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The “Princelings”^{*} and the Banks: When Does a Legitimate Business Practice Become Criminal Corruption in Violation of the Foreign Corrupt Practices Act?

Beverley Earle[†] & *Anita Cava*[‡]

Abstract: The Foreign Corrupt Practices Act (FCPA) prohibits the bribery of foreign public officials. When does hiring a relative of a foreign official cross the line into criminal activity in violation of the Act? We suggest that there should not be an absolute prohibition on hiring qualified relatives of foreign officials. Rather, there must be clear safeguards to prevent quid pro quo arrangements that further corruption.

We examine the lack of case precedents under the statute and look to cases under other statutes that examine the definition of quid pro quo to look for analogies to the FCPA. We conclude with how the DOJ and SEC could clarify this murky line between legal and illegal activity, thus giving companies operating abroad certainty that their hiring will not be the subject of FCPA enforcement action.

^{*} Compare Bo Zhiyue, *Who are China's Princelings?*, THE DIPLOMAT, Nov. 24, 2015, <http://thediplomat.com/2015/11/who-are-chinas-princelings/> (“The children of veteran communists who held high-ranking offices in China before 1966, the first year of the Cultural Revolution, are commonly called ‘princelings.’ There are princelings by birth—sons and daughters of former high ranking officers and officials of the Chinese Communist Party (CCP)—and princelings by marriage. Princelings by birth could also be further divided into subcategories: princeling politicians, princeling generals, and princeling entrepreneurs.”), *with Princelings*, WIKIPEDIA, <https://en.wikipedia.org/w/index.php?title=Princelings&oldid=731158483> (last visited Dec. 19, 2016) (“The term was coined in the early 20th century, referring to the son of Yuan Shikai (a self-declared emperor) and his cronies. It was later used to describe the relatives of the top four nationalist families; Chiang Kai-shek’s kin, Soong Mei-ling’s kin, Chen Lifu’s kin, and Kong Xiangxi’s kin. After the 1950s, the term was used to describe Chiang Ching-kuo, son of Chiang Kai-shek, and his friends in Taiwan. Today’s princelings include the children of the Eight Elders and other recent senior national and provincial leaders. . . .”).

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I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA)¹ criminalizes the offering of something of value to a foreign official to obtain or retain business.² For the most part, the U.S. government has interpreted this prohibition through plea bargains, Opinion Releases, and the 2012 Resource Guide to the FCPA.³ In a few instances, the courts have offered guidance on the statute's interpretation.⁴ Research reveals that few companies challenge the government's view by going to trial, preferring instead to make a plea deal that will limit both financial exposure and public relations problems, and, obviously, stem hemorrhaging legal costs.⁵ An exception to this approach, however, appears to be on the horizon and permits closer scrutiny of the government's interpretation of the anti-corruption law.

In 2013, JP Morgan Chase and Co. came under government scrutiny for its practice of hiring sons and daughters of foreign officials to help it secure business in China.⁶ Reportedly, the government has expanded the probe to include other banks as it appears the practice is commonplace.⁷ The company has hired former top prosecutor Mark Mendelsohn, who reportedly is preparing a "white paper" that is intended to persuade the SEC that its position is too far-reaching.⁸ Other banks involved in the investigation

¹ 15 U.S.C. §§ 78dd-1 to -3 (2012).

² 15 U.S.C. §§ 78dd-1(a), -3(a) (2012).

³ See U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter RESOURCE GUIDE].

⁴ See *infra*, Part III.A.

⁵ See Nathan Vardi, *The Bribery Racket*, FORBES (June. 7, 2010, 12:00 AM), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html> (discussing how companies hire investigators, turn over evidence to the government in FCPA cases by self-reporting and making plea deals).

⁶ See Emily Glazer, Dan Fitzpatrick & Jean Eaglesham, *J.P. Morgan Knew of China Hiring Concerns Before Probe*, WALL ST. J. (Oct. 23, 2014, 11:56 AM), <http://www.wsj.com/articles/j-p-morgan-was-aware-of-overseas-hiring-concerns-before-u-s-probe-1413998056>.

⁷ Hugh Son, *JPMorgan China Hiring Probe Spreads to Five More Banks, NYT Says* BLOOMBERG (Dec. 7, 2013, 8:26 PM), <http://www.bloomberg.com/news/articles/2013-12-08/jpmorgan-china-hiring-probe-spreads-to-five-more-banks-nyt-says> (discussing expansion of probe of companies hiring sons and daughters of Chinese officials).

⁸ See Jean Eaglesham, Emily Glazer & Ned Levin, *Wall Street Pushes Back on Foreign Bribery Probe*, WALL ST. J. (Apr. 29, 2015, 7:24 PM), <http://www.wsj.com/articles/wall-street-pushes-back-on-foreign-bribery-probe-1430349863> (mentioning Mark Mendelsohn's "White Paper"); Ned Levin, *J.P Morgan Hired Friends, Family of Leaders at 75% of Major Chinese Firms it Took Public in Hong Kong*, WALL ST. J. (Nov. 30, 2015, 8:45 PM), <http://www.wsj.com/articles/j-p-morgan-hires-were-referred-by-china-ipo-clients-1448910715> (discussing in great detail the information the bank put together in response to the federal inquiry); however more recently a settlement is rumored to be in discussion, see Ben Protes

include Bank of New York Mellon, Citigroup Inc., Credit Suisse Group AG, Deutsche Bank AG, Goldman Sachs Group Inc., Morgan Stanley, and UBS AG.⁹

This paper considers the following question: When does hiring a qualified and competent person who may be related to foreign officials cross the line into illegal conduct? Assuming that credentials from elite schools are viewed as baseline qualifications for top jobs in business, restricting the applicant pool in a way that eliminates the progeny of foreign officials will surely have negative consequences for business. A prohibition on the hiring of these individuals would effectively preclude businesses from hiring local talent. This would be especially problematic in developing countries, where the children of elite have the most access to educational opportunities, particularly when it comes to studying abroad. Does the company need only avoid specific *quid pro quo* actions to escape illegal conduct, or must the company avoid the “appearance of impropriety” as well?

We examine cases under other statutes to see if there is any applicability. For example, in *United States v. Blagojevich*,¹⁰ the Seventh Circuit Court of Appeals agreed with a former governor of Illinois and reversed his conviction on several counts. The 2015 opinion makes a distinction between “logrolling”—horse trading for jobs—and decisions involving private monetary gain.¹¹ The former, the court noted, is common in everyday politics, whereas the “swap of an official act for a private payment” is illegal.¹² The opinion references *Skilling v. United States* and honest services fraud.¹³ We also look at the “donations for admissions” conundrum in universities, recent insider trading cases, and Supreme Court analysis of corruption to illuminate the dilemma in the FCPA’s “princeling” inquiry.

We conclude by suggesting where the line might be drawn between legal hiring and illegal corruption.

& Alexandra Stevenson, *JP Morgan May Face New Scrutiny in China Hiring Case*, N. Y. TIMES (Sept. 22, 2016), <http://www.nytimes.com/2016/09/23/business/dealbook/jp-morgan-may-face-new-scrutiny-in-china-hiring-case.html?emc+eta1&r=0> (discussing reported settlement with federal prosecutors).

⁹ See Eaglesham, Glazer & Levin, *supra* note 8.

¹⁰ 794 F.3d 729 (7th Cir. 2015).

¹¹ *Id.* at 734–38.

¹² *Id.* at 734.

¹³ *Id.* at 736 (“[T]he holding of *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), prevents resort to § 1346 to penalize political horse-trading. *Skilling* holds that only bribery and kickbacks violate § 1346. So unless political logrolling is a form of bribery, which it is not, § 1346 drops out.”).

II. FCPA IN BRIEF

Over the past few years, the U.S. government has significantly ramped up its enforcement of the FCPA, a law enacted in 1977 to address bribery in the global marketplace.¹⁴ The FCPA was a response to a national scandal regarding Lockheed paying bribes to a Japanese public official in order to secure a contract for the sale of Lockheed's jets.¹⁵ The statute prohibits the giving of "anything of value" to a foreign public official to assist "in obtaining or retaining business."¹⁶ It also requires publically traded companies to maintain accurate books and records regarding any payments that flow to public officials.¹⁷

The law, enforced by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), languished on the books for decades. Between 1980 and 2005, the DOJ brought only sixty-six cases,¹⁸ while the SEC brought twenty-three enforcement actions.¹⁹ Both entities drew much comment regarding their lax attitude in trying to police a generally accepted way of doing business worldwide.²⁰ Since 2005, however, the approach has shifted to one of proactive enforcement²¹ and industry-wide investigations.²² For example, marketing practices of the pharmaceutical industry²³ and the

¹⁴ Shearman & Sterling LLP, *Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, SHEARMAN & STERLING FCPA DIGEST (Jan. 2015), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf> (discussing enforcement actions).

¹⁵ Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934–35 (2012).

¹⁶ 15 U.S.C. § 78dd-1(a) (2012).

¹⁷ 15 U.S.C. § 78m(b)(2) (2012).

¹⁸ See DEPARTMENT OF JUSTICE, *Chronological List*, <https://www.justice.gov/criminal-fraud/chronological-list> (last updated Feb. 17, 2016) (listing all of the enforcement actions brought each year, including the years 1980 through 2005).

¹⁹ SEC Enforcement Actions: FCPA Cases, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Dec. 19, 2016).

²⁰ See generally Harvey L. Pitt, *The FCPA—Best Practices for a New Climate*, COMPLIANCE WEEK (Apr. 24, 2007), <https://www.complianceweek.com/news/news-article/the-fcpa—best-practices-for-a-new-climate#.Wf18CbGZO3U> ("Although enforcement of the anti-bribery provisions of the FCPA has been sporadic, the SEC and Department of Justice are bringing cases with renewed vigor and seeking the imposition of unprecedented fines."); see also Shearman & Sterling LLP, *supra* note 14, at 3.

²¹ See generally Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439 (2010).

²² 2010 marked the peak year of corporate enforcement actions under the FCPA. See Shearman & Sterling LLP, *supra* note 14, at 1.

²³ *Stay Tuned for More*, FCPA PROFESSOR (May 2, 2011), <http://fcpaprofessor.com/stay-tuned-for-more-2/>, reprinted in Mike Koehler, *FCPA Investigations of Pharmaceutical Industry Abound*, CORP. COMPLIANCE INSIGHTS (May 5, 2011), <http://corporatecomplianceinsights.com/fcpa-investigations-of-pharmaceutical-industry-abound/> (discussing the pharmaceutical industry experience with the FCPA).

aviation services industry²⁴ have been particularly scrutinized, resulting in headline-grabbing settlement agreements.²⁵ More recently, the DOJ and the SEC are examining the banking industry and its efforts to secure business overseas.²⁶ Some commentators note that one explanation for the recent popularity of FCPA enforcement actions is the financial gain to the government.²⁷

Further, over the past five years, target companies have begun to shift away from the long-standing strategy of entering into settlement agreements with the government rather than fighting FCPA charges.²⁸ Indeed, there have been a few notable instances in which the courts have dismissed FCPA prosecutions on the grounds of overreaching or abuse of discretion.

III. CURRENT CONTEXT OF DOJ AND SEC ENFORCEMENT

A. JP Morgan Chase & Co.

JP Morgan Chase & Co. has long been interested in business in China and has used different methods to promote this agenda. Reportedly, emails reviewed by the Wall Street Journal revealed a concern about anti-bribery compliance as early as 2006 while “pursuing recruits”²⁹ and contained the phrase “bribing for business.”³⁰ Further, it appears that anonymous allegations about improprieties at the bank raised concerns and were addressed in 2011.³¹ In addition, CEO James Dimon reportedly was cognizant of these anti-corruption measures.³²

SEC filings by JP Morgan reveal that in August of 2013, the government intensified its scrutiny of the bank’s “Sons and Daughters program,” which intentionally hired adult children of the ruling elite in China.³³ In an

²⁴ See SHEARMAN & STERLING LLP, *supra* note 14, at 18.

²⁵ See generally Vardi, *supra* note 5; Paul Barrett, *Pleas Deals Are Easy, Juries Are Hard*, BLOOMBERG (July 23, 2015, 3:49 PM), <http://www.bloomberg.com/news/articles/2015-07-23/u-s-prosecutors-keep-losing-trials-in-overseas-corruption-cases> (discussing the Government’s string of losses in FCPA cases); see also, e.g., Son, *supra* note 7.

²⁶ Son, *supra* note 7.

²⁷ “Total”ly Milking The FCPA Cash Cow?, FCPA PROFESSOR (June 3, 2013), <http://www.fcprofessor.com/totally-milking-the-fcpa-cash-cow>.

