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Quis Custodiet Ipsos Custodes? A Panel Discussion on the Regulation of Political Corruption

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Transcripts

Quis Custodiet Ipsos Custodes? A Panel Discussion on the Regulation of Political Corruption

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Panelists: Jennifer Ahearn,** Kathleen Clark,*** Arlo Devlin-Brown****

Lance Cole:

Thank you, Brett, and thank you to everyone for attending today, and I especially want to thank all of the participants in the symposium for coming here at the end of what has been a very

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This is a transcript of a panel held at the *Penn State Law Review*'s 2017 Symposium. The transcript was lightly edited by the panelists and *Law Review* staff to make the transcript more reader-friendly. The views expressed in this transcript are those of the panelists alone.

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snowy week for us in central Pennsylvania. So, we are happy to have you, and I also wanted to commend the editors at the Law Review for putting this together. It is a great program and it's very, very timely. And I suppose the best thing to do is start with the *McDonnell*[1] case, as we've been very fortunate this morning to have unique insights into the *McDonnell* case with Mr. Brownlee's presentation[2] from the defense perspective and then the very thoughtful comments by Professor Brown[3] that we heard earlier in his analysis of the *McDonnell* case.

So, I think a logical place to start is with our other panelists here, and what are their thoughts on the significance of the *McDonnell* case, its greater meaning, its impact going forward, or any other approach any of you would like to take. And I hope someone will volunteer so I don't have to call on someone, because I have to do that enough with law students. But perhaps someone will volunteer to share your thoughts on the *McDonnell* case, which we can then use as a point of departure for a broader discussion of public corruption issues.

Kathleen Clark:

I nominate Jennifer.

Jennifer Ahearn:

Well I, gosh, I think I agree it's an open question, as Professor Brown talked about, as far as the impact of *McDonnell*. I think it does remain to be seen what the impact will be, and I actually think one other question that will really have a decisive effect on what the impact is, is how do the other branches of government and the other parts of the government react to *McDonnell*? I'm not trying to scoop myself here because in my presentation later I'm going to talk a little bit about how Congress might respond.[4]

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

2. Professor Cole is referring to a presentation given by John Brownlee on the trial of Virginia Governor Bob McDonnell as a part of this Symposium. Mr. Brownlee was one of Mr. McDonnell's trial lawyers.

3. Professor Cole is referring to a presentation given by Professor Brown as a part of this Symposium to accompany the article published in this Issue. *See* George D. Brown, *The Federal Anti-Corruption Enterprise After* McDonnell – *Lessons from the Symposium*, 121 PENN ST. L. REV. 989 (2017).

4. Ms. Ahearn is referring to a presentation she gave as a part of this Symposium to accompany the article published in this Issue. *See* Jennifer Ahearn, *A Way Forward for Congress on Bribery After* McDonnell, 121 PENN ST. L. REV. 1013 (2017).

But I do think that one reason that the Court may have approached the writing of its opinion in the way that it did—making a suggestion that there are constitutional concerns that it has, but not going so far as to actually make any constitutional holdings necessarily—is that I think it wants to suggest that other parts of the system should be weighing in on these issues. Whether that is simply to check prosecutors in the future, or whether there are other parts of the system that should be weighing in, I think that's one of the reasons why the court might have taken the step of including that kind of language. So, I do think we want to—as lawyers, it's easy to look at the courts, but I think we want to broaden our scope a little bit and look more broadly to see where else we think the impact will be from, because I think a lot of important impact will come from outside of that narrow corridor.

Lance Cole:

Anyone care to follow up on that?

Arlo Devlin-Brown:

I can give you a few thoughts as sort of a former prosecutor's prospective. I was chief of the Public Corruption Unit in the U.S. Attorney's Office for the Southern District of New York until last summer, when I left for private practice at Covington & Burling. But I was chief there while the *McDonnell* case was going through the appeals process and I was also supervising the prosecutions of the legislative leaders of New York state which I will be talking about later this afternoon.[5]

But my basic take on the *McDonnell* case, as a former prosecutor, is that *McDonnell* is going to prevent prosecutors from bringing weak public corruption cases, and frankly those are not the cases that prosecutors are trying to bring. This doesn't mean that *McDonnell* isn't going to have an impact or a lot of cases that are on appeal where the jury instruction may have been arguably incorrect. There's things that are going to have to get worked out through the process as new instructions are crafted. But fundamentally, *McDonnell* says that you can't

5. Mr. Devlin-Brown is referring to a presentation he gave as a part of this Symposium on the prosecutions of former New York State Assembly Speaker Sheldon Silver and former New York State Senate majority leader Dean Skelos.

bring a case, successfully anyway, against a public official where your only theory is the public official took money in return for access, in return for allowing meetings, in return for setting up meetings.

