

THE DEVIL IS IN THE DETAILS: 18 U.S.C. § 666 AFTER *SKILLING V.* *UNITED STATES*

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INTRODUCTION

In recent years, the federal government has taken an increasingly visible role in prosecuting corruption at the local and state levels.¹ Early morning mass arrests of public officials, press conferences featuring United States Attorneys promising to clean up government, and editorials bemoaning the spread of corruption have become fixtures of our national political and legal culture. In New Jersey,² Illinois,³ New

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1. Elkan Abramowitz, *Overcriminalization and the Fallout from ‘Skilling’*, N.Y. L.J., Jan. 4, 2011, www.maglaw.com/publications/data/00239/_res/id=sa_File1/070011116Morvillo.pdf.

2. The 2009 arrest of forty-four individuals in a massive corruption sweep was one of the largest in the state’s history. See Daniel Nasaw, *New Jersey Mayors and Rabbis Arrested in Corruption Investigation*, THE GUARDIAN (July 23, 2009, 5:31 PM), <http://www.guardian.co.uk/world/2009/jul/24/new-jersey-corruption-mayors-rabbis>.

Mexico,⁴ and elsewhere, corruption has rocketed to near the top of federal law enforcement's agenda. The FBI has more than doubled the number of agents working on public corruption, and the number of investigations has seen a correspondingly large increase.⁵ Local and state officials now routinely face corruption-related charges in federal court.⁶ According to former Deputy Attorney General David Ogden, the federal government has made prosecuting state and local public corruption an "urgent priority."⁷

Historically, the federal government has played an important role in prosecuting corrupt local and state officials,⁸ and it wields an array of statutes to conduct those prosecutions. Recently, however, some critics have noticed serious defects in several of these laws.⁹ In 2010, the Supreme Court weighed in. In *Skilling v. United States*, the Court limited the ability of a prosecutor to use one such statute, 18 U.S.C. § 1346, the so-called "honest services" law.¹⁰ 18 U.S.C. § 666, "Theft or bribery concerning programs receiving Federal funds," is yet an-

3. Illinois has a long and storied history of public corruption. *See, e.g.*, Claire Suddath, *A Brief History of Illinois Corruption*, TIME (Dec. 11, 2008), <http://www.time.com/time/nation/article/0,8599,1865681,00.html>.

4. *See, e.g.*, Gary King, *Addressing Corruption in New Mexico*, NMPOLITICS.NET (Sept. 20, 2011, 11:46 AM), <http://www.nmpolitics.net/index/2010/10/addressing-corruption-in-new-mexico/>.

5. Robert S. Mueller III, Dir., Fed. Bureau of Investigations, Remarks at the American Bar Association Litigation Section Annual Conference (Apr. 17, 2008) (transcript available at <http://www.fbi.gov/pressrel/speeches/mueller041708.htm>).

6. Federal involvement in prosecuting local and state corruption is, for the most part, a relatively recent phenomenon. *See* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 699–700 (2000); Arthur Maass, *U.S. Prosecution of State and Local Officials for Political Corruption: Is the Bureaucracy Out of Control in a High-Stakes Operation Involving the Constitutional System?*, 17 PUBLIUS: J. FEDERALISM 195, 199 (1987) ("Until the 1970s, with few exceptions, the repeated campaigns against state and local political corruption had been led by citizens' committees, state legislative committees, and county and state prosecutors. The campaigns were conducted under state law and in state courts, with those found guilty confined to state prisons. Institutional reforms were enacted by city councils and state legislatures. No U.S. attorneys, or attorneys general, or presidents claimed any part of the action.")

7. David W. Ogden, Deputy Att'y Gen., Remarks as Prepared for Delivery at His Installation Ceremony (May 8, 2009) (transcript available at <http://www.justice.gov/dag/speeches/2009/dag-speech-090508.html>).

8. *See, e.g.*, Sara S. Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699 (2000).

9. *See, e.g.*, Elkan Abramowitz & Barry A. Bohrer, *Too Big to Fail: Is Federal Criminal System in Need of Overhaul?*, N.Y. L.J., Sept. 10, 2010, http://www.maglaw.com/publications/data/00227/_res/id=sa_File1/070091016Morvillo.pdf.

10. *Skilling v. United States*, 130 S. Ct. 2896 (2010).

other weapon in the federal prosecutor's anticorruption arsenal. It also may prove to be the Court's next target.

In recent years, § 666 prosecutions have ensnared a wide range of state and local public officials.¹¹ The courts, in confronting and settling legal issues related to the statute, have failed to keep pace with the rate and diversity of these prosecutions, leaving many questions of statutory interpretation unanswered or unclear. When courts have interpreted § 666, they have often employed overbroad interpretations that depart from the original purpose of the statute.¹² This deferential interpretive posture has fostered § 666's growth into what one observer has called the "beast of the federal criminal arsenal."¹³

This Note argues that in the wake of the Supreme Court's decision in *Skilling*, Congress should act to clarify § 666 before the Court does so in Congress' stead. Part I of this Note briefly outlines the Court's recent decision in *Skilling*. Part II discusses the origins and evolution of § 666 and its interpretation. Part III elaborates on three serious problems that plague § 666's construction, which are the uncertainty over whether a connection to federal funds is necessary, the ambiguity as to its application to different individuals, and the question of whether it covers gratuities.

Part IV of this Note places § 666's vagaries within the context of the broader debate over federal overcriminalization, which came to a head in *Skilling* and continues to simmer in legal circles. Part V examines the future of § 666 prosecutions in the wake of *Skilling*, and urges Congress to fulfill its constitutional duty by clarifying outstanding issues related to § 666. Specifically, Part V suggests that Congress should amend § 666 to strengthen the connection to federal funding, explain the meaning of agency under the law, and decide whether illegal gratuities are a basis for prosecution under the statute.

I.

SKILLING v. UNITED STATES: A SHOT ACROSS THE BOW

The American legal establishment—academics and practitioners alike—is growing more interested in the tools used to fight corruption.¹⁴ In recent years, that interest has manifested itself primarily in a

11. See *infra* p. 15.

12. See discussion *infra* Parts II, III.

13. Daniel Rosenstein, *The Beast in the Federal Criminal Arsenal*, 39 CATH. U.L. REV. 673, 673 (1990).

14. See, e.g., *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999) (“[A] century of interpretation of the [mail fraud] statute has failed to still the doubts of those who think it dangerously vague.”).

discussion about the criminal predicate of “honest services” mail fraud.¹⁵ The discussion reached an apex in 2010, when the Supreme Court handed down decisions in three cases on the subject.

“Honest services” is a concept with a uniquely “tortured history.”¹⁶ Beginning in the 1970s, federal prosecutors used the concept to prosecute individuals who had not deprived anyone, or any entity, of actual property.¹⁷ Courts construed the federal mail and wire fraud statutes—which establish federal criminal jurisdiction over any activities that, in any way, involve the mails¹⁸ or electronic communications¹⁹—to imply the existence of a right to “honest services.”²⁰ This right has been said to vest primarily for two classes of individuals: citizens owed such a duty by public servants, and shareholders owed such a duty by employees, executives, and other company officials.²¹ Congress transformed the concept from judicial interpretation to statutory law in 1988,²² codifying the right to “honest services” in § 1346.²³

In *Skilling v. United States*,²⁴ *Black v. United States*,²⁵ and *Weyhrauch v. United States*,²⁶ all released on the same day, the Supreme Court established new restrictions on the federal government’s use of § 1346.²⁷

15. See Abramowitz, *supra* note 1.

16. Richard M. Strassberg & Roberto M. Bracerias, *Circuit Grapples with ‘Honest Services’ Fraud*, N.Y. L.J., July 8, 2002, at 9.

17. See Albert Alschuler, *The Intangible Right to Honest Services*, THE FAC. BLOG (Oct. 16, 2005, 1:21 PM), http://uchicagolaw.typepad.com/faculty/2005/10/the_intangible_.html.

18. 18 U.S.C. § 1341 (2006).

19. 18 U.S.C. § 1343 (2006).

20. The concept of “intangible rights,” such as “honest services,” is well-rooted in the common law; one opinion points to a similarly themed prosecution over two centuries ago. See *McNally v. United States*, 483 U.S. 350, 371 (1987) (Stevens, J., dissenting).

21. See Strassberg & Bracerias, *supra* note 16, at 12.

22. Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181.

23. Congress created 18 U.S.C. § 1346 in response to the Court’s limiting interpretation of 18 U.S.C. § 201 in *McNally*, 483 U.S. 350.

24. *Skilling v. United States*, 130 S. Ct. 2896 (2010).

25. *Black v. United States*, 130 S. Ct. 2963 (2010).

26. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010).

27. Section 1346, part of the federal mail fraud statute, criminalizes the behavior of any individual who deprives others of the “intangible right of honest services.” 18 U.S.C. § 1346 (2006). Although the Court granted certiorari, and heard oral arguments, in all three cases—hence their christening in the collective legal consciousness as the “honest services” cases—it discussed the relative merits of the actual “honest services” mail fraud law in only one case, *Skilling*; *Black* and *Weyhrauch* were vacated and remanded pursuant to the decision in *Skilling*. Compare *Skilling*, 130 S. Ct.

Despite two decades of contrary application of the law by lower courts, the Supreme Court ruled that the “honest services” statute, which prosecutors employed to address public and corporate corruption alike, could only be used to prosecute bribery or kickbacks.²⁸ Since the enactment of § 1346 in 1988, the broadly worded statute had been used to prosecute behavior apart from what the Court referred to as § 1346’s “core” crimes.²⁹ The Court’s *Skilling* decision, written by Justice Ruth Bader Ginsburg, was 9–0—surprisingly unanimous for the Roberts Court, which is often divided on issues pertaining to criminal justice.³⁰ Justice Scalia authored a separate opinion, joined by Justices Thomas and Kennedy, stating that the statute was unconstitutionally vague.³¹

The Court’s opinion amounted to a measured attempt to limit what the justices perceived as an incorrect application of § 1346. In rejecting the Government’s contention that § 1346 applied to broader classes of crime, the Court sought to “establish[] a uniform national standard, define[] honest services with clarity, [and] reach[] only seriously culpable conduct”³² The Court noted that through its limiting construction, it saved the statute from being invalidated on grounds of unconstitutional vagueness.³³

The Court’s decisions in the three “honest services” cases not only addressed the statutory and factual particulars therein; they spoke to a broader sense that federal corruption statutes were sorely in need of careful judicial review. Throughout the 2009–2010 Supreme Court term, observers eagerly awaited the Court’s decisions in the “honest

at 2907 (discussing “honest services”), *with Black*, 130 S. Ct. at 2970 (vacating and remanding), *and Weyhrauch*, 130 S. Ct. at 2971 (vacating and remanding).

28. *Skilling*, 130 S. Ct. at 2931.

29. *See id.* at 2932 (discussing whether conflict of interest and non-disclosure prosecutions are within the ambit of “honest services”).

30. *See, e.g.*, *Berghuis v. Tompkins*, 130 S. Ct. 2250, 2264 (2010) (5–4 decision) (concerning the right to remain silent); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089–91 (2009) (5–4 decision) (concerning the invocation of right to counsel); *Arizona v. Gant*, 129 S. Ct. 1710, 1723–24 (2009) (5–4 decision) (concerning warrantless searches pursuant to the Fourth Amendment).

31. *Skilling*, 130 S. Ct. at 2940 (Scalia, J., concurring). Interestingly, Justice Scalia would not have actually invalidated the statute, owing to a belief that this power may not be granted to the Court under Article III of the Constitution. However, wrote Scalia, “the fate of the statute” would functionally be the same by virtue of *stare decisis*. *Id.*

32. *Id.* at 2933 (internal quotation marks omitted).

