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Yes, Trump's Shakedown of Ukraine Was Impeachable "Bribery"

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Table of Contents

INTRODUCTION.....	1
I. WITHHOLDING MILITARY AID AMOUNTED TO BRIBERY	2
A. <i>Bribery Can Cover Reciprocal Exchanges of Official Acts</i>	2
B. <i>Any Limit on Statutory Bribery Need Not Apply to Constitutional Bribery</i>	4
II. DANGLING A WHITE HOUSE MEETING AMOUNTED TO BRIBERY	6
A. <i>McDonnell Does Not Bind Congress as to the Meaning of an “Official Act”</i>	6
B. <i>McDonnell’s Reasoning Does Not Apply to Impeachable Bribery</i>	7
CONCLUSION	8

Introduction

About two weeks before the U.S. House of Representatives impeached President Trump, Professor Josh Blackman and Seth Barrett Tillman published an article on *Lawfare*. In it, they argue that Trump’s withholding from Ukraine of military aid and a White House meeting, meant to pressure it to announce an investigation of Joe and Hunter Biden, did not amount to bribery for impeachment purposes.¹ Trump was ultimately impeached, and subsequently acquitted, for “abuse of power” rather than bribery,² but because their argument may be invoked during future impeachments, it still warrants close scrutiny. Blackman and Tillman are incorrect—Trump’s effort to coerce Ukraine into smearing his political rival is bribery in a constitutional sense.

The Constitution allows Congress to impeach and remove a President for “Treason, Bribery, or other high Crimes and Misdemeanors.”³ It does not, however, define the term “Bribery.” The federal bribery statute imposes criminal liability on any “public official” who “corruptly demands, seeks, receives, [or] accepts . . . anything of value personally . . . in return for . . . being influenced in the performance of any official act.”⁴ Blackman and Tillman seem to assume that this statute also supplies the framework for understanding bribery in a constitutional sense.⁵ I am willing to stipulate that the Constitution defines “Bribery” in a way that generally tracks the bribery statute’s language—though perhaps, as discussed later, with some differences.

Trump’s shakedown of Ukraine certainly seems to meet all of statutory bribery’s elements. Trump, a public official, demanded that Ukraine smear his political rival, which would help him secure reelection, and thus be valuable to him.⁶ In return, Trump would release military aid to Ukraine and meet with its President at the White House, both official acts. Trump’s motive for this demand was predominantly (in fact, entirely) to procure a personal benefit, not simply to reap the political benefits of acts that serve the public interest, and was thus corrupt.⁷ Blackman and

¹ See Josh Blackman & Seth Barrett Tillman, *Defining a Theory of ‘Bribery’ for Impeachment*, LAWFARE (Dec. 6, 2019, 12:43 PM), <https://www.lawfareblog.com/defining-theory-bribery-impeachment> [perma.cc/LY2X-ZM4Q].

² 166 CONG. REC. S936–38 (daily ed. Feb. 5, 2020).

³ U.S. CONST. art. II, § 4.

⁴ 18 U.S.C. § 201(b)(2)(A) (2018). The statute defines a “public official” to include a “Member of Congress” and “an officer or employee or person acting for or on behalf of the United States.” *Id.* § 201(a)(1).

⁵ See Blackman & Tillman, *supra* note 1 (assuming that impeachable “bribery” will “map onto the standards for liability under 18 U.S.C. § 201, the federal bribery statute”).

⁶ See *United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008), *abrogated on other grounds by* *McDonnell v. United States*, 136 S. Ct. 2355 (2016), *as recognized in* *United States v. Van Buren*, 940 F.3d 1192, 1205 (11th Cir. 2019) (holding that “the term ‘thing of value’ [as used in the bribery statute] unambiguously covers intangible considerations”). Courts of appeals have also interpreted the phrase “thing of value” in multiple other federal criminal statutes to encompass “intangibles.” *E.g.*, *United States v. Blaszcak*, 947 F.3d 19, 39 (2d Cir. 2019) (federal conversion statute, 18 U.S.C. § 641); *United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011) (federal program bribery statute, 18 U.S.C. § 666); *accord* *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir. 1986) (holding that “information can be a *thing of value*” under 18 U.S.C. § 1954); *see also* *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (“[The words ‘thing of value’] are found in so many criminal statutes throughout the United States that they have in a sense become words of art.”).