No good public corruption prosecutor brings a case where that is the theory. Frankly that wasn't the theory in the *McDonnell* case, notwithstanding the issues with the jury instructions. It's just not attractive to the jury when you're in your summation saying, "Ladies and gentlemen, this politician got hundreds of thousands of dollars and what did he do? He set up some meetings. He never put his finger on the scales of any governmental decision, but he had meetings." You don't bring a case like that. Usually, you only bring a case if you have at least some circumstantial evidence that supports an argument you can make that the money was given for meetings, sure, but the meetings were just part of an objective where ultimately the corrupt deal was the public official was going to influence the outcome of the government decision. And there's other law—hopefully we'll see how that changes—but there's other law that makes clear that it's the corrupt bargain that's the crime, and it doesn't actually matter if the politician ultimately does influence the governmental outcomes.

It frankly doesn't matter—at least under some statutes—if the politician ever actually intended to influence the governmental action. Extortion under color of official right, which is one of the crimes here, is successfully completed—basically, if you're a corrupt public official and you convince people to give you money with them believing that you are going to move government in their direction when you're actually just going to get the money and not do much. So, I think it is going to have an impact, but I don't think it's not the sort of sea change there at the prosecutorial level.

Kathleen Clark:

It would be helpful if someone could explain how the *McDonnell* prosecution ended up turning on the governor having set up meetings rather than the larger endeavor of his assisting Williams. You say no prosecutor will want the closing argument to the jury to be based on the defendant having set up meetings. What was it about the *McDonnell* case as it evolved that led the federal government to rely on meetings in its the prosecution? Do you know?

Arlo Devlin-Brown:

Yeah, so I'm not intimately familiar with the facts of *McDonnell*, certainly not as much as your last speaker. But I do think the problem in that case for the prosecutors was really the jury instructions. I don't want to go back and look at what all the opening and summation arguments were. But I strongly suspect that their argument was that the object of the scheme was for this nutrition tobacco guy to get Mr. McDonnell to use his influence to cause the state university to conduct a study that they otherwise wouldn't.

The problem was, under the prior understanding of the law before *McDonnell*, I'm not sure the prosecutor probably parsed that out to break down. You know they also argued the meetings point. The Supreme Court in their ultimate decision—they didn't say there was insufficient evidence to convict McDonnell of official acts. They noted, in fact, that some of the things that McDonnell had been accused of doing would constitute more than mere acts—an official act. The problem was the jury instruction was so broad that there was no way to tell if the jury convicted on a valid basis or not and the Supreme Court kicked it back to the circuit court to—I think—determine whether there was sufficient evidence and there could have been a retrial. The government elected not to do a retrial. I don't know why and don't have any insight into that.

Kathleen Clark:

Thanks.

Jennifer Ahearn:

Can I just say one more thing about that? Which is I think a perspective that maybe hasn't been put quite this way yet today, but I do think this is maybe something that had an impact on how these prosecutorial decisions were made. Which is, I don't think that a prosecutor maybe in this case would have seen it simply as "I just set up a meeting for a constituent." I think they would see it as "I sold a meeting to a constituent." And while maybe in the context of this case those things are not different, because the Supreme Court was so focused on what is the "act," and that's the real question. But I don't think that everyone who looked at this case divorced those things from each other. And so, the question about setting up a meeting, is it okay for a government official to set up a meeting for his constituents, sure. But if what we're saying is it's okay to sell meetings and that's

what we're really endorsing here, then I think that maybe leaves open to question if the way that *McDonnell* came out is actually going to lead to more meetings happening and more great constituent interaction that we all want to endorse, which is what the Supreme Court seemed to say. But I'm not sure everyone who looks at this case would come to that same conclusion about what the impact of *McDonnell* will be in that sense.