²⁸ This practice has drawn much commentary regarding the lack of judicial pronouncement and policing of the government in its FCPA decision-making. See Barrett, *supra* note 25.

²⁹ See Glazer et al., *supra* note 6.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* For another view of the offspring, see generally Christopher Beam, *Children of the Yuan Percent: Everyone Hates China’s Rich Kids*, BLOOMBERGBUSINESSWEEK (Sept. 30, 2015),

interview, Dimon said that

[I]t ha[d] been a “norm of business for years” for banks to hire “sons and daughters of companies” and to give them “proper jobs” without violating the law.
“But we got to figure out exactly how to create a safe harbor for that so you don’t . . . end up getting punished”³⁴

Indeed, an employee in the bank’s compliance section, Chris Charnock, suggested requiring more approvals, more training sessions and “more disclosures ‘to identify if any member of a deal has a personal/family relationship with the issuer/agency.’”³⁵

Of note in this regard is the chain of events involving the China Everbright Group and its subsidiary, China Everbright Bank, Co. In August 2013, the New York Times reported that JP Morgan had hired the son of China Everbright Group’s CEO and then was awarded “multiple coveted assignments.”³⁶ A few months later, the bank withdrew from the Everbright IPO, a “\$2 billion Hong Kong listing.”³⁷ While not clear whether the decision was made to avoid an appearance of impropriety, it is possible that it was influenced by anti-corruption measures adopted pursuant to internal recommendations.

There is some suggestion that the investigation has uncovered a “smoking gun”—a spreadsheet connecting hires to specific deals—but this has not been verified.³⁸ It has also been reported that four individuals connected to the program have been fired.³⁹ The investigation is ongoing. The bank reportedly shut down the infamous “Sons and Daughters” program

<http://www.bloomberg.com/news/features/2015-10-01/children-of-the-yuan-percent-everyone-hates-china-s-rich-kids> (discussing the “fuerdai” or the idle rich).

³⁴ Glazer et al., *supra* note 6 (Dimon was referring to sons and daughters of heads of companies and foreign officials when he stated “sons and daughters of companies”). This strategy is not new. Since the early 2000s, banks globally have been “hiring people whose connections can be professionally useful.” Michael Flaherty et al., *U.S. Probe of JPMorgan China Hiring Involves Ex-premier’s Daughter*: NYT, REUTERS (Nov. 14, 2013, 12:06 PM), <http://www.reuters.com/article/us-jpmorgan-china-hiring-idUSBRE9AD0ZW20131114>.

³⁵ Glazer et al., *supra* note 6.

³⁶ Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES (Aug. 17, 2013, 8:01 PM), http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/?_r=0.

³⁷ Elzio Barreto & Lawrence White, *JPMorgan Withdraws from \$2 Billion China Everbright Bank HK Listing: Source*, REUTERS (Nov. 19, 2013, 4:51 PM), <http://www.reuters.com/article/us-jpmorgan-everbright-idUSBRE9AI09620131119>; *see also* Glazer et al., *supra* note 6.

³⁸ Steven Perlberg, *A JP Morgan Spreadsheet Could Be the Smoking Gun in an Ongoing Antibribery Investigation*, BUS. INSIDER, (Aug. 29, 2013, 10:30 AM), <http://www.businessinsider.com/jp-morgans-antibribery-spreadsheet-2013-8>.

³⁹ *See* Eaglesham et al., *supra* note 8.

as it was previously constituted.⁴⁰ As of this date, there has been no settlement.

Interestingly, during the ongoing investigation into its “Sons and Daughters” program, JP Morgan hired a former prosecutor, Mark Mendelsohn, to write a white paper on their opposition to the government’s position.⁴¹ Seen as a key figure in FCPA interpretation at the DOJ,⁴² Mendelsohn describes himself as “the ‘architect and key enforcement official of the of DOJ’s modern Foreign Corrupt Practices Act (FCPA) enforcement program.’”⁴³ Bloggers have described him as the “prosecutor, judge, and jury” of FCPA settlements at the DOJ.⁴⁴

B. Bank of New York Mellon

In 2015, the SEC announced that Bank of New York Mellon was the first settlement in the princeling investigations.⁴⁵ The SEC’s published cease and desist order states that the investigations involved actions occurring between 2010 and 2011.⁴⁶ Officials X and Y, government officials connected to a Middle Eastern Sovereign Wealth Fund, sought internships for three individuals—one son of each official and a nephew of another. The internships were suspect for a number of reasons. First, although all were college graduates, none of the three qualified for the normal intern program because they did not have the required grade point average. Second, they were not enrolled in any graduate program, the normal requirement for college graduates. Third, the three were slated to return to the Middle East rather than be recruited for permanent positions. BNY hired the three without interviewing or meeting them and set up “bespoke internships.”⁴⁷ Emails stating “I want more money for this”⁴⁸ seem to suggest that in return for creating these three special six month internships, BNY executives expected more funds to be deposited in the bank. Two interns were placed in Boston and one in London for approximately six months; two of them were paid and

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Wall Street Firms Push Back Against FCPA Scrutiny*, FCPA PROFESSOR (May 5, 2015), <http://www.fcpaprofessor.com/wall-street-firms-push-back-against-fcpa-scrutiny>.

⁴³ *Id.* (quoting Mendelsohn’s law firm biography).

⁴⁴ *Id.*

⁴⁵ Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

⁴⁶ The Bank of New York Mellon Corp., Exchange Act Release No. 75720, 2015 WL 4911514 (Aug. 18, 2015), <https://www.sec.gov/litigation/admin/2015/34-75720.pdf> (order instituting cease-and-desist proceedings.).

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 5.

one was unpaid, although BNY paid costs such as legal and visa filing fees.⁴⁹ The interns were described in the filing as having frequent absences and not being hard-working; in short, they were “less than exemplary employees.”⁵⁰

The cease and desist order found that BNY was “corruptly providing valuable internships to relatives of foreign officials from Middle Eastern Sovereign Wealth Fund in order to assist BNY Mellon in retaining and obtaining business.”⁵¹ It also noted that BNY did not have internal controls to detect whether employees were bribing officials.⁵²

As part of BNY’s offer of settlement accepted by the SEC, the bank revamped their hiring procedures to address the issue of hiring officials’ relatives, including:

- Centralizing HR process for all hires;
- Adopting a Code of Conduct where every employee certifies that he or she does not use an ad hoc hiring process;
- Requiring every applicant to disclose whether he or “she or a close personal associate is or has recently been a government official”;
- An affirmative answer requires additional review by the bank’s anti- corruption office.⁵³

BNY settled with no admission, disgorged \$8.3 million, and agreed to pay \$1.5 million prejudgment interest and a \$5 million penalty—a fine totaling \$14.8 million.⁵⁴

During this time, BNY held \$55 billion in assets. Around the time of the discussions regarding the interns, the Middle Eastern Sovereign Wealth Fund transferred \$689,000 to BNY.⁵⁵ The evidence was replete with emails in which individuals made incriminating admissions such as: “Its [sic] silly things like this that help influence who ends up with more assets / retaining dominant position.”⁵⁶

Voluminous comments followed the announcement of the BNY settlement. In his FCPA Professor Blog, Michael Koehler noted that most of the banks will follow suit and adopt policies designed to monitor princeling hiring because they do not want to risk criminal prosecution.⁵⁷ Debevoise &

⁴⁹ *Id.* at 6–7.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 9.

⁵² *Id.* at 8–9.

⁵³ *Id.* at 9.

⁵⁴ *Id.*

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 6.

⁵⁷ *Wall Street Pushes Back Against FCPA Scrutiny*, FCPA PROFESSOR May 5, 2015), <http://www.fcprofessor.com/category/bank-of-new-york-mellon> (“When push comes to shove, these banks are not going to risk a criminal indictment to litigate a disputed legal issue.”).

Plimpton, an international business law firm, suggested that, given the fact that one was an unpaid internship, the SEC skirted the issue of “value” by stating “the internships were valuable work experience, and the requesting officials derived significant personal value in being able to confer this benefit on their family members.”⁵⁸

The disgorgement here seems disproportionate: BNY had not secured any business advantage directly linked to the interns, unless the \$689,000 deposit is a result of their status. Nonetheless, despite having already made changes to its hiring program, the bank opted to limit its legal fees and did not contest the penalty. Simply put, BNY did not try to argue that this activity was simply “relationship building,” which is not illegal.⁵⁹

C. Spaulding-Stephenson Colloquy

In the spring of 2015, respected law professors and FCPA bloggers Matthew Stephenson and Andrew Spaulding engaged in a thoughtful colloquy regarding whether or not “giving a benefit to a third party count[s] as bribing an official?”⁶⁰ Ultimately, Professor Spaulding—who had taken a position based on “experience” and “Opinion Releases” that it does not⁶¹—changed his mind. He acknowledged that both would agree that to employ a princeling would be improper “if there exists specific evidence that both offeror (the employer) and offeree (the official) believed the job had nonmonetary value for the official.”⁶² The rub, however, is that this standard is both difficult to define and even more difficult to implement. As Professor Stephenson acknowledges:

The FCPA, perhaps even more than other white-collar criminal

⁵⁸ Debevoise & Plimpton LLP, *The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials*, 7 FCPA UPDATE (2015), http://www.debevoise.com/~media/files/insights/publications/2015/08/fcpa_update_august_2015.pdf.

⁵⁹ Debevoise & Plimpton LLP, *Corrupt Intent, Relationship Building, and Quid Pro Quo Bribery: Recent Domestic Bribery Cases*, 3 FCPA UPDATE (2011), http://www.debevoise.com/~media/files/insights/publications/2011/09/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_sept_2011.pdf.

⁶⁰ Matthew Stephenson, *Can Giving a Benefit to a Third Party Count as Bribing a Foreign Official? Maybe Yes, Maybe No, or Maybe So?*, GLOBAL ANTICORRUPTION BLOG (Jan. 8, 2015), <http://globalanticorruptionblog.com/2015/01/08/can-giving-a-benefit-to-a-third-party-count-as-bribing-a-foreign-official-yes-no-or-maybe-so>. Professor Stephenson links four posts by Professor Spaulding in recounting their discussion. *Id.*

⁶¹ Andy Spaulding, *JP Morgan Revisited: What’s a Princeling Supposed to Do?*, FCPA BLOG (Jan. 7, 2015, 5:18AM), <http://www.fcpablog.com/blog/2015/1/7/jp-morgan-revisited-whats-a-princeling-supposed-to-do.html>.

⁶² Andy Spaulding, *Not Every Princeling Job is a ‘Thing of Value’*, FCPA BLOG (Jan. 12, 2015, 8:18AM), <http://www.fcpablog.com/blog/2015/1/12/not-every-princeling-job-is-a-thing-of-value.html>.

statutes, is extremely fact-sensitive—an inevitable consequence of the fact that corruption, by its nature, is hard to define in simple terms. Some conduct that is innocent, or at least lawful, when done in certain ways in certain settings, can become unlawful when done in other ways. . . .”⁶³

The professors were trying to avoid relying on a *quid pro quo* analysis, which lets too many cases slip by because the facts do not meet that requirement. However, with respect to the princeling analysis, it appears that the SEC is resorting to a vaguer “appearance of impropriety” standard, which makes doing business much more difficult.⁶⁴

IV. BROADER CONTEXT OF THE LAW

A. FCPA

1. FCPA Opinions

The Department of Justice has issued sixty Opinion Releases on the subject of the FCPA.⁶⁵ Thirteen are relevant to the issue of giving something of value to a foreign official.⁶⁶ While the amount of money involved is not dispositive, in certain situations the DOJ appears to overlook transactions that could be seen as something of value in the interest of humanitarian concerns.

The following catalogues the thirteen cases chronologically:⁶⁷

1. 80-01: A law firm wanted to give \$10,000 a year to two adopted children of an elderly honorary official. The actual parents were living government employees but described as having minimal involvement with the children. The request did not state how much total money would be transferred. The DOJ found no FCPA violation.
2. 82-04: The company hired an agent who was a brother of a foreign official in the very department where a generator sale was made. The company had the agent sign a form declaring he would not pay a commission to third party. The DOJ found no FCPA violation.

⁶³ Stephenson, *supra* note 60.

⁶⁴ See Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html> (discussing how the Republican proposal to require *mens rea* in crimes would aid white collar criminal defendants as well as the poor and the minorities, who are often tagged with possession of a gravity knife that opens quickly without knowing it is a criminal offense).

⁶⁵ *Opinion Procedure Releases*, JUSTICE.GOV (Updated June 17, 2015), <http://www.justice.gov/criminal-fraud/opinion-procedure-releases>.