33. *Id.* Although the Court ultimately saved the statute, its discussion of unconstitutional vagueness may indicate the Justices’ substantial discomfort with broad, vague language of the sort found in § 1346.

services” cases for several reasons.³⁴ The defendants in all three cases were prominent individuals, convicted amid a great deal of publicity.³⁵ The apparent recent spike in corruption no doubt also contributed to the substantial popular interest in the cases. Furthermore, many liberals and conservatives had found a rare point of agreement, cautioning that “overcriminalization” by the federal government had become a serious problem.³⁶

The Court had denied certiorari to “honest services” cases in the past,³⁷ but in 2009 granted hearings to three petitions.³⁸ *Black*, appealed from the Seventh Circuit, concerned the fraud conviction of media baron Conrad Black, and asked whether § 1346 required that the accused’s fraud must have intended to harm the party to whom the accused owed the duty of “honest services.”³⁹ *Skilling*, appealed from the Fifth Circuit, involved the former Chief Executive Officer of Enron Corp., Jeffrey Skilling, who had presided over one of the largest and most ignominious frauds in American history.⁴⁰ Skilling’s primary argument was that the language in § 1346 was unconstitutionally

34. Describing the excitement and anticipation, Professor Thomas Joo referred to the trio of “honest services” cases as “the Winter Olympics of white-collar crime.” Thomas Joo, *United States v. Jeffrey Skilling*, U.C. DAVIS SCH. L. FAC. BLOG (Feb. 22, 2010), <http://facultyblog.law.ucdavis.edu/2010/02/default.aspx>.

35. Jeffrey Skilling, for example, served as president of Enron Corporation, which collapsed in 2001 in what was then the largest corporate bankruptcy in U.S. history. Richard A. Opiel Jr. & Andrew Ross Sorkin, *Enron’s Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES, Dec. 3, 2001, <http://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html>. Conrad Black is a prominent newspaper publisher and member of the British House of Lords. Bruce Weyhrauch, while not nationally prominent, was an Alaska State Representative.

36. See, e.g., Tony Mauro, *Honest Efforts: Three Supreme Court Cases Challenge Law Used to Secure High-Profile Fraud Convictions*, NAT’L L.J., Dec. 7, 2009, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202436127254>. The anti-overcriminalization movement is discussed further in Part IV.

37. See, e.g., *Sorich v. United States*, 129 S. Ct. 1308 (2009) (Mem.).

38. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), cert. granted, 130 S. Ct. 393 (2009); *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), cert. granted, 129 S. Ct. 2379 (2009); *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), cert. granted in part, 129 S. Ct. 2863 (2009).

39. Brief for Petitioner at 22–23, *Black v. United States*, 130 S. Ct. 2963 (2010) (No. 08-876). Black additionally argued that the jury interrogatories at trial were unfairly composed. See *id.* at 54–55.

40. The collapse of Enron in 2001 was, at the time, the largest corporate bankruptcy in American history. See Richard A. Opiel, Jr. & Andrew Ross Sorkin, *Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES, Dec. 3, 2001, <http://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html>.

vague, thus rendering the statute void.⁴¹ *Weyhrauch*, appealed from the Ninth Circuit, involved a state legislator in Alaska who was convicted after failing to disclose a conflict of interest.⁴² *Weyhrauch* argued that he had not violated any state or federal laws, and that his conviction was thus not covered under § 1346.⁴³ All these cases sought clarification, in one way or another, of the patchy legislative and interpretive landscape surrounding “honest services.”

Congress enacted § 1346 with the intention of overruling the Supreme Court’s decision in *McNally v. United States*.⁴⁴ In *McNally*, the Court held that the federal statutes criminalizing mail fraud and wire fraud could not be read to include actions that defrauded citizens of the “intangible right to honest services.”⁴⁵ While many prosecutors, lower court judges, and legislators had presumed the existence of such an “intangible right,” especially for citizens vis-à-vis their government officials, the Court found no explicit or implicit statutory basis for such criminal theories.⁴⁶ Section 1346 formally codified the general public’s right, however intangible and amorphous, to the “honest services” of their elected and appointed officials.

Section 1346 imposed the “honest services” duty on virtually everyone, including corporate employees.⁴⁷ In its heyday, the boundaries of the law were hazy at best.⁴⁸ In *Skilling*, the Court pared down § 1346 to its “solid core” offenses specifically referred to in the act:

41. Brief for Petitioner, *Skilling v. United States*, 130 S. Ct. 2896 (2010) (No. 08-1394).

42. See *United States v. Weyhrauch*, 548 F.3d 1237, 1239–40 (9th Cir. 2008).

43. Brief for Petitioner, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196).

44. See, e.g., *United States v. Rybicki*, 287 F.3d 257, 261 (2d Cir. 2002) (“Congress enacted § 1346 in response to *McNally* and reinstated the ‘intangible rights’ doctrine.”); *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997) (“The timing and the explicit terms of § 1346 make clear that Congress intended the provision to reinstate the doctrine of intangible rights to honest services. Every court to address the effect of § 1346 has held that it has overruled the holding in *McNally*.”).

45. In *McNally*, a rare liberal-conservative alliance coalesced around the majority, with both Justices Thurgood Marshall and Antonin Scalia joining the opinion. *McNally v. United States*, 483 U.S. 350, 350 (1987).

46. *Id.* at 361.

47. See Frank C. Razzano & Kristin H. Jones, *Prosecution of Private Corporate Conduct*, BUS. L. TODAY, Jan.–Feb. 2009, at 37.

48. For example, Justice Stephen Breyer wondered, during oral arguments in *McNally*, if § 666 criminalized the most mundane of improper behavior. Justice Breyer imagined an employee distracting his supervisor with small talk “so the boss will leave the room so that the worker can continue to read the Racing Form.” See Ashby Jones, *If Honest-Services Law is Struck, Will an ‘Earthquake’ Ensnare?*, WALL ST. J. L. BLOG (Dec. 9, 2009, 9:01 AM), <http://blogs.wsj.com/law/2009/12/09/if-honest-services-law-is-struck-will-an-earthquake-ensue/>.

bribery and kickbacks.⁴⁹ A broader interpretation would render the statute unconstitutionally vague, according to the Court, but that vagueness did not require the statute's automatic invalidation.⁵⁰ Instead, by narrowing the law's scope to criminalize only bribery and kickbacks—what the Court considered the *McNally* definition of “honest services”—the justices managed to save the law while taking a stand against overly expansive readings of the statute.⁵¹

It is difficult to determine exactly what the Court's message was to Congress and prosecutors. The Court seemed reluctant to act beyond the bounds of judicial restraint and strike down the law in its entirety, citing a duty “not to destroy the Act, but to construe it.”⁵² As Justice Kennedy said during oral arguments in *Skilling*, “The Court shouldn't rewrite the statute; that's for the Congress to do.”⁵³

The Court could have followed the route proposed by Justice Scalia in his concurrence. Scalia noted that the Court's re-definition of § 1346 is, fundamentally, the use of a legislative power forbidden from the judiciary: “the ability to define new federal crimes.”⁵⁴ It is inappropriate for judges, according to Scalia, to “introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.”⁵⁵ Rather, Scalia argued, the law is unconstitutionally vague, and should have been stricken entirely,⁵⁶ leaving the future of the “honest services” in Congress' hands via the possibility of new legislation.

The Court's position, however, drew on substantial precedent in criminal statutory interpretation. “Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,” the Court had said previously.⁵⁷ This rule of lenity is a fundamental canon of statutory interpretation.⁵⁸ However, judicial construction of § 1346, § 666,

49. *Skilling v. United States*, 130 S. Ct. 2896, 2930 (2010).

50. *Id.* at 2904 (“This Court agrees that § 1346 should be construed rather than invalidated.”).

51. *Id.* at 2930.

52. *Id.*

53. Transcript of Oral Argument at 43, *Skilling v. United States*, 130 S. Ct. 2896 (2010) (No. 08-1394).

54. *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring).

55. *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

56. *Id.* at 2940 (Scalia, J., concurring). Justice Scalia's view on invalidating legislation is discussed *supra* note 31.

57. *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

58. According to this principle of statutory interpretation, when a criminal statute is ambiguous, courts should attempt to adopt a less punitive reading. *See, e.g.*, *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (“The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite lan-

and other criminal statutes that address white-collar crime and public corruption has frequently failed to follow this principle; in fact, as Justice Thomas explicitly noted in his dissent in *Fischer*, the majority had not even mentioned or appeared to consider the rule of lenity.⁵⁹

Having addressed the substantive issues related to § 1346 in its *Skilling* decision, the Court did not discuss “honest services” at length in *Black*⁶⁰ or *Weyhrauch*.⁶¹ In *Black*, the Court’s unanimous opinion vacating the judgment and remanding to a lower court for rehearing focused on jury instructions given at trial.⁶² In his concurrence in *Black*, Justice Scalia, joined by Justice Thomas, reiterated his belief that “§ 1346 is unconstitutionally vague.”⁶³ In *Weyhrauch*, the Court issued an unsigned *per curiam* opinion, vacating the judgment and remanding, in accordance with its ruling in *Skilling*, in one sentence.⁶⁴

The Justice Department, in fact, caught a break in how the Court ultimately decided the “honest services” cases. All nine justices agreed that § 1346 was problematic.⁶⁵ Three justices voted to strike it down in its entirety.⁶⁶ Defenders of expansive readings should be on guard, therefore, that the entire Court is willing to constrain expansively written criminal statutes, and a substantial minority is prepared to invalidate them altogether.

guage.”); *United States v. Bass*, 404 U.S. 336, 348 (1971) (“First, ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

59. *Fischer v. United States*, 529 U.S. 667, 691 (2000).

60. *Black v. United States*, 130 S. Ct. 2963, 2968 (2010) (“We decided in *Skilling* that § 1346, properly confined, criminalizes only schemes to defraud that involve bribes or kickbacks. That holding renders the honest-services instructions given in this case incorrect.”) (citations omitted).

61. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). The Court did not say much about anything in *Weyhrauch*—the opinion was one sentence long.

62. *Black*, 130 S. Ct. at 2968–69.

63. *Id.* at 2970 (Scalia, J., concurring).

64. *Weyhrauch*, 130 S. Ct. 2971. The Court’s disposition of the honest services cases led to reconsideration in other public corruption cases. *See, e.g.*, Scott Smith, *Judge Vacates Conviction of Ex-Prosecutor*, RECORDNET.COM (Feb. 7, 2011), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20110203/A_NEWS/102030334.

65. Note that none of the Justices in *Skilling* dissented from the judgment or defended the statute’s traditional construction; the concurrences were harsher expressions of a general anti-§ 1346 sentiment among the Justices.

66. Justice Scalia takes a limited view of the judiciary’s role in invalidating vague legislation. *See Skilling v. United States*, 130 S. Ct. 2896, 2939–40 (2010) (Scalia, J., concurring in part).

Despite the Court's ruling in *Skilling*, public corruption prosecutions under § 1346 have continued.⁶⁷ The status of such prosecutions after *Skilling*⁶⁸ raises multiple questions. Has *Skilling* accomplished the Court's objectives, or will the Court choose to intervene again? Will a chastened Congress revise other criminal statutes littered with the types of problems highlighted by the Court in *Skilling*, or will the Court find itself repeatedly "saving" those statutes through heroically narrow constructions?