Lance Cole:

And I wonder too, I listened to Mr. Brownlee earlier and he's obviously a phenomenally capable advocate, describing the case as a bad case that never should have been brought. However, last night I reread the case in preparing for what we're doing today, and each time I read the opinion, even as written by Chief Justice Roberts overturning the conviction, I cringe. You know, to me the behavior is troubling to say the least. I'm certainly not wanting to get into a debate with Mr. Brownlee, but he said—and I think he was echoing the arguments that were made in some of the amicus briefs—that if inviting someone to dinner at the governor's mansion can lead to prosecution or writing a letter on someone's behalf to West Point can lead to prosecution, then we have a serious problem. And I agree with that. But I also know, as everyone who has worked in government and politics knows, that all meetings are not the same. And if the governor tells someone who works for the governor, perhaps is a political appointee of the governor, perhaps wishes to advance their career based upon the governor's goodwill, "take a meeting with this person," that's not the same thing as writing a letter to West Point, where someone can disregard the letter or not. Is the state of the law now so constricted that everything that is described in the *McDonnell* case gets a pass? I certainly hope not, because the Supreme Court seemed to suggest—as Arlo pointed out—that the *McDonnell* case could still be brought. And Kathleen I see your hand going up over there.

Kathleen Clark:

I want to come back to what Jennifer just said. My interpretation of Chief Justice Robert's opinion in *McDonnell* is that the federal bribery statute no longer prohibits a federal official from corruptly accepting something of value in exchange for setting up a meeting with another government official.

Setting up a meeting doesn't rise to the level of being an official act, and is therefore not covered by the federal bribery statute.

I'm aghast at the *McDonnell* decision, and in particular at the Supreme Court's hostility towards the anti-corruption enterprise, or at least the criminal prosecution element of the anti-corruption enterprise. It makes me wonder about anti-corruption efforts in the United States more generally, and whether anti-corruption efforts need to be much more narrowly tailored to meet the concerns of the Supreme Court. Let me underline where my uncertainty is. I'm not uncertain about the scope of the federal bribery statute. I'm confident about that. What I'm uncertain about is whether other anti-corruption laws that are not criminal in nature will be reviewed with the same level of hostility or demand for rigorous scrutiny as the federal anti-bribery statute was in this context.

Arlo Devlin-Brown:

And just to put one maybe final point on this. I think you're absolutely right, that the plain reading of the *McDonnell* decision is that it is no longer a federal crime for politicians even to do this. Right? Even to say "thanks for the 100 thousand in the suitcase and I'm going to set up a meeting with you to go speak to the head of our university system." That—actually, let's have it in a contract, it's not going to influence anything, that's what it is: 100 thousand dollars for a meeting, I think that's not a federal crime under *McDonnell.*

But again, from the point of how a prosecutor can still build a case, come back to your common sense. People don't pay 100 thousand dollars to have a meeting without hoping that there's going to be some sort of influence about the outcome. And if you can build a case as a prosecutor where you could have a witness for that meeting. Say someone from the Department of Health. Ideally some contemporary emails, so you have the witness from the department of the university who says, testifies at trial: "Sir when the governor said to you, 'I want you to take a hard look at this at your meeting.' 'What did you understand that to mean?' 'I understood that to mean that we really ought to do this study.' 'Why did you understand that?' 'Well the last time he said this X, Y, and Z happened.'" And then you have some emails at the time where he's emailing his subordinates: "guys emergency session we have do this. Can you find some room in the budget for a study on this?" And those sort of things do happen.

Now that's not conclusive evidence, but I think a prosecutor—a good prosecutor with that evidence in their hands can get past the *McDonnell* threshold and can argue, survive a motion to dismiss I think, and argue to a jury that this was not money just for a meeting, which is not a crime. But the corrupt deal was money for the governor or the public official to set up a meeting and use his soft influence to make sure that some governmental action will happen.

Lance Cole:

What about the federalism aspect of this? Professor Brown made reference to it earlier and this has been a part of an issue in federal anti-corruption law and policy forever. "The feds" coming into states or local governments and imposing their own views of propriety and morality, and legality for that matter. As we heard earlier this morning, what Governor McDonnell did was apparently not a crime and was permitted under Virginia law, so do we want to leave this issue of public corruption and particularly state and local officials, to the states, or do we want federal officials to be able to exercise oversight here through criminal law enforcement?

And I think, Kathleen, part of the concerns that the Supreme Court expressed seems to turn on that issue. They seemed troubled by that idea, and even Justice Breyer's comments showed a great deal of concern about the federal officials looking over the shoulder of state officials. Personally, I'll throw my view out and turn the floor over to others. There are lots of areas I think, where it's a good idea—and we're probably going to see a lot of this—to allow the states to be laboratories of progress and new ideas, but I'm not sure corruption is one of those. I think we might prefer to have a uniform standard of corruption, and not let Arkansas—and I'm from Arkansas so I can say Arkansas—or New Jersey or Louisiana or Illinois set the standards, so any comments on the federalism aspect of this?