⁷ See *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (“[T]he term ‘corruptly’ in criminal laws has a longstanding and well-accepted meaning. It denotes an act done with an intent to give some advantage inconsistent with official duty and the rights of others.” (citation, original alteration, and some

Tillman nonetheless argue otherwise. As they see it, neither Trump’s withholding of military aid nor his offer of a White House meeting amounted to bribery. Their analysis is riddled with errors, and their conclusion is wrong.

I. Withholding Military Aid Amounted to Bribery

Blackman and Tillman argue that Trump did not commit bribery by withholding military aid from Ukraine to pressure it to announce an investigation of the Bidens. Their argument unfolds in three steps. First, they assert that statutory bribery cannot cover ordinary legislative horse-trading—for example, when a Member of Congress agrees to support another’s bill if funding is added for a pet project in the Member’s district.⁸ Otherwise, they say, virtually all Members would be subject to prosecution.⁹ From this premise, Blackman and Tillman then derive a more generalized rule—that a reciprocal exchange of official acts by two public officials can *never* amount to bribery.¹⁰ This is so, they say, even if both officials acted with self-serving motives, such as the simple desire to secure reelection.¹¹ Because Trump merely sought to trade one official act (the announcement of an investigation) for another (the release of military aid), Blackman and Tillman conclude, he cannot have committed bribery.¹² As explained below, this argument is defective at each turn.

A. *Bribery Can Cover Reciprocal Exchanges of Official Acts*

As an initial matter, reciprocal exchanges of official acts are not categorically beyond the bribery statute’s reach. I agree with Blackman and Tillman that Members cannot be indicted for ordinary legislative horse-trading, but for a different reason. Legislative horse-trading is unlike other reciprocal exchanges of official acts. It is a special case, protected by a specific provision of the Constitution: the Speech or Debate Clause.¹³ That Clause shields Members from liability for any “legislative act.”¹⁴ Legislative acts include “things generally done in a session of [either] House by one of its members in relation to the business before it.”¹⁵ When a Members votes for a

internal quotation marks omitted)); *see also* *Corruptly*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “corruptly” in criminal statutes as usually “indicat[ing] a wrongful desire for pecuniary gain or other advantage”).

⁸ *See* Blackman & Tillman, *supra* note 1 (“Consider a third hypothetical in which personal and public motivations are inextricably intertwined. . . . The run-of-the-mill horse-trading described in this example might be bad policy and, arguably, is a misuse of discretion. But whatever else it is, it is not bribery.”).

⁹ *Id.*

¹⁰ *See id.* (“Just as the executive branch should not investigate and prosecute horse-trading and log-rolling by members of Congress, Congress should not investigate and impeach horse-trading by the president. . . . Where one public official act is traded for another public official act, there has not been any illegal conduct.”).

¹¹ *See id.*

¹² *See id.*

¹³ U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.”).

¹⁴ *Gravel v. United States*, 408 U.S. 606, 626 (1972) (“[T]he Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach . . .”).

¹⁵ *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)); *see also* *Gravel*, 408 U.S. at 625 (limiting protectible legislative acts to speech, debate, and those that form “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House”).

bill in exchange for its sponsor’s adding funds for a project in her district—something “almost every member of Congress” has done¹⁶—that trade is a protected legislative act.¹⁷ The Speech or Debate Clause thus protects both Members from indictment for bribery based on that trade.