Several Members of Congress were displeased by the Court's decision in *Skilling*. Senator Patrick Leahy, the Vermont Democrat who chairs the Senate Committee on the Judiciary, was "very disappointed that the Supreme Court . . . undermined [Federal Bureau of Investigation] efforts [to combat corruption] by siding with Enron executive Jeffrey Skilling."⁶⁹ Leahy accused the Court of having "gutted a statute vital to combating public corruption."⁷⁰ Leahy's statements reflected the stance of the Department of Justice, which claimed that its ability to fight high-profile corruption would be severely limited by the Court's decision.⁷¹ Senator Jeff Sessions of Alabama, the ranking Republican on the Judiciary Committee, felt otherwise, noting that Congress had contributed to the problem of overbreadth.⁷² "[T]he vaguer [the statute], the harder it is to defend against accusations of political and abusive prosecution."⁷³

In response to *Skilling*, Senator Leahy introduced the Honest Services Restoration Act in the Senate.⁷⁴ Rep. Anthony Weiner of New

67. *Skilling Having an Impact on Pending Honest Services Fraud Cases*, CRIME IN THE SUITES (July 28, 2010), <http://crimeinthesuites.com/170/>.

68. Ross Garber, *Commentary: Public Corruption Prosecutions After Skilling*, MAIN JUSTICE (Sept. 15, 2010, 5:06 PM), <http://www.mainjustice.com/2010/09/15/commentary-public-corruption-prosecutions-after-skilling/>.

69. *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3 (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

70. *Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1 (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

71. *Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 31 (2010) (statement of Lanny A. Breuer, Assistant Att'y Gen. of the United States).

72. *Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3 (2010) (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary).

73. *Id.* at 26.

74. S. 3854, 111th Cong. (2010).

York and three fellow Democrats introduced a similar measure in the House of Representatives.⁷⁵ The proposed legislation was not reported out of either the House or Senate Judiciary Committees during the 111th Congress, but the bills were reintroduced in substantially the same form the next year.⁷⁶ The Senate bill would restore undisclosed self-dealing⁷⁷—whether by public officials or corporate employees—to the list of crimes covered by § 1346, thus superseding the bribery/kickbacks limitation imposed by the *Skilling* Court.⁷⁸

Skilling not only prevents a prosecutor from using § 1346 as expansively as they have in the past, but it has also added to a prosecutor's burden in the short term by returning long-finished cases to trial court dockets.⁷⁹ In the wake of *Skilling*, many defendants who had been convicted under § 1346 filed appeals in federal court.⁸⁰ Some have already been successful in overturning their convictions.⁸¹ The cost of these prosecutions, coupled with the time and effort expended in the pursuit of convictions under such a problematic statute, should serve as a lesson to Congress that its vague criminal statutes, designed to aid law enforcement, have the potential to wreak considerable havoc. Section 666, the “beast of the federal criminal arsenal,” could potentially be the Court's next target, and Congress should act before the Court does.

II.

THE DEVELOPMENT OF § 666'S STATUTORY FRAMEWORK

The statutory framework underlying § 666 suffers from the same kind of vague wording that characterized § 1346. Section 666 establishes criminal liability for agents of any organization, government, or agency who “corruptly” solicit, demand, accept, or agree to accept

75. H.R. 6391, 111th Cong. (2010).

76. S. 401, 112th Cong. (2011).

77. “Undisclosed self-dealing” is often defined to include official acts by a public official “for the purpose, in whole or in part, of benefitting or furthering” his financial interest, or that of a family member, close associate, or business with which he is involved; it also generally requires that the conflict be concealed. *See, e.g.*, H.R. 1923, 112th Cong. (2011) (The Public Officials Accountability Act was introduced by Rep. Mike Quigley (D-IL) and seeks to penalize undisclosed self-dealing.).

78. S. 3854, 111th Cong. § 2 (2010).

79. *See, e.g.*, Peter J. Sampson, *Judge Dismisses Charges against Former Bergen Democratic Leader Ferriero*, NORTHJERSEY.COM (July 29, 2010, 7:04 PM), http://www.northjersey.com/news/072910_Judge_dismisses_charges_against_Ferriero.html.

80. *See* Peter Lattman, *The White-Collar Pushback After the Skilling Ruling*, DEALBOOK (Aug. 25, 2010, 5:16 PM), <http://dealbook.nytimes.com/2010/08/25/the-white-collar-pushback-after-the-skilling-ruling/>.

81. *See, e.g.*, Smith, *supra* note 64.

“anything in value,” in order to be “influenced or rewarded” in connection with a transaction worth \$5,000 or more.⁸² Criminal culpability attaches if the agency or organization for which the official works receives \$10,000 or more in federal program funding over the course of a twelve-month period.⁸³ Since all states, and the vast majority of municipalities, receive federal funds in some form—and they rarely receive sums of less than \$10,000—most sub-national⁸⁴ public officials and many government contractors are within the statute’s long reach.⁸⁵

Section 666 was born as the stepchild of another statute, 18 U.S.C. § 201.⁸⁶ Section 201 criminalizes the receipt of bribes on the part of federal officials, but is limited to those “acting for or on behalf of the United States.”⁸⁷ Spurred by a pending Supreme Court case on § 201’s meaning,⁸⁸ which sought to resolve whether the provision applied to local and state officials, Congress created § 666 in 1984.⁸⁹ The statute filled a significant gap in the Department of Justice’s ability to bring prosecutions against corrupt individuals who were not federal appointees, employees, or elected officials by tying the justification for federal prosecution to the ubiquitous funds, instead of to defendants’ identities or professional roles.⁹⁰ The statute has changed little since its enactment.⁹¹

82. 18 U.S.C. § 666(a)(1)(B) (2006).

83. § 666(b), (d)(5) (containing the \$10,000 language and defining “in any one-year period” as a twelve-month period, including time before and after the commission of the offense).

84. The term “sub-national” is used in the same context elsewhere. *See, e.g.,* George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 *CATH. U. L. REV.* 403, 409 (2005).

85. It is virtually impossible to determine the precise amount of federal funds spent in a given year, since courts have interpreted the “benefits” language of § 666 expansively. *See* discussion *infra* Part III.A.

86. *See* Craig A. Raabe & Sean Johnston, *It’s a Matter of Bribery*, *BUS. L. TODAY*, Mar.–Apr. 1999, at 11, 12 (“In passing § 666, Congress sought to expand the existing federal bribery prohibition, 18 U.S.C. § 201, which only applied to federal officials.”).

87. 18 U.S.C. § 201(a)(1) (2006).

88. *Dixson v. United States*, 465 U.S. 482 (1984). The Court defined “public official” in § 201(a) as someone with “official federal responsibilities,” prompting the question of whether state and local employees were considered “public officials” for the purposes of § 201 prosecutions. *Id.* at 496. For more information on the underlying circuit split that motivated Congress, see *Salinas v. United States*, 522 U.S. 52, 58 (1997) (outlining the legislative purpose behind § 666 in advance of *Dixson* ruling).

89. The Senate Report for § 666 notes the Court’s upcoming decision in *Dixson*. *See* S. REP. NO. 98-225, 370, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

90. The history is outlined well in Rosenstein, *supra* note 13.

91. The statute has been amended three times. The only noteworthy changes effected by these amendments were a redefinition of the word “state” to include the District of Columbia, the inclusion of tribal governments as covered entities, and the

The stated purpose of § 666, at the time of its creation, was to protect the integrity of federal funds. The Senate Report on the legislation described the statute as a means of “vindicat[ing] significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.”⁹² Section 666, when it passed, was intended primarily to safeguard federal spending from theft and bribery.⁹³ It was not designed to be a general anti-corruption law;⁹⁴ Congress, in passing § 666, clearly did not intend the law to encompass every local bureaucrat’s petty theft or improper dealing.⁹⁵

Over the last twenty-five years, prosecutors and courts have read § 666 in a way that implicates individuals whose connection to federal monies is tenuous at best. One prominent example is former Illinois Governor Rod Blagojevich, who has been convicted of multiple bribery and extortion counts.⁹⁶ Blagojevich was convicted pursuant to § 666 despite the fact that he was not accused of affecting or misusing federal monies.⁹⁷ Indeed, many § 666 cases do not implicate the integrity or security of federal monies.⁹⁸ Instead, as a result of creative

clarification of the \$10,000 tolling period. *See* 18 U.S.C. § 666(b), (d)(5) (2006); Pub. L. 103-322, § 330003(c), 108 Stat. 1796, 2140 (1994); Pub. L. 101-647, §§ 1205(d), 1209, 104 Stat. 4831, 4832 (1990); Pub. L. 99-646, Sec. 59(a), 100 Stat. 3612 (1986).

92. S. REP. NO. 98-225, at 369 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510; *see also* George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 277 (1998) (quoting the same language).

93. *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991) (“[T]he language the drafters of § 666 chose is also consistent with an intention of focusing solely on offenses involving theft or bribery, the crimes identified in the title of that section.”).

94. *United States v. Frega*, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996).

95. *See Cicco*, 938 F.2d at 446 (“Rather, Congress intended § 666 to address different and more serious criminal activity. We find that the district court correctly concluded that Congress did not intend § 666 to cover actions plainly prohibited by § 601.”).

96. Bob Sexter & Jeff Coen, *Blagojevich Convicted on 17 Corruption Counts*, L.A. TIMES (June 27, 2011), <http://articles.latimes.com/2011/jun/27/news/la-pn-bлаго-convicted-20110627>.

97. *See* Second Superseding Indictment, *United States v. Blagojevich*, No. 08 CR 888 (N.D. Ill. Feb. 4, 2010), *available at* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0204_02b.pdf. While there was certainly a federal interest in Blagojevich’s alleged attempts to sell the President-elect’s seat in the United States Senate, his indictment on § 666 charges pertained to allegations of bribery in relation to hospital construction. *See* Jeff Coen & Jeremy Gorner, *Blagojevich Re-indicted, But Accusations the Same*, CHICAGO BREAKING NEWS (Feb. 4, 2010, 9:34 PM), <http://archive.chicagobreakingnews.com/2010/02/blagojevich-re-indicted-on-corruption-charges.html>.

98. *See* Brown, *supra* note 92, at 248. Brown’s article is a useful resource, but its value has diminished with the intervening Supreme Court ruling in *Sabri v. United States*, 541 U.S. 600 (2004).

applications by prosecutors and expansive interpretations by courts, § 666 has evolved into a “general anti-corruption statute.”⁹⁹

At one point, § 666 was controversial primarily because of its potential implications for the federal-state balance of power.¹⁰⁰ Although one premise of § 666—federal prosecutions of state and local officials—has been the subject of considerable grumbling (not to mention turf wars between federal and state prosecutors),¹⁰¹ the statute’s facial constitutionality¹⁰² is not in doubt.¹⁰³ In *Sabri v. United States*, the Supreme Court unanimously declared that the enactment of § 666 was well within Congress’ authority under Article I of the Constitution, citing both the Spending Clause and the Necessary and Proper Clause.¹⁰⁴ While some commentators have criticized the Court’s decision in *Sabri* as empowering Congress to create new federal criminal laws with impunity,¹⁰⁵ issues of separation of powers and federalism are generally beyond the scope of this Note.

III.

BROAD READINGS: EXPANDING THE WHAT, WHO, AND HOW OF § 666

Federal courts—including the Supreme Court—have consistently sanctioned expansive readings of § 666.¹⁰⁶ With these rulings, a common criticism has emerged: Section 666 has become a “national anti-corruption statute.”¹⁰⁷ Courts have generally interpreted the fundamental questions arising out of § 666—the requisite connection to federal funds, the nature of covered jurisdictions and actors, and the

99. Brown, *supra* note 92, at 250 (citing *Frega*, 933 F. Supp. at 1540).

100. For an example of such an argument, see Brown, *supra* note 92.

101. The question of whether federal, as opposed to state or local, prosecutors should confront state and local corruption is thorny, and makes for an entirely different discussion. It is notable that as federal prosecutions of state and local officials seem to be increasing, local prosecutors seem to be growing more interested in a piece of the action. For example, Cy Vance, the successful 2009 candidate for District Attorney in New York County (Manhattan), publicly stated his intention to beef up the office’s public corruption prosecutions. See *Cy Vance Plan for Public Integrity Unit in Manhattan District Attorney’s Office*, CY VANCE FOR DA (July 19, 2009), <http://www.cyvanceforda.com/publicintegrityrelease>.