Kathleen Clark:

Concern about federalism is one way to explain the motivation for the court's hostility towards the anti-corruption enterprise in this case. That may be part of what motivated the Court to scrutinize McDonnell's prosecution the way that it did. While that may have been a motivation, I don't see how it played into the Court's analysis, because the Court ended up gutting a

statute that applies to federal officials, the federal bribery statute, in the process.

This decision turns on three features, three elements, that weren't actually part of this case. The first element is the federal bribery statute. McDonnell wasn't a federal official, but nonetheless the Court's analysis turns on the federal bribery statute's definition of an official act. The second element is federalism. It's not clear how federalism actually plays a doctrinal role in the analysis, as opposed to a motivation for the court's hostility, or attitude. And third—I did have a third, and it wasn't the Department of Energy.[6] The third element is campaign finance doctrine. In reading the decision, you'd think that the Court was troubled by the possibility of prosecutions like McDonnell's hobbling elected politicians who have to raise campaign contributions in our system of privatized campaign finance.

If you hobble a politician's ability to obtain campaign contributions, that could be seen as an attack on democracy. But, of course, this case didn't involve campaign contributions. This case involved personal gifts. Our democracy does not depend on the ability of elected politicians to receive gifts. There is no public benefit when the governor of Virginia receives a Rolex watch. Whereas, you could claim, and many people believe, that there is a public benefit from campaign contributions going to politicians because they facilitate more speech about the campaign. But there is no public benefit from private gifts to public officials.

Arlo Devlin-Brown:

One thought I had on the federalism question is—I think both before and after *McDonnell*—it's not a binary thing. There's this real interplay between federal and state corruption laws, and state conflict of interest regulations in particular. And the reason I say that is, in order to make a federal corruption case, frankly in order to make most federal white collar cases, the hardest issue always for the prosecution is to prove criminal intent and specifically intent to defraud, intent to deceive, to hide something, right? So, the federalism sort of answer here is when states adopt stronger conflict of interest rules—disclosure rules—those things make it such that a politician who wants to

6. Rapster, *Perry Forgets Third* Agency, YOUTUBE (Nov. 9, 2011), https://www.youtube.com/watch?v=-YdS7HGO_Ik

get the illicit gifts, who wants to have an illegal, obviously incriminating string of outside income, they either have to disclose and make public, in which case hopefully there is some political response. Or they lie. And if they lie and they leave it out that makes prosecuting them federally, and probably under state law, for bribery a lot easier, because it's a lot easier to say, "Ladies and gentleman was this really politics as usual? Is this something the person thought was fine at the time? Then why'd they lie on this form?" And we'll actually talk about that a little bit later on Silver and Skelos. So, I think there is a great role for the states here if they care about these issues to tighten up their conflicts of interest rules.

Jennifer Ahearn:

And I would just say one other thing on federalism, and I think the federal *McDonnell* case is a good example of this. Let's just posit that Governor McDonnell actually did corruptly receive these gifts and it was illegal under Virginia law at the time. Under what scenario would he have been prosecuted under Virginia law? How would that have actually have happened? I mean, we know there were Virginia police who were investigating him, but I think we could all understand how maybe the Attorney General of Virginia might not be, in some situations, all that inclined to bring this prosecution. And those kind of practical difficulties get swept up in the federalism conversation, but I'm not sure they have exactly the same set of concerns, or that they implicate the same set of concerns as federalism in other contexts.

Lance Cole:

And that's exactly where I was planning to go next. The question is, to what degree should these kind of cases be left to state officials to prosecute and the feds should step out and let the state and state law enforcement do the job? Or, to extend it to its greatest either libertarian or democratic extent, let the voters decide if someone is too corrupt for public office. Then the voters will answer and can vote them out. I personally don't have great confidence in either of those approaches, but I'm happy to hear the views of the other panelists on those points.

Jennifer Ahearn:

I guess I'll bring up the *McDonnell* case as another example, which is: how would the voters in Virginia have ever

found out about any of this? I don't really understand how that would happen—again as a practical matter I don't really understand how that would have happened. I'm not sure the mechanism really works. Do you have to wait until something bad happens to the people of Virginia because of the corrupt actions that are taken by the official? Ultimately some other study doesn't get done by the medical school, and another drug doesn't get approved, or this drug gets approved and it shouldn't have and people are harmed. And then the investigation goes back and we learn—oh wait this should have never been approved in the first place, and was only approved because this person was making money off of it. Well, do we really want to wait until those kind of things happen?