Importantly, the Speech or Debate Clause is the *only* reason that legislative horse-trading cannot be indicted as bribery. Legislative horse-trading, after all, falls squarely within the bribery statute’s elements, if done with a corrupt motive.¹⁸ Indeed, Blackman and Tillman do not even attempt to justify a horse-trading exception to bribery liability as a plausible construction of the statute’s language. Curiously, they do not mention the Speech or Debate Clause either. Their *only* argument is that legislative horse-trading is so common that every Member could be prosecuted were it illegal.¹⁹ But the mere fact that a certain practice is ubiquitous among Members has no bearing on whether it is bribery. After all, if every single Member routinely accepted duffel bags full of cash in exchange for voting a certain way, it would still be bribery.²⁰ Only the Speech or Debate Clause prevents legislative horse-trading from being indictable.

This punctures any claim that reciprocal exchanges of official actions can never be bribery. A common lawyer’s trick is to draw an overgeneralized rule from a small set of examples. Blackman and Tillman do that here, stretching the horse-trading analogy to sweep up Trump’s Ukraine shakedown. But what Trump did is too unlike legislative horse-trading to be treated alike. While Speech or Debate immunity protects legislative horse-trading, it does not cover Trump’s acts, and there is no Speech or Debate Clause analogue for Presidents.

Trump’s conduct also differs from legislative horse-trading in several other important ways. First, horse-trading is a routine and usual part of the legislative process—indeed, that is why the Speech or Debate Clause protects it²¹—whereas shaking down foreign governments to secure personal benefits is anything but a routine, usual, or proper aspect of American foreign policy. Second, Members have genuine discretion in how they cast their votes, even if they are capable of exercising that discretion corruptly. Trump, however, lacked discretion under the Impoundment Control Act to withhold the military aid to Ukraine that Congress had appropriated.²²

¹⁶ Blackman & Tillman, *supra* note 1.

¹⁷ The Speech or Debate Clause protects only the trade, not the quid (a promise to cast a vote in the future) or the quo (a promise to add funds to a bill in the future) themselves. *See* *United States v. Helstoski*, 442 U.S. 477, 490 (1979) (“[P]rotection extends only to an act that has already been performed. A *promise* to deliver a speech, to vote, or to solicit other votes at some future date[, or] to introduce a bill is not a legislative act.” (emphasis added)).

¹⁸ That Congress failed to carve out an exception to the bribery statute for legislative horse-trading shows that the statute covers legislative horse-trading by its own terms. *See* *The License Cases*, 46 U.S. (5 How.) 504, 539 (1847) (“[I]f Congress does not prohibit a particular act, the inference is, that it does not think proper so to do.”).

¹⁹ *See* Blackman & Tillman, *supra* note 1.

²⁰ *See id.* (acknowledging that “the case for bribery is straightforward” when “a government official demands a briefcase full of cash in exchange for voting for a particular bill”).

²¹ *See supra* note 15 and accompanying text.

²² *See* 2 U.S.C. § 684(b) (2018) (limiting purposes for which budget authority can be deferred, and commanding that “[n]o officer or employee of the United States may defer any budget authority for any other purpose”); *see also* Office of Management and Budget—Withholding of Ukraine Security Assistance, B-331564, 2020 WL 241373 (Comp. Gen. Jan. 16, 2020) (concluding that withholding military assistance to Ukraine violated the Impoundment Control Act).

Finally, legislative horse-trading by its very nature at least conceivably produces genuine benefits to the public, and thus is worthy of constitutional protection, whereas Trump’s actions did not. When a Member demands funding for a project in her district in exchange for her vote, that funding presumably has real value to her constituents. Otherwise, she would not have wanted it, as it would not have helped her secure reelection. What Trump sought, in contrast—the mere *announcement* of an investigation into the Bidens—would have yielded no conceivable benefit to the American people. There is a fair argument that an investigation into alleged corruption by an American official and his son may be of value to the American people.²³ But tellingly, Trump did *not* ask Ukraine to conduct an actual investigation of the Bidens. He asked *only* that Ukraine *announce* one.²⁴ This naked effort to harm a political rival produced no conceivable benefit to the American public, and thus should not merit constitutional immunity.²⁵

Trump’s shakedown of Ukraine thus is simply too unlike legislative horse-trading, both legally and factually, to support a categorical rule that reciprocal exchanges of official acts can never be indictable bribery.