⁶⁶ *Id.*

⁶⁷ *Id.*

3. 84-01: A firm wanted to hire a marketing representative who was related to a head of state and who managed “certain of the head’s business affairs and investments.” The potential hire had a legitimate track record and signed statements agreeing to comply with the FCPA. The DOJ found no FCPA violation.
4. 95-03: A U.S. company wanted to form a joint venture with a partner who was a relative of the leader of the country. The relative was a “prominent business person” and also was “a foreign government official.” They had the foreign official sign the terms, which included an assertion that his “duties do not involve any decisions to award business in connection with government projects . . . [.]” and if his duties changed, the official had a duty to notify the requesting company. The DOJ found no FCPA violation.
5. 2000-01: A U.S. law firm had a foreign partner who was appointed as a foreign government official. The firm wanted to continue certain benefits like insurance and guarantee of return to full partnership for the individual. The firm could not represent clients before the fellow’s agency, would have no business in country x and the official would recuse himself from any matters involving the firm. The DOJ found no FCPA violation.
6. 2001-02: A U.S. company and a foreign company formed a consortium. They engaged in business with a government senior official in education. All agreed to abide by the FCPA and the official recused himself from any business involving the company before the agency. The DOJ found no FCPA violation.
7. 2004-01 A law firm and the Foreign Ministry (China) wanted to sponsor a comparative law seminar held in Beijing. The firm said it had no business before officials. The DOJ found no FCPA violation.
8. 2004-03: Twelve officials from a foreign ministry and a U.S. law firm wanted to sponsor a meeting in the U.S to discuss law and regulations. The officials planned to stop in three cities without spouses accompanying them. The DOJ found no FCPA violation.
9. 2004-04: A U.S. company wanted to co-sponsor a nine day study tour for officials on “drafting law on mutual insurance” (the requestor had expertise and conducted business but did not plan to organize a company in that country, however it did plan to apply for a business license eventually). The company acknowledged that “under current practice . . . [it] must demonstrate that it has been supportive of the country’s socio-economic needs, proactive in the development of the insurance industry, and active in

- promoting foreign investment.” The DOJ found no FCPA violation.
10. 2006-01: A company wanted to contribute \$25,000 to a regional customs bureau in the Ministry of Finance of an African country to help buttress enforcement of anticounterfeit laws. The DOJ found no FCPA violation.
 11. 10-01: A company had a U.S. government contract to work in a foreign country. It wanted to hire a foreign official and he or she would be director of the facility. The foreign official then had a different job. The DOJ found no FCPA violation.
 12. 12-01: The requestor wanted to represent a foreign country as a lobbyist and wanted to hire a consultant who was a member of the royal family to advise him. The opinion quoted the *Liebo* case in a footnote and left open the possibility of action if after the fact there was improper influence. The DOJ found no FCPA violation.
 13. 13-01: A partner in a U.S. law firm represented country A and had a personal friend, a foreign official, in the Office of the Attorney General. The partner wanted to pay personally the medical expenses of a daughter of the foreign official (\$20,500). He would pay the facility directly. Although the law firm would be hired on one new matter, the firm claimed no impact on future business. The opinion quoted *Liebo*, and found no corrupt intent. The DOJ found no FCPA violation.

These cases could be grouped in the following way. Three deal with study tours (2004-1, 2004-03, and 2004-04) and the direct connection to future business seemed minimal. However, despite there being no immediate business outcome, these instances could be “relationship building,” a practice that, like the hiring of relatives, builds good will over the long term. Nonetheless, the DOJ seemed comfortable because there was no obvious *quid pro quo*; oddly, it did not impose a mechanism to determine whether in fact the study tours led to business in the next two to three years. However, is it “of value” under the statute to build good will? The DOJ did not deem it necessary to make this inquiry. One case (2006-01) deals with a contribution not for a study tour but to assist in a country’s education about counterfeit trafficking—an issue that benefits U.S. businesses as well as domestic and other international businesses.

Three Opinion Releases deal with hiring individuals who actually are government officials (2001-1, 2001-02, 2010-01). Again, because there did not appear to be any current deal on the table, the government acquiesced to the arrangement. One case deals with a company making a contribution to the government to help with an anticounterfeiting measure (2006-01). Arguably, this was acceptable because the measure could not only help the

company, but also serve the public's interest.

Two cases (1980-01, 2013-01) involve payments for children of government officials. Although these are similar to the princelings in that there is a benefit of possible value to a public official, the 2013 case evidenced a humanitarian concern as the payment was for medical expenses. Nonetheless, it seems obvious that the favor curried by such largesse would be long remembered—perhaps even more than an internship.

Four Opinion Releases (1982-04, 1984-01, 1995-03, 2012-01) involve relatives of foreign officials. These track closely to the princeling problem as well. The prospective employer simply asked individuals to attest to compliance with the FCPA and saw this as resolving any impropriety. The DOJ apparently concurred. It is hard to see why these were approved when the BNY case had a different outcome. Given the chilling effect of the current investigations and the BNY settlement, relatives of foreign officials will have more difficulty getting work in international business unless the government offers more guidance. There appears to be a great deal of government flexibility in the Opinion Releases which may be misleading in the current, more draconian climate.

While Opinion Releases are not official precedents, they do provide guidance upon which business should be able to rely; presumably, major departures from decision trends should be explained by the DOJ. This is why there needs to be additional clarity from the government.

2. FCPA Cases

There is a dearth of cases litigated under the FCPA. However, from the few that exist, we can discern some guiding principles that perhaps inform the princeling debate.

a. *United States v. Liebo* (1991)

Richard Liebo served as the vice president of NAPCO, which sold military equipment internationally.⁶⁸ Liebo met Captain Tiemogo of the Niger Air Force and offered to make “some gestures” to him if Tiemogo was able to get the contract approved. Liebo met Tiemogo's cousin Barke in D.C. and offered (1) to pay for Barke's honeymoon flight to the amount of \$2,028 and (2) to create an account of \$30,000 for Barke in the name of E. Dave (Barke's girlfriend).⁶⁹

⁶⁸ *United States v. Liebo*, 923 F.2d 1308, 1309 (8th Cir. 1991).

⁶⁹ *Id.* at 1309–10.

NAPCO had contracts for airplane parts totaling over \$2,500,000 from this venture, but Liebo's conviction was limited to violating the FCPA's bribery provisions—for having purchased the airplane ticket.⁷⁰ Although he was able to win a new trial based upon newly discovered evidence,⁷¹ Liebo was again convicted, this time on the charges of aiding and abetting violations of the antibribery provisions of the FCPA and making a false statement to the Defense Security Assistance Agency.⁷² Liebo received an eighteen-month suspended sentence and was ordered to perform community service.⁷³ Barke testified that he believed this ticket was a personal gift, an unsuccessful attempt to blunt the allegation of corrupt intent.⁷⁴

b. SEC: *In the Matter of Schering-Plough* (2004)

In 2004, the SEC filed a complaint against Schering-Plough Corporation (S-P) for FCPA violations related to S-P's "charitable" donations.⁷⁵ The SEC also instituted public administrative proceedings against S-P.⁷⁶ Schering-Plough Poland, a branch office of the subsidiary of Schering-Plough, was alleged to have made payments totaling 315,800 zlotys (approximately \$76,000) to a Polish charity, Chudow Castle Foundation.⁷⁷ The founder and president of the Foundation was also the director of the Silesian Health Fund, one of sixteen government health authorities.⁷⁸ "The Silesian Health Fund was a government body that, among other things, provided money for the purchase of pharmaceutical products and influenced the purchase of those products by other entities, such as hospitals, through the allocation of health fund resources."⁷⁹ S-P Poland hoped to have a share of that business.

⁷⁰ *Id.* at 1310.

⁷¹ *Id.* at 1313–14.

⁷² *United States v. Liebo*, No. 4-89-76 (D. Minn. Jan. 28, 1992), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/22/1992-01-31-liebor-judgment.pdf>.

⁷³ *Id.* But see conflicting information from *Did Richard Liedo [sic] Win or Lose?*, FCPA PROFESSOR (Dec. 23, 2013), <http://www.fcprofessor.com/did-richard-liedo-win-or-lose> ("In the re-trial, Liebo was convicted of aiding and abetting FCPA anti-bribery violations and making a false statement to the DSAA. He was then sentenced to three years' probation, two months' home detention, and 400 hours of community service.").

⁷⁴ *Liebo*, 923 F.2d at 1310.

⁷⁵ SEC v. Schering-Plough Corp., Litigation Release No. 18740 (June 9, 2004), <https://www.sec.gov/litigation/litreleases/lr18740.htm>.

⁷⁶ *In re Schering-Plough Corp.*, Exchange Act Release No. 49838 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm>.

⁷⁷ Complaint, at 1, SEC v. Schering-Plough Corp., No. 1:04CV00945 (D.D.C. June 9, 2004), <https://www.sec.gov/litigation/complaints/comp18740.pdf>. The Chudow Castle Foundation was a charitable organization developed "to restore castles and other historic sites in the Silesian region of Poland." *Id.* at 2.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.*

Between 1999 and 2002, S-P made thirteen payments to the Foundation, all below the manager's HPP purchasing authority thus the expenditures would not require additional authorization.⁸⁰ The S-P manager who made the payments to the Foundation further tried to conceal the nature of the transactions by providing false medical justifications for the payments.⁸¹ The SEC focused on books and records violations, not antibribery provisions.⁸² Rather than fighting the SEC, Schering-Plough agreed to pay a \$500,000 civil penalty and to hire an independent consultant to study their processes, make recommendations, and then implement them.⁸³ No time limits appear in the settlement.⁸⁴

The Order does not specify what S-P received in return for the \$76,000 donation. Accordingly, just as in some of the princeling cases, there is no clearly identified *quid pro quo* and yet the parties agreed to the settlement.⁸⁵ Although this case involves a charitable contribution similar to several of the Opinion Releases, it is distinguishable because there were thirteen payments structured to fall within the manager's authority without additional authorization. Further, the founder of the charity held a position with power over what was directly in line with what SP needed—purchase of pharmaceuticals. Thus, the transaction appeared corrupt. However, no individuals were charged in this matter.

⁸⁰ *Id.* at 2–3. The largest payment was 40,000 zlotys (\$10,067), while the lowest payment was 3,000 zlotys (\$777). *Id.* at 3.

⁸¹ *Id.* at 3. The money given to the Foundation supposedly went to finance research of various diseases, including viral hepatitis, lung cancer, skin cancer, coronary disease, and infectious diseases of the liver. *Id.*

⁸² *Id.* at 5 (alleging violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act). The Exchange Act requires public companies to maintain records “which, in reasonable detail, accurately and fairly reflect the transactions” of the company. 15 U.S.C. § 78m(b)(2)(A) (2012). The Act further mandates that such companies have internal controls “sufficient to provide reasonable assurances” that transactions are properly executed and recorded. 15 U.S.C. § 78m(b)(2)(B) (2012).

⁸³ SEC v. Schering-Plough Corp., Litigation Release No. 18740 (June 9, 2004), <https://www.sec.gov/litigation/litreleases/lr18740.htm>; *In re* Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm>.

⁸⁴ *In re* Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm>.

⁸⁵ Pursuant to the settlement agreements, Schering-Plough did not admit or deny the allegations in the SEC's complaint, nor did Schering-Plough admit or deny the SEC's findings that Schering-Plough violated the record-keeping provisions of the Exchange Act. SEC v. Schering-Plough Corp., Litigation Release No. 18740 (June 9, 2004), <https://www.sec.gov/litigation/litreleases/lr18740.htm>; *In re* Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm>.

c. *United States v. Kay*

In 2007, the Fifth Circuit affirmed the convictions of David Kay and Douglas Murphy, who worked for a U.S. company that exported rice to Haiti.⁸⁶ Kay and Murphy “paid Haitian officials to reduce duties and taxes on their rice.”⁸⁷ The irony is that in cooperating on a civil matter, Kay informed outside counsel that he and Murphy had taken these actions.⁸⁸ The lawyers then told the company directors, who informed the government, which started this criminal investigation.⁸⁹ Kay received a thirty-seven month prison sentence followed by two years of supervised release and a fine of \$1,300.⁹⁰ Murphy received a sixty-three month sentence followed by three years of supervised release and a fine of \$1,400.⁹¹

The court rejected the argument that a payment made to reduce taxes was in the nature of a permissible facilitation fee. Despite general consensus that this is a common practice in Haiti and these men were singled out, the convictions were affirmed.⁹²

d. *United States v. Esquenazi*

In *Esquenazi*, the Eleventh Circuit defined *instrumentality* under the FCPA as an “entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”⁹³ Joel Esquenazi and Carlos Rodriguez, owners of Terra, a business incorporated in Florida, bought phone time from a Haitian company, Telecommunications D’Haiti S.A.M. Teleco. They sold the time to U.S. customers for a profit. Teleco handled all phone service for Haiti, but then was privatized. Officials of Teleco advised the two principals that, in return for a private payment of

⁸⁶ *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), *reh’g denied*, 513 F.3d 461 (5th Cir. 2008), *cert. denied*, 555 U.S. 813 (2008).