Lance Cole:

Or rely on the press to find it and write a story about, you know, a close friend of the governor gets favoritism and therefore the voters don't like that and speak at the next election.

Kathleen Clark:

I want to flag a philosophical point. In a sense, relying on voters can be seen as voters consenting to a conflict of interest that would otherwise violate a fiduciary duty. If we believe—I'm not sure the Supreme Court believes this anymore—but if we believe that public officials are in a position of trust, that they're supposed to act on behalf of the public, that they're in a fiduciary position, then there certainly are situations in which the beneficiary of a fiduciary relationship can consent to what would otherwise be prohibited conduct under the common law. This notion of relying on voters can be seen as an example of the beneficiary—the voters—consenting to what would otherwise be prohibited conduct.

You've already identified some of the weaknesses of relying on voters in those circumstances. There are situations in which the law says it won't allow a beneficiary to consent to a conflict because no reasonable beneficiary would consent to that kind of arrangement. You could actually conceive of the bribery statute as that kind of limitation: one to which the voters cannot consent. The bribery statute removes the option of allowing voters to consent to bribery by criminalizing it.

Arlo Devlin-Brown:

Yes, on the question of sort of multiple prosecutors in the federal versus state level, I think there's a valid point there that, sometimes, it's going to be challenging for state officials of the same party to feel as comfortable bringing a case against a powerful official who has a key role in the state. And sometimes the federal prosecutor is much more independent from state politics. So, I think federal prosecutors can play a role, and I think there are many state attorney generals, district attorneys, who do very impressive work in the area.

As to letting the voters decide, I agree with all the points that are made. There's also something fundamental about the voters and the democracy and that is, in the end, reform in the political system requires the voters to care and there are states where there's been systemic corruption problems and there may be there good government groups that advocate for solutions to those problems. And yet—it could be gerrymandering whatever else, it could party machines in different counties—but some of the same sort of people who are not necessarily reform-minded keep getting elected. And until something becomes an issue where the voters kind of get angry about it and motivated about it, I think systemic reforms to the conditions that give rise to corruption at the state level or at the federal level are challenging.

Lance Cole:

We've talked a lot about focusing on the *McDonnell* case, but we could also look at what the Supreme Court has done generally in this area, and Professor Brown made reference to this earlier. But I was thinking back to the relatively recent Supreme Court cases that we have, *Sun-Diamond*,[7] with the gratuities—the federal gratuity statute;[8] the *McCormick*[9] case with the Hobbs Act[10] and political contributions; and, of course, the *Skilling*[11] case on honest services fraud; and now we have *McDonnell*, which I think Kathleen correctly says takes a big chunk out of the federal bribery statute. And, myself and speaking only for myself here, I look at those cases and they are all very different and factually complex, and they involved

7. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).
8. 18 U.S.C. § 201 (2012).
9. McCormick v. United States, 500 U.S. 257 (1991).
10. 18 U.S.C. § 1951 (2012).
11. Skilling v. United States, 561 U.S. 358, 411 (2010).

different statutes with different applications, but there's a commonality here where the Supreme Court is both, and perhaps rightly so, enforcing very strict rules of statutory construction or analysis and reading the statutes very narrowly.

But, at the same time, there's this tendency to gravitate to this quid pro quo requirement, where you have to prove a quid pro quo—in some cases, it has to be explicit and in other cases it can be implicit—but we're left with a body of law where you have to show a quid pro quo in order to obtain a criminal conviction. And that can be—in my view at least—very difficult because a lot of corruption doesn't rise to the level of a quid pro quo. I'll throw that out to the other panelists to comment on. But, conceptually, you do scratch your head a bit, and I heard this from some of the other comments, and say what is the Supreme Court doing and why are they doing it here, and I don't know the answer to that.

Arlo Devlin-Brown:

I think you have a point that Professor Teachout, who has written a book about corruption[12] in America, has made, that the sort of current federal criminal—and I think in large part state criminal—model of corruption being a quid pro quo is not necessarily the common understanding of corruption. Not necessarily as what the founders understood it to mean. I think changing the federal law there's not a lot—other than the passage of new laws—not a lot can be done and I'm sure we'll get to this on the noncriminal law level, in terms of ethic rules reforms, civil powers, there's things that can be done.