B. *Any Limit on Statutory Bribery Need Not Apply to Constitutional Bribery*

Even if the bribery statute cannot extend to reciprocal exchanges of official acts, bribery under the *Constitution* does not necessarily has a similar limit. A term can carry different meanings

²³ Assuming there was reason to believe the Bidens really had behaved corruptly—a debunked premise, however, based on the known facts. See, e.g., Stephanie Baker & Daryna Krasnolutska, *Ukraine Ex-Official Casts Doubt on Biden Conflict Claim*, BLOOMBERG (May 7, 2019, 11:37 AM), <https://www.bloomberg.com/news/articles/2019-05-07/timeline-in-ukraine-probe-casts-doubt-on-giuliani-s-biden-claim> [perma.cc/G454-MLAW] (reporting that Joe Biden did not pressure Ukraine to oust its top prosecutor until after the prosecutor’s investigation into a company tied to Hunter Biden had already gone dormant).

²⁴ See *Impeachment Inquiry: Hearing Before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 51–52 (2019), https://judiciary.house.gov/uploadedfiles/2019-11-20_transcript_of_sondland_hearing.pdf [perma.cc/9V46-W3YU] (testimony of Amb. Gordon Sondland) (testifying that Trump wanted only Ukraine’s announcement of an investigation into the Bidens, not an actual investigation); H. PERMANENT SELECT COMM. ON INTELLIGENCE, THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT, H.R. REP. NO. 116–335, at 101–11, 228 n.93 (2019) (recounting that Trump sought only Ukraine’s announcement of an investigation into the Bidens, and never requested an actual investigation of the Bidens by the Department of Justice).

²⁵ Blackman and Tillman acknowledge that their “analysis presupposes that the president was calling for a lawful investigation,” and concede that Trump could be impeached for bribery if he “called for an unlawful investigation—for example, if [he] had asked the Ukrainians to manufacture false evidence for use in his political campaign, or if [he] asked the Ukrainians to commit fraud on their own or on our courts.” Blackman & Tillman, *supra* note 1. What Trump actually requested, as best we know, was the announcement of an investigation the merits of which did not especially interest him. Cf. HARRY G. FRANKFURT, ON BULLSHIT 55–56 (2005) (explaining that whereas a liar believes the things he says to be false, “the truth-values of [a bullshitter’s] statements are of no central interest to” him, as the bullshitter “does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.”). It is not clear whether or to what degree he personally believed an investigation of the Bidens was warranted, and there is no public evidence that he asked Ukraine to manufacture false evidence or commit fraud on the courts. What Trump did thus does not seem to be the sort of thing that Blackman and Tillman acknowledged would amount to impeachable bribery. Likewise, it would be disingenuous for them to say that, because their analysis assumes that Trump requested an actual investigation, it does not apply if he instead requested the mere *announcement* of an investigation. The precise factual allegations against Trump were well understood by the time Blackman and Tillman wrote their article, see sources cited *supra* note 24, and they cannot now pretend they were not intending to address them.

under the Constitution and a statute, after all. For example, the Supreme Court famously held that the Affordable Care Act imposed a tax in the constitutional sense, but not in a statutory sense.²⁶ Here, too, there are good reasons to construe the term “bribery” more broadly under the Constitution’s impeachment provisions than under the bribery statute.