102. Naturally, the statute could still be ruled unconstitutional as applied in specific instances. The Court has, however, frowned on facial challenges to § 666’s constitutionality. See, e.g., *Sabri*, 541 U.S. at 608–10.

103. See *id.* at 605–06.

104. *Id.*

105. See, e.g., Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75 (2003).

106. See discussion *infra* Parts III.A–C.

107. Brown, *supra* note 84, at 406.

required method of payment offered—in ways friendly to the federal government.¹⁰⁸

But whether the Court narrows or invalidates § 666, or fails to act altogether, ultimate responsibility lies with Congress. Congress passed a statute with such vague statutory language and permissive interpretive precedents, and has yet to amend it appropriately. Congress should be the branch that fixes these problems.

A. *Is a Connection to Federal Funds Necessary?*

In its early years, it was widely accepted that “§ 666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute.”¹⁰⁹ The primary purpose of the legislation was clear—Congress “cast a broad net to encompass local officials who may administer federal funds.”¹¹⁰ Although the statute’s text may not have required such a focused reading, prosecutors and judges adopted interpretations that, despite being broad, were reasonable given the text’s vagueness. In *Salinas v. United States*, the Court unanimously rejected the proposition that § 666 required prosecutors to “prove [that] the bribe in some way affected federal funds.”¹¹¹ The Court pointed to the statute’s “expansive, unqualified language, both as to the bribes forbidden and the entities covered,” as evidence of legislative intent to construe the statute broadly.¹¹² The Court effectively determined that Congress, in designing § 666, did not care whether or not a defendant’s actions had actually affected federal funds—an ironic proposition considering the supposed purpose of the legislation.¹¹³ It further cited principles of deference to Congress as justification for judicially broad readings.¹¹⁴

In *Sabri*, the Court declared that no nexus between federal funds and corrupt behavior was necessary for a defendant to incur criminal

108. See, e.g., Cheryl Crumpton Herring, *18 U.S.C. § 666: Is It a Blank Check to Federal Authorities Prosecuting State and Local Corruption?*, 52 ALA. L. REV. 1317 (2001).

109. *United States v. Frega*, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996).

110. *United States v. Westmoreland*, 841 F.2d 572, 577 (5th Cir. 1988).

111. *Salinas v. United States*, 522 U.S. 52, 55 (1997).

112. *Id.* at 56.

113. Justice Thomas, dissenting with Justice Scalia elsewhere, expressed concern that “[w]ithout a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would upset the proper federal balance.” *Fischer v. United States*, 529 U.S. 667, 690 n.3 (2000) (internal quotation marks omitted).

114. *Salinas*, 522 U.S. at 57.

liability under § 666.¹¹⁵ Justice Souter observed, “Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.”¹¹⁶ This may follow logically, but it opened endless avenues for § 666 prosecutions. The adoption of this approach has had serious implications for prosecutors, defendants, and courts.

If no nexus between federal funds and corrupt behavior needs to be proved—indeed, if prosecutors are not required to demonstrate even the slightest effect on federal funds—§ 666 applies to all state and local officials regardless of their actual responsibilities. The 2009 federal stimulus bill¹¹⁷ and 2010 health care reform bill,¹¹⁸ each of which directed hundreds of billions of dollars in federal spending to states and municipalities, therefore came with an implicit condition: even officials unconnected to, or unauthorized to spend, federal funds could conceivably face criminal charges for abuse of those funds.¹¹⁹

This discussion is not about the extent to which we tolerate corruption. Rather, it questions whether federal criminal prosecutions are necessarily the best method of addressing local and state corruption, much of which barely affects concrete federal interests.

B. *Who Faces Criminal Liability Under § 666?*

Since § 666 does not require a direct relationship between federal funds and the underlying bribes, the question of who exactly faces criminal liability under the statute is open to interpretation. A different reading might presume that to face charges under § 666, the recipient of a bribe must be in a position where he or she could affect the expenditure of federal funds. Such an approach would seem reasonable, especially given Justice Souter’s declaration in *Sabri* that § 666 is justified primarily by the need to protect federal spending, owing largely to money’s “fungible” nature.¹²⁰ If a town receives federal highway funds, but is the beneficiary of no other federal largesse, it would follow logically that only those involved in the town’s transportation au-

115. *Sabri v. United States*, 541 U.S. 600 (2004). The Court explicitly discussed the circuit split over the nexus requirement. *Id.* at 604.

116. *Id.* at 606.

117. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

118. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

119. While such a hypothetical situation is seemingly absurd, it is not proscribed by any statutory enactments or judicial decisions.

120. *Sabri*, 541 U.S. at 606.

thority could be culpable under § 666. In any event, the need for a definitive answer as to the reach of federal law in this context would serve the Court's goal of "establish[ing] a uniform national standard."¹²¹

Section 666 defines what qualifies an entity, its officers, and its bureaucrats for coverage: the receipt of "benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."¹²² The many categories of aid outlined by the statute are broad, and not particularly helpful in elucidating what constitutes covered federal funding.¹²³ One court has noted that "the plain language of § 666(b) is ambiguous in defining 'Federal program' and 'Federal assistance' . . . the defining qualities of 'Federal assistance' are still unclear."¹²⁴ The statute's terms are specific only in a superficial sense; it remains ambiguous exactly what covered federal funding means in this particular statutory framework.

The Supreme Court has endorsed a permissive interpretation in response to this ambiguity. In *Fischer v. United States*,¹²⁵ the Court ruled that a Florida hospital that had received Medicare reimbursement payments for its patients' treatments constituted a covered entity for purposes of § 666.¹²⁶ The Court ruled that because the hospital was a covered entity, the defendant in *Fischer*—a hospital administrator who faced fraud, bribery, and kickback charges under § 666—could be prosecuted as an agent pursuant to the statute.¹²⁷

Fischer claimed that Medicare payments were not truly payments to the hospital, since they were in fact substitutes for insurance payments normally made by a patient or private insurer.¹²⁸ Instead, Fischer argued that the patients were the real beneficiaries of government spending, not the hospitals.¹²⁹ As such, Fischer maintained, the statute could not apply to him, since the Florida hospital was not a

121. See *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010) (internal quotation marks omitted).

122. 18 U.S.C. § 666(b) (2006).

123. *Id.* (Covered aid includes grants, contracts, subsidies, loans, guarantees, insurance, or other forms of Federal assistance.)

124. *United States v. Marmolejo*, 89 F.3d 1185, 1189 (5th Cir. 1996).

125. *Fischer v. United States*, 529 U.S. 667, 669 (2000).

126. The case was resolving a split between the Eleventh Circuit in *United States v. Fischer*, 168 F.3d 1273, 1278 (11th Cir. 1999) and the Tenth Circuit in *United States v. LaHue*, 170 F.3d 1026, 1031 (10th Cir. 1999).

127. *Fischer*, 529 U.S. at 669. Fischer, the defendant, was president of the company controlling the hospital in question.

128. *Id.* at 678.

129. *Id.* at 676–77.

covered jurisdiction.¹³⁰ The Court dismissed these arguments, stating that the hospital, because it accepts Medicare, was subject to “substantial government regulation.”¹³¹ The Court thereby created a new criterion for determining an entity’s status under § 666 that extends beyond direct receipt of federal funding: “regulat[ion] or assist[ance] by the Government for long-term objectives or for significant purposes beyond performance of an immediate transaction.”¹³² In *Fischer*, the Court effectively enlarged § 666’s scope to include the majority of America’s privately employed physicians, osteopaths, podiatrists, chiropractors, and dentists who accept Medicare, Medicaid, or other government-funded health care programs—not to mention their secretaries, custodians, and support staff.¹³³ In his dissent, Justice Thomas noted that corner grocery stores, which accept food stamps funded by federal assistance, could potentially be covered given the expansive approach chosen by the Court.¹³⁴ It strains credulity and defies congressional purpose to interpret § 666 as permitting prosecutions of hospital employees.

The Court’s rejection of *Fischer*’s arguments affirmed the expansive interpretive approach it chose for the statute that was first adopted in *Salinas*.¹³⁵ The Court did, however, set an outer bound of the statute’s reach, noting that purchases made by the government in the “usual course of business” would not incur coverage for an entity.¹³⁶ Justice Kennedy pointed to the Senate Report on the legislation creating § 666, which stated, “not every Federal contract or disbursement of funds would be covered [under § 666]. If a government agency lawfully purchases more than \$10,000 in equipment from a supplier, it is not the intent of this section” to federalize prosecution of theft, fraud, or bribery involving the supplying company.¹³⁷ Not all federal spending, it seems, is federal spending for the purpose of § 666: If a defense contractor is awarded a multi-billion dollar contract for military equipment in its “usual course of business,” then it could presumably be exempt from prosecution. It is no wonder that § 666 has caused such uncertainty.

130. *Id.*

131. *Id.* at 680.

132. *See id.* at 680–81. This criterion is not discussed extensively elsewhere.

133. Justice Thomas, joined in dissent by Justice Scalia, criticized the Court’s interpretation and noted that this constituted an “expansive” construction of § 666. *Id.* at 691.

134. *Id.* at 691–93.

135. *See id.* at 678.

136. This is discussed extensively throughout the opinion, as it is a provision of the actual statute. *See* 18 U.S.C. § 666(c) (2006).

137. *See* S. REP. NO. 98-225, at 370, *quoted in Fischer*, 529 U.S. at 679.

In a case predating *Fischer*, the Second Circuit had defined the primary criterion for “whether the funds disbursed can be considered Federal assistance” by examining whether the “statutory scheme intended to promote public policy objectives,” instead of constituting mere “payments by the government as a commercial entity.”¹³⁸ This interpretation—which differs from the subsequent criteria elucidated by the *Fischer* Court—would seem more logical had the court not subsequently given “public policy objectives” a broad construction. The appeals court ruled that a loan from the Farmers Home Administration (FmHA),¹³⁹ which the defendant was obligated to repay with additional interest, amounted to federal assistance for purposes of the program.¹⁴⁰ The court stated that Congress had authorized the FmHA loan program in order to accomplish specific policy goals, thereby crowning it with the additional power to confer § 666 liability.¹⁴¹ Unless judges are willing to assume that Congress frequently acts without any policy or objective in mind—hardly a reassuring proposition—then every penny spent by Congress, even loans slated for repayment, would logically be associated with “public policy objectives.”

Currently, even the slightest connection to federal funds qualifies an entity and its employees for criminal liability (except when, confusingly, it does not, as in the case of the hypothetical defense contractor mentioned earlier). Just as the entity problem continues to remain unresolved, the agency problem festers as well. Section 666 purports to cover “agent[s]” of covered entities, and defines “agent” to include “a person authorized to act on behalf of another person or a government,” including “a servant or employee, and a partner, director, officer, manager, and representative.”¹⁴² The actual ability to disburse, control, or in any way affect federal funds is not mentioned anywhere in the statute. In this sense, broader readings are the logical result of the statute’s broad reach and vague language; responsibility lies, first and foremost, with Congress.

The Courts of Appeals have given mixed signals on the meaning of “agency” under § 666. For example, the Seventh Circuit upheld the § 666 conviction of an individual who had paid bribes to a Wisconsin

138. *United States v. Rooney*, 986 F.2d 31, 35 (2d Cir. 1993).

139. This program is now defunct, having been incorporated into the Farm Service Agency following a 1994 reorganization of the United States Department of Agriculture. See *History of USDA’s Farm Service Agency*, FARM SERV. AGENCY, <http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=ham-ah> (last modified Oct. 9, 2008).

