrupt state of mind. Through a series of cases discussed in Section 2.3 below, the Supreme Court and the lower courts have refined the relevant jury instructions for this crime, in campaign finance cases in particular, with real stakes for convicted defendants, giving further substance to the QPQ concept.

Arguably, the appearance of *quid pro quo* standard could include *more* than cases of outright bribery, proven at the beyond a reasonable doubt standard. By operationalizing the concept in this way, however, we present a very strong test.

In terms of procedure, the US Constitution also provides the paradigmatic settings for democratic deliberation and informed decision-making about questions of legal significance. In the grand jury and petit jury institutions, we find precisely a mechanism for determining whether a legal term of art is applicable to a real-world state of affairs.

Specifically, the Constitution provides that laypersons on grand juries must decide whether to indict on the probable cause standard that a crime has been committed, informed by the Government's evidence and deciding whether to issue a formal indictment, which summarizes the allegations and applies them to the law, given in the US Code. Similarly, petit juries are empaneled to review evidence and argument from both the Government and the defendants, along with instructions from a judge, ultimately deciding whether to convict the defendants by determining whether their transactions are too reciprocal, their intents too corrupt, at the beyond-a-reasonable-doubt standard.

To be especially careful, one should consider whether the Constitution's Speech or Debate Clause might give succor to defendants, as it prevents prosecutors from telling jurors that the official followed through with his end of the bargain on the floor of Congress. Similarly, one might worry that unsettled variations in the specific jury instructions on the law of bribery might lead the jury astray. Finally, in a society increasingly polarized by politics, one might worry that even these properly-informed decision makers might be improperly swayed by explicit or implicit assumptions about the political identifications of the defendant, leaving corruption in the eye of the beholder. In the design of our empirical studies, we take precautions on all these fronts.

Here again, one might persuasively argue that the appearance of *quid pro quo* corruption standard is more capacious, not requiring the formality of a grand jury's robust deliberations, or the specific jury instructions and beyond-a-reasonable doubt standard of the criminal trial. Thus, our method to

operationalize the appearance of *quid pro quo* corruption standard is again a strong test, offering a sufficient condition for a finding, even if not a necessary one.

With this operationalized conception in hand, we conducted two studies with mock jurors. First, we conducted a grand jury simulation (perhaps the first of its kind), involving a diverse group of forty-five human subjects recruited from the community to participate in a three-hour experience, watching excerpts from the actual video used to orient Federal grand jurors, hearing a live in-person grand jury presentation from an experienced prosecutor and testimony from two witnesses, and then deliberating in person on whether to issue a realistic indictment. This indictment charged a Member of Congress and a major campaign donor with a bribery conspiracy. The facts of the case were designed to mimic ubiquitous behavior that virtually any of the 535 Members of Congress engage in every day. Strikingly, in this highly-realistic simulation, the vast majority of our grand jurors were willing to indict such everyday behavior under the federal bribery statute.

Second, we conducted a guilt-phase experiment with 1,276 mock jurors recruited from an online population to be representative in terms of politics, age, and gender. We included realistic jury instructions, factual presentations in vignette form, and closing arguments from attorneys. We systematically manipulated the legally-relevant facts (e.g. the type of *quids* and *quos* exchanged, and the explicitness of any agreement between the parties). For robustness, we also manipulated the political party of the official, whether the jury was informed of the official performing his end of the alleged bargain, and the specific legal instructions defining bribery in a campaign finance case.

This study suggests that much of what politicians and benefactors now do in the regulatory system crafted by the Supreme Court actually *does* appear to be *quid pro quo* corruption. This evidence provides a novel basis for upholding prophylactic campaign finance restrictions, which the Supreme Court has promised can be justified to prevent the appearance of such corruption.

On the other hand, this evidence should provide some caution about using the bribery statutes as tools for regulating money in politics. As the Supreme Court has struck down prophylactic reforms, it leaves bribery as the only regulatory tool. However, it is one that gives ultimate discretion to politically-appointed prosecutors to decide who does, and does not, get indicted. This discretionary enforcement raises particularly severe problems in the First Amendment context, and also raises separation of powers problems. We develop these themes, and a regulatory safe-harbor solution, in the implications section.

This article proceeds as follows. In Section 2, we survey the current state of play in terms of money in politics, the laws regulating that behavior,

constitutional limits, and the prior literature. In Section 3, we report the grand jury simulation, including methods, results, and limitations. Section 4 does the same for our guilt-phase experiment. In Section 5, we discuss the implications of this research, in particular the problems in the current legal regime. A Methodological Appendix available online provides detail.

2. BACKGROUND

2.1 Campaign Finance

A simplified overview of the framework for campaign finance in the USA must suffice for present purposes (see generally Hasen (2016); Issacharoff, Karlan, & Pildes (2012); De Figueiredo & Garrett (2004); Post (1999)). The contemporary regime has grown out of the disclosure mandates in the Federal Election Campaign Act of 1971 (FECA) as amended in 1974, which created the Federal Election Commission and imposed additional limitations on donations made by individuals, political parties, and political action committees (PACs).

Senator James Buckley (NY) challenged FECA on the grounds that it violated the First Amendment (*Buckley*, 424 U.S. 1 (1976)). Writing that “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs of course including discussions of candidates” (*Buckley*, 14) the Supreme Court held on the one hand that FECA’s restrictions on independent campaign expenditures were unconstitutional (*Buckley*, 50). On the other hand, the statute’s restrictions on campaign contributions were an appropriate legislative “weapon[] against the reality or appearance of improper influence” (*Buckley*, 58).

In 2002 Congress acted again to address the explosion of “soft money,” raised by political parties, which amounted to about half a billion dollars in the 2000 elections (Issacharoff & Karlan 1998; Malbin 2004). The Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold, prevented national political parties from spending nonfederal dollars (soft money), placed requirements on television and radio advertisements, created new rules defining when a communication is considered “coordinated” between a candidate and the communicating entity, and created new contribution limits for individuals (Briffault 2000; Foley 2003).

The Supreme Court reviewed the Constitutionality of BCRA in the 2003 case *McConnell v. FEC* (540 U.S. 93 (2003)). The Court held that the restrictions on soft money had only a minimal effect on speech, one that could be justified by the government’s interest in preventing “both the actual corruption threatened by large financial contributions and . . . the appearance of corruption” that such contributions could create (*McConnell v. FEC*, 43–145; Strause & Tokaji 2014).

In 2007, the Supreme Court began dismantling this regime. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the Court held that the BCRA's limitations on corporate funding of express advocacy or its functional equivalent in the days just before an election are unconstitutional as applied (551 U.S. 449 (2007); Briffault 2008; Hasen 2011; Mann 2008). In 2008, the Court also struck down "the millionaires amendment," which raised contribution limits for candidates who were outspent by self-funded candidates (*Davis v. FEC*, 554 U.S. 724 (2008)).

In *Citizens United v. FEC*, the Supreme Court addressed the constitutionality of FECA's prohibition on corporate independent expenditures for advocacy in the days just before elections (558 U.S. 310 (2010)). The Court held that because "the Government may not suppress political speech on the basis of the speaker's corporate identity," corporations and unions may make independent expenditures to create their own advertisements (*Citizens United v. FEC*, 365). *Citizen's United* held that *quid pro quo* corruption, and the appearance thereof, were the *only* legitimate bases for regulation. Scholars have recognized that this holding is the most important and long-lasting aspect of the case (Kang 2012; Morley 2016).

In *SpeechNow.Org v. FEC*, the District of Columbia Court of Appeals considered whether or not the limitations placed on individual donations to PACs violated the First Amendment (559 F.3d 686, (2010)). Relying on *Citizens United*, the court held that, "the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow" (*Speechnow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010)). Super PACs may receive and spend unlimited amounts of money to support or undermine any candidate (De Figueiredo & Garrett 2004; Issacharoff & Peterman 2013; Peterman 2011).

In *McCutcheon v. FEC*, the Supreme Court overturned the aggregate limits on how much an individual may contribute to multiple candidates (*McCutcheon*, 134 S. Ct. 1434 (2014)). Following *McCutcheon* a donor may give \$2,600 per election cycle to an unlimited number of candidates.

There is no limit on how much an individual may donate to a 501(c)(4) or "social welfare" designated organization. The operation of 501(c)(4) is regulated by the IRS tax code and not FECA. These "social welfare" organizations may engage in political activism so long as it is not their "primary purpose," and need not disclose information about their donors (IRS 2014). Accordingly, these groups are known as "dark money" organizations (Gerken 2013).

Under this legal regime, private money flows into politics. The average cost of winning a Congressional campaign in 2012 was \$1.6 million and the average cost of winning a Senate campaign was \$10.4 million (Steinhauser & Yoon 2013). Even after adjusting for inflation, these costs have grown by more

than one hundred percent increase for Congressional races, and nearly one hundred percent for Senate races.

The contributions are highly concentrated. There were 666,099 total donors who gave \$200 or more, and five-sixths of these (550,503) gave less than \$2,599 (FEC 2014). Those giving more than \$2,600 represent 0.04 percent of the total population (OpenSecrets.Org 2014a). A very rare group of 1,065 individuals donated \$95,000 or more. Larry Lessig (2013) has argued that these donors are like voters in a money vote that precedes and prequalifies the actual election on polling day. The money-voters represent roughly the same percentage of the American population as the percentage of people with the name “Lester” (Lessig 2013).

These data about direct contributions does not include the money spent by others to influence the outcome of the election, and potentially influence the candidates and officials themselves. For the years 2013 and 2014, PACs—including labor, trade, membership, nonconnected, corporations, and cooperatives—spent a total of \$1.3 billion. This is in comparison to the approximately \$2.6 billion spent by candidates and parties (OpenSecrets.Org 2014b). There is no direct way to assess spending by “dark money” organizations. However, independent estimates suggest that these 501(c)(4) organizations spent \$333 million in the 2012 election cycle (OpenSecrets.Org 2013).

2.2 The Revolving Door

In the fall of 2014, after a successful primary challenge, Republican Majority Leader Eric Cantor resigned from the House of Representatives several months early to accept a \$3.4 million salary as an investment banker (Cimilluca & O'Connor 2014). The Wall Street Journal reported that, “Mr. Cantor has long been seen as a liaison of sorts between the GOP and Wall Street, which also has been a big campaign contributor” (Cimilluca & O'Connor 2014). Prior to serving in Congress, Cantor had been trained as an attorney, and worked in his family real estate business (Barbash 2014).

No law directly regulates this sort of revolving-door relationship from Congress to industry. There are, however, regulations of Members becoming lobbyists. The Ethics Reform Act requires a one-year “cooling off” period for members of the House and a two-year “cooling off” period for members of the Senate. During the “cooling off” period, former Members are prohibited from “knowingly mak[ing], with the intent to influence, any communication to or appearance before any current member” ((18 U.S.C. § 207 (e)(1)(A) (applying to Senate); 18 U.S.C. § 207 (e)(1)(B) (applying to House)). There is no prohibition placed on former Members being hired to supervise and strategize lobbying efforts of subordinates (Maskell 2014).

Revolving-door arrangements are common for federal legislators—one source counts 419 former Members of Congress that have taken up work as lobbyists (OpenSecrets.Org). Nearly two-thirds retiring Members of Congress go through the revolving door to lobbying firms (45.2 percent) or their clients in industry (19 percent) (OpenSecrets.Org 2014c). Researchers have found that more than half (56 percent) of the revenue generated by lobbying firms could be attributed to individuals with government experience, including both officials and their employees (Vidal, Draca, & Fons-Rosen 2012).

2.3 Lobbying, Reciprocal Behavior, and the Law of Bribery

The previous two sections have reviewed laws that pertain directly to revolving-door and campaign finance relationships, but these vectors of influence can also be regulated by the bribery and extortion statutes. These statutes are implicated when someone provides (or promises) campaign donations or expenditures, or a job, as the *quid*, and a politician provides (or promises) some particular official action as the *quo*.

These reciprocal interests are often connected by lobbyists—the “pros” in the political system, who are paid over \$2.4 billion per year for their services (OpenSecrets.Org 2015b). The very purpose of lobbying is to promote the specific interests of the clients, and campaign funding is a primary tool lobbyists use to make those interests known and salient to officials (Gerken & Tausanovitch 2014). Rick Hasen (2012b) explains the dynamic:

Lobbyists gain access through the cultivation of relationships with legislators and staffers using a variety of tools permissible under the law, especially the raising of campaign contributions for legislators. Campaign contributions are a key part of a culture of reciprocity. Feelings of reciprocity are formed easily and without the outlay of considerable resources, but those who help out the most are likely to get the greatest access. It is a natural instinct to help someone who has helped you.

Accordingly, lobbyists are a vital part of funding elections for those politicians from whom they request specific official actions (Abramoff 2011; Eggen & Farnam 2011; Seabrooke & Blumberg 2012; Smith 2013). In the 2012 election, for example, fifteen individuals working for lobbying firms raised over \$5 million as “bundlers” for President Obama’s campaign (CommonCause.Org 2011; Hayward 2008; OpenSecrets.Org 2015a). Six-dozen lobbyist-bundlers raised over \$17 million for Mitt Romney’s campaign (Beckel 2013). Harry Reid, as an example, raised 14 percent of his campaign fund from lobbyist-bundlers (Beckel 2013). This behavior is largely unregulated, beyond a disclosure regime, which may be counterproductive (Holman 2014). Rick Hasen

(2012b, p. 238) has argued that, “Unfortunately, lobbyist bundling disclosure might have had the perverse effect of increasing the stature of the lobbyist with an elected official, by documenting how hard a lobbyist is working for an elected official or her party.”

Frankly these numbers are small, as a proportion of campaign spending. They do not include the potentially vastly larger sums in which lobbyists encourage their clients to donate directly, which thus cannot be traced back to the lobbyist, but nonetheless open doors for him or her.

Former lobbyists, former and current Members of Congress, and presidential candidates now refer to these reciprocal relationships as a system of “legalized bribery” (Kaiser 2009; Sanders 2015; Wertheimer 2015). Jeffrey Birnbaum argues that, although donors and spenders “use euphemisms like ‘buying access’ to wink and nod their way toward the same thought. But the truth is the truth. Interests give money to buy votes” (Birnbaum 2006). Is this hyperbole? Or, if not, how exactly does the law make bribery legal?