First, impeachment’s very purpose is to hold the President accountable for violations of the public trust, even those violations that cannot amount to ordinary criminal offenses.²⁷ Second, and perhaps most importantly, reading the term “Bribery” in the Constitution to exclude reciprocal exchanges of official acts would serve no purpose, as it would not narrow the range of impeachable offenses. Blackman and Tillman’s reason to construe the bribery statute to exclude legislative horse-trading, after all, is not that such a construction follows from the statute’s text—it does not—but rather to ensure that Members are not prosecuted for horse-trading. But Trump’s shakedown of Ukraine would be impeachable even if it did not amount to “Bribery,” as it would still fall within the class of “other high Crimes and Misdemeanors.” Professor Charles L. Black, Jr., the leading scholarly authority on impeachment, has defined the set of impeachable offenses as those “which are rather obviously wrong, whether or not ‘criminal,’ and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.”²⁸ Article II’s language supports this definition: the President’s charge to “take Care that the Laws be faithfully executed”²⁹ rebuts any argument that an act taken for corrupt purposes cannot form the basis for an impeachment.

There seems to be little doubt that using one’s power of office to coerce a foreign government to smear a political rival easily fits the definition of an impeachable high crime or misdemeanor. Indeed, Blackman and Tillman do not squarely dispute that Trump’s behavior is

²⁶ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543–46, 561–75 (2012) (holding that the Affordable Care Act’s individual mandate was a tax within the meaning of the Taxing Clause, U.S. CONST. art. I, § 8, cl. 1, but not a tax within the meaning of the Anti-Injunction Act, 26 U.S.C. § 7421).

²⁷ See STAFF OF THE IMPEACHMENT INQUIRY, H.R. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26 (Comm. Print 1974) (“Impeachment is a constitutional remedy addressed to . . . wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself.”); THE FEDERALIST NO. 65, at 426 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 61 (1973) (“In sum, ‘high crimes and misdemeanors’ appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which, so far as I could discover, had no relation to whether an indictment would lie in the particular circumstances.”); 166 CONG. REC. S897 (daily ed. Feb. 5, 2020) (statement of Sen. Romney) (“To maintain that the lack of a codified and comprehensive list of all the outrageous acts that a President might conceivably commit renders Congress powerless to remove such a President defies reason.”).

Constitutional bribery also carries lesser consequences than statutory bribery. Conviction under the bribery statute results in criminal penalties, including incarceration, while conviction after impeachment results only in removal from office (and possible debarment from holding future office. *Compare* 18 U.S.C. § 201(b) (2018) (authorizing fines and a fifteen-year maximum sentence for bribery), *with* U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .”). Giving constitutional bribery a broader reach thus does not threaten to subject a broader swath of conduct to incarceration.

²⁸ CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 39–40 (1974).

²⁹ U.S. CONST. art. II, § 3.

impeachable on other grounds, such as abuse of power. They argue only that it is not “bribery.”³⁰ But if Trump’s conduct is impeachable regardless, then the only purpose for excluding it from the scope of “bribery”—limiting the set of behaviors for which a public official can be held legally accountable—would not apply here at all. And because that exclusion neither would serve any purpose nor is justifiable as a textual matter, it has no basis in law.

II. Dangling a White House Meeting Amounted to Bribery

Blackman and Tillman also argue that Trump did not commit bribery by using the promise of a White House meeting to induce Ukraine to announce an investigation of the Bidens for an additional reason: that a White House meeting is not an “official act” under a 2016 Supreme Court decision.³¹ That case, *McDonnell v. United States*,³² involved the federal bribery prosecution of former Virginia Governor, Robert McDonnell. McDonnell and his wife had accepted “\$175,000 in loans, gifts, and other benefits” from a businessman.³³ In return, McDonnell set up meetings with officials for the businessman, hosted events at the Governor’s Mansion for him, and contacted other officials about his interests.³⁴ The issue was whether these were “official act[s]” under the bribery statute.³⁵ The Supreme Court held they were not, and vacated McDonnell’s conviction.³⁶ But *McDonnell* does not bind Congress as to what “official act” means for impeachment purposes. Trump’s dangling of a White House meeting thus was also impeachable bribery.