140. *Rooney*, 986 F.2d at 34–35.

141. *Id.*

142. See 18 U.S.C. § 666(d)(1) (2006).

state senator despite the fact that the bribes related to a program financed, managed, and executed by the state's governor.¹⁴³ The panel reasoned that while the senator lacked actual specific power over that program, a "legislator with the ability to control the senate's agenda can throw a monkey wrench into a Governor's program."¹⁴⁴ No direct connection between the actor and the spending entity was necessary, nor was any actual power; presumably, the ability to delay an unrelated appointment or bill—standard political horse-trading—could equal agency. This logic has indeterminate limits—surely all legislators, lobbyists, and staffers can be said to exercise control over "a Governor's program" in one sense or another.¹⁴⁵

The Seventh Circuit's reading is doubtless in the spirit of the Supreme Court's § 666 jurisprudence: it is "expansive."¹⁴⁶ However, the Court's rationale in *Gee* is troubling, because an individual whose influence is merely tangential could face charges under the statute. A municipal or state bureaucrat who lacks the ability to act unilaterally is suddenly subject to serious criminal liability in federal court. With minor—or even theoretical—power, it seems, comes great criminal liability.

Other appellate courts have sanctioned broad understandings of what constitutes an agent for § 666 purposes, thereby increasing the pool of potential defendants.¹⁴⁷ The Third Circuit claimed that Congress, in formulating § 666, sought to "enlarge and clarify the class of persons subject to the federal bribery laws."¹⁴⁸ Yet if Congress desired to enlarge the target class, then it should have done so explicitly. Congress is the sole branch with the power to create and define new federal crimes.¹⁴⁹ The careful balance of power established in the U.S. Constitution should not so easily subject the ambit of Congressional statutes to the Executive's whims or the Judiciary's varied modes of interpretation.¹⁵⁰

143. *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005).

144. *Id.* at 715.

145. To dispassionate observers, this might seem to be a stretch; surely a state senator has more control over legislation than the average citizen. This is true—but a broad, plenary power to "throw a monkey wrench" hardly amounts to agency in any fair, meaningful sense of the word.

146. *See Fischer v. United States*, 529 U.S. 667, 691 (2000) (Thomas, J., dissenting).

147. *See infra* pp. 826–27.

148. *United States v. Cicco*, 938 F.2d 441, 445 (3d Cir. 1991).

149. *See United States v. Hudson*, 11 U.S. 32 (1812).

150. From a separation of powers standpoint, it is clear that once federal crimes have become commonplace, the duty to define those crimes is committed to Congress. *See Common Law Crimes Unconstitutional*, CONSTITUTION BLOG (Sept. 26, 2010), <http://constitutionalism.blogspot.com/2010/09/common-law-crimes-unconstitutional.html>

One federal prosecutor has posited a hypothetical scenario.¹⁵¹ Imagine a police officer in a small municipality, who faces charges of accepting kickbacks from drug traffickers in exchange for ignoring activity at a suspected methamphetamine lab on the outskirts of town, which violates state anti-drug laws. Presume that the rural township, home to only a few hundred people, receives no direct federal funding whatsoever.¹⁵² Could the local police officer, receiving his mandate, authority, and paycheck directly from the municipality with no financial input on the part of the federal government, face charges under § 666?

The plain text of the statute would suggest not, but the reality is probably different given the range of creative theories that the government has used—with courts' permission—in recent years. A prosecutor might allege that the police officer is an agent of the state, which certainly does receive federal funds. Two potential theories could justify such an assertion. First, if the state contributes in any way to the town, such as by providing funding or training officers, the state could be said to have a pecuniary interest in the town. In relying on a theory that money is fungible, state receipt of federal funding could be imputed to municipalities, thereby justifying a federal interest in the township's law enforcement.¹⁵³ Second, the officer could be perceived as an agent of the state by virtue of his role in enforcing state law, even as he is employed by the municipality. Even though the officer has no involvement with state or federal policymaking or monies, he could nonetheless be held criminally liable under a statute designed primarily to protect the federal treasury, by virtue of his oath to enforce state traffic laws.¹⁵⁴ This situation, while admittedly hypothetical, is a plausible extension of § 666's pattern of construction, and

(discussing the Constitution's textual commitment of all lawmaking powers exclusively to Congress, and the tension that results from the federal judiciary's abdication of jurisdiction to try common law crimes while such crimes are still prosecuted in some state courts).

151. In the course of researching this paper, I had several background conversations, off the record, with attorneys familiar with § 666. In line with their wishes, I have kept their identities private.

152. This scenario is, in one sense, implausible. Virtually every municipality receives some sort of federal funding, either for health, education, highway funds, or one of any number of federal grant programs. The example, however unlikely, is used to illustrate a broader point.

153. Justice Souter justified this approach, saying "liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there." *Sabri v. United States*, 541 U.S. 600, 606 (2004).

154. I do not doubt that the police officer in this hypothetical scenario is committing a serious crime. But other statutes, unrelated to the integrity of federal funds, surely address his conduct.

raises the question of whether the statute imposes any meaningful limits on prosecutorial power.¹⁵⁵

Recently, the possibility of unencumbered expansion of what constitutes an “agent” for § 666 purposes has led some courts, aware of the statute’s manifold gaps, to act more cautiously.¹⁵⁶ In 2010, the Fifth Circuit considered a case in which a jury had convicted several local Mississippi judges of accepting bribes.¹⁵⁷ According to the prosecutor’s theory, the judges, who were employed by the county in which they served and had been elected, were in fact agents of the state’s Administrative Office of the Courts (AOC).¹⁵⁸ The AOC, which plays a role in administering the state’s courts, had received over \$10,000 in federal funds for programs wholly unrelated to judicial activity.¹⁵⁹

The Fifth Circuit ruled that the county judges were “agents” of the AOC, but only insofar as they hired chambers staff whose salaries were paid partially by the AOC.¹⁶⁰ However, the court then dismissed their convictions under § 666, saying that the bribes received “had no ‘connection with any business, transaction, or series of transactions’ of the AOC.”¹⁶¹ The court further distinguished several cases in the Eleventh Circuit, in which local and state judges had accepted bribes in connection with their official, judicial duties.¹⁶² Agency is a function of specific, case-by-case circumstances; the same person could be an agent in one situation, and yet not in another.¹⁶³

155. Note that even if the officer’s crimes are not actionable under § 666, he can probably be tried on an array of federal drug trafficking and conspiracy counts. This example belies no sympathy for any corrupt, drug-trafficking police officer.

156. *See, e.g.*, *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009); *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009).

157. *Whitfield*, 590 F.3d at 325.

158. *Id.* at 344. At trial, the jury notably rejected the Government’s alternate contention that the judges were agents of Harrison County, another recipient of federal funds. *Id.* at 344 n.13.

159. *Id.* The only judicial activity that federal funding was invested in, apparently, was the installation of electronic displays in certain courtrooms. *Id.*

160. *Id.* at 345.

161. *Id.* at 346 (citing 18 U.S.C. § 666(a)(1)(B) (2006)).

162. *Id.* (citing *United States v. Castro*, 89 F.3d 1443, 1447–48, 1454 (11th Cir. 1996) and *United States v. Massey*, 89 F.3d 1433, 1436–37 (11th Cir. 1996)) (“In those cases, the defendants were . . . state judges [who] accepted kickbacks from attorneys in exchange for appointments as special assistant public defenders, an arrangement which garnered the attorneys (and ultimately the judges) significant fees at the expense of the county (which was a recipient of federal funds, in excess of 90 million a year).”).

163. *See, e.g., id.* (“A review of the record in this case makes clear that, insofar as Whitfield and Teel may have been agents of the AOC, their role as such had nothing to do with their capacity as judicial decisionmakers.”).

One court has noted, tongue-in-cheek, that under § 666 an official could be convicted of bribing himself.¹⁶⁴ Although this scenario is—one hopes—unlikely, it demonstrates the potentially absurd outcomes fomented by the statute’s vagueness. Ultimately, Congress must specifically address who is an “agent” for purposes of § 666. Failure to do so will intensify the confusion for courts and practitioners alike, and lead to continued inconsistencies in the prosecution of state and local corruption.

C. Does § 666 Apply to Illegal Gratuities?

One critical question related to § 666 is whether or not the statute extends criminal liability to the receipt of questionable gratuities. In *Sabri*, the Court noted that § 666 was intended to cover a “bribe that goes well beyond liquor and cigars.”¹⁶⁵ This dictum, advising caution and prudence, would seem to have suggested some sort of *de minimis* exception for small payments and gifts. Congress, however, has never formally incorporated such an exception into § 666. Furthermore, no federal courts have adopted, or paid heed to, Justice Souter’s words. While § 666 establishes minimum amounts that must be satisfied in other areas—federal funds received, the value of the transaction involved—there exists no lower limit on the value of the bribe received or offered.¹⁶⁶ In theory, a five-dollar bribe, or an exceedingly cheap cigar, could invite prosecution.

While it is easy to dismiss such possibilities as ridiculous, they are well within the realm of possibility. Courts have traditionally read the term “anything of value” to encompass the full possibilities of the human imagination.¹⁶⁷ “Congress’ frequent use of ‘thing of value’ in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelop both tangibles and

164. *United States v. Abbey*, 560 F.3d 513, 520 n.8 (6th Cir. 2009).

165. *Sabri v. United States*, 541 U.S. 600, 606 (2003).

166. While some have argued that such a requirement is implied, courts have roundly rejected this line of reasoning. *See Abbey*, 560 F.3d at 522 (“This is a red herring: the government is not required to prove this to sustain a 666 conviction.”).

167. Section 666(a)(1)(B) requires that the transaction, or series of transactions, “involv[e] any thing of value of \$5,000 or more.” In practice, this is rarely a bar, since it refers to the benefit being allegedly provided by the corrupt “agent.” If someone were to bribe an agent with the intent to receive less than \$5,000 in material benefit, he would not be open to prosecution, but this has nothing to do with the amount of the alleged bribe itself.

intangibles.”¹⁶⁸ According to the Second Circuit, “amusement” is a thing of value, as are sexual intercourse and the promise of sexual intercourse.¹⁶⁹ The court declined to clarify whether that promise need have been consummated, or offered in seriousness, competence, or sobriety, in order to be potential grounds for the initiation of criminal proceedings. If value can be attached, in any form, it could theoretically justify a federal indictment.

In *Salinas*, the Court had recognized the absurd situations that its reading might create, and attempted to offer a caveat. The “statute [does not] limit the type of bribe offered . . . [the statute] encompass[es] all transfers of personal property or other valuable consideration in exchange for the influence or reward.”¹⁷⁰ In emphasizing that the property must be offered “in exchange for the influence or reward,” the Court signaled that illegal gratuities were not covered under § 666.¹⁷¹

It is not always easy in practice to discern an illegal bribe from an illegal gratuity.¹⁷² “The lines between conduct constituting . . . bribery [and] payment of an illegal gratuity . . . to a public official are poorly defined and often turn on minor differences in the parties’ intent.”¹⁷³ One approach maintains, “[T]he primary difference between bribery and illegal gratuities is that bribery requires a corrupt intent, while an illegal gratuity does not.”¹⁷⁴ This is often translated to require the existence of a quid pro quo; a bribe requires one, whereas a gratuity does not.¹⁷⁵

168. *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992).

169. *United States v. Girard*, 501 F.2d 69, 71 (2d Cir. 1979).

170. *Salinas v. United States*, 552 U.S. 52, 57 (1997).

171. The Court did not directly discuss the gratuities issue in the course of its *Salinas* opinion, but the “in exchange” language closely tracks the general concept of a quid pro quo. See discussion *infra* pp. 31–32.