Before we, I let this go, one thought I have, and I'm no Supreme Court scholar, or scholar at all, about the recent Supreme Court cases. I think one thing that sort of unites them—*Skilling* and *McDonnell* and some others—and it's not really a pure liberal versus conservative line. I think one thing sort of unites them is that, as things ebb and flow, there's sort of growing distrust on the Supreme Court of prosecutorial discretion and the fair exercise of prosecutorial discretion. And you see that from very conservative judges and you see it, to a degree, from liberal judges. And I think that's a concern that motivated *Skilling*, *McDonnell*, other cases as you have these statutes that are very broad on their face, and that the Supreme

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

Court sometimes worries about. If you read the *McDonnell* oral argument it's visible there, they're talking about scenarios where what if someone gives someone ball tickets and then is it going to be a big corruption case and they're worried about the discretion.

As a former prosecutor myself, one thing I think sometimes the Supreme Court doesn't have as much perspective on is the reality of actually bring a successful prosecution, and you can't do it unless you actually have good evidence of a quid pro quo that sounds corrupt. If someone went to a minor league ball park and that's the only benefit and then got a 500 thousand dollar contract, yeah I suppose a prosecutor can bring that case, but it's not going to be successful because no one is going to think just because they went to a ball game together that that's a sufficient benefit to the public official that they would violate every other rule and give huge amounts of state money. So that's how I sort of see the Supreme Court cases.

Kathleen Clark:

In *McDonnell*, the Supreme Court shows an astounding solicitude for the class of people in this country who give gifts to elected officials as a way of achieving a political or personal goal. The Court doesn't want to interfere with the process of providing ball tickets or other benefits to elected officials. Is the Supreme Court's concern about abuse of prosecutorial discretion broad enough to reach other people who aren't in the habit of giving their elected officials such gifts? Who are the defendants in *Skilling* and *Sun Diamond* and *McDonnell*? What did these defendants have in common? Is the Supreme Court's concern about prosecutorial discretion broad enough or deep enough to reach other types of defendants?

Arlo Devlin-Brown:

I guess it was strong enough to reach this fishing boat guy who ripped up his "form."[13]

Jennifer Ahearn:

I actually followed that issue from in my prior work with the United States Sentencing Commission, so sort of looking at the Supreme Court on criminal issues more broadly and I actually think that it has been—well we'll just say this: I think

13. Yates v. United States, 135 S. Ct. 1074 (2015).

the Supreme Court has been the most defendant-friendly court in the entire country on sentencing issues, many of which involve prosecutorial discretion. You know at the heart of this is—the Armed Career Criminal Act, for example, is really vague and so let's dig into that—and one reason that's a problem because of prosecutorial discretion and how that statute is used. So, I actually do think there is some of that, but it may be for different justices, they approach that differently. So maybe it's a situation in which a certain justice doesn't feel that way about the Armed Career Criminal Act but they do about certain other defendants. But I do think that there are some justices on the Supreme Court for whom you could say that does apply across different defendants.

Lance Cole

It could be an extension of a clever argument, and I can't remember who made it, suggesting that the best way to predict the outcome of a Fourth Amendment case, a search and seizure case, [in the Supreme Court] is whether a majority of the Justices could imagine themselves being subject to that kind of treatment and therefore would be troubled with it. The point, Kathleen, I think you are making, is that they can imagine themselves in the position of the defendants in one of these cases had their careers taken a slightly different turn. They're aghast at the idea, so I see a lot of that in the opinion as well.

Jennifer Ahearn:

And I actually see maybe sort of a flip-side as well, which is that they could see themselves in that situation, but most of them at this point have never been in that situation and so I think there's also, at least I think we see this in *Citizens United*[14] and I would argue that you see it in *McDonnell* as well, a sort of disconnect with how do public officials actually do their jobs. And how do they actually interact with their constituents in a noncriminal way? How realistic is the concern, "gee I'm not sure I can take these baseball tickets because some federal prosecutor will come and make a case out of it." And I'm not sure the Supreme Court can see themselves in that situation in a way that is helpful to them in making those distinctions.

14. Citizens United v. FEC, 558 U.S. 310 (2010).

Lance Cole:

> Well again, to go in a slightly different direction, there is some level of concern, at least among some people, about the efficacy of criminal law going forward. We should probably think a bit about the ability of politicians to police and control themselves, and we're fortunate to have on the panel the preeminent expert in the country on that—Kathleen. Do you have any thoughts in terms of—and I'm thinking about not only the ethics component, but I'm talking about our national government, the ethics committees in the House and the Senate, but we also have the Office of Congressional Ethics and the Office of Government Ethics, which has had some publicity lately. And I guess the question, that I'm not doing a very good job of articulating it here, is how effective can we hope that will be—to fill the void to the extent there's a void here?