There are a range of federal laws that proscribe bribery, but 18 U.S.C. § 201(b)(1) is the paradigm, providing that “[w]hoever directly or indirectly, corruptly gives, offers or promises anything of value to any [Federal] public official ... with intent ... to influence any official act ... shall be ... imprisoned” (*United States v. Helstoski*, 442 U.S. 477, 493 n.8 (1979)). Another statute reaches state and local officials (18 USC 666). There are also crimes defining extortion under color of official right (*Evans*, 504 U.S. 255, 267 n.18 (1992); *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)). Finally, the honest services fraud statute has been interpreted to criminalize bribery by anyone using the mails or wires, regardless of the office (18 U.S.C. 1346; *Skilling v. U.S.*, 561 U.S. 358 (2010)). There are sundry state laws as well (Alschuler 2015).

These statutes have textual differences, which wreak havoc in the lower court (e.g. *U.S. v. Garrido*, 713 F.3d 985, 1001-02 (9th Cir. 2013); *Salinas v. United States*, 522 U.S. 52, 58 (1997); Brown 1999). Still, the statutes have in common the idea of a *quid pro quo* exchange. As one circuit court explains simply, “If an official receives money ‘through promises to improperly employ his public influence,’ he has accepted a bribe” (*U.S. v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013)). This exchange relationship can be seen in the cases that the Supreme Court has characterized as “paradigmatic” (130 S. Ct. at 2934). *United States v. Whitfield* involved payments of money to, and the forgiving of campaign debts for, elected state court judges in exchange for favorable judicial decisions (590 F.3d 325, 352-53 (5th Cir. 2009)). *United States v. Kemp* involved payments of money to a city treasurer in exchange for city contracts (500 F.3d 257, 281-86 (3rd Cir. 2007)). Justice Sotomayor’s pre-Supreme Court case *United States v. Ganim* involved payments of money to

a mayor for city contracts (510 F.3d 134, 147–49 (2nd Cir. 2007) (Sotomayor, J.)).

One way to understand bribery is to contrast the lesser offense of gratuity. As the Supreme Court has explained:

The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken (*Sun Diamond Growers v. United States*, 119 S. Ct. 1402, 143 L.Ed.2d 576 (1999); *United States v. Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013)).

The essence of bribery, once again, is the corrupt exchange.

In a world where officials routinely solicit campaign money from self-interested donors who seek policy outcomes from the officials that they benefit, the line demarcating bribery is not always bright (Lowenstein 1985). In *Ganim*, the Sotomayor opinion distinguished that, “[b]ribery is *not* proved if the benefit [to the official] is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be . . . in a position to act favorably on the giver’s interest” (*United States v. Ganim*, 510 F.3d 134, 147–49 (2d Cir. 2007) (emphasis added)). Recognizing that politicians will often act in a ruthlessly rational fashion, Judge Easterbrook has said that “[t]he idea that it is a federal crime for any official . . . to take account of political considerations . . . is preposterous” (*United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007)). One might suppose that the offering and garnering of campaign contributions could well be a political consideration. The Fourth Circuit has candidly said so: “[a]ll payments to elected officials are intended to influence their official conduct” (*United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993)). Nonetheless, the Supreme Court has said that if those contributions produce “ingratiation and access,” they are “in any event, not corruption” (*Citizens United*, 130 S. Ct. at 910).

It is clear that campaign contributions, as well as campaign expenditures that help a candidate, can count as “things of value” (as a *quid*) for the purposes of the bribery statutes (*Salinas*, 522 U.S. 52, 57 (1997)). The courts have adopted a subjective notion of “thing of value,” such that just about anything that one of the defendants values can count as such (*Mulhall v. Unite Here Local*, 355, 667

F.3d 1211, 1215, 187 L.Ed. 2d 517 (11th Cir. 2012) *cert. granted*, 133 S. Ct. 2849, 186 L.Ed. 2d 907 (2013) and *cert. dismissed* as improvidently granted, 134 S. Ct. 594 (2013) and *cert. denied*, 134 S. Ct. 822, 187 L.Ed. 2d 684 (2013)). In *U.S. v. Siegelman*, the primary *quid* was a \$500,000 contribution to an independent group that supported a state lottery initiative, which the official had prioritized as a political goal, even though neither he nor his campaign received the money (640 F.3d 1159, 1171 (11th Cir. 2011)).

It is not common for the Government to prosecute campaign donations or expenditures as the only *quid* in an exchange agreement, although such prosecutions do happen (e.g., *U.S. v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013); Birnbaum 2006). In one recent case, a state court judge was prosecuted for accepting campaign contributions from a litigant, through a lobbyist as an intermediary, and was “influenced” by those donations in his decision about whether to reduce a jury’s damages award (Neil 2015).

More commonly, campaign support is one part of a larger “stream of benefits” exchanged by the parties (Birnbaum 2006, pp. 24–25). This “stream of benefits” theory has been used to lower the bar for prosecutions. For example, the Third Circuit has affirmed a jury instruction that, “where there is a stream of benefits given by a person to favor a public official, . . . it need not be shown that any specific benefit was given in exchange for a specific official act” (In *United States v. Kemp*, the Third Circuit did just that. 500 F.3d 257, 281 (3rd Cir. 2007), *cert. denied*, 128 S. Ct. 1329 (2008); *United States v. Whitfield*, 590 F.3d 325, 351 (5th Cir. 2009). Similarly, Justice Sotomayor’s *Ganim* decision rejected the contention that “the benefits received must be directly linked to a particular act at the time of agreement” (*Ganim*, 510 F.3d 134, 144–50, *cert. denied*, 552 U.S. 1313, 128 S. Ct. 1911, 170 L.Ed.2d 749 (2008); *United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009)).

The lower courts sometimes embrace a causal notion of bribery, recognizing the commonsense worry that payments would distort official decisions (*U.S. v. Wright*, 665 F.3d 560, 568 (3rd Cir. 2012)). In the 2009 judicial politics case of *Caperton v. A.T. Massey Coal Co., Inc.*, the Supreme Court expressed a similar concern, even while disclaiming bribery (129 S. Ct. 2252, 2262 (2009)). There, a civil defendant lost a major case at the trial court level, and then sought to change the composition of the state supreme court before his case got there. The litigant spent millions of dollars to support a single candidate for the court, who then won a seat. The litigant’s case appeared on the docket, and the newly-robed judge refused to recuse himself. When the case reached the US Supreme Court, the question was not about bribery per se, but simply whether the judge’s failure to recuse denied due process to the civil litigant adverse to the benefactor. Still, in dicta, the Supreme Court emphasized that, “*though not a bribe* or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to

Blankenship for his extraordinary efforts to get him elected” (129 S. Ct. 2252, 2262 (2009); *Citizens United*, 130 S. Ct. 876, 910). Since then, the Supreme Court has emphasized that states have broader latitude, under the First Amendment, to regulate money in judicial elections, compared to legislative or executive elections (*Williams-Yulee v The Florida Bar* 135S. Ct. 1656(2015)).

The Supreme Court once flirted with the idea that, at least where campaign contributions are the alleged *quid*, the explicitness of the agreement could be the demarcation for bribery. In the 1991 case of *McCormick v. United States*, the Supreme Court held that a campaign contribution could be the basis for criminal extortion only if there was “an explicit promise or undertaking by the official to perform or not to perform an official act . . . [so that] the official asserts that his official conduct will be controlled by the terms of the promise or undertaking” (500 U.S. 257, 271–74 (1991)). “To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation” (500 U.S. at 272).

But a year later, in *Evans v. United States*, the Court appeared to backslide (504 U.S. 255 (1992)). The sharply-divided *Evans* court stated that the government “need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was *made in return for* official acts” (504 U.S. 268 (emphasis added)). Justice Kennedy wrote separately in *Evans*, to explain that such a broadening of the notion of bribery was required to avoid bribery via “winks and nods.” He even squared the circle, writing that “an explicit agreement [between donor and donee] may be “implied from [the official’s] words and actions”” (*Evans*, 504 U.S. 274 (Kennedy, J., concurring)). Daniel Lowenstein (2004, p. 130) concludes that, “whether *Evans* actually modifies *McCormick*, and if so to what degree, is unclear.” To be sure, *Evans* “dissipated at least some of the clarity that seemed to have been obtained by the majority in *McCormick*,” making the *quid pro quo* requirement “even more elastic” (Lowenstein 2004, p. 154).

After *Evans*, lower courts have accordingly allowed the jury to “infer” an agreement where “implicit.” *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993); *Kemp*, 500 F.3d 257 (3d Cir. 2007)). After *Evans*, the *quid pro quo* requirement is “not onerous” (*United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995)). As the courts have watered down the *quid pro quo* requirement, it may now be “all water” (Lowenstein 2004, p. 130).

Alabama Governor Donald Siegelman went to prison on such an expansive notion of the *quid pro quo* concept, and the Supreme Court declined to review his case. The Eleventh Circuit panel wrote that, “McCormick uses the word ‘explicit’ when describing the sort of agreement that is required to convict a

defendant for extorting campaign contributions. Explicit, however, does not mean express. Defendants argue that only ‘proof of actual conversations by defendants,’ will do, suggesting in their brief that only express words of promise overheard by third parties or by means of electronic surveillance will do. But *McCormick* does not impose such a stringent standard” (*United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011)).

Similarly, in *United States v. Ring* the Supreme Court denied a certiorari petition for the case that would have most squarely presented these questions (706 F.3d 460 (D.C. Cir. 2013)). Kevin Ring was a lobbyist prosecuted under the honest services fraud statute, for a mixture of behavior including both campaign contributions and other benefits, like sports tickets. He was convicted, by a jury instructed that it could find a “bribe” even if the official never accepted anything of value and never agreed to do anything in return. Affirming the *Ring* conviction, the D.C. Circuit bemoaned that “The *McCormick* Court failed to clarify what it mean by ‘explicit,’ and subsequent courts have struggled to pin down the definition of an explicit *quid pro quo* in various contexts” (706 F.3d at 466). Some courts have responded by trying to split the difference into some distinction between “express” and “explicit” agreements (*Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011)).

2.4 The First Amendment and the Speech or Debate Clause

In First Amendment jurisprudence, the words “bribery” and “*quid pro quo* corruption” (which this article has taken to mean the same thing) have become something like magic words. When the label “bribery” is applied, even to core political speech, the First Amendment can be silenced (e.g. *Ring*, 706 F.3d 460, 472 (D.C. Cir. 2013), *cert. denied*). Given that regulations of speech uttered during an election would otherwise be subject to the strictest of scrutiny, the power of these magic words is profound (*Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817, 180 L.Ed. 2d 664 (2011)).

Stated in simple terms the rule seems obvious: “a private party has no First Amendment right to petition the Government by means of ... payment of bribes” (*United States v. Tutein*, 82 F. Supp. 2d 442, 447 (D. Virgin Is. 2000) (Robertson 2011)). This rule has not been sufficiently theorized (Lowenstein 1985). One court has said that bribes “are not protected because they are not a ‘*valid*’ exercise of one’s constitutional rights of free speech or petition,” but did not specify criteria for validity (*Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 448 F. Supp. 2d 1172, 1184 (C.D. Cal. 2006)). Of course, it does not help to say that bribes are unprotected because they are crimes, because that just elevates the statutes above the Constitution, a fundamental legal inversion.

Sam Issacharoff (2010) has argued that, “[a]ny constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the uncorrupted.” Scholars have offered both normative (Newhouse 2014) and formal accounts (Greenawalt 1989). Burke argues that across nine dictionary definitions of corruption, there is a common thread; that something pure, natural, or ordered has become degraded (Burke 1997). Still, the ultimate consensus that bribery is unprotected may not require a single foundational theory (Sunstein 1995).

In the 1982 case of *Brown v. Hartlage*, the Supreme Court considered whether a candidate for office could promise specific benefits to voters as part of his election campaign, which a state law seemed to proscribe (456 U.S. 45 (1982)). The Court explained:

We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare (456 U.S. 45, 56 (1982)).

Presumably the same could be said about campaign contributors “pursuing their individual good.” In *Brown*, the Supreme Court acknowledged that its holding was based on a substantive but unspoken democratic theory, writing that: “[a]t the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed” (456 U.S. 45, 52 (1982)).

Similarly, the Supreme Court has held that the petition clause of the First Amendment “shields . . . a concerted effort to influence public officials regardless of intent or purpose” (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). The Court reiterated that it is “irrelevant” that “a private party’s motives are selfish” (*City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991)).

Not much more can be said affirmatively about *why* bribery is unprotected by the First Amendment. However, we can add two doctrinal caveats. First, in a string of recent cases, the Supreme Court has undermined the idea that some forms of speech are altogether unprotected by the First Amendment (e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 377, 383-84 (1992)). This doctrinal evolution has not yet been applied to bribery. Second, the Supreme Court has said that when a factfinder’s determination is the predicate for Constitutional scrutiny, or lack thereof, then the appellate courts will perform an “independent review” of those facts (*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); Volokh & McDonnell 1998). Thus, it

is possible that courts would overrule a jury's determination that a given set of reciprocal behaviors constituted a corrupt exchange.

The Constitution's Speech or Debate Clause also complicates any political corruption prosecution involving a federal legislator. The clause provides that US Senators and Representatives "shall not be questioned in any other place" about any "Speech or Debate" that happens on the floor of Congress. The motivation of the clause is the separation of powers: to protect members of Congress, and the institution itself, from executive and judicial overreach (Reinstein & Silverglate 1973).

In a case that reached the Court in 1972, Senator Daniel Brewster was charged with bribery, in particular for "being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation" (*U.S. v. Brewster*, 408 U.S. 501, 502-03 (1972)). The district court had altogether dismissed the indictment, citing the Speech or Debate clause, but the Supreme Court allowed the prosecution to go forward. The Court said that "taking a bribe is, obviously, no part of the legislative process or function," but that a bribe "is complete upon the agreement to accept the bribe, not the performance of the agreed upon act" (*U.S. v. Brewster*, 512). Thus, evidence of *agreement* to exchange something for legislative action is admissible, but evidence showing performance of that action is not (Henning & Radek 2011). Thus, if a legislator is charged with exchanging campaign money for a vote, then the fact that the legislator held up his or her end of the bargain could not be introduced in the bribery trial against her. The Supreme Court recognized that such a prohibition will make "prosecutions [for bribery] more difficult" but held that separation of powers required such a shield (*United State v. Helstoski*, 442 U.S. 477, 488 (1979)).

2.5 Prior Research on Political Corruption and Juries

Prior research has neither tested perceptions of corruption in the context of a rich and realistic mock grand jury experiment nor explored the systematic manipulation of facts and law relating to everyday political behavior. Nonetheless, there is a rich literature on related questions, worth surveying.