172. See Steven A. Levin, *Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case*, 33 LOY. L.A. L. REV. 1813, 1820–22 (2000). One ongoing question, for example, is whether employment can be considered a gratuity. See, e.g., *United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993); *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991).

173. Elkan Abramowitz, *Navigating the Shoals of Political Gift-Giving*, N.Y. L.J., July 6, 1999, at 1.

174. Suzette Richards & Robert Warren Topp, *Federal Criminal Conflict of Interest*, 36 AM. CRIM. L. REV. 629, 631 (1999).

175. See *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974). Section 201, which existed prior to § 666, includes provisions that expressly criminalize both bribes and gratuities. The prohibition on illegal bribes is codified in subsection (b), and illegal gratuities in subsection (c). The Court has maintained that for gratuities to rise to the level of a crime, however, “the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.” *United States v. Sun-Diamond Growers of Cal.*, 526

Much of the thinking, among both practitioners and judges, about § 666 is predicated on their understandings of other, related statutes. Section 666 was created to “redress particular deficiencies in identified existing statutes,” such as § 201.¹⁷⁶ Often, when courts interpret § 666, they point to § 201, or other federal corruption statutes, as indicative of statutory purpose and scheme.¹⁷⁷ This tendency to analogize the two statutes, however, is flawed. While § 201 explicitly covers gratuities,¹⁷⁸ § 666 does not;¹⁷⁹ consequently, § 666 gratuities prosecutions have emerged as an uncertain area of the law. The “confusing relationship”¹⁸⁰ between the statutes has begotten a circuit split as to whether § 666 intended to evoke the gratuities provision of § 201, in addition to the bribery provision it parrots.¹⁸¹ A canon of statutory interpretation, however, says that congressional silence should not be interpreted as a grant of automatic assent.¹⁸²

Three circuits have ruled that § 666 imposes criminal liability for gratuity offenses. Two circuits have held that § 666 covers only bribery, and illegal gratuities offenses cannot be prosecuted under the statute.¹⁸³ Two other circuits lean in opposite directions—the Sixth favors the inclusion of illegal gratuities in the statutory framework, while the Eleventh appears to reject it.¹⁸⁴

U.S. 398, 405 (1999). The “official act” requirement is stated in 18 U.S.C. § 201(b)(1)(A). The key distinction between these two crimes is the element of intent. “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 official action].” *Id.* at 404–05.

176. *United States v. Cicco*, 938 F.2d 441, 445–46 (3d Cir. 1991).

177. *See, e.g., Salinas v. United States*, 522 U.S. 52, 58 (1997).

178. 18 U.S.C. § 201(c) (2006).

179. *See Justin V. Shur, Defining the Scope of 18 U.S.C. § 666: Does the Federal Program Bribery Provision Extend to Illegal Gratuities?*, presented at the 24th Annual ABA-CLE Institute on White Collar Crime, Feb. 25, 2010, at 2 (on file with author).

180. *Id.* at 1.

181. *See United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States v. Zwick*, 199 F.3d 672, 686 (3d Cir. 1999), *abrogated by Sabri v. United States*, 541 U.S. 600 (2004); *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997); *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).

182. *See YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* 16 (2008).

183. *See cases cited infra* notes 193, 195.

184. *United States v. Abbey*, 560 F.3d 513, 520 n.8 (6th Cir. 2009); *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009), *vacated*, 130 S. Ct. 3542 (2010).

The Second Circuit has issued two relevant rulings, both of which state that § 666 covers illegal gratuities. The first opinion rooted its interpretation in the similarity between the general language of § 666 and the gratuities provision of § 201(c), both of which required the payment or gift be made “for or because of” official action.¹⁸⁵ When Congress amended § 666 to change that language to the present-day version—“to influence or reward”¹⁸⁶—the Second Circuit reaffirmed its holding in *United States v. Bonito*.¹⁸⁷ In *Bonito*, the second opinion to discuss the issue, the court noted that the new language closely resembled the earlier version, and that “the current statute continues to cover payments made with intent to reward past official conduct, so long as the intent to reward is corrupt.”¹⁸⁸

The Eighth Circuit has adopted this approach as well, stating that “Section 666(a)(1)(B) prohibits both the acceptance of bribes and the acceptance of gratuities intended to be a bonus for taking official action.”¹⁸⁹ The Seventh Circuit has also adopted this view, “declin[ing] to import an additional, specific quid pro quo requirement into the elements of § 666(a)(2).”¹⁹⁰

The Fourth Circuit directly criticized the Second and Seventh Circuits,¹⁹¹ noting that “[t]hese decisions blur the longstanding distinction between bribes and illegal gratuities.”¹⁹² While the court preferred to rule on narrower grounds (the defendant had, in fact, been convicted on bribery charges), it stated that the amended language of § 666 was intended to *exclude* gratuities from the statute.¹⁹³ The Third Circuit has echoed the Fourth’s reasoning.¹⁹⁴

This split turns on the question of whether § 666 requires a quid pro quo. Unlike § 201, § 666 relies on the more malleable language of “intending to be influenced or rewarded.”¹⁹⁵ The circuits that have embraced the prosecution of illegal gratuities argue that § 666’s lan-

185. *United States v. Crozier*, 987 F.2d 893, 899 (2d Cir. 1993).

186. 18 U.S.C. § 666(a)(2) (2006).

187. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).

188. *Id.*

189. *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007).

190. *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997).

191. The Seventh Circuit’s jurisprudence on this issue seems muddled at times. See *United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990) (“The essential element of a section 666 violation is a ‘quid pro quo’ . . .”).

192. *United States v. Jennings*, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998).

193. *Id.* See also Shur, *supra* note 179, at 3.

194. *United States v. Zwick*, 199 F.3d 672, 686 (3d Cir. 1999) (citing the Fourth Circuit’s decision in *Jennings* in which the court contemplated that § 666 may not criminalize gratuities).

195. 18 U.S.C. § 666(a)(1)(B) (2006).

guage effectively disposes of the need to directly prove any quid pro quo requirement, claiming that corrupt intent itself governs.¹⁹⁶

Other circuits' signals on the quid pro quo issue may indicate their leanings on the broader gratuities question. The Eleventh Circuit, for example, recently ruled that "the official must agree to take or forego some specific action in order for the doing of it to be criminal" under § 666.¹⁹⁷ A "close-in-time relationship" between the gift and the action is not sufficient; instead, a real quid pro quo must be proven.¹⁹⁸ While the Eleventh Circuit did not directly consider whether § 666 covers illegal gratuities, its requirement of a quid pro quo would seem to functionally limit § 666 to bribery and kickback prosecutions. The Sixth Circuit, on the other hand, has echoed the Seventh Circuit, and does not require a quid pro quo be proven to sustain a conviction under § 666.¹⁹⁹

Each circuit, including those that have not yet considered the illegal gratuities question directly, imposes its own interpretation of the statute. The Eleventh and Sixth Circuits' 2009 rulings indicate that the split among the circuits is widening, and only the Supreme Court or Congress can now clarify the law and achieve consistency. Until either branch takes action, a politician in New York may face conviction under a § 666 gratuities theory, while his New Jersey counterpart may not, even if the two engage in identical conduct.²⁰⁰

IV.

THE OVERCRIMINALIZATION DEBATE: SHIFT TO § 666?

The debate over "honest services," which reached a crescendo in 2010 with the rulings in *Skilling*, *Black*, and *Weyhrauch*, has subsided somewhat as prosecutors, defendants, and judges sift through what remains of § 1346's previously expansive definition.²⁰¹ While § 1346 is

196. See, e.g., *Agostino*, 132 F.3d at 1190.

197. *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009).

198. *Id.* The court noted that the agreement could be implied, in line with the Supreme Court's interpretation of the Hobbs Act, 18 U.S.C. § 1951, which criminalizes extortion under the color of official right. See *United States v. Evans*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).

199. *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (quoting *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005)).

200. New York federal district courts, which are covered by the Court of Appeals for the Second Circuit, follow the *Bonito* line of cases, discussed *supra* note 187 and accompanying text; New Jersey's federal district court, under the appellate jurisdiction of the Third Circuit, follows *Cicco*, discussed *supra* note 148 and accompanying text.

201. Many convicted defendants are now asking courts to reopen and reassess their cases. See, e.g., *Bruno Responds to 'Honest Services' Ruling*, CBS6 WRGB (June 24,

likely to garner less attention following the Court's rulings, discussion of the underlying issues—the perceived problems of federal overcriminalization and expansive, vague statutory language—is unlikely to end in the near term. In many ways, the “honest services” debate was never truly about § 1346 alone; it spoke to the overall scheme of federal fraud prosecutions.²⁰² To critics of Congress' approach, § 1346 was merely a particularly egregious example of an overbroad statute.²⁰³ The Cato Institute, a conservative legal think tank, recently cited § 1346 as “one of the worst sources of federal overcriminalization and due process violations,” but noted that post-*Skilling*, “the problem [of overcriminalized corruption] remains.”²⁰⁴

Because the overcriminalization controversy touches on both overarching and mundane jurisprudential and constitutional questions, future litigation is likely. Section 666 is more likely than many other statutes to be targeted. While “honest services” mail fraud was the subject of the most recent round of litigation, it was not the most frequently used criminal corruption statute on the books prior to *Skilling*.²⁰⁵ Between 1986 and 2008, a greater number of federal public corruption prosecutions against state and local officials arose under § 666 than under the mail fraud statute.²⁰⁶

2010, 10:11 AM), <http://www.cbs6albany.com/articles/honest-1275325-ceo-skilling.html>.

202. The parallels between § 1346 and § 666, prior to *Skilling*, are uncanny, including the description of § 1346 as a “federal ‘catch-all’ fraud law.” Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States*, 51 S. TEX. L. REV. 1087, 1103 (2010). For a discussion of the history of § 1346, see *id.* at 1121–28.

203. See, e.g., News Release, Nat'l Ass'n of Criminal Def. Lawyers, Supreme Court Rejects Expansive Interpretation of ‘Honest Services’ Fraud Statute (June 24, 2010), available at <http://www.nacdl.org/public.nsf/NewsReleases/2010mn20?OpenDocument> (quoting Nat'l Ass'n of Criminal Def. Lawyers President Cynthia Hujar Orr as saying that she expects “to see future litigation surrounding efforts by prosecutors to wedge their cases” into the Court's new § 1346 paradigm).

204. Ilya Shapiro, *Introduction to CATO INST., CATO SUPREME COURT REVIEW: 2009–2010* 1, 6–7 (Ilya Shapiro ed., 2010).

205. See Sanford Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 AM. POL. SCI. REV. 534, 535–36 (2009) (“The lead charge in 25% of the indictments was violation of 18 U.S.C. [§] 1951, the Hobbs Act, which prohibits robbery or extortion affecting interstate commerce. The next most common offense was under 18 U.S.C. [§] 666 (19% of prosecutions), which outlaws theft and bribery in entities receiving more than \$10,000 in federal funds. Other commonly employed corruption statutes included the mail fraud statute (18 U.S.C. [§] 1341, 12% of cases), the statute governing conspiracies to defraud the federal government (18 U.S.C. [§] 371, 9% of cases), and the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. [§] 1962, 4% of cases).”).

206. *Id.*

Richard Thornburgh, who served as Attorney General under President George H.W. Bush, testified before a House of Representatives subcommittee in 2009 about overcriminalization.²⁰⁷ Noting that “the problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree,” Thornburgh discussed the need to limit the use of criminal penalties when civil or administrative remedies could be sufficient and less costly for all parties involved.²⁰⁸

The chorus of concern about federal overcriminalization extends far beyond worry over the scope of corruption laws. Judge Alex Kozinski of the Ninth Circuit recently published an essay titled “You’re (Probably) a Federal Criminal,” claiming that the huge number and breadth of federal criminal codes ensures that “most Americans are criminals and don’t know it.”²⁰⁹ Harvey Silverglate, a prominent criminal defense attorney in Boston, has authored a book titled “Three Felonies a Day,” arguing that many Americans are unknowingly guilty of a range of federal crimes²¹⁰—a problem Congress has created by virtue of its many vaguely worded statutes.