Kathleen Clark:

> I guess that I would predict that there will be a constitutional challenge to an attempt to enforce noncriminal government ethics standards. We've already seen out of the Trump White House an assertion that federal ethics standards that apply across the executive branch do not apply of their own force to the White House personnel.[15]
>
> The same mindset that came up with that theory will likely look at the *McDonnell* decision, the Court's hostility towards the anti-corruption enterprise, and the dumbing down of the definition of corruption, reducing it to bribes and kick-backs, and will assert that other ethics restrictions violate one or another right or assert the government doesn't have the authority to impose such restrictions. Such a challenge could come from this White House, but it could also come from the state level. So, I would look for an opportunity to use this line of argument as a defense in an anti-corruption or ethics enforcement matter.

Lance Cole:

> Arlo, to what extent do federal prosecutors look at these kind of cases and say, "well maybe this is not right for us to handle as a criminal matter and we should leave it to whatever the body is to their own self-policing"? Does that enter the

15. Letter from Stefan Passantino, Deputy Counsel to the President, White House Counsel, to Walter Shaub, Dir., Office of Gov't Ethics (Feb. 28, 2017) (https://apps.npr.org/documents/document.html?id=3477259-WH-to-OGE-28Feb17).

calculus at all when federal prosecutors are trying to make the determination to use scarce prosecutorial resources to bring a case?

Kathleen Clark:

In the Southern District, in the last week, say.[16]

[Laughter]

Arlo Devlin-Brown:

Yes, so for a federal prosecutor, when you're looking at these things and, first of all, you have to see if the statutes, which are not super far reaching, apply. You have to see if you can get evidence of the elements but I think there is also a gestalt thing which to some significant degree tracks sort of the intent element as to whether this really sounds in criminality, and I think again that's why I think ethics regulation are sort of key. And I hear your point about that constitutional challenges could be there. But ethics regulations are key because I think they help, first of all, and second of all, when there's a known regulation that someone chooses to violate, and perhaps hides their effort to get around it, that can be good evidence of intent.

Another thing—and again this is campaign finance, a whole different animal—which I agree the Supreme Court in fact conflated with gifts in *McDonnell* in a way that's unprecedented, but I think there's also a distinction probably that prosecutors draw as to whether someone is getting campaign money in return for governmental favors or whether they're getting personally enriched. And I think you can still—I mean the Supreme Court has said it, if you put different decisions together—you can still make a federal corruption case with the quid being a campaign donation but you have to show an explicit understanding of that. But I think the reality is there's something just very viscerally different between someone who is perhaps—in a way that maybe makes people sad as citizens of a country—doing favors aggressively for campaign donors versus someone who is

16. Press Release, U.S. Attorney's Office, S. Dist. of N.Y., *Acting U.S. Attorney Joon H. Kim Statement on the Investigation into City Hall Fundraising* (Mar. 13, 2017), https://www.justice.gov/usao-sdny/pr/acting-us-attorney-joon-h-kim-statement-investigation-city-hall-fundraising (acknowledging the "difficulty [of] proving criminal intent in corruption schemes where there is no evidence of personal profit" and announcing that federal prosecutors would not bring charges against New York City Mayor Bill de Blasio).

opening a Swiss bank account and buying a yacht. There's something that just feels really more viscerally criminal, and I think that's something prosecutors think about when they analyze these cases.

Lance Cole:

I want to leave time for questions from the audience, but there is one other issue we might address. We obviously have a new presidential administration and a new landscape in Washington, and one of the things that President Trump has said he wants to do is change the way Washington works—"drain the swamp"—and try to improve the public's perception of the way government works. If each of you could suggest one thing to President Trump, have his ear and have him act on it, what would you suggest? Or what could be done that could best help him fulfill his campaign promise to drain the swamp in Washington? Don't everyone answer at once. Or maybe there's nothing the President can do because we do have to remember, theoretically, the Justice Department is supposed to operate independently from the White House, and political staff are not supposed to interfere with law enforcement, ongoing enforcement matters—but please, go ahead, Jennifer.

Jennifer Ahearn:

Perhaps, if you all are familiar with the organization I work for, you'll know what I'm going to say. But I would suggest that the President divest from his businesses and address that situation and maybe some other things that are related to that. But to set a tone at the top that says this is important and this is something that I take seriously, because I think what—one thing that's true about the ethics enforcement mechanisms that we have that you mentioned, you mentioned a number of things, but you know each of them is sort of self-contained within its own branch and it relies on enforcement within that branch. So, if you don't have the person at the very top indicating to the folks within that organization that this is something important that is to be taken seriously, I don't think you can expect those enforcement mechanisms ultimately to bear fruit.