⁸⁷ *Id.* at 439.

⁸⁸ *Id.*

⁸⁹ *Id.*; see also *Deposition Prep That Lead [sic] to One of the Most Notable FCPA Cases*, FCPA PROFESSOR (Feb. 19, 2013), <http://www.fcprofessor.com/deposition-prep-that-lead-to-one-of-the-most-notable-fcpa-cases>.

⁹⁰ *United States v. Kay*, No. 4:01CR00914-001 (S.D. Tex. July 6, 2005), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-01-05kay-judgment.pdf>.

⁹¹ *United States v. Murphy*, No. 4:01CR00914-002 (S.D. Tex. July 6, 2005), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/01-01-05kaym-judgment.pdf>.

⁹² *Kay*, 513 F.3d at 440–42.

⁹³ *United States v. Esquenazi*, 752 F.3d 912, 917 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 293 (2014). See also *id.* at 920–27 for Judge Martin’s thorough discussion of the definition of “instrumentality.” For more information on the *Esquenazi* case, see generally *United States v. Esquenazi: Eleventh Circuit Defines “Government Instrumentality” Under the FCPA*, 128 HARV. L. REV. 1500 (2015).

about \$800,000, their debt to Teleco would be reduced by \$2,000,000. In 2009, Esquenazi and Rodriguez were indicted for violating the FCPA antibribery provisions, conspiracy, and money laundering.⁹⁴ In 2011, Esquenazi and Rodriguez were convicted and sentenced to fifteen and seven years respectively.⁹⁵

The appeal focused on the fact that the Haitian individuals Terra dealt with were not foreign officials connected to an “instrumentality.”⁹⁶ According to the defendants, Teleco was not an instrumentality of the Haitian government, thus a required element of an FCPA violation was missing.⁹⁷ However, the court considered the enormity of the bribe, the corrupt intent, and the history of Teleco (in that it performed a governmental function).⁹⁸ The Eleventh Circuit was willing to support the clear finding of the lower court and the strong message of fifteen years incarceration, the most severe penalty in FCPA history.⁹⁹

Following the decision, Assistant Attorney General Lanny Breuer heralded the harsh punishment as a warning to all businesses operating in foreign countries:

This sentence – the longest sentence ever imposed in an FCPA case – is a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequences A company’s profits should be driven by the quality of its goods and services, and not by its ability and willingness to pay bribes to corrupt officials to get business. As today’s sentence shows, we will continue to hold accountable individuals and companies who engage in such corruption.¹⁰⁰

U.S. Attorney Wilfredo Ferrer seconded Breuer’s remarks, stating,

⁹⁴ *Esquenazi*, 752 F.3d at 917.

⁹⁵ *Id.* at 920 (“With a criminal history category I, Mr. Esquenazi’s guideline range was 292 to 365 months’ imprisonment. The district court ultimately imposed a below-guideline sentence of 180 months’ imprisonment. Mr. Rodriguez, with a guideline range of 151 to 188 months’ imprisonment, received 84 months.”).

⁹⁶ *Id.* at 927–29.

⁹⁷ *Id.*

⁹⁸ *Id.* at 930–32, 936–37.

⁹⁹ See Miller Chevalier, *FCPA Winter Review 2012*, <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=71404#haiti> (“The 180-month prison term imposed on Esquenazi is the most severe sentence ever imposed in an FCPA prosecution, followed by the 87-month sentence imposed on Charles Edward Jumet and the 84-month sentence imposed on Rodriguez.”) (internal citations omitted).

¹⁰⁰ Press Release, Dep’t of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), <http://www.justice.gov/opa/pr/executive-sentenced-15-years-prison-scheme-bribe-officials-state-owned-telecommunications>.

“Today’s long prison sentences confirm the serious consequences of ignoring corporate ethics when doing business abroad The FCPA ensures that American businesses are not up for sale.”¹⁰¹

The *Esquenazi* and *Kay* cases show that the harshest punishments are reserved for conduct that involves relatively large sums paid as bribes rather than a more modest gesture or one aimed at least in part for the public good as in the *Liebo* or *Schering* cases respectively.

3. FCPA Resource Guide 2012

The Resource Guide has a special section addressing the meaning of “anything of value.”¹⁰² The text focuses on “improper benefit,” yet that is not in the statute.¹⁰³ It mentions “consulting fees,” “commissions,” and “expensive gifts” and notes that cash is a red flag—as in cash in the trunk of a car.¹⁰⁴ Yet in some countries, cash is a method of payment due to problems with the banking system and related issues; using cash does not automatically mean that an entity is corrupt. The Guide makes reference to the *Liebo* case as an example of payments or gifts to third parties that can be in contravention of the statute.¹⁰⁵ Also, while charitable contributions are permitted, they cannot be a front for nefarious activity, such as bribery.¹⁰⁶ Detailed safeguards are outlined by example.¹⁰⁷

The Guide also lists “Five Questions to Consider When Making Charitable Payments in a Foreign Country.”¹⁰⁸ The last question is particularly relevant: “Is the payment conditioned on receiving business or other benefits?”¹⁰⁹ This suggests finding a *quid pro quo* and yet the *Schering-Plough* case did not have a demonstrated *quid pro quo*. There, a settlement ended the matter, just as it did in BNY case. The government’s standard for reaching a settlement seems to be an unstated “appearance of impropriety” standard rather than the more rigorous *quid pro quo* standard. While one could argue that the weaker standard facilitates more efficient use of government resources in negotiating settlements and only ensnares the guilty, one could also argue that it over-criminalizes standard business relationship-building behavior.

¹⁰¹ *Id.*

¹⁰² RESOURCE GUIDE, *supra* note 3, at 14–19.

¹⁰³ *Id.* at 14–15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 16 nn.100–01.

¹⁰⁶ *Id.* at 17, 19 (referencing the *Schering-Plough* case).

¹⁰⁷ *Id.* at 19.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

B. Cases in Other Contexts: Parallels to FCPA Enforcement?

The message found on a billboard in Springfield, MA makes no distinction between international, domestic, private business, and political corruption:

HELP THE FBI
1-844-NO BRIBE
STOP CORRUPTION NOW!
Call or go to tips.fbi.gov to report¹¹⁰

This unusual billboard reminds us that corruption is not the exclusive domain of developing countries. The United States has its share of it in various forms. We will consider corruption in non-FCPA contexts to search for applicable concepts. Of course, legal issues persist regarding what constitutes a crime under the various statutes outside the FCPA context. This ambiguity and its current resolution could be helpful in sorting out the ambiguity in the FCPA about what constitutes offering something of value to a foreign official.¹¹¹

1. *Skilling v. United States and the Honest Services Fraud Statute*

Jeffrey Skilling, convicted for criminally fraudulent activities associated with Enron, challenged the honest services fraud statute,¹¹² which provided a pillar of his conviction, as being unconstitutionally vague.¹¹³ In order to understand the parallel between the FCPA and § 1346, one must appreciate the historical context of the latter law.

For many years, the DOJ found judicial support for a broad interpretation of the mail and wire statutes, which were enacted to address the myriad schemes that rely on such communications to accomplish a fraudulent end.¹¹⁴ A line of cases extended the “any scheme or artifice to defraud” language of those statutes to apply to public officials who failed to

¹¹⁰ See Stephanie Barry, *As Casino Construction Nears, FBI Anti-Corruption Billboards Pop Up in Springfield's Skyline*, MASSLIVE (Apr. 8, 2015), http://www.masslive.com/news/index.ssf/2015/04/fbi_anti-corruption_billboard.html.

¹¹¹ Other scholars have begun to consider this issue. See, e.g., Jennifer Rodgers & Jacob Watkins, *Guest Post: The Blagojevich Case and the Line Between Corruption and Horse-Trading*, GLOBAL ANTICORRUPTION BLOG (Aug. 18, 2015), <http://globalanticorruptionblog.com/2015/08/18/guest-post-the-blagojevich-case-and-the-line-between-corruption-and-horse-trading>.

¹¹² 18 U.S.C. § 1346 (2012).

¹¹³ *Skilling v. United States*, 130 S. Ct. 2896 (2011).

¹¹⁴ See Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption is “So Yesterday”: Restoring Honest Services Fraud After Skilling and Black*, 12 U.C. DAVIS BUS. L.J. 1, 4–5 nn.110–15 and accompanying text (2012).

honor their obligations of loyalty and honest services to the public.¹¹⁵ It did not take much imagination for this same notion to be judicially interpreted to include white collar crimes. In short order, the honest services fraud prosecutions became a big weapon in the government's enforcement arsenal.¹¹⁶ And yet, the cases lent little clarity as to what this intangible right to both public and private "honest services" actually meant.

In 1987, the Supreme Court chose to interpret the mail and wire fraud statutes more narrowly, "[r]ather than . . . in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials"¹¹⁷ Limiting the statute to tangible property rights, the Court invited Congress to "speak more clearly" if it wanted to further extend the statute's reach.¹¹⁸ Rather than so doing, Congress "replaced an ambiguously interpreted law with a patently vague statute,"¹¹⁹ one that criminalized "a scheme or artifice to defraud another of the intangible right to honest services."¹²⁰

By the time Jeffrey Skilling petitioned the Supreme Court to hear his arguments, the federal Circuit Courts of Appeal had developed very different—and often inconsistent—standards to determine the existence of honest services fraud in the public sector and had virtually accepted the notion that a failure to honor fiduciary duties amounted to criminal corruption in the private sector.¹²¹ The outcome in *Skilling* was predictable, especially given Justice Scalia's strong dissent from a denial of certiorari in a case two years earlier:

Though it consists of only 28 words, the statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior. . . . [T]his expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or

¹¹⁵ *Id.* at 5, nn.16–17 and accompanying text.

¹¹⁶ Referring to the mail and wire fraud statutes, one prosecutor noted, "[They were] our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love." *Id.* at 5 (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980)).

¹¹⁷ *McNally v. United States*, 483 U.S. 350, 360 (1987).

¹¹⁸ *Id.* ("If Congress desires to go further, it must speak more clearly than it has.").

¹¹⁹ Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2010 CATO SUP. CT. REV. 201, 213 (2010).

¹²⁰ 18 U.S.C.A. § 1346 (recognized as unconstitutional in 2012) ("For the purposes of [mail and wire fraud], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

¹²¹ See Cava & Stewart, *supra* note 114, at 7–9 (discussing how the different federal circuit courts interpreted Section 1346 prior to *Skilling*).

ethically questionable conduct.¹²²

Unwilling to find the entire statute unconstitutional, the Court simply limited it to criminalize only the tangible conduct of paying bribes or receiving kickbacks for both public and private actors.¹²³ Consequently, although there is no doubt that Skilling engaged in all manner of deceptive behavior during his tenure at Enron, “the Court found no evidence that he personally engaged in bribery or received kickbacks as part of his business dealings.”¹²⁴ In June of 2013, a federal district court judge approved a deal where Skilling agreed to forfeit fourteen million dollars and to end his ongoing appeals in exchange for the government’s approval of a fourteen-year sentence to include the six already served, rather than the twenty-four-year term he was to serve.¹²⁵

2. *Bribery and Public Corruption*

The required focus on specific personal misconduct outlined by the Supreme Court in *Skilling* possibly provides a parallel when considering the “value” involved in hiring an educated, skilled scion of a powerful family in a developing nation. No doubt enforcement actions in the domestic environment of corruption became so expansive that the Supreme Court found it necessary to set much more concrete limits on the notion of “honest services.” We wonder: Is the prosecutorial climate of the FCPA becoming equally broad? Is it possible to argue that the paucity of judicial scrutiny of government enforcement actions under the FCPA has set up a shadowy constitutional conundrum rooted in vagueness? The recent decision by the Seventh Circuit overturning some of the convictions offers a platform to make a parallel argument in the princelings problem.

a. *United States v. Blagojevich* and Political Favors

In 2011, Rod Blagojevich, the former Governor of Illinois, was convicted on federal corruption charges for his attempts to sell or trade a

¹²² *Sorich v. United States*, 555 U.S. 1308, 1309–10 (2009) (Scalia, J., dissenting from denial of *cert.*).