A. McDonnell Does Not Bind Congress as to the Meaning of an “Official Act”

McDonnell does not control the meaning of an “official act” for purposes of impeachable bribery. It held that “setting up a meeting, calling another public official, or hosting an event does

³⁰ Blackman and Tillman state that “[t]here are some allegations that Trump violated an appropriations statute, which could, under some circumstances, fall within the catch-all ‘other high Crimes and Misdemeanors’ category,” but express “doubts that those circumstances are at play here.” Blackman & Tillman, *supra* note 1. This is a tendentious and misleading way to put it. The charge is that Trump committed an impeachable offense by using his power of office to pressure a foreign government to generate dirt on a political rival, not simply by violating an appropriations statute. While his conduct did in fact violate an appropriations statute, *see supra* note 22 and accompanying text, the impeachable offense was the abuse of power, not the statutory violation *qua* itself. Indeed, Trump’s conduct would be impeachable even if the appropriations statute did not bind his discretion. In any event, Blackman and Tillman ultimately avoid taking any clear position on whether Trump committed a non-bribery impeachable offense, nor do they offer any rationale for the position that he did not.

³¹ Blackman & Tillman, *supra* note 1 (“We do not think that a White House meeting is an ‘official act’ under *McDonnell v. United States*. Generally, who the president meets with, and what he says to them—even in the White House—remains constitutionally protected free speech. Thus, the only relevant official act for purposes of impeachment would be the alleged unlawful withholding of military aid.”). Most of the analysis above respecting the release of military aid applies equally well to a White House meeting, with one exception: though the President lacked the discretion to withhold the military aid, he generally has discretion as to whom he invites to the White House.

³² 136 S. Ct. 2355 (2016).

³³ *Id.* at 2361.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2375.

not, standing alone, qualify as an ‘official act’” under the bribery statute.³⁷ But the Supreme Court’s understanding of the term “official act” does not bind Congress sitting as a Court of Impeachment. Congress is not simply one of the inferior courts over which the Court exercises appellate review. It is a separate and co-equal branch of government, free to disagree with the Court and use its independent judgment to determine for itself what is an “official act” for purposes of impeachable bribery.³⁸ Congress might conclude, for example, that the term reaches any act that involves an exercise of authority available to one solely by virtue of one’s public office.

B. McDonnell’s Reasoning Does Not Apply to Impeachable Bribery

In any event, *McDonnell* is of little value to understanding what counts as an “official act” for purposes of impeachable bribery, as its reasoning is limited to the bribery statute. *McDonnell*’s exposition of the term “official act” turned on the bribery statute’s specific phrasing, precedents construing that statute, and statutory canons of construction.³⁹ But the scope of an “official act” for purposes of impeachable bribery cannot possibly depend on the bribery statute’s specific language. The Constitution predated the modern bribery statute by nearly two centuries,⁴⁰ after all, and it would be absurd to say that impeachable bribery’s scope would be different had Congress, in the 20th century, written the statute using different words. While the broad outlines of bribery under the Constitution and the statute may be similar, any inferences drawn solely from the statute’s lexical particularities about what is an “official act” do not apply to impeachable bribery.

McDonnell also warned that a broad view of the term “official act” might raise three constitutional concerns, but none has much force in the impeachment context. First, *McDonnell* said that reading “official act” expansively may undermine representative government by chilling public officials from “hear[ing] from their constituents and act[ing] appropriately on their concerns.”⁴¹ But this concern does not apply to behavior that is plainly corrupt, as Trump’s was. It is also doubtful that Members of Congress, who are themselves elected officials, would want to embarrass themselves and incur a significant political cost by impeaching a President for behaviors that they themselves routinely undertake,⁴² and thus punish a President for truly innocent behavior.

³⁷ *Id.* at 2368. The statute defines an “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3) (2018).

³⁸ See Letter from James Madison to unnamed recipient (1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349, 349 (Philadelphia, J.B. Lippincott & Co. 1865) (“[E]ach [branch] must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it”); cf. *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (holding nonjusticiable challenges to the Senate’s procedures for trying impeachments under the Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6).

³⁹ See *McDonnell*, 136 S. Ct. at 2367–72.