There is a literature among legal and policy scholars. Noonan provides a broad, historical account of the law of bribery (Noonan 1984; Rives 2000). Teachout (2014, p. 11) also chronicles the long-standing American political concern with corruption, arguing that "rules designed to limit temptations are not a backwater but a cornerstone of what is best in our country." Lessig's work focuses on contemporary politics, showing the seemingly-reciprocal relationships of politicians and their benefactors, in a dynamic that he calls "institutional corruption," drawing from prior work by Thompson, to

distinguish individual *quid pro quo* corruption (Lessig 2011; Thompson 1995). In a similar vein, Johnston identifies four *syndromes* of systemic corruption, including influence markets (Johnston 1986, 2005). With a global perspective, Rose-Ackerman argues against a single “blueprint” for corruption reform, but argues contingently to make possible “an improvement in the overall efficiency, fairness and legitimacy of the state” (Rose-Ackerman 1999).

Econometricians and political scientists have explored correlations between lobbying, campaign contributions, and legislative votes (e.g. De Figueiredo & Edwards 2007; Stratmann 2005). The market seems to recognize the value of political contributions, as stock prices of politically-active companies have been shown to react positively to Supreme Court decisions that deregulate campaign spending (Yuan 2015). Scholars have found substantial relationships between campaign spending and policy outcomes in contexts such as sugar subsidies (Stratmann 1991) and gun control (Langbein 1993). One study of data from forty-eight states found that for every dollar a corporation spent on political campaigns, they received back \$6.65 in lower state corporate taxes (Chirinko & Wilson 2010). Similarly on the federal level, government contracts are more likely to be awarded to firms that make larger federal campaigns contributions, even when adjusting for previous contract awards (Witko 2011).

Nonetheless, the consensus in the field of political science remains skeptical that political spending does produce results that are anything like a *quid pro quo* exchange. Systematic reviews argue that much of political spending appears to be more like “‘giving money to our friends even if it doesn’t change their vote’ [rather than] ‘giving money to marginal legislators to change their vote’” (De Figueiredo & Garrett 2004, p. 605). Still, “scholars have long recognized that the relevant action may take place behind closed doors, where the content of legislation is determined,” making it difficult to detect and identify *quid pro quo* exchanges from aggregate data (Milyo 2008, p. 3).

Political scientists also argue that, although donors and spenders can operate nationally, they in fact rationally focus on Members of Congress who have relevant interests within their own states or districts (Denzau & Munger 1986; Grenzke 1990). Take agriculture-business, for example. Rationally, it is to be expected that much of their money goes to Members who sit on committees that deal with agriculture, and many of these members, unsurprisingly, are from farm states. When such a Member responds to an agriculture-producer’s legislative priorities, the benefits may accrue to agriculture-business, but also to farmers, their families, and the local economies they support. On the other hand, if a politician responds to a donor in a way that does not benefit his or her own constituency, then he or she may pay political costs (Mann 1978). This behavior makes it difficult to ascertain whether a *quid pro quo* exists, and difficult to ascertain whether the ultimate policy decisions are good or bad,

from a normative perspective, for particular constituencies or society more generally.

Similarly for revolving-door situations, there are benign explanations in the political science literature. The most lucrative positions for former Members tend to be with lobby firms and law practices that are deeply involved in the policy areas in which a member gained subject-matter expertise and “relational capital” (Zaring 2013). Thus, Members need not engage in a *quid pro quo*, in order to get a lucrative job upon retirement from Congress (Vidal et al. 2012). In this environment, seniority, leadership positions, service on the relevant committees and subcommittees, and years of experience all enhance a member’s marketability across a number of public policy issues (Vidal et al. 2012). Of course, some members have much more of these than others, and not all former Members do in fact receive lucrative jobs with lobbying firms or industry. Thus, the potential for *quid pro quo* exists on the margins, although the political science literature does not provide support for such a theory.

To be sure, the frequency of corruption is unknown. Observational studies of corruption itself are stymied by its secretive nature, one hard to detect and measure (*Buckley*, 424 U.S. at 27; Olken 2009). There is some descriptive work showing that political corruption prosecutions are surprisingly frequent (Lowenstein 1985, 2004). Some evidence suggests that the timing of such prosecutions may be politically-motivated (Gordon 2009; Nyhan & Rehavi 2014).

There is also a literature on the appearance of corruption more generally. Such research is dependent on conceptual frameworks and questions of whether corruption is good or bad (Gardiner 2002; Heidenheimer & Johnston 2002). As Matt Stephenson (2007, p. 311) notes, “in some contexts, corruption can be efficiency-enhancing because it allows parties to avoid excessively cumbersome regulatory requirements.” As the normative baseline conceptions can vary, we accordingly see cross-country variation in rules governing financial contributions to political parties (Heywood 1997). Corruption may even constitute an informal political system (Scott 1972).

As Peters & Welch (1978, p. 974) argue, “What may be ‘corrupt’ to one citizen, scholar, or public official is ‘just politics’ to another, or ‘indiscretion’ to a third.” Heidenheimer (2002) classifies shades of corruption—ranging from white to gray to black—with white corruption as acts that a majority of both the elites and masses find tolerable and lack strong interest in punishing, and black corruption as more strongly sanctioned acts.

Still, there are patterns in what people view as corrupt or not. For example, in a survey of state senators, Peters & Welch (1978) found perceptions of corruption in large payoffs, short-range benefits, nonroutine acts, specific requests, and private rather than public benefits. Johnston (1986) utilized very short vignettes (a sentence each), ranging from a county treasurer embezzling

\$10,000 to an employee calling in sick and then going to a ball game. He found that larger amounts and public officials were more likely to be perceived as corrupt. Johnston (1986) also found differences in social status correlated with corruption perceptions. What lower classes see as illegitimate favors, high status groups view as the fruit of merit (1986).

Persily & Lammie (2004) draw on public opinion polls across several decades, asking general questions, such as whether “government is run by a few big interests.” They find that the majority of Americans are worried about corruption, but that these opinions are not tied to specific happenings or reforms in campaign finance. Personal characteristics, including lower status and lower levels of general trust were correlated with a generalized sense that the government is corrupt. Persily and Lammie’s (2004) article is typical of the literature in failing to distinguish the particular sense of corruption that the Supreme Court says is relevant: *quid pro quo* corruption, as they acknowledge. “We admit that the available long-term survey data, which measures perceptions of ‘crookedness’ and whether ‘government is run by a few big interests,’ do not precisely answer the more relevant constitutional questions concerning the perception of corruption arising from large campaign contributions” (2004, p. 123).

Transparency International produces a Global Corruption Barometer by interviewing 114,000 respondents in 107 countries (Heidenheimer & Johnston 2002). Worldwide, about one in four people surveyed report that they or someone in their household paid a bribe in the past twelve months (Transparency.org 2013). Even in the USA, about 7 percent of those surveyed admitted to paying a bribe (Transparency.org 2013). Of course, the fact that people engage in the activity does not mean they endorse it (Miller, Grødeland, & Koshechkina 2001). Often those who pay or receive bribes explicitly condemn the practice (Miller 2006). In fifty-one countries (including the USA) respondents report that political parties are the most corrupt, while other countries focus on the police or judiciary as most corrupt (Transparency.org 2013). Additionally, in the USA two-thirds (64 percent) of respondents think that a few big interests looking out for themselves run the government (Transparency.org 2013). This is dramatically worse than other OECD countries, such as Norway (5 percent), but more comparable to Greece (83 percent). Respondents worldwide converge on the perceptions that their governments are ineffective in fighting corruption.

In this article, we operationalize *quid pro quo* corruption using the statutory crime of bribery, and explore these appearances thereof with grand and petit juries, as the constitutionally established mechanisms for making those determinations. The extant literature on the grand jury is thus relevant, though it has been primarily normative and doctrinal. The grand jury is lauded by some as “the protector of the citizenry against arbitrary prosecution” (Schiappa 1993;

Younger 1996). Yet, others fear the grand jury has been so weakened by prosecutorial practices and judicial neglect as to be of little value (Fairfax 2011; National Association of Criminal Lawyers 2011). There is almost no empirical study of grand juries, and their internal functioning remains a black box. The only exception is a collection of self-selected anecdotes from jurors themselves (Brenner 2011).

The literature on petit juries is much more robust (Devine 2012). Prior empirical research includes observation of actual jury deliberations and outcomes, along with systematic manipulation of cases presented to mock jurors.

To the authors' knowledge, this is the first and only study of grand jury deliberations; and the first petit jury study in the context of political corruption. To be sure, no prior study has directly engaged with the legal questions concerning the scope and functioning of the bribery statute in the context of contemporary practices of politics. Thus, no prior empirical study has shed light on the potential for regulating political corruption in this new era of expanded First Amendment protection, where only *quid pro quo* corruption can be directly targeted.

3. INDICTMENT SIMULATION

3.1 Stimulus and Instrument

We presented a highly-realistic grand jury simulation, depicting a case of everyday politics in the USA, in which a regulated industry sought from a Congressman a deregulatory rider on a major piece of legislation, and the Congressman sought support for his reelection. The purported exchange, if any, was extremely indirect, as the two defendants (a Congressman and a CEO) never met directly, but instead only dealt through a lobbyist. Moreover, the contribution (\$50,000) was paid by the corporation to a third party, "Governance for America," a 501(c)(4) organization with no direct connection to the Congressman. The facts did, however, show that the Congressman's willingness to hear about the company's interests, and to promote the company's interests, materialized only after learning about the indirect campaign support. The case left it to the jurors to potentially infer that the indirect expenditure was the cause of the Congressman's newfound interest in the deregulatory legislation, and furthermore whether those facts satisfied the *quid pro quo* elements of the Federal bribery statute.

Details of our methods are shown in the Methodological Appendix. After securing informed consent and collecting demographic information, we welcomed the participants and thanked them for their time. All of the following interactions were within the roles as attorneys, witnesses, and grand jurors. The

experience began with 4.5 min of a video produced by the US Judiciary to orient real grand jurors. Participants were also provided with excerpts from the official Handbook for Federal Grand Jurors (*Administrative Office of the U.S. Courts 2012*).

Respondents were then introduced to the actor playing an assistant US attorney, who began by introducing the relevant sections of the US Code, charging bribery (18 U.S.C. 201) and conspiracy thereof (18 U.S.C. 371). The participants were provided with copies of a realistic indictment, stating the elements of each crime and factual allegations thereof, along with a one-page visual aid used by the prosecutor to clarify the relationships, reproduced as Figure 1. The defendants (Anderson and Davis) are shown in bold; the witnesses (Pew and Caldwell) are shown in italics.

The participants then heard testimony from each of the two witnesses. William Pew testified as the Chief Financial Officer of Health Industries, the company run by the defendant, Richard Anderson. He testified only to the facts that the company had interests in a particular legislative rider, that the company retained lobbyist Eric Hanson to draft and advocate for the legislation, that the company made the payment to Governance for America (GFA), and that GFA ran favorable advertisements discussing the type of bills Davis supported. The second witness, Tony Caldwell, testified as the chief aide to Congressman Davis, explaining that the Congressman met with the lobbyist but initially expressed no interest in the legislative rider. At that meeting, he instead made a comment about how he was so focused on fund-raising for his next election, he did not have time to focus on the lobbyist's proposal. Caldwell testified that after learning of the subsequent \$50,000 contribution to Governance for America, that the Congressman met a second time with the lobbyist and expressed a willingness to support the rider. Neither witness testified that they were aware of any agreement to exchange one thing for the other; rather both testified that these sorts of interactions were perfectly routine and legitimate. Neither defendant testified.

The grand jurors were given the opportunity to question each witness, as is standard in grand juries. They did so at length, posing dozens of questions. For example, the jurors expressed interest in the bona fides of the deregulation bill, and the witnesses explained that the bill could plausibly serve "job creation," which was a campaign issue for Davis, as well as potentially "save lives," if it allowed medical products to get to market more quickly. The jurors were also interested in the benefits of the bill to the company, and the witness explained that it had "increased profits by several million over the past few years." Other jurors asked about the terms of the lobbyist's compensation, and the witness explained that he was paid a success-based bonus "in the six figures." Upon questioning by the jurors, the witnesses clarified and emphasized that the

Figure 1. Visual aid summarizing the case provided to mock grand jurors.

Key Individuals

Health Industries, Inc.

- Richard Anderson, CEO (Defendant)
- Will Pew, CFO

United States Congress

- Ronald Davis, Current Congressman (Defendant)
- Tony Caldwell, Chief Aide to Congressman Davis
- Dan James, Previous Congressman

Squire and Hanson, LLP

- Eric Hanson, Lobbyist hired by Health Industries, Inc.

Governance for America

- Received \$50,000 contribution from Health Industries
- Supported Davis re-election efforts

company gave no money directly to Davis for his reelection. Caldwell testified with regard to GFA that “we don’t coordinate with any Super PAC, so we have no conversations or direct access with them. Not aware of their specific purpose or their activities.”

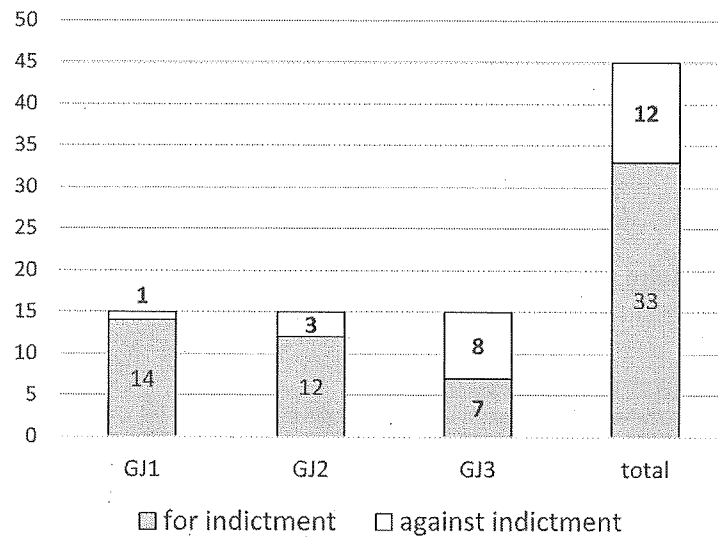
After being collectively exposed to this stimulus—including testimony and questioning—the group of forty-five participants were broken into three grand juries of fifteen each (quasi-randomly, using juror numbers assigned sequentially). Each grand jury met in a separate room, and was assigned a foreperson (the lowest juror number), to lead deliberations and sign the official forms. They were provided with official forms used by the US Federal courts, on which they could return a “true bill,” thus issuing an indictment, or declining to do so, if they failed to reach the requisite number of affirmative votes. The grand jurors then deliberated, with no further instruction or interaction from the research team.