¹²³ *Skilling v. United States*, 130 S. Ct. 2896, 2931–33 (2011). Some commentators note that requiring such tangible evidence hampers the government’s ability to prosecute corruption. Cava & Stewart, *supra* note 114 at 21 (“The events of the past decade have made glaringly clear that the civil justice and administrative regulatory systems cannot effectively harness the imaginations of determined fraudsters.”).

¹²⁴ Cava & Stewart, *supra* note 114, at 3.

¹²⁵ Laurel Brubaker Calkins, *Enron’s Skilling to Leave Prison in 2017 as Sentence Cut*, BLOOMBERGBUSINESS (June 22, 2013), <http://www.bloomberg.com/news/articles/2013-06-21/enron-s-skilling-sentence-reduced-to-14-years-by-judge>.

vacant seat on the U.S. Senate.¹²⁶ He was sentenced to fourteen years in prison.¹²⁷ On appeal, the Seventh Circuit upheld the former Governor's conviction for corruption, finding his argument that there was insufficient evidence to be "frivolous."¹²⁸ Nonetheless, the court dismissed five of the seventeen counts on the grounds that they were based on a single jury instruction regarding three different proposals that were, in the court's view, substantively different.¹²⁹

Two of the proposals in the instruction described legally corrupt behavior: (1) Blagojevich's offer to appoint Valerie Jarrett to the Senate seat vacated by the newly elected President Barack Obama in exchange for the President facilitating a private sector job and (2) his request for funds he could control as the CEO of a new nonprofit.¹³⁰ But the court saw the third proposal, a request to be appointed to the new President's Cabinet, as legally different: "a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment."¹³¹

In its further discussion of this distinction, the court offers some examples.

[Extortion involves] a quid pro quo: a public official performs an official act (or promises to do so) in exchange for a private benefit, such as money. A political logroll, by contrast, is the swap of one official act for another. Representative A agrees with Representative B to vote for milk price supports, if B agrees to vote for tighter controls on air pollution. A President appoints C as an ambassador, which Senator D asked the President to do, in exchange for D's promise to vote to confirm E as a member of the National Labor Relations Board. *Governance would hardly be possible without these accommodations, which allow each public official to achieve more than his principal objective while surrendering something about which he cares less, but the other politician cares more strongly. . . . It would be more than a little surprising to Members of Congress if the judiciary found in the Hobbs Act, or the mail fraud statute, a rule making everyday politics criminal.*¹³²

The opinion examines the three statutes under which Blagojevich was

¹²⁶ See Monica Davey, *Blagojevich Sentenced to 14 Years in Prison*, N.Y. TIMES (Dec. 7, 2011), <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html>. The seat became vacant when President Obama moved from the Senate to the Presidency. *Id.*

¹²⁷ *Id.*

¹²⁸ United States v. Blagojevich, 794 F.3d 729, 734 (7th Cir. 2015), petition for cert. filed (Nov. 17, 2015) (No. 15-664).

¹²⁹ *Id.* at 734–35.

¹³⁰ *Id.* at 733.

¹³¹ *Id.* at 734.

¹³² *Id.* at 735 (emphasis added) (citations omitted).

convicted and discusses the possibility of permissible, if perhaps unsavory, “political horse-trading” that attaches to each.¹³³ It specifically excludes such dealings from the reach of the honest services statute after *Skilling*, noting that a public official appointing someone to a public commission as a political favor while saying that the appointee is “the best person for the job” is simply not a criminal fraud.¹³⁴

One must note here that the honest services statute applies not only to public officials, but also to private actors who deprive their employers of their honest services by taking bribes or kickbacks.¹³⁵ A close analysis of the princeling situation does not immediately reveal any personal gain for the individuals who are offering the internship or the employment opportunity to a qualified family member of a public official abroad. While the princeling may not be “the best person for the job,” it is not necessarily proper to criminalize such decision-making without proof of the improper result of obtaining or retaining business under the FCPA. While one might think certain people are really buying influence and access in a manner that may seem unfair or wrong, a vague and imprecise law—one that sweeps too

¹³³ Two other cases involve criminality of public officials in another context. Two recent trials illustrate the endemic and widespread corruption in our political system. In December 2015, former New York Senate Majority Leader Dean Skelos and his son were convicted of bribery, extortion, and conspiracy. Shortly before, New York Assembly Speaker Sheldon Silver was convicted for accepting bribes and kickbacks of over four million dollars. Yet the line between improper and acceptable behavior can be confusing. These public officials were convicted of illegal activity, yet it is currently legal for state contractors to donate to Super PACs of governors running for President with whom they have contracts. New York is not alone in facing these problems, but states have chosen different approaches to rooting out corruption. These convictions will no doubt be appealed, but the connection between the repetitious extraction of money over and over in large amounts from members of the private sector with business before the legislature will likely be sufficient to sustain the verdict. While the *quid pro quo* may not have been explicit, it was well understood by the parties and supported by the evidence. See William K. Rashbaum & Susanne Craig, *Dean Skelos, Ex-New York Senate Leader, and His Son are Convicted of Corruption*, N.Y. TIMES (Dec. 11, 2013), http://www.nytimes.com/2015/12/12/nyregion/dean-skelos-adam-skelos-guilty-corruption-trial.html?_r=0; Benjamin Weiser & Susanne Craig, *Sheldon Silver, Ex-New York Assembly Speaker, is Found Guilty on All Counts*, N.Y. TIMES (Nov. 30, 2015), <http://www.nytimes.com/2015/12/01/nyregion/sheldon-silver-guilty-corruption-trial.html>; Heather Haddon & Rebecca Ballhaus, *State Contractors Aid Governors' Campaigns*, WALL ST. J. (Aug. 25, 2015), http://www.wsj.com/article_email/state-contractors-aid-governors-campaigns-1440547616-IMyQjAxMTIMyQjAxMTI1NDA5MjYwNzI2Wj. For information on how each state approaches this problem of dealing with corruption, the Center for the Advancement of Public Integrity at Columbia Law School maintains an interactive map and information detailing specific initiatives in each state. See *U.S. Anti-Corruption Oversight: A State-by-State Survey*, COLUMBIA LAW SCHOOL, <http://web.law.columbia.edu/capi-map> (last visited Dec. 19, 2016).

¹³⁴ 794 F.3d at 736.

¹³⁵ See *Skilling v. United States*, 130 S. Ct. 2896, 2934 n.46 (2011) (“Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346’s application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.”) (emphasis added).

broadly, penalizing talented individuals who happen to be related to public officials—is not the answer.

The Supreme Court denied Certiorari and Blagojevich was resentenced based on the surviving convictions. However, Judge Zabel reaffirmed the fourteen-year sentence.¹³⁶ The prosecutor noted that Blagojevich had not acknowledged his wrongdoing nor was he rehabilitated.¹³⁷

b. Boston Probation Scandal: John O'Brien and Political Favors

John O'Brien, the politically well-connected head of the Boston Probation Department, ran an agency that depended on the Massachusetts legislature for funding. A long and interesting history characterized the relationship between the legislature, the judiciary¹³⁸—also dependent on funding from the legislature—and the Probation Department.

O'Brien and two codefendants, Elizabeth Tavares and William Burke—both high-level administrators in the Department—were indicted on mail fraud, racketeering, and violations of a gratuity statute.¹³⁹ Prosecutors alleged that a fraudulent hiring scheme took place between 2000 and 2010.¹⁴⁰ After deliberating for seven days, the jury convicted these defendants on charges of racketeering, conspiracy, and four counts of mail fraud. It found they not only abused their positions to engage in improper hiring practices, but also created “a fraudulent system to make it look as though they were following proper hiring protocol.”¹⁴¹ O'Brien was sentenced to eighteen months in prison and fined \$25,000.¹⁴² Tavares was sentenced to three months in jail.¹⁴³ Burke received probation for one year.¹⁴⁴

At the sentencing proceedings, the defense reiterated the concept of

¹³⁶ Jason Meisner & Patrick M. O'Connell, *Blagojevich Faces 8 Years More in Prison After Judge Sticks to 14-Year Term*, CHIC. TRIB. (Aug. 9, 2016), <http://www.chicagotribune.com/news/ct-rod-bлагоjevich-appeal-20160809-story.html>.

¹³⁷ *Id.*

¹³⁸ Boston Globe Spotlight Team, *Patronage in the Probation Department*, <http://www.boston.com/news/local/massachusetts/specials/spotlight/probation/index/> (last visited Dec. 19, 2016).

¹³⁹ Milton J. Valencia, *3 Guilty in Probation Corruption Case*, BOS. GLOBE (July 24, 2014), <http://www.bostonglobe.com/metro/2014/07/24/jurors-deliberating-for-seventh-day-corruption-trial-probation-chief-john-brien/GVxm7KQARiid2cxFyKxuXP/story.html>.

¹⁴⁰ Indictment, *United States v. O'Brien*, No. 4:12-cr-40026-FDS (D. Mass. Mar. 22, 2012); *see also* Andrea Estes & Scott Allen, *17 Bribery Counts for Ex-Head of Probation O'Brien*, BOS. GLOBE (Apr. 25, 2013), <http://www.bostonglobe.com/metro/2013/04/24/probation/z2EzpQvta5FFjHiAurEITP/story.html>.

¹⁴¹ Milton J. Valencia, *Ex-Probation Chief Sentenced as System Decried*, BOS. GLOBE (Nov. 13, 2014), <https://www.bostonglobe.com/metro/2014/11/13/brien-sentenced-months/uHeOQXxxGcZN5p89BPysZJ/story.html>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

permissible decision-making in the political environment: “As the district court had instructed the jury, Patronage, defined as ‘getting a job or a promotion or a government benefit based upon who you know rather than what you know,’ is not a crime.”¹⁴⁵ But the trial court did not bite. At the sentencing hearing, Judge Young stated:

[P]atronage corrupts. Whether it is rendered illegal or not is immaterial, it corrupts. It’s dysfunctional. . . . This trial establishes, as no other process could, that a judiciary staff position is a thing of value under the laws of the Commonwealth, and any—not that it’s illegal to make suggestions by powerful legislators, by the Governor, it’s not improper to make suggestions of qualified people for employment on judiciary staff, but if that suggestion comes with any strings attached, now, today, it will be recognized as solicitation of a bribe.¹⁴⁶

In a noteworthy post-*Blagojevich* decision, the First Circuit Court of Appeals stayed the two jail sentences pending appeal, finding “sufficient probability that the appeals present a substantial question.”¹⁴⁷ Following the analysis outlined in *Blagojevich*, O’Brien’s counsel argued in their brief:

The government did not allege that O’Brien or his co-defendants received any money for hiring any particular individual . . . The government essentially alleged that O’Brien participated in a political patronage, which the district court instructed the jury is not a crime. . . .¹⁴⁸

O’Brien was not alleged to have received personal monetary reward for his actions and was not accused of hiring unqualified individuals. However, his department’s budget was augmented to the point that he was able to provide employment for friends and children of friends. In his brief, O’Brien argued:

[T]his Court should reject the government’s effort to transform political patronage, which, as the court below instructed, is not a crime, into federal racketeering and mail fraud particularly where, as here, there was no allegation that unqualified persons were hired, no allegation that any defendant sought personal benefit, and the purpose of the allegedly fraudulent scheme was to protect or enhance Probation

¹⁴⁵ Motion for Release Pending Appeal and Supporting Memorandum, United States v. O’Brien, No. 14-2314 (1st Cir. Dec. 22, 2014) (quoting Jury instruction p.24 (Attachment C, p.4)).

¹⁴⁶ *Id.* at 165 (This is page 78 of Attachment B, the hearing transcript).

¹⁴⁷ U.S. v. O’Brien, No. 14-2312, No. 14-2313 (1st Cir. Jan. 9, 2015).

¹⁴⁸ Brief for Defendant/Appellant at 3, United States v. O’Brien, No. 14-2314 (1st Cir. Jan. 27, 2016).