Lance Cole:

And to build on that point, and this is for all the law students in the room because you on the panel of course all know this. But in the corporate world where there's been a great deal

of attention to corporate wrongdoing and policing corporate misconduct, I think that without exception all the studies and all the analyses show the single most important thing is the "tone at the top," the top executives and the culture that they create and the examples that they set. And so, I think what we have been through in the corporate world with wave after wave of scandals, starting with insider trading scandals in the 80s and 90s and going through the mortgage crisis and up to the present, shows that the tone at the top is the most important thing, so I think there's a lot of support for your point out there.

Kathleen Clark:

Well, I was stumped at first by your question.

Lance Cole:

No I don't believe that.

Kathleen Clark:

No, I was, and then I realized that you were asking me to imagine that we could move that mountain. Before Trump was inaugurated, I was trying to think of what I would have to say about all of this. I was thinking that I could go in one of two directions. First, I could write an op-ed in which I would give advice to Donald Trump about what he needs to do. He needs to divest, which is exactly what you said. It's entirely clear. A second approach would not be advice to Donald Trump, but advice to Congress. Congress needs to get into action and re-impose the conflict of interest statute on the president. This is a president unlike any we've ever seen in our lifetimes.

I presented these two options to a friend, and she told me not to bother with the first option. Trump is not taking advice, so I should go with the second option.[17] Obviously, Congress hasn't yet taken my advice about re-imposing the conflict of interest statute on the president either. But I want to acknowledge that within the 50 or 60 days that President Trump has been in office, I've gone from imagining that we could influence him in some way, to thinking of him not as the

17. Kathleen Clark, Opinion, *Congress needs to restrict the president's financial conflicts*, WASH. POST, Nov. 29, 2016, https://www.washingtonpost.com/opinions/congress-needs-to-restrict-the-presidents-financial-conflicts/2016/11/29/f906b1e8-b5c2-11e6-959c-172c82123976_story.html?utm_te rm=.ce00e97de8fa

recipient of advice, but more like an object that appears to be nearly immovable.

We need to strategize about how this object can be moved. Forget giving advice to this President, although there's nothing wrong with that. Instead, what I find compelling is strategizing about how non-government organizations like CREW, journalists and citizens can engage Congress to put pressure on the President to take action.

Arlo Devlin-Brown:

I don't have any specific policy suggestions. I wouldn't really wade into that, but I will say that this sort of anti-corruption mission—it really is non-partisan. Obviously partisans on any side seize opportunities they see on their opponent's issues and make a partisan thing of it. But I think, broadly speaking, the public, across party lines, doesn't like corruption and it causes people to lose their faith in government. And I'm thinking a little bit of my own recent former boss, Preet Bharara, but I think public figures of any stripe who can convince the public that they care about corruption and in a nonpartisan way and will pursue it—I think they—a leader like that—can attract a lot of public support. So, I—the only thought is keeping anti-corruption as a focus has advantages to the public and I think has advantages to those who take that position.

Lance Cole:

And I think you raised a very interesting issue for the future. Which is if you look back over the three preceding very different political administrations, the Obama administration, the George W. Bush administration, and the Clinton administration, in general the Department of Justice has had a fairly uniform, consistent approach, and fairly aggressive, [approach to fighting political corruption]. There may have been peaks and valleys, ups and down, but overall a fairly uniform prosecutorial policy. Will that change going forward, who knows? But it will be something interesting to watch both as academics and just as citizens. I throw that out, but Kathleen I saw that you wanted to add something, so please do so.

Kathleen Clark:

I would, actually. The way you were speaking, I agree with you. I think you were speaking about normal times. But these are not normal times. I believe that this administration, this

White House, is acting as though its goal is to undermine public trust in government. The overarching goal isn't just deconstruction of the administrative state, but destruction of public trust in government. At least there is evidence of that.

Lance Cole:

And historically perhaps the part of the government where's there been the strongest prohibition against improper [political interference]—of course there can be political policy decisions made as to resources and priorities—but any kind of interference in the prosecutorial function or in particular cases [at the Department of Justice] has always been seen as completely off-limits. And I'm not sure if even that might be up for grabs as well, going forward. By that I mean there have been times that—you go all the way back to the Teapot Dome Scandal, for example, you can see things [at the Department of Justice] we would never countenance today. What the future holds I don't know in this area. Any questions for our panelists from the audience? Or any comments?

[The panel then took questions from the audience, which are not included because the questions were not picked up by the microphone].

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