3.2 Participants and Results

We recruited a diverse group of forty-five human subjects, blinded to the purpose of the study, from a medium-sized city in the Southwest. We paid \$20 gift cards for a three-hour commitment of time.

The votes are shown in Figure 2. Across all forty-five grand jurors overall, 73 percent (CI: 58%–85%) of the jurors voted to indict, after the deliberation.

The participants deliberated as three separate grand juries, however. The applicable voting rule is thus important to understand collective outcomes. The Handbook for Federal Grand Jurors (Administrative Office of the U.S. Courts 2012) provides that “12 members must vote in favor of the indictment

Figure 2. Grand jurors votes at end of deliberation.

before it may be returned,” and our 15-person mock juries utilized that standard (even though they were slightly smaller than the 16-person quorum provided by Federal law).¹ Applying the 12-vote rule, two out of the three grand juries decided to indict both the Congressman and the CEO defendants of at least one charge in the indictment. One grand jury was split 8–7 on the indictment.

What are the chances of a real prosecutor securing an indictment on these facts? If a prosecutor has a full-size grand jury of 23 present, to secure an indictment, he or she only needs 52 percent (12/23) of the jurors to concur in the decision to issue an indictment. A prosecutor can simply wait until he has a comfortable quorum before presenting a case for the grand jury’s determination.

If our total research population is predictive of individual votes of grand jurors drawn from a given venue to decide a similar case, then our 72 percent rate of yay votes, would have a 95% confidence interval of 58%–85%.² This

1 Grand juries may have as few as sixteen members to constitute a quorum, and as many as twenty-three, but twelve votes remains the minimum for an indictment regardless of the number of jurors present (Administrative Office of the U.S. Courts 2012). Since the twelve-vote decision rule does not scale upwards with the number of grand jurors actually attending, there is some likelihood that if the grand juries were closer to the maximum size of twenty-three, all three grand juries would have convicted.

2 For the purposes of estimating a population characteristic from a sample, frequentist statistics assume random sampling procedure. Here, we recruited broadly from the community to construct our “research population,” in a way that may be close enough to random to at least consider what randomly-drawn jurors might do. The use of confidence intervals is merely intended to assess whether we have enough respondents to say anything meaningful.

finding suggests that a prosecutor could secure an indictment with a grand jury of 21, 22, or 23 grand jurors present. With 20 or fewer grand jurors present (requiring 12 yay votes, or 60 percent), a prosecutor would still be very likely to secure an indictment on these facts, but the bottom of our confidence interval includes the possibility that she would fail. Thus, it appears that the simulated facts present a real risk of indictment to the officials and their benefactors, who undertake such political behavior.

3.3 Strengths and Limitations

Fundamentally, our simulation design allowed us to test only a single fact-pattern and a single legal regime. We did present a factual variation in a second phase of the simulation (a within-subject experimental design), which made a *quid pro quo* agreement more explicit, through the revelation of additional evidence showing that the parties had in fact met and discussed the exchange. (It is not uncommon for real grand juries to receive evidence sequentially, as an investigation proceeds.) However, the second manipulation turned out to be uninteresting since the first phase had such a large proportion of jurors voting for indictment (creating a likely ceiling effect). Accordingly, that second phase is omitted herein for space.

Standing alone, this single manipulation requires careful interpretation. Although our manipulation of the case facts allowed us to carefully specify the nature of any *quids*, *pros*, and *quos*—thus avoiding the confounds that exist in any real-world case—this simulation lacked a control group or random assignment, as in the true experiment described below. (For this reason, we refer to it as a “simulation” rather than an “experiment.”)

The simulation is best understood as a hypothetical case study, a proof of concept, or a “possibility test,” a method that is particularly interesting with regard to the grand jury, which has otherwise been shrouded in secrecy.³ The simulation allows us to predict the likely outcome of a prosecutor choosing to pursue an indictment for this particular behavior. This simulation, standing alone, leaves us unable to say whether variations in the facts or law may cause different outcomes.

3 In his handbook of social science research methods, Alan Bryman (2012, p. 70) describes valid uses of individual cases in social science research: “The *critical case*. Here the researcher has a well-developed theory, and a case is chosen on the grounds that it will allow a better understanding of the circumstances in which the hypothesis will and will not hold. . . . The *revelatory case*. The basis for the revelatory case exists ‘when an investigator has an opportunity to observe and analyze a phenomenon previously inaccessible to scientific investigation.’”(citing examples omitted, emphasis in original).

Our simulation had a very high level of verisimilitude to a real grand jury procedure, with certain exceptions. Although we used a financial incentive and intensive multi-modal outreach efforts to recruit a diverse pool broadly from the community, we did not enjoy the Federal Court's power to compel attendance. Thus, our respondents are not precisely representative of any particular pool of potential grand jurors.

Although we engaged the participants for a total of three hours, which is very extensive by mock jury standards, and may be realistic for a single case, depending on its complexity, a real grand jury experience can last for months and span multiple cases, with daily meetings that would allow grand jurors to have a higher level of acquaintance with each other, with the law, and with their roles. Similarly, our study was conducted in a very formal setting at a law school and to orient the participants to their roles, we used excerpts from the official federal courts video including a charge from a robed federal judge, excerpts from the federal grand juror manual, and realistic indictments and true bill forms. Nonetheless, real jurors summoned to a courthouse may respond differently in that setting.

Rather than utilizing written vignettes or even video reproduction as a stimulus, this experiment used an experienced prosecutor to present the case along with live actors portraying the witnesses, and even allowed participants to question the witnesses live. This setting may maximize participant engagement. Nonetheless, the participants may have sensed some artificiality, and thus responded differently than real grand jurors do. It is also possible that the videotaping caused the participants to be less candid than they otherwise might have been, if they had experienced the strict secrecy that is enjoyed by real grand juries.

With forty-five respondents, we had limited statistical power. And our method of recruiting from the population does not support the assumptions of typical hypothesis tests.

For all these reasons, the simulation should be taken as more provocative than conclusive. A different sort of empirical investigation is in order, to complement the strengths and weaknesses of the grand jury simulation.

4. CONVICTION EXPERIMENT

The grand jury simulation allowed a highly-realistic test of a factual-legal scenario, although it had a limited sample size and only a single fact-pattern. To more systematically investigate these questions, we also conducted a mock jury experiment, using a national online sample, to review criminal trial vignettes systematically manipulated in five dimensions in factorial design.

We discuss the stimulus, instrument, participants, results, and limitations herein.

4.1 Stimulus and Instrument

The stimulus was a textual vignette, displayed across multiple pages of our survey software, hosted by Qualtrics. The vignette depicted the same core facts as the grand jury experiment, but now at the trial phase. Specifically, the experiment presented the trial of a former US Representative and the Chief Executive Officer (CEO) of a fictional hospital equipment manufacturer as defendants charged with the Federal crime of bribery. In all conditions, the CEO sought to have a rider attached to a healthcare bill. The Representative was in a position to introduce that rider, and did in fact receive a benefit from the CEO.

The stimulus included a welcome and preliminary instructions by a judge, a statement of undisputed facts, closing arguments by both the prosecutor and the defense attorney, and finally jury instructions (or not, in one condition) adapted from the pattern jury instructions affirmed by prior courts. The total length of these vignettes was 750–1,000 words, depending on the experimental condition.

The vignettes were systematically manipulated along the five dimensions, shown in Table 1, creating 108 different versions of the stimulus ($3 \times 3 \times 2 \times 2 \times 3$). Our primary interests are in the PRO and QUID variables. Each variable has conditions that can serve as analytical “controls” that can be compared in contrast to a given manipulation, even if they are not labeled as such. Conceptually, there is no single fact-pattern that could be the “placebo.” Instead, hypotheses depend on specific contrasts of the manipulated facts, where everything else is held constant. The additional manipulations provide greater robustness and ecological validity, and allow testing of secondary hypotheses. Since the full factorial design assigns every respondent to test a level from every variable, we are able to very efficiently cover a wide range of cases, with a minimum number of respondents, and without having to perform sequential experiments. Some of these variations may make little or no difference to the ultimate outcome, but testing them allows us to forestall such concerns that they *might*.

For the PRO variable, in the WEAK condition, the Representative and the CEO simply had background knowledge about the reciprocal interests of each other, and acted in accordance, without any direct or indirect contact between the parties. In the LOBBY condition, a lobbyist engaged the two parties and persuaded them each to act in accordance with the interests of the other. In particular, the lobbyist suggested to both parties that he believed both that “the Representative would push through the amendment if” the CEO gave a *quid*,

Table 1. Variable definitions for experimental manipulations

VARIABLE	CONDITION1	CONDITION2	CONDITION3
PRO	Weak	Lobby	Strong
QUID	\$5k Direct	\$250k Dark	Revolving door
SPEECH/DEBATE	Quo Excluded	Quo Included	[no condition]
POLITICS	Democrat	Republican	[no condition]
LAW	None	McCormick	Evans

and that the CEO would be “more likely to act favorably if the Representative proposed the hospital equipment amendment.” Importantly, these were phrased in terms of the lobbyist’s predictions about the likely effects of each party’s behavior on the other’s behavior, not phrased in terms of the parties expressing an agreement to each other. Only in the **STRONG** condition did the parties actually meet and discuss their mutual interests, and explicitly stated that the contribution was “for” the official action.⁴ This condition is intended as a benchmark for what is indisputably *quid pro quo* corruption.

For the **QUID** variable, in the first two conditions, the CEO made a contribution or expenditure to support the reelection of the Representative. In one condition, it was \$5,000, an amount which could be given directly to a candidate’s campaign or to the candidate’s leadership PAC. In a second condition, the amount was \$250,000, and given to a 501(c)(4) organization which was working to support the official’s reelection, though doing so “independent” of the candidate himself. In a third “revolving door” condition, the alleged *quid* was an executive-level job in the CEO’s company for the Representative once he retired from Congress. Although the economic value of the job was not specified in the stimulus, the title of the job, “Vice Chairman and Managing Director,” suggests it is well-compensated.

We must acknowledge a confound, since we manipulated both the type of quid (direct contribution versus independent expenditure versus job), as well as the amount (\$5,000 versus \$250,000 versus a job worth perhaps much more) in the same variable. Although such confounds are normally to be avoided in basic science research, we decided that for the purposes of this applied research, seeking to answer the specific legal question posed by the Supreme Court, and seeking to understand contemporary politics as actually practiced, it was more important to test the complex phenomena of *quids* as they actually exist in the real world under current law. For that sake, a \$250,000 direct contribution is

4 “A few weeks before the House was scheduled to vote on the health bill, the CEO met with the Representative privately. The CEO [referred to the *quid*.] The CEO asked the Representative ‘So this means you’ll introduce the hospital equipment amendment?’ to which the Representative replied ‘Yes, next week.’”

not useful to test, since it would be per se illegal. Similarly, a \$5,000 independent expenditure or job would be senseless, since these quids are in fact much larger in the real world. For our research questions, nothing depends on our ability to estimate the marginal effect of each additional dollar of quid-value, though future research can of course do so.

For our SPEECH/DEBATE variable, we had two conditions. In the first condition, in accordance with the prohibition set out by the Speech or Debate clause, our facts include no reference to an actual legislative act. In our second condition, our facts include evidence of the proposed amendment that forms the predicate for the alleged bribe, the subsequent passage of the bill, and the ultimate profit to the CEO because of that amendment.⁵ By comparing across conditions, we can see how much of an effect, if any, this clause may have on bribery prosecutions where the constraint applies.

For the POLITICS variable, we manipulated the Representative's political affiliation, by simply adding the word "Democratic" or "Republican" at two places in the vignette, one identifying the official and the other identifying the party sponsoring the bill on which he would insert the rider. The official and party were either Democrat or Republican. We then combined this variable with the naturally-varying political affiliations of our respondents to create a "matched-politics" and a "crossed-politics" variable. For this purpose we excluded respondents who self-identified as independents, even if they leaned toward one party or the other.

For the LAW variable, we had three conditions. All respondents received general jury instructions, including the role of jurors and the beyond a reasonable doubt standard. Variations pertained to the instructions on the crime charged. In the first condition, we provided no jury instructions with regard to the specific crimes charged, but instead just asked the respondents whether the defendants were guilty of bribery (presumably causing the respondents to draw from latent conceptions of the crime). In both the second and third conditions, we provided the pattern jury instructions for the crime of bribery under 18 USC 201 (Ninth Circuit Jury Instructions Committee 2010), with additional language for the campaign finance context stating that these contributions and expenditures are otherwise perfectly legal, as affirmed in *Evans* (*Evans v. United States*, 504 U.S. 255, 258 (1992)). Both sets of legal instructions required a finding of a corrupt intent and a *quid pro quo* (though not expressed in Latin terms).

5 When the Speech/Debate Clause was not in effect, the vignette ended with: "One week later, the Representative introduced the hospital equipment amendment, and the bill was signed into law shortly thereafter. As a result, Health Industries earned millions in new profits." That text was excluded when the Clause was in effect.

However, the case law suggests that there are at least two different ways to charge a jury on this element. This variation is the subject of a Circuit split (*United States v. McGregor*, 879 F. Supp.2d 1308, 1317 (M.D. Ala. 2012) (Gold 2011)). So, we manipulated whether the judge instructed that the jury had to find that the thing of value was “in return for an explicit promise or undertaking” as the jury was instructed in the Supreme Court’s *McCormick* decision (second condition) (500 U.S. 257, 273 (1991)), or whether it was “in exchange for a specific requested exercise of his official power,” as the jury was instructed in the *Evans* decision (third condition) (504 U.S. 258).

When possible, these manipulated differences were also apparent in the closing arguments of the attorneys for and against conviction. For example, where the *QUID* was a money donation of any kind, the defense attorney asserted (in relevant part):

The Supreme Court of the United States of America has ruled, numerous times, that we all have a constitutional right to decide where to give campaign contributions. When you’re rendering your verdict, remember all that happened was the CEO gave a legal contribution to the Representative of his choosing. There is nothing illegal about engaging in democracy.