Service funding.¹⁴⁹

The O'Brien defense further argued:

[T]he gratuity statute (M.G.L. c.268A §3(a)) required the government to prove a linkage between something of substantial value given to an official and a particular official act. That the official was in a position to take some action that could benefit the giver or that something was given to build a reservoir of goodwill that might affect some future unspecified act is not enough. . . .¹⁵⁰

*At most, the evidence suggested that O'Brien took the alleged actions "by reason of the recipient's mere tenure in office" or "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future."*¹⁵¹

Will the First Circuit agree with the Seventh Circuit that such behavior is "logrolling" and reverse the conviction? Or will it agree with Judge Young that, even though there was no personal benefit to O'Brien and his actions "protected" the probation department's budget, this behavior is not legal but rather "corrupt, a sham, and dysfunctional?"¹⁵² The O'Brien case was argued on appeal before the 1st Circuit in July and a decision is pending.¹⁵³

c. *McDonnell* and Quid Pro Quo

Virginia's previous governor, Robert McDonnell,¹⁵⁴ was indicted along with his wife for activities with a businessman, Jonnie Williams, who had hoped to do business with the state.¹⁵⁵ They were charged with honest services fraud¹⁵⁶ and Hobbs Act violations for accepting loans and gifts from

¹⁴⁹ *Id.* at 24.

¹⁵⁰ *Id.* at 65.

¹⁵¹ *Id.* at 66 (emphasis added) (quoting *Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408 (1999)).

¹⁵² Honorable Judge William G. Young, Judge's Findings, *United States v. O'Brien*, No. 14-2314 (1st Cir. Jan. 27, 2016) app. at 6-7.

¹⁵³ Shelley Murphy, *Court Queries Legal Teams in Appeal of Probation Case*, BOS. GLOBE (July 25, 2016), <https://www.bostonglobe.com/metro/2016/07/25/federal-appeals-court-hears-arguments-probation-department-scandal-case/5IEPGYNlfZ511dOnyktEK/story.html>.

¹⁵⁴ *Robert McDonnell*, NAT'L GOVERNORS ASS'N, https://www.nga.org/cms/home/governors/past-governors-bios/page_virginia/col2-content/main-content-list/robert-mcdonnell.default.html (last visited Oct. 3, 2016).

¹⁵⁵ See Rosalind S. Helderman et al., *Former Va. Gov. McDonnell and Wife Charged in Gifts Case*, WASH. POST (Jan. 21, 2014), https://www.washingtonpost.com/local/virginia-politics/former-va-gov-mcdonnell-and-wife-charged-in-gifts-case/2014/01/21/1ed704d2-82cb-11e3-9dd4-e7278db80d86_story.html.

¹⁵⁶ 18 U.S.C. § 1346 (2012) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."). Section 1346 works in conjunction with 18 U.S.C. § 1341 and 18 U.S.C. § 1343, which prohibit the use of mail, TV,

Williams. Williams was hoping to secure public universities' cooperation in promoting his company manufactured dietary supplement by conducting studies with favorable outcomes, which would help boost sales.¹⁵⁷ The jury in the District Court trial convicted them both on most counts,¹⁵⁸ and the Fourth Circuit affirmed.¹⁵⁹ On Certiorari to the United States Supreme Court, the Court vacated and remanded and issued a unanimous opinion.¹⁶⁰ The ruling was thus very significant and interpreted what was an "official act" under the statute.¹⁶¹ The Court rejected the challenge that the Hobbs Act and honest services fraud statutes were unconstitutionally vague.¹⁶² The Department of Justice filed with the Court of Appeals for the Fourth Circuit "[a]fter carefully considering the Supreme Court's recent decision and the principles of federal prosecution, we have made the decision not to pursue the case further."¹⁶³ They also chose not retry Maureen McDonnell.

McDonnell and his wife were accused and initially convicted of accepting \$175,000 from Williams.¹⁶⁴ The government "to convict . . . was required to show that Governor McDonnell committed (or agreed to commit) an 'official act' in exchange for loans and gifts."¹⁶⁵ The gifts and loans were emblematic of a couple living beyond their means—including \$20,000 in designer clothes, a \$15,000 wedding gift for the Governor's daughter, a \$50,000 loan and free flights on a private plane.¹⁶⁶ The issue was what constituted an "official act?" The prosecutor had argued that there were at least five official acts whereas the Governor had argued that "merely setting up a meeting, hosting an event or contacting an official—without more—does not count as an 'official act.'"¹⁶⁷ At the inception,

radio, or wire services—including the internet—for the purpose of executing "any scheme or artifice to defraud."

¹⁵⁷ See *United States v. McDonnell*, 792 F.3d 478, 487–93 (4th Cir. 2015).

¹⁵⁸ *Id.* at 493–94; see also *Verdicts in the McDonnell Trial*, RICHMOND TIMES-DISPATCH (Sept. 4, 2014), http://www.richmond.com/news/state-regional/virginia-politics/verdicts-in-the-mcdonnell-trial/article_9e1b84d2-3385-11e4-9388-0017a43b2370.html; Frank Green et al., *Bob and Maureen McDonnell Convicted in Historic Corruption Trial*, RICHMOND TIMES-DISPATCH (Sept. 4, 2014), http://www.richmond.com/news/state-regional/virginia-politics/bob-mcdonnell-convicted-on-of-counts-maureen-mcdonnell-on-of/article_7b9b6118-343c-11e4-bef2-001a4bcf6878.html.

¹⁵⁹ *McDonnell*, 792 F.3d at 520.

¹⁶⁰ *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

¹⁶¹ *Id.* at 2367–75.

¹⁶² *Id.* at 2375.

¹⁶³ Alan Blinder, *U.S. Ends Corruption Case Against Former Virginia Governor*, N. Y. TIMES (Sept. 8, 2016), <http://www.nytimes.com/2016/09/09/us-ends-corruption-case-against-former-virginia-governor.html>.

¹⁶⁴ *McDonnell*, 136 S.Ct. at 2357.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2362–63; *United States v. McDonnell*, 792 F.3d 478, 487–89 (4th Cir. 2015).

¹⁶⁷ *McDonnell*, 136 S. Ct. at 2365–66.

[t]he parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C § 201. That statute makes it a crime for “a public official or person selected to be a public official, directly or indirectly, corruptly” to demand, seek, receive, accept, or agree, “to receive or accept anything of value” in return for “being influenced in the performance of any official act”

...

The parties also agreed that obtaining a “thing of value . . . knowing that the thing of value was given in return for official action” was an element of Hobbs Act extortion.

...

[F]ulfillment of the *quid pro quo* is not an element of the offense.¹⁶⁸

Both the Governor and his wife took the stand during the trial and were convicted on all counts except for the false statements.¹⁶⁹ Despite the prosecution’s arguments for longer sentences, the Governor was sentenced to two years and his wife to one.¹⁷⁰

The Supreme Court framed the issue as an inquiry into the meaning of “official act.” It unanimously rejected the government’s position, deciding instead to “adopt a more bounded interpretation of ‘official act.’”¹⁷¹ The Court noted that under the more constrained view, “setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ‘official act.’”¹⁷²

The Court noted that the Government’s argument raised constitutional problems.¹⁷³

Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an “official act.” In the Government’s view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.¹⁷⁴

Support for the defense’s position came from both Democrats and Republicans warning that the “breathhtaking expansion of public corruption law would likely chill federal officials’ interactions with the people they

¹⁶⁸ *Id.* at 2366.

¹⁶⁹ See Green et al., *supra* note 158.

¹⁷⁰ See Jennifer Steinhauer, *Bob McDonnell, Ex-Governor of Virginia, is Sentenced to 2 Years for Corruption*, N.Y. TIMES (Jan. 6, 2015), <http://www.nytimes.com/2015/01/07/us/bob-mcdonnell-ex-governor-virginia-sentencing-corruption.html>.

¹⁷¹ *McDonnell*, 136 S. Ct. at 2367.

¹⁷² *Id.* at 2367–68.

¹⁷³ *Id.* at 2372.

¹⁷⁴ *Id.*

serve and thus damage their ability to effectively perform their duties.”¹⁷⁵

The Court remanded for the lower court to determine if there was sufficient evidence under the new standard to determine if there was an official act, but the DOJ decided to drop the case. The Court did note:

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications and the Government’s boundless interpretation of the federal bribery statute. A more limited interpretation of the term official act leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this court.¹⁷⁶

How will this unanimous ruling affect FCPA cases if at all? Bill Steinman in the FCPA Blog argues that it will not have a dramatic effect:

The short answer to these questions is no, and the explanation is a simple one. While both statutes prohibit offering, giving or promising something of value to an official to influence official acts, the FCPA contains an additional restriction that is absent from 18 USC 201 (sic)(federal bribery statute). In particular the FCPA makes it a crime to offer, give or promise anything of value to a foreign official to induce the official “*to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government instrumentality.*”

...
But companies must bear in mind that the FCPA, on its face, is broader than its domestic sibling. It specifically reaches conduct- paying officials for the purpose of inducing them to use their influence with other officials that is not addressed in 18 USC 201. So the Supreme Court’s ruling doesn’t significantly change the FCPA landscape.¹⁷⁷

Nonetheless, the unanimous Supreme Court opinion suggests that an expansive reading over-criminalizing business conduct will not be favored and could serve to curtail some overzealous prosecutions. We will have to wait to assess the impact of the ruling on prosecutors’ conduct and future case decisions, of which there are few in the FCPA arena.¹⁷⁸

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2375.

¹⁷⁷ Bill Steinman, *What Does the Bob McDonnell Ruling Mean for the FCPA?*, FCPA BLOG (June 29, 2016, 9:18 AM), <http://www.fcpablog.com/blog/2016/6/29/bill-steinman-what-does-the-bob-mcdonnell-ruling-mean-for-th.html>.

¹⁷⁸ For further discussion on how the *McDonnell* case might apply to the FCPA, see *id.* (“Gov. McDonnell had been convicted under the federal bribery statute, 18 USC 201, which contains similar language to the FCPA. Indeed, in some respects, the two laws are virtual twins. So what does the SCOTUS

3. Commercial Bribery: Pay to Play

Pay to play or “payola” scandals rocked the radio stations within the United States in the 1950s and 60s¹⁷⁹ and have not ended.¹⁸⁰ Most recently, the largest distributor of craft beers in Massachusetts, Craft Brewers Guild, has been given a ninety-day suspension from business because it paid \$120,000 over five years to different bars to carry only their beers and not others.¹⁸¹ Although Craft Brewers may opt to pay a fine and continue to distribute beer, the amount would be equal to half of its profits during a ninety-day period. While it is legal to pay for shelf space in supermarkets and other businesses, many states forbid doing so for sales of alcohol.¹⁸² The bars involved were also charged for having accepted payments, but at least one

decision mean for the FCPA? Not terribly much.”); Richard L. Cassin, *Supremes Toss McDonnell Conviction, Knock DOJ’s ‘Boundless Interpretation’ Of Federal Bribery Law*, FCPA BLOG (June 27, 2016, 11:28 AM), <http://www.fcpablog.com/blog/2016/6/27/supremes-toss-mcdonnell-conviction-knock-doj-s-boundless-inte.html>; Tom Fox, *McDonnell and FCPA Enforcement*, COMPLIANCE & ETHICS BLOG (June 18, 2016), <http://complianceandethics.org/mcdonnell-fcpa-enforcement>; Dylan Tokar, *The Implications of the Supreme Court’s McDonnell Ruling for the FCPA*, JUST ANTI-CORRUPTION: GLOBAL INVESTIGATIONS REV. (June 28, 2016), https://www.dechert.com/files/Uploads/Documents/The_implications_of_the_Supreme_Court_McDonnell_ruling_for_the_FCPA_-_Dechert_-_28062016.pdf (“[T]he McDonnell ruling on Monday set a high bar for proving an official act under the federal bribery statute. The Supreme Court’s decision could in turn provide leverage for defence lawyers to push back against expansive government theories in FCPA cases.”); Michael Volkov, *The FCPA Implications of the Supreme Court’s McDonnell Decision—A Mountain Out of a Molehill?*, CORRUPTION, CRIME & COMPLIANCE BLOG (July 14, 2016), <http://blog.volkovlaw.com/2016/07/fcpa-implications-supreme-courts-mcdonnell-decision-mountain-molehill> (“Taking the McDonnell facts and putting them into a foreign government official’s context, the bribe giver, and not the taker (e.g. Governor McDonnell) would have violated the FCPA because he would have given the gifts with the intent to ‘affect or influence’ any act or decision of the foreign government.”); Ctr. for Advancement of Pub. Integrity, *The McDonnell Supreme Court Case: What Comes Next?* (June 30, 2016), <http://web.law.columbia.edu/public-integrity/our-work/what-comes-next/what-comes-next-mcdonnell-supreme-court-case>; Allison C. Davis, *Presupposing Corruption: Access, Influence, and the Future of the Pay-to-Play Legal Framework*, 7 WM. & MARY BUS. L. REV. 197, 210–11 (2016) (“The government only has a compelling interest in preventing quid pro quo corruption or the appearance thereof—rather than the presupposition of corruption—via restrictions of contributions, and ‘access’ resulting from contributions or expenditures does not constitute corruption.”).