⁴⁰ The modern bribery statute was originally enacted in 1962. See Act of Oct. 23, 1962, Pub. L. No. 87-849, sec. 1(a), § 201, 76 Stat. 1119, 1119–21.

⁴¹ 136 S. Ct. at 2372.

⁴² Cf. Katharine Q. Seelye, *Livingston Quits over Adultery Admission*, N.Y. TIMES (Dec. 20, 1998), <https://archive.nytimes.com/www.nytimes.com/library/politics/122098impeach-livingston.html> [perma.cc/5J3S-ZEWN] (reporting that the Speaker-designate, who had voted to impeach President Clinton, had admitted his own extramarital affairs and would resign).

Second, *McDonnell* warned that a broad reading of “official act” might raise due process concerns by failing to give public officials fair notice of what behavior the statute prohibits.⁴³ But there is no serious argument that Trump lacked notice that his behavior was wrongful. More generally, the void-for-vagueness doctrine in which that complaint sounds has little force outside the criminal context, given the particular severity of criminal punishments.⁴⁴ It applies only to those civil matters that implicate “a particularly severe penalty,” such as deportation proceedings, which can result in “lifelong banishment or exile.”⁴⁵ Mere loss of office, debarment from future office, and the resulting embarrassment a President may experience are not of a comparably “grave nature,”⁴⁶ and thus do not trigger vagueness concerns.

Third, *McDonnell* warned that reading the term “official act” broadly “raises significant federalism concerns.”⁴⁷ This concern has no force in the impeachment context, in which both the prosecutors and defendants are federal officials. In sum, *McDonnell* simply has nothing to tell us about what counts as an “official act” for purposes of impeachable bribery.

Conclusion

Impeaching Trump for bribery, Blackman and Tillman warn, would “make it effectively impossible for the president to exercise his personal constitutional authority to investigate wrongdoing by anyone, including those closely affiliated with his opponents, lest he be charged with a quid pro quo.”⁴⁸ But any sensible person could tell you that there is a world of difference between a good faith investigation of a person, even a political rival, who may have committed a crime, and an effort to use one’s power of office to harm that person for one’s personal benefit. To whatever extent it may be hard to tell in a particular case whether the President acted with corrupt purpose, that ambiguity inures to his benefit, given the burden of proof to show guilt. Recognizing Trump’s actions as bribery does not threaten to incriminate a President who acts honestly.

It is tempting to dismiss Blackman and Tillman’s argument as purely academic, given that a President can simply be impeached for “abuse of power” in place of “bribery.” But that would unduly trivialize the mischief that their argument threatens. While Trump has been acquitted, future Presidents may emulate his behavior, and Congress may impeach them for bribery. If so, their defenders may invoke Blackman and Tillman to claim that their impeachments are illegitimate. Even if such claims could never be tested in the courts of law,⁴⁹ they could cast a pall over an impeachment’s validity in the court of public opinion. The term “bribery,” moreover,

⁴³ See 136 S. Ct. at 2373.

⁴⁴ See *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (“[T]he Government violates this [due process] guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”).

⁴⁵ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (plurality opinion) (citations and internal quotation marks omitted); see also *id.* at 1212 (“[T]he Court has ‘expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.’” (citation omitted)); *id.* at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) (“I cannot see how the Due Process Clause might often require any less than [affording people fair notice of prohibited conduct] in the civil context either.”).

⁴⁶ *Id.* at 1213 (citation omitted).

⁴⁷ 136 S. Ct. at 2373.

⁴⁸ Blackman & Tillman, *supra* note 1.

⁴⁹ See *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

carries special weight in the public's imagination. It is uniquely well-adapted to convey both the precise nature and gravity of wrongdoing like Trump's. Congress should be, and is, free to invoke that term's powerful connotations in impeachment articles should future Presidents act similarly.

For all of these reasons, and contra Blackman and Tillman, Trump's shakedown of Ukraine amounts to bribery for impeachment purposes.