When the *QUID* was the revolving-door condition, however, the defense attorney argued:

These sorts of positions are commonly offered to and accepted by politicians. It is not surprising that a company would want to hire a successful legislator – especially when their business is so dependent on regulation by the government. There is nothing illegal about hiring someone, and there is nothing illegal about voting as a duly elected member of the United States House of Representatives.

Each variable received a similar set of variations for both the defendant and the prosecutor. The political affiliation variable was not highlighted in closing arguments, as such an emphasis might be found inappropriate by the trial judge, since it is not strictly relevant to the jury’s determination.

These manipulations were all embedded in the stimulus. Respondents were blinded to their experimental conditions, and the manipulations were not in any way highlighted.

We collected demographic information at the beginning of the instrument, including sex, age, race/ethnicity, education level, income, politics, and location. We asked two questions about trust as this has been found to affect views on corruption, two questions about political corruption generally, and posed

several short hypothetical scenarios to assess perceptions of corruption—all drawing from prior research.

After the stimulus, our primary dependent variable was a verdict form, matching the standard form of criminal verdict forms in federal criminal trials, posing a binary choice of guilty or not guilty on the charge of bribery for each defendant. We asked respondents how confident they were about each verdict. We also asked a battery of other questions about the criminal vignette—such as whether they found an explicit or implicit agreement.

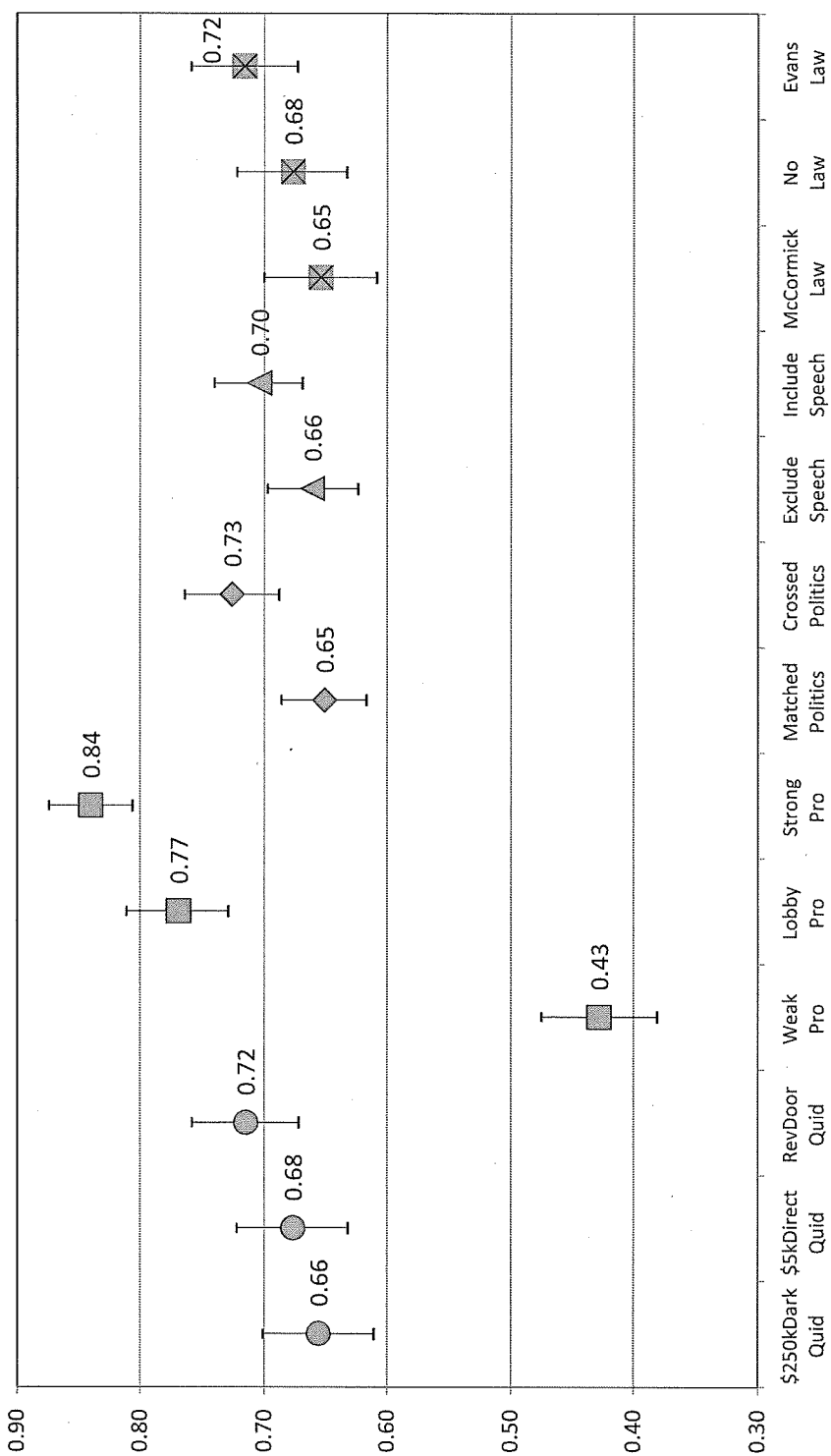
4.2 Participants and Results

We recruited 1271 jury-eligible respondents from a random online sample provided by Qualtrics, balanced to be representative of the USA census population on gender, age, and on political affiliations. A demographics table appears in the Methodological Appendix, and shows successful randomization leading to reasonable covariate balance.

Our primary outcome variable is the juror's decision to convict either the CEO or the Representative. Our first approach to the data is to simply plot the primary dependent variable of verdict, split by our primary independent variables, to create thirteen proportions. We then plot 95% confidence intervals (see Figure 3). About two-thirds of respondents voted to convict, with substantially more convicting in the lobby (77 percent) and strong conditions (84 percent), and where there is a mismatch between the respondent and the official's political affiliations (77 percent). In the weak-*pro* conditions (43 percent), less than half convicted. The participants were responsive to the facts presented, and especially sensitive to the quality of any exchange agreement between the defendants.

To test the significance and robustness of these observations, we also conducted multivariate logistic regression with the independent variables as dummies, and included many observable covariates. The model is shown in the Methodological Appendix. Odds ratios and *p*-values shown in the discussion below are based on this regression, and effectively hold all other observable variables constant.

We found that younger respondents (ages 18–24 years) were much more likely to convict ($OR = 1.70$, $p = 0.018$), along with respondents earning more than the national median ($OR = 1.35$, $p = 0.034$). On the other hand, those with higher levels of education (bachelors and higher) were less likely to convict, ($OR = 0.72$, $p = 0.021$), along with Republicans ($OR = 0.67$, $p = 0.007$). These demographic variations were successfully distributed across our conditions through random assignment, and regression controls further provide precision in the estimates for our primary dependent variables.

Figure 3. Proportion (95% CI) of mock jurors voting to convict either defendant, by experimental condition ($N = 1,271$).

In the following discussion we also provide secondary dependent variables, including perceptions of whether the facts constituted an exchange agreement (implicit or explicit), and whether it is, or should be, a crime. In particular, in the WEAK experimental condition, where 43 percent of respondents were willing to convict at least one of the defendants, about half (50 percent/56 percent) of the respondents agreed (selected somewhat agree, agree or strongly agree) that the representative/CEO had corrupt intent. Six-in-ten (59 percent) thought the money influenced the representative, while about half (44 percent /58 percent) thought that what occurred is/should be a crime. Further, even with no direct or indirect contact between the CEO and representative, 39 percent of respondents thought there was an agreement, which 40 percent believed was express, 35 percent explicit, and 49 percent implicit. This condition allows us to assess background conceptions of *quid pro quo* corruption, and thus functions as something as a baseline or control condition for the other PRO conditions.

When a lobbyist is the intermediary between policy-interested donors and the official, more than three quarters (77 percent) of respondents voting to convict, dramatically higher (OR: 4.58, $p < 0.001$) than in the WEAK condition. Strikingly, this conviction rate in the LOBBY conditions is close to the 84 percent rate in the benchmark *quid pro quo* condition (STRONG), suggesting lobbyists who connect campaign expenditures to policy are similar to outright bribers, and that the behavior is quite different that the mere reciprocal, parallel behavior of the WEAK condition. Additionally, in the LOBBY condition, three quarters (78 percent/79 percent) of the respondents agreed that the representative/CEO had corrupt intent. Further, 81 percent of respondents felt that the money influenced the representative, and 77 percent /83 percent thought that what occurred is/should be a crime. Thus, there was a strong majority condemning this type of exchange. Additionally, even with a go-between, 70 percent believed an agreement occurred, with 65 percent seeing it as express, 57 percent as explicit, and 77 percent as implicit.

In the conditions where the campaign donation was purportedly to an “independent” entity (\$250kDARKQUID), we hypothesized that the larger (\$250,000) expenditure would yield greater rates of conviction than the smaller contribution (\$5,000), even though the larger expenditure is made independently. We reject the hypothesis. If anything, we found that the \$5kDIRECTQUID had a slightly higher rate of conviction (OR = 1.12), though it is not statistically distinguishable from the \$250kDARKQUID ($p = 0.48$).

Also on the *quid* variable, we predicted that the revolving door manipulation may yield the highest rates of conviction, since the benefit could be so personal and substantial for the official, even though it may be less proximate in time (years later, after the official’s term has ended). Indeed, the hypothesis is confirmed: REVDOORQUID has 52 percent higher odds of conviction than

\$250kDARKQUID (OR = 1.52, $p = 0.012$), which is itself indistinguishable from \$5kDIRECTQUID.

Prior research supports the hypothesis that the legal instruction on 18 USC § 201 (along with *McCormick* or *Evans* clarifications) would make little or no difference in conviction rates (Marder 2006). Instead, we predicted that individuals would respond primarily based on their background notions of bribery. This hypothesis is confirmed. Our logistic regression found nonsignificant effects for each law manipulation (McCORMICK and EVANS) when compared to no additional specific legal instruction (NONE LAW) as the reference group. Still, with odds ratio confidence intervals ranging as high as 1.83, we cannot rule out the hypothesis that *Evans* may have a modest impact on outcomes.

We hypothesized that the Speech or Debate Clause would significantly reduce conviction rates by excluding the fact that the official carried through his end of the bargain. We found (if anything) a small effect (OR = 0.82), undistinguishable from no effect at all ($p = 0.15$), suggesting that prosecutions are viable in many cases, regardless of the clause. Jurors seem to follow the law that the exchange agreement is the criminal act, regardless of whether the bargain is performed. Jurors do not seem to need evidence of performance of the agreement as evidence to prove the agreement occurred.

We found that a mismatch between the respondent's political affiliation and the official's political affiliation increased the odds of conviction of either defendant by 1.52 ($p = 0.003$), and increased the rate of conviction by about 8 percent. To put this in context, the effect of mentioning the politician's party twice in the middle of the vignette was larger than the effect of giving instructions about the relevant law immediately prior to asking for a verdict. It is a larger effect (and in the opposite direction) than the Speech or Debate Clause excluding the fact that the official carried out his end of the bargain.

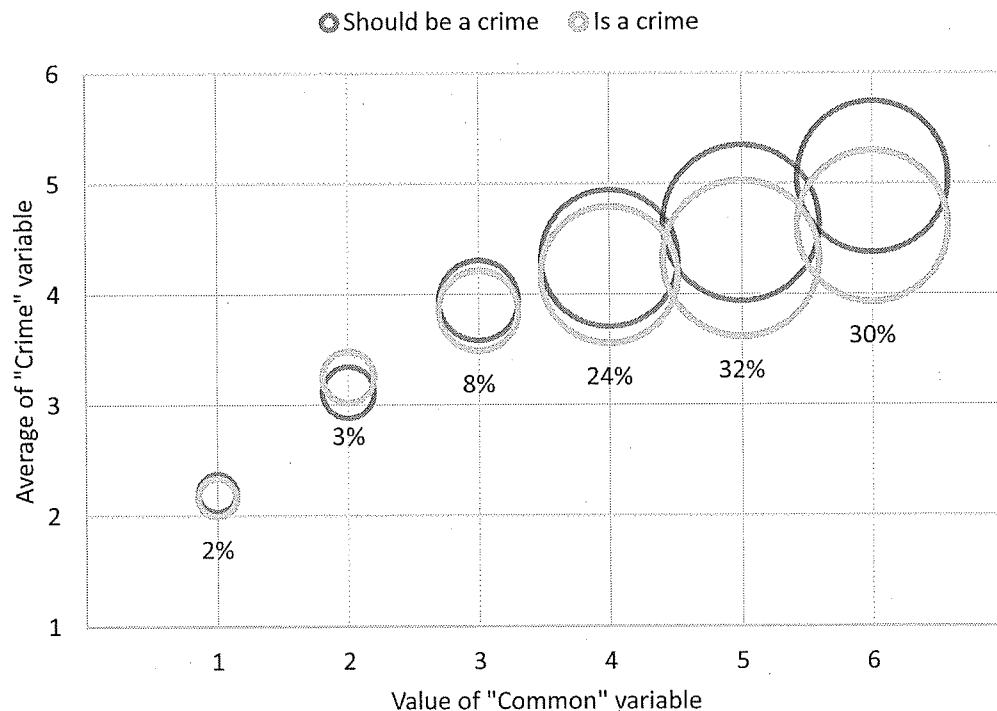
Finally, even though crimes are typically associated with deviant behavior, respondents reported that these political behaviors are common but would still find that they are criminal, and *should be* criminal. Indeed, across all conditions, although the vast majority were willing to convict, only 14 percent disagreed (including "strongly" and "somewhat") that the presented fact-pattern was common. As shown in Figure 4, we found a significant *positive* relationship ($r = 0.149$, $p < 0.001$) between views of commonality and willingness to convict. Perhaps individuals who see corruption as very common might have greater motivation to act against corruption by issuing a conviction.

4.3 Strengths and Limitations

Our experiment was a well-powered randomized experiment, which thus allows causal inference. We used a fairly realistic stimulus, including jury instructions from a judge based on pattern instructions and holdings from real courts, factual evidence, closing arguments by attorneys, and realistic binary verdicts as our primary dependent variables. Rather than using convenience samples, we utilized an online population, from which we constructed a sample that was nationally representative in terms of political affiliations, age, and sex. For other demographic factors not so balanced, we deployed regression controls. Finally, we also included several checks to ensure that our experimental participants had views on corruption that were comparable to more nationally representative samples (details in the Methodological Appendix).