¹⁷⁹ Lydia Hutchinson, *Alan Freed and the Radio Payola Scandal*, PERFORMING SONGWRITER (Aug. 20, 2015), <http://performingsongwriter.com/alan-freed-payola-scandal/> (discussing the history of how radio stations operated).

¹⁸⁰ Groups or individuals can still pay money to have matter broadcast on the radio, but the station must disclose the payment. 47 U.S.C. § 317 (2012).

¹⁸¹ Dan Adams & Megan Woolhouse, *Putting Penalties on Tap*, BOS. GLOBE (Feb. 13, 2016) at A1 (discussing the practice and contrasting with other stores where the practice is legal).

¹⁸² *Id.*; cf. Dan Adams, *Bar Owner Who Admitted Taking Incentives Won’t Face Penalty*, BOS. GLOBE (July 29, 2016) <https://www.bostonglobe.com/business/2016/07/29/regulators-decline-punish-bar-owner-who-admitted-taking-bribes/tymipoMRngE3fZNnJpGr8H/story.html> (discussing how Craft Brewers paid a \$2.6 million fine and challenged the ruling in Court).

bar owner was not sanctioned and other cases are pending.¹⁸³

While pay-to-play cases are not directly analogous to the princelings problem, they underscore the rough business environment that allows the practice in some arenas such as supermarkets. It is confusing that this trading of favors and money is legal in some contexts and not in others. Furthermore, domestically the hiring of offspring of well-connected people from both public and private sectors has long been a fact of life. While in this case, the ban on pay-to-play with alcohol allows smaller breweries to have access to a market that otherwise might be closed off by the powerful larger breweries. In the bar cases, relatively large sums of money changed hands, whereas in the princelings situations there were not large sums of money and arguably no money. Is the hiring of princelings more akin to logrolling, with no identifiable *quid pro quo*?

4. *Insider Trading* – United States v. Newman *and* United States v. Salman

The insider trading cases present an apt analogy to the princeling cases. The government has been trying—with some success—to prosecute these cases because it appears wrongful to let insiders benefit in a way from trading with information that the public never had a chance to access. To put it in the vernacular, it smelled, and the prosecutors were trying desperately to corral these Wall Street practices.¹⁸⁴ Similarly, the government is alleging that the banks' hiring of "sons and daughters" is tainted and evidence of corruption.

Todd Newman and Chiasson were employed by different hedge funds.¹⁸⁵ They were both indicted and convicted of securities fraud for receiving tips indirectly from insiders at Dell and Nvidia.¹⁸⁶ They were three levels removed from the original Dell insider and four levels removed from the Nvidia insider.¹⁸⁷ The Second Circuit overturned the convictions, stating that the prosecution must show "a meaningfully close personal relationship

¹⁸³ Dan Adams, *Bar Owner Who Admitted Taking Incentives Won't Face Penalty*, BOS. GLOBE (July 29, 2016), <https://www.bostonglobe.com/business/2016/07/29/regulators-decline-punish-bar-owner-who-admitted-taking-bribes/tymipoMRngE3fZNnJpGr8H/story.html> (discussing the lack of evidence linking payments to specific tap lines in a specific bar).

¹⁸⁴ Avi Weitzman & Daniel P. Chung, *United States v. Newman: Second Circuit Ruling Portends Choppier Waters for Insider Trading Charges Against Downstream Tippees*, GIBSON DUNN (Dec. 15, 2014), <http://www.gibsondunn.com/publications/Documents/US-v-Newman—Second-Circuit-Ruling-Portends-Choppier-Waters—Insider-Trading-Charges-Against-Downstream-Tippees.pdf>.

¹⁸⁵ *United States v. Newman*, 773 F.3d 438, 442 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (Mem.) (2015).

¹⁸⁶ *Id.* at 442–43.

¹⁸⁷ *Id.* at 443.

that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.”¹⁸⁸ The Supreme Court denied *certiorari* in October 2015.¹⁸⁹

However, in January 2016, the Supreme Court agreed to review a Ninth Circuit Court of Appeals insider trading case, *United States v. Salman*.¹⁹⁰ No doubt the Court will examine its 1983 statement in *Dirks v. SEC.*: “the test is whether the insider personally will benefit, directly or indirectly, from his disclosure.”¹⁹¹ “That benefit can be tangible, like money or services, or ‘when an insider makes a gift of confidential information to a trading relative or friend.’”¹⁹²

Arguably, the facts are stronger for the prosecution in this case than in the *Newman* or *Chiasson* cases. An individual at Citigroup, Maher Kara, gave information to his brother, Michael, who passed the information onto Bassam Salman, whose sister was engaged to marry Maher. Salman made a profit of \$1.7 million. On appeal, the Ninth Circuit upheld the conviction, declining to follow the Second Circuit’s opinion and finding the *Dirks* test was met. The judge, who incidentally was from Southern District of New York and sitting by designation, noted that the evidence was adequate and that otherwise “a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return.”¹⁹³ This result would surely subvert the purpose of the law.

The case was argued October 5, 2016 and a ruling is expected by June 2017.¹⁹⁴ If the Court upholds Salman’s conviction, it will push back the more restrictive necessity of finding a *quid pro quo*.¹⁹⁵

¹⁸⁸ *Id.* at 452; see also Peter J. Henning, *An Insider Trading Case Heads to the Supreme Court*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/business/dealbook/an-insider-trading-case-heads-to-the-supreme-court.html?_r=0 (discussing how that phrase “drew the ire of the Justice Department”).

¹⁸⁹ *United States v. Newman*, 136 S. Ct. 242 (Mem.) (2015).

¹⁹⁰ *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015), *cert. granted in part*, 136 S. Ct. 899 (Mem.) (2016).

¹⁹¹ *Dirks v. SEC.*, 463 U.S. 646, 662 (1983).

¹⁹² Henning, *supra* note 188.

¹⁹³ *Salman*, 792 F.3d. at 1094.

¹⁹⁴ See Ben Protess & Matthew Goldstein, *What is a ‘Personal Benefit’ from Insider Trading? Justices Hear Arguments*, N.Y. TIMES (Aug. 5, 2016), <http://www.nytimes.com/2016/10/06/business/dealbook/supreme-court-insider-trading.html> (discussing oral argument noting that the most vigorous critic of judge made law, Antonin Scalia, is now deceased).

¹⁹⁵ *But see* Bob Egelko, *How Scalia’s Death Impacts Supreme Court’s Pending Cases, Future*, S.F. CHRON. (Feb. 14, 2016, 6:27 PM), <http://www.sfchronicle.com/nation/article/How-Scalia-s-death-impacts-Supreme-Court-s-6830637.php>.

C. University “Legacy” Admissions

The admissions policies of private universities have been regarded as in the private domain unless they violate federal or state discrimination law.¹⁹⁶ Harvard University’s admissions policy was lauded in the famous *Bakke* case as an example of the permissible flexibility accorded to private universities.¹⁹⁷ Race, musical ability, and descendants of alumni were accorded plusses in admissions calculations.¹⁹⁸ Public universities have been more restricted by law in recent cases.¹⁹⁹ Yet legacy admissions policies skirt the issue of whether alumni are paying for advantage for their offspring in a way similar to the pay to play in commercial bribery.

For example, Duke University woos “development admits”—both alumni children and children of wealthy potential donors who might be interested in sending their children to Duke.²⁰⁰ Making no apologies, Duke’s Director of Development Communications, Peter Vaughn, denied any impropriety: “There’s no quid pro quo, no bargains have been struck.”²⁰¹ Duke acknowledged admitting 100–125 students through a special program, accounting for almost 5% of student body.²⁰² Further, the university noted that its fundraising during a six-year period surpassed the efforts of all universities; accordingly, the data shows their admission program achieved its objective.²⁰³

While there is no explicit required donation to get your child admitted, parents seem to understand that there is a mutually beneficial exchange. Nothing better illustrates this than an email exchange uncovered as result of WikiLeaks and Sony hacks.²⁰⁴ Deborah Freidell of the London Review of Books Blog reposted this correspondence:

WikiLeaks has published all the Sony emails that had been hacked last November, and made them searchable by keyword. In 2014, a senior

¹⁹⁶ See, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 316–17, 321–23 (1978) (discussing Harvard University).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See generally Alexandra Raphael, *Affirmative Action in University Admissions: Research Roundup*, JOURNALIST’S RESOURCE (Dec. 9, 2015), <http://journalistsresource.org/studies/society/race-society/affirmative-action-in-university-admissions-research-roundup>.

²⁰⁰ See Daniel Golden, *Many Colleges Bend Rules to Admit Rich Applicants*, WALL ST. J. (Feb. 20, 2003), http://online.wsj.com/public/resources/documents/Polk_Rich_Applicants.htm.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See generally WIKILEAKS, <https://wikileaks.org/> (containing history and material for the so called WikiLeaks).

executive emailed an Ivy League vice-president of philanthropy: he'd like to endow a scholarship, anonymously, 'at the \$1mm level'. In another email, he tells a development officer that his daughter is applying to the college as her first choice. It's all very decorous. The development staff arrange a 'customised' campus tour for his daughter and a meeting with the university's president; but he asks for no favours and nothing is promised.²⁰⁵

After his daughter was admitted, the same Sony executive wrote to his sister: "David. . . called me. he [sic] is obsessed with getting his eldest in Harvard next year." She replied, "If David wants to get his daughter in he should obviously start giving money."²⁰⁶ Reportedly, legacies get into Harvard at five times the rate of nonlegacies.²⁰⁷

In the world of legacy admissions, the *quid pro quo* is not often made explicit. Rather, it is more or less understood, a calculated decision that might yield rewards in time. Is this illegal? Should it be? And how different is this acceptable scenario from the one under examination here, hiring well-connected people?

Internationally, this issue of corruption of admissions takes an interesting turn. Corruption in education can exclude gifted students from coveted opportunities while well-connected, less talented students gain access to them. A classic example is the plight of an Egyptian student who took an exam for medical school and received a zero on all seven parts; it seemed she had not answered a single question. In reality, this student's excellent scores had been hijacked by someone who had left the exam blank, but who had access to a rigged system.²⁰⁸

Most recently, a Chinese administrator at a university admitted accepting \$3.6 million in bribes between 2006 and 2013. This is different from the system in U.S. universities, where money goes to the school rather than to an individual admissions officer (at least as far as reported). A commentator who lives in China and works in education has suggested that the movement to broaden the criteria for admission to Chinese universities beyond just a test score has opened the door to more discretionary admits, which in turn allows more favoritism and corruption.²⁰⁹ Ironically, change

²⁰⁵ Deborah Friedell, *How to Get into Harvard*, LRB BLOG (Apr. 20, 2015), <http://www.lrb.co.uk/blog/2015/04/20/deborah-friedell/how-to-get-into-harvard>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*; Jia Tolentino, *How to Decorously Buy Your Daughter's Way into Harvard*, JEZEBEL (Apr. 21, 2015, 2:50 PM), <http://jezebel.com/how-to-decorously-buy-your-daughters-way-into-harvard-1699199316>.

²⁰⁸ Carol Matlack, *Buying a Diploma Is Easy If You Can Pay Up*, BLOOMBERG BUSINESSWEEK (Oct. 1, 2015, 5:50 AM), <http://www.bloomberg.com/news/articles/2015-10-01/buying-a-diploma-is-easy-if-you-can-pay-up> (discussing multiple instances of corruption in education and its impact on society).

²⁰⁹ Michael Forsythe, *China Bribes Cast Doubt on College Admissions*, N.Y. TIMES, Dec. 6, 2015, at

designed to broaden admissions criteria backfired into a way to allow the privileged few to rig the process in their favor.²¹⁰ Here, gifting that is an implied *quid pro quo* for admissions to a competitive university has not been declared illegal. It is one of those tawdry practices that is unavailable to most who lack the resources but nonetheless a common practice that makes one uncomfortable.

D. Supreme Court Discussion of Corruption

There is a dilemma between reading a statute so narrowly that it escapes capturing real wrongdoing and enforcing it so broadly that honest people are ensnared in the over-criminalization of business practices. The former view is perhaps best captured by Justices Stevens' dissent in *Citizens United*,²¹¹ in which he criticizes the majority's narrow and naive view of corruption:

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important government interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption." This is the same "crabbed view of corruption" espoused by Justice Kennedy in *McConnell* and squarely rejected by the Court in that case. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an "undue influence on an officeholder's judgment" and from creating "the appearance of such influence," beyond the sphere of *quid pro quo* relationships. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can

A16 (discussing the prosecution of one administrator at Renmin University and other examples of corruption and problems).