The fundamental problem that statutes such as § 1346 and § 666 share is their vagueness, and that vagueness inevitably leaves interpretation to the discretion of individual prosecutors. Judge Dennis Jacobs of the Second Circuit wondered in a recent dissent whether judges and prosecutors “know [the true meaning of vague criminal statutes], or must make it up as they go along?”²¹¹ This is a key problem with the present system—it is unhelpful and confusing for prosecutors as well as defendants.

The unanimity of the Court’s decision in the 2010 cases represents the overall trend of Supreme Court statutory interpretation in this area.²¹² The Court may look at § 666 and seek to “establish[] a uni-

207. *Over-Criminalization of Conduct / Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 9 (2009) (statement of Richard Thornburgh, former Att’y General of the United States).

208. *Id.*

209. Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43, 44 (Timothy Lynch ed., 2009).

210. HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

211. *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (Jacobs, J., dissenting).

212. Dane C. Ball, *An Overlooked Key to Combating Overcriminalization: Reflecting on a Decade of Supreme Court Decisions Disfavoring Overly-Expansive Interpretations of Criminal Statutes*, WHITE COLLAR CRIME PROF BLOG (Nov. 1, 2010), http://lawprofessors.typepad.com/whitecollarcrime_blog/2010/11/an-overlooked-key-to-

form national standard, define[] honest services with clarity, [and] reach[] only seriously culpable conduct.”²¹³ If so, the Court would only be exercising its constitutional duty in the wake of Congress’ decision to abdicate its own.

V.

THE FUTURE OF § 666 PROSECUTIONS

Careful interpretation of criminal statutes is hardly new: “[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.”²¹⁴ Despite Justice Scalia’s sharp warning in *Sun-Diamond*, however, courts have generally deferred to federal prosecutors in answering the critical interpretive questions about § 666.²¹⁵ The key, unanswerable question is if, and how, *Skilling* will change that deferential calculus.

Even prior to the Court’s decision in *Skilling*, federal prosecutors presumed that a decision limiting “honest services” prosecutions would lead to increased utilization of other anti-corruption statutes.²¹⁶ For prosecutors, § 666 is an appealing statute with which to fill the void *Skilling* has created.²¹⁷ Other workhorse federal criminal statutes present barriers to easy use. The Hobbs Act, which addresses extortion “under color of official right”,²¹⁸ generally implies the underlying existence of a threat, and has an interstate commerce element that must be satisfied²¹⁹—a difficult proposition in cases of purely local or intra-state corruption. The Travel Act similarly requires that interstate or foreign commerce be affected.²²⁰

In a previous challenge to the “honest services” theory, as in *Skilling*, the Court had noted its own reluctance to sanction wide

combating-overcriminalization-reflecting-on-a-decade-of-supreme-court-decisions-disfavoring-overly-exp.html.

213. *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010).

214. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999).

215. I base this on the corpus of cases addressed herein, the vast majority of which—even the rare narrow interpretations—tend to side ultimately with the Government.

216. Shur, *supra* note 179, at 1.

217. Section 666 has “long [been] a favorite weapon of federal prosecutor.” Alain Leibman, *Fifth Circuit Pulls Back the Reach of 18 U.S.C. § 666 as It Relates to Bribery of Local Judges*, WHITE COLLAR DEF. AND COMPLIANCE (Jan. 18, 2010), <http://whitecollarcrime.foxrothschild.com/2010/01/articles/offense-elements/fifth-circuit-pulls-back-the-reach-of-18-usc-a-666-as-it-relates-to-bribery-of-local-judges/>.

218. 18 U.S.C. § 1951(b)(2) (2006). In addition to addressing extortion, the Hobbs Act addresses robbery. *See* § 1951(b)(1).

219. § 1951(b)(3).

220. 18 U.S.C. § 1952(a) (2006). While this might seem broad in theory, the formulation prevents prosecution of individuals for crimes of a purely local nature.

prosecutorial latitude in reading federal criminal statutes.²²¹ Instead, it put the ball squarely in Congress's court. "If Congress desires to go further," the Court wrote, "it must speak more clearly."²²² Congress's response to the Court's decision in *McNally* came in the form of § 1346.²²³ The Court reiterated that sentiment, in the exact formulation it used in *McNally*, in *Skilling*.²²⁴

Indeed, the Court reiterated in *Skilling* that to avoid being unconstitutionally vague, "a penal statute [must] 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."²²⁵ Federal criminal statutes must "employ standards of sufficient definiteness and specificity to overcome due process concerns."²²⁶ These words may be a warning to Congress and the Justice Department, hinting at a judiciary that will, in the future, approach such statutes more skeptically.²²⁷

Congress must consider what action if any it will take to clarify § 666. Skeptics will argue that the Court's ruling in *Skilling* does not bear on § 666 at all, and that the Court's attempt to limit "honest services" owes solely to the unique vagaries surrounding that law.²²⁸ The Court has, after all, adopted permissive readings of § 666 in *Salinas*, *Sabri*, and *Fischer*.²²⁹ What was true yesterday, however, will not necessarily be true tomorrow. The Court permitted the broad use of

221. *McNally v. United States*, 483 U.S. 350, 360 (1987).

222. *Id.*

223. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988).

224. *Skilling v. United States*, 130 S. Ct. 2896, 2937 (2010) (quoting *McNally*, 483 U.S. at 360).

225. *Id.* at 2904 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

226. *Id.* at 2933 n.44 (2010).

227. This extends to lower courts, which are bound by Supreme Court precedent. Although no new precedent exists vis-à-vis § 666 as a result of *Skilling*, the specter of future Supreme Court decisions often looms large, as Court of Appeals judges look to avoid issuing decisions which will later be overruled. See Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedents*, 64 J. POL. 534, 536 (May 2002); see also Ball, *supra* note 212, at 1–2 (discussing how lower courts have reacted to past Supreme Court decisions in the area of criminal statutory interpretation).

228. For an interesting back-and-forth over the Court's ruling in *Skilling* and its relationship with § 666, it is worthwhile to examine oral arguments in the Eleventh Circuit for *United States v. Siegelman*. See Jim White, *Delayed-Blog of Oral Arguments in Siegelman Case*, MY FDL (Jan. 20, 2011, 5:45 AM), <http://my.firedoglake.com/jimwhite/2011/01/20/delayed-blog-of-oral-arguments-in-siegelman-case/>.

229. See *supra* Part III.

§ 1346 only until it was no longer willing to abide by such latitude.²³⁰ In the same way, the Court may soon be ready to proscribe the expansive use of § 666. While congressional action might seem premature if the Court has not yet spoken, in a realm as complex and multifaceted as criminal prosecution, there is good reason for Congress to be vigilant and proactive. Should the Court limit the use of § 666, the resulting chaos will clog the appellate dockets as those convicted under the law seek rehearing, much as the dockets of the nation's federal courts must now hear from legions of prisoners convicted under § 1346.²³¹ Anything that could forestall such a development, in the wake of future Supreme Court rulings, would be positive.

During the 111th Congress, both houses considered amending § 666, but the legislation in question, the Public Corruption Prosecution Improvements Act (PCPIA), never made it to a full vote in either the House of Representatives or the Senate.²³² The proposed changes would have broadened the scope of the statute, while also making it markedly more punitive. Specifically, the PCPIA would have lowered the required value of a covered transaction from \$5,000 to \$1,000, thereby raising the specter of prosecutions for minutiae.²³³ Furthermore, the bill would have changed the definition of a bribe from “anything of value” to “any thing or things of value,” suggesting the possibility that miscellaneous, unconnected gifts accumulated by an individual could be used, in combination, to reach the new, lower

230. Considering how many honest services cases the Court refused to hear before finally granting certiorari in the 2009 Term, it seems that whether or not the Court would hear a case about § 1346 was always a question of if, not when. As the case law in the lower courts continues to develop related to § 666—and as it continues to confuse and muddle—the chances of the Court granting certiorari to a § 666-related case would seem to increase.

231. It is hard to ascertain exactly how many appeals have been raised on *Skilling* grounds. See, e.g., Peter Lattman, *The White-Collar Pushback After the Skilling Ruling*, DEALBOOK (Aug. 25, 2010, 5:16 PM), <http://dealbook.nytimes.com/2010/08/25/the-white-collar-pushback-after-the-skilling-ruling/> (“Justice Department spokeswoman said the agency did not keep statistics on how many motions or appeals had sought relief since the Supreme Court ruling, but anecdotal evidence suggests that the agency is now faced with defending a raft of earlier decisions.”).

232. Public Corruption Prosecution Improvements Act, S. 49, 111th Cong. (2009). The bill was reported out of the Senate Judiciary Committee, only to languish in the full Senate. The House version, Public Corruption Prosecution Improvements Act, H.R. 2822, 111th Cong. (2009), has yet to be reported out of the House Judiciary Committee.

233. See S. 49 § 5(2). It is generally presumed that a bribe in excess of this amount—whether \$5,000 or \$1,000—would count as involving “anything of value,” regardless of the transaction in question. See *United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993) (discussing what constitutes an “item of value”).

threshold.²³⁴ The bill also would have qualified § 666 violations as criminal predicates for prosecution under the Racketeering Influenced and Corrupt Organizations Act (RICO),²³⁵ potentially creating another layer of criminal liability for corrupt officials.²³⁶ Finally, the proposed legislation attempted to increase the maximum penalty for a § 666 violation from ten to fifteen years.²³⁷

The PCPIA created considerable consternation among those already concerned by § 666's seemingly limitless applications.²³⁸ The National Association of Criminal Defense Lawyers and the conservative Heritage Foundation argued that the bill would "effectively expand criminal liability to every item a public official receives."²³⁹ Indeed, courts have noted that the \$5,000 threshold is especially important "to avoid prosecutions for minor kickbacks and limit violations to cases of outright corruption."²⁴⁰ Justice Souter's prescient warning about prosecuting the receipt of "liquor and cigars" is, it seems, in danger of being ignored.

There is no question that the Department of Justice "would like another blunderbuss in their gun cabinet," as Scott Horton wrote recently in *Harper's Magazine*,²⁴¹ whether in the form of a more punitive § 666 or a restored § 1346. If the Executive Branch pushes strongly enough, they are likely to be rewarded with enhanced powers; in this field, Congress "only very rarely denies anything [the Justice Department] ask[s] for."²⁴² This reflects the reality of criminal justice

234. See S. 49 § 5(2).

235. Organized Crime and Control Act of 1970, Pub L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-68 (2006 & Supp. III 2010)).

236. See S. 49 § 10(a)(2) (adding § 666 as a RICO predicate under 18 U.S.C. § 1961). The Act also amends 18 U.S.C. § 2516(1)(c) by adding § 666 as a wiretap predicate. See S. 49 § 11.

237. See S. 49 § 5(3).

238. There are other reasons to dislike the PCPIA that are beyond the purview of this Note. For an extensive treatment of the PCPIA's proposed revisions to 18 U.S.C. § 201, from a critical perspective, see D. Michael Crites, Larry L. Lanham & Darren Richard, *A Congressional "Meat Axe"? New Legislation Would Broaden the Potential for Prosecutions Under the Federal Illegal Gratuity Statute*, 36 J. LEGIS. 249 (2010). See also Peter R. Zeidenberg, *Major Defect in Public Corruption Prosecutions Improvements Act*, THE HILL (Apr. 28, 2009, 2:15 PM), <http://thehill.com/opinion/op-ed/8104-major-defect-in-public-corruption-prosecution-improvements-act>.