Analogous to our use of a diverse population of respondents, we also created some diversity in the stimulus that we presented to them, by systematically manipulating five variables. Rather than trying to generalize from a single pristine fact-pattern, this intentional heterogeneity allows greater generalizability of our findings to a range of real-world situations, although future experimentation

Figure 4. Average perception that defendants' behavior is or should be a crime (1 = strongly disagree, 6 = strongly agree) compared with the subjects' perception that the defendants' behavior is common (same scale), with percentage of respondents at each level of perceived commonality given as the area of the bubble ($N = 1,271$).



could go even further in this regard. Still, this method allows us to answer concerns that political polarization or a particular jury instruction may be driving our results, and we can also contextualize our findings with regard to lobbyists, showing results for both less explicit and more explicit agreements. These same manipulations could have been deployed sequentially, with one experiment testing the quid variable, another testing the pro variable, etc., but our factorial design allows testing all of these variables more efficiently, since each respondent is testing a level for every variable. We did not sufficiently power our experiment to test every possible interaction of these variables as its own hypothesis.⁶ However, the Methodological Appendix includes a table disaggregating the results to a reasonable degree, and no pernicious trends are apparent.

Another limitation is that this was a vignette-based experiment, meaning that it asked respondents to *imagine* themselves in a certain role (here as petit jurors) and then decide what they would do in that role (whether to convict). This method has become a common tool in a range of scientific and practical fields including sociology, psychology, business, and health sciences (Collett & Childs 2011; Lewis-Beck, Bryman, & Liao 2003; Rutten et al. 2006; Winkelman et al. 2014). Vignette-based experiments are now published in the leading scientific journals, to predict real-world behaviors (e.g. Kesselheim et al. 2012). As one might expect, highly-emotional situations are difficult to simulate in a written vignette, and where real-world behaviors depend on incentives vignette-responses may fail to predict that behavior (Azar 2011). Jury research on validity has been indirect, but promising, showing that the verdicts of both mock jurors and real jurors tend to track the strength of the evidence presented (Devine 2012). A leading study suggests that neither “stimulus case realism” nor “study population” dampen the applicability of mock jury research to real-world scenarios.

One particular concern with online experiments is that the respondents may not pay sufficient attention to the task, or that they are so reflexively biased in one direction or the other that there were likewise not responsive. To the contrary, we found very significant responses to differences in the stimulus, with the rates of conviction more than doubling, depending on the particulars of the stimulus.⁷

6 For example, when a lobbyist offers a revolving door quid in a situation where the politics are crossed and no jury instruction is given, does the Speech and Debate Clause matter? At that level of granularity, we only have 10–11 respondents in each version of the Speech and Debate Clause variable, and thus cannot shed light on that question. Similarly for our demographic co-variables, we are unable to say whether young, Latino, highly-educated, wealthy, republican respondents view our stimulus differently, depending on whether they are male or female. A different study-design would be required to answer such questions, if they were motivated.

7 These variations are even larger than shown in Figure 3, where each variable blends across the responses in all the other variable levels. To break down these results, see Table 3 in the

Notably, we bifurcated the two tasks that are given to a jury: (i) the epistemic question of determining the facts (e.g. resolving disputed evidence to conclude who said what), and (ii) deciding whether those facts constitute a crime. We instructed the respondents to focus on the second task, and to simply take the stipulated facts as true. In real cases, facts are sometimes stipulated, and are similarly sometimes indisputable, if for example they are based on wiretaps, bugs, or documentary evidence (e.g. email correspondence). Our study would have more direct applicability to these sorts of cases. Even for other cases that turn on disputed factual questions, our study is nonetheless relevant at the second stage, once those facts are resolved in the mind of a juror, who must nonetheless then determine whether they constitute a crime. In this sense, our study has greater generalizability since it is not dependent on the particular epistemic strength or weakness of any particular case.

A related limitation is that our study abstracted away from the identity and personality of any particular criminal defendant. In a real trial, the jurors might instead be affected by the presence of their own former Congressional Representative, both positively and negatively. We speculate that this effect might operate similarly to the political affiliation variable we did study: increasing willingness to convict a politician who was disliked and decreasing willingness to convict a politician who was liked.

Unlike the grand jury experiment, which allowed a very robust deliberative process, this online experiment lacked a deliberation phase that would lead to collective verdicts with a unanimity rule. Still, the first implications discussed below (Section 5.1) focus on the *appearance* of *quid pro quo* corruption, rather than the likelihood that a defendant would be convicted for actual bribery. For these implications, we are interested in the jurors as merely members of the public (though answering a precise legal question, as we have operationalized it). Our findings (e.g. that the lobbying fact-pattern appears to be *quid pro quo* corruption for three fourths of them) are sufficient to drive those implications. Some of the other implications discussed below (Section 5.2–5.4) turn on the risk that an official or her benefactor could be prosecuted and potentially convicted of actual bribery. Here, the analyst will need to take a step of inference from our individual jurors to the likelihood that a jury would reach a unanimous verdict to convict. The prior literature shows that the votes of individual

Methodological Appendix. For example, in cases where respondents received WEAK facts and a \$250K DARK quo, and politics were matched with the official, the conviction rate was 34%. In contrast, for respondents who received a STRONG fact pattern in a REVDOOR scenario, and had crossed politics with the congressperson, this rate of conviction more than doubled to 93% ($p < 0.01$). This sensitivity to variations in the stimulus allows us to reject the hypothesis that the stimulus failed to engage or that large numbers of respondents were noncompliant.

jurors are predictive of collective jury outcomes, as the minority-voters going into deliberation are likely to be eventually persuaded by the majority voters (Diamond & Casper 1992; Sandys & Dillehay 1995). Thus, the lack of unanimity going into deliberations provides little reassurance to defendants who face prison.

Our two studies fit together, and they tell a coherent story. The grand jury's rich stimulus and extensive in-person deliberations provide precisely the strengths that balance the online experiment's weaknesses. Together, these approaches triangulate on an underlying phenomenon.

5. IMPLICATIONS

5.1 The Appearance of Corruption and the Potential for Regulation

In *Buckley*, the campaign finance decision which inaugurated the Supreme Court's dismantling project, the Court expressed a working assumption that the bribery laws deal with "only the most blatant and specific attempts of those with money to influence governmental action" (424 U.S. at 28). Similarly, scholars have said that "Bribery is 'worse' than other crimes. It is a 'crime akin to treason,' a 'despicable act.' ... We want a special crime, with a special stigma, for such conduct" (Brown 1999, p. 753). As Albert Alschuler (2015, p. 3) recently wrote, "*Quid pro quo* exchanges are rarely how corruption happens." Larry Lessig & Rick Hasen (2016, p. 3) agree that, "most members of congress are not taking bribes, and that cash-for-votes corruption likely is as rare as it has ever been in Congress." The reigning assumption is that actual bribery seems to be a rare, outlier phenomenon.

To the contrary, Daniel Lowenstein (1985, p. 786) has argued that the bribery "statutes as interpreted are susceptible of being applied, and occasionally have been applied, to situations that occur on an everyday basis in American politics." The present study gives credence to these latter views, suggesting that one of the primary assumptions of contemporary jurisprudence is flawed. At least in the eyes of the general public, bribery is ubiquitous.

We have simply used the bribery statute as a way to operationalize the Supreme Court's insistence on "*quid pro quo* corruption" as the keystone for permissible regulation. The present data—that over three-quarters of jurors find *quid pro quo* bribery when a lobbyist asks for legislative action on behalf of a benefactor—suggest that this narrowest *quid pro quo* concept may actually be more capacious than it has so far been assumed.

Doctrinally, thus, the Constitutional battle over the permissibility of regulation can be fought on a different field than scholars have so far assumed. Much of the recent debate has been over whether to replace the Supreme Court's

doctrinal emphasis on the “appearance of *quid pro quo* corruption” (individual corruption) by a broader conception of dependence corruption (“institutional corruption”), or alternatively a conception of electoral equality (Abraham 2010; Hasen 2012a; Issacharoff 2010; Lessig 2014; Tillman 2014; Tokaji 2011). Justice Scalia, for example, ridiculed such broader conceptions of corruption as mere “poetic metaphor” (*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684 (1990) (J. Scalia dissenting); overruled by *Citizens United*, 558 U.S. 310). Rather than arguing over the major premise (a conception of corruption), we now have empirical evidence to establish the minor premise (the facts that satisfy even the narrowest conception).

Perhaps these results should not be surprising. Evolutionary biologists argue that humans are naturally selected to understand the world in terms of reciprocity (Nowak 2006) and humans routinely use indirect speech to express an agreement (Pinker, Nowak, & Lee 2008). It is perhaps thus understandable that our jurors would infer *quid pro quo* agreements from the fact-patterns of seemingly-reciprocal behavior that are ubiquitous in contemporary politics.

Still, the implications do not depend on whether readers or the Court concur that the grand jurors and petit jurors were *correct* in their assessments that the presented facts constituted bribery. If the appearance of corruption standard is anything more than verbal surplusage, it must broaden the inquiry beyond whatever the Supreme Court itself thinks is actual *quid pro quo* corruption. Public perceptions of legitimacy are important for democratic governance (Gibson & Caldeira 2009; Ponnambalam 2013; Tyler 2003).

In practical terms, this finding suggests that the Supreme Court may have been wrong to overturn prior campaign finance reform efforts, while at the same time acknowledging the Constitutionality of regulations that would address the appearance of corruption. Factual findings are a tonic to the Supreme Court’s long-standing project of dismantling prophylactic campaign finance regulations (Massaro 2011a; Morley 2016).

In particular, the Supreme Court has famously held that “independent expenditures . . . do not give rise to corruption or the appearance of corruption” (*Citizens United*, 558 U.S., at 357, 130 S. Ct., at 909). Our evidence contradicts that naked assumption that the Supreme Court has used repeatedly to dismantle regulations of independent expenditures. Our grand jury simulation rendered an indictment for precisely such independent expenditures (between defendants who had never met in person, and where there was no direct evidence of an explicit agreement to make such an exchange). Further, our guilt-phase experiment found that the perceptions of corruption from large independent expenditures were indistinguishable from the perceptions of corruption for direct contributions, at currently allowable levels (See Figure 3). Thus,

independent expenditures do appear to be *quid pro quo* corruption, to our properly instructed jurors, at least.

This finding should not be altogether surprising to the courts. The courts themselves have long recognized that if a public official subjectively values something—regardless of whether it is given directly or indirectly it can form the quid in a bribery exchange (e.g. *U.S. v. Siegelman*). Our study brings that bribery-law doctrine to the First Amendment doctrine, which has nakedly supposed the opposite.

Notably, however, our experiment also suggests that an appearance of *quid pro quo* corruption can arise even when candidates receive *direct* contributions to their campaigns below the present limit of \$5,200 (combining the primary and general election limits). Our respondents did not view \$5,000 to be so small as to alleviate any concern of corruption, with over two-thirds of respondents convicting at that level, even in the LOBBY condition, where the defendants never meet directly and there is no evidence of an explicit exchange agreement. This finding undermines the motivating assumption of the *Buckley* decision, which has also been repeatedly reasserted by the Supreme Court, to suggest that the direct contribution limits “alleviate” concerns about the appearance of corruption and thereby undermine the Constitutionality of other reforms (e.g. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2827, 180 L.Ed.2d 664 (2011)). Similarly, leading commentators including Rick Hasen (2016, p. 3) have simply assumed without evidence, that at current direct contribution limits of \$5400, no Member of Congress “could be bought so cheap.” To the contrary, for our respondents, even with these limits, *quid pro quo* appearances remain. Thus, the existence of limits cannot dissipate the case for further reform.

In practical terms, therefore, to avoid the appearance of QPQ corruption, a more complete regulatory solution may be required. Such a plan could involve public funding of elections, a very strict campaign limit to small-dollar private contributions, or some combination thereof. Note that our evidence suggests that a solution would also require limits on independent expenditures (Lessig 2011). In particular, *Buckley* recognized that public financing “reduce[s] the deleterious influence of large contributions on our political process” (424 U.S. 91, 96 S. Ct. 612; also see Lessig (2011), 96, 96 S. Ct. 612).

Although the Supreme Court has not yet altogether repudiated public financing, it has chipped away at the concept, as it overturns specific instances of the reform. In a party-line split in *Arizona Free Enterprise Club*, the Supreme Court overturned a hybrid set of reforms involving small-dollar contribution limits and public financing that was keyed to individual spending. In its decision to overturn reforms, the Court disagreed with the Ninth Circuit’s holding that

they served an anticorruption interest (*Arizona Free Enter. Club*, 131 S. Ct. at 2809). In an opinion penned by Justice Kagan, the four dissenters explained:

The people of Arizona had every reason to try to develop effective anti-corruption measures. Before turning to public financing, Arizonans voted by referendum to establish campaign contribution limits. But that effort to abate corruption, standing alone, proved unsuccessful. Five years after the enactment of these limits, the State suffered “the worst public corruption scandal in its history.” In that scandal, known as “AzScam,” nearly 10% of the State’s legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation. Following that incident, the voters of Arizona decided that further reform was necessary. Acting once again by referendum, they adopted the public funding system at issue here (*Arizona Free Enter. Club*, 131 S. Ct. at 2832).

Strikingly, in its decision to overturn this reform passed by the people of Arizona, the Supreme Court majority gave virtually no attention to the “appearance of corruption” interest, as potentially distinct from the corruption interest itself. The present evidence supports public funding reforms, which seek to reduce the influence of moneyed interests.

If the Supreme Court hews to its doctrine that appearances matter for First Amendment analyses, the new evidence suggests that rather dramatic reforms could be accomplished through statutory changes alone. Unless the Supreme Court intervenes to change this doctrine, or unless public perceptions of corruption change substantially, then constitutional amendments may be unnecessary to solve these problems.

5.2 535 Felons? The Risk of Prosecution for Actual Corruption

Our research also suggests that current law may offer a surprisingly powerful tool for regulating campaign finance and revolving-door situations; indeed it may be *too* powerful. Commentators have previously assumed that the *quid pro quo* standard was very onerous, which thus prevented prosecutors from using crimes like bribery to regulate political corruption (*Arizona Free Enter. Club*, 131 S. Ct. at 135). For example, Professor Michael Seigel testified in Congress, suggesting that it needed to create more inclusive crimes, in the wake of the *Skilling* decision, which limited the honest services fraud statute to bribery:

Sometimes, despite obviously corrupt behavior, this element is impossible to prove beyond a reasonable doubt. For example, a State legislator might secretly be on the payroll of a corporation that has an interest in a wide variety of matters that are the constant subject of legislation. The employer and employee use all kinds of deception to

conceal the illicit income, which, say, adds up to half a million dollars a year. Although the legislator is a routine champion of causes that benefit the company, there is no evidence of a direct link between any particular official act and his undisclosed conflict of interest. [T]his arrangement, so obviously antithetical to a healthy political environment, lacks a Federal criminal remedy. (Statement of Michael L. Seigel, S. Hrg. 111–906 Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s *Skilling* Decision, 16–17.)