²¹⁰ *Id.*

²¹¹ *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting); see also Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS (Jan. 21, 2015, 12:26 PM), <http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics> ("In its *Citizens United v. Federal Election Commission* decision, the court opened the campaign spending floodgates. The justices' ruling said political spending is protected under the First Amendment, meaning corporations and unions could spend unlimited amounts of money on political activities, as long as it was done independently of a party or candidate.").

be neatly demarcated from other improper influences does not accord with the theory or reality of politics.²¹²

Justice Stevens called the majority focus on *quid pro quo* “myopic” and underlined the fact that the Framers “discussed corruption ‘more often in the Constitutional Convention than factions, violence, or instability.’”²¹³

In her dissenting opinion in *Yates*,²¹⁴ Justice Elena Kagan also noted her concern about a worrisome trend toward over-criminalization in our legal system. In that case, a fisherman threw back several undersized fish after being stopped by the Coast Guard and was successfully prosecuted under the shredding provisions of Sarbanes Oxley. The government argued a fish is a “tangible object” under the statute.

That brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code. . . . Still and all, I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers with too much discretion. And I’d go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.²¹⁵

Nonetheless, Justice Kagan rejected the notion that the Court should rewrite the law, suggesting it would be up to Congress to do so.

We see similarities in the current scenario involving adult children of powerful foreign officials, namely: How should the FCPA be interpreted such that it is neither rewritten nor applied so broadly that it oversteps governmental or judicial authority, thereby undermining the rule of law?

IV. PROPOSAL

Within the princeling context, a deal that is *conditioned* on hiring X or Y, who is related to the foreign official, is reasonably a *quid pro quo* of value to that foreign official and therefore improper under the FCPA. We note that JP Morgan has already abandoned its blatantly improper “Sons and

²¹² *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting) (citations omitted) (citing *McConnell v. FEC*, 540 U.S. 93, 95 (2003)).

²¹³ *Id.* at 963–64 (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009)).

²¹⁴ Known as the fish shredding case, the case poses the question of whether the destruction of undersized fish by a fisherman was a violation of Sarbanes Oxley provision originally meant to deal with the shredding of documents. The decision was held for *Yates* by 5-4. Kagan and Scalia dissented because of the way the law was written even though they might not have liked the result. *Yates v. United States*, 135 S. Ct. 1074, 1090 (2015) (Kagan, J., dissenting).

²¹⁵ *Id.* at 1100–01.

Daughters” program. But it might have been successful had it looked to Harvard College’s admissions criteria,²¹⁶ which evaluates all candidates fairly but allows a degree of credit for specific qualifications. Similarly, implementing clear hiring standards that allow some variant intangibles such as cultural competency due to study abroad, knowledge of the local business environment, particular command of a language, etc., should be sufficient to pass the legal hurdle.

Making a hiring decision simply on a *quid pro quo* basis is wrong in all contexts. But a considered decision to hire an official’s son may be defensible on many levels. Whether or not it constitutes an improper exchange of value requires examining that decision from both sides. On the one hand, the business must be able to demonstrate that the hire is a legitimate exercise of discretion, buttressed by evidence of superior competence. On the other hand, business transactions that follow the hire must appear to be unrelated and defensibly in the normal course of business.

We suggest that trading favors in business does not often work like a direct *quid pro quo*. It is more akin to the scenario where A helps B and B gets C to help A’s son; the currency is that of helping or scratching each other’s back. Accordingly, it goes without saying that in the domestic context corporations hire sons and daughters of powerful legislators all the time. Congress has not yet seen fit to prohibit such decisions. Similarly, without evidence of an exchange of value, it may be that the government goes too far in interpreting the FCPA in such a blanket fashion.

The discussion in *Blagojevich* illustrates the parallel legal line drawn in cases involving domestic public officials.²¹⁷ Even countries that have very low corruption, such as Denmark, must deal with similar situations. One researcher has found that “even in environments where outright bribery and kickbacks are rare to nonexistent, power still pays dividends for local-level politicians, their families, and firms linked to them.”²¹⁸ The grey area is large and endemic across all cultures.

Similarly, the proper legal line in hiring progeny of public officials under the FCPA is unclear at best. One need only look at the thirteen Opinion

²¹⁶ See generally 438 U.S. at 316–17, 321–23 (discussing Harvard’s admission program).

²¹⁷ See *supra* notes 134–35 and accompanying text.

²¹⁸ Morten Bennedsen, *Denmark May Be Bribe Free, but Power Pays off for Local Pols*, FCPA BLOG (Jan. 13, 2016, 9:28 AM), <http://www.fcpablog.com/blog/2016/1/13/morten-bennedsen-denmark-may-be-bribe-free-but-power-pays-of.html> (“Maybe the most remarkable pattern apparent here is that the income boost from power isn’t limited to the politician alone; his or her close family members—adult children in particular—also get a taste. In fact, the power-income connection was twice as strong on average for the offspring than for the politician. The effect was strongest for children who resided in the same municipality as their parents.”).

Releases where somewhat troubling entanglements were approved.²¹⁹

The DOJ needs to clarify its view of this issue so that companies may design and implement hiring programs to maximize their success in any country with confidence. Companies should not have to guess and then be subjected to agonizingly costly investigations if they guess wrong. We note that so-called “Monday morning quarterbacking” by government regulators is increasingly subject to comment and criticism.

Our proposal suggests the Department of Justice and the Securities and Exchange Commission implement the following:

1. Update the FCPA Guidance to reflect a best practice approach to this problem. In other words, clarify that “Sons and Daughters” are not precluded from positions, but safeguards must be in place.
2. The government should further clarify what would be considered an appropriate policy regarding hiring relatives of foreign officials connected to present and future business dealings. For example, what might overcome the present “assume a quid pro quo” attitude? Is it a detailed Human Resource procedure? Is it a clear standard for qualification?
3. Require new hires to sign forms agreeing to refrain from dealing with a relative who is a foreign official on any business matter for the company.
4. Companies must adopt clear and more specific hiring policies for both internships and permanent positions that provide their own guidance to out-of-country managers. Further, businesses must require scrupulous attention to maintaining accurate records so that documentation exists to verify process and outcome.
5. Companies must pay attention to ongoing business relationships and establish a procedure to detect and prevent any movement of a permissible hire into what appears to be a possible *quid pro quo* situation.

It is advisable to monitor judicial decisions in related areas of corruption involving public officials. For example, forthcoming opinions in *Salman* and *O’Brien* might offer some nuggets of insight into judicial perception of insider misbehavior, permissible political logrolling versus improper patronage, and the like. Nonetheless, neither case would be controlling as neither involves the FCPA.

Although it may be impossible to make it absolutely clear where the legal line is on hiring relatives of foreign officials, there is much room for improvement given the current opaque environment.

²¹⁹ See *supra* Part III.A.

V. CONCLUSION

Is it possible for a business to hire relatives of foreign officials? When is doing so legitimate relationship building and when does that strategy become suspect as a form of criminal corruption—i.e., bribery—under the FCPA? In searching for analogous situations, we see judicial acceptance of logrolling for appointments to public positions as a necessary element of politics, despite an admittedly unsavory dimension.²²⁰ We also note societal acceptance of an exchange of value in the form of donations to private universities that result in favorable admissions decisions. However unseemly, these are not criminal practices; we exist with these contradictions.

We posit that business must be able to engage in legitimate relationship building and other promotional activities if we wish to encourage its growth. Surely, the FCPA can permit a middle ground between the extremes described above by, on the one hand, Justice Stevens, who wanted a broader view of corruption rather than a narrow, more limited or “crabbed view of corruption”²²¹ and Justice Kagan, who was more concerned with over-criminalization.²²² The courts should not issue a ruling, nor should the DOJ or SEC extract a settlement, that summarily prohibits the hiring of adult children of foreign officials. We think it obvious that doing so would inappropriately affect a large number of the well-educated and knowledgeable younger generation, particularly in developing countries. But neither should a business turn a blind eye to offering a job to that same well-educated young adult in return for a specific act. We find it equally obvious that doing so evidences the *quid pro quo* that is the hallmark of finding corrupt intent.

More difficult is the offering of a job to a foreign official’s adult child without a specific promise extracted in return, but with the understanding that there may be business opportunities in the future. Suppose that future is a year down the road? Two years? Would it be different if a business opportunity related to the adult child’s contacts materialized five years later? It is this situation that may gall some, but we posit that if the person is qualified and there is a documented process, then the adult child simply should be prohibited from working on a deal associated with the foreign official parent and should refrain from using their related contacts for a minimum period, whether that be for one year or even longer, similar to restrictions on government employees becoming lobbyists in their

²²⁰ See *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015).

²²¹ See *Citizens United v. FEC*, 130 S. Ct. 876, 964 (2010) (Stevens, J., dissenting) (quoting *McConnell v. FEC*, 540 U.S. 93, 152 (2003)).

²²² See *Yates v. United States*, 135 S. Ct. 1074, 1090 (2015) (Kagan, J., dissenting).

agencies.²²³

Ultimately, the defining dimensions of a legitimate hire are the individual's personal qualifications and relevant experience combined with the rigor of the process. It is not difficult to document that the individual was selected during a hiring process that could be defended as similar across the company. Of course, one may argue that there is a strong "halo effect" that occurs when hiring foreign officials' offspring. The company benefits locally from this association, albeit indirectly with powerful local figures. This might be particularly true when a foreign enterprise offers salary, training, and development opportunities not otherwise available in the local business environment. That may be the case, but it is equally the case that business hiring is not and has never been a perfect meritocracy. We have pointed out that the college admission process is similarly suspect, but has never been attacked as overly corrupt. We can accept that the adage, "it is not always what you know, but who you know" as having some legitimate existence in every aspect of life.

The question is, what is criminal? Or even a civil wrong? The BNY settlement gives some guidance of what kind of hiring process companies need to have to protect from liability. If JP Morgan refuses to settle and proceeds to trial, we might have definitive contours of what is a criminal behavior, at least according to a federal district court. If they choose not to litigate, then any settlement will offer minimal guidance at the least and if detailed, then could assist companies in designing future hiring procedures.

VI. POSTSCRIPT

After the foregoing article had been completed, but before it was printed, the Department of Justice announced a settlement agreement with JP Morgan Chase and JP Morgan Securities (Asia Pacific).²²⁴ Both accepted that certain senior executives and employees of the company conspired to engage in *quid pro quo* agreements with Chinese officials to obtain investment banking business, planned and executed a program to provide specific personal benefits to senior Chinese officials in the position to award or influence the award of banking mandates, and repeatedly falsified or caused

²²³ See generally Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009) (including a "revolving door ban" which prohibits both dealing with a matter of a former employer for two years and dealing with the government for your new employer when you leave the government for a period of two years (if covered by 18 U.S.C. § 207(c)).

²²⁴ Press Release, Dep't of Justice, JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 million Penalty for Corrupt Hiring Scheme (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>; Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>.

to be falsified internal compliance documents in place to prevent the specific conduct at issue here.²²⁵

The total settlement was \$264 million with \$72 million to the Department of Justice, \$130 million to the Securities and Exchange Commission and \$62 million to the Federal Reserve.²²⁶ However the company was able to extract a non-prosecution agreement from the government although part of the investigation is still ongoing.²²⁷ JP Morgan disciplined over twenty employees and fired six.²²⁸ They had hired over “. . .two hundred interns as well as full time employees based on recommendations from clients, potential clients and foreign government officials.”²²⁹ Yet no individuals have been charged, despite the Yates memo’s promise.²³⁰

²²⁵ Letter from Dep’t of Justice to Mark Mendelsohn, Esq., Counsel for JP Morgan 2 (Nov. 17, 2016), <https://www.justice.gov/opa/press-release/file/911206/download>.

²²⁶ Press Release, Dep’t of Justice, JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 million Penalty for Corrupt Hiring Scheme (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>; Press Release, U.S. Sec. & Exch. Comm’n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>; Press Release, Fed. Reserve (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/press/enforcement/20161117a.htm>.

²²⁷ Press Release, Dep’t of Justice, JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 million Penalty for Corrupt Hiring Scheme (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>; Press Release, U.S. Sec. & Exch. Comm’n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016), <https://www.sec.gov/news/pressrelease/2016-241.html>.

²²⁸ See Ben Protess & Alexandra Stevenson, *JPMorgan Chase to Pay \$264 Million to settle Foreign Bribery Case*, N.Y. TIMES (Nov. 17, 2016), http://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html?_r=0.

²²⁹ *Id.*

²³⁰ See Leslie R. Caldwell, Assistant Attorney Gen., Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0>.