239. Letter from Kyle O'Dowd, Assoc. Exec. Dir. for Policy, NACDL, & Brian W. Walsh, Senior Legal Research Fellow, Heritage Found. to The Honorable Patrick Leahy & The Honorable Arlen Specter, 5 (Feb. 26, 2009), <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=ID&ItemID=19372>.

240. *United States v. Abbey*, 560 F.3d 513, 522 (6th Cir. 2009).

241. Scott Horton, *Justice After Skilling*, HARPER'S MAGAZINE (Oct. 1, 2010, 4:24 PM) <http://www.harpers.org/archive/2010/10/hbc-90007664>.

242. *Id.*

laws in the United States; lawmakers often opt for harsher, more punitive laws.²⁴³ The fear of being considered “soft on crime” is a contributing factor—Congress is “a political body that responds to political pressures . . . [that] push for more severe sentences.”²⁴⁴ Indeed, Professor Rachel Barkow has suggested that “characteristics of the federal political process make it quite likely that any intervention by Congress will yield results that are as harsh as or harsher than state sentences.”²⁴⁵ The arc of history, at least when Congress creates criminal laws, bends toward stricter justice.

George Terwilliger, who served as Deputy Attorney General in the first Bush Administration, recently spoke about § 666 in testimony before the Senate Judiciary Committee.²⁴⁶ Terwilliger used § 666 to caution Congress against overreach in response to § 1346, citing the congruity between the two statutory frameworks:

[O]ne may question whether Congress intended to occasion the wholesale importation of state and local corruption to the federal enforcement docket. Regardless of what was intended, one could consider what has resulted from the action of the courts and see the value of legislative restraint and the careful consideration of consequences when sending the federal law enforcement establishment forth with new crimes directed at state and local jurisdictions.²⁴⁷

The 112th Congress may ultimately adopt some form of legislation that changes § 666. In February 2011, Senators Leahy and Cornyn reintroduced the PCPIA as S. 401.²⁴⁸ The present incarnation of the PCPIA is materially similar to the version discussed in the 111th.

In a press release announcing the new PCPIA, Senator Leahy warned that “loopholes” plague federal corruption prosecutions.²⁴⁹

243. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 718 (2005) (“Lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justifications, if only to provide another line on the resume or potential propaganda for a grandstanding candidate.”).

244. Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1723 (2006).

245. *Id.* at 1720.

246. *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of George J. Terwilliger III, Partner, White & Case LLP).

247. *Id.*

248. S. 401, 112th Cong. (2011).

249. Press Release, Senator Patrick Leahy, Leahy, Cornyn Bring Back Proposal to Root out Public Corruption (Feb. 17, 2011), http://leahy.senate.gov/press/press_releases/release/?id=69342C70-A1CE-4424-B0CB-5830A87257F0.

These loopholes, however, exist mostly because Congress prefers to neglect the core issues underlying corruption prosecutions. The PCPIA, if adopted, would reflect a strategy of adopting vague, punitive language, instead of addressing the actual, problematic “loop-holes” that have led to uneven construction of statutes.

Congressional action to address § 666’s deficiencies is necessary. It is a generally accepted principle of statutory interpretation that, given the choice, Congress, not the courts, should determine the scope and meaning of federal laws.²⁵⁰ Federal prosecutors will benefit from a clear articulation of the law as well. Citizens also have a fundamental constitutional right to notice “that his contemplated conduct is forbidden by the statute.”²⁵¹

I propose three changes, through which Congress could have a positive effect on the federal regime of corruption control in general, and on § 666 in particular:

First, Congress should reject the proposal advanced in the PCPIA. The bill increases penalties²⁵² and expands the scope of the statute, while failing to address many of the aforementioned problems with § 666. Instead of broadening the statute, Congress should narrow the scope of § 666, and clarify the issues outstanding in its interpretation. Given the glacial rate at which the PCPIA has moved through past Congresses, real modifications could be made in committee. Those modifications should address the problems delineated above.

The most effective way for Congress to reassert legislative supremacy in interpreting § 666 would be to solidify the relationship between federal funding and the entity and agent elements of the statute, thereby slowing § 666’s development into what it is functionally becoming—a general anti-corruption statute. If Congress wishes § 666 to be a general anti-corruption statute, contradicting the statute’s original mandate, it should state that clearly via amending legislation.

250. Indeed, the Court in *Skilling* acknowledged this principle. One law professor has noted that “what is most telling [about the *Skilling* decision] is that each side was eager to show that *it was the most devoted to judicial restraint* [vis-à-vis Congress].” Bill Otis, *Honest Services Mostly Survives*, THE CRIME AND CONSEQUENCES BLOG (June 24, 2010, 12:36 PM), <http://www.crimeandconsequences.com/crimblog/2010/06/honest-services-mostly-survive.html>.

251. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612 (1954)).

252. The maximum limit may not have much effect, in practice, since most sentences for public corruption crimes fall within the Sentencing Guidelines, which rarely impose the maximum sentence. See Michael A. Collora & Jennifer M. Ryan, *Sentencing in Political Corruption Cases*, DWYER & COLLORA LLP, <http://www.dwyercollora.com/law-articles/business/political-corruption-sentencing.aspx> (last visited Aug. 31, 2011).

If the true motivations behind § 666, however, center on the integrity of federal funding, then solidifying the funding connection is a logical next step.

To do so, the term “entity” should be redefined to clearly exclude defendants with little connection to actual funding. If Congress believes that doctors who receive Medicare payments are not corrupt politicians, then it should ensure that an “entity” clearly refers only to state and local governments, as well as their bureaucratic subsidiaries. This would guarantee that federal prosecutors can still pursue cases against the vast majority of local and state officials suspected of corrupt activity, thereby refocusing § 666 on its core purpose.

Second, Congress should amend § 666 to require that “agents” of an entity exercise some element of control over that entity’s spending, or appropriation of items acquired by the entity. This change would not require prosecutors to prove an overly restrictive element—that federal funding itself was affected by the agents’ actions. Rather, a prosecutor would have to prove that there is some possible, plausible connection between the entity’s ability to spend funds, or the converted material products of those funds, and the act in question. In doing so, it would essentially adopt the Fifth Circuit’s reasoning in *Whitfield*.²⁵³ It would prevent the case of the corrupt police officer²⁵⁴ from being tried under a law irrelevant to his acts, for crimes unlinked to federal funding. Perhaps money is fungible, but agency is not.

Finally, Congress should clarify that § 666 does not cover illegal gratuities. Penalizing the acceptance of questionable gratuities for local and state officials may be controversial, even though § 201 penalizes gratuities for federal officials. It is logical that § 201, which covers federal officials, would be stricter because of a more concrete federal interest than that covered by § 666. While illegal gratuities laws may be an opening for expansive prosecution of small gifts and payments—the “liquor and cigars” problem—Congress may feel that the proliferation of gratuities may constitute a cognizable criminal issue. Regardless of what Congress decides, it is critical that the law be formally codified; it is preferable for Congress to clearly declare its intentions than to leave the law to prosecutors and judges to intuit. If Congress wishes to criminalize gratuities, it must act clearly by parroting the language of § 201(c).

My last suggestion differs from the others insofar as it does not call for restricting § 666’s potential prosecutorial ambit. While the

253. *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009).

254. *See supra* note 151–55 and accompanying text.

prevalent debate about § 666, and federal prosecution of state and local corruption generally, focuses on the pliability of the federal corruption statutes and the controversial question of federal overreach, § 666's primary weaknesses are not necessarily connected to over-criminalization and federalism discussions. Section 666's primary weakness lies instead in its vague, confusing language.²⁵⁵ From this perspective, it would be better for Congress to make the statute stronger and more punitive, rather than maintain the status quo, so long as it provided the necessary clarifications.

These actions, taken together, might reduce the number of § 666 prosecutions. Detractors may argue that fewer prosecutions would mean more corruption.²⁵⁶ While handicapping the future of corruption is necessarily speculative, Congress can use well-written statutes to combat any potential upticks in improper behavior. If necessary, Congress should strengthen other criminal statutes (in a direct, clear manner) to address the serious problems of fraud against the federal government, extortion, police corruption, and criminal conspiracy. Congress can further allocate funding to state and local authorities to prevent and prosecute corruption within entities that benefit from federal spending.²⁵⁷ The existing range of federal corruption laws provides ample legal tools with which to conduct a robust federal anti-corruption effort.

In any case, the pattern of broadly reading § 666 serves not as a check on the corrupt or a warning to wrongdoers. The worst of the worst—thieving bureaucrats, selfish public servants, and legislators for whom the oath of office is no more than a formality on the road to personal enrichment and professional advancement—will continue to be covered under reasonable readings of anti-corruption statutes. Broad constructions of § 666 distract well-meaning anti-corruption efforts from more serious and damaging threats to democratic legiti-

255. Cf. *Whitfield*, 590 F.3d at 343–47 (attempting to reconcile other courts' broad readings of § 666 with the plain language and congressional intent).

256. Speculating on the future of corruption in America is largely impossible and beyond the scope of this Note or the best guesses and judgment of this writer.

257. There is a strong argument to be made that local and state corruption is best prosecuted by local and state authorities. Although this is not the argument of this paper, local and state prosecutors may be more capable—constitutionally and pragmatically—of addressing corrupt officials within their jurisdictions. See, e.g., George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 511 (2003); George E.B. Holding, Dennis M. Duffy & John Stuart Bruce, *Federal Prosecution of State and Local Officials Using Honest Services Mail Fraud: Where's the Line?*, 32 CAMPBELL L. REV. 191, 192 n.6 (2010).

macy by ignoring the principles of fundamental fairness that undergird our criminal justice system.

CONCLUSION

Congress' inartful drafting birthed the current mess, and Congress bears ultimate responsibility for cleaning it up. If Congress fails to fix § 666, the Supreme Court may decide to weigh in. If it does, the Court is likely to significantly constrain the Act. Prior to the Court's decision to hear the "honest services" cases during the 2009 term, the Court had denied certiorari in countless § 1346 cases. Justice Scalia's dissent from one of those denials, explaining why he believed the Court needed to weigh in on that statute, is telling:

In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of § 1346. Indeed, it seems to me quite irresponsible to let the current chaos prevail.²⁵⁸

It is unlikely that the Court will allow the current questions surrounding § 666—overbroad interpretation, unlimited prosecutorial discretion, and confusion over key coverage questions—to go unanswered. If Congress neglects its duty and declines to act, then it risks incurring the wrath of a Court that is—in a moment of rare ideological consensus—increasingly frustrated by perceived overcriminalization in the federal codes. It is best that Congress, and the Justice Department, modify § 666 on their own terms, rather than in response to judicial fiat.

Indeed, if Congress hopes that it can evade the Court's scrutiny on these issues, this belief is naïve at best. As with "honest services," several denials may precede the Court's hearing a § 666 case, but the Court is unlikely to allow these problems to remain unchecked forever. If Congress cannot or will not fix § 666, the Court likely will—clarifying and, if *Skilling* is indicative of the Court's general senti-

258. *Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari). It is worth noting that in that dissent, Scalia explicitly distinguished § 666 from § 1346. "It is one thing to enact and enforce clear rules against certain types of corrupt behavior, e.g., 18 U.S.C. § 666(a) (bribes and gratuities to public officials), but quite another to mandate a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case." *Id.* at 1310. I maintain, however, that the problems with § 666 outlined in this paper are far more substantial than Justice Scalia noted at the time, as the statute's appellate history demonstrates.

ment, paring § 666 to its core purpose. To preempt judicial renovation of § 666, Congress would be well-advised to make its move.