To the contrary, our study suggests that, under the Federal bribery statutes, grand jurors applying the probable cause standard, and even petit jurors applying the beyond a reasonable doubt standard, may actually pose a real risk of jeopardy for politicians and benefactors.

The institutions of American criminal procedure would provide little succor to defendants facing such a prosecution. The grand jury process is, of course, conducted *ex parte*, and the potential defendant is given neither notice nor right to counsel (e.g. *United States v. Kingston*, 971 F.2d 481, 490 (10th Cir. 1992)). Although the grand jury was originally conceived as “the people’s panel,” to protect potential defendants from ‘spurious prosecutions, it is now instead a tool for prosecutors, consisting of “one-sided rules, principles, and procedures ... which are highly favorable to government” (Kuckes 2004, p. 2). Although our qualitative data show the grand jurors taking their roles very seriously and deliberating in earnest, we found that the institution provides no real hurdle to prosecutors who sought to indict everyday political behavior as bribery.

Once an indictment is rendered, the defendant can place small hope in the federal judge saving him or her from jeopardy (Robinson 2011; Sutherland 1949; The New York Times Editorial Board 2014). In the criminal setting, the motion to dismiss an indictment is “disfavored” and rarely successful (*United States v. Rogers*, 751 F.2d 1074, 1076–77 (9th Cir. 1985)). There are examples of trial court judges trimming some charges from indictments (e.g. Burns 2015). It is quite rare, however, for a grand-jury-issued indictment to be thrown out altogether. Our guilt-phase experiment found that neither the Speech or Debate Clause’s exclusion of certain evidence, nor either of the jury instructions endorsed by the Supreme Court (*McCormick* and *Evans*) are likely to provide substantial help to a defendant. Furthermore, criminal jury convictions are almost never overturned on questions of the sufficiency of the evidence (which would presumably be the only direct mechanism for challenging a jury’s findings that a given set of facts constitute a bribery agreement) (e.g. *Kingston*, 971 F.2d 481, 490 (10th Cir. 1992)). In this speech sensitive area, however, it is possible that appellate courts will give a more scrutinizing review.

Frankly, we have provided a very soft test of this phenomenon, one that likely underestimates the risk of jeopardy. In a real case, Federal prosecutors would buttress their case by offering immunity to favorable witnesses and withholding it from unfavorable witnesses, who will then take the Fifth (Silverglate 2009). With such a deal, the prosecutors might find witnesses willing to say that there was a much more explicit agreement than the two witnesses in our grand jury experiment, who we scripted to insist that they were unaware of any bribery agreement. Real prosecutors would also stack charges to raise the stakes for any defendant contemplating trial (Williams 1990). Every phone call made, email sent, use of the mail, and travel across state lines could itself be charged as a felony if they related to the purported bribery scheme, thus threatening many decades of potential imprisonment for a criminal defendant. RICO charges could be layered on top, along with money laundering, tax evasion, and civil forfeiture provisions, which could be devastating to the individuals involved, not to mention their businesses and families (e.g. *Ryan v. U.S.*, 688 F.3d 845, 850 (2012)). In short, the stakes could be made so high that any rational defendant would plea to a much reduced list of charges, even if he or she faced only a small chance of conviction at trial (Rakoff, Daumier, & Case 2014). As former federal judge Nancy Gertner (2015) explains, the concern is not hypothetical: it has played out specifically in public-corruption cases involving lobbying.

Perhaps it seems fanciful that any federal prosecutor would initiate such an indictment charging a high-profile and respected official, characterizing everyday political behavior as felonious. Yet in recent years the Federal Government has prosecuted several Members of Congress, state governors, and members of state legislatures for conduct involving their political supporters. Alabama Governor Don Siegelman went to prison for, *inter alia*, soliciting a contribution to an independent political group advocating for the establishment of a state lottery, in exchange for a political appointment to a state board (*Siegelman*, 640 F.3d 1159 (11th Cir. 2011)). Illinois Governor George Ryan went to prison for steering public contracts toward his friend, a lobbyist, who among other things, held two major fund-raisers for Ryan, raising a total of \$250,000 (*Ryan*, 688 F.3d 845, 850). His successor in office, Rod Blagojevich, also went to prison for bribery on an indictment, which repeatedly alleged that the scheme involved the exchange of official action for “campaign contributions” (*United States v. Rod Blagojevich et al*, No. 08 CR 888). Virginia Governor Robert McDonnell was successfully prosecuted for bribery as well (Helderman & Zapotosky 2014). In recent years, several members of the US Congress have also gone to prison for bribery-related charges, including Randy “Duke” Cunningham, who made a particularly blatant exchange of his support for defense contracts for specified

amounts of campaign support (*Committee On Jud., U.S. House Of Repres. v. Miers*, 558 F. Supp. 2d 53 (D.C. 2008)).

These examples are not intended to suggest that prosecutors are already targeting everyday political behaviors; the behaviors of these defendants were more egregious. The point of these examples is to instead show that such prosecutions are plausible; these high-profile officials and donors are not untouchable.

All of the foregoing suggests that, given our evidence that indictments and convictions for everyday political behaviors are feasible, Federal prosecutors are now the lynchpin of modern politics; they alone decide what to tolerate, and who instead becomes a felon. Others have noted the problem of over-criminalization, the breathtaking power of prosecutors in our federal system, and the phenomenon of discretionary underenforcement (Silverglate 2009; Davis 2008; Lynch 1998; Natapoff 2006; Sager 2006). “Defense attorneys and public officials who have been convicted of misconduct typically maintain that federal prosecutors can convict anyone they like,” but to date this has sounded like sour grapes, unsubstantiated by evidence (Alschuler 2015, p. 21).

As the next section shows, our contribution is more specific to politics and core political speech: the context of campaign finance and revolving-door situations, which expose the 535 Members of Congress and their political benefactors to criminal prosecution, along with the 50 state governors, the 7,383 state legislators, the thousands of state court judges, and all their political benefactors. The shadow of the federal prosecutor looms over politics and the speech that supports it. This finding has both a dark side and a potential bright side, suggesting a way forward for the regulation of money in politics.

5.3 Unpredictability, the First Amendment, and Separation of Powers

If the foregoing analysis is correct—that Federal prosecutors can target just about any contemporary politician and any of their major benefactors, with a plausible chance of exacting a conviction (by plea or trial)—then these findings provide a new and distinct perspective on the potential mechanisms of regulating money in politics. So far, the Supreme Court has seemed to assume that bright-line prophylactic regulations (e.g. specifying the maximum amount that an individual can spend in an election cycle, without triggering a public funding mechanism) are constitutionally inferior mechanisms compared to the laws proscribing bribery, which the Supreme Court has condoned instead. In this section, we suggest that using the bribery laws to regulate political corruption is also constitutionally dubious, in a way that has not yet been fully recognized.

To the extent that our empirical findings of ubiquitous criminal jeopardy are surprising, then they implicate the principle “no man shall be held criminally

responsible for conduct which he could not reasonably understand to be proscribed” (*Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)). Some scholars have argued that unpredictable liability might have a stronger deterrent effect, as it prevents gaming that might otherwise occur around bright-line rules (Feldman & Lifshitz 2011). Notwithstanding this advantage, the notion of predictability is part of a larger concept of the rule of law (Kadish & Kadish 1973).

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement” (*Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983)). The paradigm void-for-vagueness cases involve novel constructions of statutory terms, for examples, expanding a statute proscribing “entry” on land to also cover remaining on land (*Bouie*, 378 U.S. 347 (1964)), or expanding a statute proscribing interstate transport of stolen “vehicles” to also apply to airplanes (*McBoyle v. United States*, 283 U.S. 25, 27 (1931)). In those cases, the concern is that the courts have substituted one meaning for another. Other cases have a textual vagueness, such as one requiring employers to pay “the current rate of wages,” but not specifying whether the threshold was at the maximum, the minimum, or somewhere in between. “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law” (*Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). In such a case, there may be no real dispute about how much the defendant paid his workers, but at any given rate of pay the defendant would lack notice as to whether the law prohibits that rate.

In contrast, the bribery statute’s terms are clear enough: they proscribe corrupt exchanges of things of value. Indeed the Supreme Court has taken these statutes as if they are the paradigm of concrete specificity and fair notice, even using them to cabin prosecutorial discretion in another law. In *Skilling*, the Court responded to a growing recognition that 18 USC § 1346, which protects the “intangible right of honest services,” was being applied to “a staggeringly broad swath of behavior” that “headline-grabbing prosecutors” subjectively deemed “unappealing or ethically questionable,” inviting “federal courts to develop a common-law crime of unethical conduct” (*Sorich v. United States*, 555 U.S. 1204 (2009)). Specifying its “holding,” the *Skilling* court wrote “that honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks” (130 S. Ct. 2933). From the black-letter law of bribery, the *Skilling* court sought to exclude the “amorphous category” of “conflict of interest” cases (130 S. Ct. 2932). “Reading the statute to

proscribe a wider range of offensive conduct ... would raise the due process concerns underlying the vagueness doctrine" (130 S. Ct. 2931).

Our data and analyses suggest that there is nonetheless a problem with using the bribery statutes for public corruption cases. Where self-interested money is ubiquitous in politics, the essential element of that crime (the corruptly intended exchange) is in the minds of the defendant, if it exists at all. Ascertaining that predicate fact depends on the eyes of beholders, whether they be grand jurors, prosecutors, or petit jurors (Swift 1795; *United States v. Bass*, 404 U.S. 336, 348 (1971); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003)).

Once the predicate fact of a *quid pro quo* is found in a given case, it is unlikely that the defendants could successfully challenge the statute as void for vagueness (e.g. *United States v. LaHue*, 261 F.3d 993, 1005 (10th Cir. 2001)). It is not plausible to suppose that the bribery statutes themselves would be struck down as unconstitutionally vague. Still, in *F.C.C. v. Fox Television Stations, Inc.*, the Supreme Court decided whether the Federal Communications Commission's regulation of vulgarity, in the context of "fleeting expletives," was unconstitutionally vague and had a chilling effect on speech (132 S. Ct. 2307, 2317 (2012)). The Court held that, although it did not need to reach the First Amendment analysis, or whether the indecency policy was itself unconstitutional, the policy was applied in an unconstitutional way. The Court explained that, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech" (132 S. Ct. 2307, 2317 (2012); see also *Marks v. United States*, 430 U.S. 188, 196 (1977)).

The Supreme Court has often reasserted this principle in political speech cases. In *Buckley*, the Court said that "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" (424 U.S. 1 (1976) at 41 n.48; see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346, 189 L. Ed. 2d 246 (2014)). In *Wisconsin Right to Life*, the Supreme Court rejected "a test based on the actual effect speech will have on an election" because such a test fails to give candidates clear notice of what is criminalized (127 S. Ct. 2652, 2666 (2007)). As shown above, however, the bribery statute is often interpreted in such a causal way, asking whether the expenditure had an effect on the official's actions. In *Citizens United*, the Court said that "The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation" (130 S. Ct. 889). Here, we lack even that regulatory interpretation.

The Supreme Court could revisit its earlier attempts to cabin them through jury instructions. Our experiment suggests the futility of that approach.

Putting aside the due process and First Amendment problems of fair notice, political corruption prosecutions also threaten separation of powers. At the very core of the Federal Constitution is the idea of “dividing and allocating the sovereign power among three co-equal branches” (*United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974)). As noted above, the Speech or Debate Clause, in particular, was motivated by a concern that the Executive could harass and intimidate Members of Congress, a concern that had a real basis in history. That clause does not, however, preclude the sorts of prosecutions we here studied. Similarly, when the conflict has been between the Executive and the Judicial branches, the rule of law prevailed (*Nixon*, 418 U.S. at 707). We should expect that Members of Congress must also face such scrutiny. It is nonetheless disconcerting for contemporary politics, in the regime crafted by the Supreme Court, to condone a political marketplace that also creates ubiquitous jeopardy, at the sole discretion to the Executive, to pick and choose among virtually any Member. Even the implicit threat that such power could be exercised tends to subordinate Congress to the Executive, tipping the balance of power.

The separation of powers problem is not merely horizontal; there is also a vertical dynamic between the Federal and state governments. Congress has given Federal prosecutors the power to police bribery at the state and local levels as well (Brown 1999; Whitaker 1992). Andy Coan (2015) has compellingly explicated “the deep structure of American federalism,” which “focuses on the independent relationship that the Constitution establishes between state governments and their local constituencies on the one hand and the federal government and its national constituency on the other.” The bribery statutes provide an unparalleled way for the Federal government to intervene directly into that political relationship, saying precisely when state politicians and their political benefactors have established too tight of a relationship. On its own, this intervention is problematic, but it also has the potential for abuse, with the same sword of Damocles making it more difficult for state officials to robustly challenge prerogatives of the Federal executive. Instead, there is an implicit incentive for state officials to play nicely.

The separation of powers problem would be trivial, if not for the discretionary enforcement at the core of this regime (See Section 5.5). US Attorneys are political appointees, who act in a regime of political incentives. As Sara Sun Beale (2009) explains, “The position of U.S. Attorney is, in a formal sense, plainly political: U.S. Attorneys are appointed by the president with the advice and consent of the Senate, and they serve at the president’s pleasure” (Perry 1998). Even entry-level attorneys and career prosecutors—the Assistant

U.S. Attorneys (AUSAs)—have (at times) been selected based on political criteria (Beale 2009, p. 371). Justice Thomas expressed such a concern in *Evans*, describing the risk of prosecutorial adventurism “particularly grave in the inherently political context of public corruption prosecutions” (504 U.S. 295, 296-97) (plurality opinion) (Thomas, J., dissenting).

Professional norms are supposed to constrain such overt political influences (*Berger v. United States*, 295 U.S. 78, 88 (1935); Gold 2014). This may be a legal fiction (Beale 2009, p. 371). Marc Miller & Ron Wright (2008) have explicated the “black box” that is prosecutors’ discretion, and shown that while their discretion “remains mostly impervious to external regulation,” there are mechanisms of internal regulation. Given the political appointments at the top, this internal regulation may be for the worse. In one notorious instance, President George W. Bush’s political advisor, Karl Rove, pressured US Attorneys to investigate political opponents, and then removed those that refused. The Department of Justice’s own investigation concluded that, “political partisan considerations were an important factor in the removal of several of the U.S. attorneys” (USDOJ 2008; Committee On Jud., US House Of Repres. v. Miers, 558 F. Supp. 2d 53 (D.C. 2008); Lichtblau 2007). Even without such overt pressure, US Attorneys also seek promotions and higher offices, which creates its own incentives. It is unsurprising that these incentives trickle down to subordinates.

We can move beyond anecdotes. Scholars have analyzed the timing of nearly 2,000 public corruption cases in recent decades, comparing the political parties of the prosecutors (by the President who appointed them) and the defendants being prosecuted, and found that opposition party defendants are “substantially more likely to be charged immediately before an election than afterward” (Nyhan & Rehavi 2015, p.1). Strikingly, the scholars also observed the incentive structure at work: “These timing differences are associated with greater promotion rates to the federal bench (for U.S. attorneys) and to U.S. attorney (for assistant U.S. attorneys)” (Nyhan & Rehavi 2015, p.1).

These background facts sharpen the point of our empirical findings, that perceptions of corruption are politically valenced. Our data evince this phenomenon with mock jurors, but it is likely true for humans more generally, including prosecutors, even those of good will (Kahan et al. 2012). And, regrettably, these political prosecutions appear illegitimate, with criminal defendants and their supporters crying foul, and observers having little ability to sort the wheat from the chaff (e.g. Weiss 2014).

Could defendants raise politicized prosecution as a defense? Although there would seem to be an equal protection claim, the battle would be uphill (*McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262 (1987); *United States v. Stewart*, 590 F.3d 93, 121 (2d Cir. 2009)). To

even get a decision on such a challenge, an indicted defendant would have to decline the best plea deal offered by the Government. Then the courts would remind that, “the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, and a prosecutor’s pretrial charging decision is presumed legitimate” (*United States v. Stewart*, 122). Prosecutors could relatively easily concoct a “rational basis” for choosing one prosecution ahead of another, if it were even called upon to do so (*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989); but see Eyer 2014). Courts are understandably hesitant to overturn the discretionary decisions of a coequal branch, especially when the decisions have already survived another filter designed to police their impropriety: the grand jury. But as we have seen, that institution may not be up to the task.

The point is simply that, as the Supreme Court has overturned bright-line prophylactic campaign finance regulations, its blithe gestures toward the law of bribery as an alternate regulatory mechanism should not be reassuring. Using these statutes to regulate private money in politics raises its own Constitutional problems. These problems may be even more trenchant than the problems with bright-line prophylactic regulations, as these problems undermine due process and threaten the Constitutional structure of government itself.

5.4 Safe Harbors as a Solution

The most obvious path forward is to try to maintain the equilibrium that now exists: the Supreme Court continues dismantling prophylactic regulations, more private money floods into politics, federal prosecutors opportunistically prosecute the most egregious cases, and public trust in government falters. Much of the foregoing has suggested that the status *quo* is precarious, and may be upset by a scandal or crisis that makes tangible its contradictions (Massaro 2011b).

Alternatively, the USA could enact Constitutional amendments to bar private money in politics, or at least replace the big-dollar funding with public money. Even short of Constitutional amendments, state and federal statutory reforms could be reconsidered as constitutionally viable once again, in light of the new evidence here presented. Regardless of whether they are done by Constitutional amendment, Congressional action, or through state legislation or referenda, these reforms all require political will.

There is another potential route forward. We have shown that under the current bribery statutes, prosecutors have discretion to impose a real threat of criminal jeopardy on almost any politician and their benefactors who seek official action. Congress and/or the Executive could carve out of these criminal

statutes certain “safe harbors,” defining with bright-line rules the behaviors that will *not* give rise to criminal jeopardy.

Congress and the Executive have successfully employed this strategy in other areas of regulation, most notably in the healthcare sector. The anti-kickback statute (AKS) regulates payments made to healthcare providers “in return for referring an individual to a person for the furnishing . . . of any item or service for which payment may be made . . . under a Federal health care program” (42 U.S.C. § 1320a–7b(b)(2)). The paradigm fact-pattern is a medical device company paying a surgeon a bonus on the side for every time that the surgeon implants the company’s product, which is then reimbursed by Medicare. The AKS creates a felony crime very similar to bribery, with the same “corrupt” intent requirement (*U.S. v. Hancock*, 604 F.2d 999, 1002 (1979)). The statute in fact includes “bribes” as such (*Skilling v. U.S.*, 561 U.S. 358 (2010)). And it suffers from the same problem that infects the bribery statute in contemporary politics: physicians (like politicians) are awash with money from purveyors of products and services who seek healthcare reimbursements (like self-interested political benefactors). Physicians often lease space from hospitals (who then seek reimbursements for services provided to patients on the advice of the physicians) and often provide technical consulting services to drug and device makers (who then seek reimbursements for their products provided to patients on the advice of physicians). Since we have adopted a complicated market-oriented healthcare system with many overlapping financial relationships, the problem for the kickback statute is to sort the bona fide wheat from the criminal chaff.

The AKS existed as such for fifteen years, but many in the healthcare industry expressed concerns that, “because the language of the statute was so broad, providers were uncertain as to what practices were prohibited and what practices were permissible” (Kusserow 1992). Accordingly, Congress wrote into the anti-kickback statute a rather peculiar provision, which explicitly allows the Secretary of Health and Human Services to exclude any relationships that she sees fit from the scope of the crime (42 U.S.C.A. § 1320a–7b). Over time, the Secretary has in fact promulgated regulations specifying 28 such “safe harbors,” utilizing “bright line” rules where ever possible (42 C.F.R. § 1001.952 (2007); Kusserow 1992, p. 53). For example, several of the “safe harbor provisions require that the compensation arrangement be in writing, signed by the parties, and specify the services, equipment, or premises covered by the agreement,” which helps ensure that the money transfers for fair market value, not disguising kickbacks (*U.S. ex rel. Armfield v. Gills*, No. 8:07-CV-2374-T-27TBM, 2012 WL 5340131, at *5 (M.D. Fla. Oct. 29, 2012)).

In adopting the safe harbor provisions, HHS explained that “[i]f a person participates in an arrangement that fully complies with a given [safe harbor]

provision, he or she will be assured of not being prosecuted criminally or civilly for the arrangement that is the subject of that provision” (Background to Safe Harbor Provisions, 56 Fed. Reg. 35952, 35954 (July 29, 1991)). Because these safe harbors exist under the auspices of the statute itself, they create a binding limitation on the scope of the crime. Nonetheless, “the burden is on the party seeking protection under a safe harbor provision to demonstrate strict compliance with each and every element of the safe harbor” (*Armfield*, 2012 WL 5340131, at *5). Susan Morse (2016) has recently given a comprehensive treatment of the incentives created by such rules.

The Federal government has utilized safe-harbor provisions in other contexts. For one example, lawyers make innumerable factual representations in their pleadings, and it may be difficult to predict which are sanctionable (17 C.F.R. § 230.506). In Rule 11 of the Federal Rules of Civil Procedure, Congress created a safe harbor, allowing parties to avoid sanctions if they retracted any frivolous pleadings within 21-days of being put on notice by the opposing party (*Rector v. Approved Fed. Sav. Bank*, 265 F.3d 248, 251 (4th Cir. 2001)). In the months preceding a bankruptcy, a company may make thousands of financial transactions, and it may be difficult to discern which are fraudulently designed to exploit the upcoming bankruptcy. The Bankruptcy Code allows trustees to avoid certain transfers, unless they comply with a statutory safe harbor (In re Quebecor World (USA) Inc., 453 B.R. 201, 203 (Bankr. S.D.N.Y. 2011) aff’d, 480 B.R. 468 (S.D.N.Y. 2012) aff’d, 719 F.3d 94 (2d Cir. 2013)). Internet service providers cannot feasibly predict which of the materials that it serves may be illegal. The Communications Decency Act and related statutes provides immunity under certain conditions, which Mark Lemley (2007) has called safe harbors. The tax code also has safe harbors (Cauble 2014). Scholars have proposed safe harbors in other statutory regimes, and analyzed various statutory provisions in these terms (e.g. Swire 1993; Popofsky 2007; Hasen 2006; see also Solan 2001).

Scholars have also interpreted certain Supreme Court doctrines as creating constitutional “safe harbors” (Klein 2001). Although the concept of safe harbors as a regulatory mechanism has not yet been fully theorized, Susan Klein (2001, p. 1033) has gone the farthest, explaining safe harbors have the advantage of clarity, even if they do not perfectly match what any particular decision-maker would regard as the ideal scope.

The foregoing examples of safe harbors have been authorized by Congress or the Courts. But the Executive can also create safe harbors by simply pre-specifying how it will exercise its prosecutorial discretion. For example, the Food Drugs and Cosmetic Act prohibits the sale of misbranded drugs and devices, and this statute has been interpreted to proscribe “off-label” promotion, making it a felony crime. Since off-label use is permitted, and quite common,

there is a problem of drawing a line to specify when the manufacturer has promoted those uses. The Food and Drug Administration has thus created certain “safe harbors”—such as the distribution of peer-reviewed literature—to provide guidance to manufacturers as to when it will and will not exercise its enforcement discretion (Dresser & Frader 2009).

Beyond the healthcare sector, the Executive-branch has a wide range of prosecutorial guidelines, but these primarily focus on procedure and the conduct of prosecutors (US DOJ 1980). In some instances, however, the Department of Justice has explicitly stated its substantive enforcement “priorities,” in a way that nearly promises not to prosecute in de-prioritized areas. One notable example was the Obama Administration’s decision to de-prioritize prosecutions for individual marijuana use in states where it had been legalized, for those complying with state laws (Cole 2011; *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013)). While these guidelines are not technically binding, it seems likely that if the Government nonetheless chose to prosecute more broadly, criminal defendants could use the guidelines to show entrapment, estoppel, or due process violations (*Fox v. FCC*, 132 S. Ct. 2307, 2317 (2012)).

A safe harbor strategy could be applied to the bribery statute (Stein 2012). If so, it would be largely immune from Constitutional scrutiny, even in the sensitive domain of campaign finance. The promulgation of bright-line rules, specifying who can give how much money to who at what time would largely obviate the concerns with discretionary enforcement and vagueness (see Sections 5.2 and 5.3). Individuals that fall outside the safe harbors and are prosecuted for bribery, could not raise the substantive limits instantiated in the safe harbors as infringing their First Amendment rights, because the First Amendment does not protect bribery (see Section 2.4). “The inapplicability of a safe harbor does not, by itself, make the alleged conduct illegal” (U.S. ex rel. Osheroff v. Humana, Inc., Not Reported in F.Supp.2d Med & Med GD (CCH) P 304, 144, *10 (S.D. Fl, 2012); (Klein 2001, p. 1033).

This very same point also shows the limits of this strategy. The bribery statutes are useful for the common situations in which political benefactors also seek official action from those that receive their largesse. We tested a concrete quid, but the doctrine suggests a much more ambiguous “stream of benefits,” could suffice. And for the “pro,” our evidence suggests that the relationship between the *quid* and the *quo* need not be very close, however. It is an empirical question to ask how often the largest political spenders also seek official action from Congress, but one might hypothesize that there is a large correlation. Still, at the end of the day, these bribery statutes would not solve the sheer imbalances in democratic power caused by imbalances in wealth (Hasen 2010). They could, however, be part of a larger public funding regime that served that end.

Recusals could be an important part of the safe harbor strategy (Nagle 2000). The Supreme Court has held that a judge who benefits from campaign spending may violate a litigant's due process rights, unless he recuses himself (*Caperton*, 129 S. Ct. at 2262). The Supreme Court has also upheld a state ethics commission rule, which requires city councilors to recuse themselves where there is a conflict of interest, holding that this policy also did not violate the First Amendment (*Nevada Com'n on Ethics v. Carrigan*, 564 U.S. 117 (2011)). Accordingly, political candidates who promise to recuse themselves from decisions affecting their donors could protect themselves against bribery prosecutions. With the unpredictable threat of bribery prosecution, recusals may become a new equilibrium.

The safe harbor strategy may appear to be a rather technical solution to the profound problem of money in politics. But, it may work. The exact same regulations that the Supreme Court has struck down in case after case could be reconstituted as mere safe harbors from the bribery statutes, and then avoid the same fate. In fact, much more aggressive prophylactic reforms could be passed, dramatically changing the landscape of money in politics. All this can be done unilaterally by the Executive alone, under current law. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" (*United States v. Nixon*, 418 U.S. 683, 693 (1974)).

The safe harbor strategy is not an end-run around the Supreme Court. Instead, it takes the Supreme Court at its word, which has long promised that Government may regulate *quid pro quo* corruption or the appearance thereof.

6. CONCLUSIONS

We provide a novel way to operationalize the Supreme Court's doctrine about the permissibility of regulating core political speech. Our two different research methods complement each other, and triangulate on a single phenomenon, together providing a robust test of the applicability of the Supreme Court's doctrine.

The Court and commentators could simply dismiss the present data, expressing a "hope [that] judges will not base their decisions on a headcount of the American people" (Persily & Lammie 2004, p. 122). We think that the "appearances" standard, must however, mean something distinctive. And this is not simply a poll. Unlike prior studies, which fail to target the narrow sense of *quid pro quo* corruption in particular, and fail to engage the rich factual context and potential for democratic deliberation (Persily & Lammie 2004, p. 133). we have provided a robust grand-jury procedure with evidence and deliberations, along with a systematically-manipulated petit juror procedure, tailored to the jury instructions for the specific federal criminal laws of bribery, and the legal

standards for indictment (probable cause) and guilt (beyond a reasonable doubt) (Persily & Lammie 2004, p. 129).

Our findings are disconcerting. The evidence suggests that legal elites—the scholars and the courts—may have underestimated the capacity of the *quid pro quo* concept. If appearances of *quid pro quo* corruption run rampant, then the Supreme Court's three-decade project of dismantling prophylactic reforms has failed, under its own criteria for evaluation. Nonetheless, our findings suggest that future reforms may enjoy a new vitality under the First Amendment.

Supplementary material

A Methodological Appendix is available at *JLA* online.

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